

The Dutch criminal justice system



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Preface

The Dutch criminal justice system has long been famous for its mildness and tolerant attitude towards societal and morally controversial issues. This mildness, which found reflection in the early 1970's in a strikingly low prison rate, for example, and in a tolerant attitude towards drugs, prostitution or euthanasia, has traditionally impressed foreign criminal law scholars and criminal justice officials.

However, this traditional tolerance is less and less reflected in the actuality of the criminal justice system. Crime has increased considerably and so has the prison rate. Major changes have taken place in Dutch society. It has gradually become multi-ethnic, and a diffusion of normative systems has undermined the once shared common values and norms. Crime has changed, becoming more violent and organized. In this climate, the traditional tolerance has become criticized and disputed.

These changes require new criminal justice policies. In recent years, considerable changes to criminal law and law enforcement legislation have been adopted by Parliament. The Dutch police force has been reorganized, as has the prosecution service. The statutory powers of the police to investigate organized crime have been widened. The efficiency of the prosecution service has improved, the judiciary has been extended and prison capacity has been increased. The demand for a safer society has been responded to in the form of a tougher attitude towards criminality and a decline in tolerance.

This book covers both the organization of the present Dutch criminal justice system and the main procedures used within the system. It deals with the basic principles that guide the operation of the Dutch criminal justice system.

In this third edition, the operation and organization of the Dutch criminal justice system is not merely dealt with from a legal point of view but also from a criminal policy perspective. The legal and policy information provided is up to date to January 2008; the latest statistical information available is that of the year 2006.

I hope that this introduction to the Dutch criminal justice system will prove to be useful both to those new to the Dutch system and those wishing to extend their knowledge of it.

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1 The structure of the Dutch State

1.1 General organization of the state structure

The Netherlands was, in the past, a major colonial power, with possessions in both the East and West Indies. In 1949 sovereignty over the East Indies was transferred to Indonesia and, in 1975, Surinam gained independence.

However, the Kingdom of the Netherlands continues to be located on two continents: the Kingdom in Europe and the Kingdom in the Caribbean. Constitutionally, the Kingdom consists of three territorial parts: the Netherlands, the Dutch Antilles (Curaçao, Bonaire, St. Maarten, St. Eustatius and Saba) and Aruba, which is, due to its ‘*status aparte*’ considered to be a separate country. The Antilles have, all together, approximately 220,000 inhabitants and Aruba approximately 70,000. Curaçao and St. Maarten are associated states within the Kingdom. The other islands are considered to be special municipalities.

The constitutional relationship between the Kingdom in Europe and the Dutch Antilles and Aruba is governed by the 1954 Charter of the Kingdom of the Netherlands, which is superior to the Constitution. From a constitutional point of view, the Kingdom exhibits federal characteristics, although as these have no bearing upon the criminal justice system in the Netherlands, they will not be considered further here.

The Netherlands is a constitutional monarchy. The Constitution charges the Government – the Monarch and Her ministers – with the responsibility for governing the country. The Monarch, although part of the Government, cannot be held accountable for political decisions (The King can do no wrong, sect. 42 Constitution).

The Netherlands is a parliamentary democracy, which means that the Government may hold office only so long as it has the confidence of Parliament. Once this is lost, or an individual member of Government loses this confidence, the Government or the minister must resign. Dutch governments as a rule are formed by coalitions of a number of political parties owing to the electoral system of proportional representation. Ministers or deputy ministers are not themselves members of Parliament.

The Dutch Parliament (*Staten-Generaal*) consists of two houses: the Lower House (*Tweede Kamer der Staten-Generaal*) and the Upper House or Senate (*Eerste Kamer der Staten-Generaal*). The 150 members of the Lower House are elected every four year by the general population of Dutch citizens. The 75 members of the Senate are elected by the members of the provincial councils, of which there are twelve.

Chapter 1

The main task of the Lower House is to supervise the Government in their day-to-day running of the country. Members of the Government can, under the responsibility with which they are charged under the Constitution, be ordered to appear before the Lower House and to answer questions as to their decisions and any actions taken. The Lower House is frequently the scene of heated political debate.

The Dutch Parliament, acting jointly with the Government, may pass Acts of Parliament. As a rule, the Government takes the initiative in the legislative process by drafting bills. Following the adoption of a bill in the Lower House, it is discussed by the Senate and, if adopted, the bill becomes an Act of Parliament through the signature of the Monarch and the Minister responsible for the field to which the bill relates.

The Lower House also has the right to take the initiative in the legislative process as well as possessing the right to propose amendments to a governmental bill. The minister proposing a bill may adopt or reject any such amendments or may submit these to a vote. The Lower House may reject the bill or adopt it by majority vote.

The Senate does not have the right of initiative or amendment but shares other rights such as the right of interpellation and the right of inquiry with the Lower House. Although without the right of initiative or amendment, the Senate has the right to reject a bill adopted in the Lower House. The bill in such a case will be withdrawn by the Government.

As such, the Senate has limited tools to influence political debate and is therefore sometimes also known as the 'House of reflection'.

There is a separation of powers between the legislature, the administration and the judiciary. This separation is, however, not very strict; e.g. an Act of Parliament can only be adopted by agreement between Government and Parliament.

The constitutional organization of the Netherlands is that of a decentralized unitary state.

One type of decentralisation concerns the division of state powers over territorially-decentralized entities: the twelve provinces and the approximately 450 municipalities. These decentralized entities have restricted legislative and executive powers.

The Netherlands has three administrative layers: the State, the provinces and the municipalities. At the state level, administrative powers are held by the Government (the ministers and their ministries). By Act of Parliament the Government can be empowered to issue rules giving shape to those Acts.

The supreme organ of a province is the provincial council, which is directly elected. The supreme organ of a municipality is the municipal council, which is also directly

elected. These bodies have mainly local legislative powers. They may issue city or province regulations. Non-compliance with these regulations constitutes a minor offence that carries a statutory sentence of a fine of the third category (see section 8.4). In municipalities, the executive powers are vested mainly in the board of mayor and aldermen (*college van burgemeester en wethouders*). In the provinces, the so called *Gedeputeerde Staten* (States Deputies) chaired by the *Commissaris van de Koningin* (Queen's Commissioner) are vested with executive powers. The Mayor and the Queen's Commissioner are appointed by the Government by Royal decree.

Another type of decentralisation concerns the division of state powers over functionally decentralized entities such as water boards and public law industrial regulatory bodies. Water boards and public industrial regulatory bodies, such as the Social and Economic Council as well as the commodity boards (*productschappen*) and industrial boards (*bedrijfschappen*), have the power to issue regulations, non-compliance with which constitutes a criminal offence.

The organization of the administration of justice presents a fragmented picture but there exists uniformity in the administration of criminal justice, which is entrusted to the judiciary.

1.2 Legislative power related to criminal justice

The primary form of legislation is an Act of Parliament enacted jointly by Government and Parliament. Section 81 of the Constitution provides that the legislative power is exercised by the Government and the Parliament jointly. As a rule, a bill is prepared by the Government – specifically, the legislative department of the Ministry which has competence over the subject dealt with – and discussed in legislative committees of the Parliament. During the final discussion in a full session of the Parliament, amendments to the bill may be proposed. The bill and any amendments are adopted by majority vote. The Act may include a delegation of the elaboration of further legislation on the subject covered by the Act to the Government or to an individual minister. On this basis, the Government may issue rules (*Algemene maatregel van bestuur*), which may contain provisions non-compliance with which constitutes an offence. The precise penalties for non-compliance, however, must be contained in the Act itself.

In addition ministerial regulations, made by one or more ministers or deputy ministers, contain rules.

Furthermore, organs with legislative power of territorially decentralized bodies – the provinces and municipalities – as well as functionally decentralized bodies can take decisions of a legislative nature the non-compliance with which may constitute a criminal offence. Powers to take decisions of a legislative nature are given to decentralized bodies by Acts of Parliament.

All bodies mentioned above have legislative powers in the field of substantive criminal law. Only an Act of Parliament, however, may contain definitions of crimes. Any other legislative regulations may only contain definitions of criminal infractions.

In the field of procedural law, procedural rules may be enacted only by Act of Parliament; however, the Parliament may also decide to delegate the authority to issue elaborative rules of a procedural nature to the Government or individual minister. This is also the case for penitentiary law and for the law relating to the execution of sentences.

1.3 Ministerial responsibility for the main organs of the criminal justice system

The judiciary comprises both judges and public prosecutors. The Minister of Justice is responsible for the judiciary as far as it concerns the prosecution service (public prosecutor).

Judges are independent and no Minister has authority over them, with the exception that the budget for the running of the courts is a part of the wider budget of the Ministry of Justice. The budget is allotted to the courts by the Council for the Judiciary and the courts are accountable to the Council for the Judiciary with regard to how they utilize their resources. The Minister thus is only responsible for the functioning of the judiciary as a whole.

The police consist of 25 regional police forces and one national police force, charged with a number of very special tasks and powers. The Minister of Justice is responsible for the regional police forces in relation to criminal investigation. The Minister of Interior is responsible in relation to public order and the tasks and powers of the police force. The police budget is controlled by the Ministry of Interior.

The prosecution service is a nationwide organization with offices at district court level and at the level of the Court of Appeal. The prosecution service is organized hierarchically. At the top sits the Board of Prosecutors General. The service functions under the responsibility of the Minister of Justice but is not an agency of the Ministry.

The police forces, prosecution services and courts are regulated on a day to day basis by, respectively, the chief police officer, the chief public prosecutor or the board of the court. Instructions to ensure that certain investigation and prosecution policies are enforced may be issued by the chief public prosecutor or the Board of Prosecutors General. No actor has the authority to issue instructions to the courts. Instructions with regard to the division of the case load within the court are given by the head of a court section.

1.4 Underlying principles related to the criminal justice system

The basic principles of the criminal justice system are that there is no competence without a sound statutory basis, that there is no competence without responsibility and that there is no responsibility without accountability.

2 Criminal policy

2.1 Introduction

The Dutch criminal justice system has long been noted for its mildness. In support of this view, reference was usually made to its tolerant criminal policies towards societal and morally controversial criminal offences like drugs or euthanasia, and to the low prison rate in the Netherlands compared to other European countries. Both aspects of the mild criminal climate in the Netherlands will be dealt with, beginning with the penal policy.

2.2 Penal policy

In 1980, the prison rate was approximately 23 per 100,000. At present, it is around 130 per 100,000. The low prison rate in the 1970's and the early 1980's was partly cosmetic, because in practice there was a considerable difference between actual prison capacity and the need for capacity, giving rise to 'waiting lists'. In the Netherlands, offenders who are not in pre-trial detention before trial and who are sentenced to imprisonment, do not serve their prison sentence immediately after sentencing, but are put on a waiting list and called to serve their sentence as soon as there is capacity. From the mid-1970's, the backlog in implementation of prison sentences and thus of the waiting lists was increasing. The prison department of the Ministry of Justice had failed to anticipate the mismatch between the actual capacity of the prison system and the need for capacity.

Only at the beginning of the 1980's was a wide scale extension of prison capacity initiated. In the early 1990's, the largest ever prison construction program started and a number of new prisons were opened. At present, prison capacity stands at around 18,700 places.

Over the last two decades, the prison rate has more than quadrupled. The Netherlands has one of the fastest growing prison populations in the world.

This increase in prison numbers has been mainly due to the handing down of more severe sentences. Although the crime rate has remained relatively stable, the number of cases tried by criminal courts has substantially increased, and the average prison sentence imposed has become much longer. In 1985, almost 16,000 (partly) unus-

pending prison sentences were imposed with a total of 5,668 detention years. Twenty years later, the number of prison sentences is 26,000 and the number of detention years has increased to 12,399.

An additional reason for the increase in the prison rate is the introduction of a new policy to answer the serious criticisms of the delayed implementation of prison sentences.

In various memoranda and policy plans, the importance of an efficient and effective implementation of prison sentences was stressed. The proper implementation of sanctions is seen as a cornerstone of a reliable administration of criminal justice. The so called 'waiting lists' and the policy of releases prior to the official early release date have been severely criticized and additional capacity has been made available through cell sharing and prison construction. In special penitentiary establishments, such as juvenile detention institutions, and detention facilities for illegal foreigners, female convicts and for the implementation of entrustment orders, extra capacity will be needed over the next years.

The stereotype of the Netherlands as a country with exceedingly mild penal policies is – like most stereotypes – greatly oversimplified. Nonetheless, in comparison to many European countries, and particularly the United States, Dutch penal policy is less centred on incarceration.

Penal policies since the 1980's have been characterized by a strong tendency to reduce the use of short-term imprisonment and to increase the use of non-custodial sanctions.

During the same period, in which prison sentences became longer and the number of prison cells rose sharply, the use of short-term imprisonment fell. Fines became the preferred sanction, prosecutorial diversion (such as out of court settlement or suspended prosecution) grew rapidly, community sentences came into use, and new non custodial sentences were developed.

2.3 Law enforcement policy

A remarkable feature of present day criminal law enforcement in the Netherlands is that only a small percentage of all crimes that are registered by the police are actually tried by a criminal court. While the number of registered crimes increased fivefold between 1970 and 2005, the number of cases tried in court merely doubled.

In 2006, 1,21 million crimes were registered by the police. The number of cases solved was a mere 278,606 (23,1%). In a significant number of 'solved' cases, there were additional suspects who were not tried for the offence committed. In total, 358,300 suspects have been questioned by the police, of which 307,600 were male and 50,700 were female.

The prosecution service took the decision to prosecute in 267,710 cases. Almost half of those cases (126,092) were settled out of court by the prosecution service, being either a dismissal due to technicalities (mainly insufficient evidence) in 14,319 cases, a dismissal due to the use of the expediency principle in 16,325 cases, or an out of court settlement in 77,816 cases. Criminal courts tried 134,375 cases. In 124,524 cases, the prosecution secured a conviction, with 8,970 trials resulting in acquittal. The courts imposed 185,003 sanctions, of which 16,410 were unsuspended prison sentences, 8,878 partly unsuspended prison sentences, and 14,760 suspended prison sentences. 46,177 non-suspended fines were imposed, 4,169 partly suspended fines, as well as 4,314 suspended fine sentences. The number of community service orders was 40,577. The number of imposed entrustment orders (see section 8.8) was 250.

These figures show that a custodial sentence is still considered a last resort, and that, despite the increased length of prison sentences, elements of relative mildness, such as the expediency principle, the lack of mandatory sentences and wide sentencing discretion for the judiciary, are built into the system itself as a core element of Dutch criminal policy.

Proper law enforcement and administration of criminal justice has, in the last decade, become an issue of growing public concern. Reported crime has increased six-fold since 1970, while the clearance rate has gradually decreased to around 23% at present. This is mainly due to a lack of investigative capacity. The increase of the police force did not keep pace with the increase in crime. In relation to the volume of crime, the per capita level of expenditure to control crime is low in comparison with neighbouring countries. In addition, the number of public prosecutors and the size of the judiciary is relatively small, leading to a slow pace in the process of criminal justice (Eco-ris 2004).

The high degree of non-intervention and the slowness of the cogs of justice are detrimental to the proper administration of criminal justice. Recently, a crime-control policy plan was launched to increase public expenditure for criminal law enforcement and the administration of criminal justice by increasing the numbers within the police force, the prosecution service and the judiciary.

2.4 Crime control policy

In recent years, crime control policy plans have been launched to improve criminal law enforcement and the administration of criminal justice. As far as it concerns crime control, actions have been taken to increase the numbers within the police forces and of other persons concerned with crime control in the public domain. As a consequence, the large number of crimes that previously did not result in any intervention by law enforcement agencies has been reduced. Similarly, the clearance rate has been increased, more cases have been prosecuted, and more cases have been dealt with by courts more quickly. The average time lapse between an offence being committed and an actual trial has been seriously reduced as a result of expedited intervention by both the prosecution service and the courts. The shortage of personnel has gradually been alleviated. Furthermore, measures have been taken to improve the effectiveness of criminal law interventions for offenders who are likely to re-offend or for juveniles who seem likely to start a criminal career. The most recent crime control policy plan aims to achieve a safer society by reducing criminality and nuisance in the public domain (so-called ‘zero tolerance’).

Law enforcement agencies will give priority to reducing violence in public areas by focusing, *inter alia*, on street robberies, the destruction of public property, nuisance in public transport et cetera. Special criminal law measures for persistent offenders will be developed in order to reduce recidivism.

Juvenile offenders will be monitored, school absence will be targeted and safety in schools will be increased.

Tolerance for non-compliance with licensing requirements (for coffee shops, brothels, bars et cetera) will be restricted and measures will be taken to improve the quality and safety of public spaces.

This criminal policy plan has resulted in a considerable number of law proposals and law reforms which are gradually being adopted by Parliament. Recently adopted Acts concern *inter alia* the power of a mayor to designate public areas as safety risk areas. In those areas, the police is empowered to carry out random (fire-)arms controls.

Furthermore, legislation has been adopted in order to enhance the possibility of large scale camera surveillance at railway stations or other unsafe spots. The duty to carry an ID-card has been adopted. The legal position of a landlord whose tenant is using a house for growing cannabis has been changed, allowing the landlord to annul the contract and force the tenant to leave the house immediately.

Furthermore, new ways to detain persistent offenders are planned, new educational sanctions and measures for juveniles have been granted a statutory basis and the prosecution service has been authorized to impose penal orders.

At present, there are signs that some of the measures taken to improve safety in the public domain are having an effect.

2.5 Tolerance in criminal policies

Another characteristic of the Dutch criminal justice system is its legal tolerance towards societal and morally controversial issues such as pornography, drugs, induced abortion, prostitution and euthanasia.

Despite the fact that all these phenomena may fall within statutory definitions of criminal offences and may result in prosecution and punishment, policies have been developed to regulate tolerance towards those phenomena. Legal tolerance does not mean that the criminal justice system is indifferent towards these phenomena but that no criminal investigation takes place when they occur provided that policy instructions which define the borders of legal tolerance are complied with. This may be better understood by considering in more detail the development of the policies on abortion and euthanasia.

Although termination of life on request (euthanasia) and induced abortion still constitute a crime (sects 293 and 296 CC respectively), special grounds of exemption from criminal liability have been defined in law in order to regulate tolerance of medical doctors who act in conformity with medical ethics.

The present policy of tolerance both in relation to induced abortion and euthanasia is the result of long and sometimes heated discussions by professionals, by the public at large and, eventually, by Parliament.

2.6 Criminal policy re induced abortion

The prohibition of induced abortion has been debated in the Netherlands ever since the enactment of the provisions on abortion in the 1886 CC but a more tolerant social attitude towards induced abortion stems from the 1960's, when the opinion on abortion and contraceptives changed very quickly.

A liberal idea quickly emerged about social and cultural issues, especially in the field of morals. Three reasons can be given for that:

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- first, contraceptives were perfected and became more widespread;
- second, medical-technical developments regarding artificial insemination and sterilisation resulted in a discussion on the beginning of human life;
- finally, discussions and law reform abroad regarding abortion, such as in England in 1967, also stimulated discussion in the Netherlands. A sizeable number of Dutch women had at that time an abortion abroad.

Consequently, traditional opinions in Dutch society about topics such as sexuality, marriage, pregnancy and family planning began to shift and conservatism lost ground. A gulf opened up in opinions on the values of human life. Higher demands were placed on the quality of each individual human existence in terms of physical, psychological and also societal respect. In addition, the demand to be able to arrange one's life according to one's own philosophy or insights and to take one's own responsibility for it increased. As a corollary, this required that unwanted pregnancies were to be prevented as much as possible but that where an unwanted pregnancy occurred, induced abortion should offer a way out.

The widespread availability of contraceptives, and especially the introduction of the birth control pill in 1962, allowed an enormous revolution in sexual norms, as sexuality and reproduction were no longer linked. Moreover, it contributed to the emancipation process of women. In this atmosphere of change, the issue of abortion could once again become an important subject of public discussion. For those in religious circles, the protection of unborn human life took centre stage. In socialist and liberal circles, the right of self-determination of women was emphasised. The emergence of the Women's Liberation Movement around 1970, which regarded a woman's right to abort as a fundamental part of female emancipation, played an important role in the discussions.

Legal vacuum in the 1970's

Until 1970, the discussion on abortion took place outside the political arena and had a strong medical and ethical tone. There was a tendency in medical circles to take up a more liberal position in relation to abortion than laid down in the Penal Code. In fact, a legal vacuum emerged at this time and within that legal vacuum there was room for the establishment of abortion clinics and thus an ability to perform abortions. Thus, around 1970 the first abortion clinics appeared, established by the Foundation for Medically Safe Termination of Pregnancy (STIMEZO), where pregnancies of less than twelve weeks were terminated on non-medical indication. STIMEZO clinics thereby

committed criminal offences, for abortion at the request of women without medical need was not legitimized by statute or by case law.

By the end of 1971, this legal vacuum led the prosecution service to state publicly that a prosecution for abortion would only be started after consultation with the State Inspectorate of Public Health, which was in charge of the supervision of health care at large.

The supervision of the Inspections of Public Health concerning abortion was reduced from an integral review of the validity of the medical or social indication to a merely technical supervision. This was related to the fact that there existed no unanimity among physicians about the cases in which induced abortion was permissible, or even necessary. As such, there was no control of the ground for termination, merely supervision of the technique, hygiene and possible aftercare in relation to an abortion performed.

Since there was no review of the validity of the reason, the prosecution service had to give physicians the benefit of the doubt. Prosecutions were hence not started. Therefore, the courts were not able to clarify the question as to whether induced abortion for social reasons was punishable or not. Moreover, the Minister of Justice had made prosecution in criminal cases regarding abortion clinics dependent on his prior consent, suggesting that the prosecution service could not prosecute without the Minister of Justice's consent. The prosecution service has only rarely taken action against a physician and where they have done so the outcome was often not a dismissal rather than a conviction.

The 1981 Termination of Pregnancy Act

After seven bills on the exemption of punishment for induced abortion were submitted to Parliament between 1970 and 1979, the 1981 Termination of Pregnancy Act finally entered into force in 1984. Under this Act, induced abortion is not punishable if it is performed in compliance with the requirements of the Act. These requirements are the following:

- an abortion may only be performed by a physician in a hospital or in an abortion clinic, which has a permit from the Ministry of Public Health for that purpose;
- prior to the performance of an abortion, a period of five days for reflection must have been observed. This means that the physician may not proceed to termination of the pregnancy other than on the sixth day after the woman has consulted the physician and at that occasion discussed her intention with him.

The number of abortions performed annually in the Netherlands is slowly increasing despite the fact that fewer women from abroad come to the Netherlands for an abortion. In the nearly twenty-five years since the 1984 Act, the number of foreign clients has decreased to about one tenth of the original number.

In contrast to the decrease in the number of foreign clients, there has been an increase in the number of abortions of women living in the Netherlands. The main reason for this trend is the absolute and relative increase in the population of risk groups with regard to unwanted pregnancy, especially immigrant women and girls. The Netherlands still has a relatively low abortion rate (2006: 8,6 abortions per 1,000 women aged 15-45 years).

Around 60% of the women who have an abortion are women from minority groups, primarily Antillean and Surinamese women (abortion rate 40,6 resp. 44 per 1,000) and, to a lesser degree, Turkish and Moroccan women.

These data in particular cause anxiety, because they show that an increasing group of women living in a vulnerable social position (migrant women, black and refugee women) become involuntarily pregnant and appear not to have available the means by which to prevent an unwanted pregnancy leaving abortion as the only family planning option. This tentative conclusion must make uncomfortable reading for all those who advocate ethical forms of contraception and birth control.

In a country such as the Netherlands, where the abortion rate is amongst the lowest in the world because of the quality of information and a supply of a wide range of contraceptive methods, it is unacceptable that, with regard to family planning, women have to resort to a method which seems least suited for it. This is even more so, when women remain deprived of other methods of family planning because of a lack of free choice in the matter.

2.7 Criminal policy re euthanasia

The means by which a policy of tolerance towards induced abortion was established has been more or less model for the policy of tolerance towards euthanasia.

The cultural change and the change in medical technology in the 1960's and 1970's led to a number of scientific publications and public discussions on end of life decisions (intervention or non-intervention) taken by doctors. The issue of euthanasia gradually became the focus of a number of empirical medical and legal studies. In the 1980's, the prosecutorial policy and a number of criminal court decisions fuelled the discussions and led to the establishment of various advisory committees and eventually to a solid basis of codification.

In 2002, the Termination of Life on Request and Assistance in Suicide (Review Procedures) Act came into force after thirty years of societal discussions and parliamentary debates on the question of whether a termination of someone's life on request under all circumstances and without any differentiation constitutes the crime of euthanasia. The Act included in section 293 subsection 2 CC a special ground of exemption from criminal liability in case of termination of someone's life on request, provided that the physician complies with statutory standards of due care.

Major rulings on due care standards

The statutory standards of due care are not included in section 293 CC but are laid down in the Termination of Life on Request Act. The Act in fact codified a series of lower and Supreme Court case law decisions with regard to euthanasia. Five court decisions are of importance.

The first court decision was that of the Leeuwarden district court in the *Postma case* (Leeuwarden District Court 21 February 1973, *NJ* 1973, 183), in which a female physician stood trial for terminating her mother's life on request. The mother was old and suffering unbearable physical pain as a result of a cerebral hemorrhage. The Court formulated three conditions for impunity. These conditions are:

- the patient is considered by medical opinion to be incurably ill ;
- the patient is, either physically or psychologically, suffering to an unbearable or severe extent;
- the patient has previously, in writing or orally, expressed his explicit will that his life will be terminated in order to be free from his suffering.

Eleven years later, the Rotterdam District Court in the *Wertheim case* (Rotterdam District Court 24 November 1984, *NJ* 1985, 63) refined these conditions. In this case, a friend who was not a physician, assisted in the suicide of a 67-years old woman who assumed she suffered from cancer. The court formulated two additional requirements for due care to be met in order to achieve impunity:

- termination of life on request may only be performed by a physician; and
- the physician must inform his patient thoroughly on his health prospects and on viable alternatives to termination of life on request.

In 1984 in the *Schoonheim case* (HR 27 November 1984, *NJ* 1985, 106), the Supreme Court ruled that the termination of life performed by a physician according to objective medical insights may be considered as an act of necessity due to a conflict of duties, and therefore may be justified. When performing euthanasia, the physician is

confronted with conflicting obligations: the professional obligation to act in conformity with objective medical insights, the norms of medical ethics, and his medical expertise on the one hand, and the obligation as a civilian to obey criminal law, on the other hand.

In the assessment as to whether the defense of necessity is applicable, the Supreme Court considers the following questions of importance:

1. should, according to professional medical insight, an ever-increasing deterioration and further aggravation of unbearable suffering be feared?
2. does the possibility exist that the patient will soon no longer be able to die in a dignified way?
3. were (other) means left to relieve the suffering?

If questions 1 and 3 are answered by an express no, and question 2 by a motivated yes, this implies that the euthanasia performed by the physician, according to objective medical insights, can be considered as an act of necessity.

In the *Chabot case* (HR 21 June 1994, *NJ* 1994, 656), the Supreme Court stipulated that, for a doctor who terminates the life of a patient who is not suffering physically but mentally and who is not in a terminal phase, a defense to necessity is not *per se* excluded. However, the court has to proceed with extreme caution when assessing whether there is a viable defense of necessity in case a patient's suffering does not follow demonstrably from a physical disease or disorder, and may in fact only consist of a perception of pain and the loss of bodily functions.

Furthermore, the Supreme Court confirmed that in such a case there has to be an unbearable and incurable mental suffering. In general, there is no incurable psychiatric suffering if a realistic alternative to relieve that suffering has been turned down by the patient in full freedom.

As the court has to show extremely great caution in assessing whether the defense of necessity has to be recognized, it must also involve the opinion of an independent expert who has seen and examined the patient.

If that second opinion of an independent expert is not available, the defense to necessity cannot be admitted.

Finally the *Brongersma* decision (HR 24 December 2002, *NJ* 2003, 167). This is on first sight a rather atypical case because it concerns euthanasia performed on somebody who was suffering neither physical nor psychological unbearable suffering pain. Brongersma was 86 years old, had lived his life and wanted to cease the continuation

of his life because he considered it as senseless. He was afraid of becoming very lonely, dependent upon others, and of deteriorating physically to the point where he was in a bad physical state. After a number of talks with his patient, and after consulting two independent doctors, the physician assisted in suicide. Brongersma was suffering the continuation of his life, he was tired of life; as such, his suffering was existential.

According to the Supreme Court, this type of suffering falls outside the scope of the medical domain of euthanasia. Only suffering that is in substantial sense caused by a medically classifiable somatic or psychiatric disease can legitimate an intentional termination of life (the classification prerequisite).

The 2001 Act

The 2001 Termination of Life on Request and Assistance in Suicide (Review Procedures) Act formulates six statutory due care criteria to be met by a physician in order to guarantee him impunity (sect. 293 subsect. 2 CC):

- the doctor must be satisfied that the patient's request is made voluntarily and is well-considered;
- the doctor must be satisfied that the patient's suffering was unbearable and that there was no prospect of improvement of the situation;
- the doctor must have thoroughly informed his patient about his situation, the prospects and the expected course of his illness;
- the doctor, together with his patient, must have come to the conclusion that there is no viable alternative in the patient's situation;
- the doctor must have consulted at least one other independent physician, who must have seen the patient, and who must have given a written opinion on the compliance with the due care criteria referred to under a-d; and
- the doctor must have terminated the life of his patient with due medical care and attention.

Physicians are required to disclose their life terminating acts in a notification procedure for which the Burial Act provides the statutory basis.

Five regional (euthanasia) review committees, established in 1998, assess whether the physician, in case of termination of life, has acted with due care and consist of three members: one legal expert, one physician and one expert on ethical issues.

The five regional review committees assess annually about 2,000 cases of euthanasia and assisted suicide and in a mere 19 cases over the last three years (2004-2006), has a

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committee come to the conclusion that the physician did not meet the standards of due care.

