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Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure*

C.H. Brants-Langeraar*

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1. Introduction: the Essentially Inquisitorial Nature of Dutch Criminal Procedure

Before addressing the question of consensus in Dutch criminal procedure, a few introductory remarks on the essentially inquisitorial nature of criminal process in the Netherlands may serve to help understand why consensual elements such as plea and confession bargaining are at odds with the system (and frowned upon); they exist, but only to a limited extent. Indeed, the central role of the public prosecution service in criminal policy, and of the public prosecutor in individual cases, is at the heart of criminal proceedings in general and of any abbreviated procedures in particular. In the theory of comparative studies, it is commonplace to note that (nowadays) there is no such thing as purely inquisitorial or purely adversarial criminal procedure, and that even systems that belong to the same ‘family’ may differ considerably.¹ Nevertheless, the dichotomy can provide an important theoretical tool of analysis, and it is as such that I employ it here. On the (theoretical) continuum between adversarial and

* C.H. Brants-Langeraar is Professor of Criminal Law and Criminal Procedure at Utrecht University.

* The most comprehensive textbooks on Dutch criminal procedure, from which the general data in this contribution have been taken, are: Cleiren & Nijboer, 2003, Melai *c.s.*, *s.d.* (looseleaf) and Corstens, 2005. The Dutch Code of Criminal Procedure is referred to in the following pages by the abbreviation Sv – from its Dutch name *Wetboek van Strafvordering*. It dates from 1926 and has been amended and updated many times since. The Dutch Criminal Code of 1886 is abbreviated as Sr (*Wetboek van Strafrecht*); it too has been extensively modernised and amended. The case law of the Dutch Supreme Court (*Hoge Raad*) is cited in the usual (Dutch) way by the abbreviation HR, followed by the date and number under which it was published in *Nederlandse Jurisrudentie (NJ)*. Parliamentary documents (draft legislation etc.) are referred to as *Kamerstukken II*, followed by the year and number; legislation by its publication reference *Stb*, followed by the number, or *Stcrt.* followed by the number.

¹ Damaska 1973 and 1986. Common, internationally agreed standards of fair trial have introduced more adversarial elements into European continental procedure with its generally inquisitorial bent, while professionalised crime control by public authorities and, more recently, ever greater emphasis on law and order, have brought to countries with predominantly adversarial style procedures a pre-trial phase that has much of the inquisitorial (Delmas-Marty & Spencer 2002).

inquisitorial, Dutch procedure comes out very much weighed toward the latter and that applies especially to the concept of truth finding in criminal cases, to the role of the prosecutor in that process, and to the hierarchically organised prosecution service that designs and controls criminal policy.

As in all modern inquisitorial procedures in continental Europe, the procedural and organisational arrangements that govern criminal justice in the Netherlands reflect how individuals define their relationship to, and expectations of, the state in terms of the modern *Rechtstaat*: the state is fundamental to the rational realization of criminal justice as part of the ‘common good’, and as such is expected (and trusted) to uphold both law and order and individual liberty. Nevertheless, given that the powers needed for the former may threaten the latter, their exercise is curtailed by the primacy of written rules of law, by entrenched abstract constitutional rights of the individual and by the division of power within the state. In this framework, the fair and accurate outcome of a criminal case depends less on the assertion of individual defence rights (as it would in an adversarial procedure), than on the integrity of functionaries of the state – police, prosecution, and judge – in performing their allotted tasks within the limits of codified criminal procedure.²

In the Netherlands, these fundamental assumptions translate into a procedure that is perhaps more inquisitorial than many on the continent of Europe. Truth finding – and therefore the legitimate outcome of any case – is regarded as a matter for professionals only, and best undertaken pre trial by a non-partisan state prosecutor who is in control of the police and will ensure that all evidence is gathered (both for and against the suspect), and at trial by an active judge. However, although the judge is expected to take an active truth-finding role in court, and although the defence has the right to contest the evidence, it is the prosecutor who sets the agenda with the trial ‘dossier’, compiled during a pre-trial investigation that is relatively closed to defence and completely closed to the public. The pre-trial role of the defence is not to gather evidence, but to point the prosecutor towards avenues of investigation favourable to the suspect, which the prosecutor has a duty to investigate. This notion of the prosecutor as impartial and non-partisan is crucial to the understanding of Dutch proceedings and cannot be overstated. It not only underlies the very powerful position of the prosecution, it also reflects and reinforces the fundamental confidence in the state as a guardian of justice and due process that is such a salient feature of criminal process in the Netherlands.

Dutch public prosecutors are trained in the same way as judges. Indeed, the Public Prosecution Service is regarded as part of the judiciary, known as the ‘standing judiciary’ because the prosecutor stands during his performance in court. The idea that the prosecutor is ‘really’ some sort of judicial figure, is reflected in the magisterial stance that prosecutors are expected to adopt in the execution of their most important tasks: controlling and monitoring an impartial pre-trial investigation by the police, compiling the dossier and deciding whether or not to prosecute on the basis of their findings. Guarantees that prosecutors will actually fulfil this non-partisan role are to be found in the hierarchical system of monitoring and control that governs both relationships with the police and within the prosecution service as well as with the trial court, and especially in the professional ethics that prosecutors internalise during training.

At the same time, while individual prosecutors may be judicial figures in this role, the prosecution service to which they belong is also very much part of the

² Cf. Brants & Field 2000.

executive civil service, answerable in the final event to the minister of justice and greatly involved in shaping criminal policy. This has resulted in an elaborate system of internal directives (*Aanwijzingen* issued by the so-called council of procurators general – *procureurs-generaal* – in Dutch) that direct prosecutors to certain types of decisions in certain types of cases – in theory always taken after a judicial weighing of interests in individual cases – on whether or not to allow a case to go to the full blown trial phase. As most such decisions are a fairly routine matter, in practice this can set the written law aside for whole categories of offences, so that the prosecution service in the Netherlands is something of an anomaly in terms of the *trias politica*.

From the above we may distil two outstanding features of Dutch criminal justice. On the one hand, the fundamental belief in non-partisan truth finding by the prosecution as a prelude to trial (where the prosecutor's version of events may be contested by the defence and is verified by the court), which precludes any notion that the 'truth' is something that may be arrived at through party-driven negotiation and agreement. On the other, the same judicial role of the prosecutor, combined with prosecutorial directives on non-prosecution, which affords the prosecution in general a vast amount of discretion in keeping cases out of court: full blown trials are very much the exception. Prosecutorial discretion therefore plays a very important role in streamlining the Dutch criminal justice system and in dealing with an ever-increasing caseload, but it does not include the authority to come to 'arrangements' regarding the truth (or the sentence, which is the prerogative of the court).³

The organization of formal criminal procedure all the way down the line reflects the notion that 'the truth' in criminal cases is not open to negotiation. Neither in theory nor in practice is there much scope for formal or informal bargaining. Bargaining happens in practice only if the prosecutor finds himself somehow in a less powerful position than he theoretically has – namely if he is faced with powerful defendants such as white collar or organised criminals. It occurs most especially in the areas where the prosecution has the discretion to decide on alternative ways of dealing with offences other than bringing them to court and/or for some reason needs the co-operation of the defendant. However, because – with one exception – there is no formal means of achieving a bargained solution, negotiations mostly take place behind closed doors are not subject to judicial control. This very fact has given rise to serious political debate, for it has been interpreted to mean that whatever goes on in the prosecutor's office somehow cannot stand the light of day. In the following pages we shall see that court procedures in the Netherlands, which are public, also leave little to no room for negotiation, so that by definition any bargaining there is takes place pre trial within the more or less closed ambit of prosecutorial investigation. We shall also see that, while new legislation, strengthening the position of the prosecution further, is aimed, among other things, at removing bargaining opportunities, it is questionable whether it will succeed in doing so.

2. (I) Organization of Criminal Procedure (more Serious Crimes)

2.1. Pre-trial stage

(1.) According to Article 148 Sv, the public prosecutor is in charge of all criminal investigations, and the pre-trial stage in the Netherlands usually consists of an

³ At least not at present. As we shall see, there are important legislative changes in the making.

investigation by the police under his/her direction.⁴ It may begin as soon as a reasonable suspicion has arisen that a criminal offence has occurred and be directed against a specific person suspected of that offence (Art. 27 Sv), or – in cases of serious (organised) crime – at an earlier point in time, namely if there is a reasonable suspicion that a person or persons are involved in or planning an offence (Art. 132a Sv). The aim is to explore all possible avenues of investigation, therefore also those that could point to a suspect's innocence, and to collect evidence with a view to deciding whether or not to bring the case to trial. The threshold of 'reasonable suspicion' activates prosecutorial and police powers of investigation.

Prior to a fairly recent change in the law,⁵ it was not unusual for the prosecutor to involve an investigating magistrate (*rechter-commissaris*) and request the opening of judicial pre-trial investigation (*gerechtelijk vooronderzoek*). Indeed, he was obliged to do so if he wished to employ certain investigative powers, such as a house search. Originally, judicial pre-trial investigation was conceived of as an extra guarantee that the investigation would be impartial, investigating magistrates being ordinary judges at the district court acting by rote in the role of investigators. They would themselves undertake substantial investigations, directing the police, conducting house searches, interviewing suspects and witnesses, etc. At this stage, the defence also had more rights (for example with regard to disclosure and confrontation) than during the prosecutor's investigation. Although judicial pre-trial investigation still features as a possibility in the code of criminal procedure (Arts. 181-241c), over the years, the role of the investigating magistrate has been substantially eroded. Partly, this was due to an increase in criminal cases that made it virtually impossible for investigating magistrates to adequately fulfil their investigative tasks.

