HOGE RAAD DER NEDERLANDEN

HR

Supreme Court of the Netherlands

Annual report 2021

The painting (oil on canvas) was painted in 2015 by Helen Verhoeven. She worked on the painting, which measures some 400 cm x 647 cm, for an entire year from her studio in Berlin. It hangs in the reception area of the Supreme Court building.

Foreword

With this annual report, the Supreme Court of the Netherlands accounts for its work and use of resources in 2021. In the Kingdom of the Netherlands, the Supreme Court makes its contribution to the rule of law fulfilling its functions in democracy for the benefit of people, businesses and organisations.

The year 2021 was once again a year dominated by the health crisis surrounding COVID-19. Thanks to the efforts of the members of the Supreme Court and the Procurator General and his office and the staff of the Operations Directorate, it has been possible to ensure that the Supreme Court functions as well as possible in the service of the administration of justice.

Using images, words and figures, we offer you impressions in this annual report of the work that was done in 2021. Following a brief outline of the Supreme Court as a whole, we will say something about the duties of the Supreme Court and the Procurator General at the Supreme Court in the 'Supreme Court' section. Specifically, we will highlight the connection between fundamental rights and the Supreme Court. This theme is also addressed in the 'Case Law' section, which includes a review of court decisions and advisory opinions from 2021. The 'Supreme Court' section also reports on contacts between the Supreme Court and the legislature, and on work of the Supreme Court in the multi-layered legal system in Europe. The duties of the Supreme Court's Procurator General in 2021 are highlighted in the 'Procurator General's Office' section. The 'Operations' section reports on collaboration and cross-pollination within the organisational units in 2021, covering a number of different themes. Information on case disposition, formation and a financial overview can be found in the 'Figures and Financial overview' section.

At the presentation of the results, we recall with gratitude that the commitment of all colleagues in the organisation has once again made an essential contribution to the quality of cassation jurisprudence in the interests of those seeking justice.

Dineke de Groot, President
Edwin Bleichrodt, Procurator General
Vera de Witte, Director of Operations

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1. The Supreme Court of the Netherlands

1.1 Scope

The Supreme Court is a court that is part of the judiciary (Article 2 of the Judiciary Organisation Act). The Field of activity of the judiciary includes at its core the adjudication of civil cases, criminal cases and administrative cases. Administrative law is divided into social security law, tax law, economic administrative law and other administrative law. The field of activity of the Supreme Court mainly covers civil law, criminal law and tax law, and in addition a limited part of social security law and economic administrative law. In the Kingdom of the Netherlands, the Supreme Court is the highest court in its field of activity for legal actions in both the Netherlands and Aruba, Curaçao, Sint Maarten, Bonaire, Saba and Sint Eustatius. Cases can reach the Supreme Court in three ways: by means of a notice of appeal in cassation directed against a decision rendered by a court in a fact-finding instance, an application by the Procurator General at the Supreme Court for cassation in the interest of the law, or a court decision (in a civil case or a tax case) referring a question on a matter of law to the Supreme Court for a preliminary ruling.

The work of the Supreme Court is carried out within the judicial organisation of the Supreme Court, which consists of three parts: the Supreme Court, the Procurator General's Office and Operations. The members of the Supreme Court and the Procurator General's Office are judicial officers. The members of the Supreme Court administer justice in cases brought before the Supreme Court. The members of the Procurator General's office issue advisory opinions (legal opinions) in cases, among other things. The employees of the Operations Directorate have facilitative tasks in the judiciary organisation of the Supreme Court.

1.2 Key tasks of the Supreme Court and the Procurator General's Office at the Supreme Court

The annual reports of the Supreme Court always focus on the tasks of the Supreme Court in promoting the uniformity and the development of the law and providing legal protection.
The Supreme Court case law is part of the administration of justice in the polity and society in the Kingdom of the Netherlands. Facets of justice include, for instance, that people have effective access to a court that can adjudicate their case, or that people can assert their right to legal protection. Another facet of justice is the legal certainty that people need in society and their living environment. Legal certainty involves, put succinctly, that it is clear what a rule of law means, that the rule of law is applied consistently, and that the substance of a court decision on that rule of law is as foreseeable as it can be. The Supreme Court's tasks in respect of uniformity of the law, development of the law, and legal protection play an important role in providing legal certainty to the public. The Supreme Court rules in the highest instance in legal actions on the interpretation and interpretation of rules of civil law, criminal law and tax law. The Supreme Court does this on the basis of advisory opinions proffered by the Procurator General at the Supreme Court and the Advocates General of the Procurator General's Office. The Supreme Court's tasks in respect of uniformity of the law, development of the law, and legal protection also play an important role in those opinions.

In administering justice, the Supreme Court engages in a dialogue with the two other state powers – the legislature and the executive – and with the Court of Justice of the European Union in Luxembourg and the European Court of Human Rights in Strasbourg. If the legislature disagrees with an interpretation of a rule of law by the Supreme Court, then the rule of law may be changed through legislation. If the executive disagrees with a Supreme Court decision, then a representative of the executive may bring the interpretation and application of a rule of law to the attention of the legislature, accompanied by an explanation of the executive dilemma. The legislative, executive and judicial branches each have their own responsibility in the rule of law based democracy, which responsibility is defined in the Dutch Constitution (and, for the Kingdom of the Netherlands, also in the Charter for the Kingdom of the Netherlands). Together, the three state powers bear responsibility for respecting human freedom and dignity, the principles of democracy governed within the rule of law, and the values of the European Union.

Uniformity of the law

The uniform interpretation and application of the law by the Supreme Court promotes that the law works in the same way in every part of the Netherlands. On the basis of the case law of the Supreme Court, judges at district courts and courts of appeal will then interpret and apply the legal rules in the same way whenever possible. This serves the individual interest of treating people equally in equal cases. Promoting uniformity of the law is also a task that serves the public interest in legal certainty in polity and society.

The Supreme Court promotes uniformity in civil and criminal law from its role as the sole highest court. Within administrative law, the Supreme Court is one of the four highest administrative courts. The other three are the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal, and the Trade and Industry Appeals Tribunal. The Supreme Court is the highest administrative court for all of tax law and for a limited part of social security law and economic administrative law. The highest administrative courts promote the uniform interpretation and application of the Dutch General Administrative Law Act through the Administrative Law Uniformity Committee (Commissie rechtseenheid bestuursrecht). That committee publishes its own annual report. The results of the deliberations in the said committee are not binding on the administrative judges of the courts concerned, but are a factor to be considered in the proper adjudication of the case.

With a view to mutual alignment in administrative law, appointments are made between the highest administrative-law tribunals. For example, members of the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal and the Trade and Industry Appeals Tribunal participate in hearing each other's cases when questions concerning the uniformity of law are at issue. Some members of the Supreme Court function as extraordinary State councillors in cases heard by the Administrative Jurisdiction Division of the Council of State. They are able to contribute their knowledge of and experience in civil law, criminal law and tax law to the Administrative Law Uniformity Committee. They can also take part in hearings of the Administrative Jurisdiction Division where a 'cross-court' issue is at stake, including those cases referred to its 'grand chamber'. Whereas a chamber generally consists of three members, the grand chamber consists of five, usually including one member from each of the other courts. Several Advocates General from the Procurator General's Office at the Supreme Court have also been appointed as State Councillor Advocate General at the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal and the Trade and Industry Appeals Tribunal.

Legislation came into force in mid-2021 (Bulletin of Acts and Decrees 2020, 416; Bulletin of Acts and Decrees 2021, 281) that allows judges from other administrative courts to be appointed to the Supreme Court as justices extraordinary (cross-appointments). In mid-2021, the Supreme Court recommended a number of State councillors of the Administrative Jurisdiction Division to the House of Representatives for such an appointment. The appointment procedure was still ongoing at the end of 2021. It is a welcome development for uniformity throughout the legal system that cross-appointments will be able to contribute to the administration of justice by the Supreme Court. There is some overlap between the different areas of law, for example in terms of fines, government liability or damages. For the practical usability of the law and the legal system, it is of great importance that uniformity of law is ensured both within a jurisdiction and between jurisdictions, for example when it comes to legal concepts that play a role in different jurisdictions or to the uniform application in the Netherlands of the laws of the European Union.

Development of the law

People make the law, use the law, and stay engaged in the further development of the law. For example, it is common for the Supreme Court to have to rule on the question of whether the legislature intended for a particular issue to be covered by a particular statutory rule. In creating legislation, it is certainly not always feasible for legislatures to oversee the types of cases to which a statutory rule should apply and to design the explanatory memoranda to the legislative proposal accordingly. By establishing rules of law, the legislature serves the public interest, which prevails over individual cases. In individual cases, the court administers justice on the basis of the rules of law. With the interpretation of rules of law in the administration of justice, the law takes further shape.

In the highest instance, the Supreme Court resolves issues of law within its Field of activity about the interpretation and application of rules of law. In that context, therefore, the Supreme Court also concerns itself with the further development of the law. The Supreme Court does this on the basis of rules of law and further develops those rules through interpretation and application in actual cases. In doing so, the Supreme Court avails itself of the advisory opinions proffered by members of the Procurator General's Office. Those advisory opinions often highlight different perspectives on how to dispose of a case. The legislative history, the application practice, and insights of legal scholars generally provide the necessary points of reference for this. If the resolution of an issue of law requires a choice reserved to the legislature or an assessment reserved to the executive, the Supreme Court tends to exercise restraint. In doing so, the Supreme Court must consider the extent to which such restraint is compatible with the measure of legal protection it must provide in a case. An example can be found in a case in which a person had been convicted on appeal of embezzlement and fraud, and an order was given for the publication of the decision on the rechtspraak.nl website, showing the defendant's full name and a picture of their face. The person in question challenged this form of publication before the Supreme Court. Article 36(1) of the Dutch Criminal Code provides that the court must determine the manner in which the order to publish the decision is effected. The Supreme Court ruled that this provision does not stipulate that the court order to publish the decision can relate to a picture of the defendant. Indeed, this is not a fact stated in the rules for the content of a decision as contained in the Fourth Section of Title VI of Book Two of the Dutch Code of Criminal Procedure.

Legal Protection

Providing legal protection is one of the three key tasks of the Supreme Court. It was explained in the 2019 annual report that the legal protection task is exercised in individual cases when assessing the case based on legal criteria. Based on decisions rendered in 2019, that annual report provided examples of cases that concerned individual legal protection and did not involve a broader development of the law. The 2020 annual report explained that the legal protection task has two aspects, with one relating to the individual case in question and one transcending individual cases. Besides paying attention to individual legal protection in a case in cassation, the Supreme Court, when hearing and deciding a case, also pays attention to aspects of legal protection that affect other people in society. Moreover, that task includes allowing the Supreme Court to provide a counterbalance in the trias politica (separation of powers) model, for example by resolving an imperfection in the legislation or the implementation thereof, or at least to identify such imperfection if resolving it is beyond its remit. The legal protection task is essential to striking a balance between the three state powers, which also serves the proper administration of justice. Often, the Supreme Court's role as the highest court extends beyond the interests of the parties in their specific case. The individual legal protection sought in a particular case and the independent views expressed in the Advocate General's advisory opinion provide a basis for the Supreme Court to make certain choices in the performance of its tasks with respect to legal protection and the uniformity and development of the law. In this annual report, this is reflected in a variety of decisions in the 'Case Law' section. Decisions in that section concern, among other things, earthquake damage, equal treatment of potential candidates in the event of municipal land allocation, outings for children in foster care, the tax on imputed return on investment in Box 3, the right of a defendant to examine witnesses, or the unlocking of a smartphone against someone's will. These are issues that affect far more people than only those who are involved as parties or interested parties in the case before the Supreme Court. The Supreme Court's task to provide legal protection thus covers not only the individual aspect of the case, but also the public interest of cassation jurisprudence for society and for the legal and societal practice.

Publication of Supreme Court decisions and advisory opinions by the Procurator General's Office

It is also important for the uniformity of the law, the development of the law, and legal protection that Supreme Court decisions are accessible to everyone. Thanks to the efforts of the Supreme Court Knowledge Centre, Supreme Court decision are published on the website rechtspraak.nl shortly after being rendered.

Supreme Court decisions have been published on rechtspraak.nl since 2000. For some years now, decisions from before that time have been added to rechtspraak.nl gradually on a project basis. This is done in addition to the regular work where possible and is labour-intensive. By 2021, the Supreme Court has been able to publish a total of 200 pre-2000 decisions on rechtspraak.nl. Specific individual

requests from litigants or legal aid providers to publish a specific pre-2000 decision on rechtspraak.nl are complied with to the extent possible. When decisions are rendered, the Supreme Court organisation keeps track of whether the Supreme Court refers in its findings to pre-2000 decisions that have not been published on rechtspraak.nl yet. Such a pre-2000 decision will then be published separately on rechtspraak.nl around the time the decision in question is rendered, to ensure that the reasoning underlying contemporary Supreme Court decisions is freely accessible.

1.3 Fundamental rights and the Supreme Court

What can someone who is registered by credit institutions as a defaulter do to get rid of that label?[1] Are the police allowed to unlock a confiscated smartphone by placing the suspect's thumb on the smartphone against the suspect's will?[2] Or: Can a municipality prohibit someone from wearing clothing bearing the logo of a banned motorcycle club on the street?[3] These are examples of questions that may be put to the Supreme Court. These are examples where fundamental rights play a role, such as the right to privacy, the right to a fair trial, and the right to freedom of expression.

Fundamental rights are also referred to as human rights or basic rights. In essence, they protect human freedom and dignity. Human rights have been described in laws and regulations for centuries. After World War II, more and more instruments emerged nationally and internationally to improve compliance with human rights and the effectiveness of legal protection. Some States proceeded to enshrine more about human rights in the national Constitution.

In the Netherlands, human rights have been in the Dutch Constitution ever since the 1798 "Constitution of the Batavian People" ("Staatsregeling voor het Bataafsche Volk"). In 1983, Chapter 1 of the Dutch Constitution was given the title "Fundamental Rights". The Netherlands is a member of the Council of Europe, which was founded in 1949 and created the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) in 1950. The European Court of Human Rights was established in 1959 and adjudicates cases instituted by people about Member State compliance with that convention. The Council of Europe monitors compliance with the decisions rendered by that court. The Netherlands is also a member of the European Union. Fundamental rights are an integral part of the general principles of law[4] and of Union law.[5]

The adjudication of cases involving fundamental rights, human rights and basic rights (hereinafter also referred to collectively as "fundamental rights") in the Kingdom of the Netherlands is thus regulated at national and international level. Rules on fundamental rights are important for the protection of human freedom and dignity. Ultimately, that protection must be guaranteed by the people working with the rules. People make, implement and enforce rules. People stand up for rights, obligations and interests for themselves or another, or for the State.

In our legal system, representatives of the government assess whether fundamental rights are respected in consideration of the public interest. This happens when making and implementing rules. For example, parliamentary documents may address how a proposed legal provision relates to the legal protection of people from the exercise of government powers. The implementation in a specific case can also often involve individual interests in the compliance with fundamental rights. This concerns not only the fundamental rights from Chapter 1 of the Constitution, but also the human rights and basic rights from, for example, the ECHR and the Charter 'which may be binding on all persons by virtue of their contents', in the words of Article 93 of the Dutch Constitution.

The judge's task is to resolve disputes and to try criminal offences (Article 112 of the Dutch Constitution). This is done based on the rules of law as they apply in the Kingdom of the Netherlands on the basis of laws, treaties and unwritten law. If in a specific case a rule of law applies that can be interpreted in different ways, then the court must interpret that rule of law. An important source for the interpretation

[1] Supreme Court 3 December 2021, ECLI:NL:HR:2021:1814.
[2] Supreme Court 9 February 2021, ECLI:NL:HR:2021:202.
[3] Supreme Court 24 December 2021, ECLI:NL:HR:2021:1946.
[4] E.g. ECJ 14 May 1974, ECLI:NL:HR:1974:51, para. 13.
[4] Treaty on European Union; Charter of Fundamental Rights of the European Union (CFREU) .

of rules of law by the court is the intent of the legislature as is evident from the text and legislative history of a written rule of law. In a rule of law based democracy, such as the Netherlands, the court does not intervene in the choices and considerations that are up to the legislature. The court rules on individual rights, obligations and interests in a specific case.

In response to a particular court case, the judge will take into account the interest at the level of the individual with regard to the observance of fundamental rights. Article 94 of the Dutch Constitution instructs the court not to apply a statutory provision if this application is incompatible with any binding provisions of treaties and of decisions of international-law organisations. Important international sources of fundamental rights are found in the ECHR and in the Charter of Fundamental Rights of the European Union. In the event of a treaty violation, the court can sometimes provide legal protection through restoration of rights. This happened in 2021, in the case in which it was ruled that the regulation governing the tax on imputed return on investment (box 3) for the years 2017 and 2018 violated Article 1 of the First Protocol to the ECHR in combination with Article 14 ECHR. Statutory regulations imposed by a municipality, province or water board can be declared ineffective by the court due to a violation of a fundamental right in the Dutch Constitution. This happened in 2021, in the case about the wearing of clothing bearing the logo of a banned motorcycle club.[6]

In the Dutch Constitutional system, the legislature therefore assesses, in the public interest, whether or not proposed provisions in the formation of laws and regulations are contrary to fundamental rights. In respect of the implementation of rules of law and their interpretation and application by the court, scrutiny of fundamental rights may take place in the individual interest. This allows the court to provide legal protection to citizens. If the legislature disagrees with the court's interpretation of a rule of law, then the legislature can amend the rule of law through further laws and regulations. It is essential for the uniformity and development of the law in the legal system, and for the legal protection of people in a rule of law based democracy, that the court can adjudicate on the compliance with fundamental rights in every case and in every instance. However much the public interest is served by the legislative and executive branches, in individual cases the effectiveness of the safeguards for human freedom and dignity does partially depend on the legal protection provided by the court.

1.4 Contacts with the legislature

The President of the Supreme Court and the Procurator General at the Supreme Court may provide advisory opinions on draft legislative proposals at the request of the Minister of Justice and Security. As a rule, advisory opinions are given on proposed legislation relating to the organisation of the judicial system and coordination within it, and on changes to procedural law. These advisory opinions are politically neutral.
The choices made in the advisory process will take into account that the President and the Procurator General cannot anticipate future cassation proceedings on the interpretation and application of provisions that have been proposed and may become law. The joint responsibility of the three state powers for human freedom and dignity, the principles of a rule of law based democracy, and the values of the European Union are also taken into account.
The advisory opinions issued are published on the Supreme Court's website. In 2021, the President and the Procurator General published two advisory opinions on the merits of proposed legislation, compared with four in 2020. This concerns:

- Advisory opinion on draft decrees to the Temporary Experiments Act on the administration of justice
- Advisory opinion on draft legislative proposal on double surnames

As an institution, the Supreme Court fulfils an autonomous role in the good relations between representatives of the three state powers. The President of the Supreme Court and the Procurator General at the Supreme Court perform a linking function that manifests itself mainly in contacts and conversations. Good relations contribute to mutual respect and an understanding of one another's responsibilities in polity and society. A direct dialogue between representatives of the state powers allows for an exchange of views on the shared underlying responsibility for the function of the law

[6] Supreme Court 24 December 2021, ECLI:NL:HR:2021:1946.

in upholding human freedom and dignity, the principles of the rule of law based democracy, and the values of the European Union. Such a dialogue does not concern pending or future cases, but concerns topics that promote the understanding of and insight into one another's work. What information does one need about the nature of the other's work in order to do one's one work as effectively as possible? An example of the contacts in 2021 is the working visit by Senators to the Supreme Court on 5 October 2021. The Mr. Visserzaal courtroom in the Supreme Court building was the scene of a lively discussion on such topics as the court's sources for the interpretation of the law, the significance of Parliamentary Papers for the court's work, or general dilemmas in overseeing the scope of issues that are the subject of proposed legislation or jurisprudence. The use of the annual report provides another example. Over the course of the year, the content of the Supreme Court's annual report regularly proves to be an appropriate tool in the dialogue with representatives of the other institutions and organisations.

Signals to the legislature
Since 2017 the Supreme Court's annual report has included an overview of decisions that draw the legislature's attention to a specific problem. In 2021, the Supreme Court sent a signal to the legislature in ten decisions, compared to eight in 2020, four in 2019, ten in 2018 and fourteen in 2017.

The overview of signals summarises the judgments containing a signal to the legislature. The signal is highlighted and possibly explained in more detail. No systematic approach is taken to the selection of such decisions. The overview is provided in light of the Supreme Court's tasks of promoting the uniformity and the development of the law and offering legal protection. The executive, legislative and judicial branches of government each have their own responsibilities under law when using legislation. They all share an interest in effective legislation that offers legal certainty to those seeking justice and to society as a whole. In serving this interest they also interact with each other. Effective interaction between the three powers will, among other things, promote the quality of the law, as well as the rate at which bottlenecks in the law can be recognized and resolved.

As part of that interaction, the Supreme Court may decide to include signals for technical legal issues concerning the application of legislation that arise in the cases it hears. Passing on signals can help society and those involved in the administration of justice to recognise what legal and technical problems the Supreme Court encounters in practice. Signals are intended as an aid, alongside the weekly publication of Supreme Court decisions on rechtspraak.nl. It is up to the legislature to decide whether it wants to respond to a signal from the Supreme Court, for example with a legislation process or a through a dialogue between co-legislators.

The signals to the legislature in the Supreme Court's annual reports are of a variable nature. This may include, for example, the indication of legal bottlenecks, but it may also concern the identification of deficiencies in the law. Legal points of a technical nature include, for example, gaps in statutory aw, rules that conflict with higher-order rules, unclear regulations or regulations that are not properly coordinated. Addressing a shortcoming in the law stems from the Supreme Court's task to provide legal protection and promote the development of the law.
In its report of 18 October 2021 on the legal protection of Dutch citizens, the Venice Commission ("Venetië Commissie") recommended that the judiciary organise channels in which the attention of the other state powers can be drawn to legislation that presents the legal practice with dilemmas in the legal system. Since 2017, the Supreme Court's signals to the legislature have functioned as such a channel: the signaling of a decision can be a tool for the legislature to further consider whether a bottleneck or deficiency in the law identified in a decision contains a system-level dilemma.

Signals that the Supreme Court passes on to the legislature do not concern choices that are not up to the court, such as political choices. Sometimes the Supreme Court can provide a solution to an identified bottleneck in its decision, while remaining within the boundaries of its tasks. In other cases, the decision will indicate that this is in fact impossible or undesirable under the applicable law. Signals from the Supreme Court to the legislature are limited to questions that the Court encounters in its case load.

Suspension of a remand to custody on the basis of Article 87 of the Dutch Bankruptcy Act

On the basis of Article 87 of the Dutch Bankruptcy Act, the district court may order that a bankrupt debtor be remanded in custody if they fail to comply with the obligations under the Dutch Bankruptcy Act or if there is a well-founded fear of such failure. This is also referred to as bankruptcy-related detention. The remand to custody order is valid for thirty days and can then be extended for up to thirty days each time.

In this case, the district court imposed a remand to custody order, but held that it would be suspended with conditions. The Dutch Bankruptcy Act does not provide for such a possibility, but courts regularly order the suspension of a remand to custody. Further to questions raised by courts of appeal in respect of this practice, the Procurator General at the Supreme Court lodged a claim for cassation in the interest of the law by an opinion of Advocate General De Bock.

In this judgment, the Supreme Court provided procedural points of reference for suspending a remand to custody order. A suspension of the remand to custody of Article 87 of the Dutch Bankruptcy Act, with or without conditions, is indeed possible according to the Supreme Court. The measure is consistent with the interpretation and application of the Dutch Bankruptcy Act and the obligations arising for the Netherlands from Article 5 ECHR. Relevant here is, among other things, that there is only reason to suspend the remand to custody if the requirements for the remand to custody itself have been satisfied. The period of thirty days, stated in Article 87(3) of the Dutch Bankruptcy Act for the validity of the remand to custody order, does not continue during the suspension. Lastly, the Supreme Court provided a number of procedural safeguards with a view to the legal protection of the bankrupt party. For example, the court should attach to the suspension of the remand to custody a period within which to examine whether there is reason to lift the remand to custody or the suspension thereof, or to list or adjust the conditions.

Supreme Court 22 January 2021, ECLI:NL:HR:2021:102

Does the commencement of mediation interrupt the limitation period of a legal claim in a cross-border dispute?

The Dutch Civil Code provides for several forms of limitation. Thus, legal actions are time-barred by limitation. This period can be interrupted, which sets off a new limitation period, at least in most cases. The interruption of the limitation period of legal actions is regulated by Articles 3:316 et seq. of the Dutch Civil Code.

In this case, the claimant, residing in Belgium, sold an equity interest in 2003 against, among other things, a subsequent payment plan. The buyer was subsequently declared bankrupt. In 2006, the claimant entered into a settlement agreement with some of the parties involved in the sale. This agreement stipulated, among other things, that the claimant was granting discharge in respect of its claims in connection with the sale and that the parties would not make any negative statements about one another. In 2015, mediation took place between the claimant and a party involved in the settlement agreement. The mediation was not successful.

The claimant then requested the court, among other things, to set aside the settlement agreement should be aside on the grounds of error. The court of appeal ruled that the claim for setting aside had become time-barred by limitation. The claimant complained at the Supreme Court that the limitation period had been interrupted by the commencement of mediation in 2015, pursuant to Article 6 of the Act implementing Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (hereinafter referred to as the "Implementation Act"). The claimant had not expressly invoked this provision at either the district court or the court of appeal. However, according to the claimant, the court of appeal should have supplemented the reliance on limitation with this legal ground of its motion.

The Implementation Act applies to cross-border civil and commercial disputes and has not been incorporated into the Dutch Civil Code. A possible result of this is that the regulation may be overlooked

in legal practice. Several draft legislative proposals have meanwhile been drawn up for the regulation of non-cross-border mediation, including the Promotion of Mediation Act. This most recent proposal provides, among other things, for an addition to Article 3:316 of the Dutch Civil Code stipulating that the limitation period of a legal claim is also interrupted by the commencement of mediation.

The Supreme Court ruled in this case that the commencement of mediation cross-border disputes can indeed be equated with the acts of interruption mentioned in Article 3:316 of the Dutch Civil Code. This is consistent with the rationale underlying the limitation regime of the Mediation Directive, which seeks to ensure that parties are not at risk of limitation during mediation. Indeed, the court of appeal should have assessed the claimant's reliance on the interruptive effect of the mediation on the basis of Article 6 of the Implementation Act.

