Supervision of the criminal justice system
Summary

Elke Devroe, Marijke Malsch, Joery Matthys en Goos Minderman

1. Introduction

The central research question is: "What kinds of supervision are currently present in the criminal justice system, and what caveats can be identified in both a legislative and a practical context?". Because of this, the concepts 'supervision' and 'criminal justice system' need to be delineated. This research confines itself to supervisory activities regarding the quality of actions within the criminal justice system, which means that purely organizational and procedural activities fall outside of its scope. Furthermore, a division is made between 'internal' and 'external' supervision. Internal supervision is the kind that happens within an organizational actor, while external supervision is handled by supervisory parties outside of the organization. Another form of external supervision is the judicial remedies (e.g.: appeals procedures) that can be used to review decisions made by an actor.

The concept of 'criminal justice system' denotes the activities of those public actors that play a role in the investigation and prosecution of criminal activities. As such, courts and actors that are responsible for enforcement of court decisions, fall outside of the scope of this research, except when they are supervisory actors of those organizations that do play a role in investigation and prosecution (e.g.: as we will see later on, courts are supervisory actors). The supervision of judicial decisions has its own logic, which is relevant, but could not be looked at within the confines of this research.

The rapport does not only look at supervision of the criminal justice system in the Netherlands, but also in Belgium. This comparison gives the opportunity to gain interesting insights from another way of organizing the supervision of the criminal justice system, which can potentially be inspiring for the Dutch actors. The choice for Belgium is partially because of the shared legal history with the Netherlands, and partially for pragmatic reasons: the researchers already have quite some experience with and contacts within the Belgian system. But a number of obvious differences, such as the existence of an investigative judge (onderzoeksrechter) and a permanent parliamentary supervision body for the police, make the choice for Belgium quite relevant.

2. Conceptual framework

After delineating 'criminal justice system' and 'supervision', they still need to be conceptually defined. In regard to the criminal justice system, the two main actors are the police and the public prosecutor. In Belgium, the public prosecution has an additional actor, the investigative judge. To define 'supervision', the initial delineation of the Holtslag Commission (1998) is used: "Supervision concerns the collection of information regarding the question whether an action or a case holds up to previously stated criteria, the forming of an opinion in this regard, and an intervention if this is deemed necessary". This definition is interpreted in a broad way in this research, leading to a number observations:

(1) Supervision is always about the actions of others. If one supervises its own actions, this can be considered an act of reflection, but nothing more. At the same time however, internal supervision will be a part of this research, because it is a first step to understanding one's own actions;

(2) Supervision is always about protection legal requirements: it has as its aim to make sure organizations act as they are legally required;
(3) Supervision does not create new interests or values, it is thus conserving and conservative in;
(4) No supervision leads to blind actions: the link between acting and valuing disappears;
(5) Supervision relies on a system of norms that is created outside of the environment that needs to be supervised. In the public sector, this system of norms is translated into regulation. In other words, there is always a legal basis for the supervision of public actors.

In this research, supervision is divided into three elements, as the definition already indicated. In regard to the first element, gathering information, the relevant information needs to be public, or at least accessible to the supervisory bodies. The second element, the ability to evaluate, means that a supervisory body should be able to have an informed opinion about decisions made by an actor. This informed opinion should also be explicitly states, by means of an advice, a decision, or any other communication coming directly from the supervisory body. The third element, intervention, is interpreted more broadly than the legal ability to intervene, since it also takes into account informal ways of influencing.

Apart from the three elements of supervision, the literature also revealed a number of conditions that need to be fulfilled for effective supervision to take place:

(1) The actions taken need to be observable, which usually means there needs to be some kind of written document related to the supervision. A report is a good example of this;
(2) The supervised actions need to be transparent. Is there enough information to go on to form an opinion? Without information there can be no judgement what so ever, and without enough information there can be no informed judgement. So there is a necessity for sufficient insight into the circumstances and the context in which an actor finds itself, as well as the intentions it has;
(3) All the relevant decisions need to be part of the supervision. As such, there should be no exceptions to the supervision, unless there are very good reasons for this;
(4) Supervision should in ideal circumstances be done by an organization different from the actor that is under supervision. However, this does not necessarily mean that supervision should always be neutral: it can be done having certain interests in mind;
(5) The supervisory body should be able to in some way influence the supervised actor. Or in other words: the supervision should somehow matter.