At the same time, the Supreme Court ruled that the prosecutor could continue with his own pre-trial investigation parallel to that of the investigating magistrate, during which defence rights were (much more) limited.⁶ In the much-reduced number of cases in which judicial investigation nowadays gets underway, parallel investigation by the prosecutor is the norm and it has been given a solid basis in law (Arts. 149, 177a Sv.). All of this has rendered investigating magistrates somewhat superfluous as investigators, and their role has undergone a substantial change in focus: their main tasks are now the authorisation of telephone taps and bugs (Arts. 126l, 4, 126m, 7, 126s, 4, 126t, 6 Sv), and interviewing, under oath, witnesses whom the defence wants to challenge but who will not be called in court.⁷

⁴ For the sake of brevity, from now on I will use the masculine form to denote the prosecutor, although nowadays women are very much in evidence in the prosecution service. The same applies to judges.

⁵ Wet herziening gerechtelijk vooronderzoek, *Stb.* 1999, 243 and *Stb.* 2004, 243. This change coincided with a desire to strengthen the leading position of the public prosecutor with regard to the police in pre trial investigation, especially where the use of covert investigative methods is concerned. See Beijer *et al.* 2004.

⁶ HR 22 November 1993, *NJ* 1984, 805. The only limit is that the prosecutor may not use his own investigative powers in this way *solely* in order to curtail defence rights, although whether or not this occurs is very difficult to establish.

⁷ Because they rely so strongly on written evidence contained in the trial dossier, Dutch trials very much 'paper trials' and many witnesses are not called to give evidence in court. Article 6 of the European Convention on Human Rights and Fundamental Freedoms, however, while not requiring that the evidence be challenged in open court, does require that the defence have the opportunity at some stage in the procedure, to confront and question witnesses (see eg. ECtHR: 20 November 1989, A166 (*Kostovski v the Netherlands*) in which the European Court found Dutch procedure wanting in this respect). This has put paid to a previous practice of using non-contested (and sometimes anonymous) testimony in evidence, and in cases in which it is judged

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This state of affairs, criticized by some legal scholars, defence lawyers and investigating magistrates themselves as giving the prosecution too much power, undermining defence rights and putting the investigating magistrate at too great a distance from the actual investigation while still requiring that he make important investigative decisions,⁸ is the legal consolidation of a long standing practice. It is the police who do the actual investigative work and in this they are fairly independent, although formally under the supervision of the prosecutor. The latter, while keeping tabs on what is going on, rarely becomes involved in any hands-on way. Prosecutors do not, for example, usually interview suspects or witnesses themselves, although they may tell the police to do so. The police also take the first steps in the compilation of the dossier, which is then handed over to the prosecutor for completion.

In practice, prosecutors tread a fairly difficult path in making sure that they are informed of progress (or the lack thereof) and that the investigation has not become one-sided and lost sight of the possibility that the suspect may be innocent,⁹ while being careful not to meddle in investigation tactics and techniques for which they have no training and which are the expertise of the police and forensic scientists. While the ordinary police have general investigative powers, the investigation of some crimes requires highly specialised knowledge. In these cases special officers (from the inland revenue service, economic crimes service, agriculture and fishery service, etc.) will undertake the investigation, again under supervision of the public prosecutor. Although this sometimes makes it difficult for the prosecutor to actually direct an investigation, there is specialisation within the prosecution service too, with some prosecutors concentrating on fraud, organised crime, insider dealing, crimes under international law and so on.

As in all countries, it is usually the police in the Netherlands who receive the first indications that a crime has been committed (or is being planned), either because it is reported by a member of the public, or through a tip off or open or covert police surveillance. By law, the opportunity principle (principle of expediency is a better term, in any event for the Dutch situation) governs the prosecutor's decision to prosecute (Art. 167 Sv) and filters down to the police at the investigative stage. For this, there is no explicit legal basis, but in practice the police have considerable discretion in deciding which cases to pursue, sometimes even if serious crimes are involved. It is, of course, unlikely that they would ignore a murder, but they may well simply note a citizen's report of a theft or burglary (usually for insurance purposes), perhaps visit the house and then take the matter no further if they feel it is unlikely that the case could ever be solved and that further investigation is a waste of time. Although the law makes no mention of such police-discretion, it is primarily based on prosecutorial directives. These may be regarded as quasi-law (and are so regarded by the Supreme Court, so that a defendant may invoke them in court) and it is in the directives from the prosecution service, themselves based on a generic form of the opportunity principle, that (non) prosecution policy – as opposed to decisions in individual cases – is formulated and anticipated by the police.

Sometimes, these directives will specifically require that certain types of crime be investigated as a matter of policy, but more often they explicitly allow or even

undesirable and/or dangerous to call a witness at trial, the investigating magistrate may hear that witness under oath *in camera* – where the defence may put (written) questions – and produce a report in his findings: the report may then be used in evidence (see e.g. Art. 226a ff Sv).

⁸ See for an overview, Beijer *et al.* 2004, ch. 3.

⁹ A few recent miscarriages of justice in the Netherlands have shown that in this they are not always successful.

require the prosecutor – and therefore the police – to refrain from action in specific cases. Among these are some forms of drug crime (as most people would expect in the Netherlands), but there are many other examples. To name but two: before the law was changed to allow euthanasia by a doctor under certain circumstances, euthanasia-policy was governed entirely by a directive based on the case law of the Supreme Court; another, much less obvious example is that crimes committed by journalists in the course of their professional activities will also not be investigated with a view to trial, if they can be justified by necessity in connection with the freedom of expression.¹⁰ Decisions to investigate (further) or not will also depend on the offender and the circumstances. And finally, considerations of available manpower and the size of the existing caseload (or backlog) may determine the expediency of (further) investigation. The logic of the Dutch system and the hierarchical position of the prosecutor, dictate that he should be informed of any such police (non) action. In practice, this need not be the case although, again, serious crimes and certainly those involving (serious) physical harm will be brought to the prosecutor's attention.

The nature of Dutch criminal investigations as the beginning of a truth finding process by the state in the form of the non-partisan prosecutor, determine the position of the defence at the pre-trial stage. The role of the defence lawyer is restricted to directing the prosecution to possibilities in the investigation favourable to his client that have been overlooked, and to making sure that due process is observed. In a sense, this could be described as 'looking over the prosecutor's shoulder' and in that way ensuring that the eventual trial dossier will be a complete and accurate version of events. This is somewhat hampered by the fact that access to the full dossier only becomes a defence *right* 10 days before trial, before which the defence lawyer is dependent on permission from the prosecutor (or investigating magistrate, should he have become involved), and that permission may be withheld 'in the interests of the investigation' (Art. 30,2 Sv). What could be described as the watchdog role of the defence more or less precludes their conducting their own parallel investigations. Neither do they have the explicit right to do so.

Recent developments have forced lawyers to take a more adversarial stance,¹¹ and have led to the first steps on the road to parallel defence investigations, with the defence sometimes hiring private investigators or employing independent forensic experts (although in the latter case they will not have access to the evidence itself – which is examined by the state forensic institute working for the prosecution – only to that institute's report). However, even such steps are rare and in any event, Dutch lawyers never conduct full investigations themselves and do not regard it as their task. Any evidence they may uncover or witness they may wish to have called cannot be introduced in court other than through the public prosecutor or, in the event of his refusal to do so, with the court's permission.¹² The Code of Conduct of the Dutch Bar Association is somewhat ambivalent on the matter of lawyers conducting pre-trial investigations and certainly there is a taboo on speaking to a witness pre trial; although not expressly forbidden, it is simply not done.

¹⁰ Aanwijzing toepassing dwangmiddelen bij journalisten, *Stcrt.* 15-01-2002, 46.

¹¹ One is the virtual disappearance of the old-style investigating magistrate who would be more amenable than a prosecutor to suggestions by the defence for further investigation. Another is the case law led reduction of the active truth-finding role of the trial judge: in many cases, contra-expertise on forensic evidence or the calling of a witness at trial are now dependent on the defence's making a reasoned request that demonstrates the relevance of such action.

¹² They may produce witnesses in court, but the final decision whether they will be heard rests with the court itself.

Neither do victims have official standing as a party in court in the sense that they could investigate and produce evidence. Again, recent developments and public dissatisfaction with the performance of the police and prosecution service have wrought a certain amount of change, albeit indirectly. It is now not unusual for a crusading journalist (of whom there are several) to take up and publish a victim's case and try to uncover evidence of guilt. Although there is no legal basis whatsoever for this, apart from the freedom of expression, and anything they discover can only figure as evidence at trial if introduced by the prosecutor, in this way the media can put considerable pressure on police and prosecution, somewhat undermining the strict ideology of non-partisan truth-finding.

(2.) Articles 53 and 54 Sv give the police the power to apprehend a suspect and take him to a place for questioning by the prosecutor or the assistant prosecutor. Although these provisions certainly give him the right to do so, the prosecutor does not usually interrogate suspects himself. From a comparative perspective, 'assistant prosecutor' is a somewhat misleading translation of the Dutch *hulpofficier*, for this figure is always a police officer of a certain rank. The law therefore explicitly covers standard practice, namely that the police interrogate suspects during pre-trial investigations. The purpose of an arrest is interrogation, after which the prosecutor or assistant prosecutor may order that the suspect be held in custody for three days (with an extension of a further three days if strictly necessary) – but only if the arrested person is suspected of an offence punishable by more than 4 years imprisonment.¹³ A suspect has the legal right to counsel at any time (Art. 38 Sv), but there is a difference between indigent suspects and those who can afford their own lawyer. Although indigent suspects may request that a lawyer be assigned to them, counsel *pro deo* is not automatically assigned until the suspect is detained in custody after the initial interrogation (Art. 40 Sv) at the earliest and only in serious cases. The more well off may engage counsel whenever they want. The fact that there is a right to counsel at any time implies that these suspects also have the right to consult the lawyer of their choice when held for interrogation at a police station (Art. 50 Sv). Certainly in this respect non-indigent suspects are better off. However, whether or not counsel is assigned or privately engaged, and whether or not the suspect has been detained in custody, or for what offence, makes no difference to the situation *during* interrogation.