Supreme Court 19 February 2021, ECLI:NL:HR:2021:274

The preparation of a plan of final distribution for estates subject to debt restructuring with assets amounting to less than EUR 2,000

Article 356 of the Dutch Bankruptcy Act governs the termination of the debt restructuring scheme, following a termination hearing by the court. This article requires, among other things, that the administrator prepare a plan of final distribution. If the debt restructuring scheme has been settled on the basis of the simplified procedure under Article 354a of the Dutch Bankruptcy Act, preparing the plan of final distribution can be omitted.

Case law provides for different ways of settlement in cases where the estate assets amount to less than EUR 2,000 upon termination of the debt restructuring scheme. For example, according to the 'Overijssel method', the debt restructuring scheme is terminated in such a case on the basis of Article 354a of the Dutch Bankruptcy Act, with no plan of final distribution being prepared. Based on the 'Gelderland method', a plan of final distribution must always be prepared after termination, regardless of the estate balance. Further to the divergent approaches, the Limburg District Court referred questions to the Supreme Court for a preliminary ruling. The district court asked, among other things, whether estates subject to debt restructuring with assets amounting to less than EUR 2,000 needed to be settled in the same way and, if so, whether settlements in which the estate assets amount to less than EUR 2,000 should take place in accordance with the statutory framework of the Dutch Bankruptcy Act.

The Supreme Court answered both questions in the affirmative. It is relevant in this regard that the legislature has made an exception to the rule that a verification meeting be held and a plan of final distribution be prepared, but only in the event that the simplified procedure of article 345a of the Dutch Bankruptcy Act is applied. There is no basis for declaring this exception applicable to other situations. Similarly, the circumstance that filing the plan of final distribution requires a court fee to be paid from the estate assets and that this is onerous on estates with few assets does not constitute grounds to deviate from the statutory scheme. In the Supreme Court's opinion, it is up to the legislature to assess whether and how this should be provided for.

Supreme Court 24 September 2021, ECLI:NL:HR:2021:1353

Criminal Division

Consequences of a court-approved composition in a bankruptcy for a fine or confiscation order imposed or to be imposed

This case concerned the question of what the consequences of a bankruptcy will be for a fine or confiscation order to be imposed or already imposed, when the bankruptcy is terminated by a court-approved composition. A court-approved composition was concluded between the bankrupt party and their creditors. In it, agreements were made about the payments of the debts, either in full or in part. This composition was then approved by the court.

Because it is unclear whether and in which cases the State is bound to a court-approved composition, the Procurator General at the Supreme Court brought a claim for cassation in the interest of the law

by means of an opinion by Advocate General Keulen. In its decision in this case, the Supreme Court addressed the question of whether a court-approved composition in the bankruptcy of a suspect or convicted person affects the enforcement of a fine or confiscation order imposed or to imposed and as from when the public prosecutor can file a claim as creditor in the bankruptcy proceedings on behalf of the State in connection with an expected fine or confiscation order. The Supreme Court hereby provided a procedural framework for the status of criminal claims against a bankrupt party.

After addressing the questions, the Supreme Court made one last observation. Earlier on in the judgment, it was explained that the application of the composition regime might lead to the fact that, with respect to a fine or confiscation order as a result of the incurrence of a natural obligation, no recovery, or no full recovery, can take place anymore. In the debt restructuring scheme for natural persons, on the other hand, claims arising from such things as an irrevocable criminal conviction to pay a fine or a confiscation order remain enforceable even after the debt restructuring is terminated, to the extent that they remained unsettled during the debt restructuring on the basis of Article 358(1) and (4) of the Dutch Bankruptcy Act. According to the Supreme Court, the question of whether, in relation to the composition regime, a similar exception should be provided for the fine and the confiscation and, if so, the way in which such a regime should take shape, is not for the court to answer. That is a potentially relevant subject for the legislature.

Supreme Court 2 February 2021, ECLI:NL:HR:2021:112

The importance of transitional law in new legislation in criminal law

Transitional law governs how new laws and regulations affect an existing legal situation. This case was about the transitional law regarding the probationary period attached to the conditional release of a convicted person who was imposed a prison sentence. A legislative amendment that entered into effect on 1 January 2018 introduced the possibility of extending this probationary period. As such, the legislative amendment may be prejudicial to a convicted person serving their prison sentence.

In this case, the district court ruled that the public prosecutor's request to extend the probationary period of the conditional release of a convicted person given a prison sentence before 1 January 2018 was inadmissible. Further to this decision, the Procurator General at the Supreme Court brought a claim for cassation in the interest of the law through an action brought by Advocate General Vegter.
The Supreme Court ruled that the new regulation relates to the execution of an imposed sentence and therefore cannot be considered a legislative amendment with respect to criminalisation or sentencing. In most cases, an extension of the probationary period in cases where a prison sentence was pronounced before 1 January 2018 is not contrary to the principle of legality of Article 7 ECHR. The Supreme Court has provided guidelines for the exceptional cases that do violate the ECHR.

After addressing the questions, the Supreme Court made a last, more general observation on transitional law, which may be of interest to the legislature. It is clear from the legislative history that the legislature chose not to provide for a transitional law regime regarding the legislative amendment at issue in this case, and that the legislature, in making that choice, assumed that the legislative amendment entering into effect immediately would not be contrary to the principle of legality. However, such legislative amendments are often quick to raise – often complex – questions of a transitional nature in the light of, in particular, Article 7(1) ECHR. These questions – and the attendant uncertainties for the legal practice – can be avoided if a specific statutory transition regime is provided for, the purpose of which is to respect the nature of the sentence irrevocably imposed by the court and the maximum duration for which that sentence can be enforced, even in situations in which Article 7(1) ECHR does not compel or appear to compel making such a provision.

Supreme Court 15 June 2021, ECLI:NL:HR:2021:850

Tax Division

Legal protection from another's income data on the allowance decision

As the highest court on matters of civil law, criminal law and tax law, the Supreme Court in principle does not rule on the amount of allowances. The legislature has assigned those matters to other

administrative courts. The right to allowances and other income-related schemes is determined, among other things, by the 'income data'. That income data must be determined each year by the tax inspector (also referred to as 'Tax Administration Blue' - "Belastingdienst Blauw"), either on the basis of the most recent assessment or on the basis of the payroll taxes, and subsequently provided to 'customers', in particular the allowances inspector "Tax Administration Red" - "Belastingdienst Rood"). The income data is something that the Supreme Court can rule on.

In this case, the taxpayer objected to a number of allowance-related decisions, complaining that her ex-partner's income data had been set too high. This resulted in her receiving fewer allowances than expected. One of the questions was whether the taxpayer's objection was admissible.

The legislative history of the State Taxes Act shows that the legislature recognised the need for the necessary legal protection and provided that the person to whom the income data relates can turn to the court at least once: as a result of the assessment if imposed and, if the payroll taxes concern the final levy, as a result of the use of the 'income data' by the allowances inspector (i.e. in the procedure following the granting or refusal of an allowance). However, the income data may also be decisive for the allowance applied for by another person, such as in this case the ex-partner and in other cases, for example, the partner or domestic partner.
As the statutory regulation stands now, no objection or appeal can be lodged by that other person against the use of the income data. This means that the other person has no legal remedy against the basis on which the allowance is determined, meaning the statutory regulation has a lacuna in terms of the legal protection it provides. The court of appeal found a way around that in this case. Referring to Article 1 of the First Protocol to the ECHR and Article 6 ECHR, the Supreme Court explains why the statutory provisions in question should indeed not be applied according to their literal wording.

Supreme Court 5 February 2021, ECLI:NL:HR:2021:179

Concurrent provisions on the tax group

In tax law, changes take place frequently. Tax laws and regulations change every year, in part due to changes in national policy, international and European regulations and treaties, and under the influence of court decisions. There have been quite a few changes in the provisions on the tax group for corporate income tax purposes as well in recent years, both in the Dutch Corporation Tax Act 1969 [Wet op de vennootschapsbelasting 1969] and the Dutch Decree on Tax Groups 2003 [Besluit fiscale eenheid 2003].

This case is about whether the Dutch Decree on Tax Groups 2003 was not amended to reflect a legislative amendment that sought to allow the projected losses of a holding company to be offset against profits only if those profits also stemmed from the activities as holding company. Article 5(4) of the Dutch Decree on Tax Groups 2003 provides that the profits of a subsidiary included in a tax group immediately upon its incorporation are considered to be profits of the incorporators. The question is whether the latter also applies if the incorporators qualify as a holding company and the subsidiary does not. All in all, this concerned a combination of several provisions, each with its own background and rationale.

The Supreme Court adheres to the literal text of the provision of the Dutch Decree on Tax Groups 2003, meaning the profits of the incorporated subsidiary, which in themselves have nothing to do with holding activities but are regarded as profits of the incorporating holding company, can still be offset against its losses as profits accruing to the holding company.
The holding company loss scheme has meanwhile been abolished, although the scheme does still appear in transitional law.

Supreme Court 11 June 2021, ECLI:NL:HR:2021:884

Legal protection and the interaction between the legislative, executive and judicial powers

The legislative, executive and judicial branches of government each have their own statutory responsibilities 'when using legislation. A relevant theme in recent years, also in terms of choices to be made by the legislature, is the extent to which the judiciary should and can provide protection from the executive. The Tax Division handed down a number of judgments on this subject in 2021.

The judgment ECLI:NL:HR:2021:1654 is described in this annual report in the selection of judgments rendered by the Tax Division. In this case, a taxpayer relied on a notice on the website of the Tax administration, which in retrospect turned out to be incorrect, about the surrender of an annuity insurance policy. The question was whether the Tax Administration was nevertheless bound by this notice on the basis of the principle of legitimate expectations – a general principle of good governance that prescribes that a citizen must be able to trust that a certain commitment by an administrative body will be fulfilled.

Based on an earlier Supreme Court judgment, the taxpayer would not be able to rely on the principle of legitimate expectations, because the 'disposition requirement' had not been met. This requirement stipulates that the taxpayer, based on the incorrect information, has done or omitted something as a result of which they not only have to pay the tax legally owed, but also incur a loss or an additional loss. Based on current legal conceptions, the Supreme Court saw reason to revise its case law in this regard. The Supreme Court lifted the restrictive requirement of loss or additional loss in addition to the tax owed. If a taxpayer, relying on information from the Tax Administration that in retrospect proves to be incorrect, does something or fails to do something that results in the taxpayer being assessed for a higher amount than they believed they should have to pay based on that information, the effective legal protection from infringements of the principle of legitimate expectations generally means that the taxpayer may not be assessed for the extra amount.

The judgment ECLI:NL:HR:2021:1748 is also described in this annual report in the selection of judgments rendered by the Tax Division. This judgment is about Project 1043 and the Tax Administration's FAF database. FAF is short for the Dutch Fraude Signaleringsvoorziening, or fraud detection facility. In the context of this Project 1043, income tax returns were selected for further examination and recorded in the FAF database to detect and combat systemic fraud. One of the selection criteria for further examination was dual nationality. Once selected, taxpayers were subject to further annual examination of their returns for five years.

In this case, the taxpayer had deducted expenses for maintenance and specific care expenses in her 2014 tax return. The Inspector denied that deduction in part. It was not until after lodging an objection, an appeal, and an appeal to the higher court that the taxpayer turned to the Supreme Court to complain about the application of Project 1043 in her case, which she believed led to unequal treatment of taxpayers. She could not have been aware of this any sooner. Advocate General Niessen suggested that the assessment of the appeal in cassation should be based on these new facts. The Supreme Court persisted in the premise that facts not established or advanced before the district court or the court of appeal cannot be taken into account in cassation, and pointed out the possibility of requesting a review at the court of appeal. The Supreme Court also offered some observations on the possible legal consequences if it should indeed turn out that Project 1043 and/or FAF played a role in the taxpayer's case, and therefore a serious infringement of a fundamental right was committed.

Supreme Court 5 November 2021, ECLI:NL:HR:2021:1654
Supreme Court 10 December 2021, ECLI:NL:HR:2021:1748

Restoration of rights for the tax on imputed return on investment in Box 3 for 2017 and 2018

In recent years, the Supreme Court's Tax Division has issued several judgments on the tax on imputed return on investment. In 2019, the Supreme Court ruled that the Box 3 tax in 2013 and 2014 constituted a system-level violation of Article 1 of the First Protocol if the nominal return to be achieved in Box 3 is on average lower than 1.2% (4% of 30%, the tax owed), but that, in principle, the Supreme Court is unable to resolve this, as that requires changes to be made to the current tax system which cannot be sufficiently deduced from the system of statutory law. In its relationship to the legislature, the court must then apply restraint (see, for example, HR 14 June 2019, ECLI:NL:HR:2019:816).

In 2021, too, the Supreme Court issued a number of judgments on the taxable income from savings and investments of income tax Box 3. On 24 December 2021, the Supreme Court handed down a ruling in mass objection proceedings, ECLI:NL:HR:2021:1963, described in this annual report in the selection of judgments rendered by the Tax Division. The mass objection proceedings revolved around the question

of whether the Box 3 system in 2017 and 2018 violated the right to property protected by Article 1 of the First Protocol to the ECHR and the prohibition of discrimination of Article 14 ECHR.

The Supreme Court ruled that the Box 3 system in place as of 2017 did indeed violate the right to property and the prohibition of discrimination. Because of the way in which the legislature has sought alignment with an average distribution of Box 3 assets across savings and investments and with yields averaged in previous years, the system has become further removed from taxation of income that can be assumed to have been enjoyed by an individual taxpayer, although the legislature did envisage the latter. The Supreme Court took into account that the legislature indicated that it would not be presenting any legislative amendments until 2025 and offered the taxpayer restoration of rights by stipulating that only the actual yield realised be subject to tax.

Supreme Court 24 December 2021, ECLI:NL:HR:2021:1963

1.5 The Supreme Court and the multi-layered legal system

The Supreme Court deals with cases that are governed by rules of law of the Netherlands, but also by rules established outside the Netherlands. The latter rules of law include, in particular, the law of the European Union, universally binding treaty provisions and resolutions by international institutions that have effect pursuant to Article 93 and Article 94 of the Constitution and rules of law in cases from the Caribbean part of the Kingdom. In the latter category, as in the Netherlands, it is possible that the legislature sees reason in a Supreme Court decision to amend a rule of law that was addressed in a case. In the other two categories the Supreme Court not only has to engage in a dialogue with the legislature and the executive for the interpretation and application of the law, but also with the Court of Justice of the European Union (hereinafter "ECJ") in Luxembourg and the European Court of Human Rights in Strasbourg. The national, transnational, interregional and international origin of rules of law together constitute sources of law in what is also known as a layered rule of law.

Law of the European Union

In the interpretation and application of EU law the Supreme Court assesses, also on the basis of the "CILFIT criteria", whether the Supreme Court can automatically apply Union law in a case or whether it must first refer a question for a preliminary ruling about EU law to the ECJ subject to application of Article 267 of the Treaty on the Functioning of the European Union (ECJ 6 October 1982, C-283/81, ECLI:EU:C:1982:335 (CILFIT)). The ECJ in Luxembourg is the highest court when it comes to the interpretation of EU law. Exactly 39 years after the CILFIT judgment, the ECJ ruled again on the CILFIT criteria in 2021 (ECJ, 6 October 2021, C-561/19, ECLI:EU:C:2021:799 (Consorzio Italian Management and Catania Multiservizi)).

In 2021, four ECJ decisions (of the 21 decisions in the cases originating from the Netherlands) concerned cases in which the Supreme Court had referred questions for a preliminary ruling in previous years. Three of those cases concerned a judgment (a decision substantiated with reasons):

- ECJ 3 June 2021, C-39/20, ECLI:EU:C:2021:435 (Jumbcarry Trading);
  final judgment: Supreme Court 17 September 2021, ECLI:NL:HR:2021:1271;
- ECJ 3 February 2021, C-922/19, ECLI:EU:C:2021:91 (Stichting Waternet);
  final decision: Supreme Court 17 December 2021, ECLI:NL:HR:2021:1889);
- ECJ 12 May 2021, C-709/19, ECLI:EU:C:2021:377 (Vereniging van Effectenbezitters);
  this case was later removed from the Supreme Court case list (Article 246 DCCP).

The fourth decision concerned a decision (CJEU 15 September 2021, C-442/19, ECLI:EU:C:2021:769 (Stichting Brein), after which the proceedings in cassation were resumed before the Supreme Court.

In 2021, the Supreme Court referred questions for a preliminary ruling to the ECJ in three cases (Supreme Court 19 February 2021, ECLI:NL:HR:2021:271); Supreme Court 26 March 2021, ECLI:NL:HR:2021:455); Supreme Court 14 December 2021, ECLI:NL:HR:2021:1841)).

In 2021, the Supreme Court also often dealt with EU law in other cases. Three examples are given here. In a case on consumer rights, the Supreme Court refrained from answering a question referred to it by the Subdistrict Court for a preliminary ruling about Article 6:230v(1) DCC on the ground that a question concerning the interpretation of the provision of a directive that is implemented by Article 6:230v(1) DCC was pending before the ECJ (Supreme Court 12 November 2021, ECLI:NL:HR:2021:1677).
In a case about a suspect's right of access to a lawyer, the Supreme Court applied Article 3(1) of Directive 2013/48/EU (Supreme Court 22 June 2021, ECLI:NL:HR:2021:962). This Article provides that Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively. In its decision, the Supreme Court referred to a decision given by the ECJ (ECJ 5 June 2018, case C-612/15, ECLI:EU:C:2018:392 (Kolev et al.), point 103).
Also based on existing ECJ case law, the Supreme Court answered the question of whether, in a specific case, a limitation was justified on the deduction of mortgage interest that had been paid for an owner-occupied home located in Belgium within the meaning of Article 3.111 of Income Tax Act 2001 (Supreme court 8 October 2021, ECLI:NL:HR:2021:1472).

The dialogue between the Supreme Court and the ECJ to promote the functioning of EU law in their respective fields of activity not only takes place in cases but also in field-specific contacts. For example, in 2021 case law relating to the CILFIT criteria was the subject of a speech given by the president of the ECJ and a speech given by the president of the Supreme Court at the opening of the International Federation of European Law (FIDE) Congress on 4 November 2021 in The Hague. One of the themes of the dialogue between the Supreme Court and the ECJ is the joint responsibility of the judiciary for respecting human freedom and dignity, the principles of the democratic rule of law, and the values of the European Union.

European Convention on Human Rights and Fundamental Freedoms

On the basis of Article 93 and 44 of the Constitution, the Supreme Court's Field of activity in cases also covers the provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). Among other things, the ECHR provides that the European Court of Human Rights in Strasbourg (ECtHR) can render decisions on the application of the ECHR by the national court. This takes place on the basis of complaints that are submitted against the Member State. The ECtHR's interpretation of ECHR provisions in cases against Member States may be addressed in cases brought before the Supreme Court which involve universally binding provisions of the ECHR.

The relationship between the ECtHR and the courts of the Member States including the Supreme Court, is, among other things, characterised by a dialogue that serves to promote the operation of the ECHR in the respective Field of activity s and the joint responsibly of courts for respecting human freedom and dignity and the principles of the democratic rule of law. The dialogue takes place not only in cases but also in field-specific contacts. The president of the Supreme Court was invited by the president of the ECtHR to give a speech on 10 September 2021 at a "solemn hearing" of the ECtHR.

Over the years, the ECtHR has received proportionally few complaints from the Netherlands (annual report of the ECtHR for 2021, p. 189). In 2021, the ECtHR rendered a decision against the Netherlands in seven cases (annual report of the ECtHR for 2021, p. 187).

In the Case Law section under the heading *The right to hear witnesses* an example of a decision is included in which the Supreme Court responds to a decision rendered by the ECHR in which a complaint against the Netherlands was declared well-founded, and the consequences for the interpretation and application of Dutch law are addressed. This is where the duties of the Supreme Court's in its dialogue with the ECtHR converge with its duties in promoting the uniformity and the development of the law and providing legal protection.

Aspects of the painting by Helen Verhoeven

The Corpses of the De Witt Brothers

This work shows the corpses of brothers Johan and Cornelis De Witt. A raging mob, consisting of members of the local militia, murdered the brothers in 1672 as an expression of their dissatisfaction with the situation of the Republic of the Seven United Netherlands. 1672 was the infamous rampjaar, a year riddled with catastrophe. The republic was embroiled in a war with England and France. Johan de Witt, a powerful man, had served as grand pensionary for 19 years. In 1672 his older brother, Cornelis, was accused of high treason and was to be exiled. When Johan went to the prison to get him in the wake of the judgment, both were murdered. Their corpses were mutilated and put on display. The image depicted in the painting was intended as a sharp rebuke of the lynch mob. The artist, Jan de Baen, worked on the painting in the period of 1672-1675.

Stern (Ulrike Meinhof)

This is a portrait of Ulrike Meinhof painted by Marlene Dumas in 2004. As a member of the radical left Rote Armee Fraktion (Red Army Faction, or "Faction") founded in 1970, Ulrike Meinhof was involved in bank robberies and bombings. The Faction protested what they viewed as the failed denazification of West Germany and the country's involvement in NATO. In the Faction's view, the West German government was nothing more than a continuation of the fascist regime. Meinhof was the star writer of pamphlets and other propaganda for the Faction. She was arrested in 1972 and ultimately sentenced to eight years in prison in November 1974. A year later, various Faction members were prosecuted en masse for a large number of murders, attempted murders and the formation of a criminal organisation. On 9 May 1976, before Meinhof could be convicted of those crimes, she was found dead in her cell, hanging from a towel. To this day, her sympathisers doubt whether her death was a suicide.

Aspects of the painting by Helen Verhoeven

Guernica by Picasso

In this painting from 1937, Pablo Picasso illustrates the panic that accompanies a bombing raid. In 1937, during the Spanish Civil War, the German air force bombed the Basque village of Guernica. The painting shows the violence against humans, the terror of animals, and the destruction of buildings. Since 1937, the painting has travelled the entire world as a protest against the atrocities of war. Honouring Picasso's express wish, the canvas was not returned to Spain until after Franco's death. The Spanish Civil War began in 1936 with the revolt of right-wing generals led by Franco against the left-liberal government. The generals were supported by the German air force, which viewed the bombing of Guernica as an opportunity to try out their weapons.

Johan van Oldenbarnevelt

Artist Michiel van Mierevelt painted this portrait of state attorney and grand pensionary Johan van Oldenbarnevelt (1547-1619). Van Oldenbarnevelt, who opposed Maurice of Nassau during the Twelve Years' Truce of the Eighty Years' War, was convicted of high treason and beheaded. Under Van Oldenbarnevelt's leadership, the States-General became the most powerful government body of the Seven Provinces. Maurice of Nassau increasingly interfered in the day-to-day business of government, which ultimately ended up putting the two at loggerheads. In 1617, at Van Oldenbarnevelt's initiative, the States-General decreed that city managers could hire their own militias. This resulted in the poaching of troops from Holland who were under Maurice's command. In response, Maurice staged a coup d'etat. Van Oldenbarnevelt was convicted of high treason by what amounted to a kangaroo court. He was beheaded at the Binnenhof in The Hague on 13 May 1619.

2. The Administration of Justice

2.1 Civil cases

Field of activity

Civil law mainly concerns conflicts between citizens (private individuals and companies). The civil cases heard by the Civil Division range from disputes in the personal or relational sphere (divorce, alimony, custody arrangements for minors, involuntary commitment of persons with a mental disorder), via consumer law or commercial contracts to, for instance, complicated damage claims, settlement of bankruptcies, or international law and public international law. Moreover, in cases involving civil government liability, the Civil Division may have to deal with virtually any other area of law.

Figures

In 2021, the total number of incoming civil cases was 401 (2020: 439). The 401 cases concerned 240 claims, 54 petitions, and 87 applications. The distinction between petitions and applications is related to the introduction of digital cassation litigation in these types of cases on 1 April 2021. There were another 20 cases in which district courts and courts of appeal referred questions to the Supreme Court for a preliminary ruling. This number has never been this high. The assessment of questions referred for a preliminary ruling occupies a significant part of the Civil Division's workload.

The number of judgments rendered in 2021 was 372 (2020: 393). Of the 372 judgments rendered in 2021, 205 cases were decided upon on the merits, which is 55 percent (2020: 50 percent). No case was decided upon through the application of Article 80a of the Dutch Judiciary Organisation Act (2020: 1) and 167 cases were decided upon on the basis of Article 81 of the Dutch Judiciary Organisation Act (2020: 194).
It is only in very exceptional cases that the Civil Division decide of cases by means of Article 80a of the Dutch Judiciary Organisation Act. One reason for the small number of cases decided upon on the basis of Article 80a of the Dutch Judiciary Organisation Act is that legal assistance by a specialist cassation lawyer is mandatory in cassation cases. Quality requirements are imposed on these cassation lawyers. This means that the vast majority of cases do not meet the requirements to be decided upon on the basis of Article 80a of the Dutch Judiciary Organisation Act. An increase in the average processing time is related to the infrequent application of Article 80a of the Dutch Judiciary Organisation Act, because there are hardly any more simple cases that can be withdrawn from consideration at an early stage.

Of the total number of decisions rendered in 2021 (372), the appeal in cassation was rejected in 239 cases and in 107 cases the judgement of the lower court was quashed. Out of the total number of cases/ judgments, almost 29 percent quashed the lower court's judgment. Other types of case determination account for the remaining percentage.

Selection of judgments

For each area of law, some judgments are discussed that were rendered by the Supreme Court in 2021 and that have been important for uniformity of justice, development of law and legal protection, or that are otherwise relevant from a societal point of view. The discussion will focus on the decision and its significance. Legal and social developments that played a role in the background may also be discussed. Some of the decisions include illustrations on the meaning of fundamental rights in Supreme Court decisions (see 1.3 Fundamental rights and the Supreme Court). The following topics are discussed:

- Equal opportunity in land allocation
- Health crisis and rent reductions for businesses
- Outings with foster parents
- Earthquake damage Groningen II
- Available assets upon commencement of debt restructuring

Equal opportunity in land allocation

The Municipality of Montferland wanted to sell a parcel of land in the centre of Didam to a project developer. Another entrepreneur also announced its candidacy to the Municipality, but the Municipality sold the parcel to the project developer anyway. The entrepreneur filed summary proceedings against

the Municipality and the project developer. According to the entrepreneur, the Municipality was only allowed to sell the parcel after a public procedure in which all candidates were given a fair chance to place a bid on the parcel: the Municipality should have provided opportunity for competition. The district court did not rule in favour of the entrepreneur. The court of appeal was also of the opinion that a municipality is not required to provide opportunity for competition when allocating land.

