

Direct application of international economic and social human rights in the Netherlands: towards a context-dependent approach?

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Abstract

Recently, the Netherlands Supreme Court (“Hoge Raad”) formulated a new test for determining the direct application of international law in the Dutch legal order. The court added new aspects to those established in earlier case law. Firstly, that the fact that a provision affords the State freedom of choice and policy does not stand in the way of direct application. Secondly, that direct application of an international norm may be dependent on the actual context in which a provision is invoked. These criteria will influence the judicial application of international economic and social human rights in the Dutch legal order. Furthermore, the second criterion, which determines that the direct application depends on the context of the case is controversial. It provides a potentially wide discretionary authority for the court to allow or not allow a treaty provision to be applied directly. Moreover, the test appears to be in conflict with the Constitution for the Kingdom of the Netherlands. The article discusses the problems of the context-based approach and the possible consequences of the test formulated by the Supreme Court for the application of international economic and social rights in the Netherlands.

1. Introduction

On 10 October 2014 the Netherlands Supreme Court (“Hoge Raad”) gave a ruling in a case concerning the prohibition of smoking in small cafes, which case had been instituted by the non-smokers’ federation CAN against the State of the Netherlands.² That case included concerns relating to the health aspects of being exposed to tobacco smoke, as well as to the protection those suffering can derive from international law. The Supreme Court formulated a new test in the ruling for determining the direct application of provisions of international law, a test which is important for the judicial application and effect of international economic and social human rights in the Dutch legal order.

The test introduced by the Supreme Court builds on the assessment criteria for the direct application formulated by the Supreme Court in 1986 in the so-called *Railway Strike ruling*, which for a long time was the standard ruling concerning the direct effect of international

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² Supreme Court 10 October 2014 (ECLI:NL:HR:2014:2928); JB 2014/224 with case note by J.J.J. Sillen, NJ 2015/12 with case note by E.A. Alkema, AB 2015/21 with case note by S. Philipssen and J.C. de Wit, AA20150305 with case note by R.J.B. Schutgens.

law in the Dutch legal order.³ The Supreme Court has now added a number of aspects to those criteria. In the first place, that when a standard in international law affords the State freedom of choice and policy, that freedom does not need to stand in the way of direct application. Secondly, that the direct application of that standard is dependent on the actual and factual context in which a provision is invoked.

The possibility that also standards which allow a freedom of choice or policy could apply directly, increases the chances of successfully invoking international economic and social rights before a Dutch court. After all, those rights are often vaguely or broadly formulated and require a variety of active measures on the part of the contracting State for their fulfilment. It is less easy, however, to find the right place for the second criterion, which determines that the direct application depends on the context of the case. This criterion provides a potentially wide discretionary authority for the court to allow or not allow, as the case may be, a treaty provision to be applied directly. Moreover, the test appears to be in conflict with article 93 of the Constitution for the Kingdom of the Netherlands (hereafter: 'the Constitution'), which determines that a provision applies directly or not 'according to its contents'.⁴

That the present CAN-ruling will have an influence on the application and effect of international economic and social rights has already been established. Whether in the future courts will take up the direct application either more or less often is harder to predict. Faced with an appeal to the actual context of a case, the courts could theoretically follow whichever direction they choose.

This article discusses the possible consequences of that judgment on the case law concerning the direct application of international economic and social rights by the Dutch courts. Following a short introduction concerning the nature and the application of international economic and social rights in paragraphs 2 and 3, attention is given in paragraph 4 to the criterion set in the CAN ruling. The contextual – or: case-dependent – approach of direct application is further analysed in paragraph 5, and mention is also given to the scant case law that has been published since the CAN ruling. Paragraph 6 contains a few concluding remarks.

2. Economic and social human rights

The term "Economic, Social and Cultural Rights" is used in international law as the collective name for a large number of human rights applying to areas such as health, housing, education, social security, food, water, work and participation in cultural life. Within this whole area, international *cultural* rights hold a special position, while they play no part

³ Supreme Court 30 May 1986, NJ 1986, 688 (Spoorwegstaking), reproduced in: *Netherlands Yearbook of International Law* (1987), p. 392..