Dutch law does not give suspects the right to have a lawyer present during police questioning in the pre-trial stage. It does not explicitly say so. That this is the case (and it is standard practice not to admit counsel unless the police and/or prosecutor give permission) is deduced *a contrario* from Article 186a Sv that gives the right to have a lawyer present during questioning by the investigating magistrate, whereas no such provision exists with regard to questioning by the police. (As we have seen, investigations of this kind by the investigating magistrate are becoming increasingly rare and certainly the great majority of suspects in the pre trial stage are questioned, at least at first, without a lawyer being present). The question of whether or not counsel should be admitted at this point has been a recurring theme of debate since the 1970's. It has come up again recently, but as always the ministry of justice, the prosecution service and the police have resisted vigorously. The underlying arguments are that the presence of a lawyer would not only unduly hamper the police in their investigation (suspects would refuse to say anything), but also, given the guarantees of supervision by the prosecutor and in the final event the court, that a lawyer is unnecessary

¹³ Thereafter an investigating magistrate or a court is required to extend the period of custody.

considering that the police can be trusted to duly carry out their duties of non-partisan truth finding within the legal limits of due process. A compromise solution of installing tape and/or video recorders during police interrogation has been reached, but there seems to be no hurry to implement it.¹⁴ It follows that the absence of a lawyer does not affect the status of evidence at trial obtained by the police during questioning.

That the police would be unduly hampered by the presence of a lawyer because suspects would refuse to speak, is a rather strange argument given that they have the right to remain silent and, according to Article 29 Sv, must be informed of that right before interrogation begins. What constitutes 'interrogation' has been interpreted by the Dutch Supreme Court to mean 'questions concerning a specific offence with regard to which a reasonable suspicion exists against the person questioned'.¹⁵ There is therefore a certain leeway before interrogation proper begins and the suspect must be informed of his right to remain silent, during which the police may ask 'prior informative questions' not concerned with the specific offence. Statements given in answer to such questions, even if amounting to a confession, may be used in evidence. If the suspect has not been informed of the right to remain silent, confessions or admissions of guilt given after interrogation has started are regarded as illegally obtained.

Whether or not illegally obtained evidence is excluded is a matter for the court to decide (Art. 359a Sv), namely whether it was obtained in serious breach of the defendant's rights. A failure to observe Article 29 Sv is regarded as a serious breach, but that need not apply to indirect evidence resulting from such statements, which is certainly not automatically excluded. In any event, exclusion of evidence, even of illegally obtained confessions, does not automatically result in acquittal. Not only will the court always ask a defendant who claims he is innocent but has confessed while not being warned of his right to remain silent, whether he stands by his retraction of the confession, the rules of evidence are such that even after exclusion of the confession there may still be enough other evidence upon which to base a conviction. If, however, the breach of the defendant's rights was such as to preclude a fair trial, the court also has the option of dismissing the prosecution altogether.¹⁶

The right to remain silent is interpreted in the Netherlands as prohibiting undue coercion during interrogation. This is based less on notions of fundamental human rights (although they do of course play a part) than on the idea that statements obtained by coercion are very often false and hamper the investigation. Combined with the obligations of the prosecution (and the police) to non-partisan truth finding, it follows that bargaining for confessions at this stage is not allowed. This is not to say that it does not occur, only that the police would not regard it as bargaining, but more as falling within the legitimate boundaries of reasonable pressure. Given the absence of lawyers and (as yet) of verifiable recordings of interrogations, it is impossible to know how often the police might suggest that early release is on offer in exchange for a confession. Every so often cases emerge in which defendants claim to have falsely confessed due to such pressure. Whether or not this could rightly be called bargaining

¹⁴ Things may now speed up a little given that recent miscarriages have shown that neither the police nor the prosecution are always as non-partisan as was supposed (*Evaluatieonderzoek Schiedammer Parkmoord* 2005).

¹⁵ HR 29 November 1981, *NJ* 1982, 258.

¹⁶ The rules of evidence and of the exclusion of illegally obtained evidence contained in the code of criminal procedure are highly complicated, and have become even more so after a number of Supreme Court rulings that interpret them further.

is a moot question. In theory the police themselves have nothing to offer, as possible inducements are dependent on the prosecutor's decision.

(3./4.) The decision whether or not to prosecute, and on which charge(s), is the exclusive prerogative of the prosecutor; no other person or organ of the state may bring a prosecution (known in Dutch law as the monopoly principle). There is no formal hearing (adversarial or otherwise) to assess the sufficiency of the evidence, although new legislation will soon require the prosecutor to inform the victim of the outcome of his deliberations.¹⁷ He must take his decision on the basis of two considerations. Firstly: is there sufficient evidence to warrant prosecution? If not, he must formally dismiss the case, for to pursue it would be an abuse of power.¹⁸ If there is sufficient evidence, he comes to the second consideration: does the public interest require prosecution in the light of the interests involved (including those of defendant and victim)? This is where a specific interpretation of the opportunity principle comes into play. Originally, and the text of the relevant provision of the code of criminal procedure (Art. 167,2 Sv) still reads this way, the idea was that the prosecutor should prosecute, unless prosecution served no public interest. Nowadays, this is interpreted the other way round: no prosecution, unless it serves the public interest.¹⁹ If he decides not to prosecute, the prosecutor has a number of options open: to dismiss the case or to deal with it himself out of court (in what way precisely will be discussed below under III, IV and V).

Although the decision (not) to prosecute is one that is made by the individual prosecutor on the case while the law binds him only to the very generally worded considerations of public interest, he is not entirely free in the way he uses this discretionary power. To start with, the minister of justice has the power to directly intervene in individual cases, although he cannot do so without informing parliament who can then call him to account (Art. 127 *Wet rechterlijke organisatie*). This power, recently introduced, has been criticised as bringing the prosecutor's decision in individual cases (as opposed to generic decisions about prosecution as part of criminal policy) too much under political control;²⁰ it is to be expected (and hoped) that the minister will be exceedingly prudent in using it. But if prosecutors are unlikely to be too much bothered by intervention by the minister of justice, they *are* bound to the directives from the procurators-general. For many sorts of crime, these stipulate that the prosecutor must, or must not, prosecute under certain circumstances. A defendant may invoke them in court if he considers he has been prosecuted in violation of a specific directive, and the court will dismiss the case unless the prosecutor can show why, despite the directive, special circumstances warranted prosecution.²¹ Conversely, if the prosecutor does not prosecute while a directive stipulates that he should, this could play a part if the victim or other interested party should attempt to compel prosecution.

In the exclusively professional system of Dutch criminal procedure, there is little scope for participation by citizens, be they victims or otherwise. There is no lay-

¹⁷ Wijziging van het Wetboek van Strafvordering ter versterking van de positie van het slachtoffer in het strafproces, *Kamerstukken II* 2004/05, 30 143.

¹⁸ Prosecutors have been known to prosecute in the absence of sufficient evidence in cases of complicated white-collar fraud, the idea being that even without a conviction the defendant would have had his comeuppance in the media (see Brants & Brants, 1991).

¹⁹ Simmelink 2004.

²⁰ See *inter alia*, Reijntjes *s.d.* and contributions in Loof 1999.

²¹ HR 19 June 1990, *NJ* 1991, 119; see also HR 22 February 2000, *NJ* 2000, 557.

participation at trial – no jury or mixed tribunal – and there is, among most legal scholars and professionals what can only be described as a distinct aversion to the idea that the public should participate in any way in a criminal case, other than as defendant or witness.²² That also applies to decisions on (non) prosecution. Pressure from victims' interest groups has brought about some change, although the basic rule of Dutch criminal procedure still applies: a victim is never a prosecutor.²³ During the first legislative process aimed at improving the position of the victim in criminal process (the second is now underway), the Minister of Justice reiterated this principle, adding that, were it to be otherwise, the victim would have too great an influence on the procedure, thereby endangering the non-partisan nature of prosecution that was in the hands of the prosecution service precisely for reasons of objectivity.²⁴

There are, however, some small breaches in both the monopoly and opportunity principles. Some crimes can only be prosecuted after a complaint to the prosecutor, usually by the victim (e.g. libel, Art. 261 ff Sr). Previously, some forms of sexual crimes concerning minors older than 12 but younger than 16 also came under this category (in order to avoid prosecutions for statutory rape/sexual assault if the minor had willingly and knowingly consented).²⁵ Ideas about sex with minors have, however, changed since the 1970s when these provisions were in force. Nowadays, the prosecutor need not await a complaint, but he must first allow the minor concerned to express an opinion on the proposed prosecution (Art. 167a Sv in conjunction with Arts. 245, 247 and 248a Sr). Prosecution on complaint is not a complete breach of the opportunity principle: once received, the complaint in no way obliges the prosecutor to prosecute it merely enables him to do so.

The victim or his/her surviving family can also attempt to influence the decision on prosecution in another way, for nowadays they have the right to request a 'second opinion' on the thoroughness of the pre-trial investigation if the prosecutor has decided to drop the case for lack of evidence, while they consider that the police have not done enough to find the perpetrator. This right has not yet been consolidated in law, but follows from a prosecutorial directive.²⁶ Again, this possibility does not detract from the prosecutor's monopoly on the prosecution decision, for it will still be for him to decide – even after more and possibly sufficient evidence has been gathered – whether or not it is expedient to prosecute. The only way that the prosecutor's decision not to prosecute can be reversed, is through a so-called Article 12-procedure. Article 12 Sv gives any person with a reasonable interest in prosecution the right to apply to the appeal court in order to have the prosecutor's decision to either drop the case or to deal with it himself out of court, overturned. A 'person with a reasonable interest' not only (obviously) includes the victim (or his/her surviving relatives), but also legal persons such as corporations or interest groups (the latter if they can show a durable existence combined with a specific interest in the case).