The Supreme Court ruled in favour of the entrepreneur. The government is not allowed to violate the rules of public law when entering into and executing private-law contracts. The principle of equality is one of those rules. Therefore, this principle also applies to the sale of immovable property. If a government body, such as a municipality, wants to sell immovable property, it must offer potential candidates equal opportunity by providing room to compete in the run-up to the sale of the property. The government will then need to establish objective, verifiable and reasonable criteria to select the buyer from among the candidates. Also, in order to realise equal opportunity, the government body must ensure an appropriate measure of openness by disclosing information about the immovable property, the selection procedure, the time frame, and the selection criteria in a timely manner.
If it can be assumed that only one serious candidate qualifies for the purchase, then the government body need not provide any opportunity for competition. However, this too must be disclosed in advance.

As a result of the Supreme Court's decision, a government entity can no longer offer immovable property for sale exclusively to one party without disclosing this in advance. This decision on the private-law actions of the government is in line with the case law of the Administrative Jurisdiction Division of the Council of State on the granting of scarce permits.

Supreme Court 26 November 2021, ECLI:NL:HR:2021:1778
Advisory opinion of deputy Procurator General ECLI:NL:PHR:2021:243

Health crisis and rent reductions for businesses

The health crisis surrounding the COVID-19 virus has had far-reaching consequences since the spring of 2020. Industries such as the hospitality industry and the retail industry were forced to close their doors, or experienced restrictions in their business operations, for example in terms of their opening hours, rules about keeping 1.5 metres distance, or the maximum number of customers allowed to be inside at any given time. In the rental sector, the health crisis led to discussion about the question of whether commercial property lessees can claim rent reductions. The Roermond District Court referred questions on this subject to the Supreme Court for a preliminary ruling.

The Supreme Court judgment concerns commercial space within the meaning of Article 7:290 of the Dutch Civil Code (retail space). The government-mandated temporary closure of the hospitality industry does not constitute a defect in the leased property. Nevertheless, according to the Supreme Court, entitlement to a rent reduction still exists.
The circumstance that, as a result of the government measures in connection with the health crisis, a lessee whose turnover depends on the public visiting them is unable to exploit the business space, or able to exploit it only to a limited extent, is an exceptional circumstance of a general nature relating to public health. In principle, it should be assumed that leases concluded before 15 March 2020 have not taken this into account. Therefore, an unforeseen circumstance as referred to in Article 6:258 of the Dutch Civil Code exists on the basis of which the court can adjust the lease by reducing the rent.

As a rule, any disadvantage caused by this circumstance does not fall within the control of the lessee or the lessor. Therefore, in principle, the disadvantage should be borne equally between them. This may be deviated from based on individual circumstances, such as the capacity or financial position of one of the parties.
In determining the rent reduction, the lessee's loss of turnover and the Reimbursement Fixed Costs (TVL, short for Dutch tegemoetkoming vaste lasten) that the lessee receives from the government must be considered, using the fixed costs method. The amount of the rent reduction can then be calculated according to the formula: (agreed rent – part of TVL attributed to rent) x percentage of decrease in turnover x 50%.

The Supreme Court's decision provides lessees and lessors with tools to negotiate a rent reduction. If the parties fail to reach agreement by mutual consultation, they may turn to the court. The court will then take into account the Supreme Court's answers to the questions referred for a preliminary ruling.

Preliminary ruling Supreme Court 24 December 2021, ECLI:NL:HR:2021:1974
Advisory opinion of deputy Procurator General ECLI:NL:PHR:2021:902

Outings with foster parents

A child has been placed in the custody of a youth care institution (a certified institution) by the court and has also been placed in the care of a foster home. In that case, do the child's vacations or outings require the consent of the parents and/or the certified institution? In practice, juvenile judges have expressed different views on this. For this reason, the The Hague District Court referred questions to the Supreme Court for a preliminary ruling.

In its decision, the Supreme Court stated that the best interests of the minor (the child) should always be the starting point in these matters. This follows from Article 3(1) of the Convention on the Rights of the Child (CRC). The aim of family supervision is to provide parents with help in caring for and raising the minor. During family supervision, parents retain custody. However, a family supervision order may entail that the parent's custody is in fact limited by written instructions from the certified institution. If the court has authorised custodial placement, then the certified institution will determine where the minor will stay. Even then, the certified institution must pay attention to the parents' parenting and caregiving abilities. Control over day-to-day routine lies with the foster parents, but important decisions are made by the custodial parents.

In the case of custodial placement in a foster home, the duties of the foster parents in principle include making decisions about outings and vacations with the minor. Therefore, the foster parents do not require the consent of the custodial parents for this. On the other hand, foster parents need to give notice of an intended outing or vacation to the certified institution if it will affect the execution of the parental contact arrangements. In such a case, the certified institution may grant or refuse consent, based on the best interests of the minor. The certified institution may inform the foster parents that they must also obtain prior consent for outings or vacations in other cases.

The decision emphasises that the best interest of the minor is always the starting point. Outings and vacations are part of the foster parents' responsibility for the day-to-day routine. The consent of the certified institution is in any case required if parental contact arrangements are affected. Disputes can be submitted to the juvenile judge by any party involved (Article 1:262b of the Dutch Civil Code).

Preliminary ruling Supreme Court 21 May 2021, ECLI:NL:HR:2021:748
Advisory opinion of deputy Procurator General ECLI:NL:PHR:2021:57

Earthquake damage Groningen II

In 2019, the Supreme Court ruled on liability for damage resulting from earthquakes caused by gas extraction and on the types of damage that are eligible for compensation (Supreme Court 19 July 2019, ECLI:NL:HR:2019:1278). The damages also include compensation for loss of enjoyment of property and compensation for intangible loss (pain and suffering damages).

On the basis of this, the Arnhem-Leeuwarden Court of Appeal subsequently rendered a decision in a case brought against the Nederlandse Aardolie Maatschappij B.V. (NAM). The claimants in this case are over sixty residents with homes that have suffered physical damage caused or exacerbated by earthquakes. In 2021, the Supreme Court heard NAM's appeal in cassation against the court of appeal's decision.
Physical damage to a home can be used to delineate the cases in which an entitlement to compensation for lost enjoyment of property and an award of pain and suffering damages does or does not exist. The Supreme Court accepted that in this case. Being or not being a resident of a particular area above the Groningen field, as mentioned by the Supreme Court in 2019, is not the only way to delineate these cases.

The level at which the nuisance and inconvenience caused by NAM is unlawful has been reached in respect of a resident of a home to which physical damage caused or exacerbated by earthquakes has occurred at least once. This applies irrespective of the varying degrees of physical damage to homes. The enjoyment of a property lost in such a case qualifies for compensation. The amount of the compensation must be determined on an individual basis.
A resident of a home that has suffered physical damage at least twice is additionally entitled to compensation for intangible loss or harm. The court of appeal was free to set the pain and suffering damages at a minimum of EUR 2,500 per resident.
The decision in this case is relevant for other cases involving earthquake damage. Over 5,000 cases are pending before the Noord-Nederland District Court concerning lost enjoyment of property and intangible loss or harm due to earthquake damage. It is important for the residents in the earthquake zone, NAM and the judge that the applicable rules of law for determining damages are – if possible – easy to manage. This promotes an efficient and predictable way of deciding these cases.

Supreme Court 15 October 2021, ECLI:NL:HR:2021:1534
Advisory opinion of Advocate General ECLI:NL:PHR:2021:294

Available assets upon commencement of debt restructuring

When a person who is in considerable debt is admitted to debt restructuring, they must surrender the money in their bank account and their property to the administrator. During the debt restructuring, the debtor is allowed to keep a portion of their income each month to meet their fixed costs. If rent or other fixed costs need to be paid shortly after admission to debt restructuring, but the monthly income does not come in until some time later, the debtor faces the problem of how to meet these obligations.

A debtor requested the examining judge for leave to use part of the balance on their bank account at the time of the admission to the debt restructuring to cover the first round of fixed costs during the debt restructuring. The examining judge refused to grant the leave requested. The debtor's appeal was dismissed by the district court. The debtor then submitted the case to the Supreme Court.
The Supreme Court pointed out that if the debtor allowed new debts to arise during the debt restructuring, this could cause the debt restructuring to end without a "clean slate" and creditors would still be able to enforce payment of their claims. Usually, the debtor will receive a portion of their income only several days or weeks after the commencement of the debt restructuring. There is a good chance that the debtor will have to take on new debts in order to pay their fixed costs. This is undesirable because it jeopardises the "clean slate".
The Supreme Court therefore ruled that the administrator may determine that the debtor need not surrender part of their financial resources at the commencement of the debt restructuring, to the extent that such is necessary to pay the costs of living and fixed costs in the first period.

In practice, the issue concerning the costs of living and fixed costs in the first period of debt restructuring was handled differently by the district courts. The legislature devised an arrangement for a similar issue that arises in the event of attachment of a bank account. This arrangement does not apply in the case of debt restructuring. The Supreme Court's decision henceforth allows the administrator to make an appropriate decision.

Supreme Court 12 November 2021, ECLI:NL:HR:2021:1670
Advocate General's advisory opinions ECLI:NL:PHR:2021:207 and ECLI:NL:PHR:2021:809

2.2 Criminal cases

Field of activity

The Criminal Division's Field of activity covers the fields of substantive criminal law, criminal procedure, special criminal law, European law (EU Law and ECHR) and international criminal law. The Criminal Division also hears extradition cases and retrials.

Figures

In 2021, the total number of incoming criminal cases was 3346 (2020: 3414). The total number of criminal

cases that were dealt with in 2021 was 3649, (2020: 3459), with 3417 decisions being rendered (2020: 3246). Of the 3417 decisions rendered in 2021, 711 cases were decided upon on the merits, which is 20.8 percent (2020: 22.6 percent), 1070 cases were decided upon through the application of Article 80a of the Dutch Judiciary Organisation Act (2020: 830) and 268 cases were decided upon through the application of Article 81 of the Dutch Judiciary Organisation Act (2020: 320).

Of the total number of decisions rendered in 2021 (3417), appeals in cassation were rejected in 439 cases (2020: 481) and in 2021 cases the judgement of the lower court was quashed and referred (or referred back) to a court of appeal or district court (in 2020: 186) and 242 cases were set aside and decided upon by the Supreme Court itself (2020: 254). Out of the total number of decisions, almost 13 percent quashed the lower court's judgment. Other types of deciding cases account for the remaining percentage.

Selection of judgments

For each area of law, some judgments are discussed that were rendered by the Supreme Court in 2021 and that have been important for uniformity of justice, development of law and legal protection, or that are otherwise relevant from a societal point of view. The discussion will focus on the decision and its significance. Legal and social developments that played a role in the background may also be discussed. Some of the decisions include illustrations on the meaning of fundamental rights in Supreme Court decisions. The following topics are discussed:

- The right to hear witnesses
- Investigation methods
- Case law on fundamental rights
- "Fewer Moroccans"
- Special conditions in vice cases

The right to examine witnesses

This judgment is about the denial of a request by the defence to call a witness. It involved a witness who had made a statement incriminating to the defendant. This judgment constitutes the Supreme Court's first response to the European Court of Human Rights (ECtHR) judgment of 19 January 2021 in Keskin v. The Netherlands. In that case, the ECtHR upheld a complaint against such a denial. That ECtHR decision has implications for the assessment by the Dutch criminal courts of requests to summon and examine witnesses. Prior to the ECtHR's decision in the Keskin case, the Dutch criminal courts required the defence to substantiate such requests.

In the judgment, the Supreme Court pointed out that in the Dutch system – unlike in many other ECHR Member States – the hearing focuses on the assessment of the findings from the preliminary investigation, including the witness testimony provided. This set-up of criminal proceedings is aimed at contributing not only to an efficient and well-structured hearing of criminal cases within a reasonable period of time, but also to ascertaining the truth. Indeed, witness statements are taken no later than necessary after the event to which they relate. This does not alter the fact that decisions by the fact-finding court on summoning and examining witness and on the question of whether arguments can be established as fact must be rendered in a manner that – in the words of the ECtHR – safeguards the 'overall fairness of the trial'.

The Supreme Court held as follows. As a result of the ECtHR judgment, cases in which a witness has given an incriminating statement and the defence has been unable to examine this witness any sooner, the interest in summoning and examining that witness must be presupposed, so that no further substantiation of this interest may be demanded from the defence.
In those cases, the question of whether an opportunity to examine the witness can and should be realised will have to be subject to further scrutiny.
In addition, the ECtHR's decision underscores the importance of the court verifying, before the case is deemed proven in part on the basis of the statement of a witness not examined, whether the proceedings as a whole comply with the right to a fair trial guaranteed by Article 6 ECHR. However, it does not follow from that decision that the right to examine a witness entails that a request by the

defence to examine a witness who has made an incriminating statement should always be allowed, regardless of the factors mentioned and the significance of that statement in the light of the other results of the criminal investigation.

The case in which this Supreme Court judgment was rendered involved an abused bicycle mechanic. The court of appeal denied the request to examine two witnesses to this incident. According to the court of appeal, the examination of these witnesses was not necessary, given the substantiation of that request and the time that had elapsed since the date of the offence as charged. As Procurator General Bleichrodt opined as well, that ruling cannot be upheld. The reasons for this are that the court of appeal assumed the finding of fact exclusively on the basis of these statements contested by the defendant, without the defence having been able to examine these witnesses, whereas it has not been demonstrated that the court of appeal ascertained whether the proceedings as a whole complied with the right to a fair trial guaranteed by Article 6 ECHR.

This case was followed by several other cases in 2021 in which the ECtHR judgment in Keskin was invoked successfully. A particular problem arises when it comes to incriminating statements by young children (cf. Supreme Court 12 October 2021, ECLI:NL:HR:2021:1418, among others). Even then, the interest in summoning and examining the witnesses must be presupposed. The age of the witnesses and their possible family relationship to the defendant do not automatically detract from this. Special reasoning requirements apply to the denial of a request to examine the children as witnesses in cases where their well-being would be jeopardised by giving a statement (cf. Supreme Court 17 March 2020, ECLI:NL:HR:2020:446).

The effect of this case law is not that all requests to examine witnesses must be granted without question. In the judgment of 28 September 2021, ECLI:NL:HR:1279, the defence wanted to bring up the legitimacy of the preliminary investigation for discussion through the examination of witnesses. So this case was not about the examination of a witness about a statement by that person that could be used by the court for evidence. For such cases, the Supreme Court judgment of 20 April 2021 discussed here, which is also referred to as the post-Keskin judgment, did not change anything. The rule laid down in the Supreme Court judgment of 4 July 2017, ECLI:NL:HR:2017:1015, stipulating that the defence's request for summoning and examining witnesses must be substantiated, is still valid.

Supreme Court 20 April 2021, ECLI:NL:HR:2021:576
Advocate General's advisory opinion ECLI:NL:PHR:2021:234

Investigation methods

The question of how far the powers of the police extend in specific cases is of all time. The matter is determined by the court, and ultimately by the Supreme Court. Limits are imposed on those powers, not only by the legislature, but also by the case law of the European Court of Human Rights (ECtHR). The fact that new questions constantly arise is due in part to new technological developments and new investigation methods aimed at combating serious crime.
An example of this is the appeal in cassation in the interest of the law lodged by Procurator General Bleichrodt on the biometric unlocking of a suspect's smartphone, against their will. The purpose of this unlocking was to gain access to the contents of the smartphone with a view to investigation. This was done by handcuffing the suspect and placing their fingerprint on the screen. The district court deemed this to be permissible.

The Procurator General pointed out that there is no explicit legal basis for this in the laws and regulations. He raised the question of whether the ECRH opposes this course of action, in particular the nemo tenetur principle enshrined therein, stipulating that the accused has the right to remain silent and thus the right not to incriminate themself. Although he ultimately concluded that the district court's decision was not indicative of an incorrect interpretation of the law, the Procurator General filed two grounds for cassation, asking the Supreme Court what limits can be imposed on the use of coercion.

The Supreme Court broadly concurred with the Procurator General and dismissed the appeal in cassation. In doing so, the Supreme Court noted the following.

The system of the provisions on which the authority to seize is based also encompasses the statutory basis for the authority to examine items that have been seized. It had been ruled previously that this also applies to computers, smartphones and the like (cf. Supreme Court 4 April 2017, ECLI:NL:HR:2017:584). Furthermore, exercising the coercive measure of seizure may also entail the performance of acts – if necessary with a proportional degree of violence – that are meant to take custody of items for the purpose of prosecution within the meaning of Article 134(1) of the Dutch Code of Criminal Procedure. In comparison, the use of the suspect's fingerprint under coercion does not constitute a violation of the nemo tenetur principle enshrined in, among others, Article 6 ECHR. Dutch law does not contain an unconditional right or principle stipulating that a suspect cannot in any way be required to grant their cooperation in obtaining evidence that might incriminate them. The decisive element is whether the use of the evidence obtained from a suspect against their will would strip the suspect of their rights to remain silent, and thus to refuse to incriminate themselves. Reference is made to the factors mentioned in this context in ECtHR 11 July 2006, 541810/00 (Jalloh v. Germany), in which the forced administration of an emetic to have the defendant regurgitate bubbles of drugs he had swallowed was deemed impermissible. As the level of physical coercion was minor with the aim of using the suspect's fingerprint to biometrically unlock the smartphone, it did not constitute a violation of the nemo tenetur principle.

In Supreme Court 22 June 2021, ECLI:NL:HR:2021:947, with an advisory opinion by Advocate General Harteveld, the Supreme Court deemed a method used by police impermissible. It concerned the suspect of fatal arson at a residence. The suspect had repeatedly invoked her right to remain silent. The suspect had been deemed vulnerable and, for that purpose, safeguards had been provided for the police questioning: not only was an attorney present, but the questioning was also being recorded and monitored by an investigative psychologist using audio-visual equipment. During an interruption of – and therefore immediately following – questioning, the suspect was questioned in the police station's exercise yard by an investigating officer not recognisable as such. The officer asked her questions about her involvement in the arson and how the offence was committed.
The Supreme Court previously referred to the importance of the freedom to testify in connection with the permissibility of having an undercover officer systematically collect information while the suspect is deprived of their liberty (Supreme Court 9 March 2004, ECLI:NL:HR:2004:AN9195). The suspect's status as a vulnerable person may be relevant when assessing whether the suspect's statements were made in violation of that freedom to testify. After all, the suspect's person is relevant when assessing the amount of pressure they may have felt from the undercover officer and the extent to which the investigating officer's conduct may have incited the statements made by the suspect. In the judgment of 22 June 2021, the Supreme Court quashed the court of appeal's judgment.

Supreme Court 9 February 2021, ECLI:NL:HR:2021:202
Supreme Court 22 June 2021, ECLI:NL:HR:2021:947
Advocate General's advisory opinions ECLI:NL:PHR:2020:927 and ECLI:NL:PHR:2021:295

Case law on fundamental rights

Like all national courts, the Supreme Court also has a duty to enforce the fundamental rights as formulated in the European Convention on Human Rights and Fundamental Freedoms (ECHR), among others. This duty is particularly relevant when considering in cassation proceedings whether an appealed judgment is compatible with those fundamental rights. Those fundamental rights can also play a role in proceedings that, in principle, will not be heard by the Supreme Court under our legal system.

This is the case in, for example, matters relating to pre-trial detention. On 2 November 2021, the ECtHR ruled that the common practice of using standard reasoning for continuing the pre-trial detention in the Netherlands is contrary to Article 5(3) ECHR. The ECtHR issued this ruling in cases with numbers 10982/15 (Maassen v. the Netherlands), 73329/16 (Hasselbaink v. the Netherlands) and 69491/16 (Zohlandt v. the Netherlands). The ECtHR held, among other things, that "the domestic courts' arguments for and against release must not be 'general and abstract', but contain references to specific facts and the personal circumstances justifying an applicant's detention".

In Supreme Court 9 November 2021, ECLI:NL:HR:2021:1662, the Supreme Court took the opportunity to express its opinion on this topic, although the case in question did not involve flawed reasoning. The Supreme Court noted superfluously that decisions relating to pre-trial detention must always contain reasoning tailored to the case in question. With regard to decisions of the court in chambers on pre-trial detention, this general obligation to provide reasons is also expressed in Article 24(1) of the Dutch Code of Criminal Procedure and follows from requirements set in Article 78(2) of the Dutch Code of Criminal Procedure for pre-trial detention orders and orders extending a pre-trial detention. Because reasoning tailored to the case takes more time, this will affect the organisation and/or budget.

A matter regularly submitted to the Supreme Court concerns the defendant's right to be present at hearings. According to established case law, the Supreme Court emphasises that the fact-finding court must weigh all interests involved in staying an investigation when denying a motion for stay. Several decisions to deny a motion for stay were set aside in 2021 for failing to do so (Supreme Court 2 November 2021, ECLI:NL:HR:2021:1570 and Supreme Court 11 May 2021, ECLI:NL:HR:2021:685 and Supreme Court 2 March 2021, ECLI:NL:HR:2021:330). However, there were also cases in which the Supreme Court denied the appeal in cassation, such as one in which the investigation would have been stayed for the fourth time and the interests of the victims were also relevant (Supreme Court 13 July 2021, ECLI:NL:HR:2021:1134).
The judgment of the ECtHR of 27 July 2021, 72631/17 (X v. the Netherlands) also pertained to the right to be present on appeal. The complainant had explicitly stated that she wished to be present at the hearing of the court of appeal, but her counsel had erroneously submitted a date on which it was impossible for her to be present. The Supreme Court – deviating from Advocate General Spronken's advisory opinion – denied the appeal in cassation against the rejection of the motion for stay (Supreme Court 9 May 2017, ECLI:NL:HR:2017:826). The ECtHR disagreed with how the Supreme Court had weighed the circumstances of the case in this matter, but confirmed the established case law: "(…) Article 6 does not always require a right to a public hearing, still less a right to appear in person. In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it and of their importance to the appellant".

Supreme Court 9 November 2021, ECLI:NL:HR:2021:1662
Supreme Court 2 November 2021, ECLI:NL:HR:2021:1570
Advocate General's advisory opinions ECLI:NL:PHR:2021:833 and ECLI:NL:PHR:2021:733

"Fewer Moroccans"

One judgment that received a lot of media attention was the judgment regarding a well-known politician who had asked those present at a campaign meeting whether they would like more or fewer Moroccans and, after the crowd replied "fewer", had said: "then we will arrange that". He was found guilty without punishment of defaming a group of people based on their race (Article 137c of the Dutch Criminal Code).

It was a fundamental matter, in which the importance of compliance with the law on the one hand was weighed against the freedom of expression guaranteed in the Constitution and the European Convention on Human Rights and Fundamental Freedoms (ECHR) on the other hand. In his advisory opinion, the Procurator General at the time, Silvis, discussed the relevant case law of the European Court of Human Rights.

In its judgment, the Supreme Court closely followed previous decisions, in particular the assessment framework in Supreme Court 16 December 2014, ECLI:NL:HR:2014:3583, holding as follows:
"Partly in view of Article 10 ECHR and the case law of the ECtHR, one must consider the wording of a statement and the context in which that statement was made – including, according to [the case law of] the ECtHR, 'the immediate or wider context' – when assessing whether the statement is a punishable offence under Article 137c of the Dutch Criminal Code. In addition, one must establish whether the statement in question could contribute to the public debate or is an artistic expression. One must also establish whether the statement is unnecessarily hurtful in that context.
When assessing whether a statement is unnecessarily hurtful – and it concerns a statement by a

politician in the context of the public debate, including the political debate – one must recognise on the one hand the importance of the fact that the politician in question must be able to actually address matters of public interest even if their statements may be hurtful, shocking or disturbing, but on the other hand also the politician's responsibility in the public debate to avoid disseminating statements that are in breach of the law and the fundamental principles of the rule of law based democracy. This applies not only to statements inciting hatred, violence or discrimination, but also to statements inciting intolerance."

In the judgment, the Supreme Court then first addressed the court of appeal's finding that the proven statements regarding residents of the Netherlands with a Moroccan background are defamatory in nature. The Supreme Court deemed this finding correct and sufficiently substantiated. Contrary to what its everyday use might imply, the term "race" as used in Article 137c of the Dutch Criminal Code must be interpreted in accordance with the purport of the list contained in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination, which in addition to race also includes: colour, descent, or national or ethnic origin.

It then addressed the question of whether the statement was unnecessarily hurtful. The answer to that question was in part determined in the light of the question of whether finding the defendant guilty without punishment of defaming a group of people was compatible with the defendant's right to freedom of expression as guaranteed in Article 10 ECHR. The appeal in cassation was denied on that point as well:
"The Supreme Court takes into account in this regard that the court of appeal considered in its finding that the defendant, as a politician, must actually be able to address matters of public interest even if his statements may be hurtful, shocking or disturbing, but that in the public debate he also carries a responsibility to avoid disseminating statements that are in breach of the law and the fundamental principles of the rule of law based democracy, including statements that – given the manner and context in which they were made – directly or indirectly incite intolerance."

A politician's statements therefore cannot readily be considered "unnecessarily hurtful", as a politician's freedom of expression pertains not only to himself but is also a safeguard in the proper functioning of a parliamentary democracy. However, statements by a politician that are defamatory in nature can still be considered "unnecessarily hurtful" if they are contrary to the fundamental principles of the rule of law based democracy, for example because they incite intolerance. Thus, the statement's defamatory nature remains the statutory basis for the criminal liability of the statement.

Supreme Court 6 July 2021, ECLI:NL:HR:2021:1036
Advocate General's advisory opinions ECLI:NL:PHR:2021:487 and ECLI:NL:PHR:2021:613

Special conditions in vice cases

Article 14c(2) of the Dutch Criminal Code provides that when the court imposes a suspended sentence, it can set special conditions. The convicted person must comply with those conditions for the duration of the probationary period or a part thereof.
The law mentions a number of conditions and concludes the list with "14° other conditions concerning the convicted person's conduct." According to now-established case law, these are conditions that serve to promote a proper way of living or certain conduct that the convicted person must be obliged to abide by from a social decency point of view. Such conditions must adequately state the rules of conduct they are meant to embody. They cannot be deemed to include conduct of the defendant that is effectively equivalent to cooperating in wide-ranging and drastic coercive measures used by police. (Cf. Supreme Court, 7 July 2020, 2020, ECLI:NL:HR:2017:1215). Even after a suspended conviction, one must avoid a situation in which the defendant does not know how to comply with the imposed conditions or in which the conditions allow for arbitrary invasions of their private life.

One example of a case in which the condition was correctly applied is Supreme Court 11 May 2021, ECLI:NL:HR:2021:698. In that case, the court of appeal had imposed the special condition that the defendant surrender the data carriers containing all of the images/recordings of the 14-year-old girl who was the victim of stalking.

A couple of times, the court of appeal also set conditions that did not meet the standards of established case law, as was the matter in Supreme Court 12 October 2021, ECLI:NL:HR:2021:1502. The court of appeal set the following special condition: "the defendant must ensure that whenever he is in a room with minors, he is always under the supervision of an adult with knowledge of his conviction". This is incompatible with the aforementioned provision because the convict's conduct does not in all circumstances decide whether he will be in a room with minors and whether an adult will be present to supervise while moreover having knowledge of the convict's conviction.