⁴ The full text of Article 93 of the Constitution reads as follows: "Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published" (Translation: Ministry of the Interior and Kingdom Relations of the Kingdom of the Netherlands).

worth mentioning in the practice of law in the Netherlands. For these reasons the argument set out below is limited to international economic and social human rights.

Economic and social rights had already been included in many national codifications since the nineteenth century. The development of economic and social rights as *international human rights* started in the first half of the twentieth century.⁵ A number of conventions were taken up then by the Member States of the International Labour Organization (ILO), amongst other things aimed at improving labour conditions and setting up trade unions. This development had an influence on the creation of the Universal Declaration of Human Rights (UDHR) in which, besides the well known civil and political rights, a large number of economic and social rights are also included. One crucial step towards the universal legal application of economic and social rights from the UDHR was the entering into force of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶ This convention is still the most important international treaty for the protection of economic and social rights. It encompasses a large number of different rights: the right to work, fair labour conditions, the right to set up trade unions and the right to strike (articles 6, 7 and 8), the right to social security (article 9), the right to family life (article 10), the right to an adequate standard of living, including the right to food, clothing and housing (article 11), the right to health (article 12), the right to free education (article 13) and the right to participate in cultural life and to enjoy the benefits of scientific progress (article 15).

Many other international human rights treaties also contain provisions relating to economic and social rights. Examples include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities. For The Netherlands and other European countries, a number of European conventions are equally important in relation to safeguarding of economic and social rights. These conventions include the Charter of Fundamental Rights of the European Union and the European Social Charter.

3. Direct application of economic and social rights by courts

Civil and political rights and economic and social rights are formally of equal value. The official position taken at the international level since the drafting process of the UDHR was taken up is succinctly described in the oft-quoted final declaration of the World Conference on Human Rights in Vienna in 1993: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".⁷

⁵ For a more extensive history of its creation see Steiner & Alston, *International Human Rights in Context*, 3rd edition, Oxford: OUP 2008, p. 269 and further and R. Normand and S. Zaidi, *Human Rights at the UN, The Political History of Universal Justice*, Indianapolis: IUP 2008.

⁶ Treaty Series (Tractatenblad) 1969, 100; effective date: 11 March 1979 (Treaty Series 1978, 178).

⁷ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, par. 5.

In reality, however, there is little consensus in practice and in the doctrine concerning this parity and equality. Differences of opinion about the nature and contents of the rights and the nature and contents of the obligations they afford States are as old as the post-war codifications themselves.⁸ Concerning this, it is stated in the explanatory notes on the drafting process and the text of the ICESCR and ICCPR:

“Those who were in favour of drafting a single covenant maintained that human rights could not be clearly divided into different categories, nor could they be so classified as to represent a hierarchy of values. All rights should be promoted and protected at the same time. Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured. [...]

Those who were in favour of drafting two separate covenants argued that civil and political rights were enforceable, or justifiable, or of an ‘absolute’ character, while economic, social and cultural were not or might not be; that the former were immediately applicable, while the latter were to be progressively implemented; and that, generally speaking, the former were rights of the individual “against” the State, that is, against unlawful and unjust action of the State, while the latter were rights which the State would have to take positive action to promote. Since the nature of civil and political rights and that of economic, social and cultural rights, and the obligations of the State in respect thereof, were different, it was desirable that two separate instruments should be prepared.”⁹

More than sixty years since then, the differences of opinion cited above concerning the nature and legal character of international economic and social human rights still apply. Moreover, they have an influence on the debate on the question as to whether the national courts may apply them directly. After all, whoever thinks that economic and social human rights should only be taken to be assignments to the legislator to take steps to progressively realize the rights¹⁰, will also be of the opinion logically speaking that these rights do not provide any concrete obligations and due to their nature are not suitable for direct application in individual cases. A court that still applies such standards will soon be criticized for meddling in matters that are reserved for the legislator.

