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1 FUNDAMENTAL RIGHTS AND PRIVATE LAW – A TALE OF TWO ‘LIVING
INSTRUMENTS’

If the defendant successfully relies on an absolute prescription period, the claimant has no right of action anymore. This is problematic in ‘long-tail’ cases, when the losses are concealed and cannot be established before the absolute prescription period lapses. The prime example is the development of lung cancer as a result of the exposure to asbestos. As the latency period is very long, the victim usually becomes aware of the losses after the claim is already time-barred. Other claimants face similar problems, for example victims of childhood abuse or victims of crimes against humanity committed by the State. It is questionable whether they can be expected to be fully aware of the losses and familiar with the possibility to hold the person responsible liable before the prescription period lapses.

These are first of all problems that have to be solved within the system of private law, under its own rules and principles, including the right to access to a court, which is recognised as a fundamental principle of civil procedural law. However, they can also be understood in terms of fundamental rights law, because the right to access to a court is recognised under art. 6 of the European Convention on Human Rights (hereafter: Convention or ECHR) as well. A court that is confronted with these problems therefore has to take into account two ‘living instruments’ of law – private law and the Convention – each with their own distinctive developments and possibilities.

In practice, the protection of fundamental rights in the private sphere depends very much on a construction of private-law concepts that complies with the requirements derived from fundamental rights law. An evolution has to come from within the system of private law in the first place, as Lord Bingham argued in the context of the law of tort:

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[T]he question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention. I prefer evolution.¹

Against the background of the relationship between the Convention system, national constitutional law and national private law, this contribution examines the *influence* of the right to access to a court under art. 6 ECHR on the *core concept* of prescription, with a focus on the prescription of ‘long-tail’ claims. Has private law been able to fashion ‘appropriate remedies’, or has a solution only been reached after this contemporary problem has been ‘swept up by the Convention’?

In order to fully understand the interplay between private law and fundamental rights, the general constitutional framework is first analysed. As the European Court of Human Rights (hereafter: ECtHR or Strasbourg Court) has a subsidiary role and often leaves a considerable margin of appreciation to the national authorities, national courts are encouraged to come up with solutions to fundamental rights problems. This task is becoming more important, because the Strasbourg Court is in crisis and transition (section 2). However, Strasbourg jurisprudence still serves as a valuable substitute for national constitutional arguments in the Netherlands (section 3) and the United Kingdom (section 4), countries that do not have a separate constitutional court and do not have a tradition of judicial review on the basis of a national constitutional document.²

In this constitutional context, an important role has been preserved by and for private law. Within Dutch private law, one instrument is of particular importance: the possibility to set aside binding statutory rules on the basis of art. 6:2 (2) of the Dutch Civil Code (hereafter: DCC) (section 5). It is this provision that has been used to ‘remedy’ the problem of the prescription of ‘long-tail’ claims (section 6), before this issue reached the Strasbourg Court (section 7). After having examined the compatibility of Dutch private law with the relevant requirements arising from recent Strasbourg jurisprudence (section 8), it is argued that an evolving interpretation of the core concepts of the Dutch Civil Code can be used to contribute to the protection of fundamental rights in the Netherlands (section 9).

1 Lord Bingham in his dissenting judgment in House of Lords 21 April 2005, [2005] UKHL 23, at 50 (*JD/East Berkshire Community Health NHS Trust*), a case about the possible liability of a local authority to parents whose children had been wrongfully taken into care.

2 The United Kingdom does have a Human Rights Act, which incorporates the Convention rights into the British legal order. See further in section 4.

2 WHAT THE STRASBOURG COURT EXPECTS FROM NATIONAL COURTS

In order to understand the interplay between the Convention and national law, it is essential to grasp the general principles that should be followed by national courts in matters touched on by the Convention.³ The Preamble emphasises the importance of the ECHR as a system of ‘collective enforcement’ of fundamental rights. The national authorities have the primary responsibility to safeguard the Convention rights, and it is up to the Strasbourg Court to supervise their compliance and to protect fundamental rights in the last instance. The Court has a *subsidiary* role:

‘The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. (...) The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. (...) By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.’⁴

The margin of appreciation doctrine is a corollary of this principle of subsidiarity. The scope of the margin of appreciation – between ‘wide’ and ‘narrow’ – determines the leeway afforded to national authorities to interpret and apply the Convention within their domestic systems. It is important to stress that the Court uses the margin of appreciation doctrine to define the relationship between the Convention system and the national authorities. The doctrine is not meant to dictate the position of national courts towards the legislature and executive bodies. In the words of the Court, the doctrine ‘cannot have the same application to the relations between the organs of State at the domestic level’.⁵

Formally, the obligations under the Convention do not go further than remedying the breach in the instant case.⁶ The respondent State has ‘a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing

3 J.H. Gerards, ‘Samenloop van nationale en Europese grondrechtenbepalingen – hoe moet de rechter daarmee omgaan?’, *TvCR* 2010, pp. 224-255; J.H. Gerards, ‘The European Court of Human Rights and the national courts – giving shape to the notion of “shared responsibility”’, in: J.H. Gerards & J.W.A. Fleuren, *Implementatie van het EVRM en de uitspraken van het EHRM in de nationale rechtspraak. Een rechtsvergelijkend onderzoek* (Report for the Dutch Research and Documentation Centre WODC, 2013), Nijmegen: Radboud Universiteit Nijmegen 2013, pp. 71-124.

4 ECtHR 7 December 1976, 5493/72, at 48 (*Handyside/United Kingdom*); ECtHR 23 July 1968, 1474/62, at I.B.10 (*Belgian Linguistic case*).

5 ECtHR 19 February 2009, 3455/05, at 184 (*A. and others/United Kingdom*).

6 Art. 46 ECHR.

before the breach'.⁷ The Court does not only decide individual cases on their merits, though. It has the task 'to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties'.⁸ When the Court is faced with a new case, the Court considers 'whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States'.⁹

From the perspective of the Court, national courts have to guarantee compliance and the State can be held accountable before the Court if they have not fulfilled this duty. But can national courts provide a higher level of protection than the Convention requires? art. 53 ECHR plays a central role here:

'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.'

This provision must be interpreted as meaning that the Convention system guarantees a *minimum* level of fundamental rights protection, which has to be observed by the executive, legislative and judicial branches of the State, also when they act in a private capacity, or when they regulate and decide matters of private law.¹⁰ In principle, it is not problematic if national authorities afford a level of fundamental rights protection higher than the protection provided under the Convention. On the contrary: the level of national fundamental rights protection matters, because the level of protection under the Convention is influenced by the commonly accepted standards in the different member States of the Council of Europe.¹¹ The Court is informed and inspired by these standards. It may accept a certain interpretation of the Convention when there is a general agreement amongst the majority of the States parties.¹²

The *minimum* level of protection may be hard to determine. A certain problem may not yet have reached the Court, and even when it has, the answer may be ambiguous or leave a considerable margin of appreciation to the national authorities. It may also be difficult to determine the *minimum* level of protection when one fundamental right has to be weighed against another fundamental right, or against other interests. It has to be ensured that 'generos-

7 ECtHR 31 October 1995, 14556/89, at 34 (*Papamichalopoulos and Others/Greece*).

8 ECtHR 7 January 2010, 25965/04, at 197 (*Rantsev/Cyprus and Russia*).

9 ECtHR 9 June 2009, 33401/02, at 163 (*Opuz/Turkey*).

10 The latter point has been reaffirmed in ECtHR 16 December 2008, 23883/06, at 33 (*Khurshid Mustafa and Tarzibachi/Sweden*), referring to ECtHR 13 July 2004, 69498/01, at 59 (*Pla and Puncernau/Andorra*).

11 ECtHR 25 April 1978, 5856/72, at 31 (*Tyrer/United Kingdom*).

12 Gerards 2013, p. 88, with examples.

ity for one party does not lead to a disproportionate burden for the other'.¹³ Take for example art. 6 ECHR. The prescription of a claim limits the right to access to a court of the claimant in order to protect the legitimate expectations of the defendant. Both interests are protected under art. 6 ECHR, and both interests have to be weighed to decide whether the prescription period serves a legitimate aim and satisfies the principle of proportionality in the case at hand.

