

The Netherlands: The Protection of Fundamental Human Rights In Criminal Process¹

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1. INTRODUCTION

The Kingdom of the Netherlands currently consists of three countries: The Netherlands³ (Europe), The Netherlands Antilles (five Caribbean islands)⁴ and Aruba (a Caribbean island). The basis of the Kingdom of the Netherlands is the Charter for the Kingdom of the Netherlands (*het Statuut*) of 28 October 1954.⁵ In 1954 Aruba was part of The Netherlands Antilles, but it became independent of the other islands on 1 January 1986. In principle, The Netherlands, The Netherlands Antilles and Aruba are fully autonomous in their internal affairs. The emphasis of this contribution is The Netherlands.

The Netherlands is governed by the rule of law. International human rights treaties play an important role in that regard. As regards criminal procedure, the European Convention on Human Rights and Fundamental Freedoms (ECHR) is of especially great significance. The right to liberty (Article 5 ECHR), the right to a fair trial (Article 6 ECHR), and the right to privacy (Article 8 ECHR) are most frequently invoked by the defence in criminal proceedings, and exert a daily influence on criminal justice process. Nevertheless, increasingly international human rights provisions seem to be fulfilled in Dutch criminal procedure more minimally than they used to be. It would seem, therefore, that one can detect a development from an extensive realization of fundamental rights to an often merely sufficient fulfilment. This relates to suspects; the protection of victims' fundamental rights has expanded greatly.

In order to secure a reasonable perception of the way both international and regional fundamental rights instruments are implemented in the Dutch criminal procedure system, a description will be given first of which instruments are relevant to The Netherlands and

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³ Although formally and principally incorrect, The Netherlands is often referred to as Holland. North and South Holland in the western part of the Netherlands are only two of the twelve provinces within The Netherlands.

⁴ The governments of The Netherlands and of the Islands have plans to restructure the Kingdom of The Netherlands. These plans entail that two of the five islands of The Netherlands Antilles, Curaçao and Sint-Maarten, would become countries of their own within The Kingdom, while the other three islands would become a direct part of The Netherlands as special municipalities.

⁵ Entry into force: 29 December 1954 (*Stb.* 1954, 596). Most recently amended 7 September 1998 (*Stb.* 1998, 579). (*Stb.* = *Staatsblad*, the official Bulletin of Acts).

their legal position in the Dutch legal order, after which the organisation of criminal justice and the system of criminal procedure law is explained. Subsequently the position of human rights in Dutch criminal procedure is elaborated. Finally, I discuss the most important changes within criminal procedure that might effect the realization of human rights.

2. THE APPLICABILITY OF INTERNATIONAL LAW TO DUTCH CRIMINAL PROCEDURE

A. The Status of International Law in the Dutch Legal Order

With regard to international law, a monistic system applies: all international law – both written and unwritten – that is in force for the Kingdom of the Netherlands is a part of the domestic legal order. No transformation via a national order of the international norm into national law is needed. Moreover, Article 93 of the Constitution specifies that “Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.” In addition, Article 94 establishes that “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.” So international and regional human rights and humanitarian law treaties have power over national law (even over statutes and the Constitution), and the provisions in those treaties can be invoked by individuals and must be applied in court if and only if they are “binding on all persons”.

This is of specific importance in relation to human rights: while the courts are still not authorized to review Acts of Parliament against fundamental rights laid down in the Constitution (*toetsingsverbod*; Article 120 of the Constitution),⁶ they are actually obliged to do so against fundamental rights in treaties insofar as provisions are concerned that are binding on all persons. Thus in that case the courts have a duty to apply these international human rights provisions *ex officio*. Whether treaty provisions meet this requirement is decided on a case-by-case basis. Provisions are usually considered to have such general binding power if they can be applied directly, that is without the need to regulate in further

⁶ A Bill is presently under discussion in parliament that would lift the review prohibition for specific constitutional fundamental rights; see *infra* sub 5.A).

detail.⁷ Most human rights embodied in legally binding treaties that are relevant to criminal procedure – usually civil rights – are regarded as having this kind of binding power. Articles 93 and 94 of the Constitution do not, however, apply to provisions in such soft law instruments as the Universal Declaration of Human Rights (1948).

The Kingdom of the Netherlands is party to most of the important international and European human rights treaties and endorses many soft law codifications of human rights, such as declarations, sets of rules and principles, and codes of conduct. Here I shall in principle only mention those (international and regional) instruments that are expressly relevant to criminal procedure – *i.e.*, the pre-trial stage of criminal investigation, prosecution, and the trial proceedings in court – within the Kingdom; the same applies to possible reservations to the instruments.⁸

B. International Human Rights Instruments

Being one of the 51 founding members of the United Nations, the Kingdom of the Netherlands joined the organisation on 10 December 1945. This was precisely three years before the adoption by the UN General Assembly of the Universal Declaration of Human Rights (UDHR, 1948). The Dutch Government recognizes that this declaration – to which one cannot of course become a party – applies at all times, anywhere in the world.⁹ The Kingdom is furthermore a party to eight of the so-called nine core international human rights treaties, most of which are mentioned below.¹⁰

The International Covenant on Civil and Political Rights (ICCPR, 1966) and the covenant's Optional Protocol on an individual complaints procedure (ICCPR OP-I, 1966) were signed on 25 June 1969,¹¹ while on 9 August 1990 The Kingdom of the Netherlands became a party to the Second Optional Protocol on the abolition of the death penalty (ICCPR OP-II, 1989).¹² Several reservations are made in respect of the ICCPR. The Kingdom of the Netherlands does not consider itself bound by the obligations on the treatment of prisoners

⁷ See Karel Kraan, The Kingdom of the Netherlands, in: Lucas Prakke & Constantijn Kortmann (eds.), *Constitutional Law of 15 EU Member States*, Deventer: Kluwer, 2004, p. 627.

⁸ All the instruments mentioned in this contribution are contained in P.H.P.H.M.C. van Kempen (ed.), *International and Regional Human Rights Documents*, Nijmegen, Wolf Legal Publishers 2008. See the Treaty Database on <<http://www.minbuza.nl/verdragen/en/home>> (in English) for a complete overview of human rights instruments to which the Kingdom of the Netherlands is a party, of dates of signature, ratification and entry into force, and reservations, declarations and objections; see also <<http://sim.law.uu.nl>>

⁹ See the governments' recent Human Rights Strategy for Foreign Policy: "Mensenrechtenstrategie voor het buitenland beleid", in: *Kamerstukken II*, 2007-2008, 31 263, nr. 1, and nr. 17, p. 4. (*Kamerstukken* = parliamentary documents; *II* = Second Chamber).

¹⁰ See the list on <<http://www2.ohchr.org/english/law/index.htm>>.

¹¹ Entry into force: 11 March 1979 for The Netherlands and The Netherlands Antilles, and 1 January 1986 for Aruba.

¹² Entry into force: 11 July 1991 for the whole of The Kingdom.

set out in Article 10 § 2 and § 3 (second sentence). Furthermore, on the fair trial provisions in Article 14 it reserves (as regards § 3 (d)) the statutory option of removing a person charged with a criminal offence from the courtroom in the interests of proper conduct of the proceedings, and (on § 5), the statutory power of the Supreme Court of The Netherlands (*Hoge Raad der Nederlanden*) to have sole jurisdiction to try certain categories of persons charged with serious offences committed in the discharge of a public office. And as to § 7 it accepts this provision only insofar as no obligations arise from it further to those set out in article 68 of the Criminal Code of The Netherlands (*Wetboek van Strafrecht – Sr*) and article 70 of the Criminal Code of The Netherlands Antilles, which provisions are codifications of the principle *non bis in idem* (protection against double jeopardy) (cf. *infra sub 4.F*).

The countries of the Kingdom of the Netherlands are also parties to several specific human rights and humanitarian law treaties. On 8 December 1949, the Kingdom signed all four Geneva Conventions (1949) on humanitarian law.¹³ Protocol I (1977) and Protocol II (1977)¹⁴ as well as the recent Protocol III (2005)¹⁵ followed later. No reservations were entered as to any of these conventions and protocols thereto. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965) was signed on 24 October 1966, devoid of reservations.¹⁶ The competence of the Committee for the Elimination of Racial Discrimination to receive individual complaints (see Article 14 CERD) is recognized for the whole of the Kingdom.¹⁷ As of 17 July 1980, The Kingdom became a party (without reservations) to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979),¹⁸ and it recognizes the competence of the Committee on the Elimination of Discrimination against Women to receive individual

¹³ These are entitled: Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; Geneva Convention relative to the treatment of prisoners of war; Geneva Convention relative to the protection of civilian persons in time of war. Entry into force of all four conventions: 3 February 1955 for The Netherlands and The Netherlands Antilles, and 1 January 1986 for Aruba.

¹⁴ These are respectively Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of Non-international Armed Conflicts (Protocol II). Both protocols were signed on 12 December 1977 by The Kingdom, and both entered into force on 26 December 1987 for the whole of The Kingdom.

¹⁵ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III). Signed: 14 March 2006 by the Kingdom of the Netherlands; entry into force: 13 June 2007 for the whole of The Kingdom.

¹⁶ Entry into force: 9 January 1972 for The Netherlands and The Netherlands Antilles, and 1 January 1986 for Aruba. The 1992 Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination has been accepted for The Kingdom of the Netherlands on 24 January 1995. Especially relevant to criminal procedure are Articles 5 (a) and (b) and 6 CERD.

¹⁷ See the declarations by the Kingdom of the Netherlands to the treaty.

¹⁸ Entry into force: 8 August 1991 for the whole of The Kingdom. The Kingdom of the Netherlands accepted – on 10 December 1997 – the 1995 Amendment to article 20, paragraph (1) of the Convention on the Elimination of All Forms of Discrimination Against Women. Particularly relevant to criminal procedure is Articles 15 CEDAW.

complaints under the Optional Protocol (CEDAW OP, 2000)¹⁹. Almost five years later, on 4 February 1985, the Kingdom signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984).²⁰ The competence of the Committee against Torture with regard to Inter-State Complaints (Article 21) and Individual Complaints (Article 22) is accepted.²¹ The CAT Optional Protocol (CAT OP, 2002) on the establishment of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Subcommittee on Prevention) was signed but has not been ratified at the time of writing.²² Again some five years later – on 26 January 1990 – The Kingdom became a signatory to the Convention on the Rights of the Child (CRC, 1989).²³ It is also a party to the two protocols to the convention, but these have not yet entered into force in the whole of The Kingdom.²⁴ With regard to the convention some reservations were made that are relevant to criminal procedure. On article 37 (c) CRC it is stated that the provisions therein “shall not prevent the application of adult penal law to children of sixteen years and older, provided that certain criteria laid down by law have been met.” And concerning Article 40 The Kingdom of the Netherlands made clear that “cases involving minor offences may be tried without the presence of legal assistance and that with respect to such offences the position remains that no provision is made in all cases for a review of the facts or of any measures imposed as a consequence.” On 30 March 2007 the Kingdom of the Netherlands signed the Convention on the Rights of Persons with Disabilities (CRPD, 2006), but has not yet ratified it.²⁵ It made reservations, but none of these are directly relevant to criminal procedure. Furthermore, so far the Kingdom has not subscribed to the Optional Protocol on individual complaints mechanisms (CRPD OP, 2006). The International Convention for the Protection of All Persons from Enforced Disappearance (CED, 2006) was signed 30 March 2007, too, but has not yet been ratified. Finally, none of the countries within The Kingdom of the Netherlands nor The

¹⁹ Signed: 10 December 1999; entry into force: 22 August 2002 for the whole of The Kingdom.

²⁰ Entry into force: 20 January 1989 for The Netherlands, The Netherlands Antilles, and Aruba. The 1992 Amendments to Article 17, paragraph 7, and article 18, paragraph 5, of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment were accepted for the whole of The Kingdom on 24 January 1995.

²¹ See the declarations by the Kingdom of the Netherlands to the treaty.

²² Signed: 3 June 2005. Since the CAT OP has not yet been ratified, it has not entered into force for the Kingdom of the Netherlands.

²³ Entry into force: 8 March 1995 for The Netherlands, 16 January 1998 for The Netherlands Antilles, and 17 January for Aruba. The 1995 Amendment to Article 43 (2) of the Convention on the Rights of the Child has been accepted for the whole of The Kingdom on 4 December 1996 (entry into force: 18 November 2002). Specifically relevant to criminal procedure in the CRC are Articles 3, 16, 37, and 40.

²⁴ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC OP AC, 2000), was signed on 7 September 2000, but has not been ratified and has therefore not entered into force. The other protocol, i.e. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC OP SC, 2000), was signed on 7 September 2000 too, and entered into force on 23 September 2005 for The Netherlands, and on 17 October 2006 for Aruba; it has not yet entered into force for The Netherlands Antilles.

²⁵ Particularly relevant to criminal procedure are Articles 13, 14, 15, 22, and 23 CRPD.

Kingdom as such is party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, 1990).²⁶

C. Regional European Human Rights Instruments

At the European regional level, The Netherlands (not per se The Kingdom as a whole) belongs to several organisations that concern themselves with human rights. First of all, The Kingdom of the Netherlands is a founding member of the Council of Europe (CoE), an organisation that aims to protect human rights, pluralist democracy and the rule of law. By signing the CoE Convention for the Protection of Human Rights and Fundamental Freedoms – the so-called European Convention on Human Rights (ECHR, 1950) – on 4 November 1950, The Kingdom became one of the original signatories to this treaty.²⁷ What is more, all fourteen protocols to the convention have been signed, and these have all been ratified, with the exception of the Seventh Protocol (ECHR P7, 1984). This protocol is particularly relevant to criminal procedure since it provides for, *inter alia*, rights to appeal in criminal cases, compensation for miscarriage of justice, and protection against double jeopardy (*ne bis in idem*).

With regard to appeal in criminal cases (Article 2 ECHR P7), the Dutch Government declared that “it interprets paragraph 1 of Article 2 thus that the right conferred on everyone convicted of a criminal offence to have conviction or sentence reviewed by a higher tribunal relates only to convictions or sentences given in the first instance by tribunals which, according to Netherlands law, are in charge of jurisdiction in criminal matters.” It is unclear whether The Netherlands is ever going to ratify the Seventh Protocol. The ECHR provides for an individual complaints mechanism, the acceptance of which is obligatory for all state parties (see Article 34 ECHR) since the entry into force of the Eleventh Protocol on 1 November 1998.²⁸ Another important treaty within the Council of Europe is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT, 1987), of which the Kingdom became an original signatory on 26 November 1987.²⁹ Protocol I (1993) and Protocol II (1993), both of which amend the

²⁶ See as relevant to criminal procedure especially Articles 16-19 CMW.

