Chapter 3
Effects in Time of Judgments in the Netherlands: Prospective Overruling and Related Techniques

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Abstract In the Netherlands, the established rule is that there is no system of precedent even though especially the judgments of the Dutch Supreme Court and the other highest courts are very *authoritative* and *persuasive*. Nevertheless, lower judges and the four highest courts are in principle *not* bound by previous judicial decisions. As regards court cases, the declaratory theory is formally adhered to: the judge does *not* create new law, but states the law as it is. As a result, court rulings are, as a general rule, relevant retrospectively.

The formal adhesion to the declaratory theory is not only undermined by everyday practice, it is also mitigated by the formal recognition of what could literally be translated from Dutch legal doctrine as the 'law forming task' of the judiciary. Within this context, Dutch courts occasionally address the effects in time of their judgments. The present contribution discusses the various ways in which this is done in practice and pays specific attention to the technique of prospective overruling.

The Way Precedent Operates in the Netherlands

In the Netherlands, the established rule is that there is NO system of precedent. Lower judges and the four highest courts[1] are in principle *not* bound by previous

[1]An important characteristic of the organization of the Dutch judiciary is that, although the Netherlands have a Supreme Court (Hoge Raad), in cases of administrative law there are three courts whose cases cannot be brought to the Supreme Court. Their decisions are final, which means

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E. Steiner, *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions*, Ius Comparatum – Global Studies in Comparative Law 3,
DOI 10.1007/978-3-319-16175-4_3

judicial decisions. This rule is laid down in Article 12 of the General Provisions Act (Wet algemene bepalingen) of 1829.

Status of Judge-Made Law in the Netherlands

In the Netherlands, judgments of the courts are formally *not* a source of law (in that sense, 'case *law*' or 'judge-made *law*' does not exist). Nevertheless, especially the judgments of the Dutch Supreme Court (*Hoge Raad*) and the other highest courts are very *authoritative* and *persuasive*. As regards court cases, the declaratory theory is formally adhered to: the judge does *not* create new law, but states the law as it is (even though in everyday practice the fallacy of this approach is recognized, e.g. in case law where the Dutch Supreme Court specifically states that it will fill in a so-called 'open-ended norm'; see HR 27 November 1981, NJ 1982, 503 ('Pensioenvereveningsarrest', also known as 'Boon v. Van Loon')).[2]

The formal adhesion to the declaratory theory is not only undermined by everyday practice, it is also mitigated by the formal recognition of what could literally be translated from Dutch legal doctrine as the 'law forming task' (*rechtsvormende taak*) of the judiciary. More and more the highest courts are enabled to declare their interpretation of a legal matter outside the context of a concrete case before them through various institutional arrangements. The oldest of these arrangements is the possibility for the Supreme Court to give 'rulings in the interest of the law' (*cassatie in het belang der wet*, which is of French origin). 'Rulings in the interest of the law' may occur in cases that were decided upon by a lower court, in which all parties involved refrain from lodging cassation appeal. Whereas such a case would normally not find its way to the Supreme Court, the Public Attorney may decide to bring the case before the Court in order for it to rule on the legal question at hand. Its ruling, however, carries no consequences for the parties in the initial proceedings. The only possible rationale behind this instrument is to allow the Supreme Court legal means to assert its position as an *authoritative* and *persuasive* interpreter of the law. In 2012 three Acts of Parliament were passed to strengthen this position further. The Act on Strengthening Cassation (Wet versterking cassatierechtspraak) and the Act on Preliminary Questions to the Supreme Court both focus on the

that, in their field, they serve as the highest judicial body. The Central Appeals Tribunal (Centrale Raad van Beroep) predominantly deals with cases concerning social security and the civil service, the Trade and Industry Appeals Tribunal (College van Beroep voor het Bedrijfsleven) rules on disputes arising from several specialized Acts in the socio-economic domain (e.g. Competition Law and Telecommunication Law), and finally, the competence of the Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State) lies in all other fields of administrative law where a formal decision of a government body, which is not a general provision, is at the basis of court proceedings. The Supreme Court deals with all other cases, including tax matters.

[2]Cf. Kottenhagen (1986), 23 ff. See also Haazen (2001), 11 ff.