3. Methodological premises

This research is an explorative and qualitative multiple case study design, in which the two cases, the Netherlands and Belgium, are both analysed separately (vertical analysis) and then compared to each other (horizontal analysis). To maintain internal validity, different methods of data gathering were triangulated. The intention of this research was not to generalise (external validity), or to claim that the findings are valid for all the actors within the criminal justice system.

First, the Procedural Penal Code and relevant literature were studied, To be able to answer the second part of the research question, the practices of different supervisory bodies were then mapped by means of in depth interviews. More than forty face to face interviews were held with experienced practitioners in both the Netherlands and Belgium. Last, the most telling results of the desktop research and interviews were translated into propositions, which were put forward at a Round Table conference.

4. Results

4.1. An inventory of supervision in the Netherlands

This chapter of the report discusses how supervision is handled in the criminal justice system in the Netherlands. The following actions are discussed: supervision of the Ministry of Security and Justice on the police and public prosecutor, the supervision of the public prosecutor on the police, the internal supervision within police and public prosecutor, the inspection services of Security and Justice, the supervisory capabilities of the public prosecutor with the High Council (art. 122 RO Law), the supervision of a judge concerning technical mistakes (vormfouten) (article 359a Procedural Penal Code), and a number of other actors which also perform some kind of supervision. Attention is also paid to the supervision of the penalty order (strafbeschikking) and on ZSM (short for '*Zo Snel, Slim, Selectief, Simpel, Samen en Samenlevingsgericht Mogelijk')*, an operational method that enables the public prosecutor, police, probation services, victim support and Council for the Protection of Children to sit together in an early stage, and together decide on a certain case. What is also discussed, is how these supervision abilities function in practice. To be able to ascertain this, interviews were conducted with a group of experienced practitioners.

From the analysis it became clear that all the different supervisory actors had the ability to gather information, but that this ability differed strongly depending on the actor. The prosecutor with the High Council has a lot of competences to gather information independently, often competences that are bestowed to it by law, and so does the inspection services of Security and Justice. The judge has several competences as well, as defined in the Procedural Penal Code, but at the same time he is highly dependent on the police and the public prosecutor, which assemble the file of the case. If this file is incomplete or skewed, a judge can be misled (not necessarily on purpose). The other supervisory actors are also at least partially dependent for their information gathering on the actor they are supervising. This is an important shortcoming in their ability to effectively and independently supervise.

All, or at least most of the supervisory actors that were analysed, also produced some kind of evaluation of the findings, in different forms. Concerning this aspect, no discernable differences were found between the supervisory actors.

It is in the third element, the ability to intervene, that most differences are found. A judge can impose drastic sanctions when faced with technical mistakes, such as a mistrial, suppression of evidence (which can lead to acquittal), or a lowering of the sentence. However, judges have been hesitant to impose such sanctions, given that there are other interests to be taken into account, which is why these technical mistakes nowadays often go unsanctioned. The prosecutor with the High Council does not have an ability to intervene. The internal kinds of supervision with the police and public prosecutor can produce disciplinary sanctions, which are potentially highly intervening for those involved, but at the same time are not really visible to the outside world. So in the Netherlands, supervisory bodies are often not independent from the actor they are supervising.

An important condition for effective supervision is the fact that it should be public and transparent. The supervisory actor hence has to be able to get a sufficient amount of information about the activities of the actor it is supervising. However, supervision of the penalty orders and the ZSM way of working, which often produces penalty orders, is not very public in nature and is not transparent. It can hence be expected that external supervision of penalty orders and ZSM is not very effective. Additionally, the amount of cases that are processed through the ZSM way of working is increasing. This lowers the supervision of a growing percentage of criminal cases.

The interviewees were most critical about the supervision of the ZSM way of working. They found the situation there worrisome, especially because of the increase of these cases. The literature as well revealed that with ZSM, there are caveats in the conditions for an effective supervision, notably concerning transparency and the provision of information.