In cases of non-compliance with the standards of due care, a report is sent to the Board of Prosecutors General, which will take a decision on whether or not to prosecute based on prosecutorial directives in relation to euthanasia and assisted suicide.

The existence of only a small number of cases in which a committee concludes that the physician did not comply with the standards of due care is a strong indication that the physician's knowledge on how to act in cases of request for euthanasia over the years has substantially improved. The Act, the prosecutorial directives and the published assessments of the regional review committees have had the result that in virtually all cases a physician facing a request for euthanasia knows how to act and have improved the legal certainty of the physicians in the performance of euthanasia.

Palliative care

In the majority of the cases, the request for termination of life is expressed at the moment that no further medical treatment is feasible for a patient, as a curative effect can no longer be hope for. Such a situation primarily concerns terminal patients with cancer, with HIV/Aids and with acute short syndromes or with chronic diseases such as dementia, stroke, pulmonary emphysema, heart and vascular diseases, and Parkinson disease. When further medical treatment becomes useless, all that is left is to wait for death. In as far as the patient is hospitalized, a further stay in hospital is no longer necessary after this medical conclusion. The patient is send back home to await death, supported and looked after by family, relatives and additional professional home care such as district nurses, home health aides and other care providers.

There is currently a wide range of palliative care services available in the Netherlands. There are opportunities to receive palliative care at home, in nursing homes, care homes, hospitals, independent professionally staffed hospices and volunteer-run hospices. A striking feature of the situation in the Netherlands is that special facilities for terminally ill patients, such as hospices, only began to appear since the beginning of the 1990's, whereas neighbouring countries had established such facilities much sooner. This is probably explained by the fact that, in the Netherlands, general practitioners, nursing home doctors, home care workers and others have always given high priority to caring for the dying in addition to providing care for other patients. In the Netherlands, there is therefore a relatively large number of possibilities for nursing and care at home, and staff in nursing homes and care homes are becoming progressively better equipped to care for the dying.

As part of the palliative care for terminally ill patients, palliative sedations have been applied in cases where one or more medically incurable or intractable symptoms of a disease – the so-called refractory symptoms – exist and which leads to unbearable suffering. In such a case, on the basis of informed consent by the patient, he is sedated so as to mitigate his suffering. Part of the palliative sedation is that hydration and nutrition is ceased. Palliative sedation happens rather frequently. Annually, approximately 140,000 people die in the Netherlands. Approximately 10% of all deaths were the result of terminal sedation (www.annals.org/cgi/content/full/141/3/178?). Until very recently palliative sedation was considered to be a form of euthanasia and therefore fell under the legal regime of the 2001 Act. After the publication in December 2005 by the Royal Dutch Medical Association of its guidelines for palliative sedation, the Board of Prosecutors General decided in 2006 that palliative sedation is a professional treatment and therefore does not fall within the scope of the 2001 Act.

Evaluation of the euthanasia practice

In 2007, the fourth nation-wide evaluation of the practice of termination of life on request was published (see for a summary: *The New England Journal of Medicine* 2007, 356:19, p. 1957-1965).

Two major conclusions can be drawn from the evaluation research:

- the percentage of euthanasia and assisted suicides decreased significantly as is shown in boxes 1 and 2;
- the percentage of notifications increased sharply: in 2005, 80,2% of all cases of euthanasia or assisted suicide were reported. Between the first and fourth evaluation the percentage of notifications had increased from 18% in 1990 to 40,7% in 1995 to 54,1% in 2001.

Box 1 Medical end of life decisions	2001	%	2005	%
– termination of life on request	3,500	2,6	2,325	1,7
– assisted suicide	300	1,2	100	0,1
– termination of life without explicit request	950	0,7	550	0,4
– abstinence of life prolonging treatment	28,000	20	21,300	16
– pain or symptom alleviation hastening death as possible side effect	29,000	21	33,700	25
Box 2 Palliative sedation	2001	%	2005	%
– with medical end of life decisions	8,500	6,0	9,700	7,1
– without medical end of life decisions	n.a.		1,500	1,1

% of all deaths in the Netherlands

Both conclusions ask for clarification. The decrease in the percentage of euthanasia is not the result of the fact that physicians are more hesitant to perform euthanasia – in 1/3 of all requests for euthanasia, physicians respond favorably to the request – but is the result of epidemic factors. The number of people dying annually is gradually decreasing and the percentage of people who die over 80 years of age is increasing. Amongst those over 80 years of age, the percentage of termination of life on request is very small. Furthermore, the increase of cases of palliative sedation is related to the decrease in the percentage of euthanasia. Sedation was most common for patients under 80 with cancer who had previously requested euthanasia.

The sharp increase in the percentage of notifications is partly the result of a much clearer view on what medical treatment is considered as terminating of life. In 2005, 99% of all treatments consisting of the application of neuromuscular relaxants, such as barbiturates, in combination with a sleep-inducing drug was notified as euthanasia. In 2001, in this category only 74% of cases were notified.

This study gives for the first time data on the reasons for non-notification: very few physicians do not notify because of doubts as to whether they have met all the criteria of due care or because of the fear of prosecution.

The evaluation research makes clear that 20% of physicians do not notify a termination of life on request because they consider their medical treatment with opiates and sedatives not to be euthanasia but pain alleviation or palliative sedation.

Indeed, one of the weak points in the 2001 Act is that it is quite difficult to draw a demarcation line between pain alleviation, palliative sedation and termination of life decisions.

The fourth evaluation shows that the fear of a slippery slope as expressed in foreign critical observations of the Dutch euthanasia policy is not realised: rather, termination of life is decreasing, particularly for weak and vulnerable groups – e.g. those who cannot express their requests. The increase in the percentage of notifications does not mean that all decisions and treatments in relation to the end of a life are in conformity with the law and take place in a transparent way, but the 2001 Act has had beneficial effects on the lawfulness and transparency of a substantial number of end of life decisions and opened the Dutch euthanasia policy for scrutiny and critical discussion.

The problem of the remaining 20% of physicians who do not notify a termination of life because they do not consider their medical treatment as a termination of life requires, however, a solution and demands action in this regard. Obviously the legal and medical views on the borderline between termination of life and normal medical treatment are diverging. The provision of gradually increasing quantities of medica-

tion for pain alleviation, which may lead to a hastening of death, are medically considered to be normal medical treatment, whereas lawyers consider such treatment to be a termination of life.

This problem of diverting definitions as to the termination of life is not a recent one. In 1985, the State committee on euthanasia suggested reforming section 293 PC by implementing the clause in the PC that allowed that a physician that hastens a patient's death as a side effect of a treatment that in itself is necessary for the alleviation of serious suffering is not criminally liable. In the fourth evaluation of the practice of the Euthanasia Act, a number of recommendations were formulated. One of the recommendations is to consider explicit inclusion of this clause in the Penal Code.

2.8 Declining tolerance

Both the policy towards abortion and that towards euthanasia are good examples of the present Dutch tolerance. Such tolerance, towards controversial legal matters has however come under attack in recent years, as has the cultural tolerance for which the Netherlands has been famous since the 17th century when religions others than Calvinism and Catholicism could be practised peacefully. The Netherlands was a refuge for French Huguenots, as well as Portuguese and Spanish Jews in a period of European history in which religious intolerance was the norm. In present times, tolerance towards new foreign immigrants and towards other religions is declining, as is the tolerance towards controversial legal phenomena such as drugs.

2.9 Drug policy

There are a number of unique elements in the present Dutch drug policy:

- a distinction is made between substances with acceptable health risks for the user, such as marihuana or weed, and drugs with unacceptable health risks such as heroin, cocaine, XTC or other synthetic drugs. Substances with acceptable health risks are called soft drugs; the others hard drugs;
- the market for soft drugs (coffee shops) is strictly separated from the market for hard drugs;
- drug users are not treated as criminal offenders but as medical patients who might need help to improve their physical and mental health;
- the main feature of the Dutch drug policy is harm reduction and its objectives are to prevent the use of (hard) drugs and to limit the risks and harm to the drug user;

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- law enforcement is concentrated on the production, possession, selling, import and export of drugs. The maximum statutory sentences for these offences differ considerably dependent on the type of drug involved.

The policy to separate the markets of hard and soft drugs was a response to the social crisis of widespread heroin use in the 1970's. In the 1970's, a drug policy was adopted that was seen as rather tolerant towards the use of cannabis. The theory behind this policy was that if one makes small amounts of less harmful substances available for sale in a controlled setting (coffee shop), this will prevent users from buying them from an illegal dealer who may persuade him to try and buy hard drugs.

Soft drugs can be bought in a coffee shop. To run a coffee shop one needs a license from the municipality.

Municipalities may attach conditions to this license. The main additional conditions concern the prohibition of sale of alcohol, the minimum distance between the coffee shop and schools, and opening hours.

Coffee shop owners/operators are not prosecuted for selling or possessing soft drugs provided that they comply with the criteria laid down in the so-called AHOJ-G guidelines; these include:

- no advertising (A)
- no hard drugs sale (H)
- no nuisance (O)
- no sale to juveniles (J)
- no sale in large quantities (5 grams per purchase) (G)

Coffee shop owners who comply with these criteria may stock up to 500 grams of cannabis.

Although the selling and possession of soft drugs constitutes a crime, the application of the expediency principle by the prosecution service results in non-prosecution of this crime.

Since 1999, the mayor of a given municipality has been empowered to close a coffee shop when the above conditions are not respected. Furthermore, municipalities can regulate the number of coffee shops, and in a not insignificant number of municipalities (around 80%), coffee shops are simply not tolerated at all. The decision not to allow a coffee shop has to be taken in consultation with neighbouring municipalities in order to avoid a too heavy burden then falling upon municipalities that do tolerate them. A restriction of the number of coffee shops has to be reasoned, because the decision can be appealed to an administrative court. One important reason often

given is that additional coffee shops would have a negative effect on the quality of life in the area.

These new powers have resulted in a serious reduction of the number of coffee shops from around 1,179 in 1997 to 729 in 2004. As a rule, coffee shops are now localised in cities.

Recent data has shown that four out of five juveniles have never smoked dope – a fact that contradicts the commonly-held view that 80% of members of this age group are cannabis users.

Tolerance has never been extended towards the drug trade, production or large scale supply, regardless of whether it concerned soft drugs or hard drugs. However, the rather tolerant approach towards the use, possession and supply of small amounts of soft drugs has, in recent years, become less so.

The rather tolerant approach towards soft drug use has had undesirable side effects. The high concentration of THC in Dutch cannabis and the correlation between cannabis use and psychiatric disorders has given rise to concern. Moreover, the increase in the number of plants for home grown weed and of the number and size of professional cannabis nurseries to respond to the demand from coffee shops has led to drug-related criminality and, furthermore, caused serious societal problems.

With the same drug policy aims in mind, recent measures have been taken to reduce street dealing, drug tourism, cannabis cultivation and the number of coffee shops. Stricter rules for the establishment of coffee shops have been issued, municipalities have been empowered to combat undesirable side effects, and measures to counter drug tourism have been taken by authorising municipalities to refuse or withdraw a coffee shop's operating license on grounds of unacceptable effects on the quality of life. Tougher action against cannabis cultivation in residential areas is intended to make cultivation of home grown weed as unattractive as possible; and educational programs have been developed for schools in order to discourage the use of (soft) drugs, et cetera, et cetera.

This all constitutes a far less tolerant policy towards soft drugs.

2.10 Cultural tolerance

In the wake of September 11th 2001 and other similar attacks, the cultural tolerance, in particular tolerance towards immigrants who bring with them their own culture and religion, is seriously under threat.

In public debates, voices proclaiming the belief that cultural tolerance is responsible for the uncertainty in Dutch society and has thus gone too far can be heard loud and clear. Dutch tolerance began in a society that was fairly homogenous, with more or less common values and norms. The differences in values and norms that there were, those mainly based on religion, could be bridged by the exchange of views and opinions, and tolerance was never considered to have been applied beyond acceptable and understandable limits. Furthermore, this model of tolerance was the result of a process of public debates, during which extreme views and standpoints were reconciled.

In a relatively short period of time, the Netherlands has become a multiethnic and multicultural melting pot in which values and norms are no longer based on common religious, social and political views.

Furthermore, exponents of tolerance had been gradually extending the limits of tolerance without a careful process of debates and exchange of views. The murder of provocative exponents of tolerance such as Pim Fortuyn (2002) and Theo van Gogh (2004) sent a serious shockwave through Dutch society but also revealed that large groups within society, both allochthonous and autochthonous, were either not yet ready or no longer ready to apply tolerance towards their neighbours on all matters where tolerance had previously held sway, such as on sexuality, foreign immigrants, foreign religions, non-conformist ways of life, freedom of speech, et cetera. One is therefore left to wonder whether what went before was really tolerance or rather simply disinterest. In any case, tolerance towards Islam and Muslims has collapsed following those murders. The present climate is dominated by mistrust and mutual fear between Muslims and non-Muslims. This mistrust and fear is very detrimental for a tolerant Dutch culture.

3 The Dutch Criminal Code

3.1 History

The history of the present Dutch Criminal Code starts in 1810, when the Kingdom of Holland under Louis Napoleon Bonaparte was annexed to the French Empire, and the Penal Code for the Kingdom of Holland, in force since 1809, was replaced by the French Napoleonic *Code Pénal*.

After the restoration of independence in 1813 and after the Kingdom of the Netherlands was established in 1815, the French code was kept in force provisionally, however, with some important changes. The sanctions system was reformed considerably, for instance by abolishing deportation and lifelong forced labor.

The 1813 Dutch Constitution stipulated that the main body of substantive and procedural criminal law is to be regulated in codes.

During the nineteenth century, a number of draft criminal codes were proposed, but the lack of parliamentary unanimity on both the sanctions system and the prison system prevented adoption of any of these drafts.

However, important revisions of the criminal code did take place, in particular regarding sanctions. The range of sentences was reduced to various forms of imprisonment, fines, suspension of certain rights and forfeiture of certain goods. Corporal punishment was abolished in 1856, as was the death penalty in 1870. Instead the life sentence was introduced.

In fact, the ideas of the classical school of criminal law, prevalent in the French *Code Pénal*, were gradually replaced by more modern ideas, which led to more humane sanctions and prisons.

Dutch prisons of that time, mainly built in the 17th century, were incompatible with those modern ideas. The prison regime was very harsh, with a focus on re-education. There was no differentiation in prisons according to age, term of prison sentence, or whether the prisoner was a first offender or recidivist etc. Imprisonment had a detrimental effect on prisoners, who were not housed in individual cells but in common quarters.

In 1823, the Dutch Association for the Moral Improvement of Prisoners, the forerunner of the present probation service, was established by a group of citizens. The aim of the Association was the moral advancement of prisoners. The volunteers of

the Association tried to combat the threat of moral decay arising from the lamentable conditions in prison by visits, educational measures, religious instruction and the supply of books.

The Dutch Association played an important role in the final adoption by Parliament of the cellular prison system (the 'Pennsylvanian system'), which paved the way for the first truly national criminal code.

In 1870, a penal law reform committee was established that drafted a criminal code which, together with an extensive explanatory memorandum, was submitted to Parliament in 1879 by Mr. Modderman in his capacity as Minister of Justice. The criminal code (*Wetboek van Strafrecht*) was adopted in 1881, but came into force in 1886, because a number of Acts had to be reformed and new prisons based on the cellular prison system first had to be built.

3.2 Major Criminal Code reforms

Since 1886 the Criminal Code has undergone considerable reform. New criminal provisions have been added, for example on discrimination, intrusion of privacy, environmental pollution, illegal computer activities, commercial surrogate motherhood, stalking and virtual child porn. Other offences, such as adultery or homosexual acts between an adult and a juvenile of over sixteen years of age have been decriminalized. Termination of pregnancy (induced abortion) and termination of life on request and assistance in suicide (euthanasia) are no longer punishable, provided that certain legal requirements are met.

Major criminal law reforms took place in juvenile criminal law (1965 and 1995), on sentencing, the extension of suspended sentences (1987), the introduction of early release (1987), the reform of fines (1983), the introduction of community sentences and so called task penalties (see sections 8.4 and 8.9) (1989-2001), on corporate criminal liability (1976) and on serious offences against public morals (1986-2002). Furthermore, the code has been reformed by the introduction of the crime of conspiracy (1994), the introduction of new criminal law measures such as the Confiscation and Compensation Order and the Detention of Persistent Offenders Order (1993-2004), and by recent legislation related to terrorism (2004). Finally, the implementation of EU law will result in criminal law reforms such as legislation on money laundering and the fight against terrorism, and legislation on mutual recognition of decisions to confiscate.

By the 1989 Administration of Road-Traffic Offences Act, minor traffic offences were classified as administrative offences instead of criminal offences.

On the occasion of the 100th anniversary of the Criminal Code in 1986, the question was raised as to whether a full re-codification of criminal law was necessary. There was no great enthusiasm for this idea, however. A preference was expressed instead for ongoing partial criminal law reforms, and for a gradual modernization of the present Criminal Code.

3.3 Characteristics of the Criminal Code

Compared to the French Penal Code, the Dutch Criminal Code is characterized by its simplicity, practicality, its faith in the judiciary, adherence to egalitarian principles, absence of specific religious influences, and recognition of an autonomous 'legal consciousness'.

Its simplicity, for instance, is still illustrated by the legal definitions of criminal offences, the division of criminal offences into either crimes or infractions, and its sanctions system containing only four principal sentences: imprisonment, detention, task penalty and fine.

Its faith in the judiciary is evident from the absence of lay judges or mandatory sentences for serious offences, and the wide discretionary power in sentencing.

The Dutch Criminal Code does not contain distinctions and definitions of a dogmatic nature. The Code contains neither definitions on various forms of culpability or causation nor on definitions of defenses.

The Criminal Code is a very practical one, leaving the development of criminal law doctrine in general to the courts and to the Supreme Court in particular. The Dutch Criminal Code is in many respects a true product of the neo-classical school.

3.4 Division in the Criminal Code

The Criminal Code (CC) consists of three books.

The first book (sects 1-91) is a general part concerning the scope of application of the code, sanctions and measures, defenses, attempt and conspiracy, the extension of criminal liability through participation, the reduction of sentences in case of concurrence, the statute of limitations, and the *non bis in idem* principle.

In the second (sects 92-423) and third (sects 424-476) book, the core crimes and infractions are defined.

3.5 Criminal law for juveniles

There is no special statute on juvenile offenders. The Criminal Code, however, contains a number of special provisions on juveniles. These primarily concern the sanctions which can be imposed on juvenile offenders (sects 77a through 77hh CC).

3.6 Other main criminal law statutes

The Dutch Criminal Code does not define all criminal offences. Numerous other statutes complement criminal law legislation. The main examples are the 1950 Economic Offences Act, the 1994 Road Traffic Act, the 1928 Narcotic Drug Offences Act and the 1989 Arms and Munitions Act. Violation of these Acts (e.g. drunk driving, hit-and-run, illegal possession of firearms, trafficking of drugs) constitutes a crime. Military criminal law is found in the 1991 Military Criminal Code. The Code contains criminal law provisions supplementary to the provisions in the Criminal Code.

Furthermore, hundreds of by-laws contain criminal provisions for the proper law enforcement of administrative legislation. The general part of the Criminal Code is also applicable to other criminal law statutes and criminal by-laws (sect. 91 CC).

3.7 Code language

The authoritative version of the Criminal Code is in Dutch. There are, however, some rather outdated, unauthorized translations of the Dutch Criminal Code in French, German and English:

- Code Pénal Néerlandais, in: M. Ancel and Y. Marx, *Les Codes Pénaux Européens*, Tome III, Centre Français de droit comparé, Paris 1958, pp. 1375-1466;
- *Das Niederländische Strafgesetzbuch*, translated by D. Schaffmeister, in: H.H. Jescheck and G. Kielwein, *Sammlung ausserdeutsche Strafgesetzbücher*, Band 18, de Gruyter, Berlin 1977;
- *The Dutch Penal Code*, translated by L. Rayar and S. Wadsworth, in: *The American Series of Foreign Penal Codes*, no. 30, Rothman Littleton, Colorado 1997.

New criminal law legislation is published at www.overheid.nl on the internet.

4 The Dutch Code of Criminal Procedure

4.1 History

In the Netherlands, the Napoleonic *Code d'instruction criminelle* was applied until 1838 with some modifications. For example, the French jury system has never been adopted in the Netherlands.

The Dutch Code of Criminal Procedure, which came into force in 1838, was not really a new code, but rather a translation of the French Code. The 1838 Code was characterized by strong inquisitorial elements. The suspect was the object of a secret and written investigation procedure without any procedural rights. The numerous attempts to reform the Code of 1838 and to restrict the inquisitorial elements failed until the present Code of Criminal Procedure (*Wetboek van Strafvordering*) was enacted in 1926.

4.2 Characteristic of the Code of Criminal Procedure

In the Explanatory Memorandum of the Code of Criminal Procedure (CCP), the code is characterized as 'being moderately accusatorial'. In comparison to the 1838 Code, the new code gave the offender more procedural rights to influence the course of justice. At an early stage in the investigative phase, the offender obtained the right to be assisted by counsel, with whom he can have free oral and written communication. In the pre-trial phase, the offender also acquired the right to remain silent when interrogated. He, furthermore, was granted the right to be informed of the results of the investigation by the police or the examining judge, and to interfere in these investigations, albeit, with restrictions. In order to prevent abuse of the procedural rights by the offender, these rights could be restricted 'in the interest of the investigation' by the public prosecutor or the examining judge. Such restrictions, however, can be reviewed by higher judicial authorities.

According to the Code, the emphasis of the criminal procedure lies in the trial, where immediacy is the leading principle. This principle requires that all evidence has to be produced and discussed at trial in the presence of the defendant, and that hearsay-evidence is not accepted. In 1926, however, the Supreme Court ruled that a *testimonium de auditu*, hearsay evidence, is admissible. Other exceptions to the immediacy principle, such as the use of the statements of anonymous witnesses as means of evi-

dence, were later also ruled to be admissible, provided there is circumstantial evidence. Despite the explicit text of the CCP, the role of truth-finding the truth belongs as a rule not to the trial but rather to the judicial preliminary investigation by the investigative judge.

Under the influence of decisions by the European Court on Human Rights, the immediacy principle has begun again gradually to play a role in Dutch criminal procedure. Today, the adversarial character of a trial is increasingly stressed.

4.3 Division in the Code

The Code of Criminal Procedure is divided into five books.

The first book (sects 1-138c) contains provisions on the competence of the police, the public prosecutor and the judiciary, the rights of the defendant and the defense counsel, and coercive measures such as pre-trial detention, seizure or search of premises, interception of communication, and special covert or intrusive investigative powers.

The second book (sects 139-398) contains the legal provisions on the pre-trial and the trial stages.

The third book (sects 399-481) deals with legal remedies such as appeal and cassation.

The fourth book (sects 482-552vv) contains special criminal procedure provisions, e.g. for trials against juveniles and corporate bodies and for international co-operation in criminal matters.

The last book (sects 553-592a) contains provisions on the implementation of court decisions.

4.4 Major procedural law reforms

The Dutch Code of Criminal Procedure has undergone considerable reform in the last years. The Code dates from 1926 and reflected at that time a careful consideration of interests and competences of the classic court room participants: the suspect and his defense counsel, the police and the prosecution service. One can argue that today the need for major law reform is obvious because the Code of Criminal Procedure:

- is in fact based upon the principles of the Napoleonic *Code d'instruction criminelle* and begins from the position that the Code serves the realization of the substantive criminal law;
- is insufficiently reflective of the changed relationship between the police, the prosecution service and the investigating judge, and furthermore is to little con-

cerned with the interest of other court room participants such as witnesses and victims;

- provides one model for the administration of justice, i.e. the model for major cases (a judicial preliminary investigation followed by a full bench trial). The way in which less serious or complex offences are administered is derive from this model;
- is not the main source of criminal procedural law, which instead stems from the Supreme Court's case law; and
- became a tangled mess from the constant supplements and reforms of recent decades. The reforms have been detrimental for the consistency and coherence of the CCP.

A full law reform in which the general principles of criminal procedure are reconsidered seems neither necessary nor desirable.

The Code of Criminal Procedure establishes a balanced allocation of powers and rights to parties in a criminal court procedure. There is no need for a re-allocation of competence.

The recent law reforms did not result in a substantially different position of the parties in court, nor in an essential shift in competence. A full revision is also not desired because, from the perspective of the operational situation in the administration of criminal justice, there are many objections. At present, pressure on criminal justice officers is too high to begin working with a completely new Code. Such drastic change would cause the administration of criminal justice to overheat.

The conclusion is that there is no need to seriously reform the structure of the trial procedure but instead to concentrate on a substantial reform of the structure of the pre-trial investigation.

In 1997, a team of researchers from various Dutch Law Faculties started the research project 'CCP 2001', which has led to four voluminous reports on the various phases of criminal procedure. The first report¹ deals with the trial phase and suggests that the systematic starting points of the Dutch Code of Criminal Procedure are either outdated or seriously undermined by the Supreme Court's case law. To give an example:

¹ M.S. Groenhuijsen/G. Knigge (Eds.), *Het onderzoek ter zitting. Onderzoeksproject strafverordening 2001; eerste interimrapport*, Gouda Quint, Deventer 2001.

The immediacy principles as expressed in the 1926 CCP have been undermined by the so called '*de auditu*' ruling (HR 20 December 1926, *NJ* 1927, p. 85). As a consequence of this ruling, the heart of the criminal procedure is no longer the trial but instead the pre-trial investigation, in which pre-trial investigation statements of the suspect and witnesses as well as experts are filed by the police or the investigating judge and the main judicial activity during trial is reduced to the short verification of the sufficiency and reliability of the statements. This modification made the system very pragmatic.

The second report² deals with the pre-trial investigation phase and shows that there is no systematic relation between the investigative competences as ruled in the CCP and the control competences as laid down in a wide range of special laws.

Furthermore, the institutional relationship between the actors in criminal procedure has been drastically changed. The police have been professionalized, the prosecution service's tasks and powers have been very much extended and the dominant role of the investigating judge has been reduced in practice. There is a world of differences between the law relating to the pre-trial investigation phase in the CCP and what occurs in practice.

The third report³ deals mainly with coercive means for investigative legal remedies and adjudicative powers of the prosecution service.

The fourth⁴ report deals with a broad variety of procedural topics, such as some basic principles for the prosecution of crimes, European judicial co-operation in criminal matters and the use of evidence obtained abroad.

In the four reports, altogether almost 3,000 pages, a blue print for reform of the present CCP has been sketched, on the basis of which the section of the Ministry of Justice responsible for the drafting of new laws has begun work on major procedural law reforms.

According to the reports, the reforms should be guided by three basic ideas:

- that the purpose of criminal procedure is to provide an appropriate response to criminal behavior; it should focus on the finding of truth and thus be concerned with more than the simple realization of substantive criminal law;

² M.S. Groenhuijsen/G. Knigge (Eds.), *Het vooronderzoek in strafzaken*, Onderzoeksproject strafvordering 2001; tweede interimrapport, Gouda Quint, Deventer 2001.

³ M.S. Groenhuijsen/G. Knigge (Eds.), *Dwangmiddelen en rechtsmiddelen*, Onderzoeksproject strafvordering 2001; derde interimrapport, Kluwer, Deventer 2002.

⁴ M.S. Groenhuijsen/G. Knigge (Eds.), *Afronding en verantwoording*, Onderzoeksproject strafvordering 2001; eindrapport, Kluwer, Deventer 2004.

- the re-calibration of the legal position of the various participants in the criminal procedure through:
 - the recognition of the witness and the victim as participants in the criminal justice procedure;
 - the abolition of the judicial preliminary investigation and confirmation of the public prosecutor as leader of the criminal investigation as well as the confirmation of the examining judge as performer of the two main duties: deciding on requests to apply coercive measures and interrogating witnesses on request; and
 - the strengthening of the role of the trial judge, as well as of the rights of the defense lawyer;
- the implementation of a multiple tracks model: the procedure for the administration of criminal justice should depend upon the seriousness of the offence and the sanctions or measures that can be imposed.

Since the publication of the reports a number of reform bills have been discussed by Parliament, but not all reform proposals put forward by the research group have been adopted by the Government. The proposal to abolish the judicial preliminary investigation e.g., a very essential part of the suggested reforms, has not been adopted. Instead, a repositioning of the judicial preliminary investigation is suggested.

Reform proposals that have been adopted by Parliament and have been implemented include the proposal to empower the public prosecutor to settle definitively cases out of court (entered into force 1-2-2007), to strengthen the position of the victim in the pre-trial and trial phase (entered into force 1-1-2007), and to restructure the appeal procedure (entered into force 1-1-2007).

Since 1990, over 100 law reforms, including important alterations and extensions of the Code, have taken place. There were a number of important reasons for major changes, such as technological progress and the increasing impact of international human rights instruments on national criminal procedure.

4.5 Main reasons for procedural law reforms

Technological progress

New technological developments have enabled the use of advanced technical means of coercion in the fight against organized and serious crime. In this connection, two major changes can be highlighted.

Firstly, the 1993 DNA Act introduces the possibility, in cases of serious suspicion of a crime that carries a statutory imprisonment of eight years or more, to take blood from the suspect for a DNA test for identification without the suspect's consent but by order of the examining judge. Since 2001, subject to a public prosecutor's order, a buccal mouth swab for a DNA test may be taken from anyone suspected of a crime that carries a statutory imprisonment of four years or more, and since 2006, DNA samples may be taken from all convicts sentenced for crimes that carry a statutory prison sentence of four years or more.

Secondly, the 1993 Computer Crime Act introduces the possibility for investigators to intercept all forms of telecommunication and the possibility to intercept all forms of communication by means of long-distance target microphones, and the 2000 Special Investigative Powers Act introduces the power to use tracking and tracing devices for remote monitoring; recently the power to use scanning devices for telecommunication has also been adopted.

