



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

The Protection of Human Rights in Criminal Law Procedure in The Netherlands

Piet Hein van Kempen¹

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Introduction

The Kingdom of the Netherlands currently consists of three countries: The Netherlands² (Europe), The Netherlands Antilles (five Caribbean islands)³ and Aruba (a Caribbean island). The basis of the Kingdom of the Netherlands is the Charter for the Kingdom of the Netherlands (*het Statuut*) of 28 October 1954.⁴ In 1954 Aruba was part of The Netherlands Antilles, but it became independent of the other islands on 1 January 1986. In principle, The Netherlands, The Netherlands Antilles and Aruba are fully autonomous in their internal affairs. The emphasis of this contribution is on The Netherlands.

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

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

¹ Piet Hein van Kempen is Professor of Human Rights Law, Radboud University Nijmegen, and deputy justice with the criminal division of the Court of Appeal, 's-Hertogenbosch, the Netherlands. I am grateful to Ms. Andra Schrama for her valuable contribution in collecting materials needed to write this contribution.

² Although formally and principally incorrect, the Netherlands is often referred to as Holland. North and South Holland in the western part of the Netherlands are only two of the twelve provinces within the Netherlands.

³ The governments of The Netherlands and of the Islands have plans to restructure the Kingdom of The Netherlands. These plans entail that two of the five islands of The Netherlands Antilles, *e.g.* Curaçao and Sint-Maarten, would become countries of their own within The Kingdom, while the other three islands would become a direct part of The Netherlands as special municipalities.

⁴ Entry into force: 29 December 1954 (*Stb.* 1954, 596). Most recently amended 7 September 1998 (*Stb.* 1998, 579). (*Stb.* = *Staatsblad*, Bulletin of Acts and Decrees.)

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

I. The Applicability of International Law to Dutch Criminal Law Procedure

I.1 The Status of International Law in the Dutch Legal Order

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

This is of specific importance in relation to human rights: while the courts are still not authorized to review Acts of Parliament against fundamental rights laid down in the Constitution (*toetsingsverbod*; Article 120 of the Constitution),⁵ they are actually obligated to do so against fundamental rights in treaties insofar as provisions are concerned that are binding on all persons. Thus in that case the courts even have a duty to apply these international human rights provisions *ex officio*. Whether treaty provisions meet this requirement is decided on a case-by-case basis. Provisions are usually considered to have such general binding power if they can be applied directly, that is without the need to regulate in further detail.⁶ Most human rights embodied legally binding treaties that are relevant to criminal law procedure – usually civil rights – are regarded as having this kind of binding power. Articles 93 and 94 of the Constitution do not, however, apply to provisions in such soft law instruments as the Universal Declaration of Human Rights (1948).

The Kingdom of the Netherlands is party to most of the important international and European human rights treaties and endorses many soft law codifications of human rights, such as declarations, sets of rules and principles, and codes of conduct. Here I shall in principle only mention those (international and regional) instruments that are expressly relevant to criminal law procedure – *i.e.*, the pre-trial stage of criminal investigation, prosecution, and the trial proceedings in court – within the Kingdom; the same applies to possible reservations to the instruments.⁷

⁵ A Bill is presently under discussion in parliament that would lift the review prohibition for specific constitutional fundamental rights; see *infra* section IV.1).

⁶ See Karel Kraan, ‘The Kingdom of the Netherlands’, in Lucas Prakke & Constantijn Kortmann (eds), *Constitutional Law of 15 EU Member States*, Deventer: Kluwer, 2004, p. 627.

⁷ All the instruments mentioned in this contribution are contained in P.H.P.H.M.C. van Kempen (ed.), *International and Regional Human Rights Documents*, Nijmegen, Wolf Legal Publishers 2008. See the Treaty Database on <<http://www.minbuza.nl/verdragen/en/home>> (in English) for a complete overview of human rights instruments to which the Kingdom of the Netherlands is a party, of dates of signature, ratification and entry into force, and reservations, declarations and objections; see also <<http://sim.law.uu.nl>>

I.2 International Human Rights Instruments

Being one of the 51 founding members of the United Nations, the Kingdom of the Netherlands joined the organisation on 10 December 1945. This was precisely three years before the adoption by the UN General Assembly of the Universal Declaration of Human Rights (UDHR, 1948). The Dutch Government recognizes that this declaration – to which one cannot of course become a party – applies at all times, anywhere in the world.⁸ The Kingdom is furthermore a party to eight of the so-called nine core international human rights treaties, most of which are mentioned below.⁹

The International Covenant on Civil and Political Rights (ICCPR, 1966) and the covenant's Optional Protocol on an individual complaints procedure (ICCPR OP-I, 1966) were signed on 25 June 1969,¹⁰ while on 9 August 1990 The Kingdom of the Netherlands became a party to the Second Optional Protocol on the abolition of the death penalty (ICCPR OP-II, 1989).¹¹ Several reservations are made in respect of the ICCPR. The Kingdom of the Netherlands does not consider itself bound by the obligations on the on treatment of prisoners set out in Article 10 § 2 and § 3 (second sentence). Furthermore, on the fair trial provisions in Article 14 it reserves (as regards § 3 (d)) the statutory option of removing a person charged with a criminal offence from the courtroom in the interests of proper conduct of the proceedings, and (on § 5) the statutory power of the Supreme Court of The Netherlands (*Hoge Raad der Nederlanden*) to have sole jurisdiction to try certain categories of persons charged with serious offences committed in the discharge of a public office. And as to § 7 it accepts this provision only insofar as no obligations arise from it further to those set out in article 68 of the Criminal Code of The Netherlands and article 70 of the Criminal Code of The Netherlands Antilles, which provisions are codifications of the principle *non bis in idem* (protection against double jeopardy) (cf. *infra* section III.8).

The countries of the Kingdom of the Netherlands are also parties to several specific human rights and humanitarian law treaties. On 8 December 1949 the Kingdom signed all four Geneva Conventions (1949) on humanitarian law.¹² Protocol I (1977) and Protocol II (1977)¹³ as well as the recent Protocol III (2005)¹⁴ followed later. No reservations were entered as to any of these conventions and protocols thereto. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965) was signed on 24

⁸ See the governments' recent Human Rights Strategy for Foreign Policy: 'Mensenrechtenstrategie voor het buitenlands beleid', in: *Kamerstukken II*, 2007-2008, 31 263, no. 1, and no. 17, p. 4. (*Kamerstukken* = parliamentary documents; *II* = Second Chamber).

⁹ See the list on <<http://www2.ohchr.org/english/law/index.htm>>.

¹⁰ Entry into force: 11 March 1979 for The Netherlands and The Netherlands Antilles, and 1 January 1986 for Aruba.

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

¹² These are entitled: Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; Geneva Convention relative to the treatment of prisoners of war; Geneva Convention relative to the protection of civilian persons in time of war. Entry into force of all four conventions: 3 February 1955 for The Netherlands and The Netherlands Antilles, and 1 January 1986 for Aruba.

¹³ These are respectively Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of Non-international Armed Conflicts (Protocol II). Both protocols were signed on 12 December 1977 by The Kingdom, and both entered into force on 26 December 1987 for the whole of The Kingdom.

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

October 1966, devoid of reservations.¹⁵ The competence of the Committee for the Elimination of Racial Discrimination to receive individual complaints (see Article 14 CERD) is recognized for the whole of the Kingdom.¹⁶ As of 17 July 1980 The Kingdom became a party (without reservations) to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979),¹⁷ and it recognizes the competence of the Committee on the Elimination of Discrimination against Women to receive individual complaints under the Optional Protocol (CEDAW OP, 2000).¹⁸ Almost five years later, on 4 February 1985, the Kingdom signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984).¹⁹ The competence of the Committee against Torture with regard to Inter-State Complaints (Article 21) and Individual Complaints (Article 22) is accepted.²⁰ The CAT Optional Protocol (CAT OP, 2002) on the establishment of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Subcommittee on Prevention) was signed but has not been ratified at the time of writing.²¹ Again some five years later – on 26 January 1990 – The Kingdom became a signatory to the Convention on the Rights of the Child (CRC, 1989).²² It is also a party to the two protocols to the convention, but these have not yet entered into force in the whole of The Kingdom.²³ With regard to the convention some reservations were made that are relevant to criminal law procedure. On article 37 (c) CRC it is stated that the provisions therein ‘shall not prevent the application of adult penal law to children of sixteen years and older, provided that certain criteria laid down by law have been met.’ And concerning Article 40 The Kingdom of the Netherlands made clear that ‘cases involving minor offences may be tried without the presence of legal assistance and that with respect to such offences the position remains that no provision is made in all cases for a review of the facts or of any measures imposed as a consequence.’ On 30 March 2007 the Kingdom of the Netherlands signed the Convention on the Rights of Persons with Disabilities

¹⁵ Entry into force: 9 January 1972 for The Netherlands and The Netherlands Antilles, and 1 January 1986 for Aruba. The 1992 Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination has been accepted for The Kingdom of the Netherlands on 24 January 1995. Especially relevant to criminal law procedure are Articles 5 (a) and (b) and 6 CERD.

¹⁶ See the declarations by the Kingdom of the Netherlands to the treaty.

¹⁷ Entry into force: 8 August 1991 for the whole of The Kingdom. The Kingdom of the Netherlands accepted – on 10 December 1997 – the 1995 Amendment to article 20, paragraph (1) of the Convention on the Elimination of All Forms of Discrimination Against Women. Particularly relevant to criminal law procedure is Articles 15 CEDAW.

¹⁸ Signed: 10 December 1999; entry into force: 22 August 2002 for the whole of The Kingdom.

¹⁹ Entry into force: 20 January 1989 for The Netherlands, The Netherlands Antilles, and Aruba. The 1992 Amendments to Article 17, paragraph 7, and article 18, paragraph 5, of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment were accepted for the whole of The Kingdom on 24 January 1995.

²⁰ See the declarations by the Kingdom of the Netherlands to the treaty.

²¹ Signed: 3 June 2005. Since the CAT OP has not yet been ratified, it has not entered into force for the Kingdom of the Netherlands.

²² Entry into force: 8 March 1995 for The Netherlands, 16 January 1998 for The Netherlands Antilles, and 17 January for Aruba. The 1995 Amendment to Article 43 (2) of the Convention on the Rights of the Child has been accepted for the whole of The Kingdom on 4 December 1996 (entry into force: 18 November 2002). Specifically relevant to criminal law procedure in the CRC are Articles 3, 16, 37, and 40.

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

(CRPD, 2006), but has not yet ratified it.²⁴ It made reservations, but none of these are directly relevant to criminal law procedure. Furthermore, so far the Kingdom has not subscribed to the Optional Protocol on individual complaints mechanisms (CRPD OP, 2006). The International Convention for the Protection of All Persons from Enforced Disappearance (CED, 2006) was signed 30 March 2007, too, but has not yet been ratified. Finally, no country within The Kingdom of the Netherlands nor The Kingdom itself is party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, 1990).²⁵

I.3 Regional European Human Rights Instruments

At the European regional level The Netherlands (not per se The Kingdom as a whole) belongs to several organisations that concern themselves with human rights. First of all The Kingdom of the Netherlands is a founding member of the Council of Europe (CoE), an organisation that aims to protect human rights, pluralist democracy and the rule of law. By signing the CoE Convention for the Protection of Human Rights and Fundamental Freedoms – the so-called European Convention on Human Rights (ECHR, 1950) – on 4 November 1950 The Kingdom became one of the original signatories to this treaty.²⁶ What is more, all fourteen protocols to the convention have been signed, and these have all been ratified as well, with the exception of the Seventh Protocol (ECHR P7, 1984). This protocol is particularly relevant to criminal law procedure since it provides for, *inter alia*, rights to appeal in criminal cases, compensation for miscarriage of justice, and protection against double jeopardy (*non bis in idem*). With regard to appeal in criminal cases (Article 2 ECHR P7), the Dutch Government declared that ‘it interprets paragraph 1 of Article 2 thus that the right conferred to everyone convicted of a criminal offence to have conviction or sentence reviewed by a higher tribunal relates only to convictions or sentences given in the first instance by tribunals which, according to Netherlands law, are in charge of jurisdiction in criminal matters.’ It is unclear whether The Netherlands is ever going to ratify the Seventh Protocol. The ECHR provides for an individual complaints mechanism, the acceptance of which is obligatory for all state parties (see Article 34 ECHR) since the entry into force of the Eleventh Protocol on 1 November 1998.²⁷ Another important treaty within the Council of Europe is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT, 1987), of which the Kingdom became an original signatory on 26 November 1987.²⁸ Protocol I (1993) and Protocol II (1993), both of which amend the ECPT, were also signed later.²⁹ A soft law instrument that merits mention here is the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism (2002).

Furthermore, The Netherlands (not The Kingdom as a whole) is one of the original member states of what is presently known as the European Union (EU).³⁰ Within the EU many instruments relevant to human rights have been adopted. One of the most important is

²⁴ Particularly relevant to criminal law procedure are Articles 13, 14, 15, 22, and 23 CRPD.