The case of Supreme Court 6 April 2021, ECLI:NL:HR:2021:498 also concerns a special condition that did not fully pertain to the convict's own conduct. The condition was that "the convicted person will be registered for the covenant" between the probation service and the police for the rehabilitation of sex offenders. In so far as the condition furthermore entailed that the convicted person "must cooperate in the covenant between the probation service and the police, which means that he may be visited by the neighbourhood police officer at or around his home", it also did not meet the aforementioned standards. Indeed, in only referring to the cooperation in the covenant for the rehabilitation of sex offenders, the court of appeal did not adequately describe the rules of conduct imposed by the special condition, nor did it clarify the purpose and form of the visits of the neighbourhood police officer that the convicted person must cooperate in.

In Supreme Court 9 March 2021, ECLI:NL:HR:2021:248, the condition was that the defendant would cooperate in talks with the probation service about his behaviour in a digital environment where pornographic images involving minors can be obtained or where people communicate about sexual conduct with minors. The talks must also address how the convicted person intends to avoid this conduct, in which context he will cooperate in police checks of digital data carriers. It is not apparent how exactly the condition of cooperating in police checks of digital data carriers relates to the talks with the probation service as also mentioned in the special condition. Furthermore, it is not apparent how and with what frequency police may check the data carriers, which officers this will involve and how it is guaranteed that the checks will not impede on the defendant's private life more than necessary for the intended supervision.

Supreme Court 28 September 2021, ECLI:NL:HR:2021:1403, NJ 2022/9, annotated by J.M. ten Voorde, also involves a special condition imposed in the sentence for a sexual offence involving minors. This case concerned multiple indecent acts committed with a person below the age of sixteen years. In addition to conditions prohibiting contact with the victims and other minors, the condition was "that the convicted person will permit the consultation of relevant references". In that regard, Advocate General P.C. Vegter noted that it remained unclear whether the court of appeal was referring to the parents of children living nearby or perhaps even therapists and/or professionals entrusted with privileged information such as attorneys or general practitioners. This condition did not meet the requirements either. After all, the court of appeal did not specify how exactly that condition relates to the other special conditions set by the court of appeal and the options already available to supervise compliance with those conditions. Moreover, by stipulating only that the defendant must permit the consultation of "relevant references", the court of appeal did not specify who can be considered such references and for what purpose those references may be consulted.

Supreme Court 9 March 2021, ECLI:NL:HR:2021:248
Supreme Court 6 April 2021, ECLI:NL:HR:2021:498,
Supreme Court 28 September 2021, ECLI:NL:HR:2021:1403
Supreme Court 12 October 2021, ECLI:NL:HR:2021:1502

Advocate General's advisory opinions
ECLI:NL:PHR:2021:11
ECLI:NL:PHR:2021:136
ECLI:NL:PHR:2021:663
ECLI:NL:PHR:2021:961

2.3 Tax cases

Field of activity

The Tax Division of the Supreme Court primarily handles tax matters. These concern taxes and levies imposed by both the central government as well as those imposed by local or regional authorities such as provinces, municipalities and district water boards. In addition, the Tax Division handles appeals in cassation against decisions of the Central Appeals Tribunal and the Trade and Industry Appeals Tribunal. In those appeals, the Supreme Court's review is limited to the application of elements of social security or subsidy schemes relating to tax rules and concepts. The Tax Division's duties also include hearing appeals in cassation against decisions of the Customs Division of the Amsterdam Court of Appeal.

Figures

In 2021, the total number of incoming tax cases was 1220 (2020: 877). The number of judgments rendered in 2021 was 835 (2020: 866). In 2021, an independent advisory opinion was delivered by an Advocate General in 103 cases (2020: 121).

In 2021, the Tax Division of the Supreme Court rendered 835 judgments. In 349 judgments, the decision was substantiated with reasons (2020: 351), which is 42 percent, 80 cases were decided upon with application of Article 80a of the Dutch Judiciary Organisation Act (2020: 114) and 406 cases were decided upon through the application of Article 81 of the Dutch Judiciary Organisation Act (2020: 401).

Of the total number of judgments rendered in 2021 (835), appeals in cassation were declared unfounded in 483 cases, in 27 cases the judgment of the lower court was quashed and referred (or remanded) to a court of appeal or district court, and 32 cases were decided upon by the Supreme Court itself after quashing the contested court of appeal judgment. Out of the total number of 835 judgments, 7 percent of the decisions quashed the lower court's judgement.

Selection of judgments

For each area of law, some judgments are discussed that were rendered by the Supreme Court in 2021 and that have been important for uniformity of justice, development of the law and legal protection, or that are otherwise relevant from a societal point of view. The discussion will focus on the decision and its significance. Legal and social developments that played a role in the background may also be discussed. Some of the decisions include illustrations on the meaning of fundamental rights in Supreme Court decisions (see section on fundamental rights and the Supreme Court). The following topics are discussed:

- The tax on imputed return on investment in Box 3 of the Personal Income Tax Act
- Project 1043 and the fraud alert feature at the Tax Authorities
- The disposition requirement when relying on the principle of legitimate expectations contra legem
- Hearings without the parties being physically present in court due to Covid-19
- The relationship between fraus legis and anti-abuse provisions (Article 10a of the Corporate Income Tax Act)

The tax on imputed return on investment in Box 3 of the Personal Income Tax Act

In 2021, the Supreme Court rendered several judgments regarding Box 3 taxable income from savings and investments. A collective complaints procedure had been filed regarding the question of whether in the years 2017 and 2018 that system contravened – particularly with regard to depositors – (i) the right to property protected by Article 1 of the First Protocol of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) and (ii) the prohibition against discrimination enshrined in Article 14 ECHR. In a collective complaints procedure, several sample cases are selected for presentation to the tax court and all the other objections – which may number in the tens of thousands – are stayed until final decisions have been rendered in the sample cases.

In addition, the Supreme Court also handled a Box 3 case that did not fall under the collective complaints procedure. This case involved a taxpayer who received a State Pension benefit that was

subject to EUR 1,354 in tax in Box 3 even though she had only received EUR 1,244 in - income from her savings. Her objection to her 2017 tax assessment was that Box 3 was systematically unlawful and, moreover, that the levy in her particular case resulted in an individual and disproportionate burden that was prohibited by the ECHR. In the advisory opinion dated 25 March 2021 (ECLI:NL:PHR:2021:293), Advocate General Wattel concluded, partly on the basis of statistical analysis – an unacceptably large standard deviation from an average return on a fictitious mix of assets – that after the system was changed in 2017, the Box 3 levy constituted a systemic violation of the prohibition of discrimination. The Supreme Court declined to address the system-wide matter because the selection of sample cases for the collective complaints procedure entailed that the system-wide matter had to be addressed exclusively in the context of that procedure, but it did address the individual matter (Supreme Court 2 July 2021, ECLI:NL:HR:2021:1047). It repeated that in answering the question of whether an individual and disproportionate tax burden has arisen, the Box 3 levy must be viewed in conjunction with the taxpayer's financial situation as a whole, adding that if that levy is higher than the actual return, such a burden does arise if the taxpayer's income is so low that she must consume her assets in order to pay the tax.

The judgment in the collective complaints procedure addressing the system-wide matter was rendered on 24 December 2021 (ECLI:NL:HR:2021:1963). The case involved a married couple who had achieved a return on investments totalling EUR 6,612 in 2017 and EUR 3,528 in 2018 but who had been forced to pay Box 3 levies amounting to EUR 12,705 and EUR 11,969, respectively.
On 1 November 2021, Advocate General Niessen had also concluded that since 2017, the Box 3 system had violated the right to property and the prohibition of discrimination enshrined in Article 14 ECHR (ECLI:NL:PHR:2021:1019). He advised ignoring the fictitious mix of assets – because it constituted an unacceptable infringement on individual freedom of choice when it came to savings and investments – and offering redress by taxing savings and other assets at the fixed statutory rate of return – in 2017 – of either 1.65% or 5.39%.

The Supreme Court also held in the judgment of 24 December 2021 that the Box 3 system in place as of 2017 did indeed violate the right to property and the prohibition of discrimination. Because of the way in which the legislature has sought alignment with an average distribution of Box 3 assets across savings and investments – the mix of assets – and with yields averaged in previous years, the system has become further removed from taxation of income that can be assumed to have been enjoyed by an individual taxpayer, although the legislature did intend for the latter. Choosing to avoid risky investments entails a relatively heavy financial burden. This overly restricts the power to dispose of one's property as guaranteed by the ECHR. Persons who do opt to make risky but disappointing or even loss-producing investments are also prejudiced. The Supreme Court offered redress by subjecting only the actual return to the levy.

Supreme Court 2 July 2021, ECLI:NL:HR:2021:1047
Supreme Court 24 December 2021, ECLI:NL:HR:2021:1963
Advocate General's advisory opinions ECLI:NL:PHR:2021:293 and ECLI:NL:PHR:2021:1019

Project 1043 and the fraud alert feature at the Tax Authorities

On 10 December 2021, the Supreme Court issued a decision (ECLI:NL:HR:2021:1748) in a case regarding the Tax Authorities Project 1043 and its use of a database with a fraud alert feature (FAF). In the context of this Project 1043, income tax returns were selected for further examination and recorded in the FAF database to detect and combat systemic fraud – attempts to get the Tax Authorities to pay out funds based on incorrect data. One of the selection criteria for further examination was dual nationality. Once selected, taxpayers were subject to further annual examination of their returns for five years.

The taxpayer had deducted expenses for alimony and specific care expenses in her 2014 tax return. The Inspector denied that deduction in part. It was not until after lodging an objection, an appeal, and an appeal to the higher court that the taxpayer turned to the Supreme Court to complain about the application of Project 1043 in her case, which she believed led to unequal treatment of taxpayers. In an advisory opinion dated 17 June 2021 (ECLI:NL:PHR:2021:617), Advocate General Niessen concluded that the complaint essentially entailed that the additional assessment had to be reduced or revoked because

it had been unlawfully imposed. His view was that, in principle, the processing of the data recorded in the context of Project 1043 or the FAF constituted a violation of the right to privacy enshrined in Article 8 ECHR and that there was no statutory basis for such violation. He therefore considered the use of those data to be impermissible.

The Supreme Court did not address the individual complaint because the taxpayer did not complain about Project 1043 or the FAF on appeal, but only did so in once the appeal in cassation was before the Supreme Court. The Supreme Court cannot investigate such a complaint because that would require it to make findings of fact – was the taxpayer actually included in the FAF and, if so, with what consequences that otherwise would never have arisen? – and the Supreme Court only addresses questions of law and procedural omissions, not questions of fact.

The Supreme Court did, however, address the issue in general terms. It referred to the option of reconsidering the court of appeal's judgment based on facts that had not been known to the court of appeal. It formulated general principles for handling complaints about Project 1043, the FAF and the use of the FAF against taxpayers: if the Inspector notes that a taxpayer does not have a full or partial right to a deduction they have claimed, it is not unlawful in itself to audit tax returns that had been submitted in previous or subsequent years. That audit may very well be unlawful if it ensues from a risk selection, a processing of personal data in a database or the use of a database in which personal data are stored based on a criterion that leads to a violation of the taxpayer's fundamental rights, such as the prohibition of discrimination based on one's ethnicity, orientation or religious convictions. In such an exceptional case, it may be that the inspector is not entitled to adjust the return based on information that was revealed in that audit.
Violation of the right to the protection of privacy by processing personal data in contravention of the Personal Data Protection Act or the General Data Protection Regulation (GDPR) does not automatically constitute such a case. This means that the violation of the protection of one's privacy will not lead to the reduction of an assessment that has otherwise been correctly calculated. A tax court also cannot grant the taxpayer damages in such case, because that is only permitted if the assessment is unlawful. Incidentally, a taxpayer seeking such damages must file a request with the relevant administrative agency. Under the law, litigation of such matters must be held before the administrative court with general jurisdiction or the civil court. Such a case cannot be heard by a tax court.

Supreme Court 10 December 2021, ECLI:NL:HR:2021:1748.
Advocate General's advisory opinion ECLI:NL:PHR:2021:617.

The disposition requirement when relying on the principle of legitimate expectations contra legem

On 5 November 2021, the Supreme Court ruled on a case (ECLI:NL:HR:2021:1654) in which a taxpayer relied on a statement on the Tax Authorities website regarding the surrender of an annuity insurance policy which proved, in retrospect, to be incorrect. Up to that point, the Tax Authorities was not bound by incorrect general information regarding the substance of tax regulations that created legitimate expectations for a taxpayer regarding the policy to be followed by the Tax Authorities, unless the taxpayer (i) could not reasonably understand the inaccuracy of the information – the inaccessibility requirement – and (ii) based on that incorrect information, did something or failed to do something as a result of which they not only had to pay the tax imposed by law but also incurred additional loss (disposition requirement). The Supreme Court abolished the latter limitation in this judgment.

The taxpayer had purchased an annuity insurance policy in 1989 that entered into effect on 1 December 1989 and expired on 1 December 2015. Each year, he had deducted the premium owed from his taxable in income. He had visited the Tax Authorities website looking for information about the tax consequences of surrendering an annuity insurance policy early. That website stated, among other things: "You do not pay (…) any revision interest if you: purchased an annuity insurance policy before 16 October 1990." Based on that statement, the taxpayer surrendered the annuity insurance policy before the expiry date. The information on the website was incorrect, however, and the Inspector still charged the taxpayer EUR 37,465 in revision interest when imposing the 2015 assessment. The dispute centred on whether the Tax Authorities had created the legitimate expectation that no revision interest would be charged upon the early surrender. The court of appeal held that the statement on the Tax

Authorities website was clear and unambiguous and that the taxpayer was entitled to rely on that statement because it satisfied both the inaccessibility requirement and the disposition requirement. The State Secretary opposed that judgment and initiated an appeal in cassation because his view was that revision interest could not be considered 'an extra loss incurred' in addition to the tax that still had to be paid by law, which meant that the disposition requirement was not met and that the Tax Authorities was not bound by the incorrect information on the website.

Advocate General Niessen stated in his advisory opinion (ECLI:NL:PHR:2021:538) that the loss in question actually was 'an extra loss incurred' because the incorrect information not only caused the taxpayer to have to pay tax that corresponded to the regular expiry of the annuity insurance policy – waiting for the policy to expire and the payments to begin – but had to pay another amount as well. The other amount regarded the revision interest, which would not have been owed had the taxpayer not premised his actions on the erroneous presumption caused by the Tax Authorities website.

The Supreme Court ruled (ECLI:NL:HR:2021:1654) that according to the case law that applied up to that time, the disposition requirement had not been met in this case because the information on the Tax Authorities website was not about tax, but about revision interest. The taxpayer had not, relying on the incorrect information, done something or failed to do something as a result of which he not only had to pay the revision interest that would be charged but also incurred an additional loss as well.
The Supreme Court, however, did not believe that ruling against the taxpayer could be reconciled with current legal conceptions. It therefore abolished the restriction of 'loss' to 'an extra loss incurred'.
If a taxpayer, relying on information from the Tax Authorities which in retrospect proves to be incorrect does something or fails to do something that results in the taxpayer being assessed for a higher amount than they believed they should have to pay as a result of the act or omission based on that information, the effective legal protection from infringements of the principle of legitimate expectations generally means that the taxpayer may not be assessed for the extra amount.

Supreme Court 5 November 2021, ECLI:NL:HR:2021:1654
Advocate General's advisory opinion ECLI:NL:PHR:2021:538

Hearings without the parties being physically present in court due to Covid-19

A judgment of 9 April 2021 (ECLI:NL:HR:2021:505) centred on the Temporary COVID-19 Justice and Security Law. That law provides that if a physical hearing cannot be held in civil or administrative law proceedings in connection with the COVID-19 outbreak, the oral hearing can be held by means of a two-sided electronic means of communication.

In this case, the invitation to the appellate hearing stated that the oral hearing would be held via a video connection. The taxpayer requested the court of appeal to adjourn the case because he wished to be physically present at the oral hearing on a later date. He asserted that he was 74 years old and did not have the necessary electronic equipment or any experience with video conferencing. The court of appeal dismissed his request for an adjournment, informing him that he would be heard by telephone during the hearing. The Inspector did participate in the hearing via an audio-video connection.

The taxpayer was the non-prevailing party on appeal. He then initiated an appeal in cassation. Before the Supreme Court, he asserted that he was unable to assert his positions, or do so sufficiently, during the hearing because of the faulty telephone connection. His position was that Article 6 ECHR (fair hearing) and the rules of due process had been violated. In his view, his request for an adjournment to a date on which it would have been possible for him to be physically present should not have been dismissed.

The Supreme Court found in favour of the taxpayer. In principle, in order to ensure a fair hearing within the meaning of Article 6 ECHR, and particularly the equality of arms, the parties must be able to avail themselves of equivalent, two-sided means of communication during an oral hearing. Using technologically simpler means of communication or other deviations without the parties' consent are only permitted if the court is convinced that the non-equivalence of the means will not preclude a fair hearing and it has weighed the relevant interests that make that deviation acceptable.

A request for an adjournment of the oral hearing need not be honoured if the request is based solely on the desire for a physical hearing, but if a party asserts a compelling reason in good time for why it cannot be present on the hearing date or cannot prepare for the hearing, the court must grant that request unless an adjournment is precluded by other, more compelling interests. Such a dismissal must be well-reasoned. The reason for ruling that the taxpayer could participate in the hearing by telephone was insufficient.

Supreme Court 9 April 2021, ECLI:NL:HR:2021:505

The relationship between fraus legis and anti-abuse provisions (Article 10a of the Corporate Income Tax Act)

In 2021, several judgments were rendered about the relationship between the unwritten legal principal that prohibits fraus legis (evasion of law) and the statutory restriction which Article 10a Corporate Income Tax Act (CITA) imposes on the deduction of interest between affiliated parties to avoid profits for tax purposes being shifted to low-tax foreign countries by artificially financing loans to otherwise profitable Dutch companies and subsidiaries.

The judgment of 9 April 2021 regarded a taxpayer who was part of a worldwide group of companies. It was the parent company of a fiscal unity for corporate income tax purposes. In the years 2007 through 2010, the group of companies bought and sold several companies, for which purpose the interested party had borrowed money from its American parent company. That money was used for capital contributions and loans to other group companies. The Tax Authorities denied the deduction of interest on those loans because the same interest expenses were eligible for deduction abroad, perhaps even twice, given that the interested party was transparent for US tax purposes.

The judgment of 16 July 2021 regarded a French private equity fund which had incorporated three legal entities in the Netherlands via hybrid sub-investment funds with a view to acquiring a Dutch group of companies; those three legal entities formed a fiscal unity. The parent company of that fiscal unity was the interested party in this case. In the context of the acquisition, the French investment funds deposited money that was made available to them as invested capital in convertible instruments issued by the interested party. Those instruments qualified as loan capital in the Netherlands and the interested party wished to deduct the interest on that loan capital. The Tax Authorities denied the deduction. According to the Tax Authorities, although according to the letter of the law Article 10a CITA did not apply, equity capital was artificially converted into loan capital with the primary purpose of evading taxation in the Netherlands.

In both cases, the question was whether the unwritten legal principle that prohibits fraus legis (evasion of law) precluded the deduction of interest on the debts which the Dutch interested party owed to affiliated foreign creditors – debts which the tax authority had deemed to be artificial. That question was answered in the negative in the first judgment and in the affirmative in the second judgment, in both cases in accordance with the advisory opinion issued by Advocate General Wattel (ECLI:NL:PHR:2020:672 and ECLI:NL:PHR:2020:102).

In the judgment of 9 July 2021 (ECLI:NL:HR:2021:1102), the Supreme Court held that the case was about money that had ultimately been borrowed from an external source and that had been used for capital contributions and loans to group companies for, inter alia, internal and external acquisitions that were, in themselves, effected for business purposes. The deduction of the interest owed did not result in that interest being set off against profits that had been purchased or against benefits that had otherwise been artificially created. Even though the Dutch tax base had been eroded, the deduction of interest did not contravene the aim and purpose of the CITA because the dominant explanation for the tax benefit lay in the use of the Bosal gap that, at the time, was attributable to the system of the CITA itself.

In the judgment of 16 July 2021 (ECLI:NL:HR:2021:1152), the Supreme Court held that the deduction of interest on the convertible instruments did actually contravene the aim and purpose of the CITA. The reason for this was that that aim and purpose opposed the achievement of what, in themselves, are considered to be business purposes (an acquisition) by utilising juridical acts which are unnecessary for those purposes – which are essentially detours – which can only have their origin in the primary

motivation for combining the business profit with artificially created interest expenses, that being to shift the profit and randomly and continuously thwart the levy of corporate income tax.

Supreme Court 9 July 2021, ECLI:NL:HR:2021:1102
Supreme Court 16 July 2021, ECLI:NL:HR:2021:1152
Advocate General's advisory opinions ECLI:NL:PHR:2020:672 and ECLI:NL:PHR:2020:102

2.4 Fourth Division cases

Field of activity

In addition to the Civil Division, the Criminal Division, and the Tax Division, the Supreme Court of the Netherlands has a Fourth Division. The Fourth Division handles complaints against judicial officers and cases regarding the suspension and dismissal of judicial officers who are appointed for life. Only the Procurator General of the Supreme Court can initiate such cases with the Supreme Court. Furthermore, the Fourth Division handles applications dealing with the challenge of a Supreme Court justice. The Fourth Division consists of the president of the Supreme Court, three vice presidents of the Civil Division, Criminal Division, and Tax Division, and a number of justices from those divisions.

Figures

In 2021, the Fourth Division rendered decisions in six cases. These concerned one decision in response to a claim by the Procurator General in connection with a complaint against a judicial officer, two decisions in response to a claim by the Procurator General to dismiss a judicial officer, and three decisions in cases in which justices were challenged.

Claim in response to a complaint made against a judicial officer

The section on the Procurator General's Office in this annual report reports, under the heading external right of complaint, that the Procurator General's Office at the Supreme Court filed one claim pursuant to Article 13a of the Judiciary Organisation Act (Wet op de rechterlijke organisatie) with the Supreme Court in 2021. This claim concerns the subdistrict court judge's duty to supervise administrators, which is regulated in Book 1 of the Dutch Civil Code. In response to a complaint filed with the deputy Procurator General, the deputy Procurator General lodged a claim with the Supreme Court, principally as referred to in Article 13a of the Judiciary Organisation Act and, alternatively, a claim for an appeal in cassation in the interest of the law. The subdistrict court judge had prohibited a complainant from performing certain activities as an employee of a firm of administrators. The complaint filed against the subdistrict court judge concerned this measure and the process leading up to it.
The principal claim raised the question of whether the subdistrict court judge acted in the performance of his judicial duties and whether the measure should be considered a judicial decision.

In its decision, the Supreme Court held in respect of the principal claim that the subdistrict court judge had indeed acted in the performance of his judicial duties in respect of the complainant, since he had taken the measure in the context of his statutory supervisory duties. This measure must be considered a judicial decision in view of the fact that the measure affects the performance of the administrations in which the complainant and her employer are involved. Then, under the complaints procedure of Article 13a of the Judicial Organisation Act, an examination of whether the subdistrict court judge exceeded the limits of his legal powers by taking the measure cannot be carried out. The consequence of this is that the Procurator General's principal claim is inadmissible. The case was referred to the Civil Division of the Supreme Court in connection with the alternative claim for an appeal in cassation in the interest of the law. The Civil Division has rendered a decision on the alternative claim.

Supreme Court 9 July 2021, ECLI:NL:HR:2021:1126 (Fourth Division) and Supreme Court 17 December 2021, ECLI:NL:HR:2021:1921 (Civil Division)
Deputy Procurator General's advisory opinion ECLI:NL:PHR:2021:1246

Suspension and dismissal of a judicial officer

The section on the Procurator General's Office in this annual report reports that the Procurator General has filed two claims with the Supreme Court for the dismissal of judicial officer.

Both cases concern a claim for the dismissal of a deputy judge. Deputy judges usually perform a main position outside the judiciary. They can be called upon to perform judicial duties by the court administration of the court which they serve. As for several years the law (Article 46m, opening words and (d), Judicial Officers (Legal Status) Act (Wet rechtspositie rechterlijke ambtenaren)) has provided for the possibility of the dismissal of a judicial official by the Supreme Court if the judicial officer has not been called upon to perform activities as referred to in Article 5f(2) of that Act for a period of two years, nor been appointed or temporarily appointed for that period as referred to in Article 5f(1) or (3) of that Act.

This statutory possibility of dismissal can be at odds with judicial impartiality because the court administration decides whether a deputy judge will be called to act, and the chair of that court administration can request the Procurator General to use this ground for dismissal.

In the decisions in these cases, the Supreme Court held that this ground for dismissal cannot be used in a manner that could erode judicial impartiality. As a result, the mere fact that the court administration has not called for a deputy judge to act for two years is not sufficient ground for dismissal. In addition to that, there must a sufficiently compelling reason justifying the submission and awarding of the application for dismissal.

The facts in both cases have demonstrated that the persons in question had not been called to act for at least two years. In one of the cases, the deputy judge had systematically failed to respond to call notices asking for her availability to perform judicial duties. Nor had she responded to other correspondence. In the other case, the appointment to the position of deputy judge was related to the individual's main position as civil-law notary. Disciplinary measures were imposed on the individual in question in response to complaints made against this individual. The Disciplinary Court disqualified the individual in question from acting as a civil-law notary. As a result, this individual lacked authority and credibility, both externally towards persons seeking justice and internally towards other judicial officers. In both cases, the Supreme Court held that there was a sufficiently compelling reason. In both cases, the individuals in question were dismissed as deputy judges.

Supreme Court 24 December 2021, ECLI:NL:HR:2021:1995 and ECLI:NL:HR:2021:1996
Deputy Procurator General's advisory opinions ECLI:NL:PHR:2021:1236 and ECLI:NL:PHR:2021:1234

Cases in which justices were challenged

To safeguard judicial impartiality in a case, the law provides for the possibility of filing a request to challenge a judge. In cases in which legal representation by an attorney is required, the request must come from the attorney. In other cases, a party or an interested party can file the request themselves.

The premiss of the assessment of a challenge is that a judge must be presumed to be impartial by virtue of their appointment, unless exceptional circumstances arise that provide compelling evidence that they harbour a bias against the person filing the challenge, or that the applicant has objective grounds for suspecting such bias.[7] Challenges directed at a member of the Supreme Court are dealt with by the Fourth Division of the Supreme Court. If a challenge is awarded, the judge challenged will be replaced with a different judge. If the challenge is rejected, the judge challenged will continue to hear the case.