The impact of international human rights instruments

The second cause of recent changes is the need to meet the demands stemming from international human rights instruments concerning persons accused of crimes and of persons deprived of liberty in so far as these instruments are directly applicable under Dutch law.

The Netherlands has no constitutional court and section 120 of the Dutch Constitution explicitly prohibits (constitutional judicial) review of Acts of Parliament (statutes) by courts: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the court". However, the Dutch Constitution obliges the courts to review all domestic legislation, including Acts of Parliament, with regard to their compatibility with directly applicable provisions of international treaties to which the Netherlands is a contracting party, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950.

All provisions in this Convention that do not need further legislative implementation or operationalisation are regarded as directly applicable. Where a Dutch statutory provision is found to be in conflict with a directly applicable provision of the Convention, the court must apply the provision of the Convention instead of the national provision. Section 94 of the Constitution reads: "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".

Standards on the application of directly applicable provisions of the Convention elaborated in case-law by the European Court of Human Rights (ECHR) in Strasbourg must also be applied by Dutch courts. This is not only the case with regard to ECHR decisions involving the Netherlands, but also with regard to decisions involving other Member-States of the Council of Europe, in as far as these decisions contain standards regarding the provisions of the Convention. This means that apart from decisions against the Netherlands, other decisions of the court also may have an impact on Dutch criminal procedural legislation and trial practice.

The ECHR's decisions in the *Cubber and Hauschildt* cases (26 October 1984, A 86 and 24 May 1989, A 154) resulted in the reform of the criminal procedure for juveniles. The *Kruslin and Hunig* case (24 April 1990, A 176) necessitated new procedural provisions for the interception of (telephone) communications; the *Kostovski* case (20 November 1989, A 166) led to the introduction of legislation on anonymous witnesses; the *Kamasinski* case (19 December 1989, A 168) formed the reference point for new legislation on interpretation and translation help during the criminal procedure; and the *Brogan* case (29 November 1988, A 145 B) has resulted in control by the investigating judge of the lawfulness of the detention within the first period of 72 hours of the police custody (see section 7.7).

In 2000, the position of suspects was improved in line with the equality of arms principle as expressed in Article 6 of the Convention. A suspect now has the right to request the investigating judge to carry out further investigations of a specific nature, the so-called mini-investigation (see section 7.6).

The crisis in police investigations

In 1996, the Parliamentary Enquiry Committee on police investigations came to the conclusion that the Netherlands was suffering a crisis in police investigations. No legal standards for police investigations methods existed. Neither the courts nor the prosecution service performed its role of supervising the police sufficiently conscientiously, with the result that the police could operate outside the authority and control of the prosecutor in charge. The outcome was that undercover policing methods were often used that were incompatible with the rule of law in a democratic state. The Committee's report was profoundly shocking to those responsible for the supervision of the Dutch police, and in 2000 led to far-ranging legislation on investigative powers and special investigative methods, such as observation and tailing, police infiltration, running informers, interception of communication by technical means, covert entry, pseudo-purchase and pro-active investigation (sects 126g-126ui CCP).

The implementation of EU law

The EU Council may issue framework decisions (sect. 34 subsect. 2 TEU). These framework decisions are binding upon the Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. They do not have direct effect but therefore have to be implemented.

Framework decisions have resulted in criminal procedural law reforms. The Council framework decision of 15 March 2001 (2001/220/JHA) e.g. led to the adoption of new rules strengthening the position of the victim in the criminal procedure.

The Council framework decision on mutual recognition to financial penalties (2005/214/JHA) and the framework decision on the execution of orders freezing property or evidence (2003/577/JHA) have recently been implemented.

4.6 Procedural criminal law in other Acts and international instruments

Some Acts, such as the 1950 Economic Offences Act and the 1928 Narcotic Drug Offences Act, include procedural law regulations that partly deviate from the Code of Criminal Procedure, in particular concerning searches of premises and the procedure for seizures.

The Code of Criminal Procedure is not applicable to minor road-traffic offences. These are dealt with through administrative procedures without direct access to a criminal court. The 1989 Administration of Road-Traffic Offences Act empowers the police to impose a maximum administrative fine of € 340 per offence. The fine becomes irrevocable, unless a complaint is lodged with the prosecution service, which acts as an administrative agency. The decision of the prosecution service can be challenged before the cantonal judge of the district court, who may review the decision of the public prosecutor. Ultimately, an appeal may be filed with the court of appeal in Leeuwarden, which in this case functions as the highest (administrative) instance.

There is no special statute on criminal procedure for juvenile offenders. The Code of Criminal Procedure contains special provisions on juvenile trials (sects 486 through 505). As a rule, trials in juvenile court are not open to the public.

The 1991 Military Code of Criminal procedure regulates the organization of the military court system and contains supplementary provisions for the military court trial.

The Netherlands has signed and ratified a number of (Council of Europe or European Union) Conventions dealing with procedural law issues, for instance the conventions on Mutual Assistance in Criminal Matters, on Transfer of Proceedings in Criminal Matters, on Extradition, on the International Validity of Criminal Judgments and on the Transfer of Sentenced Persons.

4.7 Code language

The Code of criminal procedure has been officially published in Dutch. No translations in languages other than German are available:

- Die niederländische Strafprozessordnung vom 1. Januar 1926, Übersetzung und Einführung von Hans-Joseph Scholten, Freiburg im Breisgau: edition iuscrim 2003.

5 The main organs of the criminal justice system

A The police force

5.1 Introduction

The formal organization of the police force is laid down in the 1993 Police Act. Prior to this Act, the police force was divided into a national police force and 148 municipal police forces. The 1993 Police Act reformed the organization and main structures of the police service. The main reason was the need to increase efficiency and effectiveness in the fight against supra-local, national and international (organized) crime. There are presently 25 regional police forces and a small national police force with only very specific tasks and powers. Each of these police forces is considered an independent force. The size of each force depends on factors such as population size and crime level in the region.

In addition to the regional and national police forces, there is a Royal Dutch Military Police, a small force which, under the supervision of the Minister of Defense, exercises the primary general role of policing within the Dutch armed forces.

The task of the police force (sect. 2 Police Act) is to enforce the legal order, and to render assistance to those who need help. The enforcement of the legal order comprises the enforcement of criminal law, the enforcement of public order and the performance of judicial services.

When enforcing public order, the police operate under the authority of the mayor of the municipality in which the police act. The mayor can issue instructions in this respect. For the enforcement of public order, the legal regime of the Police Act is applicable.

When enforcing criminal law and performing judicial services, the police act under the authority of the prosecution service competent at the place of action (sect. 13 Police Act). The enforcement of criminal law comprises the effective prevention, termination and investigation of criminal offences. The prosecution service can give instructions to the police for the enforcement of criminal law (sect. 15 Police Act).

As far as the enforcement of criminal law is concerned, there is no organizational separation or distinction within the police force between the investigation of criminality and the prevention thereof. Both are tasks of the police. Within the police force some departments concentrate on investigation (criminal investigation department),

while others concentrate on prevention. For the enforcement of criminal law, regardless of whether it is prevention or investigation, the Code of Criminal Procedure is applicable.

As noted above, the political responsibility shifts with the nature of the police action but in cases in which the enforcement of the legal order and the enforcement of criminal law coincide, the mayor and the public prosecutor will confer on the steps to be taken. This will apply particularly where large scale risk events (football matches et cetera) take place.

Unlike in systems such as that of England and Wales, the Dutch police do not play any role in the prosecution of crime.

A police officer has jurisdiction *ratione loci* in the whole of the Dutch territory, but as a rule he will restrict his actions to the region where he is employed. In order to carry out judicial services, all senior police officers have the role of auxiliary to the public prosecutor (*hulpofficier van justitie*). In this capacity, they may carry out some tasks on behalf of the public prosecutor.

5.2 Organization of the police force

The country is divided into 25 police regions. Each region has its own police force under the administrative management of the mayor of the largest or most central town in the region; the other mayors or council officials in the region participate in a supervisory council, which has very limited powers. The regular police force has approximately 52,000 employees, of whom 36,800 are executive police officers, vested with the right to investigate criminal offences.

In addition to the regional police forces, a national police force exists (The National Police Services, *Het Korps Landelijke Politie Diensten KLPD*). This force has 5,000 employees and consists of various units such as the motorway police, the water police, the railway police and the department of national criminal investigations. The national police force is responsible for international police cooperation, for the international exchange of police information, as well as for maintaining the contact with Dutch liaison officers abroad and foreign liaison officers in the Netherlands. The national crime squad forms part of this department. The regional police forces and the national police force act under the ultimate supervision of the Minister of Interior as far as the maintenance of public order and security is concerned. The Minister of Justice is politically accountable for the enforcement of criminal law activities of the police. The police forces have responsibility for their own operational management, and the

Ministry of Interior is responsible for the overall management of the Dutch police as a whole.

The budget of the police forces is provided by the Ministry of Interior. It is allocated proportionately in accordance with factors such as the size and composition of the population within the region.

A regional police force may consist of several functional and territorial units. Functional units perform specific activities in the whole region or in the whole police force, for example the department for personnel and equipment or the regional criminal investigation department. Territorial units exercise police powers in a specific area of the region.

The chief of the regional police has authority over both the functional and territorial units.

The bottom of a regional police force consists of the so called basic units – the smallest territorial unit – which is responsible for daily surveillance, the provision of emergency help, the registration of criminal offences, contact with the population in their territory and smaller criminal investigations.

The basic units of a given area together form a district. The criminal investigation department, the traffic control police unit and the alien department are the functional units of a district. A number of districts, together with certain special functional divisions such as the division for judicial affairs, charged primarily with the task of investigating organized crime, capital crimes and very complex crimes, form the regional police force.

The division for judicial affairs is divided up into departments dealing with technical investigation activities, criminal intelligence and juvenile policing. Within a regional police force, there exist supporting divisions that do not carry out day to day policing tasks but provide support to the operative units and divisions. One of the supporting divisions deals with crime prevention.

The level of cooperation and information exchange between the various police forces is far from optimal and as a result in 2007, Parliament passed a reform to the Police Act to reduce the autonomy of the individual forces and to increase the power of the two police ministries (Interior and Justice) to set the priorities for police activities. The reform was deemed necessary to improve the efficiency of the police and to provide better tools for the fight against transborder and national organized crime. Where the level of cooperation and information exchange is not improved – for example by the creation of one national computer network instead of various non-compatible individual police force networks and by developing combined investiga-

tion specializations (such as in relation to child pornography), the Government will consider establishing a full national police force.

Specialized units in the police structure

A number of specialized units exist within the police structure. There are supra-regional teams charged with the task of tackling crimes of medium seriousness. These teams concentrate on robberies, ram-raiding, large scale burglary by gangs, trafficking in human beings et cetera.

The role of the national criminal investigation department of the National Police Service is to investigate organized and serious crime, which transcends regional and national boundaries in terms of the nature of crime or the group of offenders involved. Key areas for the national criminal investigation department are the investigation of the production and trafficking of synthetic drugs, organized crime originated from South East Asia and South America, criminal organizations in the Netherlands and crime connected with logistical hubs such as Schiphol Airport and the seaports.

The major role in the fight against terrorism is assigned to the Counter Terrorism and Special Tasks Unit (UTBI) of the National Police Service, which has nationwide responsibility for counter-terrorism.

Furthermore, there is a Financial Intelligence Unit, integrated into the National Police Service, that receives, analyses and disseminates reports on unusual transactions and serves as a point of contact for law enforcement. Following analysis, unusual transactions may be deemed suspicious transactions, which may lead to investigation for money laundering or corruption. The Disclosure of Unusual Transactions Act determines the entities (such as banks, money transfer institutions, casino's and dealers in very expensive goods) that are subject to the duty to report unusual transactions where the transactions match with objective indicators.

Special investigative agencies

In addition to the regular police services, there are special criminal law enforcement agencies both at the local and the national levels that are vested with the right to monitor and investigate a restricted category of offences. These agencies form part of the local or national administration.

On the national level, there are four special investigative agencies under the control of governmental departments, such as the Economic Control Agency and the Customs and Excise Investigative Office of the Inland Revenue Ministry (FIOD), the Social Information and Investigation Agency of the Ministry of Social Affairs and Employ-

ment, the Investigative Agency of the General Inspectorate of the Ministry of Agriculture, Nature and Food Quality, and the Information and Investigation agency of the Ministry of Housing, Spatial Planning and the Environment. These special agencies have investigative powers only for criminal offences related to matters of immediate concern to these Ministries.

The custom authorities and the National Police Services actively cooperate in tracing illegal residents, illegal imports and other matters.

Finally, there is a National Information and Security Service (the former National Secret Service) that is accountable for national security and the continuation of the democratic order. Information collected by the NISS may be used as evidence in terrorism-related trials.

The exchange of information is crucial for effective policing. For all the operational processes of the police – supervision and enforcement, investigation and processing – the police forces exchange information both with one another, and with their national and international partners.

There exists an intensive exchange of computerized information between police forces, special investigative units and partners. This exchange of information, however, can be improved.

Police forces and intelligence services exchange information on a national and international level in order to combat terrorism. The Counter Terrorism and Special Tasks Unit (UTBT) gathers, records and collates information for the investigation and prevention of terrorist crimes.

The National Criminal Intelligence Service (NRI) supplies criminal intelligence and expertise to the police forces. By maintaining databases containing data on crimes and their modes of operation and other information, the NRI supports the forces in their fight against organized crime and serious forms of supra-regional crimes.

5.3 Supervision of the police

The prosecution service is ultimately responsible for all aspects of criminal investigation. Public prosecutors have to ensure that the police observe all statutory rules and procedures.

Formally, the public prosecutor is the senior investigator (sects 148 CCP and 13 Police Act). In practice, however, the police deal with most cases without prior consultation with the public prosecutor except in more important criminal cases, where the

latter may give detailed instructions. On a day-to-day basis, consultation takes place on a more abstract level, in order to determine policy for the investigation of certain kinds of crime and for the use of special investigation methods (undercover agents, infiltrators et cetera). This is due to the limited strength of the prosecution service, as well as the recognition that, with regard to investigative techniques and tactics, the police possess greater expertise than the prosecution service.

There is also consultation in specific cases where police officers require the approval or co-operation of the public prosecutor or the examining magistrate for the use of certain means of coercion.

Instructions – the CCP uses the word: orders – are binding and non-compliance with the instruction may give rise to a disciplinary sanction. The power of the public prosecutor to give detailed instructions is based on section 148 subsection 2 CCP.

5.4 Instructions to the police

Public prosecutors have taken a more proactive part in investigative work by issuing written or oral instructions to the police on the investigation of specific offences. This may be a result of the increasing complexity of cases and a lack of financial resources, which has made it necessary to fix priorities when instituting investigations.

On March 1st, 2003, the Board of Prosecutors General issued an instruction to the police on whether or not to prioritize the investigation of crime (State Journal 2003, 41). There are two basic rules in this instruction: the first is that investigation by the police shall always take place where the offender is known except in trivial cases which did not cause danger, injury or damage. Furthermore, investigation may be refrained from where this is explicit policy – for example, no investigation in a case of violence within the family in order to make voluntary aid possible.

The second basic rule is that the more serious the crime is the more intensive the investigation shall be. In the instruction both basic rules are further elaborated so that police officers can more easily assess what crimes shall be investigated.

Furthermore, the Supreme Court's rulings on inadmissible evidence have increasingly stressed the importance of public prosecutors in ascertaining, as early as possible, what methods should be employed in the investigation.

The criminal investigation police are largely responsible for investigating the facts and ascertaining the truth. The majority of criminal offences that come to trial are prosecuted only on the basis of the information collected by the investigating police officers.

5.5 Tri-party discussions

There is no sharp division between the enforcement of public order and the enforcement of criminal law, so it is not always clear under whose authority the police act. As a consequence, the mayor, who is responsible for the administrative management of the regional police force (*korpsbeheerder*), meets regularly with the head of the regional police force and the (deputy) chief of the regional prosecution service (the so-called tripartite consultation) to discuss questions such as the input of the police force to fight local crime and improve local safety. In all 25 police regions such tri-party discussions regularly take place. For the enforcement of public order by the police force, the mayor is answerable to the city council.

5.6 Powers of the police force

In relation to the task of detecting and investigating criminal offences, the police are vested with specific statutory powers such as arrest, police custody and seizure. Some powers may only be exercised by senior police officers who have been designated as auxiliary to the public prosecutor (*hulpofficier van justitie*). An auxiliary is not a member of the prosecution service, nor vested with the powers of a public prosecutor. However, he is vested with the power to use coercive measures, such as search and police custody.

The police may use force in the exercise of their police tasks. Furthermore, the police may carry out a body search if safety reasons so require.

On the basis of the Police Act, the police have the power to perform limited invasions of someone's privacy by means of surveillance or by taking pictures of persons in public.

The Dutch police have the power to set aside an offence without the further involvement of the criminal justice system.

When an offence has been investigated and the investigation has been concluded, the police have the possibility of various avenues of action towards the offender. The police can caution the offender or give him an oral or written admonition. This may be a preferred option when dealing with juvenile offenders, first offenders or those committing either domestic violence or minor crimes. Furthermore, the police can mediate between the offender and the victim by suggesting that the former compensate for the damage done or offer an apology, all of which may be an appropriate reaction in cases of bodily injury, damage to property or embezzlement. The police can also

offer a financial settlement out of court for certain types of crimes such as shoplifting or drink driving. This power of the police to settle a case is rather restricted. The maximum financial settlement possible is limited to € 350. The police power to settle a case is laid down in section 74c Penal Code, and further elaborated in the Royal Decree on police settlements (*Transactiebesluit 1994*) and in instructions issued by the Board of Prosecutors General. These instructions dealing with shoplifting and embezzlement as well as with impaired driving and have the aim of improving a uniform application of this power by the police and to facilitate control by the prosecution service.

A weak point of the transaction is that non-acceptance automatically leads to the issuing of a writ of summons and a trial. This automatism brings a lot of work before the prosecution service and courts. To avoid this, the prosecution service has recently been vested with the right to impose sentences and orders without intervention by the court (see section 7.5 – Penal order).

5.7 Recruitment and appointment

The selection criteria for joining the force at the lower level – assistant police officer and police officer – are age (> 17 years), a driving license, Dutch nationality, the absence of a criminal record and good physical condition.

An initial police education (basic training) is provided. For the higher police ranks a post-initial education is provided through management courses (operational management, tactical management and strategic management) as well as specialist courses (technical and tactical detective, specialist, graduate detective or specialist). Part of the career development concept is to encourage police officers to take post-initial courses for the purpose of specialization or for the acquisition of management skills.

A Police Training and Knowledge Centre exists, which is responsible for the basic training and the training for all-round police officers.

The Netherlands Police Academy provides the initial courses at Bachelor and Master level, as well as the post-initial courses.

The Heads of the regional police forces are nominated by the Minister of Interior and the Minister of Justice and appointed by the Crown. The mayor, who has the administrative management of the regional police forces, makes a list of recommended officers after consultation with the chief public prosecutor and the regional board of mayors. The Queen's commissioner and the Board of Prosecutors General may advise on the appointment.

B The prosecution service

5.8 Introduction

The main task of the prosecution service is to administer, by means of criminal law, the legal order. The prosecution service plays a pivotal role in the administration of criminal justice. The decisions made by the public prosecutor involve profound consequences for the offender, and repeated refusals to prosecute certain crimes may also lead to a decline in the detection and investigation of offences by the police. In turn, the charges laid against the accused largely delineate the adjudicatory functions of the courts.

It is no exaggeration to say that the Dutch prosecution service has enormous powers, at least in dealing with criminal cases. It has a monopoly over prosecutions, and employs the expediency principle in this connection. Furthermore, it makes use of its hierarchical structure to pursue a coordinated policy. In this way, the prosecution service is able to determine systematically what cases should be brought to trial, and what sentences the courts should be asked to impose.

Since the introduction of the present Code of Criminal Procedure in 1926, the decision to institute criminal proceedings has been reserved exclusively to the prosecution service. Approximately one half of the crimes that reach the public prosecutor's office through the intermediary of the police are not brought to trial, but are disposed of by the prosecution service itself. Usually this involves a decision not to prosecute through a dismissal due to technicalities, or through a dismissal due to the exercises of the expediency principle, or by a settlement out of court by means of a transaction. If the prosecution service decides to refer a matter to a criminal court, suspects in simple, less serious types of crimes will generally be summoned by the public prosecutor exclusively on the basis of the information obtained in the police investigation. In cases of a more complicated nature or a serious crime, the public prosecutor may apply to the investigating judge for a preliminary judicial investigation. Complicated and serious crime cases are cases in which more intrusive investigative methods are required (such as searches, interception of communication by technical means et cetera). For the use of those intrusive methods, the police and public prosecutor need to seek the permission of the investigating judge. Some methods can, as a rule, only be authorised by a judge. The investigating judge has power which the police and prosecutor lack. He may order a witness to appear for him and make a witness deposition

or he may order a psychiatric examination of the suspect or initiate a bodily examination. When the preliminary investigation, conducted either by the police or by the examining judge, is completed, it is once again the public prosecutor who must decide whether or not to prosecute or to continue the prosecution.

If the suspect is notified by the public prosecutor that no charges will be brought (either conditionally or otherwise), the case is terminated, unless fresh incriminating evidence is subsequently discovered.

If the public prosecutor decides to prosecute, (i.e. if a notification of further prosecution or a summons is issued), the accused can lodge a written notice of objection with the district court. The objection procedure enables the suspect to challenge in a non-public setting (i.e. *in chambers*) what may be a rash or unjust prosecution, and thereby avoid the exposure of a public trial.

This judicial review of the decision to prosecute is fairly limited. In the great majority of cases, the notice of objection procedure results, after a brief investigation, in a decision by the judge in chambers that the case should go to trial after all. Should the court find that a prosecution is unjustified, the case will be dismissed. Otherwise, the case is prepared for trial. The grounds on which the prosecution may be dismissed are limited to four:

- where the case is to be dismissed because the prosecutor no longer has the right to prosecute, e.g. due to the statute of limitations;
- where the evidence against the accused is manifestly insufficient;
- where the act does not constitute a criminal offence; and
- where the accused is not liable, e.g. due to self-defense.

5.9 Supervision over the police

The prosecution service is ultimately responsible for all criminal investigations.

Until rather recently, the prosecution service did not perform its supervisory role over the police in an adequate manner. The police enjoyed too much autonomy in their investigative activities, in particular in the fight against organized crime. Since the adoption of statutory rules on investigative police methods in 2000 and the reorganization of the prosecution service, the services' supervisory role over the police has been improved. For the use of covert policing method, prior consultation with the prosecution service or its explicit approval is mandatory.

5.10 Organization of the prosecution service

General Prosecution Service

The prosecution service is a nation-wide organization of prosecutors. It is organized hierarchically. At the top is the Board of Prosecutors General. The service functions under the responsibility of the Minister of Justice, but is not an agency of the Ministry of Justice. The service is part of the judiciary, but its position differs from that of the other part of the judiciary, that is, the judges. The judges are independent, have life tenure, and are separate from the Ministry of Justice. Public prosecutors are civil servants, may be fired and fall under the political responsibility of the Ministry of Justice. At present there is a total of approximately 600 public prosecutors, of whom around 40% are female.

The organization of the prosecution service is regulated by the 1827 Judicial Organization Act. In 1999, the prosecution service underwent a thorough reform in terms of its organizational structure, the line of command and the power of the Ministry of Justice to give instructions in individual cases.

The prosecution service is organized in two layers corresponding to the courts of first instance and the courts of appeal.

At the nineteen district courts, the prosecution service (*arrondissementsparket*) consists of prosecutors holding the rank of chief prosecutor, senior prosecutors, prosecutors, substitute prosecutors and prosecutors acting in single court sessions. The latter is vested with all powers of a prosecutor with one exception. He may only act as prosecutor in single judge court sessions. In these sessions, only simple criminal cases are tried. The single judge is vested only with the power to impose prison sentences of one year maximum.

The public prosecutors are supported by clerks of the prosecution service (*parketsecretaris*) who may hold a mandate to summon a suspect in simple cases. They assist the prosecutor in preparing prosecutorial decisions. As a rule, these clerks check the police files to see whether there is sufficient evidence for a prosecution, and draft the charge and writ of summons. Clerks of the prosecution service may hold a mandate to summon an arrested suspect prior to his release. The mandate is restricted to criminal cases to be tried in single judge court sessions. A mandate, under Dutch law, means that the public prosecutor remains at all times competent to withdraw the summons issued by his clerk.

At the five courts of appeal, the prosecution service consists of the chief Advocates-General and the Advocates-General. The main task of the service at the court of appeal level is to deal with charges in appellate cases.

National prosecution office

In addition to the nineteen prosecution services at district court level, there is also a national prosecution office located in Rotterdam, which is not linked to a particular district court. The public prosecutors of the national prosecution office are vested with the same powers as the prosecutor at district court level. Their main task is to investigate and prosecute serious (organized) crimes – crimes which due to their seriousness or frequency constitute a serious threat to the legal order and which require financial or tax expertise– and nation-wide or international crime, the detection of which is the responsibility of the national crime squad is competent.

The office supervises the national Police Force Unit for the fight against (inter)national organized crime and prosecutes cases investigated by this unit. Furthermore, the national prosecution office develops investigation and prosecution policy with regard to (international) organized crime. An operational task of the office is the coordination and handling of foreign requests for legal assistance.

The structure of the national prosecution office is similar to the prosecution office at district court level.

Functional prosecution office

A separate office exists within the prosecution service for the prosecution of criminal offences investigated by the four special investigative agencies (see section 5.2) under the control of governmental departments such as fiscal, economic and fraud crimes, social security crimes, health crimes and environmental crimes. In this functional prosecution office, special expertise in these fields is concentrated, which is beneficial for a proper prosecution of these, generally-speaking, rather complicated crimes.

The Board of Prosecutors General

There is no hierarchical relation between prosecution services of the courts of first instance or of the national prosecution office and the prosecution services of the courts of appeal. All are subordinated to the Board of Prosecutors General. The Board directs the prosecution service as one organization.

The prosecution service is headed by a Board of three to five Prosecutors General (*College van procureurs-generaal*). The Crown appoints the chairman of the Board. The Board has its office (*het parket generaal*) in The Hague. The Board of Prosecutors General may give instructions to the members of the prosecution service concerning their tasks and powers in relation to the administration of criminal justice and other statutory powers, e.g. supervision of the police. Such an instruction may be of a general

policy nature or of specific nature. Prosecutors are legally bound by these instructions.

The highest authority over investigation and prosecution rests with the Board. The Board ultimately supervises the implementation of a proper prosecution policy by the prosecution service, and a proper investigation policy by the police. The Board meets on a regular basis with the Minister of Justice.

The Board of Prosecutors General is advised by a number of advisory bodies, consisting of public prosecutors and high ranking police officers. One of these bodies is the serious crime committee, which functions as a policy making body concerning organized crime, and which filters recommendations about organized crime control. The advisory bodies initiate the issuing of national prosecution guidelines.

A significant number of guidelines issued by the Board of Prosecutors General concern the investigation and prosecution policy in relation to the enforcement of the Opium Act, e.g. the guideline investigation and prosecution policy September 10, 1996 (State Journal 1996, 187), which tolerates certain drugs offences provided that the requirements expressed in the guideline are complied with (see section 2.9).

Specialized units within the service structure

At the district court level, the prosecution service consists of units. There are two kinds of units: the territorial and the functional units. The territorial unit deals with all criminal cases in a designated territory. The functional unit deals with crimes regardless of the territory in which they have been committed.

In addition to these units, there are specialized units for organized crime, fraud crime, economic crime and environmental crime.

5.11 Political accountability

The prosecution service is not an independent body in the sense that the Minister of Justice is politically accountable for the policy of the prosecution service and can be held to account in Parliament for intervening or failing to intervene in this policy. He can be questioned by Parliament both for the prosecution policy at large and for individual prosecutorial decisions. This political accountability is one of the core elements of the Rule of Law in the Dutch State.

The Minister of Justice is hence involved in the formulation of prosecution policy at large. There are regular contacts between the Minister and the Board of Prosecutors General in this respect. The Board of Prosecutors General is responsible for the

proper realization of the prosecution policy, as agreed with the Minister of Justice. The Board issues instructions in this respect. The Minister may be involved in the decision making in individual cases as well. He may be consulted by individual prosecutors in cases where the prosecutorial decision may have an impact on the general prosecution policy, or where his political accountability is at stake. The final responsibility rests with the Minister of Justice.

Section 127 Judicial Organization Act empowers the Minister of Justice to issue general and special instructions on the exercise of the tasks and powers of the prosecution service. Those instructions are legally binding for the prosecution service as a whole as well as individual public prosecutors. This section underlines that the Minister of Justice is politically accountable for the policy of the prosecution service at large and for individual prosecutorial decisions. Before the Minister of Justice can issue an instruction concerning investigation or prosecution in an individual case, a special procedure is to be applied (sect. 128 JOA).

When the Minister of Justice considers giving an instruction in an individual case, the Board of Prosecutors General shall be given the opportunity to express its views concerning the instruction considered. That instruction and its reasoning are sent to the Board, which gives its reasoned views.

The instruction must be reasoned and issued in a written form. In very urgent cases, the instruction can be issued orally but shall also be issued in written form within a week. The instruction together with the considered instruction and the views of the Board shall be added to the case file unless this is contrary to state interest. In the latter case, a notification that an instruction has been issued is added to the case file. In this way the court is informed that an instruction to prosecute the case or an instruction on what sentence to request has been given to the public prosecutor. The court will certainly consider this when giving its judgment.

The Minister of Justice is not only empowered to give the instruction that an individual case shall be investigated and prosecuted but can also issue an instruction that a case shall not be investigated or prosecuted. In that case the Minister shall notify Parliament (both Chambers of the States-General) that such an instruction has been issued. His instruction together with the considered instruction and the views of the Board of Prosecutors General shall be sent to Parliament. This procedure ensures democratic control over the Minister's decision.