It is clear that in the end, the Court sets the standards and determines whether the national authorities have complied with their obligations. Yet the initial assessment has to be made by the national authorities. That task is becoming more important, because the Strasbourg Court is in crisis and transition. In crisis, because the Court still faces a serious backlog of admissible applications with no prospect of a definitive solution,¹⁴ despite recent reforms.¹⁵ In transition, because these reforms – including the prioritisation of applications,¹⁶ the pilot judgment procedure,¹⁷ the possibility to declare an application inadmissible when the applicant 'has not suffered a significant disadvantage'¹⁸ and the future introduction of an advisory opinions procedure¹⁹ – indicate that the Court focuses more of its attention on the most serious and systemic problems, and on important questions of interpretation of the ECHR,²⁰ and less on the delivery of justice in each individual case.²¹

13 R.A. Lawson, 'Beyond the Call of Duty? Domestic Courts and the Standards of the European Court of Human Rights', in: H.J. Snijders & S. Vogenauer (eds.), *Content and Meaning of National Law in the Context of Transnational Law*, Munich: Sellier 2009, p. 38.

14 By the end of November 2015, 64,450 applications were still pending before a judicial formation, compared to a total of 69,900 in January 2015 (http://echr.coe.int/Documents/Stats_month_2015_ENG.pdf, last accessed 5 January 2016).

15 For an overview of the latest developments, consult the *CDDH report on the longer-term future of the system of the European Convention on Human Rights* (CDDH(2015)R84 Addendum I), Strasbourg: December 2015 ([www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/CDDH\(2015\)R84_Addendum%20I_EN-Final.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/CDDH(2015)R84_Addendum%20I_EN-Final.pdf), last accessed 5 January 2016).

16 Rule 41 of the Rules of Court enables the Court to have regard to the importance and urgency of the issues raised in deciding the order in which cases are to be dealt with.

17 Rule 61 of the Rules of Court enables the Court to select one or more applications for priority treatment, in order to be able to identify the structural problems underlying repetitive cases and give the Government clear indications of the type of measures needed to remedy these problems.

18 Art. 35 (3)(b) ECHR.

19 In the near future, highest national courts may ask the Strasbourg Court for an preliminary advisory opinion (Protocol No. 16 to the ECHR). The Protocol is optional and will enter into force if it is ratified by a minimum of 10 member States (Art. 8 of the Protocol). As of 11 December 2015, the Protocol was signed by 16 and ratified by 6 member States.

20 Brighton Declaration, issued after the High Level Conference on the Future of the European Court of Human Rights on 20 April 2012, at 33 (www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf, last accessed 5 January 2016).

21 S. Greer & L. Wildhaber, 'Revisiting the Debate about "constitutionalizing" the European Court of Human Rights', *Human Rights Law Review* 2012, p. 686.

National authorities have to follow the principles arising from the judgments by the Court and have to guarantee that they are quickly and effectively implemented in national law and judicial decision-making. The question whether, and to what extent, national *courts* will come up with these solutions, as opposed to the legislative or executive branch, is primarily a question of national law.²² The answer depends on constitutional and institutional considerations, such as the need for a legal basis in national law to provide fundamental rights protection.

3 WHY NATIONAL FUNDAMENTAL RIGHTS PROTECTION IS LIMITED

When it comes to fundamental rights protection, the Netherlands forms an exception to the European rule.²³ It does not have a specialised constitutional court that reviews legislation. On the contrary, judicial review of primary legislation against the rights embodied in the Constitution is prohibited.²⁴ art. 120 of the Dutch Constitution reads:

‘The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.’²⁵

Are the courts nonetheless entitled to review primary legislation against other constitutional norms, notably fundamental principles of Dutch law? Reluctantly, the Supreme Court decided that Dutch courts may not review primary legislation against such legal principles either.²⁶ Such a review is only possible

22 National courts may also provide additional protection on the basis of EU law or international human rights law, but these categories fall outside the scope of this contribution.

23 J. Uzman, T. Barkhuysen & M.L. van Emmerik, ‘The Dutch Supreme Court: A Reluctant Positive Legislator?’, in: A.R. Brewer-Carías (ed.), *Constitutional Courts as Positive Legislators*, Cambridge: Cambridge University Press 2013, p. 646.

24 Even if such a review were possible, the Constitution would be of little help, because the right of access to a court is not embodied in the Constitution. In 2014, a draft bill was tabled to include such a provision in the Dutch Constitution, see *Kamerstukken II*, 2014/15, 31 570, no. 25, p. 5-6.

25 In Dutch: ‘De rechter treedt niet in de beoordeling van de grondwettigheid van wetten en verdragen.’ A translation of the Constitution is available on www.government.nl. Legislation has been proposed to allow judicial review against national constitutional rights: ‘Voorstel van wet van het lid Halsema tot verandering in de Grondwet, strekkende tot invoering van de bevoegdheid tot toetsing van wetten aan een aantal bepalingen van de Grondwet door de rechter’, *Kamerstukken II*, 2009/10, 32 334, 2, pp. 1-2. On 5 March 2015, the proposal was discussed in the Lower House (*Tweede Kamer*). There is no two-thirds majority in that house, so the future of this proposal is uncertain, see *Handelingen II* 2014/15, 60, item 11, pp. 1-24.

26 HR 14 April 1989, ECLI:NL:HR:1989:AD5725, NJ 1989/469, at 3.6 (*Harmonisatiewet*). The Supreme Court did so reluctantly, because it made clear that it deemed the legislation at issue to violate the legitimate expectations of the students concerned, and thus to violate the principle of legal certainty (*Harmonisatiewet*, at 3.1).

when the circumstances and interests at stake have not been considered by the legislature during the decision-making process.²⁷

That is not to say that Dutch courts do not review primary legislation against fundamental rights standards. On certain conditions, treaty provisions – such as the Convention rights – have a direct effect in the Dutch legal order, as is stipulated in art. 93 of the Dutch Constitution.²⁸ Individuals may challenge legislative acts for violation of such treaty provisions on the basis of art. 94 of the Dutch Constitution:

‘Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.’²⁹

Dutch courts are thus caught between a ban and a command: they shall not review primary legislation against the Constitution, but they shall review primary legislation against international law with direct effect.³⁰ Although the courts do not have the power to annul legislative acts, they are empowered to set aside a conflicting provision of national law in the instant case,³¹ or to interpret that provision in conformity with the demands of international law. On this basis, the courts have enforced – and sometimes clarified³² – the requirements arising from the Convention and Strasbourg jurisprudence.³³

27 *Harmonisatiewet*, at 3.9.

28 On the assessment of direct effect: HR 10 October 2014, ECLI:NL:HR:2014:2928, NJ 2015/12 (*Staat/Nietrokersvereniging CAN*).

29 In Dutch: ‘Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties.’ This kind of review is not the exclusive prerogative of the Dutch Supreme Court, but may be exercised by any court in the Netherlands: Uzman, Barkhuysen & Van Emmerik 2013, p. 646.

30 Dutch courts are also obliged to ensure the effective application of EU law. From the perspective of the Court of Justice of the EU, this is not a matter of national constitutional law, but a matter of EU law itself: ECJ 5 February 1963, Case 26/62 (*Van Gend & Loos*); ECJ 15 July 1964, Case 6/64 (*Costa/E.N.E.L.*); ECJ 9 March 1978, Case 106/77, at 21 (*Amministrazione delle Finanze dello Stato/Simmenthal SpA*). A discussion on the interaction between EU law and national constitutional law is beyond the scope of this contribution.

31 An increasing number of authors argues that the courts may also declare a provision *generally* non-binding on the basis of Art. 94 of the Dutch Constitution. This should only be possible if the courts are convinced that the statutory rule cannot be applied lawfully to any case, which is a rare occasion and certainly not the case when it concerns the law of statutory limitations. See for further discussion and references J. Uzman, *Constitutionele remedies bij schending van grondrechten* (diss. Leiden), Deventer: Kluwer 2013, pp. 70-85.