²⁷ Entry into force: 31 August 1954 for The Netherlands, 31 December 1955 for The Netherlands Antilles, and 1 January 1986 for Aruba.

²⁸ The right of individual petition before the European Court of Human Rights as provided for in the Ninth Protocol (which is terminated by the Eleventh Protocol) had already been recognized since 1 October 1994 for the whole of The Kingdom.

²⁹ Entry into force: 1 February 1989 for the whole of The Kingdom.

ECPT, were also signed later.³⁰ A soft law instrument that merits mention here is the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism (2002).

Furthermore, The Netherlands (not The Kingdom as a whole) is one of the original member states of what is presently known as the European Union (EU).³¹ Within the EU many instruments relevant to human rights have been adopted. One of the most important is the Charter of Fundamental Rights of the European Union (2000). Currently it is not directly legally binding on the member states and organs within the Union, but it is supposed to gain this status in the near future. This depends on whether the Treaty of Lisbon will enter into force or not.³² The Netherlands has approved this amending treaty.³³ The provisions of the Charter are addressed to the institutions and bodies of the Union and to the Member States only when they are implementing Union law. Once the Charter has legally binding status, individuals can invoke the charter rights in national criminal procedure, but only with regard to a substantive or a procedural subject within the field of the law of the Union.

Finally, I should mention the Organisation for Security and Co-Operation in Europe (OSCE), of which The Netherlands is also one of the founding members. Within the framework of this organization several declarations and other documents have been adopted that are relevant to criminal procedure. Specifically noteworthy is the 2006 Declaration on Criminal Justice Systems.³⁴ These documents are of marginal importance only to the practice of Dutch criminal procedure. They are not legally binding and they cannot be invoked by individuals in a court of law.

3. DUTCH CRIMINAL PROCEDURE

A. General

³⁰ Both protocols were signed on 5 May 1994, and both entered into force on 1 March 2002 for the whole of The Kingdom.

³¹ The Netherlands Antilles and Aruba are not full members of the EU, but each is a so-called Overseas Country or Territory associated with the Union.

³² The Treaty of Lisbon amending the European Union Treaty and the European Community Treaty (signed at Lisbon, 13 December 2007) stipulates that "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."; see Article 6 of the consolidated version of the EU Treaty.

³³ See the Approval by Parliament's First Chamber (*Eerste Kamer*) in *Handelingen I* 2007-2008, nr. 38, 8 July 2008, p. 1618.

³⁴ Document MC.DOC/4/06 of 5 December 2006, adopted at the Fourteenth Meeting of the Ministerial Council, Brussels. Other documents that contain provisions relevant to criminal procedure are, e.g.: Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE (1990) (see § 5); Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991) (see § 1.23).

Fundamental rights that are relevant to criminal procedure in The Netherlands are only be found in international and regional instruments; there are also some in the Constitution of the Kingdom of the Netherlands.³⁵ The Constitution provides for fundamental rights in Chapter 1, i.e., Articles 1 to 23. Directly or at least indirectly relevant to criminal procedure are: Article 1 on equal treatment; Article 6 on the freedom of religion and belief; Article 7 on the freedom of expression; the rights to association and to assembly and demonstration in Articles 8 and 9; the right to privacy in Article 10; Article 11 on the right to inviolability of the person; the right to respect for the home and correspondence in Articles 12 and 13; the right to liberty and *habeas corpus* in Article 15; the legality principle or *nulla poena sine praevia lege poenali* in Article 16; the prohibition against being kept from the competent court or the principle *ius de non evocando* in Article 17; and the right to legal representation in Article 18.³⁶ Furthermore, Article 113 demands that the “trial of offences shall [also] be the responsibility of the judiciary.” Article 114 of the Constitution holds that capital punishment may not be imposed. And Article 121 states that trials shall be held in public, and that judgments shall specify the grounds on which they are based, and be pronounced in public. The Constitution does not provide for a provision on the right to a fair trial as such.³⁷ Moreover, as has already been mentioned above, the Dutch courts are (still) not authorized to review Acts of Parliament against fundamental rights laid down in the Constitution (*toetsingsverbod*; Article 120 of the Constitution).³⁸ This implies an important limitation on the possibility for the defence to successfully invoke constitutional rights in criminal trials.

Article 107 of the Constitution stipulates that “criminal procedure shall be regulated by Act of Parliament in general legal codes without prejudice to the power to regulate certain matters in separate Acts of Parliament.” So the legal basis of criminal procedure in The Netherlands is the Code of Criminal Procedure (*Wetboek van Strafvordering - Sv*) of 1926.³⁹ This is a statute. Provisions of or relevant to criminal procedure are provided for in several other statutes too, such as the 1928 Narcotic Drug Offences Act (*Opiumwet*), the

³⁵ Generally on the fundamental rights in the Constitution, see Constantijn A.J.M. Kortmann & Paul Bovend'Eert, *Dutch Constitutional Law*, The Hague / London / Boston: Kluwer Law International, 2000, p. 145-159.

³⁶ Cf. Jaap de Hullu, Criminal Law Aspects of Human Rights Protection in The Netherlands, vol. 3 *Journal of Constitutional Law in Eastern and Central Europe*, nr. 2 (special: Human Rights as Constitutional Rights), 1996, p. 173-179.

³⁷ A critic is P.A.M. Mevis, *Constitutioneel strafrecht* (Constitutional Criminal Law), Deventer, 1998, p. 10-11, 41-44. See also R. de Lange & P.A.M. Mevis, 'Constitutional Guarantees for the Independence of the Judiciary', vol. 11.1 *Electronic Journal of Comparative Law* (May 2007), <<http://www.ejcl.org/111/art111-15.pdf>>.

³⁸ See *supra* section I.1.

³⁹ On this Code, see Peter J. P. Tak, *The Dutch criminal justice system*, Nijmegen: Wolf Legal Publishers, 2008, p. 29-37.

1950 Economic Offences Act (*Wet op de economische delicten*), and the 1997 Act on Weapons and Munitions (*Wet wapens en munitie*).⁴⁰ Lower legislative bodies (such as provinces and municipalities) have no autonomous power to regulate criminal procedure, and neither do the courts. Nevertheless, the court's case-law – especially that of the criminal chamber of the Supreme Court – is of great importance to the meaning, scope, and purpose of provisions of criminal procedure.

The public prosecution service (*Openbaar Ministerie*) has exclusive power to prosecute individuals and legal persons. The Minister of Justice is politically accountable for the prosecution service, its actions and decisions. The prosecution service is responsible for criminal investigation by the police (*politie*) and the use of investigative powers. Methods of investigation that substantially infringe fundamental rights can only be employed if they have a basis in law. This requirement results from the principle of legality (Article 1 Sv), and from the fundamental rights provisions in, e.g., the Constitution, the ECHR, and the ICCPR. Investigative methods can always be employed that do not breach fundamental rights, or not substantially; Article 2 of the Police Act (*Politiewet*) on the task of the police is considered by the courts to provide the relevant basis.

Additionally, all powers that infringe fundamental rights can generally be used only in case of reasonable suspicion that an offence (infraction or crime) has been committed (cf. Article 27 Sv). A reasonable suspicion does not require much, however: under certain circumstances it may even be constituted by an anonymous tip. In ordinary cases the condition of reasonable suspicion applies, e.g., to arrest, pre-trial detention, search and seizure, interrogation of the suspect, and to all kinds of special investigative powers (see Articles 126g-126ni Sv), such as recording communication, surveillance, infiltration, running informants, and undercover pseudo-purchases (see also *infra sub* 4.C).⁴¹ If terrorism is concerned, though, these special covert investigation powers, as well as powers to search objects, vehicles and clothing, may be used if there is merely “an indication of a terrorist crime” (Articles 126za-126zs Sv), which requirement can be met even more easily than the requirement of “reasonable suspicion”.⁴² Furthermore, in connection with

⁴⁰ See on sources of criminal law in general J.F. Nijboer, 'The Criminal Justice System', in J.M.J. Chorus, P.H.M. Gerver & E.H. Hondius, *Introduction to Dutch Law*, Alphen aan den Rijn: Kluwer Law International, 2006, p. 402-406.

⁴¹ See Council of Europe, 'Reply to the Questionnaire on Special Investigation Techniques in Relation to Acts of Terrorism – Netherlands' on: <http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/4_theme_files/special_investigation_techniques/Netherlands%20reply.pdf>.

⁴² For the definition of “terrorist crime”, see Article 83 Sr.

organised crime, covert investigation powers may be used in case of “reasonable suspicion” that a serious crime (as defined in Article 67 § 1 Sv) “has been committed or that such crimes are being planned or committed by a criminal organisation, which in view of their nature or connection with other crimes planned or committed by the same organisation constitute a serious breach of the legal order” (see Article 126o-126ui Sv). This does not require the existence of a concrete suspicion of a specific crime; an abstract suspicion of abstract serious crimes suffices. Moreover, the use of these powers is not in any respect limited to suspects. The possibility to apply these powers in the event of “planning” serious organized crime implies that the police force is authorized to investigate pro-actively. Interestingly, the powers may also be utilized when the planning as such is not in violation of criminal law. When the planning does constitute a criminal offence, however (see for example Article 46 on criminal preparation, and the provisions on conspiracy in, e.g., Articles 80, 96, 103, 114b, 120b, 122, 176b, 282c, 289a, 304b, 415b Sr), special investigative powers can be applied on the basis of a reasonable suspicion of that concrete crime (*i.e.*, on the basis of Articles 126g-126ni Sv).

B. Actors in Criminal Process

a. The courts and judges

The judiciary deals with criminal law offences within the criminal law divisions of each of the nineteen District Courts (*rechtbanken*), five Courts of Appeal (*gerechtshoven*), and the Supreme Court (*Hoge Raad der Nederlanden*), which is a court of cassation.⁴³ The Kingdom of the Netherlands does not have a Constitutional Court. Furthermore, each District Court has a number of sub-district venues; there are 61 of these so called Cantonal Courts (*kantongerechten*) in total. Generally, the sub-district courts only handle minor offences, mostly infractions (*overtredingen*) (see Article 382 Sv). Most crimes (*misdrifven*) and all other offences are dealt with by a District Court. The Supreme Courts only decides on points of law and procedural matters; all the district and appeal courts also examine and establish the facts. Criminal cases are decided by professional judges (or justices, in the Courts of Appeal and in the Supreme Court). Serious offences are dealt with by a panel of

⁴³ See the Judicial Organization Act (*Wet op de Rechterlijke Organisatie*). See for information on the organization A.F.M. Brenninkmeijer, Juridical Organization, in: J.M.J. Chorus, P.H.M. Gerver & E.H. Hondius, *Introduction to Dutch Law*, Alphen aan den Rijn: Kluwer Law International, 2006, p. 53-61; see also <<http://www.rechtspraak.nl>> (website is partly in English).

three judges; less serious offences that are simple in nature and that carry a punishment of no more than one year of imprisonment can be tried by a single District Court judge (*Politierechter*) (see Articles 368-369 Sv).

The Dutch system does not make use of laymen or juries,⁴⁴ and even for those in the legal professions it is not especially easy to become a judge (or prosecutor). First of all one needs to possess an outstanding master's degree in law. After that there are two alternative routes to becoming a judge (or prosecutor). One possibility is to apply for a position in the training programme for judges (and prosecutors), called the RAIIO training. Applicants can enter the programme only after they have passed a battery of tough intelligence and psychological tests and several interviews. The programme normally takes six years and it offers a combination of theory and practice. Only after successfully completing the training programme are the participants appointed as assistant judges (or prosecutors) with one of the District Courts. After satisfactorily fulfilling that position for about a year one can be appointed a judge for life (or prosecutor for unlimited time) by Royal Decree (see Article 117 of the Constitution). Another possibility is offered to legal professionals (*e.g.*, attorneys, company lawyers, academics, civil servants) who have at least six years of relevant job experience. They can apply for the position of judge (or prosecutor) in case of a vacancy at one of the courts (or prosecuting offices). Candidates who are selected are hired as assistant judges (or prosecutors) and enter a training programme to become a professional judge (or prosecutor). Depending on previous experience the programme takes about a year to eighteen months. Although judges are appointed for life (and prosecutors for unlimited time), at the age of 70 they are honourable discharged from their function.

The pre-trial phase can involve an important task for the investigative judge (*rechter-commissaris*) (see Articles 170 ff Sv). The pre-trial investigation is chiefly inquisitorial rather than adversarial in nature.⁴⁵ This applies to a greater extent to the police investigation than to the judicial preliminary investigation (*gerechtelijk vooronderzoek*; see Articles 181-241c Sv) which is conducted by and at the orders of the investigative judge. The judicial preliminary investigation is initiated by the investigative judge at the request of the prosecutor. The investigative judge was introduced into the Dutch system to provide an

⁴⁴ In military criminal cases, however, a high military officer takes a place in the court.

⁴⁵ See C.H. Brants-Langeraar, *Consensual Criminal Procedures*, in J.H.M. van Erp & L.P.W. van Vliet (eds), *Netherlands reports to the Seventeenth International Congress of Comparative Law*, Utrecht 2006, Antwerpen / Oxford: Intersentia, section 1; also published in: vol. 11.1 *Electronic Journal of Comparative Law* (May 2007), section 1, on: <<http://www.ejcl.org/111/art111-6.pdf>>.

impartial, objective investigator in an early stage of criminal law proceedings. If more serious offences are involved he or she usually does play a role in the pre-trial investigation, even if only a police investigation takes place because no judicial preliminary investigation has been initiated.

First of all, the investigative judge reviews the legality of police custody (*inverzekeringstelling*) after three days and fifteen hours at the latest (Article 59a Sv; cf. Article 5 § 3 ECHR), and apart from that he or she is authorized to order a remand in custody (*voorlopige hechtenis*) (Article 63 Sv). Furthermore, in principle the investigative judge is the authority who authorizes or orders, for example: seizure (Article 104 Sv), search of homes and other places (Article 110 Sv), a criminal financial investigation (Article 126 Sv), and recording communication (Articles 126l and 126m Sv). He or she can execute several of these powers *ex officio*, especially if the pre-trial investigation has officially become a judicial preliminary investigation. Other important powers are questioning the suspect, witnesses, and experts. Unlike the prosecutor, the investigative judge can – in a judicial preliminary investigation – order the appearance of suspects and witnesses. He or she has, however, no power to decide on prosecution of the suspect: the prosecutor has a monopoly over the decision whether someone will be prosecuted and appear before a court; so the prosecution does not need leave from a judge or court to prosecute.

