Criminal procedure in the Netherlands

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in the

Netherlands

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Contents

Abbreviations

AID	Algemene Inspectiedienst *(General Inspection Service)*
Art(s).	Article(s)
Bijl. Hand.	Bijlagen bij de Handelingen of Kamerstukken *(Parliamentary documents)*
cf.	confer
CJEC	Court of Justice of the European Communities
ECD	Economische Controledienst *(Economic Investigation Agency)*
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ed(s).	editor(s), edition
e.g.	exempli gratia
EHRM	Europees Hof voor de Rechten van de Mens *(European Court of Human Rights)*
et al.	et alii/aliter
et seq	et sequentes
EU	European Union
EVRM	Europees Verdrag tot Bescherming van de Rechten van de Mens *(European Convention for the Protection of Human Rights and Fundamental Freedoms)*
FIOD	Fiscale Inlichtingen en Opsporingsdienst *(Fiscal Inquiries and Investigations Service)*
GVO	Gerechtelijk Vooronderzoek *(Preliminary Judicial Inquiry)*
GW	Grondwet *(Constitution)*
HR	Hoge Raad *(Supreme Court)*
ICCPR	International Covenant on Civil and Political Rights
i.e.	id est

KLPD	Korps landelijke politiediensten *(National Police Services Agency)*
NJ	Nederlandse Jurisprudentie *(Dutch Jurisprudence)*
NJB	Nederlands Juristenblad *(Dutch law review)*
no./nr.	number/nummer
OM	Openbaar Ministerie *(Public Prosecutor's Office)*
Ow	Opiumwet *(Opium Act)*
p./pp.	page/pages
par.	paragraph
publ. ser.	publication series
Pw	Politiewet *(Police Act)*
RO	Rechterlijke Organisatie *(Judicial Organisation)*
RuG	Rijksuniversiteit Groningen
Sr	Wetboek van Strafrecht *(Penal Code)*
Stb	Staatsblad *(Bulletin of acts and decrees)*
Stcrt	Staatscourant *(Government Gazette)*
Sv	Wetboek van Strafvordering *(Code of Criminal Procedure)*
WAHV	Wet administratiefrechtelijke handhaving verkeers-voorschriften *(Act on the Administrative Punishment of Road Traffic Offences)*
WED	Wet op de Economische Delicten *(Economical Offences Act)*
WODC	Wetenschappelijk Onderzoek- en Documentatiecentrum
WVW	Wegenverkeerswet *(Road Traffic Act)*
WWM	Wet Wapens en Munitie *(Weapons and Ammunition Act)*
XTC	Extasy (a chemical drug)

Introductory remarks

Before discussing the more specific and technical aspects of the Dutch law of criminal procedure, some general introductory remarks are in order. It should first be pointed out that the *Code of Criminal Procedure* (Sv) is not set in stone. Although there have been many and quite far-reaching amendments to the Code, at present, the law of criminal procedure is in the process of being extensively modernised. Incentives for this modernisation were proposed in the reports of the research project *Strafvordering 2001*.[1] These reports are the result of long-term academic research into modernising the foundations of the Code of Criminal Procedure and contain various proposals to reform the law of criminal procedure. In a letter to the Lower House of Parliament *(Tweede Kamer)*, the current Minister of Justice expressed his intention to revise the Code extensively in several phases based upon the results of the research project.[2] This revision is being achieved through a series of amendments. At the time of publication of this contribution, some have already to a certain extent been put into force, other are under Parliamentary consideration and others are still in the preparation phase. Several chapters of this contribution will provide a closer look at these changes.

Apart from the modernisation, the *leitmotiv* of recent reform of the law of criminal procedure has been the broadly discussed matter of personal security. The threat posed by international terrorism and international organised crime provides a reason to extend the jurisdiction of police and judicial authorities in the investigation and collection of evidence during the preliminary investigation.

Furthermore, for a sound understanding of the current Code and the above-mentioned reform, it is important to appreciate the nature of the Dutch Code of Criminal Procedure. Although it is customary to characterise criminal procedures using the terms 'inquisitorial' and 'accusatorial', these notions have lost their value in relation to the present Dutch Code. The structure of the Code does not allow interpretation by these two notions, nor can specific provisions in the Code and the legal-political choices on which it is based be justified by referring to its alleged inquisitorial and accusatorial character. It is rather the adversarial nature and individual legal protection that are key in the current Code and in the modernisation that is taking place. Criminal procedure is aimed at provoking a clash of opinions;

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[1] It consists of four reports: *Groenhuijsen/Knigge* (eds.), Het onderzoek ter zitting; *idem*, Het vooronderzoek in strafzaken; *idem*, Dwangmiddelen en rechtsmiddelen; *idem*, Afronding en verantwoording.

[2] *Kamerstukken II* 2003–2004, 29 271, nr. 1, Algemeen kader herziening Wetboek van Strafvordering.

it is centred on the (ritualised) debate amongst the main players of the criminal procedure: the judge, the public prosecutor, the accused and his lawyer. The organisation of the Code of Criminal Procedure is designed to streamline and to encourage that debate.[3] Also, the Code of Criminal Procedure must be organised in such a way that it respects the interests of each of those involved. The criminal proceedings must do justice to and offer the space for consideration of the individual rights and interests of the accused, of the witnesses and of the victim.

A third comment reflects the goal, or rather the goals, of the Dutch Code of Criminal Procedure. Usually, the main purpose of the Code of Criminal Procedure is considered to be subsidiary; a means only of giving effect to substantive criminal law. Following this approach, the aim of the criminal proceedings comprises establishing substantive truth on the accuracy or inaccuracy of the allegations against the accused. The criminal investigation and the debate amongst the players involved are aimed at reaching an official decision on the matter of whether the accused is guilty of a criminal offence. Only a ruling of guilt based on well-established substantive truth justifies imposing criminal sanctions. Phenomena comparable to 'plea bargaining' or arrangements between the judge, the public prosecutor's office and the defence over limits to the indictment or over the extent of the investigation, are incompatible with the Dutch concept of search for substantive truth.

In addition to the purpose of serving the law of criminal procedure, a goal in and of itself during the proceedings is advancing a purposeful and balanced use of the powers of public authorities. It relates to the autonomous social significance of the law of criminal procedure. The legitimacy of the action of a public authority in relation to a presumed criminal act is upheld only if the public authority is able to react in a way that is considered adequate in all aspects. The adequacy of the public authority's reaction is measured by its non-arbitrary and proportional nature and the ability to consider all the rights and interests involved in the case (i.e., those of the accused, of the witness, of the victim, of the public authority and of society).

Finally, the style of litigating in the Netherlands should be briefly described. Although the Code may provide otherwise, in the practice of criminal law prosecution, the preliminary investigation can be considered the crucial stage in the proceedings. During the preliminary investigation, the case is clarified and the police and/or examining magistrate record the evidence collected. If the case is brought before court, in principle, no investigation is carried out during the trial in the sense that no additional evidence is adduced through witness testimonies and so forth. Based on the general admissibility of oral testimony,[4] the results of the preliminary investigation can be used as evidence and the trial often has the character of a discussion and evaluation of the results of the preliminary investigation. As a result,

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[3] See: *Groenhuijsen/Knigge* (eds.), Het onderzoek ter zitting, pp. 29–31.

[4] This has already been decided by the Hoge Raad in 1926; see: HR 20 December 1926, NJ 1927, 85.

even large and difficult criminal cases can, strictly speaking, be concluded relatively quickly and quite informally at trial.

Furthermore, it may be pointed out that the current practice of criminal law proceedings, influenced by contemporary customs, can be characterised as functional and pragmatic.[5] Under pressure from a rising crime rate and the structurally limited capacity of police and justice agencies, on a policy level, the aim is to conclude as many cases as possible with the limited means available. Automatization, efficiency and bureaucracy are typical of the functioning of court bodies. This results in the settlement of many criminal offences out of court and the course of criminal proceedings only being bound by formalities in a very limited way. This settlement out of court is not based on a concept of 'plea bargaining'; see section 11.1.

1. Aims and sources of criminal procedure[6]

The primary source of Dutch law of criminal procedures is the Code of Criminal Procedure (CCP). This Code was established in 1921 and brought into force on 1 January 1926. Although the legislator intended this Code to be a drastic reform of criminal procedure and also intended to steer away from the French-based law of criminal procedure,[7] the classification and structure of the Code was still clearly influenced by the French Code. Because of the case law of the European Court of Human Rights (ECtHR) and of the High Council, Dutch criminal law practice and especially the many amendments implemented since 1926, many of these historical characteristics have, subsequently disappeared. From the now extensive list of amendments, some can be identified as not only significantly changing the law of criminal proceedings but also representing the political climate found in criminal law of the time they were established. Examples are the revision of the regulation on preventive custody,[8] the law of material sanctions,[9] the law of procedural omission,[10] the revision of preliminary judicial inquiry,[11] the regulation of the so-called 'criminal investigation competences in exceptional circumstances',[12] the improvement of the position of the injured parties of criminal offences and the introduction

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[5] On contemporary customs and criminal law practice, see: *Kelk*, Strafrechtelijk stromenland, in: Enschedé, Naar eer en geweten, pp. 255–287.

[6] On this, see: *Corstens*, Het Nederlands strafprocesrecht, pp. 15–39.

[7] The applicable Code of Criminal Procedure for this was brought into force in 1838. This old Code is little more than a translation of the French *Code d'Instruction Criminelle*.

[8] Law of 26 October 1973, Stb. 1973, 509.

[9] Law of 31 March 1983, Stb. 1983, 153.

[10] Law of 14 September 1995, Stb. 1995, 411.

[11] Law of 27 May 1999, Stb. 1999, 243.

[12] Law of 27 May 1999, Stb. 1999, 245.

of the right to speak for victims or their next of kin in court.[13] Below, the subjects of the said amendments will be elaborated further.

Article 107 of the Constitution is dedicated by the legislator to organising criminal law and the law of criminal procedure into a general Code. Additionally, the Constitutional legislator indicates that particular subjects may be dealt with in separate acts. The legislator has used this possibility extensively. In addition to the general Criminal Code and the Code of Criminal Procedure, many special laws contain specific provisions for creating different criminal offences and different criminal procedure norms. The law of economic offences is of great importance in this class. Court proceedings before special criminal divisions are provided for offences that fall within the purview of this law.[14] The law is also afforded an independent arsenal of provisional measures and sanctions. Of further importance in day-to-day criminal law proceedings are the Law on Road Traffic of 1994, the Opium Act (1928) and Weapons and Ammunition Act (1997). These laws provide specific offences and are relevant to the law of criminal procedure inasmuch as they set out the special arrangements for the appointment of criminal investigators and the special means of coercion available to them.

Arts. 93 and 94 of the Constitution deal with international treaties that involve the Dutch government and are directly binding on the Dutch legal order. Laws that are incompatible with such international treaties must be disregarded by the judge. Based on these provisions, the minimum rights, recorded in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), are guaranteed directly by the Dutch law of criminal procedure. In this way, the ECHR guarantees function as a source of law in criminal law practice. To ensure that Dutch criminal law practice meets the minimum requirements of the ECHR, adjustments to the Code of Criminal Procedure are regularly implemented. An example of this is the regulation on anonymous witnesses.[15] Additionally, the guarantees of the ECHR are further developed in the case law. For example, various decisions from the *Hoge Raad* describe how to implement through the existing law of criminal proceedings, the requirement to try a case within a reasonable time, the right of the accused to attend trial and the right to examine witnesses.[16]

The involvement of the European Union (EU) in criminal law practice implies that legal instruments that result from this involvement can be considered sources of the law of criminal procedure. The European directives and framework decisions

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[13] Law of 23 December 1992, Stb. 1993, 29; and the Law of 21 July 2004, Stb. 2004, 382.

[14] It includes criminal offences from a large number of special laws concerning the regulation of the economy and environmental protection.

[15] See the Law of 11 November 1993, Stb. 1993, 603; this matter is chiefly governed by Arts. 226a–226f and 344a Sv.

[16] See: HR 3 October 2000, NJ 2000, 721, comment JdH; HR 12 March 2002, NJ 2002, 317, comment Sch; HR 1 February 1994, NJ 1994, 427, comment C.

impose obligations mainly on the legislator but at the same time it is the duty of the judge to interpret national law according to those directives and framework decisions.[17]

In the Code of Criminal Procedure and in special laws on investigation and prosecution, the legislator has granted powers to officials. Since Dutch law does not provide for a duty to investigate and prosecute, these powers can be considered as permission to conduct certain investigation or prosecution activities. This implies that the decision on whether to use powers of investigation and prosecution in individual cases is not only governed by statutory criteria but also by policy considerations.[18]

Alongside this policy framework, there are then two extra-judicial sources of law of criminal procedure. In order to guide policy considerations and to encourage uniform action by police officers and public prosecutors in individual cases, many policy regulations have been drawn up, mainly by the public prosecutor's office. Police officers and public prosecutors are given directions on the use of their statutorily attributed discretionary powers through instructions and directives for policy in investigation, prosecution and criminal proceedings. What is referred to here is a variety of different policy regulations of a diverse nature: the use of measures of coercion, the question of whether, and if so in what way, the case is to be settled pursuant to criminal justice (e.g., extra-judicially or through prosecution) or the nature and extent of the sanction that is used when concluding the case extra-judicially or that the public prosecutor can require in court. These policy regulations are published and accessible on the internet.[19] The instructions and directives provided by the public prosecutor's office are very important in the day-to-day operation of criminal law practice.

The second extra-judicial source is related to general principles of justice. Because the involvement of public authorities in criminal procedure is not only controlled by legal regulations but also by policy regulations, it is not sufficient for the judiciary simply to test the actions of the police or public prosecutor in individual cases against the applicable legal regulations. Additionally, their actions are tested against unwritten principles for the proper conduct of proceedings such as the prohibition on arbitrariness, the prohibition on abuse of authority, the principle of legal security and the principles of proportionality and subsidiarity. As a result, the judge can find investigation and prosecution activities in a certain case unlawful even though they may have been executed in compliance with legal requirements.[20]

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[17] It is a matter here of the obligatory interpretation in conformity with directives and framework decisions; on the latter, see: CJEC 16 June 2005, C-105/03 *(Pupino)*.

[18] For more details on this: *'t Hart*, Strafrecht en beleid; *idem*, Openbaar Ministerie en rechtshandhaving; *Cleiren*, Beginselen van een goede procesorde.

[19] www.openbaarministerie.nl.

[20] Cf. HR 12 December 1978, NJ 1979, 142, comment GEM; HR 19 September 1988, NJ 1989, 379; HR 19 June 1990, NJ 1991, 119, comments ThWvV and MS.

In addition to 'true' criminal law and law of criminal procedure, a form of 'quasi-criminal law' has been established in the Netherlands in which punitive financial sanctions are imposed by administrative authorities. This form of intervention is also referred to as 'administrative criminal law'. In these cases, a violation of legal regulations is not considered as a criminal offence but as an administrative violation for which administrative penalties are imposed. This development was introduced by the Law on Administrative-Judicial Enforcement of Traffic Regulations (WAHV).[21] On the introduction of this law, criminal enforcement of traffic regulations was replaced with an administrative criminal law enforcement model. The success of this law, to be understood in terms of the effectiveness of punishment and the use of police and judicial resources, has led to the replacement of criminal law enforcement with administrative penalties in a broad range of areas.[22] Procedural regulations for imposing public penalties are not included in the Code of Criminal Procedure but in special legislation (WAHV) and the general law on administrative law.

2. Overview of criminal procedure

2.1 Main stages of criminal procedure

2.1.1 Preliminary investigation

The procedure in criminal cases comprises the following main stages: a) the preliminary investigation, b) the trial at first instance, c) remedies at law and d) the execution of the sentence. The last phase is beyond the scope of this book and will thus not be considered.

A criminal offence must be suspected before a *preliminary investigation* can be initiated. The suspicion must be based on facts and circumstances leading to a reasonable probability that a criminal offence has been committed or that more serious organised crime offences[23] are being planned or have been committed (Arts. 27 and 132a Sv). The preliminary investigation comprises the criminal investigation and the preliminary judicial inquiry (Arts. 170 et seq Sv). The criminal investigation is formally led by the public prosecutor (Arts. 132a, 141 and 148 Sv) and, in practice, is carried out by criminal investigators. For petty crimes, the public prosecutor's

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[21] Wet administratiefrechtelijke handhaving verkeersvoorschriften, Law of 3 July 1989, Stb. 1989, 300.

[22] On this development, see: *Corstens*, Een stille revolutie in het strafrecht; *Hartmann*, Buitengerechtelijke afdoening, in: Groenhuijsen/Knigge (eds.), Het onderzoek ter zitting, pp. 60–69.

[23] For such offences, preventive custody must be allowed. This means offences for which a term of imprisonment of at least four years must be imposed (see Art. 67(1) Sv).

leadership of the investigation remains remote and the police work quite autonomously. In daily practice, the public prosecutor's office takes an executive role through general instructions and directives in which investigation priorities can be set and directions are given for the course of action in individual cases. With the more serious offences, however, the public prosecutor is often directly involved because the authority to decide on the use of important powers of investigation are given to him and choices must be made concerning the extent and manner of the criminal investigation; choices for which the public prosecutor is ultimately responsible.

The orientation of criminal procedure towards the substantive search for truth necessitates an impartial criminal investigation. Criminal investigators must conduct an inquiry into both incriminating and exculpatory circumstances.[24] The basic legislative assumption is that the investigating officers are allowed to do what is necessary and reasonable in carrying out a criminal investigation. The assignment to conduct a criminal investigation implies the power to carry out a range of investigation activities. An express legal basis is not required for these activities.[25] It is otherwise in the case of far-reaching investigation such as those that infringe individual rights and liberties[26] or that involve activities that threaten the integrity of the investigation and the police force such as the use of infiltrators or *agents provocateurs*. The performance of such investigation activities must be based on specific powers.[27]

If the public prosecutor considers that there is sufficient reason, he can request the examining judge to initiate a *preliminary judicial inquiry* (Art. 181 Sv). The authority over this part of the preliminary inquiry lies with the examining judge. Initiating the preliminary judicial inquiry does not terminate the criminal investigation. After the initiation of the preliminary judicial inquiry, the public prosecutor may continue the criminal investigation for which he is responsible.[28] For this

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[24] *Corstens*, Strafprocesrecht, pp. 256–258; *Groenhuijsen/Knigge* (eds.), Het vooronderzoek in strafzaken, pp. 464–468.

[25] In case law, for example, it is accepted that investigating officers have the power to conduct a neighbourhood inquiry (the structured questioning of residents in the area where a criminal offence was committed), 'to nose about' in garbage, to question a large circle of (potentially suspected) persons in order to obtain handwriting sample, to take body samples for DNA testing.

[26] Like physical freedom, inviolability of the home, property, personal privacy, communication, recording personal information, etc.

[27] See in this connection: ECtHR 25 September 2001, appl. no. 44787/98 *(P.G. and J.H. v. United Kingdom)*, where the Court pointed out the 'implied powers of police officers to note evidence and collect and store exhibits for steps taken in the course of an investigation' and the fact that a 'specific statutory or other express legal authority is required for more invasive measures' (§ 62).

[28] *Corstens*, Strafprocesrecht, pp. 304–305; HR 22 November 1983, NJ 1984, 805, comment ThWvV.

ongoing criminal investigation, powers may be employed that are also available to the examining judge in the preliminary judicial inquiry. However, the public prosecutor must keep the examining judge informed of the progress of the investigation and the results obtained (Art. 177a Sv).

In the original structure of the Code of Criminal Procedure, the inquiry conducted by the examining judge was an essential part of criminal procedure. Most of the means of coercion were incorporated in the preliminary judicial inquiry. Therefore, for a long time, only the examining judge had the power to confiscate objects, search a house or an enclosed space, issue an order for the surrender of objects or have telephone conversations tapped. If a case required any of these means of coercion, the public prosecutor was obliged to demand a preliminary judicial inquiry. Over time, most of the means of coercion originally attributed to the examining judge alone have been separated from the preliminary judicial inquiry and became autonomous. Consequently, the preliminary judicial inquiry has since become of very little practical significance. Nowadays, the most important reason for initiating a preliminary judicial inquiry is for examining witnesses and recording their testimonies so that they can be used in court as evidence.

Once the preliminary judicial inquiry is completed, the public prosecutor must decide whether to prosecute. The following possibilities exist:

a) the case is dismissed, with or without certain conditions (Arts. 167 and 242 Sv);
b) the case is concluded extra-judicially by an out-of-court settlement (Arts. 74 et seq Sr), conditional dismissal (Art. 244 Sv) or (in the near future)[29] by imposing an alternative sentence (Arts. 257a et seq Sv);
c) the case is brought to court for trial (Arts. 258 et seq Sv);
d) the case is joined *ad informandum* to another criminal case. This term is not defined by statute but is accepted in the jurisprudence.[30]

2.1.2 Trial of first instance

If the case is to be brought to court, the president of the court fixes the trial date at the request of the public prosecutor. At this stage, the president can already give some instructions to ensure the smooth conduct of a trial. He can order that a suspect appears in person and issue the suspect a summons to appear. If there is a probability a witness will not appear, a summons can be issued for the witness as well (Art. 258(6) Sv).

The public prosecutor brings a case to court by means of a summons. The suspect is called to appear by this summons and the criminal offence for which he is

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[29] See section 11.2: Settlement by the Public Prosecutor's Office.

[30] See section 11.3: Joinder of charges *ad informandum*. On this, *Franken*, Voeging ad informandum in strafzaken.

suspected is indicated (the indictment). Additionally, the suspect is informed of procedural rights.[31] As long as the trial has not yet commenced, the public prosecutor is authorised to withdraw the summons and dismiss the case. However, once the trial has effectively commenced, the public prosecutor is no longer authorised to strike out the prosecution or to interfere with the conduct of the trial. Responsibility for further procedure and any decisions to be taken in the case then lie with the judge.[32] The public prosecutor is charged with calling witnesses, experts, interpreters or the victim or the victim's relatives. If the defence finds the appearance of an expert or a witness at the trial desirable it can apply to the Public Prosecutor's Office to call that expert or witness. In principle, the public prosecutor is obliged to comply with that request (Arts. 263 and 264 Sv). The judge can overrule a refusal of the public prosecutor to call a requested expert or witness at the trial.

The accused is not obliged to appear at the trial. If he does not appear, he can be sentenced *in absentia*. If the judge finds that the presence of the suspect is important for the conclusion of the case, he can adjourn the proceedings and order the accused to appear in person (and order him brought into court). If the trial is conducted *in absentia*, the accused can retain counsel to represent him (Art. 279 Sv).

In the criminal law trial of an adult, the trial is in principle open to the public. For special reasons provided by law, for example, to uphold public order, national security or the interests of minors, the judge can rule that the trial be held fully or partly *in camera* (Art. 269 Sv). The trials of minors are in principle held *in camera* (Art. 495b Sv).

In summary, a trial proceeds as follows:

- the case against the accused is called (Art. 270 Sv);
- the accused is asked for his personal data; he is then told he is not obliged to answer questions (Art. 273 Sv);
- the public prosecutor submits the case to court (Art. 284 Sv);
- the accused is heard (Art. 286 Sv);
- if available, witnesses and experts are examined (Arts. 287–299 Sv);
- the case file is presented; the presentation can be replaced by a short description of the content of the documents (Art. 301 Sv);
- the victim or his next of kin can make a statement (Art. 302 Sv);
- the public prosecutor delivers his indictment (Art. 311 Sv);
- the civil claimant can advance a claim for compensation for damages caused by the criminal offence (Art. 334 Sv);

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[31] Like the right to inspect the case file, to obtain legal advice and to call and examine witnesses.

[32] See Art. 266 Sv; *Corstens*, Strafprocesrecht, pp. 213–214; HR 15 February 1949, NJ 1949, 305, comments BVAR; HR 7 May 1985, NJ 1985, 842.

– the defence then presents its arguments, possibly followed by reply and rejoinder; the defendant always having the last word (Art. 311 Sv);
– after the accused's closing statement, the court hearing is concluded and the date on which the judgment will be pronounced is announced. Generally, the judgment is given 14 days later[33] (Art. 345 Sv).

The judgment comprises various final pronouncements. The judge can, based on formal grounds, declare the initiating summons invalid, the public prosecutor's case inadmissible or the court not competent. If the case is not concluded with this kind of formal decision, then the judge can pronounce his verdict and acquit, dismiss all charges against[34] or convict the accused (Arts. 348–350, 357–359a Sv). In the latter case the verdict also entails a ruling on the claim for damages from the civil claimant (Art. 361 Sv).

2.1.3 Remedies

The public prosecutor and the suspect can use legal remedies against the verdict. The basic principle is that an appeal against the final judgment at first instance can be lodged at the higher court. This involves a complete retrial. The public prosecutor and the accused can, in principle, lodge an appeal at the *Hoge Raad* of the Netherlands against the final pronouncements of the higher court. In considering an appeal, the *Hoge Raad* only rules on legal elements rather than examining factual matters.[35]

2.1.4 Execution

If no legal remedies are used against the final judgment or if the legal remedies have been exhausted, the verdict is final and can be executed. The *execution* of judicial decisions is the responsibility of the Public Prosecutor's Office. The obligation to execute a final judgment is not a policy matter for the Public Prosecutor's Office; execution is in principle obligatory.[36]

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[33] This is also the legal allowable maximum delay between conclusion of the hearing and pronouncing the judgment.

[34] An acquittal must be given if the facts in the summons have not been proved; all charges may be dismissed if the facts have been proved but these facts do not prove a criminal offence or the accused is not punishable.

[35] Art. 79 Judicial Organisation Act (*Wet op de Rechterlijke Organisatie*, RO).

[36] Art. 553 Sv; *Machielse*, Executie: plicht of bevoegdheid?, in: Corstens et al. (eds.), Straffen in gerechtigheid, pp. 155–167; HR 1 February 1991, NJ 1991, 413, comment ThWvV.

2.2 Court system and jurisdiction

The adjudication of criminal offences, pursuant to Art. 113 of the Constitution, is assigned to the 'judiciary'. The Judiciary Organisation Act indicates that it is composed of three levels of courts: district courts (19), higher courts (5) and the *Hoge Raad* (Supreme Court) (Art. 2 RO). Criminal cases are brought before a *district court of first instance* (Art. 45 RO). Depending on the nature and the seriousness of the criminal offence or the suspect's age, the offence is tried before a judge sitting alone or before a panel of three judges. Misdemeanors[37] are tried by a district court judge sitting alone (Art. 382 Sv). Minor criminal offences are tried by the police court judge, also sitting alone (Art. 368 Sv). The maximum term of liberty-depriving sentences which the police court judge can impose is one year (Art. 369 Sv). If the criminal offence is more serious, the case must be tried before a panel of three judges at the district court (Art. 268 Sv.). The trial of economic offences is assigned to a specialised police court judge or a panel of three judges (Arts. 52 RO and 38 WED). The trial of minors, in principle, is assigned to the juvenile court judge unless the seriousness of the offence and/or the nature of the sanction to be imposed is such that it requires a trial before a panel of judges (Arts. 53 RO and 495 Sv).

The *higher courts* are responsible for hearing *appeals* lodged against the verdict of one of the courts of first instance. The higher court, too, has a distinction between single-judge courts and courts with a panel of judges. In principle, if a case at first instance has been tried by a judge sitting alone, the appeal is heard by a single judge at the court of appeal (Art. 411 Sv).[38] This does not apply for cases before the police court judge for economic offences; appeals against judgments in these cases must be heard before a panel of three judges from the court for economic offences (Arts. 64 RO and 52 WED).[39]

Finally, the *Hoge Raad* hears cassation appeals in relation to criminal cases (Arts. 78 RO and 427 Sv). The basic principle is that the decisions of the *Hoge Raad* are taken by five judges; in less complicated cases a decision by three judges is possible. The cassation appeal to the *Hoge Raad* against the final judgment of a court of appeal is limited to the question of whether the disputed judgment is made in full accordance with the prescribed procedure and a correct interpretation of law

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[37] In Dutch criminal law, acts punishable by law are subdivided into 'crimes' and 'misdemeanors'.

[38] With the limitation that there has not been imposed a liberty-depriving sentence of more then six months. If the police court judge has imposed a higher sentence, that alone justifies a procedure in appeal before a panel of three judges.