An illustration of the latter is the criticism from Alkema in his case note in the CAN case. As to the testing by the Supreme Court of the legitimacy of national legislation in relation to international law in the case, Alkema writes: “That legitimacy is first and foremost the concern of other State bodies such as the legislator, parliament or the government. It is the government in particular that usually has the best insight, thanks to its participation in the negotiations over the convention, into the intention of the parties to the convention. The courts (...) mainly lack that inside information. In my opinion, they therefore apply more of a

⁸ See Normand and Zaidi (2008), p. 188–204.

⁹ UN Doc. A/2929, *Annotations on the text of the draft International Covenants on Human Rights*, 1955, p. 7–8.

¹⁰ Compare the text of article 2 paragraph 1 of the ICESCR.

‘remaining task’ in case of the latter to protect parties at their request in their fundamental rights (...).¹¹

4. The criterion formulated in the CAN ruling

In the CAN case the Supreme Court takes a position in the debate about the influence of the legal nature of economic and social rights on their judicial application. The Supreme Court does that by formulating a new test for assessing the direct application of convention provisions. That test reads as follows:

“3.5.1 The question concerning the extent to which a convention provision is accorded direct application within the meaning of articles 93 and 94 of the Constitution should be answered by an explanation of that provision. That explanation should be in accordance with the criteria set out in articles 31–33 of the Vienna Convention on the Law of Treaties of 23 May 1969 (...).

3.5.2 If it does not follow either from the text or the history of its realization that no direct application of the convention provision is intended, then the contents of that provision are decisive. At issue is whether these contents are unconditional and sufficiently precise to be applied as objective law in the national legal order (...).

3.5.3 If the result to be accomplished in the national legal order on grounds of a convention provision is unconditional and set out with sufficient precision, then the sole fact that the legislator or the government is afforded freedom of choice or policy in relation to taking measures in order to achieve that result, does not prevent the provision having direct application. Whether such an application applies depends on the answer to the question whether the provision in the context in which it is invoked can function as objective law. Contrary to the submissions of the State, the sole existence of freedom of choice or policy therefore does not mean that no direct application is possible (...).”

When formulating this test the Supreme Court built on the criteria from the Railway Strike ruling, already mentioned above, giving these a broader incorporation. Firstly, as to the requirements to be set for the text of the provision to be examined, the Supreme Court uses the criterion formulated by the European Court of Justice (ECJ) that this text should be *unconditional* and *sufficiently precise* in order to be invoked directly.¹²

Secondly, the Court held that convention provisions in which the government is allowed freedom of choice or policy (a certain discretionary power, or *margin of appreciation* as one could also call it) may have direct application. The Supreme Court appears to have been inspired here as well by the case law of the ECJ.¹³ It is clear that this addition is principally

¹¹ NJ 2015/12, under 5.

¹² See for example ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich*), point 11; 11 July 2002, C-62/00, ECLI:EU:C:2002:435 (*Marks & Spencer*), point 25, and 5 October 2004, C-397/01–C-403/01, ECLI:EU:C:2004:584, (*Pfeiffer et al.*), point 103. For further discussion of the CAN ruling on this point: B.C.A. Toebes, *Tabakszaak tegen Nederland*, NJB 37 (2015), p. 2606–2611.

¹³ See for example ECJ 24 October 1996, C-72/95, ECLI:EU:C:1996:404 (*Kraaijeveld*).

important in relation to the application of economic and social human rights. As already mentioned above, the fact that many economic and social human rights afford a State freedom of choice or policy in choosing the means for implementing the rights, is one of the most important objections to their direct application. In practice as well, that was also frequently found to stand in the way of direct application.¹⁴ The Supreme Court had already dealt with this issue in earlier judgments¹⁵, but it was finally settled in this case. This means that the possibilities for making an appeal for direct application of economic and social convention rights are expanded.