In the actual trial (see Articles 282 ff Sv) the courts play a fairly active role. The court will strive to find the truth as regards the offences as these have been charged by the prosecutor in the so called *tenlastelegging*. In doing so it mainly bases its questions, findings and decisions on the presentation in the dossier of records of the evidence collected in the pre-trial stages. The court sessions are not particularly suited to all kinds of investigation. If such investigations are required or if the court deems it preferable otherwise, the case will be referred to the investigative judge in the pre-trial phase for further investigation (Article 316 Sv). Nevertheless, the court itself interrogates the accused during the hearing (Article 286 Sv). Furthermore, the court questions witnesses and experts (Article 292 Sv) insofar as they are present at trial (most of them will already have had definitive hearings in the pre-trial phase before the police and the investigative judge; written transcripts of their statements are set down in official records and placed in the case file). Furthermore, the

court can, for example, *ex officio* order the prosecutor to summon witnesses and experts to appear in court (Article 263 Sv).

The trial hearing is slightly more adversarial than inquisitorial. To a greater extent than in the pre-trial phase there is equality of arms as between the defence and the prosecutor. The defence can comment on the legality and quality of the case file and the evidence presented in court, on the prosecutor's charge and the sentence proposed, and on the facts of the case. The defence, however, has few possibilities to demand rehearing of witnesses or experts and to demand or present additional evidence during the court session. Apart from exercising (somewhat limited) powers to discover truth, the court has a responsibility to guard due process. It assesses the legality and quality of the evidence presented in the case file and by the prosecutor during the court session, and it must guarantee that the trial is fair and that the process is completed within reasonable time.

b. The Public Prosecution Service

The *Openbaar Ministerie* (literally: public ministry) is the Public Prosecution Service in The Netherlands.⁴⁶ It is not a government department like the Ministry of Justice, but part of the Judiciary. As mentioned above, however, the Minister of Justice is politically accountable for the prosecution service, its actions and decisions. Hierarchically, the service is placed under the Minister. He or she has policymaking power, and may give binding instructions with regard to investigation and prosecution in individual cases. He or she can be held accountable in parliament for using or failing to use these powers.⁴⁷ Generally the Minister of Justice uses these powers in individual cases with great reservation. Within criminal procedure the prosecution might have to justify its actions before the investigative judge or the court.

To qualify as a prosecutor one has to meet the same requirements as those that apply to judges (see *supra sub 3Ba*). The service is hierarchically organized internally. At the level of first instance there is a prosecution office (*arrondissementsparket*) attached to every one of the nineteen District Courts. These district offices are composed of several prosecutors (*officieren van justitie*) and a head prosecutor (*hoofdofficier van justitie*). One level up there

⁴⁶ On the *Openbaar Ministerie*, see Peter Tak, The Dutch Prosecution Service, in: Peter J.P. Tak (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen: Wolf Legal Publishers, 2004, p. 355-383; and < <http://www.om.nl>> (website is partly in English).

⁴⁷ Peter Tak, The Dutch Prosecution Service, in: Peter J.P. Tak (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen: Wolf Legal Publishers, 2004, p. 374-375.

is an office (*resortsparket*) attached to all of the five Courts of Appeal. The prosecutors here (called *advocaten-generaal*) conduct criminal cases in appeal. They are placed hierarchically under the head prosecutor (*hoofdadvoocaat-generaal*). Furthermore the Prosecution Service has a national prosecution office (*landelijk parket*) that deals with (inter)national organised crime and terrorism, and functional offices (*functioneel parket*) that specialize in environmental crime, economic crime and fraud. All the district, appeal and national offices are placed under the national Board of procurators general (*College van procureurs-generaal*) that has its seat in The Hague (*Parket Generaal*). The Board monitors the prosecutors and their actions and decisions in individual cases, for example those on prosecution, and issues policy directives (*beleidsregels* or *richtlijnen*) concerning criminal procedure.

The main tasks of the prosecution service are: investigating criminal offences, prosecuting offenders, and executing sentences. With regard to all these tasks it has a responsibility to protect the rights of both victims and offenders. According to the Code of Conduct of the Prosecution Service (*Gedragscode Openbaar Ministerie*),⁴⁸ prosecutors will execute their tasks “with special attention to fundamental human rights” (Rule 1.2), “with respect to the inherent human dignity, without distinction as to person or status, and without discrimination on the grounds of religion, sex, sexual inclination, national origin, ethnicity, skin colour, age or on any other grounds” (Rule 1.3) and in “a fair, impartial, objective and fearless manner” (Rule 1.4). This is also of importance in criminal investigation by the police. Since the prosecutor owns command over criminal investigation (see Article 148 Sv) and has authority over the police (Article 13 Police Act), he or she is obliged to ensure that the police force is working in conformity with criminal procedure law and ensures the fundamental rights of individuals.⁴⁹ The prosecutor can instruct the police in these matters as well as on the pursuit of specific investigations. This, however, does not alter the fact that the prosecutor depends on the police to provide information.

On the basis of the criminal investigation the prosecutor decides whether a case should be brought to court and which offences will be charged. The public prosecution service has a monopoly on the prosecution of individuals and legal entities. Individuals have no right to

⁴⁸ Adopted 11 July 2005 by the Board of procurators general.

⁴⁹ Cf. Barry Hancock & Egbert Myjer (eds), *Human Rights Manual for Prosecutors* (by the International Association of Prosecutors), Nijmegen: Wolf Legal Publishers, 2002, which offers a survey of relevant international human rights standards and instruments.

initiate a criminal trial; victims can, however, join the criminal trial by submitting a claim for damages against the suspect.⁵⁰ In The Netherlands, what is called principle of expediency applies: the prosecution service is not obliged to prosecute every crime of which it becomes aware (as it would have to do under the principle of legality), but it can decide not to prosecute if a conviction might not be obtainable or if “reasons of public interest” do not favour prosecution (see Article 167 CPC).⁵¹ The prosecutor has several options if he or she decides not to bring a case to court by filing charges against the suspect.⁵² He or she can dismiss the case unconditionally (*onvoorwaardelijk sepot*; see Article 167 § 2 or Article 242 § 2 Sv) or conditionally (*voorwaardelijke sepot*; see Article 167 § 2, Article 244 § 3 or Article 245 § 3 Sv). A sort of conditional dismissal is also offered with the so called transaction (*transactie*; Articles 74-74c Sv): the suspect can prevent prosecution and a trial by meeting conditions laid down by the prosecutor. In most cases the condition will be the payment by the culprit of a sum of money to the state which can be as great as the maximum fine carried by the offence.⁵³ The transactional settlement can be applied to all infractions and all crimes that carry a maximum punishment of six years imprisonment. If the suspect does not meet the transactional conditions he will be summoned to trial. Over 30% of the criminal cases in The Netherlands are settled through a transaction. The legislator aims to replace the transaction gradually with a procedure of “prosecution through penal orders” (*OM afdoening door strafbeschikking*), which was introduced on 1 February 2008 in Article 257a Sv: the prosecutor imposes a criminal punishment on the suspect.⁵⁴ This procedure can be applied to offences that carry a maximum punishment of no more than six years’ imprisonment. The penal order is considered a prosecution. By accepting the punishment the suspect admits to being guilty of the offence. The order has the same legal status as a judgment by a court. The prosecutor can order: community service (*taakstraf*) with a maximum of 180 hours; a fine (*boete*); withdrawal from society (*onttrekking aan het verkeer*); payment to the state for the victim; disqualification from driving (*ontzegging van de rijbevoegdheid*). The prosecutor is not

⁵⁰ See on the role of the victim in the Dutch criminal justice system M.E.I. Brienen & E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Nijmegen: Wolf Legal Publishers, 2000, p. 666-671.

⁵¹ See for greater detail Peter Tak, The Dutch Prosecution Service, in: Peter J.P. Tak (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen: Wolf Legal Publishers, 2004, p. 367-369.

⁵² See also *sub* 4.B.

⁵³ See for greater detail on the transaction Peter J. P. Tak, *The Dutch criminal justice system*, Nijmegen: Wolf Legal Publishers, 2008, p. 87-88.

⁵⁴ See C.H. Brants-Langeraar, *Consensual Criminal Procedures*, in J.H.M. van Erp & L.P.W. van Vliet (eds), *Netherlands reports to the Seventeenth International Congress of Comparative Law*, Utrecht 2006, Antwerpen / Oxford: Intersentia, section 4.4; also published in: vol. 11.1 *Electronic Journal of Comparative Law* (May 2007), section 1, on: <<http://www.ejcl.org/111/art111-6.pdf>>.

authorized to order a sentence entailing deprivation of liberty. The *strafbeschikking* is also discussed below in 4Bb and 5Bg.

Persons – such as victims – who have a direct interest in a prosecutor’s decision not to bring a case to court may file a complaint under Article 12 Sv with the competent Court of Appeal. If the court is of the opinion that a court prosecution should have taken place it can order the prosecutor to initiate one. This is rather exceptional.

In addition to the police The Netherlands is familiar with four special criminal investigation services (*bijzondere opsporingsdiensten*) with their own pre-trial investigative and evidence-gathering powers.⁵⁵ They all work under the supervision and instruction of the prosecutor. Their power to investigate crime is limited to the policy area for which they are appointed. In principle they have the same investigative powers as police investigators (cf. Article 142 Sv). The investigations of these services can (and often will) result in a prosecution by the prosecution services. In the area of tax the Fiscal Information and Investigation Service & Economic Investigation Service (*Fiscale inlichtingen- en opsporingsdienst & Economische controledienst; FIOD-ECD*) investigates fraud and tax. Furthermore, the Social Intelligence and Investigation Service (*Sociale Inlichtingen- en Opsporingsdienst; SIOD*) investigates offences in the field of social security. Crime related to agriculture, nature, food quality and animal wellbeing is combated by the General Inspection Service (*Algemene inspectiedienst, AID*). Finally, the Ministry of Housing, Spatial Planning and the Environment (*Ministerie van VROM*) has its own Intelligence and Tracing Service (*Inlichtingen- en Opsporings Dienst, VROM IOD*) to investigate serious – often organized – crime in this policy field.

Apart from the decision on laying charges, the prosecutor is also responsible for presenting the dossier and the evidence therein to the court. In the Dutch criminal justice system, evidence gathered in the pre-trial phase by police, prosecutor, investigative judge or defence is not subject to any special procedure by which the evidence has to be granted leave to go to court. In case the exclusion of evidence is indicated because it has been obtained unlawfully (see *infra sub 4.G*) this will be decided by the court at trial. In principle, all evidence might be employed in criminal cases. The use of evidence obtained

⁵⁵ See the 2006 Act on special investigation services (*Wet op de bijzondere opsporingsdiensten*).

abroad (extraterritorial use of evidence) is also allowed, in principle under the same conditions as other evidence.

c. The defence lawyer

To become a defence lawyer one first of all needs a master's degree in law. With that it is possible to apply to a law firm to become a trainee lawyer. Trainees have to work in practice and attend a programme of courses for at least three years before they are unconditionally accepted as a member of the Dutch bar. If accepted by a law firm, they automatically have the right to appear and conduct proceedings in court in criminal cases. Pursuant to the 1952 Act on Advocates (*Advocatenwet*), defence lawyers are required to become a member of The Netherlands Bar Association (*Nederlandse orde van advocaten*).⁵⁶ This association does not have special divisions for criminal law or other fields of law, nor does it function as a Public Defender's Office. The latter is an institute with which The Netherlands is not familiar; all attorneys in The Netherlands are entitled to conduct the defence in criminal cases (as well as civil ones) (see Article 11 Act on Advocates).

The conduct of defence lawyers is first of all mentioned in Article 46 of the Act on Advocates. More detailed regulations are offered in the Dutch 1992 Code of Conduct (*Gedragsregels 1992*) and in the Code of Conduct for lawyers in the European Union (most recently amended in 2002). Misconduct can be sanctioned through disciplinary law. The sanctions are: a warning; a reprimand; a one year maximum suspension; expulsion (Article 48 Act on Advocates).

The main role of the defence lawyer is to consult with and assist the client during all stages of criminal law proceedings. This means that the lawyer shall represent the points of view of the clients and that he or she shall exercise the rights of the defence and make use of all possibilities within the bounds of the law to achieve the client's interests. The defence lawyer is not, however, allowed to pursue the defence contrary to the apparent wishes of the client, the accused.⁵⁷ To that extent the suspect is "dominus litis" of the defence in criminal law proceedings in The Netherlands. At the same time the defence lawyer assumes

⁵⁶ On the Bar, see < <http://www.advocatenorde.nl> > (website is partly in English).

⁵⁷ On the role and duties of criminal defence lawyers, see Ties Prakken & Taru Spronken, *The Investigative Stage of the Criminal Process in the Netherlands*, in: Ed Cape et al. (eds), *Suspects in Europe*, Antwerp / Oxford, Intersentia, p. 174-177; and Taru Spronken, *Reflections on a European Charter for Criminal Defence Lawyers*, Deventer: Kluwer 2003, p. 56-58.

full responsibility for the handling of a case. In case the advocate has a difference of opinion with his client concerning the way in which the case should be handled, and this dispute cannot be resolved by mutual consultation, the advocate shall withdraw (Rule 9 Code of Conduct). The defence lawyer is regarded as the inseparable, partisan representative of the client. He or she has no obligation to actively gather and introduce evidence to support the client's case, although it might be wise for him or her to do so. Persons who might expect that they will be prosecuted may request the investigative judge to conduct investigations in their case (*mini-instructie*; Article 36a Sv). The same right accrues to their lawyers (Article 36e Sv). The defence, however, does not have a duty to assist the course of justice whatsoever. What is more, the Dutch system is not acquainted with such legal constructs as "obstruction of justice" and "contempt of court". Nevertheless, lawyers must abstain from adversely affecting the lawful discovery of the truth by the judicial authorities.