Supreme Court. The first Act facilitates the Supreme Court in a fast track ruling procedure to decide on the inadmissibility of appeals in cases where such appeals are manifestly ill-founded and holds lawyers to a higher than usual standard of competence and education to be able to bring an appeal at the Supreme Court. The second Act contains an amendment to the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering) and allows lower judges to raise preliminary questions to the Supreme Court in civil proceedings where there is a multitude of claims of a similar nature. In the explanatory memoranda of both Acts the rationale behind these instruments was justified in the interest of the 'development of the law' (*rechtsontwikkeling*)[3] or the 'forming of law' (*rechtsvorming*),[4] as well as promoting 'unity of case law' (*rechtseenheid*).[5] The fast track inadmissibility procedure facilitates the Supreme Court by letting the Court concentrate on more fundamental questions of law. The procedure on preliminary rulings aims to accomplish the same by permitting the Supreme Court to establish its line of reasoning in cases or fields of law where large aggregations of legal questions arise. With regard to these preliminary rulings, the amended Code of Civil Procedure obliges lower courts to take the preliminary ruling of the Supreme Court into account in their judgments.

Nevertheless, the Legislature still formally adheres to the general notion of Article 12 of the General Provisions Act. By way of the new legislation and providing the aforementioned rationale, the Legislature makes it more than implicitly clear that although lower courts are allowed to think for themselves, the general expectation is that they will follow the Supreme Court's case law in the vast majority of cases.

In administrative law, the 2012 Administrative Proceedings Amendment Act (Wet aanpassing bestuursprocesrecht) and its Explanatory Memorandum evoke a similar expectation. This Act amends the General Administrative Law Act (Algemene wet bestuursrecht), and establishes three 'Grand Chambers' (*grote kamers*) of five judges for each of the three highest administrative courts (the Central Appeals Tribunal, the Trade and Industry Appeals Tribunal, and the Administrative Jurisdiction Division of the Council of State). Enabled by the fact that members of one of these courts almost always serve as replacement-members in the other two courts, the three separate administrative courts are to be represented in these Grand Chambers. According to Article 8:10a of the newly amended General

[3]Explanatory Memorandum on the Act on strengthening Cassation, TK (2010/2011) 32576, nr. 3 and the Explanatory Memorandum on the Act on Preliminary Questions to the Supreme Court, TK (2010/2011) 32612, nr. 3.

[4]Explanatory Memorandum on the Act on Preliminary Questions to the Supreme Court, TK (2010/2011) 32612, nr. 3.

[5]Explanatory Memorandum on the Act on strengthening Cassation, TK (2010/2011) 32576, nr. 3 and the Explanatory Memorandum on the Act on Preliminary Questions to the Supreme Court, TK (2010/2011) 32612, nr. 3.

Administrative Law Act, proceedings before these Grand Chambers are only justified in the interest of 'unity of case law' and the 'development of the law'.[6,7]

The conclusion of this can only be that Dutch constitutional doctrine is not free from ambivalence. On the one hand, Dutch judges are formally not allowed to 'make' law. On the other hand, the national Legislature expects some degree of 'unity of case law', a considerable contribution to the 'development' of the law, and in some cases the 'forming' of law. An exact boundary between especially the latter and judge-made law is not given in this respect.

The practice of application of Article 94 of the Constitution does offer some insight into this matter. Again, according to Article 94 of the Constitution, courts may not apply national law if 'such application is in conflict with provisions of treaties or resolutions by international institutions that are binding on all persons'. In his farewell address, Supreme Court President S.K. Martens showed that in the vast majority of cases strict application of Article 94 offers no remedy to the parties involved.[8] In most cases where national legislation was deemed in violation of international law (predominantly the European Convention on Human Rights), non-application of national law would lead to a 'legal vacuum'. For instance, in a 2003 case of the Administrative Jurisdiction Division of the Council of State, the removal of voter rights of those under legal guardianship (usually mentally disabled persons) under Article 54 of the Constitution was deemed in violation of Article 25 of the International Covenant on Civil and Political Rights because of discrimination between the mentally disabled that were under guardianship and those who were not. The Administrative Jurisdiction Division of the Council of State could have chosen for non-application of Article 54. However, in doing so a situation would arise in which there were no rules for removal of voter rights of the mentally disabled at all. The Division argued that the choice for this or other possibilities of legally addressing this discrimination was not theirs to make. The variety of options was so extensive that according to the Division it fell outside the 'law forming task' of the judiciary to choose. In doing so, plaintiffs were told that they were right about the discriminatory nature of Article 54 of the Constitution, but that this was a matter for the national Legislature, to whom this issue was implicitly deferred. In 2008 a constitutional amendment was passed that allows persons under legal guardianship the right to vote.