Through this procedure, openness over the involvement of the Minister of Justice in prosecutorial decisions is guaranteed. This openness however is absent when the

prosecution service agrees with the considered instruction and takes such a prosecutorial decision so that an instruction does not need to be issued.

The starting point of the legislator adopting section 128 JOA was that there shall be a restricted use of instructions in individual cases by the Minister of Justice. Until now, the Minister has not made use of this power.

5.12 Recruitment and dismissal of public prosecutors

The statutory requirements for becoming a public prosecutor are possession of Dutch nationality and a university law degree (sects 1c and 1d Legal Position of Judicial Civil Servants Act). Supplementary professional requirements are laid down in the Royal Decree concerning the Education of Judicial Civil Servants.

Every judicial civil servant has to follow a training program of six years. This program comprises an internship at a district court and a district prosecution office, an external internship and further theoretical education to improve professional skills, abilities and knowledge.

The training program is the same for all judicial civil servants independent of their intention to become a public prosecutor or a judge. Annually, the judicial civil servant in training will be assessed during the training program.

Before an applicant will be selected to follow the internship program the National Selection Committee for the Judiciary (see section 5.19) will ask for written information about the applicant from referents, will interview the applicant and will take note of the results of a psychological test of the applicant.

Public prosecutors are, dependent on their rank, appointed either by the Minister of Justice or by the Crown.

Substitute public prosecutors are appointed by the Minister of Justice and all other prosecutors are appointed by the Crown by Royal Decree (sect. 1a Legal Position of Judicial Civil Servants Act).

Since public prosecutors are civil servants, the grounds for dismissal are laid down in section 98 of the General Rules for Civil Servants (a Royal Decree). The main grounds are:

- a. the loss of a statutory prerequisite to become a public prosecutor;
- b. a court decision that he is placed under legal restraint;
- c. a prison sentence for a crime;
- d. disability to exercise his tasks properly due to illness for more than two years;

- e. disability to exercise his tasks properly due to other reasons;
- f. retirement at the age of 65; and
- g. providing irregular or restricted information which otherwise would not have led to an appointment as public prosecutor.

The dismissal can be both honourable and dishonourable. The grounds for dismissal under a, d, e, f are honourable.

The highest body in the prosecution service is the Board of Prosecutors General. The highest official is the chairman of the Board who is appointed by the Crown by Royal Decree for a term of three years (sect. 130 Judicial Organization Act). He can be re-appointed once for a second term of three years. The members of the Board (maximum four) are appointed by the Minister of Justice for an indeterminate term.

5.13 Self-perception

The aim of the prosecution service is to bring those criminal cases to trial that the service cannot itself dispose of by applying discretionary powers in conformity with the law and guidelines issued by the Board of Prosecutors General. The overall aim is to pursue a criminal policy in order to reduce the crime rate.

Individual members are expected to work objectively to take well considered prosecutorial decisions and to present to the court both evidence against the suspect and evidence in his favor, and to request a sentence which is appropriate.

Some of the prosecutors view themselves as crime fighters, others have a more magisterial attitude similar to judges. Within the service, it is the latter attitude that is considered most appropriate. The international standards and norms for prosecutors as well as the principles laid down in human rights instruments are considered by the service to work with their endeavors to promote an effective, fair, impartial and efficient prosecution of criminal offences.

5.14 The office of the Procurator-General at the Supreme Court

The office of the Procurator-General at the Supreme Court is not part of the prosecution service. It forms an independent office with special tasks and powers.

The office consists of the Procurator-General and the Advocates-General. The Procurator-General and the Advocates-General at the Supreme Court are independ-

ent officials appointed for life with mandatory retirement at the age of seventy (sects 117 Dutch Constitution and sect. 1a Position of Judicial Officials Act).

The main statutory tasks of the Procurator-General are:

- to prosecute members of Parliament, ministers and deputy ministers for criminal offences committed in the exercise of their function. No ex officio prosecution is allowed. An order to prosecute has to be given either by Royal Decree or by decision of the Lower House (sect. 119 Dutch Constitution);
- to advise the Supreme Court in all cases before them, and to give his legal opinion on disputed legal questions;
- to appeal in cassation in the interest of the proper application of criminal law.

The task of advising the Supreme Court and giving a legal opinion on disputed legal questions is primarily carried out by the Advocates-General.

The Procurator-General is charged in particular with the supervision of the enforcement and implementation of statutory rules by the courts.

C The courts

5.15 Organization of the court system

The organization of the court system is regulated by the Judicial Organization Act (*Wet op de rechterlijke organisatie*), which was enacted in 1827. This statute underwent a major reform in 2002.

At present, there is a total of approximately 2,200 (fte) judges in the Netherlands, of whom around 450 deal with criminal cases. Approximately 50% of judges are female.

Criminal offences are dealt with by the criminal sectors of courts at three levels. The first instance level are district courts (*rechtbanken*). There are nineteen such courts. Each court has a number of subdistrict venues, the so-called cantonal sector. There are 61 of these in total. The district courts differ greatly in size, which depends mainly on the number of inhabitants of the jurisdiction.

The second level is the court of appeal (*gerechtshof*), of which there are five. The highest level is the Supreme Court (*Hoge Raad*) in The Hague.

Unlike the other courts, the Supreme Court does not deal with the facts of a case, but reviews only the lawfulness of the judgments of lower courts and the manner of pro-

ceedings. In exceptional circumstances, the Supreme Court is the court of both first and last instance. Where members of Parliament, ministers and deputy ministers are to be tried for offences committed in the exercise of their functions, only the Supreme Court is competent to try these cases. Up to now, no such trial has ever taken place.

Not all judges are professional judges. Lawyers, legal scholars and other persons in possession of a law degree and who possess knowledge and experience of the criminal justice system may be appointed as substitute judges. In such capacity, they participate on a more or less regular basis in the administration of criminal justice, for which they receive a small remuneration. Through their participation, the case load of professional judges is reduced and courts may also benefit from their specific expertise.

There is no jury system in the Netherlands. Criminal justice is administered by legally qualified career judges and public prosecutors.

There is thus no participation by lay persons except in a single instance: the penitentiary division of the court of appeal in Arnhem, which hears penitentiary issues such as the refusal of early release, consists of three professional judges and two experts in behavioral sciences.

Judges are independent and no administrative body has competence or authority to influence court decisions. No administrative body is empowered to issue guidelines or to formulate and enforce a criminal policy directed at the judiciary. In the Dutch criminal justice system, penal order procedures by judges are unknown, as are guilty plea procedures, plea bargaining procedures or other consensual proceedings.

5.16 General court service

Infractions are tried by a single cantonal judge (*kantonrechter*) of the cantonal sector of a district court. Infractions dealt with by this judge are often infractions for which either the police or the public prosecutor had offered a settlement out of court but which has not been accepted by the offender. The judge gives his sentence orally and immediately following the closure of the public trial.

Crimes are tried either by a full bench of three judges, or by a single judge of a district court. The more complex and serious cases for which the public prosecutor requests a sentence of more than one year of imprisonment are dealt with by a full bench. If the public prosecutor considers the case to be a comparatively minor one, he can

prosecute before the police judge (*politierechter*), a single judge chamber of the district court. The police judge may not impose prison sentences exceeding twelve months. The police judge is entitled to refer a case to the full bench criminal division if he is of the opinion that a full bench would be more appropriate. Furthermore, nearly all economic crimes and environmental crimes such as infringement of the Trading hours Act or the Commodities Act are tried by a single judge (economic police court), and nearly all juvenile crime is tried by a single judge of the juvenile court (*kinderechter*), except in serious cases where a full bench specialist chamber deals with economic crimes and juvenile crimes.

The court of appeal sits in a three judge or one judge bench and reviews sentences. The review may lead to an acquittal, a more severe sentence or a confirmation of the sentence.

As a rule, the Supreme Court hears a case in last instance with a bench of five judges. It may hear a case with a bench of three judges as well, where the Supreme Court deems that the review of the case cannot result in cassation, or when no legal questions are at stake (sect. 75 JOA).

As a result of the 2002 reorganization of the judicial system, integral management has been introduced within each of the courts. Each court has its own collegial council, chaired by the court president. The council is charged with the general management and day-to-day running of the court.

The new members of the collegial council are appointed by Royal Decree and nominated by the Minister of Justice. The Council for the Judiciary makes a shortlist after consultation with the collegial council. The collegial council further consists of the head of the various sectors who may give directions as to how judges should go about their work. They allocate the case load for individual justices or court chambers.

Furthermore, the director of operations is a member of the council. This ensures unity within the court management.

Within this framework, the sector heads are charged with the day-to-day running of the sector. The collegial council decides on the number of sectors and allocate cases to those sectors. The collegial council may issue instructions and directions in order to improve the operation of the court. Tasks and powers of the collegial council are laid down in sections 15-28 of the Judicial Organization Act.

The courts are accountable to the Council for the Judiciary with regard to how they utilize their resources. The courts are not accountable to the Council for the way in which judicial decisions are adopted.

In its turn, the Council reports to the Minister of Justice for the way in which resources are utilized. The creation of autonomy of the judicial system means that the Minister is less directly involved. As a result, he is politically responsible only for the functioning of the judicial system as a whole.

5.17 The Supreme Court

The highest court in criminal matters is the Criminal Chamber of the Supreme Court. It is competent to review a decision (cassation) in cases where the law has been improperly applied, or the rules of due process and fairness of the procedure have been violated (sect. 79 JOA). Both the defendant and the prosecution service have the right to appeal in cassation to the Supreme Court against all criminal judgments of lower courts against which no other remedy is open, or against which such remedy has been open. Since 2002 the ban on cassation against an acquittal has been overturned.

Where the Supreme Court quashes the judgment due to an error of law, the case, as a rule, is remitted to the court whose judgment was quashed. In cases of a procedural error, the Supreme Court remits the case to another court. The court of remittance is bound by the decision of the Supreme Court.

The Supreme Court can also give a decision in cases which the parties themselves have not submitted. This is possible when the Procurator-General at the Supreme Court *sua sponte* submits a case to the Supreme Court to decide a matter of principle, even though no appeal in cassation has been lodged. This so-called cassation in the interests of law (*cassatie in het belang van de wet*) is intended to ensure the uniformity in the application of criminal law by the courts.

Furthermore, the Supreme Court is empowered to decide, upon the request of a convicted person, that his case, in which a final judgment has already been rendered, be retried. This review of a case is only possible if contradictory judgments in a case exist or new, previously unknown, facts in favor of the convicted person have emerged that cast serious doubt on the validity of the final judgment. This review is an extraordinary remedy against miscarriages of justice. The retrial is conducted by the court of appeal to which the case is referred (sects 457-481 CCP).

Precedents

The Supreme Court can play a guiding role in the application of criminal law at large through its powers to give decisions of principle on criminal law issues. Although there is no statutory rule on precedents and although due to their status as independ-

ent courts lower courts are not compelled to follow the views of the Supreme Court, they will generally do so, since the Supreme Court does not readily deviate from previous rulings.

5.18 Council for the Judiciary

In 2002, the judicial system in the Netherlands underwent a far-reaching reorganization. This move reinforced the constitutional position of the judiciary and further safeguarded the independence of the judge. A Council for the Judiciary (*Raad voor de Rechtspraak*) was established at the national level, while courts throughout the country were given the responsibility for running their own organization on the basis of an integral management structure.

The Council for the Judiciary is part of the judicial system but does not administer justice itself. It has assumed responsibility for a number of tasks from the Minister of Justice. These tasks are operational in nature and include the allocation of budgets, supervision of financial management, personnel policy, ICT and accommodation. The Council supports the courts in executing their tasks in these areas. It was also given the task of promoting the quality of the judicial system. The Council also acts as a spokesperson for the judiciary in public and political debates.

The Council's tasks relate to operational matters (in the broadest sense of the term), budgetary matters and the qualitative aspects of the administration of justice.

The Council has a pivotal role in terms of preparing, implementing and accounting for the judicial system's budget. The budget system is based on a workload-measurement system maintained by the Council. The Council encourages and supervises the development of operational procedures in the day-to-day running of the courts. The specific tasks in question are personnel policy, accommodation, ICT and external affairs. The Council has a range of formal statutory powers that enable it to carry out these tasks. For instance, the Council is empowered to issue binding general instructions with regard to operational policy, although it prefers to exercise this power as little as possible.

The Council is responsible for the recruitment, selection and training of judicial and court officials. It carries out its tasks in these areas in close consultation with the court councils. The Council has a significant say in appointing members to the court council.

The Council's task as it pertains to the quality of the judiciary system involves promoting the uniform application of the law and enhancing judicial quality. In view of

the overlap with the content of judicial rulings, the Council has no powers of compulsion in this area.

The Council has also a general advisory role. It advises the Government on new laws that have implications for the judicial system. This process takes place in ongoing consultation with the members of the court councils.

Although the Council has formal powers at its disposal, the relationship between the Council and the courts should not be seen as hierarchical. The Council sets itself the primary goal of supporting the courts in their tasks. In order to ensure that the various tasks are carried out properly, the Council consults regularly with court presidents, directors of operations, sector heads and the Board of Representatives (an advisory body made up of representatives from the courts).

The organization of the Council for the Judiciary is laid down in sections 84-90 of the Judicial Organization Act, and the tasks and powers of the Council are laid down in sections 91-104a JOA.

5.19 Recruitment

The main prerequisite to being eligible for training to become a judge is an excellent law degree. Candidates must also pass a psychological examination, as well as interviews with the National Selection Committee for the Judiciary, which consists of legal and non-legal professionals. The psychological test is an analytical/cognitive one, testing individual intelligence; whereas the interviews with members of the selection committee test communicative skills, the ability to make and motivate sound decisions.

This procedure takes eight weeks. Candidates who are selected are appointed by the Justice Minister as trainee with one of the nineteen courts.

Trainees are required to undergo six years of training. The training is a mix of theory and practice. The theory consists of courses provided by the magistrate's academy, the so-called study center for the administration of justice in Zutphen (*Stichting Studiecentrum Rechtspleging*).

During the six years training period, the trainee is required to undergo four years in service training (both within the court administration and within the prosecution service) and two years external training in a law office or a company or at a police office. The main aim of the external training is to provide the trainee with work experience in a different area of the legal profession. After four years in service training the trainee chooses either for a post within the judiciary or within the prosecution service.

At the end of the trainee period, the candidate is appointed as deputy prosecutor or deputy judge. After a year, they are appointed as prosecutor or judge.

There is a second route to becoming a judge or public prosecutor; so-called ‘outsiders’ are also recruited by the service. Outsiders are legal professionals (lawyers, academics, civil service officers) over the age of thirty with professional work experience of more than six years with an interest in becoming a judge or public prosecutor. They can apply for a position within the judiciary or prosecution service and are invited for interviews with the members of the National Selection Committee for the Judiciary. In the majority of cases, those candidates that pass selection by the Selection Committee serve for approximately a year as a deputy judge or deputy prosecutor in order to allow their competences and abilities to be assessed. After that year, the collegial council of the court or the Chief Public Prosecutor may recommend to the Government the candidate’s full appointment.

The promotion of judges to higher posts such as that of a vice-president of the court or that of an appellate judge is mainly based on work experience and outstanding legal and managerial skills. The same is also true for promotion within the prosecution service.

There are no criteria for promotion laid down in the law. Judges are appointed for life until they retire. The age of retirement is seventy years. Life tenure is seen as a means to support their independency. Public prosecutors do not have life tenure but are appointed for unlimited time. When they do not function well they can be dismissed (see section 5.12).

5.20 Further judicial agencies

Although the courts remain the prime institution for dealing with criminal cases, the prosecution service has increasingly been vested with adjudicatorial and dispositional powers.

The prosecution services were recently empowered to issue penal orders without any prior consultation with the criminal courts (see section 7.5).

D The probation service

5.21 Organization of the probation service

The Dutch Association for the Moral Improvement of Prisoners was established in 1823 as a private initiative, since which time the Dutch probation system has been extended by a number of (sometimes religious) associations, all of which have focused on the three main tasks of the probation service: cell visits, the provision of social enquiry reports, and the provision of aftercare.

In the past decades, reorganizations in the probation service (*reclassering*) have taken place in order to increase their efficiency in spite of budget cuts.

The present probation services cooperate in the Dutch Probation Foundation, which allocates the budget for probation activities over three probation agencies: the probation department of the Salvation Army – in particular dealing with homeless people and juveniles in multi problem situations – the probation department of the Mental Health Care Organization (*GGZ Nederland*) – dealing with alcohol- and drug addicted clients – and the National Probation Service (*Reclassering Nederland*) with ten regional offices covering all district court jurisdictions and around 1,350 employees.

The Foundation is governed by the 1995 Probation Rules. The Foundation's responsibility is to ensure that in each of the district court jurisdictions the statutory probation activities are performed by professional probation officers that possess an (academic) education in social work. For those activities, the Foundation receives an annual budget from the Ministry of Justice (approximately 140 million Euro).

Main functions

The main functions of the probation service are laid down in sections 8-12 of the 1995 Probation Rules:

- the provision of early help, consisting of provisional social enquiry reports on the offender to the police, the prosecution service and the judge in case the person in question has been arrested by the police and pre-trial detention is considered;
- the provision of social enquiry reports at the request of the criminal justice agencies, of the offender or on the initiative of the probation service in order to enable the agencies to make decisions;
- the provision of assistance and supervision for suspects or convicted persons;
- assisting someone with a suspended sentence or a conditional pardon to comply with the conditions imposed and to report to the judicial authorities on this com-

pliance. The probation officer can in case of compliance failure propose to revoke the suspended sentence or the conditional pardon;

- providing probation activities during aftercare;
- preparing and implementing task penalties and substitutes to imprisonment, such as electronic tagging, including supervision of compliance with task penalties and providing information to the competent authorities on compliance.

The probation service no longer offers probation activities in penitentiary establishments.

Role of volunteers

There are two kinds of volunteers assisting in probation activities:

- individual volunteers who, at the request of the probation foundation, cooperate in carrying out the statutory probation tasks; and,
- organizations of volunteers who initiate and develop projects which are closely related to the statutory probation activities.

E Sentence enforcement

5.22 Sentence enforcement agencies

National Agency of Correctional Institutions

The enforcement of custodial sentences is a statutory task of the prosecution service (sect. 553 CCP) but is actually carried out by the National Agency of Correctional Institutions of the Ministry of Justice (*Dienst Justitiële Inrichtingen*) operating a computerized cell-allotment system. The budget of the Agency is around 1,3 billion Euro.

The Agency has to ensure the safe, efficient and humane enforcement of custodial sentences and measures.

Strategic prison policy is developed by the Minister of Justice, who is politically accountable for the development of prison policy. The National Agency of Correctional Institutions of the Ministry of Justice translates strategic prison policy into operational policy. The policy is implemented by the prison governor and his assistants. The division between policy making and policy implementation enables prison

management teams to make their own decisions in personnel, financial and material matters, as each of the penitentiary establishments is required to manage its own budget (see chapter 10).

Central Fine Collection Agency

The enforcement of fines is carried out by the Central Fine Collection Agency (*CJIB*) under the supervision of the prosecution service. The agency collects fines for traffic violations and fines imposed by the courts. Furthermore, the agency implements the transactions and proposals by the police or the prosecution service for out-of-court settlements.

Crime should not pay. The public prosecutor, therefore, may request the court to confiscate the proceeds from crime. The prosecution service has a special office in Leeuwarden – the proceeds of crime office – to advise public prosecutors in these matters. In case the court decides to confiscate the proceeds of a crime, recovery is carried out by the Central Fine Collection Agency.

F The defense

5.23 Introduction

Although the defense lawyer is not an officer of the court, defense is considered vital for the proper administration of criminal justice in so far as the crime charged is a serious one.

For the suspect, defense counsel is of crucial importance. One of his main tasks is to legally support his client during the pre-trial, trial and appeal stages and to ensure that his client gets a fair trial. The defense lawyer is his client's counsel and the relation is based on trust. The aim of the defense is to provide his client with the best chance of realizing his legal rights as one of the trial parties.

The defense cannot be obliged to actively cooperate in the investigation of the case nor to provide the court with information on the case unless this is in the interest of his client.

A code of conduct exists for defense lawyers. The defense lawyer as a rule will represent the points of view of his client. He shall perform his task independently. He shall not act in a way that his freedom and independence in the exercise of his profession is jeopardized.

5.24 The Bar

Assistance in criminal matters and legal aid is provided by lawyers registered with a Dutch district court.

A university degree in law and further professional training is the legal qualification for registration. The number of registered lawyers at present in the Netherlands is about 14,000 (25% of whom are female). Registered lawyers practice their profession in a self-employed capacity.

There are around 3,000 law firms, the majority of which are small (< 20 lawyers). Relatively few lawyers specialize solely in defense work.

All registered lawyers have to be members of the Dutch Bar Association (*De Nederlandse Orde van Advocaten*). The General Board of the Association, under the presidency of the Dean, is elected by the members of the Assembly of Deputies, who are elected by the regional bar associations. The General Board and the local bar associations promote the ethical practice of law by registered lawyers, and may take disciplinary measures in this respect.

All registered lawyers are subject to disciplinary law regulations issued by the Association.

Disciplinary jurisdiction is exercised by Disciplinary Councils in the first instance, and by the Court of Discipline in appellate cases. Disciplinary sanctions may be imposed for a registered lawyer's acts and failures that are in conflict with the proper care lawyers have to provide to those whose interests have to be served, as well as for acts and failures that are unbecoming of a professional in a situation of trust etc.

Admission to the profession, the powers and duties of registered lawyers, the organization of the Bar and disciplinary law are regulated in the 1952 Bar Act.

In a strict sense, defense counsels are not bodies under public law, or even an official part of the criminal justice system. Such institutions as public defenders are unknown in the Netherlands. All lawyers are independent in the pursuance of their profession.

5.25 Legal aid

Under the Code of Criminal Procedure, a defendant is at all times entitled to choose one or more defense counsels. In principle, the defendant has to pay for any defense counsel chosen in this way.

The Code also allows assignment of defense counsel in cases involving crimes. In such cases, the fee is paid by the criminal justice authorities.

A counsel is assigned automatically in cases involving possible deprivation of liberty. Once a suspect has been detained in police custody, he is given legal assistance by the counsel on duty. Such an appointment is then confirmed *ex officio* by the president of the district court when the suspect is remanded in custody.

Furthermore, a defense counsel may be assigned by the Regional Legal Aid Council in order to represent a suspect with a low income. The suspect as a rule has to pay the Council a financial contribution proportionate with his income. The rules on legal aid are contained in the 1993 Legal Aid Act.

5.26 Qualifications of defense lawyers

The qualifications of defense lawyers are equivalent for all defense lawyers regardless whether they are state paid or privately paid lawyers. They must be in possession of a law degree and have completed a further four years of professional training.

After completing a four year bachelor and master degree at a university law faculty, would-be-lawyers can apply to a law firm for employment as a trainee lawyer. The term of a traineeship is three years, during which the trainee may act as a lawyer under the direction of an experienced lawyer, the mentor, in order to improve knowledge, acquire necessary skills and experience. At the beginning of the traineeship one is sworn in by the district court as a lawyer so that one has the right to pursue litigations in civil law suits or to serve as defense lawyer in criminal cases.

The Dutch Bar Association has developed a Professional Education Program for the Legal Profession which is mandatory for trainees in the first year of their traineeship. A written examination on the subject of this program has to be passed before the end of the traineeship. If not, the trainee is disbarred. Furthermore, in the second and third year of the traineeship a Continued Education Program for Trainees is to be followed.

The Professional Education Program encompasses nine components such as Code of Conduct, mediation, reading annual accounts and the mastering of skills necessary for a lawyer.

The Continued Education Program encompasses a number of courses which deepen legal and practical knowledge. Courses are offered on various subjects such as bankruptcy law, European law and environmental law.

Furthermore, education requirements exist such as participation in plea competitions and attendance of lectures.

6 Issues of criminal law

6.1 Definition of criminal offence

The Criminal Code does not give a definition of the concept of a criminal offence. It deals with the conditions that have to be met before an offender can be punished, and provides the statutory definitions of the different punishable conducts. The statutory definition of an offence contains the constituent elements of the criminal offence. The constituent elements must be summed up by the public prosecutor in his charge, and the presence of these elements must be proven by the facts presented by the prosecution service before a court may sentence the offender. Where a constituent element is missing in the charge, a discharge (*ontslag van rechtsvervolging*) must follow. Where the public prosecutor can not prove by evidence that the charge is matched by the facts, an acquittal (*vrijspreek*) must follow.

In practice an offender whose conduct falls within the statutory definition of an offence is criminally liable. In the charge the absence of defenses does not have to be summed up. The substantive criminal law legislator presumes that in most cases defenses will not apply. If there are indications that a defense may apply – in general the offender will raise a defense, where applicable – the court has to ascertain whether the defense applies. If so, the court has to discharge the accused.

The statutory elements of a criminal offence play an important role in substantive criminal law, due to the principle of legality.

6.2 Principle of legality

The principle of legality is established in the Criminal Code. Section 1 reads: “No conduct constitutes a criminal offence unless previously statutorily defined in criminal statutes”. A similar provision is laid down in the Constitution (sect. 16).

The legality principle is a guarantee against arbitrary administration of criminal justice, and offers a high degree of legal certainty. The principle guarantees that only the legislature may define criminal offences. The principle guarantees, moreover, that no court may create new criminal offences by an analogous interpretation of criminal law provisions.

The principle furthermore guarantees that new criminal law provisions may not be retroactive. The prohibition of retro-activity is not applicable if a new criminal provi-

sion replaces older ones, and the re-definition of the criminal offence is to the advantage of the offender or the reduction of the maximum sentence to be imposed is the result of a change of the legislators' views on the punishability of the offence. In these cases, the most favorable provision must be applied.

The principle of legality, furthermore, requires that only penalties specified by statutes may be imposed.

6.3 Applicability of Dutch criminal law

Sections 2-7 CC contain provisions on the applicability of Dutch criminal law.

Under the principle of territoriality, Dutch criminal law is applicable to anybody who commits a criminal offence on Dutch territory or on board of a Dutch vessel or aircraft outside the Netherlands.

Under the universality or protective principle, anyone who commits designated offences against the interest of the Dutch State or Dutch financial interests outside Dutch territory falls under Dutch criminal law jurisdiction.

Under the active nationality principle, Dutch criminal law is applicable to anybody of Dutch nationality who commits, outside Dutch territory, either a designated crime or an offence that under Dutch criminal law constitutes a crime and under the law of the country where the offence is committed is considered to be a criminal offence (the requirement of double incrimination). The designated crimes include, *inter alia*, offences against the security of the Dutch state and royal dignity. The active nationality principle includes the domicile principle. Dutch criminal law is applicable to someone of non-Dutch nationality who is resident in the Netherlands and who has committed a designated crime such as terrorism or a sexual crime like genital mutilation outside the territory of the Netherlands.

Furthermore, Dutch criminal law applies to anybody whose prosecution by a foreign state has been transferred to the Netherlands pursuant to a treaty conferring jurisdiction to prosecute in the Netherlands.

Finally, Dutch criminal law is applicable to a public official employed by a Dutch public service who commits, outside Dutch territory, serious offences involving abuse of office.

6.4 Classification of offences

All criminal offences are classified as either crimes or infractions. There is no clear and conclusive qualitative criterion (such as *mala in se* versus *mala prohibita*). The division is used for all criminal law statutes. Offences constituting a crime may only be defined by Acts of Parliament.

The classification of offences is decisive for deciding the court before which the criminal offence must be tried: crimes (as a rule) are tried by the police judge or a full bench of the district court, whereas infractions are tried by a cantonal judge (sect. 382 CCP). The classification, furthermore, is relevant, because an attempt to commit an infraction, or complicity as an accessory to an infraction, does not trigger criminal liability.

Minor traffic offences do not constitute a criminal offence but are an administrative offence, to be administered through an administrative procedure without direct access to a court. Such an administrative offence is administered by the police through an administrative fine. The maximum fine is € 340. The police officer's decision to impose an administrative fine is final if, within a certain period of time, no protest appeal is filed with the prosecution service. In the latter case, the public prosecutor has to re-examine the case and can revoke the police officer's decision. Where the public prosecutor reaffirms the administrative fine, an appeal is possible to the cantonal judge of the district court who acts as an administrative judge.

It is very likely that the administrative procedure in the near future will be extended to other minor offences. The court of appeal in Leeuwarden functions as the highest administrative appellate court in respect of administrative offences.

6.5 Legal definitions of some major crimes

Intentional homicide (sect. 287 Criminal Code): anyone who intentionally takes the life of another person is guilty of homicide and liable to a term of imprisonment not exceeding fifteen years or a fine of € 67,000.

Murder (sect. 289 Criminal Code): anyone who intentionally and with premeditation takes the life of another person is guilty of murder and liable to life imprisonment or a term of imprisonment not exceeding thirty years of imprisonment or a fine of € 67,000.

Assault (sect. 300 Criminal Code): physical abuse is punishable by a term of imprisonment not exceeding three years or a fine of € 16,750.

Theft (sect. 310 Criminal Code): a person who removes any property belonging in whole or in part to another, with the object intention of unlawfully appropriating it, is guilty of theft and liable to a term of imprisonment not exceeding four years or a fine of € 16,750.

Robbery (sect. 312 Criminal Code): theft preceded, accompanied or followed by an act of violence or threat of violence against persons, committed with the object of preparing or facilitating the theft or, when the offender is caught red-handed, of either securing escape for himself or for others participating in the serious offence, or of securing possession of the stolen property, is punishable by a term of imprisonment not exceeding nine years or fine of € 67,000. A term of imprisonment of not more than twelve years or a fine of € 67,000 shall be imposed where the offence is committed during the hours of night in a dwelling or where the offence is jointly committed by two or more persons or where serious bodily harm ensues as the result of the act.