32 In the context of criminal procedural law, the Supreme Court has, for example, given further guidance after ECtHR 27 November 2008, 36391/02 (*Salduz*) and subsequent judgments by the Strasbourg Court, in: HR 30 June 2009, ECLI:NL:HR:2009:BH3079, NJ 2009/349; HR 1 April 2014, ECLI:NL:HR:2014:770, NJ 2014/268; HR 22 December 2015, ECLI:NL:HR:2015:3608.

33 Gerards & Fleuren 2013, with many examples.

In spite of its imperative wordings, art. 94 of the Constitution has its limits. The possibility to interpret legislation in conformity with international law is – to some extent – limited by general rules of interpretation.³⁴ While a consistent interpretation may therefore not be feasible, setting aside the conflicting statutory rule may not be effective, because it does not remedy the underlying problem. The Supreme Court decided that in such a case, the need to provide effective legal protection has to be weighed against the need for the courts to exercise restraint when developing new rules and intervening in existing statutory regulations.³⁵ The courts may fill the resulting gap by falling back on another statutory rule, provided that this solution is in concordance with the statutory legal system and the rules already laid down for similar situations.³⁶ However, if different solutions are possible and if the choice between those options involves considerations of public policy, the courts have to defer the question to the legislature – at least for the time being.³⁷

art. 94 of the Constitution is also limited when it comes to the interpretation of the content of the Convention itself. This became clear when the Dutch Supreme Court was asked to decide whether same-sex couples have the right to marry under art. 1:30 DCC. Such a right could not be derived from art. 12 ECHR, which grants the right to marry to ‘men and women’ and is interpreted by the Strasbourg Court as referring to ‘the traditional marriage between persons of opposite biological sex’.³⁸ According to the Supreme Court, there was no ‘sufficient basis’ to interpret the content of art. 12 ECHR as being ‘more dynamic’ than followed from Strasbourg jurisprudence.³⁹

In another landmark case, the Supreme Court was asked whether the obligation to provide for the cost of the care and the upbringing of a child under art. 1:394 DCC only rested on ‘the man’ – as the provision stated – or also extended to a female companion who ‘has agreed to an act which could have resulted in the begetting of the child’.⁴⁰ The right to family life under

34 S.K. Martens, ‘De grenzen van de rechtsvormende taak van de rechter’, *NJB* 2000, p. 750. In practice, these limits can be stretched in order to effectively enforce fundamental rights, see for examples Uzman 2013, pp. 60-63.

35 HR 12 May 1999, ECLI:NL:HR:1999:AA2756, *NJ* 2000/170, at 3.14 *et seq.* (*Arbeidskostenforfait*).

36 This part of the test essentially stems from HR 30 January 1959, *NJ* 1959/548 (*Quint/Te Poel*).

37 See for an overview of the relevant case law Uzman 2013, pp. 119-136.

38 ECtHR 17 October 1986, 9532/81, at 49 (*Rees/United Kingdom*). In 2010, the Court noted that the institute of marriage ‘has undergone major social changes since the adoption of the Convention’, but was not prepared to decide that Art. 12 ECHR grants this right to same-sex couples, because ‘there is no European consensus regarding same-sex marriage’. See ECtHR 24 June 2010, 30141/04, at 58 (*Schalk and Köpf/Austria*).

39 HR 19 October 1990, ECLI:NL:HR:1990:AD1260, *NJ* 1992/129, at 3.4. Since 1 April 2001, Art. 1:30 BW has read as follows: ‘A marriage may be entered into by two persons of a different or of the same sex.’

40 This contribution relies on the translation by H. Warendorf *et al.*, *The Civil Code of the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2013.

art. 8 ECHR did not require the State to grant the child such a claim. The Supreme Court held:

‘Art. 53 ECHR leaves the national legislature the discretion to provide more protection than the provisions of the ECHR do. However, the Dutch courts are bound by art. 94 of the Dutch Constitution, which states that statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties. Such a conflict cannot be determined solely on the basis of an interpretation by the national – Dutch – courts of the concept of “family life”, in view of recently adopted legislation, which leads to more protection than may be assumed on the basis of the case law of the ECHR with regard to art. 8 ECHR.’⁴¹

On the one hand, art. 94 of the Constitution obliges the courts to enforce the Convention rights, on the other hand the Supreme Court cautions that the courts have to conform to the interpretation of those rights by the Strasbourg Court. This has prompted constitutional lawyers to conclude that the Supreme Court exercises more restraint when there is no ‘clear mandate by the European Court of Human Rights’.⁴² In a series of judgments, the House of Lords, now the Supreme Court of the United Kingdom, seems to have taken a similar position. It is useful to take note of this debate, in order to understand the relationship between the Convention system, national constitutional law and national private law.

4 THE ‘MIRROR PRINCIPLE’: NO MORE, NO LESS

The United Kingdom does not have a constitutional court and does not have a codified, but an ‘unwritten’ constitution, which is derived from a number of sources, such as statute law, common law and constitutional conventions.⁴³ As it is a dualist State, international law does not have any direct effect until it is incorporated into the domestic legal order.⁴⁴ Despite the fact that the

41 HR 10 August 2001, ECLI:NL:HR:2001:ZC3598, NJ 2002/278, at 3.9: ‘Art. 53 EVRM laat de nationale wetgever de vrijheid om een verdergaande bescherming te bieden dan de bepalingen van het EVRM geven. De Nederlandse rechter is evenwel gebonden aan art. 94 Gr.w, ingevolge welke bepaling binnen het Koninkrijk geldende wettelijke voorschriften geen toepassing vinden, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen. Een zodanige onverenigbaarheid kan niet worden aangenomen uitsluitend op basis van een uitleg door de nationale – Nederlandse – rechter van het begrip “family life” in het licht van recent tot stand gekomen wetgeving, die leidt tot een verdergaande bescherming dan op grond van de rechtspraak van het EHRM met betrekking tot art. 8 EVRM mag worden aangenomen.’

42 Uzman, Barkhuysen & Van Emmerik 2013, p. 659.

43 P. Leyland, *The Constitution of the United Kingdom. A Contextual Analysis*, Oxford: Hart 2012, Chapter 2.

44 The exception to the rule being EU law, which constitutes an autonomous legal order (footnote 30).

United Kingdom was amongst the founding fathers of the Convention, it lasted until 1998 before the Convention rights were incorporated into the Human Rights Act.

Prior to the adoption of the Human Rights Act, Lord Bingham, then Lord Chief Justice, stated that the Act would allow British courts to make ‘a significant contribution (...) in the development of the law of human rights’.⁴⁵ In the *Ullah* case, however, Lord Bingham ruled that an evolving interpretation of the Human Rights Act was not to be preferred. Here, apparently, the law should remain static until either the legislature or the Strasbourg Court flexes its muscles:

‘It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.’⁴⁶

This approach was supported by the other Lords and has been coined the ‘mirror principle’.⁴⁷ The message is twofold: national courts are not obliged to provide additional protection and they *should* not provide such protection, because that would risk undermining the uniformity of the Convention and would involve a choice that should be made by the legislature. In the *Al-Skeini* case, Lord Brown even reversed the last sentence: the courts should do ‘no less, but certainly no more’. He added that a ‘danger’ of a more generous interpretation of the Convention by the highest national court is that ‘the member state cannot itself go to Strasbourg to have it corrected’.⁴⁸

A number of objections have been raised against the ‘mirror principle’.⁴⁹ First of all, no distinction is made between clear, unclear and non-existent Strasbourg jurisprudence. The principle seems to prevent domestic courts from developing the interpretation of the ECHR, even when there is no clear Strasbourg authority. Second, the Strasbourg Court itself does not think that the Convention should be applied in a strictly uniform manner. As we have seen, the Court leaves a margin of appreciation to the national authorities, who have

45 Statement by Lord Bingham in the House of Commons on 3 November 1997: HL Deb, Vol. 582, col. 1245, referred to by Lady Hale, Justice of the Supreme Court: B. Hale, ‘*Argentoratium Locutum*: Is Strasbourg or the Supreme Court Supreme?’, *Human Rights Law Review* 2012, p. 70.