²⁵ See as relevant to criminal law procedure especially Articles 16-19 CMW.

²⁶ Entry into force: 31 August 1954 for The Netherlands, 31 December 1955 for The Netherlands Antilles, and 1 January 1986 for Aruba.

²⁷ The right of individual petition before the European Court of Human Rights as provided for in the Ninth Protocol (which is terminated by the Eleventh Protocol) had already been recognized since 1 October 1994 for the whole of The Kingdom.

²⁸ Entry into force: 1 February 1989 for the whole of The Kingdom.

²⁹ Both protocols were signed on 5 May 1994, and both entered into force on 1 March 2002 for the whole of The Kingdom.

³⁰ The Netherlands Antilles and Aruba are not full members of the EU, but they are both a so-called Overseas Country or Territory associated with the Union.

the Charter of Fundamental Rights of the European Union (2000). Currently it is not directly legally binding on the member states and organs within the Union, but it is supposed to gain this status in the near future. This depends on whether the Treaty of Lisbon will enter into force or not.³¹ The Netherlands has approved this amending treaty.³² The provisions of the Charter are addressed to the institutions and bodies of the Union and to the Member States only when they are implementing Union law. Once the Charter has legally binding status, individuals can invoke the charter rights in a national criminal procedure, but only with regard to a substantive or a procedural subject within the field of the law of the Union.

Finally, I should mention the Organisation for Security and Co-Operation in Europe (OSCE), of which The Netherlands is one of the founding members. Within the framework of this organization several declarations and other documents have been adopted that are relevant to criminal law procedure. Specifically noteworthy is the 2006 Declaration on Criminal Justice Systems.³³ These documents are of marginal importance only to the practice of Dutch criminal law procedure. They are not legally binding and they cannot be invoked by individuals in a court of law.

II Dutch Criminal Law Procedure

II.1 General

Fundamental rights that are relevant to criminal law procedure in The Netherlands cannot only be found in international and regional instruments; there are also some contained in the Constitution of the Kingdom of the Netherlands.³⁴ The Constitution provides for fundamental rights in Chapter 1, *i.e.*, Articles 1 to 23. Directly or at least indirectly relevant to criminal law procedure are: Article 1 on equal treatment; Article 6 on the freedom of religion and belief; Article 7 on the freedom of expression; the rights to association and to assembly and demonstration in Articles 8 and 9; the right to privacy in Article 10; Article 11 on the right to inviolability of the person; the right to respect for the home and correspondence in Articles 12 and 13; the right to liberty and *habeas corpus* in Article 15; the legality principle or *nulla poena sine praevia lege poenali* in Article 16; the prohibition against being kept from the competent court or the principle *ius de non evocando* in Article 17; and the right to legal representation in Article 18.³⁵ Furthermore, Article 113 demands that the ‘trial of offences shall also be the responsibility of the judiciary.’ Article 114 of the Constitution holds that capital punishment may not be imposed. And Article 121 states that trials shall be held in

³¹ In the Treaty of Lisbon amending the European Union Treaty and the European Community Treaty (signed at Lisbon, 13 December 2007) it is stipulated that ‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.’; see Article 6 of the consolidated version of the EU Treaty.

³² See the Approval by Parliament’s First Chamber (*Eerste Kamer*) in *Handelingen I* 2007-2008, no. 38, 8 July 2008, p. 1618.

³³ Document MC.DOC/4/06 of 5 December 2006, adopted at the Fourteenth Meeting of the Ministerial Council, Brussels. Other documents that contain provisions relevant to criminal law procedure are, *e.g.*: Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE (1990) (see § 5); Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991) (see § I.23).

³⁴ Generally on the fundamental rights in the Constitution, see Constantijn A.J.M. Kortmann & Paul Bovend’Eert, *Dutch Constitutional Law*, The Hague / London / Boston: Kluwer Law International, 2000, pp. 145-159.

³⁵ Cf. Jaap de Hullu, ‘Criminal Law Aspects of Human Rights Protection in The Netherlands’, vol. 3 *Journal of Constitutional Law in Eastern and Central Europe* (1996), no. 2 (special: Human Rights as Constitutional Rights), pp. 173-179.

public, and that judgments shall specify the grounds on which they are based, and be pronounced in public. The Constitution does not provide for a provision on the right to a fair trial as such.³⁶ Moreover, as has already been mentioned above, the Dutch courts are (still) not authorized to review Acts of Parliament against fundamental rights laid down in the Constitution (*toetsingsverbod*; Article 120 of the Constitution).³⁷ This implies an important limitation on the possibility for the defence to successfully invoke constitutional rights in criminal trials.

Article 107 of the Constitution stipulates that ‘criminal procedure shall be regulated by Act of Parliament in general legal codes without prejudice to the power to regulate certain matters in separate Acts of Parliament.’ So the legal basis of criminal law procedure in The Netherlands is the Code of Criminal Procedure (CCP, *Wetboek van Strafvordering*) of 1926.³⁸ This is a statute. Provisions of or relevant to criminal procedure are provided for in several other statutes too, such as the 1928 Narcotic Drug Offences Act (*Opiumwet*), the 1950 Economic Offences Act (*Wet op de economische delicten*), and the 1997 Act on Weapons and Munitions (*Wet wapens en munitie*).³⁹ Lower legislative bodies (such as provinces and municipalities) have no autonomous power to regulate criminal procedure, and neither do the courts. The court’s case law – especially that of the criminal chamber of the Supreme Court – is nevertheless of great importance to the meaning, scope, and purpose of provisions of criminal procedure.

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

Additionally, all powers that infringe fundamental rights can generally be used only in case of reasonable suspicion that an offence (infraction or crime) has been committed (cf. Article 27 CCP). A reasonable suspicion does not require much, however: under certain circumstances it may even be constituted by an anonymous tip. In ordinary cases the condition of reasonable suspicion applies, *e.g.*, to arrest, pre-trial detention, search and seizure, interrogation of the suspect, and to all kinds of special investigative powers (see Articles 126g-126ni CCP), such as recording communication, surveillance, infiltration,

³⁶ A critic is P.A.M. Mevis, *Constitutioneel strafrecht* (Constitutional Criminal Law), Deventer: Gouda Quint, 1998, pp. 10-11 and 41-44. See also R. de Lange & P.A.M. Mevis, ‘Constitutional Guarantees for the Independence of the Judiciary’, vol. 11.1 *Electronic Journal of Comparative Law* (May 2007), <<http://www.ejcl.org/111/art111-15.pdf>>.

³⁷ See *supra* section I.1.

³⁸ On this Code, see Peter J. P. Tak, *The Dutch criminal justice system*, Nijmegen: Wolf Legal Publishers, 2008, pp. 29-37.

³⁹ See on sources of criminal law in general J.F. Nijboer, ‘The Criminal Justice System’, in J.M.J. Chorus, P.H.M. Gerver & E.H. Hondius, *Introduction to Dutch Law*, Alphen aan den Rijn: Kluwer Law International, 2006, pp. 402-406.

running informants, and undercover pseudo-purchases (see also *infra* section III.5).⁴⁰ If terrorism is concerned, though, these special covert investigation powers, as well as powers to search objects, vehicles and clothing, may be used if there is merely ‘an indication of a terrorist crime’ (Articles 126za-126zs CCP), which requirement can be met even more easily than the requirement of ‘reasonable suspicion’.⁴¹ Furthermore, in connection with organised crime, covert investigation powers may be used in case of ‘reasonable suspicion’ that a serious crime (as defined in Article 67 § 1 CCP) ‘has been committed or that such crimes are being planned or committed by a criminal organisation, which in view of their nature or connection with other crimes planned or committed by the same organisation constitute a serious breach of the legal order’ (see Article 126o-126ui CCP). This does not require the existence of a concrete suspicion of a specific crime; an abstract suspicion of abstract serious crimes suffices. Moreover, the use of these powers is not in any respect limited to suspects. The possibility to apply these powers in the event of ‘planning’ serious organized crime implies that the police force is authorized to investigate pro-actively. Interestingly, the powers may also be utilized when the planning as such is not in violation of criminal law. When the planning does constitute a criminal offence, however (see for example Article 46 on criminal preparation, and the provisions on conspiracy in, *e.g.*, Articles 80, 96, 103, 114b, 120b, 122, 176b, 282c, 289a, 304b, 415b Criminal Code), special investigative powers can be applied on the basis of a reasonable suspicion of that concrete crime (*i.e.*, on the basis of Articles 126g-126ni CCP). This thus leaves open the possibility that the police can also conduct pro-active investigation in cases where a reasonable suspicion cannot be sustained that a serious (organised) crime is being either planned or committed.

II.2 Actors in Criminal Law Procedure

II.2.a The Courts and Judges

The judiciary deals with criminal law offences within the criminal law divisions of each of the nineteen District Courts (*rechtbanken*), five Courts of Appeal (*gerechtshoven*), and the Supreme Court (*Hoge Raad der Nederlanden*), which is a court of cassation.⁴² The Kingdom of the Netherlands does not have a Constitutional Court. Furthermore, each District Court has a number of subdistrict venues; there are 61 of these Cantonal Courts (*kantongerechten*) in total. Generally, the subdistrict courts only handle minor offences, mostly infractions (*overtredingen*) (see Article 382 CCP). Most crimes (*misdrijven*) and all other offences are dealt with by a District Court. The Supreme Courts only decides on points of law and procedural matters; all the district and appeal courts also examine and establish the facts. Criminal cases are decided by professional judges (or justices, in the Courts of Appeal and in the Supreme Court). Serious offences are dealt with by a plural chamber consisting of three such judges; less serious offences that are simple in nature and that carry a punishment of no more than one year of imprisonment can be tried by a single District Court judge (*Politierichter*) (see Articles 368-369 CCP).

⁴⁰ See Council of Europe, ‘Reply to the Questionnaire on Special Investigation Techniques in Relation to Acts of Terrorism – Netherlands’ on: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/4_theme_files/special_investigation_techniques/Netherlands%20reply.pdf.

⁴¹ For the definition of ‘terrorist crime’, see Article 83 Criminal Code.

⁴² See the Judicial Organization Act (*Wet op de Rechterlijke Organisatie*). See for information on the organization A.F.M. Brenninkmeijer, ‘Juridical Organization’, in J.M.J. Chorus, P.H.M. Gerver & E.H. Hondius, *Introduction to Dutch Law*, Alphen aan den Rijn: Kluwer Law International, 2006, pp. 53-61; see also <http://www.rechtspraak.nl> (website is partly in English).

The Dutch system does not make use of laymen or juries.⁴³ In fact, even for those in the legal professions it is not especially easy to become a judge (or prosecutor). First of all one needs to possess an outstanding master's degree in law. After that there are two alternative routes to becoming a judge (or prosecutor). One possibility is to apply for a position in the training programme for judges (and prosecutors), called the RAIO training. Applicants can enter the programme only after they have passed a battery of tough intelligence and psychological tests and several interviews. The program normally takes six years and it offers a combination of theory and practice. Only after successfully completing the training program are the participants appointed as assistant judges (or prosecutors) with one of the District Courts. After satisfactorily fulfilling that position for about a year one can be appointed a judge for life (or prosecutor for unlimited time) by Royal Decree (see Article 117 of the Constitution). Another possibility is offered to legal professionals (*e.g.*, attorneys, company lawyers, academics, civil servants) who have at least six years of relevant job experience. They can apply for the position of judge (or prosecutor) in case of a vacancy in one of the courts (or prosecuting offices). Candidates who are selected are hired as assistant judges (or prosecutors) and enter a training program to become a professional judge (or prosecutor). Depending on previous experience the program takes about a year to eighteen months. Although judges are appointed for life (and prosecutors for unlimited time), at the age of 70 they are honourable discharged from their function.

The pre-trial phase can involve an important task for the investigative judge (*rechter-commissaris*) (see Articles 170 ff CCP). The pre-trial investigation is chiefly inquisitorial rather than adversarial in nature.⁴⁴ This applies to a greater extent to the police investigation than to the judicial preliminary investigation (*gerechtelijk vooronderzoek*; see Articles 181-241c CCP) which is conducted by and at the orders of the investigative judge. The judicial preliminary investigation is initiated by the investigative judge at the request of the prosecutor. The investigative judge was introduced into the Dutch system to provide an impartial, objective investigator in an early stage of criminal law proceedings. If more serious offences are involved he or she usually does play a role in the pre-trial investigation, even if only a police investigation takes place because no judicial preliminary investigation has been initiated. First of all, the investigative judge reviews the legality of police custody (*inverzekeringstelling*) after three days and fifteen hours at the latest (Article 59a CCP; cf. Article 5 § 3 ECHR), and apart from that he or she is authorized to order a remand in custody (*voorlopige hechtenis*) (Article 63 CCP). Furthermore, the investigative judge in principle is the authority who authorizes or orders, for example: seizure (Article 104 CCP), search of homes and other places (Article 110 CCP), a criminal financial investigation (Article 126 CCP), and recording communication (Articles 126l and 126m CCP). He or she can execute several of these powers *ex officio*, especially if the pre-trial investigation has officially become a judicial preliminary investigation. Other important powers are questioning the suspect, witnesses, and experts. Unlike the prosecutor, the investigative judge can – in a judicial preliminary investigation – order the appearance of suspects and witnesses. He or she has, however, no power to decide on the prosecution of the suspect: the prosecutor has a monopoly over the decision whether someone will be prosecuted and appear before a court; so the prosecution does not need leave from a judge or court to prosecute.