[39] On the organisation and the task of the judiciary see: *Corstens*, Strafprocesrecht, pp. 122–135; *Minkenhof/Reijntjes*, De Nederlandse strafvordering, pp. 56–69.

(Art. 79 RO). The *Hoge Raad's* rationale in cassation case law is the development and unity of law.[40]

The administration of criminal justice is carried out by professional judges; trial by jury in the Netherlands was abolished in 1813. As a result, laymen do not have a formal role in criminal proceedings. The Dutch version of 'lay' participation in the administration of criminal justice is the institute of the 'judge substitute'. It concerns people who are effectively jurists but typically function in a working environment outside the judiciary.[41] They can be appointed as a judge substitute at a district court or at a higher court and, in that capacity, they can participate periodically in trying criminal offences.

2.3 Organisation of the public prosecution authorities

The public prosecution authorities are organised as a nationwide institute charged with the enforcement of the rule of law in criminal cases. It comprises the following divisions:

- the supreme public prosecutor's office;
- the district public prosecutor's offices;
- the 'ressort' public prosecutor's offices;
- the national public prosecutor's office (Art. 134 RO).

The Board of Procurators General, which is part of the supreme public prosecutor's office, is responsible for the department of public prosecution (Art. 130 RO). This board comprises three to five members. It is authorised to give general and specific instructions to the other divisions of the department of public prosecution.

The district public prosecutor's offices carry out their duties at the district courts to which they are affiliated; the *ressort* public prosecutor's offices at the higher courts.[42] They are led by a Chief Public Prosecutor and a Chief Advocate General respectively. The national public prosecutor's office is not affiliated with a district or higher court but is functionally linked to the National Criminal Investigation Department. The national public prosecutor's office, led by a Chief Public Prosecutor, is engaged in work in supra-regional/international organised crime. Apart from the divisions of the public prosecution authorities as mentioned in the Judiciary

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[40] On the role of the *Hoge Raad* in criminal cases, see: *Dorst van*, Cassatie in strafzaken.

[41] E.g., as lawyer, university employee, etc.

[42] A few years ago, in the context of reform of the public prosecutor's office, the issue arose as to whether the district public prosecutor's offices and *ressortsparketten* were to be integrated. Because of the independent function of the public prosecutor's office in handling criminal cases at appeal, an independent *ressort* public prosecutor's office was preserved.

Organisation Act, there is also a 'functional public prosecutor's office' now led by a Chief Public Prosecutor. This office is linked to special units of investigation that investigate criminal offences under several special laws such as social security legislation, environmental law and tax law.[43] The department of public prosecution is organised horizontally in the sense that there is no hierarchical relationship between the district public prosecutor's offices, the *ressort* public prosecutor's offices, the national public prosecutor's office and the functional public prosecutor's office. The Chief Public Prosecutors and the Chief Advocate General answer to the Board of Procurators General.

The *Minister of Justice* is politically responsible for the way in which the department of public prosecution performs its duties. For this reason, the minister is authorised to give general and specific instructions to the department of public prosecution (Art. 127 RO). The special instructions can relate to the way in which a public prosecutor must use his powers in a specific case. Also included in the range of possible instructions is whether to proceed to prosecution. For the advancement of transparency and democratic control, the law provides several guarantees in the context of the minister's concrete intervention in judicial affairs. For example, before giving an instruction, the Board of Procurators General must be consulted, and the instruction must be reduced to writing and added to the court record of concrete criminal cases. If an instruction is to dismiss a case, the parliament must be informed (Art. 128 RO).[44]

For the past few decades, the department of public prosecution has given an account of its policy in publicly accessible *annual reports*. Originally (from 1970), these were published as an attachment to the Ministry of Justice's budget. They are now published separately under the responsibility of the Board of Procurators General and comprise two parts: an annual account with information on the previous calendar year and a policy plan for the following year.[45]

Attached to the *Hoge Raad* is an office of the public prosecutor. This office is organisationally separate from the public prosecutor's offices that are active at the district courts and the higher courts. The reason for this is that the office at the *Hoge Raad* is charged with special tasks such as prosecuting misconduct by members of Parliament, ministers and secretaries of state, formulating legal opinions, initiating cassation in the interest of law and making demands for the suspension or dismissal of judicial officials. The public prosecutor's office at the *Hoge Raad* is

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[43] In legislation in which reorganising special powers of investigation are put into effect, a legal basis was also given the functional public prosecutor. See the bill on special powers of investigation, *Kamerstukken II* 2004–2005, 30 182.

[44] For greater detail on the Dutch public prosecution service, see: *Daele van*, Het openbaar ministerie; *Reijntjes*, Artikelen 7–11, in: Melai/Groenhuijsen (eds.), Het wetboek van strafvordering.

[45] See, e.g., *Jaarbericht 2004* and *Goed beschouwd 2005*, as a PDF file available at www.openbaarministerie.nl.

led by a Procurator General assisted by a substitute Procurator General and a number of Advocates General.[46]

3. General principles governing criminal procedure

A number of basic assumptions and principles underlying the Code of Criminal Procedure are not set out explicitly in its text. Without an understanding of these basic assumptions and principles (which relate to the exercising of powers of investigation and prosecution, the relationship between the public prosecutor's office and the judge, the establishment of proof and procedural principles) the Dutch practice of criminal law is difficult to understand.

3.1 Monopoly on prosecution

The right to prosecute criminal offences and bring a criminal case before a court of law with the intention of punishing the criminal offender is reserved to the public prosecutor's office. Third parties such as victims and other injured parties do not have independent or derivative prosecution rights. The legislator saw the exercise of the right to prosecute as an 'act of public law', of which the exercise ought to be guided by 'the common good'.[47] This basic assumption is not compatible with a private right of prosecution. It does imply that the public prosecutor's office is obliged to take into account the interests of the victims and other injured parties in evaluating whether the common good is served by prosecuting.[48]

3.2 Principle of opportunity

In exercising the power of investigation and prosecution, the guiding principle is not one of legality but one of opportunity. The fact that investigation and prosecution are not matters of duty but of authority is provided under Arts. 167 and 242 Sv. These provisions indicate that prosecution may be abandoned 'for reasons of public interest'. The basic considerations of the principle of opportunity were set down as early as 1885 and still maintain their importance.[49] At present, they can be

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[46] See Arts. 111–123 RO.

[47] See the explanatory memorandum to the Code: *Bijl. Hand. II* 1913–1914, 286, no. 3, p. 9.

[48] *Groenhuijsen/Knigge* (eds.), Het vooronderzoek in strafzaken, pp. 78–86; *idem*, Afronding en verantwoording, pp. 189–242.

[49] *Boot*, De afhankelijkheid van het openbaar ministerie ten opzichte van het instellen der strafvordering. See also: *Groenhuijsen/Knigge* (eds.), Afronding en verantwoording, pp. 214–216.

expressed as follows: the principle of opportunity is a logical consequence of the monopoly on prosecution. If the exercise of prosecution is seen as an act of public law, it ought to be possible to determine in every case whether prosecution serves the general good. That evaluation will not be possible if a general duty of prosecution is assumed in which the public prosecutor must bring all reported criminal offences before court. Furthermore, in a modern, multiform society; criminal law is guided by the maintenance of law and order and a consideration of different interests. The institution of criminal prosecution is, in addition to administrative law, civil law and other, non-judicial forms of conflict resolution, only one of the means available to the government to achieve those goals. Along with taking into consideration the many kinds of sentences and the limited capacity to investigate and prosecute, it is necessary to make choices and to establish priorities. The principle of opportunity enables these choices to be made and these priorities to be set and thus offers the basis for the criminal policy pursued by the public prosecution services.[50]

The power of the public prosecutor's office to dismiss a criminal offence affects police investigation. It is acceptable that the police, by using its capacity to investigate and with reference to the prosecution policy of the public prosecutor's office, establishes priorities and does not start an investigation in the context of certain criminal offences.[51] In the practice of criminal law, several instruments are used to coordinate justice policy with the investigative activities of the police.[52]

The way in which discretionary powers are used in a democratic legal order ought to be transparent and surrounded by means of control. As to investigation and prosecution policy, these are the political responsibility of the Minister of Justice whereas the complaint procedure enables the parties concerned to seek to establish the dismissal of a prosecution by a court ruling (on this procedure see section 10.1). In a procedure for leave to prosecute, the Code does not provide for a procedure between the preliminary and final investigation in which the judge must issue a summons to the suspect for trial and test whether there are sufficient grounds against the suspect to justify a public trial. Such an intermediate procedure conflicts with the monopoly of prosecution and the principle of opportunity. The Code does provide a procedure in which the judge, at the request of the accused and preceding the trial, can examine whether there are sufficient grounds against the suspect (see section 10.2).

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[50] For the theory basis for this, see: *'t Hart*, Om het OM.

[51] *Doelder de/'t Hart*, Verbaliseringsbeleid en opportuniteitsbeginsel, Delikt en Delinkwent 1976, 204–211; *Daele van*, Het openbaar ministerie, pp. 215–275; HR 31 January 1950, NJ 1950, 668, comment W.P.

[52] These range from the public prosecutor's office giving general directives and instructions to the police for seconding officers from the public prosecutor's office to the police station.

3.3 Requirement of suspicion

'Investigation' and 'prosecution' are reactive in nature in the sense that the system set out in the Code is based on the assumption that investigation and prosecution are aimed at clarifying the 'reasonable grounds' within the meaning of Arts. 27 and 132a Sv. Powers in criminal procedure can only be used where there is a suspicion that a criminal offence has been committed or that more serious, organised crimes are being planned or have been committed. This requirement of suspicion can be regarded as the minimum condition for a criminal investigation.[53]

Creating a large number of offences would be problematic if the police were allowed to take action against individuals only after the suspicion has arisen that a criminal offence has been committed. A good example of this is the many victimless offences in the framework of legislative provisions. In such legislation, the police are mainly attributed powers with a view to *controlling* compliance with the law. If, on executing such a power, it appears as though the person under suspicion is guilty of a criminal offence, that conclusion is sufficient for a subsequent criminal investigation.[54]

This structure explains the inclusion in the Code of Criminal Procedure of the so-called 'exploratory inquiry' in Art. 126gg Sv. This regulation has been included in the Code to offer to the police and public prosecutor a means of investigation in the fight against organised crime, even if the requirement of suspicion has not been met. This exploratory inquiry serves as a preparation for investigation, as is indicated in the law.

Recently, a bill was tabled in the Lower House of Parliament in which the threshold for criminal investigation was lowered for terrorist offences. This bill allows for the application of powers to investigate 'indications of a terrorist offence'. This bill also allows for extracting and processing data from automated databases in the framework of an exploratory investigation on a terrorist offence.[55]

3.4 System of fundamental principles

From the principle of opportunity, it follows that not only does the public prosecutor's office decide on whether to prosecute a criminal offence, but also which

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[53] *Lensing*, note 1a to Art. 27, in: Melai/Groenhuijsen, Het wetboek van strafvordering; *Reijntjes*, Boef of burger.

[54] HR 2 December 1935, NJ 1936, 250, comment W.P.; on control and investigation, see: *Aler*, De politiebevoegdheid bij opsporing en controle; *Buruma*, De strafrechtelijke handhaving van bestuurswetten, pp. 187–255.

[55] On this bill, see: *Kamerstukken II* 2004–2005, 30 164, nr. 2. The bill was tabled in the context of the 'liberalisation of the possibilities to investigate and prosecute terrorist crimes'.

criminal charges an accused must face before a criminal court. At the formulation of the accusations in the summons (the indictment), the public prosecutor may limit the prosecution to only some of the criminal offences (allegedly) committed by the suspect or even to a less serious version of the offence. Such a limitation can be appropriate to conclude the trial sooner or to avoid discussion about parts of the material claims that are irrelevant for coming to a conclusion on the essence of the case. The judge is bound by the choices made by the public prosecutor in the description of the fact for which the accused is summonsed to appear in court. The judge cannot *ex officio* extend the examination at trial and the resulting verdict to include offences other than those for which the accused is summonsed or aspects of the offence the public prosecutor did not include in the summons. The concept of the 'system of fundamental principles' refers to the judge being bound set out by the description of the criminal offence by the public prosecutor.[56] The ease of handling of criminal cases in court depends to a large extent on this fundamental system.

3.5 Monitoring role of a presiding judge

The primary function of the examination at trial is finding the facts of the offence for which the accused is charged. The judge has an active role in this and is solely responsible for the accuracy of the decision he takes. The presiding judge who is solely responsible for examining the substantive truth, is considered an important guarantor of the accuracy of a court verdict.[57] As a secondary function, the judge has the task of monitoring: the judge must be able to examine the lawfulness of the criminal investigation.[58] Therefore, the criminal investigators must draft reports of the acts of investigation they performed that, in principle, must be added to the case file by the public prosecutor.[59] If the judge considers certain acts of investigation towards the accused unlawful, this can have an effect on the verdict, ranging from, and depending on the nature and gravity of the unlawfulness, either reducing the sentence, excluding evidence or declaring the public prosecutor's proceedings inadmissible.[60]

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[56] On this, see: *Jong de*, De macht van de telastelegging in het strafproces; *idem*, De grondslagleer: (steeds) minder formalistisch dan velen denken, NJB 2004, 270–280; *Boksem*, Op den grondslag der telastlegging. Beschouwingen naar aanleiding van het Nederlandse grondslagstelsel; *Groenhuijsen/Knigge* (eds.), Het onderzoek ter zitting, pp. 179–194.

[57] *Groenhuijsen/Knigge* (eds.), Het onderzoek ter zitting, pp. 15–23 and 37; *idem*, Afronding en verantwoording, pp. 104–107 and 379–381.

[58] This is emphasised in the legislation on 'special investigation methods', see: *Kamerstukken II* 1996–1997, 25 403, pp. 14–16.

[59] Adding these to the file is not necessary if the report is not important for the judge's decision; HR 19 December 1995, NJ 1996, 249, comment Sch.

[60] See below under 3.11.

3.6 Adversarial system, right to be present, oral hearing

The principles mentioned in the title of this section play a prominent part in the trial regulations. This is why the trial is adversarial. The accused and his defence have opportunities to challenge the evidence gathered, to present additional material to the court, to call and question witnesses and experts and to plead against the accusation. The legal regulations assume that the proceedings are conducted orally among all parties to the trial so that they are all simultaneously informed of the material on which the judge will render his decision and about each party's standpoint. These legal assumptions ensure, for example, that the presiding judge will not examine a witness in the privacy of his chambers out of the context of the public trial and to the exclusion of the parties to the trial.[61]

In order to secure his appearance at the public trial, the accused is called by means of a summons. To ensure that the summons reaches the accused, it must be served in person where possible. When personal service does not appear possible, the summons is sent to the address at which he is registered or to the actual address of residence (Arts. 585 et seq Sv).[62] This summons does not oblige the accused to appear. According to the Dutch law of criminal procedure the accused can decide whether to appear.[63] If the accused does not appear but the judge deems it desirable that he does so, he can order the accused to be present and will issue a summons to that effect (Art. 278 Sv). If the judge sees no reason for such an order, the case will be conducted in the absence of the accused.

In case law, it is assumed that the accused, by not appearing after having been sent a valid summons, has renounced his right to be present at the trial. The concept of 'renunciation of rights' implies that the accused has voluntarily chosen not to appear. This in turn implies that if the accused appears to be willing to appear but cannot, due to circumstances beyond his control and so requests adjournment of the trial, the judge, in principle, must honour that request. This will enable the accused to be present at the trial on another date and to present his defence.[64]

On special grounds, the accused can be *excluded* from a part of the trial. For instance, the judge can decide to remove the accused from the courtroom for misbehaving and disturbing the peace (Art. 273 Sv). Also, the accused may be ordered to leave the courtroom temporarily in order for a witness to be questioned without the witness having to be confronted with the accused. This measure of temporary ex-

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[61] HR 20 April 1999, NJ 1999, 677, comment 'tH.

[62] If the accused is not registered anywhere and has no known address or place of residence, then the *subpoena* is left with the clerk of the court.

[63] This applies even for the more serious offences.

[64] On this, see the important judgment of HR 12 March 2002, NJ 2002, 317, comment Sch.; HR 8 February 2005, NJ 2005, 229; *Hartog den*, Algemene beschouwingen bij het onderzoek ter terechtzitting, III Afstand doen van rechten, note 5, in: Melai/Groenhuijsen, Het wetboek van strafvordering.

clusion can be adopted when the witness will not testify in the presence of the accused, for example, out of fear or risk of being threatened by the accused. After questioning the witness, the accused is allowed to return to the courtroom and is informed of the content of the statement given by the witness (Art. 297 Sv).

3.7 Principle of immediacy

Various provisions in the Code of Criminal Procedure express the principle of immediacy: the judge, in his verdict, can take into account only what has been brought forward at trial (Arts. 301, 338, 348 and 350 Sv). This principle has been given formal expression in the Dutch law of criminal procedure; it does not mean that the substantive sources of the evidence must be produced in court. The only requirement is that witnesses of the criminal offence and/or experts testify at the trial. As early as 1926, the year the current Code of Criminal Procedure came into force, a *Hoge Raad* ruling allowed the use of *testimonium de auditu* as evidence.[65] It is said of this ruling that it has been more important for the practice of criminal law than the introduction of a new code. Moreover, the consequence of this ruling is that witness statements that are included in the reports of the police or the *rechter-commissaris* can be used as evidence by the presiding judge.[66] This means that during the preliminary investigation, evidence can be gathered and included in the case file. In the practice of criminal law, in most trial cases, the examination of the materials in the case file are sufficient for the judge, the public prosecutor and the defence to determine their respective procedural strategies. Only in a very limited number of cases do the parties to the trial or the judge believe the witnesses and/or experts should be examined at the trial. This state of affairs implies that the preliminary investigation, in preparing for the trial and in particular gathering evidence, is of essential importance.[67] Therefore, the public prosecutor must always be impartial and objective in compiling the case file so that all the relevant information, both for and against the accused, is available for the judge to consider.[68]

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[65] HR 20 December 1926, NJ 1927, 85.

[66] Special permission or a form of acceptance from the accused is not required for this.

[67] On this see: *Garé*, Het onmiddellijkheidsbeginsel in het Nederlandse strafprocesrecht; *Borst*, notes 8–15 to Art. 338, in: Melai/Groenhuijsen, Het wetboek van strafvordering.

[68] On compiling the proceedings file: *Franken*, Algemene beschouwingen bij het onderzoek ter zitting, I De betekenis van het dossier in het strafproces, in: Melai/Groenhuijsen, Het wetboek van strafvordering; *Groenhuijsen/Knigge* (eds.), Het vooronderzoek in strafzaken, pp. 460–472.

3.8 Public nature of criminal proceedings

In principle, the court sessions of criminal trials are public and any member of the public who is of age is allowed to attend.[69] Minors are only allowed into the courtroom with the judge's consent. Once court examination has commenced, and only for exceptional and concrete reasons, the judge can order that the doors be closed and that the trial be closed to the public. Art. 269 Sv provides an exhaustive list of these special reasons.[70] If the judge decides to hold the proceedings partly or fully *in camera*, the judge must provide reasons for this decision in the trial minutes.

As a rule, the trial is public only in criminal cases in which the accused is of age. In criminal cases involving minors, the rule is to conduct the proceedings *in camera* (Art. 495b Sv).The verdict in criminal cases must always be pronounced in public. No exceptions may be made to this basic principle.[71]

The public nature of the administration of justice also implies that media representatives, including those of *radio* and *television*, have the right to be present at the court session. Because of the necessity for special arrangements, such as installing microphones or artificial light, radio and television recordings of (parts of) court sessions are made only once the judge has given permission for this. Generally, this permission is only given on condition that no recognisable recordings of the accused are made and broadcast.

Media reports on criminal proceedings usually do not mention the accused by full name but rather only by the initials. This practice is not based on any special legal provision but on a code of conduct within journalism.[72]

3.9 The judge's freedom of selection and assessment

The Dutch judge, in principle, is free to select and to assess the information gathered from the case papers and the court sessions. The guiding principle here is

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[69] This follows from a number of provisions: Art. 121 GW, Art. 6 EVRM, Arts. 4 and 5 RO, Art. 269 Sv.

[70] The decision to hold a trial *in camera* can be taken in the interest of good morals, state security as well as of the protection of minors or the protection of the individual privacy of the suspect, other parties to the trial or otherwise interested parties. Case law strictly adheres to this; for example, see: HR 4 April 2000, NJ 2000, 633, comment 'tH.

[71] For instance, the judge cannot cause information that was brought to his attention during an *in camera* part of the trial and that was included in the reasoning of the sentence, to be withdrawn from the public nature of the sentence; see: HR 2 July 2002, NJ 2003, 2, comment Kn.

[72] On the public nature and the role of the media: *Corstens*, Strafprocesrecht, pp. 557–558.

his personal conviction regarding the truth of the materials.[73] In principle, in his reasons for the ruling, the judge need not give an account of the considerations that led him to his conclusion. However, a number of limitations have been placed on judicial freedom in the Code and in case law. As such, the judge is to take into account a few minimum requirements of proof in assessing the evidence of the criminal offence such as the *unus testis, nullus testis*-rule.[74] Furthermore, the judge must give specific reasons for his decision in the verdict if these differ from explicit and substantiated positions of one of the parties to the trial (Art. 359(2) Sv). This requirement for justification does not limit the judge in his freedom of appreciation but does justice to the adversarial nature of criminal proceedings. The arguments given at trial force the judge to provide an explanation to the parties to the trial as to the grounds of his decision.[75]

Additionally, certain material is, in principle, inadmissible as evidence or is only admissible on special grounds. For example, the accused's refusal to give a statement is generally inadmissible as evidence in and of itself. The judge can use such refusal, though, in appreciating the conclusive nature of other incriminating evidence against the accused.[76] Also, an accused's statement that the judge considers to be untruthful is admissible as evidence on condition that the judge can deduce such conclusion from other evidence that should also be included in the ruling.[77]

3.10 Principle of concentration

The regulations for the conclusion of criminal cases at trial and for the content of the verdict are based on the principle of concentration. This means that the judge, in one verdict, must decide on all aspects of the criminal offence: on the evidence presented, on the culpability of the act and the perpetrator and on the measures and the punishment to be imposed. By concentrating all decisions against the accused in one verdict, the equilibrium and consistency of a judicial pronouncement is ensured. A two-phase process, in which the first phase deals with the question of evidence and culpability and the second phase with the measure of punishment, is not allowed by the Code of Criminal Procedure. The only exception to this rule is the procedure for withdrawal of wrongly obtained advantage.[78]

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[73] On the judge's freedom of assessment see: *Borst*, notes 23–25 of Art. 338, in: Melai/Groenhuijsen, Het wetboek van strafvordering.

[74] In section 8, Sources of evidence, these minimum requirements are further discussed.

[75] *Groenhuijsen/Knigge* (eds.), Het onderzoek ter zitting, pp. 448–452.

[76] On this point, see, in addition to ECtHR 8 February 1996, app. no. 18731/91 *(John Murray v. UK)*, HR 3 June 1997, NJ 1997, 584; HR 10 November 1998, NJ 1999, 139.

[77] See, for instance, HR 12 March 1996, NJ 1996, 539 and HR 19 March 1996, NJ 1996, 540.

[78] On this point see section 10.3.

3.11 Reasonable delay for prosecution

The Code imposes few time restrictions on the course of the preliminary investigation and of the trial, even when followed by appeal and cassation. In a number of cases the legislator has considered it sufficient to indicate that some actions must be carried out 'as soon as possible' or 'immediately'. For some decisions, the legislator imposed specific time-limits including the maximum duration of preventive custody preceding the trial examination[79] and the decision to prosecute further after the conclusion of the preliminary investigation.[80] Otherwise, the duration of criminal proceedings or parts thereof is not limited. Based on the requirement for the administration of justice within a reasonable time as indicated in Arts. 5(3) and 6(1) ECHR, the *Hoge Raad* has placed a *time limit* on the conclusion of parts of the criminal proceedings. The reasonable delay requirement for prosecution begins to run from the moment a certain action is taken against the suspect from which he can reasonably conclude that criminal proceedings will be initiated against him. In case law, various activities in criminal procedure can trigger these provisions, for example, the first questioning of the suspect at the police station, the moment he is taken into custody or served with a summons.

The reasonable delay for prosecution is, in compliance with ECtHR case law, determined by three factors: the complexity of the case, the attitude of the accused at trial and the behaviour of the competent authorities involved in the criminal proceedings. In the light of these factors, the *Hoge Raad* has indicated that for prosecution at first instance, a maximum term of two years applies. The same applies for the prosecution of an appeal; in principle, a maximum term of two years also applies there, counted from the moment the appeal is initiated.[81] If a case at first instance or appeal takes longer to come to a conclusion, this can only be justified based on one of the above-mentioned three factors. If such justification for the violation of the two-year term cannot be provided, the judge must take measures in favour of the accused. Generally, a violation of the reasonable delay leads to the pronouncement of a lighter sentence. In extreme cases, the unreasonable delay can cause the case of the public prosecutor to be declared inadmissible.[82]

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[79] On this point see section 5.1.4.2.

[80] On this point see section 5.2.2.

[81] For procedures in which the suspect is taken into preventive custody, the maximum term is set at 16 months.

[82] This case law is set out in the significant judgment of HR, 20 June 2000, NJ 2000, 721, comment JdH. On the meaning of 'reasonable delay' in Dutch law of criminal procedure, see further: *Jansen*, De redelijke termijn met name in het bestuursrecht, pp. 77–96, 201–238, 299–319.

3.12 Consideration of interests and assessment of procedural omission

In the preliminary remarks, some indication was given of the character and function of the Dutch law of criminal procedure. The law of criminal procedure is concerned with individual legal protection, doing justice to all the interests involved in a case and ensuring an adequate reaction from authorities when there is a suspicion of a criminal offence. The actual meaning of these features appears in particular in the assessment of the so-called 'procedural omission in the preliminary investigation'. The notion of procedural omission includes the behaviour of the police and judiciary in the preliminary investigation that is considered unlawful and the issue of the consequences of the established unlawful action or omission for the conclusion of the case against the accused. As the final conclusion following many years of development in the case law on this topic,[83] the legislator added Art. 359a Sv to the Code in 1995. To apply this provision, the notion of 'procedural omission' must be interpreted broadly. It includes every action by the police and judiciary during the preliminary investigation that can be considered unlawful (examples of this are maltreating a suspect in a detention cell during the first phase of custody, denying the suspect information on the results of a DNA test, access to which he is entitled by law, or acquiring evidence unlawfully).

Whether such procedural omissions must be met with certain consequences depends on the question of whether or not it is an irremediable procedural omission. If a remedy proves possible, then compliance with the legal regulations must be restored. If the procedural omission cannot be remedied, compensation for damages caused by the omission may be considered. That compensation can take several forms. According to Art. 359a Sv, the judge can decide that the omission must lead to a milder sentence, to exclusion of the acquired evidence or to a declaration that the public prosecutor's case against the accused is inadmissible. Furthermore, it is accepted in case law that the judge may establish in his verdict the occurrence of a procedural omission but that its nature is such that there is no cause for legal consequences. It appears from the law and case law that the assessment of the nature and severity of the procedural omission and the forms of compensation to be offered are a matter of a weighing of interests. In doing so, the judge must consider the nature of the infringed regulation, the legal interest targeted by the regulation concerned, the severity of the omission and the nature and scope of the damages suffered by the accused.[84] In this context, the exclusion of unlawfully obtained evi-

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[83] On this point, see, amongst others, *Corstens* (ed.), Rapporten herijking strafvordering 1993; *Stamhuis*, Vormvoorschriften: een overzicht van rechtspraak.

[84] On the application of Art. 359a Sv, see the significant judgment of HR 30 March 2004, NJ 2004, 376, comment YB; *Embregts*, Uitsluitsel over bewijsuitsluiting; *Woensel van*, Sanctionering van onrechtmatig verkregen bewijsmateriaal, Delikt en Delinkwent 2004, 119–171; *Groenhuijsen/Knigge* (eds.), Afronding en verantwoording, pp. 341–385; *Franken*, Voor de vorm, pp. 6–25.

dence is not the only legal consequence available to the judge. There is a wider range of options available. This system makes a balanced reaction possible to an unlawful action of the authorities in the preliminary investigation, one that enables the judge to weigh all the interests that are effectively at stake.