46 House of Lords 17 June 2004, [2004] UKHL 26, at 20 (*R. (Ullah)/Special Adjudicator*).

47 J. Lewis, ‘The European Ceiling on Human Rights’, *Public Law* 2007, pp. 720-747.

48 House of Lords 13 June 2007, [2007] UKHL 26, at 106 (*Al-Skeini and others/Secretary of State for Defence*).

49 Lewis 2007, p. 720 *et seq.*; T. Rainsbury, ‘Their Lordships’ Timorous Souls’, *UCL Human Rights Review* 2008, pp. 32-52; Lord Irving, ‘A British Interpretation of Convention Rights’, *Public Law* 2012, p. 237 *et seq.*; Hale 2012.

the primary responsibility to safeguard the Convention rights and are 'evidently better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute submitted to them and the various competing rights and interests'.⁵⁰ Third, the result of the 'mirror principle' is that controversial questions are not only deferred to the legislature, but also to another court: the Strasbourg Court.⁵¹

The Supreme Court of the United Kingdom has not yet overruled the 'mirror principle' as such, but its application has been refined in later jurisprudence. With regard to the first point ('no less'), the Supreme Court has made it clear that it may refuse to follow Strasbourg authority,⁵² although it would have

'to involve some truly fundamental principle or some most egregious oversight or misunderstanding before it could be appropriate (...) to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level'.⁵³

With regard to the second point ('no more'), the Supreme Court has shown that it does interpret the Convention rather independently in the absence of clear Strasbourg authority.⁵⁴ Such an approach has been suggested by Lord Wilson:

'At any rate where there is no directly relevant decision of the ECtHR with which it would be possible (even if appropriate) to keep pace, we can and must do more. We must determine for ourselves the existence or otherwise of an alleged Convention right. And, in doing so, we must take account of all indirectly relevant decisions of the ECtHR and, in particular, of such principles underlying them (...).'⁵⁵

Lord Mance even warned against a 'tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights'. He indicated that the common law embraces many of the rights that are protected under the Convention as well:

'In some areas, the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence (...).

⁵⁰ *Pla and Puncernau/Andorra*, at 46.

⁵¹ Rainsbury 2008, p. 36.

⁵² Supreme Court (United Kingdom) 9 December 2009, [2009] UKSC 14, *per* Lord Phillips, at 11 (*R./Horncastle*).

⁵³ Supreme Court (United Kingdom) 16 October 2013, [2013] UKSC 63, *per* Lord Mance, at 27 (*R. (on the application of Chester)/Secretary of State for Justice*).

⁵⁴ For example in House of Lords 18 June 2008, [2008] UKHL 38 (*In re P. and others*). See for other examples Hale 2012, pp. 71-77.

⁵⁵ Supreme Court (United Kingdom) 17 December 2014, [2014] UKSC 67, at 105 (*Moohan and another/The Lord Advocate*). Lord Wilson refers to similar statements in other judgments of the Supreme Court (at par. 104).

And in time, of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene.⁵⁶

This may have been a strategic statement, in an attempt to take the wind out of the sails of critics who claim that the Strasbourg Court imposes unwanted policies on the United Kingdom, and to anticipate a possible retreat of the United Kingdom from the Convention system. This threat is not at all imaginary, because the Conservative Party has proposed to ‘scrap the Human Rights Act and curtail the role of the European Court of Human Rights’.⁵⁷ However, it is also very sensible to take domestic law as the natural starting point, as a matter of judicial policy. Not in order to refuse to follow Strasbourg authority, but to see how domestic law can contribute to the protection of fundamental rights. And as long as fundamental rights protection on the basis of national constitutional law remains limited, an evolving interpretation of other domestic rules may serve as a valuable alternative.

5 STANDARDS OF REASONABLENESS AND FAIRNESS AS A VALUABLE ALTERNATIVE

In the Dutch context, it is interesting to focus the attention on one private-law instrument that shows striking similarities with art. 94 of the Dutch Constitution: the possibility to set aside binding rules, in particular statutory provisions, in private relationships. This possibility was acknowledged already under the former Dutch Civil Code,⁵⁸ but has been codified in art. 6:2 (2) DCC:

‘A rule binding upon [obligee and obligor, RdG] by virtue of law, usage or a juridical act does not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.’⁵⁹

56 Supreme Court (United Kingdom) 26 March 2014, [2014] UKSC 20, per Lord Mance, joined by Lord Neuberger and Lord Clarke, at 46 (*Kennedy/The Charity Commission*).

57 The Conservative Party Manifesto 2015, pp. 58-60, available through www.conservatives.com/manifesto.

58 Art. 1374 (3) of the former DCC stipulated that contracts had to be executed in ‘good faith’. This provision has been used by the Supreme Court to rule that a private party may not invoke a statutory rule in certain circumstances, for example in: HR 29 April 1983, ECLI:NL:HR:1983:AG4579, NJ 1983/627 (*Spruijt/Sperry Rand Holland*); HR 1 July 1983, ECLI:NL:HR:1983:AB7666, NJ 1984/149 (*Herzfeld/Groen*); HR 13 November 1987, ECLI:NL:HR:1987:AC3287, NJ 1988/254 (X/Y); HR 20 January 1989, ECLI:NL:HR:1989:AD0580, NJ 1989/322 (*Wesselingh/Weisz*).

59 Art. 6:2 (2) DCC. In Dutch: ‘Een tussen [schuldeiser en schuldenaar, RdG] krachtens wet, gewoonte of rechtshandeling geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn.’

The ‘standards of reasonableness and fairness’ filter through the entire law of obligations and even the law of property in general.⁶⁰ They are used to interpret, to supplement or – in this case – to correct the law. Although the latter possibility is not considered to be a ‘review’ of the relevant rule, but merely a derogation thereof in a specific case, the result seems hard to square with the *Wet Algemeene Bepalingen* – an Act from 1829 that holds general provisions about the applicability of the law – which stipulates in art. 11 that ‘the judge must rule according to statutory law’, and that ‘under no circumstances, may he judge the inner value or fairness of statutory law’.⁶¹ Just like art. 94 of the Dutch Constitution, art. 6:2 (2) DCC is an important exception to this old rule.

Both provisions allow the courts not to apply otherwise applicable statutory rules to the cases presented to them, but the focal point is different. While art. 94 of the Dutch Constitution focuses on international law, art. 6:2 (2) DCC uses a different angle:

‘In determining what reasonableness and fairness require, generally accepted principles of law, current juridical views in the Netherlands and the societal and private interests involved in the case must be taken into account.’⁶²

Standards of reasonableness and fairness can be considered to include fundamental rights norms,⁶³ but their interpretation is not limited by the content and direct effect of these international norms, as is the case under art. 93 and 94 of the Dutch Constitution. The Supreme Court has always emphasised that art. 6:2 (2) DCC has to be applied with restraint. And in 2014, the Supreme Court added for the first time that the instrument may not be used to interfere with the express considerations of the legislature:

‘Because the constitutionality of Acts of Parliament may not be reviewed by the courts against any other law than international law (art. 120 of the Dutch Constitution), the courts may not review the considerations of the legislature against general legal principles or (other) unwritten law (cf. HR 14 april 1989, ECLI:NL:HR:1989:AD5725, NJ 1989/469 (Harmonisatiewet)). The same holds true when that review is placed

60 The new Dutch Civil Code contains many references, see for an overview H.J. Snijders, ‘Redelijkheid en billijkheid in het vermogensrecht van het Burgerlijk Wetboek voor en na 1992’, *Ars Aequi* 2012, pp. 771-778.

61 In Dutch: ‘De regter moet volgens de wet regt spreken: hij mag in geen geval de innerlijke waarde of billijkheid der wet beoordeelen.’