⁴³ In military criminal cases, however, a high military officer takes a place in the court.

⁴⁴ See C.H. Brants-Langeraar, *Consensual Criminal Procedures*, in J.H.M. van Erp & L.P.W. van Vliet (eds), *Netherlands reports to the Seventeenth International Congress of Comparative Law*, Utrecht 2006, Antwerp / Oxford: Intersentia, section 1; also published in: vol. 11.1 *Electronic Journal of Comparative Law* (May 2007), section 1, on: <<http://www.ejcl.org/111/art111-6.pdf>>.

In the actual trial (see Articles 282 ff CCP) the courts play a fairly active role. The court will strive to find the truth as regards the offences as these have been charged by the prosecutor in the so called *tenlastelegging*. In doing so it mainly bases its questions, findings and decisions on the presentation in the case file records of the evidence collected in the pre-trial stages. The court sessions are not particularly suited to all kinds of investigation. If such investigations are required or if the court deems it preferable otherwise, the case will be referred to the investigative judge in the pre-trial phase for further investigation (Article 316 CCP). Nevertheless, the court itself interrogates the accused during the hearing (Article 286 CCP). Furthermore, the court questions witnesses and experts (Article 292 CCP) insofar as they are present at trial (most of them will already have had definitive hearings in the pre-trial phase before the police and the investigative judge; written transcripts of their statements are set down in official records and placed in the case file). Furthermore, the court can, for example, *ex officio* order the prosecutor to summon witnesses and experts to appear in court (Article 263 CCP). The trial hearing is slightly more adversarial than inquisitorial. To a greater extent than in the pre-trial phase there is equality of arms as between the defence and the prosecutor. The defence can comment on the legality and quality of the case file and the evidence presented in court, on the prosecutor's charge and the sentence proposed, and on the facts of the case. The defence, however, has few possibilities to demand rehearing of witnesses or experts and to demand or present additional evidence during the court session. Apart from exercising (somewhat limited) powers to discover truth, the court has a responsibility to guard due process. It assesses the legality and quality of the evidence presented in the case file and by the prosecutor during the court session, and it must guarantee that the trial is fair and that the process is completed within reasonable time.

II.2.b The Public Prosecution Service

The *Openbaar Ministerie* (literally: public ministry) is the Public Prosecution Service in The Netherlands.⁴⁵ It is not a government department like, *e.g.*, the Ministry of Justice, but part of the Judiciary. As mentioned above, however, the Minister of Justice is politically accountable for the prosecution service, its actions and decisions. Hierarchically, the service is placed under the Minister. He or she has policymaking power, and may give binding instructions with regard to investigation and prosecution in individual cases. He or she can be held accountable in parliament for using or failing to use these powers.⁴⁶ Generally the Minister of Justice uses these powers in individual cases with great reservation. Within criminal law procedure the prosecution might have to justify its actions before the investigative judge or the court.

The service is hierarchically organized internally. At the level of first instance there is a prosecution office (*arrondissementsparket*) attached to every one of the nineteen District Courts. These district offices are composed of several prosecutors (*officier van justitie*) and a head prosecutor (*hoofdofficier van justitie*). One level up there is an office (*resortsparket*) attached to all of the five Courts of Appeal. The prosecutors here (called *advocaten-generaal*) conduct criminal cases in appeal. They are placed hierarchically under the head prosecutor (*hoofdadvoocaat-generaal*). Furthermore the Prosecution Service has a national prosecution office (*landelijk parket*) that deals with (inter)national organised crime and terrorism, and functional offices (*functioneel parket*) that specialize in environmental crime, economic crime

⁴⁵ On the *Openbaar Ministerie*, see Peter Tak, 'The Dutch Prosecution Service', in Peter J.P. Tak (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen: Wolf Legal Publishers, 2004, pp. 355-383; and < <http://www.om.nl> > (website is partly in English).

⁴⁶ Peter Tak, 'The Dutch Prosecution Service', in Peter J.P. Tak (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen: Wolf Legal Publishers, 2004, pp. 374-375.

and fraud. All the district, appeal and national offices are placed under the national Board of procurators general (*College van procureurs-generaal*) that has its seat in The Hague (*Parket Generaal*). The Board monitors the prosecutors and their actions and decisions in individual cases, for example those on prosecution, and issues policy directives (*beleidsregels* or *richtlijnen*) concerning criminal law procedure.

To qualify as a prosecutor one has to meet the same requirements as those that apply to judges (see *supra* section II.2.a).

The main tasks of the prosecution service are: investigating criminal offences, prosecuting offenders, and executing sentences. With regard to all these tasks it has a responsibility to protect the rights of both victims and offenders. According to the Code of Conduct of the Prosecution Service (*Gedragcode Openbaar Ministerie*⁴⁷), prosecutors will execute their tasks ‘with special attention to the fundamental human rights’ (Rule 1.2), ‘with respect to the inherent human dignity, without distinction as to person or status, and without discrimination on the grounds of religion, sex, sexual inclination, national origin, ethnicity, skin colour, age or on any other grounds’ (Rule 1.3) and in ‘a fair, impartial, objective and fearless manner’ (Rule 1.4). This is also of importance in criminal investigation by the police. Since the prosecutor owns command over criminal investigation (see Article 148 CCP) and has authority over the police (Article 13 Police Act), he or she is obligated to ensure that the police force is working in conformity with criminal procedure law and ensures the fundamental rights of individuals.⁴⁸ The prosecutor can instruct the police in these matters as well as on the pursuit of specific investigations. This, however, does not alter the fact that the prosecutor depends on the police to provide information.

On the basis of the criminal investigation the prosecutor decides whether a case should be brought to court and which offences will be charged. The public prosecution service has a monopoly on the prosecution of individuals and legal entities. Individuals have no right to initiate a criminal trial; victims can, however, join the criminal trial by submitting a claim for damages against the suspect.⁴⁹ In The Netherlands what is called principle of expediency applies: the prosecution service is not obligated to prosecute every crime of which it becomes aware (as it would have to do under the principle of legality), but it can decide not to prosecute if a conviction might not be obtainable or if ‘reasons of public interest’ do not favour prosecution (see Article 167 CPC).⁵⁰ The prosecutor has several options if he or she decides not to bring a case to court by filing charges against the suspect.⁵¹ He or she can dismiss the case unconditionally (*onvoorwaardelijk sepot*; see Article 167 § 2 or Article 242 § 2 CCP) or conditionally (*voorwaardelijke sepot*; see Article 167 § 2, Article 244 § 3 or Article 245 § 3 CCP). A sort of conditional dismissal is also offered with the so called transaction (*transactie*; Articles 74-74c CCP): the suspect can prevent prosecution and a trial by meeting conditions laid down by the prosecutor. In most cases the condition will be the payment by the culprit of a sum of money to the state which can be as great as the maximum fine carried by the offence.⁵² The transactional settlement can be applied to all infractions and

⁴⁷ Adopted 11 July 2005 by the Board of procurators general.

⁴⁸ Cf. Barry Hancock & Egbert Myjer (eds), *Human Rights Manual for Prosecutors* (by the International Association of Prosecutors), Nijmegen: Wolf Legal Publishers, 2002, which offers a survey of relevant international human rights standards and instruments.

⁴⁹ See on the role of the victim in the Dutch criminal justice system M.E.I. Brienens & E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Nijmegen: Wolf Legal Publishers, 2000, pp. 666-671.

⁵⁰ See for greater detail Peter Tak, ‘The Dutch Prosecution Service’, in Peter J.P. Tak (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen: Wolf Legal Publishers, 2004, pp. 367-369.

⁵¹ See also section III.4.

⁵² See for greater detail on the transaction Peter J. P. Tak, *The Dutch criminal justice system*, Nijmegen: Wolf Legal Publishers, 2008, pp. 87-88.

all crimes that carry a maximum punishment of at most six years of imprisonment. If the suspect does not meet the transactional conditions he will be summoned to trial. Over 30% of the criminal cases in The Netherlands are settled through a transaction. The legislator aims to replace the transaction gradually with a procedure of ‘prosecution through penal orders’ (*OM afdoening door strafbeschikking*), which was introduced 1 February 2008 in Article 257a CCP: the prosecutor imposes a criminal punishment on the suspect.⁵³ This procedure can be applied to offences that carry a maximum punishment of no more than six years’ imprisonment. The penal order is considered a prosecution. By accepting the punishment the suspect admits being guilty of the offence. The order has the same legal status as a judgement by a court. The prosecutor can order: community service (*taakstraf*) with a maximum of 180 hours; a fine (*boete*); withdrawal from society (*onttrekking aan het verkeer*); payment to the state for the victim; disqualification from driving (*ontzegging van de rijbevoegdheid*). The prosecutor is not authorized to order a sentence entailing deprivation of liberty. The *strafbeschikking* is also discussed below in sections III.4.b and IV.2.g.

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

In addition to the police The Netherlands is familiar with four special criminal investigation services (*bijzondere opsporingsdiensten*) with their own pre-trial investigative and evidence-gathering powers.⁵⁴ They all work under the supervision and instruction of the prosecutor. Their power to investigate crime is limited to the policy area for which they are appointed. In principle they have the same investigative powers as the police investigators (cf. Article 142 CCP). The investigations of these services can (and often will) result in a prosecution by the prosecution services. In the area of tax the Fiscal Information and Investigation Service & Economic Investigation Service (*Fiscale inlichtingen- en opsporingsdienst & Economische controledienst; FIOD-ECD*) investigates fraud and tax. Furthermore, the Social Intelligence and Investigation Service (*Sociale Inlichtingen- en Opsporingsdienst; SIOD*) investigates offences in the field of social security. Crime related to agriculture, nature, food quality and animal wellbeing is combated by the General Inspection Service (*Algemene inspectiedienst, AID*). Finally, the Ministry of Housing, Spatial Planning and the Environment (*Ministerie van VROM*) has its own Intelligence and Tracing Service (*Inlichtingen- en Opsporings Dienst, VROM IOD*) to investigate serious – often organized – crime in this policy field.

Apart from the decision on laying charges, the prosecutor is also responsible for presenting the case file and the evidence therein to the court. In the Dutch criminal justice system evidence gathered in the pre-trial phase by police, prosecutor, investigative judge or defence is not subject to any special procedure by which the evidence has to be granted leave to go to court. In case the exclusion of evidence is indicated because it has been obtained unlawfully (see *infra* section III.9) this will be decided by the court in trial. In principle all evidence might be employed in criminal cases. The use of evidence obtained abroad (extraterritorial use of evidence) is also allowed, in principle under the same conditions as other evidence.

⁵³ See C.H. Brants-Langeraar, *Consensual Criminal Procedures*, in J.H.M. van Erp & L.P.W. van Vliet (eds), *Netherlands reports to the Seventeenth International Congress of Comparative Law*, Utrecht 2006, Antwerp / Oxford: Intersentia, section 4.4; also published in: vol. 11.1 *Electronic Journal of Comparative Law* (May 2007), section 1, on: <<http://www.ejcl.org/111/art111-6.pdf>>.

⁵⁴ See the 2006 Act on special investigation services (*Wet op de bijzondere opsporingsdiensten*).

II.2.c The Defence Lawyer

To become a defence lawyer one first of all needs a master's degree in law. With that it is possible to apply to a law firm to become a trainee lawyer. Trainees have to work in practice and attend a programme of courses for at least three years before they can be appointed as defence lawyers. If appointed they automatically have the right to appear and conduct proceedings in court in criminal cases. Pursuant to the 1952 Act on Advocates (*Advocatenwet*), defence lawyers are required to become a member of The Netherlands Bar Association (*Nederlandse orde van advocaten*⁵⁵). This association does not have special divisions for criminal law or other fields of law. nor does it function as a Public Defender's Office. This is an institute with which The Netherlands is not familiar; all attorneys in The Netherlands are entitled to conduct the defence in criminal cases (as well as civil ones) (see Article 11 Act on Advocates).

