

Implementation of the ECHR and the case-law of the European Court of Human Rights in national case-law. A comparative study

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EXECUTIVE SUMMARY

Background, research questions and approach

The European Convention of Human Rights (ECHR) has had a great impact on Dutch law and Dutch case-law. Two assumptions are often made to explain this impact. First, it is often assumed that the traditional openness of Dutch law to international law is responsible for the powerful impact on national law, combined with a prohibition of constitutional review of acts of parliament. Secondly, an explanation is often found in the activist attitude of the European Court of Human Rights (ECtHR) and the growing impact of its case-law. It is then presumed that, as a consequence of the constitutional peculiarities of the Dutch legal system, the far-reaching ECtHR judgments penetrate directly and deeply into the Dutch legal order.

For some years now there has been a debate on the impact of international law (in particular the ECHR and the judgments of the ECtHR) given via national case-law. In order to provide a sound factual basis for this debate, the present study was commissioned by the Scientific Research and Documentation Centre of the Dutch government, at the request of the Ministry of Security and Justice. The study focuses on the interrelationship between, on the one hand, constitutional systems for the implementation of international law in the domestic legal order and, on the other hand, the way in which and the extent to which national courts apply (or otherwise take account of) the ECHR and the case-law of the ECtHR. The study concentrates on five research questions:

1. What requirements have been formulated by the ECtHR in relation to the implementation of the ECHR in national law and the application of ECtHR case-law by national courts, and to what extent does the ECtHR allow for national peculiarities?
2. How does national constitutional law provide for the implementation of international law, particularly the ECHR, in the national legal order?
3. Which constitutional powers and instruments do national courts use to guarantee that the state complies with its obligations under the ECHR?
4. How do national courts deal with the case-law of the ECtHR and what is the influence of ECtHR judgments on national case-law?
5. To what extent are the ECtHR and its case-law the subject of national debate and, to the extent that such debate exists, how does it influence debates on national courts' powers?

In order to answer these questions, the study has followed a dual approach. First, an analysis has been made of the requirements the ECtHR has formulated in respect to national case-law and of the way the ECtHR responds to criticism of its judgments. To this end, an extensive review of case-law and scholarly literature has been undertaken. In addition, in-depth, qualitative interviews have been conducted with six judges and three registrars of the ECtHR. Secondly, a comparative legal study has been conducted into the way international law, in particular the ECHR and the case-law of the ECtHR, impacts national case-law. Based on an extensive questionnaire, national experts in six states (Belgium, France, Germany, the Netherlands, Sweden and the United Kingdom) have examined the status

of international law in the national legal order; to what extent national courts are competent to review national legislation and administrative acts for their compatibility with international treaties and other international norms; and which competences they have and employ to apply the ECHR and the case-law of the ECtHR. The national experts have also investigated the extent to which the ECtHR's judgments are accessible to national judges and the extent to which the influence of ECtHR's case-law on national law is a matter for debate.

Answers to the research questions

1. The ECtHR has increasingly formulated obligations on the national courts to interpret and apply national law in conformity with the ECHR. Moreover, the scope of the rights protected by the ECHR has greatly expanded in recent years. The expansion and intensification of the obligations on national courts have been accompanied by a strengthening of the co-operation and dialogue between national courts and the ECtHR. The ECtHR invites national courts to give their own interpretation to the ECHR, even if it deviates from the interpretation given by the ECtHR, since this may lead to the further development and refinement of ECHR law. The ECtHR has also developed a number of instruments to help it respect national identity and national diversity. Although the ECtHR requires that its doctrines and criteria be applied in national law, it leaves the states a great deal of leeway to decide how to do so. As long as a minimum of fundamental rights protection is guaranteed, the ECtHR is even willing to accept different outcomes from what it would itself have achieved.

2. Although it is common to classify the constitutional systems that states use to give effect to international law as 'monist' and 'dualist' systems, these labels are not really indicative of the way such effect is put into practice. For example, international customary law is not only part of the law of the land of monist countries such as Belgium, France and the Netherlands, but also of Germany and the United Kingdom, which are usually characterised as dualist states. In Belgium, France and the Netherlands, the national courts are also competent to give direct effect to treaty provisions, yet the same is true of Germany. In Germany, however, the consent of the national parliament to an international treaty ensures that such a treaty has the same status as a federal act of parliament, while in Belgium, France and the Netherlands, international treaties (insofar as they have direct effect) have priority over both anterior and posterior national acts of parliament. In the Netherlands and Belgium, even the Constitution must be disapplied if that is necessary to avoid violations of the international treaty provisions which have direct effect (including the provisions of the ECHR). In dualist Sweden, international treaties may not be part of the law of the land, but the ECHR has been transformed into national legislation. Moreover, the Swedish constitution has empowered the Swedish courts to review anterior and posterior acts of parliament for their conformity with the ECHR, which implies that this treaty has quasi-constitutional status. In the United Kingdom, the national courts are also competent to apply provisions of the ECHR, although they are not permitted to resolve conflicts between primary legislation and the Convention which cannot be avoided by means of treaty-consistent interpretation. In such cases they must confine themselves to a 'declaration of incompatibility'.