62 Art. 3:12 DCC. In Dutch: ‘Bij de vaststelling van wat redelijkheid en billijkheid eisen, moet rekening worden gehouden met algemeen erkende rechtsbeginselen, met de in Nederland levende rechtsovertuigingen en met de maatschappelijke en persoonlijke belangen, die bij het gegeven geval zijn betrokken.’ The list is not exhaustive: M.v.A. II, *Parl. Gesch. Inv. Boek* 3, p. 1035.

63 C. Mak, *Fundamental rights in European contract law* (diss. Amsterdam UvA), Alphen aan den Rijn: Kluwer Law International 2008, p. 41.

in the key of the reasonableness and fairness that govern the legal relationship between parties to a contract (art. 6:2 and 6:248 DCC).⁶⁴

In that sense, the mandate under art. 6:2 (2) DCC is perhaps more limited than the mandate under art. 94 of the Dutch Constitution. Yet art. 6:2 (2) DCC does have an added value. It provides a statutory basis to reach a result that is in conformity with the demands of fundamental rights law. This is also important for those cases that may not benefit from a review against those rights. Parties may, for instance, not have invoked fundamental rights norms,⁶⁵ while the courts are not bound to apply such norms *ex officio*.⁶⁶ It may also be the case that the parties have relied on fundamental rights norms, but that these norms do not provide enough direction, because Strasbourg jurisprudence is ambiguous or leaves a considerable margin of appreciation, or because a certain problem has not yet reached the Strasbourg Court.⁶⁷ One of the important examples within Dutch private law is the solution for the prescription of long-tail claims, which is discussed in the following sections.

6 PRESCRIPTION AND THE RIGHT TO ACCESS TO A COURT IN THE NETHERLANDS

In some cases, the prescription of a claim is problematic, because the losses are concealed and cannot be established before the prescription period lapses. The prime example is the development of mesothelioma, a type of lung cancer that is caused almost exclusively by exposure to asbestos, when fibres are inhaled or ingested into the body.⁶⁸ The disease is very aggressive and causes the death of most patients within the period of one or two years after diag-

64 HR 19 December 2014, ECLI:NL:HR:2014:3679, NJ 2015/344, at 3.6.1 (*Bosentan*): ‘In verband met het grondwettelijke verbod wetten in formele zin te toetsen aan ander recht dan internationaal recht (art. 120 Grondwet), kan de rechter de afweging van de wetgever niet toetsen aan algemene rechtsbeginselen of (ander) ongeschreven recht (vgl. HR 14 april 1989, ECLI:NL:HR:1989:AD5725, NJ 1989/469 (Harmonisatiewet)). Dat geldt ook indien die toetsing plaatsvindt in de sleutel van de redelijkheid en billijkheid die de rechtsverhouding van partijen bij onder meer een overeenkomst beheersen (art. 6:2 en 6:248 BW).’

65 In the *Bosentan*-case, concerning the question whether a health insurer should cover the costs for an experimental medical treatment, the parties could have relied on international law (e.g. Art. 2 ECHR), but they did not. The case was decided on the basis of Art. 6:2 (2) DCC.

66 ECtHR 15 November 1996, 18877/91 (*Ahmet Sadik/Greece*).

67 HR 13 November 1987, ECLI:NL:HR:1987:AC3287, NJ 1988/254 (*X/Y*) is an early example.

68 There is therefore no problem of multiple causality, as may be the case with other forms of lung cancer, caused both by asbestos and by the smoking habit of the victim itself. For those problems, the Dutch Supreme Court has decided on a solution based on proportional liability in HR 31 March 2006, ECLI:NL:HR:2006:AU6092 (*Nefalit/Karamus*).

nosis.⁶⁹ In the Netherlands, approximately 330,000 employees were exposed to asbestos in the past.⁷⁰ It is expected that 12,400 of them will die as a result of mesothelioma in the period of 2000-2028.⁷¹ The latency period of the disease is very long: usually thirty to forty years between initial exposure and diagnosis.⁷² This is problematic for the patients, because art. 3:310 (2) DCC stipulates that 'the right of action to compensate for the loss shall in any event be prescribed on the expiry of thirty years from the occurrence of the event which caused the loss'.⁷³

The Dutch legislature offered a solution for such personal injury cases by adding a new paragraph to art. 3:310 DCC:

'In derogation of paragraphs 1 and 2, a right of action to compensate for damage by injury or death is prescribed only upon the expiry of five years from the beginning of the day following the one on which the person prejudiced has become aware of both the damage and the identity of the person responsible therefor. If the person prejudiced was a minor on the day on which the damage and the identity of the person responsible therefor became known, the right of action is prescribed only on the expiry of five years from the beginning of the day following the one on which the person prejudiced became of age.'⁷⁴

Since this provision has no retroactive effect and has only been applicable from 1 February 2004 onwards, many old cases are governed by the long period of thirty years. One of those cases concerned Mr. Van Hese, who was employed as a painter with *De Schelde*, a shipbuilding company, from 16 March 1957 until 7 June 1963, where he was exposed to asbestos. In the course of 1996, Van Hese was diagnosed with mesothelioma. He died shortly after, at the age of 61. Before his death, Van Hese commenced proceedings against *De Schelde*, claiming both material and non-material damages.

His heirs continued this lawsuit against his former employer. *De Schelde* claimed that the action for damages was barred because Van Hese had been exposed to the asbestos more than thirty years earlier.⁷⁵ The heirs of Van Hese tried to convince the courts not to apply the long prescription period, mainly on the basis that such a strict application would, in the given circumstances,

69 Gezondheidsraad, *Asbest: Risico's van milieu- en beroepsmatige blootstelling* (Report no. 2010/10), Den Haag: Gezondheidsraad 2010, p. 33.

70 Gezondheidsraad 2010, p. 30.

71 Gezondheidsraad 2010, p. 23, referring to O. Segura, A. Burdorf, C. Looman, 'Update of predictions of mortality from pleural mesothelioma in the Netherlands', *Occupational and Environmental Medicine* 2003, pp. 50-55.

72 Gezondheidsraad 2010, p. 41.

73 Art. 3:310 (2) DCC.

74 Art. 3:310 (5) DCC.

75 HR 28 April 2000, ECLI:NL:HR:2000:AA5635, NJ 2000/430, at 3.1 (*Van Hese/De Schelde*).

be contrary to ‘standards of reasonableness and fairness’ under art. 6:2 (2) DCC.⁷⁶ Before the Supreme Court, they raised another argument: strict application of the long prescription period would be contrary to art. 6 ECHR, which should have been taken into account by the lower courts.⁷⁷

This was not the first time the Supreme Court had to rule on the validity of a long prescription period. In earlier cases, the Supreme Court had been very reluctant. Faced with a case of medical malpractice⁷⁸ and a case concerning childhood abuse,⁷⁹ the Supreme Court admitted that it may be hard to accept that an action is barred by prescription before there could be awareness of the losses on the side of the claimant, but that the long prescription period should be applied strictly, because of the important aim of providing legal certainty, also in the interest of the defendant.

Faced with the case of Van Hese, the Supreme Court again acknowledged the importance of the ‘principle of legal certainty’, but decided to provide a window of opportunity for ‘exceptional cases’, when the losses are concealed and cannot be established before the prescription period lapses. The Supreme Court noted that the legislature had not considered such a possibility when drafting the applicable law on statutory limitations.⁸⁰ The Supreme Court decided that the courts may declare the prescription period inapplicable on the basis of art. 6:2 (2) DCC, because application would, in the given circumstances, be contrary to ‘standards of reasonableness and fairness’. On the basis of certain factors, a court must assess whether a case is indeed that exceptional:

- a) whether it concerns the compensation of pecuniary losses or non-pecuniary losses, and whether the amount of compensation benefits the victim himself, his heirs or a third party;
- b) whether there exists a claim for compensation on another ground;
- c) whether the defendant may be blamed for the event that caused the losses;
- d) whether the defendant calculated, or should have calculated, the possibility that he would be found liable for the losses;
- e) whether the defendant still has a chance of reasonably defending himself;
- f) whether the liability is covered by insurance;

76 In the first and second instance, the heirs also argued that the moment that the tumour starts to grow should be considered ‘the event which caused the loss’, and not the moment of exposure (*Van Hese/De Schelde*, at 3.2).