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

The main role of the defence lawyer is to consult with and assist the client during all stages of criminal law proceedings. This means that the lawyer shall represent the points of view of the clients and that he or she shall exercise the rights of the defence and make use of all possibilities within the bounds of the law to achieve the client's interests. The defence lawyer is not, however, allowed to pursue the defence contrary to the apparent wishes of the client, the accused⁵⁶ – the suspect is *dominus litis* of the defence in criminal law proceedings in The Netherlands. At the same time the defence lawyer assumes full responsibility for the handling of a case. In case the advocate has a difference of opinion with his client concerning the way in which the case should be handled, and this dispute cannot be resolved by mutual consultation, the advocate shall withdraw (Rule 9 Code of Conduct). The defence lawyer is regarded as the inseparable, partisan representative of the client. He or she has no obligation to actively gather and introduce evidence to support the client's case, although it might be wise for him or her to do so. Persons who might expect that they will be prosecuted may request the investigative judge to conduct investigations in their case (*mini-instructie*; Article 36a CCP). The same right accrues to their lawyers (Article 36e CCP). The defence, however, does not have a duty to assist the course of justice whatsoever. What is more, the Dutch system is not acquainted with such legal constructs as 'obstruction of justice' and 'contempt of court'. Nevertheless, lawyers must abstain from adversely affecting the lawful discovery of the truth by the judicial authorities.

II.3 Investigation of the Facts (Establishing the Truth)

In criminal law procedure in The Netherlands the emphasis in regard to establishing the facts of a criminal case clearly lie in the pre-trial procedure. Commonly, little new evidence is presented during the court procedure. The investigation of the facts, truth discovery and the gathering of evidence both against and in favour of the suspect is first of all the responsibility

⁵⁵ On the Bar, see < <http://www.advocatenorde.nl> > (website is partly in English).

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

of the police, under the supervision of the prosecutor. The prosecutor presents the case file and the evidence therein to the court. The court will judge the case mainly on the basis of that file and on the assessment and discussion in court between the prosecutor and defence about the evidence and legal aspects of the case. The court judges are acquainted with the case prior to the trial and they examine the file thoroughly before the trial actually starts. During the court session the judges briefly discuss all the main evidence, and some of it in greater detail if it is unclear or in dispute. The Court actively assesses the legally and quality of the evidence in the case file by questioning the defendant about it. If the court considers that evidence has been obtained illegally it might exclude it (cf. *infra* section III.9). Witnesses and experts will only be questioned by the trial court itself if the prosecutor – *ex officio* or at the request of the defence – has summoned witnesses to appear in court or if it is deemed necessary by the court to hear a witness. Usually, however, the case will then be sent back to the investigative judge, to enable him or her to rehear certain witnesses. The reports of these hearings will then be added to the file.

II.4 Appeal, Cassation, and Revision

In case of crimes (*misdrifven*) the system of remedies (*rechtsmiddelen*) always allows for an appeal to a Court of Appeal at the request of the prosecution as well as at the request of the defence if the defendant was not completely acquitted of all charges (Article 404 CCP). The same applies to infractions (*overtredingen*), albeit in that case some extra restrictions on the defence apply: they cannot appeal if either no criminal penalty was imposed or if the defendant was fined less than €50. What is more: in that case the defence in principle cannot enter an appeal in cassation before the Supreme Court either. Yet another, extra obstacle to an appeal is provided in Article 410a CCP: in cases in which the prosecution or defence appeals against infractions or less serious crimes, while the court in first instance imposed a penalty of no more than €500, the appeal will only be granted by the Court of Appeal if this is necessary for the course of justice. An appeal normally has to be made within fourteen days after the judgement in first instance has been rendered (Article 408 CCP). On the nature of the appeal trial, see *infra* section IV.4.

After the appeal proceedings have been concluded both the prosecution and defence can appeal on points of law only via the remedy of cassation to the Supreme Court (see *supra* section II.2.a). This is a court of cassation; The Kingdom of the Netherlands does not have a Constitutional Court. The possibility to appeal in cassation is limited in a somewhat similar fashion as the remedy of appeal (see Article 427 CCP⁵⁷). There is however no equivalent to Article 410a CCP for cassation. The final result of cassation can be adverse to the defendant. Since the prosecution can enter an appeal in cassation against an acquittal, this can also mean that an acquittal (*vrijspraak*) or dismissal of all charges (*ontslag van alle rechtsvervolging*) after cassation is reversed to a guilty verdict and punishment.

Miscarriage of justice should as far as possible be redressed with the ordinary remedies of appeal and cassation. In favour of the defendant, however, Dutch criminal procedure law does under specific circumstances allow closed cases to be reopened by revision (*herziening*) of criminal judgments having power of *res judicata* (see Article 457 CCP). At present three grounds are offered for revision (see for the future however *infra* section III.8). Revision is first of all possible if different court decisions are incompatible with each other. Secondly, a closed criminal procedure can be reopened if a new fact (*novum*)

⁵⁷ Cassation is furthermore limited in Article 80 § 2 Judicial Organization Act (*Wet op de Rechterlijke Organisatie*) with regard to judgements by subdistrict courts (*i.e.*, Cantonal Courts (*kantongerechten*); see *supra* section II.2.a).

makes it likely that, had the trial court known that fact, it would have taken a fundamentally different decision, which would have been more favourable to the convicted person. Finally, revision can be granted if the European Court of Human Rights has established in a judgment that the ECHR has been violated in the proceedings that led to the conviction and revision is necessary with a view to redressing that violation.⁵⁸

II.5 An Adversarial or Inquisitorial System?

As apposed to the Anglo-American adversarial criminal procedure law system, a Continental system is recognized which is inquisitorial in nature and which is applied, *e.g.*, in most of the non-English speaking European countries. Within this dichotomy, criminal law procedure in The Netherlands – being an European state – must indeed be characterised as inquisitorial.⁵⁹ However, this qualification is not quite meaningful, since neither of these systems exists in a pure form, and because there are many differences, even between continental systems.

In the Dutch criminal justice system the pre-trial investigation phase is largely inquisitorial in nature. The collection of evidence and fact finding is mainly done by the authorities: the police force investigates under the prosecutor's and/or the investigative judge's supervision. In this phase of criminal law procedure the suspect figures mainly as a subject of investigation and he or she is exposed to undergo all kinds of coercive powers. Of course the culprit can contest the actions of the authorities when he is heard to that end or via possible remedies, and he or she can instigate investigations as well, but the system is not constructed in such a way that the defence is equally responsible for truth discovery as the authorities. For one thing, the possibilities for investigations at the instigation of the defence offered in the Code of Criminal Procedure mostly go via the authorities: *e.g.*, the defence may request the investigative judge to conduct investigations in their case (*mini-instructie*; see *supra* section II.2.c), DNA-counter-expertise goes via the prosecutor, and if the defence wishes expert investigations the investigative judge will appoint an expert to assist him or her in the investigation. Moreover, there is no equality of arms whatsoever during the pre-trial investigation as between the prosecution and the defence. This is most obvious if the newly introduced procedure of 'prosecution through penal orders' (*OM afdoening door strafbeschikking*) is applied (see sections II.2.b, III.4.b and IV.2.g).

The balance is considerably different in the trial phase, which is of a moderately accusatory and adversarial nature. Nevertheless, it is the court (*i.e.*, the chairman) that leads the proceedings and presents the evidence and investigation results in the case file on trial and actively questions the defendant, witnesses and experts. However, both the prosecution and the defence can contest every thing that is presented in court, give their own view on the case and the evidence, and question the defendant, witnesses and experts for themselves. The position of the prosecution and defence is much more one of equality of arms. As far as the trial in appeal is concerned, the procedure has become much more adversarial: the scope and content of the hearing in this procedural phase now depend very much on what the prosecution and defence bring forward for discussion (see *infra* section IV.4).

⁵⁸ See P.H.P.H.M.C. van Kempen, *Heropening van procedures na veroordelingen door het EHRM*. (Reopening of Procedures after Judgements by the European Court of Human Rights), Nijmegen: Wolf Legal Publishers, 2003, pp. 106-146 and pp. 541-542 of the English summary; T. Barkhuysen, M.L. van Emmerik & P.H.P.H.M.C. van Kempen (eds.), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order*, The Hague / London / Boston: Kluwer Law International, 1999.

⁵⁹ See in more detail on this subject Peter J. van Koppen & Steven Penrod, *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Perspectives in Law & Psychology), New York: Kluwer Academic / Plenum Publishers, 2003, with a lot of contributions on The Netherlands.

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

III Human rights in Dutch criminal law procedure

III.1 The Right to Life

The death penalty was abolished in The Netherlands in 1870. Article 114 of the Constitution declares that capital punishment may not be imposed. So far there has not been any serious discussion in or outside parliament about reintroducing this punishment. This negative obligation on the state of course protects the right to life. Dutch law does not, however, expressly provide for the protection of life by a positive obligation on the state to instigate criminal investigations if reliable information points to a life threatening situation, or to start a criminal investigation if someone has been killed under suspicious circumstances and prosecute and punish perpetrators. Such positive obligations do, however, stem from the case law of the European Court of Human Rights on the right to life in Article 2 ECHR.⁶⁰

III.2 The Right to be Protected Against Cruel and Humiliating Treatment

The prohibition of torture and inhuman and degrading treatment as such is not provided for in a statute. A broader right is contained in the constitution, however, Article 11 of which states: ‘Everyone shall have the right to inviolability of his person, without prejudice to restrictions laid down by or pursuant to Act of Parliament.’ So this constitutional right is not absolute. Article 3 ECHR, which applies in full in The Netherlands, is, though. What is more, although this provision literally only involves a negative obligation on the state, the European Court has managed to formulate similar positive obligations on the basis of Article 3 ECHR, as it was able to construct an obligation regarding the right to life in Article 2 ECHR.⁶¹ So

⁶⁰ See, *e.g.*, ECtHR (Grand Chamber), 28 October 1998, Appl. 23452/94 (*Osman v. The United Kingdom*); ECtHR (Grand Chamber), 24 October 2002, Appl. 37703/97 (*Mastromatteo v. Italy*); ECtHR (Grand Chamber), 15 May 2007, Appl. 52391/99 (*Ramzahari v. The Netherlands*); ECtHR (Grand Chamber), 30 November 2004, Appl. 48939/99 (*Öneryildiz v. Turkey*). Highly critical of this is P.H.P.H.M.C. van Kempen, *Repressie door mensenrechten. Over positieve verplichtingen tot aanwending van strafrecht ter bescherming van fundamentele rechten* (Repression by Human Rights. On Positive Obligations to Apply Criminal Law to Ensure Fundamental Rights), Nijmegen: Wolf Legal Publishers, 2008.

⁶¹ See, *e.g.*, ECtHR 24 January 2008, Appl. 839/02 (*Maslova & Nalbandov v. Russia*); ECtHR, 3 May 2007, Appl. 71156/01 (*Gldani Congregation of Jehovah's Witnesses v. Georgia*); ECtHR, 12 October 2006, Appl. 13178/03 (*Mubilanzila Mayeka & Kaniki Mitunga v. Belgium*); ECtHR, 4 December 2003, Appl. 39272/98 (*M.C. v. Bulgaria*).

inhuman treatment by both the authorities and private persons must be investigated, prosecuted and properly punished.

III.2.a Interrogation and the Prohibition Against Ill-Treatment

In regard to interrogations, Article 29 CCP contains an important safeguard against pressuring suspects: any official who interrogates a suspect is obliged to refrain from anything that aims at obtaining a statement from the suspect of which it cannot be ascertained that it is given freely. So statements – and confessions alike – must be voluntary and may not be obtained through the use of force, threats, or promises (on the consequences of ill-treatment during interrogation of the suspect, see *infra* section III.9). Prior to interrogation, suspects need to be instructed that they are under no obligation to answer the questions posed (cf. *infra* section III.4.f). During interrogations suspects without an adequate command of the Dutch language have a right to an interpreter (see *infra* section III.4.i). The moment someone has become a suspect he or she has a right to freely choose an attorney (Articles 28 and 39 CCP). In the preliminary investigation phase, though, the right to have counsel present does not in principle apply during the first period of questioning (called the *ophouding voor onderzoek*),⁶² which is set at a maximum of six hours (cf. *infra* section IV.2.b). This does not imply that immediately thereafter the suspect has a right to be provided with legal aid by the state. Counsel shall in principle only be assigned in the event of police custody (*inverzekeringstelling*) or remand (*voorlopige hechtenis*), i.e., remand in custody (*bewaring*), continuation of remand detention by court order (*gevangenhouding*), or taking into remand detention by court order (*gevangenneming*).⁶³ If some form of deprivation of liberty by remand is applied, the accused will also be assigned counsel during the trial in first instance and in appeal (Article 41 CCP⁶⁴). If the culprit is not deprived of his liberty he or she can nevertheless request legal aid. There is no statutory right to have counsel present during police interrogation. However in case of interrogation by the prosecutor or by the investigative judge, in principle a lawyer has to be admitted (Article 57 and 186a CCP). The police, prosecutor and investigative judge at present have no general obligation to make audio or video recordings of their interrogations (however, cf. *infra* section IV.2.b).