The right of challenge is regulated in the procedural law of all three branches of law in which the Supreme Court handles cases. The Protocol for the participation of the Supreme Court of the Netherlands in the handling and deliberations of a case provides additional rules for the handling of a challenge of one of the members of the Supreme Court.

In 2021, the Supreme Court rendered decisions in three challenge cases. The challenges in these cases were directed at members of the Tax Division. In each of these three cases, the Supreme Court disregarded the challenge. The main reason for disregarding the challenges was that the applicant had not explained in the grounds for challenge why in the case in question judicial impartiality would suffer.

Supreme Court 15 January 2021, ECLI:NL:HR:2021:61

Supreme Court 3 September 2021, ECLI:NL:HR:2021:1215
Supreme Court 17 December 2021, ECLI:NL:HR:2021:1905

In 2021, the Supreme Court also rendered a decision on an application for reconsideration of a decision rendered by the fourth chamber in a challenge case from 2020. The members of the Civil Division of the Supreme Court handled this application for reconsideration and rejected it.

Supreme Court 24 December 2021, ECLI:NL:HR:2021:1973
Advocate General's advisory opinion ECLI:NL:PHR:2021:1220

2.5 Internal complaint cases

The Supreme Court's internal complaint scheme entitles everyone to submit a complaint to the President of the Supreme Court regarding the manner in which the Supreme Court, a member of the Supreme Court or the clerk of the Supreme Court has conducted themselves towards the complainant on a given occasion. Complaints cannot be filed in respect of conduct regarding which it is or was possible to take proceedings before a judicial instance. Complaints also cannot be filed in respect of a judicial decision or the manner in which said decision was arrived at, including the procedural decisions taken in the context. In cases involving the exercise of powers conferred upon the clerk of the Supreme Court by law, complaints directed against acting clerks will be attributed to the clerk of the Supreme Court. These complaints will also be handled in the context of this complaint scheme.

Pursuant to the complaint scheme, an annual overview will be published of the registered complaints and of the complaints handled and settled by the President.

Complaints in the reporting period

In 2021, the President handled five complaints pursuant to the complaint scheme.

The first complaint regarded an acting clerk of the Tax Division. In response to a request to declare several decisions rendered by the Tax Division obsolete, the acting clerk sent a letter on behalf of the president of the Tax Division stating that the Tax Division saw nothing in the requesting party's assertions to take decision by virtue of their office to declare the decisions obsolete or withdrawing those decisions. The essence of the complaint was that the conduct of the acting clerk consisted of the signing and sending of a letter and that he had no authority to do either. The President ruled that the letter encompassed a notification on behalf of the president of the Tax Division announcing the Tax Division's decision. This was a judicial decision and a procedural decision taken within that context, that does not fall within the scope of the right to complain. Because only a judge can render a decision declaring a judgment to be obsolete, the refusal of a request to do so is also considered a judicial decision. The acting clerk carried out the assignment he was given and did not act, and could not have acted, independently and/or without authority. The complaint was declared to be manifestly ill-founded.

The second complaint regarded the sending of a Tax Division judgment to the complainant by registered letter via PostNL. The registered letter failed to reach the addressee on two occasions. The clerk of the Supreme Court arranged for an investigation to determine how it was possible that neither of the two registered letters had arrived. PostNL was repeatedly contacted in that context. The findings of the investigation were shared with the complainant. The result of this investigation was that both letters were addressed correctly and were offered to PostNL in the customary fashion and that there was no reason to assume that any act or omission occurred within the Supreme Court that could have contributed to the letters' failure to arrive. Apparently there had been a flaw in PostNL's services. Because there were no irregularities on the part of the Supreme Court in relation to the sending or delivery, the complaint was declared ill-founded on this point.
Because of the investigation initiated at PostNL, the complaint took longer to settle than was required by the complaint scheme. The complaint was declared well-founded on this point.

The third complaint regarded the handling of and judgment on an appeal in cassation before the Tax

[6] Supreme Court 25 September 2018, ECLI:NL:HR:2018:1770, para. 4.2.1.

Division, in which respect the Tax Division ruled that the party in question was inadmissible because the court fee that was owed had not been paid. The complaint discussed the reasoning underlying the judgment and the correspondence that had been exchanged between the party in question and the Supreme Court when the appeal in cassation was handled. The President noted that this correspondence was part of the case file and, therefore, that it was also taken into account in handling and rendering judgment on the appeal in cassation. The complaint thus regarded the reasoning for the judgment and the judicial decision, which is excluded from the right to complain embodied in the complaint scheme. The complaint was declared to be manifestly ill-founded.

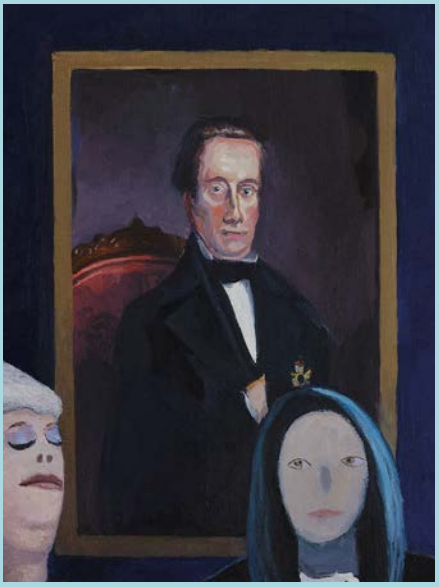
The fourth complaint regarded the fact that an acting clerk had acted in that capacity in both tax cases and cases in which judges were challenged. According to the complainant, the acting clerk could not be unbiased with respect to the latter cases. This complaint also involved several points regarding procedural and substantive decisions in cases in which that same acting clerk was involved. The President's view was that the mere fact that a person carries out duties in the capacity of a clerk, acting or otherwise, in both tax cases and in cases in which judges were challenged is not sufficient to conclude that the complaint was well-founded. The complaint was therefore declared to be manifestly ill-founded. The President also ruled that the objections relating to the procedural and substantive decisions could not be considered complaints. Pursuant to the Supreme Court's Complaint Scheme, complaints cannot regard a judicial decision or the manner in which said decision was arrived at, including the procedural decisions taken in that context.

The fifth complaint was a request to reopen a previous complaint case. These earlier complaints regarded the position of an acting clerk in a case in which judges were challenged. The complainant listed several points about procedural and substantive decisions, such as the scheduling of a hearing on a case in which judges were challenged and the substance of a decision rendered by the panel hearing that action. The President held that these points could also not be considered complaints. Pursuant to the Supreme Court's Complaint Scheme, complaints cannot regard a judicial decision or the manner in which said decision was arrived at, including the procedural decisions taken in that context. The earlier complaint case could therefore not be reopened.

Other correspondence

The Supreme Court and the President of the Supreme Court also received letters and e-mails covering a wide range of topics in 2021. For example, some complained to the Supreme Court or the President because they were displeased about a judgment rendered by the Supreme Court or decisions rendered by other judicial bodies. Complaints were also received about a decision or a response from the Procurator General at the Supreme Court in the context of one of their special duties. These letters and e-mails do not fall within the scope of the complaint scheme and that is generally the gist of the responses sent by the clerk of the Supreme Court.
Others drew the attention of the Supreme Court and/or the President to more general societal issues and their dissatisfaction with those issues, or to their own personal problems and issues. The clerk of the Supreme Court also handles this correspondence. In most cases, there was nothing the Supreme Court and/or the President could do for these individuals. If possible, these individuals are referred to other bodies or legal professionals.

Aspects of the painting by Helen Verhoeven



Johan Thorbecke

Johan Rudolph Thorbecke (1798-1872), depicted here in a painting by Johan Heinrich Neuman, was a statesman who made significant contributions to the formation of the Dutch state, including the revision of the Dutch Constitution. As a liberal member of parliament and a prominent legal scholar, he was appointed to lead the commission responsible for revising the Dutch Constitution. This commission was established by William II and charged with drafting a new Constitution, which became known as the Constitution of 1848.

This new Constitution laid the foundation for the current system of parliamentary democracy in the Netherlands. The inviolability of the King, ministerial responsibility, direct elections (though still for a limited group of voters), and augmentation of the rights and responsibilities of the parliament are all enshrined in this Constitution.

Desiderius Erasmus

Desiderius Erasmus (c. 1467-1536) was one of the greatest philosophers in the history of the Netherlands. A staunch humanist, his work is known for its collective concept of freedom, academic freedom and ideas. Much of his work emphasises the freedom of humanity, the love of one's fellow man, and the peace between peoples. As a theologian and philosopher, he lived through the conflict between Catholicism and the emerging forms of Protestantism. He understood Luther's opposition to Catholicism, but disagreed with him about the role of free will in the salvation of mankind. He was pleased with Luther's translations of the Bible that were intended to bring the word of God closer to mankind. The portrait of Erasmus dating to 1523 was painted by artist Hans Holbein the Younger.

3. The Procurator General's Office at the Supreme Court

3.1 The Procurator General's Office

The Procurator General's Office is an independent part of the Supreme Court and is headed by the Procurator General. The Office comprises the Procurator General, the Acting Procurator General and Advocates General (AGs). In 2021, the Office of the Procurator General at the Supreme Court comprised 22 ordinary members and 2 extraordinary members. The Office is independent and is not part of the Public Prosecution Service. The Office is divided into three sections: civil, criminal and tax. The most important duty of the Office is to provide the Supreme Court with legal advice, known as advisory opinions, regarding cases before the Court. These are issued independently by the Advocates General of that office. In 2021, a total of 1,469 advisory opinions were issued (2020: 1,480): 412 in civil cases, 954 in criminal cases and 103 in tax cases.

In addition, the Procurator General has several specific duties, for example in respect of cassation in the interest of the law and criminal prosecutions of members of government or parliament. The specific duties of the Procurator General that are discussed in this section are related to:

- Handling requests for a change of venue
- Service of writs
- Cassation in the interest of the law
- Revision
- Suspension and dismissal of judges
- Criminal prosecution of members of parliament, ministers and state secretaries
- Supervision of the Public Prosecution Service (OM)
- Supervision of the processing of personal data by courts and the Procurator General's Office at the Supreme Court
- External complaint cases
- Internal complaint cases

3.2 Handling requests for a change of venue

The Procurator General handles requests from the Public Prosecution Service for changes of venue for the prosecution and trial of judges and members of the Public Prosecution Service (Article 510 Dutch Code of Criminal Procedure). The procedure is intended to prevent an officer of the court who is suspected of a crime from being tried by their own court. In these cases, the Procurator General advises the Supreme Court on the issue of whether a change of venue must be made and proposes a court to be designated as the new venue. An advice recommending a change of venue does not entail an assessment of whether a complaint or suspicion is well-founded or whether a trial must actually be held. After a referral, the Public Prosecution Service at the court to which the case has been referred determines whether a prosecution should go forward.

One request for a change of venue was handled during the reporting period. The request pertained to a judge against whom a complaint had been filed alleging that she had committed slander, libel and defamation of character. In the request for a change of venue, the chief public prosecutor noted that the complainant had also filed a complaint against the relevant party in 2020. The Supreme Court had designated the Amsterdam District Court to handle the previous complaint. The Supreme Court designated the Amsterdam District Court in the new case as well (Supreme Court 5 July 2021, 21/02608).

3.3 Service of writs

In the reporting year, 1,847 writs were served. Most of these were writs intended for the State of the Netherlands. Under the law, writs that are intended for the State of the Netherlands are served on the Procurator General's Office at the Supreme Court. The clerk of the Supreme Court is charged with the administrative processing and forwarding of the writs to the ministry or ministries named therein.

The law also appoints the Procurator General's Office at the Supreme Court as the address for service of writs intended for the King. Such writs are forwarded to the King's Office.

In certain cases, writs which are intended for persons or instances that reside or are domiciled abroad rather than in the Netherlands and which regard a case that is being heard or must be heard by the Supreme Court are also served on the Procurator General's Office. In 2021 a writ was served on the Office with a summons for proceedings in cassation intended for a country in South America. That country was a party to the Hague Service Convention 1965. The writ was forwarded to that country's Ministry of Foreign Affairs with due observance of the formal and other requirements of the convention and through the intervention of the Dutch embassy.

3.4 Cassation in the interest of the law

One of the special duties of the Procurator General is to initiate claims in cassation in the interest of the law (see Article 78(1) Judiciary Organisation Act). This extraordinary remedy is an instrument for obtaining the Supreme Court's decision on a question of law which must be answered in the interest of legal uniformity and which cannot be put before the Supreme Court, or at least not soon enough, via an ordinary appeal in cassation. More information about cassation in the interest of the law can be found on the website of the Supreme Court.

Requests and rejections

In 2021, the Procurator General received 44 requests to initiate claims in cassation in the interest of the law, seventeen more than the year before.
In the reporting period, the Procurator General sent 28 rejection letters in response to requests to initiate claims in cassation in the interest of the law, seven more than the year before. The most common reason for rejecting a request was that it did not assert a disputed question of law that required clarification.

Claims and decisions

In 2021, seven claims in cassation in the interest of the law were submitted – three of which were in related cases – three fewer than the year before. Of these claims, five were in criminal cases and two were in civil cases. Several of these cases involved questions of about fundamental rights, partly in the light of the European Convention on Human Rights (ECHR).

Further to the Prokuratuur judgment rendered by the European Court of Justice, three related claims were submitted. This judgment centred on the question of when government agencies should be permitted access to suspects' telecom data (traffic and location data). The judgment had created uncertainty about which suspected criminal offences permitted claims seeking traffic and location data and what procedure must be followed in such cases.

The following questions were posed in the first claim: Does every claim for traffic data and location data confer the option to seek an authorisation from the examining judge? Is the examining judge required to substantively assess a claim for an authorisation, including when the data being claimed can only result in a minor infringement on the data subject's privacy? The second claim regarded the condition that 'precise conclusions' about the data subject's private life can be drawn from traffic data. The third claim regards the scope of the Prokuratuur judgment and the limitation to 'serious criminal offences'. In the last two claims, the Supreme Court was presented with questions to be referred to the Court of Justice for a preliminary ruling.

For the claims, see:
ECLI:NL:PHR:2021:1179
ECLI:NL:PHR:2021:1180
ECLI:NL:PHR:2021:1181

The Supreme Court has not yet rendered a decision.

The principle of legality embodied in Article 7(1) ECHR entails that no one may be convicted of any criminal offence pursuant to any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. This principle played a role in a case in which a question was submitted to the Supreme Court with respect to the transitional law regarding the trial period attached to conditional provisional release.

Since 1 January 2018, the law has permitted the probationary period to be extended in the case of a conditional provisional release. The claim posed the question of whether the probationary period can be extended in relation to criminal offences that were committed or convictions that were pronounced prior to that date. The Supreme Court ruled that, in principle, this would not be precluded by the principle of legality. The Supreme Court noted that statutory amendments such as the one in question quickly give rise to complex transitional-law questions, and that such questions – and the uncertainties for legal practice they entail – can be avoided by the implementation of a specific transitional regulation.

For the claim, see: ECLI:NL:PHR:2021:194
And for the decision of the Supreme Court: ECLI:NL:HR:2021:850

In 2021, the Supreme Court rendered a decision in the case in which a claim had been submitted in 2020 regarding the biometric unlocking of a smartphone that had been seized. The principle of *nemo tenetur* enshrined in Article 6 ECHR played an important role in the case. This principle entails that no one may be forced to incriminate themselves. In this case, the smartphone was unlocked by handcuffing the suspect against his will and then placing his thumb on the fingerprint scanner.

The Supreme Court noted at the outset that the system of provisions on which the authority to seize is based also encompasses the statutory basis for the authority to examine items that have been seized in order to ascertain the truth. Taking the coercive measure of seizure may entail the performance of acts – if necessary, with a proportional degree of violence – that are meant to accomplish the seizure or obtain access to the contents of the items seized. The decisive factor in determining whether the principle of nemo tenetur has been violated is whether the use of the evidence obtained from a suspect against his will would strip the rights of the suspect – to remain silent, and thus to refuse to incriminate the suspect's – of any real meaning (see also the decision of 11 July 2016 rendered by the ECtHR in the Jalloh/Germany case). The Supreme Court deemed that the district court's ruling - that the application of a very limited amount of physical force in this case did not infringe the principle of nemo tenetur - was not incorrect or incomprehensible.

For the claim, see: ECLI:NL:PHR:2020:927
And for the decision of the Supreme Court: ECLI:NL:HR:2021:202

The other claims and decisions regarded:

- The maximum term of a hospital order ("tbs") with treatment.

  For the claim, see: ECLI:NL:PHR:2021:212
  And for the decision of the Supreme Court: ECLI:NL:HR:2021:760

- The question of whether a subdistrict court judge can dissolve an employment contract for economic reasons if an employee calls in sick during or shortly after proceedings with the Employee Insurance Agency (UWV) seeking a dismissal permit.

  For the claim, see: ECLI:NL:PHR:2021:1014
  And for the decision of the Supreme Court ECLI:NL:HR:2022:276

- The question of whether a subdistrict judge can prohibit an employee of a firm of administrators from performing certain work. In this case, the principal submission was a claim within the meaning of Article 13a Judiciary Organisation Act and the alternative submission was a claim for cassation in the interest of the law.

  For the claim, see: ECLI:NL:PHR:2021:1246
  And for the decisions of the Supreme Court: ECLI:NL:HR:2021:1126 ECLI:NL:HR:2021:1921.

- Questions regarding the suspension of bankruptcy-related detention.

For the claim that had already been submitted in 2020, see: ECLI:NL:PHR:2020:1088
And for the decision of the Supreme Court: ECLI:NL:HR:2021:102.

- Questions about the consequences a bankruptcy will have for a fine that has been or will be imposed, or for a confiscation, when the bankruptcy is terminated by a court-approved composition.

For the claim submitted in 2020, see: ECLI:NL:PHR:2020:733
And for the decision of the Supreme Court: ECLI:NL:HR:2021:112

- The commencement date of the term for objection to a notification of the conversion of a sentence to community service.

For the claim submitted in 2020, see: ECLI:NL:PHR:2020:1183
And for the decision of the Surpreme Court: ECLI:NL:HR:2021:352

3.5 Review

A person who has been convicted of a crime may request a review of the conviction, which is an extraordinary legal remedy with its own special proceedings before the Supreme Court. The situations in which a convicted person's request for a review may be granted include a situation in which a new fact (a "novum") which the court did not previously know about comes to light after the criminal conviction has become irrevocable, and this fact gives serious cause to believe that had the court known of that fact at the time of the trial, either the person would not have been convicted or the sentence would have been less severe.

A convicted person is always entitled to submit a request for review to the Supreme Court, and may even submit more than one such request. There is no limitation period.

Articles 461, et seq., of the Dutch Code of Criminal Procedure govern the authority of the Procurator General at the Supreme Court to investigate whether there are possible grounds for reviewing an irrevocable conviction. If a case involves a conviction for a crime that is subject to a prison sentence of twelve years or longer, and the legal system was severely shocked by this crime, the convicted person's attorney may prepare for the review request by submitting a request to the Procurator General to further investigate the circumstances described in that request. In this respect, there must be sufficient indications that there may be a ground for review, and that the investigation being requested is necessary.

The Procurator General may request an advice from the Advisory Committee on Closed Criminal Cases (Adviescommissie afgesloten strafzaken, or ACAS). This is mandatory for convictions carrying a prison sentence of six years or longer. The ACAS advises on the desirability and substance of further investigation. The committee consists of five members and five acting members, including 2 academics, an expert in police practices, an and a member of the Public Prosecution Service, supported by a secretary. In 2021, C.P.M. Cleiren, Professor (emeritus) of Criminal Law and Criminal Procedure at Leiden University, chaired the committee.

In 2021, two requests were received. One request regarded a 2017 conviction for attempted homicide which carried a prison sentence of five years and six months. The request was received on 1 December. No decisions on requests for further investigations were issued in the reporting year. One request regarded a 2011 conviction for murder, violation of the Weapons and Munitions Act (briefly put) and intentionally handling stolen property which carried a prison sentence of fifteen years. The request was received on 23 December. No decisions on requests for further investigations were issued in the reporting year.

In 2021, two requests from 2020 were dismissed. One request regarded a 2003 conviction for participating in multiple murder and participating in theft with violence which carried a life sentence in prison. The Supreme Court dismissed the appeal in cassation in 2004. Following the advice of the ACAS, the Advocate General dismissed the request because the case did not involve new and/or different insights – expert or otherwise – and thus there were insufficient indications that there might be a

ground for review. Incidentally, the Advocate General also dismissed a request for further investigation in this case in 2015, also on the advice of the ACAS. One request regarded a 2000 conviction for multiple counts of attempted murder and – briefly put – violation of the Weapons and Munitions Act which carried a prison sentence of six years. Following the advice of the ACAS, the Advocate General dismissed this request because there were insufficient indications that there might be a ground for review. Given the evidence and the lack of any explanation for the contradiction between the convicted person's repeated confessions and the investigation that was being requested, it was impossible to see how examining the five suggested witnesses could result in a novum.

In 2021, three requests from previous years were handled. A request from 2020 regarding a 1998 conviction for murder which carried a prison sentence of fifteen years was sent to the ACAS for an advice in the reporting year. The ACAS had still not issued its advice in this case in the reporting year. A request from 2018 regarding a 2011 conviction for war crimes during the armed conflict in Rwanda in 1994 carrying a life sentence in prison was sent to the ACAS for advice in 2018. The ACAS had still not issued its advice in this case in the reporting year. In the 'Deventer murder case' – involving a murder conviction in December 2000 which carried a twelve-year prison sentence and which had been the subject of multiple requests for review – the Advocate General had already decided in 2014 to initiate a further investigation based on the advice of the ACAS. The partial investigations that had been conducted in previous years were evaluated in 2019. In consultation with the defence, the Advocate General decided to institute a review of the forensic/technical portion of the original police investigation in this criminal case, with that review to be conducted by three forensic/technical detectives from a cold case team that are part of a police unit that has had no previous involvement in this case. At the end of the reporting year, the Advocate General was still awaiting the results of that review.

Review to the detriment of former suspect

The law also provides for the special option of reviewing, at the request of the Board of the Public Prosecution Service, an irrevocable final decision by a Dutch court which resulted in the acquittal or dismissal of all criminal charges against the former suspect. Such a request may only be made under certain extraordinary circumstances prescribed by law (Article 482a of the Dutch Code of Criminal Procedure). Such a request has never yet led to a review that worked to the detriment of the former suspect. In the case of such a request, the Procurator General's Office at the Supreme Court fulfils certain duties with which it is charged by law, such as the issue of an advisory opinion. In 2021, no such requests regarding former suspects were handled.

3.6 Suspension and dismissal of judges

The Constitution provides that judges are appointed for life. They cannot be involuntarily dismissed by the government or the States-General. This is intended to safeguard the independence of judges and to protect judges from undesired bias. Adjudication by "an independent and non-partisan court" is one of the elements of the law on fair hearings as laid down in Article 6 of the European Convention on Human Rights.

In certain cases, judges can be suspended or dismissed by the Supreme Court, such as in cases of illness, proven unsuitability for membership of the judiciary, or a criminal conviction. The statutory procedure entails that the Supreme Court renders a decision to suspend or dismiss in response to a claim by the Procurator General.

The Procurator General presented two cases to the Supreme Court in the reporting period. Both cases involved a claim for the dismissal of a deputy judge. In both cases, the person in question had not served as a deputy for many years before the claim.

Deputy judges perform their duties when called to the bench by the management board of the court. For the last several years, the law has made it possible for a deputy judge to be dismissed by the Supreme Court if the deputy judge have not been called to the bench for two years. Because the management board of the court decides whether or not a deputy will be called to the bench,the management board of the court itself determines whether that condition to dismissal will be met. This can be at odds with internal judicial independence. In his claim, the Procurator General took the position

that the president of the court requesting the dismissal of the deputy judge because that judge was "not assigned for two years" must explain in that request why the administration had no longer called the deputy to the bench. The Supreme Court can then review the legal validity of that reason.

In its decisions in these two cases, the Supreme Court held that the "not assigned for two years" ground for dismissal cannot be used in a way that could infringe on judicial independence. That means that the mere fact that the management board of the court has not called for a deputy judge to act for two years is not a sufficient ground for dismissal. In addition to this, there must be a sufficiently compelling reason, based in the deputy judge's statement or conduct, or in other circumstances relating to that judge, which justify submitting and granting a request for dismissal. Furthermore, according to the Supreme Court, the legislative history shows that the ground for dismissal does not apply if another ground for dismissal applies.

Based on these findings, the Supreme Court imposed the following two requirements on a dismissal request based on the "not assigned for two years" ground:
- the request asserts that the deputy has not been called to the bench for two years and explains why that is so;
- the request contains additional grounds explaining why there is a sufficiently compelling reason for granting the dismissal.

In both cases, the Supreme Court held that it had been proven that the relevant judge had not been assigned for two years, that the reason for that non-assignment had been explained and that there was a sufficiently compelling reason that justified the dismissal. In one of the cases, the deputy judge had systematically ignored the calls for her to provide information on when she was available to undertake judicial work, while she also declined to respond to other correspondence, including requests for a personal interview. In the other case, the appointment to the position of deputy judge was related to the individual's main position as civil-law notary. The later irrevocable decisions imposing disciplinary measures on the relevant judge showed that this individual lacked authority and credibility, both externally towards persons seeking justice and internally towards other officers of the court. The dismissal was allowed in both cases (Supreme Court 24 December 2021, ECLI:NL:HR:2021:1995 and ECLI:NL:HR:2021:1996).

3.7 Criminal prosecution of members of parliament, ministers and state secretaries

The Procurator General at the Supreme Court has a duty in respect of the criminal prosecution of abuses of office and crimes involving abuses of office. Article 119 of the Constitution states that ministers, state secretaries and members of parliament accused of crimes involving abuse of office must be tried by a special forum. The Supreme Court is designated as that special forum, and such trials are presided over by ten justices. The Supreme Court is both the first and last instance in such cases, which means that the Supreme Court's decision is no longer open to any legal remedies.

The Procurator General at the Supreme Court is charged with the criminal prosecution of such abuses of office or crimes involving such abuses (Article 111(2), opening words and (a), Judiciary Organisation Act). The Procurator General does not have exclusive discretion to pursue such a prosecution, however. The Procurator General would first have to be instructed to pursue such a prosecution, either by means of a Royal Decree or by a resolution of the House of Representatives. Such an instruction has never yet been issued.

In 2017, the Minister of Justice and Security adopted a protocol describing how reports of abuses of office by members of parliament, ministers and state secretaries that are received by a ministry, the Public Prosecution Service or the Procurator General at the Supreme Court must be dealt with. The Procurator General informs the Minister of Security and Justice on the issue of whether there are reasons that would prompt a criminal investigation. The Procurator General would do this after conducting an exploratory investigation. Investigations conducted by the Procurator General in 2021
In 2021, three exploratory investigations were conducted in response to reports against current or former members of parliament, ministers and state secretaries.