6.6 Minimum age of for criminal responsibility

The minimum age of criminal responsibility is twelve years. Children under the age of twelve years of age cannot be prosecuted for criminal offences, but Civil Code measures, such as a referral to a juvenile treatment center, may be applied.

To juveniles between twelve and sixteen years of age, juvenile criminal law is applicable.

To juveniles aged between sixteen and eighteen, juvenile criminal law is applied in principle, but the juvenile court may apply adult criminal law where it finds grounds to do so by reasons of the gravity of the offence, the character of the offender, or the circumstances in which the offence was committed. For the same reasons, adults aged between 18 and 21 may face juvenile criminal law instead of adult criminal law. The statutory age of adulthood is 18 years of age.

There is no statutory maximum age of criminal responsibility, although old age may be taken into consideration by the public prosecutor when deciding whether or not to prosecute a crime.

6.7 Causation

Although, according to many statutory definitions of offences, the causing of harm of a particular kind constitutes a criminal offence – see e.g. the statutory definition of murder – the Criminal Code does not define the circumstances under which an act may be perceived as the cause of a result.

The criterion for causation is developed in the Supreme Court's case law. Initially, the Court used as the criterion for causation the reasonable foreseeability of the result as the criterion for causation.

Since 1978, the Court has applied the criterion of reasonable imputability in its case law. The foreseeability of the result is still an important factor, as is the factor that no other act may predominantly have influenced the result (HR 12 September 1978, *NJ* 1979, 60).

6.8 Mental elements

The statutory definition of crimes contains as a rule a mental element (e.g. intent or negligence). This mental element must be present in order to trigger criminal liability, and must be proven by the public prosecutor before the court may sentence the offender. Absence of the evidence or of the presence of the mental element leads to an acquittal. The concept of strict liability is unknown in Dutch criminal law.

Where the mental element is not part of the statutory definition of the criminal offence, which is as a rule the case for infractions, the mental element is presumed to be present unless there are indications to the contrary.

The absence of the mental element in such a case leads to a discharge due to the absence of criminal liability.

It is a key principle of Dutch substantive criminal law that there is no criminal liability without culpability or blameworthiness (*geen straf zonder schuld*).

6.9 Culpability

Two forms of culpability are distinguished: intent (*opzet*) and negligence (*schuld*).

Intent includes acting willingly and knowingly, as well as acting in the awareness of a high degree of probability. Intent may be present in the form of a *dolus eventualis*, which is the case where the offender willingly and knowingly accepts a considerable risk that a certain result may ensue. The *dolus eventualis*-doctrine is often applied in court practice.

Negligence includes both conscious and unconscious negligence. The former is present when the offender is aware of a considerable and unjustifiable risk that the element exists or will result from the act, but thinks on unreasonable grounds that the risk will not materialize.

Unconscious negligence is present when the offender was not aware of the risk, but should have been aware of it (carelessness or thoughtlessness).

6.10 Justification and excuse

The Criminal Code contains a number of provisions establishing defenses. In addition to these statutory defenses, there are two non-statutory defenses, which have been developed in the case law of the Supreme Court.

The Criminal Code does not distinguish between justification and excuse. In both cases, according to the Criminal Code, the offender is not criminally liable. The distinction between justification and excuse is however made in criminal law doctrine.

At present, the prevailing view is that justifications concern the lawfulness of the act whereas excuses concern the blameworthiness. If grounds for justification are present, the violation of the law does not constitute a criminal offence. If grounds for excuse are present, the violation of the law constitutes a criminal offence, but the offender cannot be blamed for having committed the offence.

All defenses may be invoked with respect to all offences; no single offence is excluded.

The statutory grounds for justification are:

- necessity (sect. 40 Criminal Code);
- self-defense (sect. 41 Criminal Code);
- public duty (sect. 42 Criminal Code); and
- obeying the official order of a competent authority (sect. 43 Criminal Code).

The requirements of subsidiarity and proportionality have to be met when accepting a justification defense.

The statutory grounds for excuse are:

- insanity (sect. 39 Criminal Code);
- duress (sect. 40 Criminal Code);
- excessive self-defense (sect. 41(2) Criminal Code); and
- obeying an order issued without authority (sect. 43(2) Criminal Code).

Two additional defenses have been developed in the case law. The first, the absence of substantive unlawfulness, is a justification; the second, the absence of all blameworthiness due to ignorance (mistake of facts or mistake of law), is an excuse. In both cases, according to the Criminal Code, the offender is not criminally liable.

6.11 Justification defenses

Necessity (noodtoestand)

Section 40 Criminal Code reads: Anyone who commits an offence as a result of a force he could not be expected to resist is not criminally liable.

On the basis of the history of the Code, the Supreme Court ruled that this section includes necessity.

Necessity is a situation in which a person has to choose between conflicting duties. "If the person in such a situation obeys the most important one and violates by doing so the criminal law his act is justified" according to the Supreme Court. In this formulation, the principles of subsidiarity and proportionality are applied.

Self-defense (noodweer)

Section 41 Criminal Code reads: Anyone who commits an offence where this is necessary in the defense of his person or the person of another, his or another person's integrity or property against immediate unlawful attack is not criminally liable.

As a rule, one may not take justice into one's own hands, but in the case of an immediate unlawful attack one may repel force by force, provided that there is no other convenient or reasonable mode of escape (subsidiarity). The amount of force must be reasonable (proportionality). In assessing whether the force was reasonable, the criminal court may take the personal characteristics of the accused into consideration.

Public duty and official orders (wettelijk voorschrift en ambtelijk bevel)

Section 42 Criminal Code reads: Anyone who commits an offence in carrying out a legal requirement is not criminally liable.

Section 43 Criminal Code reads: Anyone who commits an offence in carrying out an official order issued by a competent authority is not criminally liable.

In both cases, impunity is guaranteed because the person acted on the authority of a governmental body or public officer.

Absence of substantive unlawfulness (afwezigheid van materiële wederrechtelijkheid)

This justification defense was developed by the case law of the Supreme Court. In 1933, the Court ruled that, even though unlawfulness is not an element in the statutory definition of the offence (thus unlawfulness does not have to be proved), the offender cannot be convicted where his act does not result in a substantive unlawfulness. This is the case when an act (which is in conflict with the law) serves the same interest as is guaranteed by the law. The legal impact of this non-codified justification is limited. After 1933, the Court did not repeat its ruling.

6.12 Excuse defenses

Insanity (ontoerekenbaarheid)

Section 39 Criminal Code reads: Anyone who commits an offence for which he cannot be held responsible by reason of a mental defect disorder or mental disease is not criminally liable.

No statutory standards or case law standards are set for determining insanity, but in practice a person is not held responsible for his criminal conduct if at the time of such conduct, as a result of a mental defect, disorder or disease, he lacks substantial capacity either to appreciate the wrongfulness of his conduct, or to bring his conduct into conformity with the requirements of law.

In assessing whether the offender cannot be held responsible, the court makes use of reports by psychiatrists.

Duress (overmacht)

Section 40 Criminal Code encompasses both necessity and duress. An offender who acts under the pressure of an external force he could not reasonably resist is excused. The external force may be an unlawful threat from another person or a natural force. If someone acts under the pressure of a force caused by his moral conscience, he does not have the defense of duress. In case of duress, the will of the offender is impaired to such a degree that he can not be blamed for his act.

Excessive self-defense (noodweerexces)

Section 41(2) Criminal Code reads: Anyone exceeding the limits of necessary defense, where such excess has been the direct result of a strong emotion brought about by the attack, is not criminally liable.

When the unlawful attack causes strong emotions such as rage, anger, fear or desperation, the person attacked may not react properly by using a reasonable mode of escape. Due to the emotions, he may overreact and use an amount of force that is disproportionate. Due to the strong emotions, the offender's will is impaired so that he can not be blamed for his act.

Obeying an unlawful order (onbevoegd gegeven ambtelijk bevel)

Section 43(2) Criminal Code reads: Obeying an official order issued without authority does not remove criminal liability unless the order was assumed by the subordinate in good faith to have been issued with authority and he complied with it in his capacity as subordinate.

Good faith may be both subjective and objective. The latter means that there is still a responsibility on the subordinate to be prudent, and in case of doubt to refrain from obeying the order.

Absence of all blameworthiness (afwezigheid van alle schuld)

In line with the principle 'no criminal liability without blameworthiness' in the Supreme Court's case law the excuse of absence of all blameworthiness has been developed in the Supreme Court's case law. It supplements the codified defenses. Absence of all blameworthiness may be due to ignorance of facts, or ignorance of law.

The ignorance of facts must be reasonable. The offender must have done all he reasonably be expected to do in order not to be ignorant. If the ignorance is due to indolence, frivolity or indifference, there is no absence of all blameworthiness.

The ignorance of law functions as a mitigation of the presumption that everyone has to know the law. The ignorance is only excused when the offender has actively sought expert advice on law by a person or agency having such an authority that he could reasonably trust the reliability of the advice, but he was misinformed. Misinformation by the police, a notary, a civil servant or public official of a ministry may lead to excusable ignorance. Misinformation by his counsel does not lead to excusable ignorance of the offender.

6.13 Inchoate offences

Two inchoate offences are to be distinguished.

Attempt

An attempt to commit a crime is punishable where the offender manifests his intention by initiating the crime (sect. 45 CC). In case of attempt, the statutory principal penalty for the crime is reduced by one third. This sentence reduction has two reasons: less danger to society has materialized than if the crime had been completed, and the reduction may be an incentive for the offender not to see the crime through to the end.

The Code does not define where the preparation of a crime starts and the execution of it ends. The Supreme Court's case law seems to follow the objective theory: an act, which in its outward appearance should be regarded as being directed to the consummation of the crime, is an act initiating the crime.

There is no attempt if the crime has not been completed by reasons only of circumstances dependent on the offender's will, the so-called voluntary withdrawal (sect. 46b CC). The offender's motives for not completing the crime are irrelevant.

There are two reasons for the impunity of this so-called voluntary withdrawal: the offender is not as bad as he initially appeared to be, and impunity may be an incentive not to complete the crime.

Preparation

Preparation does not fall within the legal scope of attempt since there is no initiation of the crime. For the prevention of crimes, it was felt to be unsatisfactory that the police could not arrest offenders preparing serious crimes. In 1994, therefore, the preparation of serious crimes that carry a statutory prison sentence of not less than eight years were criminalized (sect. 46 CC). Preparation of such a crime is punishable where the offender intentionally obtains, manufactures, imports, transits, exports or has at his disposal, objects, substances, monies or other instruments of payment, information carriers, concealed spaces or means of transport clearly intended for the joint commission of such a crime.

In the case of preparation, the statutory maximum penalty for the crime is reduced by one half or to fifteen years when the statutory maximum penalty is life sentence, since no or less danger for society has materialized.

There is no preparation where the crime has not been completed only by reason of circumstances dependent on the offender's will (sect. 46b CC).

6.14 Complicity

Complicity is the involvement in criminal offences as principal or as accessory before and during the fact.

Principals are those who commit a criminal offence, either personally or jointly with another, or who cause an innocent person to commit a criminal offence and those who, by means of gifts, promises, abuse of authority, use of violence, threat or deception or providing the opportunity, means or information, intentionally solicit the commission of a crime (sect. 47 CC).

Accessories to crimes are those who intentionally assist during the commission of a crime and those who provide the opportunity, means or information to commit the crime (sect. 48 CC).

Accessory to infractions is not punishable. In the case of complicity as an accessory, the statutory maximum of the principal penalty is reduced by one third. In case the offence carries a life sentence, the accessory may be sentenced to an imprisonment of twenty years maximum.

6.15 Corporate criminal liability

Criminal liability is not restricted to natural persons. Private or public corporate bodies, such as provinces or municipalities and its public organs, can also be held liable for committing an offence (sect. 51 CC). The State as public corporate body enjoys criminal immunity. State agencies, however, like ministries, fall within the scope of section 51 CC.

The Supreme Court has ruled that public corporate bodies such as provinces or municipalities also enjoy criminal immunity where criminal offences have been committed in the execution of tasks exclusive to the authority of public corporate bodies. The Supreme Court ruled, furthermore, that where a public corporate body is immune from prosecution, an officer of such a body also enjoys that immunity.

In recent years two major events involving numerous deaths and serious injury have occurred for which local government were accused of criminal negligence due to the neglect of their public duties: the firework disaster in Enschede in 2000 and the fire in a pub in Volendam on New Year's Eve 2001. Both the public corporate bodies and

the local governments, however, were immune for prosecution due to the Supreme Court ruling. At present, a bill is pending to lift the immunity of public corporate bodies and to make them not only politically but also criminally accountable in such scenarios.

In cases where a criminal offence has been committed by a corporation, prosecution may be instituted against the corporation and/or against the persons in the corporation who have ordered the commission of the criminal offence and against those in control of such unlawful behavior. A person is considered to be in control when he is in the position to decide that the act takes place and accepts the actual performance, or when he is in the position to take measures to prevent the act but fails to do so and consciously takes the risk that the prohibited act is performed. Both the person and the corporate body may be sentenced for the offence.

A corporate body commits a criminal offence if the corporation itself or the management is in the position to control the occurrence of the criminal activities and, moreover, if it turns out in the course of the events that these activities had been accepted by the corporate body.

6.16 Double jeopardy

Double jeopardy or successive prosecutions for the same act are prohibited by section 68 Criminal Code, which reads: “No person may be prosecuted twice for an act for which a final judgment has been rendered by a (Dutch) court, except in cases of a review decision by the Supreme Court”. The Code does not define what is meant by act.

According to the Supreme Court’s case law, where one act constitutes more than one criminal offence, each of them can be prosecuted, provided the offences are different in the objective of prohibition and in the nature of the blame that can be imputed to the offender, e.g. a joy-rider who drives dangerously can be prosecuted both for the offence of joy-riding and for the offence of dangerous driving.

6.17 Statute of limitations

Time limits can bar the prosecution of a criminal offence. The rationale for the time limits is related to the reduced societal need to punish the offender, and the difficulties in gathering evidence after a long lapse of time. The more serious the offence, the longer the period of limitation is. For the most serious crimes there is no statute of limitations because for these crimes the rationale for the time limits is not applicable.

New technologies like DNA techniques diminish the difficulties in gathering evidence. Furthermore, the reasoning that the societal need to punish the offender has decreased over the course of time is not convincing in cases of more serious crimes.

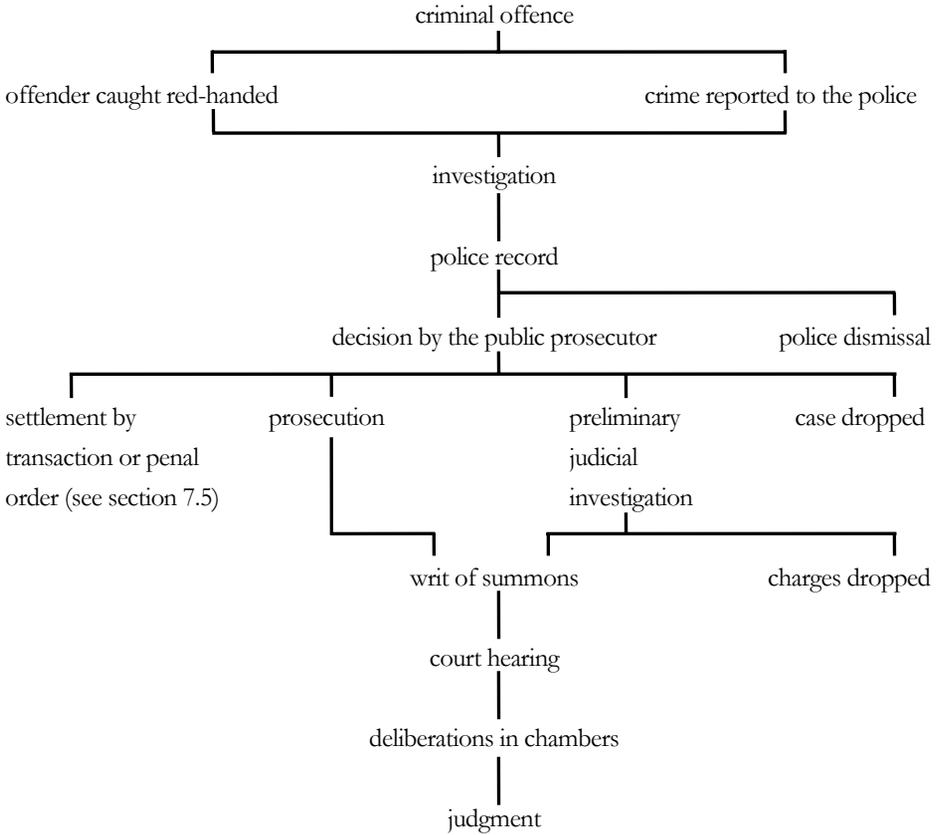
According to section 70 CC, the statute of limitation ranges from three years for all infractions, to twenty years for crimes which carry a statutory punishment of more than ten years of imprisonment. The time limits are six and twelve years for crimes which carry statutory imprisonment of less than three and less than ten but more than three years respectively. There is no statute of limitation for crimes carrying a life sentence. Exceeding the time limits leads to a dismissal of the case.

The time limits for the enforcement of the sentence are one-third longer than the time limits for the prosecution (sect. 76 CC).

7 Issues of procedural law

A The pre-trial phase

Scheme of the criminal procedure in first instance



7.1 Pre-trial investigation

A criminal procedure for a court in first instance comprises two phases: the pre-trial investigation phase and the public trial phase.

There are two kinds of pre-trial investigations:

- the investigation by the police under the direction of a public prosecutor; and
- the preliminary judicial investigation by an investigating judge.

7.2 Police investigation

The criminal procedure is initiated by the pre-trial investigation carried out by the police as soon as the police are informed of a criminal offence. The purpose of the pre-trial investigation is to gather information on the offence and the suspect. A suspect is anyone who may reasonably be suspected of having committed the offence. The police have the right to question any person in relation to the offence, whether or not this person is a suspect. However, no one is obliged to answer questions put by the police.

The police prepare a written record of the questioning of the suspect and other persons and of other relevant findings of facts. The written records are prepared by the police under oath, and may be used as evidence by the court. The police are authorized to carry out coercive measures such as arrest, bodily search and search of the premises when the legal prerequisites to do so exist.

7.3 Investigative methods

The Code of Criminal Procedure does not give a systematic description of investigative measures, nor provide statutory rules for all investigative methods used by the police.

Some statutory rules exist concerning the interrogation of the offender by the police and concerning investigative methods of a coercive nature such as the use of DNA-tests for the identification of the offender, or the interception of (tele-)communication. Other important investigative methods, such as the interrogation of witnesses or the application of technical means of investigation such as fingerprints, confrontation through the Oslo-method and the use of dogs for a search have recently been given a statutory basis.

The admissibility of these investigative methods previously had been based on the Supreme Court's case law.

Under Dutch law, before a criminal investigation may be started and investigative measures applied, there must be a reasonable suspicion that a criminal offence has

been committed. In recent years, the police have more and more focused on the gathering of information about networks, groups and individuals especially in order to know what criminal activities are being planned, thus before a criminal offence has been committed, so-called pro-active policing. Pro-active policing methods and covert policing methods like surveillance, infiltration and the handling of informants have recently acquired a statutory basis in the Code of Criminal Procedure by the 2000 Special Powers of Investigation Act.

When the police investigation is completed, the written records are forwarded to the prosecutor for a decision on prosecution.

7.4 Investigating judge

The role of the investigating judge in the pre-trial phase was reduced in the 2000 Act on the Revision of the Judicial Investigation. At present, he performs two functions, namely in determining whether a suspect should remain in pre-trial detention for a period of up to fourteen days (see section 7.7), and in (further) investigating the crime.

Judicial preliminary investigation

During the judicial preliminary investigation by the investigating judge there is a greater degree of equality of arms between the defense lawyer and the public prosecutor, and there are more possibilities for the defense counsel to play an active role.

The judicial preliminary investigation is more open than the pre-trial police investigation – although it may be that this investigation is kept secret for the suspect in the interest of the investigation – and the suspect has more rights than during pre-trial police investigations.

During the judicial preliminary investigation, the defense counsel has the right to attend the hearing of witnesses and experts by the investigating judge, unless prohibited by the interests of the investigation. He can suggest questions to be put by the investigating judge. Where the defense counsel is not present at the hearing, he will be informed as soon as possible of the content of the proceedings unless this is in conflict with the interests of the investigation. During the judicial preliminary investigation, the judge has full powers to decide on the investigative activities to be carried out, and on whether the questions put by the defense counsel need to be answered by the witnesses and experts. However, the defense counsel can play an active role. To give an example; when during a judicial preliminary investigation a reconstruction is carried

out, the defense counsel can ask the judge permission to give instructions, to give further information or to order that certain remarks are registered in the files. The defense counsel can request additional witnesses or experts within reasonable limits. When the investigating judge turns down the request, an appeal is possible. In the judicial preliminary investigation the defense counsel has many more rights than during the pre-trial police investigations. The main reason for this is that the evidence is collected during the judicial preliminary investigations. Witnesses and experts are heard under oath by the investigating judge and their statements are recorded in the files so that the court does not have to hear those witnesses and experts during the court trial, but can rely upon the files. That reduces the length of the court trial considerably. Therefore, the defense counsel is expected to play an active role in the judicial preliminary investigations.

7.5 Prosecutorial decisions

When the police investigation or the preliminary judicial investigation is terminated, the files are forwarded to the prosecutor for a decision. He can decide:

- to drop the case;
- to settle the case by means of a transaction or a penal order; or
- to issue a writ of summons for the offender.

Non-prosecution

The power to prosecute resides exclusively with the prosecution service. No prosecutorial power is granted to private persons or bodies, not even when the prosecution service declines to prosecute.

This prosecution monopoly does not require the prosecution service to prosecute every crime brought to its notice.

The prosecution service may decide not to prosecute in cases where a prosecution would probably not lead to a conviction due to lack of evidence, or for technical considerations (technical or procedural waiver).

The prosecution may also decide not to prosecute under the expediency principle. The expediency principle laid down in section 167 CCP authorizes the prosecution service to waive (further) prosecution ‘for reasons of public interest’.

In appropriate cases, the prosecutor can decide conditionally to suspend prosecution. The suspended non-prosecution has no statutory footing, and is therefore theoretically dubious, but it is generally accepted that the prosecution service is allowed to suspend a prosecution. Explicit general or special conditions for a suspended prose-

cution do not exist, but in practice the prosecutor imposes conditions similar to the conditions attached to a suspended sentence.

Prior to the late 1960's, the discretionary power to waive (further) prosecution was exercised on a very restricted scale.

Thereafter, however, a remarkable change in prosecution policy took place. Research on the effects of law enforcement coupled with the limited resources of law enforcement agencies revealed that it was impossible, undesirable, and in some circumstances even counter-productive to prosecute all offences investigated.

Gradually, the discretionary power not to prosecute for policy considerations began to be exercised more widely.

To harmonize the utilization of this discretionary power, the head of the prosecution service, the Board of Prosecutors General, regularly issues national prosecution guidelines. Public prosecutors are directed to follow these guidelines except where there are special circumstances in an individual case.

Grounds for non-prosecution

In one of every ten files forwarded by police to the public prosecutor a decision to waive a prosecution is taken.

In 50% of these cases there are technical legal reasons for not submitting the case to court. For the rest, a waiver takes place due to the application of the expediency principle. The main reasons to apply the expediency principle are:

- measures other than penal sanctions are preferable (mainly disciplinary sanctions or administrative or private law measures); and
- prosecution will be disproportionate, unjust or ineffective because
- the crime is of a minor nature;
- the suspect's contribution to the crime was minor;
- the crime has a low degree of punishability; or
- the crime is old;
- the suspect is too young or too old;
- the suspect has recently been sentenced for another crime;
- the crime has negatively affected the suspect himself (victim of his own crime);
- the health conditions of the suspect;
- rehabilitation prospects of the suspect;
- change of circumstances in the life of the suspect;
- suspect cannot be traced;
- corporate criminal liability;
- the person in control of the unlawful behavior is prosecuted, not the perpetrator;

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- the suspect has paid compensation;
- the victim has contributed to the crime; and
- a close relation between the victim and the suspect, and prosecution would be contrary to the interest of the victim.

A relative high number of waivers concern the crimes of participation in a criminal organization (28%), rape (27%), insult of a public officer (21%) and intentional receiving (23%).

The grounds for non-prosecution due to technicalities can be:

- wrongly registered as suspect by the police;
- insufficient legal evidence for a prosecution;
- inadmissibility of a prosecution because of the expiry of the time limit, the decease of the suspect, the absence of a complaint in cases of private complaint offences, the non-observance of undue delay (sect. 6 ECHR) or suspect not yet criminally liable (< 12 years of age);
- the court does not have a legal competence over the case;
- the act does not constitute a criminal offence;
- the offender is not criminally liable due to a justification or excuse defense; and
- the evidence has been illegally obtained.

Public prosecutors are not obliged to motivate their decisions not to prosecute due to technicalities or due to policy considerations. They are, however, obliged to categorize their decisions under one of the reasons or grounds for non-prosecution previously mentioned. This categorization is no guarantee for a uniform application of the reasons for non-prosecution. However, it provides information on the prosecution policy pursued in each of the nineteen prosecutorial jurisdictions, and provides insight into the difference in these prosecution policies. It is one of the means to harmonize these prosecution policies.

In the early 1980's, the proportion of unconditional waivers on policy considerations was relatively high. Approximately one quarter of all crimes cleared were not prosecuted for policy reasons. The rationale was that prosecution should not be automatic, but should serve a concrete social objective. Such a high proportion of waivers on policy grounds faced serious criticism. The prosecution service was instructed to reduce the number of unconditional waivers by making more frequent use of conditional waivers, reprimands or transactions.

Today, the percentage of unconditional policy waivers has dropped to around 5%. The decrease of the percentage of unconditional waivers has not led to an increase in number of cases tried by a criminal court. This is because an increasing number of cases were either conditionally waived or settled out of court with a transaction.

Transaction

Transaction can be considered as a form of diversion in which the offender voluntarily pays a sum of money to the Treasury, or fulfils one or more (financial) conditions laid down by the prosecution service in order to avoid further criminal prosecution and a public trial.

The opportunity to settle criminal cases by way of a transaction has long existed. The first opportunity to settle a case financially was created in 1838 for offences which carry no other statutory sentence than a fine. The offender who volunteers to pay the maximum statutory fine may settle his criminal case by paying (sect. 74a CC). The second opportunity to settle a case was adopted in 1921. The public prosecutor may, before trial, propose one or more conditions in lieu of criminal proceedings.

Prosecution is in effect suspended until such time as the conditions are met, after which the right to prosecute lapses.

However, until 1983 this opportunity to settle a case financially was exclusively reserved for misdemeanors in principle punishable only with a fine. Following the recommendations of the Financial Penalties Committee, the Financial Penalties Act of 1983 expanded the scope of transactions to include crimes which carry a statutory prison sentence of less than six years (sect. 74 CC).

The restriction that transaction is excluded for crimes carrying a statutory prison sentence exceeding six years has a limited impact. The overwhelming majority of crimes carry a statutory prison sentence of less than six years.

The following conditions may be set for a transaction:

- the payment of a sum of money to the State, the amount being not less than three Euro and not more than the maximum of the statutory fine;
- renunciation of title to objects that have been seized and that are subject to forfeiture or confiscation;
- the surrender of objects subject to forfeiture or confiscation, or payment to the State of their assessed value;
- the payment in full to the State of a sum of money or transfer of objects seized to deprive the accused, in whole or in part, of the estimated gains acquired by means of or derived from the criminal offence, including the saving of costs;

- full or partial compensation for the damage caused by the criminal offence;
- the performance of non-remunerated work or taking part in a training course of 120 hours.

Compliance with the conditions set by the prosecution service does not imply that the offender admits that he has committed a criminal offence.

Acceptance of the public prosecutor's offer to settle a case is as a rule beneficial to the offender: he avoids a public trial, the transaction is not registered in the criminal record, and he is no longer uncertain about the sentence. On the other hand, by accepting the transaction he gives up the right to be sentenced by an independent court with all associated legal guarantees (sect. 6 ECHR). The acceptance must be made in free will without constraint.

The almost unlimited power given to the prosecution service in 1983 to settle criminal cases by a transaction without the intervention of a court has been strongly criticized. The most important criticism was that the increased transaction opportunities introduced a plea-bargaining system, represented a breach of the theory of the separation of powers, undermined the legal protection of the accused, favored certain social groups, and entrusted the prosecution service with powers which should remain reserved to the judiciary. Furthermore, it was feared that with nearly ninety percent of all crimes brought within the sphere of the transaction, the public criminal trial, with its safeguards for the accused, would become the exception and not the rule.

Despite this criticism, the introduction of the broadened transaction was a great success. More than one third of all crimes dealt with by the prosecution service are now settled out of court by a transaction. This is in line with the national criminal policy plan, which formulated the target that one-third of all prosecuted crimes be settled by way of a transaction.

Transactions for crimes seem to be very popular, both for the prosecution service and the offender. They save the prosecution service and the offender time, energy and expenses, and furthermore protect the offender against stigmatization. Quite often, high transaction sums for environmental crimes committed by corporations are accepted in order to avoid negative publicity.

To minimize the risk of arbitrariness and lack of uniformity in the application of transactions, the Board of Prosecutors General has over the years issued guidelines for the common crimes for which transaction is most frequently used, relating to the principles to be taken into consideration regarding transaction and prosecution.