III.2.b Detention and the Prohibition of Ill-Treatment

Detention can easily result in cruel and humiliating treatment and punishment of those who are deprived of their liberty. The requirement and applicable procedures for deprivation of liberty in the pre-trial phase and during trial are laid down in Articles 52-88 CCP. The detention regime and the norms that apply during detention are regulated primarily by the 1998 Penitentiary Principles Act (*Penitentiaire beginselenwet*), the Penitentiary Measure (*Penitentiaire maatregel*), the 1994 Police Service Guidelines (*Besluit beheer regionale politiekorpsen*), the 1994 Official instruction for the police, Royal military police and other investigation officials (*Ambtsinstructie*⁶⁵) and the rules of the specific detention facility.⁶⁶

⁶² For a critical view of this, see The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the authorities of the Kingdom of the Netherlands on the visits carried out in June 2007*, Strasbourg, 5 February 2008, Part I, paras. 21-22.

⁶³ On these forms of deprivation of liberty, see *infra* section III.3.

⁶⁴ As for juveniles, see Article 489 CCP.

⁶⁵ *Besluit houdende regels met betrekking tot een nieuwe Ambtsinstructie voor de politie, de Koninklijke marechaussee en de buitengewoon opsporingsambtenaar en de maatregelen waaraan rechtens van hun vrijheid beroofde personen kunnen worden onderworpen* (Decree on rules relating to a new Official Instruction to the police, the Royal Military Police and those with extraordinary detective powers and the measures under which persons can legally be deprived of their liberty).

Although the state is not obliged to inform detainees of their rights, it does of course have the duty to ensure them.

An important safeguard against ill-treatment in detention is the possibility that the detainee can inform people outside prison about his or her deprivation of liberty. After arrest the suspect can contact a lawyer if he or she has one. If this is not the case one can only be contacted after the suspect has been taken into custody or remand, since in that case one will be provided. An arrested person has no statutory right to contact family members or others. The 1994 Official instruction for the police, Royal military police and other investigation officials declares, however, that at the detainee's request the authorities shall inform a family member or housemate as soon as possible if this does not infringe the interests of criminal investigation. This requirement has however still not been implemented properly.⁶⁷ If necessary, the detainee should be provided with a doctor and medical care. Mail between an attorney and a detainee is in principle privileged, but other mail may be censored if necessary. Exactly which rights a detainee has depends on the interests of the investigation into the case, on the severity of the case, and on the detainee him-/herself. The most restricted, severe regime is applied in Extra high security level prisons (*extra beveiligde inrichtingen*), which house suspected terrorists, extremely dangerous persons and detainees who present an extremely high escape risk.⁶⁸

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

III.3 Pre-Sentence Deprivation of Liberty and *Habeas Corpus*

The first period of police questioning (*ophouding voor onderzoek*; Article 61 CCP) of a suspect is set at a maximum of 6 hours. The hours between 12.00am and 9.00am are not counted, however, so the period can extend to 15 hours. It must be ordered by the prosecutor or a higher police officer (*hulpofficier van justitie*) and since it is applied to a suspect it requires a reasonable suspicion of the person questioned. After police questioning has ended the suspect should be released or taken into police custody at the order of the prosecutor or superior police officer. Police custody (*inverzekeringstelling*; Article 57 CCP) is only possible in case of a reasonable suspicion of an offence for which pre-trial detention (*voorlopige hechtenis*) is allowed (see *infra*). It is limited to a maximum of 3 days, which period may be

⁶⁶ On prison law in The Netherlands, see Constantijn Kelk, 'The Netherlands', in Dirk van Zyl Smit & Frieder Dünkel (eds), *Imprisonment Today and Tomorrow. International Perspectives on Prisoners' Rights and Prison Conditions*, The Hague / London / Boston, Kluwer Law International 2001, pp. 478-507; Peter J. P. Tak, *The Dutch criminal justice system*, Nijmegen: Wolf Legal Publishers, 2008, pp. 139-170; <<http://www.dji.nl>> (website is partly in English).

⁶⁷ See CPT, *Report to the authorities of the Kingdom of the Netherlands on the visits carried out in June 2007*, Strasbourg, 5 February 2008, Part I, para. 20.

⁶⁸ The regime is criticised by the CPT, *Report to the authorities of the Kingdom of the Netherlands on the visits carried out in June 2007*, Strasbourg, 5 February 2008, Part I, paras. 41-53.

extended by another 3 days if this is urgently required. Not later than 3 days and 15 hours after arrest the suspect must be brought before the investigative judge (Article 59a § 1 CCP). The judge will examine the lawfulness of the custody. This procedure aims to meet the Habeas Corpus requirements, especially in Article 5 § 4 ECHR.

After a period of at most 6 days and 15 hours the investigative judge can order remand in custody (*bewaring*; Articles 63-64 CCP) for 14 days at the request of the prosecutor. The facts or circumstances must show that there are serious indications (*ernstige bezwaren*) against the suspect. Remand in custody is thus not possible based only on reasonable suspicion, in ordinary cases anyway, unlike the case of suspicion of a terrorist crime (Article 67 § 4 CCP). Since remand in custody constitutes the first form of pre-trial detention (the other two forms are continuation of remand detention by court order and taking into remand detention by court order) the following requirements have to be met as well. First, an order for pre-trial detention may only be issued in the event of: an offence which carries a maximum punishment of imprisonment for four years or more; an offence that is specifically listed, such as incitement to hatred, threat, and embezzlement; or if no permanent address or place of residence of the suspect can be established in The Netherlands and he or she is suspected of an offence which is punishable by imprisonment (Article 67 CCP). Second, an order for remand in custody can only be issued if there is a serious danger of absconding or if a serious consideration of public safety requires the immediate deprivation of liberty (Article 67a CCP).

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

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

On every occasion when the investigative judge or the court decides to order or prolong custody or pre-trial detention, the defendant has the right to state his opinion. Furthermore, he or she can always request the termination or suspension of pre-trial detention (Article 69 § 1 CCP). The rejection of such a request by the investigative judge cannot, however, be appealed. Moreover, the defendant cannot appeal an order by the investigative judge for remand in custody (*bewaring*). He or she may then request the court (*i.e.*, the District Court) to end or suspend his detention. Such requests may be unlimited. The defendant has, however, the right to appeal only once to the Court of Appeal against the rejection by the court of such requests (Article 87 CCP). Article 71 CCP provides for the possibility to appeal a court order for continuation of remand detention (*gevangenhouding*) and a court order that the suspect will be taken into remand detention (*gevangenneming*). Furthermore, orders to extend remand detention may be appealed, too, but only if the defendant did not appeal any earlier order for (the extension of) remand detention. Finally, with regard to the suspension of pre-trial detention it is important to note that criminal

procedure law does provide for release on bail in Article 80 CCP. At the request of the suspect or prosecutor, or *ex officio*, the judge can suspend pre-trial detention both unconditionally and subject to special conditions. Although bail can constitute such a condition, it is very seldom applied in the practise of Dutch criminal law procedure.

III.4 Fair Trial

III.4.a Charge

Although not required under any statute, anyone who is arrested must immediately be informed verbally of the reasons for the arrest (cf. Articles 5 § 2 ECHR, and 9 § 2 ICCPR). If police custody or pre-trial detention is applied, the offences of which the defendant is suspected will be contained in the detention orders. In case a judicial preliminary investigation is conducted, the charge shall be stated as specifically as possible at the start of the investigation (Articles 181-182 CCP). The charge on which the trial will eventually be based (the *tenlastelegging*) shall be precisely described in the summons (*dagvaarding*) (Article 261 CCP), which must be served on the defendant in principle 10 days before the start of the trial in court (Article 265 CCP). If the case comes up before a District Court judge sitting alone (*Politierechter*; see *supra* section II.2.a) a term of 3 days applies (Article 370 CCP). These terms may be shortened if the defendant agrees. If the suspect is caught in the act, he or she can be brought to trial that same day (Article 375 CCP). The charge may be amended during the trial in first instance as well as in appeal, provided that the charge in essence is about the same criminal fact as the original allegation (Article 313 CCP).

III.4.b The Right to Bring One's Case Before a Court

As explained in an earlier section (see *supra* II.2.b) Dutch criminal procedure law makes provision for settlement out of court. The transaction system encourages defendants to make use of these alternatives since the prosecutors' punishment is usually less severe than either the sentence that will be requested in court or the sentence the court may be expected to hand down. Defendants do not as such have a right to be provided with legal aid by the state if they settle out of court (see *supra* section III.2.a). They should, however, be provided with assistance if the prosecutor, by way of 'prosecution through penal orders' (*OM afdoening door strafbeschikking*; Article 257a CCP), imposes on the suspect a punishment of community service, disqualification from driving, or a fine and/or a payment to the state for the victim of more than €2000, or if he or she makes an order concerning the behaviour of the suspect (Article 257c CCP). In that case the defendant should also be heard.

Defendants have no power to bring their criminal case before an independent and impartial criminal court, nor can they force the prosecution to prosecute them. The public prosecution service has a monopoly on prosecuting suspects and summoning them before a criminal court (see *supra* section II.2.b). If, however, the prosecutor imposes a punishment on the suspect through the *strafbeschikking* of Article 257a CCP, the defendant may object to the prosecutor about that punishment. The prosecutor then has to withdraw the punishment or bring the case before the District Court (Articles 257e-257f CCP). The defendant's objection has to be made within fourteen days. After that the opportunity to object to the prosecutor's penal order is lost, and with it the possibility to have the case heard by the court. In addition, the remedy of objection can no longer be utilized if the defendant has voluntarily complied with the order, or if he or she has, while assisted by counsel, signed a written waiver to the right to object.

III.4.c Right to an Independent and Impartial Tribunal

Judges are appointed for life by Royal Decree (on the requirements for appointment, see II.2.a). Within the system of law they have an independent and impartial position. The courts and judges do not answer to the Minister of Justice nor to parliament. Conversely, the minister has the sole political responsibility for the functioning of the judiciary system as a

whole. The introduction on 1 January 2002 of the Council for the Judiciary aimed to strengthen the independence of the courts.⁶⁹ The Council does not form part of the executive branch but is regarded as being a body of the judiciary that is not charged with judiciary duties. It acts as an intermediary between the Minister of Justice and the courts with regard to the utilization of resources: the courts are only accountable to the Council, while in turn the Council reports to the Minister of Justice. The courts, however, are not answerable to the Council as to the content, tenor and effect of judicial decisions. Judges are reasonably well paid. They are appointed for life (*i.e.*, until the age of 70). A judge can only be dismissed by the Supreme Court, *e.g.*, if he or she is physically or mentally unable to fulfil the task or if he or she is convicted of a crime. This is very exceptional, since most judges will themselves resign if a dismissal procedure is threatened.

In order to ensure the impartiality of every court Articles 512 to 518 CCP contain regulations on the challenge and exemption of judges. A judge may not hear a case if it might harm judicial impartiality. The case law of the European Court of Human Rights on the requirement of independence and impartiality in Article 6 § 1 ECHR is considered to be vital to the meaning of this requirement. So if a judge identifies a possible conflict of interest, bias, prejudice or an interest in the matter being decided, he or she has to recuse him- or herself. Some of the most frequent reasons for a defendant's challenge are earlier decisions of a judge in the same case or in a related one (*e.g.*, a case of a co-defendant) and the conduct or decisions of the judge during the session.⁷⁰ Previous involvement in the case can constitute a reason why a judge cannot hear the case. For example, an earlier decision on pre-trial detention will in principle be an impediment.

III.4.d The Reasonable-Time Requirement

On the basis of Article 6 § 1 ECHR and the rather casuistic jurisprudence of the ECtHR, the Supreme Court of The Netherlands has established some clear general guidelines regarding the right to have one's case heard within a reasonable time.⁷¹ Roughly, a case in first instance normally has to be concluded within two years after the moment the suspect was criminally charged. In appeal a judgment in principle must be rendered within two years after filing the appeal. However, if the suspect undergoes pre-trial detention or if the suspect fall under juvenile criminal law, a maximum period applies, usually of 16 months. Moreover, in the event of appeal to a Court of Appeal or appeal in cassation to the Supreme Court, the files of the case normally have to arrive at the appeal court no later than six months after filing the appeal. On the consequence of violation of the reasonable time requirement, see *infra* section III.9.

III.4.e The Right to a Public Hearing and Pronouncement of Sentence

Article 121 of the Constitution holds that, except in cases laid down by Act of Parliament, trials shall be held in public and judgments shall be pronounced in public. This applies equally to the media. Persons below the age of 18 are not generally admitted, however. According to Article 269 CCP the court can order that the hearing shall take place behind

⁶⁹ On the Council for the Judiciary, see M. Kuijer, *The Blindfold of Lady Justice*, Nijmegen: Wolf Legal Publishers, 2004, pp. 395-405.

⁷⁰ See Marijke ter Voert & Jos Kuppens, *Schijn van partijdigheid rechters* (Doubts about judicial impartiality), Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), The Hague: Boom Juridische uitgevers, 2002, pp. 83-84 of the English summary.