4. Rights of the accused

4.1 Legal advice

In Dutch criminal proceedings, the accused has the right to be advised by one or more legal counsel. In national law, this right is guaranteed in Art. 18 GW and Art. 28 Sv, among other provisions.[85] A person who is sworn as a lawyer can act as counsel in criminal cases. Counsel can be chosen by the suspect or be appointed by the government. The suspect may choose his own counsel if he is able to bear the costs. The government will appoint in one of two situations. The first is when the suspect is not financially capable of bearing the costs himself.[86] Secondly, and in addition to the former, the official appointment of a counsel is obligatory in situations that are procedurally very taxing on the suspect. This is the case, for example, when the suspect is placed in preventive custody (for details see Art. 41 Sv). At the moment the suspect is taken into custody, legal advice is provided by so-called 'duty lawyers' or 'duty counsel' *(piket-advocaten)*.

The suspect has a right to be advised by a lawyer, but is not obliged to accept advice. Suspects, in principle, have a right to conduct their own defence throughout the procedure. In 1999, an exception was made to this principle for cases in cassation. Since then, Art. 437(2) Sv now provides that the mandatory statement of appeal before cassation (in which the objections against the sentence under appeal are expressed) can only be served by the accused's counsel.[87]

In order to give meaning to the right to legal advice, the suspect is given the opportunity, every time he makes a request, to consult his lawyer as often as possible (Art. 28(2) Sv). Furthermore, it is laid down that the lawyer has free access to the suspect who has been deprived of his liberty. The lawyer can speak with the suspect in confidence and they can exchange letters to which the authorities cannot

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[85] See also the provisions under Art. 6 ECHR and Art. 14 ICCPR with similar treaty-like bases.

[86] See Art. 12 together with Art. 44 *Wet op de Rechtsbijstand*. Cf. also Art. 5 Besluit rechtsbijstand- en toevoegcriteria of 11 January 1994 (Stb. 1994, 32), last amended 1 May 2004 (Stb. 2004, 167).

[87] Another – small – exception that involves obligatory representation at trial is indicated in Art. 463 Sv, in which it is stipulated that an oral explanation of the request for review at the *Hoge Raad* can only be provided by a lawyer.

have access (Art. 50 Sv).[88] This basic right is known as the 'private communication between counsel and suspect'. In the context of effective legal advice – a concept that also occurs in case law from Strasbourg[89] – the Code offers further supporting powers. For instance, counsel has the same rights as the suspect during the preliminary investigation to inspect the case file; and counsel receives a copy of each of the documents the government has to send the suspect (Art. 51 Sv). Finally, counsel and suspect must be guaranteed sufficient time to prepare the defence. The mandatory time limit for court appearance after service of a summons, among other provisions, serves this purpose. In cases heard before a panel of judges at a district court, this period is at least ten days and in those before a single-judge court, it is generally at least three days. If this delay is found to be too short, for example, because of the special circumstances of the case, the defence can file a reasoned application to the court for adjournment of the case.

From the foregoing, it appears that the right to legal advice is concerned with all stages of the case: the preliminary investigation, the trial (including, of course, all legal remedies) and the execution phase. It deserves special mention that the suspect does not have the right to have his counsel attend the *police questioning* with him. This matter is very controversial within the Dutch doctrine. Although there has been much intense debate over the possible introduction of this right, the minister of justice has consistently refused to amend the statutory regulations on this point.[90]

4.2 Presumption of innocence and the right to remain silent; nemo tenetur

The *praesumptio innocentiae* as defined under Art. 6(2) ECHR is not included in the Dutch Constitution or in the national Code of Criminal Procedure as such. Nonetheless, it is considered part of the criminal law system in force. In the doctrine, a distinction is made between three aspects of this principle:

– in cases of reasonable doubt, the judge will not be allowed to convict;

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[88] The criminal investigation cannot be delayed by this; if there is a suspicion that these powers are abused to sabotage the investigation, these powers – under guarantees as set out in law – can be suspended on authority of the *rechter-commissaris* or the public prosecutor.

[89] A legal advice that is 'practical and effective' is required; see, amongst others, ECtHR 13 May 1980, Pub. Ser. A 37 *(Artico v. Italy)*; ECtHR 24 November 1993, Pub. Ser. A 275 *(Imbrioscia v. Switzerland)*.

[90] See: *Fijnaut*, De toelating van raadslieden tot het politiële verdachtenverhoor; *Spronken*, Verdediging. Een onderzoek naar de normering van het optreden van advocaten in strafzaken. For another approach, see (Pleidooi voor consultatierecht voorafgaand aan het politieverhoor; protocollering van het verhoor en registratie op video): *Groenhuijsen/ Knigge* (eds.); Het vooronderzoek in strafzaken, pp. 671–755.

– the accused cannot be treated as a convicted person while the proceedings remain pending;
– in criminal cases, the accused is not required to prove his innocence.[91]

The accused's freedom to make a statement is expressly guaranteed by the Code. According to Art. 29 Sv, the examining judge or official is to refrain from any action that could result in involuntary statements by the accused. The importance of this regulation is further emphasised by the obligation expressly to inform the suspect before the questioning that he is not obliged to answer any questions (Art. 29(2) Sv).[92] This is referred to as the 'duty to caution'.

There are different ideas on the question of whether the suspect's freedom to make a statement (and the connected right to remain silent) is a manifestation of a broader principle by which the suspect is not obliged in any way to incriminate himself or otherwise participate in his own conviction *(nemo tenetur prodere se ipsum)*.

In the law as it stands, indications of an affirmative answer to that question can be found. Traditionally, it is assumed in case law that the authority of the investigator to ask for the personal details of the suspect when checked does not imply that the suspect has the obligation to answer that question.[93] This is linked with the distinction commonly made in doctrine between 'tolerating duress' (mandatory) and 'actively cooperating with the authorities' (not mandatory). In addition to this, the privilege of non-disclosure of witnesses is also associated with a broader *nemo tenetur* principle, in so far as Art. 219 Sv[94] gives a witness the right not to answer questions if he, by answering, runs the risk of exposing himself, or a close relative, to prosecution. Yet another indication is the statutory regulation that governs the means of coercion for ordering the surrender of objects that may be seized. Such an order cannot be directed at the suspect (Art. 96a(2) Sv).

Although there may be several indications of an affirmative answer to the question raised, applicable law offers at least as many *exceptions*. The obligatory blood and breathalyser tests to determine the blood alcohol concentration is one example from traffic law. These forms of investigation for the most part require a certain action on the part of the suspect. Furthermore, the Code of Criminal Procedure contains provisions that govern DNA tests (Arts. 195a et seq Sv) and various measures that aid the investigation (Art. 61a(2) Sv). Only at the highest level of abstraction can it be said that such measures do not require the suspect to cooperate by provid-

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[91] *Keijzer*, Enkele opmerkingen omtrent de praesumptio innocentiae in strafzaken, in: Enschedé et al., Naar eer en geweten, pp. 235–254.

[92] It is, for that matter, interesting that the first Dutch Code of Criminal Procedure of 1838 still recognised an obligation on the part of the suspect to answer questions (Art. 199 Sv); this obligation was removed in 1886.

[93] HR 16 January 1928, NJ 1928, 233.

[94] See also related provisions under Arts. 217, 160 and 137 Sv.

ing evidence to convict him. The possibility may also be raised of extending the period of detention for questioning at the police station in order to identify the suspect who refuses to provide his personal data (Art. 61(2) Sv).[95] In addition, it should be noted that the *Hoge Raad* has concluded in a series of rulings since 1977 that 'in law, no unconditional right or principle is established according to which a suspect cannot be obliged to cooperate in gathering potentially incriminating evidence against him'.[96]

In a recent dissertation on this topic, a conclusion was reached that the *nemo tenetur* principle in Dutch criminal cases has slowly evolved from the right to remain silent to a 'container concept'. The author proposed that, because of its unclear theoretical diversity, the use of the principle in legislation, case law and doctrine is, in fact, chiefly rhetorical.[97] This analysis is very appealing. There is thus little added value in describing Dutch law in terms of *nemo tenetur*. For actual practice it is more important to focus – as do the other Member States of the Council of Europe – on the exegesis of Strasbourg case law on this subject matter.[98]

4.3 Translation and assistance of an interpreter

The basic provisions on the use of interpreters can be found under Arts. 275 and 276 Sv: if the suspect cannot understand or speak the Dutch language sufficiently, the examination at trial cannot take place without the assistance of an interpreter.[99]

Originally, there were no arrangements for the preliminary investigation in procedural law on this subject. This was changed as a result of the *Kamasinski* ruling in which it was determined that the right to be assisted by an interpreter should also apply to documents in the stage of preliminary investigation.[100] As a consequence, the 'directive of assistance by an interpreter in the preliminary investigation of criminal cases' was drafted.[101] It is important to note that the suspect does not have the right to a full translation of all documents of the preliminary investigation. The

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95 This regulation operates against the background of the general obligation for citizens to carry proof of identification and present these upon request by a police officer; see Art. 8a Police Act.

96 HR 15 February 1977, NJ 1977, 557 comment GEM.

97 *Stevens*, Het nemo-teneturbeginsel in strafzaken.

98 See the – well-known but difficult to interpret – decisions in the following cases: ECtHR 25 February 1993 *(Funke v. France)*; ECtHR 8 February 1996 *(Murray v. United Kingdom)*; ECtHR 17 December 1996 *(Saunders v. United Kingdom)*, ECtHR 20 October 1997 *(Serves v. France)*, ECtHR 3 May 2001 *(J.B. v. Switzerland)* and ECtHR 8 April 2004 *(Weh v. Austria)*.

99 For the stage of the preliminary investigation, see Art. 191 Sv.

100 ECtHR 19 December 1989, NJ 1994, 26.

101 Dated 11 June 1996, Stcrt. 1996, 168, came into force 1 September 1996.

suspect is to specify those documents of which he would like to know the content and then the key elements of these documents will be translated. The *Hoge Raad* has ruled on this matter: 'Generally, the translation of the summary of eligible documents will suffice.'[102]

Dutch law has evolved two safeguards to ensure the reliability of the translations. First, in principle, only registered translators are used; registration requires a quality check. Secondly, interpreters are sworn in at the trial to ensure that they will fulfil their task 'conscientiously'. However, there remains a practical problem regarding suspects from remote countries who, with some regularity, complain that the interpreter provided (for instance, for Mandarin) cannot understand or speak the particular dialect, which complicates communication. Such complaints are usually difficult to verify. In these situations it is difficult to determine whether the defence is trying to obstruct the course of justice or there is indeed a serious problem in ensuring a fair trial.

4.4 The right to be present at the trial

Section 3.6 above considered the right of the accused to be present at the trial. In order to be in a position to apply this right effectively, the government is obliged to summons the accused to attend to the trial (Arts. 585 et seq Sv). Two principles should be raised here.

First, in principle, the accused is not obliged to attend the trial. He is free to choose to be absent at his trial. The judge will respect this choice in principle unless he considers the personal confrontation with the accused necessary in order to come to a balanced judgment (for example, in the context of the punishment or sanction to be imposed). In this case the judge can order the accused to be present and will issue a warrant for that purpose (Art. 278 Sv). In practice this means that an accused in preventive custody can be brought against his will and that the police can collect a hostile witness from his home to appear before court.

Secondly, it must be observed that in Dutch criminal law, sentencing *in absentia* occupies a larger place than in other legal systems. This is one of the consequences of the regulations on issuing summonses. A lawful summons, delivered to an address where the accused officially resides but where he does not in fact live means that the document will not physically reach him and he will thus remain unaware of the trial date. Furthermore, if the accused is of no known address – and a notification to the clerk of the court suffices – the accused will not be aware of his trial. According to applicable Dutch law, it is even possible in certain circumstances that the accused can be sentenced by default both at first instance and at appeal. Doubts

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[102] HR 16 December 1997, NJ 1998, 352.

have been expressed regularly about whether this situation conforms with the ECHR,[103] particularly following the *Colozza* ruling.[104] In this ruling, two criteria are key. On the one hand, it is determined that only an explicit refusal of the right to be present can be accepted. On the other hand, it is also indicated that there is not necessarily an infringement to this treaty provision when the violation of the right to be present can be attributed entirely to the negligence of the accused while the authorities have made all efforts reasonably expected to inform the accused of the trial date. To a great extent, these problems could be avoided if a provision is introduced imposing the obligation on suspects to provide an address of residence on first contact with the police and judiciary for the criminal case concerned.[105]

Finally, Art. 279 Sv should be mentioned. According to Dutch criminal procedure, in principle, a suspect cannot be represented in court by another person.[106] According to Art. 279 Sv, an accused who is absent can nevertheless be defended by a lawyer on condition that the lawyer, at the trial, attests to having been expressly authorised by the accused to do so. When the lawyer states he has been authorised, he is taken at his word. If the defence is pursued in this way, the outcome will be regarded as a valid judgment on completion of the trial. This implies that the sentence is not supposed to have been given *in absentia* which, in turn, has consequences for the period during which any remedies at law can be initiated. Another consequence of this regulation is that a lawyer who has not received explicit authorisation will no longer be allowed to speak on the essence of the case to the defence of the accused. According to settled law from *Hoge Raad*, counsel, barring exceptional circumstances, can only speak to clarify the accused's absence and to request an adjournment of the case.[107] Art. 279 Sv and its use in the administration of justice have been strongly criticised in criminal law doctrine. Many authors are of the opinion that the applicable law does not conform with the tenor of the ECtHR rulings in the cases *Lala* and *Pelladoah*.[108]

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[103] See, e.g., *Myjer*, Bij een vijftigste verjaardag, pp. 22 and 26.

[104] ECtHR 12 February 1985, Publ. Ser. A 89.

[105] This is proposed by *Lamèris-Tebbenhof Rijnenberg*, Dagvaarding en berechting in aanwezigheid; and *idem*, in: Groenhuijsen/Knigge (eds.), Het onderzoek ter zitting, p. 118.

[106] Exceptions to this rule are with the district judge and the police court judge for economic offences.

[107] HR 23 October 2001, NJ 2002, 77 comment JR; and HR 23 April 2002, NJ 2002, 338 comment Sch.

[108] ECtHR 22 September 1994, Publ. Ser. A 297-A and NJ 1994, 733 comment Kn *(Lala v. Nederland)*; ECtHR 22 September 1994, Publ. Ser. A 297-B *(Pelladoah v. Nederland)*. On the scientific discussion see: *Plaisier*, Het verstek in strafzaken; and *idem*, commentary on Art. 279, in: Melai/Groenhuijsen, Het wetboek van strafvordering (suppl. 135).

4.5 Internal openness

One of the most important rights of the defence concerns the principle of internal openness. This means that the accused and his counsel must be kept informed on the progress of the proceedings and of the results of any relevant investigation, unless other significant interests (temporarily) prevent this. Various aspects can be identified in this principle.

The internal openness of legal proceedings implies, first, that the accused should always be aware of what he is being accused. Within the current system of criminal proceedings, the applicable principle is that as the procedure progresses – and as stronger means of coercion can be employed against the accused – a sharper and/or more *accurate description of the charges* is required. As such, relatively light means of coercion can be used in the beginning of an investigation if the criterion of Art. 27 Sv is met: if there is a person against whom 'a suspicion of guilt of any criminal offence' appears from facts and circumstances. If a prolonged preventive custody is deemed necessary, this can only be achieved if the order for arrest[109] 'describes the criminal offence as accurately as possible' and states the grounds for issuing it and the circumstances that have led to the assumption of these grounds (Art. 59(2) Sv). This is also the case when a judicial preliminary investigation is sought[110] in which the offence is to be formulated 'as accurately as possible at this stage of the case' (Art. 181(2) Sv). The most detailed formulation of the charges is made in the indictment. This consists of a specification of the offence with a mention of the time, the place and the circumstances in which the offence took place and is provided with the sections of the law that have been violated by this conduct (Art. 261 Sv). It has already been explained above[111] that this designation of the charges, based on the so-called 'system of fundamental principles', also binds the judge.

A *second* element of the principle of internal openness concerns the *inspection* of, and the *acquisition of copies* of, the documents relating to the case. The Code provides clear rules on this matter. During the preliminary investigation, the public prosecutor allows the accused to *inspect the case file* when he requests. During the GVO (*Gerechtelijk Vooronderzoek* or preliminary judicial investigation) this authority falls to the examining judge. If it benefits the investigation, certain documents can be excluded. The accused is then advised in writing that the file presented to him is incomplete (Art. 30 Sv, with recourse to a remedy at law against this refusal at Art. 32 Sv). Some documents must always be available for inspection (Art. 31 Sv): the report of the accused's questioning, of acts of investigation at which occasion the accused was allowed to be present or of witness examinations

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109 See section 5.1.4.2.

110 See section 5.2.

111 See section 3.4.

of which the content was already made known to him verbally. From the moment the GVO is concluded or after the summons is issued, no document of the case file may be denied for inspection to the defence (Art. 33 Sv). The accused may acquire copies of all the documents he is allowed to inspect at the court's registry (Art. 34(2) Sv).

As a *third* element of the requirement of internal openness, it should be mentioned that the accused in the Dutch system of criminal procedure always *has to be heard* before the judge takes a decision when the public prosecutor demands one be taken or when the defence requests one. This way it is guaranteed that the accused always knows which actions have been taken or are intended to be taken against him and on which grounds these are based so that the accused can set out his own point of view against it.

Finally, the regulation on the examination at trial, in many ways, also provides proof of the predominant perspective of internal transparency. In principle, during the trial, nothing to do with the proceedings may be kept from the accused. For instance, the judge cannot gather information on the charges without the accused being present. Exceptionally, Art. 297(3) Sv provides that the judge may order the accused to leave the courtroom whilst a witness is examined. That is an arrangement for the benefit of the witness, for example, in cases in which the witness is the victim of the offence and there are concerns about the negative consequences of a physical confrontation with the accused.[112] But even in those situations, the essence that underlies internal openness is satisfied since, immediately following the questioning and before continuing the trial, the accused must be informed of what occurred in his absence (Art. 297(4) Sv).

4.6 The right to examine witnesses

The above remarks lead naturally to the issue of the extent of the right of the defence to examine witnesses. The guiding principle here is undoubtedly Art. 6(3)(d) ECHR. In accordance with this provision, Dutch criminal procedure is framed such that, in principle, there is a right to confront witnesses for the prosecution with their statements at any time during the proceedings. Yet this right is not unlimited. It was mentioned above that in the Netherlands witness statements can be accepted *de audito* as valid evidence and that, as a consequence, the accent in many criminal procedures has moved to the preliminary investigation. The witness's statement given to the police or the examining judge is reduced to writing in a report and it is this document that is then reviewed at trial. Therefore, it is rare that a witness is asked to appear at the trial to give his testimony again orally and in public. In a fundamental judgment, the *Hoge Raad* has indicated to what extent this practice

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[112] See: HR 26 November 2002, NJ 2003, 66.

conforms with treaty law.[113] Because of the doctrinal character of this decision, we will elaborate on the main rules that flow from it.

The *Hoge Raad* postulates that the use of the above-mentioned reports in and of itself does not contradict the ECHR and that there is certainly no issue of incompatibility if the defence at any stage of the trial has had the opportunity to test the reliability of a statement or whether the statement is substantially supported in other pieces of evidence. However, the circumstances of the case may present a different situation and the judge, *ex officio* if necessary, may need to summons the witness to trial. This is the case, for example, when the statement recorded in the report is the only direct evidence that the accused is involved in the offence *and* (this requirement is cumulative) that the witness has later withdrawn his statement before a judge or has refused to repeat it. If the witness is called to court pursuant to this rule but fails to appear or refuses to make a statement, the judge may then again revert to the statement made during the preliminary investigation and use this as evidence. The conclusion of this case law is that it is almost always allowable to decide a case on the basis of evidence that has been gathered during the preliminary investigation, even if the accused is not directly confronted with the witnesses for the prosecution.

In respect of the defence witnesses, it is suggested that the accused was given several opportunities to bring these to the attention of the judiciary during the preliminary investigation (see below under section 4.7). For the trial stage, Art. 263 Sv prescribes that the accused is authorised to call witnesses and experts. To that end, he needs to present a list to the public prosecutor in a timely manner. There are only a limited number of reasons available to the public prosecutor, defined by law, to refuse to summons a witness. These are: a) it is improbable that the witness will appear before the court; b) the public prosecutor is of the opinion that the witness's health or well-being may be jeopardized by giving a statement and that preventing this risk weighs more heavily than hearing the witness in court; and c) if the public prosecutor is of the opinion that the accused's defence will not reasonably be damaged by a refusal (Art. 264 Sv). If the public prosecutor uses this possibility, the accused may still appeal to the judge at the trial to call the witness. The court then decides based on the same three criteria (see Art. 288(1) Sv).

The grounds for refusal named under b) above are related to the position of the so-called 'threatened witness'. In the Netherlands there is a distinct rule for this legal concept (Arts. 226a–226f Sv; see also the definition under Art. 136c Sv). The examining judge can order the witness's identity be kept secret if two cumulative requirements are met.[114] First, it must be in relation to a situation in which the witness feels threatened to such an extent that it is reasonable to assume that life,

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[113] HR 1 February 1994, NJ 1994, 427 comment C.

[114] On this procedure, see also: *Corstens*, Strafprocesrecht, pp. 325–328.

health or security may be at risk or it is likely that the witness's family life or socio-economic existence may be disrupted. Secondly, the witness must have indicated an unwillingness to take the stand for that reason. Before the examining judge decides on the status of threatened witness, the accused (and the public prosecutor's office) is (are) heard.[115] It is important that the examining judge ascertain the identity of the threatened witness. This is a treaty provision intended to prevent abuse of the rule: it is the only means to ensure that a witness previously heard by the police as an ordinary witness does not subsequently take the stand again – this time anonymously – and provide 'new' evidence in a manner that cannot be verified. The essence of this special procedure is that the witness can be heard in the absence of the accused and possibly in the absence of the accused's counsel (Art. 226d Sv). In order to maintain a minimum of the right to examine, the defence may provide questions in advance to be put to the witness. After the examination, the defence is informed of the results, after which the witness can be asked further questions via audio or video connection or in writing. The examining judge will allow this as long as the questions cannot reveal the witness's identity.

It is appropriate in this context to point out the special provisions on the acquisition of evidence concerning the statement of a threatened witness. According to Art. 344a(2) Sv, the report on the examination of a threatened witness can only count towards evidence of the charges if the regulations of Arts. 226c–226f Sv were taken into consideration and if it concerns an offence for which preventive custody is allowed and is of such a grave nature that it constitutes a serious infringement of the rule of law.

For less far-reaching cases there is still the possibility not to conceal the identity completely, but to prevent questions concerning certain personal details (Art. 190a Sv). This is the case for situations in which there are concerns that the witness will experience difficulties or will be hindered in the practice of his profession. Such witnesses include undercover officers and *agents provocateurs*. They will then only be required to submit the code number with which they are registered with the police.

4.7 Mini trial

Traditionally, the criminal procedure is organised in such a way that the suspect takes a more passive role during the initial stages of the investigation and is only equipped with the rights and competences that result in more of an equality of arms with the public prosecutor's office. This was also the basic principle of the Dutch Code of Criminal Procedure of 1926 in which the suspect effectively would have

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[115] Accused and public prosecutor can lodge an appeal against an unacceptable decision within 14 days (Art. 226b(2) Sv).

substantial defensive rights at his disposal only from the moment of prosecution.[116] In the current Code an important correction has been made.[117] This regulation, referred to as the 'mini trial', came into force on 1 February 2000.

The mini trial implies that the accused, against whom the government has taken action and who can reasonably expect to be prosecuted in the Netherlands for a certain offence, can petition the examining judge to conduct some inquires into the offence (Art. 36a Sv). The number of authorised persons is thus limited to the suspects against whom action has already been taken. The government must have taken action on the grounds of which the suspect can reasonably expect to be prosecuted. This criterion corresponds with that of the 'criminal charges' as the basic principle of the administration of justice within a reasonable time as set out under Art. 6 ECHR. The petition must be in writing and substantiated. In order to prevent abuse and to avoid overtaxing the justice system it is additionally required that the petition, first, clearly states on what grounds the suspect believes prosecution is imminent and, secondly, which acts of investigation the suspect would like to see carried out and how this is likely to be to his advantage. This can refer to, for example, having a certain witness or expert heard who could provide information in favour of the suspect. Vexatious and unsubstantiated petitions can evidently and even without hearing the suspect, be declared inadmissible (Art. 36b(2) Sv). After completion of the petitioned act of investigation, the examining judge will send the relevant documents to the public prosecutor and a copy to the suspect (Art. 36b(5) Sv).

Such is the situation for cases in which prosecution has not yet commenced. This does not mean that subsequently the suspect is left empty-handed. If prosecution has commenced but no GVO has been initiated, the suspect can apply to the examining judge. Also during an ongoing GVO, the suspect should petition the examining judge to apply *ex officio* his powers of investigation in this context. After completion of the GVO and before commencement of the trial, the suspect can request further acts of investigation pursuant to Art. 241 Sv. Even after the public trial has begun, a request for additional investigation is still possible: at first instance by virtue of Art. 316 Sv and at appeal by virtue of Art. 411a Sv.

Before the mini trial was introduced, members of the police and judiciary were very doubtful as regards the desirability of such an instrument. They feared it

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[116] In which the concept 'prosecution' was described as: the involvement of a judge in the case. At the time, that could be done in three ways: demanding preventive custody, demanding a preliminary judicial inquiry and summonsing the accused. – Fundamental critique on this basic principle is provided by the research project *Strafvordering 2001*; see: *Groenhuijsen/Knigge* (eds.), Het vooronderzoek in strafzaken, in which it is suggested to bring forward the point at which systematic legal protection is offered the moment a person is first heard by the police in the capacity of suspect.

[117] Preliminary Judicial Inquiries Review Act, 27 May 1999, Stb. 243, came into effect 1 February 2000.

would be abused and congest the justice system. But more particularly, they feared criminals would use this right to gain more insight into the conduct of police investigations and the methods of investigation employed. Some years after coming into force, the efficacy of this law has been evaluated empirically. The conclusion from the study is very reassuring: 'Such abuse, whether incidental or not, does not appear in practice. There is only the observation that the mini trial is now mostly about hearing witnesses at a relatively late stage of the preliminary investigation.'[118] In addition to this, it is argued that the mini trial's practical manifestation 'has moved quite far away' from the legislator's original intention. According to the authors of the study, the mini trial as an incentive for the defence to influence the direction of the investigation is not or is barely present in practice.[119]

5. Phases of the criminal process

There are four stages to the procedure followed in criminal cases: the preliminary inquiry, the proceedings at trial, application of remedies at law and execution of the court order. Within the preliminary inquiry, a distinction is drawn between the criminal investigation and the preliminary judicial inquiry. The remedies at law that can be applied against criminal judgments are 'ordinary' remedies (challenge, appeal and cassation) and 'special' remedies (review and appeal-cassation in the interest of law). The difference between these two categories is connected with the finality of the court order. The ordinary remedies at law must be lodged within fixed time limits following the date of the contested order and have the effect of deferring the finality of that decision. The special remedies at law can only be lodged against orders that have become final. The review is an opportunity in certain cases for the convicted person to reopen criminal proceedings that have already been closed. Appeal-cassation in the interest of law is a remedy at law that can only be lodged by the Procurator General at the *Hoge Raad* and is for the benefit of the unity and the development of the law.

5.1 Preliminary inquiry 1: investigation

5.1.1 Structure of the legislation

The manner in which the Code governs criminal investigation lacks coherence. There is no defined and systematic regulation that lays down the tasks and powers of all persons involved in criminal investigation. Rather, it is a fragmented and

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[118] Evaluatie Wet herziening GVO (from the department of criminal law at the Erasmus University Rotterdam), WODC Cahier 2004-11, Den Haag 2004, p. 36.