Penal order

A weak point of the transaction is that non-compliance automatically leads to the issuing of a writ of summons and a trial. This automatism creates a lot of work for the prosecution service and the court. To avoid this, the prosecution service statutorily was recently vested with the power to impose sentences and orders without intervention by the court (sects 257a-257h CCP). In a so-called penal order (*strafbeschikking*), the prosecution service may impose:

- a task penalty to perform non-remunerated work or compulsory participation in a training course lasting 180 hours;
- a fine;
- a withdrawal from circulation of seized objects;
- an order to pay to the treasury a sum of money to benefit the victim;
- the withdrawal of a driving license for a period of up to six months.

Furthermore, the order may consist of instructions to be complied with by the offender. Those instructions may not restrict the offender's freedom of religion or his civil liberties. The instructions may consist of:

- the surrendering of objects that may be eligible for forfeiture or confiscation;
- the payment to the treasury of a sum of money that is equal to the profit of the crime;
- the payment of an amount of money to a public fund the aim of which is to support victims of crimes. The amount of money may not be higher than the maximum statutory fine set for the offence; or
- compliance with specifically-designed instructions during a probationary term of one year maximum.

Before the public prosecutor may impose a sentence, he has to hear the offender in person or by telephone. In cases where the public prosecutor intends to impose a fine or compensation order of more than € 2,000, the offender is assigned a defense counsel for the hearing. For the imposition of orders, the offender does not have the right to be heard by the public prosecutor. The sentence or order becomes final unless the offender objects either in person at the public prosecutor's office or by letter. In such cases, a court trial will take place (sect. 257e CCP).

The main purpose for this law reform was to extend the capacity of the criminal justice system by increasing the prosecutorial power to divert cases and to settle cases out of court.

The penal order may be imposed for infractions and for crimes which carry a statutory prison sentence of six years or less.

The right of the prosecution service to impose a penal order will be gradually implemented. Until 2012, the transaction and the penal order will co-exist.

The writ of summons

When a criminal case has not been settled out of court, the prosecutor will summon the suspect to appear in court. The summons comprises the charge (*tenlastelegging*) and a list of witnesses to be *sub-poenaed*.

The public prosecutor is truly *dominus litis*. The trial judge has no control over the content of the charge. The prosecutor may decide to charge the suspect with a less serious offence (e.g. by disregarding aggravating circumstances) despite the existence of sufficient evidence to charge the suspect with a more serious crime, or may limit the charge to certain of the offences committed by the suspect. The court is informed in an informal way about the other offences committed (*voeging ad informandum*). At the imposition of sentence, the court may consider these non-charged offences, provided that the suspect does not deny them and the offence can be proved.

The trial stage begins as soon as the prosecutor has issued a summons.

7.6 Character of the pre-trial phase

The pre-trial phase has a moderate inquisitorial character. Specific inquisitorial elements are present when coercive measures such as bodily searches, searches of the premises or telephone interception are applied.

The inquisitorial character is tempered by provisions providing that the offender has the right to be assisted by a defense counsel and the right to communicate without supervision of his counsel. The suspect is furthermore informed of the progress of the investigations in the pre-trial phase, unless this information would hamper the proper conduct of the investigation.

Mini-investigation

Since February 2000, the inquisitorial nature of the pre-trial investigation has been weakened by the adoption of an accusatorial element. Since then, a suspect, against whom a pre-trial investigation by the police or public prosecutor is running, and his defense counsel have the right to address the investigating judge with a reasoned request to carry out one or more specified investigations (sects 36a-36e CCP).

In order to avoid unreasonable and rash requests the suspect has to name the concrete investigations to be carried out (e.g. the interrogation of Mr. X as witness or expert witness or to carry out a reconstruction) and to mention what interest he has in having them carried out.

The right of the suspect to request this so-called mini-investigation can interfere with the investigation by the police and the public prosecutor. Therefore, the investigating judge can refuse such a request taking into account all relevant circumstances such as the actual state of the investigation, the interests of the suspect or an objection by the public prosecutor (who shall be informed by the investigating judge of the request). The investigating judge has large discretionary powers either to turn down the request or to partially comply with the request. He can reduce the number of witnesses whose interrogation has been requested, because the number is unreasonably large or because the interrogation of a witness is considered to be irrelevant.

A mini-investigation is one of the means to improve the fairness of the criminal procedure. A suspect has an interest in presenting possible evidence in his favor to an independent judge at the earliest possible stage.

The main reason for introducing this right to request a mini-investigation has been that it partly counterbalances the drastic extension of powers of the police and prosecution service in the pre-trial investigation in recent decades.

B Special issues

7.7 Arrest and detention before and pending trial

Deprivation of liberty before and whilst awaiting trial of a person suspected of having committed a criminal offence can be divided into five phases:

- police arrest in order to be questioned;
- police custody;
- remand in custody;
- remand detention;
- detention pending trial.

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The decision of police arrest and police custody rests with the public prosecutor or a senior police officer if seeking the permission of the prosecutor would cause undue delay.

The decision to remand a suspect into custody, remand detention and detention pending trial rests with the judiciary, a single judge or a full bench of the court. The latter three phases form the pre-trial detention; the first and second phase are not part of the pre-trial detention.

Police arrest

Police-arrest (*aanhouding*, sects 53-54 CCP) is possible for any offence where offenders are caught red-handed, or otherwise for crimes which carry a statutory prison sentence of four years or more.

Arrests have to be ordered by a public prosecutor or a senior police officer (*hulpofficier van justitie*) where the order of the public prosecutor would cause undue delay, or in urgent cases by any police officer.

The aim of arrest by the police is the interrogation of the suspect by a (senior) police officer in the interest of the investigation of a criminal offence. During the first interrogation, the police officer must ensure that the right person has been arrested, that the arrest was lawful, and that continuation of the arrest seems necessary. This is the so-called verification interrogation. The verification interrogation is the most appropriate moment to comply with the obligation to inform the arrested person of the reasons for his arrest (sect. 5 ECHR).

The person arrested has the right to be assisted by his defense counsel only during this verification interrogation, but in practice a counsel is hardly ever present. The same applies for an interpreter.

The police arrest may last up to six hours, not including the hours between midnight and nine a.m., during which the detainee can be further interrogated about the crime allegedly committed by him (sect. 61 CCP). In this interrogation the suspect has no right to assistance by a defense counsel. A defense counsel is not yet assigned to him. The client can see a counsel of his own choosing after this questioning.

The term of six hours starts at the moment when the person arrested arrives at the place of questioning. As transport to the place of questioning may take some time, the deprivation of liberty can take much longer than six hours.

During the police arrest, an additional term of six hours arrest – not including the hours between midnight and nine a.m. – may be ordered for the identification of offenders caught red-handed during which investigative measures may be taken, such as fingerprints, photographs, observation, haircut and so on.

Police custody

After expiry of the term for police-arrest, the suspect has to be either released or taken into police custody (*inverzekeringstelling*, sect. 57 CCP). Police custody is ordered by the public prosecutor or by a senior police officer. Police-custody can only be applied in the interest of the investigation of criminal offences for which pre-trial detention is possible.

The police custody order contains a description of the criminal offence, the reasons why the order was issued (in the interest of the investigation), and the circumstances which have resulted in the supposition of these reasons (mostly: interrogation of witnesses/confrontation/further interrogation of the suspect is necessary).

From the moment of the police custody order, the suspect has the right to an assigned defense counsel with free access to the suspect, unless this is abused to hamper the finding of the truth. The defense counsel may also have access to the police files on the case. The suspect can be restricted in his rights to receive visits and to communicate by telephone and letters.

The police custody order holds good for three days. The order can be extended once for up to three days by the public prosecutor (sect. 58 CCP).

Ultimately, after three days and fifteen hours, the arrested person has to be brought before the investigating judge. The judge may only examine the lawfulness of the police custody. The person in custody may be assisted by his defense counsel.

Remand in custody

After the expiry of the term of police arrest and police custody (six days and fifteen hours) the suspect has to be released or brought before the investigating judge who can order remand in custody (*bevaring*, sect. 63 CCP) for fourteen days at the request of the public prosecutor. The remand in custody order can also be issued without preceding police custody.

The suspect is heard by the investigating judge. His counsel may be present at this interrogation. The remand in custody is the first phase of the pre-trial detention.

Two statutory requirements for the application of pre-trial detention must be met.

The first requirement regards cases in which pre-trial detention may be applied. The second deals with the grounds on which pre-trial detention may be applied.

Section 67 of the Code of Criminal Procedure enumerates the cases in which pre-trial detention may be applied.

Pre-trial detention can be ordered if a serious suspicion exists that the offender has committed an offence:

- which carries a statutory prison sentence of four years or more; or
- which is specifically designated, e.g. embezzlement, fraudulent misrepresentation and threat; or
- which carries the penalty of imprisonment whilst the suspect does not have a fixed residence or regular place of abode in the Netherlands.

Section 67a CCP specifies the grounds on which pre-trial detention may be applied. According to this section, for the application of pre-trial detention there must be a danger that the suspect will abscond or will pose a serious danger to public safety. A serious danger to public safety exists:

- if the offence carries a maximum statutory sentence of at least twelve years imprisonment and public order has been seriously affected by the offence;
- if there is a serious risk that the offender will commit a crime, that carries a maximum statutory sentence of not less than six years of imprisonment; or which may jeopardize the safety of the state or the health or safety of persons; or create a general danger to property;
- if there is a serious suspicion that the offender has committed designated offences such as property offences, threat, embezzlement or money laundering and will re-offend, and less than five years have passed since he was sentenced to a deprivation or restriction of liberty or a community service order; or
- if it is necessary to detain the offender in order to establish the truth by methods other than through his own statement.

Remand in custody is not permitted if it is not likely that the offender will be sentenced to unsuspended imprisonment. Furthermore, pre-trial detention has to end if it is likely that the actual term of imprisonment (taking into consideration the provisions on early release) will be shorter than the period spent in pre-trial detention.

Remand detention

If the grounds for pre-trial detention after expiry of the term of remand in custody are still valid, the prosecutor requests the full bench of the court to order the suspect be remanded (*gevangenhouding*, sect. 65 CCP). This request may be repeated twice. The maximum period of remand detention may not exceed ninety days. The requests are dealt with by the court in chambers. The suspect is heard in processing these requests.

The suspect can at all times request cancellation of the remand detention, and has the right to be heard during the first request.

Detention pending trial

If the suspect is still in pre-trial detention after one hundred and four days (the term of the remand in custody plus that of the remand detention), the public prosecutor has to present the case to the court for trial. Unless the case is ready for trial, the trial may be adjourned. In either case, the remand detention order may remain valid until sixty days after the final court decision, provided that the verdict in the first instance and on appeal results in a prison sentence exceeding the period spent in detention. In case of an acquittal or discharge or a prison sentence in length not exceeding the pre-trial detention, the order has to be cancelled with immediate effect.

In the majority of cases, the offender is released before the full-term of pre-trial detention (hundred and four days) has expired. Limiting the duration of pre-trial detention has the result that cases against detained suspects are tried by courts with priority.

The court remanding the suspect in custody has the authority on its own initiative or on the request of the public prosecutor or the suspect to suspend pre-trial detention. The statutory condition for suspension is that the offender will not flee from justice when the suspension is revoked, or when he is sentenced to imprisonment. The court is free to impose other 'special conditions'. These can include the condition that the suspect has himself admitted to a clinic, e.g. for drug addicts. The checks on compliance with this condition, however, are not always very effective. In a great majority of cases, the court imposes conditions which restrict the freedom of the suspect to a lesser extent.

The court may impose bail as a guarantee that the conditions are observed, but hardly ever does so.

7.8 The right to challenge detention

For police arrest and the first term of police custody, the CCP provides no legal remedy to challenge the lawfulness of the detention. If the lawfulness of these phases of detention is doubted, a solution has to be sought in consultation with the police and the public prosecutor who has issued the order, or with their superior officers. If this fails, it is possible to initiate summary civil proceedings before a civil judge alleging unlawful detention and urgency of the case.

The suspect can make use of the right to request release when he is brought before the investigating judge before the expiry of three days of police custody.

With regard to remand in custody, it is assumed that the suspect has the right to elicit a release order from the investigating judge. If this is issued, the prosecution service has fourteen days to lodge an appeal with the district court.

The suspect cannot appeal against the remand in custody order but he is entitled to request the court in chambers to cancel the remand in custody order. At the occasion of his first request, the suspect has the right to be heard by the court. Should the court refuse to cancel the remand in custody order, an appeal by the suspect can be lodged with the court of appeal. The public prosecutor may lodge an appeal against the decision of the district court to cancel the remand in custody on its own motion or at the request of the suspect.

In case of a remand detention and detention pending trial order, the suspect can appeal against this order to the court of appeal within three days. The suspect can, however, only lodge one appeal against the decision of the district court to order or to continue the pre-trial detention. The public prosecutor can lodge an appeal within two weeks against a decision to lift a remand detention or a detention pending trial order.

If the possibility of challenging the detention under criminal procedure does not, in the circumstances of the case, offer the prospect of a timely decision, the civil judge can always be asked for a decision by means of summary civil proceedings.

All in all, this leads to the conclusion that Dutch law offers full *habeas corpus* protection.

7.9 The right to compensation for unlawful detention

The Dutch CCP (sects 89-91) provides for financial compensation for time spent in pre-trial detention when the criminal case ends without a sentence or with a sentence for an offence for which pre-trial detention was not admissible.

Compensation is possible for unlawful detention, but also in retrospect for unjustified lawful detention.

The compensation does not have to be of a financial nature. Unlawful as well as unjustified lawful detention can be compensated in the form of reduction of the duration of a prison sentence imposed for another criminal offence or balanced with fines to be paid.

Unjustified lawful detention is compensated by a payment for immaterial damages of around € 90 per day of deprivation of liberty. Material damages (loss of income) is compensated as well.

The decision on compensation under criminal procedures is given by the criminal court in chambers based on fairness. This court should preferably be composed of the judges who also served as the trial judges as they are fully acquainted with the case at hand.

Furthermore, the state can be sued in civil court for claims for unlawful detention.

7.10 Deduction of the period of detention

A statutory provision (sect. 27 CC) provides that the full term of arrest and pre-trial detention shall be deducted from the term of imprisonment. Courts do not have any discretion in this regard.

7.11 Rights of the defense counsel during pre-trial investigations

A distinction should be made between two types of defense lawyers active during the pre-trial investigations. Some suspects are wealthy enough to choose and pay their own defense lawyers. Those lawyers are paid for the number of hours they spend on assisting their clients, and one may expect that these privately paid defense lawyers will play an active role in carrying out private investigations as far as possible. They will actively look for evidence in favor of their client; they will challenge expert witnesses or reports by experts by way of contra-expertise, and they will spend considerable time discussing the results of their investigations with their clients as well as what

defense position they will take when their client stands trial. A privately paid defense lawyer is, however, more an exception than a rule.

The vast majority of arrested suspects will receive legal aid, which means that a defense lawyer is assigned to them by a public organization called the Regional Legal Aid Council (see section 5.25).

Legal aid by defense counsels is paid by the State. The fee is rather low which means that the defense counsel needs a number of legal aid assignments in order to earn a living. That payment reduces both the possibility and the will to invest considerable time in carrying out private investigations, to challenge all the evidence produced by the public prosecutor or to have contra expertise carried out by private experts. Legal aid defense counsels cannot be faulted for such an attitude. This is the result of an imbalance between the public prosecutor (who is a well paid official) with access to all types of forensic public services to support him in his investigation activities, and the legal aid defense counsel who has no access at all to public services but only to private forensic services which must be paid by him out of his moderate fee.

Both the privately paid defense counsel and the legal aid defense counsel have the same restricted rights to be active during the pre-trial investigations. Let us therefore look at the rights they have during that phase of the criminal procedure.

The defense counsel has the right to free and unmonitored access to a client who is in custody. Since such access is not allowed to delay the investigation, the counsel is always partly dependent on the criminal justice authorities and on the time and facilities made available for this purpose by the police.

When exercising his right to inspect the police files on the case, the defense counsel is also dependent on the cooperation of the relevant authorities in order to obtain the copies in good time. The most important restriction on the provision of an effective defense is the fact that the defense counsel does not have the right, under statutory law or case law, to be present at police interrogations.

During the police investigation, the defense counsel does not receive any information on the content of the investigation nor on its progress. His position differs completely from that of the public prosecutor. The public prosecutor in the Dutch criminal justice system is ultimately responsible for the criminal investigation and for adherence by police to all statutory rules and procedures. Formally, the public prosecutor is the senior investigator, and although in practice the police deal with most cases without prior consultation with the public prosecutor, the latter will be in-

formed by the police on content and progress of the investigation, in particular in important criminal cases. In the more serious cases, the public prosecutor can give detailed instructions to the police, for example to reduce or extend the scope of investigation, or to contact experts in certain types of expert investigation. During the investigation phase, the public prosecutor has an enormous lead on information, which makes his procedural position much stronger than that of the defense counsel, who receives very little information on the course of the investigation.

Furthermore, the public prosecutor leads the investigation and can request all types of investigation and support by any experts he deems necessary. The defense counsel can ask the public prosecutor to involve an expert in the investigation or to hear witnesses or experts, but the public prosecutor may refuse that request.

In cases where the defense counsel believes that the opinion of an expert witness is indispensable and the public prosecutor refuses to request such an opinion, the defense counsel can hire an expert witness, but at his own expense.

An additional problem for defense counsel in the Netherlands is that almost all forensic experts are employees of the Dutch Forensic Institute (NFI), a state institute paid from public funds. The NFI and its experts – in particular, DNA experts – carry out research exclusively at the request of the public prosecutor and the police.

The public prosecutor can contact the NFI upon the receipt of the forensic expertise report and can discuss the content of that report with the forensic expert. In this discussion, the forensic expert might express his doubts concerning the involvement of the suspect in the crime as based on the results of the forensic DNA research.

Although such information is of major importance to the defense counsel, he is not allowed to be present at the meeting between the forensic expert and the public prosecutor. The public prosecutor is entitled to keep confidential from both the defense counsel and the court any communication from the forensic expert. This lack of information can be detrimental to the suspect, which ultimately can lead to an unjust conviction.

C The trial phase

7.12 General issues

The pre-trial phase ends and the trial-phase begins with the decision to prosecute the case and to summon the offender. The charge is included in the summons (*dagvaarding*) to enable the offender to prepare his defense.

A court hearing commences with the identification of the accused by the presiding judge of the court and the reading of the charge (*tenlastelegging*) by the public prosecutor. The accused is reminded by the court of his right to remain silent.

The charge is the subject of the court session. It consists of a description of the alleged criminal offence, and closely follows the statutory definition of the offence.

The court does not have the power to modify the charge even if it deems this necessary. This is due to the fact that the prosecutor is truly master of the trial; this is known as ‘the tyranny of the charge’, i.e. that the court may only convict on the basis of the charge.

The public prosecutor can request a change of charge while the case is pending in court. Orally, he can add any aggravating circumstances to the charge as these circumstances come to his knowledge during the trial. Where the public prosecutor is otherwise of the opinion that the charge must be changed or supplemented, he make requests to the court in writing. The increased or supplemented charge cannot alter the act for which the suspect has to stand trial (sect. 313 CCP).

The charge can be changed or supplemented even after the final speech of the public prosecutor or even at the appeal stage. The court, before accepting the change, shall hear the suspect and the defense lawyer on the proposed change.

After the reading of the charge, the court examines the accused and the witnesses (either called by the prosecutor or by the defendant or his defense counsel) and the experts. Afterwards, the public prosecutor and the defense counsel may ask additional questions of the accused and the witnesses. Unlike the accused, witnesses are obliged to answer the questions put by the court, the prosecutor and the defense counsel. The examination of the accused and the witnesses by the court is usually combined with the reading by the presiding judge of their statements made to the police or the investigating judge. Witnesses are examined under oath. The defendant may not be

questioned under oath. He has the right to remain silent, and cannot be obliged to tell the truth and nothing but the truth.

Although the Code of Criminal Procedure embodies the immediacy principle requiring the direct presentation of evidence by witnesses and by experts during the court trial, witnesses are as a rule not questioned, since the Supreme Court ruled that hearsay evidence may be used instead. The immediacy principle as laid down in the case law of the Supreme Court has been seriously watered down. In fact, criminal court sessions to a large extent concern the written statements of witnesses filed by the police or the investigating judge. These written statements may be used as evidence provided that these have been discussed in court. This restriction of the immediacy principle has as effect that court trials do not take very long if the accused confesses and do not contradict the written statements of the witnesses. It is rare that even in serious cases a trial lasts more than a couple of days or even hours.

After the evidence has been presented and discussed, the public prosecutor makes his closing speech (*requisitoir*). In his closing speech, he gives a summary of the evidence, recommends what offence the defendant is to be sentenced for and requests a particular sentence. The Board of Prosecutors General has issued a considerable number of directives on what sentences are appropriate in individual cases. The most important directives are the so-called Polaris guidelines which cover the sentences to be requested for almost 80% of the most commonly committed crimes. Sentencing suggestion guidelines exist for threat, insult, theft, discrimination, handling stolen property, unlawful intrusion of someone's premises, injury, joint acts of violence against persons and property, drugs offences, traffic offences, et cetera (see section 9.6). An individual member of the prosecution service is bound by these directives. This obligation stems from the hierarchical structure of the prosecution service, that commit a member lower down in the hierarchy to act upon instructions emanating from his superior (sect. 139 Judicial Organization Act and sect. 140 CCP). However, the judge is not bound by this sentence request. It appears though that in practice the court considers the sanction requested by the public prosecutor in his closing speech as a basis for its sentencing. Finally, the defense counsel addresses the court with his plea. Before the presiding judge closes the trial, the last word is given to the accused.

After the close of the court session, the court deliberates in chambers to deliberate on the verdict and the sentence. The verdict must be available within two weeks. The verdict is read in a public session of the court. As a rule, it takes more than two weeks

to write a verdict and to give a full summing up of the evidence used for to reason the decision. Such extended verdicts are normally only prepared when appeal or appeal in cassation is lodged.

A person convicted may not be ordered to pay the costs of the criminal procedure.

7.13 Court decisions

In a judgment, the court can take four procedural decisions and four substantive decisions.

As procedural decisions, the court can declare the summons null and void, can declare itself not competent to try the case, can dismiss the case and finally can suspend further prosecution (sect. 348 CCP).

The court must declare the summons null and void when it has not been served properly, or when the charge is not properly formulated or not comprehensible.

The court can declare itself not competent to try the case when the offence charged has not been committed within its jurisdiction, or when the offence belongs to the jurisdiction of another specialized court, e.g. the juvenile court or an economic police court. The court must dismiss the case when the right to prosecute a case no longer exists, e.g. due to the statute of limitations, due to a settlement of the case through a transaction or penal order, or due to the fact that the requirement for prosecution has not been met.

Under some circumstances, the court must suspend further prosecution, e.g. when the defendant is not fit to stand trial.

When the court decides that the summons is valid, that the court is competent to try the case, that the case is not to be dismissed and that further prosecution does not need to be suspended, the court has to give a substantive decision, which means a decision on the charged offence. The court has to decide four questions:

- are the facts mentioned in the charge proven;
- do the facts constitute a statutory criminal offence;
- is the accused criminally liable; and
- what sentence shall be imposed (sect. 350 CCP)?

The accused is to be acquitted when the essential facts charged are not proven by the evidence presented.

A discharge of the accused takes place when the facts charged are proven, but do not constitute a criminal offence, or when the offender is not liable due to a justification or exculpation defense.

A sentence is imposed when the evidence that the accused has committed a criminal offence is beyond reasonable doubt and when the accused is criminally liable for the offence.

The verdict must be reasoned (sects 358 and 359 CCP). The reasoning concerns the question of whether the charge is proven, why an explicit defense is denied, or why despite guilt no penalty is imposed. In addition, the sentence imposed must be reasoned.

A dismissal, a decision on incompetence, a decision to declare the summons null and void, as well as a decision to suspend further prosecution must also be reasoned.

An acquittal does not need to be reasoned.

Special reasoning is required when the court imposes a more serious sentence than requested by the public prosecutor, or when an entrustment order is imposed.

Dutch criminal case law is published in the weekly periodical *Nederlandse Jurisprudentie* (mainly Supreme Court rulings). Case law of lower courts is published in a bi-monthly periodical *Nederlandse Jurisprudentie Feitenrechtspraak Strafzaken* (Dutch Case Law in Criminal Matters). Abstracts of criminal case law are published in the *Nieuwsbrief Strafrecht* (Newsletter Criminal Law).

7.14 Character of the trial phase

The trial phase has an accusatorial character. To a large extent there is an equality of arms between the public prosecutor and the defendant, who may present evidence in favor of his client.

Under Dutch criminal procedural law the main truth finding phase is, as a rule, not the court session but the judicial preliminary investigation by the investigative judge. The task of the court during the court trial is mainly restricted to an assessment of the legality of the evidence gathered during that investigation.

At the trial stage the defense counsel's role is more limited. He gives guidance to his client when being questioned by the court and public prosecutor. He makes, where relevant, critical remarks regarding the police files, in particular where evidence might

have been illegally obtained or the fundamental rights of the suspect have been neglected, and he addresses the court in an oral pleading. Unlike in other countries there are very limited possibilities for the defense lawyer to ask for additional evidence or for a rehearing of witnesses or experts during the trial phase. Cross examination is unknown in Dutch criminal procedure.

D Special issues

7.15 Legal remedies against court decisions

The CCP provides various legal remedies against court decisions. The most important are appeal and appeal in cassation.

The general legal remedy against a decision by the court of first instance is appeal. An appeal may be filed by both the public prosecutor and the accused. The appeal must be filed in due time, as a rule, within fourteen days. An appeal does not involve a complete rehearing of the case by the court of appeal but is concentrated on the grounds for appeal cited by the prosecution service or the accused, and which are discussed in a memorandum of appeal. The appellate court may, if the appeal was lodged solely by the accused, increase the sentence only by a unanimous decision. An acquittal by a court of first instance may also only be changed into a conviction by a unanimous decision of the court. No appeal is allowed in cases where the maximum fine imposed is less than € 50. In cases where the fine is below € 500 permission to appeal is required. The presiding judge of the Court of Appeal decides whether an appeal is permissible, i.e. whether an appeal decision is necessary in the interest of a proper administration of justice (sect. 410a CCP).

Appeal in cassation may be lodged at the Supreme Court against Court of Appeal decisions. An appeal in cassation may be lodged by both the public prosecutor and the accused.

Appeal in cassation is neither a re-hearing of the case, since the Supreme Court is not deciding on the facts, but merely assess the proper application of law by the lower courts. Where the Supreme Court rules that substantive or procedural law has not been properly applied, the verdict of the lower court will be quashed and the case will be referred back to the Court of Appeal or another court. That court has to render a new decision, and is bound by the decision of the Supreme Court concerning the proper application of law in that case.

7.16 Trial in absence of the accused

The accused has the right to be present at the court trial, but he is not obliged to appear in court unless the court orders so, which is rarely the case. A case may be tried in the absence of the accused, unless he was improperly summoned. As a rule, the summons must be served to the accused in person, or to his representative, at least ten days prior to the court session.

Prior to the 1998 Procedural law reform Act, the accused lost the right to be defended by his defense counsel if he himself was not present during court session. The European Court on Human Rights decided in the *Lala* and *Pelladoab* decisions that this was in conflict with section 6 of the European Human Rights Convention.

Since that Act, an absent defendant may be represented by his counsel where the latter is explicitly empowered by the accused to do so. In such cases, the trial is considered to take place in the presence of the accused (sect. 279 CCP).

7.17 Rules of evidence

An offender can be convicted only when the Court, during the Court trial, is convinced by the evidence that the offender has committed the offence defined by statute as charged (sect. 338 CCP). The evidence may not rest upon the testimony of a single witness (*unus testis nullus testis*), and a conviction may never be based solely on the statement of the accused. A guilty plea is unknown.

The court is free in assessing the truthfulness and quality of the evidence. In the verdict, the court has to state the reasons for convicting the accused. The burden of proof as a rule lies with public prosecutor. The court may play, however, an active role in gathering evidence during the trial by ordering further investigation. The presumption of innocence is a fundamental principle of the Code of Criminal Procedure.

7.18 Statutory means of evidence

Five means of evidence are defined by statute (sect. 339 CCP):

- the court's own observations during the court hearing, e.g. photos or audio/video-recording;
- the statement of the accused in or out of court, provided the statement is filed;
- the statement of a witness in court, including hearsay testimony;
- the statement of an expert in court; and
- written (police) materials.

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A statement of the accused is his statement during court trial about facts and circumstances he knows from his own knowledge. A refusal to make a statement may not lead to adverse inferences; an obvious lie, however, may.

A statement of a witness is the information he gives in court on facts and circumstances he personally perceived and experienced. Personal opinions, guesses and conclusions are excluded as evidence. Hearsay testimony falls within the definition of a witness' statement, which has as effect that a police officer can make a statement about a statement of a witness without the latter appearing in court.

Previously, the criminal procedure took place predominantly on the basis of police files and reports on statements made by the accused, witnesses or experts in front of the examining judge proceedings, thus weakening the adversarial principle. Under the influence of recent case law of the European Court of Human Rights, the adversarial principle receives presently somewhat more emphasis through the regular summoning of more witnesses.

An expert statement is an opinion based on an expert's knowledge concerning the subject on which his opinion is sought. As a rule this opinion is expressed in an expert witness' report, which is read out at trial.

In such cases, the report falls under the evidence category of written materials.

The Code distinguishes five categories of written materials (sect. 344 CCP):

- written decisions by members of the judiciary;
- reports by members of competent agencies, e.g. police reports on facts or circumstances personally perceived or experienced by them;
- documents of public agencies concerning subjects related to their competence containing the communication of facts and circumstances perceived or experienced by these agencies;
- reports of experts; and
- all other written materials. The latter category may only be used in relation with the content of other means of evidence.

Conviction may be based on a police report without further additional evidence being required.