3. National courts diverge greatly in their competence to guarantee compliance with international treaty obligations (in particular with the obligations resulting from the ECHR). The differences are partly related to the differences in status of the ECHR in the national hierarchy of law. Formally and legally, the competence to avoid violations of the substantive provisions of the ECHR is most far-reaching in those states where the courts may disapply acts of parliament and sometimes even the Constitution if they constitute a violation of the ECHR. In practice, however, it is very rare for courts to actually disapply primary legislation because of the ECHR. The other way around, the experience in the United Kingdom – the only state of the six states studies in which the courts do not have any powers to give priority to the ECHR over primary legislation – is that the political institutions almost always give consequence to a court finding of an incompatibility with the ECHR. In all states studied,

however, it is clear that the courts prefer to avoid violations of the ECHR by interpreting and applying provisions of national law as far as possible in conformity with the ECHR and with the case-law of the ECtHR. In the United Kingdom, the courts are even obliged to interpret national law in such a way as to prevent violations of ECHR rights. In Belgium, Germany and France, where only the constitutional courts are empowered to judge the constitutionality of primary legislation, the constitutional courts appear to interpret national constitutional rights in the light of the ECHR and the case-law of the ECtHR. This is in effect an indirect review of primary legislation for its compatibility with the ECHR provisions as interpreted by the ECtHR.

4. As far as the application of the case-law of the ECtHR by national courts is concerned, neither the nature of the constitutional system for the implementation of international law, nor the available constitutional powers appear to have much practical relevance. Whether the system is predominantly monist or predominantly dualist, the national courts always strive to implement the ECtHR's interpretations as carefully as possible. As a consequence, the judgments of the ECtHR have a great impact and influence on national case law in all the six states studied. It is far from true that in monist states, such as the Netherlands, France or Belgium, the application of ECtHR interpretation is much more servile and obedient than in dualist states such as the United Kingdom. The judgments of the ECtHR have equally great importance for national fundamental rights doctrines in dualist states.

Simultaneously, the courts in all the states studied have developed instruments to mitigate the effects of the implementation of the ECHR and to make ECtHR precedents more compliant with national law. The Dutch courts, just like courts in the other states studied, appear to bend and mould the ECtHR's doctrines, criteria and factors in such a way as to fit them into national law. If it turns out that an ECHR interpretation genuinely cannot be made compliant with national law, moreover, the courts may sometimes even decide not to endorse this interpretation. In addition, the courts in all states studied have shown themselves to be strongly aware of their constitutional position. They tend to defer to the national legislature and administrative bodies, leaving a wide margin of discretion to them, and they will hardly ever accept far-reaching interpretations of fundamental rights that are not strictly required by the ECtHR.

5. Broad and articulate debates on the impact of the ECtHR's case-law have surfaced in particular in the United Kingdom and in the Netherlands, although the debate there is framed in different terms. In the other states studied there is less criticism of the ECtHR's approach and such criticism as there is, is less often expressed in the political arena and the media. Mostly, criticism in these states relates to individual, controversial judgments of the ECtHR.

It has appeared from this study that the ECtHR is best able to deal with the latter type of criticism. If national courts articulate express, well-reasoned objections to certain ECtHR interpretations, the ECtHR even regards this important and valuable. It then considers the national judgments as the basis for a dialogue between courts, in which controversies and critique are phrased in a way to which the ECtHR can properly respond. Those states in which the highest courts aim at an active, express dialogue with the ECtHR, like the United Kingdom and Germany, and whose case-law is easily accessible to the ECtHR's judges and registry, appear to be able to exert significant influence on the development of the ECtHR's jurisprudence. In the Netherlands, criticism is only rarely expressly voiced in judgments and the criticism raised is often only summarily reasoned. Furthermore, in the Netherlands, translations of national judgments are usually unavailable.

Conclusion

The nature of the constitutional system for the implementation of international law by means of national case-law is much less important in explaining the impact of international law than is often assumed. In all the states studied, the ECHR and the case-law of the ECtHR exert a great influence on national case-law, regardless of whether the system is predominantly monist (as in the Netherlands,

France, Belgium and, to a certain extent, Germany) or predominantly dualist (as in the United Kingdom and Sweden). Moreover, the courts in all the states studied have instruments at their disposal that enable them to fit the ECHR provisions into their own, national law and to demarcate their own responsibilities from those of other constitutional powers. The ECtHR accepts this and even encourages national courts to actively seek the best way to protect the ECHR rights in their own legal systems. National courts were able to use this leeway to engage in an effective dialogue with the ECtHR, based on well-reasoned, accessible judgments.