[119] Evaluatie Wet herziening GVO, p. 45.

barely structured regulation in which, in particular, limited attention is given to the rights and powers of the defence and the victim. The most significant parts of the regulation on criminal investigation relate to the task of investigation itself (Arts. 140–149), the report to be drafted (Arts. 152, 153 and 155–157), the designation of criminal investigators who also act as assistant public prosecutors, drafting reports and accusations (Arts. 160–166a) and the means of coercion (Arts. 52–126gg; 150–151d). There is certainly a historical explanation for the current state of affairs,[120] but the explanation does no justice to the present-day significance of criminal investigation for the entire law of criminal procedure. Hence, the public prosecutor has correctly decided to review fully the regulation of the preliminary inquiry.[121]

5.1.2 Criminal investigators and leading the investigation

The investigation can be performed by a) the public prosecutors, b) officials from the regional police forces, c) officers, non-commissioned officers and designated members of the Royal military police,[122] d) the criminal investigators of the special criminal investigation department and e) special criminal investigators (Arts. 141 and 142 Sv). The statutory designation of a criminal investigator legitimises the performance of a criminal investigation and, if the conditions for this are satisfied, the use of specific powers to gather evidence.

Designating *public prosecutors* as criminal investigators does not mean that in practice they are actively involved in investigating criminal offences, but rather expresses the fact that they are responsible for leading the investigation and are functionally responsible for managing cases within the criminal investigation. With a view to exercising this leading role, they can give orders to the other investigators who are responsible for investigating criminal offences (Art. 148 Sv).

The statutory delegation of leadership in the criminal investigation to the public prosecutor is not inconsistent with the fact that in practice the *police* investigate most criminal offences with relative autonomy and that the public prosecutor only becomes aware of a case when the report drafted by the police is forwarded to his office. The relative autonomy of the police in the investigation is connected with the fact that, with the assistance of various instruments, the police's investigative work is brought into line with the public prosecutor's policy. This includes, among other things, *directives* and *instructions* from the public prosecutor's office to the

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[120] See: *Groenhuijsen/Knigge* (eds.), Het vooronderzoek in strafzaken, pp. 387–430.

[121] *Kamerstukken II* 2003–2004, 29 271, nr. 1, Algemeen kader herziening Wetboek van Strafvordering, pp. 13–17.

[122] The section of the armed forces that is responsible for police matters. Under certain circumstances, the Royal military police can also investigate criminal offences perpetrated by civilians.

police with policy guidelines for investigating categories of criminal offences, periodical and specific consultation between the police and the public prosecutor's office and the secondment to the police station of the public prosecutor office employees who can take decisions there on behalf of the public prosecutor on the way in which criminal offences are handled.[123] Otherwise, the public prosecutor leads the investigation from a distance and the leadership only becomes concrete if the police must contact the public prosecutor in connection with the particulars of a case. However, in more serious cases, the involvement of the public prosecutor's office in the investigation is more concrete and intensive. Only if the more intrusive means of coercion must be applied does the public prosecutor need to be involved. As regards applying such powers, the public prosecutor should take the decision and possibly consult the *rechter-commissaris*. In these cases the leadership position of the public prosecutor over the management of cases during the investigation takes on its true character.

5.1.3 Report and accusation

Everyone has the authority to report the commission of an offence to a criminal investigator who in turn is authorised to act (Art. 161 Sv). A report is a notification in any form made to a criminal investigator that a crime may have been committed.

In Dutch law there are only a few examples of an *obligation to report*. The most significant of these is the obligation of public authorities and officials to make a report to the public prosecutor or an assistant public prosecutor about crimes that have come to their attention and into which that authority or official is not authorised to conduct investigations (Art. 162 Sv). In addition to this, everyone is obliged to report to a criminal investigator certain crimes against State security, offences that endanger the community, life-threatening offences, abduction or indecent assault (Art. 160 Sv). Nevertheless, violating an obligation to report is only punishable to a very limited extent (Arts. 135 and 136 Sr).[124]

The authority to report does not affect the general authority for criminal investigators to act *ex officio* and investigate a suspected crime that has come to their attention. The legal allocation of the investigative duty legitimises action, even if a report has not, or has not yet, been made by a citizen or the injured person. This differs from the limited category of accusation offences. It includes criminal offences for which investigation and prosecution are only admissible after a person designated by the law – generally the injured person or, for minors, the legal guardian – has made an accusation to the public prosecutor or assistant public prosecutor

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[123] See on this: *Daele van*, Het openbaar ministerie, pp. 215–258; *idem*, Het openbaar ministerie en strafrechtelijk beleid, pp. 267–520.

[124] See: *Noyon/Langemeijer/Remmelink*, Het wetboek van strafrecht, notes on Arts. 135 and 136 Sr.

about a committed offence. The accusation is a formal report with a petition to commence criminal prosecution (Arts. 164–166a Sv).

The criminal investigator and the (assistant) public prosecutor are obliged to receive reports and accusations and reduce these to writing. However, following receipt of a report or accusation, the initiation of a criminal investigation and criminal proceedings is not obligatory. According to the principle of opportunity, investigation and prosecution can be waived.[125]

5.1.4 Powers of investigation[126]

5.1.4.1 General features of the legislation

For the purpose of carrying out a criminal investigation, the police and the judiciary are assigned various powers of investigation. Before considering specific powers in greater detail, a few general features of the legislative norm should be mentioned.

a) It is customary for legislation to specify individual powers with respect to which offences and to which situations the use of the power is allowed. Traditionally, on this point, the legislation relies on the two situations of 'catching someone in the act of committing an offence' and 'suspicion of a crime for which preventive custody is authorised'. In cases where someone has been caught in the act of committing an offence, then the power concerned can be applied as regards each criminal offence (from the most serious crime to the most simple misdemeanour). By contrast, in cases where an offence is not discovered while being committed, then the means of coercion may only be applied if preventive custody is allowed for that crime. This involves crimes which are punishable by the deprivation of liberty for at least four years or of one of the crimes for which the law specifically provides (Art. 67 Sv). The idea behind this dichotomy is that in situations where an offender is caught in the act of committing an offence there is little uncertainty about the perpetrator and immediate measures can be taken to investigate the issue. Where someone has not been apprehended in the act of committing an offence, their constitutional rights may be infringed only if the suspected crime is of a more serious nature.[127]

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[125] Cf. *Duijst*, notes on Arts. 160 t/m 166a, in: Melai/Groenhuijsen, Het wetboek van strafvordering.

[126] See for a detailed consideration of the regulation of powers of investigation: *Corstens*, Strafprocesrecht, pp. 249–298 and 349–497; *Minkenhof/Reijntjes*, Strafvordering, pp. 122–214; *Melai/Groenhuijsen*, Het wetboek van strafvordering, note to Arts. 52–126gg.

[127] *Melai/Groenhuijsen*, Het wetboek van strafvordering, note to Art. 128.

In more modern regulations on powers of investigation, the operative difference is between the suspicion that a crime has been committed on the one hand and the suspicion that an *organised crime* for which preventive custody is allowed, has been planned or committed. The classic notion of suspicion is associated with the reactive nature of criminal proceedings, that is, accounting for a probable, committed criminal offence. The second notion of suspicion was developed and laid down in the law with a view to combating organised crime, for which the anticipated investigation aimed at prevention is important.[128]

b) Those authorised by the Code to use powers of investigation, are the citizen, the criminal investigator, the assistant public prosecutor, the public prosecutor, the *rechter-commissaris* or the court. The citizen is given very limited powers that can be used in situations of *in flagrante delicto*,[129] whereas the criminal law enforcement authorities have far-reaching powers according to the gravity of the suspected offence. As these far-reaching powers become more extensive, determined by the nature and extent of infringement of constitutional rights, the law requires a decision from a higher authority. Thus, criminal investigators may impose short-term forms of detention of a suspect, while a court order is required for the longer-term forms of detention.

Within the system of the allocation of further-reaching powers to increasingly higher authorities, certain provisions have been made to enable a quick reaction when a situation requires it. In these cases the role of the public prosecutor or the assistant public prosecutor is important. If a power is attributed to the public prosecutor by law, but by reason of urgency, the decision of the public prosecutor cannot be obtained, then, in some cases, the assistant public prosecutor can make the decision, with the obligation to inform the public prosecutor about this.

The involvement of the *rechter-commissaris* in the investigation can be achieved by the participation of an examining magistrate or anyone having judicial authority. In the first case, certain powers have been assigned to the *rechter-commissaris* on the assumption that he is personally present at the execution of an investigatory act and is fully responsible for its development. An example of this is the execution of a search warrant. The role of the *rechter-commissaris* as court authority ensures that he can give authorisation for the execution of a far-reaching investigation after having received a claim to do so from the public prosecutor. In the case, for example, of the recording of telecommunications; a decision is reserved for the public prosecutor but he requires a preceding written authorisation of the *rechter-commissaris* for recording. On the granting of a warrant authorising the recording

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[128] See the Law on special powers of investigation (Law of 27 May 1999, Stb. 1999, 245) and the Parliamentary reports (*Kamerstukken* 25 403).

[129] It concerns powers that make immediate action possible after catching someone in the act of committing an offence, while waiting for the police to arrive.

of telecommunications, the *rechter-commissaris* has to judge the legitimacy of the intentions behind the application.

c) The regulation of investigation by the Code is not restrictive and this can be seen in three ways. First of all, the legislator has assigned additional investigative powers to criminal investigators under various special laws. The rationale behind this is that for the enforcement of the special legislation, the competences in the Code of Criminal Procedure are not considered to be sufficient, so that additional competences are, if not necessary, then highly desirable. Important examples of this are investigation under the Road Traffic Act of 1994 in the context of the investigation and the prosecution for driving vehicles under the influence of alcohol or other drugs (Art. 163 WVW 1994), the investigation of vehicles and the clothing of the suspect under suspicion of violation of the Opium Act (Art. 9 Ow) and the searching of a building by criminal investigators on grounds of a suspected violation of the Weapons and Ammunition Act (Art. 49 WWM).

Secondly, the exercise of the task of investigation, which, according to jurisprudence, falls in the domain of legally regulated powers, legitimises acts of investigation for which there are no particular legal grounds. It concerns acts that have little or no impact on individual freedoms. In jurisprudence, it is assumed that such acts are inherent – as implied powers – to the police's task to enforce the legal order (Art. 2 Pw) and to investigate criminal offences.[130] These acts are controlled by the principles of proportion and subsidiarity.

Finally, the legislation of the powers of investigation is founded on the basic principle that citizens can contribute voluntarily to the realisation of investigation activities. This not only concerns activities that would be illicit without voluntary cooperation but also activities that do not have an explicit legal foundation. Voluntary cooperation legitimises the actions of criminal investigators.[131]

5.1.4.2 Deprivation of the suspect's liberty

The Code of Criminal Procedure offers several *means of coercion* by which the suspect can be deprived of his liberty: arrest, police detention, remand in custody, imprisonment and apprehension.

– *Arrest*

If a person is caught in the act of committing a criminal offence, he can be arrested by any citizen or criminal investigator (Art. 53 Sv). If not caught in the act,

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[130] See, e.g., HR 19 December 1995, NJ 1996, 249, comment Sch; HR 19 March 1996, NJ 1997, 85, comment Kn.

[131] *Groenhuijsen/Knigge* (eds.), Dwangmiddelen en rechtsmiddelen, pp. 469–483.

arrest is only permitted if the offence is one for which preventive custody is allowed or if the suspect, in previous contacts with the police, has given false personal details. In principle, the public prosecutor is authorised to make an arrest without having caught the perpetrator in the act of committing a criminal offence. If there is no time to await the public prosecutor's decision, the assistant public prosecutor and the ordinary criminal investigator can make an arrest. They must inform the public prosecutor as quickly as possible about the arrest (Art. 54 Sv).

In addition to the arrest, the arresting officer is authorised to apply other means of coercion. He can enter and, if necessary, search premises to make an arrest (Arts. 55 and 55a Sv). Furthermore, objects in possession of the suspect may be seized (Art. 95 Sv) and the suspect's clothing may be searched (Art. 56(4) Sv). Also, the arresting officer may ask the suspect for information that is important in establishing the suspect's identity. In this perspective, the suspect or objects in his possession (such as a bag or wallet) may be searched (Art. 55b Sv).

The purpose of the arrest is to bring the suspect to a place for questioning. This is usually the police station. If the arrest was made by a criminal investigator (which in practice is the most common situation), the suspect must be brought before a public or assistant public prosecutor. He must establish the lawfulness of the arrest and may subsequently decide to keep the suspect in custody at the police station for investigation for a maximum of six hours. These six hours can be used to question the suspect and to conduct further investigation (such as making photographic and video recordings, taking finger prints, setting up a confrontation or identification procedures and so on; see Art. 61a Sv). Also, the suspect's body and clothing may be searched. Even a search of the suspect's body cavities is a possibility. Because of the drastic nature of such a search this can be authorised only by the public prosecutor, and may be carried out only by a physician (Art. 56 Sv). If the suspect refuses to make his personal details known, the public or assistant public prosecutor can prolong the term of custody once by six hours in order to further investigate the suspect's identity (Art. 61 Sv).

Before commencement of the police questioning the suspect must be informed that he is not obliged to answer any questions (Art. 29 Sv). If the suspect makes a statement during this questioning, this can be later used as evidence by the judge. The suspect's counsel does not have the right to be present at the police questioning. The police officers must draft a report on the arrest, the arraignment, the questioning and the other acts of investigation conducted at the police station. This document is added to the case file so that the trial judge is able to verify the lawfulness of all acts described in it.

At the end of the six-hour term of the suspect's custody at the police station, he is to be released unless he is placed in preventive custody.

– *Police detention*

Police detention is a means of coercion that deprives the suspect of his liberty in order to ensure the suspect is available for the judiciary for the purpose of the investigation. This means of coercion can only be applied if, because of the nature of the offence, preventive custody is permitted (Arts. 57 and 58 Sv). The decision to apply police detention lies with the public prosecutor or assistant public prosecutor. This form of detention can last for a maximum of three days and can be prolonged by the public prosecutor once by a further three days. The suspect in detention is held in a police cell. While being held at the police station, the suspect can be questioned and subjected to measures used for investigation, such as taking photos and making video recordings, taking finger prints, setting up a confrontation or identification procedures and so on. Also, restrictions can be imposed in the context of contact with third parties or the acquiring of information. Furthermore, the suspect can be moved to a hospital or other facility where medical surveillance is available (Art. 62 Sv).

Prior to giving an order of police detention, the suspect must be heard by the officer who takes the decision. The suspect can be advised by a lawyer. A report of this examination is to be drawn up and added to the case file and the order must be in writing and signed. The order must mention the suspect and contain a description of the criminal offence. A transcript of the order must be given to the suspect. A duty counsel scheme is available to provide legal aid to suspects in police detention. This scheme implies that lawyers, if they have agreed to do so, will provide legal aid to suspects in police detention and they will be compensated for their work by the government (Art. 40 Sv).

The public prosecutor, or assistant public prosecutor, who decides to place the suspect in preventive custody cannot be regarded as a 'judge or other officer authorised by law to exercise judicial power' as laid down in Art. 5(3) ECHR. In order to meet this provision and as a result of the ruling of the ECtHR in the *Brogan v. UK* case,[132] a provision has been introduced in the Code, based on which the suspect must be brought before the *rechter-commissaris* not later than three days and 15 hours after the police detention has begun. This judge, after hearing the suspect, renders a decision on the lawfulness of the police detention. The suspect can be assisted by a lawyer. If the *rechter-commissaris* finds the preventive custody unlawful, he must order the immediate release of the suspect. The hearing and the decision of the *rechter-commissaris* must be recorded in writing (Art. 59a Sv).

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[132] ECtHR 29 November 1988, Publ. ECHR Series A, vol. 145.

– *Preventive custody: general principles*[133]

The remand in custody, imprisonment and apprehension are all included in preventive custody (Art. 133 Sv). This detention only occurs after a written decision of a judge that serves that end. In this decision, the suspect's identity must be indicated and the criminal offence described as accurately as possible. Also the reasons for imposing a preventive custody must be specified in the order. The written order must be given to the suspect (Art. 78 Sv).

The law provides an exhaustive list of the circumstances in which preventive custody is allowed and the reasons for which preventive custody of the suspect is imposed. Preventive custody can only be ordered if the offence, according to law, carries a sanction of imprisonment of four years or more (Art. 67(1)(a) Sv) or if it is related to a criminal offence that is specifically provided by law (Art. 67(1)(b) and (c) Sv).[134] Preventive custody is more likely to be imposed on a suspect who does not have a fixed domicile or residence in the Netherlands. In such circumstances, the only restriction is that the criminal offence can result in a prison sentence. The extent of the maximum penalty that can be imposed by law is not relevant in this case. A suspicion is insufficient reason to order preventive custody; the law, in using the term 'serious objections' *(ernstige bezwaren)*, calls for a higher degree of suspicion that the suspect is guilty of committing a criminal offence (Art. 67(3) Sv). This requirement is connected to the drastic character of the preventive custody.

The *reasons* for preventive custody are described in Art. 67a Sv. Reasons other than those listed in this provision cannot lead to the preventive custody of the suspect. The reasons are focused on the suspect's person and are as follows:

a) To prevent escape. The risk of escape refers to the attempt to avoid the enforcement of a court-imposed penalty, not to the appearance at the trial. The suspect is not obliged to appear before court (see above section 3.6).

b) An important reason of public security, the nature of which requires immediate detention of the suspect. These 'important reasons' are only met when:

   1. the suspicion points to a criminal offence that carries a term of imprisonment of 12 years or more which constitutes a serious disruption of legal order;
   2. the risk is high that the suspect will re-offend by committing one of the crimes specifically listed by law;
   3. preventive custody is required to bring the truth to light – other than by questioning the suspect (Art. 67a(2) Sv). This relates to suppressing the danger of

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[133] On the regulation for preventive custody, see: *Beijerse uit*, Op verdenking gevangengezet.

[134] The rationale for this specific mention is related to the legal threat of punishment, which is lower than four years.

collusion or where there is a serious risk that evidence may be destroyed or witnesses pressured.

Although preventive custody cannot be regarded as an anticipation of a sentence later to be imposed by court and cannot be used as such,[135] it is related to the judge's verdict in several ways. Thus, preventive custody may not be imposed when it is unlikely that the judge, in his decision, will impose a sentence that will deprive the suspect of his liberty. Subsequently, the judge, who decides on preventive custody, must ensure that the suspect is not preventively deprived of his liberty any longer than the extent of the prison sentence that is likely to be imposed. As soon as the preventive custody equals this anticipated sentence, it must be ended (the anticipation instruction of Art. 67a(3) Sv). Furthermore, the judge is obliged to take an already imposed period of preventive custody into account in his final ruling and pronouncement of a penalty (Art. 27 Sr).

Unlike police detention, preventive custody is not executed at the police station but rather at a detention facility.

– *The various orders*

The order for a remand in custody is granted by the *rechter-commissaris* when demanded by the public prosecutor. Prior to granting the order, the suspect must be heard by the *rechter-commissaris* on which occasion the suspect is entitled to be advised by his lawyer. The remand warrant can lead to a detention for a maximum 14 days, during which time the suspect can be set free by the *rechter-commissaris* or the public prosecutor (Arts. 63 and 64 Sv).

After remand in custody, the suspect can be further remanded by an order of imprisonment granted by the court. The imprisonment may be ordered for a maximum of 90 days. In practice, the imprisonment at first is limited to 30 days. This way, the court obliges the public prosecutor to demand an extension of imprisonment when the 30-day period has run out. In doing so, the court is able to follow the progress of the inquiry and to consider the necessity for continuing the preventive custody. In extending the term of imprisonment, the court is still bound by the previously mentioned maximum of 90 days. Before granting the order of imprisonment or an extension thereof, the suspect is heard, unless he indicates that there is no need (Arts. 65 and 66 Sv).

If the public prosecutor is of the opinion that after the term of 90 days the preventive custody must be continued, the criminal case must be brought before court. The commencement of the trial within the maximum term of imprisonment results in the legal extension of the preventive custody to 60 days after the day the court has arrived at a final judgment. With this regulation, the legislator sought to

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[135] Cf. HR 2 March 1954, NJ 1954, 240.

encourage a speedy conclusion to the preliminary inquiry and have the judge at trial decide relatively quickly on the necessity of a continuation of the preventive custody in cases in which preventive custody is applied.

In practice, it often occurs that the preliminary inquiry is not concluded at the end of the 90-day period. To prevent the suspect from being set free prematurely, the public prosecutor must summons the suspect to appear in court notwithstanding that the preliminary inquiry is not yet concluded. The Code provides a number of procedural provisions to this end. Thus, the case may be brought before the court based on an interim summons. This implies that it is sufficient to use the description of the relevant inculpatory evidence from the order of imprisonment. Subsequently, a *pro forma* court session takes place in which the court deals exclusively with the continuation of the preventive custody and determines a new date on which the court will deal with the substance of the matter. In the meantime, the preliminary inquiry can be concluded. The public prosecutor is then authorised to adjust the charges (Arts. 258(2), 261(3), 282 and 314a Sv).

The apprehension of the suspect can be ordered by the court at trial. This decision can be made when the suspect has not previously been subject to preventive detention but when the court holds that there are (new)[136] grounds to proceed to preventive custody. Such cases rarely occur in practice. Additionally, an order of imprisonment can be given which requires the extradition of a suspect who is located abroad.[137]

– *Intermediary termination and stay*

At any time during the preventive custody, the suspect can make a request to any court, that the custodial measure be terminated. At the first request, the suspect must be offered the opportunity to be heard; further requests can be handled by the court in writing (Art. 69 Sv).

In addition to this relief, the suspect can also make a *request for a stay* of preventive custody. The stay must be regarded as a temporary interruption of the detention. The court can attach special conditions to the stay, such as the payment of a deposit, or the obligation that the suspect be admitted to an institution to undergo therapeutic treatment. The stay under payment of a deposit, comparable to a form of bail, is rarely applied in practice. The possibility of stay is most commonly used to interrupt detention for a few days so that special circumstances concerning the suspect can be met, such as attending a family event (birth, death) or a visit to the hospital (Arts. 80–88 Sv).

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136 For example, there is a sudden increased risk of absconding.

137 This possibility is related to older extradition treaties in which the condition for extradition was the issuance of an order for imprisonment by the judge.

– *Legal remedies*

To a limited extent, the suspect can appeal against decisions of the court concerning the preventive custody at a higher court of appeal. He can appeal against the order of imprisonment or against the extension thereof (Art. 71 Sv) and has the same choice in relation to the decision of the court on a request of relief or a request of stay. The suspect can appeal only one of these decisions (Art. 87 Sv).

– *Preventive custody after first instance*

As mentioned above, the order for (or extension of) imprisonment is legally valid for 60 days after the date of the final ruling of the court. The suspect or the public prosecutor can appeal against the court's decision. If this occurs, the appeal judge must rule on the continuation of the preventive custody. During the term of 60 days the imprisonment of the accused can be extended up to a maximum of 180 days. If this extension is sought, the accused must be offered the opportunity to be heard by a higher court. The case must be brought before the appeal court for a public hearing within the maximum term. After that, the order remains in force for 60 days after the day on which the appeal court reached a final verdict. If cassation is initiated against the final ruling of the appeal court at the *Hoge Raad*, the extended imprisonment remains in force until the *Hoge Raad* has concluded the case.

The anticipation principle (Art. 67a(3) Sv: the preventive custody may not exceed the foreseeable prison sentence) is also valid at the court of appeal. The court of appeal must end the preventive custody as soon as the duration of the preventive detention is equal to the deprivation of liberty imposed by way of sentence by the court of first instance or the court of appeal (Art. 75 Sv).

– *Compensation for damages*

The Code provides the grounds on which the suspect can claim damages if it appears afterwards that he has been wrongfully placed in preventive custody. What is special about this provision is that it relates to the compensation for damages that is caused by a lawful government act. The legislator has included this regulation in the Code for considerations of justice. The right to compensation for damages only exists when the trial has been concluded without imposing a penalty or sanction or when the suspect has been sentenced for an offence for which no preventive custody can be imposed (Arts. 89–93 Sv).[138]

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[138] For this regulation, see: *Borsboom*, Schadevergoeding voor voorlopige hechtenis; *Kwakman*, Schadecompensatie in het strafprocesrecht.

5.1.4.3 Questioning of the accused

During the various stages of preventive custody, the judiciary has access to the suspect and the suspect can be questioned for the purpose of establishing the truth. The law provides for this with respect to detention. For the remaining forms of detention used as a means of coercion, the power to question is embedded in the legal system. Subsequently, while in a detention facility, the accused in preventive detention can be brought to a police station for questioning.[139]

According to the Code, the criminal investigator and the public prosecutor have no powers to subject a suspect who is not in detention to questioning. There is no way to compel a suspect who is free to appear at the police station or the public prosecutor's office to give a statement. Consequently, the suspect can only be asked to come to the police station and cooperate in the questioning voluntarily.

Suspect questioning is safeguarded only to a limited extent. The suspect may not be placed under so much pressure that he can no longer be said to have given a voluntary statement and he is not obliged to answer questions. Each time he is questioned, the officer questioning him must inform him of the right to remain silent (Art. 29 Sv). During the process of police questioning, the suspect has the right to legal advice; the suspect does not, however, have the right to have his lawyer present at the questioning (Art. 28 Sv). A record must be made of the questioning. The record will generally not be a word-for-word reproduction of the questions asked nor will it reproduce the suspect's precise wording in his answers to the questions. The suspect's statement is generally reproduced in the record as a continuous narrative. The disadvantage of this practice is that in reproducing the suspect's statements, many official expressions are brought in, and nuances and details, which are important in assessing the statement, often do not appear in the record.

If the officer questioning the suspect breaches the prohibition on using pressure during the questioning and the suspect gives a statement, the judge can declare the public prosecutor's legal action against the suspect inadmissible or exclude the suspect's statement from evidence.[140] This latter legal consequence can also be imposed by the judge if the suspect is questioned without first being informed of the right to remain silent.[141]

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[139] With respect to this, see the public prosecutor's policy guideline of 1 September 2001 on taking in for questioning detainees, persons in detention, and youths.

[140] Cf. HR 13 May 1997, NJ 1998, 152 with note Sch, in which a method of examination was condemned because it placed too much pressure on the accused to have him speak.

[141] See with respect to the examination of the accused: *Lensing*, Het verhoor van de verdachte in strafzaken: een rechtsvergelijkende studie; *Melai/Groenhuijsen*, Het wetboek van strafvordering, the note to Art. 29.

As a result of some controversial criminal cases in which doubts were raised as to the quality of the police questioning and of the investigation into safeguards surrounding the police questioning, *audiovisual recording* of the police questioning is now being used experimentally. For the time being, such recording is reserved for the more serious criminal cases.[142]

5.1.4.4 Search and seizure[143]

When catching someone in the act of committing an offence or when acting on suspicions of a crime for which preventive custody is allowed, criminal investigators have the power to seize objects (Art. 96(1) Sv). To seize these items, the Code offers a number of additional means of coercion. In order to make such a seizure, criminal investigators may:

- enter any premises (Art. 96(1) Sv);
- secure premises while awaiting the arrival of the judge or the public prosecutor who has the authority to search the premises (Art. 96(2) Sv);
- search the arrested suspect's clothing (Art. 56(4) Sv);
- issue an order to surrender an object subject to seizure against a person who has control of the object (Art. 96a Sv). This order may not be issued against the suspect. Persons who have a right to refuse information[144] need not comply with the order;
- search means of transportation (cars, boats), with the exception of the living quarters of the means of transportation (Art. 96b Sv).

The authority to search premises, depending on the nature of the premises searched, is reserved to the public prosecutor or the *rechter-commissaris*. If the search is of a residence without the consent of the occupant or of an office used by someone bound by confidentiality (a lawyer, doctor, clergyman; see Art. 218 Sv), then only the *rechter-commissaris* has the power to search the residence or the office (Art. 110 Sv). For other premises, such as private land, industrial buildings and so forth, it is also the public prosecutor who has the authority to search (Art. 96c Sv).

If there is an urgent need to search a residence or an office of a person bound by confidentiality and it is not possible to wait for the *rechter-commissaris*, the search

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[142] *Zwieten van*, Elektromagnetische registratie van het politieverhoor, Delikt en Delinkwent 1998, 248–267; *Groenhuijsen/Knigge* (eds.), Het vooronderzoek in strafzaken, pp. 671–755.

[143] As regards this, see: *Vennix*, Boef en beslag. De strafvorderlijke inbeslagneming van voorwerpen.