'Allowance Affair'

One exploratory investigation was prompted by reports that 87 victims of the 'Allowance Affair' filed against the Prime Minister, current and former ministers, the State Secretary of Finance and the State Secretary of Social Affairs and Employment.

The Procurator General's report of the investigation includes a discussion of the causes of the Allowance Affair. The report states that, in 2005, the legislature made a unilateral decision to shift the burden of the implementation problems associated with childcare allowances onto the shoulders of the applicants. For example, strict requirements were imposed on parents in terms of the quality of the information they presented, the collection and submission of evidence and the deadlines they had to meet. An applicant's failure to meet every single aspect of every requirement had far-reaching consequences. Conversely, the Tax Authorities was also subject to deadlines by which decisions had to be taken and the Tax Authorities had to work with a rigorous reclamation framework that had few temporal limits, in which respect the law – which lacked any sort of hardship clause – was premised on the principal of 'all or nothing'. When the legislation was drafted, there was no recognition of the possibility that such a system could create enormous problems for the applicants – which consisted of a large group of fairly unskilled parents. When drafting the legislation, the legislature also failed to include important judicial remedies for legal protection, such as a hardship clause and a proportionality review when reclaiming benefits. This was exacerbated by an increasing pressure to combat fraud, which led to the problems arising.

The reports primarily regarded problems that ensued from old reclamation claims in the context described above and that were unrelated to abuses of office for which ministers or state secretaries could be prosecuted. In this respect, most of the reports were largely based on the hearing conducted by a parliamentary committee. The law prohibits using the substance of such hearings as evidence in a criminal prosecution. The Procurator General's report also states that political accountability must be the primary concern in a parliamentary democracy. There were no leads for a criminal investigation.

For the report of the exploratory investigation, see:
https://www.hogeraad.nl/actueel/nieuwsoverzicht/2021/maart/advies-pg-hoge-raad-regering-strafrechtelijk-opsporingsonderzoek/

Breach of confidentiality relating to the minutes of Cabinet meetings

An exploratory investigation prompted by the report filed by outgoing Prime Minister Rutte regarding a suspected breach of confidentiality relating to the minutes of Cabinet meetings. The Procurator General's report on the exploratory investigation concludes that there were no concrete suspicions relating to any of the ministers, former ministers, state secretaries or members of parliament. The results of the investigation offered the Procurator General insufficient reason to advise the Minister of Security and Justice to institute an investigation in order to ascertain whether a current or former minister, state secretary or member of parliament should be criminally prosecuted.

For the report of the exploratory investigation, see:
https://www.hogeraad.nl/over-ons/publicaties/

Reports against Minister Kaag

An exploratory investigation prompted by reports against Minister Kaag in connection with the alleged financing of terrorism. According to the report, Ms Kaag, the former Minister of Foreign Trade and Development Cooperation, ensured that subsidies were granted to the Palestinian organisation Union of Agricultural Work Committees (UAWC) even though she knew that this organisation had ties to the Popular Front for the Liberation of Palestine (PFLP). The European Union considers the PFLP to be a terrorist organisation. The report alleges that Ms Kaag persisted in this financing despite being repeatedly advised of these ties. The reports refer, among other things, to the fact that a 17-year-old Israeli girl was killed in a bombing in Dolev in 2019. Two of the suspects in that bombing were members of the PFLP and employees of the UAWC.

The Procurator General's report on the investigation indicates that the mere fact that two of the suspects in the attack were members of the PFLP and employees of the UAWC does not mean that the criminal

offence of terrorist financing as meant in Article 421 Criminal Code was committed. That is not altered by the fact that the investigation shows that the two suspects in the bombing received part of their salary as part of the overhead costs of the Dutch-financed programme with the UAWC. According to the Procurator General, there were no indications that the financial support was actually used for terrorist activities.

Furthermore, according to the Procurator General, there were no indications that Ms Kaag intended to finance terrorism, including in a conditional sense. The policy was actually aimed at preventing the financing from being used for purposes that would contravene Dutch foreign policy.
The Procurator General concluded that the investigation did not reveal any facts or circumstances supporting a suspicion of abuse of office. There was therefore nothing in the exploratory investigation that would prompt a criminal investigation in response to the reports against Ms Kaag.

For the report, see:
https://www.hogeraad.nl/actueel/nieuwsoverzicht/2022/januari/pg-hoge-raad-aanknopingspunten-strafrechtelijk-opsporingsonderzoek/

3.8 Supervision of the Public Prosecution Service (OM)

Article 122(1) of the Judiciary Organisation Act provides that the Procurator General at the Supreme Court can notify the minister if the Procurator General believes that the Public Prosecution Service (Openbaar Ministerie, or OM) is not complying with the requirements or properly performing the duties imposed on it by law. This authority conferred upon the Procurator General at the Supreme Court is related to Procurator General's mandate to ensure that the statutory rights and duties imposed on the courts as described in Article 121 Judiciary Organisation Act are enforced and performed, respectively. This provides a legal basis for the Procurator General at the Supreme Court's supervision of the OM.

In the context of this authority, the Procurator General at the Supreme Court conducted various thematic investigations into how the OM performs its duties, always devoting attention to the legal quality of the duty being investigated. In performing this duty, the Procurator General at the Supreme Court acts as a neutral and independent instance in service of the law whose role is to observe and advise. The goal is to promote and safeguard proper compliance with, and implementation of, statutory law.

Investigations in the context of supervising the OM

In 2021, an investigation was conducted into the follow-up on prosecution orders that the courts of appeal had issued in cases involving the submission of complaints pursuant to Article 12 of the Dutch Code of Criminal Procedure.

In 2021, the investigation was continued into the exercise of the OM's authority in the context of the Computer Crime III act (Computercriminaliteit III). The investigation commenced in 2019. The new investigation was continued into compliance with the statutory requirements relating to the OM's issuance of penalty orders. The investigation was started in 2020. The exploratory investigation of the 'Groesbeek head-kickers cases' was completed in 2021. The investigation had been started in 2020.
The investigations are explained in more detail, below.

Supervision of the follow-up on prosecution orders pursuant to Article 12 of the Dutch Code of Criminal Procedure

A file-based investigation was carried out in the reporting year regarding the extent to which the case was actually prosecuted after the complaints filed pursuant to Article 12 of the Dutch Code of Criminal Procedure were deemed to be well-founded. The investigation showed that, in 2019, 298 complaints that were filed pursuant to Article 12 of the Dutch Code of Criminal Procedure were deemed to be well-founded. Of these cases, 287 were investigated. That is to say that by the time the investigation was completed in June 2021, either a judgment or penalty order had been issued in those cases or the case was still in the process of being handled. In one case, no information was available; in six cases, the local OMs had not yet been informed of the decisions, but that was done afterwards. In four cases, the decision was taken not to prosecute.

Supervision of exercise of powers relating to cybercrime

The investigation into the exercise of the OM's powers in the context of the Computer Crime III act (Computercriminaliteit III) commenced in 2019. The investigation regarded how the OM applied the method of 'investigating in a computerised work environment' method and how the OM supervised the implementation of this investigation method. This investigation was done in tandem with the Justice and Security Inspectorate, which permanently supervises police use of this investigation method. A file-based investigation commenced in 2020, after a literature-based investigation was completed in 2019. Multiple meetings were held with the public prosecutor specialising in digital intrusion (DIGIT investigator) and the support they receive from the National OM and with the Justice and Security Inspectorate. An interim report was completed in December 2020 and submitted to the OM for a response. In 2021, another file-based investigation was conducted with regard to investigations from 2020 and 2021. Semi-structured interviews were also conducted with the individuals involved. The investigation was then completed and a start was made with the analysis and preparation of the final report, which is expected to be offered to the Minister of Security and Justice expected to in the course of 2022.

Supervision of the issuance of penalty orders

In the first report, entitled 'Decided and Considered' ('Beschikt en Gewogen'), which was completed in 2014 and offered to the Ministry of Security and Justice on 1 January 2015, the key issue was compliance with statutory requirements in connection with the issuance of OM penalty orders. That led to the identification of several problems that had to be solved in relation to recommendations. The report entitled 'To be Continued: Decided and Considered' ('Wordt vervolgd: Beschikt en gewogen'), which was published in 2017, discusses how the OM followed up on the recommendations that were made in the first report. A new investigation of the OM penalty order was begun in November 2020. This investigation involved more randomly chosen cases than the first investigation. This had to do with the COVID-19 pandemic; measures taken by the OM from before and after the pandemic were examined. Data were collected in 2021. The results of the investigation are expected in 2022.

Supervision of the OM's practices in the Groesbeek case

In 2020, the Procurator General at the Supreme Court, in the context of supervising the OM's practices, started an exploratory investigation into how the OM handled the cases referred to in the media as the 'Groesbeek head-kickers cases'. In these cases, the prosecution of four suspects ran aground in the court of appeal in 2012 after the Advocate General at the procurator general's office at the court of appeal claimed that the OM's case could not be pursued because he could not vouch for the integrity of the evidence. The court of appeal concurred with the claim and ruled that the OM could not prosecute, after the district court had previously convicted the perpetrators of participating in attempted homicide. The injured parties appealed to the Supreme Court of the Netherlands in vain. That legal remedy is not open to the injured party if neither the suspect nor the OM has lodged an appeal in cassation.

The OM provided the Procurator General at the Supreme Court with the information necessary for the exploratory investigation. The Procurator General at the Supreme Court studied the documents and interviewed various persons – primarily persons who were employed at the OM and who were involved in the case. Based on this exploratory investigation, the Procurator General at the Supreme Court decided in 2021 that there were no violations of integrity by the OM or the persons working there. At the time of the appeal in these cases, after weighing the interests and exhausting other options, the OM made a reasonable decision in claiming that the prosecution could not be pursued. Continuing the case could have harmed a legitimately protected interest. The Procurator General at the Supreme Court decided not to pursue a more in-depth investigation of the course of affairs in this criminal case. The investigation, however, did prompt the Procurator General at the Supreme Court to make recommendations to the OM, formulating issues that could also serve as a guideline for reflection on the matter within the OM. In that context, the Procurator General at the Supreme Court noted that significant improvements had already been made since the prosecution in the Groesbeek case had begun.

3.9 Supervision of the processing of personal data by courts and the Procurator General's Office at the Supreme Court (GDPR)

The General Data Protection Regulation ("GDPR") is applied since 25 May 2018. It concerns European regulations that replace the Personal Data Protection Act in the Netherlands. The GDPR protects

fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. The GDPR provides rules for the processing of personal data. The provisions of the GDPR also apply to activities of the courts, at least in so far as they do not concern criminal cases. For criminal cases, the Directive on data protection for the purposes of investigation and prosecution [in Dutch: Richtlijn gegevensbescherming opsporing en vervolging] applies instead of the GDPR. Unlike the GDPR, the Directive has no direct effect. In order to implement the Directive, the Police Data Act and the Judicial Data and Criminal Records Act were amended.

The judiciary has the task of enforcing the standards of the GDPR and the provisions adopted under the Directive itself, without supervision by the Personal Data Protection Authority. In 2018, the Procurator General of the Supreme Court, in consultation with the courts, took the initiative to assign this supervision to the Procurator General of the Supreme Court by, in short, embedding GDPR complaints into the already existing external right of complaint.

The Regulation on the supervision of the processing of personal data by courts and the Procurator General's Office at the Supreme Court (hereinafter: the Regulation) implies that the processing of personal data in the context of the performance of judicial duties includes all processing of personal data that takes place in the context of legal proceedings. The supervisory role of the Procurator General at the Supreme Court includes dealing with complaints from data subjects who believe that the processing of their personal data by the courts or the Procurator General's Office of the Supreme Court infringes the GDPR or the provisions adopted under the Directive. The Regulation also entails that the Procurator General prepares an annual report on its activities, possibly including a list of the types of complaints and reported infringements and any petitions brought before the Supreme Court.

Complaints filed

In 2021, eleven GDPR complaints were filed with the Procurator General at the Supreme Court. All but four of these complaints were settled in 2021. The response to four complaints was that pursuant to Article 11 of the Regulation, the substance of a court decision can not be the subject of a complaint.

One complaint entailed that the complainant, as a data subject (not as a party to the proceedings), had to provide personal data of herself and her children in child maintenance proceedings to the court of appeal, so that one of the parties could take note of it. The response to this complaint was that the data provided by the complainant in the proceedings before the court of appeal was also important for the assessment of the dispute and that the substance of a court decision cannot be the subject of a complaint.

Another complaint entailed that sending a copy of the notice that the exemption from court fees was provisionally granted because "the criteria of inability to pay are met" to the other party, constitutes a violation of the GDPR. The response to this complaint was that the decision on exemption from court fees is a procedural decision, which cannot be the subject of a complaint.

Two other complaints related to what the court considered in the judgment, so that those complaints could not be dealt with.

Two similar complaints concerned the fact that the district court, in proceedings in which the complainant was neither a party nor a data subject, enclosed exhibits to the file that contained privacy-sensitive information of the complainant. Complainants believe that the GDPR has been violated. The response to the complaints was that the deputy Procurator General may decide to either deal with a complaint about the processing of personal data relating to the complainant by courts in the exercise of their judicial duties or to refer it to the court involved should that court not already have dealt with the complaint. In view of the provisions of Articles 8 and 9 of the Regulation in conjunction with Article 13b(4) of the Judiciary Organisation Act, the deputy Procurator General referred the complaint (each time) to the management board of the court, informing the complainant that, if the handling of the complaint by the management board of the district court would lead to an outcome that the complainant is not satisfied with, the complainant can still submit the complaint to the Procurator General.

Another complaint concerned the way in which the president of the district court, on behalf of the management board of the court, responded to complaints under the GDPR. The complainant was informed, inter alia, that the president has interpreted the complainant's requests as a request for inspection to see whether all the documents had been received by the district court, which interpretation is not incomprehensible. Such a request is not a request under the GDPR. Furthermore, it was complained that the management board of the court confuses the concepts of controller and processor of personal data. One of the responses to this was that the president's letter stated that judicial officers and court officials have access to the data for case administration and processing purposes. In the light of the provisions of the GDPR, the deputy prosecutor general is of the opinion that the management board of the court could suffice to state who the controller is.

One complaint filed in 2020 was handled in the reporting year. The complaint entailed that the district court had unlawfully processed the personal data of the complainant by linking the data to an invoice for the payment of a court fee. Among other things, the response to the complaint, which essentially entailed that the complainant did not agree with the payment of the court fee, entailed that it did not fall within the domain of GDPR issues. In so far as other complaints concern cases before the district court that were settled in 2013 and 2016, the Procurator General was of the opinion that they were not filed within a reasonable period, so that these complaints were not handled. It was also written that the district court informed the complainant upon referring her case to a different district court that it did so because the complainant's correspondence address was located in the district of the other court. This meant that the other court had jurisdiction pursuant to the law, which in turn meant that the employees of that court were authorised to take note of the complainant's court documents. Finally, it was responded that the substance of court decisions cannot be the subject of a complaint and that the Procurator General is not authorised to handle complaints about the processing of personal data by the Ministry of Justice and Security.

Furthermore, in the reporting year 208 violations of the GDPR, in the sense of data breaches, were registered. Ten of these data breaches occurred within the Supreme Court, while the other data breaches occurred at the courts and the Council for the Judiciary. The majority of the cases (169) concerned showing, sending or providing personal data to a person whereas this was not intended. Other cases concerned, among other things, stolen or lost data carriers and/or paper containing personal data (15), personal data that was published accidentally (13) or post with personal data that was lost or returned opened (10).

3.10 External complaint cases

Based on the external right to complain, anyone who has a complaint about the way in which a judicial officer charged with the administration of justice has comported himself towards him in the performance of his duties may submit this complaint to the Procurator General at the Supreme Court. Such a complaint can be considered a written request to the Procurator General to file a petition with the Supreme Court containing an application for an investigation into the conduct. The external right to complain is provided for in the Judiciary Organisation Act in Articles 13a up to and including 13g. An explanation of the handling of complaints is published on the Supreme Court's website. The Act prescribes that the Procurator General at, and the president of, the Supreme Court annually report on the work they have performed in the context of handling complaints based on Articles 13a et seq.

After a complaint is received, the Procurator General may decide to institute a preliminary investigation whereby the complainant, the accused judge and the management board of the court involved are given the opportunity to provide further information. Such a preliminary investigation will not be performed if the complaint cannot or need not be handled. This is the case, for example, if a complaint pertains to a court decision, the complaint was filed too late or if the complainant has an insufficient interest in an investigation by the Supreme Court. The latter may be the case if the complaint was handled and settled fairly in the internal procedure before the court in question and a hearing by the Supreme Court will have no added value.

If the Procurator General has instituted a preliminary investigation he will inform the complainant, the accused judge and the court administration of his findings. The Procurator General may decide to

submit the complaint to the Supreme Court to investigate the manner in which the judge in question acted in the performance of their duties. A motive for this may be to obtain clarity about a standard of conduct. If the Procurator General submits a complaint to the Supreme Court this does not mean that he believes the act to be improper. The Supreme Court decides whether or not the accused judge acted properly. This decision will not affect any pending cases. In its decisions, the Supreme Court cannot impose any measures on the accused judge or assign compensation to the complainant either.

The complaints scheme arranged for in the Judiciary Organisation Act applies to judges and justices. In addition, this scheme applies to justices at the Central Appeals Tribunal and the Trade and Industry Appeals Tribunal. The chair and members of the Board of Discipline and the chair and members of the divisions for notarial matters also fall under the statutory complaints procedure. The same holds true for the members and deputy members of the regional disciplinary tribunal and the central disciplinary tribunal for the healthcare sector. Based on Article 120(4) Judiciary Organisation Act, the complaints scheme applies mutatis mutandis to the members of the Procurator General's office at the Supreme Court mentioned in Article 113 Judiciary Organisation Act. The complaints scheme of the Judiciary Organisation Act does not apply to the president and the members and deputy members of the Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba.

In the period from 1 January through 31 December, 106 complaints were filed with the Procurator General. By comparison: in 2020, 59 complaints had been filed from 1 January through 31 December. All but 21 of the 106 complaints were settled in 2021. 20 of these 21 complaints were settled at the start of 2022. In addition, 13 complaints from 2020 were settled in 2021.

In the reporting period the deputy Procurator General submitted a claim with the Supreme Court for conducting a further investigation into the conduct of a judge.

Below an overview is shown of the content and manner in which complaints were handled by the Procurator General. The following categories are addressed:
- Complaints that do not qualify to be handled;
- Complaints that were not first filed with the court in question;
- Complaints that did not result in a petition based on substantive grounds;
- Other grounds

Complaints that do not qualify to be handled

A considerable part of the complaints submitted does not qualify to be handled. Below an overview is shown of these complaints, subdivided based on the reason why the complaint is not handled. This concerns the following categories;
- complaints about court decisions;
- complaints that were not filed within a reasonable period;
- requests to the Procurator General to intervene in a case;
- complaints about persons who fall outside of the scope of the complaints procedure;
- complaints for which the law has a separate provision;
- proper settlement in the internal complaints procedure of the court;
- other complaints that are inadmissible.

Complaints about court decisions

Article 13a Judiciary Organisation Act determines that court decisions cannot be the subject of complaints. These are decisions of the court about the case or the manner in which the proceedings will be conducted. These not only include the final decision, but also the reasoning of the decisions. Furthermore, the decisions the judge makes at the hearing, such as the decisions about hearing a witness or the decision about the time the parties are allowed for addressing the court, are court decisions that cannot be the subject of a complaint. The same holds true for adopting the content of the record of the hearing.

Also if there is an incorrect decision or if the judge has failed to make a decision, a complaint of the complainant in this respect will be declared inadmissible, given that such a complaint is also directed

against a court decision. The only way to have a court decision reviewed is to lodge a timely appeal against it. If it is not or no longer possible by law to lodge an appeal against the decision, a court decision cannot be reassessed or changed by submitting a complaint either.

Like in the past years, in 2021 a large part of the complaints handled also concerned a court decision. In the reporting period, in 55 of the complaint cases settled it was argued, among other things, that the complainant did not agree with the court decision. It concerned a wide variety of decisions, such as:
- a court decision in which a judicial substitution request was imposed on the complainant;
- a court decision to hear a case ten minutes earlier with the permission of the complainant's counsel;
- a court decision in which the complainant's complaint is declared inadmissible based on Article 12 of the Dutch Code of Criminal Procedure;
- a decision of the cause-list judge to refuse the document containing exhibits, also containing an increase of claim after the personal appearance of the parties;
- a court decision about drawing up a record and whether or not to render an interim judgment;
- a court decision about accepting documents from colleagues.

With regard to these complaints the Procurator General informed the complainant, stating reasons, that the complaint could not be handled.

Complaints not filed within a reasonable period

In five of the complaint cases the complaint was not handled because it had not been filed within a reasonable period. The period of time the Procurator General applies for a complaint to be filed is one year after the event that is the subject of the complaint has occurred, unless there are special circumstances. These cases concerned issues from, inter alia, 2017 an 2019.

Requests to the Procurator General to intervene in a case

In 26 cases the Procurator General was requested, inter alia, to take over the hearing of the case, to intervene in a different manner or to change or review the outcome of the case. It was requested, among other things, to discuss the course of a case with the justice in question and to arrange for a new hearing to be conducted, to set aside a judgment or to confirm that the judgment was invalid, to check the settlement of a judicial substitution request against a judge so that this judicial substitution request would be handled correctly, and to ensure that a judgment would not be rendered before a decision had been made about the complaint. The Procurator General informed the complainants that he does not have any responsibilities or authority regarding specific disputes and proceedings based on which he could intervene, or review or change the outcome. The right to complain cannot be used to bring up court decisions for discussion or to reassess lawsuits.

Complaints about persons who fall outside of the scope of the complaints procedure

Article 13a(1) Judiciary Organisation Act offers the possibility to complain about conduct of a judicial officer responsible for the administration of justice. This circle of people also includes justices at the Central Appeals Tribunal and the Trade and Industry Appeals Tribunal and the chair and members of a number of disciplinary boards. Complaints about the conduct of persons other than the aforementioned judicial officers cannot be handled by the Procurator General.

In 2021 fifteen such complaints were filed. These were complaints about various persons or authorities, namely the Supervisory Council West of the Disciplinary Rules Foundation NVM [Stichting Tuchtrechtspraak NVM] and NVM's Central Supervisory Board, the business operations of a district court, a municipality, the police, the Public Prosecution Service, the Dutch Data Protection Authority, the Dutch Bar Association, the Employee Insurance Agency UWV, the Tax Authorities, employees of the court registry, court clerks, the Mediation Bureau in addition to the Judiciary, bailiffs, the Higher Education Appeals Tribunal, the Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba and a civil-law notary.

There were also complaints about conduct of judicial officers responsible for the administration of justice that fell outside of the scope of the complaints procedure because this conduct did not take place in the performance of the judicial function. One complaint pertained to the Central Disciplinary

Committee for the Healthcare Sector. In addition, it concerned a complaint about the conduct of the chair and the judicial member of the management board of a court in their capacity of member of the board.

Complaints for which the law has a separate provision

Complaints entailing that the judge acted in a biased or partial manner at the hearing need not be handled pursuant to Article 13b(1) under f Judiciary Organisation Act. The law has a separate provision for this, namely the challenge of a judge.

In eight cases, complaints about bias or partiality of the judge on that ground were not handled. In two cases the complaint was also not handled based on Article 13b(1)(f) Judiciary Organisation Act, but in those cases it was not handled on the ground that there was a court decision regarding that complaint against which no legal remedy was available. In those cases the challenge chamber had already rendered a decision.

Proper settlement in the internal complaints procedure of the court

If the Procurator General is of the opinion that the court administration settled the complaint properly and correctly in the court's internal complaints procedure, there is usually no reason for a new investigation into that complaint by the Procurator General or the Supreme Court. To that extent, the complainant reasonably has an insufficient interest in an investigation by the Supreme Court. In eighteen cases this was the case with regard to the complaint or part of the complaints.

Other complaints that could not be handled

In addition, there were requests that could not be handled for other reasons, for example because the Procurator General is not authorised to issue advice in legal matters and he is not authorised to receive reports or to order a prosecution.

Article 13a(2) Judiciary Organisation Act states, inter alia, that the complaint must contain as clear a description as possible of the conduct in question and the complaint which has arisen regarding this conduct. If a complaint does not meet these requirements, the Procurator General cannot handle the complaint.

Complaints that were not first filed with the court in question

The premise of the external complaint scheme is that complaints about judges are first filed with and investigated by the court which the judge complained about belongs to. It is for that reason that Article 13b(1)(b) Judiciary Organisation Act determines that the Procurator General is not required to handle a complaint if the internal complaints procedure at the court in question has not been followed yet.

In 2021, the Procurator General informed twelve complainants that he would not handle their respective complaints because the internal complaints procedure at the court in question had not been followed yet. In three cases the complainants had already filed their complaint with the court in question, but the internal complaint procedure had not been completed yet. In nine cases the complaint had not been filed with the court in question yet, and the Procurator General forwarded the complaint to the management board of that court in conformity with Article 13b(4) Judiciary Organisation Act. The Procurator General informed the complainants that they could file the complaint with the Procurator General again if they saw reason for this after it had been handled by the management board of the court.

Complaints that did not result in a petition based on other grounds

A number of complaints, whether or not after an investigation, did not result in the filing of a claim with the Supreme Court on other grounds.

One complaint case concerned the complaint, inter alia, that the judge had not drawn up the record of the oral hearing in a civil case or had drawn it up too late. The deputy Procurator General states first and foremost that issuing a copy of a record of the oral hearing is one of the duties and powers of the court

clerk. Complaints about conduct of the court clerk cannot be handled in a complaints procedure based on Article 13a Judiciary Organisation Act.

Drawing up the original record of the oral hearing is one of the duties and powers of the judge before whom the oral hearing took place. When a judge does not perform that task or does not perform it correctly, this may constitute conduct of a judge in the performance of his duties, unless it concerns a court decision. The deputy Procurator General wrote that this indicated that the complaint about the failure to draw up a record or the record being drawn up too late could not be handled in the context of Article 13a Judiciary Organisation Act. Furthermore, the complainant had lodged an appeal with the court of appeal.

The deputy Procurator General therefore did not take up the complaint while he awaited whether or not the failure to draw up/hand over the record in due time would be addressed in those appeal proceedings and, if so, how that decision of the court of appeal would read. The deputy Procurator General requested the complainant to inform him about this or to respond in a different manner. Because a response had not been received from the complainant more than three months later, the complainant was informed that, unless he would still respond within a month, the file would be closed.