⁷¹ See HR, 17 June 2008, *LJN* BD2578 (*HR = Hoge Raad* (Supreme Court); *LJN* refers to the number of the case on <www.rechtspraak.nl>). See also HR, 3 October 2000, *NJ* 2000, 721, with case note by J. de Hullu (*NJ = Nederlandse Jurisprudentie* (a journal on case law); 2000 presents the year; 721 presents the case number).

closed doors. The order can be taken *ex officio* as well as at the request of the prosecutor, defendant or any of the other participants in the trial, such as witnesses. Reasons for issuing such order can be the interest of public morality, public order, state security, the interests of minors, respect for the personal life of the defendant or others (such as witnesses and victims), and to avoid obstruction of the course of justice. A special provision applies to juveniles: in their case the trials shall be conducted behind closed doors (Article 495b CCP). The judgment in their cases will also be pronounced in public, however. The rights of the media are discussed further on (see section III.6).

III.4.f Presumption of Innocence

Suspects have the right to remain silent. Prior to any interrogation of a person who must be considered a suspect the authorities need to caution that person that he or she is under no obligation to answer questions (*cautio*; Article 29 § 2 CCP). This applies equally during the pre-trial investigation stage and in court. A statement by the defendant that has been made without such prior caution may not be used in evidence against him or her, unless it can be considered that he or she shall not be harmed by the omission (cf. *infra* section III.9).

A defendant's refusal to give a statement cannot as such be used as evidence against him or her. However, in conformity with the case law of the ECtHR, in situations which clearly call for an explanation from the accused, silence may be taken into account when assessing the persuasiveness of the evidence against him or her.⁷² The burden of proof rests completely with the prosecution. In ordinary criminal trials this cannot be reversed under any circumstances. However, in criminal procedures concerning offences of a somewhat administrative nature (such as traffic law, environmental law, and financial and tax law) defendants can sometimes be in the factual or even legal position that they have to prove their innocence.

It is considered a breach of the *Trias Politica* principle on the separation of powers if politicians or important public officials make statements on individual cases that are before the courts. It might even constitute a violation of the presumption of innocence or the right to a fair trial in Article 6 ECHR. Under very exceptional circumstances this could lead a court to render the prosecution inadmissible (cf. *infra* section III.9). Although such a situation has not occurred in The Netherlands so far, politicians increasingly seem to be less reserved about stating their opinion on cases on trial and on specific judgments. On the media, see *infra* section III.6.

III.4.g The Right to Counsel

All suspects (both minors and adults) have a right to assistance by counsel. This right does not apply during the initial police interrogation, though. As explained above, the Dutch legal system provides for legal aid for indigent defendants (see *supra* section III.2.a). Many attorneys are of the opinion that the payment for handling such cases is inadequate. The right to counsel does not as such imply a right to an adequate defence. As noted before, the defence lawyer is not allowed to operate the defence contrary to the apparent wishes of the client (see *supra* section II.2.c). So the defendant can make his wishes and views clear to his counsel at all times. If the defendant has counsel of his own, he or she can discharge him or her at all times and hire another defence lawyer. If the state has provided the accused with counsel, they can both request replacement of counsel by another defence lawyer in the case of the defendant (Article 45 CCP).

⁷² Cf. HR, 3 June 1997, *NJ* 1997, 584; ECtHR, 8 February 1996, Appl. 18731/91, paras. 44-58 (*Murray v. The United Kingdom*).

Several privileges apply between counsel and defendant. First of all the authorities have to respect client-attorney confidentiality (cf. Article 218 CCP). Tapping of telephone conversations or interception of defence lawyers' e-mail is illegal, unless they are suspects themselves (cf. Article 126aa CCP).⁷³ The premises of defence lawyers who are not themselves suspects may be subject to search and seizure, but letters and other documents that fall within the privileged of non-disclosure cannot be seized (Article 98 CCP). Even if the defendant is deprived of his or her liberty there is in principle free access between counsel and client. This means that counsel and client must be permitted to speak privately and correspond confidentially (Article 50 CCP). This must be realised under supervision of the prison authorities in order to prevent the detainee's escape and to secure the safety of the lawyer, and within the rules of the penitentiary facility. Free access may furthermore not delay the criminal investigation. It may also be restricted if it will probably lead to a situation such as one in which the suspect will hinder the investigation or the process of fact-finding, or in which information that has to remain confidential will be revealed to him or her.

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

III.4.h Adequate Time for the Preparation of the Defence and the Right to Know and Contest the Evidence

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

Some sensitive information may be kept secret from the defence – and the trial judges – even during trial. Under strict conditions the law provides for a special procedure to guarantee the complete anonymity of threatened witnesses (*bedreigde getuigen*; Articles 226a-226f CCP). Such procedure furthermore exists for witnesses whose identities cannot be

⁷³ See HR, 10 April 1979, *NJ* 1979, 374, with case note by Th.W. van Veen.

revealed for reasons of state security, for example because they are agents of the General Intelligence and Security Service (*AIVD*) or Military Intelligence and Security Service (*MIVD*). These witnesses are so called covert witnesses (*afgeschermdde getuigen*; Articles 226m-226s CCP). The procedure for covert witnesses was introduced to make it easier to make use of intelligence as evidence in criminal trials. Although these procedures are applicable with regard to all kinds of offences and suspects, they can be of particular use in terrorist and criminal organization cases. Both threatened and covert anonymous witnesses will be heard by the investigative judge. The defence can put questions to the investigative judge that they would like to be put to the witness. The judge will only put these questions to the witness if answering them will not cause the identity to be revealed. The defence can appeal to the court against the decision of the investigative judge to keep the identity of a threatened witness secret and to question the witness in person (Article 226b CCP). The law does not provide for an appeal against the decision to apply the procedure for covert witnesses. Despite their anonymity, the statements of anonymous witnesses can be used as evidence in court if the special procedures have been complied with. A conviction may not, however, be based either solely or to a decisive extent on anonymous statements. Apart from complete anonymity the law also provides for the possibility of partial witness anonymity: the witness will be questioned in the presence of the defence, but his or her name, address, age, profession etcetera will not be made public and the witness can wear a disguise (Article 190 CCP). Other information, *e.g.* documents the disclosure of which will constitute a threat to society, may also be kept secret, but such information cannot be used as evidence.

During the pre-trial investigation phase (*cf. supra* section II.2.c) and to some degree during the trial, too, the defence can have witnesses and experts called and heard, have experts investigate a particular aspect of the case, have a DNA-test counter-checked, produce documents and items of evidence, etcetera. The defence has a right to cross-examine witnesses and experts who have been called by the prosecution. The judge ultimately decides which information will be used as evidence. Apart from statements by anonymous witnesses (see above) Dutch criminal procedure law also admits hearsay testimony as evidence.⁷⁴ Permissible as evidence, furthermore, are witness statements that have been given by suspects or convicts in exchange for reduction of the sentence they might receive in their own case or already have received (*toezeggingen aan getuigen in strafzaken*). Such an agreement between the prosecutor and the witness must be in writing and is only permissible in serious organized crime cases (Articles 226g-226k CCP). It has to be approved by the investigative judge. If the statement could make or has made an important contribution to the criminal investigation or prosecution, the witness may face in his or her own case: a reduction of a prison sentence of at most one third; replacement of a maximum one third of a prison sentence, or a fine, by a suspended sentence; replacement of no more than one third of a prison sentence by a fine (Article 44a Criminal Code). The prosecution cannot commit itself to witness immunity. Finally, it is permitted to use as evidence statements of suspects, witnesses and experts who have been questioned through a video and audio link, a so-called videoconference (*videoconferentie*; Articles 78a and 131a CCP). The court, investigative judge or official in charge of the hearing decides whether a videoconference will take place. The defendant or his or her counsel may first respond to the proposal. The decision to apply a videoconference is not open to appeal.

⁷⁴ See HR 20 December 1926, *NJ* 1927, p. 85 (Testimonium de auditu).

III.4.i The Right to an Interpreter and Translation of Documents

Defendants without an adequate command of the Dutch language have a right to an interpreter during interrogations, pre-trial hearings and in trial, and to some extent they have a right to written translation of documents (cf. Articles 191 and 275-276 CCP). The investigative and trial judges have a responsibility to secure this right. Moreover, the defendant can request the assistance of an interpreter during trial (Article 263 CCP). There are no restrictions regarding the relevant language. The interpreter will be sworn in every time he or she assists in the case. The prosecution has a list of qualified interpreters that can be used. There seem to be sufficient interpreters in The Netherlands. Hitherto, now interpreters have had to comply with hardly any requirements, but recently the Dutch Parliament accepted the Act on Sworn Interpreters and Translators (*Wet beëdigde tolken en vertalers*⁷⁵). This Act contains provisions on the quality and swearing in of interpreters and translators and on a procedure for complaints against them.

III.5 The Right to Privacy

As explained earlier, criminal procedure law in The Netherlands permits all ordinary investigative powers as well as covert investigation methods such as recording communication, surveillance, infiltration, running informants, and undercover pseudo-purchases (Articles 126g-126zu CCP). These covert powers can all be applied pro-actively against suspects, against persons who are associated with a criminal organisation without necessarily being involved in crime themselves, and sometimes even against non-suspect third parties. Apart from the requirements already discussed (see section II.1), such powers may only be applied if required or urgently required in the interests of the investigation. They must be ordered by the prosecutor. For some of the methods – such as the recording of confidential communications, the interception of telecommunication, the entry of private premises – the order may be given only after authorisation by an investigating judge. Infiltration by civilians and *laissez passer* (*doorlating*) may be ordered only on the authorisation of the national Board of procurators general (*College van procureurs-generaal*; see *supra* section II.2.b) after consultation with the Minister of Justice (Article 140a CCP).

DNA testing (see the definition in Article 138a CCP) against the will of the defendant is allowed for in the interest of the investigation if there are serious indications (*ernstige bezwaren*) against the suspect that he or she committed a crime for which pre-trial detention is permitted (see the requirements discussed in section III.3). The test can be ordered by the prosecutor, or by the investigative judge in the event of a judicial preliminary investigation (Articles 151b and 195d CCP). The 2004 Act on DNA Testing of Convicted Persons (*Wet DNA-onderzoek bij veroordeelden*) offers the possibility to collect DNA cell material from people convicted of a crime for which pre-trial detention is allowed (Article 2 § 1). The DNA profiles are only to be processed for the purpose of the prevention, detection, prosecution and trial of criminal offences. If execution of the order for the taking of cellular material so requires, the public prosecutor may issue a warrant for the arrest of the individual concerned (Article 4 § 1). The order to provide cellular material and the compilation and storage of the applicant's DNA profile can be applied against persons who have been convicted before the Act entered into force, unless at that point the sentence was already fully executed (Article 8). In the case of *Van der Velden* the European Court of Human Rights held that the Act does not

⁷⁵ Act of 11 October 2007, *Stb.* 2007, 375. Entry into force: not yet known.

violate the principle of legality in Article 7 ECHR nor the right to private life in Article 8 ECHR.⁷⁶

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

III.6 The Right to Freedom of Expression and the Role of the Media in Criminal Trials

Court judges, prosecutors and defence lawyers are all to some degree allowed to talk to the media about ongoing cases. Judges, however, may only speak about the case in very general terms. All courts have a special media spokesperson (also a judge), who is authorized to explain the trial and the courts decisions to the press and public. Prosecutors can speak more freely, but of course within the limits of the presumption of innocence. The prosecution offices all make use of a special 'media prosecutor'. Lawyers can more freely enjoy their freedom of expressions as regards individual cases. Nevertheless, they may not reveal information which is brought confidentially to their attention by the defendant or prosecution. Lawyers can be prosecuted for what they say in court or outside if this constitutes an offence which they personally committed. If a lawyer defends someone who is prosecuted for, *e.g.*, hate speech, blasphemy or offensive proclamations, the lawyer's defence and explanation of the defendant's statements will normally be perfectly admissible. In any case, Dutch criminal procedural law is not familiar with the legal construct of 'contempt of court'.

Journalists in The Netherlands can publish and broadcast almost everything they want on both ongoing and concluded criminal investigations and trials. Of course they may not commit criminal offences or civil law torts, but apart from that they are scarcely limited in what they bring to the public about the name, address, profession, background, family of the defendant, the question of the culprit's guilt, the punishment he should either get or have received, etcetera. In the course of the last decade the media have become much less reserved about criminal cases. For a long time, for instance, the media only referred to suspects by their initials, but the full name of suspects and uncover photographs and videos are now used more and more frequently. Besides that, the media's attention to some cases seems to be without limit, even to the extent that it influences the trial. Harmful publicity in the media about a criminal case or suspect may be considered by the court when deciding the sentence.⁷⁷ The Netherlands Press Council (*Raad voor de Journalistiek*) is charged with the examination of complaints against violations of good journalistic practice. Their guidelines state that a 'journalist prevents himself from publishing details in pictures and text as a result of which suspects and accused can be easily identified and traced by persons other than the circle of people that already know about them. A journalist does not have to observe this rule when: the name forms an important part of the report; not mentioning the name because of the general reputation of the person involved does not serve any purpose; not mentioning the name could cause a mix-up with others who can be predictably harmed as a result of that; the name is mentioned within the framework of investigative reporting; the person himself seeks publicity.'⁷⁸ The Guidelines and decisions of the Council are not legally binding, though, nor can violations of the guidelines be punished.