[144] This means the right of persons not to have to meet the obligation to give an answer to questions from the judge. The basis of this right not to answer rests on the personal connections the witness has with the accused (spouse, parent, child) or for professional reasons (doctor, lawyer, clergyman). See Arts. 217–219 Sv.

can be carried out by the public prosecutor or the assistant public prosecutor. In this case, the law requires that before the search, the *rechter-commissaris* grant the public prosecutor or the assistant public prosecutor the power to search (Art. 97 Sv).

The criminal investigator must prepare a notice of seizure for each seizure of an object. A receipt must be given to any person from whom an object is seized (Art. 94(3) Sv).

A few *limitations* are imposed on the power of search and seizure. The suspect has the right to communicate privately with his lawyer (Art. 50 Sv). Thus, letters and documents that form part of this communication may not be seized and these pieces may not be made known. Moreover, during the search of an office of a person bound by confidentiality, such duty of confidentiality of the person concerned should be respected as much as possible. For this reason, the search should be limited to letters or documents that are directly related to the criminal offence. *Exceptions* to the power to seize are also letters and documents to which the duty of confidentiality extends (Art. 98 Sv).[145] In practice, to protect the interests of third parties who are involved in the duty of confidentiality, the search of a lawyer's office is in principle only carried out in the presence of the local president of the Bar Association. He can be consulted *in situ* on the issue of whether a document found is protected by the lawyer's duty of confidentiality. Furthermore, a special rule exists for seizing postal items that are in the possession of the Postal Services. The seizure of such items can only be carried out through an order to surrender, to be issued by the public prosecutor. The order can relate only to the postal items that are intended for or come from the suspect, or that are connected with the criminal offence (Art. 100 Sv). To examine the content of postal items handed over, the public prosecutor must obtain the authority of the *rechter-commissaris*.

Related to the various above-mentioned powers to search exercisable by the criminal investigator, the public prosecutor or the *rechter-commissaris*, the Code contains special provisions for searching for and acquiring data that are stored or recorded in data carriers and computerised works. In a search to seize objects, related computerised work may also be searched and any *data* of interest in the investigation may be recorded. This authority includes the possibility of searching computerised work, which is held elsewhere, on condition that the work is, for example, accessible via a network connection from the place to be searched. Upon discovering secured computerised work or databases, a demand may be made to be given access. This demand cannot be directed at the accused. Anyone with a right to refuse information need not respond to the demand (Arts. 125i–125n Sv).[146]

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[145] These limits lapse in the special situation where a person bound to confidentiality himself is considered the accused and he abuses his duty of confidentiality to escape the notice of the law. Cf. HR 29 June 2004, NJ 2005, 273, comments Kn.

[146] See on this: *Wiemans*, Onderzoek van gegevens in geautomatiseerde werken.

Interested parties can lodge a *complaint* against the seizure of objects. This complaint is handled by the court. In this procedure, the court can rule on the lawfulness of the seizure and the issue of whether the seizure must be upheld (Art. 552a Sv).

5.1.4.5 Special powers of investigation

The Code has a comprehensive rule covering the so-called 'special powers of investigation'.[147] These are powers that can be applied based not only on the suspicion of a criminal offence that has been perpetrated, but also, and in particular, on suspicion that organised criminal offences have been planned and perpetrated. Where such suspicion arises, the effort of the investigation is not so much to clarify a criminal offence; the investigation is primarily intended to dismantle the organised connection. Essential to the special powers of investigation is its covert nature. These include: the methodical *observation of persons*, *infiltration* and *pseudo-sale*, the criminal investigator's methodical *undercover* gathering of information, the *covert entry* into private premises, the *recording* of *private communication* by technical means, the recording of *telephone conversations*, *access to data* from a mobile telephone service provider about a user and about his telecommunication use, and the *use of citizens* in the investigation (Arts. 126g–126gg Sv). The public prosecutor decides on the application of these special powers of investigation. To record a private conversation and to record a telephone conversation the public prosecutor needs authorisation from the *rechter-commissaris*.

The legislation on special investigation methods covers cases that involved secret police practices for which there was, at the time, no express legal basis and in respect of which the performance by the police was not, or only to a limited extent, justified by the presence of the public prosecutor and the judge. This led to an elaborate parliamentary investigation and the recommendation to regulate the special methods of investigation in the Code of Criminal Procedure.[148] The goal of the regulation was to bring the criminal investigation and the application of the powers of investigation under the control of the public prosecutor and the criminal judge again. This is the reason that the power to take decisions is assigned to the public prosecutor. In using the special powers of investigation and the investigative results obtained therefrom, a record must be made that should be attached to the case file (Art. 126aa Sv). Through this attachment, the presiding judge is in a position to test the lawfulness of the investigation. If it concerns the application of a special power of investigation as regards someone other than the accused, this person must be informed after completion of the application and as soon as the interest of the in-

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[147] For greater detail on this matter: *Tak*, Heimelijke opsporing in de Europese Unie, pp. 547–622.

[148] *Kamerstukken II* 24 072, nr. 10, Inzake opsporing, Rapport van de Parlementaire Enquêtecommissie Opsporingsmethoden (Concerning investigation, Report from the Parliamentary Board of Enquiry into Methods of Investigation).

vestigation allows for such (Art. 126bb Sv). These provisions contemplate banning secret police practices and making police actions transparent and verifiable.

5.1.4.6 DNA testing

For the purpose of the investigation, the public prosecutor can, where there is a suspicion of a crime for which preventive custody is authorised, arrange for a DNA test to be performed. Because of the high evidentiary value of the results of this test, the manner in which it is carried out is covered by guarantees. The DNA test can be carried out using material that is discovered during the investigation into the criminal offence when the suspect's identity is still unknown, or, if the suspect's identity is known, using a cell sample taken from him (Arts. 151a and 151b Sv). The cell sample can be taken from the suspect from the lining of his cheek, his blood or the roots of his hair. The DNA test must be carried out by one of the legislatively authorised laboratories. The suspect must be informed of the result and he has the right to a re-appraisal: he can apply to the public prosecutor to have a second test carried out by one of the legislatively authorised laboratories.

The DNA profiles acquired through the DNA investigation need not be destroyed after being used in the criminal case, but may be saved in a databank. The saved DNA-profiles can be used to shed light onto future criminal offences where the suspect is still to be identified. The databank of DNA profiles, based on the law of 16 September 2004, Stb. 2004, 465 (act on DNA tests of convicted persons), is also made up of DNA profiles of persons who have had a sanction imposed by the trial judge for a criminal offence for which preventive custody is authorised, and this sanction either deprives them of their liberty or requires a community service. The public prosecutor can order cell samples to be taken from these people. To carry out this sample taking, the public prosecutor can order the convicted person to be held for this purpose. The convicted person can file a notice of objection with the court against the finding and processing of his DNA profile.

5.1.4.7 Demanding production of 'data'

An important innovation within the legislation of powers of investigation found in the Code is the introduction of powers for criminal investigators and the public prosecutor to demand the production of data in 2005.[149] When a crime is suspected, criminal investigators are authorised to demand the production of identifying data from persons and legal persons. The demand can be directed at those who can reasonably meet the demand. The demand must be in writing. A report must be drafted of the provision of any such data (Arts. 126nc and 126uc Sv). The public

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[149] See the Law of 16 July 2005, Stb. 2005, 390 *(Wet bevoegdheden vorderen gegevens)*.

prosecutor's authority to demand the production of data is broader and can relate to filed or recorded data in general.[150] In addition, the public prosecutor must, in principle, make the demand in writing and draft a report of the provision of data (Arts. 126nd and 126ud Sv). As an extension to his power to demand such production, the public prosecutor can also order that data that were processed up to four weeks following the claim be ascertained and made available. Further, he can demand to be granted access to data and, if it appears that the data have been encrypted, order that they be decrypted (Arts. 126ne–126nh, 126ue–126uh Sv). These new powers do justice to the fact that electronic data processing is playing an increasingly important role in society, and hence are becoming increasingly relevant to the investigation and prosecution of criminal offences.

5.1.5 Obligation to report

With respect to various specific powers of investigation, the Code provides that criminal investigators should draft reports on the application of these powers and must also mention in these reports the outcome of the investigation. In addition to this special obligation to report, Art. 152 Sv generally provides that criminal investigators should compile reports relating to the criminal offence which they have investigated, covering all actions taken in the context of the investigation and their findings. This report must be filed at the office of the public prosecutor and is added to the case file. In this way, the public prosecutor's office and the judge can monitor the activities of the criminal investigators.

Case law provides that the 'materiality criterion' determines the issue of whether in specific circumstances based on Art. 152 Sv a report must be drafted and what must be recorded in the report. Drafting a report of the investigation and the individual investigation activities may be abandoned if the facts and circumstances to be related cannot be relevant to any subsequent decision by the presiding judge.[151] This criterion implies that the report must not only include a statement that could be used against the suspect, but also the facts and circumstances that can be used in the suspect's favour. This can be derived from the fact that the law of criminal procedure, including the preliminary inquiry, is directed at the establishment of material truth.

It is indicated in case law that criminal investigators, in drafting the report, may, to a certain extent, *conceal certain aspects* of the investigation from the public.

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[150] Exceptions are personal data regarding a person's religion, beliefs, race, political convictions, health, sexual life or membership in an employer's organisation.

[151] Cf. HR 19 December 1995, NJ 1996, 249, comments Sch. The meaning of Art. 152 Sv and the above-mentioned materiality criterion are further elaborated in the public prosecutor's office directive on powers of investigation *(Aanwijzing opsporingsbevoegdheden)* of 11 January 2000. This directive is published in an attachment to the Staatscourant (Stcrt. 2000, 25) and at www.openbaarministerie.nl.

Certain facts, such as the personal details of informants or infiltrators or details of investigation tactics, even if they are relevant in connection with establishing the truth, may be withheld. The extent of concealment depends on a weighing of the interests of the investigation, against those of possible third parties (such as informants and witnesses) and the defence. Not mentioning certain facts in the report may not result in a disproportionate threat to the chances of a fair trial for the accused.[152] The responsibility for the way in which the report is drafted and the decision to conceal certain facts is borne by the public prosecutor. These provisions to some extent seem to conflict with the case law of the ECtHR. From this case law, it appears that not reporting facts in the report constitutes a lawful conflict of interest in the context of the internal transparency of the criminal proceedings. The European Court considers limitations to internal openness admissible, on the condition that the limitation does not harm the likelihood of fair proceedings and the limitation is procedurally compensated. The essential part of such compensation includes substantive court supervision over the violation of internal transparency.[153] This court supervision is lacking in Dutch criminal proceedings.

5.2 Preliminary inquiry 2: preliminary judicial inquiry

5.2.1 Current function of the preliminary judicial inquiry

Originally, the preliminary judicial inquiry was an important phase in the preliminary inquiry of criminal cases. The most important explanation for this was that many means of coercion, such as seizure, search, issuing an order of surrender, recording of telecommunications and so forth were reserved to the *rechter-commissaris* and could in principle only be applied in the context of a preliminary judicial inquiry. In all cases in which it was necessary for establishing the truth to use one of the means of coercion, a preliminary judicial inquiry had to be opened. The legal regulations for investigation have since changed to such an extent that these means of coercion have become separated from the preliminary judicial inquiry and can be used as independent means of coercion in the criminal investigation.[154] The consequence is that the practical significance of the preliminary judi-

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[152] *Minkenhof/Reijntjes*, Strafvordering, pp. 220–224; *Groenhuijsen/Knigge* (eds.), Het vooronderzoek in strafzaken, pp. 460–496.

[153] See in particular: ECtHR 27 October 2004, app. no. 39647/98 en 40461/98 *(Edwards and Lewis v. UK)*; see on this matter: *Groenhuijsen/Simmelink*, Bijzondere opsporingsbevoegdheden en het systeem van het Wetboek van Strafvordering in het post-Van Traa tijdperk, in: Burg van der (ed.), Getuigend staatsrecht, pp. 313–346.

[154] On this development: *Groenhuijsen/Knigge* (eds.), Het vooronderzoek in strafzaken, pp. 497–517.

cial inquiry has been reduced.[155] The justification for commencing a preliminary judicial inquiry is now primarily concerned with the examination of witnesses.

5.2.2 Investigation by the rechter-commissaris[156]

The preliminary judicial inquiry is a method of prosecution of the suspect. This means that the preliminary judicial inquiry can begin only on the basis of a request from the public prosecuter to the *rechter-commissaris* to open an investigation. In the request, the offence that is the subject of investigation must be specified (Art. 181 Sv). This specification is the basis of the investigation, which is binding on the *rechter-commissaris* who does not have the authority to investigate other criminal offences not included in the request. The *rechter-commissaris* has control over the preliminary judicial inquiry. From this it follows that the *rechter-commissaris*, by virtue of his office, is authorised to conduct all activities that he considers necessary in the search for truth. In practice the official investigation is usually limited and the actions of the *rechter-commissaris* are to a considerable extent determined by requests from the public prosecutor's office and petitions from the accused and his lawyer.

In the legislation on the preliminary judicial inquiry, the *rechter-commissaris* has a *broad range of powers* available to carry out the investigation: seizure, search, DNA-tests, personal and clothing searches, carrying out an inspection, examining the suspect, witnesses and experts. Of these powers, the possibility of examining witnesses is of great importance for present-day practice. Against the background of the ECtHR case law on the right of the defence to examine witnesses (Art. 6(3) ECHR), the possibility for the *rechter-commissaris* to call and – possibly under oath – examine witnesses pursuant to the Dutch law of criminal procedure is the means adopted to meet the requirements of the ECHR. It is a matter here of, on the one hand, offering the defence the opportunity to examine a witness,[157] and on the other hand the possibility of hearing a witness on an anonymous basis, whereby the defence is given a means other than a direct adversarial one to examine the witness.

The public prosecutor and defence have the right to be present when the *rechter-commissaris* examines witnesses and the *rechter-commissaris* can also allow the accused to attend the examination. The witness is generally not sworn for the examination. If it involves a witness who is expected not to be able to appear at trial, then the *rechter-commissaris* should invite the public prosecutor and the defence to attend the examination. In this case, the witness can be heard under oath. The wit-

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[155] See the WODC report Evaluatie Wet herziening GVO, Cahier 2004-11, p. 44.

[156] *Corstens*, Strafprocesrecht, pp. 299–339; *Minkenhof/Reijntjes*, Strafvordering, pp. 233–265.

[157] But to a limited extent, witnesses are heard at trial; for practical reasons, this is carried out by the examining judge.

ness is obliged to obey a summons or call to appear. A limited circle of persons related by blood or marriage, persons who by virtue of their office or profession are bound by confidentiality or a witness who would place himself or members of his immediate family at risk of prosecution if he were to testify, can excuse himself from the obligation to appear as a witness to testify (Arts. 217–219).

When examining witnesses, the *rechter-commissaris* has a number of possibilities available to him to ensure that certain information does not come to the knowledge of the accused. In these cases, the *rechter-commissaris* must weigh the interests of the defence in examining the witness directly against the conflicting interests regarding the investigation or the witness himself.[158] Thus, the *rechter-commissaris* may carry out the entire examination or a part thereof in the *absence of the accused* and his lawyer (Art. 187 Sv). Moreover, he can decide that a witness does not have to answer certain questions from the public prosecutor, or the accused or his lawyer (Art. 187b Sv) or that certain answers will not be made known to the parties to the proceedings (Art. 187d Sv). Furthermore, the *rechter-commissaris* can decide that the personal details of the witness will not be made known to the accused and his lawyer. In addition, the power includes keeping the witness's *identity concealed* (Arts. 226a–226f Sv). This far-reaching power can only be applied if it involves a witness who, after making a damaging statement, has grave fears that he will face reprisals on the part of the accused. The *rechter-commissaris* should take measures that are reasonably necessary to guarantee the *anonymity of the witness*. These can go so far as to exclude the public prosecutor, the accused and his lawyer during the examination of the witness. In a similar case, special provisions should be made to offer the defence the opportunity to ask the witness questions. This includes the use of an intercom and possibly voice distortion. The nature of the measures taken by the *rechter-commissaris* is governed by the principal of proportionality.[159] A number of *procedural guarantees* apply in the context of the anonymous examination of witnesses. The defence must be informed of the decision of the *rechter-commissaris* to examine a witness anonymously. An appeal against this decision may be lodged with the court. In principle, the witness is examined only after the period for appeal has elapsed or after the court has declared the appeal unfounded. If no delay of the examination of the witness is allowed, the examination can also be carried out earlier. If the court finds the appeal to be well-founded, the *rechter-commissaris* must destroy the record of the examination. The record of examination of an anonymous witness may be used as evidence by the trial judge but there are several significant limitations attached to this. First, the offence for which the accused is being prosecuted must be of certain seriousness: preventive custody is provided for the offence and the offence must be

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[158] Cf. ECtHR 26 March 1996, NJ 1996, 741, comments Kn *(Doorson v. the Netherlands)*.

[159] See: ECtHR 23 April 1997, NJ 1997, 635, comments Kn *(van Mechelen et al. v. the Netherlands)*.

considered as a serious breach of the legal order. Secondly, the evidence may not be based 'to a great extent' on the statement of an anonymous witness. Substantial additional evidence is necessary in addition to the statement (Art. 344a Sv).

The fact that a preliminary judicial inquiry is current does not mean that the criminal investigation is complete. While the *rechter-commissaris* conducts the investigation, the criminal investigation can continue under the direction of the public prosecutor. The jurisprudence has accepted that, in this simultaneous ongoing criminal investigation, criminal investigators may carry out investigations into the offence for which the preliminary judicial inquiry was commenced and activities may be carried out that are also within the province of the *rechter-commissaris*. This includes, for example, questioning the accused or witnesses. The law also provides the *rechter-commissaris* with the opportunity to assign certain acts of investigation to criminal investigators. The public prosecutor must informe the *rechter-commissaris* of the parallel investigation and of its results (Art. 177a Sv).

The *rechter-commissaris* closes the investigation when it has been completed (Art. 237 Sv). The public prosecutor must decide within two months whether to pursue a prosecution against the accused. He can abandon further prosecution for juridical and technical or for policy reasons (Art. 242 Sv). This decision brings the case to an end and the defendant must be informed of the decision in writing. The consequence is that the accused cannot be prosecuted for the same act again, unless a 'fresh complaint' comes to light.[160] The public prosecutor can also inform the accused in writing that further prosecution will occur, the trial date for which has not yet been set. This decision can take the form of a notice that the accused will be prosecuted, unless he follows certain conditions for the duration of a probationary period (such as compensating damages, undergoing therapeutic treatment, etc.). Once the conditions have been complied with, the decision is changed into an unconditional dismissal. Furthermore, the public prosecutor can summons the accused to trial directly.

5.3 Trial

5.3.1 Nature of the trial

In the previous section, various elements were discussed regarding the procedure of cases at trial. In section 3.8, the public nature of the trial was examined. In section 5.1.4.2, the legal concept of the '*pro forma* court' was described; this is inescapable if the maximum period for detention is insufficient to complete the pre-

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[160] This is new evidence that was not investigated earlier in the investigation. The same legal consequence is connected with exceeding the above-mentioned delay of two months, see Art. 255 Sv.

liminary inquiry. In addition, section 3.7 discussed the strong influence of the *Hoge Raad* decision on the practice of the Dutch criminal procedure to accept *de auditu* witness testimony in evidence. This *Hoge Raad* ruling has had a significant influence on the profile of Dutch criminal procedure. If the Code of Criminal Procedure originally assumed that the accused, witnesses and experts would all give oral testimony at the hearing, since the *de auditu* judgment, the trial is now *run on the basis of the statements made during the preliminary inquiry* and *then reduced to writing*. The hearing itself is then characterised as a 'verification meeting' *(verificatievergadering)*. It is chiefly a conference during which the results of the preliminary inquiry are again summarised and during which the parties have the opportunity to give their opinion on the question of which conclusions should be drawn regarding the evidence. This state of affairs gives Dutch criminal procedure, by comparison, a *unique character*. Through the method provided, it is fairly normal within the Dutch system that a chamber of judges at a court can handle approximately ten serious criminal cases in one day. Nobody considers it unusual if a case of indecent assault is scheduled for one hour and many manslaughter cases are completed in half a day by the trial court. Foreigners are often surprised by this fact. They cannot imagine that such a speedy method can result in a meticulous assessment of the case. As mentioned, the most important explanation lies in the crucial role played by the *dossier* (the case file) of the legal proceedings.

The accused, his counsel and the public prosecutor will be asked at trial to provide chiefly a reaction to the credibility of the various statements that appear in the *dossier*. There is yet a second explanation for the speed at which court hearings proceed in the Netherlands. This lies in the circumstance that the Dutch Code does not have a wholly separate procedure for an accused who has confessed. Unlike the common practice found in many countries – chiefly in countries where a jury of laypersons decides the issue of proof – the basic principles for the standardisation of the trial is independent of the procedural position taken by defence. Concretely, this means that the Code offers various guarantees for which in a significant majority of the cases (more than 80 % of the accused who stand trial confess the alleged offence) there is in fact no need. Guarantees for the adequate establishment of truth at a hearing have little meaning if the defence and the public prosecutor have already reached an agreement on the offence that the accused committed. A third factor that can also be considered a possible explanation for the relatively high speed with which cases are disposed of, is more speculative in nature. It has been suggested that a consequence of the relatively lenient punishment climate in the Netherlands could be that suspects do not use all available existing means of defence. The typical Anglo-Saxon adversarial legal culture – as well as the European continental counterpart to it in which there is a strong emphasis on the principle of immediacy – should then be interpreted against the background of the great risk for the accused in criminal cases of facing an adverse outcome from the legal dispute.

5.3.2 Course of trial

We believe that these preliminary remarks are necessary for a proper understanding of the technical legal regulation of the public hearing in the Netherlands. We will now consider the content of the Code on this point. The hearing begins with calling the case (Art. 270 Sv). The personal details of the accused are verified, and the accused is informed that he must listen carefully but that he does not have to answer the questions asked (Art. 273 Sv). Thereafter the public prosecutor presents the case and he can demand to have the indictment amended (Art. 284 Sv).

The accused is questioned first (Art. 286 Sv). Usually this examination is predominantly a confrontation with the procedural documents. It is put to the accused that he gave statements to the police and the *rechter-commissaris* about the alleged offence. The essential question is then whether he stands by these statements. If this is the case – and it mostly is – a short summary of the documents is sufficient. If the accused says at trial that he would like to amend his statement, then the judge will want to know why the previous statement is not correct. In both situations it is therefore the written statement included in the procedural documents that is the most prominent point of reference. If the accused alleges that the statement from the preliminary inquiry is not correct because, for example, the questioning police officer pressured him during questioning, then this can be a reason for the judge to investigate the statement further. In such situations, it is possible that the questioning officers will still be called as witnesses. After the accused, the witnesses and experts who are present take the stand.[161] We again point out that in practice this only happens in a small number of the cases handled in court. The witnesses and experts have almost always given statements during the preliminary inquiry, which have been put in reports. These witnesses and experts are also generally heard at the hearing on the basis of the content of the written reports.

During the trial, it may appear that the preliminary inquiry was not sufficient or that there are other reasons to direct that further acts of investigation be performed. In these situations, it is possible to *adjourn* the trial for a fixed or an unfixed period.[162] In these cases, the *rechter-commissaris* can be charged to hear the witnesses concerned during the adjournment (Art. 316 Sv). In addition, there is the possibility to call the witnesses to the public trial (Art. 315 Sv). Whether the former or the latter method is chosen will usually depend on the number of informants to be heard.

During the proceedings, special attention will be devoted to the legal claim of the *injured party* (Arts. 332 et seq Sv). Because the legal claim must be simple in

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[161] Also, unlike the accused, under oath (Arts. 290, 299 Sv).

[162] If the accused is in preventive custody, the adjournment for a fixed period lasts a maximum of three months; if it has been adjourned for an unfixed period, then the court must set a limit within which the investigation must be recommenced (Art. 282 Sv).

nature (both as regards the proof and as regards the application of the law), it can be quite swift.[163] In practice, this amounts to the fact that if the accused presents a serious defence against the legal claim for damages, this will virtually always be declared inadmissible. This outcome leaves the possibility open to the victim to file the same claim for damages against the accused in the civil court. The possibility at law for the injured party to explain the legal claim orally (Art. 334(4) Sv) is rarely ever used.

Another issue involving the victim arises if he uses the right to speak pursuant to Art. 302 Sv (see section 6.2 below). The judge has, in this context, the task of ensuring that the victim does not proceed outside the thematic boundaries of the right to speak: he may speak about the consequences of the offence for himself and his surroundings, but may not make any normative judgment about, for example, the punishment for the accused that he thinks would be suitable. In addition, the judge monitors the order of the trial by ensuring that the victim does not speak longer than is reasonably necessary.

After the (alleged) offence has been considered and then the personal circumstances of the accused examined[164] (including, amongst other things, the criminal record)[165] the public prosecutor delivers his *closing speech* (Art. 311 Sv). This consists of summarising final remarks that must provide a conclusion regarding the outcome of the case. The public prosecutor will demand a penalty or sanction. The prosecutor must also make it known whether after the trial he still intends to institute a legal claim for withdrawal of wrongly obtained advantage against the accused. The accused and his counsel can answer this (pleading). After the public prosecutor files a statement of reply, the accused still has, by means of a rejoinder, the right to have the last word on the issue (Art. 311(4) Sv).

Everything that occurs at a hearing is related in a report drawn up by the registrar (Art. 326 Sv) and is signed by the court clerk and one of the judges (Art. 327 Sv). According to Arts. 357–361 Sv, there are detailed rules over the content of the written ruling from the court. A full elaboration of these elements need not be included in either the report from the hearing or the judgment. On this point also, Dutch legal practice is very practical: unnecessary work is avoided as much as possible. Specifically, this means that the court report and the evidence used by the judge are

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163 Moreover, a speedy trial is encouraged by the circumstance that almost all claims are already lodged during the preliminary inquiry and then – by a so-called 'give-cause form' *(voedingsformulier)* – also supported in writing. The judge enables this to verify promptly to what extent the various items of loss can be considered founded.

164 In the legal practice of all known lower and higher level courts, these two distinct trial stages run in that order. It is interesting to note that no trace of the difference can be found in the legal provisions. Remarkably, well-known guides on the law of criminal procedure also pay very little attention to the difference.

165 In the Netherlands, it is completely acceptable that earlier punishments of the accused at trial are raised.

only further elaborated if the accused or the public prosecutor's office lodges an appeal.[166]

There is still one issue that must be mentioned in connection with the investigation at the hearing: the so-called scheduling hearing *(regiezitting)*. A scheduling hearing cannot be found in the Code of Criminal Procedure. It is an aid that spontaneously came into being in legal practice to make the extensive and/or complicated criminal cases at hearing easier to estimate and (thus) run more smoothly.[167] The *scheduling hearing* is not a separate preliminary pre-trial procedure, but is the first part of the public hearing. The court session with the judge, the public prosecutor and the defence, is intended to take stock of and exchange wishes and intentions with respect to the organisation of the actual investigation in court. The public prosecutor and the defence use this opportunity to state on which issues they would like to focus the proceedings. Moreover, they can then state in their judgment which forms of further investigation are still necessary and which witnesses and experts they would like to have appear. If an agreement is reached over these issues, then there is enough time to call and summons the witnesses concerned. This informal preliminary procedure carries a reduction in the number of adjournments of the trial and with it the more worthwhile use of the available hearings.

5.4 Ordinary remedies at law

The Dutch law of criminal procedure recognises ordinary remedies at law and special remedies at law. The ordinary remedies at law are: challenge, appeal and appeal-cassation. The special remedies at law are: appeal-cassation in the interest of law and review.[168] We will only consider the ordinary remedies at law here[169] and in the above-mentioned order.

5.4.1 Challenge

The challenge is a remedy at law that is almost extinct. It was originally intended as a possibility for an accused who is sentenced when absent from the trial to defend his case. According to the 1926 Code, this was why a challenge was allowed for every judgment *in absentia*. This resulted in a 'plague of challenges'. Numerous accused, after not appearing at first instance, would lodge a challenge, be

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166 For more details, see: Art. 327a or 365a Sv.

167 The *Strafvordering 2001* research project proposes codifying this scheduling hearing; see: *Groenhuijsen/Knigge* (eds.), Het onderzoek ter zitting, pp. 42 et seq.