There is an abundance of examples in which courts argue similarly. According to Martens, courts will only fill the void left by the non-application of national law ex-Article 94 of the Constitution when there is either only one possible way to remedy

[6]The Explanatory Memorandum on the Administrative Proceedings amendment Act also mentions the interest of the 'forming of law' by the administrative courts. TK (2009/2010) 32450, nr. 3.

[7]Furthermore, the 2012 amendment of the General Administrative Act grants members of the three courts the right to render 'conclusions' in proceedings before either of the other two courts, provided that these proceedings are not held before a single-judge chamber (i.e. only with regard to more difficult legal issues).

[8]Martens (2000).

the incompatibility of national law with international law, or when the national Legislature has been made aware of such incompatibility by previous judgments, but did not act upon it. Case law on this is sparse, especially where it involves the latter option. This latter option does, however, provide some examples of prospective overruling, as we shall see below.

But let us return to the declaratory theory. As a result of the fact that the declaratory theory is formally adhered to, court rulings are, as a general rule, relevant retrospectively. The fact that the court formally only states the law as it is also appears where for a long time it was not the habit of the Dutch Supreme Court to indicate specifically that its interpretation of the law had changed; even the text of landmark cases often does not reflect that they contain a major change. The first case in private law where a different approach was chosen and where the Supreme Court indicated that its interpretation of the law had changed is HR 7 March 1980, NJ 1980, 353 (known as 'Stierkalf-arrest').[9]

In the Netherlands, there are no general judicial transition rules. General transition rules as regards judicial decisions may be hard to formulate since much depends on the specific circumstances of the case. J.M. Smits advocates a topical approach to the matter, distinguishing between different types of cases.[10] It has been argued that at least two criteria should be taken into consideration in this specific area: (1) legal certainty and (2) a reasonable degree of predictability of changes in the court's established interpretation of the law.[11]

The Dutch Supreme Court has formulated transition rules on an *ad hoc* basis in a number of cases from 1981 onwards.[12] This happened for the first time in a private law case in 1981: HR 27 November 1981, NJ 1982, 503 ('Pensioen-vereveningsarrest' or 'Boon v. Van Loon' mentioned above). The Court decided that entitlements to a pension of one of the spouses had to be taken into consideration in divorce proceedings when dividing the assets of the spouses. This judgment changed an approach based on a different rule dating from 1959 and, therefore, the Court specifically provided that the new interpretation of the law would only be relevant for the case at hand and future cases. The Court stated, amongst other things, that legal certainty would be endangered if the new interpretation could also be invoked by spouses who had previously been involved in divorce proceedings.

It has been a matter of debate whether this case can be classified as prospective overruling. In the end everything seems to hinge on the definition of prospective overruling: according to various scholars prospective overruling occurs only where the Court decides that its new interpretation is relevant for future cases but not for the case at hand. In Boon v. Van Loon the ruling was also relevant for the case at hand, so the new interpretation was valid *ex nunc* and, consequently, it is not a case

[9] See Kottenhagen (1986), 19 ff.

[10] Smits (2000).

[11] Groenhuijsen (2003).

[12] Smits (2000), 16, 23–24.

of prospective overruling in the classic sense.[13] Some Dutch authors nevertheless consider Boon v. Van Loon to be an example of what they call 'qualified prospective overruling'.[14]

A similar example where no prospective overruling occurred but where the Court decided about the effects of its judgment in time is ECLI:NL:HR:2013:BZ2653. It is a criminal case concerning the definition of rape. The defendant had forced a French kiss upon the victim. In earlier case law, this had been qualified as rape by the Court since it was considered to be sexual penetration of the body of the victim without consent. In the case at hand, the Supreme Court explicitly changed its approach. It ruled that a French kiss cannot be equalled to sexual intercourse or a similar act. Consequently, the Court determined that a forced French kiss would not be qualified as the crime of rape according to the applicable article of the Dutch Criminal Code anymore. The Court also decided that its new interpretation of rape could not be considered as a new (factual) circumstance that would allow those convicted of rape in earlier cases to reopen their case by way of the remedy of 'revision'. Consequently, the relevance of the Court's new interpretation of rape was limited to the case at hand and future cases (*ex nunc*).

