CHAPTER VII

The Netherlands

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The study of the legal validity of the European system for the protection of human rights, compared with the national practices in the field of criminal policy, provides an exemplary illustration of the legal validity of international rules within the national legal systems. In my view, an appraisal of that legal validity cannot be carried out except in the light of an assessment based on the various interactive criteria (legitimacy, effectiveness, rationality).[1] Jurists have too often assessed the validity of rules in the light of the dominant approach of their particular specialization. Lawyers specializing in international law have been exercised above all by formal, rational validity, without addressing themselves to the real effectiveness of the rule. Criminal-law specialists, for their part, have only addressed themselves to the validity of European rules when they actually had a bearing on practice in the field of criminal law. For many lawyers, the question of the legitimacy of the rule was a question of legal philosophy.

Since people have started to study the empirical effectiveness of the European rules within the national legal systems, they have come to realize that that effectiveness – albeit an important criterion in itself – varies according to the type of underlying legitimacy and rationality. When it comes down to it, effectiveness varies in accordance with a number of interactive characteristics peculiar to the treaty concerned, peculiar to the type of implantation or incorporation and peculiar to each State. It is by studying that interaction of variables that lawyers have observed that the effective implantation of European rules does not depend primarily on the status of the treaty in the particular domestic legal order (dualism or monism), but on the attitude of the judiciary vis-à-vis the treaty and on the judiciary 's view as to its position within the *trias politica*.

I. The Power of the Judiciary and the Legal Status of Treaties within the National Legal System in the Netherlands

For a proper understanding of the variables peculiar to the treaty and peculiar to the type of implantation or incorporation and their interaction with the

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power of the judiciary, it is important to distinguish between the following concepts: (§ 1 legal force; (§ 2) domestic effect; (§ 3) direct effect and (§ 4) primacy.[2]

§ 1 – Legal Force

Ratification of treaties determines their entry into force in general and their entry into force for a given State in particular. Formally the State is responsible from then on for the application of the treaty. The substance of that responsibility varies substantially depending on the character and the aim of its provisions. Some prescribe only the result to be achieved; others require the State to utilize certain instruments and methods in order to achieve the result in question. The kind and aim of such provisions therefore determine the kind and aim of the discretion vested in the institutions of the State – including the judiciary – and having regard to their obligations.

The European Convention on Human Rights was ratified by the Netherlands on 31 August 1954.[3]

§ 2 – Domestic Effect

Although States may commit themselves internationally to incorporate the international rules into their domestic legal order in a predetermined way,[4] it is normally constitutional law and convention that prescribe the legal consequences flowing from the international law and having a bearing on the domestic legal order (domestic effect). Under the influence of dualism,[5] the States are against international rules having a legal effect within the domestic legal order unless they have been incorporated or national legislation has been altered. Between ratification and incorporation or transformation, the domestic effect of a treaty may only be based on the concept of the rule of presumption, whereby the judiciary may, in interpreting national laws, presume that the legislature did not intend to legislate or maintain laws contrary to its obligations under the treaty.

In the Netherlands, where international law and domestic law are regarded as forming parts of a single legal order (monism), international rules have legal effect *per se*. They are applied within the domestic legal order as rules of an international nature and of international origin. Furthermore, Article 93 of the Netherlands Constitution expressly provides that "provisions of treaties and of decisions of international organizations, the content of which may be binding on everyone, shall have binding effect after having been made public". Consequently, at national level all the legislative and executive authorities are bound to respect those obligations within the limits of their respective powers. As far as direct application by the courts is concerned, international rules must have direct effect.

§ 3 – *Direct Effect*

International rules have direct effect (or are self-executing) when the judiciary can apply them without any implementation or execution by an international or national authority. Although some treaties provide that rules are to have direct effect,[6] in most cases it is the judiciary which decides.[7] As far as the European Convention on Human Rights is concerned, a special situation is involved, since the European Court of Human Rights decides whether national judicial decisions – irrespective as to whether they are based on self-executing rules – comply with the rules laid down in the Convention.[8]

In the Netherlands, the Constitution does not simply authorize the courts to apply so-called self-executing rules even if they conflict with rules of national law, it states that this is a legal and constitutional duty: "Regulations which are in force in the Kingdom of the Netherlands shall not be applied if this application is not in conformity with provisions of treaties or decisions of international organizations which are binding upon everyone" (Constitution, Art. 94). In such cases no legislative or administrative implementation is required.[9] However, the relationship between those rules which are self-executing and the Constitution remains blurred, since the courts in the Netherlands are not empowered to rule on the constitutionality of laws, or hence on the constitutionality of treaties (Constitution, Art. 120), but check whether the legislation complies with self-executing rules laid down in the treaties.

