

Implementation of the United Nations Convention on the Rights of the Child in the Dutch case law

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Summary

In general

The United Nations Convention on the Rights of the Child (CRC) was adopted unanimously by the United Nations General Assembly on 20 November 1989. The Convention entered into force on 2 September 1990 and has been ratified by almost every State (191). The Convention entered into force in the Netherlands on 8 March 1995.

The CRC contains not only civil- and political rights, but also economic, social and cultural rights for all persons below the age of eighteen. It includes some specific rights for children to guarantee their rights to provision, protection and participation. The Committee on the Rights of the Child is the institution for monitoring the CRC. Every State Party has to submit an initial report to the Committee within two years after the Convention entered into force and after that every five years. In their report they have to explain to the Committee how the Convention has been implemented in their State. Not only the State Party but also specialized UN-agencies and non-governmental organisations can inform the Committee about the implementation. The report of the State Party is discussed during a public meeting of the Committee. Afterwards the Committee informs the involved State Party about its concerns and recommendations in the so-called 'Concluding Observations'.

The Netherlands

The initial report of the Netherlands was presented to the Committee in April 1997. The Committee considered the report at its meetings held on 4 and 5 October 1999 and adopted the 'Concluding Observations' on 8 October 1999.

The second report was submitted in March 2002 and the expectation is that it will be considered by the Committee in September 2004.

According to the legal history, the Dutch government did not expect the CRC to have many consequences for the Netherlands. Reservations were made to articles 26, 37 and 40 CRC and declarations to articles 14, 22, 38 CRC. The legal history shows that the government expected that articles 5, 7(1), 8(1), 9(2), (3), (4), 10(1), 12(1),(2), 13, 14, 15, 16, 30, 37 and 40(2) CRC might have direct effect.

Case law research

This research project aimed at the implementation of the articles of the CRC in the Dutch case law. This report shows an overview of and a commentary on the relevant case law up to and including 2001 (seventy-five cases). As appears from the case law, articles 2-12, 16, 19-23, 26-28, 37 and 40 CRC are already invoked or applied ex officio by the courts. The Convention has been applied ex officio by courts in many cases. Articles 3, 7, 9, 10 and 37 CRC were applied most often, the other articles of the CRC were invoked only rarely. In most cases in which a lawyer based his argument on the CRC, the courts rejected that argument.

Of the articles mentioned by the government as being possibly 'directly applicable', the courts have –implicitly or explicitly- directly applied in one or more cases articles 7(1) (right to name, nationality, to know and be cared for by parents), 9(3) (personal relations and direct contact with parents) and 37 CRC (protection against torture, cruel, inhuman or degrading treatment or punishment). However, articles 3 (best interests of the child), 23 (handicapped children) and 40(1) (penal law, promoting reintegration) CRC were also directly applied by a court, although they were not mentioned by the government as articles which might be 'directly effective'.

Future

It seems highly likely that articles 7(1), 9(3) and 37 CRC (mentioned by the government as perhaps 'directly applicable') will also become directly effective in the future, since it follows from case law that direct application of those articles is possible. In addition it cannot be excluded that articles 3, 23 and 40(1) CRC will

be applied directly by courts (although the government did not expect them to have direct effect), since this has been done previously. In the coming years the direct application may be extended to articles 5, 8(1), 9(2),(4), 10(1), 12(1), (2), 13, 14, 15, 16, 30 and 40(2) CRC because the legal history shows that the government expected that those articles might have direct effect.

According to the opinion of the authors, it is possible that in the future the courts may also accord direct effect to article 2 CRC (discrimination).

Further influence of the Convention is expected in the field of juvenile delinquency, if article 40 (1) CRC can indeed be applied directly (e.g. actual execution of the punishment).

It is also possible that the imprisonment of a minor foreigner for a period of one year or more will not be compatible with art. 37 CRC.

This report makes it clear that the CRC has been recognized as a source for the further development of juvenile justice in the Netherlands. In the opinion of the authors it is desirable that the use of the Convention in case law will increase and that the CRC will become an active and effective instrument to realize the rights of all children within the Netherlands.