In point 3.5.3 the Supreme Court also judged that, when allowing direct application, the actual context in which a provision is invoked can be taken into account. That consideration appears to be the third one based on ECJ case law.^{16, 17} This approach is more problematic and it is analysed further in the following paragraphs.

5. The contextual approach of direct application

5.1 Introduction

The contextual approach to the concept of direct application is not new, but up until now it has not played a prominent role in the doctrine and case law in the Netherlands.¹⁸ On the other side to the contextual approach lies the dichotomous approach, which in short is based on the fact that a convention provision, depending on the interpretation of that provision, either applies directly in all cases or not at all. The formulation of article 93 of the Constitution encourages a dichotomous approach. That article speaks of “provisions of treaties ... which may be binding on all persons by virtue of their contents”, giving the impression that treaty provisions can be divided into two categories, namely provisions that bind by virtue of their contents and provisions that do not.¹⁹

¹⁴ See for example Central Appeals Tribunal 18 June 2014 (ECLI:NL:CRVB:2004:AP4680), legal ground 3.1.4; Administrative Law Division Council of State (RvS) 22 January 2007 (ECLI:NL:RVS:2007:AZ7882), legal ground 2.1; Amsterdam Court of Appeals 25 October 2007 (ECLI:NL:GHAMS:2007:BB6504), point 4.8.7; Supreme Court 14 April 1989 (ECLI:NL:HR:1989:AD5725), NJ 1989, 469 (Harmonisatiewet).

¹⁵ Cf. Supreme Court 9 April 2010 (ECLI:NL:HR:2010:BK4549), NJ 2010/388 (SGP).

¹⁶ See for example ECJ 13 July 1989, 5/88, ECLI:EU:C:1989:321 (*Wachauf*), legal ground 18 (“The fundamental rights acknowledged by the Court of Appeal do not however apply absolutely, but must be considered in relation to their social function. The benefit of ownership right and the freedom of professional practice can be subjected to limitations particularly under the scope of joint market regulation, insofar as such limitations actually answer the objectives of the general interest to which the Community aims and, taking the intended objective into consideration, cannot be considered to be a disproportionate and intolerable intervention, meaning that the safeguarded rights become affected at their core”).

¹⁷ In *LaGrand*, its seminal case on direct effect, the International Court of Justice also took into consideration the context of the case: ICJ, *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, I.C.J. Reports, par 77.

¹⁸ J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen*, Den Haag: Boom 2004, p. 69; including other terms for this approach: ‘relative’, ‘concrete’ and ‘situational’.

¹⁹ *Id.*, p. 68.

In the contextual approach, introduced now as criterion by the Supreme Court, the question arises as to whether a provision applies directly is partly dependent on the question whether a court, in the concrete case put before it, sees the possibility of applying the provision. As an example, *Fleuren* cites a judgment given by the Central Appeals Tribunal (“Centrale Raad van Beroep”) dating from 1989, in which the Tribunal was required to assess the direct application of a part of article 7 of the ICESCR. The Central Appeals Tribunal found:

“The question of the direct application should be answered in accordance with articles 93 and 94 of the Constitution on the basis of the convention provisions themselves. In the opinion of the Central Appeals Tribunal, it is important in respect of the ICESCR that the direct application of any particular provision of the ICESCR is an absolute exception to the general nature of this convention. Such an exception, in the opinion of the Tribunal, can only occur when not only the convention provision in question provides for direct application in its nature and content and through sufficient clarity and focus, *but also when the case to which and the context in which the application of that convention provision is requested is sufficiently structured and specified for such a direct and enforceable application to be reasonable.*”²⁰

Evidently, the question arises just *how* a court should assess whether a particular case and context are sufficiently structured and specified. With some effort it is possible to distil a few general criteria from the scant case law and literature on the matter. Firstly, for example, the alleged violation of the convention provision in question should be sufficiently serious. Secondly, it may be relevant if apart from the invoked convention provision, similar national legal rules or other international standards are also applicable. A third relevant contextual factor may be the existence of a clearly identifiable (government) authority which is to be held accountable for the violation of the right and competent to provide for reparation.²¹ Those are relatively broad criteria and it is not yet possible to provide greater specification for interpreting the contextual approach.