Likewise, according to Article 93 of the Constitution decisions of international organizations may have direct effect – and hence have the status of domestic law. The classic example is Common Market regulations. However, the courts in the Netherlands have gone much further. As long ago as 1980 the *Hoge Raad* (Supreme Court) decided that the legal distinction between legitimate and illegitimate children had changed a great deal and that that development was reflected in the judgment of the Court of Human Rights in the case of *Marckx*. The *Hoge Raad* took the view that the national courts had to take this into account, which meant that the *Hoge Raad* gave the decision in *Marckx* virtually the force of law.[10] In a recent case on the use of an anonymous witness in criminal proceedings, the European Commission on Human Rights considered that that practice did not comply with the Convention. In the light of the decision of that quasi-judicial institution, a court in the Netherlands suspended imprisonment in a similar case.

Likewise the decisions of the European Commission on Human Rights on the admissibility of complaints have been used by the national courts.

§ 4 – *Primacy*

In countries following the dualist system which employ incorporation or transformation it is clear that the rule *lex posterior derogat lege priori* applies.

The situation is less clear-cut in the monist system, where self-executing rules are integrated into the legal order.

The basic principle is as follows: the effectiveness of international rules is based intrinsically on their primacy over national law. That principle has also been incorporated into the Constitution of the Netherlands. Article 94 provides that national legal rules in force the application of which would be incompatible with directly effective rules of treaties or decisions of international bodies cannot be applied. This means that those international rules always have primacy, even if they conflict with later national rules or national constitutional rules.

II. The Effect of the Limitations and Exceptions Set out in the European Convention on Human Rights[11] on the National Legal System: The Attitude of the Judiciary in the Netherlands[12]

§ *1 – Legal Exceptions*

Article 5 § 1 of the Convention states that everyone has the right to liberty and security of person. Although this right is not expressed in absolute terms, the Commission has always regarded it as forming a whole.[13] Moreover, Article 5 § 1 only provides protection against deprivation of liberty. Other restrictions on the physical freedom of a person are in principle excluded from the protection of Article 5 § 1, although the Court did decide in the *Guzzardi* case[14] that compulsory residence on an island, accompanied by restrictions on social contacts, constituted deprivation of liberty. This shows that the distinction between deprivation of liberty and other restrictions on liberty is not particularly clear-cut and that, instead, account must be taken of degree or intensity rather than nature or substance.

Indents a) to f) of Article 5 § 1 provide for a series of legal exceptions relating to the penal system from the point of view of both the sanction imposed for offences and supervisory and protective measures. The latter may concern persons who are not guilty of any offence, such as minors, persons suffering from infectious diseases, persons of unsound mind, vagrants, aliens pending their deportation, etc.

The exceptions set out in indents a) to f) of Article 5 § 1 are expressly authorized subject to their being effected in accordance with a procedure prescribed by law. To deprive a person of his liberty in accordance with a procedure prescribed by law implies that the deprivation of liberty has been effected in accordance with the procedure and substance of national law. The Commission and the Court of Human Rights are not entitled to put themselves in the place of the national courts, which are responsible for verifying that national laws have been correctly interpreted and applied, and have the duty of ascertaining that the laws have not been applied arbitrarily. What is more, they must verify whether the legal procedures themselves are consistent with the

Convention, which confers on them the right and the duty to effect a marginal review of national laws and their application.[15] In a case relating to the conformity with Article 5 § 1 of the law relating to military discipline in the Netherlands, the Court stated as follows:

"Each State is competent to organize its own system of military discipline and enjoys in the matter a certain margin of appreciation. The bounds that Article 5 requires the State not to exceed are not identical for servicemen and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. Nevertheless, such penalty or measure does not escape the terms of Article 5 when it takes the form of restrictions that clearly deviate from the normal conditions of life within the armed forces of the Contracting States. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question".[16]

The reception of the legal exceptions set out in indents a) to f) of Article 5 § 1 by the legal system in the Netherlands has made itself manifest, as far as the judiciary is concerned, above all in three sectors: persons of unsound mind, aliens, and prohibitions on freedom of movement in certain localities. I should like simply to point to certain matters which have been the subject of judicial decisions, without entering into the subject-matter proper.[17]

A – Persons of Unsound Mind

The fact that certain aspects of the legal status of persons of unsound mind in the Netherlands were problematic from the point of view of their conformity with the Convention was clearly illustrated by the cases of *Winterwerp*[18] and *Hendrika Wilhelmina van der Leer*.[19]

On several cases the *Hoge Raad* has held that the detention of a mentally ill person in a psychiatric asylum on the basis of a telephone inquiry by the President of the *Arrondissementsrechtbank* (District Court) to the patient 's doctor and the police which did not afford the patient or his lawyer the opportunity to respond, constitutes a violation of both Article 35 i § 3, and Article 17 of the *Krankzinnigenwet* [Mentally Ill Persons Act] and of Article 5 § 1 of the Convention.[20]

B – Aliens

The courts in the Netherlands have frequently had occasions to rule on the conformity with the Convention of the application of the laws relating to aliens, in particular in the case of the lawfully arrest or detention of a person for the purposes of preventing illegal entry into Dutch territory or of a person against whom deportation or extradition proceedings are pending. In several cases aliens who were at risk of being deported or extradited refused to disclose their

identity and nationality, which extended the period during which they were kept in custody.