Under Article 12 Sv, the appeal court reviews the complete case, hears all concerned (including the defendant) and then takes the decision on whether or not

²² Although there are calls from political parties to introduce lay participation, most influential legal scholars still oppose it: see e.g. Groenhuijsen & Knigge, 2004. See for an overview of the arguments for and against: Brants 2004.

²³ See on the position of the victim in the Netherlands in comparison with other countries: Brienens & Hoegen 2000.

²⁴ *Kamerstukken II* 1989/90, 21 345, nr. 3, p. 3.

²⁵ The age of consent in the Netherlands is 16.

²⁶ Aanwijzing tweede beoordeling (second opinion) opsporingsonderzoek, *Stcrt.* 2000, 43; see also Beijer 2001.

prosecution should follow as if it were the prosecutor; i.e., the court must take all of the interests involved into consideration and then decide, on the basis of the opportunity principle, whether prosecution is in the public interest. If it so decides, it may then order the prosecutor to prosecute. Whatever it decides (to order prosecution or to uphold the original decision) is open to appeal to the Supreme Court on points of law. Whether the authority of the court to review the prosecutor's decision also extends to the charge, was a point of debate for a long time. The Supreme Court has however ruled that if an interested party considers the prosecutor has undercharged, it may request the appeal court to order that prosecution be brought on a specific, more serious charge.²⁷ Article 12 Sv is the only way in which a private person (natural or otherwise) can formally influence the decision on prosecution, but the appeal court, not the interested party has the last word: if the court upholds the prosecutor's original decision, there is nothing that anyone can do about it.

2.2. Trial Stage (Post-Charge)

(1.) The prosecutor at a Dutch trial is regarded as *dominus litis*; in other words, he controls proceedings in the sense that he determines not only whether adjudication takes place before the court, but also the charge upon which, if proven, that court will eventually pronounce sentence. The charge – *telastelegging* – is contained in detail in the summons to appear at a certain date – *dagvaarding* – (Art. 261 Sv). Until the president of the court opens the trial on that day (Art. 270 Sv), the prosecutor is free to change his mind, withdraw the charges or amend them. After that point, he may no longer withdraw the charge(s). He is also limited in any amendments he may wish to make and, now that the trial has started, dependent on permission from the court to make them (Art. 313 sub 1 Sv). Permission cannot be granted if the amendment means that the defendant would stand trial for a different crime altogether (Art. 313,2 Sv), but the court will usually permit amendments in order to repair insufficiencies in the charge (for example the prosecutor has forgotten an essential element of the crime, has got the date wrong or some such error).²⁸

Once the trial has opened then, the prosecutor must proceed with the case, but that is not to say that he must go ahead and try to obtain a conviction if he now feels there are insufficient grounds. What he may always do, either immediately or at any point further on, is request that the defendant be acquitted or be dismissed from prosecution.²⁹ This too is not his decision but the court's, but it would be very surprising if a court were to decide otherwise (indeed, if the prosecutor presents no evidence they cannot decide otherwise). While formally the prosecutor cannot withdraw the charges after the trial has commenced, such decisions then being in the

²⁷ This case concerned a motorcyclist who killed a child and was prosecuted for culpable homicide by reckless driving. The parents thought that the charge should have been intentional homicide, which carries a much greater penalty. After the appeal court had dismissed their request to amend the charge on the grounds that to grant it would mean violating the principle of the division of power, the Supreme Court ruled that Article 12 requires the appeal court to put itself in the position of the prosecutor with regard to all aspects of the case, therefore also the charge (HR 25 August 1996, NJ 1996, 714).

²⁸ Given the codified nature of Dutch criminal law that requires a charge to contain all of the (written and often complicated) elements of a crime, such insufficiencies occur with a certain frequency.

²⁹ The difference between an acquittal (case not proven for lack of evidence) and dismissal from further prosecution (the facts do not amount to a criminal offence or the defendant is not culpable) is substantial and complicated, and has a number of consequences. For the purpose of this contribution it is not necessary to go into the matter further.

hands of the court, in practice amendments that amount to a substantial reduction (while not changing the nature of the crime charged) or a request for acquittal, really boil down to the same thing. The aggrieved party has recourse to Article 12 Sv (see above) if the charges are dropped and the summons withdrawn before the trial has commenced, but no redress if a trial, once started, ends with a conviction for a lesser offence or an acquittal: a retrial would be blocked by the principle of *ne bis in idem* (double jeopardy). It follows from the monopoly principle that no other official or private party can take over a prosecution if the prosecutor does not wish to proceed.

(2./3.) A guilty plea by a defendant does not exist as such in Dutch criminal procedure; at least not in the sense and with the connotations and legal consequences it has in many other jurisdictions (and notably adversarial ones). A defendant is not required at the beginning of trial to state whether or not he pleads guilty, but he can, of course, confess. Dutch defendants do so in a majority of cases and usually during pre-trial investigation. In theory, however, a confession provides no basis for allowing a defendant to control the adjudication of his case, let alone for bargaining. Under the rules of evidence, a confession is simply a 'statement by the defendant' and, although it forms legally admissible evidence, is in itself not enough to convict – however convincing it may be (Art. 341,4 Sv). The idea that a defendant who confesses should somehow be treated differently during trial, or that the truth finding exercise by the state that is at the heart of both pre-trial and trial procedure is now no longer necessary, is anathema in the light of inquisitorial ideology.

Meanwhile, despite the deep-seated notions that not the defendant but the prosecutor and in the final instance the court determine events at trial and that a confession cannot provide sufficient evidence of guilt, there is one situation in the Netherlands in which a defendant can prevent the hearing of evidence and judgement by the court. It has no basis in law, but is recognised as a legitimate means of adjudication by the Supreme Court and is known as *voeging ad informandum*.³⁰ Literally, this means 'addition with an eye to providing information' and it occurs if defendants have committed, and admitted to, more offences than those with which they are charged. It comes very close to the English system of 'taking other offences into consideration', with the important difference that it is the prosecutor with the consent of the defendant (and not the defence) who will add to the dossier, for the court's information, other offences with an eye to having them taken into consideration at sentencing. It has two, related aims: to allow the courts (and the prosecution) to deal with more offences than would otherwise be logistically possible, while still providing a punitive reaction to criminality. All involved (defendant, prosecutor and court) stand to gain from this system, for the defendant can start with a clean slate (and will incur a less severe penalty than the usual accumulation if each offence were to be tried and proven), the prosecutor can lighten his caseload and spare himself the trouble of proving each offence separately (the charge being the only offence that requires legal proof), and the court can use its time economically. The Supreme Court has stipulated a number of conditions to act as safeguards against coercion. The most important is that the defendant must not only have confessed to the prosecutor, but must reiterate that confession unconditionally in court before the

³⁰ HR 13 February 1979, *NJ* 1979, 243.

tribunal that will pronounce sentence.³¹ No other prosecution is possible for an offence that has been dealt with in this way (*ne bis in idem*).³²

This is the only situation in which a court may take a confession as sufficient indication of guilt. Otherwise, even if a defendant admits guilt, the court must still establish, according to the normal rules, that there is enough evidence to convict. The evidentiary rules in the Netherlands constitute what is known as a negative system of evidence: the court must have a legal sufficiency of evidence of a certain legal sort *and* may not convict unless that evidence has convinced it of guilt.³³ If this causal relationship is missing, *in dubio pro reo* prevails. An extra safeguard requires the court to give a reasoned decision, setting out the (legal) evidence by which it has been convinced. In practice, a confession, although not legally sufficient, may carry a great deal of weight in convincing a court, so that the requirements of additional evidence are minimal. Moreover, a very recent addition to the code of criminal procedure allows the court in some cases to pronounce sentence without reasoning if the defendant has admitted guilt (see further § 6).

3. (II) Organization of Criminal Procedure and Variations for Lesser Crimes

3.1. Procedure for most Serious Crimes

(1.) The Dutch Criminal Code (*Wetboek van Strafrecht*) divides crimes into felonies (*misdriften*) and misdemeanours (*overtredingen*), while municipalities may also stipulate misdemeanours in their byelaws. Separate statutes, dealing with special issues (drugs, social-economic crime, traffic crime, etcetera.) also contain provisions of criminal law, again divided into felonies or misdemeanours. This distinction determines before which court a case will be tried. With a few exceptions, misdemeanours are tried by a single judge (*kantonrechter*). Felonies are always tried in a district court (*arrondissementsrechtbank*), of which there are 19, spread around the country, sometimes by a panel of three judges, sometimes by a single judge.³⁴

As we have seen, under the opportunity principle as it applies in the Netherlands, with its elaborate system of prosecutorial directives, not more than 4% of all felonies that come to the attention of the police, actually reach a court and the percentage of misdemeanours is even less. However, if they do, that same principle implies that the prosecution has taken a deliberate decision to prosecute on the basis of prior investigation. In principle, that investigation has the same goal whatever the crime: gathering evidence in the light of non-partisan truth finding, although obviously its scope and duration will differ according to the circumstances. The use of some covert investigation techniques is subject to (complicated) legal limitations (Arts. 126g-126gg Sv); the most important are that covert investigation involving a serious breach of privacy is only allowed in cases of felonies and sometimes only if the crime is punishable by more than 4 years imprisonment; bugging and telephone tapping have

³¹ HR 6 February 2001, *NJ* 2001, 184.