A number of remarks were made by the interviewees in regard to the supervisory capabilities of a judge on technical mistakes (article 359a Procedural Penal Code). The judge, including the High Council, often acts as some kind of a 'guardian angel', several respondents noted. This means the judge repairs technical mistakes, instead of sanctioning them. Respondents differed in opinion on the validity of this position: some supported it, others noted that the police and public prosecutors now lacked sufficient incentives not to commit these kinds of technical mistakes, since they were not being sanctioned if they did.

The other kinds of supervision mentioned by the interviewees, sometimes had a more provisional character. Lawyers, mentioned by several respondents as supervisory actors, are mostly concerned with protecting their clients. If an error is made which benefits this client, a lawyer will most likely not want this error to be revealed.

4.2. An inventory of supervision in Belgium

In this chapter, the supervision in Belgium regarding three actors is discussed: the police, the public prosecutor, and the investigative judge.

Supervision of the police has developed mainly alongside five lines: direct hierarchical supervision, supervision through disciplinary actions, supervision by the General Inspection of the local and federal police, supervision by a permanent Parliamentary Committee (Comité P), and finally supervision through criminal procedures. Supervision of the public prosecutor can also be divided between direct hierarchical supervision and disciplinary supervision. Besides these two forms, the High Council for Justice, the higher investigative court of investigation (Kamer van inbeschuldigingstelling), and the judge presiding over a case also play a role as supervisory actors. There was an additional focus on the supervision of dismissal of cases, and the supervision on settlements (minnelijke schikkingen), the latter being a system similar to the penalty orders in the Netherlands. Apart from the public prosecutor, another actor has competences in regard to public prosecution in Belgium: the investigative judge. This actor investigates a case both in favor and against a suspect, thus taking an independent position. Because of this, supervision of this actor is also taken into account. The greater amount of independence of judges means that it is mostly external actors which are responsible for supervision: the High Council for Justice, the lower investigative court (raadkamer), the higher investigative court, the public prosecutor office, and the judge presiding over a case. Finally, two more actors are looked at, both of them responsible for supervision of all three actors mentioned above: the different ombudsmen, and lawyers.

Just like in the Netherlands, all supervisory actors of the criminal justice system have the possibility to gather information. This ability seems to be developed the strongest in regard to the police, especially because of the role the permanent Parliamentary Committee plays. Supervisory actors of the public prosecutor and investigative judge seem to be more dependent on information given by these actors. The supervisory actors also are able to evaluate all of the information received by them The biggest divergences in competences can be found in the ability to intervene. The General Inspection for the federal and local police does not have any capacity to intervene, but advises the other relevant authorities. The High Council for Justice also does not have the possibility to sanction public prosecutors or investigative judges. This is the same for the permanent Parliamentary Committee, though this body does play an important role supporting public prosecutors and external

disciplinary bodies when they investigate the police. The lower and higher investigative courts do have the ability to intervene, because they have the possibility to annul actions made by the public prosecutor or the investigative judge.

In general, the internal supervisory competences do not seem to adhere to the conditions of effective supervision, especially not the smaller disciplinary measures. These are not public, and are not even evaluated by for example a judge. The more serious disciplinary sanctions are supervised more thoroughly, especially the ones that apply to the public prosecutor. However, a low amount of transparency is also evident there. The external supervisory actors are more in line with the conditions of effective supervision. The permanent Parliamentary Committee has a written and transparent procedure, and the supervision by the presiding judge spans all actors. This last kind of supervision however has been diminished to some extent however, especially concerning technical mistakes. The reason for this is first the Antigoon verdict, and then the legislation that was made to anchor this verdict in the law.

The greatest shortcoming regarding transparency and a check by a judge, was found in the settlement procedures. In there, the public prosecutor seemed to virtually decide on its own whether or not to offer a settlement, and to engage in negotiations with the suspect. Though the verdict concerning these procedures by the Constitutional Court did not have the goal to halt all of these procedures, this did in effect happen. If a reparation law on settlement procedures includes the possibility of a check by a judge, one that goes further than a simple procedural test, then the transparency of settlements would already be increased significantly.