An initial line of cases is concerned with the period of detention pending deportation or extradition. In one case,[21] after having been detained six months under Article 197 of the Penal Code (return to the Netherlands following deportation), the appellant had been held in detention for four months under the *Vreemdelingenwet* (Aliens Act). He maintained that such detention pending deportation was contrary to Article 5 § 1 f), since the State was no longer making the necessary efforts to establish his nationality. The court decided that deportation within a reasonable time was still possible and that therefore the detention was effected in accordance with a procedure prescribed by law.

In another case, the appellant,[22] who was residing illegally in the Netherlands, had already been deported on several occasions. In this case, he asked, in summary proceedings, for the withdrawal of the deportation order and its suspension until such time as the decision had been taken and as the European Commission of Human Rights had issued its decision on admissibility. The *Arrondissementsrechtbank*, Rotterdam, held that the cause of the detention was the appellant 's attitude, that the European Commission of Human Rights had not asked for his deportation to be suspended and that, therefore, he was detained in accordance with a procedure prescribed by law.

The *Gerechtshof* (Court of Appeal), The Hague, decided in a case concerning extradition[23] that deprivation of liberty in the case of the appellant, whose nationality was doubtful, was consistent with Article 5 § 1 f) of the Convention. In addition, the European Commission of Human Rights had refused under Article 36 to apply to the Netherlands Government to suspend the extradition proceedings.

A second line of cases was concerned with potential political refugees staying at the "residence centre" at Amsterdam airport. In one case,[24] the President of the *Arrondissementsrechtbank*, Haarlem, decided that such a stay, which was based in law on Article 6 of the *Vreemdelingenwet*, could not be regarded as detention within the meaning of Article 26 of that Act, and that therefore there was no question of a deprivation of liberty within the meaning of Article 5 § 1 of the Convention. The fact that the persons ' movements were restricted during such a stay did not mean that physical detention was involved, since they had the opportunity to leave Netherlands and were free to do so.

A similar decision was taken by the *Arrondissementsrechtbank*, Haarlem, on 16 September 1985.[25] In that particular case a parallel can be drawn with the case of *Engel*, in which certain restrictions on soldiers ' freedom were also not considered to constitute a deprivation of liberty.[26] Quite recently, the *Hoge Raad*[27] held that it is not permissible to deprive of his physical liberty a person who has been refused access to the territory but is *de facto* in the territory of the Netherlands (in the airport) and is therefore under the jurisdiction of the Dutch authorities, unless that deprivation of liberty falls within one of the exceptions set out in Article 5 of the Convention and is provided for by law. The *Hoge Raad* considered that the *Vreemdelingenwet* made no provision for an

exception of this kind and that therefore there was no legal basis. As a result, the Government introduced a legal reform to that effect which was passed on 17 January 1989.

C – Prohibition on Free Movement in Certain Places

In a well-known decision,[28] the *Kantongerecht* (Cantonal Court), Utrecht, banned a prostitute, who was a heroin addict and had already been found guilty, from frequenting certain areas of the city between 9 p.m. and 4 a.m. She was also debarred from using public transport at those times. That restriction on her liberty was declared to be consistent with Article 5 § 1 of the Convention and Article 2 of the Fourth Protocol.

In another case, the provisional detention of a suspected rapist had been suspended by the public prosecutor because of lack of space in the prisons, on condition that he did not enter a particular park in Amsterdam or the area of city where the victim lived. The President of the *Arrondissementsrechtbank*, Amsterdam, declared that the restrictions on the suspect's freedom of movement were not disproportionate, although he did not give substantive reasons for his decision.[29]

A person who had been convicted for an offence under the *Opiumwet* (the Dutch law on narcotic drugs) had been forbidden to enter certain quarters of Rotterdam pursuant to a police regulation. Before the *Hoge Raad* the person in question relied on Article 2 of the Fourth Protocol, arguing that the rules were not sufficiently clear and that therefore he could not have foreseen that sanction. The *Hoge Raad* decided nevertheless that that restriction on his freedom of movement, which was not a radical one, was in accordance with the law and necessary in a democratic society for the protection of heath and morals.