When it comes to questions of admissibility, the Criminal Law Division of the Supreme Court has recently been more specific in its approach to judicial transition rules. When the aforementioned Act on Strengthening Cassation entered into force on 1 July 2012, several cases were pending before the Supreme Court that were deemed to qualify for the new fast track inadmissibility procedure. Since no transition period was stipulated by the Legislature, it was up to the Supreme Court to decide whether or not pending cases could be subject to this new procedure.[15] The Supreme Court (or at least, the Criminal Law Division of the Supreme Court) ruled that it would only apply the new procedure in cases in which cassation was filed for after 1 October 2012, because before that date the parties preparing a procedure before the Supreme Court could not have known if and when the Act on Strengthening Cassation would enter into force. Although this case law is prospective in nature, it cannot be seen as prospective overruling, given the fact that the Supreme Court did not overrule its own case law, but rather set a fixed date for application of new legislation.

A final example of a case that cannot be classified as prospective overruling is HR 24 April 1992, NJ 1993, 643. It concerns a case in which the Supreme Court was, nevertheless, concerned about the effects of its ruling in time. In the case, the Court determined when pollution of the environment (soil) can be viewed as a tort for which the State can claim damages from those responsible for the pollution

[13] Kottenhagen (1986), 279 ff.

[14] Uzman et al. (2010), p. 27.

[15] On 11 September 2012 (NJ 2013, 241; NJ 2013, 242; NJ 2013, 243; NJ 2013, 244) the Supreme Court ruled on four different cases that were used as test cases (with four different Attorneys General rendering conclusions) in this regard. All cases qualified for the new fast track procedure, but were declared inadmissible on the basis of the 'old' procedure.

(given the fact that the State will incur costs for cleaning up the polluted soil). The Supreme Court decided that such behaviour can only be considered a tort from 1 January 1975, since at that time it must have been clear for businesses that the State would take action in such cases to clean up the environment and incur costs, something that was according to the Court not clear before this date (although this date might in the opinion of the Court not be applicable in some cases of very severe pollution in which the required clarity may have existed before the date mentioned in the judgment).

Criticism of the Retrospective Effect of Judicial Decisions in the Netherlands

The retrospective effect of judicial decisions has been criticized in the Netherlands in legal writing, but only to a limited extent.[16] Generally speaking, the effects in time of judicial decisions have only received attention rather sparingly. This may also be due to the fact that the courts use various techniques to limit the effects of judicial decisions where such is necessary without using transition rules. In his PhD thesis, O.A. Haazen lists a variety of these methods, such as (1) unlimited retrospective effect of the judicial decision combined with an exception for the parties to the action in cases where the application of the rule would not be reasonable and equitable, (2) unlimited retrospective effect with an exception for specific types of cases, (3) retrospective effect for a specific time period only (e.g. 40 years), (4) unlimited retrospective effect unless an excusable *error iuris* can be proven, etc.[17]

The Use of the Technique of 'Prospective Overruling' in the Netherlands

Prospective overruling was first discussed in Dutch legal literature in 1950, in an inaugural lecture by J. Drion.[18] An early example of attention for the effects of judicial decisions in time by the Dutch Parliament dates from 1958. In that year the Dutch Parliament discussed a bill on fiscal procedure 'and some members submitted that a Supreme Court decision reversing a previous ruling should only apply to facts and circumstances that would transpire after the publication of that decision'.[19] This

[16] Cf. Kottenhagen (1986) and Haazen (2001).

[17] Haazen (2001), 27–28.

[18] Drion (1950).