5.2 Critical review of the contextual approach

The scarce literature on this subject does not provide much support for the contextual approach of the concept of direct effect. It seems that the Netherlands Supreme Court had opted for the dichotomous approach for some time.²² There are well-founded objections that can be made against the contextual approach²³, the most problematic issue appears to be its arbitrary nature. Taking this approach in its most extreme form amounts to circular reasoning: the court judges that a standard has direct effect because it finds that it can have direct effect in the case at issue. This could lead to one and the same provision having direct effect with the one court but not with the other, depending on the courts’ weighing of merits of the case and the method used to assess them. This poses a risk of legal

²⁰ *Id.*, p. 412, with reference to the Central Appeals Tribunal (Centrale Raad van Beroep) of 16 February 1989, AB 1989, 164 [emphasis added].

²¹ *Id.*, p. 412.

²² See J. Uzman, *Constitutionele remedies bij schending van grondrechten*, diss., Leiden 2013, p. 36–38; and *Fleuren*, p. 363–364.

²³ *Fleuren*, p. 420–423.

uncertainty and arbitrariness. The problem is more than just academic. Studies into the effect of the Convention on the Rights of the Child (CRC) have shown that case law on the effect of CRC treaty provisions is sometimes inconsistent and unclear.²⁴

A comparison with the case-dependent application of other legal provisions may illustrate that a case-dependent approach can lead to difficulties.²⁵ It would be very difficult to defend a case in which a court ruled that Section 9 of the ECHR – which protects freedom of speech – did not apply to people demonstrating against the asylum policy but could be invoked by participants in a demonstration in favour of building more holiday homes on the Dutch coast. It would be regarded as just as unacceptable if the court allowed the victims of serious environmental pollution but not those of the earthquakes in Groningen to base their claims on Section 6:162 of the Dutch Civil Code (on unlawful acts). But this is precisely what could happen in a context-based approach in its most extreme form.

5.3 Possibilities offered by the contextual approach

Both the content and the scope of Section 9 of the ECHR and Section 6:162 of the Dutch Civil Code are significantly clearer than that of many international economic and social rights. Especially when it comes to the application of these economic and social rights, the dichotomous approach and the concept of *a provision that is binding on all* becomes much more problematic.²⁶ The concepts do not generally lend themselves well to this. As held by the Central Appeals Tribunal in the quotation above, there are many treaty provisions which by their language and contents can only be executed by means of national legal measures and are not suited for direct application in the majority of cases, but which in *some* cases could well be applied directly by a court. It would therefore be unsatisfactory and arbitrary to categorically classify such provisions categorically as 'binding on all' or 'not binding on all' or 'directly effective' or 'not directly effective'.

This is offset by the contextual approach to the question of whether a provision has direct effect. In this approach, a provision may be given direct effect if the court has the option of applying the concept in the case at issue in view of the court's own weighing of its constitutional position in the case, its powers, the merits of the case and the applicable legislation. Whether a provision has direct effect thus depends on the actual case (all the facts and circumstances, the context) in which it is invoked. It is, in this view, perfectly possible that the same provision could be directly applicable in the one case but not in the other.

²⁴ See J.H. de Graaf e.a.: *'De toepassing van het Internationaal Verdrag inzake de Rechten van het Kind in de Nederlandse rechtspraak'*, Deel I, Nijmegen: Ars Aequi Libri, 2012 en Deel II, Amsterdam: CCRA, 2015. For earlier, less comprehensive, research see: G.C.A.M. Ruitenbergh, *Het Internationaal Kinderrechtenverdrag in de Nederlandse rechtspraak*, Amsterdam: SWP, 2003 en *De uitdaging van het kinderrechtenverdrag voor de Nederlandse rechtspraak*, FJR 2004, p. 30–35; M.L. van Emmerik, *Toepassing van het Kinderrechtenverdrag in de Nederlandse rechtspraak*, NJCM-Bulletin, 30 (2005) 6, p. 700–716; Den Haag 1999;

²⁵ This comparison is borrowed from an earlier paper: G.J.W. Pulles, *Onduidelijkheid over de rechtstreekse werking van kernbepalingen van het VN-kinderrechtenverdrag*, NJB 4 (2011) p. 231–324.