C. Investigation of the Facts (truth finding)

In criminal procedure in The Netherlands, the emphasis in regard to establishing the facts of a criminal case clearly lie in the pre-trial procedure. Commonly, little new evidence is presented during the court procedure. The investigation of the facts, truth finding and the gathering of evidence both against and in favour of the suspect is first of all the responsibility of the police, under the supervision of the prosecutor. The prosecutor presents the dossier and the evidence therein to the court. The court will judge the case mainly on that basis and on the assessment and discussion in court between the prosecutor and defence about the evidence and legal aspects of the case. The court judges are acquainted with the case prior to the trial and they examine the dossier thoroughly before the trial actually starts. During the court session the judges briefly discuss all the main evidence, and some of it in greater detail if it is unclear or in dispute. The Court actively assesses the legality and quality of the evidence in the dossier by questioning the defendant about it. If the court considers that evidence has been obtained illegally it might exclude it (cf. *infra sub 4.G*). Witnesses and experts will only be questioned by the trial court itself if the prosecutor – *ex officio* or at the request of the defence – has summoned witnesses to appear in court or if it is deemed necessary by the court to hear a witness. Usually,

however, the case will then be sent back to the investigative judge, to enable him or her to rehear certain witnesses. The reports of these hearings will then be added to the file.

D. Appeal, Cassation, and Revision

In case of crimes (*misdrifven*) the system of remedies (*rechtsmiddelen*) always allows for an appeal to a Court of Appeal at the request of the prosecution as well as at the request of the defence if the defendant was not completely acquitted of all charges (Article 404 Sv). The same applies to infractions (*overtredingen*), albeit in that case some extra restrictions on the defence apply: they cannot appeal if either no criminal penalty was imposed or if the defendant was fined less than € 50. What is more: in that case the defence in principle cannot enter an appeal in cassation before the Supreme Court either. Yet another, extra obstacle to an appeal is provided in Article 410a Sv: in cases in which the prosecution or defence appeals against infractions or less serious crimes, while the court in first instance imposed a penalty of no more than € 500, the appeal will only be granted by the Court of Appeal if this is necessary for the course of justice. An appeal normally has to be made within fourteen days after the judgment in first instance has been rendered (Article 408 Sv). On the nature of the appeal trial, see *infra sub 5.D*.

After the appeal proceedings have been concluded, both the prosecution and defence can appeal on points of law only via the remedy of cassation to the Supreme Court (see *supra sub 3.B.a.*). This is a court of cassation; The Kingdom of the Netherlands does not have a Constitutional Court. The possibility to appeal in cassation is limited in a somewhat similar fashion as the remedy of appeal (see Article 427 Sv⁵⁸). There is however no equivalent to Article 410a Sv for cassation. The final result of cassation can be adverse to the defendant. Since the prosecution can enter an appeal in cassation against an acquittal, this can also mean that an acquittal (*vrijspraak*) or dismissal of all charges (*ontslag van alle rechtsvervolging*) after cassation is reversed to a guilty verdict and punishment.

Miscarriages of justice should as far as possible be redressed with the ordinary remedies of appeal and cassation. In favour of the defendant, however, Dutch criminal procedure law does under specific circumstances allow closed cases to be reopened by revision (*herziening*) of criminal judgments having power of *res judicata* (see Article 457 Sv). At

⁵⁸ Cassation is furthermore limited in Article 80 § 2 Judicial Organization Act (*Wet op de Rechterlijke Organisatie*) with regard to judgments by sub-district courts (*i.e.*, Cantonal Courts (*kantongerechten*); see *supra 3.B.a.*).

present three grounds are offered for revision (see for the future however, *infra sub 4.F.*). Revision is first of all possible if different court decisions are incompatible with each other. Secondly, a closed criminal procedure can be reopened if a new fact (*novum*) makes it likely that, had the trial court known that fact, it would have taken a fundamentally different decision, which would have been more favourable to the convicted person. Finally, revision can be granted if the European Court of Human Rights has established in a judgment that the ECHR has been violated in the proceedings that led to the conviction and revision is necessary with a view to redressing that violation.⁵⁹

E. An adversarial or inquisitorial system?

As opposed to Anglo-American adversarial system of criminal procedure, a Continental system is recognized which is inquisitorial in nature and which is applied, e.g., in most of the non-English speaking European countries. Within this dichotomy, criminal procedure in The Netherlands – being a Continental European state – must indeed be characterised as inquisitorial.⁶⁰ However, this qualification is not quite meaningful, since neither of these systems exists in a pure form, and because there are many differences, even between continental systems.

In the Dutch criminal justice system the pre-trial investigation phase is largely inquisitorial in nature. The collection of evidence and fact finding is mainly done by the authorities: the police force investigates under the prosecutor's and/or the investigative judge's supervision. In this phase of criminal procedure the suspect figures mainly as a subject of investigation and he or she is exposed to undergo all kinds of coercive powers. Of course the culprit can contest the actions of the authorities when he is heard to that end or via possible remedies, and he or she can instigate investigations as well, but the system is not constructed in such a way that the defence is as responsible for truth finding as the authorities. For one thing, the possibilities for investigations at the instigation of the defence offered in the Code of Criminal Procedure mostly go via the authorities: for example, the defence may request the investigative judge to conduct investigations in their

⁵⁹ See P.H.P.H.M.C. van Kempen, *Heropening van procedures na veroordelingen door het EHRM*. (Reopening of Procedures after Judgements by the European Court of Human Rights), Nijmegen: Wolf Legal Publishers, 2003, p. 106-146 and p. 541-542 of the summary in English; T. Barkhuysen, M.L. van Emmerik & P.H.P.H.M.C. van Kempen (eds.), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order*, The Hague/London/Boston: Kluwer Law International, 1999.

⁶⁰ See in more detail on this subject Peter J. van Koppen & Steven Penrod, *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Perspectives in Law & Psychology), New York: Kluwer Academic/Plenum Publishers, 2003, with a lot of contributions on The Netherlands.

case (*mini-instructie*; see *supra* sub 3.B.c.), DNA-counter-expertise goes via the prosecutor, and if the defence wishes expert investigations the investigative judge will appoint an expert to assist him or her in the investigation. Moreover, there is no equality of arms whatsoever during the pre-trial investigation between the prosecution and the defence. This is most obvious if the newly introduced procedure of “prosecution through penal orders” (*OM afdoening door strafbeschikking*) is applied (see sub 3.B.b., 4.B.b. and 5.B.g).

The balance is considerably different in the trial phase, which is of a moderately accusatory and adversarial nature. Nevertheless, it is the court (i.e., the chairman) that leads the proceedings and presents the evidence and investigation results in the dossier at trial and actively questions the defendant, witnesses and experts. However, both the prosecution and the defence can contest everything that is presented in court, give their own view on the case and the evidence, and question the defendant, witnesses and experts for themselves. The position of the prosecution and defence is much more one of equality of arms. As far as the trial in appeal is concerned, the procedure has become much more adversarial: the scope and content of the hearing in this procedural phase now depend very much on what the prosecution and defence bring forward for discussion (see *infra* section 5.D.).

So in my opinion the Dutch system is largely inquisitorial in the pre-trial investigation phase and moderately accusatory and adversarial during the trial. Since the trial phase is strongly guided by the dossier as it was constructed in the pre-trial investigation, when qualifying the nature of criminal procedure in The Netherlands the pre-trial proceedings have to weigh rather more than the trial phase. Therefore, on a continuum of 1 to 10 (1 is strictly adversarial; 10 is strictly inquisitorial), I would rate the essential nature of the criminal procedure as a whole with a 6 for The Netherlands, i.e., it is a tempered form of inquisitorial proceedings. Given that only a few fundamental rights demand adversariality – this applies especially to the right to examine witnesses for and against the defendant (cf. Article 6 § 3 (d) ECHR) – as such, of course, this says little about whether or not the system applies high human rights standards, if only because accurate truth-discovery is a prerequisite to a case outcome that is fair to all involved. In regard to The Netherlands, I would even say that the tempered inquisitorial nature of the Dutch system is generally speaking well counterbalanced by a moderately active judicial protection of fundamental rights.

4. HUMAN RIGHTS IN DUTCH CRIMINAL PROCEDURE

A. Fundamental Rights Independent of Fair Trial

a. The right to life

The death penalty was abolished in The Netherlands in 1870. Article 114 of the Constitution declares that capital punishment may not be imposed. So far there has not been any serious discussion in or outside parliament about reintroducing this punishment. This negative obligation on the state of course protects the right to life. Dutch law does not, however, expressly provide for the protection of life by a positive obligation on the state to instigate criminal investigations if reliable information points to a life threatening situation, or to start a criminal investigation if someone has been killed under suspicious circumstances and prosecute and punish perpetrators. Such positive obligations do, however, stem from the case-law of the European Court of Human Rights on the right to life in Article 2 ECHR.⁶¹

b. The right to be protected against cruel and humiliating treatment

The prohibition of torture and inhuman and degrading treatment as such is not provided for in a statute. A broader right is contained in the constitution, however, Article 11 of which states: “Everyone shall have the right to inviolability of his person, without prejudice to restrictions laid down by or pursuant to Act of Parliament.” So this constitutional right is not absolute. However, Article 3 ECHR, which applies in full in The Netherlands, is. What is more, although this provision literally only involves a negative obligation on the state, the European Court has managed to formulate similar positive obligations on the basis of Article 3 ECHR, as it was able to construct an obligation regarding the right to life in Article 2 ECHR.⁶² So inhuman treatment by both the authorities and private persons must be investigated, prosecuted and properly punished.

⁶¹ See e.g., ECtHR (Grand Chamber) 28 October 1998, *Osman v The United Kingdom*; ECtHR (Grand Chamber) 24 October 2002, *Mastromatteo v Italy*; ECtHR (Grand Chamber) 15 May 2007, *Ramzai v The Netherlands*; ECtHR (Grand Chamber) 30 November 2004, *Öneryıldız v Turkey*. Highly critical of this is P.H.P.H.M.C. van Kempen, *Repressie door mensenrechten. Over positieve verplichtingen tot aanwending van strafrecht ter bescherming van fundamentele rechten* (Repression by Human Rights. On Positive Obligations to Apply Criminal Law to Ensure Fundamental Rights), Nijmegen: Wolf Legal Publishers, 2008.

⁶² See e.g., ECtHR 24 January 2008, *Maslova & Nalbandov v Russia*; ECtHR 3 May 2007, *Gidani Congregation of Jehovah's Witnesses v Georgia*; ECtHR 12 October 2006, *Mubilanzila Mayeka & Kaniki Mitunga v Belgium*; ECtHR 4 December 2003, *M.C. v Bulgaria*.

Interrogation and the prohibition against ill-treatment

With regard to interrogations, Article 29 Sv contains an important safeguard against pressuring suspects: any official who interrogates a suspect is obliged to refrain from anything that aims at obtaining a statement from the suspect of which it cannot be ascertained that it is given freely. So statements – and confessions alike – must be voluntary and may not be obtained through the use of force, threats, or promises (on the consequences of ill-treatment during interrogation of the suspect, see *infra sub* 4.G.). Prior to interrogation, suspects need to be instructed that they are under no obligation to answer the questions posed (cf. *infra sub* 4.B.f.). During interrogations suspects without an adequate command of the Dutch language have a right to an interpreter (see *infra sub* section 4.B.i). The moment someone has become a suspect he or she has a right to freely choose an attorney (Articles 28 and 39 Sv). However, during the preliminary investigation phase, the right to have counsel present does not in principle apply during the first period of questioning (called the *ophouding voor onderzoek*),⁶³ which is set at a maximum of six hours (cf. *infra sub* 5.B.b.). This does not imply that immediately thereafter the suspect has a right to be provided with legal aid by the state. Counsel shall in principle only be assigned in the event of police custody (*inverzekeringstelling*) or remand (*voorlopige hechtenis*), i.e., remand in custody (*bewaring*), continuation of remand detention by court order (*gevangenhouding*), or taking into remand detention by court order (*gevangenneming*).⁶⁴ If some form of deprivation of liberty by remand is applied, the accused will also be assigned counsel during the trial in first instance and in appeal (Article 41 Sv).⁶⁵ If the culprit is not deprived of his liberty he or she can nevertheless request legal aid. There is no statutory right to have counsel present during police interrogation. However in case of interrogation by the prosecutor or by the investigative judge, in principle a lawyer has to be admitted (Article 57 and 186a Sv). The police, prosecutor and investigative judge at present have no general obligation to make audio or video recordings of their interrogations (however, cf. *infra sub* 5.B.b.).

⁶³ For a critical view of this, see The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the authorities of the Kingdom of the Netherlands on the visits carried out in June 2007*, Strasbourg, 5 February 2008, Part I, para. 21-22.

⁶⁴ On these forms of deprivation of liberty, see *infra sub* 4.A.c.

⁶⁵ As for juveniles, see Article 489 Sv.

Detention and the prohibition of ill-treatment

Detention can easily result in cruel and humiliating treatment and punishment of those who are deprived of their liberty. The requirement and applicable procedures for deprivation of liberty in the pre-trial phase and during trial are laid down in Articles 52-88 Sv. The detention regime and the norms that apply during detention are regulated primarily by the 1998 Penitentiary Principles Act (*Penitentiaire beginselenwet*), the Penitentiary Measure (*Penitentiaire maatregel*), the 1994 Police Service Guidelines (*Besluit beheer regionale politiekorpsen*), the 1994 Official instruction for the police, Royal military police and other investigation officials (*Ambtsinstructie*⁶⁶) and the rules of the specific detention facility.⁶⁷ Although the state is not obliged to inform detainees of their rights, it does of course have the duty to ensure them.

An important safeguard against ill-treatment in detention is the possibility that the detainee can inform people outside prison about his or her deprivation of liberty. After arrest the suspect can contact a lawyer if he or she has one. If this is not the case one can only be contacted after the suspect has been taken into custody or remand, since in that case one will be provided. An arrested person has no statutory right to contact family members or others. The 1994 Official instruction for the police, Royal military police and other investigation officials declares, however, that at the detainee's request the authorities shall inform a family member or housemate as soon as possible if this does not infringe the interests of criminal investigation. This requirement has however still not been implemented properly.⁶⁸ If necessary, the detainee should be provided with a doctor and medical care. Mail between an attorney and a detainee is in principle privileged, but other mail may be censored if necessary. Exactly which rights a detainee has depends on the interests of the investigation into the case, on the severity of the case, and on the detainee him-/herself. The most restricted, severe regime is applied in Extra high security level

⁶⁶ Besluit houdende regels met betrekking tot een nieuwe Ambtsinstructie voor de politie, de Koninklijke marechaussee en de buitengewoon opsporingsambtenaar en de maatregelen waaraan rechtens van hun vrijheid beroofde personen kunnen worden onderworpen (Decree on rules relating to a new Official Instruction to the police, the Royal Military Police and those with extraordinary detective powers and the measures under which persons can legally be deprived of their liberty).