77 In addition, the heirs invoked Art. 1, 3, 5 and 13 ECHR, Art. 3 and 11 of the European Social Charter and Art. 7 of the International Covenant on Economic, Social and Cultural Rights. The arguments raised by the heirs have been published in *NJ* 2000/430. These arguments are not considered in this contribution.

78 HR 3 November 1995, ECLI:NL:HR:1995:ZC1867, *NJ* 1998/380, at 3.4 (*Van B./Vereniging voor Diaconessenarbeid*).

79 HR 25 June 1999, ECLI:NL:HR:1999:ZC2934, *NJ* 2000/16, at 5.1.

80 *Van Hese/De Schelde*, at 3.3.1. This may have been an implicit reference to the exception created in *Harmonisatiewet*. See further in section 3.

- g) whether the claimant brought his claim within a reasonable period after the diagnosis.⁸¹

This discretion has not only been used in cases of mesothelioma. The Supreme Court has reaffirmed the possibility to set aside a statutory prescription period in a case concerning custody.⁸² And the District Court The Hague has set aside the relevant prescription period in several cases concerning the liability of the State for crimes committed by Dutch military forces in Indonesia in the period from 1945 to 1949.⁸³

The list of factors has been criticised for its lack of clarity: it is neither exhaustive nor hierarchical, and some factors may be interpreted both as favourable and as detrimental to the position of the claimant.⁸⁴ Courts do not always pay attention to all factors in their judgments,⁸⁵ despite the fact that the list is imperative.⁸⁶ In practice, culpability (c), the chance of conducting a defence (e) and the expeditiousness of the claimant (g) are compelling factors for lower courts in reaching a decision.⁸⁷ The decision on factor (g) may be regarded as preliminary: if the claimant has not acted within two years after diagnosis, he has wasted his chances.⁸⁸ While lower courts have thus contributed to greater clarity and consistency,⁸⁹ several authors still call on

81 *Van Hese/De Schelde*, at 3.3.3.

82 HR 20 June 2014, ECLI:NL:HR:2014:1492, at 3.6.2.

83 District Court The Hague 14 September 2011, ECLI:NL:RBSGR:2011:BS8793, at 4.13-4.14, and District Court The Hague 11 March 2015, ECLI:NL:RBDHA:2015:2442, at 4.4-4.18; District Court The Hague 27 January 2016, ECLI:NL:RBDHA:2016:701, at 4.4-4.24; District Court The Hague 27 January 2016, ECLI:NL:RBDHA:2016:702, at 4.5-4.22.

84 J.L. Smeehuijzen, 'Naar een scherpere gezichtspuntencatalogus bij verjaring van asbestzaken', *AV&S* 2005, pp. 48-60; J.L. Smeehuijzen, *De bevrijdende verjaring* (diss. VU Amsterdam), Deventer: Kluwer 2008, p. 256-258; J.E. Jansen, 'Geen bevrijdende verjaring zonder rechtsverwerking', *RMThemis* 2009, p. 215.

85 J.P. Quist, *Gezichtspunten in het privaatrecht* (diss. Rotterdam), Den Haag: Boom Juridische uitgevers 2014, p. 331.

86 Most lists of the Dutch Supreme Court are not imperative (Quist 2014, pp. 63-65). Quist criticises the use of imperative lists, because it does not encourage parties and the courts to consider other relevant factors (Quist 2014, pp. 577-578). In some mesothelioma cases, lower courts do consider other factors, such as the fact that the victim died at the age of 87 years (The Hague Court of Appeal 25 January 2011, ECLI:NL:GHSGR:2011:BP1109), or the exposure to asbestos during a previous employment (Subdistrict Court Almelo 25 August 2009, ECLI:NL:RBALM:2009:BJ9333).

87 M.R. Hebly & S.D. Lindenbergh, 'Doorbreking van de absolute verjaring in geval van mesothelioomclaims: de toepassing van de gezichtspunten uit Van Hese/De Schelde', *AV&S* 2013, pp. 162-172.

88 Hebly & Lindenbergh 2013, p. 171. This period of two years was advised by T. Hartlief, Jac. Hijma & H.J. Snijders, *Advies over doorbreking van de verjaringstermijn en stelplicht en bewijslast voor aansprakelijkheid voor het Instituut asbestslachtoffers* (report of 6 Februari 2009), pp. 34-35. The report can be consulted via www.asbestslachtoffers.nl.

89 According to Wolters, case law shows more consistency than is presumed in literature: P.T.J. Wolters, 'Het vaste gewicht van de gezichtspunten van Van Hese/De Schelde', *AV&S* 2015, pp. 15-25.

the Supreme Court to indicate the relative importance of the different factors.⁹⁰

What influence did art. 6 ECHR have on this outcome? The argument was raised by the heirs and played a prominent role in the reasoning of the Advocate-General.⁹¹ Yet it does not seem to have influenced the decision, and it is used by the Dutch Supreme Court to justify the outcome only in a limited way. On the one hand, the Supreme Court noted that the long period of prescription restricted the right to access to a court under art. 6 ECHR, but that this restriction fell within the ‘margin of appreciation’ of the States parties, considering the length of the period and the important aim of legal certainty. On the other hand, the Supreme Court noted that its solution for ‘exceptional cases’ was nonetheless ‘in line with’ the right of access to a court under art. 6 ECHR.⁹²

7 PRESCRIPTION AND THE RIGHT TO ACCESS TO A COURT BEFORE THE ECtHR

At that time, the leading ECtHR judgment on the compatibility of limitation periods with art. 6 ECHR was *Stubbings/United Kingdom*.⁹³ The case concerned Ms. Leslie Stubbings, born on 29 January 1957, who alleged that she had been sexually assaulted by her adoptive father Webb on a number of occasions between December 1959 and December 1971. Since 1976 Stubbings experienced severe psychological problems (schizophrenia, emotional instability, paranoia, depression and agoraphobia). She was hospitalised on three occasions and attempted suicide once. Allegedly, it was only after she consulted a psychiatrist in September 1984 that Stubbings realised her mental health problems may have been caused by the childhood abuse. In August 1987, she brought an action in damages against her adoptive parents and brother.

It was unclear which limitation period was applicable to the facts of the case. Under section 2 of the Limitation Act 1980, the general period of limitation for an action in tort is six years from the date on which the cause of action accrued, or from the eighteenth birthday.⁹⁴ The courts have no discretion to extend this period in favour of the claimant. Under section 11(1), the period of limitation for ‘any action for damages for negligence, nuisance or breach of duty’ is three years from either the date when the cause of action accrued or the ‘date of knowledge’,⁹⁵ whichever is the later. Section 33(1) does give

90 Smeehuijzen 2005 and 2008, supported by Chr.H. van Dijk, ‘Kroniek verjaring en stuiting: de praktijk blijft weerbarstig’, *AV&S* 2011, p. 15 and Hebly & Lindenbergh 2013, p. 172.

91 Opinion of Advocate-General Spier, ECLI:NL:PHR:2000:AA5635, at 9.1-9.9.

92 *Van Hese/De Schelde*, at 3.3.2.

93 ECtHR 22 October 1996, 22083/93 and 22095/93 (*Stubbings/United Kingdom*).

94 When it concerns an infant, the period expires after six years from the eighteenth birthday: section 28(1) in conjunction with section 38(2) of the Limitation Act 1980.