[19] Gribnau and Lubbers (2013), 185. Cf. Parliamentary Papers 1958/59, 4080, no. 7, 4.

proposal for prospective overruling generated little enthusiasm in Parliament, and did not give rise to a change in the law nor in judicial decisions.[20]

The number of cases in which 'prospective overruling' has been used by the Dutch courts is limited. An important example in the area of private international law is a case about the applicable property regime governing a marriage concluded under the 1905 Hague Convention on the Law applicable to Matrimonial Property Regimes, which was subsequently denounced by the Netherlands in 1977 and replaced by new rules. In this case the Dutch Supreme Court decided that the new law would not be applied to the case at hand, nor to previous cases, and this decision was motivated by the requirements of legal certainty (HR 27 March 1981, NJ 1981, 335 (known as 'Haagse Italianen')).[21]

HR 17 January 2003, NJ 2003, 113 is another example of prospective overruling. It is a case in which cassation appeal was lodged at the Dutch Supreme Court against a judgment of the court of appeal in the town of 's-Hertogenbosch. One of the defendants was domiciled in Belgium and, therefore, the summons had to be served on that defendant according to the EU Service Regulation. Article 9(2) of this Regulation determines that 'where according to the law of a Member State a document has to be served within a particular period, the date to be taken into account with respect to the applicant shall be that determined by the law of that Member State'. When service was effected in the case at hand, the law of the Member State, i.e. Dutch law, was not clear according to the Supreme Court. As a result of this, mistakes had been made in the service of the summons and the claimant was of the opinion that these mistakes could be corrected later in the procedure. The Court determined that in this case it would indeed offer the claimant the possibility to correct its mistake even though it had become clear in the meantime that the applicable law prevented such correction. The Court explicitly ruled that it would also allow a correction in other cases where this mistake had been made, provided that the incorrect service had been effected before 1 April 2003 at which time the right interpretation of the law should be considered known to all litigants.

Another case in which the law was considered to be unclear is HR 27 April 2007, NJ 2008, 121. The unclearness concerned the moment a cassation appeal should be lodged at the Dutch Supreme Court against rulings of the Court of Justice of the (former) Netherlands Antilles and Aruba in which only part of the case was decided by way of a final judgment. Here, also, the Supreme Court decided that it would do justice according to what now appeared to be the wrong interpretation of the law, but only up to a certain moment, in this case for cassation appeals lodged against judgments of the Court of Justice that had been pronounced before 1 June 2007. For the future, the right interpretation would be followed.

A final example of a case in which the law was considered to be unclear by the Dutch Supreme Court is HR 27 May 2011, NJ 2012, 625. The case concerned the time period in which an appeal could be lodged against a judgment of a court by

[20] Gribnau and Lubbers (2013), 185.

[21] Smits (2000), 22.

a trustee in bankruptcy proceedings. The Supreme Court decided that its ruling in this case made clear what was previously unclear, i.e. the procedural steps that had to be taken by the trustee for filing the appeal, and therefore the Court decided that in this case the relevant time period for filing the appeal would only start to run for the trustee from the day after it had given its judgment. This would be different in future cases since in these cases the law would be clear as a result of the ruling of the Supreme Court.

Other examples of cases in which prospective overruling occurred concern tax law and social security law. It is held in the Netherlands that the Dutch Supreme Court and the other highest courts are more likely to provide a transition regime in tax law or social security matters than in the area of private law.[22] Since administrative agencies that operate in these fields issue large quantities of similar decisions, not providing such a regime could result in the opening or re-opening of vast numbers of legal procedures.

In the field of social security law the Central Appeals Tribunal changed its position on the question whether the relationship between a company and its managing director should be considered to be an employment relationship, if this director is also the main shareholder of the company. Answering this question was important when it came to qualifying for certain benefits (e.g. disability benefits). Beginning in 1968, the mere existence of a labour contract between the company and its managing director sufficed. In 1985 the Tribunal concluded that it would be more suitable to determine the relationship between the director and the company on the basis of the specific circumstances of each case, rather than on the basis of the existence of a labour contract. In light of legal certainty, however, the Tribunal postponed the effects of its change in interpretation until the moment 'the revised opinion of the Tribunal would be sufficiently commonly known'.[23]

In 1987 the same Tribunal declared a decision of 9 February 1984 to revoke the unemployment benefits of a woman because of her marriage discriminatory and the legislation on which this decision was based in direct violation of Article 26 of the International Covenant on Civil and Political Rights. In applying Article 94 of the Constitution as mentioned before, the Tribunal allowed the Legislature to develop new rules, rather than imposing its own. This case does, however, offer one of the very few examples in which the Tribunal 'warns' the Legislature implicitly to act, because it states that in cases on similar administrative decisions after 23 December 1984 it will strike down administrative discriminatory decisions regardless of the consequences for the national finances.[24] And indeed the Tribunal kept its word. In a 1989 case concerning pensions, the discrimination of widowers, who did not qualify for certain pensions even though widows and orphans did, wasruled in violation of

[22] Ibid., 25.