⁶⁷ On prison law in The Netherlands, see Constantijn Kelk, The Netherlands, in: Dirk van Zyl Smit & Frieder Dünkel (eds.), *Imprisonment Today and Tomorrow. International Perspectives on Prisoners' Rights and Prison Conditions*, The Hague/ London/Boston, Kluwer Law International 2001, p. 478-507; Peter J. P. Tak, *The Dutch criminal justice system*, Nijmegen: Wolf Legal Publishers, 2008, p. 139-170; <<http://www.dji.nl>> (website is partly in English).

⁶⁸ See CPT, *Report to the authorities of the Kingdom of the Netherlands on the visits carried out in June 2007*, Strasbourg, 5 February 2008, Part I, para. 20.

prisons (*extra beveiligde inrichtingen*), which house suspected terrorists, extremely dangerous persons and detainees who present an extremely high escape risk.⁶⁹

Any detainee may complain against any decision (or the refusal to take one) by or on behalf of the prison warden (see Articles 60 to 73 Penitentiary Principles Act). This thus also provides the opportunity to point at possible violations of fundamental prisoners' rights. Complaints are filed with the complaints committee (*beklagcomissie*) at the prison facility. The committee can declare the complaint inadmissible, ill-founded or well-founded. If the complaint is well-founded the prison wardens' decision will be annulled, and the committee can order the warden to take a new one. Both the detainee and the warden have the right to appeal against the decision by the complaints committee to an appeal committee (*beroepscommissie*) appointed by the Council for the Administration of Criminal Justice and Youth Protection (*Raad voor strafrechtstoepassing en jeugdbescherming*). Besides that, complaints can be made to the national Ombudsman.

c. Pre-sentence deprivation of liberty and Habeas Corpus

The first period of police questioning (*ophouding voor onderzoek*; Article 61 Sv) of a suspect is set at a maximum of 6 hours. The hours between 12.00 am and 9.00 am are not counted, however, so the period can extend to 15 hours. It must be ordered by the prosecutor or a higher police officer (*hulpofficier van justitie*) and since it is applied to a suspect it requires a reasonable suspicion of the person questioned. After police questioning has ended the suspect should be released or taken into police custody at the order of the prosecutor or superior police officer. Police custody (*inverzekeringstelling*; Article 57 Sv) is only possible in case of a reasonable suspicion of an offence for which pre-trial detention (*voorlopige hechtenis*) is allowed (see *infra*). It is limited to a maximum of 3 days, which period may be extended by another 3 days if this is urgently required. Not later than 3 days and 15 hours after arrest the suspect must be brought before the investigative judge (Article 59a § 1 Sv). The judge will examine the lawfulness of the custody. This procedure aims to meet Habeas Corpus requirements, especially those of Article 5 § 4 ECHR.

After a period of at most 6 days and 15 hours the investigative judge can order remand in custody (*bewaring*; Articles 63-64 Sv) for 14 days at the request of the prosecutor. The

⁶⁹ The regime is criticised by the CPT, *Report to the authorities of the Kingdom of the Netherlands on the visits carried out in June 2007*, Strasbourg, 5 February 2008, Part I, § 41-53.

facts or circumstances must show that there are serious indications (*ernstige bezwaren*) against the suspect. Remand in custody is thus not possible based only on reasonable suspicion (in ordinary cases anyway, unlike the case of suspicion of a terrorist crime – Article 67 § 4 Sv). Since remand in custody constitutes the first form of pre-trial detention (the other two forms are continuation of remand detention by court order and taking into remand detention by court order) the following requirements have to be met as well. First, an order for pre-trial detention may only be issued in the event of: an offence which carries a maximum punishment of imprisonment for four years or more; an offence that is specifically listed, such as incitement to hatred, threat, and embezzlement; or if no permanent address or place of residence of the suspect can be established in The Netherlands and he or she is suspected of an offence which is punishable by imprisonment (Article 67 Sv). Second, an order for remand in custody can only be issued if there is a serious danger of absconding or if a serious consideration of public safety requires the immediate deprivation of liberty (Article 67a Sv).

If the period of remand custody is ending and the requirements for pre-trial detention are still met, a subsequent prolongation of pre-trial detention may be ordered by the Regional Court in the form of an order for continuation of detention on remand (*gevangenhouding*) for a maximum duration of ninety days. Normally, therefore, a person has to be presented before the trial court within 110 days and 15 hours (that is: 15 hours (6 + 9) + 6 days (2 x 3) + 14 days + 90 days) or released after that period has expired. If the trial has started within the period of 110 days and 15 hours, the order for remand detention will remain valid for 60 days after the day of the court's judgment. In terrorism cases (i.e., cases where the defendant is suspected of committing a terrorist crime; see Article 83 Sr) the maximum period of continuation of remand detention by court order before the trial starts may be extended up to two years (which sums to two years and 90 days).

In case the trial has started while the suspect is not deprived of his liberty, the trial court can order the suspect to be taken into remand detention (*gevangenneming*). This constitutes the third form of pre-trial detention. The order to apply such detention will also remain valid for 60 days after the day of the court's judgment.

On every occasion when the investigative judge or the court decides to order or prolong custody or pre-trial detention, the defendant has the right to state his opinion. Furthermore,

he or she can always request the termination or suspension of pre-trial detention (Article 69 § 1 Sv). The rejection of such a request by the investigative judge cannot, however, be appealed. Moreover, the defendant cannot appeal an order by the investigative judge for remand in custody (*bewaring*). He or she may then request the court (*i.e.*, the District Court) to end or suspend his detention. Such requests may be unlimited. The defendant has, however, the right to appeal only once to the Court of Appeal against the rejection by the court of such requests (Article 87 Sv). Article 71 Sv provides for the possibility to appeal a court order for continuation of remand detention (*gevangenhouding*) and a court order that the suspect will be taken into remand detention (*gevangenneming*). Furthermore, orders to extend remand detention may be appealed, too, but only if the defendant did not appeal any earlier order for (the extension of) remand detention. Finally, with regard to the suspension of pre-trial detention it is important to note that criminal procedure law does provide for release on bail in Article 80 Sv. At the request of the suspect or prosecutor, or *ex officio*, the judge can suspend pre-trial detention both unconditionally and subject to special conditions. Although bail can constitute such a condition, it is very seldom applied in the practise of Dutch criminal procedure.

B. Fair Trial Rights

a. Charge

Although not required under any statute, anyone who is arrested must immediately be informed verbally of the reasons for the arrest (cf. Articles 5 § 2 ECHR, and 9 § 2 ICCPR). If the suspect is detained in police custody or pre-trial detention, the offences of which he is suspected will be contained in the detention orders. If a judicial preliminary investigation is conducted, the charge shall be stated as specifically as possible at the start of the investigation (Articles 181-182 Sv). The charge on which the trial will eventually be based (the *tenlastelegging*) shall be precisely described in the summons (*dagvaarding*) (Article 261 Sv), which must be served on the defendant in principle 10 days before the start of the trial in court (Article 265 Sv). If the case comes up before a District Court judge sitting alone (*Politierechter*; see *supra sub 3.B.a.*) a term of 3 days applies (Article 370 Sv). These terms may be shortened if the defendant agrees. If the suspect is caught in the act, he or she can be brought to trial that same day (Article 375 Sv). The charge may be amended during

the trial in first instance as well as in appeal, provided that the charge in essence is about the same criminal fact as the original allegation (Article 313 Sv).

b. The right to bring one's case before a court

As explained above (see *supra sub 3.B.b*), Dutch criminal procedure makes provision for settlement out of court. The transaction system encourages defendants to make use of these alternatives since the prosecutors' punishment is usually less severe than either the sentence that will be requested in court or the sentence the court may be expected to hand down. Defendants do not as such have a right to be provided with legal aid by the state if they settle out of court (see *supra sub 4.A.b.*). They should, however, be provided with assistance if the prosecutor, by way of "prosecution through penal orders" (*OM afdoening door strafbeschikking*; Article 257a Sv), imposes on the suspect a punishment of community service, disqualification from driving, or a fine and/or a payment to the state for the victim of more than € 2000, or if he or she makes an order concerning the behaviour of the suspect (Article 257c Sv). In that case the defendant should also be heard.

Defendants have no power to bring their criminal case before an independent and impartial criminal court, nor can they force the prosecution to prosecute them, given the monopoly on prosecution that the public prosecution service has (see *supra sub 4.A.b.*). If, however, the prosecutor imposes punishment on the suspect through the *strafbeschikking* of Article 257a Sv, the defendant may object to the prosecutor about that punishment. The prosecutor then has to withdraw the punishment or bring the case before the District Court (Articles 257e-257f Sv). The defendant's objection has to be made within fourteen days. After that the opportunity to object to the prosecutor's penal order is lost, and with it the possibility to have the case heard by the court. In addition, the remedy of objection can no longer be utilized if the defendant has voluntarily complied with the order, or if he or she has, while assisted by counsel, signed a written waiver to the right to object.

c. Right to an independent and impartial tribunal

Judges are appointed for life by Royal Decree (on the requirements for appointment, see 3.B.a.). Within the system of law they have an independent and impartial position. Courts and judges do not answer to the Minister of Justice or to parliament. Conversely, the

minister has sole political responsibility for the functioning of the judiciary system as a whole. The introduction of the Council for the Judiciary on 1 January 2002 aimed to strengthen the independence of the courts.⁷⁰ The Council does not form part of the executive branch but is regarded as being a body of the judiciary that is not charged with judiciary duties. It acts as an intermediary between the Minister of Justice and the courts with regard to the utilization of resources: the courts are only accountable to the Council, while in turn the Council reports to the Minister of Justice. The courts, however, are not answerable to the Council as to the content, tenor and effect of judicial decisions. Judges are reasonably well paid. They are appointed for life (i.e., until the age of 70). A judge can only be dismissed by the Supreme Court, for example if he or she is physically or mentally unable to fulfil the task or if he or she is convicted of a crime. This is very exceptional, since most judges will themselves resign if a dismissal procedure is threatened.

In order to ensure the impartiality of every court Articles 512 to 518 Sv contain regulations on the challenge and exemption of judges. A judge may not hear a case if it might harm judicial impartiality. The case-law of the European Court of Human Rights on the requirement of independence and impartiality in Article 6 § 1 ECHR is considered to be vital to the meaning of this requirement. So if a judge identifies a possible conflict of interest, bias, prejudice or an interest in the matter being decided, he or she has to recuse him or herself. Some of the most frequent reasons for a defendant's challenge are earlier decisions of a judge in the same case or in a related one (for example a case of a co-defendant) and the conduct or decisions of the judge during the session.⁷¹ Previous involvement in the case can constitute a reason why a judge cannot hear the case. For example, an earlier decision on pre-trial detention will in principle be an impediment.

d. The reasonable time requirement

On the basis of Article 6 § 1 ECHR and the rather casuistic jurisprudence of the ECtHR, the Supreme Court of The Netherlands has established some clear general guidelines regarding the right to have one's case heard within a reasonable time.⁷² Roughly, a case in first

⁷⁰ On the Council for the Judiciary, see M. Kuijer, *The Blindfold of Lady Justice*, Nijmegen: Wolf Legal Publishers, 2004, p. 395-405.

⁷¹ See Marijke ter Voert & Jos Kuppens, *Schijn van partijdigheid rechters* (Doubts about judicial impartiality), Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Den Haag: Boom Juridische uitgevers, 2002, p. 83-84 of the summary in English.

⁷² See HR, 17 June 2008, *LJN* BD2578 (*HR* = *Hoge Raad* (Supreme Court); *LJN* refers to the number of the case on <www.rechtspraak.nl>). See also HR, 3 October 2000, *NJ* 2000, 721, with case-note by J. de Hullu (*NJ* = *Nederlandse Jurisprudentie* (a journal on case-law); 2000 presents the year; 721 presents the case number).

instance normally has to be concluded within two years after the moment the suspect was criminally charged. In appeal a judgment in principle must be rendered within two years after filing the appeal. However, if the suspect undergoes pre-trial detention or if the suspect fall under juvenile criminal law, a maximum period applies, usually of 16 months. Moreover, in the event of appeal to a Court of Appeal or appeal in cassation to the Supreme Court, the files of the case normally have to arrive at the appeal court no later than six months after filing the appeal. On the consequence of violation of the reasonable time requirement, see *infra sub 4.G.*

e. The right to a public hearing and pronouncement of sentence

Article 121 of the Constitution holds that, except in cases laid down by Act of Parliament, trials shall be held in public and judgments shall be pronounced in public. This applies equally to the media. Persons below the age of 18 are not generally admitted, however. According to Article 269 Sv the court can order that the hearing shall take place behind closed doors. The order can be taken *ex officio* as well as at the request of the prosecutor, defendant or any of the other participants in the trial, such as witnesses. Reasons for issuing such an order can be the interest of public morality, public order, state security, the interests of minors, respect for the personal life of the defendant or others (such as witnesses and victims), and to avoid obstruction of the course of justice. A special provision applies to juveniles: in their case, the trials shall be conducted behind closed doors (Article 495b Sv). However, the judgment in their cases will also be pronounced in public. The rights of the media are discussed further on (see *sub 4.D.*).

f. Presumption of innocence

Suspects have the right to remain silent. Prior to any interrogation of a person who must be considered a suspect the authorities need to caution that person that he or she is under no obligation to answer questions (*cautio*; Article 29 § 2 Sv). This applies equally during the pre-trial investigation stage and in court. A statement by the defendant that has been made without such prior caution may not be used in evidence against him or her, unless it can be considered that he or she shall not be harmed by the omission (cf. *infra sub 4.G.*).

A defendant's refusal to give a statement cannot as such be used as evidence against him or her. However, in conformity with the case-law of the ECtHR, in situations which clearly call for an explanation from the accused, silence may be taken into account when assessing the persuasiveness of the evidence against him or her.⁷³ The burden of proof rests completely with the prosecution. In ordinary criminal trials this cannot be reversed under any circumstances. However, in criminal procedures concerning offences of a somewhat administrative nature (such as traffic law, environmental law, and financial and tax law) defendants can sometimes be confronted with a certain presumption of guilt, which they can attempt to refute.