95 As defined in section 14 of the Limitations Act 1980.

the courts the discretion to disapply this period when 'it would be equitable to allow an action to proceed'. As has been the case in the Netherlands since *Van Hese/De Schelde*, the courts have to take into account certain factors in exercising this discretion. They 'shall have regard to all the circumstances of the case', and in particular to:

- a) the length of, and the reasons for, the delay on the part of the claimant;
- b) the effect of this delay upon the evidence;
- c) the conduct of the defendant after the cause of action arose, including his or her response to the claimant's reasonable request for information;
- d) the duration of any disability of the claimant arising after the accrual of the cause of action;
- e) the extent to which the claimant acted promptly and reasonably once he or she knew that he or she might have a claim;
- f) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice he or she may have received.⁹⁶

Unfortunately for victims of childhood abuse, the Lords unanimously decided that section 11(1) applied in cases of *accidentally* inflicted injuries, and not in cases of *intentionally* inflicted injuries, such as rape and indecent assault.⁹⁷ As a result, claims for compensation for psychological injury caused by childhood abuse were subject to the general period of limitation of six years under section 2 and the courts could not exercise any discretion on the basis of section 33(1). The Law Commission described this result as 'anomalous', because 'a claimant who has been sexually abused by her father may have longer to bring a claim for damages against her mother for negligently failing to prevent the abuse than to bring a claim against her father for actually committing the abuse'.⁹⁸

Four British nationals, including Ms. Stubbings, decided to lodge applications against the United Kingdom before the Strasbourg Court. They complained that this construction by the House of Lords of the Limitation Act 1980

⁹⁶ Section 33(3) of the 1980 Limitation Act 1980, summarised by the author.

⁹⁷ House of Lords, [1993] AC 498 (*Stubbings/Webb*).

⁹⁸ The Law Commission, *Limitation of Actions* (Report No. 270, laid before the Parliament on 9 July 2001), p. 2 (www.lawcom.gov.uk/wp-content/uploads/2015/03/lc270_Limitation_of_Actions.pdf, last accessed 5 January 2016). In 2008, the House of Lords overruled *Stubbings/Webb* in *A/Hoare* (House of Lords 30 January 2008, [2008] UKHL 6). From that moment on, section 11(1) does include sexual assault, and the courts may exercise their discretion under section 33 in favour of victims of childhood abuse. Art. 6 ECHR and the Human Rights Act are not mentioned in *A/Hoare*.

violated their right of access to a court under art. 6 ECHR.⁹⁹ The Court recalled that art. 6 ECHR embodies the right to institute proceedings before a court in civil matters, but noted:

‘However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with art. 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.’¹⁰⁰

The Court showed restraint when applying these standards to the cases of childhood abuse. According to the Court, limitation periods in personal injury cases pursue ‘several important purposes’. They ensure ‘legal certainty and finality’, protect defendants from ‘stale claims which might be difficult to counter’ and prevent problems of ‘evidence which might have become unreliable and incomplete because of the passage of time’.¹⁰¹ The prescription period of six years from the eighteenth birthday was ‘not unduly short’ and could have been used by the applicants to initiate civil proceedings.¹⁰² In addition, ‘criminal prosecution could be brought at any time and, if successful, a compensation order could be made’.¹⁰³ The very essence of the right of access to a court had therefore not been impaired, according to the majority.¹⁰⁴

Whereas the Strasbourg Court acted with restraint in *Stubbings/United Kingdom*, recent cases show that the Court is prepared to find a violation. One of those judgments is *Moor/Suisse*.¹⁰⁵ For the first time, the Strasbourg Court had the chance to examine the compatibility of a strict application of limitation periods to mesothelioma cases with art. 6 ECHR. The case concerned Hans

99 In addition, all of the applicants complain that the difference in the rules applied to themselves and other types of claimants was discriminatory, contrary to Art. 14 ECHR. Furthermore, three applicants, including Ms. Stubbings, complain that the State has failed in its positive obligation to protect their right to respect for their private lives, by failing to provide them with a civil remedy, contrary to Art. 8 ECHR, also in combination with Art. 14 ECHR. These complaints are not considered in this contribution.

100 *Stubbings/United Kingdom*, at 50.

101 *Stubbings/United Kingdom*, at 51.

102 *Stubbings/United Kingdom*, at 52-53.

103 *Stubbings/United Kingdom*, at 52.

104 The Court noted that this may not be a perfect solution to the underlying problem, but found that it was up to the national authorities to consider making ‘special provision for this group of claimants in the near future’. *Stubbings/United Kingdom*, at 56.

105 ECtHR 11 March 2014, 52067/10 and 41072/11 (*Moor /Suisse*), only available in French.

Moor, who worked as a machine fitter with *Oerlikon* (now *Alstom*) from 1965 until 1978, where he was exposed to asbestos. In May 2004, just before his retirement, he was diagnosed with mesothelioma. In November 2005, he died at the age of 58.

Before his death, Moor commenced proceedings against *Alstom*. After his death, these proceedings were continued by his two daughters as heirs. His daughters also joined the proceedings commenced by Moor's wife against the Swiss *Caisse nationale suisse d'assurance en cas d'accidents*. Ultimately, the Federal Supreme Court of Switzerland dismissed both claims, because they were subject to a prescription period of ten years after the events which caused the damage.¹⁰⁶ Mother and daughters lodged an application in Strasbourg, claiming that art. 6 ECHR had been breached. They argued that their right of access to a court was rendered theoretical and illusory, because the prescription period of ten years expired before they could have been aware of the losses.¹⁰⁷

The Strasbourg Court first reiterated its statements in *Stubbings/United Kingdom* and acknowledged that limitation periods pursue the legitimate aim of providing legal certainty. It also repeated its findings in *Eşim/Turkey*, where it stated that 'in personal injury compensation cases, the right of action must be exercised when the litigants are actually able to assess the damage that they have suffered'.¹⁰⁸ The Court then acknowledged that a strict application of absolute limitation periods to persons suffering from diseases which could not be diagnosed until many years after the triggering events deprives those persons of the chance to assert their rights before the courts.¹⁰⁹ The Court considered that when it is scientifically proven that a person could not know that he or she was suffering from a certain disease, as is the case with mesothelioma, that fact should be *taken into account* ('devrait être prise en compte') in *calculating the limitation period* ('pour le calcul du délai de péremption ou

106 Art. 20 (1) Bundesgesetz über die Verantwortlichkeit des Bundes sowie seiner Behördemitglieder und Beamten: 'Die Haftung des Bundes (Art. 3 ff.) erlischt, wenn der Geschädigte sein Begehren auf Schadenersatz oder Genugtuung nicht innert eines Jahres seit Kenntnis des Schadens einreicht, auf alle Fälle nach zehn Jahren seit dem Tage der schädigenden Handlung des Beamten.' Art. 127 Obligationenrecht: 'Mit Ablauf von zehn Jahren verjähren alle Forderungen, für die das Bundeszivilrecht nicht etwas anderes bestimmt.' And Art. 130 Obligationenrecht: '1 Die Verjährung beginnt mit der Fälligkeit der Forderung. 2 Ist eine Forderung auf Kündigung gestellt, so beginnt die Verjährung mit dem Tag, auf den die Kündigung zulässig ist.'

107 Appealing to the motto of the ECtHR that the Convention must be interpreted in a manner which renders its rights 'practical and effective, not theoretical and illusory'. ECtHR 9 October 1979, 6289/73, at 24 (*Airey/Ireland*) and ECtHR 21 February 1975, 4451/70 (*Golder/United Kingdom*), where the ECtHR constructed Art. 6 ECHR to include the right of access to a court.

108 ECtHR 17 September 2013, 59601/09, at 25 (*Eşim/Turkey*).

109 *Moor/Suisse*, at 77.

de prescription’).¹¹⁰ The Court concluded, with a six-one majority, that art. 6 ECHR had been violated.

After *Moor/Suisse*, it is clear that a strict application of absolute limitation periods on mesothelioma cases impairs the very essence of the right to access to a court under art. 6 ECHR and does not fall within the ‘margin of appreciation’ of the States parties, as the Dutch Supreme Court suggested in *Van Hese/De Schelde*. Moreover, it is clear that a solution has to be found for all personal injury cases that involve losses that remain concealed and cannot be established before the prescription period lapses. The Dutch Supreme Court has provided a solution under art. 6:2 (2) DCC for old cases that are not governed by art. 3:310 (5) DCC. Does this solution comply with the requirements arising from *Moor/Suisse*?