7.19 Rules on gathering evidence

The rules governing the methods of acquiring evidence deal mainly with the interrogation of the accused or the witnesses, and with the legal prerequisites for acquiring technical evidence. Coercive measures can be used to collect evidence. In principle, these coercive measures may only be used in cases of crimes for which pre-trial detention is allowed by law (crimes carrying a statutory prison sentence of four years or more). Permission to apply intrusive investigation measures must be obtained from the investigating judge.

Unlawfully obtained evidence (e.g. evidence collected during illegal searches of premises or illegal interception of communication) may have three consequences (sect. 359a CCP):

- the court may mitigate the sentence in proportion with the seriousness of the irregularity provided that the harm caused by the irregularity can be compensated;
- the court may exclude the evidence; and
- the case may be dismissed if the irregularity caused by obtaining the evidence illegally would lead to a trial that would be in conflict with the principles of a proper criminal procedure.

E The victim

7.20 Legal position of the victim

The term victim does not occur in the Code of Criminal Procedure or in any other criminal law statute. The victim has a procedural role only in his capacity as witness, informer or injured party. He has few rights in the pre-trial and trial phase. He has no right to present a criminal charge or to be heard in his capacity of victim on the charge presented by the public prosecutor. The victim has neither the right to counsel nor the right of appeal.

Due to the changing attitude towards the weak legal position of the victim, and in line with the United Nations Declaration on Basic Principles of Justice for Victims of Crime and the Abuse of Power (1985) as well as the EU Council framework decision on the standing of victims in criminal proceedings (15 March 2001), a number of guidelines have been issued by the prosecution service on how to treat victims. The

guidelines oblige police and prosecutors to inform the victim whether the prosecution of the offender will take place, and about the possibility of financial compensation from the offender.

Furthermore, the legal position of the victim has been substantially improved by the 1993 Criminal Injuries Compensation Act. He now has access to police files, and the right to be informed by the public prosecutor on the standing of the criminal procedure.

Since 2005 the victim has a restricted right to give an oral statement during court trial, the so-called victim impact statement. The model of restorative justice is gaining an increasing number of supporters.

7.21 Complaints by the victim against non-prosecution

The Dutch Code of Criminal Procedure grants the right of prosecution exclusively to the prosecution service. The State thus has a full monopoly on prosecution without any restriction. The victim does not have the right to private prosecution.

Anybody with an interest in the prosecution of an offence can file a protest against a decision to waive a case by lodging a complaint with a Court of Appeal. The court examines the manner in which the discretionary power was utilized by the public prosecutor. This examination extends both to the legality of the decision (the issue being the proper application of the law), and to the use of discretion (a study of the extent to which this decision is in line with the general prosecution policy). The complainant has the right to be heard by the court, and may be assisted by his counsel. The court of appeal may order the public prosecutor to initiate a prosecution if it finds that the prosecutor has misused his discretionary power. However, in practice the Court of Appeal seldom orders prosecution. Around 1,200 complaints are filed annually.

In addition to judicial control over prosecution, administrative control over prosecution can take place at the request of a person with an interest in prosecution. An individual can request a public prosecutor to review a prosecution decision or, should he refuse to do so, write a letter to a higher official in the hierarchy of the prosecution authority, requesting that the decision of the subordinate prosecutor be reviewed.

7.22 Civil claims in criminal trials

Since the 1993 Criminal Injuries Compensation Act, the victim can join the proceedings in the pre-trial or trial phase in his capacity as injured party, and can claim full fi-

nancial compensation from the offender to be decided on by the criminal Court (sect. 51a CCP).

The claim may comprise material and immaterial damages. The heirs of a victim who died as a result of the criminal offence may join the proceedings as well. There is no statutory maximum amount that can be claimed when joining the proceedings, but the claim must be clear and not too complex to be dealt with by the criminal court.

The joinder as a rule is effected by a form in the pre-trial phase to be handed to the public prosecutor, and in the trial phase to be handed to the Court containing personal data of the injured party and information on what the grounds for the claim are and the content of the claim. For the proper preparation of the claim, the injured party has access to the police files of the case. In claiming compensation from the offender, the victim is not assisted by the State, but may be assisted by a counsel or by a proxy.

The State does not assist the injured party in the effective recovery of his claim. To avoid the situation that recovery of the claim is impossible due to the unwillingness of the offender, the court can either impose a partly suspended sentence under the condition that the offender pays compensation (sect. 14c CC), or can impose a compensation order (sect. 36f CC). Compensation orders are enforced by the State.

7.23 Criminal Injuries Compensation Fund

In 1976, the Criminal Injuries Compensation Fund was established. Anyone who has been the victim of a violent crime that caused serious physical or psychological injuries can claim compensation of up to € 22,700 for material damage and € 9,100 for immaterial damage from this Fund. A national committee decides whether the claim is to be granted. Appeal against this decision may be made to the Court of Appeal in The Hague.

The Compensation Fund pays out annually around five million Euros to victims. The number of claims is around 6,000. Around two-third of the claims are granted.

7.24 Victim Support Centers

Local victim support centers, funded by the Ministry of Justice through the National Victim Support Organization, cover the country and provide help and guidance to individual victims of crime, e.g. by directing victims to the criminal injuries compensa-

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tion fund. Annually, over 1,800 professionals and volunteers approach more than 100,000 victims. Two thirds of them accept the offer. Particular attention is given to victims of incest, rape and other types of violence. A number of schemes are developed for special types of aid, such as support groups for victims of robbery, victim aid for tourists, and aid to victims of sexual violence. In most cases, the police refer the victim to the victim support centers.

The victim support center provides financial and material help and helps the victim to overcome any psychological and emotional problems resulting from the crime. The victim is helped in avoiding further contact with the offender, and in solving practical problems (such as housing and employment). The Victim Support Center also provides information about the criminal case and the offender, as well as information on the technical aspects of crime prevention.

8 The system of sanctions

8.1 Classification of penalties

The current Dutch sanction system for adults distinguishes between penalties and measures.

Penalties are aimed at punishment and general prevention. Punishment means that the offender, through the penalty, is made to suffer in reaction to the harm caused by his offence to others. In the penalty, revenge plays a role. Due to this element of revenge, the length of imprisonment must be proportionate to the level of blameworthiness.

Measures, on the other hand, are aimed at the promotion of the security and safety of persons or property, or at restoring a state of affairs. A measure differs from a penalty in that it can also be imposed where there is no question of criminal responsibility, in the sense that the person cannot be blamed for having committed a crime.

The Criminal Code furthermore distinguishes between principal penalties and accessory penalties, which could originally only be imposed in conjunction with a principal penalty. Since 1984, accessory penalties may be imposed as principal sentences as well.

8.2 Sanctions for adults

The various principal penalties are set out in order of severity in section 9 of the Criminal Code as follows:

- imprisonment (sects 10-13);
- detention (sects 18-19);
- task penalties (sects 22c-22k); and
- a fine (sects 23-24e).

For all offences, the maximum of the statutory penalty is specified by the Act, which defines the particular offence. This maximum penalty reflects the gravity of the worst possible case and is thus high for the most serious offences, e.g. life or thirty years imprisonment for murder, twelve years for rape, nine years for extortion, six years for domestic burglary and four years for simple theft.

8.3 Capital punishment

Capital punishment for ordinary crimes was abolished in 1870. For military crimes and war crimes, capital punishment was abolished in 1983 (sect. 114 Dutch Constitution), but in practice had not been used since 1950. The Netherlands ratified Protocol no. 6 to the European Convention of Human Rights on the abolition of the death penalty which entered into force in 1985.

8.4 Principle penalties

Imprisonment

The most severe penalty in the Dutch penal system is imprisonment, which can only be imposed for crimes. The most severe form is life imprisonment, which is rarely imposed (since 1950, on approximately 35 occasions). Around twenty crimes carry life imprisonment as a statutory penalty, but the Criminal Code does not prescribe compulsory life imprisonment in any circumstances. Crimes, such as murder or manslaughter under aggravating circumstances that carry a tariff of life imprisonment also carry a fixed-term prison sentence of up to thirty years. Furthermore, since 1983 a fine may be imposed as the sole sanction for any crime, even those which carry life imprisonment as statutory sanction.

A life sentence is deprivation of liberty for an indeterminate period. Parole or release arrangements are not applicable in the case of a life sentence. A life sentence as a rule lasts until the death of the prisoner. Life sentences, however, after twenty years of serving the sentence may be converted by way of pardon into a fixed-term prison sentence. After such a pardon, the offender may be considered for early release. A conversion by way of pardon is very rarely granted.

The fixed-term prison sentence is the most frequently applied form of imprisonment. The statutory minimum is one day and the statutory maximum is fifteen years. For designated crimes and in certain circumstances, the maximum may be thirty years. Unlike the situation in other countries, no offences carry a special statutory minimum term of imprisonment. Thus, for example for murder, a minimum prison sentence of one day is theoretically possible.

Where an offender is sentenced to imprisonment for several offences committed concurrently or consecutively, the court may impose a prison sentence which may ex-

ceed by one third the maximum statutory prison sentence for the severest offence. A prison sentence, however, may never exceed thirty years.

Detention

Detention is the custodial sentence for infractions. The minimum duration of detention is one day and the maximum duration is one year. In special cases, e.g. in cases of recidivism, the maximum can be increased to sixteen months. Originally intended as a *custodia honesta*, detention is deemed a lighter sentence on the sentencing scale than imprisonment, although the two hardly differ in the manner of their implementation. In the near future, the sentence of detention will be abolished.

Task penalty

The task penalty is one type of the community sentences increasingly used to reduce the incidence of custodial sentences. Additional forms of community sentences such as electronic monitoring and penitentiary programs are alternative forms to the deprivation of liberty (*executiemodaliteiten*).

The development of community sentences started in the seventies with the establishment in 1974 of the Committee on alternative penal sanctions. This Committee was set up to advise the Government on new sentencing options in order to reduce the number of short term prison sentences.

Resolution (76) 10 of the Committee of Ministers of the Council of Europe and positive experiences in England and Scotland suggested the community service order (CSO) as a sentencing option.

In 1979, the Committee on alternative penal sanctions proposed a CSO experiment, which was initiated on February 1, 1981.

Ministerial guidelines directed that the experiments take place within the existing statutory framework. Therefore CSO could be imposed by the prosecution service as a condition for waiving prosecution, or by the Court as a condition attached to a decision to suspend a sentence.

At the end of the experiment, statutory provisions governing the CSO for adult offenders were introduced in the Criminal Code on December 1, 1987. Statutory provisions on CSO for juvenile offenders followed in September 1995.

The criminal court could impose a CSO only when it would otherwise impose an unconditional prison sentence of six months or less or a part-suspended/part-unconditional prison sentence of which the unconditional part is six months or less. Com-

munity service could not be used as an alternative to a suspended prison sentence, a fine, or a fine-default detention.

The number of CSO's imposed on adult offenders increased rapidly from 2,000 in 1983 to over 41,000 in 2006.

In 2001, the provisions on the CSO were considerably reformed. The CSO has been replaced by the task penalty (*taakstraf*) which is no longer a substitute for a short term prison sentence but a distinct sanction option considered to be a restriction of a person's liberty that is less severe than the custodial sentence, and more severe than a fine. A task penalty may consist of a work order, a training order or a combination of both orders.

A task penalty may not exceed a total of 480 hours of which the work order is 240 hours maximum. The task penalty must be completed within twelve months. Extension of the completion term is possible.

When imposing a task penalty, the court has to state the term of default detention in case the task penalty is not complied with. The default detention is at least one day and the maximum is eight months. Every two hours of task penalty count for one day default detention. When part of the task penalty is complied with, the length of the default detention is reduced proportionally.

The prosecution service is responsible for overseeing compliance with the task penalty, and information may be requested from individuals and organizations involved in probation work for this purpose. In appropriate cases, the prosecution service may change the nature of the work to be carried out, or the kind of education to be followed.

When the prosecution service is satisfied that the task penalty has been carried out properly, it must notify the person convicted as soon as possible.

If the person convicted has not carried out the task penalty properly, the prosecution service may order implementation of the default detention mentioned in the sentence, taking into account the number of hours of the task penalty that has been carried out properly. The person convicted can file an appeal against the order to implement the default detention. The appeal is dealt with by the court which imposed the task penalty. The order to implement the default detention must be given within three months of the end of the completion period.

The probation service is responsible for administering task penalties and coordinators have been appointed in each of the nineteen jurisdictions who canvass for workplaces where the work order can be carried out. The work order must benefit the community. It can be with public bodies such as the municipality, or private organizations involved in health care, the environment and the protection of nature, or social and cultural work.

A training order is of a different nature. It means that the offender is sentenced to follow a training course in order to learn specific behavioral skills or in order to be confronted with the consequences of his criminal behavior for the victim. Training orders are mainly imposed on offenders from whom it is expected that they are motivated to change their behavior by attending courses or other activities aiming to improve communicative or social abilities.

Fine

The fine is the least severe of the principal penalties. Originally, the fine was exclusively intended for infractions and minor crimes.

Since the 1983 Financial Penalties Act all offences, including those subject to life imprisonment, may be sentenced with a fine.

The 1983 Act furthermore expresses the principle that fines should be preferred over prison sentences. Section 359 CCP requires the court to give special reasons whenever a custodial sentence is ordered instead of a fine.

The 1983 Act was the final part of a major reform of the fines system, which started in the mid-1970's with a view to creating better opportunities to reduce the use of imprisonment.

The law reform was prepared by the Financial Penalties Committee established in 1966. The reform of the fines system was launched in 1976, by enacting the Financial Penalties Enforcement Act. The main purpose of this Act was to improve the enforcement of fines so that fines could function as a better alternative to the short-term prison sentences. This Act introduced the installment fine and other opportunities for paying fines in installments, simplified the recovery procedures in cases of non-payment, and reduced the maximum fine default detention.

The next step was the adoption of the 1983 Financial Penalties Act. This Act replaced the old fine system, in which every offence carried its own statutory maximum fine, with a more simple and convenient system of fine categories. The minimum fine for

all offences is three Euros. The maximum fine depends on the fine category into which a crime or infraction is placed.

The 1983 Act created six fine categories with (at present) maxima of € 335, € 3,350, € 6,700, € 16,750, € 67,000 and € 670,000 (sect. 23 CC). Infractions come under the first three categories and crimes under categories II through V. Category VI fines can only be imposed on corporate bodies and on individuals under a few special criminal laws, such as the Economic Offences Act and the Narcotic Drug Offences Act.

When the fines system was reformed in 1983, the old system of fixed sum fines was retained. Following the advice of the Financial Penalties Committee, the introduction of a day-fine-system, as known in an increasing number of European criminal law systems, was rejected on theoretical as well as practical grounds.

The Act urges courts to take into account the financial position of the offender when imposing a fine sentence in as far as this is necessary to arrive at an appropriate sentence without the offender being disproportionately affected in his income and capital (sect. 24 CC). There must be a two-pronged proportionality test, between the crime and the fine and between the fine and the ability to pay.

The Court may decide that the payment of fines be done in installments to be determined by the Court. The total fine has to be paid within two years.

8.5 Fine default detention

The implementation of fines and other judicially imposed financial penalties rests entirely with the prosecution service. Fines are collected by the Central Fine Collection Agency. If the person convicted does not pay the fine, the fine may be recovered from the offender's property. If the prosecution service rejects recovery as an option, default detention will be enforced. The term of the default detention is set by the court when imposing the original fine. In practice, a conversion rate of € 50 for one day default detention is usually applied.

The statutory minimum duration of fine default detention is one day, and the maximum is twelve months. A fine default detainee can be released if he pays the fine while in prison.

In order to reduce the need for prison capacity for fine default detention, a more effective way of recovering fines imposed for crimes forms part of the present sentence implementation policy. The aim of this policy is to recover 95% of the fines within a year after their being imposed.

There are at present no alternatives for fine default detention. The early release regulations are not applicable on fine default detention.

8.6 Other community sanctions

Electronic monitoring

Electronic monitoring (EM) is the latest new community sentence that may gain a statutory basis in the near future. A bill is pending to make electronic monitoring for a period of four months maximum a distinct sanction option. EM is a restriction of liberty that can be imposed as a sentence in case a full deprivation of liberty is considered to be too severe and inappropriate. At present EM is still regulated in an instruction by the Board of Prosecutors General (12 December 2005, *Stcr.* 253). Electronic monitoring is considered to be a viable substitute to imprisonment or any other form of deprivation of liberty (e.g. pre-trial detention).

Electronic monitoring is applied either in the last phase of the serving of the prison sentence as part of a penitentiary program, or in combination with a suspended sentence. By applying EM in the last phase of the serving of the prison sentence, the actual period spent in the prison can be reduced.

The public prosecutor may request the Court to impose a suspended sentence and to order EM as a condition. Electronic monitoring in combination with a suspended sentence can be applied in three different ways:

- EM as condition attached to a suspended sentence;
- EM as substitute for imprisonment of six months maximum. EM is ordered as a condition attached to a suspended sentence in combination with mandatory program activities for at least 26 hours a week. The program activities consist of work, education and/or behavioral training. During the remaining hours, the convict has to stay at home; and
- EM as substitute for imprisonment of between six and twelve months in combination with a task penalty of 240 hours. This application of EM can be used in addition to the EM as substitute for imprisonment of six months.

Candidates for electronic monitoring are proposed by the probation service. The probation service is charged with supervision and control. The decision to allow persons to serve their sentence through electronic monitoring is made by the Court in as far as it concerns the combination with a suspended sentence and is vested with the prison administration in as far as it concerns the last phase of the detention.

8.7 Accessory penalties

The possibility of imposing accessory penalties is limited to certain kinds of offences.

The accessory penalties are:

- deprivation of rights and disqualification from practicing professions;
- forfeiture; and
- publication of the judgment.

The deprivation of rights concerns: the right to hold a public office, the right to serve in the army, the right to vote and to be elected, the right to serve as an official administrator and the right to practice specific professions (sect. 28 CC).

Forfeiture consists of deprivation of objects or money (sect. 33 CC). Objects that may be forfeited are those obtained by means of the criminal offence, or in relation to which the offence was committed or which are manufactured or intended for committing the crime.

The Court may order that the judgment be published in a newspaper or a specialist journal or through a billboard. The expenses for the publication are to be borne by the convict. Publication of the judgment (sect. 36 CC) is only rarely imposed.

Some special criminal law codes contain specific accessory penalties such as withdrawal of one's driving license (sect. 17b of the 1994 Road Traffic Act) or closure of a company (sect. 7 Economic Offences Act). These specific accessory penalties are more frequently imposed.

8.8 Measures

Measures can be imposed on offenders regardless of whether they can be held criminally responsible for having committed an offence, since measures are not aimed at punishment but at the promotion of safety and security of persons or property or at

restoring a state of affairs. Measures can be imposed as a distinct sentence or in combination with sanctions.

A range of measures is laid down in the Criminal Codes:

Withdrawal from circulation (sect. 36b CC)

During a police investigation objects may be seized. Certain objects which are dangerous or whose possession is undesirable may be confiscated. This concerns: objects obtained entirely or largely by means of or derived from the offence, objects in relation to which the offence was committed, objects used to commit or prepare the offence, objects used to obstruct investigation of the offence, and objects manufactured or intended for committing the offence.

If the uncontrolled possession of the objects in question would be in conflict with the law or contrary to the public interest, they can be withdrawn from circulation, regardless of whether the offender is convicted of a criminal offence.

This measure can also be imposed in addition to a penal order.

Confiscation of illegally obtained profits (sect. 36e CC)

Since the 1993 Criminal Code law reform (the so-called Strip-them Act) the court may impose an obligation to pay to the State Treasury an amount that equals the financial gain obtained through the commission of criminal offences. The measure was introduced in order to improve the fight against organized crime such as drug trafficking, fraud, environmental crime and money laundering.

Not only the profits from a crime for which the offender was sentenced, but also the profits from similar offences for which a fine of the fifth category may be imposed, and where there is sufficient evidence that they have been committed by him, may be confiscated.

The Court must assess the net value of the illegally obtained profits. In case of non-compliance with the obligation of full recovery, the Court may order civil imprisonment, i.e. imprisonment for debt. Only full recovery can lead to release from civil imprisonment.

Obligation to pay compensation (sect. 36f CC)

The 1996 Compensation Order Act introduced the possibility for the court to impose an obligation upon a person convicted of a criminal offence to pay the State Treasury a sum of money for the benefit of the victim of the crime. The Treasury shall remit

the money received to the victim without delay. In cases of non recovery of the full amount due, the Court can order default detention of one year maximum.

This measure was introduced in order to improve the legal position of the victim in the criminal procedure

This measure can also be imposed in addition to a penal order.

Psychiatric hospital order (sect. 37 CC)

If a defendant cannot be held criminally liable for the crime of which he is accused by reason of a mental defect or disorder, the Court may not impose a penalty, but may order that the defendant be committed to a psychiatric hospital for up to one year, provided that the person is a danger to himself, to others, to the general public or to property in general. The Court shall only issue the order after submission of a reasoned, dated and signed opinion of at least two behavioral experts – one being a psychiatrist – who have examined the defendant, except in cases where the defendant is unwilling to cooperate in a psychiatric examination.

Entrustment order (sect. 37a CC)

If the Court considers that a defendant, despite his mental defect or disorder, can be deemed responsible, it may, in order to protect the safety of other people, the general public or property, impose a penalty in combination with an entrustment order with compulsory nursing care. An entrustment order may be imposed for crimes carrying a statutory prison sentence of at least four years.

The order may only be issued after submission of opinions by two behavioral experts who have examined the defendant, except when he refuses to cooperate in such an examination. The order is carried out in a special secure private or state institution where the person is treated, the so-called *terbeschikkingstelling* (TBS).

The order lasts for two years, but on application of the prosecution service may be extended by one or two years. For certain violent offences, a further extension is possible as long as the safety of others so requires. Every six years, a review of the entrustment order has to take place. A recent opinion of behavioral experts has to be available to the Court.

Decisions of the Court to extend the entrustment order, or to refuse to extend, may be appealed by the detained psychiatric patient or by the public prosecutor (sect. 509v CCP). Appeals are heard by the penitentiary division of the Court of Appeal in Arnhem. The division consists of three professional judges, and two experts in behavioral sciences who are not members of the judiciary (sect. 73 Judicial Organization Act).

Decisions by the Penitentiary Division of the Arnhem Court of Appeal are final. Judicial review by the Supreme Court is not available (sect. 509x CCP).

In recent years, the entrustment order institutions have been under great pressure. The courts have increasingly imposed entrustment orders but the number of detained psychiatric patients being released has decreased. The main reason for this trend is a rise in the number of serious crimes, mainly violent crimes and sexual offences, and the increase in the number of severely mentally disordered offenders due to alcohol- and drug addiction. These factors have led to an increasing average length of the term of treatment (in 1995: 59 months, in 2006: 89 months). Many detained psychiatric patients, even after the regular term of treatment (six years), are not ready for a safe return into society, and courts continue to extend their entrustment orders with nursing care.

Despite long-term treatment, these mentally disordered delinquent psychiatric patients continue to pose a high risk to society.

For these persistently dangerous delinquent psychiatric patients, long-stay wings have been opened. It is estimated that one third of the total population in the entrustment order institutions are eligible for long-stay wings. With the establishment of long-stay wings, it is accepted by psychiatrists and by the courts that the entrustment order in effect means a detention for life.

In the long-stay wing, the psychiatric treatment is afforded a lower priority. The day-to-day regime in a long-stay wing aims to prevent delinquent psychiatric patients from deteriorating as much as possible by providing them with a meaningful existence. For delinquent psychiatric patients who are eligible for the long-stay wing, the prognosis is rather bad. Those who have been treated for more than twelve years have a tendency to become chronic delinquent psychiatric patients.

Patients who, after being treated, are considered no longer to pose a danger gradually receive leave permissions and eventually the nursing care will be conditionally terminated. The conditional termination of nursing care (sect. 38g PC), introduced in 1997, offers the possibility of a smooth transition from the nursing care in the entrustment order institution to complete freedom and a return to society. A gradual transition and an increase in freedom are made possible. The conditional termination runs one year and may be extended twice for one year. During the conditional termination of the nursing care, the entrustment order still is valid and may even be extended by the Court.

The conditional termination of nursing care is not widely applied because the three year probation period is considered to be too short. After the expiry of that period,

the possibility no longer exists to assist, supervise or treat the patient in order to monitor the use of psycho-pharmacy and to reduce recidivism. A bill to extend the probation period to nine years is under discussion.

Out-patient hospital order (sect. 38 CC)

If the Court considers that the requirements for an entrustment order are met but compulsory nursing care in a secure institution is not necessary, it can order an entrustment in combination with conditions. The delinquent psychiatric patient is not treated in a closed entrustment order treatment institution but in a regular mental hospital or in society provided that the patient complies with the conditions such as to place himself under the treatment of a psychiatrist or to use psycho-pharmacy. If the patient does not comply with these conditions, or if otherwise the safety of others or the general safety of persons or property so requires, and on request of the prosecution service, the Court may order that the entrustment order be implemented in a secure institution (sect. 38c CC). The Court orders that the probation service shall offer the necessary help and support.

When a custodial sentence is also imposed, the entrustment order shall not be for more than three years. The instructions attached to the entrustment order may not limit the freedom to profess religious or other beliefs or curtail constitutional freedom.

The persistent offender detention order (sect. 38m CC)

Persistent offenders (mainly drug addicted offenders) are responsible for a disproportionately large share of property crimes and nuisance in the major Dutch cities. In order to enhance security and to reduce this nuisance, since 2001 the Court has had the power to impose a detention order. The major aim of the detention order is to enhance the security and to stop the re-offending by the offender. The Court may, at the request of the public prosecutor, impose the order when the following conditions are met:

- the offence with which the offender is charged allows for pre-trial detention;
- the offender has in the previous five years been sentenced to imprisonment or community service at least three times;
- the offender is likely to re-offend; and
- the safety of persons or property are at stake.

The order may only be issued after submission of an opinion on the recidivism risks, the causes of recidivism and the receptivity for interventions. A risk assessment instrument has been developed in order to properly prepare such an opinion. Such an opinion need not be submitted in cases where the offender refuses to cooperate in the risk assessment examination.

The order may last two years regardless of the seriousness of the crime. The order is implemented in a closed setting.

Where the problem of persistent re-offending is related to drug- or alcohol addiction or to a mental disorder, the detention order may lead to a treatment for drug- and alcohol rehabilitation provided that the offender is motivated to participate in a re-socialisation and reintegration program. In a number of cases, no program is offered because the offender is not motivated or is unsuited. The re-socialisation and reintegration program is regulated in the Prison Rules (Chapter 9A) and consists of skills training in relation to self-care and hygiene, labor, education, financial administration, unsupervised living and social attitude.

The Court may suspend the order under certain conditions, e.g. the condition that the offender accepts medical treatment for his addiction as an out-patient. A probation officer specialized in the rehabilitation of drug addicts supervises the offender.

The court may assess the effect of the order halfway through the implementation and may decide that there is no longer any need to continue the implementation of the order.

8.9 Sanctions for juveniles (sects 77a-gg CC)

In 1995, a major reform of juvenile criminal law took place in response to criticisms regarding the juvenile criminal law adopted in 1965. The 1965 juvenile criminal law was considered too paternalistic and no longer in line with the increased emancipation of the youth. Furthermore, the legal position of juveniles was too weak and the juvenile criminal law was perceived as too complex and out-dated.

The 1995 juvenile criminal law was simplified and modernized by introducing various substitutes to imprisonment, and by taking into consideration the increased emancipation of adolescents.

Only a restricted number of crimes committed by juveniles are tried by juvenile courts, since both the police and the prosecution service can settle juvenile cases out of court.

The conditions attached to a transaction are different from those for adults (sect. 77f CC). The conditions may be:

- compliance with the instructions issued by the Child Care and Protection Board during a probationary period not exceeding six months;
- performance of non-remunerated labor or for forty hours maximum to be completed within three months;
- reparation of the damage caused by the offence;
- attending a training project for forty hours maximum to improve behavioral skills; and finally
- the payment of a sum of less than € 3,350 to the Treasury.

For minor crimes such as vandalism, shoplifting and theft, even the police may settle the case through a so-called *Halt-maatregel* (Stop-measure), provided that the juvenile offender takes part in a crime prevention project of not more than twenty hours (sect. 77e CC). This settlement is regarded as a conditional waiver. The public prosecutor supervises the Stop-measures and may give instructions to the police.

The Stop-measure is applicable for all juveniles even those who due to their age (less than twelve years old) cannot be held criminally responsible. For those younger than twelve years, the measure must be of a pedagogic nature (e.g. writing an essay and offering an apology to the victim).

Where the crime is too serious to be settled out of court, the juvenile court may impose juvenile detention, a task penalty or a fine.

The aim of the detention is correction. The pedagogical effect of the detention is mainly the result of the deterrent effect of the sanction. Although the treatment of the juvenile offender is not a major point during the implementation of the detention, much attention is paid to formative activities such as education, work and sport.

The minimum term of juvenile detention is one day. The maximum term is twelve months for juvenile offenders under sixteen years of age and 24 months for those over sixteen years. Juvenile detention is implemented in special juvenile penitentiary institutions where offence-related treatment can take place.

The task penalty may consist of:

- a community service order or work contributing to the repair of the damage caused by the offence of 200 hours maximum;
- a training order (attendance at a training center in order to follow courses or training programs) of 200 hours maximum; or

- a combination of a community service order and a training order of 240 hours maximum.

Non-compliance with a task penalty may lead to a default detention in a juvenile detention center of four months maximum.

For many juveniles, a fine is an effective sanction provided that the fine is not paid by the parents. The minimum fine is € 3, the maximum is € 3,350, which may be paid in installments. The total fine must be paid within two years. When neither full payment nor recovery of the amount due is possible, the court may order a fine default detention in a juvenile detention center for three months maximum or a task penalty.

8.10 Measures for juveniles

Four measures may be imposed by a juvenile court:

- the committal to an institution for juveniles;
- withdrawal from circulation;
- confiscation of illegally obtained profits; and
- compensation for the damage.