168 An appeal for clemency is not put on a par with the application of a remedy at law. This is justified because, with an application for clemency, it is not the force of law of the underlying court ruling that is challenged.

169 The special remedies at law are considered briefly under section 9 below.

afforded a sentencing hearing on appeal, would again not appear and lodge a second challenge. All this led not infrequently to four actual considerations of the case, in addition to which a cassation appeal could be lodged with the *Hoge Raad*.

The legislator had gone too far, and a fundamental retrenchment was subsequently carried out. First, the challenge against decisions that were rendered on appeal was abolished; furthermore, the remedy at law would no longer be possible against judgments *in absentia* at first instance, in so far as there was a right of appeal.[170] Since then, the conditions that must be met, to be able to lodge a challenge, can be summarised as follows:

- judgment *in absentia*
- made in first instance
- against which no appeal is admissible
- by which the accused is not acquitted and has already not satisfied the imposed sanction (Art. 399 Sv).

Practically, this means that the remedy at law lies only in cases related to a misdemeanour (thus not an indictable offence) and in which only a minor sanction is imposed. Because this, in particular, relates to minor cases, we will not consider the manner in which the challenge is carried out.[171]

Nevertheless, we will mention the proposal of the *Strafvordering 2001* research project to extend new more significant content to the remedy at law of the challenge. The thought is that the remedy at law is only available to accused persons who are sentenced (1) at the highest *de facto* instance and (2) *in absentia* beyond their control.[172] In this way, the remedy at law is transferred to the appeal stage and explicitly coupled with the right of attendance under Art. 6 ECHR. The legislator has already adopted several proposals from the research project, but this idea regarding the reorientation of the challenge has for the moment been rejected.

5.4.2 Appeal

The appeal is by far the most important legal remedy in criminal cases. The remedy is available to the accused and the public prosecutor. There are only a few exceptions: the accused cannot lodge an appeal against an acquittal, and no appeal lies against judgments for misdemeanours if the imposed penalty is less than

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170 These changes date back to the 1930s and are implemented via the so-called 'economy laws'.

171 It will be recorded only when the accused does not appear at the challenge hearing, the judge declares the challenge lapsed (Art. 402 Sv), with which the contested ruling becomes *res judicata*. If the accused does appear, then a new hearing is arranged 'as if the legal action *in absentia* had not occurred' (Art. 403 Sv).

172 *Groenhuijsen/Knigge* (eds.), Dwangmiddelen en rechtsmiddelen, p. 38, pp. 199–328.

€ 50.[173] The appeal must in general be lodged within 14 days of the final pronouncement of the decision at first instance.[174]

The appeal can only be lodged against an order in its entirety: partial appeal is not possible (Art. 407 Sv). The Dutch law of criminal procedure thus does not recognise, for example, an appeal that is limited to the penalty. This does not eliminate the fact that a person who appeals is authorised[175] to file a document with objections against the disputed order (Art. 410 Sv; see also Art. 416 Sv which holds that concrete objections can be abandoned after the appeal process has commenced).

The accused is summonsed to appear at the appeal hearing (Arts. 412, 413 Sv), and the case is usually decided by the full bench of the court.[176] Moreover, the way in which the proceedings are carried out is in principle the same as prescribed for the first instance (see the transition provisions under Art. 415 Sv). This point of departure should be explained further on one point. In Dutch law, appeal proceedings build on those at first instance. This appears from, among other provisions, Art. 422 Sv, which authorises the appeal judge, in rendering his judgment, to rely on the results of investigation that (only) came to light during the trial at first instance. The appeal is thus not an entirely new treatment of the case as though no legal proceedings occurred before. The legal regulations substantially require a new investigation. It is obvious from this that the attention of the appeal judge is to a certain extent directed by the content of the objections introduced in accordance with Arts. 410 and 416 Sv. But it is necessary to take this further. The appeal judge is also ultimately independently responsible for a full and accurate investigation, and he can never be compelled to adopt parts of the decision of the first judge as he cannot simply appropriate these as his own. For example, if the accused objects only to the punishment imposed, the judge will investigate this objection in particu-

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[173] Art. 404 Sv. This limit applies to both the accused and the public prosecutor and also applies if the judge in first instance gives a ruling of guilty without imposing a punishment (Art. 9a Sr).

[174] Except in situations in which the summons at first instance is not served in person and the accused was also not informed of the hearing date, then the 14-day delay begins to run from the moment when the accused is made aware of the order. Otherwise, the remedy at law is commenced by a declaration made by the registry clerk of the court that rendered the contested decision; see Arts. 449 et seq.

[175] 'Competent'; to date there is no obligation to file a statement for appeal.

[176] Art. 411. Completion by a single judge is possible if four conditions are met: a. the case is simple; b. a penalty or measure is imposed at first instance; c. the order was also given by a judge sitting alone at first instance; and d. the possible penalty cannot be more than six months' imprisonment. In practice, these conditions lead to the fact that there are relatively few situations in which the appeal is heard by a single judge. Having regard to the relative simplicity of the much greater number of cases, the *Strafvordering 2001* project proposed bringing before a single judge all cases on appeal that had already been decided at first instance by a police court judge or district court judge.

lar, but in addition he should also *ex officio* verify whether there is sufficient evidence available for a conviction.

The court's decision takes the place of that of the judge at first instance. To that end the court can confirm or quash the judgment complained of. In the latter case, the court must thereupon, as the law expresses, 'do what the court was required to do' (Art. 423 Sv: 'doen wat de rechtbank had behoren te doen'). A peculiarity remains that some decisions on appeal can only be taken 'unanimously'. The decision to quash an acquittal and to substitute it with a conviction, and the decision to impose a higher punishment than that imposed at first instance can only be taken if all three appeal justices agree in doing so.

5.4.3 Cassation

From the above subsections it appears that for most criminal cases in the Netherlands the principle of two full actual trials is recognised. Cassation appeal can still often be lodged subsequently with the *Hoge Raad* of the Netherlands.

Cassation appeal lies in all criminal cases that have been decided on appeal.[177] Furthermore, it is also available in misdemeanour cases that are tried by the court, unless a sentence was pronounced but no punishment (Art. 9 Sr) was imposed or a sanction of less than € 250 was imposed (Art. 427 Sv).

The time limit for lodging a cassation appeal is the same as that for appeal (Art. 432 Sv).[178] However, this is the only similarity, as the two remedies are completely different. The *Hoge Raad* – also known as the court of cassation – is not a trier of fact; rather it decides on *points of law alone*. In cassation, no new judgment is rendered in the case, but the central issue remains whether the judge of fact interpreted and applied the law correctly and whether there was any serious omission of procedural formality that led to the contested pronouncement (cf. Art. 431 Sv). The task of the *Hoge Raad* is thus principally to advance the development of the law and to monitor legal unity.[179] From this it follows that a cassation appeal – unlike the appeal – may be limited to *a part of* the contested order or judgment (Art. 427 Sv). Also, the treatment of the case is very different from that at appeal:

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[177] For a long time, there was a limitation to the effect that a cassation appeal against an acquittal was not possible (old Art. 430 Sv), even for the public prosecutor. Even acquittals that could be lawfully proven to be erroneous were protected from the cassation judge. Art. 430 Sv lapsed 1 January 2003.

[178] The remedies at law must also be applied in identical ways; see Arts. 449 et seq Sv.

[179] One comment is necessary here. The *Hoge Raad* is not only verifying whether the judge of fact made a judicial error. The *Hoge Raad's* task also includes ensuring that the decision is consistent with the law applicable at the time of the *Hoge Raad* judgment; thus, in principle, an appeal can lie against an amendment that was passed after the highest judge of fact ruled on the case and which could thus not have been considered. See: HR 26 June 1962, NJ 1963, 12 and 44 comments WP.

in cassation, the legal proceedings are almost entirely *in writing*. In 2000, for example, a provision was introduced whereby the accused is obliged to file a statement of cassation in which the objections he has to the contested judgment are given, and failure to do so will render the request inadmissible (Art. 437 Sv).[180] All cases are handled in open court before a single judge (Art. 438 Sv). This is a largely a ceremonial session, where pieces are moved about the board. What is important is that at this hearing the Procurator-General's conclusion is taken to the *Hoge Raad*. This is a document in which the Procurator General advises the *Hoge Raad* how in his opinion it should decide on the cassation. Only in rare cases in which the accused's counsel[181] wishes to give an oral explanation on the means of cassation or wishes to argue against the appeal instituted by the public prosecutor, will the case be heard before a full court of the *Hoge Raad*.

In most cases, the *Hoge Raad* pronounces its judgment without an oral ruling. Art. 440 Sv lists the possible outcomes to which it can lead. The *Hoge Raad* can declare a cassation appeal inadmissible, it can *dismiss* the cassation appeal or it can *quash* the contested order or judgment wholly or in part, whether on adduced grounds, or on other grounds. The rule under Art. 81 RO offers an interesting aspect of cassation practice. It provides that inadequate and unsubstantiated claims may be dismissed: 'If the *Hoge Raad* holds that a claim cannot lead to cassation and does not require an answer to questions of law in the interest of legal unity or development of the law, the *Hoge Raad* can, in recording the grounds for its decision, limit itself to this judgment.' This possibility is frequently used. In the case of quashing a contested order or judgment, the *Hoge Raad* will itself conclude the case if this is possible without any further investigation into the facts. If a new investigation into the facts is necessary, the *Hoge Raad* will send the case back to a lower court of law to be tried.[182]

6. Agencies involved in the criminal justice system

6.1 Police

The duty of the Dutch police is laid down in two places in legislation. Art. 2 of the 1992 Police Act says: 'The task of the police, subordinate to the competent authorities and in accordance with the regulations in force, is to attend to the effec-

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[180] The public prosecutor has had this obligation for longer.

[181] It is important to note that only counsel for the accused may act at the cassation stage; the accused can no longer make a personal contribution at this stage of the proceedings because of its high legal standard.

[182] The case is sometimes *sent back* to the instance that made the contested judgment, in other situations, the case is *referred* to another judge of fact. This depends on the circumstances of the case.

tive enforcement of the legal order and to give assistance to those who require it.' Thus, apart from offering assistance, it involves upholding public order (Art. 12 Police Act) and criminal law enforcement (Art. 13 Police Act). The latter is defined as the effective prevention, investigation and termination of criminal offences. In upholding public order, the police are under the authority of the mayor; in criminal law enforcement, the responsibility lies with the public prosecutor.

The *powers* of the police in the execution of this task will be discussed in section 7 below under methods of investigation and means of coercion.

The *organisation* of the police may be presented as follows.[183] In 1993, a large-scale reform of the police order was finalised and included the elimination of the distinction between the municipal and the national police. Since then, the 'regular' or general police comprise 25 regional police units and a so-called National Police Services Agency (KLPD). The *authority* over the units has already been mentioned. The corps manager, generally the mayor of the largest municipality in the region, is responsible for the *management*. The corps manager must consult the police commissioner (chief superintendent of police) and the Chief Public Prosecutor. Accordingly, since 1993, the judiciary has a voice in management decisions concerning the allocation of people and means.

In addition to the regional units, six nationwide detective teams can be distinguished. They are responsible for investigating semi-serious crimes that have a tendency of crossing regional borders. This also involves serious and semi-serious cases of horizontal fraud (fraud in the movement of private funds and goods in which a private party suffers damages).[184]

The new Police Act has also created the National Police Services Agency. As the name implies, its responsibility involves tasks that, because of their nature, require a national approach. The agency comprises several departments. In the context of criminal law enforcement it is principally the National Bureau of Criminal Investigation *(Nationale Recherche)*, which consists of six core teams and the National Team of Criminal Investigation *(Landelijk Rechercheteam)*, the Synthetic Drugs Unit *(Unit Synthetische Drugs)*, the Human Smuggling Unit *(Unit Mensensmokkel)* and the so-called XTC teams, which are important.

In addition to the regular police, the Netherlands also has 'special investigation services'. The public servants of these services are responsible for the enforcement of particular criminal laws and answer to the departments of the particular field (thus, not to the ministry of Justice). The most important special investigation services are the Economic Investigation Agency (*Economische Controledienst* or

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183 For greater detail: *Boek*, Organisatie, functie en bevoegdheden van politie in Nederland.

184 See: *Corstens*, Strafprocesrecht, p. 108, with reference to the regulation of 15 January 2004, Stcrt. 2004, no. 19.

ECD) at the Ministry of Economic Affairs, Fiscal Inquiries and Investigations Service (*Fiscale Inlichtingen en Opsporingsdienst* or FIOD) at the department of Finances and the General Inspection Service (*Algemene Inspectiedienst* or AID) at the Ministry of Agriculture, Nature Conservancy and Fisheries.

6.2 Department of public prosecution

The organisation of the Department is described in section 2.3 above. What remains is a brief consideration of this body's task.

According to Art. 124 RO, the Department of Public Prosecution is responsible for upholding the legal order within the context of criminal law enforcement and for other tasks as set by law. We are of the opinion that this description is less clear than the list of tasks that was described in Art. 4 RO. In that article, it was established that the department was to ensure:

- enforcement of the laws;
- prosecution of criminal offences; and
- execution of all criminal sentences.

The substance of the department's task did not change with the introduction of the new RO law. A few remarks relating to the above-mentioned three tasks will be made here.

The public prosecutor's office is charged with executing criminal sentences. From the specification 'all', as expressed in the law, one can infer that there is in principle no policy freedom on this point. Therefore the public prosecutor's office cannot refrain from executing certain legal rulings for reasons of opportunity.[185]

The 'prosecution' of criminal offences implies that a judge is involved in the case and adverse decisions against the accused are requested. The public prosecutor's office is the only body authorised to perform this function and the so-called 'prosecution monopoly' was indicated in section 3.1 above. Another important point is that the public prosecutor does not have to bring every feasible criminal case before the judge. Apart from several modalities for settling out of court (see section 11 below), prosecution can also be abandoned for the common good. This principle of opportunity (see section 3.2 above) is a contributing factor to two characteristics in the operation of the Dutch public prosecutor's office: a) this body is considered to be the most important one in the administration of criminal justice, especially because b) it pursues a *policy* in various domains that directly affects and co-determines the citizen's legal position.

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[185] See also: HR 1 February 1991, NJ 1991, 413.

Both characteristics are even more clearly visible when considering the public prosecutor's office's task of *enforcing and upholding the laws and supervising the enforcement* of the legal order through criminal justice *(de strafrechtelijke rechtsorde te handhaven)*. We again draw attention to the fact that there are so many laws that it is not possible to enforce them all and to attempt to punish every violation. That only occurs when, through enforcement, a significant positive contribution to the common good is to be expected. The situations in which this is the case are laid out in investigation and prosecution directives. The directives are published and are binding to the extent that it is only possible to deviate from them based on exceptional and substantiated considerations. A peculiarity in this context is that the *Hoge Raad* directives are recognised as legal rules to which citizens can appeal in criminal proceedings.

Two more subjects are worth mentioning in the context of the public prosecutor's office's tasks. First, the public prosecutor is in charge of the *investigation*. The public prosecutor's office must guarantee the judicial quality of the investigation. In this capacity of safeguard, the public prosecutor's office plays or can play an essential role in the investigation procedure.[186] The control over the progress of the investigation is then linked to responsibility for its outcome. The public prosecutor supervises the actions of the other criminal investigators and can intervene when necessary. His role is not one of observing and legitimising but rather of defining, steering and supervising. He will, of course, normally not become involved in tactical or operational decisions, but his (dormant) control can be activated in concrete procedures. His leading position can manifest itself in actions taken at his own initiative or when the criminal investigator (usually the police detective) requests it. As the seriousness or the complexity of the case increases, the public prosecutor will, in principle, be more closely involved.

The second subject regarding the public prosecutor's office's task is concerned with the requirement that the public prosecutor carry out his duties in 'the manner of a magistrate'. The public prosecutor in Dutch criminal law is not just the opposing party to the accused. He is not even authorised to focus unilaterally on securing a conviction. What differs, for example, from what is common in adversarial legal systems is that the Dutch public prosecutor must conduct as objective an investigation as possible and seek both incriminating and exculpatory information. This magistrate-like role of the public prosecutor implies that he is to strive for a correct and balanced application of the law. Additionally, it can be mentioned that the public prosecutor's office in the Netherlands is part of the judicial branch. Regular, or 'real' judges are indicated as the 'sitting' judicial branch; the public prosecutor's office is categorised as the 'standing' judicial branch. The educational requirements are the same for public prosecutors as they are for judges; in principle, they are

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[186] For greater detail, see: *Groenhuijsen/Knigge* (eds.), Afronding en verantwoording, pp. 99 et seq.

appointed for life and their salary is set by law. The aim of this is to reinforce the public prosecutor's office's independence and rule out political influences in the legal process as much as possible. In addition, the circumspect way in which the Minister of Justice's power of appointment is organised must be seen against this background.[187]

6.3 The bar

In criminal cases, counsel's *task* is two-fold. He provides his client with legal advice and he ensures that the rules of procedure are respected and that the requirements for a fair trial are met.[188] Counsel has an exceptional position within the system of criminal procedure. He is present on behalf of his client only. Counsel is allowed – and obliged – to be partial in the literal meaning of the word. He does not have the role of an 'officer of the court' who must contribute to the public or common good. He is not expected to be objective; rather he is expected to take a unilateral orientation towards what is good for the defence. This fixation on a single purpose contributes to the quality of the case and is to be appreciated for that reason. The alert and active behaviour of counsel can and may lead to polarisation in the courtroom. This is nothing but the expression of the dialectical character of Dutch criminal procedure and as such, it contributes to the goals of adversariality. Also, it cannot remain unmentioned that as a consequence hereof counsel can never be used as a means of proof in criminal proceedings.

In keeping with the goal of encouraging the adversarial nature of the proceedings, counsel, in performing this task, must be subject to as few restrictions as possible. A natural *limitation* is that he is to keep to the law and to the Bar Association's code of conduct. Additionally, it is undisputed that he may not hinder the authorities in finding the truth. Counsel is also subject to the regulations and principles of unwritten law. The old expression *point d'intérêt, point d'action* seems to be appropriate in this context. Moreover, the relevant literature excludes from acceptable behaviour anything that is 'not at all suitable or is manifestly contrary to the purpose of the powers and that its interest is no longer an interest that is to be protected by law'.[189] In this respect, we touch on the controversial issue of whether the counsel can abuse his authority. We believe he can, but such (dis)qualification can only be made in exceptional circumstances, namely, when the defence uses the assigned authority with no other intention than to interfere with the proper course

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[187] Art. 127 RO; see further, section 2.3 above.

[188] See: *Groenhuijsen/Knigge* (eds.), Het onderzoek ter zitting, pp. 195–231; and with other emphases *Spronken*, Verdediging. Een onderzoek naar de normering van het optreden van advocaten in strafzaken.

[189] *Cleiren*, Een grensoverschrijdende verdachte?, in: Boek et al. (eds.), Grensoverschrijdend strafrecht, p. 161.

of justice or, in pursuing an interest respect for which is not reasonable, obstructing the course of justice.[190]

Two final remarks on the description of the task of the Bar in criminal cases remain to be made. First, the task described can only be carried out appropriately if the following *supporting rights* are in principle guaranteed:

- private communication between the suspect and his counsel (Art. 50 Sv);
- duty of confidentiality and attendant right of non-disclosure for the counsel in the context of what has occurred in the professional contact between counsel and suspect;
- inspection of the case file by counsel (Art. 51 Sv);
- counsel's attendance at the suspect's interrogations.

Secondly, in the Dutch system of criminal procedure, defence has many opportunities to make a plea. He can choose to pursue a confrontational strategy but will then be bound by that choice. Freedom to act is not the same as acting without consequences. If the defence deliberately declines to make a plea, this may lead to, for example, forfeiture of defence. The right to a defence can then not be called upon any more in a later stage of the trial. Similarly, counsel is expected to be alert. If a police official or, further into the trial, the judge makes a procedural error and counsel, who is present, does not object, a later complaint may be rejected on the grounds that, apparently, the suspect's case was not damaged by it.

6.4 The judge

The organisation of the judicial branch and the main competency regulations were already discussed in section 2.2. This section will consider chiefly the judge's *task* within the system of Dutch law of criminal procedure. In doing this, distinctions are made according to the different stages of the procedure.

During the *preliminary investigation*, the judge has three types of task.[191] First, he is charged with the assessment of the question of whether an authorisation can be granted for the use of the most drastic means of coercion. Obvious examples are prolonged preventive custody and the recording of telephone conversations. Secondly, the judge's involvement may be required as the substitute for an act of investigation. This is expedient, for example, in situations in which the act of investigation is by nature fairly irreversible. An example may be the case in which it is highly unlikely that the witness can be heard at trial. It is important that the judge does not take initiative himself for this purpose: he can only become involved if the

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[190] *Groenhuijsen/Knigge* (eds.), Het onderzoek ter zitting, p. 220.

[191] For greater detail on this, see: *Groenhuijsen/Knigge* (eds.), Afronding en verantwoording, pp. 102 et seq.

public prosecutor's office makes a demand or the defence makes a petition. Thirdly, the judge can play a role in dealing with incidents during the preliminary investigation. According to applicable law, this mostly occurs when the court makes a ruling by way of a court order.

The judge's place in the preliminary investigation can also be negatively defined. For example, the judge is not in charge of the preliminary investigation. And, in connection with this: he is not an examining judge in the strict sense of the word. Indeed, the judge is not solely responsible for concluding the case or for the completeness of the investigation.[192]

This role changes completely from the moment the case is before the court. During the *public trial*, the judge is responsible for the complete and precise examination of the facts before court. Here, too, responsibility is connected with control. What is also remarkable is that the judge will be the first to question the accused and the witnesses and experts. The public prosecutor's office and the defence, in this respect, have the right to ask these informants additional questions. Furthermore, it should be pointed out that the judge's responsibility, in practice, often has a subsidiary character.[193] Indeed, the trial agenda is determined by the different approaches of the public prosecutor's office and the defence. If the difference of opinion is mainly about the evidence, then the trial is aimed at the issue of whether the burden of proof can be considered sufficient or an acquittal is appropriate. In other situations where the accused confesses to the offence he is charged with, the main focus of the trial is likely to be the question of the penalty. Moreover, the demands on the procedure of a criminal judgment set out in the law (Arts. 358, 359 Sv) contribute to the judge's position. The legal requirements of substantiation oblige the judge to enter into a dialogue with the defence. The main provision was recently[194] elaborated in Art. 359(2) Sv: 'The verdict, if it deviates from the expressly argued standpoints of either the accused or the public prosecutor, must indicate the particular arguments that have led to that deviation.' In short, according to applicable law, a participant in the proceedings who has presented a well-argued point of view is either proved right, or the judge explains in his ruling why he is unable to share the party's opinion.

Arts. 512–518 Sv contain provisions for *challenging* and exempting judges. Parties can challenge a judge on facts or circumstances which tend to discredit his

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[192] According to applicable law, an exception to this can be found in the small category of criminal cases in which a preliminary judicial inquiry is initiated. That is formally led by the *rechter-commissaris*. In the research project *Strafvordering 2001* it is proposed to remove the institute of Preliminary Judicial Inquiry from the Dutch criminal procedure.

[193] According to the propositions in the research project *Strafvordering 2001*, this factual situation should also be put down in the Code of Criminal Procedure.

[194] The new part two of Art. 359 came into force on 1 January 2005.

judicial impartiality.[195] A substantiated objection is dealt with as quickly as possible by a panel of judges which doesn't include the judge against whom the objection is filed. This chamber must decide as quickly as possible and there is no remedy in law against this judgment.

7. Other participants in the criminal process

7.1 The accused

The position of the accused was largely clarified in section 4, which dealt with the rights of the defence. It suffices here to complete the picture with a brief consideration.

The accused's position at trial is mainly controlled by the requirement of the *praesumptio innocentia*. From that perspective, the most important characteristics of his legal position are easily distinguished. In Dutch procedural law, the accused is granted full legal capacity and is allowed freely to take a position at a trial. Determining a strategy at trial, in practice, usually involves a choice between *pacification* (confess and plea for clemency) and *polarisation* (deny or fight the case on other fundamental points). A justified choice presupposes that the accused is well informed about his legal position at trial. Hence, the vital importance of the right to information (including setting bail), the right to legal advice and an appropriate arrangement of the internal openness of the trial.

These rights also imply some *obligations*. According to applicable law, the accused may be required to make use of the defence rights presented to him at an early stage. If he does not do so without good reason, the authorities may conclude that the defendant has forfeited his right. This means that such rights cannot easily be called upon again at a later stage of the procedure. The research project *Strafvordering 2001* takes this approach one step further. The researchers recommend that the accused who wishes to defend his case (in other words who wants to adopt a confrontational approach to the criminal proceedings) must make it possible for the authorities to contact him. Specifically, this means a compulsory choice of residence in the more severe criminal cases and to the possibility of preventive custody in order to be able to serve the summons on the accused in person.

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[195] This is a very open criterion within Art. 512 Sv. The Code does not indicate cases in which the impartiality must surely be considered compromised. On this topic see: *Groenhuijsen/Knigge* (eds.), Het onderzoek ter zitting, pp. 145–177.

7.2 The victim

Very few provisions in the Code of Criminal Procedure, as it came into force in 1926, were devoted to the interests of the victim. 'The victim' as such was not acknowledged by the legislator as a party to criminal proceedings. The victim did play a part in other capacities: as the one who reported the offence, as the one entitled to issue a complaint (for example, in Art. 12 Sv in the case of a decision not to prosecute the suspect) or as a witness. There was a separate arrangement that made it possible to make *a civil claim for compensation* for damages against the suspect. That claim could then be added to the criminal proceedings and be treated simultaneously (Arts. 332–337 Sv). The person who made the claim was referred to as the 'offended party' *(beledigde partij)* in the Code, later as the 'injured party' *(benadeelde partij)*. In order to limit the complications of this intervention, the legislator laid down in law that the civil claim is only possible when it is of secondary importance to the criminal procedure. There is no room for a complex civil trial within the criminal trial.

In the second half of the 1980s, the thinking as regards the role of the victim in the legal system changed. The legal community realised that it also has a responsibility towards the victims of crimes. This led to several amendments to the system of criminal procedure.

First, from that time on, several directives and other policy guidelines were introduced that established a *proper legal position* for victims. Only the regulations that remain today will be considered here.[196] The most important generic guideline was the 'instruction on victim support' of 1999. In this document, the police and judiciary are charged with three key duties in relation to the victim:

- giving the victim a fair and, where necessary, personal treatment;
- providing clear and relevant information as quickly as possible;[197]
- making optimal use of the possibilities of compensation for damages in the context of the criminal case.

For some categories of particularly vulnerable victims, such as victims of sexual offences, additional regulations were introduced. They are entitled to a treatment that is adapted to the particular vulnerabilities that result from such crimes.[198]

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[196] For a more elaborate overview see: *Groenhuijsen/Knigge* (eds.), Dwangmiddelen en rechtsmiddelen, pp. 778 et seq.

[197] The victim has the right to be kept informed about the progress of the case (for instance, when there is an arrest, when the case will come before court and so on) and must be informed about his own powers in criminal procedure.

[198] See the 1999 'Aanwijzing bejegening slachtoffers van zedendelicten'. See also: 'Aanwijzing opsporing seksueel misbruik in afhankelijkheidsrelaties' of 1999. This instruction is interesting because it provides many guarantees that are to protect the suspect

Secondly, another interesting regulation was introduced in the 'instruction on second opinions in criminal investigation' of 1 March 2000. These policy guidelines aim at addressing the dissatisfaction victims often feel for the way in which the police are conducting the criminal investigation. If, for example, they find that certain acts of investigation are wrongfully omitted, they can file a complaint if it concerns 'decisions on direction in sensitive cases'. This can lead to the appointment of an evaluation team that is composed of an experienced public prosecutor and one or more investigation experts. The findings of these independent teams are made known to the victim and are added to the case file.