⁷⁶ ECtHR, 7 December 2006, Appl. 29514/05 (*Van der Velden v. The Netherlands*).

⁷⁷ Cf. Gerechtshof Amsterdam, 18 July 2003, *LJN AI0123*.

⁷⁸ On the Netherlands Press Council, see <<http://www.rvdj.nl>>. (website is partly in English, and contains an English version of the Guidelines and of the amendments).

Media do have the right to be present during trial. This only applies to the non-audio-visual media. It is forbidden to film or record the trial in court without the specific approval of the court. Moreover, the court can order that the hearing shall be held behind closed doors (see *supra* section III.4.e). All courts provide special facilities for the media. These facilities differ, depending on the size of the court. A press-card is standard, as is the supply of free copies of case lists to journalists. The court rooms contain tables for the press, and a press-room is available in the larger courts. In 2003 the judiciary adopted a press guideline for dealing with the press.⁷⁹

III.7 Protection Against Discrimination

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

III.8 Protection Against Double Jeopardy (*Non Bis in Idem*)

If a criminal trial in The Netherlands, The Netherlands Antilles or Aruba has resulted in a final verdict with power of *res judicata* the defendant in that case cannot in any of these countries be prosecuted, put on trial or punished again for the offence for which he or she was acquitted or convicted in that verdict (Article 68 Criminal Code⁸⁰). If the verdict has been rendered by a foreign criminal court, the same applies if the defendant was acquitted (*vrijspraak*) or dismissed of all charges (*ontslag van alle rechtsvervolging*), and in case of a conviction, if punishment has been imposed, followed by complete enforcement, pardon, or lapse of time. Prosecution for an offence is also barred if the suspect already fulfilled a condition set by the competent authorities of a foreign state in order to finally settle the case and prevent prosecution for that offence (the so-called foreign transaction; cf. II.2.b). At present criminal procedure law in The Kingdom of the Netherlands allows only in the defendant’s favour for reopening of closed cases by the remedy of revision (*herziening*; see *supra* section II.4). However, the Dutch government is preparing a Bill that contains limited grounds for revision of criminal judgments by which the defendant is acquitted or dismissed of all charges. It will become possible to reopen cases if new evidence (*e.g.*, DNA test) has come to light and the case concerns an offence that carries a maximum punishment of life imprisonment, or if certain procedural irregularities have occurred (*e.g.*, forgery of a crucial case document, perjury crucial to the case, and bribery of officials, judges, etcetera).

⁷⁹ The 2003 Press Guideline is available in English on <<http://www.rechtspraak.nl>> (go via: Actualiteiten, Informatie voor de pers).

⁸⁰ See in greater detail Andre Klip & Harmen van der Wilt, ‘The Netherlands, Non bis in idem’, vol. 73 *International Review of Penal Law* (AIDP, 2002), pp. 1091-1137.

III.9 Consequences of Misuse or Abuse of power and/or Infringement of Fundamental Rights

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

A statement of a suspect that is obtained by putting unlawful pressure on him or her during the interrogation (cf. *supra* section III.2.a) will be excluded as evidence. If the treatment violates the prohibition against torture in Article 3 ECHR, the prosecution shall be declared inadmissible. In case the treatment constitutes inhuman or degrading treatment in the sense of Article 3 ECHR, it will depend on the circumstances whether this must lead to inadmissibility of the prosecution, or only to exclusion of the statement obtained through the ill-treatment. An official who conducts such an unlawful interrogation could be disciplined internally or punished in a criminal trial.

Regarding unlawful acts by the criminal investigation and prosecuting authorities, it is important that prosecutorial inadmissibility can only come into play if the acts concerned constitute serious breaches of the principles governing proper proceedings by which, deliberately or with gross negligence, the accused's right to a fair hearing (Article 6 ECHR) has been disrespected.⁸¹ This means that inadmissibility will not follow in the event of a mere violation of the right to privacy in Article 8 ECHR by misuse (there was no reasonable suspicion, without the necessary authorisation, or in contravention of other procedural rules) of invasive methods of surveillance by investigative authorities. Depending on the seriousness of the violation this will normally result in the exclusion of evidence obtained through the violation or in a reduction of the sentence.

Breaches of custody or pre-trial detention rights cannot be brought up in trial if these have already been reviewed or could have been reviewed by a judge or court during the pre-trial investigation phase (cf. *supra* sections III.2.b and III.3). This is barred by the principle of the closed system of remedies (*gesloten stelsel van rechtsmiddelen*).⁸²

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

⁸¹ See HR 19 December 1995, *NJ* 1996, 249, with case note by T. Schalken; HR 30 March 2004, *NJ* 2004, 376, with case note by Y. Buruma.

⁸² HR 30 March 2004, *NJ* 2004, 376, with case note by Y. Buruma.

III.10 State of Emergency and Derogation from Obligations Under Human Rights Treaties

Article 103 of the Constitution allows for declaration by Royal Decree of a state of emergency in order to maintain internal or external security. A Royal Decree is an order of the government, *i.e.* The Queen and the Ministers in Council. According to the 1996 Act on the Coordination of Emergency Situations (*Coördinatiewet uitzonderingstoestanden*) the declaration has to be requested by the Prime Minister, and immediately reported to the States General (*Staten Generaal*, *i.e.*, the Second and First Chamber together) and published in the *Staatsblad* (the official Bulletin of Acts). Both the government and the States General can terminate a state of emergency. Furthermore, the States General can set a time limit.

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

As has already been mentioned, the Constitution does not provide for a provision on the right to a fair trial as such. So according to Dutch domestic law the right to a fair trial is neither derogable nor non-derogable. However, since suspension of Articles 93 and 94 of the Constitution (see *supra* section I.1) is not provided for, the derogation regimes of particularly the ECHR and the ICCPR will remain intact during a state of emergency. Both the European Convention as the United Nations Covenant allow for derogation from the right to a fair trial in Article 6 ECHR (see Article 15 § 2 ECHR) and in Article 14 ICCPR (see Article 4 § 2 ICCPR). Fair trial rights may therefore also be suspended in The Netherlands in the event of a state of emergency.

IV Recent Legal Changes in Dutch Criminal Procedure Affecting Human Rights

IV.1 General

During the last decade many changes within criminal procedure law have occurred in The Netherlands. This section points out some of the most important recent changes as a result of changing perceptions of public safety and the risk of certain types of crimes (*e.g.*, terrorism, organised crime). Furthermore, attention will be paid to some amendments of criminal procedure law that affect the way fundamental rights are secured and can be enjoyed in

ordinary criminal cases.⁸³ Most of the reforms amend the existing common legal framework of criminal law enforcement. Some of the changes made to strengthen the fight against terrorism involved some fundamental departures from the foundations of criminal law procedure, but most of these deviations were limited to terrorism cases (see *infra* the introduction of section IV.2 for an exception as regards the definition on criminal investigation). At present no major legislative reforms in the field of criminal procedure law are being discussed in parliament.⁸⁴ Less fundamental criminal procedure law Bills are mentioned if relevant to the subjects discussed below.

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

However, some counterbalance might be underway: parliament is currently discussing a Bill that partly lifts the prohibition on the courts to review Acts against constitutional fundamental rights (see *supra* section I.1).⁸⁵ If accepted – the Bill has already passed the Second Chamber – the prohibition will no longer apply to, *e.g.*, all the constitutional rights and requirements mentioned *supra* in section II.1.

IV.2 Pre-Trial Setting

As regards criminal pre-trial investigation, many laws, measures and practices of course imply restrictions on the right to a private life. However, not only does the number of ways to restrict the privacy of citizens seem to be increasing almost constantly, what is more, in combination the restrictions are very far-reaching and they form a severe restriction on the privacy of citizens.⁸⁶ This is a development that cannot be captured very well, either by the Supreme Court of The Netherlands or the European Court of Human Rights. The Supreme Court is currently still not authorized to review Acts of Parliament against fundamental constitutional rights (*toetsingsverbod*; see *supra* sections I.1 and IV.1), while the European Court in fact only deals with human rights violations on a case-by-case basis and hardly ever decides on a general development as such.

So, for example, The Netherlands has become the world lead in tapping telephone conversations for some years now.⁸⁷ *E.g.*: in the second half of 2007 the Dutch authorities tapped 12,491 telephone numbers (84% mobile; 16% land line).⁸⁸ In the Code of Criminal Procedure the power to tap telephones is subject to the most severe conditions within the

⁸³ Many of the legislative amendments of the last few years have been the result of the academic project 'Strafvordering 2001' (Criminal law procedure 2001). See the four reports of the project: M.S. Groenhuijsen & G. Knigge (eds), respectively Groningen: Drukkerij Rijksuniversiteit Groningen 1999, Deventer: Gouda Quint 2001, Deventer: Kluwer 2002 en 2004.

⁸⁴ For an overview, see Letter of the Minister of Justice, *Kamerstukken II* 2007-2008, 29 271, no. 7.

⁸⁵ See *Kamerstukken* 28 331 (see the text of the Bill in: Eerste Kamer 2004-2005, no. A).

⁸⁶ Cf. Privacy International, 'Leading surveillance societies in the EU and the World 2007', on <<http://www.privacyinternational.org>> (see under: Key PI Resources).

⁸⁷ See, *e.g.*, *NRC Handelsblad* 29 May 2008, '1.700 gesprekken per dag afgetapt' (1.700 conversations wiretapped per day) (<http://www.nrc.nl/binnenland/article1900270.ece/1.700_gesprekken_per_dag_afgetapt>); *De Groene Amsterdammer* 2002 (week 25), 'Aftappers in het nauw' (Wiretappers cornered) (<http://www.groene.nl/2002/0225/rz_tappen.html>).

⁸⁸ Letter from the Minister of Justice, *Kamerstukken II* 2007-2008, 30 517, no. 6.

code, yet this power apparently can be applied quite easily. Intrusion on privacy therefore has become relatively simple within the criminal justice system.

A fundamental, dogmatic change regarding criminal investigation was caused by the 2007 amendment of the definition of criminal investigation in Article 132a CCP.⁸⁹ The new definition is much wider than the old one. Although it was introduced in anti-terrorism legislation, it actually applies to criminal investigation in general. Before the amendment Article 132a CCP stated that a criminal investigation shall mean an investigation led by the public prosecutor with the aim of taking decisions under the Code of Criminal Procedure and prompted by reasonable suspicion that an offence has been committed or that such offences are being planned or committed by a criminal organisation. Now it means an investigation in relation to criminal offences led by the public prosecutor with the aim of taking decisions under the Code of Criminal Procedure. So the existence of reasonable suspicion is no longer the principal basis of criminal investigations; pro-active investigations and the use of intrusive investigative powers must be regarded as perfectly normal as far as the definition is concerned.

Finally, it is worth mentioning that the government is preparing a Bill on financial compensation for the use of coercive powers (*schadevergoeding voor de toepassing van dwangmiddelen*).⁹⁰ It will cover investigative powers in all cases.

IV.2.a Special Provisions for Terrorism Cases

Most significant with regard to security legislation is the 2007 Act on the Expansion of the Possibilities for Investigating and Prosecuting Terrorist Offences (*Wet verruiming mogelijkheden opsporing en vervolging terroristische misdrijven*).⁹¹ The most important provisions in the Act are the following. First, it provides for the possibility to hold terrorism suspects in remand custody (*bewaring*) for two weeks even if there are no strong allegations against them (see *supra* section III.3). The Dutch legal system does not allow for secret arrest and detention, deportation and extraordinary rendition without habeas corpus. Second, information from the investigation can now be kept confidential for a maximum of two years and 90 days by postponing the trial (see *supra* section III.3 and III.4.h). Evidence supportive of the defendant's case may never be deleted, though, not even in special circumstances. Finally, the Act offers the possibility to use all special covert investigative powers as well as powers to search objects, vehicles and clothing if there is merely 'an indication of a terrorist crime' (see *supra* section II.1). As for the last mentioned amendment: the application of intrusive powers on such a vague basis might be problematic with regard to Article 8 ECHR, since restrictions on the right to a private life must be foreseeable, *i.e.*, they must be formulated with sufficient precision to enable the individual to regulate his conduct. The possibilities for the investigative judge and courts to review the necessity, proportionality and lawfulness of the application of these powers in terrorism cases are relatively limited compared to equivalent powers in ordinary and organised crime cases. Moreover, none of the very broad powers is restricted to life crimes or crimes that carry life imprisonment as maximum punishment; they can be utilized in all terrorist crimes.