²⁶ Fleuren, p. 68.

It is fair to assume that this could enhance the impact and effectiveness of international economic and social rights.²⁷ If the emphasis is placed less on the wording of a provision and more on the context of the case in which it is invoked, there are a number of situations in which it becomes easier for the court to uphold the invocation of such a treaty provision and apply it directly in the actual case at issue. In this case the court is not hampered by the overly vague or general wording of a treaty provision and need have no fear of precedent or severe criticism that it has acted contrary to the legislature's intentions – its judgment solely concerns the case at issue. In other words, the contextual approach allows for flexibility and discretion in the application of economic and social human rights.

This approach does not rule out the risk of legal uncertainty and arbitrariness touched on above. However, for the advocates of social and economic rights, the extended alternatives for applying direct effect undoubtedly form a powerful argument in favour of a contextual approach. Unfortunately, there is no sign of whether this was the intention of the Supreme Court in the CAN judgment. The Supreme Court did not give *any* reasons for the introduction of context-based approach. One hopes that this will be rectified in a future ruling.

5.4 Recent developments

As things stand it remains difficult to predict the effect the context-based approach will have on the legal development of economic and social human rights in the Dutch legal order. The CAN-judgment is still too fresh to have had much effect. The approach has however occasionally arisen in precedent published since that time, such as the much-discussed ruling of the Central Appeals Tribunal of 26 November 2015 on the right to relief facilities for failed asylum seekers, as embodied in provisions of the European Social Charter (ESC).²⁸ In point 5.4 of that judgment the Central Appeals Tribunal ruled with reference to previous judgments that “the provisions of the ESC invoked by the appellants cannot be regarded as provisions that are binding on all”. In point 5.5 the Central Appeals Tribunal goes on to say that “the provisions of the ESC invoked by the appellants are not in the given circumstances provisions that are binding on all as provided for in Article 94 of the Constitution”. Those so inclined could infer from this that the Central Appeals Tribunal has toyed with the idea of reconsidering in this case its previous judgment on the non-direct effect of the ESC. But that remains conjecture and what the 'given circumstances' are is not said in so many words.

An unequivocal application of the contextual approach can be found in a ruling of the Utrecht District Court of 23 September 2016. The case was brought by a woman who was not entitled to maternity benefits because she had given birth in the period between the passing into law of the *Act on the termination of entitlement to benefits under the Invalidity Insurance (Self-Employed Persons) Act* ('Wet einde toegang verzekering WAZ') – which ended the right to these benefits and the introduction of the *Act on Maternity Allowances*

²⁷ See Fleuren, p. 405–420.

²⁸ Central Appeals Tribunal (Centrale Raad van Beroep) 26 November 2015 (ECLI:NL:CRVB:2015:3803).

for the Self-Employed ('Wet zwangerschaps- en bevallingsuitkering zelfstandigen' – Wet ZEZ), which reintroduced the benefits. In its ruling the court considered the effect of Article 11.2b of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which had been invoked. The court held first and foremost that this provision was unconditional and sufficiently precise. The court then went on to rule as follows:

"The question of whether there is direct effect therefore depends on whether the provision can function as objective law in the context in which it is invoked. ... The court answers this question in the affirmative. In the context in which the treaty article is invoked, the court considers the claimant's situation in the light of the legislature's decision to abolish the arrangement under public law for maternity leave for self-employed people with effect from 1 August 2004. The main reason for abolishing the Invalidity Insurance (Self-Employed Persons) Act (WAZ) was that self-employed people (and their organisations) had called for its abolition in view of its compulsory nature and the imbalance between the premium and the amount of the benefits. Another reason was that the private market offered alternatives for insuring the risk if required (...). However, when the Wet ZEZ came into force on 4 June 2008 the legislature once again provided a legal basis for insuring the risk of loss of income under public law. It turned out in practice that self-employed women tended not to be insured for incapacity for work in general and pregnancy in particular. To protect the mother and child the legislature decided to reintroduce insurance under public law to cover the risk of loss of income (...). The court held that the legislature had thus abolished an initially favourable provision for self-employed women and reinstated it after four years in response to the problems with privatisation that emerged. The legislature thus reconsidered its previous legislative amendment without making provision for self-employed women who were unable to work owing to pregnancy and childbirth between 1 August 2004 and 4 June 2008. ... In the light of that context the court judges that the claimant's situation is directly subject to the provisions of Section 11.2, preamble and (b) of the UN Women's Convention."²⁹

For the time being, this remains the sole judgment in which the contextual approach is followed. Other recent case law in the field of economic and social law suggests that when questions arise about the direct effect they are answered exclusively on the basis of the criteria content and scope of the treaty provisions that have been invoked.³⁰

6. Conclusion

²⁹ District Court (Rechtbank) Midden-Nederland 23 September 2016, ECLI:NL:RBMNE:2016:5113, points 15 and 16.

³⁰ See for example: District Court (Rechtbank) The Hague 9 November 2015 (ECLI:NL:RBDHA:2015:12746) (with regard to Article 5, section 3, of the WHO Framework Convention on Tobacco Control); Administrative Jurisdiction Division of the Council of State (Raad van State) 17 June 2015 (ECLI:NL:RVS:2015:1865) (with regard to Article 27 CRC); Court of Appeals (Gerechtshof) The Hague 24 February 2015 (ECLI:NL:GHDHA:2015:2002) (with regard to Article 6 CRC) and District Court The Hague 25 June 2015 ECLI:NL:RBDHA:2015:8950 (with regard to Article 47 ESC).

The number of cases in which national courts take recourse to international economic and social human rights is on the rise. These cases often involve politically-sensitive, complex issues that cross both geographical boundaries and those between fields of law and scientific disciplines (examples include migration, climate change and counterterrorism).³¹ Despite the problems associated with judicial application of these rights, it seems that national courts in a large number of States are becoming more inclined to apply them as a rule of decision in the national legal order.³²

Viewed in that light, clarity about the possibility of relying on international economic and social rights is more important than ever. The CAN-judgment provides more clarity where the Supreme Court rules that standards that give the State discretionary powers can have direct effect. The contextual approach also provides for this, but the concept is problematic since it also makes it possible to limit the justiciability and effect of economic and social rights and creates the risk of legal uncertainty and arbitrariness. The consequences of the CAN judgment for economic and social rights thus remain to be seen. It will be interesting to see whether Dutch courts actively apply the contextual approach. If so, it will be very important for the courts to clearly substantiate this in their rulings. This will create the necessary clarity and legal certainty and will do justice to the new approach concerning the direct effect of international economic and social rights that has been set in motion by the Supreme Court.

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³¹ Cf. R. van Gestel, M. Loth, *Urgenda: roekeloze rechtspraak of rechtsvinding 3.0?*, NJB 37 (2015), p.2605.

³² See for example M. Langford, *Domestic Adjudication and Economic, Social and Cultural Rights: a Socio-Legal review*, International Journal on Human Rights, vol 6, nr. 11, 2009, p. 91-121; F. Coomans, *Justiciability of Economic and Social Rights. Experiences from Domestic Systems*, Antwerpen, Oxford, Intersentia, Maastricht Center for Human Rights, 2006 en M.E. Muggli e.a., *Tracking the relevance of the WHO Framework Convention on Tobacco Control in legislation and litigation through the online resource, Tobacco Control Laws*, Tobacco Control 2014;23(5):457-60.