

12. Summary

12.1 Introduction

In this summary the two lines of research that were central to this project come together. The first, in section 12.3, regards the evaluation of the Act on Requests for a Preliminary Ruling to the Hoge Raad (the Dutch Supreme Court) in civil law matters (hereafter also: Wpv). The second, in section 12.4, regards the question whether the introduction of a similar scheme in criminal law is possible, and if so, under what circumstances and conditions. We thus provide an answer to the two-part question underlying this study, formulated in section 1.4 as follows:

- How is the present procedure as regards requests for a preliminary ruling to the Hoge Raad functioning in civil law, and
- Is it possible, and if so, under what circumstances, to introduce a preliminary ruling procedure in criminal law?

But first, we will address in section 12.2 the research methods that have been used during this research.

12.2 Research methods

The research results are obtained by using 'classical' legal research methods and empirical research methods. The results that are discussed in chapters 2, 3 and 6 are based on an analysis of case law, legislation, parliamentary documents and literature about the preliminary ruling procedure. These legal sources provided the basis for the analysis of the successes and failures, if any, of the preliminary ruling in civil law, and, subsequently, gave insight into the arguments in favor of or against the introduction of the preliminary ruling procedure in criminal law.

Chapters 4 and 7 contain the results of the empirical part of this research. For the most part, this empirical research consisted of interviews with practitioners, but we also organized two expert meetings on the possible introduction of the preliminary ruling procedure in criminal law. By conducting interviews with practitioners in civil law we aimed to get more insight into the experiences with the legal provisions on the preliminary ruling in civil law of judges, lawyers and advocate generals. Moreover, we intended to get an insight into their perceptions as to the extent to which the objectives, as determined by the legislature, of the provisions on the preliminary ruling procedure have been fulfilled. On the basis of six interviews with practitioners in criminal law and two expert meetings, we also gained insight into the perceived desirability of the introduction of the preliminary ruling procedure into criminal law, the need for and the arguments in favor of or against such an introduction. Chapters 5 and 8 contain the conclusions for the civil law and the criminal law part of the research respectively. These conclusions will be highlighted hereafter.

12.3 Civil-law evaluation

With regard to the first part of the above question, we wish to emphasize again that the Act on Requests for a Preliminary Ruling to the Hoge Raad has proven to be an unqualified success. The Act has furthered the development of civil law: law formation, legal uniformity and legal certainty have all been stimulated by it, as shown in sections 3.5 and 5.1. In cases in which the need for a landmark ruling is felt, it is possible in an early stage of a civil procedure to get the (law developing) answer to an urgent legal question from the Hoge

Raad at short notice; this means that the Act (also) meets its own goals. Of course we will never know whether these cases might not have reached the Hoge Raad through the regular channels at any time, and thus whether the same law formation results might not have been arrived at through those channels. However, the relevant cases now got there sooner, while other cases would not have reached the Hoge Raad at all, which in itself is a merit of the Act.

It further appears that the scheme is well-known, is invoked regularly, is sufficiently accessible, poses hardly any problems or bottlenecks, is received well by the people in the relevant field, and has an obvious added value compared to the alternative law formation (cassation) instruments in civil law studied by us. It is hard to determine whether any (undesirable) side-effects have occurred, however we have not noticed any concrete evidence of unforeseeable and undesirable effects.

In our opinion, the two (strongly interrelated) success factors of (the practice of) the scheme are the benevolence and the speed, with which both the Civil Chamber of the Hoge Raad and the Procurator General's office at the Hoge Raad have dealt with these cases; they have shown true leadership. This also holds an important lesson in the event of the introduction of the Act in criminal law.

Points of attention, and possibly of improvement, obviously also exist; these may deserve attention in the event of an introduction elsewhere. Firstly, the necessity to guard against an influx of cases, together with the corresponding strictness as regards the terms of admission of the scheme and/or possibly an adaptation of the speed of answering certain questions (by giving them a lower priority). Secondly, the role of the Bar at the Hoge Raad has drawn some criticism. The added value of the Bar in civil-law cases, which in our opinion as yet exists, shall have to be demonstrated in the coming period, as otherwise the present system will soon become untenable given the scheme in fiscal matters, which does not require representation by a cassation lawyer. Thirdly, there should be full transparency on the part of the judge as to the question, whether prior consultations (within the court system) on a possible request for a preliminary ruling have taken place. If this has been the case, it should be reported, so as to enable the parties to react to this. Fourthly, it is in line with the foregoing that all judicial decisions relating to the dismissal of, lodging of, reaction to or the handling of already processed requests for a preliminary ruling should be published at 'www.rechtspraak.nl'. We also hope that the Hoge Raad will start publishing the input by third parties on a request lodged with them, thus creating transparency whether this has been of any influence. And finally, in the fifth place, in view of the general public goal of the Act, which is to present questions timely to the Hoge Raad that would otherwise not have reached it or would have reached it too late, we think it is only fair to assume that the cost of this public interest should not only be borne by the accidental litigants, but should be paid for through an allowance from a law formation fund to be established to this end.

12.4 Introduction in criminal law?

In view of the data available at present, the preliminary ruling procedure in civil law all in all has been successful enough to be continued. From these data it also follows that in the civil-law context no fundamental objections have arisen as regards the introduction of the procedure in other areas of the law (as has already been the case in fiscal law). Nevertheless, it is to be considered that criminal law has its very own context, with criminal procedure having its own characteristics and features, differing from civil procedure. We already pointed this out in section 1.3 and in chapter 8. This means that criminal law requires its own balancing of interests, in order to decide whether the introduction of a preliminary ruling procedure meets a need, and whether it can play a meaningful role in the

administration of criminal justice. It also means that, should the decision be taken to introduce a preliminary ruling procedure in criminal law, the statutory provisions of the civil-law preliminary ruling procedure cannot simply be transplanted to the Code of Criminal Procedure.