[23] CRvB 4 October 1985, AB 1986, 38.

[24] CRvB 14 May 1987, RSV 1987, 246.

Article 26 of the Covenant. Since the administrative decision with regard to the widower involved was made after 23 December 1984, he was granted the pension as a result of this ruling.[25]

The Tax Division of the Dutch Supreme Court can impose a transition measure to limit the temporal effect of its decisions and has up to now done so on a number of occasions.

> In broad outline, tax courts can currently draw on three categories of transition measures. The first category concerns transition measures whose gist is that the aim and purpose of the old regime continue to apply to certain specified cases. 'Prospective overruling' falls within this category. The second category concerns transition measures whose effect is that the new regime applies only in part. This category contains such arrangements as transition schemes [scope of application of the new regime widens incrementally every year] and phase-out schemes [scope of application of the new regime narrows incrementally every year]. The third category concerns optional schemes, where the taxpayer has a choice: he can opt for either the old regime or the new one.[26]

Prospective overruling occurred in at least three decisions in tax matters, two from 1991 and one from 2000.[27] 'In these decisions the Court reversed its position on the issue of sound business practice to the taxpayer's disadvantage.' In HR 13 November 1991, BNB 1992, 109 the relevant part of the decision reads as follows:

> 3.6 The circumstance that the party interested could rely on existing case law for considering his method of calculating profits in line with sound business practice, implies that he cannot be requested to pass to another calculation method without any limit. Such transition should reasonably meet legitimate expectations.
>
> This requirement is violated if the taxpayer has to abandon his usual method of calculation regarding loans and bonds already acquired. Therefore it is acceptable for the taxpayer to apply the old calculation method for bonds that he had already purchased when he could first take account of this court's decision, namely 1 January 1992. Bonds purchased after this date, have to be valued in accordance with what sound business practice requires ...[28]

The two other cases concerning 'sound business practice' (in which a similar decision was taken) are HR 18 December 1991, BNB 1992, 181, and HR 28 June 2000, BNB 2000, 275.

According to Gribnau and Lubbers, 'Compelling justification for using prospective overruling is needed in tax matters, for example an anticipated disproportionate budgetary impact of the court decisions on public revenue.'[29] As stated above, the same rationale seems to apply in social security matters.

In tax matters, one also finds cases where the Court declares that it will not change its case law, but that it may do so in the future if the Legislature does not

[25] CRvB 7 December 1988, AB 1989, 10.

[26] Gribnau and Lubbers (2013), 193.

[27] Ibid., 192.

[28] This translation is derived from Gribnau and Lubbers (2013), 182.

[29] Gribnau and Lubbers (2013), 195.

introduce new legislation.[30] In such cases the Court grants the Legislature a *terme de grâce* to amend e.g. unjustified discrimination in violation of Article 26 of the International Convention on Civil and Political Rights. In these cases the Legislature is not obliged to introduce legislation retroactively. Statute may enter into force for the future only. If the Legislature fails to amend legislation, the Court may initiate regulatory modification. Any judicial decision that follows from such an initiative will only be applicable to future cases and, therefore, this may be qualified as a kind of prospective overruling.[31] Relevant case law is HR 15 July 1998, BNB 1998, 293 and HR 12 May 1999, BNB 1999, 271, in which the violation of Article 26 of the Convention was established, but referred to the Legislature in a similar fashion as the case concerning the unemployment benefits for married women, and HR 24 January 2001, BNB 2001, 291 and 292, where it was decided that the Legislature had indeed introduced the relevant legislation and that no court intervention was needed.

In criminal law, one finds cases in which the Dutch Supreme Court applies prospective overruling too. An example is HR 6 January 1998, NJ 1998, 367 ('Pikmeer II'). The case concerned criminal liability of decentralized administrative organs. In this case, the Supreme Court considered that it would change its case law, but also determined that in the case at hand it would still apply previous case law. Legal certainty was one of the relevant reasons for opting for prospective overruling.