³² HR 29 November 1983, *NJ* 1984, 277.

³³ Acquittal therefore results if there is enough evidence, but the court is not convinced, or if the court is convinced of guilt but there is not a legal sufficiency of evidence: for example, a statement by the defendant (confession) or by a single witness is not enough. On the other hand, a sworn written report by a law enforcement officer is (Art. 344,2 Sv) is in itself sufficient – a provision that reflects the considerable confidence that the Dutch system places in the non-partisanship of the police.

³⁴ The organisation of the Dutch judiciary still reflects the French situation under Napoleon, which was introduced at the beginning of the 19th century when the Emperor's forces invaded the Netherlands. The occupation lasted only a few years, but left an indelible mark on Dutch justice.

the extra requirement that they must be authorised by an investigating magistrate. Where felonies are concerned, it is the complexity of the specific case that determines the composition of the court.

(2./3.) Felonies of any complexity are tried before a district court consisting of a panel of three judges, all professionals (Art. 268 Sv). Sentence is usually pronounced no more than two weeks later. If the prosecutor feels that the crime will be simple to prove and that the sentence is unlikely to be more than 1 year imprisonment, he may bring the case before a so-called ‘police judge’ (*politierechter*), who sits alone and usually pronounces sentence immediately afterwards (Arts. 367-381). This judge is simply one of the judges accredited to the district court, who do a spell of several months (the duration varies) sitting alone instead of with two colleagues (the name, police judge, has no real significance). If the case turns out to be more complicated than the prosecutor originally surmised, it is referred to a panel of district court judges. Paradoxically, although these are the simplest cases, only the more experienced judges sit alone, the difficult task of truth finding that rests on the shoulders of a judge in an inquisitorial system being considered as best learned first in a group process. The procedural rules in court are mostly the same, whether or not a defendant comes before a panel of three or before a single judge, in any event with regard to evidential rules and confessions. Any differences concern matters of efficiency (such as a brief summons that is elaborated in court, a verbal sentence, etc.).

3.2. *Different Procedures for Less Serious Crimes*

(1./2.) Simple crimes require no more than simple investigation, but in principle the breadth of the preliminary investigation is a matter of police discretion – and in the final event that of the prosecutor. Misdemeanours rarely require any investigation at all. Whether or not a crime is simple does not affect the opportunity principle. Meanwhile, the existence of prosecutorial directives means that many if not most decisions on (non) prosecution are a matter of routine, although the magisterial role of the prosecutor in principle requires him to balance the interests in each specific case. The expediency of prosecution in simple cases of frequently committed offences is therefore mostly determined by directive, with discretion not to charge and to drop the case if individual circumstances so dictate.³⁵ Lately, the procurators general have made it known that dropping the case entirely is to be discouraged: for a long time, more than 50% of all cases were simply dismissed without any action being taken at all. However, the Dutch criminal justice system has a range of out-of-court measures at its disposal – most of which are imposed by the prosecutor and in minor cases by the police – to which we shall come presently. For a number of political and policy reasons, prosecutors are directed to make use of such measures. They are now used in about 30% of all cases, and can be imposed for offences that carry up to 6 years imprisonment.³⁶ An aggrieved party who feels the case should, nevertheless be tried

³⁵ Given the extremely broad nature of prosecutorial discretion in the Netherlands, this not only applies to less serious cases, although obviously these are the most likely to be covered by a policy of non-prosecution.

³⁶ This would include grievous bodily harm, some cases of manslaughter, incitement to or assistance with suicide, theft, breaking and entering, fraud, intimidating a witness, blackmail, and many other offences of a more or less serious nature.

by a court, has recourse to the procedure under Article 12 Sv (as described in § 2.1, 3/4 above).

(3.) We have already seen that the less serious felonies may be heard by a single 'police judge', rather than by a panel of three. Misdemeanours (with one or two exceptions that need not concern us here) are heard by a single cantonal judge. Many of these cases concern persons who have not complied with one of the out-of-court measures and who are then be summonsed to appear before this judge (a substantial number of defendants apparently feel no inclination appear and many such cases are tried *in absentia*). The main difference in procedure concerns the manner of the summons, but the essentials of the Dutch inquisitorial trial (the powerful position of the prosecutor, the active truth-finding judge and the requirements of legal evidence) remain theoretically intact.

One of the most time-consuming activities of the cantonal judge used to be traffic offences (most usually hearing cases in which imposed traffic fines had not been paid). Since 1990, traffic offences that do not result in injury to persons or damage to goods have been taken out of reach of the criminal courts and are now administrative offences, punishable by fines of not more than €340 only (comparable to the German system of *Ordnungswidrigkeiten*).³⁷ Municipal traffic wardens, not the police, monitor these very minor offences. Appeal against the administrative decision can be lodged first with the public prosecutor who has discretion to overturn the original decision as being unreasonable considering the circumstances in which the offence took place, or to lower the fine given, as the law puts it, the circumstances of the person concerned. Appeal to an independent tribunal against the prosecutor's decision can be lodged with the cantonal judge,³⁸ against whose decision further appeal is possible to one of the five courts of appeal (namely in Leeuwarden, a town in the north of the country). Despite the involvement of the prosecutor, this procedure is more administrative than criminal.

4. (III/IV/V and X) Formal and Informal Ways of Avoiding Trial

It will be obvious by now that the Dutch prosecutor is a powerful figure in Dutch criminal procedure, with an immense amount of discretion. The interpretation of the opportunity principle in the Netherlands and the part played by the heads of the prosecution service in issuing directives on (non) prosecution for categories of offences, have long been the main means of streamlining criminal procedure and ensuring that the courts do not become overburdened. The essentially inquisitorial nature of truth finding and the attendant systemic roles of the impartial investigating prosecutor and the defendant as an object of investigation, leave little room for the latter as an autonomous, let alone consenting party to proceedings. While a case can be prevented from going to trial in several ways, this is essentially not the defendant's but the prosecutor's decision.

To this end, the prosecutor has a number of measures at his disposal, many of which would come under the heading of diversion in other jurisdictions. They differ, however, from the concept of diversion in, for example, England and Wales, in that they are not aimed at removing offenders from the criminal justice system as such,

³⁷ Wet van 3 juli 1989, houdende administratiefrechtelijke afdoening van inbreuken op bepaalde verkeersvoorschriften, laatstelijk gewijzigd bij *Stb.* 2004, 215.

³⁸ Thereby bringing this procedure into line with the requirements of the fair trial provision, Article 6, of the European Convention on Human Rights and Fundamental Freedoms.

merely at keeping them away from court³⁹ while still keeping them within reach of the prosecutor and allowing for a punitive reaction on the part of the state. At the time of writing, the situation is one of transition, as the law is about to undergo some very substantial changes. The following therefore describes first the law as it now stands, then the reason for the changes, and finally the new provisions, which are expected to come into force in 2006 – all of which bear directly on the position of the prosecutor and the scope for bargaining and consensus in Dutch criminal procedure.

At present, a prosecutor, acting on the opportunity principle, may decide to drop the case entirely (Arts. 167,2 and 242,2 Sv) or to prosecute on the basis of the most serious form of the offence, but he may also decide to employ one of the possibilities that the law allows which is somewhere in between: to prosecute for a less serious form of the offence,⁴⁰ or to drop the case conditionally (conditional waiver of prosecution). But whatever he decides, an aggrieved party (although they must be informed) has no way of preventing this, except through an Article 12-procedure. The monopoly principle also prevents the court from intervening in the decision in any way (other than the appeal court under Art. 12 Sv): it cannot therefore force the prosecutor to prosecute or change the charge, even if it feels that a more serious form of the offence would be more appropriate.

Dropping a case conditionally can take different forms. The first is that the prosecutor informs the suspect that he will not prosecute if the suspect fulfils one or more stipulated conditions: for example restores any damage caused by the offence, apologizes to the victim, undergoes treatment for substance addiction, etcetera. The second is known as *transactie*, which literally means transaction: non-prosecution is conditional upon the suspect's paying a certain sum of money (Art. 74 Sr). The prosecutor may decide to employ these options at any time in the procedure up till the point at which the summons has been issued. Although strictly speaking the law allows him to do so only after pre-trial judicial investigation (Arts. 242,2 Sv ff), conditional waivers outside of judicial pre-trial investigation are simply based on the opportunity principle. The only restriction is that there must be sufficient evidence to prove the offence in court: to get a suspect to agree to a conditional waiver when there is no right to prosecute in the first place, would amount to an abuse of power. Article 74c Sr also gives the police the authority to issue transaction-proposals to those suspected of misdemeanours and of simple felonies. In the latter case, the suspect must be more than 18 years of age and the transaction sum may not exceed €350. Both the so-called police-transaction (often used for first time shoplifters) and transactions by the prosecution are governed by prosecutorial directives.

4.1. Conditional Waiver of Prosecution

Conditional waivers of prosecution entail rights and obligations on both sides: the prosecutor waives his right to prosecute in exchange for the suspect's fulfilling the conditions, while the suspect waives *his* right to a fair trial, namely the right to have the case heard in public by an independent and impartial tribunal (Art. 6,1 ECHR),⁴¹ in exchange for the case being kept permanently out of court (the principle of *ne bis in idem* will prevent further prosecution as soon as the agreement has been reached and

³⁹ Brants & Field 1995.

⁴⁰ This option is not based on any specific legal provision other than Article 167,2 Sv (the opportunity principle), but is accepted practice (Corstens 2005, p. 503).