§ 2 – *Lawful Restrictions under Articles 8 to 11 and Article 2 of the Fourth Protocol*[30]

A – State of the question

These articles of the Convention and of the Fourth Protocol provide that everyone has the right to respect for his private and family life, his home and his correspondence; to freedom of thought, conscience and religion; to freedom of expression; to freedom of peaceful assembly and to freedom of association; and to freedom of movement. However, the exercise of those rights may be subjected to legitimate limitations, for instance, for the protection of morals, the protection of the rights and freedoms of others, the prevention of disorder or crime, and so on. Fundamentally, through the technique of legitimate limitations, the State reserves itself a margin of appreciation through which it safeguards the exercise of its sovereignty when national interests are at stake.

In order to determine whether the law or a national practice is consistent with the Convention, it is necessary to answer three questions:
- is there an interference with the right(s) of the citizen?
- is that interference prescribed by national law?
- is the restriction or interference necessary in a democratic society with a view to attaining one of the aims which are set out, exhaustively and explicitly, in the articles of the Convention?

In accordance with the recent caselaw of the European Court of Human Rights, this assessment will be carried out bearing in mind that there is no room for the concept of inherent limitations.[31] According to the theory of inherent limitations, the rights of persons in a particular legal situation (prisoners, mental patients, military personnel, officials) are more limited than those of other persons. According to that theory, it is not the exercise of the relevant rights which is restricted, but the content of the rights themselves. In order to ascertain the legal situation of prisoners, for example, it is essential to know whether the restrictions on their rights must comply with the limitations laid down in the articles of the Convention or whether they may go beyond that. For a time, the Commission considered that application of the limitations set out in the Convention was unnecessary in the case of censorship of or restrictions on prisoners' correspondence. In the Commission's view, in that context limitations of that type were inherent in imprisonment, even in the case of correspondence between a prisoner and his lawyer. The Court rejected that view, emphasizing that the rights and limitations set out in the Convention form a whole and that each limitation of those rights must be necessary in a democratic society with a view to one of the aims exhaustively and expressly specified in the Convention.[32] In effecting that evaluation the special position of prisoners may be taken into consideration, which means that in reality the prison authorities and the judicial authorities have a wide discretion. In addition, the Commission has sometimes initiated independent investigations with a view to establishing whether restrictions on prisoners' correspondence, for example, were reasonable and truly necessary in a democratic society.[33]

The remaining question is whether the national authorities may utilize the concept of inherent restrictions as regards rights for which no limitations are provided for in the Convention and which are not expressed to be absolute rights ("*Notstandsfest*")[34] which can be subject to no limitation, not even in time of war. In the *Golder* case the Court answered this question in the affirmative,[35] which is therefore illogical.[36]

The Court explained in the *Sunday Times* case what is to be understood by "prescribed" or "provided by law":
- the law does not have to be formal, statute law, there merely has to be a basis in national law;
- the law must be adequately accessible;
- the law must be reasonably comprehensible to the citizen;
- the citizen must be able to foresee the consequences that a given action may entail (the requirement of foreseeability).

Legitimate limitations are formulated in analogous terms in all the other similar articles, with the exception of Article 10. The exercise of the freedoms set out in Article 10 carries with it duties and responsibilities and may be subject, not only to restrictions, but also to such formalities, conditions and penalties as may be prescribed by law. At first sight, it is surprising that restrictions on freedom of expression itself should be so broadly defined. In practice, it matters little whether the complaint is brought against the application of the legal rule restricting the exercise of this right or against the sanction imposed for infringing that rule.

Article 10 § 2 also refers expressly to the duties and responsibilities of those who exercise the rights in question. According to the caselaw of the Court of Human Rights, that reference to duties and responsibilities makes it possible to have regard to "the particular situation of the person exercising freedom of expression and to the duties and responsibilities that are incumbent on him by reason of this situation".[37] What is important is that that reference does not invariably extend the restrictions, but at times curtails them. The Commission took that view expressly in the *Lingens* case, where a journalist had been convicted for defamation for publishing an article criticizing the former Austrian Chancellor Kreisky:

"It is obvious that by his public office a politician exposes himself to public criticism to a larger degree than the ordinary citizen. The existence of such criticism is an essential condition for the functioning of an 'effective political democracy' as defined in the Preamble of the Convention (...). To exercise such control is not only a right, but may even be considered as a 'duty and responsibility' of the press in a democratic State".[38]

B – The Situation with Regard to Legitimate Limitations in the Netherlands

Numerous aspects of criminal proceedings may be subjected to review as to their compliance with the limitations set out in Articles 8 to 11 of the Convention and Article 2 of the Fourth Protocol. They cover the criminal charge, the preliminary investigation (as regards legitimate evidence and private life, for example), the sentence (for instance, a ban on free movement in certain areas, publication of the judgment in the press), the consequences of the penalty imposed (for example, the effects of the deportation of aliens found guilty of an offence on their family life) and the application of the sanction (for example, as regards prisoners' rights). Without any claim to completeness, it seems worth setting out the matters connected with or related to criminal proceedings in relation to which the limitations set out in the Convention have been raised by the courts in the Netherlands.