In 1992, the Code of Criminal Procedure was amended to establish a clearer recognition of the victim's perspective.[199] The most important substantial amendments chiefly concern the addition of a provision for a *civil claim for damages* by the injured party and the introduction of the damages measure as a criminal sanction.[200] What is probably more important, though, is the two-fold symbolic function this law has had. First, for the first time, a separate chapter was added to the Code in which the rights of the injured party are systematically described as a result of which at least this group of victims received definite recognition as a real, *full party* to criminal proceedings. Secondly, the 'Terwee' law, which, in substance, is strongly geared toward the examination at trial, is to be considered as an attempt by the legislator at strengthening the victim's position during the preliminary inquiry. Unfortunately, the directives of the 1980s did not prove to be very effective in practice. The coming into force of the 'Terwee' law was therefore used to prepare new rules of conduct for police and the agencies of justice in combination with a more vigorous control mechanism for their enforcement.

As of 1 January 2005, the so-called 'right to speak at trial' is available to the victim. This means that, during the public trial, the victim of a serious crime[201] may make a statement about how the offence has affected him (Art. 302 Sv).[202]

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against the possibility of a false report. As a result, the interests of the victims and the suspects must be delicately weighed and it cannot be denied there is a tension between them.

[199] This is the much-discussed Terwee Act: the Law of 23 December 1992 (Stb. 1993, 29), which came into force in a part of the country on 1 April 1993, in the remainder of the country on 1 April 1995.

[200] What is new, for example, is the power to lodge the demand during the preliminary inquiry and the power to split a demand (that way the easily recoverable part of it can be concluded at the criminal trial while the more difficult part of the claim may be handled by the civil judge later). The victim who has entered the criminal proceedings by a claim, is allowed to be assisted or represented (Art. 51e Sv), he has access to the case file (Art. 51d Sv), he may present pieces as evidence for the claim but may not have witnesses subpoenaed in this context (Art. 334 part 1 Sv), he is entitled to the assistance of an interpreter if he does not master the Dutch language (Art. 334 part 2 Sv), and he is to be informed separately of time and place of the trial (Art. 51f Sv).

[201] This power is limited to those who are victims of an offence for which a term of imprisonment of eight years or longer is imposed and only special offences such as sexual offences and serious violent crimes.

Finally, mention is made of some *limitations* of the victim's rights already granted that are characteristic of the Dutch system of criminal procedure.

First, the concept of the private criminal prosecution is not recognised in the Netherlands.[203] However, this is not considered to be a shortcoming. Nor is there a plea in the literature for the introduction of such a law. Secondly, the victim may not act as a kind of assistant public prosecutor.[204] At this point too, no recommendations are made to reform the applicable law. Both parts of the applicable law have the same *ratio*. In our opinion this is beautifully set out in a statement of the European Forum for Victim Services on the fundamental principles of modern victim rights in Europe:

> "Throughout Europe, the State has assumed responsibility for prosecuting offenders and has removed from the victim the burden of responsibility for determining any action to be taken in respect of the offender. The acceptance of responsibility by the State should be recognised as a fundamental right of victims of crime, and no attempts should be made to erode this by returning the responsibility for decision making to victims."[205]

Thirdly, until now, no separate chapter had been established in the Code of Criminal Procedure that laid down the rights and powers that accrue to the victim. This is considered a deficiency, especially because the European Framework decision on this matter does seem to demand that. That is why it is good that a bill was recently introduced to fill that lacuna. Its content is discussed below in section 12.3.

8. Sources of evidence

8.1 System of evidence

There is a negative statutory system of evidence in Dutch criminal procedure. It is a statutory system because the Code offers an exhaustive recital of the factual sources on which the court may base its evidentiary decision.[206] Moreover, it is a 'negative' system since the law has no obligatory indications as regards the persuasive force of the means of proof. However, Art. 338 Sv provides the criterion by which evidentiary decisions must be made. The charges can be considered proven

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[202] There are also 'supporting rights' for the victim who makes use of this right to speak: the victim may seek legal advice and has a right to the services of an interpreter if is unable to speak or understand Dutch well (Art. 337 Sv).

[203] In France and Belgium, this is indicated as the *action directe*; in Germany the figure of the *Privatklage*.

[204] Compared with the German legal concept of the *Nebenklage*.

[205] European Forum for Victim Services, Statement of Victims' Rights in the Process of Criminal Justice, p. 5 (see also www.euvictimservices.org).

[206] Art. 339 Sv: 'The following are considered legal means of proof: the judge's own observation; statements from the accused; witness statements; expert statements; written records.'

if the court is *persuaded*, based on the legal evidence, that the accused committed the alleged offence. It is a question of judicial persuasion, which is said to have been satisfied when the court no longer has any reasonable doubt regarding the facts of the case. The judge must be persuaded by the substance of the legal evidence. There is generally a wide range of results from the investigation in the court record that can be used as evidence. Some of the results include incriminating evidence, while other sources can be exculpatory. What is of importance is that, under Dutch law, the court has great freedom to select from this collection of investigative results – thus, from possible means of proof – what it considers the most reliable. The court is thus free to select and assess the available material.[207] From amongst an existing set of mutually inconsistent witness statements, the court can choose the one it is inclined to believe.[208]

For a deep understanding of Netherlands rules of evidence two further issues must be briefly considered. First, the precise *extent of the rules of evidence* must be considered. Throughout the criminal proceedings, the court must determine a variety of facts. Only a small number of these decisions will be governed by the rules of evidence norms. That is, they apply only to a decision concerning a) the issue of whether the accused committed the alleged offence, and b) the issue of the amount of the associated advantage the offender wrongly obtained through commission of the crime (Art. 511 ff. Sv). This means, for example, that the factual basis for a defence raised by an accused seeking exemption from penalty (e.g., self-defence) is not governed by the rules of evidence. The same is true for aggravating or mitigating circumstances in the context of sentencing.

The second issue that deserves mention concerns the so-called *rule of minimum evidence*. Generally, it can be argued that charges can only be considered proven where there are at least two mutually independent factual sources available from which incriminating evidence appears. In the Code of Criminal Procedure, this requirement is laid down in the article that provides that the judge cannot find the defendant guilty of the alleged offence based exclusively on the statement of a single witness (Art. 342(2) Sv). Nor, in applying the same principle, can a conviction be based solely on a confession of the accused (Art. 341 par. 4 Sv). It is, thus, always necessary to have two pieces of corroborating evidence. Nevertheless, it is very important that the scope of this starting point be well defined. The principle, in fact, only relates to the indictment as a whole. Parts of the indictment can reliably be declared proven if only one statement about it is available. And, according to the case law from the *Hoge Raad*, this can comprise many parts.[209] Close reading

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[207] The *Hoge Raad* has consistently held that the selection and the evaluation of the evidence is left to the judge of fact. The *Hoge Raad* must therefore not consider this judgment: it will not verify whether other sources could possibly have been more persuasive or another choice of means of proof could have been more plausible.

[208] As regards this freedom to evaluate, see also section 3.9 above.

[209] Compare HR 19 October 1954, NJ 1955, 2 comments WP.

of this case law teaches us that the starting point is perhaps inversely formulated: in principle, the statement of a single informant (the statement from a witness/victim or the confession of the accused) suffices provided that the plausibility of a single part of the indictment is moreover corroborated by the content of another, independent means of proof. It also becomes clear why, within the Dutch law system, a solution more pragmatic than in many other counties can be found to the dilemma that arises when an offence is committed in a typical one-on-one situation. It is generally known that many crimes against property (robberies), violent crimes (assault or battery) and indecency offences (mostly rapes) occur unobserved by third parties, and without available substantial technical or forensic evidence. In these circumstances, the accused's statement often conflicts directly with that of the person making the complaint; that is, the victim. The Dutch law of criminal procedure offers a solution to this dilemma, in so far as parts of the accused's statement in fact appear to overlap with that of the victim. For example, in the case of a rape, the accused often admits that there was intercourse, but denies any force or threat and even indicates there was consent. According to applicable law, the court can, in such circumstances, presume sufficient legal proof. The entire indictment will certainly be covered by the statement made by the witness/informant/victim, while the content of parts of the indictment (intercourse, time and place) will also be confirmed through the accused's statement. Under these conditions, there is, according to applicable Dutch law sufficient *legal proof*. Another question is then whether the court through this legal proof is satisfactorily *persuaded* of the guilt of the accused. This is a question of judgment, which often amounts simply to which of the two involved parties the court finds more credible.

8.2 Means of proof

8.2.1 The judge's own observation

The judge's own observation during the trial is a means of proof (Art. 340 Sv). It is important that these be personal observations made during the trial. The rationale for this means of proof is based in part on the fact that the list of legal means of proof provided by Art. 339 Sv is in fact archaic and incomplete.[210] Means of proof that can be used officially in court for personal observation includes photos, films, maps, videotapes, diagrams, plans, weapons, burglar's tools and other (confiscated) objects presented during the trial. It can also be the visible, physical characteristics of persons; thus, the judge can, through personal observation, determine that the appearance of the accused matches the description provided by the witness.

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[210] For this reason the *Strafvordering 2001* project proposed introducing a free system of evidence in which the judge can use every available source of evidence. See: *Groenhuijsen/Knigge* (eds.), Het onderzoek ter zitting, pp. 397–454.

An exceptional variant is still that the court can observe that the accused's statement is 'evidently untruthful'. The evident untruthfulness of the statement may, as the Court has consistently held, contribute to proof of the alleged offence.[211]

8.2.2 Accused's statement

In practice, the accused's statement is an important means of proof. This is so because in the Netherlands a majority of the accused who appear in trial have provided a confession. And then it is just a small step for the judge to be able to consider a statement proven.

In this country, every accused is heard in court in his capacity as the accused. An accused cannot be heard as a witness and he is also never sworn. Nevertheless, the judge does inform him that he is not obliged to answer the questions asked. Otherwise, the examination at trial – just as with other witnesses and experts – is initially carried out by the presiding judge. Only once he has completed his questions do the public prosecutor and the defence have an opportunity to ask additional questions. In practice, in ordinary criminal cases, this opportunity is not used very intensively so that the core lies with the judge's examination.[212]

As a consequence of the *de auditu* case law, the judge can also use as evidence the statement the accused made outside court, for example, during investigation.[213] Often, the statement is set out in a report (from the police or the *rechter-commissaris*). If the accused retracts the statement he made in the preliminary inquiry, the judge may decide which of the statements he considers the most reliable.

Art. 341(3) Sv provides that: 'his statement can only relate to himself'. This is a fairly rigid way of saying that *statements made by the co-accused* cannot be used as means of proof. The reasoning behind this provision is that the legislator sought to prevent the co-accused from wrongfully blaming others for the alleged offence. Thus, to prevent this kind of conduct, it is forbidden for one suspect to shift responsibility to another person involved in the proceedings. The legislator, however, was only partially successful in this effort. First, because the notion of 'co-accused' in the Dutch legal system has been formally interpreted. It is only when cases are tried jointly that the statement of one co-accused is inadmissible. If the accomplices are tried successively, then one co-accused can reliably testify against the other. Secondly, the *Hoge Raad* has, moreover, held that it is also possible to use a statement from the co-accused as means of proof if the statements were not intended to come

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211 The accused's *silence* may not, by contrast, contribute to the proof.

212 Dutch practice is thus on this point quite distinct from the Anglo-Saxon 'cross examination'.

213 This is again expressly confirmed under Art. 341(2) Sv.

to the attention of the law. This is, for example, the case when a detainee in prison tells a story to a fellow detainee about an offence they committed together.[214]

8.2.3 Witness's statement

The Dutch rules of evidence are very well laid down. Art. 339 of the Code of Criminal Procedure provides an exhaustive list of admissible means of proof; the following five articles develop and further standardise the means of proof (Arts. 340–344 Sv).

Art. 342 Sv relates to witness statements. According to this article it is understood that the account a witness gives in court is of the facts or circumstances known to that witness from his experience. It must be an account based on sensory observation. The witness may not express opinions or speculations and assumptions in his statement.[215] To advance the veracity of these statements, the Code provides that the witness make his statement under oath or solemn vow (Art. 290 Sv). If the witness lies, then he is perjuring himself (Art. 207 Sr).

In the overview of the rights of the defence in section 4 above, the extent of the accused's right of examination was considered. Moreover, it was stated that, in Dutch criminal procedure practice, only a small number of witnesses appear in court to testify. Most witnesses are heard only during the preliminary inquiry by the police and/or *rechter-commissaris*. Their statements are thus introduced in court through written documents.

Three points deserve to be mentioned here briefly. First, the witness's *right to refuse to testify*. A witness who has been called must in principle appear in court and answer the questions asked of him. He may, nevertheless, refuse to answer the questions if he can 'excuse' himself. He may do so if he is related directly, or indirectly to the third degree, to the accused by blood or by marriage or if he is the accused's (current or former) life partner (Art. 217 Sv). In addition, there is a right to refuse to answer pursuant to so-called professional confidence (lawyers, clergymen, medical practitioners), but only in so far as it involves facts divulged in the context of the professional relationship (Art. 218 Sv). Finally, a witness is not obliged to answer questions if there is a danger that he (or a close family member and/or a partner) will be exposed to the risk of criminal prosecution (Art. 219 Sv).

Secondly, in section 4, the legal concept of the anonymous (threatened) witness was considered. A few more comments may be made here regarding the so-called

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[214] HR 16 March 1965, NJ 1965, 269 comments WP. – One statement is not sufficient for a conviction. This applies to witnesses (see above), and it also applies to the accused. A confession alone is thus insufficient for a charge to be considered proven; there must still be so-called 'supporting' evidence (Art. 341(4) Sv).

[215] The corresponding requirement that is placed on the accused states, that it must be about facts or circumstances that are known to him through personal experience.

'chief witness'. This is the witness who makes a statement against an accused after coming to an agreement with the authorities about his position in his own criminal proceedings. The *Hoge Raad* has held that the statement of the *chief witness* is admissible as legal evidence. If the reliability of the evidence is challenged by the defence, the chief witness must be heard by a judge (preferably by the judge seized of the matter). If the judge wishes to use the contentious statement as evidence in his judgment, he must provide separate reasons for his decision to do so. In no circumstances may a charge that is considered proven be based on statements from a chief witness.[216] A new law on this has only recently come into force.[217] From 2005 on, testimony of the chief witness is admissible only in cases involving serious crimes.[218] It can then be agreed with the chief witness that in his own criminal proceedings the public prosecutor will request a commutation of the sentence in accordance with Art. 44a Sr (Art. 226g Sv) or that – after a final judgment – he will issue a positive opinion for a pardon (Art. 226k Sv). The *rechter-commissaris* will, as a precaution, check the agreements that have been meticulously written out for their lawfulness (Art. 226g Sv), and will also subsequently hear the chief witness (Art. 226j Sv).[219]

According to the law as it stands, a witness has certain specific *obligations*. He is obliged to appear, he must answer questions, he will be compelled to take an oath or solemn vow, following an examination, he must remain available for further questions after an adjournment, and so forth. There are, against this, scarcely any rights or individual powers. This appears somewhat unbalanced. Therefore, for the *Strafvordering 2001* research project there is a plan to grant the witness a more inclusive and better-balanced legal position. A separate heading in the Code should be included in which rules about the rights of the witness (assistance, compensation for costs, etc.) can systematically be regulated.[220]

8.2.4 Expert evidence

According to Art. 343 Sv, an expert communicates to the court his opinions about the subject matter of the trial that falls within his area of expertise.[221] Despite this formal language the position of the expert witness in Dutch law is remarkably

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216 HR 30 June 1998, NJ 1998, 799 comments Sch. See also on this: *Corstens*, Strafprocesrecht, p. 662 and pp. 328 et seq.

217 *Kamerstukken* 26 294 and 28 017; Stb. 2005, 254 and 255.

218 That is, for maximum penalties higher than eight years or for the possibility of preventive custody along with an offence committed in connection with organised crime.

219 It must be noted that the chief witness *cannot* be heard as a threatened witness (see section 4 above).

220 *Groenhuijsen/Knigge* (eds.), Het onderzoek ter zitting, pp. 300 et seq.

221 See in particular: *Hielkema*, Deskundigen in Nederlandse strafzaken; *Kampen van*, Expert Evidence Compared.

loosely regulated. There are no rules with respect to the cases in which experts must be involved[222] and there are no nationally valid requirements as to which qualification standards the expert must satisfy. Some guarantee of the reliability of the information provided by the expert will, nevertheless, be sought with a view to the expert swearing that he will fulfil his duty using the best of his knowledge (Arts. 228 and 296 Sv). Experts are chiefly requested to appear by the judicial authorities. There are, for example, certain legal experts (psychologists, psychiatrists) who regularly provide opinions regarding the accused's mental capacity (responsibility). The expert as defined by Art. 343 Sv provides an oral statement. In addition, there is the written expert evidence, which is governed separately under Arts. 227–236 Sv (see also Art. 344(1) Sv).

Case law has established that there is a *right to counter-investigation* (second expert opinion), if this is practical[223] and the defence has undertaken steps in time to insist on this.[224] This right includes the possibility of compensation for the associated costs. Occasionally, the law expressly allows a right to counter-investigation, such as in the context of a DNA testing (Art. 195a Sv).

Moreover, according to the case law, the judge has an additional obligation to provide reasons for a judgment in cases where the defence provides a substantiated objection to the reliability of the *research method* used by the expert in the concerned case.[225] In such situations, the judge may use the contested expert opinion as proof only if he provides reasons why he considers the employed method *in casu* reliable.

8.2.5 Written documents

The final means of proof permitted by law is that of 'written documents'. These include (Art. 344 Sv):

1. court orders and other decisions,
2. reports that meet all legal requirements,
3. official documents from public boards and officials, which are intended to serve as proof of any fact,
4. experts' reports (see section 8.2.4 above), and
5. all other documents and texts.

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[222] There are a few exceptions that relate chiefly to DNA testing (Arts. 195a et seq Sv).

[223] This limit is seen, for example, in the availability of samples.

[224] HR 2 February 1993, NJ 1993, 476.

[225] For standard examples see: HR 28 February 1989, NJ 1989, 748; and HR 30 March 1999, NJ 1999, 451.

A few remarks may serve to clarify the above. First, the law does not provide a definition of what the term 'documents' should include. Formally, it involves items that are capable of being read aloud. The written documents can in principle be used as means of proof only when they are read aloud or a summary of them is communicated to the court (Art. 301 Sv).[226] It should be pointed out that in practice reading aloud or summarising does not take place very often if neither the public prosecutor nor the defence, on being asked, objects to the document.

It should be noted that the requirement of double confirmation need not be met as regards the reports referred to under section 2 above. In the absence of other factual sources available to the judge, the law provides that an authenticated report of this nature can provide sufficient proof of the alleged offence (Art. 344(2) Sv). Nevertheless, the meaning of such a document must of course be put into perspective and the literature argues persuasively that the provision will in practice only have a use in relation to simple facts established by *in flagrante delicto*. In the case of indictable offences, the judge is unlikely to consider himself persuaded by a single report if the accused denies the offence.[227]

The documents that fall under the 'all other documents and texts' category (sub 5) can only be used as proof in connection with other means of proof. The law does not express anything new with this: it confirms that these elements provide sufficient legal proof only when used with other evidence from the investigation. Also of importance is the fact that this category includes all reports in which there is a formal defect, for example, unsigned reports or reports from foreign criminal investigators.

9. Finality

A court's decision cannot be reversed if, within the statutory period allowed, no legal remedy has been commenced, or if all available *legal remedies* have been *exhausted* and the decision has been upheld. The general rule is that only final orders can be executed. An important exception to this rule is connected with the possibility of an accused being sentenced in his absence. After a conviction *in absentia*, the public prosecutor's office must serve notice on the accused in which it is stated that the accused has been sentenced (Art. 366 Sv). After service of this notice, the order can be executed, even if the period allowed for applying a legal remedy has not yet run. This power lapses when the accused uses his right to seek the available legal remedy.

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[226] See: *Corstens*, Strafprocesrecht, p. 665 with further sources cited.

[227] According to *Nijboer*, in: Cleiren/Nijboer, Tekst en commentaar strafvordering, Art. 344 Sv, note 4.

The public prosecutor's office is obliged to execute final sentences. On this point, the public prosecutor has no jurisdiction to abandon execution on the grounds of policy considerations. Only in exceptional circumstances can the convicted person apply to court to stay the execution of the order. Such exceptional circumstances might include cases in which, during execution of the sentence, there is an issue of government action that conflicts with one of the ECHR guarantees.[228]

The consequence of a final acquittal, the dismissal of all charges or conviction is that the person concerned cannot be tried again on the same facts. The *ne bis in idem* principle is set out in Art. 68 Sr and is applied extensively in Dutch law. No new trial based on the same facts is possible either after a final order from a Dutch judge, or also after an out-of-court settlement or an alternative sentence.[229] In addition, foreign court orders can block prosecution in the Netherlands. The criminal Code includes various provisions that flow from the substantive *ne bis in idem*-principle. Certain orders of the court or of the public prosecutor terminate the proceedings and the result is that the accused may not in principle be tried again for the same crime.[230] The same procedural operation of the *ne bis in idem*-principle is weaker than the prohibition on repeated prosecution after a final court order, since the discovery of 'new complaints' can lead to new proceedings against the accused.

Reopening a criminal case in which the judge has made a final order is only possible in limited circumstances. An *acquittal* or *dismissal* of all charges is irreversible;[231] only an order for conviction may be reopened. The grounds for review are limited to situations in which:

- mutually incompatible statements are made in different criminal cases;
- there is an issue of discovery of new facts that, if they had been uncovered earlier, would have led to the public prosecutor's case being declared inadmissible, to acquittal, to dismissal of all rights to prosecution or to application of a lighter sentence;
- the ECtHR determines that in the criminal procedure one of the ECHR guarantees has been violated and it is necessary to reopen the case with a view to rectifying the outcome within the meaning of Art. 41 ECHR (see Art. 457 Sv).

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228 See: *Machielse*, Executie: plicht of bevoegdheid?, in: Corstens et al. (eds.), Straffen in gerechtigheid, pp. 155–167; *Simmelink*, Kanttekeningen bij het gesloten stelsel van rechtsmiddelen, in: Harteveld/de Jong/Stamhuis, Systeem in ontwikkeling, pp. 461–481; ECtHR 4 February 2003, appl. no. 52750/99 *(Lorsé et al. v. The Netherlands)* and HR 31 October 2003, NJ 2005, 196, comments EAA.

229 See section 11 Consensual disposal.

230 It concerns the decision to exempt from prosecution following a notice of objection against a summons (see section 10.3), notice of further prosecution and the neglect of time limits for further prosecution following an inquest (see section 5.2).

231 Review of an acquittal following discovery of new evidence is not possible; cf. *Mevis/Kooijmans*, Herziening ten nadele: een studie naar de wenselijkheid en mogelijkheid van herziening ten nadele in het Nederlandse strafprocesrecht.

If the convicted person thinks that one of the grounds for *review* exists, he must file an application with the *Hoge Raad*. If the latter deems that there are grounds for the application, then the case will be referred to the court and it will be considered anew. The penalty that results from this reconsideration may not be heavier than the one in the original court order.[232]

The exceptional legal remedy of *cassation* can also be commenced against a final order. This remedy is only open to the Procurator-General at the *Hoge Raad*. The Procurator General brings the case before the *Hoge Raad* and formulates the point of law in respect of which a *Hoge Raad* decision is requested. The *Hoge Raad* can dismiss the appeal or quash the contested ruling 'in the interest of the law'. This gives expression to the fact that the *Hoge Raad's* decision will have no consequences as regards the finality or the execution of the decision. The convicted person can derive no rights from the quashing of the conviction in these proceedings.[233] If the (further) execution of the sentence following the quashing appears unjust in the interest of the law, it is possible to grant a pardon.

A cassation in the interest of the law is rarely used, which explains why in this procedure the *Hoge Raad's* rulings are of great importance for practice or for the unity of law.[234]

10. Special forms of procedure

In the practice of criminal justice, the procedural model in the Code of Criminal Procedure is employed flexibly. The model makes it possible to try simple cases efficiently while the more complex cases can be concluded taking account of the criminal procedure guarantees that correspond to the seriousness of the offences and the parties' positions during the proceedings. Because of this flexibility there is no need for provisions for exceptional procedures in the Dutch criminal practice to speed up and simplify the conclusion of many common simple criminal offences. Nevertheless, the Code includes two exceptional procedures connected to the monopoly over prosecution and the principle of opportunity. The objection by interested parties against a failure to prosecute an offence and the notice of objection against a summons must be considered guarantees controlling the powers of prosecution of the public prosecutor's office. Furthermore, the Code provides for special procedures in connection with the withdrawal of a wrongfully obtained advantage.

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[232] On review: *Strijards*, Revisie. Inbreuken en executiegeschillen betreffende het strafgewijsde; *Kempen van*, Heropening van procedures na veroordelingen door het EHRM, Over redres van schendingen van het EVRM in afgesloten strafzaken als ook in afgesloten civiele en bestuurszaken.

[233] See Art. 456 Sv and Art. 78 RO.

[234] On this: *Hartog Jager den*, Cassatie in het belang der wet. Een buitengewoon rechtsmiddel.

10.1 Articles 12 et seq Sv: the appeal against a failure to prosecute a criminal offence

The principle of opportunity makes it possible for a criminal offence not to be prosecuted even though a verdict of guilty from the judge appears likely. By way of compensation for the fact that an injured party has no opportunity to commence criminal proceedings (public prosecutor's monopoly to prosecute), the person directly involved can lodge an appeal with the court against the decision of the public prosecutor's office not to prosecute the criminal offence. The notion of 'non-prosecution' must be interpreted broadly. It not only includes situations where a public prosecutor decides against bringing a charge in relation to a criminal offence that has come to his attention before the court, but also situations where the police refrain from performing investigations to clear up a suspicion that is raised. The appeal is not only open in circumstances where there is no prosecution at all, but also in circumstances where the legal action of the public prosecutor office is limited to a minor offence, even though it appears that proceedings for a more serious form are possible.[235]

The notion of a person 'directly concerned' not only refers to the injured party or the victim, but also to a legal person that according to its objectives and actual activities, promotes an interest that would be directly concerned by the decision not to prosecute. This includes, for example, an animal protection society who appeals against non-prosecution of a case of cruelty to animals.

Because of the appeal, the court must consider whether prosecution of the criminal offence is appropriate. This means, among other things, that the Court renders an interim judgment not only on the feasibility of the criminal proceedings, but also over the opportunity therefore. In the latter case, the Court must ensure that the public prosecutor has good policy grounds to prosecute.[236]

The appeal procedure under Arts. 12 et seq Sv meets an existing practical need. Thus, from 2002 to 2004, 1,500, 1,600 and 1,800 complaints respectively were filed with the courts.[237] It should be noted, however, that only a fraction of these complaints was declared to be well-founded.

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[235] See: HR 25 June 1996, NJ 1996, 714, comments Sch; in this case, it was an issue of the public prosecutor seeking to prosecute the perpetrator of a fatal road accident for (in short) death by negligence, while the next of kin thought the charge should have been intentional deprivation of life.

[236] For more on this objection procedure: *Corstens*, Strafprocesrecht, pp. 518–528; *Melai/Groenhuijsen*, Het wetboek van strafvordering, note to Arts. 12–12l.

[237] Public prosecutor, Annual Report 2004, p. 23.

10.2 The notice of objection against the summons

As discussed above (section 3.2), the Code of Criminal Procedure has no procedure to enable the judge, after the conclusion of the preliminary inquiry, to verify whether there is sufficient evidence against the suspect to justify initiating a public trial. The decision to take the case to trial is reserved for the public prosecutor. However, if the accused believes that he is being prosecuted on unfair grounds, he can lodge an appeal with the court (Arts. 250–252 and 262 Sv). The result is that the case for the time being will not be heard in a public trial, rather the court will consider the grounds for prosecution *in camera*. This judicial review is limited to the viability of the prosecution; the judge may not give an opinion on the opportunity to prosecute. The assessment of the viability of the prosecution is summary in nature with respect to both the factual and the legal issues.[238] The court does not have the task of investigating whether a conviction is probable, but rather only of pronouncing a negative ruling: a trial then is only inadmissible if it is highly improbable that the judge will later convict the accused. Only under these conditions will there be no public trial and the accused discharged (Art. 250(4) Sv).[239]

Although the notice of objection against the proceedings must in theory be considered as an essential guarantee for the accused, in practice the significance of the notice of objection procedure is negligible. In fact, the procedure is seldom used, so seldom even that there are no legal statistics on it.[240]

10.3 Withdrawal of advantage

Against the background of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Strasburg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, provisions have been added to the Code of Procedure which contemplate improving the application of confiscation of proceeds of criminal offences. It affects the regulation of the so-called 'criminal financial investigation' (Arts. 126–126f Sv) and of the withdrawal procedure (Arts. 511b–511i).