⁴¹ However judicial the role of the prosecutor might be in Dutch criminal procedure, he does not form an impartial tribunal, and he is certainly not independent.

the conditions fulfilled). Because of the waiver of such fundamental rights on the part of the suspect, it is standard case law of the European Court of Human Rights that conditional waivers of prosecution require his informed and willing consent: there must be no suggestion that they are 'tainted by constraint'.⁴²

Whether or not that is the case in the Netherlands, is a moot point, for it is doubtful to what extent conditional waivers are actually – as opposed to theoretically – consensual criminal procedures. In any event, the powerful position of the prosecutor means that conditional waivers are not normally negotiations between equal parties. While they do allow the prosecutor to shift a larger case load than would otherwise be possible so that he stands to gain in this sense (and at the same time they allow the courts to use their time efficiently for other cases), the suspect always has much more to lose if he refuses to agree. It should also be noted that it is presumed that a suspect who agrees to a conditional waiver is guilty, but that an admission of guilt is not required.⁴³ This has always been a somewhat contentious point, especially where transaction is concerned, for although transaction is not prosecution and is regarded theoretically as an agreement under civil law, it is to all intents and purposes (and certainly according to the ECtHR) a criminal sanction – albeit not one imposed by a court.⁴⁴ For that very reason it is not entirely discretionary in so far as the offences for which it can be imposed are limited.

Since 1986, transactions have been possible for both misdemeanours and for felonies that carry up to 6 years imprisonment and/or fines of the highest category – which in cases of compounded felonies or social economic crime may run into millions (Art. 74,1 Sr). The most common condition is payment of a certain sum (from €2,- to the maximum fine that could have been imposed had the suspect been found guilty in court). In order to induce the suspect to agree, the transaction-proposal is always less than the maximum, but is accompanied by the warning that, should the prosecutor bring the case before a court, he will then ask for a much higher penalty. Other conditions are possible, including the Dutch equivalent of community service orders (Art. 74,2f Sr) and the payment or handing over of illegally obtained assets (Art. 74,2d Sr). In most run-of-the-mill-cases, suspects are more than willing to agree, for the simple reason that the transaction will be the end of the matter and they will avoid the public stigma of a court appearance. Although the law stipulates that the prosecutor may not refuse when the suspect offers to pay the maximum fine if the offence is punishable by a fine only, and also offers to fulfil any other conditions the prosecutor may wish to impose (thereby implying informed consent) in practice transaction is very much a matter of 'take it or leave it'. There is, however, one category of offenders who are in a position to negotiate and it is here that we find what amounts to plea and sanction/sentence bargaining in Dutch procedure.

⁴² ECtHR 27 February 1980, A 35 (*De Weer v Belgium*).

⁴³ There is one form of conditional waiver that is reserved for juveniles, the so-called HALT-programmes, which are administered by the police and involve juveniles, usually first offenders, being ordered to perform some sort of community service. They are seen as deserving a second chance and it is regarded as especially important to keep them out of the juvenile courts and young offenders institutions wherever feasible. To be eligible for a HALT-programme, the offender must admit to the offence.

⁴⁴ It is intended to be punitive and deterrent and involves the deliberate infliction of (financial) pain: ECtHR 21st February 1984, A 73 (*Öztiirk v Germany*).

4.2. *Transaction and White Collar and Corporate Crime*

From the 1980's onwards, the prosecution service has increasingly turned its attention to white collar and corporate crime (since 1976 corporations have been directly criminally liable under Dutch law, as are corporate executives for crimes committed by corporations under their control), concentrating especially on fraud, insider dealing and environmental crime. Finding enough evidence for a conviction, however, has often proved considerably more difficult than taking corporations and their executives to court. Such crimes will usually fall within the category for which transaction is allowed, but it is not always take it or leave it in these cases. The defendants are often as powerful as the prosecution, for they can engage specialised – and expensive – legal counsel, as well versed in the legal ins and outs of fraud as any prosecutor. Increasingly, such lawyers are becoming specialised in bargaining techniques too, skills that are not normally needed in the Dutch inquisitorial setting and that many 'ordinary' criminal lawyers lack. Moreover, the difficulties of proof mean that such cases require a great amount of time and manpower on the part of the prosecution, with no certainty of conviction – indeed, they have very often resulted in (partial) acquittals.

These are cases that attract a great deal of publicity once they reach the court stage. Corporate criminals are keen to avoid negative publicity, both for themselves and for their business, and would rather not stand on their right to a public hearing and an impartial tribunal.⁴⁵ They are also prepared to pay to stay out of court, sometimes regardless of whether or not they consider themselves guilty, or indeed are guilty; however, the very fact that they may have a chance of successfully contesting the case gives them a powerful means of persuading the prosecutor to be flexible. Should they fail to win the case, prosecutors will find their shortcomings splashed across the front pages of the national press, will have wasted an enormous amount of time and have lost face within the prosecution service – not a good thing for a career civil servant. Both sides therefore have much to lose by letting a case go to court. In these cases, negotiations about the amount of the transaction sum, about the payment of illegal assets, about the charge (with the defendants agreeing not to contest a lesser charge if others are dropped, or agreeing to part transaction, part minor charge) are not at all unusual. Just how often such deals occur is unknown, for transaction is not subject to any public judicial scrutiny and takes place behind closed doors (in that sense, although it closely resembles plea and sentence bargaining in the US, it is not the same, the other major difference being that not the court, but the prosecutor imposes the 'penalty'). *That* they occur, however, is public knowledge, and has been the remit of many an investigative journalist.⁴⁶

4.3. *New Legislation*

Negative publicity about 'backroom-deals' with powerful suspects and corporations formed the backdrop to public and political dissatisfaction with this practice and led to a prosecutorial directive that instructs the prosecutor to make any such major transactions public afterwards.⁴⁷ Meanwhile, the very concept of prosecutorial discretion to keep any cases, not only the corporate offences, out of court through imposing conditional waivers has been questioned. This has finally led to legislative

⁴⁵ See Baauw 1999.

⁴⁶ This was already the case in the 1980's: see Brants, 1988, and Brants & Brants 1991, ch. IX.

⁴⁷ Aanwijzing hoge transacties en transacties in bijzondere zaken, *Stcr.* 22-01-2002, 39.

proposals due to come into force in 2006 that do not in anyway take away discretionary power from the prosecutor, but greatly enhance it by allowing him to impose prosecutorial penal orders.⁴⁸ The fundamental reason for what amounts to a huge change in policy and indeed in the very system of criminal procedure, is the change in penal climate that has gradually taken place in the Netherlands over the years.

Until well into the 1980's, the Dutch enjoyed the reputation of having one of the mildest penal climates and lowest rates of incarceration in the world. This state of affairs stands in direct relation to the way in which prosecutorial discretion was used to ensure a pragmatic criminal policy of regulation through non-prosecution.⁴⁹ Indeed, thirty years ago it was the stated policy of the prosecution service to increase the number of criminal cases in which no action was taken at all: prosecutors were encouraged to drop cases if at all possible, and to reserve the weight and social cost of any criminal sanction for the most serious only. The public interest in prosecution was then seen as easily outweighed by other factors, among other things that prosecution and punishment were unlikely to lead to rehabilitation and that a tolerant society should be measured by the way in which it managed to avoid what was regarded as the conflictual and socially and individually damaging solution of criminal law.⁵⁰

When the possibility of transaction for felonies was introduced in 1986 (before then they were allowed for misdemeanours only, except in cases of social-economic crime), it was still very much with this idea in mind. However, the tide was already turning, with prosecutors being urged to use transaction (rather than unconditional waivers) in order to streamline criminal process but not let crime go unpunished, and an increasing number of prosecutorial directives setting out rules about which cases were eligible and what the transaction sum should be. Efficiency arguments were beginning to take precedence over traditional ideological notions that criminal law should be used as a last resort only – an *ultimum remedium*. Moreover, the development of a coherent policy of what has been called regulated tolerance through the use of non-prosecution and transaction put the emphasis less on tolerance than on regulation, although not necessarily through using the full weight of the criminal law.⁵¹ By the middle of the 1990's, however, public and political debate on crime and criminal law had become dominated by the perceived need for not only less tolerance, but also greater punitive regulation.

The Netherlands have not escaped the general trend in Western Europe towards tougher crime control and harsher sentencing, in the wake of growing (and media-fuelled) feelings of insecurity in society and/or rising levels of crime (any causal relationship is not necessarily present; nevertheless public and politicians normally simply assume it). An insecure public makes for lack of confidence in criminal justice, but visible crime control through criminal trials and punishment has become less and less the norm. Although the prosecution service has stepped up the number of prosecutions and sentencing has become harsher in the courts, this has resulted primarily in overburdening the courts and the prison system. However, the traditional means of relieving that burden – transaction and other conditional waivers – are no longer considered a real option; indeed, they are seen one of the causes of declining public confidence in criminal justice, because they are invisible and give neither

⁴⁸ Wet OM-afdoening, *Kamerstukken II* 2002/03, 28 600.

⁴⁹ Brants 1998.

⁵⁰ Downes 1993 and Brants & Field 2000.