In another case the complaint concerned a court of appeal hearing at which the substance of the case had been heard. The case was stayed pending the Supreme Court's decision in another case. The attorney of the complainant would then request resumption of the case, and would submit the Supreme Court's judgment. After the Supreme Court had rendered a judgment, the attorney then submitted a deed submission of products- also deed increase of claim after the personal appearance of the parties, whereby he submitted the conclusions and findings of the complainant further to the judgment and the judgment and the opinion of the Advocate General to that judgment. After the other party had objected to the submission of this deed, the cause list judge decided that the deed would be rejected and that the judgment and opinion could only be submitted. The complainant complained about both the acting justice and the cause list judge. In addition, the complainant complained about the management board of the court.

With regard to the acting justice, the complaint concerned the lack of clarity that arose after the oral hearing, as there was no record and no interim judgment. With regard to the cause list justice, the complaint concerned the refusal of the deed submission of products containing exhibits, also deed increase of claim. The complainant was of the opinion that Article 6 ECHR had been violated. The Procurator General pointed out that the justice's decisions on drawing up a record, and whether or not to render an interim judgment, are court decisions. The cause list judge's decision to refuse the deed is a court decision. Complaints about these decisions cannot be handled.

The complaint about the management board of the court concerned, among other things, the exceeding of the complaint handling period and the failure to respond to the complainant's request for an explanation about the exceeding of this term. The complaint also entailed that the court administration's apologies in the response letter are inappropriate, as the time periods were exceeded without any prior notification. The Procurator General decided not to submit the complaint to the Supreme Court, taking into account the fact that the court administration apologised for the delay.

In addition, there was a complaint about a court of appeal. The complainant had been involved in proceedings before this court of appeal. The attorney of the other party acted as attorney in a different court district and as deputy justice at the court of appeal. The complaint entailed that the complainant's position in the proceedings had been prejudiced because the attorney acted in a double capacity at the court of appeal. The complainant was of the opinion that such a combination of positions violated the rules of integrity and independence and resulted in the appearance of partiality of the justices handling the case. She had first submitted the complaint with the court of appeal. The management board of the court responded that there is no absolute prohibition for attorneys to hold the position of judge or deputy justice, provided that it does not take place before a court in the court district where the attorney is registered. The attorney in question was not registered in the court of appeal's district and had furthermore not acted as deputy justice for many years.

The management board of the court deemed the complaint unfounded. However, in her letter the complainant had referred to the court of appeal's "Protocol for Deployment of Deputy Justices", in particular to no. 8a, a guideline regarding attorneys, which entails, among other things: "As from 1 July 2021, attorneys from outside the court district who are affiliated to the court of appeal will not act as attorney or adviser in any proceedings before the court of appeal (...)". Guideline 8a could also be interpreted as a standard of conduct for the deputy justice. The Procurator General therefore requested the chair of the management board of the court whether the complaint could be handled again in the light of the Protocol. The president handled the complaint again on behalf of the management board of the court and concluded that the complaint was well-founded.

Other grounds

There were two complaints that concerned a refusal to hear a case. The first complaint concerned a request for the prosecution of judges due to a refusal to hear the case as referred to in Article 13 General Provisions Act. The Procurator General informed the complainant that he did not have any responsibilities or authority based on which he could meet that request, even if he saw reason for this. In addition, the Procurator General pointed out superfluously that there is a situation involving a refusal to hear the case if a judge refuses to decide on a case that is pending before them. That is not the situation that occurred here. After all, the district court had assessed the appeals and declared them unfounded.

The second complaint entailed that there was a refusal to hear a case because the district court had decided against hearing a case. An enquiry at the district court demonstrated that the court fee for these proceedings had not been paid. There was no situation involving a refusal to hear a case.

In two cases, in addition to the complaint filed with the Procurator General, it was requested to take disciplinary measures against the judges against whom the complaints were directed. In those cases, the Procurator General informed the complainants that he did not see reason for claiming such a measure.

Claims submitted

After an investigation, the Procurator General may decide to present a complaint to the Supreme Court – by means of filing a petition – for conducting a further investigation into the conduct of a judicial officer.

In 2021, in one case a petition as referred to in Article 13a Judiciary Organisation Act was filed. In this case, on 29 April 2021, the deputy Procurator General filed a petition principally within the meaning of Article 13a Judiciary Organisation Act and, alternatively, a claim for cassation in the interest of the law. The petition concerned the subdistrict court Judge's supervisory duties regarding the administrator. The complaint against the subdistrict court Judge concerned an injunction the subdistrict court Judge had imposed on the complainant to perform certain activities as an employee of a firm of administrators and the manner in which that injunction had come about. The question was whether the subdistrict court Judge had acted in the performance of his judicial duties when imposing the injunction or whether the injunction had to be regarded as a court decision within the meaning of Article 13a(1) Judiciary Organisation Act.

On 9 July 2021 the Supreme Court rendered a judgement in this case (ECLI:NL:HR:2021:1126).
For the petition, see: Procurator General's Office at the Supreme Court 29 April 2021, ECLI:NL:PHR:2021:1246
And for the decision of the Fourth Division of the Supreme Court, see: Supreme Court 9 July 2021, ECLI:NL:HR:2021:1126

3.11 Internal complaint cases

The internal complaints procedure of the Procurator General's Office at the Supreme Court of the Netherlands (hereinafter "the complaints procedure") states that anyone has the right to submit a complaint with the Procurator General about the way in which the Procurator General's Office or one of its members comported themselves towards them in a specific matter. Paragraph 2.4 of the complaints procedure lists the exceptions to this right to complain. The most important exceptions are that the

contents of an advisory opinion, the date on which an advisory opinion is given, the decision not to give an advisory opinion and, briefly put, decisions of the Procurator General in the context of the performance of his special duties cannot be the subject of complaints.

Complaints in the reporting period

In 2021 four complaints were filed against the Procurator General. The complaints were filed in response to the handling of complaints as referred to in Article 13a of the Judiciary Organisation Act. The complaints against the Procurator General were handled by the deputy Procurator General.

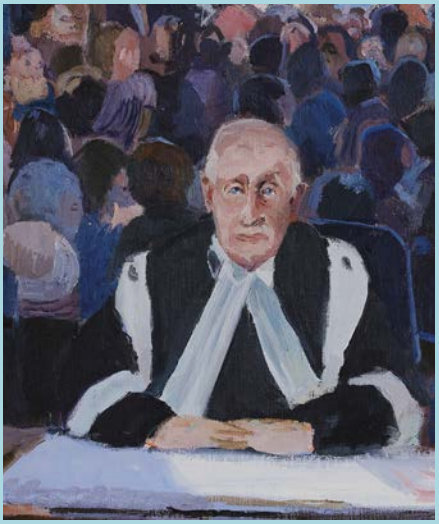
The Procurator General had written to the complainant that his complaint concerned a court decision and that complaints about court decisions are excluded from the right to complain. The complaint was that the Procurator General did not want to handle the complaint. The deputy Procurator General deemed the complaint unfounded.

A complaint case concerned a complaint about the fact, among other things, that for the handling of a complaint the Procurator General had requested a complaints file from the previous instance. It was argued that the General Data Protection Regulation (hereinafter "GDPR") had been violated. Requesting the complaints file, however, was necessary for the performance of the Procurator General's duties as laid down in Article 13a et seq. Judiciary Organisation Act. Consequently the GDPR was not violated (see Article 6(1)(e) GDPR). The complaint was found to be manifestly ill-founded.

One complaint concerned a response letter the Procurator General had sent further to a complaint about a district court's refusal to hear the case. The complainant disagreed with Procurator General's opinion that there was no refusal to hear the case. The deputy Procurator General responded that the decision of the Procurator General cannot be the subject of a complaint pursuant to the complaints procedure (see Article 2.4). The complainant also wanted the Procurator General to take further steps to achieve an outcome of a legal dispute that was satisfactory to the complainant. Because this is not possible under the law, the complaint was not handled further due to a lack of interest.

A complaint partially concerned a decision the Procurator General had made in a complaint case. These complaints are excluded from the complaint procedure. Furthermore, it was argued that the Procurator General had rendered a judgment in a complaints case pending before the court of appeal. The deputy Procurator General disagreed and deemed the complaint manifestly ill-founded.

Aspects of the painting by Helen Verhoeven



Lodewijk Ernst Visser

Lodewijk Ernst Visser (1871-1942) was appointed as President of the Supreme Court of the Netherlands in 1939. He served as such for only a brief period of time before being suspended by the German occupier in 1940 and then permanently dismissed in March 1941 because he was Jewish. The German occupier decreed that Jews could not be civil servants. His fellow justices remained silent. Visser later said that the attitude of the Supreme Court, and especially the fact that the justices had signed declarations of Aryan origins, impacted him more than the dismissal itself. He died in 1942 at the age of 70 from complications of a stroke.

In 2011, then-President of the Supreme Court Geert Corstens said that signing the declarations of Aryan origins went against everything for which the Supreme Court was supposed to stand. "When we look back, we are filled with sadness and shame about how wrong things went at that time," said Corstens. To emphasise the injustice of the era, the Supreme Court named the large courtroom in honour of Justice Visser. It is the only area in the building named for just one person. The portrait was painted by Harm Kamerlingh Onnes.

Hugo de Groot

The year 2021 was dedicated to Hugo de Groot (1583-1645). The 400th anniversary of Hugo de Groot's legendary escape from Loevestein Castle in a book chest was marked on 22 March. Hugo de Groot is considered to be one of the greatest jurists of all time. He was also a theologian. He is considered to be one of the founders of international law. His most famous works include Mare liberum ('The Free Seas') and De iuri belli ac pacis ('On the Law of War and Peace'). He received a life sentence in prison at Loevestein Castle for his role in the intra-Calvinist disputes of the early 17th century. He was allowed to continue studying during his imprisonment, which ultimately facilitated his escape. He escaped to France by hiding in the chest that had been used to bring him books.

Hugo de Groot also has ties to the Supreme Court. Six statues stand before the Supreme Court building at Korte Voorhout at The Hague. One of these is of Hugo de Groot. The glass-walled hallway of the building also displays a quote by Hugo de Groot: "UBI IUDICIA DEFICIUNT INCIPIT BELLUM". Freely translated, this warns: 'Where legal justice falls short, armed struggle begins.' His portrait, painted by artist Jan A. van Ravensteyn, also hangs in the Supreme Court building.

Aspects of the painting by Helen Verhoeven

William the Silent

On the eve of the Eighty Years' War (1568-1648), William of Orange made a plea for freedom of belief and religion. 'I cannot agree that monarchs should rule over the souls of their subjects and take from them their freedom of belief and religion', he said. This speech became known as the Oudejaarsrede – the New Year's Eve Speech. He made his speech on 31 December 1564. Four years later the war broke out, but he had already fled to Germany in 1567.

William of Orange is considered the 'Father of the Netherlands' because he led the revolt against the Spanish Habsburgs. He had originally served the King of Spain as a stadtholder – essentially a governor – of Holland, Zeeland and Utrecht. When a resistance formed in the Netherlands in the face of the increasing centralisation of Spanish power and the increasingly violent persecution of Protestantism, he became its leader. Philip II declared him an outlaw after the formation of the Union of Utrecht in 1579 and the Act of Abjuration of 1581, in which the nobility declared that they no longer recognised Philip II as their ruler. Balthasar Gerards assassinated William of Orange in Delft on 10 July 1584, nearly 20 after the New Year's Eve Speech. The portrait was painted circa 1579 by artist Adriaen Thomasz Key.

Aletta Jacobs

Dutch women achieved universal suffrage in 1919 thanks in part to the efforts of Aletta Jacobs (1854-1929) as a member of the International Alliance of Women. Aletta was the first Dutch woman to successfully complete her university studies. As a general physician in Amsterdam, she held free consultations and advocated the use of birth control. Thanks to her career as a physician, she met the income requirement that was then attached to the right to vote. When she wished to cast her vote, however, the law included a provision that expressly prohibited women from voting. As a member of the International Alliance of Women, she fought to improve the position of women in Dutch society. It was thanks in part to her efforts that women won the right to vote in the Netherlands in 1919.

4. The organisation

4.1 Introduction

The Supreme Court's organisation is a judiciary organisation (Article 2 of the Judiciary Organisation Act) and consists of three independent parts: the Supreme Court, the Procurator General's Office at the Supreme Court and the Operations Directorate.

In 2021, the judicial body of the Supreme Court consisted of the president and 34 justices. The Office of the Procurator General at the Supreme Court consisted of 22 ordinary members, 2 extraordinary members, the deputy Procurator General and the Procurator General. The Operations Directorate consists of the Director of Operations and the employees of the scientific, legal and administrative support, the knowledge centre, the departments of finance, automation, communication, human resources, and the record office. 214 persons worked at the Operations Directorate.

4.2 Highlights

Based on several themes, the collaboration and collateral benefits within the organisational units in 2021 are reported on.

COVID-19

The COVID-19 pandemic once again considerably affected the Supreme Court's organisation in 2021. To the extent possible, the Supreme Court followed the measures to prevent the spreading of the virus and the internal organisation directives of the Central Government with due observance of the interest of continuity of case law. The Supreme Court was able to continue the regular processes regarding the handling of cases: receiving and handling cases, conducting hearings, issuing opinions (advices) by the members of the Procurator General's Office, hearings in chambers and rendering judgments.

In order to allow the primary process to continue, various measures were taken. The supervisors together with the employees of the scientific, legal and administrative support made an effort to guarantee that the handling of cases continued and to cater for personal situations. At the end of 2021, investments were made in the purchase of ICT equipment in order to facilitate working from home. This also catered to the desire to improve the safeguards for the management and safety of information further with the help of equipment made available by the employer.

COVID-19 has not diminished the commitment and enthusiasm to allow the Supreme Court to function optimally as an organisation. Among other things, the following key points were addressed.

Digitisation

Digitisation has become a permanent factor of change within the Supreme Court. Digitisation concerns, inter alia, conducting digital proceedings and digitising the internal work processes. It is possible to conduct digital proceedings before the Supreme Court in the sectors civil law, criminal law and tax law. The majority of the internal work processes has also been digitalised. Special attention is devoted to information and ICT security.

Knowledge management

Knowledge management plays a fundamental role in the work of the Supreme Court. Various legal sources are used for this, which have been digitised and which are easy to find and easy to apply. This is known as the HR Knowledge Portal [HR Kennisplein]. At the Supreme Court the HR Knowledge Portal is the central point where information and knowledge is made available and shared. The goal is to make the information sources available in a more user friendly and orderly manner. In the HR Knowledge Portal the collected content of publishers and governments can be searched in its entirety and it is possible to share documents, in so far as this is appropriate for the judicial domain. Open Source Software is used.

Human resource management (HRM)

At the end of 2021 the "Strategic Framework Personnel Policy 2022-2026" [Strategisch Kader Personeelsbeleid 2022-2026 (SKP)] was drawn up. The policy starts from the developments on the one

hand and an analysis of the existing situation on the other hand. This framework provides an HRM strategy for 2022-2026. For the realisation of the strategic objectives various policy themes will be fleshed out in the coming years. It concerns labour market communication, career and training policy, diversity and inclusion policy and other subjects that fall under HRM.

Openness and integrity
An open working attitude, an honest and reliable working method and treating each other correctly are of course essential. The Supreme Court spends a lot of attention on integrity. By way of support, two regulations were adopted in 2021: the regulation on "Integrity" and the regulation on "Inappropriate Behaviour". The Supreme Court's organisation has three confidential advisers who can be consulted. They come from various parts of the organisation, also for the benefit of the access to confidential advisers.

Absence due to illness
In 2021 the aim was to reduce the sick leave, leaving aside COVID-19. Various measures were taken to this end. The year 2021 was concluded with an absenteeism rate of 4.2%, 0.7% lower than the average absenteeism rate in 2021 of 4.9% within the public administration and government agencies.

Introduction of new employees
Helping new employees find their way and supporting them so that they are quickly able to work independently is also known as "onboarding". It is the first step in getting acquainted with the organisation. In 2021, the Supreme Court developed an app to provide new employees with information about the Supreme Court. This app turned out to be of immense added value in a year when the policy was to work from home.

Sustainability
The Supreme Court's organisation takes measures to make the business operations more sustainable. The measures are taken in the context of the 2030 Climate Objectives of the Central Government and the public interest in sustainable business operations. In 2021, the Supreme Court's ecological footprint was drawn up, together with the Working Party on Sustainability of the Ministry of Justice and Security. This footprint shows that the Supreme Court is sustainable when it comes to focus areas such as transportation and waste, but that additional measures are required for energy use.
The ecological footprint is a good basis to build from. We are making the effort to reduce our climate footprint together with Poort van Den Haag, one of the parties in the group that manages the Supreme Court building.

Safety
In 2021, a Security Consultant entered the service of the Supreme Court for a duration of 2 years. He is responsible for the entire security policy and the day-to-day implementation thereof. This shows that the subject of safety is a strong point on the agenda. For the Supreme Court, safety not only pertains to physical safety, but also other forms of safety such as information security. Societal developments require a conscious consideration of risks and appropriate measures. This is done in consultation with a number of parties in and surrounding the judiciary and the government.

Risk management
In 2021, the Supreme Court's organisation set up risk management as an integral part of the strategy and policy. This allows the organisation to identify any risks in a timely manner and to take control measures so that the continuation of the main processes is safeguarded in the best manner possible. In 2022 the risk management will be developed further. We apply risk management with the following objectives: complying with laws and regulations, protecting the Supreme Court's organisation, safeguarding the continuation of the work processes, achieving a better use of resources and being prepared for the future.

Aspects of the painting by Helen Verhoeven

Napoleon

Although Napoleon (1769-1821), portrayed here in 1812 by artist Jacques-Louis David, has primarily gone down in history as a conqueror, the French occupation of the Netherlands left behind indelible traces on the government. In 1795, the Batavian Republic, as the Netherlands was then known, was actually a vassal state of France. Patriots rose up against the Dutch nobility and the House of Orange. French troops helped them oust William V from his throne. Many administrative innovations occurred during the French occupation: a Constitution, a civil code, the centralisation of government, the establishment of both the land registry and the registry of births, deaths and marriages, and the standardisation of weights and measures. The Royal Institute of Science, Letters and Fine Arts and the Royal Library of the Netherlands were also founded under French rule. The Constitution of the Batavian People, which was implemented by Napoleon in 1798, is seen as the first Dutch Constitution.

Guusje Minkenhof

Guusje Minkenhof (1909-2005) was the first woman to serve as a justice on the Supreme Court of the Netherlands. She was appointed in 1967. Anna Augusta Leonie Minkenhof – as Guusje was formally known – had been appointed two years before as Advocate General to the Supreme Court. She served as vice president starting in 1978 until she retired a year later. She made a significant contribution to Dutch law with her book "Nederlandse Strafvordering", which has served as the seminal work on Dutch criminal law and procedure since 1936.

5. Figures and Financial overview

5.1 Case details

Civil Law Division	2020 Actual	2021 Schedule	2021 Actual
incoming cases	439	558[1]	401
cases decided upon of, total	424	558	402
cases decided upon of, judgments	393	528	372
cases decided upon of, other[2]	31	30	30
advisory opinions[3]	410	538	412
final case load	460	480	459
total average turnaround time[4]	391	--	402

Criminal Law Division	2020 Actual	2021 Schedule	2021 Actual
incoming cases	3414	3750	3346
number of cases involving grounds for cassation	2008	2100	1722
cases decided upon of, total	3459	3500	3649
cases decided upon of, judgments	3246	3275	3417
cases decided upon of, other[5]	213	225	232
advisory opinions	949	900	954
final case load	2318	2568	2015
total average turnaround time[6]	254		248

Tax Division	2020 Actual	2021 Schedule	2021 Actual
incoming cases	877	900	1220
cases decided upon of, total	922	950	1089
cases decided upon of, judgments	866	875	835
cases decided upon of, other[7]	56	75	254
advisory opinions	121	140	103
final case load	817	767	948
total average turnaround time[8]	310	--	291

[1] The scheduled number of incoming cases for 2021 was based among other things on the expected incoming cases related to the Public Servants Standardization of Legal Status Act. These cases were not part of the incoming cases.

[2] This concerns cases in which the appeal in cassation was withdrawn or cancelled, and cases in which the hearing of the appeal is suspended.

[3] The numbers of advisory opinions also comprise the instances involving a position pursuant to Article 80a of the Judiciary Organisation Act. These figures do not include 5 cross-appeals in cassation.

[4] The average turnaround time includes the turnaround time of cases that have been before the Court of Justice of the European Union. The turnaround time is calculated from the date of receiving the notice of appeal in cassation or the application for cassation until the case is decided upon of.

[5] 'Cases decided upon of, other' comprises cases in which the appeal in cassation was withdrawn and cases that were decided upon of administratively by the court clerk.

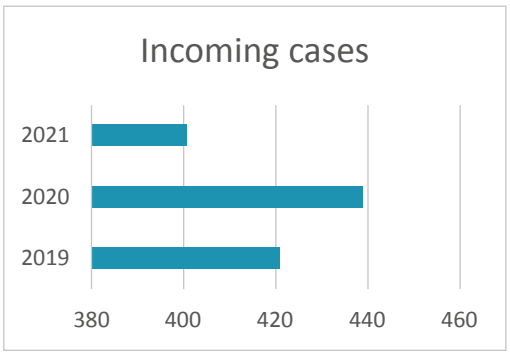
[6] The average turnaround time includes the turnaround time of the Committee for Evaluation of Closed Criminal Cases (ACAS committee) to issue an opinion on instituting a further investigation in retrials **in favour of defendants. The average turnaround time is calculated from the moment the Supreme Court receives the file until the case is decided upon of.

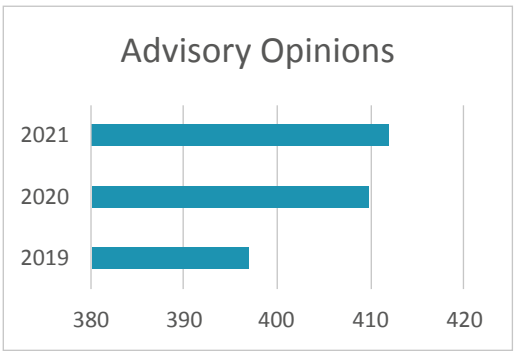
[7] 'Cases decided upon of, other' comprises cases in which the appeal in cassation was withdrawn or cancelled, cases that were decided upon of administratively by the court clerk, cases in which the hearing of the appeal is suspended and cases that were decided upon of **upon challenge.

[8] The average turnaround time includes the turnaround time of cases that have been before the Court of Justice of the European Union, cases in which the appeal in cassation was withdrawn or cancelled, or decided upon of by the court clerk, cases in which the hearing of the appeal is suspended, and cases that were decided upon of on opposition. The turnaround time is calculated from the date of receiving the notice of appeal in cassation until the case is decided upon of.

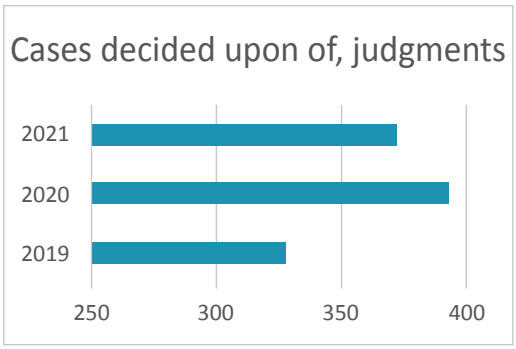
Civil Law Division

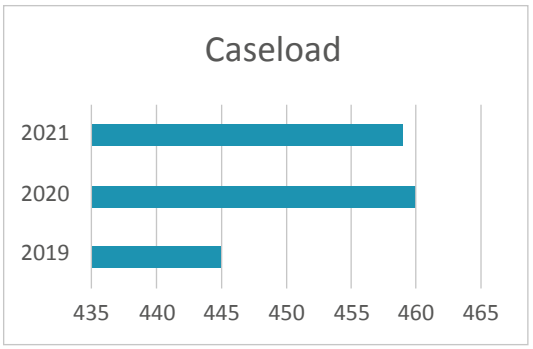
	2019	2020	2021
incoming cases	421	439	401
claim cases	265	254	240
summonses	1	--	--
applications	143	177	54
cases initiated by application	--	--	87
questions referred for preliminary ruling[9]	12	8	20
advisory opinions	397	410	412
advisory opinions positions pursuant to Article 80a Judiciary Organisation Act	5	4	1
cases decided upon of, judgments	328	393	372
claim cases	205	244	217
summonses	1	2	--
cases initiated by application	--	--	15
applications	112	140	124
questions referred for preliminary ruling	10	7	16
cases decided upon of, other	26	31	30
claim cases	22	18	18
summonses	--	--	--
cases initiated by application	--	--	2
applications	4	13	9
questions referred for preliminary ruling	--	--	1
caseload	445	460	459
claim cases	321	313	318
summonses	3	1	1
cases initiated by application	--	--	70
applications	114	138	59
questions referred for preliminary ruling	7	8	11





[9] These concern questions referred to the Supreme Court of the Netherlands for a preliminary ruling.