Another example of prospective overruling is HR 27 February 2001, NJ 2001, 499. The case concerned the question whether an appeal against a first instance decision in criminal matters in which the defendant had *not* been indicated by his name, could also be lodged without the defendant indicating his name. Previously this had been deemed possible, but in the case under consideration the Supreme Court decided that this would no longer be possible for the reasons provided in the court decision. Nevertheless, the Court also decided that it would hold the anonymous appeal in the case at hand admissible since in the opinion of the Court the defendant could not have been aware of the change.[32]

HR 12 November 2002, JOL 2002, 621 is a criminal case in which (amongst other things) the interpretation of a particular article of the Dutch Criminal Code was at issue. The article regulates the powers of the defendant's lawyer while the defendant is absent in court. The Supreme Court decided that the interpretation of this article had been under discussion for some time and that as a result the lawyer had not acted in the manner that was prescribed according to the interpretation of the article which the Court now considered to be correct. Therefore, the Court decided that it would disregard the fact that the lawyer had made the relevant mistake and would continue hearing the case.

[30] Wattel (1990), 528; Smits (2000), 23.

[31] Gribnau and Lubbers (2013), 191–192.

[32] '3.8. Niettemin zal de Hoge Raad in dit geval, nu de verdachte niet bekend kon zijn met deze gewijzigde opvatting, de verdachte in zijn beroep ontvangen.'

In administrative law, several examples of prospective overruling can be found. Some of these examples require a basic knowledge of Dutch administrative law: for a case to be admissible before an administrative court, the party concerned first needs to file a complaint against an administrative decision with the administrative body that made it. Only if this procedure is not satisfactory, can the party lodge an appeal with an administrative court.

One of the first examples is a 1984 case before the Trade and Industry Appeals Tribunal concerning the administrative decision to temporarily revoke a transport company's permit for violating the terms of the collective employment agreement for chauffeurs. In the standing case law of the Tribunal these administrative decisions were suspended for the duration of the court proceedings (thus allowing companies, for the time being, to proceed as usual). The Tribunal changed its position on these semi-automatic suspensions, but argued nevertheless that a sudden change in case law was not desirable. It granted the company the suspension it sought, but ruled that its new position on the matter would be applied to all similar cases from 1 January 1985 onwards.[33]

In a 2004 case, the question at hand was whether or not a Milk Control Station was an administrative organ as indicated above. If so, its decisions would have legal effect and (but this was not in dispute) an appeal to an administrative court would (eventually) be admissible. For technical reasons concerning Dutch administrative law, the Milk Control Station (as well as similar organizations) was no longer considered to be an administrative organ in the eyes of the Trade and Industry Appeals Tribunal. To grant the supervisory bodies on dairy production a transition period to get 'their statutes and decision making process' in order, the Tribunal decided to effectuate this change in case law from 1 January 2005 onwards.[34]

In the Brummen case of 2003, the Administrative Jurisdiction Division of the Council of State ruled that an administrative decision and the grounds on which it rested were presumed to be legal if the grounds on which an appeal was filed against it were dismissed by an administrative court in prior judicial proceedings, and the party involved refrained from lodging further appeals with the highest administrative courts. The Division did not hold this break in its standing case law against the plaintiff, because he laboured under the assumption of the earlier case law. The change of interpretation by the Division was only to be implemented in later cases.[35]

In 2011 the Administrative Jurisdiction Division of the Council of State decided that all pollution-related grounds for appeals in cases concerning environmental permits (*omgevingsvergunningen*) under the new Act on General Provisions of Environmental Law (Wet algemene bepalingen omgevingsrecht) were allowed before an administrative court if during the prior complaint procedure at least one pollution-related complaint was lodged. This means that if during the prior procedure complaints regarding, for example, noise pollution were made, all other

[33] Cbb (vz.) 19 April 1984, AB 1985, 554.

[34] Cbb 19 May 2004, AB 2004, 269.