⁵¹ Brants 1998.

offenders nor society the feeling that ‘real’ punishment has been meted out. For some time, politicians had been pushing for other solutions that would provide a coherent security policy, reinforce waning confidence in the criminal justice system and at the same time reduce the overload of cases facing the courts.⁵² One such solution was put forward in a parliamentary motion that called for the introduction of plea-bargaining and abbreviated procedures after guilty pleas in order to increase the capacity of the courts and nevertheless provide the spectacle of public sentencing.⁵³

The minister of justice commissioned research into plea-bargaining,⁵⁴ and on the basis of the results informed parliament that little was to be expected from the introduction of such a *corpus alienum* into Dutch procedure. Not only did it not fit a procedural tradition of active judicial truth finding, capacity gains would be negligible; neither would plea-bargaining put an end to the ‘undesirable’ practice of negotiation between the prosecution and (powerful) defendants. Instead of plea-bargaining the minister proposed to introduce a system whereby the public prosecutor would be able to impose fines in the form of penal orders. This would be catching a number of birds with one stone: the courts would be unburdened and yet there would be ‘real’ punishment. Moreover, the problem of those who agree to transaction and yet do not pay (approximately 25%) would be solved: because transaction, although substantively a fine, is formally an agreement under civil law, non-compliance can only be solved through either prosecution or through somewhat tortuous civil enforcement mechanisms. Under the new system, the imposition of a prosecutorial fine is an act of prosecution, and the fine itself formally a criminal sanction; that means that the prosecutor can enforce it directly.⁵⁵

4.4. Penal Orders

Under the new law, the code of criminal procedure will be amended and a new chapter IVA added: ‘Prosecution through penal orders’ (Arts. 257a-h Sv) will come into force in 2006. Article 12 Sv will be amended to allow an aggrieved party to complain to the court of appeal and request that the case be brought before a court. Conditional waivers and transaction will disappear. Instead of coming to an ‘agreement’, the prosecutor will send the suspect a penal order, describing the offence and setting out the proposed fine. Before doing so, he must ‘establish the guilt’ of the suspect, although again no admission of guilt is necessary. Fines of more than € 2.000,- and the imposition of community service orders require the prosecutor to hear the suspect, if he so wishes in the presence of a lawyer. The suspect can block the penal order by a complaint against the decision to the district court, which will then hear the case in full; if he fails to complain within two weeks, the order can be enforced immediately. Penal orders can be issued for the same range of offences now subject to transaction and the penalties and conditions are practically the same as the conditions that can now be imposed through transaction. The prosecutor has one new measure at his disposal, namely confiscation of the suspect’s driving license for a maximum of 6 months. The police will also be able to issue penal orders to a maximum of €225,- (Art. 257b).

⁵² See for an overview of this ideological change: Pakes 2004.

⁵³ *Kamerstukken II* 2002/03, 28 600 VI, nr. 127.

⁵⁴ Brants & Stapert 2004.

⁵⁵ Letter from the minister of justice concerning plea-bargaining, 23 October 2003, *Kamerstukken II* 2003/04, 29 200 VI, nr. 31.

According to the government, the enforcement of penal orders will greatly simplify the problem of those who, at present, do not pay the agreed transaction sum. Whether or not this sanction will be a more visible form of punishment than transaction remains to be seen, for it is the suspect who must force a public hearing by complaining to the court. The government estimates that between 4% and 25% of suspects will actually do so (a guess based on the one hand on those who take administrative traffic offences to court and, on the other, the number of people who fail to pay transactions). Some authors have questioned this, pointing to the fact that penal orders for felonies are by no means comparable to administrative traffic fines. The argument has also been put forward that the number of persons who feel they have been treated unjustly by the prosecutor, may well rise considerably, now that all consensual aspects have been removed from this sanction. In that case, the expected gains in court capacity could prove illusory.⁵⁶ At the same time, of course, many will still be keen to avoid the public stigma of a court appearance. For that reason, and in order to enhance the potential visibility, the prosecution service will produce public lists of penal orders served, while details of individual orders can be provided to anyone on request, unless this would unduly contravene the rights of the suspect or a third party.

Although some have welcomed it, often on the grounds of efficiency, there has also been much criticism of this legislation. Its proponents point to the fact that what was already the case in practice – a substantial role for the executive (i.e. the prosecution service) in dealing with criminal cases – has been given a sound basis in law. For others however, this is precisely the main stumbling block: penal orders by the prosecution change the constitutional order of the Netherlands, which is based, *inter alia*, on the principle that only a court can punish an offender. The Dutch organisation for the judiciary is the most positive, considering this new law a ‘fortunate development’ that will bring the legal order into line with standard practice. They do, however, warn that the prosecution service will need ‘to have its house in order’ and that prosecutors are now obliged, more than ever, to take an impartial and judicial stance in this new task.⁵⁷

Others, who have welcomed the legal basis of the prosecutor’s new powers, are dubious about their scope. There is a risk that penal orders will become the dominant form of criminal sanction, while the only limit appears to be that the prosecutor cannot impose a prison sentence. This has led to fears that a culture of punishment may grow within the prosecution service, in which the courts are seen as necessary only for sending offenders to prison. These authors have called for reticence in this respect. The new law, however, does not appear to promote a reticent attitude, the only ways to call the prosecutor’s decision into question being a complaint to the court by the suspect (which is not expected to be very frequent and, indeed, is not the intention), or an Article 12 procedure initiated by the aggrieved party.⁵⁸

All the other comments about prosecutorial penal orders and the new law have been extremely negative. The Dutch Bar Association has stated that a more principled debate should have taken place before initiating such a far-reaching breach of the principle of *trias politica* and has asked what the prosecution service has done to deserve the power to establish guilt and pass sentence, given that they have already shown a lack of ‘judicial attitude’ in dealing with transactions under the current

⁵⁶ Crijns 2004, p. 234.

⁵⁷ Nederlandse Vereniging voor Rechtspraak 2003.

⁵⁸ Mevis 2004.

system. The new powers will exacerbate this, without the necessary guarantees of legal protection, so that 'essential elements of fair trial are lacking'. And unless a suspect complains to the court, there is no judicial control of the way in which a decision to impose a penal order is taken.⁵⁹ On the point of principled debate, some authors have called this new legislation a 'revolutionary development' now that the new prosecutorial powers imply that the prosecutor will 'judge' cases, a task reserved for the judiciary under the Dutch Constitution. They also doubt whether this new law will pass muster with the European Court of Human rights, given that access to the courts is dependent on the suspect's initiative, while the prosecutor may not only impose financial sanctions but others that infringe on the suspect's freedom rights, such as community service orders and confiscation of a driving license.⁶⁰

Two other points of criticism have been raised, that concern the increased power of the prosecutor as such, and the question of whether this will, as the government assumes, mean the end of 'undesirable bargaining practices'.⁶¹ While penal orders certainly fit the inquisitorial nature of Dutch penal procedure and the large degree of confidence it places in impartial prosecution, in essence they are also a step back to long gone inquisitorial times when prosecution, judgement and sentencing were concentrated in one figure. While no external (judicial) controls govern the situation in which the penal order is imposed, it is unclear to what rules the prosecutor is bound when establishing guilt. In any event, no admission of guilt is required, and the presumption seems to be that only a guilty suspect will accept the order. However, acceptance in itself does not necessarily imply guilt.

Although the right to have a lawyer assigned and present if the penal order is to exceed €2.000,- is an improvement in comparison with transaction, there is still a problem of informed consent to a waiver of trial if the suspect accepts the order without a lawyer, and in cases under €2.000,-, for the prosecutor is by far the most powerful party. He is also not obliged by law to inform the suspect of the consequences of accepting a penal order (a criminal record, for example). Neither is there any reason to suppose that no negotiation will ever precede the issuing of a penal order, for the same category of powerful criminals with their specialised lawyers will no doubt take advantage of the situation in exactly the same way as they now negotiate transactions. The same inducements to avoid a public trial apply, while the same evidential problems will beset the prosecutor who is now obliged to establish guilt himself.

5. (VI) Procedures for Victim-Offender Reconciliation

Although, as in other countries, the position of the victim of a criminal offence has been the subject of much and heated debate, criminal procedure as such does not offer much scope for reconciliation procedures. There is a deal of enthusiasm among academics for the notions of mediation and restorative justice, even to the point of there being an academic journal on the subject that has been in existence now for five years.⁶² However, the government has always resisted incorporating such ideas formally into criminal procedure. In its latest round of legislative proposals aimed at improving the position of the victim – proposals that were prompted not only by pressure from victim interest groups or politicians but also, perhaps mainly, by a

⁵⁹ Nederlandse Orde van Advocaten 2003.

⁶⁰ Crijns 2004 and De Graaf 2003.

⁶¹ Brants & Stapert 2004.

⁶² *Tijdschrift voor Herstelrecht*, published by Boom Juridische uitgevers.

European Union Framework Decision that requires such legislation – the minister of justice is quite clear on the position of the victim in Dutch criminal process: criminal procedure is not geared primarily towards ‘solving a (social) conflict between victim and offender’, but towards ‘the state’s reacting to the defendant’s behaviour (punishing the offender)’.⁶³

With this in mind, measures to improve the position of the victim aim primarily at ensuring that victims are informed of any decision in the case in which they are involved and of ways of obtaining compensation, and at allowing them to inform the judge as to the trauma that the crime has caused (victim-impact statement), all currently the subject of prosecutorial directives. An improved procedure for compensation in the context of a criminal trial has been in place since 1993.⁶⁴ This procedure was introduced experimentally in two districts first, and then in the whole of the country in 1995. The law allows the victim to approach the prosecutor before joining the trial as an aggrieved party with a claim to compensation, and to attempt, with the help of prosecutorial staff at the court, to come to an agreement with the offender about compensation. The principle of opportunity then allows the prosecutor to base his decision on whether or not to prosecute on the outcome. While this could be called negotiation, there is no evidence that any bargaining takes place; but as settlements reached in this way are not open to public judicial scrutiny if the offender is not prosecuted, there is no way of knowing for certain. An offender’s willingness to agree to compensate the victim is a factor in the prosecutor’s decision on (non) prosecution and could be part of a conditional waiver. It will also play a role in sentencing if the prosecutor decides to prosecute after all.