8 THE COMPATIBILITY OF *VAN HESE/DE SCHELDE* WITH ART. 6 ECHR

The Strasbourg Court has not indicated how national authorities should take the long latency period ‘into account’, or what it means that ‘the right of action must be exercised when the litigants are actually able to assess the damage that they have suffered’. The Dutch Supreme Court did mention seven relevant factors that lower courts have to take into account when they exercise their discretion under art. 6:2 (2) DCC. According to several authors,¹¹¹ the Dutch Minister of Justice¹¹² and several lower courts,¹¹³ the current Dutch practice is in conformity with *Moor/Suisse*. Others call the compatibility of *Van Hese/De Schelde* with art. 6 ECHR into question.¹¹⁴ After all, Dutch courts may still decide not to exercise their discretion in favour of the claimant. Is that not contrary to art. 6 ECHR?

For the Strasbourg Court, the chance of conducting a defence (factor e) is a relevant circumstance as well. According to the Court, one of the ‘important purposes’ of prescription periods is to

110 *Moor/Suisse*, at 78.

111 M.R. Hebly, ‘Werpt Straatsburg een nieuw licht op de verjaring van asbestclaims?’, *Letzel & Schade* 2014, pp. 40-42; P.T.J. Wolters, ‘Het vaste gewicht van de gezichtspunten van Van Hese/De Schelde’, *AV & S* 2015, pp. 24-25; J. Emaus in her case note under *Moor/Suisse*, *EHRC* 2014/164, at 8.

112 *Aanhangsel Handelingen II* 2013/14, 1864.

113 District Court Midden-Nederland 10 November 2014, ECLI:NL:RBMNE:2014:5507, at 4.7; District Court Den Haag 5 November 2014, ECLI:NL:RBDHA:2014:13593, at 4.4-4.5; Court of Appeal The Hague 24 November 2015, ECLI:NL:GHDHA:2015:3152, at 4.5.

114 Statement of B. Ruers in the Dutch newspaper *Trouw*: ‘Uitspraak Hof vergroot kans op schadevergoeding asbest’, *Trouw* 3 April 2014, p. 7; Questions by the Dutch member of parliament De Wit to the Minister of Justice, *Aanhangsel Handelingen*, 2013/14, no. 1758; C.C. van Dam, *Aansprakelijkheidsrecht. Deel I: Rechtsbescherming, rechtsmiddel en rechtsherstel*, Den Haag: Boom Juridische uitgevers 2015, p. 49.

‘protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.’¹¹⁵

It therefore seems appropriate to take this circumstance into account, even if this may not always have a beneficial effect on the outcome for the claimant.¹¹⁶

The Strasbourg Court does not consider the expeditiousness of the claimant (factor g). For Dutch courts, the decision on this point may be regarded as preliminary: if the claimant has not acted within two years after diagnosis, he has wasted his chances.¹¹⁷ It is argued that this factor is not contrary to art. 6 ECHR. After all, the real problem in *Moor/Suisse* was that the claim was time-barred *before* the losses could be established. The requirement that the claimant has to bring his claim within a reasonable period *after* the diagnosis does not restrict or reduce the access to a court in such a way or to such an extent that the very essence of the right is impaired. It serves the legitimate aims of ‘legal certainty and finality’,¹¹⁸ while it cannot be said that the period of two years is ‘unduly short’.¹¹⁹

The Strasbourg Court does not consider whether the defendant may be blamed for the event that caused the losses (factor c). Hebly and Lindenbergh have shown that lower courts do examine whether the actual defendant could reasonably have been expected to know the health risks and take the precautionary measures. The courts do find it relevant, in this context, whether the employer produced or processed asbestos, and what kind of job the employee had at the time.¹²⁰ If there is little to blame the defendant, this factor may contribute to the decision that the court will not exercise its discretion in favour of the claimant. Hartlief, Hijma and Sniijders caution that this is essentially a question of liability, and not of prescription.¹²¹ That does not mean that the law should regard the question of culpability as irrelevant. But the law should deal with that problem under the question of whether the actual defendant may be held liable. Although it cannot be said that the current application is contrary to art. 6 ECHR, the fact that the Strasbourg Court does

115 *Stubbings/United Kingdom*, at 51; *Moor/Suisse*, at 72.

116 An additional argument may be that it is also a relevant factor under section 33(3) (b) of the Limitations Act 1980.

117 Hebly & Lindenbergh 2013, p. 171.

118 *Stubbings/United Kingdom*, at 51.

119 An additional argument may be that it is also a relevant factor under section 33(3) (e) of the Limitations Act 1980.

120 Hebly & Lindenbergh 2013, p. 166.

121 Hartlief, Hijma & Sniijders 2009, pp. 35-36. Culpability is not a relevant question under section 33(3) of the Limitation Act 1980 either.

not examine whether the defendant may be blamed may constitute an argument for the Dutch Supreme Court to reconsider its case law on this point.¹²²

The other circumstances mentioned in *Van Hese/De Schelde* are of minor importance in Dutch practice. Just as the Dutch Supreme Court, the Strasbourg Court finds it relevant to know whether the claimants have already been compensated on another ground (factor b), but such a compensation should not deprive them of the possibility to claim all their losses:

‘Par ailleurs, la Cour ne méconnaît pas que les requérantes ont touché certaines prestations. Elle se demande cependant si celles-ci sont de nature à compenser entièrement les dommages résultés pour les intéressées de la péremption ou de la prescription de leurs droits.’¹²³

The remaining circumstances are not mentioned in *Moor/Suisse*: whether it concerns the compensation of pecuniary losses or non-pecuniary losses, and whether the amount of compensation benefits the victim himself, his heirs or a third party (factor a), whether the defendant calculated, or should have calculated, the possibility that he would be found liable for the losses (factor d), and whether the liability is covered by insurance (factor f). As these factors are not compelling for Dutch courts either, it is argued that they will not lead to problems under art. 6 ECHR. It may be concluded that the solution provided in *Van Hese/De Schelde* for exceptional cases is generally in line with the current requirements under art. 6 ECHR. By providing this solution under art. 6:2 (2) DCC, private law has therefore been at the forefront of fundamental rights protection.

9 PRIVATE LAW AT THE FOREFRONT OF FUNDAMENTAL RIGHTS PROTECTION

Since the European Court of Human Rights has a subsidiary role and often leaves a considerable margin of appreciation to the national authorities, domestic courts have an important stake in protecting fundamental rights at the national level. Yet the possibilities to do so are limited in the Netherlands, because judicial review of primary legislation against the rights embodied in the Dutch Constitution is forbidden. And even though the Constitution obliges the courts to enforce the Convention rights, constitutional lawyers claim that the Supreme Court exercises considerable restraint when it is not backed by the European Court of Human Rights.

This contribution has balanced this claim by pointing out a *third way* to protect fundamental rights in the private sphere: an evolving interpretation

¹²² Provided that such a case is brought before the Supreme Court and provided that the argument is raised.

¹²³ *Moor/Suisse*, at 76.

of the *core concepts* of the Dutch Civil Code. The solution to the problem of the prescription of 'long-tail' claims, the object of this study, illustrates this point. Fourteen years before the first mesothelioma case reached the Strasbourg Court, the Dutch Supreme Court decided that an absolute prescription period may be declared inapplicable on the basis of art. 6:2 (2) DCC. Strasbourg jurisprudence provided some guidance at the time, but the influence of art. 6 ECHR on this outcome has been fairly limited. Still, the Supreme Court did not defer the matter to the legislature, but used a private-law concept – the standards of reasonableness and fairness – to provide a solution that is in line with the requirements arising from recent Strasbourg jurisprudence, as this contribution has shown.

In the absence of judicial review against the Dutch Constitution, the Dutch Civil Code therefore provides a legal basis to reach a result that is in conformity with the demands of fundamental rights law. This is important, also for those cases that may not benefit from a review against those rights, because the parties did not rely on those rights, or because Strasbourg jurisprudence is unclear or silent on the matter. It is also important, as it is expected that the Strasbourg Court will increasingly focus its attention on the most serious and systemic problems, and on important questions of interpretation of the ECHR, and less on the delivery of justice in each individual case. In this constitutional context, a significant role has been preserved by and for private law.