It is considered a breach of the *Trias Politica* principle on the separation of powers if politicians or important public officials make statements on individual cases that are before the courts. It might even constitute a violation of the presumption of innocence or the right to a fair trial in Article 6 ECHR. Under very exceptional circumstances this could lead a court to render the prosecution inadmissible (cf. *infra sub 4.G.*). Although such a situation has not occurred in The Netherlands so far, politicians increasingly seem to be less reserved about stating their opinion on cases on trial and on specific judgments. On the media, see *infra sub 4.D.*.

g. The right to counsel

All suspects (both minors and adults) have a right to assistance by counsel. This right does not apply during the initial police interrogation.⁷⁴ As explained above, the Dutch legal system provides for legal aid for indigent defendants (see *supra sub 4.A.b.*). Many attorneys are of the opinion that the payment for handling such cases is inadequate. The right to counsel does not as such imply a right to an adequate defence. As noted before, the defence lawyer may not conduct the defence contrary to the apparent wishes of the client (see *supra sub section 3.B.c.*). So the defendant can make his wishes and views clear to his counsel at all times. If the defendant has counsel of his own, he or she can discharge him or her at all times and retain another defence lawyer. If the state has provided the accused with

⁷³ Cf. HR, 3 June 1997, *NJ* 1997, 584; ECtHR 8 February 1996, *Murray v The United Kingdom*, §. 44-58.

⁷⁴ However, recent decisions by the European Court seem to imply that the presence of a lawyer during police questioning is a fundamental right and that there should be no exceptions. See ECtHR 27 November 2008, *Salduz v Turkey*, and ECtHR 11 December 2008, *Panovits v Cyprus*.

counsel, they can both request replacement of counsel by another defence lawyer (Article 45 Sv).

Several privileges apply between counsel and defendant. First of all the authorities have to respect client-attorney confidentiality (cf. Article 218 Sv). Tapping of telephone conversations or interception of defence lawyers' e-mail is illegal, unless they are suspects themselves (cf. Article 126aa Sv).⁷⁵ The premises of defence lawyers who are not themselves suspects may be subject to search and seizure, but letters and other documents that fall within the privilege of non-disclosure cannot be seized (Article 98 Sv). Even if the defendant is deprived of his or her liberty there is in principle free access between counsel and client. This means that counsel and client must be permitted to speak privately and correspond confidentially (Article 50 Sv). This must be realised under supervision of the prison authorities in order to prevent the detainee's escape and to secure the safety of the lawyer, and within the rules of the penitentiary facility. Free access may furthermore not delay the criminal investigation. It may also be restricted if it will probably lead to the suspect's hindering the investigation or the process of fact-finding, or to the revelation to him or her of information that has to remain confidential.

During the pre-trial investigation the suspect has the right to be assisted by counsel when, for example, powers of search, inspection of premises, seizure, and the collection of DNA are being used, or if the suspect or witnesses are being questioned by the investigative judge. Although there is no statutory right to be informed about an upcoming search, inspection of premises or seizure, both the defendant and counsel may nevertheless be present during searches and inspections of premises if this does not interfere with the investigation (cf. Articles 99a and 193 Sv). If the defendant is not present during a search or inspection – for example because he is deprived of his liberty – counsel can substitute. The authorities, however, are not obliged to await the arrival of the lawyer or defendant.

h. Adequate time for the preparation of the defence and the right to know and contest the evidence

During pre-trial investigation (police investigation or judicial preliminary investigation) defendant and counsel are in principle granted full excess (*interne openbaarheid*) to all the

⁷⁵ See HR, 10 April 1979, *NJ* 1979, 374, with case-note by Th.W. van Veen.

case documents if they so request (Articles 30 Sv). However, the investigative judge and the prosecutor are authorized to withhold particular documents from the defence in the interests of the investigation. If this is the case it must be drawn to the defendant's attention. It is also possible to keep a police investigation or judicial preliminary investigation secret from suspects for some time. In that case, or if the defence has only restricted access to the dossier, all restrictions must be lifted as soon as the judicial preliminary investigation has ended, or when the defendant has received a notification that the case will go to trial (*kennisgeving van verdere vervolging*), or when the summons for the trial in first instance has been served, or when a penal order by the prosecution has been issued (see Article 33 Sv). (On the timely presentation of the charges, see *supra sub 4.B.a.*) If the suspect is in pre-trial detention this means that full access to the dossier will be granted at most 110 days and 15 hours after he or she was deprived of liberty (cf. *supra sub 4.A.c.*). However, in terrorism cases access to the dossier can be restricted or even totally denied for a maximum period of two years and 90 days (Article 66 § 3 and 30 § 2 Sv).

Some sensitive information may be kept secret from the defence – and the trial judges – even during trial. Under strict conditions the law provides for a special procedure to guarantee the complete anonymity of threatened witnesses (*bedreigde getuigen*; Articles 226a-226f Sv). Such procedure furthermore exists for witnesses whose identities cannot be revealed for reasons of state security, for example because they are agents of the General Intelligence and Security Service (*AIVD*) or Military Intelligence and Security Service (*MIVD*). These witnesses are so called covert witnesses (*afgeschermdde getuigen*; Articles 226m-226s Sv). The procedure for covert witnesses was introduced to make it easier to make use of intelligence as evidence in criminal trials. Although these procedures are applicable with regard to all kinds of offences and suspects, they can be of particular use in terrorist and criminal organization cases.

Both threatened and covert anonymous witnesses will be heard by the investigative judge. The defence can put questions to the investigative judge that they would like put to the witness. The judge will only put these questions if answering them will not cause the identity of the witness to be revealed. The defence can appeal to the court against the decision of the investigative judge to keep the identity of a threatened witness secret and to question the witness in person (Article 226b Sv). The law does not provide for an appeal

against the decision to use the procedure for covert witnesses. Despite their anonymity, the statements of anonymous witnesses can be used as evidence in court if the special procedures have been complied with. A conviction may not, however, be based either solely or to a decisive extent on anonymous statements. Apart from complete anonymity the law also provides for the possibility of partial witness anonymity: the witness will be questioned in the presence of the defence, but his or her name, address, age, profession etcetera will not be made public and the witness can wear a disguise (Article 190 Sv). Other information such as documents, the disclosure of which will constitute a threat to society, may also be kept secret, but cannot be used as evidence.

During the pre-trial investigation phase (cf. *supra sub 3.B.c.*) and to some degree during the trial, too, the defence can have witnesses and experts called and heard, have experts investigate a particular aspect of the case, have a DNA-test counter-checked, produce documents and items of evidence, etcetera. The defence has a right to cross-examine witnesses and experts who have been called by the prosecution. The judge ultimately decides which information will be used as evidence. Apart from statements by anonymous witnesses, Dutch criminal procedure also admits hearsay testimony as evidence.⁷⁶ Permissible as evidence, furthermore, are witness statements that have been given by suspects or convicts in exchange for reduction of the sentence they might receive in their own case or already have received (*toezeggingen aan getuigen in strafzaken*). Such an agreement between the prosecutor and the witness must be in writing and is only permissible in serious organized crime cases (Articles 226g-226k Sv). It has to be approved by the investigative judge. If the statement could make or has made an important contribution to the criminal investigation or prosecution, the witness may in his or her own case receive: a reduction of a prison sentence of at most one third; replacement of a maximum one third of a prison sentence, or a fine, by a suspended sentence; replacement of no more than one third of a prison sentence by a fine (Article 44a Sr). The prosecution cannot commit itself to witness immunity. Finally, statements of suspects, witnesses and experts who have been questioned through a video and audio link, a so-called videoconference (*videoconferentie*; Articles 78a and 131a Sv), may be used as evidence. The court, investigative judge or official in charge of the hearing decides whether a

⁷⁶ See HR 20 December 1926, *NJ* 1927, p. 85 (Testimonium de auditu).

videoconference will take place. The defendant or his or her counsel may first respond to the proposal. The decision to use videoconferencing is not open to appeal.

i. The right to an interpreter and translation of documents

Defendants without an adequate command of the Dutch language have the right to an interpreter during interrogations, pre-trial hearings and in trial, and to some extent they have a right to written translation of documents (cf. Articles 191 and 275-276 Sv). The investigative and trial judges have a responsibility to secure this right. Moreover, the defendant can request the assistance of an interpreter during trial (Article 263 Sv). There are no restrictions regarding the relevant language. The interpreter will be sworn in every time he or she assists in the case. The prosecution has a list of qualified interpreters that can be used. There seem to be sufficient interpreters in The Netherlands. Hitherto, interpreters had to comply with few requirements, but recently the Dutch Parliament accepted the Act on Sworn Interpreters and Translators (*Wet beëdigde tolken en vertalers*).⁷⁷ This Act contains provisions on the quality and swearing in of interpreters and translators and on a procedure for complaints against them.

C. The Right to Privacy

In Dutch criminal procedure, all ordinary investigative powers are permitted, as well as covert investigation methods, such as recording communication, surveillance, infiltration, running informants, and undercover pseudo-purchases (Articles 126g-126zu Sv). These covert powers can all be applied pro-actively against suspects, against persons who are associated with a criminal organisation without necessarily being involved in crime themselves, and sometimes even against non-suspect third parties. Apart from the requirements already discussed (see *sub 3.A.*), such powers may only be applied if required or urgently required in the interests of the investigation. They must be ordered by the prosecutor. For some of the methods – such as the recording of confidential communications, the interception of telecommunication, the entry of private premises – the order may be given only after authorisation by an investigating judge. Infiltration by civilians and *laissez passer* (*doorlating*) may be ordered only on the authorisation of the

⁷⁷ Act of 11 October 2007, *Stb.* 2007, 375. Entry into force: not yet known.

national Board of procurators general (*College van procureurs-generaal*; see *supra* section II.2.b) after consultation with the Minister of Justice (Article 140a Sv).

DNA testing (see the definition in Article 138a Sv) against the will of the defendant is allowed in the interest of the investigation if there are serious indications (*ernstige bezwaren*) against the suspect that he or she committed a crime for which pre-trial detention is permitted (see the requirements discussed under 4.A.c.). The test can be ordered by the prosecutor, or by the investigative judge in the event of a judicial preliminary investigation (Articles 151b and 195d Sv). The 2004 Act on DNA Testing of Convicted Persons (*Wet DNA-onderzoek bij veroordeelden*) offers the possibility to collect DNA cell material from people convicted of a crime for which pre-trial detention is allowed (Article 2 § 1). The DNA profiles are to be processed for the purpose of the prevention, detection, prosecution and trial of criminal offences only. If execution of the order for the taking of cellular material so requires, the public prosecutor may issue a warrant for the arrest of the individual concerned (Article 4 § 1). The order to provide cellular material and the compilation and storage of the applicant's DNA profile can be applied against persons who have been convicted before the Act entered into force, unless at that point the sentence was already fully executed (Article 8). In the case of *Van der Velden* the European Court of Human Rights held that the Act does not violate the principle of legality in Article 7 ECHR nor the right to private life in Article 8 ECHR.⁷⁸

Municipalities have the power to place cameras in public areas for constant public surveillance if this is considered to be necessary for the preservation of public order (Article 151c of the 1992 Municipalities Act; *Gemeentewet*). The recordings may be secured for a maximum period of four weeks. They may be used in criminal investigations and for the prosecution of offences as well as for evidence in court.

D. The Right to Freedom of Expression and the Role of the Media in Criminal Process

Court judges, prosecutors and defence lawyers are all, to some degree, allowed to talk to the media about ongoing cases. Judges, however, may only speak about the case in very general terms. All courts have a special media spokesperson (also a judge), who is authorized to explain the trial and the courts decisions to the press and public. Prosecutors

⁷⁸ ECtHR 7 December 2006, *Van der Velden v The Netherlands*.

can speak more freely, but of course within the limits of the presumption of innocence. The prosecution offices all designate one of the prosecutors as media spokesperson. Lawyers can enjoy their freedom of expressions as regards individual cases more freely. Nevertheless, they may not reveal information which is brought to their attention in confidence by the defendant or prosecution. Lawyers can be prosecuted for what they say in court or outside if this constitutes an offence which they personally committed. If a lawyer defends someone who is being prosecuted for, e.g., hate speech, blasphemy or offensive proclamations, the lawyer's defence and explanation of the defendant's statements will normally be perfectly admissible. In any case, Dutch criminal procedural law is not familiar with the legal construct of "contempt of court".

Journalists in The Netherlands can publish and broadcast almost everything they want on both ongoing and concluded criminal investigations and trials. Of course, they may not commit criminal offences or civil law torts, but apart from that they are scarcely limited in what tell the public about the name, address, profession, background, family of the defendant, the question of the culprit's guilt, the punishment he should either get or have received, etcetera. In the course of the last decade, the media have become much less reserved about criminal cases. For a long time, for instance, the media only referred to suspects by their initials, but the full name of suspects and undercover photographs and videos are now used more and more frequently. Besides that, in some cases media attention seems to be without limit, even to the extent that it influences the trial. Harmful publicity in the media about a criminal case or suspect may be considered by the court when deciding the sentence.⁷⁹ The Netherlands Press Council (*Raad voor de Journalistiek*) is charged with the examination of complaints against violations of good journalistic practice. Their guidelines state that a "journalist must not publish details in pictures and text as a result of which suspects and accused can be easily identified and traced by persons other than the circle of people that already know about them. A journalist does not have to observe this rule if: the name forms an important part of the report; not mentioning the name because of the general reputation of the person involved does not serve any purpose; not mentioning the name could cause a mix-up with others who may be predictably harmed as a result; the name is mentioned within the framework of investigative reporting; the person himself

⁷⁹ Cf. Gerechtshof Amsterdam, 18 July 2003, *LJN AI0123*.

seeks publicity.’’⁸⁰ The guidelines and decisions of the Council are not legally binding, nor can violations of the guidelines be punished.

Media do have the right to be present during trial. This only applies to the non-audio-visual media. It is forbidden to film or record the trial in court without the specific approval of the court. Moreover, the court can order that the hearing shall be held behind closed doors (see *supra* section III.4.e). All courts provide special facilities for the media. These facilities differ, depending on the size of the court. A press-card is standard, as is the supply of free copies of case-lists to journalists. The court rooms contain tables for the press, and a press-room is available in the larger courts. In 2003 the judiciary adopted a press guideline for dealing with the press.⁸¹

E. Protection against Discrimination

In Article 1, the Constitution holds that “All persons in The Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.” And, for example, Article 1 ECHR, which must be considered part of the legal order of The Kingdom of the Netherlands (see *supra* section I.1) states that the rights and freedoms in the Convention shall be secured to everyone within the jurisdiction of The Kingdom. All individuals – citizens and non-citizens, and nationals and non-nationals alike – must therefore be indiscriminately guaranteed a fair trial and all other fundamental rights relevant to criminal process.