4.3. Round Table conference

During the Round Table conference a number of propositions were put forward by the researchers. The participants were able to indicate their approval or disapproval, discuss the proposition, and then vote again. Hereunder an overview of the propositions:

- The supervision by a judge about admissibility of evidence provides sufficient guarantees that police and public prosecutor will be careful about the evidence gathering process, also because of the possibility of appeal.
- There are too many supervisory bodies. They get in the way of each other, and nobody feels really responsible for good supervision.
- In Belgium, the individual police officer is supervised too strictly, which means there is a loss of innovation and creativity in investigations. In the Netherlands however, there is hardly any sanction for a police officer that crosses an ethical boundary when they are investigating a case.
- Supervision from above and from outside only has a limited impact. It is much more effective to have an internal supervision: police officers supervise each other, public prosecution officers do the same, and so on. This kind of supervision should be mandatory.
- The judge of the investigation (rechter-commissaris) is too dependent on information from police and public prosecutor to decide on the acceptability of certain methods of investigation. Because of this dependence, effective supervision is limited.
- The media are indispensable as guardians against things going wrong in the criminal justice system, but do not necessarily have a positive influence on the quality of the system (improvements made within the system).
- Research in legal psychology has had a much bigger influence on changing the criminal justice system for the better than any supervision within the system itself.

- Legal scholars should be ashamed that practitioners within the criminal justice system do not see their participation in the process as a form of supervision.

Following the discussion, the participants formulated a number of recommendations. These are not the same as the recommendations made by the researchers at the end of this project. The following recommendations were made:

- There is a need for more feedback towards actors that indicate that something went wrong. If these actors would also be informed about the result of their actions, also in the long term, they would feel greater commitment towards the supervision.
- If there is some kind of compensation mechanism for mistakes made during the course of an investigation, than this would lead to a more people reporting these mistakes. This possibility is already there in the Netherlands, but the procedure to obtain this is not clear, which is evident from the small amount of people even familiar with this possibility.
- The Dutch disciplinary law regarding police and public prosecution is underdeveloped. The Belgian model does not necessarily need to be followed, because it is not easy to just impose a regulatory system from one country to another.
- The judge of the investigation in the Netherlands has quite a number of possibilities to supervise current cases, but does not often make use of these possibilities. Further research is needed to explain if nthis is because there is a lack of familiarity/expertise with these competences, or more simply a lack of capacity. This kind of supervision can improve the quality of current cases.
- The academic world needs to pay more attention to the practices within the criminal justice system. This also means that it should be easier for the academic world to get access to data. However, this works both ways: young scholars should be encouraged to engage with practitioners, even if this not immediately translate to articles in peer-reviewed journals

5. Analysis

In the analytical chapter, the Netherlands and Belgium are first analysed separately, looking each time first in how far the different supervisory actors have the ability to engage in the three elements of supervision, and second in how far the countries adhere to the different conditions of effective supervision. Then, a comparative analysis takes place, identifying interesting similarities and differences between the two countries. First, there is the supervision of the police. Looking at the elements ‘gathering information’ and ‘evaluating’, there are no real apparent differences between the two countries. This is different when it comes to the intervention ability, including the ability to sanction people. In the Netherlands, these abilities are mostly concentrated within the police force itself, and the sanctioning ability is a part of the internal disciplinary capacity, imposed by the hierarchical superiors. This is different in Belgium, where there is a difference between internal disciplinary actions by the superior, and external disciplinary actors. This can be explained because in Belgium there is still a significant local anchoring of the police, where the mayor of a city still has relevant authority over the police, while in the Netherlands the police has been much more separated from the local level, especially since the latest reform. A second notable difference is the overall capacity of the supervisory actors, which does seem to be greater in Belgium.

The second interesting point of comparison concerns the judge of the investigation in the Netherlands and the investigative courts in Belgium. The actors do differ from each other, but at the same time there are a number of similarities, such as the competences they both have. Because of this, the legal position of the judge of the investigation is actually quite strong. However, the actor does in practice not make full use of these competences. One possible explanation for this is that the

judge of the investigation is a solitary actor. One option could be to increase the capacity of judges of investigation, rather than increase their competences regarding supervision.