⁸⁹ Introduced by the 2007 Act on the expansion of the possibilities for investigating and prosecuting terrorist offences (*Wet verruiming mogelijkheden opsporing en vervolging terroristische misdrijven*); see *infra* section IV.2.a.

⁹⁰ Letter from the Minister of Justice, *Kamerstukken II* 2007-2008, 29 271, no. 7. See also *Kamerstukken II* 2005-2006, 30 164, no. 19 (Motie van het Lid Weekers c.s.).

⁹¹ Act of 20 November 2006, *Stb.* 2006, 580; entry into force: 1 February 2007 (*Stb.* 2006, 731).

It is important to note that the possibility of applying investigative powers has also been consciously extended by the criminalization of several acts that were not previously criminal offences. The 2004 Act on Terrorist Offences (*Wet terroristische misdrijven*) widened the criminal law to conspiracy (*samenspanning*; Article 80 Criminal Code) to commit several terrorist offences (Articles 114b, 120b, 176b, 282c, 292a, 304b, 415b Criminal Code), to the terrorist criminal organisation (Article 140a Criminal Code), and to recruitment for violent Jihad (Article 205 Criminal Code).⁹² When investigating all these offences it is possible to utilize investigative powers against persons who have not (yet) committed a tangible crime. So this criminalisation offers the opportunity to investigate in what is in fact a pro-active phase.

IV.2.b Interrogation of the Suspect

The right to have counsel present does not in principle apply during the first period of the culprit's questioning (see *supra* section III.2.a). However, as of 1 May 2008 an experiment has been running in which suspects accused of a crime against life may have their counsel present during police interrogations. The experiment will run for two years in the jurisdictions of the police forces of Amsterdam-Amstelland and Rotterdam-Rijnmond only.

As has already been mentioned, the police, prosecutor and investigative judge at present are under no general obligation to record interrogations by audio or video means. The Minister of Justice, however, has stated by letter to parliament that interrogations of suspects will be audio recorded if a crime is implicated that is listed in the Criminal Code and carries a maximum punishment of at least twelve years, or that caused someone's death or serious injury, or that concerns a serious sex offence, or if a child under 16 or a mentally handicapped person is involved in the case as a suspect, witness, or victim.⁹³

IV.2.c Detention

Since 1990 the prison population, especially the numbers serving prison sentences and in pre-trial detention, have grown almost constantly in the Netherlands. The total number of people in Dutch prisons increased from 6,800 (in 1990) to 17,600 (in 2005) (in 2006 the number decreased slightly to 16,230, but it is very uncertain whether this constitutes the start of a trend).⁹⁴ The numbers serving sentences in prison and pre-trial detention are primarily responsible for these statistics. Moreover, for around a decade now there has been a huge increase in the number of cases in which defendants are sentenced to life imprisonment (which in the Netherlands is in fact deprivation of liberty for the term of one's natural life). These developments raise the question whether the principles of proportionality and necessity, as contained in Article 5 ECHR, are adequately applied with regard to deprivation of liberty, especially of those suspected of an offence. In section IV.2.a it has already been explained that the standards have been lowered for terrorism cases.

⁹² Act of 24 June 2004, *Stb.* 2004, 290; entry into force: 10 August 2004 (*Stb.* 2004, 373).

⁹³ See *Kamerstukken II*, 2005-2006, 30 300 VI, no. 178, p. 2.

⁹⁴ See further: Wetenschappelijk Onderzoek- en Documentatiecentrum, *Criminaliteit en rechtshandhaving 2006. Ontwikkelingen en samenhangen*, (Onderzoek en beleid, no. 255), p. 491, Table 6.3 (at: <www.wodc.nl>); and the World Prison Brief (at: <<http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/>>).

IV.2.d Data Requisition

The 2005 Act on the Power to Requisition Data (*Wet bevoegdheden vorderen gegevens*; see Articles 126nn-126ni CCP) provides the police with powers to easily collect ‘identifying data’ from individuals, legal bodies and companies.⁹⁵ Moreover, the 2007 Police Data Act (*Wet politiegegevens*) introduced rather wide provisions to provide private individuals and private bodies with data collected by the authorities.⁹⁶ So, via the police, data can now fairly simply pass around between the private and the public sector. Furthermore, the Bill on the duty to retain telecommunication data (*Wet bewaarplicht telecommunicatiegegevens*), which is currently passing through parliament, contains an obligation on telecommunication suppliers to retain for a period of twelve months data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.⁹⁷ The Bill aims to implement EU Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006.⁹⁸

IV.2. Obligation to Carry Identification Papers, Camera Surveillance, DNA, Blood Tests

After a long and tense discussion, the 2004 Act on the Extensive Obligation to Identify Oneself (*Wet op de uitgebreide identificatieplicht*) entered into force on 1 January 2005.⁹⁹ The obligation implies that any individual from the age of 14 in the public space must always immediately be able to show identification papers if so requested by the police, military police or public surveillance officer. Officials can request identification papers if this is reasonably necessary for the fulfilment of their task, *e.g.*, the investigation of criminal offences.

The 2005 Act on Camera Surveillance¹⁰⁰ gave municipalities the power to place cameras in public areas in order to hold the public under constant surveillance if this is considered to be necessary for the preservation of public order. The recordings may be used in criminal law procedure (see *supra* section III.5). So, in a way, this criminal investigative power spreads out indirectly over the life of non-suspects individuals when they are present in the public space.

For the purpose of the prevention, detection, prosecution and trial of criminal offences, the 2004 Act on DNA Testing of Convicted Persons (*Wet DNA-onderzoek bij veroordeelden*) offers the possibility to collect DNA cell material from people convicted of a crime for which pre-trial detention is allowed (see *supra* section III.5).¹⁰¹

At present, parliament is discussing a Bill on compulsory cooperation with a blood test in criminal cases (*verplichte medewerking aan een bloedtest in strafzaken*). The legislative proposal aims to provide the possibility to force a suspect or other party to cooperate with an examination by which it can be ascertained whether he or she carries a virus that could be transmitted while committing a criminal offence on the victim.¹⁰²

⁹⁵ Act of 16 July 2005, *Stb.* 2005, 390; entry into force: 1 January 2006 (*Stb.* 2005, 690).

⁹⁶ Act of 21 July 2007, *Stb.* 2007, 300; entry into force: 1 January 2008 (*Stb.* 2007, 549).

⁹⁷ Amended Bill of 22 May 2008, *Kamerstukken* 31 145 (see First Chamber, 2007-2008, no. A).

⁹⁸ Published in *Official Journal of the European Union*, L 105/54 of 13.4.2006.

⁹⁹ Act of 24 June 2004, *Stb.* 2004, 300; on the entry into force, see *Stb.* 2004, 583.

¹⁰⁰ Act of 30 June 2005, *Stb.* 2005, 392; entry into force: 1 February 2006 (*Stb.* 2006, 32).

¹⁰¹ Act of 16 September 2004, *Stb.* 2004, 465; entry into force: 1 February 2005 (partly; *Stb.* 2005, 18), 1 March 2005 (partly; *Stb.* 2005, 80), 1 May 2006 (partly; *Stb.* 2006, 220), and 1 August 2006 (partly; *Stb.* 2006, 312).

¹⁰² Bill of 11 October 2007, *Kamerstukken* 31 241.

IV.2.f Witness Procedures

Several new Acts concern witnesses. Introduced in 2006 was the Act on Commitments to Witnesses in Criminal Cases (*toezeggingen aan getuigen in strafzaken*), which allows for the use as evidence of witness statements that have been given by suspects or convicts in exchange for reduction of the sentence they might receive in their own case or already have received (see *supra* section III.4.h).¹⁰³ The 2006 Act on Covert Witnesses (*Wet afgeschermdde getuigen*) to keep witnesses covert for reasons of state security also entered into force that year (see *supra* section III.4.h).¹⁰⁴ In a similar way as the procedure for threatened witnesses these procedures can be of particular interest in terrorism and organised crime cases.

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

Another new provision that deserves mentioning here is the possibility to question suspects, witnesses and experts through a video and audio link, a so called *videoconferentie* (see *supra* section III.4.h).¹⁰⁵ This amendment also came about in the framework of the security programme.

IV.2.g Prosecution

The procedure of 'prosecution through penal orders' (*OM afdoening door strafbeschikking*), which was introduced 1 February 2008 in Article 257a CCP, involves a most fundamental change of the criminal justice system (see *supra* sections II.2.b and III.4.b). This procedure in fact lays the criminal investigation, prosecution, trial of the facts, deciding on the punishment and execution of the punishment all in the hands of the prosecution offices. This amendment constitutes a shift of power from the courts to the prosecution as regards trying the facts and deciding on the punishment. Of course, the defendant can object to the order and have his case heard by a court. But in the face of fear of a prolonged period of insecurity about the outcome of a trial, coupled with apprehension of the public trial itself, culprits might choose to comply with the order immediately, even if their case could not have been proven in court or if they might have expected a less severe punishment at trial.

As regards the possibility to prosecute those suspected of the most serious crimes, it is noteworthy that as of 1 January 2006 the period of limitation has been removed for all crimes that carry a maximum punishment of life imprisonment.¹⁰⁶ The statutory maximum punishment of many offences has been raised as of 1 February 2005.¹⁰⁷ The maximum limit on the term of imprisonment went up from twenty to thirty years with this amendment of the law.

¹⁰³ Act of 12 May 2005, *Stb.* 2005, 254; entry into force: 1 April 2006 (*Stb.* 2006, 150).

¹⁰⁴ Act of 28 September 2006, *Stb.* 2006, 460; entry into force: 1 November 2006 (*Stb.* 2006, 461).

¹⁰⁵ Act of 16 July 2005, *Stb.* 2005, 388; entry into force: 1 January 2007 (*Stb.* 2006, 209).

¹⁰⁶ Act of 16 November 2005, *Stb.* 2005, 595; on the entry into force, see *Stb.* 2005, 596.

¹⁰⁷ Act of 22 December 2005, *Stb.* 2006, 11; on the entry into force, see *Stb.* 2006, 23.

IV.3 Trial Setting: Special Proceedings and Special Procedural Law?

Generally, the competent court in first instance is roughly speaking the District Court of the jurisdiction in which the offence was committed or in which the defendant lives. There are some exceptions, though. The District Court of The Hague, for example, is the competent court for criminal offences that fall within the ambit of the Act on International Crimes (*Wet internationale misdrijven*), crimes and some infractions committed by military are tried before the District Court of Arnhem, and the Amsterdam District Court is competent in insider trading cases. Of more importance here is that the District Court of Rotterdam is competent if an offence is prosecuted by the national prosecution office (*landelijk parket*; cf. *supra* section II.2.b), which focuses on (inter)national organised crime and terrorism. If a terrorist or organised crime case is prosecuted by one of the district prosecution offices, however, the District Court in that district is competent as usual. In any case, both terrorist or organised crime cases are always tried before an ordinary court; Dutch law does not provide for military or any other special court for such cases. Nor are there any special rules other than those discussed before that apply to such proceedings: suspects in such cases in principle enjoy the same rights as other suspects.

IV.4 Appeal

The 2006 Act on Streamlining Appeal (*Stroomlijnen hoger beroep*) limited the possibilities to appeal in cases in which only a fine of no more than €500 is imposed (cf. *supra* section II.4).¹⁰⁸ More importantly, the essence of the appeal procedure has been fundamentally amended in order to secure a more efficient procedure and lighten the workload of the appeal courts: appeal no longer implies a second, new, full and complete consideration of the case, but merely operates as a ‘continuous procedure’ which will concentrate on matters in dispute. In principle only issues addressed by the defence in the grounds of appeal are discussed in the appeal trial. This means that this procedural phase is much more adversarial in nature than the trial in first instance. It also means, though, that the appeal courts will offer defendants less *ex officio* legal protection now than under the former appeal regime. However, in the specific cases of organised crime and terrorism, the legislator has not in any other way limited or otherwise modified the rights of a higher court to review either the facts of a case or a sentence.

IV.5 Post-Trial Protection: The Principle of *Non Bis in Idem*

The prohibition against double jeopardy applies in exactly the same way in respect of terrorism and other serious offences as it does for any other offence. Although the legislator is currently drafting a Bill on the reopening of closed criminal cases – to the disadvantage of acquitted defendants – the proposed grounds for revision are not in any way specifically limited to or aimed at terrorist or organised crime cases (see *supra* section III.8).

Conclusion

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

¹⁰⁸ Act of 5 October 2006, *Stb.* 2006, 470; entry into force: 1 March 2007 (partly), 1 July 2007 (*Stb.* 2007, 70).

Constitution of the Kingdom of Netherlands does not contain a right to a fair trial is effectively neutralized via direct application of the right to a fair trial, in particular in Article 6 ECHR.

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

Cite as: Piet Hein van Kempen, *The Protection of Human Rights in Criminal Law Procedure in The Netherlands*, vol. 13.2 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (May 2009), <<http://www.ejcl.org/132/art132-1.pdf>>.