F. Protection against Double Jeopardy (*ne bis in idem*)

If a criminal trial in The Netherlands, The Netherlands Antilles or Aruba has resulted in a final verdict with power of *res judicata* the defendant in that case cannot be prosecuted in any of these countries, put on trial or punished again for the offence for which he or she was acquitted or convicted in that verdict (Article 68 Sr⁸²). If the verdict has been rendered by a foreign criminal court, the same applies if the defendant was acquitted (*vrijspraak*) or dismissed of all charges (*ontslag van alle rechtsvervolging*), and in case of a conviction, if

⁸⁰ On the Netherlands Press Council, see <<http://www.rvdj.nl>>. (website is partly in English, and contains an English version of the Guidelines and of the amendments).

⁸¹ The 2003 Press Guideline is available in English on <<http://www.rechtspraak.nl>> (go via: Actualiteiten, Informatie voor de pers).

⁸² See in greater detail Andre Klip & Harmen van der Wilt, The Netherlands, *Non bis in idem*, vol. 73 *International Review of Penal Law* (AIDP, 2002), p. 1091-1137.

punishment has been imposed, followed by complete enforcement, pardon, or lapse of time. Prosecution for an offence is also barred if the suspect has already fulfilled a condition set by the competent authorities of a foreign state in order to finally settle the case and prevent prosecution for that offence (the so-called foreign transaction; cf. 3.B.b.). At present criminal procedure in The Kingdom of the Netherlands only allows for reopening of closed cases in the defendant's favour, by the remedy of revision (*herziening*; see *supra sub* 3.D.I). However, the Dutch government is preparing a Bill that contains limited grounds for revision of criminal judgments by which the defendant is acquitted or dismissed of all charges. It will become possible to reopen cases if new evidence (e.g., DNA test) has come to light and the case concerns an offence that carries a maximum punishment of life imprisonment, or if certain procedural irregularities have occurred (e.g., forgery of a crucial case document, perjury crucial to the case, and bribery of officials, judges, etcetera).

G. Consequences of Misuse or Abuse of Power and/or Infringement of Fundamental Rights

There are specific rules Dutch criminal procedure for the situation in which it appears to a trial court that procedures have been breached in the preliminary investigation and it is no longer possible to repair the violation (see Article 359a Sv). If the legal consequences are not otherwise provided for in law, the court can determine: that the mere recognition by the court of the procedural breach provides sufficient redress, that the sentence shall be mitigated, that evidence shall be excluded, or that the prosecution shall be stayed. In choosing between these consequences the court takes into account the interests served by the infringed rule, the seriousness of the defect and the disadvantage caused by it. The court has a wide discretionary power in deciding what sanction will be applied.

A statement of a suspect that is obtained by putting unlawful pressure on him or her during the interrogation (cf. *supra sub* 4.A.b.) will be excluded as evidence. Treatment violating the prohibition against torture in Article 3 ECHR, results in a stay of prosecution. If the treatment constitutes inhuman or degrading treatment in the sense of Article 3 ECHR, it will depend on the circumstances whether this must lead to a stay of prosecution, or only to exclusion of the statement obtained through the ill-treatment. An official who conducts such an unlawful interrogation could be disciplined internally or punished in a criminal trial.

Regarding unlawful acts by the criminal investigation and prosecuting authorities, it is important that a stay of prosecution can only come into play if the acts concerned constitute serious breaches of the principles governing proper proceedings by which, deliberately or with gross negligence, the accused's right to a fair hearing (Article 6 ECHR) has been disrespected.⁸³ This means that a stay will not follow in the event of a mere violation of the right to privacy in Article 8 ECHR (there was no reasonable suspicion, without the necessary authorisation, or in contravention of other procedural rules) of invasive methods of surveillance by investigative authorities. Depending on the seriousness of the violation this will normally result in the exclusion of evidence obtained through the violation or in a reduction of sentence.

Breaches of custody or pre-trial detention rights cannot be brought up in trial if these have already been reviewed or could have been reviewed by a judge or court during the pre-trial investigation phase (cf. *supra sub* 4.A.b. and c.). This is barred by the principle of the closed system of remedies (*gesloten stelsel van rechtsmiddelen*).⁸⁴

If the reasonable time requirements (see *supra sub* 4.B.d.) are not met this will usually lead to a small reduction of the sentence. Only recently the Supreme Court ascertained that it cannot – that is no longer – lead to a stay of prosecution. This sanction could, however, still be applied if politicians or important public officials were, deliberately or with gross negligence, to make a statement on individual cases that are before the courts and such statements would constitute a violation of the presumption of innocence or the right to a fair trial in Article 6 ECHR which seriously affects the defendant. Deliberately withholding crucial evidence by the accused or seriously deceiving the court might also have to result in a declaration of inadmissibility of the defence.

H. State of Emergency and Derogation from Obligations under Human Rights Treaties

Article 103 of the Constitution allows for declaration by Royal Decree of a state of emergency in order to maintain internal or external security. A Royal Decree is an order of the government, i.e. The Queen and the Ministers in Council. According to the 1996 Act on the Coordination of Emergency Situations (*Coördinatiewet uitzonderingstoestanden*) the declaration has to be requested by the Prime Minister, and immediately reported to the

⁸³ See HR 19 December 1995, *NJ* 1996, 249, with case-note by T. Schalken; HR 30 March 2004, *NJ* 2004, 376, with case-note by Y. Buruma.

⁸⁴ HR 30 March 2004, *NJ* 2004, 376, with case note by Y. Buruma.

States General (*Staten Generaal*, *i.e.*, the Second and First Chamber together) and published in the *Staatsblad* (the official Bulletin of Acts). Both the government and the States General can terminate a state of emergency. Furthermore, the States General can set a time limit.

The declaration may derogate from the constitutional fundamental rights of religion (Article 6) insofar as the exercise of this freedom other than in buildings and enclosed places is concerned, of expression (Article 7), association (Article 8), assembly and demonstration (Article 9), respect for the home (Article 12) and correspondence (Article 13), and from the constitutional obligations that the trial of offences shall be the responsibility of the judiciary, and that a sentence entailing deprivation of liberty may be imposed only by the judiciary (Article 113 § 1 and § 3). Although the Constitution does not expressly refer to the non-derogability of certain rights and freedoms, those constitutional rights and freedoms that are not mentioned in Article 103 could be considered as such. So, as far as criminal procedure is concerned, the rights to privacy (Article 10), inviolability of the person (Article 11), liberty and *habeas corpus* (Article 15), access to the competent court (Article 17), legal representation (Article 18), as well as the acceptance that trials shall be held in public, and that judgments shall specify the grounds on which they are based, and be pronounced in public (Article 121) are non-derogable in that respect. Nevertheless, all these fundamental rights may always be restricted or at least regulated by Act of Parliament. Only the legality principle or *nulla poena sine praevia lege poenali* (Article 16), and the prohibition of capital punishment (Article 114), can be neither limited nor derogated from in time of peace or during a state of emergency.

As has already been mentioned, the Constitution does not provide for a provision on the right to fair trial as such. So according to Dutch domestic law the right to a fair trial is neither derogable nor non-derogable. However, since suspension of Articles 93 and 94 of the Constitution is not provided for, the derogation regimes of particularly the ECHR and the ICCPR will remain intact during a state of emergency. Both the European Convention as the United Nations Covenant allow for derogation from the right to a fair trial in Article 6 ECHR (see Article 15 § 2 ECHR) and in Article 14 ICCPR (see Article 4 § 2 ICCPR). Fair trial rights may therefore also be suspended in The Netherlands in the event of a state of emergency.

5. RECENT LEGAL CHANGES IN DUTCH CRIMINAL PROCEDURE AFFECTING HUMAN RIGHTS

A. General

During the last decade many changes within criminal procedure have occurred in The Netherlands. This section points out some of the most important recent changes as a result of changing perceptions of public safety and the risk of certain types of crimes (e.g., terrorism, organised crime). Furthermore, attention will be paid to some amendments of criminal procedure that affect the way fundamental rights are secured and can be enjoyed in ordinary criminal cases.⁸⁵ Most of the reforms amend the existing common legal framework of criminal law enforcement. Some of the changes made to strengthen the fight against terrorism, involve some fundamental departures from the foundations of criminal procedure, but most of these deviations were limited to terrorism cases (see *infra* the introduction of 5.B. for an exception regarding the definition on criminal investigation). At present no major legislative reforms in the field of criminal procedure law are being discussed in parliament.⁸⁶ Less fundamental criminal procedure Bills will be mentioned if relevant to the subjects discussed below.

In general, one could note that, although human rights in the Netherlands are generally taken seriously by the legislator, the administration and the judiciary, fundamental rights seem increasingly to function only as absolute minimum conditions which have to be met. As a result, international human rights provisions are increasingly sparingly implemented and assured in several policy and legal areas in the Netherlands. This applies to the European Convention on Human Rights, and holds to an even greater degree in relation to other Council of Europe instruments and the United Nations covenants and treaties.

However, some counterbalance might be underway: parliament is currently discussing a Bill that partly lifts the prohibition on the courts to review Acts against constitutional

⁸⁵ Many of the legislative amendments of the last few years have been the result of the academic project *Strafvordering 2001* (Criminal procedure 2001). See the four reports of the project: M.S. Groenhuijsen & G. Knigge (eds), respectively Groningen: Drukkerij Rijksuniversiteit Groningen 1999, Deventer: Gouda Quint 2001, Deventer: Kluwer 2002 en 2004.

⁸⁶ For an overview, see Letter of the Minister of Justice, *Kamerstukken II* 2007-2008, 29 271, nr. 7.

fundamental rights (see *supra sub 2.A.*).⁸⁷ If accepted – the Bill has already passed the Second Chamber – the prohibition will no longer apply to, e.g., all the constitutional rights and requirements mentioned *supra sub 3.A.*.

B. Pre-trial Setting

As regards criminal pre-trial investigation, many laws, measures and practices of course imply restrictions on the right to a private life. However, not only do the ways to restrict the privacy of citizens seem to be increasing constantly, what is more, in combination the restrictions are very far-reaching and they form a severe restriction on the privacy of citizens.⁸⁸ This is a development that cannot be captured very well, either by the Supreme Court of The Netherlands or the European Court of Human Rights. The Supreme Court is currently still not authorized to review Acts of Parliament against fundamental constitutional rights (*toetsingsverbod*; see *supra sub 2.A.* and *5.A.*), while the European Court in fact only deals with human rights violations on a case-by-case basis and hardly ever decides on general developments as such.

So, for example, The Netherlands has been the world leader in tapping telephone conversations for some years now:⁸⁹ In the second half of 2007 the Dutch authorities tapped 12,491 telephone numbers (84% mobile; 16% land line).⁹⁰ In the Code of Criminal Procedure the power to tap telephones is subject to the most severe conditions within the code, yet this power can apparently be used quite easily. Intrusion on privacy therefore has become relatively simple within the criminal justice system.

A fundamental, dogmatic change regarding criminal investigation was caused by the 2007 amendment of the definition of criminal investigation in Article 132a Sv.⁹¹ The new definition is much wider than the old one. Although it was introduced in anti-terrorism legislation, it actually applies to criminal investigation in general. Before the amendment, Article 132a Sv stated that a criminal investigation shall mean an investigation led by the public prosecutor with the aim of taking decisions under the Code of Criminal Procedure

⁸⁷ See *Kamerstukken 28 331* (see the text of the Bill in: Eerste Kamer 2004-2005, nr. A).

⁸⁸ Cf. Privacy International, *Leading surveillance societies in the EU and the World 2007*, on <<http://www.privacyinternational.org>> (see under: Key PI Resources).

⁸⁹ See, e.g., *NRC Handelsblad* 29 May 2008, '1.700 gesprekken per dag afgetapt' (1.700 conversations wiretapped per day) (<http://www.nrc.nl/binnenland/article1900270.ece/1.700_gesprekken_per_dag_afgetapt>); *De Groene Amsterdammer* 2002 (week 25), 'Aftappers in het nauw' (Wiretappers cornered) (<http://www.groene.nl/2002/0225/rz_tappen.html>).

⁹⁰ Letter from the Minister of Justice, *Kamerstukken II 2007-2008*, 30 517, nr. 6.

⁹¹ Introduced by the 2007 Act on the expansion of the possibilities for investigating and prosecuting terrorist offences (*Wet verruiming mogelijkheden opsporing en vervolging terroristische misdrijven*); see *infra sub 5.B.a.*

and prompted by a reasonable suspicion that an offence has been committed or that such offences are being planned or committed by a criminal organisation. Now it means an investigation in relation to criminal offences led by the public prosecutor with the aim of taking decisions under the Code of Criminal Procedure. So the existence of a reasonable suspicion is no longer the principal basis of criminal investigations; pro-active investigations and the use of intrusive investigative powers must be regarded as perfectly normal as far as the definition is concerned.

Finally, it is worth mentioning that the government is preparing a Bill on financial compensation for the use of coercive powers (*schadevergoeding voor de toepassing van dwangmiddelen*).⁹² It will cover investigative powers in all cases.

a. Special provisions for terrorism cases

Most significant with regard to security legislation is the 2007 Act on the Expansion of the Possibilities for Investigating and Prosecuting Terrorist Offences (*Wet verruiming mogelijkheden opsporing en vervolging terroristische misdrijven*).⁹³ The most important provisions in the Act are the following. First, it provides for the possibility to hold terrorism suspects in remand custody (*bewaring*) for two weeks even if there are no strong allegations against them (see *supra sub 4.A.c.*). The Dutch legal system does not allow for secret arrest and detention, deportation and extraordinary rendition without habeas corpus. Second, information from the investigation can now be kept confidential for a maximum of two years and 90 days by postponing the trial (see *supra sub 4.A.c.* and *4.B.h.*), although evidence supportive of the defendant's case may never be deleted, not even in special circumstances. Finally, the Act allows the use of all special covert investigative powers as well as powers to search objects, vehicles and clothing if there is merely "an indication of a terrorist crime" (see *supra sub 4.A.a.*). As for the last mentioned amendment: the application of intrusive powers on such a vague basis might be problematic with regard to Article 8 ECHR, since restrictions on the right to a private life must be foreseeable, i.e., they must be formulated with sufficient precision to enable the individual to regulate his conduct. The possibilities for the investigative judge and courts to review the necessity,

⁹² Letter from the Minister of Justice, *Kamerstukken II 2007-2008*, 29 271, nr. 7. See also *Kamerstukken II 2005-2006*, 30 164, nr. 19 (Motie van het Lid Weekers c.s.).