The third interesting point of comparison relates to the supervision of penalty orders in the Netherlands and the (enhanced) settlement in Belgium. Both of these relate to a shift where cases are settled outside of court, instead of ending in a judgement by the court. In both countries the public prosecutor has, or at least had, a large amount of discretionary power to issue a penalty order/settlement, and is supervision of this competence minimal. Also in both countries, it is primarily the suspect who can in some way supervise these decisions, since it is he who can appeal the penalty order, of chose not to accept the settlement. Finally, in both countries the penalty order/settlement is not added to the criminal record of a person, which significantly lowers the transparency of the system. A first possible improvement of the Dutch system could be the introduction of a procedural check by a judge, to make sure all conditions to offer a penalty order are met. However, given the popularity of the instrument, an even broader check of its proportionality may be in order. The Constitutional Court in Belgium has already concluded that a lack of this kind of check is problematic in settlement procedures, and run counter the right to an fair trial.

A fourth point of comparison concerns the disciplinary actions in regard to the public prosecutor. In the Netherlands this is handled strictly via hierarchical and internal processes, while in Belgium there are even separate disciplinary courts, since the last legislative changes on this. This means there are significant redundancies in Belgium: internal hierarchical disciplinary measures, external disciplinary measures, and the possible supervision of the criminal court. From the discussion at the Round Table conference it became clear that the internal hierarchical supervision was seen as necessary, but insufficient. External disciplinary supervision creates a possibility to sanction actions that are not necessarily criminal in nature, but that can endanger the trust society has in public action regarding the criminal justice system. At the same time, the Belgian system of external disciplinary supervision can be criticised as having quite a low transparency, so that a more open system should be preferred.

Finally, something still needs to be said concerning how judges handle technical mistakes. Initially, the approach of the Netherlands and Belgium differed significantly. In Belgium a technical mistake often had a much more significant impact, but throughout the years this impact was limited more and more, most importantly with the Antigoon verdict in 2003 and the legislation that was based on this verdict in 2013. So an evolution towards the situation in the Netherlands can be observed. One can ask if this is a good evolution: if a technical mistake can lead to a mistrial, then this is a significant learning moment for the public prosecutor. An easier acceptance of technical mistakes, means that the public prosecutor lacks incentives to learn from previous mistakes, and this perverted effect cannot be underestimated.

6. Conclusion

The twofold research question was: “What kinds of supervision are currently present in the criminal justice system, and what caveats can be identified in both a legislative and a practical context?” Until now, an inventory of this supervision was missing. This report gives an oversight of supervisory actors and their competences over organisations within the criminal justice system. The choice was made to also discuss the internal supervision of police and public prosecutor, even though it formally does not adhere to the conditions that were put forward in the theoretical chapter, namely that supervision needs to be done by an external actor.
The analysis showed that not all of the supervisory actors had all three core competences. At the same time, it is possible to state that in both countries there were organisations that could gather information, evaluate and intervene (not necessarily together). When discussing the penalty order, a

caveat was identified that still needs to be looked at further. But in general, there is a plethora of supervision mechanisms within the criminal justice system.

Specifically concerning the caveats in the Netherlands, the following conclusions can be drawn:

- There is no public supervisory body in the Netherlands that is established external to the police, public prosecutor, and the Ministry. The continuing steps towards more independence of the National Police, together with its strong central steering, raises questions about the ability to have an independent oversight over the police, which is transparent and accountable to the public.
- The role of the judge should be revitalised in the Netherlands, so that there is a greater ability for learning for the police and public prosecutor. One possibility is to again penalise technical mistakes, or at the least pay more attention to them.
- Supervision of the penalty order falls is done only by the police and public prosecutor themselves. Apart from them, only the suspect has the possibility to test the validity of the penal order, through an appeals procedure.

This research should definitely be continued. The field of supervision is quite broad, thus we only concentrated on a very specific subfield. Continued research can focus on measuring the different core competences and conditions of supervision. If it then turns out that some supervisory actors do not adhere to these competences and conditions, recommendations can be made to remedy this. A number of interesting research questions could be posed about this. Internal processes of quality assurance were also not discussed in this research, while they as well can have an influence on the effectiveness of supervision. Furthermore, inspection services in the Netherlands and Belgium were not discussed. Finally, the judicial branch was discussed as a supervisory actor, but not as an object of supervision. This actor can also be very interesting for continued research.