The criminal financial investigation must be considered a part of the preliminary inquiry. The purpose of the financial investigation is to establish how much profit the accused obtained in the commission of the criminal offences and what sums are

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[238] HR 29 September 1951, NJ 1952, 58; HR 30 September 1987, NJ 1987, 486, comments Corstens.

[239] See on this procedure: *Valkenburg*, Het bezwaarschrift tegen de dagvaarding.

[240] For this reason, it has been proposed that the notice of objection procedure be abolished; see: *Neut van der/Simmelink*, Requiem voor het bezwaarschrift tegen de dagvaarding?!, in: 't Hart et al. (eds.), Strafrecht in balans, pp. 135–174; *Groenhuijsen/Knigge* (eds.), Afronding en verantwoording, pp. 221–222.

available to be recovered through a court-imposed confiscation order. The public prosecutor leads the financial investigation. To open this investigation, the public prosecutor obtains leave from the *rechter-commissaris*. Criminal investigators are granted the authority to carry out the investigation to gather information and collect data regarding the accused's financial position (Art 126a Sv). During the financial investigation, the public prosecutor has the general power to confiscate assets which can be recovered through a confiscation order. Furthermore, the public prosecutor can apply to the *rechter-commissaris* for the authority to exercise certain investigatory powers, such as search or the examination of witnesses, for the purpose of the financial investigation (Art. 126b Sv).

The criminal financial investigation is of course connected with the preliminary inquiry as regards the criminal offence, yet from the legal perspective these procedures are distinct. Even though the preliminary inquiry into the criminal offence may have been concluded and the case brought to trial, the financial preliminary inquiry can continue for up to two years after the judgment has been pronounced in the first instance. The reasoning behind separating the conclusion of the criminal case and the execution of the financial investigation is found in the time that is involved in unravelling laundering structures in international and organised crime and in the corresponding need for international criminal cooperation.

As a departure from the primary rule that the criminal court must decide all matters relating to the criminal offence (the principle of concentration, see section 3.10 above), the imposition of a sanction aimed at the confiscation of the proceeds of crime (Art. 36e Sr) does not form part of the criminal proceedings.[241] For imposing this sanction, it is only possible to proceed using the withdrawal procedure provided under Arts. 511b et seq Sv. The condition for this procedure is that the accused is found guilty of a criminal offence. In addition to this conviction, the public prosecutor can, up to two years after the court sentencing order, apply for an order from the court that will proceed to confiscate the proceeds of crime. Based on this demand, a public trial will take place corresponding with the procedure for trials of criminal offences. After this trial, the court will pronounce an order that is confined to the issue of the confiscation of the proceeds of crime. The accused and the public prosecutor may file a further appeal or cassation appeal against this judgment.[242]

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[241] See on the Dutch regulation on confiscation of proceeds of crime: *Borgers*, De ontnemingsmaatregel.

[242] See on special procedures related to withdrawal of wrongly obtained advantage: *Groenhuijsen* et al. (eds.), Ontneming van voordeel in het strafrecht, pp. 69–112 and 155–193; *Keulen*, Crimineel vermogen en strafrecht, pp. 199–319.

11. Consensual disposal

11.1 Out-of-court settlement and provisional dismissal

Under Dutch law, the public prosecutor and the police have broad powers to settle criminal offences extra-judicially. These possibilities only apply when the accused cooperates. If the accused refuses to cooperate in an extra-judicial settlement, then the court can impose only criminal sanctions.[243] The best practical instrument for extra-judicial settlement is the out-of-court settlement. This is governed not by provisions in the Code of Criminal Procedure, but rather by provisions in the Criminal Code (Arts. 74–74c Sr). The out-of-court settlement implies that the public prosecutor can impose *conditions on the accused* to avoid criminal proceedings. The most common condition is payment of a sum of money of between € 2 and the maximum fine for the offence. In practice, it mostly involves standardised amounts that are related to the characterisation of the offence and are established in directives from the *College van Procureurs-generaal* (the council of procurators-general).[244] Furthermore, as a condition, the accused can be required to give up certain seized objects or surrender these objects, the proceeds of crime can be transferred to the state, the injured party can be indemnified for the damage suffered, unpaid work can be performed or an educational plan followed. If the accused fulfils the conditions set, the right to prosecute lapses.[245]

The power to use out-of-court settlements to deal with crimes is *limited*. It can only be implemented in respect of offences carrying a maximum penalty of six years imprisonment. If the possible punishment imposed by law is higher, then it is accepted that the offence is of such a serious nature that extra-judicial settlement is inappropriate. In the light of the principle of opportunity (see section 3.2 above), the six-month term is not as rigid as it appears. The public prosecutor has the jurisdiction, on drafting the indictment, to omit aggravating circumstances. This can result in an offence, although it does not appear on the face of it amenable to settlement through an out-of-court settlement, falling within the six-year limit. An example is shoplifting whereby the shoplifter who, when caught in the act of committing the offence, pushes shop staff to escape. According to the normal legal classification, this offence must be qualified as 'robbery' (theft with force or violence), for which the maximum prison term is nine years (Art. 312 Sr). If the force or violence is omitted as an aggravating circumstance when applying the principle of opportunity, then the simple theft, with a maximum penalty of a four-year prison

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[243] The principle that punishments can only be imposed by the judge is also called the obligation to pursue legal proceedings.

[244] These directives are published on www.openbaarministerie.nl.

[245] This effect explains the regulation on the out-of-court settlement in the Criminal Code: the out-of-court settlement is designed as a condition for prosecution.

term, can be considered for extra-judicial settlement. For criminal offences that are regarded as 'misdemeanours', an out-of-court settlement is possible.

The authority to settle out of court for misdemeanours and simple crimes can also be used by appointed police officers. This is possible only in cases punishable by a monetary penalty, which is set at a maximum amount of € 350 for simple crimes (Art. 74c Sr). The Out-of-Court Settlement Decree 1994 (*Transactiebesluit*, Stb 1994 390) provides an exhaustive list of offences for which an out-of-court settlement by the *police* is allowed. The money rates the police are authorised to impose for criminal offences are established by the public prosecution office and laid out in directives. The police may not deviate from these amounts without the consent of the public prosecutor.[246]

In addition to the out-of-court settlement, the Code of Criminal Procedure provides for the possibility of the public prosecutor dealing with criminal offences extra-judicially using a *conditional dismissal*. This means of settlement is regulated only very summarily. The law confines itself to indicating that the public prosecutor can delay the ruling regarding the criminal trial for a fixed period and as long as conditions are imposed on the accused (Arts. 167 and 244 Sv). The law specifies neither the criminal offences for which a provisional dismissal is available nor which conditions can be imposed. According to the literature, the public prosecutor can impose on the accused the same conditions with the provisional dismissal as are possible with a provisional punishment on conviction pronounced by a judge.[247]

In the Dutch criminal procedure a substantial part of the criminal offences that come to the attention of the police and the public prosecutor can be dealt with extra-judicially. Thus, in 2004, the criminal court tried 146,400 criminal offences and the public prosecutor handled 124,100 offences. In 82,700 cases, the public prosecutor made an out-of-court settlement or offered a provisional dismissal.[248] From these numbers alone it can be derived that the extra-judicial settlement is essential for the functioning of the criminal justice system.

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[246] On out-of-court settlements see: *Noyon/Langemeijer/Remmelink*, Het wetboek van strafrecht, the notes to Art. 74–74c; *Osinga*, Transactie in strafzaken; *Biggelaar van den*, De buitengerechtelijke afdoening van strafbare feiten door het openbaar ministerie.

[247] These conditions are summarised under Art. 14c Sr: indemnity for the criminal offence, admission into a care facility, deposit of bail, payment of a sum of money to the criminal injuries compensation fund, or other conditions regarding the conduct of the convicted person. This last open category includes, for example, an order restraining contact, an order restraining hooligans from going to a stadiums, an order restraining a person from going to a certain part of a city or imposing an obligation to undergo therapeutic treatment. See: *Reijntjes*, Art. 167, note 17 and *Doelder de*, Art. 244, note 18, both in: Melai/Groenhuijsen, Het wetboek van strafvordering.

[248] Public prosecutor, Annual Report 2004, pp. 22–23.

11.2 Settlement by the public prosecution office

At the time of writing this contribution, Parliament was discussing an amendment to the law under which the regulation of the extra-judicial settlement of criminal offences could be re-organised.[249] The very essence of this proposal is that the two principles on which current extra-judicial settlements are based, voluntary co-operation of the accused and the obligation to pursue legal proceedings, are abandoned. Instead, the public prosecutor would have an autonomous authority to impose penalties and measures for offences carrying a prison term of a maximum of six years and misdemeanours that carry alternative sentences. The sanctions which could be imposed by the public prosecutor are community service, fines, removal of goods, measures for damages and disqualification from driving.[250] In addition to imposing these penalties, the public prosecutor's office could give the accused instructions by which he must abide. These instructions are comparable to the conditions that the current regulation provides for out-of-court settlements and provisional dismissal.[251]

From the authority of the public prosecutor's office to punish it is possible to imply an authority on the part of police officials and other public services to impose sanctions for criminal offences. The authority for police officials is limited to misdemeanours and minor offences for which a maximum penalty is a fine of € 350. Other public services can impose sanctions in cases of alternative sentencing for infringement of regulations with respect to which they have a supervisory role. The imposition of penalties by police officials and other public services will be further regulated in a general administrative measure. Additionally, the sanctions to be imposed for concrete offences will be set out in guidelines issued by the public prosecutor.

An important distinction between the out-of-court settlement and the provisional dismissal on the one hand and the new settlement regulation of the public prosecutor's office, is the fact that the alternative sentence can be executed independently. After delivering or dispatching the alternative sentence to the accused, an appeal may be lodged within 14 days (Art. 257e Sv). The public prosecutor must consequently bring the case to the attention of the court. Thereafter, a court hearing will take place following the rules that would apply if the public prosecutor were to have brought the case to court immediately by summons. The court then has the

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[249] *Kamerstukken II* 2004–2005, 29 849, proposal for a law for completion of cases by the public prosecutor.

[250] The public prosecutor's office is not authorised to impose punishments that deprive a person of liberty; there are constitutional objections to this (see Art. 113(3) of the Constitution).

[251] This includes: surrendering objects that were seized, delivering up objects, repaying the proceeds of crime, paying a sum of money into a fund for victims of criminal offences, and directions as regards the behaviour of the accused.

task of investigating the case fully, without being limited by the public prosecutor's alternative sentence (Art. 257f Sv). Appeal and cassation appeal again lie against the court's decision.

If the accused does not appeal the alternative sentence, it becomes final and subject to execution (Art. 257g Sv). If it relates to a fine, then the public prosecutor is authorised, if the accused fails to pay, to obtain a statement of the accused's property and income status. In addition, it is possible to commit the accused to prison to enforce payment,. This detention is only allowed once the power has been vested in the court and the duration of the detention can be a maximum of one week (Art. 578b Sv).

Other possible sanctions that the public prosecutor's office can impose and instructions that it can give presume that the accused will cooperate. These include community service orders or therapeutic treatment orders. To guarantee such cooperation, it is laid down that similar sanctions and directions are imposed only if the accused is given an opportunity to be heard on this issue and if he has promised to fulfil them (Art. 257c Sv). If it subsequently appears that the accused has not (fully) satisfied the community service or has not fully acted on the directions, then he can still be summonsed to appear in court for the criminal offence. The judge is not bound by the earlier alternative sentence in rendering his decision, with the understanding that the judge in his ruling must take account of the part of the alternative sentence the accused did satisfy. If the accused has, by contrast, fully performed the alternative sentence, the public prosecutor's right to prosecute lapses and the accused cannot be tried again for the same offence (Art. 255a Sv).

Although the public prosecutor's settlement must replace the out-of-court settlement and the provisional dismissal, the various instruments and the public prosecutor's settlement will, after the law comes into force, continue to be available for a while. The reasons for this are connected with the fact that the public prosecutor and the police must adapt to the new system and also relate to the uncertainty over the practical effects of the regulation on the workload of the public prosecutor's office and the judge.

11.3 Joinder of charges ad informandum

Although not entirely extra-judicial, a practice that is certainly *extra-legal* has developed in connection with the settlement of criminal offences by the judge under the heading of 'joinder of charges *ad informandum*' *(voeging ad informandum)*. This practice is applied, in particular, in cases where an accused has committed a series of criminal offences, for which the public prosecutor's office has not found it necessary, bearing in mind the likely punishment, to specify all the offences in the summons. The public prosecutor will then limit himself to the statement of a selec-

tion of the criminal offences. The remaining offences will not be the subject of independent prosecution; they will rather be brought to the attention of the judge through joinder of charges in the record of penalties. The aim is for the court to take into consideration not only the criminal offences for which the accused is being prosecuted and sentenced when deciding the penalty, but also of the other offences committed by the accused and brought to the court's attention. The *Hoge Raad* has accepted this practice in its case law and has attached various conditions to it. The joinder of criminal offences for the attention for the judge is only allowed if the public prosecutor agrees not to commence independent criminal proceedings with respect to the other offences. The result of this undertaking is that the accused may no longer be faced with criminal proceedings for the offences concerned.[252] Furthermore, there can be no debate over evidence of the offences concerned; this is demonstrated by an acknowledgment by the accused of the facts. Likewise, the accused must accept the joinder. Finally, the judge must also agree with this manner of taking criminal offences into consideration. Within the limits of the maximum penalty available for the offences in the summons and established by the judge, the joinder acts *ad informandum* as an aggravating circumstance.[253]

The practice of joinder *ad informandum* has been adopted to limit the workload of the public prosecutor and the judge. The effect of the possibility of joinder is that the criminal proceedings can be limited to the criminal offences that are considered most important in assessing the accused's punishment. At the same time, the joinder *ad informandum* is seen as an instrument by which criminal trials can be definitively concluded; the facts are put before the judge and weighed by him when making a ruling regarding the accused. The joinder *ad informandum* is often applied in practice. In addition to the number of criminal offences brought before the court for trial in 2004 (146,400), 14,200 offences *ad informandum* were brought to the court's attention.[254]

12. Proposals for reform

Since the Code of Criminal Procedure came into effect in 1926, many amendments have been adopted. In particular, over the last 25 years, a vast and poorly organised body of amendments has been introduced into the Code. Since there is

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[252] This effect flows from the principle of trust: the public prosecutor is bound to carry out his undertaking.

[253] On this practice: *Franken*, Voeging ad informandum in strafzaken.

[254] Public prosecutor, Annual Report 2004, p. 22. The joinder *ad informandum* is applied mostly in cases in which an accused is summonsed before a full court of the district court. In the light of this, the Annual Report makes the interest of the joinder clearer. In 2004, 16,700 offences were submitted to court by summons, with 14,200 facts *ad informandum* joined.

no underlying fundamental plan or coherent guiding principles for the majority of these amendments, the consequence is that the Code is suffering from a lack of structure and system. As a result the government has proposed the drawing up of an *entirely new Code* and a decision has been taken to revise parts of the criminal procedure. In a letter from the Minister of Justice to the Lower Chamber, plans have outlined for a legislative programme in the field of the law of criminal procedure, to give effect to the proposed revision.[255] The lack of an underlying fundamental plan or guiding principles does not alter the fact that the aggregate of the existing and planned amendments that have taken place can be connected to a few trends that underpin the developments. These are not typical Dutch phenomena, but can be explained by the broader European criminal developments. In particular:

- the increase in powers to investigate and to prosecute terrorist crimes;
- the review of the preliminary inquiry;
- the review of the position of the victim;
- the destandardisation and acceleration of proceedings.

12.1 Investigating and prosecuting terrorist crimes

Against the background of the EU-Framework Decision on combating terrorism, the Criminal Code has been amended with respect to terrorist crimes. Included in this are two bills being considered in Parliament by which special provisions will be added to the Code of Criminal Procedure that are particularly important for investigating and prosecuting terrorist crimes. It relates to powers for the purpose of the investigation and control of screened hearings of witnesses by the *rechtercommissaris* during the preliminary judicial inquiry.

From the bill regarding broadening the powers to investigate in the area of terrorist crimes, a few essential points deserve to be mentioned here.[256] First, the bill makes it possible for persons suspected of terrorist crimes to be placed in preventive custody without the requirement for the public prosecutor to bring the case to trial at the latest by the end of the maximum period for the detention (90 days). Instead, this period is extended to a maximum of two years. With this change, it will be possible to conceal from the suspect the full results of the preliminary inquiry, since he has a right to full inspection of the court records only once he has been summonsed to trial. Furthermore, the grounds for applying the authority to investigate have been extended. Generally, a suspicion within the meaning of Art. 132a Sv is required, and the investigation of terrorist crimes can already take

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[255] *Kamerstukken II* 2003–2004, 29 271, nr. 1, Algemeen kader herziening Wetboek van Strafvordering.

[256] *Kamerstukken II* 2004–2005, 30 164.

place where there are 'indications of a terrorist crime'. Finally, an extensive array of powers is introduced into the Code that can be used when these 'indications' exist. These powers may be compared with the special investigative powers and powers to request information discussed earlier under 5.1.4.5 and 7. In addition, the public prosecutor is granted the authority to decide that in a specific indicated area, criminal investigators may inspect objects and means of transportation, and people's clothing.

The draft law on screened hearings of witnesses by the *rechter-commissaris* is intended for investigating the reliability of information from the General Intelligence and Security Services (*Algemene Inlichtingen- en Veiligheidsdienst* or AIVD).[257] This information can be used as evidence provided that the judge and the defence are presented with sufficient opportunity to investigate the reliability of the information. According to the current legislation, it cannot be adequately guaranteed that the sources of the AIVD information will not be made public. To address this shortcoming, the bill makes it possible for the *rechter-commissaris* to question any witnesses on the origin and reliability of this information without the presence of the public prosecutor and the defence. The identity of the witness is thus protected and it is possible to test whether the content of the witness's statement, from a standpoint of protection of state security, can be placed in the record. A questionable part of this bill is the provision by which the decision to admit the witness's statement into the records does not fall to the *rechter-commissaris*, but rather is reserved to the witness. This conflicts with the obligation of the *rechter-commissaris* to conduct independent investigations into the material truth and to issue a report.

12.2 Review of the preliminary inquiry

In the letter mentioned above, *Algemeen kader herziening Wetboek van Strafvordering* (General review framework of the Code of Criminal Procedure), the Minister of Justice announced that the regulation on the preliminary inquiry will undergo a general review. This review will be implemented in several individual bills, and will include the bills that were drafted in the context of the *Strafvordering 2001* research project.[258] A main theme in the anticipated bills is the adaptation of the Code's structure, which is connected with making the criminal investigation independent and the diminished significance of the preliminary judicial inquiry. The aim is to implement a modern system for the regulation of the preliminary inquiry. Important points of interest here are the position of the suspect in the preliminary inquiry and the position of the victim in the law of criminal procedure.

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[257] *Kamerstukken II* 2004–2005, 29 743.

[258] *Groenhuijsen/Knigge* (eds.), Het vooronderzoek in strafzaken; *idem*, Dwangmiddelen en rechtsmiddelen.

12.3 The position of the victim

The current legal position of the victims of offences within criminal proceedings has already been discussed in section 7.2. The Code of Criminal Procedure in 1992 had already been the subject of a fundamental review with a view to a more systematic recognition of the interests that are at stake for the victims in the criminal case. Likewise, since the 1980s quite a few policy rules (*aanwijzingen* or instructions) have been introduced to protect the legitimate interests of victims during the preliminary inquiry in criminal cases.

In 2000, an extensive comparative law study was published, from which it emerged that the Dutch system of law could be called reasonably advanced, based on the criteria of sources of international law in which minimum rights for victims were established.[259] Soon thereafter, a EU framework decision on this matter was passed, in which rules binding on Member States are taken up with respect to the legal position of victims in the law of criminal procedure.[260] In the report on the implementation of the Framework Decision, the Dutch government concluded that Dutch law already generally satisfied the Framework Decision. However, the European Commission appeared to think otherwise. In a robust evaluation report of 16 February 2004, it was held that none of the Member States – including the Netherlands – had properly implemented the obligations in the Framework Decision. Although the Dutch government did not share this negative assessment, in June 2005 it introduced a bill to further strengthen the position of the victim in criminal proceedings.[261]

The most *important change* that this bill introduces is that for the first time a separate title will be dedicated to 'the victim'.[262] Until now, in the Code of Criminal Procedure, the victim was only recognised if he also took on another capacity, such as informant, witness or injured party. This has now changed, and the Code has thus now been brought in conformity with the basic principles of the EU Framework Decision.

As regards content, it is striking that, for the first time, the new provisions offer a *legal definition* of the notion of 'victim'. As such, the victim is considered 'the one who, as a direct result of a criminal offence, has experienced loss of property or

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259 *Brienen/Hoegen*, Victims of Crime in 22 European Criminal Justice Systems. The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure.

260 Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (2001/220/JHA).

261 *Kamerstukken* 30 143.

262 This concerns Title IIIA in the first book (Arts. 51a–51h Sv).

other harm or injury'.[263] The victim is then afforded a series of procedural rights. He has a *right* to be notified of the commencement and continuation of the case against the accused, of course including the content of the decision to prosecute and the time and place of the trial. Moreover, he shall 'in cases indicated' be informed of the release of the accused or convicted offender. The victim is *authorised* to inspect court records that concern him (Art. 51b Sv).[264] The victim may have *assistance*, he may have legal *representation* at trial and he has the right to an interpreter (Art. 51c Sv). The victim has the right to be heard at trial, a notion that has been preserved from the existing law (Art. 51e Sv), and the right as injured party to make a claim for compensation for damages (Arts. 51f–51g Sv).

Two details from the bill deserve particular attention. First, the proposed Art. 51h Sv provides that by means of administrative measures, further regulations can be made with respect to mediation between the accused and the victim. There is here a clear connection with Art. 10 of the EU Framework Decision, in which the Member States are called upon to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure. The second detail can be considered as flowing from Art. 2 of the Framework Decision. This article requires, among other things, that 'Member States shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings …'. On the one hand, treating the dignity of the individual with respect is at the basis of almost all other procedural rights of the victims. On the other, it is, therefore, very disappointing that the European Commission, in its February 2004 evaluation report, should have noted that, in the sensitive domain of Art. 2 alone, none of the Member States had fully 'transposed' the commitments. Against this background, it can be seen as an important step that the Dutch legislator now proposes the following *new provisions in criminal procedure* for the draft law under consideration:

- 'The public prosecutor bears the responsibility for the proper treatment of the victim' (Art 51a(2) Sv); and
- 'The judge bears the responsibility for proper treatment of the victim or the victim's next of kin' (Art. 288a(2) Sv).

In addition to their instrumental function, these rules also have a highly symbolic role. They also indicate a certain level of ambition. The provisions underscore the fact that the fair treatment of victims goes to the core values of criminal procedure. The core values are indeed reflected in the primary tasks of the officials who are

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[263] Art. 51a(1) of the new Sv. A legal person who has suffered direct damage is considered a victim. The victim's next of kin also enjoy most victim rights (Art. 51d Sv; Art. 51e(2) Sv).

[264] Of course there are exceptions (e.g., in connection with the private life of the accused), with a regulation for appeal for situations in which the victim disagrees with the public prosecutor's decision to withhold inspection.

responsible for the operation of the system. However precarious the ideal objectives of each system of criminal procedure may also perforce be, in each case, it is firmly established that treatment of victims based on understanding and respect contributes to the ideal of civilisation that forms a part of the basic aims of the Dutch law of criminal procedure.

12.4 Streamlining appeal to a higher court

By way of conclusion to this – inevitably incomplete – sketch of the current proposed reform, we will return to the field of remedies at law. In section 5.4.2 above, an outline of the most important remedy at law was described, the appeal to a higher court. It is now opportune to consider the proposals that were made in the *Strafvordering 2001* research project regarding desirable changes to the current law in this field.[265] This is the case because the regulation of appeal to a higher court reflects one of the most critical features of a system of legal procedure. In the situation in the Netherlands, the research group argues for a strengthening of the *inter partes* nature of the proceedings. The criminal procedure should be more responsive, which means that it must examine more expressly the statements and deliberations of the parties to the proceedings. This is in line, for example, with the basic principle that the conduct of the case should be as much as possible focused on the issues on which the parties involved differ. In concrete terms, for example, if the accused denies the allegation, then the proceedings will concern principally the issue of whether he is guilty. However, if the accused confesses, the focus of the case is entirely different: the judicial investigation and decision are principally focused on the issue of the sanction to be imposed on the offender.

A central point according to the research group is that this *structure* must also be *strengthened* and the *appeal phase* must be emphasised. The intention is that after the first instance order, there is further litigation with an even more concentrated focus. An appeal to a higher court is mostly concerned with the parts of the contested order to which the appellant objects. All elements to which no objections were made must in principle be considered established. Considered in this way, the appeal proceedings are interpreted as a kind of funnel. The *objectum litis* (the object of dispute) is gradually intensified over the course of the proceedings. If a party still wishes to have issues reconsidered, he will have a hearing only if he can provide good reasons for why such a request was not made earlier in the proceedings.

From these general basic principles, there are *three themes* on which proposals have been made to adapt the current rules of appeal.

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[265] See: *Groenhuijsen/Knigge* (eds.), Dwangmiddelen en rechtsmiddelen, pp. 329–436.

First, in relation to the definition or delineation of the remaining dispute at appeal:, the research group wishes to emphasise three instruments. It is of interest to obtain a view as quickly as possible of the procedural position of the defence and the public prosecutor in the stage after the decision at first instance. To begin, for this purpose, greater importance should be given to Art. 410 Sv concerning the objections of the appellant. This article should no longer have an informal legal status, but should be made equal in importance to the defences advanced at trial. The appeal judge should thus be obliged systematically to answer the objections that are advanced in this article in his judgment or ruling. The same should apply to the objections that, under Art. 416 Sv, can be advanced immediately following the beginning of the appeal hearing. This provision should also be declared applicable to the public prosecutor, so that the judge should then be aware on what issues the parties disagree. The third measure to encourage a rapid clarification of the issues is to make it possible to allow for a scheduling hearing at appeal too (see section 5.3 above).

A second issue relates to the release of witnesses who may be needed during the appeal hearing. According to applicable law, the criterion laid out under Art. 288 Sv is applied. The appeals judge must consider whether or not a failure to call a particular witness would prejudice the position of the public prosecutor or the accused in the appeal. According to the *Strafvordering 2001* research group, a stricter criterion should apply. Since the parties concerned had the opportunity at first instance to call witnesses, the so-called 'necessity criterion' should apply at the appeals stage: witnesses are only heard at appeal if it is necessary to reconstruct the material truth around the allegation.[266]

Thirdly, an appeal that has been systematically and comprehensively drafted, has consequences for the status of uncontested parts of the challenged decision. For example, an accused may appeal against an order with a sentence because he finds the punishment too severe. According to current law, the appeals judge will have to deliver a decision or judgment in relation to all the decisions and reasons that are required for a 'normal' criminal judgment. This means that the appeals judge must also give a reasoned and well-argued statement (possibly by reference to the judgment of the first instance), against which appeal may be had to the court of cassation. A different approach is suggested in the proposals from the *Strafvordering 2001*. The accused who opposes only the measure of punishment implicitly indicates his agreement with the charges considered proven. This part then is not considered at appeal. The appeals judge may thus also provide only decisions and reasons about the imposed punishment in his judgment. There is then nothing further said about the matter of the charges considered proven (and the means of proof used). On a practical level, this means that the decision of the first judge on these issues has become inviolable. It is no longer possible in the court of cassation to

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266 See for valid law: the distinctions surrounding the necessity criterion under Art. 418 Sv.

appeal the judgment of the first judge, and therefore, the decision of the appeals judge contains – correctly – nothing on this point, so that nothing can be raised at the *Hoge Raad*. On balance, the construction chosen comes fairly close to the creation of a partial appeal. The difference remains, nonetheless, that the appeals judge retains the authority to extend *ex officio* the investigation to issues other than those against which there is an appeal if he *prima facie* believes that substantial errors were made that would have resulted in a different outcome.

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