⁹³ Act of 20 November 2006, *Stb.* 2006, 580; entry into force: 1 February 2007 (*Stb.* 2006, 731).

proportionality and lawfulness of the application of these powers in terrorism cases are relatively limited compared to equivalent powers in ordinary and organised crime cases. Moreover, none of the very broad powers is restricted to crimes against life or crimes that carry a maximum of life imprisonment; they can be utilized in all terrorist crimes.

It is important to note that the possibility of applying investigative powers has also been deliberately extended by the criminalization of several acts that were not previously criminal offences. The 2004 Act on Terrorist Offences (*Wet terroristische misdrijven*) widened the criminal law to conspiracy (*samenspanning*; Article 80 Sr) to commit several terrorist offences (Articles 114b, 120b, 176b, 282c, 292a, 304b, 415b Sr), to the terrorist criminal organisation (Article 140a Sr), and to recruitment for violent Jihad (Article 205 Sr).⁹⁴ When investigating all these offences it is possible to utilize investigative powers against persons who have not (yet) committed a tangible crime. So this criminalisation offers the opportunity to investigate in what is in fact a pro-active phase.

b. Interrogation of the suspect

The right to have counsel present does not in principle apply during the first period of the culprit's questioning (see *supra sub 4.A.b*). However, as of 1 May 2008 an experiment has been running in which suspects accused of a crime against life may have their counsel present during police interrogations. The experiment will run for two years in the jurisdictions of the police forces of Amsterdam-Amstelland and Rotterdam-Rijnmond only.⁹⁵

As has already been mentioned, the police, prosecutor and investigative judge at present are under no general obligation to record interrogations with audio or video-equipment. The Minister of Justice, however, has stated by letter to parliament that interrogations of suspects will be audio recorded if a crime is implicated that is listed in the Criminal Code and carries a maximum punishment of at least twelve years, or that caused someone's death or serious injury, or that concerns a serious sex offence, or if a child under 16 or a mentally handicapped person is involved in the case as a suspect, witness, or victim.⁹⁶

⁹⁴ Act of 24 June 2004, *Stb.* 2004, 290; entry into force: 10 August 2004 (*Stb.* 2004, 373).

⁹⁵ It is now doubtful whether the experiment will be enough to satisfy the new requirements apparently set out by the European Court. See note 74 *supra* and ECtHR 27 November 2008, *Salduz v Turkey*, and ECtHR 11 December 2008, *Panovits v Cyprus*.

⁹⁶ See *Kamerstukken II*, 2005-2006, 30 300 VI, nr. 178, p. 2.

c. Detention

Since 1990 the prison population, especially the numbers serving prison sentences and in pre-trial detention, have grown almost constantly in the Netherlands. The total number of people in Dutch prisons increased from 6,800 (in 1990) to 17,600 (in 2005) (in 2006 the number decreased slightly to 16,230, but it is very uncertain whether this constitutes the start of a trend).⁹⁷ The numbers serving sentences in prison and pre-trial detention are primarily responsible for these statistics. Moreover, for around a decade now there has been a huge increase in the number of cases in which defendants are sentenced to life imprisonment (which in the Netherlands is indeed deprivation of liberty for the term of one's natural life). These developments raise the question of whether the principles of proportionality and necessity, as contained in Article 5 ECHR, are adequately applied with regard to the deprivation of liberty, especially of those suspected of an ordinary offence. It has already been explained under 5.B.a. that the standards have been lowered for terrorism cases.

d. Data requisition

The 2005 Act on the Power to Requisition Data (*Wet bevoegdheden vorderen gegevens*; see Articles 126nn-126ni Sv) provides the police with powers facilitating the collection of "identifying data" from individuals, legal bodies and companies.⁹⁸ Moreover, the 2007 Police Data Act (*Wet politiegegevens*) introduced rather wide provisions to provide private individuals and private bodies with data collected by the authorities.⁹⁹ So, via the police, data can now fairly simply pass around between the private and the public sector. Furthermore, the Bill on the duty to retain telecommunication data (*Wet bewaarplicht telecommunicatiegegevens*), which is currently passing through parliament, contains an obligation on telecommunication suppliers to retain, for a period of twelve months, data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.¹⁰⁰ The Bill aims to

⁹⁷ See further: Wetenschappelijk Onderzoek- en Documentatiecentrum, *Criminaliteit en rechtshandhaving 2006. Ontwikkelingen en samenhangen*, (Onderzoek en beleid, nr. 255), p. 491, Table 6.3 (at: <www.wodc.nl>); and the World Prison Brief (at: <<http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/>>).

⁹⁸ Act of 16 July 2005, *Stb.* 2005, 390; entry into force: 1 January 2006 (*Stb.* 2005, 690).

⁹⁹ Act of 21 July 2007, *Stb.* 2007, 300; entry into force: 1 January 2008 (*Stb.* 2007, 549).

¹⁰⁰ Amended Bill of 22 May 2008, *Kamerstukken* 31 145 (see First Chamber, 2007-2008, nr. A).

implement EU Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006.¹⁰¹

e. Obligation to carry identification papers, camera surveillance, DNA, blood tests

After a long and tense discussion, the 2004 Act on the Extended Obligation to Identify Oneself (*Wet op de uitgebreide identificatieplicht*) entered into force on 1 January 2005.¹⁰²

The obligation implies that any individual from the age of 14 in the public space must always immediately be able to show identification papers if so requested by the police, military police or public surveillance officer. Officials can request identification papers if this is reasonably necessary for the fulfilment of their task, e.g., the investigation of criminal offences.

The 2005 Act on Camera Surveillance¹⁰³ gave municipalities the power to place cameras in public areas in order to hold the public under constant surveillance if this is considered to be necessary for the preservation of public order. The recordings may be used in criminal procedure (see *supra sub 4.C.*). In a way, this criminal investigative power therefore spreads out indirectly over the life of non-suspect individuals when they are present in the public space.

For the purpose of the prevention, detection, prosecution and trial of criminal offences, the 2004 Act on DNA Testing of Convicted Persons (*Wet DNA-onderzoek bij veroordeelden*) offers the possibility to collect DNA cell material from people convicted of a crime for which pre-trial detention is allowed (see *supra sub 4.C.*).¹⁰⁴

At present, parliament is discussing a Bill on compulsory cooperation with a blood test in criminal cases (*verplichte medewerking aan een bloedtest in strafzaken*). The legislative proposal aims to provide the possibility to force a suspect or other party to cooperate with an examination by which it can be ascertained whether he or she carries a virus that could be transmitted while committing a criminal offence on the victim.¹⁰⁵

f. Witness procedures

¹⁰¹ Published in *Official Journal of the European Union*, L 105/54 of 13.4.2006.

¹⁰² Act of 24 June 2004, *Stb.* 2004, 300; on the entry into force, see *Stb.* 2004, 583.

¹⁰³ Act of 30 June 2005, *Stb.* 2005, 392; entry into force: 1 February 2006 (*Stb.* 2006, 32).

¹⁰⁴ Act of 16 September 2004, *Stb.* 2004, 465; entry into force: 1 February 2005 (partly; *Stb.* 2005, 18), 1 March 2005 (partly; *Stb.* 2005, 80), 1 May 2006 (partly; *Stb.* 2006, 220), and 1 August 2006 (partly; *Stb.* 2006, 312).

¹⁰⁵ Bill of 11 October 2007, *Kamerstukken* 31 241.

Several new Acts concern witnesses. The Act on Commitments to Witnesses in Criminal Cases (*toezeggingen aan getuigen in strafzaken*) was introduced in 2006, which allows for the use as evidence of witness statements that have been given by suspects or convicts in exchange for reduction of the sentence they might receive in their own case or already have received (see *supra sub 4.B.h.*).¹⁰⁶ The 2006 Act on Covert Witnesses (*Wet afgeschermdde getuigen*) to keep witnesses covert for reasons of state security also entered into force that year (see *supra sub 4.B.h.*).¹⁰⁷ In a similar way as the procedure for threatened witnesses these procedures can be of particular interest in terrorism and organised crime cases.

All these kind of procedures cause difficulties for both the defence and trial court judges seeking to independently question witnesses and assess and contest the reliability of their statements. The procedures were introduced in order to comply with the requirement of the right to a fair trial in the case-law of the European Court of Human Rights on Article 6 ECHR when making use of witness statements that have been obtained from anonymous witnesses or under other special circumstances. This cannot, however, alter the fact that the introduction of these procedures has contributed to a shift of power from the trial courts to the investigative judge and the prosecution. Moreover, the covert witness legislation has brought intelligence investigations further into the field of criminal procedure. In that sense a shift is taking place: criminal justice is no longer only founded on police investigations but increasingly on intelligence as well.

Another new provision that deserves mentioning here is the possibility to question suspects, witnesses and experts through a video and audio link, a so called *videoconferentie* (see *supra sub 4.B.h.*).¹⁰⁸ This amendment also came about in the framework of the security programme.

g. Prosecution

The procedure of “prosecution through penal orders” (*OM afdoening door strafbeschikking*), which was introduced 1 February 2008 in Article 257a Sv, involves a most fundamental change of the criminal justice system (see *supra sub 3.B.b.* and *4.B.b.*). This procedure in fact lays the criminal investigation, prosecution, trial of the facts,

¹⁰⁶ Act of 12 May 2005, *Stb.* 2005, 254; entry into force: 1 April 2006 (*Stb.* 2006, 150).

¹⁰⁷ Act of 28 September 2006, *Stb.* 2006, 460; entry into force: 1 November 2006 (*Stb.* 2006, 461).

¹⁰⁸ Act of 16 July 2005, *Stb.* 2005, 388; entry into force: 1 January 2007 (*Stb.* 2006, 209).

deciding on the punishment and execution of the punishment all in the hands of the prosecutor. This amendment constitutes a shift of power from the courts to the prosecution as regards trying the facts and deciding on the punishment. Of course, the defendant can object to the order and have his case heard by a court. But in the face of fear of a prolonged period of insecurity about the outcome of a trial, coupled with apprehension of the public trial itself, suspects might choose to comply with the order immediately, even if their case could not have been proven in court or if they might have expected a less severe sentence at trial.

As regards the possibility to prosecute those suspected of the most serious crimes, it is noteworthy that as of 1 January 2006 the statute of limitation has been removed for all crimes that carry a maximum punishment of life imprisonment.¹⁰⁹ The statutory maximum punishment of many offences has been raised as of 1 February 2005.¹¹⁰ The maximum limit on the term of temporary imprisonment went up from twenty to thirty years with this amendment of the law.

C. Trial Setting: Special Proceedings and Special Procedural Law?

Generally, the competent court in first instance is roughly speaking the District Court of the jurisdiction in which the offence was committed or in which the defendant lives. There are some exceptions. The District Court of The Hague, for example, is the competent court for criminal offences that fall within the ambit of the Act on International Crimes (*Wet internationale misdrijven*), crimes and some infractions committed by military are tried before the District Court of Arnhem, and the Amsterdam District Court is competent in insider trading cases. Of more importance here is that the District Court of Rotterdam is competent if an offence is prosecuted by the national prosecution office (*landelijk parket*; cf. *supra sub 3.B.b.*), which focuses on (inter)national organised crime and terrorism. If a terrorist or organised crime case is prosecuted by one of the district prosecution offices, however, the District Court in that district is competent as usual. In any event, both terrorist and organised crime cases are always tried before an ordinary court; Dutch law does not provide for military or any other special court for such cases. Nor do any special rules other

¹⁰⁹ Act of 16 November 2005, *Stb.* 2005, 595; on the entry into force, see *Stb.* 2005, 596.

¹¹⁰ Act of 22 December 2005, *Stb.* 2006, 11; on the entry into force, see *Stb.* 2006, 23.

than those discussed before apply to such proceedings: suspects in such cases in principle enjoy the same rights as other suspects.

D. Appeal

The 2006 Act on Streamlining Appeal (*Stroomlijnen hoger beroep*) limited the possibilities to appeal in cases in which only a fine of no more than € 500 is imposed (cf. *supra* section II.4).¹¹¹ More importantly, the essence of the appeal procedure has been fundamentally amended in order to secure a more efficient procedure and lighten the workload of the appeal courts: appeal no longer implies a second, new, full and complete reconsideration of the case, but merely operates as a “continuous procedure” which will concentrate on matters in dispute. In principle, only issues addressed by the defence in the grounds of appeal are discussed in the appeal trial. This means that this procedural phase is much more adversarial in nature than the trial in first instance. But it also means that the appeal courts will offer defendants less *ex officio* legal protection now than under the former appeal regime. However, in the specific cases of organised crime and terrorism, the legislator has not in any other way limited or otherwise modified the rights of a higher court to review either the facts of a case or a sentence.

E. Post-trial protection: the principle of ne bis in idem

The prohibition against double jeopardy applies in exactly the same way in respect of terrorism and other serious offences as it does for any other offence. Although the legislator is currently drafting a Bill on the reopening of closed criminal cases – to the disadvantage of acquitted defendants – the proposed grounds for revision are not in any way specifically limited to or aimed at terrorist or organised crime cases (see *supra sub* 4.F.).

6. CONCLUSION

With the principle that concludes tried cases indefinitely – the *ne bis in idem principle* – I have also come to the conclusion of this contribution. To my eyes, the foregoing shows that there is genuine concern for human rights in the Dutch criminal procedure law system. Where fundamental rights are insufficiently provided for in domestic law this is in general

¹¹¹ Act of 5 October 2006, *Stb.* 2006, 470; entry into force: 1 March 2007 (partly), 1 July 2007 (*Stb.* 2007, 70).

adequately counterbalanced by applying international human rights standards. That the Constitution of the Kingdom of Netherlands does not contain a right to a fair trial is effectively neutralized via direct application of the right to a fair trial, in particular in Article 6 ECHR.

Nevertheless, some fundamental changes in criminal procedure in The Netherlands have occurred in the last decade or so, underpinned by terrorism, organised crime and the wish to make the criminal justice system more efficient. This has also affected the position of the courts, prosecution, defence and victims in the system and the way human rights are assured by it. All changes seem to be in conformity with the human rights standards as set by international organizations like the Council of Europe and the United Nations. Particularly the case-law of the European Court of Human Rights exerts an incredible influence in this regard. Nevertheless, the legislator, administration and courts these days seem to have other concerns than only trying to provide the best human rights standard possible. As a result, fundamental rights seem increasingly to function only as absolute minimum conditions which have to be met, less and less as guiding principles, the generous fulfilment of which is an aspiration for legislation, policy and practice.