[35] ABRvS 6 August 2003, AB 2003, 355.

pollution-related appeals (e.g. water pollution) would be admissible. In case law concerning permits under the old system for pollution-related complaints, this leniency was not practised. The case before the Division concerned a permit under the old system, and these cases can be lodged before the Division for years to come. In order to create some degree of unity in case law, the Division found that the appeals in cases concerning permits under the old system would be adjudicated by using the interpretation it gave for permits under the new system. However, in light of legal certainty, this change of case law would only be applied to cases in which the original administrative decision was made after 1 April 2011.[36]

A final, and recent, example of prospective overruling can be found in ABRvS 29 February 2012 AB 2013, 235 in which the Administrative Jurisdiction Division of the Council of State stated that 'from now on ... new grounds of appeal will only be admissible, if they are filed no longer than 3 weeks after the Division has asked for an expert's report'.

The Circumstances or Contexts in Which It Might Be Appropriate to Use or Not to Use the Technique of Prospective Overruling in the Netherlands

The courts in the Netherlands seldom pay explicit attention to the effects in time of their judgments. Where they do, it seems that no effort is made to formulate general rules, but solutions are provided on an *ad hoc* basis.[37]

In criminal law, the following (cumulative) criteria have been advocated in legal literature[38] for prospective overruling to be justified:

1. The judicial decision which produces a change in the interpretation of the law must significantly affect the criminal liability of the defendant or his position as a party in the criminal lawsuit;
2. This judicial decision must be detrimental to the defendant;
3. The change could not have been anticipated by the defendant when he committed the acts for which he is prosecuted.

Van Kreveld[39] found that from 'the modest volume of relevant case law of the highest administrative court' in the Netherlands it appears 'that there is a cause for limiting the temporal effect of a judicial decision if the following cumulative conditions are met:

1. The new interpretation signals a sudden and fundamental change;

[36] ABRvS 9 March 2011, AB 2011, 130.

[37] Haazen (2001), 630–631.

[38] Groenhuijsen (2003).

[39] van Kreveld (2008), 212.

2. Groups in society or administrative bodies have acted in good faith and in keeping with the older, rejected interpretation;
3. Full or partial retroactive force clearly leads to substantial social or administrative problems, seriously disadvantages citizens, or necessitates a full, if pointless, repetition of countless decision-making processes;
4. On balance it is to be preferred that the courts limit these consequences of the retroactive force of transition law themselves, rather than that they leave it to the legislator or the executive.'[40]

'Van den Berge[41] argues that limiting retroactive force should not be an option in cases of adjusting case law, concretising standards, correcting errors or making alterations resulting from increased understanding.'[42]

The Advantages or Disadvantages That Have Been Identified in the Netherlands as Regards Prospective Overruling

Obviously, the most important advantage of prospective overruling that has been identified in the Netherlands is that it serves legal certainty in the sense that the court announces a new interpretation for future cases only.

An important disadvantage that has been identified is that by way of prospective overruling the development of the law is realized at the expense of the litigants in the individual case. These litigants will not benefit from the new interpretation. It has been suggested that this problem may be circumvented by making active use of 'cassation in the interest of the law' for providing new interpretations or by announcing new interpretations by way of *obiter dicta* in cases where the new interpretation cannot be applied due to procedural reasons or due to issues of substantive law.

Some authors have claimed that one should differentiate between the application of the new interpretation *ex nunc* (i.e. for the case at hand and future cases) and the application for future cases only (prospective overruling). Where the new interpretation is not revolutionary in the sense that the parties could have known about it beforehand the new interpretation should be applied *ex nunc*, whereas prospective overruling should be reserved for cases where the new interpretation is so revolutionary that it could not have been expected by the litigants.[43]

[40] Gribnau and Lubbers (2013), 194.

[41] van den Berge (2005), 40.

[42] Gribnau and Lubbers (2013), 194.

[43] See for the topics discussed in this section: Kottenhagen (1986), 276 ff.

The Argument that Prospective Overruling Should Not Be Used When a Decision Turns Purely on the Construction of a Statute

In the Netherlands, we have not found the argument that prospective overruling should not be used when a decision turns purely on the construction of a statute. However, we found the related argument that judicial decisions should *not* have retrospective effect in certain cases (as a result of which the judge should decide *ex nunc* or by way of prospective overruling). Retrospective effect is acceptable when courts purely interpret legal rules. It becomes problematic, however, when the Legislature provides open-ended norms which have to be applied by the judge or when the court creates new jurisprudential rules or reverses formerly established case law. Especially in the latter case, deciding *ex nunc* or by way of prospective overruling seems to be justified.[44]

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[44] Cf. Popelier et al. (2013), 5.

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