1/ The criminal charge. There are few cases in which a criminal charge has itself been reviewed from the point of view of its consistency with the Convention. In one case, a counsel for a client accused of committing sexual acts with a minor of under sixteen years of age argued that Article 247 of the Penal Code

constituted an infringement of the right to respect one 's private life (Convention, Art. 8). The *Arrondissementsrechtbank*, 's Hertogenbosch, took the view that the charge was necessary in a democratic society in the interests of protection of health or morals or for the protection of the rights and freedoms of others.[39]

In another case, the defence argued that Article 137 e of the Penal Code, which makes it a criminal offence for a person to express ideas which he knows, or should reasonably know, are insulting to a particular group on account of its race, religion or ideology, was contrary to freedom of religion and freedom of expression (Convention, Arts. 9 and 10). The *Arrondissementsrechtbank*, Zwolle, held that Article 137 e of the Penal Code was necessary in a democratic society for the protection of the reputation or rights of others.[40]

2/ Preparatory investigation. In recent years the prosecuting authorities in the Netherlands have been confronted with offenders acting in groups (demonstrators, squatters) who refuse to give their identity.[41] In such circumstances the police have attempted to ascertain the identity of the offenders by other means. The *Hoge Raad* had to rule on 8 May 1984 on the consistency with Article 8 (private life)[42] of the practice of photographing a suspect against his will. The *Hoge Raad* held that to photograph a suspect against his will and to incorporate it in a police classification was consistent with Article 8, since the restrictions were absolutely necessary for the purposes of detention for questioning.

3/ Sentencing. A newspaper – the *Leidsch Dagblad* – was prosecuted for *smaad* (defamation) and ordered to publish the judgment in the press. The newspaper considered that that part of the judgment was an interference with its right to freedom of expression which was not provided for in Article 10 § 2. The *Kantongerecht*, The Hague, considered that that restriction was necessary in a democratic society to protect the reputation of others.[43]

A ban on free movement in certain places is another illustration of the effect of a sentence, in this case on the offender 's private life (*cf.* the cases mentioned earlier). It is surprising, however, that the prohibition on free movement in certain places has been used by Dutch courts in criminal cases involving female offenders (prostitutes, for example) but not in cases involving female victims (rape victims). This finding reflects the separation in the Netherlands of civil and criminal proceedings. Consequently rape victims, and organizations of rape victims, have applied to the Presidents of the district courts, who have on several occasions in summary civil proceedings ordered bans on free movement in certain places.[44]

In another case, a serviceman was sentenced to four days ' imprisonment by the provincial military commander for taking part in an anti-missile demonstration in uniform. In an appeal to the Military Court the serviceman relied on Article 10 (right to demonstrate), but the court decided that it was not the right itself which was in issue but rather the use of the serviceman 's uniform.[45]

A journalist who had been fined for having lived in a house which was closed

on account of illegal drug dealing relied on Article 10 (freedom to receive information) before the *Arrondissementsrechtbank*, Groningen. The Court held that the measures taken were necessary for the prevention of disorder and the protection of the rights and freedoms of others. As far as the journalist was concerned, the closure of the house had no substantial consequences as regards his freedom to receive information, since he had every opportunity to attend the closure and to interview the inhabitants (as he had in fact done).

4/ The consequences of the penalty. The courts have had to rule on many occasions on whether national restrictions on private and family life were compatible with the Convention. One question which has frequently arisen is whether the deportation of an alien consequent upon his being found guilty of an offence may constitute an infringement of the right to respect for one's family life. The Convention does not provide that aliens have a right to enter or reside in a member State. However, each member State's immigration policy must be consistent with the obligations of the Convention. In one case,[46] the appellant, whose place of origin was Surinam, was declared *persona non grata* on account of his having been sentenced to a term of imprisonment for drug trafficking. He argued on the basis of Article 8 of the Convention that he should be allowed to remain in the Netherlands together with a foreigner who was lawfully resident and their child. The *Raad van State* (Council of State) held that that interference with family life was compatible with the limitations set out in Article 8, in particular for the prevention of disorder. In another case,[47] a Turk, who had been living in the Netherlands for ten years, had his residence permit withdrawn after he was found guilty of drug trafficking. He pleaded Article 8 with a view to protect his wife and five children. The *Raad van State* decided that the interference with his family life was consistent with the limitation relating to prevention of disorder in Article 8 of the Convention. The *Raad van State* decided similarly in 1987, when it observed that the family of an alien who had been found guilty and declared *persona non grata* was free to follow him abroad.[48] The European Court of Human Rights took a similar line in the case of *Abdulaziz, Cabales and Balkandali*, when it held as follows: "The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country".[49]

5/ Application of penalties: Prisoners.[50] A complaints procedure for prisoners, internees and persons on parole has been in force in the Netherlands for about ten years. In the period following its introduction, the *Beroepscommissie van de Centrale Raad van Strafrechtstoepassing* (appeals board of the central council for the application of criminal law)[51] has had to deal with complaints about the alleged non-conformity of prison practices with the Convention. The appeals board has consistently refused to apply the concept of inherent limitations and has constantly sought to apply the caselaw of the Strasbourg institutions.