Our literature study, but above all our qualitative empirical research, has shown that by and large no fundamental objections exist against the introduction of a preliminary ruling procedure in criminal cases. Such a procedure would not violate principles and provisions of criminal procedure. (Pragmatic) solutions could be conceived for the apparent bottlenecks. This does not mean however, that a preliminary ruling procedure ought to be introduced in criminal cases.

Our literature study and qualitative empirical research have shown that valid arguments exist in favour of introducing a preliminary ruling procedure in criminal law. Obviously counter-arguments also exist. All these arguments should be weighed. There is a range of divergent fundamental and practical arguments, which at times are related and at other times carry their own weight. As the results of the qualitative empirical research show, weighing the various arguments may differ per person. A fundamental starting point of the weighing process is the question, whether criminal law needs a preliminary ruling procedure. An important observation in this respect, of both the literature study and the qualitative empirical research, is that there have been cases in the past indeed, in which a preliminary ruling procedure would have resulted in a quick and final decision in a criminal case, in which the court deciding questions of fact would have incorporated the Hoge Raad's response to the request for a preliminary ruling. Both cassation in the interest of the law and the informal fast procedure for the ordinary remedies of appeal and cassation would not have been a better alternative in these cases, and both of them have their own limitations. There thus appears to be a need. At the same time though, we gathered from literature and the professionals we spoke with as part of our research, that these cases would have been dealt with through cassation in the interest of the law and the informal fast procedure. And seen in this light, there is no or only a limited necessity, as the existing instruments seem to provide adequate solutions. In any case the view prevails that in criminal law the need is less urgent than in civil law, also because in criminal law, as a rule, litigation is continued up to the Hoge Raad. In short, people in the criminal field express doubts as regards the added value of a preliminary ruling procedure in criminal law, but the general attitude seems to be that one is not –fundamentally – against the introduction of such a procedure in criminal law.

As things stand, it is our view that a preliminary ruling procedure in criminal law should be introduced. For us, the potential merits of the procedure in terms of quickly obtaining a judgment from the Hoge Raad on a pure legal question, which may contribute to law making, unity of the law, legal protection and improvement of the quality of criminal procedure, constitute an important consideration. The mere existence of a preliminary ruling procedure also shows the importance attached by the legislature and the judiciary to the quality of criminal justice, both in a concrete criminal case and at the level of criminal justice as a system. The preliminary ruling procedure provides the court deciding questions of fact, the defence and the Public Prosecutor with a transparent legal instrument, which they may but do not have to deploy, in order to involve the Hoge Raad as a cassation court in the decision of a criminal case. After the introduction of the preliminary ruling procedure legal practice will show whether, and if so to what degree, the procedure will be invoked. Only then will the need, and the exact nature thereof, become apparent. It cannot be ruled out of course that the availability of the preliminary ruling procedure will further the use thereof. On the other hand, the preliminary ruling procedure does not prejudice the use of the

existing instruments of cassation in the interest of the law and the informal fast procedure. It is conceivable that the extraordinary remedy of cassation in the interest of the law will be invoked less, which may cause the Procurator General at the Hoge Raad to adjust his (extended) policy in this regard. Another consideration is that, in view of the motion by Dijkhoff and Van Nispen, Parliament wishes to introduce a preliminary ruling procedure in criminal law. Furthermore, as mentioned before, no existing principles and provisions of criminal procedure preclude the introduction of a preliminary ruling procedure in criminal law, which leads us to think that in any case its introduction causes no harm ('it can't do any harm and may do some good'). Finally, it can be prevented that criminal law is considered to be the exception to the rule that there is a preliminary ruling procedure available. At this moment, there is a preliminary ruling procedure in civil law as well as in tax law, while already preliminary questions of relevance for criminal law can be submitted to the Hoge Raad by making use of the preliminary ruling procedure in civil law in summary proceedings.

In our opinion, the literature study, the qualitative empirical research and the results of the evaluation of the civil-law preliminary ruling procedure all make it clear that an Act on a preliminary ruling procedure in criminal law should be subject to conditions. These conditions can be summarized in the sense that such Act to be introduced must have the following characteristics: a sober set of statutory provisions, which only allows for the submission to the Hoge Raad of pure legal questions pertaining to an actual criminal case before a lower court, and where both this court and the Hoge Raad act as gatekeepers for the lodging and the admission of requests for a preliminary ruling, where both have the power to pursue a selection policy on the basis of open statutory criteria, allowing for prioritization and controllability of dealing with preliminary questions, without the Hoge Raad being under an obligation to give reasons for its decision to dismiss a request for a preliminary ruling, all of this in a procedure, which includes input by third parties (including the victim of the crime in question) in the preliminary ruling procedure only after permission of the Hoge Raad, and which results in a decision by the Hoge Raad on the request for a preliminary ruling within a term of six months or – if possible – less, and in which, finally, the cost incurred by the suspect on account of the preliminary ruling procedure will be reimbursed.

12.5 Conclusion

An outline was given of the results of the evaluation of the preliminary ruling procedure in civil law, as well as of the contours of the (desirability of the) introduction of a preliminary ruling procedure in criminal law. We wish to emphasize again that it follows from the foregoing that the introduction of a preliminary ruling procedure in criminal cases does not mean that the Act on the civil-law preliminary ruling procedure can or must be transplanted one-on-one into the Code of Criminal Procedure, nor that the same expectations of merit, added value and use of the said preliminary ruling procedure may apply. However, we are convinced that the introduction of the possibility to request a preliminary ruling in criminal cases may be useful in promoting uniformity of (criminal) law and may contribute to both law formation and legal protection in criminal law, as well as the improvement of the quality of criminal justice.