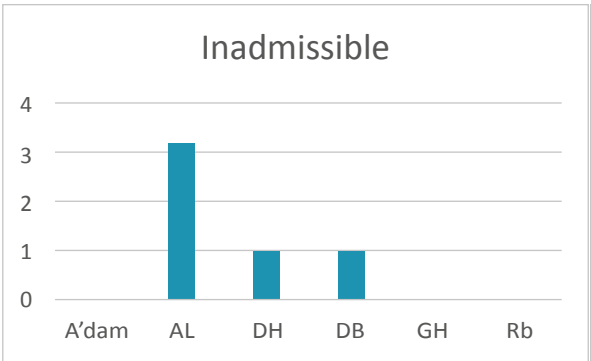
	2019	2020	2021
cases decided upon of, judgments	328	393	372
rejection	193	262	239
set aside	103	99	107
inadmissible	14	7	5
other	9	18	5
question referred for preliminary ruling	9	7	16

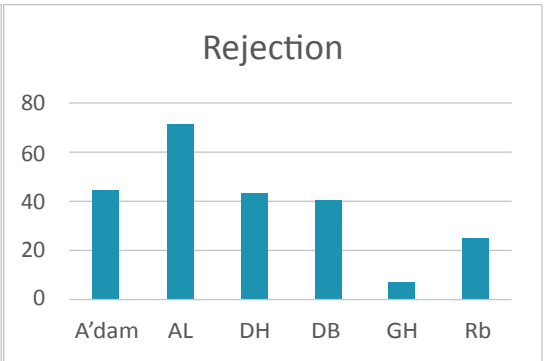
cases decided upon of, judgments	2019	2020	2021
Substance	188	198	205
Article 80a Judiciary Organisation Act	2	1	--
Article 81 Judiciary Organisation Act	138	194	167

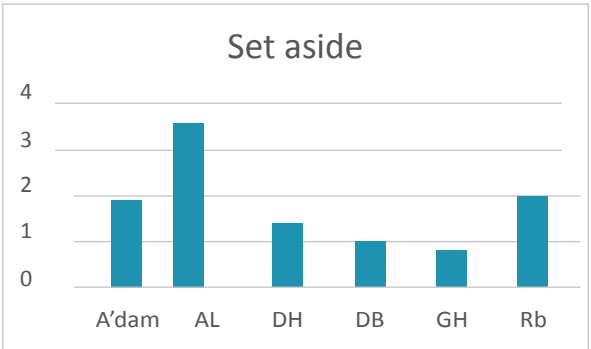
incoming cases per Court of Appeal	2019	2020	2021
Court of Appeal of Amsterdam	81	79	75
Court of Appeal of Arnhem-Leeuwarden	90	118	110
Court of Appeal of The Hague	95	72	94
Court of Appeal of 's-Hertogenbosch	74	73	36
Joint Court of Justice[10]	13	19	12
Other	--	--	1
District Courts	67	78	73

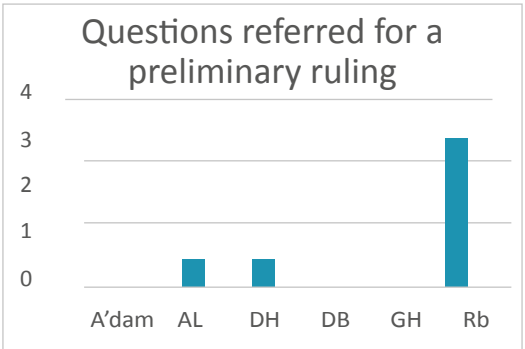
judgments per court of appeal	Inadmissible	Rejected	Set aside	Questions referred for preliminary ruling	Other
Court of Appeal of Amsterdam	--	46	19	--	1
Court of Appeal of Arnhem-Leeuwarden	3	73	36	2	--
Court of Appeal of The Hague	1	45	14	2	--
Court of Appeal of 's-Hertogenbosch	1	41	10	--	1
Joint Court of Justice[11]	--	8	8	--	--
Other	--	--	--	--	1
District Courts	--	26	20	12	2

[10] the Joint Court of Justice refers to the Joint Court of Justice of Aruba, Curaçao, Saint Maarten and of Bonaire, Saint Eustatius and Saba
[11] Idem







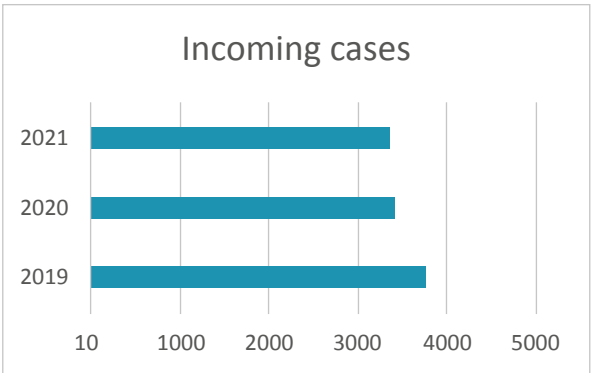


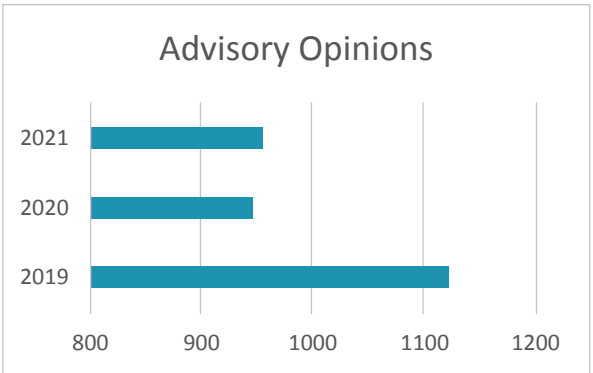
Amsterdam stands for the Court of Appeal of Amsterdam, Arnhem-Leeuwarden for the Court of Appeal of Arnhem-Leeuwarden, The Hague for the Court of Appeal of The Hague, 's-Hertogenbosch for the Court of Appeal of 's-Hertogenbosch, Joint Court for the Joint Court of Justice, and District Courts for the District Courts.

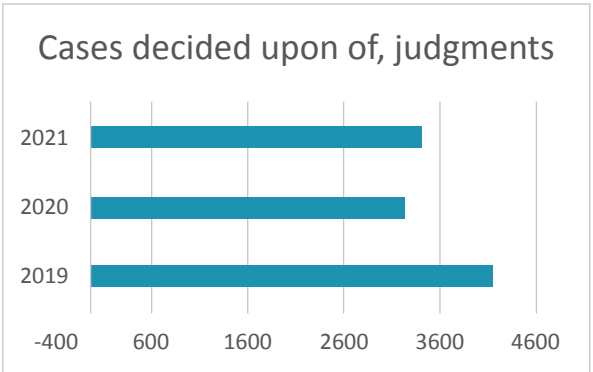
Criminal Law Division

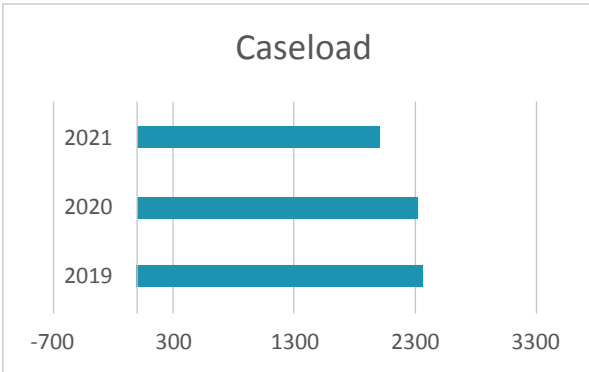
	2019	2020	2021
incoming cases	3.755	3.414	3.346
regular criminal cases	3.509	3.151	3.034
decisions	220	238	281
reviews[12]	26[13]	25[14]	31[15]
advisory opinions	1.124	949	954
advisory opinions	1.124	949	954
cases decided upon of, judgments	4.155	3.246	3.417
regular criminal cases	3.912	3.018	3.180
decisions	222	197	212
reviews	21	31	25
cases decided upon of, other	187	213	232
caseload	2.363	2.318	2.015
regular criminal cases	2.212	2.161	1.832
decisions	125	138	160
reviews	26	19	23

[12] This includes requests for further investigation.
[13] Including 2 requests for further investigation.
[14] Including 13 requests for further investigation.
[15] Including 1 request for further investigation.









	2019	2020	2021
cases decided upon of, judgments	4.155	3.246	3.417
rejection	539	481	439
set aside and referred	187	186	202
set aside and decided upon of by Supreme Court	161	254	242
inadmissible	3.252	2.295	2.524
well-founded	1	7	3
other	15[16]	23[17]	7[18]

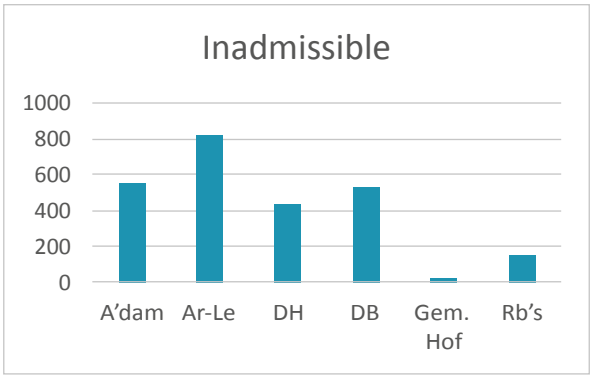
cases decided upon of, judgments[19]	2019	2020	2021
Substance	629	735	711
Article 80a Judiciary Organisation Act	1.442	830	1.070
Article 81 Judiciary Organisation Act	365	320	268

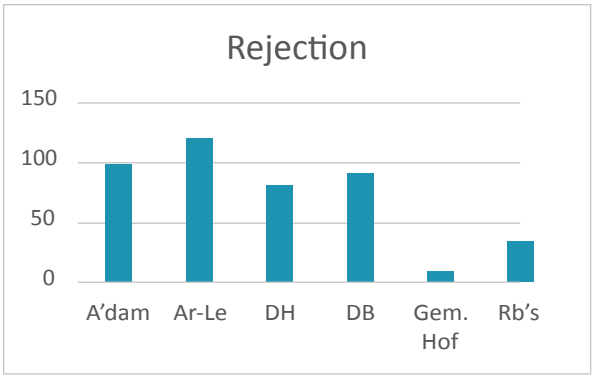
	2019	2020	2021
review cases decided upon of, judgments	19	18	25
well-founded	1	7	3
denied	12	10	20
inadmissible	5	1	1
other	1	-	1

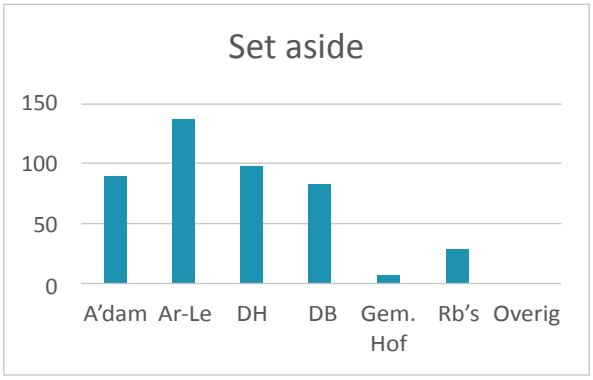
[16] Including 2 requests for further investigation.
[17] Including 13 requests for further investigation.
[18] Including 1 request for further investigation.
[19] Cases with grounds for cassation.

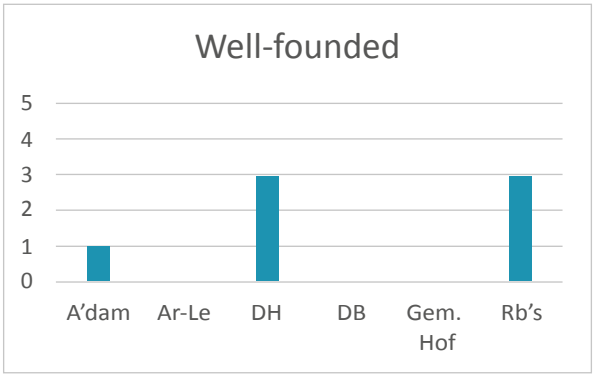
incoming cases per court of appeal	2019	2020	2021
Court of Appeal of Amsterdam	862	747	721
Court of Appeal of Arnhem-Leeuwarden	1.051	1.032	1.069
Court of Appeal of The Hague	825	648	558
Court of Appeal of 's-Hertogenbosch	718	697	641
Joint Court of Justice	70	45	60
District Courts	228	245	296
Other	1[20]	-	1[21]

judgments per court of appeall	Inadmissible	Rejected	Set aside	Well-founded	Miscellaneous[22]
Court of Appeal of Amsterdam	553	100	90	1	1
Court of Appeal of Arnhem-Leeuwarden	822	121	137	1	-
Court of Appeal of The Hague	434	82	98	-	3
Court of Appeal of 's-Hertogenbosch	535	92	83	-	-
Joint Court of Justice[23]	27	10	7	-	-
District Courts	152	34	29	1	3
Other	1	-	-	-	-



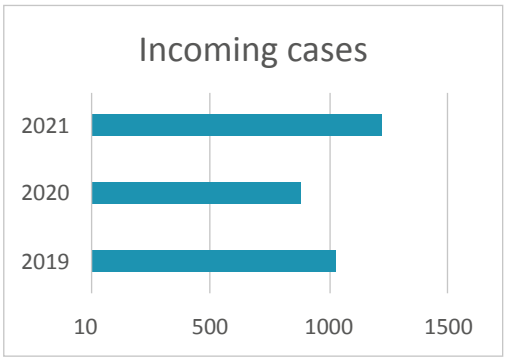


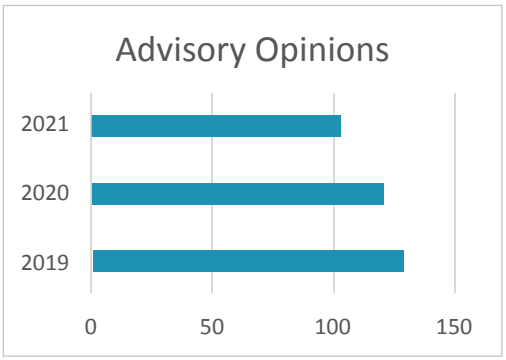


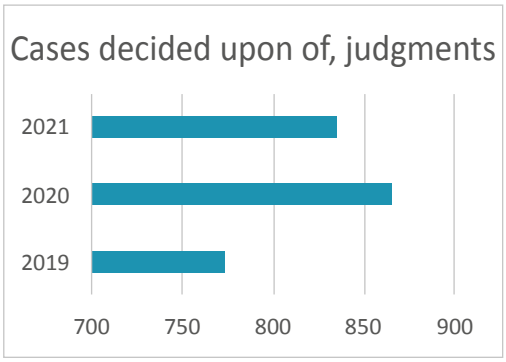


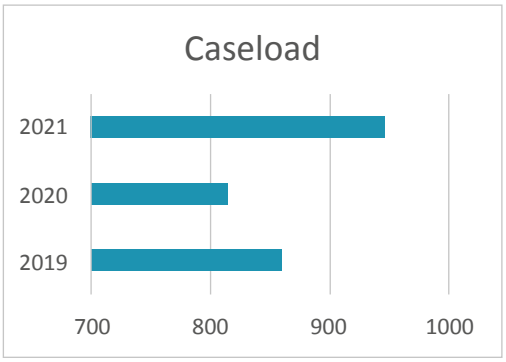
[20] Appeal in cassation in the interest of the law concerning a decision of the Central Disciplinary Committee for the Healthcare Sector.
[21] Complaint pursuant to Article 13a Dutch Code of Criminal Procedure.
[22] 1 judgment on a request for further investigation was included under 'other'.
[23] Joint Court of Justice refers to the Joint Court of Justice of Aruba, Curaçao, Saint Maarten and of Bonaire, Saint Eustatius and Saba.

Tax Division	2019	2020	2021
incoming cases	1.026	877	1.220
appeal in cassation	1.010	861	1.196
review	13	11	22
questions referred for a preliminary ruling	3	5	2
advisory opinions	129	121	103
cases decided upon of, judgments	773	866	835
appeal in cassation[24]	764	850	824
review	6	9	7
questions referred for a preliminary ruling	3	7	4
cases decided upon of, other	50	56	254
caseload	862	817	948
appeal in cassation	851	807	928
review	5	6	18
questions referred for a preliminary ruling	6	4	2







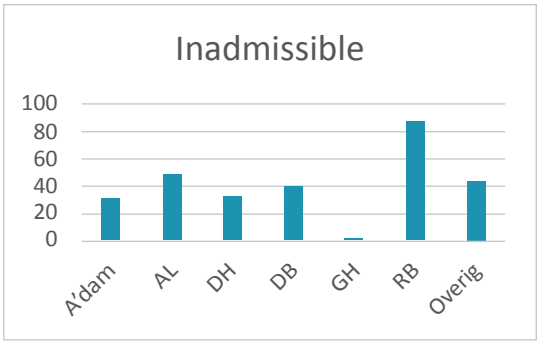


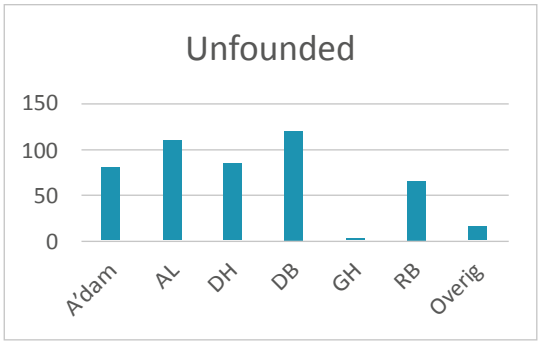
	2019	2020	2021
cases decided upon of, judgments	773	866	835
unfounded	378	490	483
inadmissible	270	275	286
other	1	-	3
set aside and decided upon of by Supreme Court	58	50	32
set aside and referred	63	44	27
questions referred for a preliminary ruling	3	7	4

cases decided upon of, judgments	2019	2020	2021
Substance	355	351	349
Article 80a Judiciary Organisation Act	148	114	80
Article 81 Judiciary Organisation Act	270	401	406

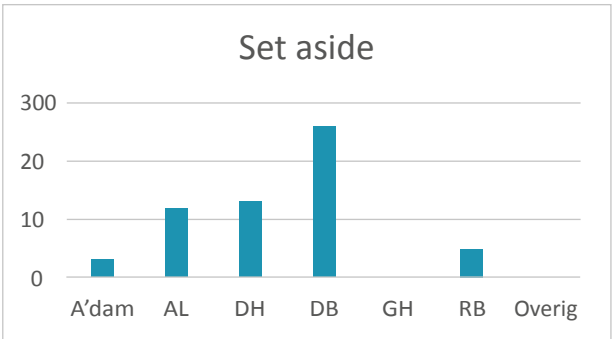
incoming cases per court of appeal	2019	2020	2021
Court of Appeal of Amsterdam	154	114	190
Court of Appeal of Arnhem-Leeuwarden	222	209	288
Court of Appeal of The Hague	194	152	161
Court of Appeal of 's-Hertogenbosch	209	151	132
Joint Court of Justice[25]	5	6	10
District Courts	173	167	352
Central Appeals Tribunal	50	52	64
Other	19	26	23

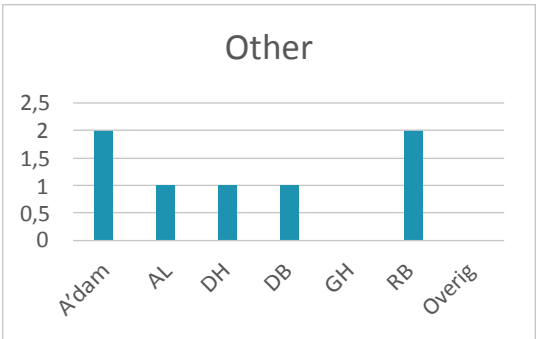
Judgments per court of appeal	Inadmissible	Unfounded	Set aside	Other
Court of Appeal of Amsterdam	30	81	3	2
Court of Appeal of Arnhem-Leeuwarden	49	110	12	1
Court of Appeal of The Hague	33	86	13	1
Court of Appeal of 's-Hertogenbosch	41	121	26	1
Court of Appeal of 's-Hertogenbosch[26]	1	3	--	--
District Courts	88	66	5	2
Miscellaneous[27]	44	16	--	--





[25] Joint Court of Justice refers to the Joint Court of Justice of Aruba, Curaçao, Saint Maarten and of Bonaire, Saint Eustatius and Saba.
[26] Idem.
[27] The 'other' section also includes a decision on a question referred to the Supreme Court for preliminary ruling.





Amsterdam stands for the Court of Appeal of Amsterdam, Arnhem-Leeuwarden for the Court of Appeal of Arnhem-Leeuwarden, The Hague for the Court of Appeal of The Hague, 's-Hertogenbosch for the Court of Appeal of 's-Hertogenbosch, Joint Court for the Joint Court of Justice, District Courts for the District Courts and Other for the Central Appeals Tribunal, the Trade and Industry Appeals Tribunal and the Council of State.

5.2 Staff

Below, an overview has been included of the formation of the Supreme Court – broken down by organisational unit as at 1 January 2021 and 31 December 2021 and the average staffing during the entire year of 2021.

FORMATION/STAFF OVERVIEW	1 January 2021	31 December 2021	average staffing 2021
President's Office	3,05	3,05	3,05
Procurator General's Office	4,86	4,86	4,86
Civil Law Division	67,42	72,71	69,44
Criminal Law Division	84,57	83,67	84,20
Tax Law Division	46,31	46,42	46,77
other operations	43,29	46,50	46,07
TOTAL	**249,50**	**257,21**	**254,39**

5.3 Composition of the Supreme Court of the Netherlands and the Office of the Procurator General at the Supreme Court on 31 December 2021

Supreme Court of the Netherlands

President	President G. de Groot (C)[1]
Vice Presidents	Vice President R.J. Koopman (B) Vice President C.A. Streefkerk (C) (up to and including 31 December 2021) Vice President J. de Hullu (S) Vice President V. van den Brink (S) Vice President M.V. Polak (C) Vice President M.E. van Hilten (B) Vice President M.J. Kroeze (C) (as from 1 January 2022)
Justices	Justice E.N. Punt (B) Justice M.W.C. Feteris (B) Justice M.A. Fierstra (B) Justice Y. Buruma (S) Justice J. Wortel (B) Justice T.H. Tanja-van den Broek (C) Justice E.S.G.N.A.I. van de Griend (S)

[1] C = civil; S = criminal; B = tax. The person involved is part of the chamber or section within the office of the Procurator General in this sub-division.

	Justice A.L.J. van Strien-van Strien (S)
	Justice E.F. Faase (B)
	Justice M.J. Borgers (S)
	Justice C.E. Du Perron (C)
	Justice A.F.M.Q. Beukers-van Dooren (B)
	Justice J.C.A.M. Claassens (S)
	Justice M.T. Boerlage (B)
	Justice C.H. Sieburgh (C)
	Justice A.E.M. Röttgering (S)
	Justice P.A.G.M. Cools (B)
	Justice H.M. Wattendorff (C)
	Justice F.J.P. Lock (C)
	Justice M. Kuijer (S)
	Justice C. Caminada (S)
	Justice A.E.B. ter Heide (C)
	Justice J.A.R. van Eijsden (B)
	Justice S.J. Schaafsma (C)
	Justice F.R. Salomons (C)
	Justice T. Kooijmans (S)
	Justice G.C. Makkink (C)
Court clerk	J. Storm

Changes in the Supreme Court of the Netherlands

Appointed as vice president	Vice President M.J. Kroeze	As from 1 January 2022
Appointed as justice	Justice S.J. Schaafsma	As from 1 May 2021
	Justice F.R. Salomons	As from 1 May 2021
	Justice T. Kooijmans	As from 1 September 2021
	Justice G.C. Makkink	As from 1 September 2021
Dismissal granted to	Mr L.F. van Kalmthout	As from 1 January 2021
	A.M.J. van Buchem-Spapens	As from 1 May 2021
	G. Snijders	As from 1 May 2021
	P.M.F. van Loon	As from 1 August 2021
	J.A.C.A. Overgaauw	As from 1 August 2021
	C.A. Streefkerk	As from 1 January 2022

Office of the Procurator General at the Supreme Court

Procurator General	Procurator General F.W. Bleichrodt
Deputy Procurator General	Deputy Procurator General M.H. Wissink (C)
Advocates General	Advocate General P.J. Wattel (B)
	Advocate General E.M. Wesseling-van Gent (C)
	Advocate General R.E.C.M. Niessen (B)
	Advocate General R.L.H. IJzerman (B)
	Advocate General E.B. Rank-Berenschot (C)
	Advocate General D.J.C. Aben (S)
	Advocate General E.J. Hofstee (S)
	Advocate General P. Vlas (C)
	Advocate General A.E. Harteveld (S)
	Advocate General G.R.B. van Peursem (C)
	Advocate General T.N.B.M. Spronken (S)

	Advocate General C.M. Ettema (B) Advocate General R.H. de Bock (C) Advocate General T. Hartlief (C) Advocate General W.L. Valk (C) Advocate General B.J. Drijber (C) Advocate General B.F. Keulen (S) Advocate General M.L.C.C. Lückers (C) Advocate General B.F. Assink (C) Advocate General D.J.M.W. Paridaens (S) Advocate General G. Snijders (C) Advocate General S.D. Lindenbergh (C)
Advocate General extraordinary	Advocate General extraordinary Mr P.C. Vegter (S) Mr F.F. Langemeijer (C)
Deputy Advocate General	Deputy Advocate General P.M. Frielink (S)

Changes in the Office of the Procurator General at the Supreme Court

Appointed as Procurator General	Procurator General F.W. Bleichrodt	As from 1 September 2021
Appointed as deputy Procurator General	Deputy Procurator General M.H. Wissink	As from 1 May 2021
Appointed as Advocate General	Advocate General G. Snijders Advocate General S.D. Lindenbergh	As from 1 May 2021 As from 1 November 2021
Discharge granted as deputy Procurator General and appointed as Advocate General extraordinary	Advocate General extraordinary F.F. Langemeijer	As from 1 May 2021
Dismissal granted to	J. Silvis	As from 1 September 2021

5.4 Financial overview

	2021						
	Draft budget Justice and Security	Revised budget Justice and Security	Forecast based on annual plan	Liabilities entered into 2021	actual	difference between actual and budget	%
Expenditures							
Staff salaries			27.100.000		27.212.083		
Own Staff, other			447.500		410.484		
Own Staff, total	**27.574.000**	**27.877.000**	**27.547.500**	**27.352.894**	**27.622.567**	**-254.433**	**100,3%**
External staff	**745.000**	**2.466.000**	**2.195.082**	**1.870.501**	**2.773.837**	**307.837**	**126,4%**
Equipment other	**1.755.000**	**1.543.000**	**1.557.900**	**2.425.409**	**1.600.330**	**57.330**	**102,7%**
ICT equipment	**1.393.000**	**1.864.000**	**1.436.795**	**2.894.324**	**2.236.309**	**372.309**	**155,6%**
SSO's	**65.000**	**261.000**	**200.000**	**372.741**	**352.536**	**91.536**	**176,3%**
Total	**31.532.000**	**34.011.000**	**32.937.277**	**34.915.869**	**34.585.579**	**574.579**	**105,0%**
Receipts							
staff secondment and other receipts			**50.000**		-109.267	-109.267	
Total receipts	**0**	**0**	**50.000**		**-109.267**	**-109.267**	**-218,5%**
Total expenditures -/- receipts	**31.532.000**	**34.011.000**	**32.987.277**	**34.915.869**	**34.476.312**	**465.312**	**1,37%**

Statement of liabilities, expenditures and receipts

Trial balance sheet as at 31/12/2021			
	debit		credit
Expenditures		***Receipts***	
Expenditures charged to the budget	34.476.312	Receipts credited to the budget	0
Off-budget expenditures	0	Current account Justice & Safety	0
Cash and cash equivalents	-34.475.732	Off-budget receipts	0
Off-budget receivables	-580	Contra account off-balance receivables	0
Contra account outstanding liabilities	2.811.251	Outstanding liabilities	2.811.251
Total	**€ 2.811.251**	**Total**	**€ 2.811.251**

Trial balance sheet as at 31 December 2021