Most of the complaints are concerned with Article 8. The biggest group of decisions are essentially about the concept of the right to respect for private life. As a result of the application of that concept, prisoners have succeeded in enforcing their right to chose their own doctors[52] and obtain better protection for their personnel files. As a result, prisoners ' personal files, which contain details of their personal histories, their families and their social backgrounds, are accessible only to the persons for whom they are intended (for instance, the judicial authorities and not the administrative staff of the prison).

In order that complainants should not be left without any remedy in cases falling outside the jurisdiction of the appeals board, the President of the *Arrondissementsrechtbank* has jurisdiction as judge of the prisoner 's place of residence. In one case, two members of the IRA had been detained in two different prisons pending a decision of the *Hoge Raad* on a request for their extradition to the United States. The prisoners were in isolation and complained that they had no opportunity to talk or communicate with one another. They argued that this form of detention constituted a breach of the right to respect for their private lives. The President of the *Arrondissementsrechtbank*, Amsterdam, held that the conditions in which the prisoners were detained were compatible with Article 8, because they were necessary in a democratic society in the interests of public safety and the prevention of disorder.[53]

In conclusion, a recent research paper on the caselaw of the *Hoge Raad* with respect to major international human rights instruments makes the following findings: 1. the impact of such instruments was virtually non-existent prior to 1980 but has since been steadily and rapidly increasing; 2. the criminal chamber of the *Hoge Raad* is responsible for 75% of the cases in which international human rights instruments are invoked; and 3. the cases in which reference is made to provisions of the European Convention on Human Rights accounts for a similar percentage of all cases in which international human rights instruments are invoked.[54]

In this chapter, an attempt has been made to illustrate that this impact has not been confined to the *Hoge Raad*, but has been apparent also at the most varied levels of the judicial system in the Netherlands; by the same token, the international norms set out in the Convention affect the most varied aspects of criminal proceedings and of the penal system.

In order to judge the effectiveness of the provisions of the European Convention, and in particular of the limitations and exceptions set out therein, in the context of the system of criminal law in the Netherlands, it is necessary in my view to distinguish between internal legal effectiveness and empirical effectiveness.

As far as internal legal effectiveness is concerned, it seems to me to be of real importance that the legal effects of the criminal law – the operation of the penal system – should be able to be called into question by citizens themselves. This effectiveness, which has been made possible by the novel machinery of references to the institutions at Strasbourg, by the supervision which those institutions carry out and by the raising of the provisions of the European

Convention in the national courts, has the result that national practice is scrutinized in the light of a corpus of legal principles which must be complied with if the system is to operate in a manner consistent with respect for fundamental rights.

In addition, as far as external or empirical legal effectiveness is concerned, it is clear that that effectiveness varies depending on the underlying type of legality or rationality. The wording of the Convention itself – and in particular the definition of the limitations and exceptions – constitutes a political compromise, reflecting the delicate balance between national sovereignty and European integration. Once the structures and institutions had been designed on paper and set up, the Convention obtained quasi-autonomy. This explains why the impact of the Convention and the power of the Strasbourg institutions have been much greater than the States thought they would be at the time of ratification. That the Commission is endeavouring to increase its power vis-à-vis the States in order to verify the actual situation *in situ* is a further indication of this trend. But there are also indications pointing in the opposite direction. The Commission holds only a very small percentage of complaints to be admissible. The underlying policy is far from clear and well-defined. The Commission 's secretariat was not designed to cope with the present workload and, as a result, it does not have sufficient means to study the legal issues on a comparative basis. As far as the States are concerned, they do not show much enthusiasm for remedying this problem.

In these circumstances, it seems to me that the empirical effectiveness of the Convention and its limitations and exceptions lies above all in the exteriorization, in a politico-juridical logical framework and on the basis of a comparative approach, of the criteria underlying the practice of the criminal law. The more the Strasbourg institutions and the national courts give vague or formal, rather than explicit and substantive, reasons for the use of the limitations and exceptions set out in the Convention, the more national practice in the field of criminal policy will be legitimated without there being any possibility of checking its empirical effectiveness.