Meanwhile, there are any number of restorative justice experiments (especially with regard to juvenile offenders), all of which are ‘tolerated’ under the opportunity principle but not particularly encouraged by the procurators general, and most of which depend on the enthusiasm of individuals or victim organisations, and on the cooperation of individual prosecutors. While these organisations no doubt keep track of their own cases and successes (or lack thereof) there are no publicly available statistics. The minister of justice has made it known that he will not formally incorporate such procedures into criminal procedure. However, given that Article 10 of the EU-directive requires reconciliation procedures for victims, he ‘may, at some point in the future’ issue a ministerial decree on the subject. In the meantime, standard policy will continue emphasise mediation and reconciliation in administrative and civil procedures and not in the field of criminal law.⁶⁵

6. (VII/VIII/IX) Guilty Pleas / Admissions of Guilt; Confession and Sentence Bargaining

As we have seen, inquisitorial truth finding in Dutch criminal procedure and the attendant rules of evidence mean that an admission of guilt or a confession by the defendant has no influence on evidence taking, let alone on the type of procedure. There are therefore no separate procedures if the defendant pleads guilty, no means of abbreviating the procedure as such, and no formal means of arriving at a lesser sentence in exchange for a guilty plea. Previous attempts to introduce separate

⁶³ *Kamerstukken II* 2004/05, 30 143, nr. 3, p. 9.

⁶⁴ *Wet van 23 December 1992, Stb.* 1993, 29.

⁶⁵ *Crijns* 2004 and *De Graaf* 2003. See also, *Kamerstukken II* 2003/04, 29 279, nr. 10 and *Kamerstukken II* 2003/04, 27 213, nr. 8.

procedures for defendants who confess⁶⁶ provoked lively debate in the Netherlands, with those in favour very much in the minority. The argument that this would introduce an alien element into Dutch criminal procedure and would undermine the very principles on which it is based, easily won the day.⁶⁷ The prosecutor is always bound to present sufficient legal evidence to prove the offence, and the court is bound to examine that evidence and then use it to come to a verdict – but a guilty verdict only if it has been convinced.

A statement by the defendant admitting guilt is simply one piece of evidence and in itself not sufficient to convict. In theory, therefore, the court may ignore a confession it finds implausible, although in practice (and certainly if the defendant has had legal representation from an early stage) that would be unlikely. It is also true that, while there must be other legal evidence to arrive at a sufficiency, a confession may carry a great deal of weight if believed by the court; again in practice it often takes very little to find a sufficiency of evidence (a statement by a witness testifying to finding a body, for example) so that a defendant may well be essentially convicted on the basis of his own confession.

Sentence must be pronounced according to the law (Art. 359 Sv), which means that the court must take into account the circumstances of the offence and the offender, and the shock and distress that the crime has caused to the victim and to society at large (to which end it may make use of the victim-impact statement outlined in the previous paragraph). There is no mention of confessions or of discounts. Dutch judges have a wide discretion in sentencing (anything between the general minimum of 1 day imprisonment or €2 to the special maximum set by law on each offence – Arts. 10 and 23 Sr) and are not bound by the sentence the prosecutor asks for; in practice they will take it into account but are usually more lenient. Although the prosecutor represents the interests of due process in the widest sense, he is nevertheless more inclined to err on the side of the victim and society in requesting sentence: it is the judge who will pay most attention to the interests and circumstances of the offender.

For that reason, an admission of guilt will be reflected in the sentence, for to admit guilt is to show remorse and that is certainly a circumstance that will be taken into account. If a defendant has apologised to a victim, or agreed to compensation, this will also work in his favour. But these are informal conditions that the court will take into account along with other circumstances, and there are no legal or traditional sentence discounts. There is also no bargaining, although many defendants do confess in the hope and expectation that the court will show leniency and in that sense we may say that these are situations known in the US as implicit bargaining. Probably the mechanism works the other way round and defendants, often instructed by their lawyers, are aware that to persevere with a denial of guilt when there is evidently sufficient evidence against them would be to invite a harsher sentence.

As there is no special or abbreviated procedure, there is also no question of the defendant giving up fundamental trial rights if he has pleaded guilty, with one exception: the right to a reasoned decision. A recent innovation, based on efficiency considerations, has been to allow the court to give an unreasoned decision if the defendant has admitted guilt (and has not retracted the admission at any stage), therefore a decision that does not set out the legal evidence on which it is based in full, or address the reasons for coming to a guilty verdict. This applies to the verdict

⁶⁶ Commissie Herijking wetboek van strafvordering 1992.

⁶⁷ Hildebrandt *et al.* 1993.

only and in any event the court must always give the reasons that have led to a specific sentence. Appeal is always possible.

A final legislative innovation, due to come into effect, has introduced the only situation in which sentence bargaining may take place in the Netherlands, although it is not called that – it is indicative of the Dutch aversion to the idea of bargaining that every attempt is made to avoid using even the term. Rather, it is a reward system for defendants who agree to testify against co-defendants (so-called crown witnesses). After much debate, this idea finally resulted some years ago in draft legislation.⁶⁸ Before that, the Supreme Court had approved it, although with a clear hint in its decision that such fundamental changes to the system of criminal procedure were a matter for the legislature.⁶⁹

Until now, a prosecutorial directive that anticipates the new law governs the use of crown witnesses.⁷⁰ In cases of serious, organised crime that carry a penalty of 4 years or more and in cases of all crimes punishable by more than 8 years, the prosecutor may come to an agreement with a defendant that the latter will testify during a judicial pre trial investigation against a co-defendant, in exchange for which the prosecutor will request of the court a reduction in sentence; he may not offer immunity from prosecution. The prosecutor may also tell a person already convicted that the prosecution service will advise favourably on a request for a pardon amounting to a reduction in sentence of one third, in exchange for that person's testimony. This agreement must be in writing. The judge of instruction then hears the crown witness as to the nature of the agreement and the reliability of the witness, but also as to whether it is strictly necessary to resort to this measure given the circumstances of the case. If his decision is positive on all counts, he then hears the witness on oath.⁷¹

There has been much debate on the ethical and legal ramifications of using crown witnesses. Some commentators accept the government's argument that this is the only way to penetrate to the leading figures of organised crime, but others are sceptical. On the one hand there is the problem that, although the prosecution enters into the agreement, it is a judge who takes the final decision so that the witness cannot be sure that it will be honoured. Moreover, crown witnesses may not testify anonymously, although the prosecutor may offer protective measures and the existence and identity of the witness need not be made known until the pre-trial investigation has been closed. For these reasons some have questioned the efficacy of the measure. On the other hand, some commentators abhor the very idea of such 'satanic deals with criminals': why, they ask, should the criminal profit from helping convict a co-defendant and where are the guarantees that his testimony will be reliable given the promised reward? The argument has also been put forward that this may well lead not to the criminal authorities' getting a grip on organised crime but to organised crime

⁶⁸ Toezegging aan getuigen in strafzaken, *Kamerstukken II* 1998/99, 26 294 and *Kamerstukken II* 2001/02, 28 017.

⁶⁹ HR 30 June 1998, *NJ* 1998, 799, HR 6 April 1999, *NJ* 1999, 565 and HR 1st June 1999, *NJ* 1999, 567.

⁷⁰ Tijdelijke aanwijzing toezeggingen aan getuigen in strafzaken, *Stcrt.* 20-07-2001, no. 138.

⁷¹ If he comes to a negative decision, there is an avenue of appeal to the district court *in camera*, but not to the Supreme Court.

getting a hold on the authorities, while some lawyers have questioned the ramifications of the crown witness for the co-defendant's right to a fair trial.⁷²

7. Conclusion

All of the above points clearly in one direction: the increasingly powerful position of the prosecution more or less precludes consent and bargaining in Dutch criminal procedure. Suspects and defendants are still very much objects of inquisitorial investigation, despite the (adversarial) elements of fair trial that the European Convention on Human Rights requires. That bargaining and consensual procedures exist at all, is due, on the one hand, to circumstances in which any prosecutor would find himself at a disadvantage (namely in dealing with corporate and organised crime), and on the other to pragmatic considerations (shifting an increasing caseload in order to avoid overburdening the courts). Any consensual moments that are built into the procedure occur pre trial, even if the court, as in taking other offences into consideration (*voeging ad informandum*) or sentencing crown-witnesses, has the last word.

For such pre-trial arrangements, the opportunity and monopoly principles provide ample scope, although we should be careful to distinguish between consent and bargaining. Consent is formally required in a number of situations, although these will decrease substantially after penal orders come into effect. But consent does not imply negotiation. Even now, conditional waivers of prosecution, *ad informandum* procedure and victim compensation procedures are regarded as take-it-or-leave-it situations. That may or may not be the case and is not public knowledge, given the lack of public scrutiny. It is, however, certainly true that in most cases a suspect or defendant has by far the most to lose by not agreeing to a prosecutor's proposal. In any event, the only indication that negotiations take place and that the prosecutor may not always be entirely in control of the situation, concerns powerful organised and corporate criminals, which has led to much political and public disapproval. There is, and has always been, a strong aversion to allowing a suspect or defendant to control events himself. Reluctantly, and only in the face of sustained pressure by politicians and the European Union, have victims been given a certain standing in criminal process, but not to the extent that they can formally force a prosecutor or a court to act in a certain way.

The underlying ideological reason for this state of affairs is the immense trust in the authority of the non-partisan prosecutor and the courts, and in hierarchical organisational controls, that the system reflects. It would be going too far to elaborate on this. Suffice it to say that in the Netherlands this inquisitorial feature of criminal procedure is taken to extremes. There are indications that the public are increasingly unwilling to trust the prosecution service, although the authority of the courts remains more or less intact. As yet, however, the political answer has been to shore up the position of the prosecution service, while paying not much more than lip service to demands that whatever goes on in the prosecutor's office, should be subject to public scrutiny.

⁷² See *inter alia* Prakken 1996, Buruma 1999, Van den Wijngaert 2003, p. 230 and Corstens 2005, p. 329.

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