NOTES

1. F. Ost and M. van de Kerchove, *Jalons pour une théorie critique du droit*, Publication des Facultés Universitaires Saint-Louis, Brussels, 1987, Part 3, La validité en droit, p. 257 et *seq.*: F. Ost, "Considérations sur la validité des normes et systèmes juridiques", *JT.*, 1984, pp. 1–6: M. van de Kerchove, "Les lois pénales sont-elles faites pour être appliquées? Réflexions sur les phénomènes de dissociation entre la validité formelle et l 'effectivité des normes juridiques", *JT.*, 1985, pp. 329–334.
2. P. Van Dijk, "Domestic Status of Human-Rights Treaties and the attitude of the judiciary; the Dutch case", in M. Nowak, D. Steurer and H. Tretter, *Progress in the spirit of human rights, Festschrift für F. Ermacora*, Kehl/Strasbourg/Arlington, 1988.
3. The First Protocol was also ratified. The Second and Third Protocols entered into force on 21 September 1970, the Fourth on 23 June 1982, the Fifth on 20 December 1971 and the Sixth on 25 April 1986. The Seventh and Eighth have not yet been ratified.

4. According to the caselaw of the Court of Justice of the European Communities, in particular the judgment in Case 26/62, *Van Gend en Loos* [1961] ECR 1, the relationship between Community law and the legal order of the Member States is monist.
5. The contribution of C. Palazzo and A. Bernardi on the reception of the texts and caselaw of the Strasbourg institutions in Italy provides an illustration of that approach (*see supra*, Part II, Chapter V).
6. *Cf.* Article 189 of the EEC Treaty. As far as the other provisions of the EEC Treaty are concerned, the Court of Justice of the European Communities decides whether or not they have direct effect.
7. The States generally prefer to leave that decision to their courts, which gives them greater freedom.
8. Proposals exist which would also give the European Court of Human Rights the power to give preliminary rulings on questions from national courts. *Cf.* L. Betten and J. Korte, "A Procedure for Preliminary Rulings in the Context of Merger", *Human Rights Law Journal*, 1987, pp. 75–80.
9. E.A. Alkema, "The Application of Internationally Guaranteed Human Rights in the Municipal Order", in *Essays on the Development of the International Legal Order in Memory of H.F. van Panhuys*, 1980, pp. 181–198; Z.W. Drzemczewski, *European Human Rights Convention in Domestic Law. A Comparative Study*, Oxford, 1983, p. 86 *et seq.*
10. Judgment of the *Hoge Raad* of 18 January 1980, *Nederlandse Jurisprudentie*, 1980.
11. For the effect of human rights on the dual legal order of the European Communities, *see* L. Betten, *The incorporation of fundamental rights in the legal order of the European Communities*, The Hague, 1985.
12. At the Netherlands Human Rights Research and Information Centre (*Studie- en Informatiecentrum Mensenrechten* – SIM) of the University of Utrecht, L. Zwaak has drawn up for the Human Rights Directorate at Strasbourg a *Digest of Dutch caselaw referring to the European Convention on Human Rights*. The caselaw used is drawn from that source. That Centre is also responsible for the *Digest of Strasbourg caselaw relating to the European Convention on Human Rights*, published by Carl Heymans Verlag, 1984, updated by supplements, 1988.
13. *Cf.* the decisions of the Commission in Applications No 5573/72 and 5670/72: "The term 'liberty' and 'security' (...) must be read as a whole and, in view of its context, as referring only to physical liberty and security. 'Liberty of person' in Article 5 § 1 thus means freedom from arrest and detention and 'security of person' the protection against arbitrary interference with this liberty". Applications No 5573/72 and 5670/72, *Adler and Bivas v. Federal Republic of Germany*, Yearbook XX (1977), p. 102, at p. 146, and Application No 9516/81, *X. v. the Netherlands*, unpublished.
14. Judgment of 6 November 1980.
15. In the *Winterwerp* case (ECHR, 24 October 1979, Series A, No 33, and in the case of *De Wilde, Ooms and Versyp* (vagrancy), (ECHR, 18 June 1971, Series A, No 12), the judicial institutions set up under the Convention carried out a marginal review of certain aspects of, respectively, the Dutch and Belgian legislation on persons of unsound mind.
16. ECHR, *Engel and others v. Netherlands* case of 8 June 1976, Series A, No 22, p. 25.
17. *Cf.* Ph. Bernardet, A. Darmstädter and C. Vaillant, "Portée de la jurisprudence européenne sur l 'internement psychiatrique en France", *RSC*, 1988, pp. 255–271; F. Massias, "Police des étrangers et droits de l'homme en Europe. La libre circulation des personnes et ses prolongements selon la jurisprudence des instances européennes", *RSC*, 1988, pp. 223–254.
18. ECHR, *Winterwerp v. Netherlands* case of 24 October 1979, Series A, No 33.
19. Commission report of 14 July 1988, Application No 11509/85.
20. Judgment of the *Hoge Raad* of 8 July 1985, *Rechtspraak van de Week*, 1875 (151) and judgment of the *Hoge Raad* of 10 May 1985, *Rechtspraak van de Week*, 1985 (99).
21. Judgment of the *Hoge Raad* of 17 January 1984 in *Delikt en Delinkwent*, 1984, p. 258.
22. Judgment of 29 August 1983 of the *Arrondissementsrechtbank*, Rotterdam, *Weekblad Rechtspraak Vreemdelingen*, 1983, D 76.

23. Judgment of the *Gerechtshof*, The Hague, of 26 October 1984.
24. Judgment of 18 November 1986 of the President of the *Arrondissementsrechtbank*, Haarlem, *Rechtspraak Vreemdelingen*, 1986, p. 11.
25. Judgment of 16 September 1985 of the *Arrondissementsrechtbank*, Haarlem, NAV, 1985, p. 416.
26. Commission report in the case of *Engel and others*, Series B No 20 (1974–1976), p. 60.
27. Judgment of 9 December 1988.
28. Judgment of 4 September 1984 of the *Kantongerecht*, Utrecht, *Nederlandse Jurisprudentie*, 1985, p. 209.
29. Case of 12 July 1984, *Kortgeding*, 1984, No 211.
30. Article 2 of the Fourth Protocol: "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3.No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. 4. The rights set forth in Paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society".
31. *Cf.* ECHR, *Golder v. United Kingdom* case of 21 February 1975, Series A, No 18, § 44, and the report of the Commission of Human Rights in the *Sunday Times* case, § 194.
32. *Cf.* Council of Europe, Caselaw Topics No 1, *Human Rights in Prison* (1971), pp. 24–30. *Cf.* also Application No 6166/73, *Baader, Meins, Meinhof, and Grundmann v. Federal Republic of Germany*, Yearbook XVIII (1975), pp. 132–164.
33. *Cf.* ECHR, *Silver and others v. United Kingdom* case of 25 March 1983, Series A, No 61.
34. For example, Art. 3, Art. 4 § 1, Art. 7, etc.
35. ECHR, *Golder v. United Kingdom* case of 21 February 1975, Series A, No 18, § 38.
36. P. Van Dijk and G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, Deventer, Kluwer, 1984, p. 422, disagree with the Court here.
37. *Cf.* the Commission 's report of 30 September 1975 in the *Handyside* case, Series B No 22, 1976, at p. 44. *Cf.* also ECHR, 7 December 1976, Series A, No 24, p. 23.
38. *See* the Commission 's report of 11 October 1984 in the case of *Lingens*.
39. Case of 29 October 1985 of the *Arrondissementsrechtbank*, 's-Hertogenbosch, *Nederlandse Jurisprudentie*, 1986, p. 169.
40. Case of 9 January 1986 of the *Arrondissementsrechtbank*, Zwolle, No 14740/85.
41. There is no obligatory identity card in the Netherlands; however, the political authorities are trying to introduce one as a result of pressures from other Member States of the EEC.
42. *Nederlands Juristenblad*, 1984, p. 796.
43. *Kortgeding*, 1983, p. 64.
44. J. Hes, *Het straatverbod in kort geding als "ultimum remedium"*, Nemesis, 1984, pp. 130–139.
45. Case of 3 December 1986 of the Military Court, *Themis*, 1987, p. 133.
46. Judgment of 26 July 1985 of the Raad van State, Case A2.0845.1982.
47. Judgment of the Raad van State, *Weekoverzicht Raad van State*, 1986, p. 214.
48. Judgment of the Raad van State, *Weekoverzicht Raad van State*, 1987, p. 233. The European Commission of Human Rights likewise considered that the expulsion or deportation of a member of the family was compatible with Article 8 if the other members of the family could follow him and that this requirement was a reasonable one. *Cf.* Council of Europe, Caselaw Topics No 2, *Family Life* (1972), pp. 40 and 41. *Cf.* also Application No 2991/66, *Kahn v. United Kingdom*, Yearbook X (1967), p. 478, and Application No 7816/77, *X. and Y. v. Federal Republic of Germany*, DR (1978), p. 219.
49. ECHR, *Abdulaziz, Cabales and Balkandali v. United Kingdom* case of 28 May 1985, Series A, No 94.
50. Mr Viering has recently published an article on this subject under the title Het Europees

Verdrag voor de Rechten van de Mens in de rechtspraak van de beroepscommissie. Het eerste decennium, in *Delikt en Delinkwent*, 1988, pp. 40–52.

51. It was formerly known as the *Beroepscommissie van de centrale raad van advies van het gevangeniswezen*.
52. *Beroepscommissie*, 28 April 1981, *Penitentiaire Informatie*, 1981, p. 39; *Beroepscommissie*, 25 July 1983, *Penitentiaire Informatie*, 1984, p. 6.
53. Case of 7 May 1986 of the President of the *Arrondissementsrechtbank*, Amsterdam, No KG 89/491K.
54. H. Von Hebel, *The caselaw of the Dutch Supreme Court with respect to the major international human rights instruments: the utility of statistical data*, unpublished.