The latter three measures are governed by the same rules on measures applicable in adult criminal law.

The committal to an institution for young persons is a very radical measure, and may only be imposed where it concerns a serious offence for which pre-trial detention is allowed, where the safety of others or the general safety of persons or of property requires such a measure to be imposed, and where the measure is in the interest of the future development of the offender.

The main objective of the measure, besides the protection of the community, is to provide young persons with the education and the care which is considered necessary.

The duration of the measure is not fixed in advance but is rather determined by the degree to which the young person in question requires residential education. For this reason, the juvenile court may only impose the measure after submission of a reasoned, dated and signed opinion by no fewer than two behavioral scientists of different disciplines. One such expert must be a psychiatrist if the juvenile suffered from mental defect or mental disease at the time of the commission of the offence.

The measure runs for two years. It can be terminated by the Minister of Justice at any time throughout upon consultation with the Childcare and Protection Board. The

measure may also be extended by the Juvenile Court. Extensions can be requested for a maximum of two years upon request of the prosecution service. Extension is only possible if the measure was imposed in case of a violent offence or a sexual offence. Extension of the term of the measure by a further two years is only possible when the juvenile offender at the time of the offence was suffering from a mental defect or mental disease. The security and development criteria must once again be met before extension is allowed. This means that a juvenile offender receiving such a measure at the age of 17 years can be, at the maximum, detained until he is 23. A request for an extension of the measure of committal to an institution is heard by a three-judge bench of the district court.

A fifth measure is at present under discussion: the re-education order for six to twelve months, during which time the juvenile has to follow special treatment programs such as Multidimensional Treatment Foster Care. Juveniles showing a chronic anti-social or criminal behavior or suffering of serious emotional disorders may be placed in a foster family that has undergone special training in how to deal with disturbed youngsters.

The order may be extended for one year maximum only once. Before the order may be imposed, an opinion by the Child Care and Protection Board has to be submitted to the prosecution service.

8.11 Special sanctions for military personnel

Neither the Criminal Code nor any other statute provides special sanctions for civil servants or other special groups. The Military Criminal Code, after the reform on 1 January 1991, contains sanctions similar to those noted in the Criminal Code. The custodial sanctions imposed on military personnel are enforced in the military penitentiary establishment (Nieuwersluis), where the regime differs from ordinary penal establishments.

8.12 The suspended sentence

Sections 14a-14k CC deal with the suspended sentence. The Dutch suspended sentence is a hybrid form of the Belgian-French *sursis* and the Anglo-Saxon probation. A suspended sentence involves the non-implementation of (a part of) an imposed sentence. Since its introduction in 1915, the rules for the suspended sentence have been radically revised a number of times. The last major reforms took place in 1986

and 2006, when the scope of application of the suspended sentence was substantially expanded.

The reforms were strongly influenced by the need to reduce pressures on prison capacity. The 1986 reform simultaneously responded to a need, which had long been recognized in practice, to make a partial revocation of a suspended sentence possible. Since the 2006 law reform, a suspended sentence is possible for all principal sentences. A prison sentence of up to two years, detention and fines may all be suspended totally or in part. A prison sentence between two years and four years may be suspended for a part not exceeding two years. A prison sentence of over four years may not be suspended.

The suspended sentence can be applied to all offences. Accessory penalties may be suspended as well.

8.13 Partly suspended sentences

The court may impose a sentence that is suspended only in part. Since a sentence may consist of a combination of various principal penalties, a partly suspended prison sentence in combination with a task penalty or a fine is possible. The suspended sentence is very widely applied.

Conditions

The suspended sentence is always subject to the general condition that the convicted person shall not commit another offence during the period of probation.

In addition to the general condition, the court may impose one or more special conditions, such as:

- compensation for all or part of the damage caused by the offence;
- admission to an institution of nursing care for the duration of the period of probation;
- deposit of bail (an amount of money equal to the statutory fine);
- the donation of a certain sum of money not exceeding the maximum statutory fine to the Criminal Injuries Compensation Fund or to other organizations interested in the protection of the interests of the victims of crime; and
- other special conditions concerning someone's behavior and attitude.

The special conditions may not restrict the freedom to practice one's religion or personal beliefs or one's civil liberties.

Chapter 8

The court determines the length of the probation period at the time of the sentencing. The probation period for the pecuniary conditions is two years, and for the other conditions three years maximum. The probation period can be extended to ten years maximum where there exist serious indications that the convict will again commit a serious crime involving bodily harm.

Control over compliance with conditions

The effectiveness and credibility of the suspended sentence depends very much upon the control over the compliance with the conditions attached to the suspended sentence. The prosecution service has to exercise control over compliance and the probation service may be ordered by the Court to help and assist the convicted person to comply with the conditions imposed. The probation service keeps the prosecution service and the Court informed about the progress of the suspended sentence through progress reports (sect. 12 Probation Rules).

Compulsory probation supervision was abolished in 1973 as a result of pressure from the probation service, which increasingly had come to feel that this task conflicted with its proper social work role. With the abolition of the supervision by the probation service, the judiciary's confidence in the effectiveness of the special conditions plummeted and gradually less 'creative' behavioral conditions were attached to the suspended sentence.

Revocation

Non-compliance with the conditions attached to the suspended sentence may lead to a revocation by the Court of the suspended sentence on request of the public prosecutor. The Court may decide partially to revoke the suspended sentence, or to extend the probation period or to add or change the condition attached to the suspended sentence.

When the court considers revocation of a suspended sentence or part of it, it may instead order the performance of a task penalty (sect. 14g CC).

9 Sentencing

9.1 Statutory framework

The Dutch judiciary is vested with its widest discretionary power when sentencing. The very few statutory rules that guide the court in this process are general and do not limit the court in choices of type and severity of the sanctions in individual cases. The statutory framework of sanctions is set very broadly. The statutory minimum term of imprisonment is one day, and is the same for all crimes, regardless of the generic seriousness of the offence.

Maximum terms of imprisonment are specified and reflect the gravity of the worst possible case. Few crimes are subject to life-imprisonment, but instead of life-imprisonment a fixed term prison sentence of up to thirty years or a fine can be imposed. Mandatory minimum sentences are unknown in Dutch penal law.

Aggravating circumstances

The Criminal Code provides a rather restricted set of rules for aggravating circumstances. Three circumstances may result in a more severe sentence: recidivism, concurrent offences and the committal of an offence in the capacity as a public official. In case of aggravating circumstances, the statutory maximum sentence may be increased by one third.

In addition, the Code has specified special aggravating circumstances for a number of criminal offences, which may result in a more severe sentence. This is the case with offences that are qualified in terms of their consequences, (e.g. assault resulting in the death of the injured person).

Mitigating circumstances

The Criminal Code contains one mitigating circumstance, i.e. youth. Young offenders fall within the limit of juvenile criminal law with a much lighter sanction system.

Apart from this general mitigating circumstance the criminal Code contains special mitigating circumstances, which are related to certain offences.

Concurrent sentences

Concurrent prison sentences cannot be imposed. When a suspect stands trial for concurrent offences or for multiple offences, the court cannot impose a prison sen-

tence simultaneously and cumulatively. In that case, the court can impose a joint sentence, the maximum term of which may be one-third higher than the highest statutory maximum prison sentence for one of those criminal offences but never more than thirty years.

Fines may be imposed for any of the concurrent offences.

There is a possibility of combining various principal sentences. A prison sentence, if totally or partly suspended, may be combined with a fine or a task penalty.

9.2 Rules on reasoning of sentences

The choice of sanctions lies with the court, but is subject to procedural requirements concerning the reasoning of the sentence:

- Section 359 (5) CCP requires that the verdict states the reasons determining the sentence. Until recently the court often confined itself to a standard phrase limited to the statement that the imposed sentence meets the seriousness of the offence, the circumstances in which the criminal offence has been committed, and the personality of the offender. It was generally known that this reasoning, required by section 359 (5) CCP, was pre-printed on the sentence form, or flowed easily from the word processor when devising the verdict. Recently, courts have begun to reason their sentence decisions more thoroughly.
- Section 359 (6) CCP furthermore requires that in a verdict that results in the deprivation of liberty, the special reasons that led to the choice of a custodial sentence are to be given, as well as the circumstances that were considered in assessing the appropriate length of the sentence. The choice of a suspended sentence does not need further reasoning. This requirement was incorporated in the CCP through the 1983 Financial Penalties Act.
- Finally, section 359 (7) CCP requires special reasoning when the court imposes an entrustment order for a crime involving a risk to bodily integrity.

Dutch procedural criminal law provides for a two-step procedure in the sentencing of adults (sect. 359 (5) and 359 (6) CCP).

The first requires a decision on the amount of the punishment that is proportionate to the offender's criminal liability and the seriousness of the offence.

The second step requires a decision on whether punishment should be imposed as a fine, a suspended sentence or determinate sentence of imprisonment.

In this decision, it is not the individual criminal liability or seriousness of the offence that plays a decisive role, but considerations of special or general prevention.

9.3 Statutory sentencing rules

There is no statutory provision on the aims of sentencing. These aims are quite diverse and include retribution, special or general deterrence, rehabilitation, conflict solution, protection of society and reparation.

All the statutory sanctions and measures are based on various sentencing aims. The task penalty combines many aims, but special prevention has a certain priority when imposing the task penalty. Multiple aims exist also for the withdrawal of illegally obtained profits (reparation, retribution and prevention), the fine (retribution, prevention and reparation), imprisonment (retribution, prevention and protection) and the entrustment order (protection, prevention as well as retribution). The basic notion of sentencing, however, remains the retribution of criminally liable conduct.

The court is free to choose one or more aims it thinks appropriate in each individual case. The chosen aim can often be deduced from the kind of sentence and the length of the sentence. The court frequently opts for a combination of sentencing aims, but there are also many examples where one aim is emphasized, e.g. HR (= Supreme Court) 26 August 1960, *NJ* (= Dutch case law) 1960, 566: retribution ('...that measures are not, unlike sentences, also beneficial to retribution of the criminal offence and are only aimed at the protection of public order and improvement of the offender...'); HR 9 December 1986, *NJ* 1987, 540: general prevention ('...that foreign criminals, like the defendant, should be deterred from providing for themselves by committing offences in this country...'); HR 12 November 1985, *NJ* 1986, 327: protection of society against the defendant ('...in the imposition of a prison sentence, the reason that the Court wished to protect society as far as was possible by doing so is not impermissible...'); HR 15 July 1985, *NJ* 1986, 184: special prevention ('...with a view to a proper enforcement of norms, the Court holds that no other sentence but deprivation of freedom shall be imposed...').

As a rule, however, the court does not explicate the aims of the sentence in the verdict at all. There exists one sentence, however, in a famous case (the murder of Pim Fortuyn, a popular politician, who was killed whilst campaigning for Prime Minister), in which the court explicitly dealt with the aims of sentencing. The murderer was sentenced to a prison sentence of eighteen years and not to life sentence despite the so-

cietal shock that the murder caused and the seriousness of the crime. The Court in first instance ruled that for humanitarian reasons the suspect deserved to have an opportunity to return to free society. On appeal, the Court referred explicitly to the attack on the democratic process and the very restricted recidivism risk, but kept the sentence intact because, as a rule, a first offender murderer, despite the seriousness of the crime and the special circumstances, would not normally be sentenced to life (Amsterdam Court of Appeal 18 July 2003, *NJ* 2003, 580).

A few years later in another famous case (the murder of the media personality Theo van Gogh, who produced the film 'Submission'), which was equal in its shock to society, the Court sentenced the offender to life. In this case, however, the murderer did not show signs of remorse and was more likely to re-offend after being released (Amsterdam District Court 26 July 2005, www.rechtspraak.nl, no. LJN AU0025).

The question arises here as to the extent to which the guilt of the offender puts a further limit on the severity of the sentence, and to what extent the sentence imposed should be in proportion to the degree of criminal liability. The principle 'no sentence without criminal liability' is part of Dutch penal law. That means that a defendant, by reason of insanity, cannot be punished and his case will be dismissed. But if he is a danger to himself or to others, or to the general safety of persons or goods, the court must order that the defendant be admitted to a secure institution through an entrustment order (*TBS*).

However, the principle 'no sentence without criminal liability' does not result in the consequence that the sentence is fully determined by this liability. Nor does it mean that a sentence that is disproportionate when measured by the degree of liability is inappropriate. In fact, the sentence is not only determined by the degree of liability, but also by other factors such as: protection of society against recurrence in connection with the danger of the offender; the seriousness of the offence committed; the seriousness of the effects for the legal order; and the general and preventive effect which emanates from such a sentence (HR 15 July 1985, *NJ* 1986, 184). In its case law, the Supreme Court has repeatedly accepted a sentence in which a measure (e.g. an entrustment order), due to mental disorder, was combined with a very long prison sentence. Despite diminished liability due to the mental disorder, the court can pass a long-term prison sentence, because it feels the need to keep the offender outside society for a long time, in order to protect society (HR 10 September 1957, *NJ* 1958, 5, HR 6 December 1977, *NJ* 1979, 181 and HR 12 November 1985, *NJ* 1986, 327). A combination of an entrustment order and a life sentence, however, is not compatible. When the court imposes a life sentence, it is the intention of the court that the con-

vict does not return into free society. The entrustment order has as main aim that the offender receive treatment and that he, as a consequence, be able to return into society. A combination of these sentences would conflict (HR 14 March 2006, NJ 2007, 345).

Various personal or isolated factors may be reasons to adjust the sentence upwards or downwards. An upward adjustment may be justified by the criminal past of the accused, or by the negative attitude of the accused during the examination in court; for example, an accused who consequently denies having committed the crime, or an accused wanting to evade a sentence by making several false statements, by the motives that compelled him to commit the offence, for instance jealousy and hate, by the circumstance that the accused did not want to cooperate in a psychiatric evaluation, or by the fact that the accused fails to understand that his behavior was wrong.

A downward adjustment may be justified by a serious delay between the time of committing the crime and the trial, by voluntarily offering compensation for damages inflicted, by expressions of regret on the part of the accused, by a lack of previous convictions or by positive probation prospects.

9.4 Judicial review of sentencing

A sentence by a court of first instance can be reviewed by an appellate court. An appeal can be lodged by the convict or the prosecutor. In appeal, the court enjoys full discretion to determine a new sentence.

As a rule, lodging an appeal pays off. Research on 20,000 appeal cases in 1994 and 1995, showed that in 21,5% the appeal sentence was similar to the prison sentence imposed in first instance. In 14,1% the appeal sentence was lower, and in 8% higher than the prison sentence imposed in first instance.

In almost 52% of the cases, the Appeal Court changed the prison sentence imposed by the court of first instance into a partly suspended sentence or, although rarely, into a fine. The total amount of prison days imposed by courts of first instance was 1.8 million. On appeal, the amount was reduced to 1.3 million prison days, a reduction of 1,370 prison years.

Sentence reduction by the Court of Appeal is often a reward for good conduct during the time elapsed between the verdict in first instance and the court session in appeal.

Review of sentencing is exercised by the Supreme Court as well, but the review is restricted to the question as to whether the sentence is sufficiently reasoned, according to the statutory requirements of section 359 CCP.

The Supreme Court, as a rule, accepts as sufficiently motivated the standard formula that the sentence is proportionate with the seriousness of the crime, the circumstances in which it was committed, and with the personal circumstances of the suspect.

The Supreme Court does not accept the standard formula when the sentence is surprisingly severe. This is the case when, for example:

- there is an obvious discrepancy between the offence committed and the sentence imposed, e.g. the seizure of a car worth € 18,000 for a criminal offence that carried a fine not exceeding € 5,000 (HR 13 June 1989, *NJ* 1990, 138);
- on appeal the sentence is augmented considerably without further motivation, which is the case when a suspended prison sentence, imposed in first instance, is replaced by a determinate sentence (HR 2 April 1985, *NJ* 1985, 875);
- the judge did not respond to an explicit defense as to the sentence at the trial, in which the defendant pointed out a factor for reduction of the sentence in an insistent and confident way (HR 1 November 1988, *NJ* 1989, 351); or
- the court imposes a high fine whilst the offender is poor (HR 17 February 1998, *NJ* 1998, 447).

Recently the proper reasoning of sentences has been stressed by a reform of section 359 subsection 2 CCP. The Court has to give explicit reasoning for not taking into consideration a well-reasoned and sound argument of the public prosecutor or the defense counsel.

9.5 Disparity in sentencing

The absence of mandatory rules for sentencing may contribute to a mild penal climate, but may also result in great disparity in sentencing.

Disparity between sentences for crimes that appear similar is one of the most serious problems in sentencing in The Netherlands. The Court of Appeal or the Supreme Court can, as we have seen, reverse extreme unjust sentences. But neither appellate courts, nor the Supreme Court, can ever realize full equality in sentencing by lower courts. Equality in sentencing has been a major concern over the last decades.

Various proposals have been discussed to improve the equality in sentencing without restricting the judges' discretionary powers to individualize the sentence too much.

Those proposals ranged from the establishment of a special sentencing court, to a data bank on sentences, or sentencing check-lists or sentencing guidelines for courts,

but none of those proposals has led to a viable solution to the problem of disparity in sentencing.

For certain types of offences, there was found to be less disparity in sentencing. This was not a coincidence, but a result of the fact that for these offences the prosecution service had issued directives on what sentence was to be requested at trial in the closing speech. This holds good for drink-driving, social security fraud, tax fraud, drug crimes, and so on. Those directives had a harmonizing effect. It appeared that in practice the Court considered the sanction requested by the prosecutor in his closing speech as a guideline for sanctioning.

The directives have been issued by the Board of the Prosecutors-General, and were in line with the sentencing policy of individual courts.

An individual member of the prosecution service is bound by these directives in principle. This obligation stems from the hierarchical structure of the prosecution service, in which someone lower in the hierarchy is committed to instructions emanating from his superior. This commitment is expressed in the law (sect. 139 Judicial Organization Act, and sect. 140 CCP).

Unlike the members of the prosecution service, the Court is not bound by these directives. Nor is it obliged to state the reasons for a deviation from the directives to the detriment of the offender (HR 10 March 1992, NJ 1992, 593). In daily practice, however, the directives prove to be a guide in its sentencing policy.

Although, since the 1970's, these types of sentencing directives for prosecutors have been issued for a large variety of crimes, they did not have the desired effect. This was due to the fact that the directives allowed a large margin between the highest and the lowest sentence to be requested, without making clear when the highest or the lowest sentence was appropriate.

There was also a lack of consistency in the directives. The question of whether a weapon was used was very important in the directive on bodily harm, but the use of a weapon did not play a role in the directive on sentencing for the use of violence.

Another reason why the sentencing directives were not an effective instrument against disparity in sentencing was that the prosecutorial directives on sentencing left room for public prosecutors, without further reasoning, to deviate from these directives in individual cases.

9.6 Prosecutorial sentencing guidelines

Within the prosecution service, since 1999 more than 35 national guidelines for sentencing, the so-called *Polaris*-guidelines, have been formulated, which should lead to

equality in sentencing for the majority of crimes. The structure of these prosecutorial sentencing guidelines is very clear and is based on the 'Frame for prosecutorial sentencing guidelines' published by the Board of Prosecutors General (State Journal 2001, 28). For each crime, a number of sentencing points is set, e.g. bicycle theft 10 points; burglary 60 points; motorcar theft 35 points; shop lifting 6 points; criminal damage 6 points; bodily harm 12 points; criminal intimidation 8 points; verbal insult 8 points; open or overt use of violence 15 points; import or export of hard drugs 30 points; burglary in a factory 42 points.

Due to special circumstances, the number of points can be adjusted higher or lower, e.g. the use of weapons or injury to the victim leads to extra points. The crime committed being one of attempt leads to a reduction of points. Recidivism ensures that 10% of the points are added; multiple recidivism leads to a 20% increase in the number of points.

Let us take the *Polaris*-guidelines on assault as an example. The number of sentencing points for assault is 12. When the assault leads to injury, extra points are added: 3 points for light injury (no medical help needed), 8 points when medical treatment is needed, 21 points when specialist medical treatment is needed (broken nose, cheekbone or facial scars) and 35 points for more serious injuries.

Where the assault took place with the use of a blunt weapon 7 points are added. When a stabbing weapon is used, the penalty is 17 points and when a fire arm is used 52 points are added.

When the assault is motivated, either wholly or partially, on the basis of discrimination or when the assault is related to a sport event, an additional 25% is added.

The total number of points is doubled where the victim is a public servant or a professional lawfully executing his duties in public or when the victim prevented or attempted to prevent the assault. 33% is added in cases in which the assault was committed against a victim who was in a dependant relationship to the offender. Finally, an additional 25% is added when the victim was arbitrarily chosen by the offender.

Eventually, the points are added up and converted into a sentence.

Not all the points count fully for the sentence. A conversion method has been elaborated. Up to 180 points, every sentencing point counts. Between 181 to 540 points, each point counts as half a point and above 541 points each point counts as a quarter of a point.

Every point may lead to a fine of € 22 or to one day of imprisonment or to two hours task penalty. Below 30 points, the public prosecutor can avoid a public trial and use

the fine transaction. Between 30 and 60, points the prosecutor may only use the task penalty transaction. Above 61 points, there will be an indictment and the public prosecutor will request a task penalty (< 120 points) or a prison sentence (> 120 points).

An individual public prosecutor is allowed to deviate from these guidelines, but he has to give an explicit reason for doing so. The advantage of this system is that review can take place in all nineteen regional prosecution services. In cases where a prosecutor deviates greatly from the national policy, a discussion is held between the chief public prosecutor and the individual prosecutor.

Uniform requests by the prosecution service, on the basis of these guidelines for sentencing, lead to more uniform sentences by the courts.

9.7 Judicial points of reference for sentencing

The absence of mandatory sentences and the wide discretionary power in sentencing is one of the characteristics of the Dutch criminal justice system. It is an expression of faith in its judiciary. However, discretion may lead to arbitrary or inconsistent sentences. Therefore the use of discretion needs to be justified by the Court in its reasoning of the sentence. Nowadays, society expects greater transparency and equality in sentencing.

Unlike public prosecutors, judges cannot be bound by guidelines on sentencing issued by superior courts because in the judiciary no hierarchy exists. Judges, however, are free to develop a consistent sentencing system.

In recent years, two instruments have been developed in order to support courts in the sentencing process: a databank of consistent sentencing case law and judicial points of reference for sentencing. For a number of crimes, points of reference are set by the National Board of presiding judges in criminal courts. Points of reference for sentencing exist for drug crimes, traffic crimes, various types of theft, injuries and perjury.

As a rule, judges seem to apply those points of reference. When a conflict arises between the application of the prosecutorial sentencing guidelines and the judicial points of reference for sentencing, the latter prevail, as is shown in a decision of the Amsterdam Court of Appeal 24 July 2007, NJFS 2007, 229.

10 The prison system

10.1 Introduction

An increasing number of people are incarcerated for a short- or long-term present in Dutch penitentiary establishments annually.

Over the last twenty-five years, the composition of the Dutch prison population has changed considerably. In comparison with the prison population in the 1980s, in present day the Netherlands, prisons contain prisoners of a different type detained on various titles and when convicted serving much longer sentences for a different kind of offences.

Prisoners are by no means a homogeneous group. They vary in age, gender, nationality, ethnic background, education, et cetera. The group also varies on the reason for being deprived of their liberty. Some are detained awaiting (pending) trial – the pre-trial detainees – others are detained to serve a prison sentence either imposed by a court as sentence or imposed by a court as a sentence substituting the non payment of a pecuniary sentence. A third group is detained in order to implement an entrustment order imposed by the court as sentence or in combination with a prison sentence for convicts who due to a mental disorder cannot be held fully criminal responsible for the offences committed. A fourth group is prisoners who are detained as a result of a penal measure imposed by the court against persistent offenders – mainly drug or alcohol addicts.

Finally there is a group of prisoners who are detained in deportation centers for illegal foreign nationals in order to ensure their deportation.

The Minister of Justice is ultimately responsible for the Prison Administration and the development of prison policy. Regular prison memoranda or prison policy plans are issued. They indicate changes in prison philosophy and regime policies. Between 1953, when the Principles of Prison Act came into force, and 1999, when its successor the Penitentiary Principles Act came into effect, four major prison memoranda have been published, showing that high expectations of the rehabilitation ideal have been gradually altered towards a more down to earth philosophy.

The latest prison-memorandum was issued in 1994. In Dutch it is called '*Werkzame detentie*'. It means both effective incapacitation and laborious or industrious detention. Security, humanity and efficiency became the keywords for this new prison policy.

The main reason for developing a new prison policy was the changing characteristics of the prison population. There are an increasing number of prisoners serving very long prison sentences; there are more aggressive prisoners and prisoners with a high escape-risk or psychotic and drug addicted prisoners.

There were also an increasing number of non-native prisoners who would be expelled after their release. The number of nationalities, foreign languages, religions in prison, et cetera was growing annually.

Another reason to reconsider prison policy was the enormous extension of the penitentiary capacity since the 1982 prison memorandum.

During the last decade, the prison rate doubled and the Netherlands had one of the fastest growing prison populations in the world.

The incarceration rate per 100,000 inhabitants grew from 45 in 1990 to more than 128 in 2006 (see: www.prisonstudies.org).

In recent years, no memorandum has been issued but that does not mean that no major changes in the prison policy have taken place: recently the organization has been restructured and a new detention concept has been developed (*De nieuwe inrichting*), tailor made detention and treatment for adults have been implemented, multi-person cells have been introduced and establishments for persistent offenders have been opened.

Despite major prison construction activities in recent years, projections by the Ministry of Justice suggest the need for ever more capacity.

The Dutch Prison Service was reorganized in the mid 1990's after a lengthy and complex process. Until then, the management of Dutch prisons and penitentiary institutions was directed by the Central Prison Directorate of the Ministry of Justice. Almost all decisions concerning personnel and prisoners were made by this Directorate. A so-called deconcentration process put an end to this situation. Since then, the prison governors are vested with powers that previously belonged to the Prison Directorate. In 1995 the National Agency for Custodial Institutions was established. The office is located near the Ministry of Justice. The Agency has four main divisions: a prison division, a division for Entrustment Orders Treatment Institutions, a division for juvenile custodial institutions and a division for special detainees like drug couriers (the so-called drug swallows) and illegal immigrants who are detained in order to ensure their deportation. Within the National Agency there are departments for transport of prisoners, for religious care and for training of prison wardens. The task of the Agency is to coordinate the decentralized management, and to develop and implement a system of planning and control.

The deconcentration process brought a division between strategic prison policy-making and implementation of this policy. The former is the task of the Directorate General, Prevention Youth and Sanction of the Ministry of Justice, the latter the task of the National Agency and prison governors.

The National Agency is supervised by a number of inspectorates such as the Inspectorate of health for the health care in prison, the Inspectorate of labor for the labor conditions in prison. Since January 2005, the Agency is also supervised by the Inspectorate for the Implementation of Sanctions, which supervises the main tasks of the Agency: the realization of security and the treatment of prisoners.

This division between policy-making and policy implementation is very favorable to prison organization, because local management has ample opportunity to make its own decisions in personnel, financial and material matters.

10.2 The 1998 Penitentiary Principles Act

The main legislation on the enforcement of prison sentences is the 1998 Penitentiary Principles Act (PPA: *Penitentiaire beginselenwet*), and the attached Penitentiary Rules (a Royal Decree) in which principles laid down in the PPA are elaborated in more detail. The Act replaced the 1953 Principles of Prison Administration Act and considerably changed the regulations on differentiation of penitentiary establishments or institutions and on the selection of prisoners. As of January 1, 1999, the Act is in effect. The core of the Penitentiary Principles Act consists of four topics. The Act:

- legalizes some restrictions of human rights;
- takes as a starting point that the implementation of prison sentences does not take place under the principle of separation, but under the principle of association;
- guarantees a minimum of facilities and activities for prisoners; and
- provides prisoners with legal safeguards.

The guiding principles of the Penitentiary Act are: the principle of resocialisation, the principle that a sanction is implemented as soon as possible after it is imposed, and the principle that the incarcerated person is to be subjected to as few restrictions as possible.

The Penitentiary Principles Act, furthermore, covers the principles governing the regulation of different types of penitentiary institutions. The three different types are:

- remand houses, mainly for implementation of pre-trial detention orders and for implementation of certain prison sentences or other kinds of deprivation of liberty;

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- prisons for the implementation of prison sentences at large; and
- institutions for persistent offenders.

Penitentiary institutions do not include institutions for the treatment of those detained under an entrustment order due to their mental disorder at the time of committing a crime, or the institutions for juvenile detainees. The Penitentiary Principles Act is not applicable to these institutions. A separate set of Principle Acts exists for the deprivation of liberty of juveniles and the implementation of entrustment orders.

The Penitentiary Principles Act also elaborates the principles in respect of classification of prisons, level of association, selection of prisoners, use of control on and violence against prisoners, degree of contact with the outside world, social, spiritual and medical care, prison work, recreation, discipline and the complaint procedure for prisoners.

The PPA is both applicable to prisoners and to pre-trial detainees. As a rule, the legal position of a pre-trial detainee is similar to that of a convict. The PPA provides rights and obligations for all persons detained, regardless of the title of detention – prison sentence, pre-trial detention order, fine default detention, detention of persistent offenders measure or expel detention order (sect. 1 PPA).

Prison sentences or measures depriving someone's liberty are to be served in a penitentiary institution or through participation in a penitentiary program (sect. 2 PPA).

Penitentiary programs

The new Penitentiary Principles Act (sect. 4) and Penitentiary Rules (sect. 5 and further) have introduced the penitentiary programs as a back-door variant of community sanctions. Characteristic of a penitentiary program is that part of the sentence is not served in prison but outside prison, e.g. at home, in a drug rehab centre et cetera.

Penitentiary programs are discretionary programs. The prison governor may nominate prisoners for a penitentiary program and a selection officer makes a decision based upon various factors, such as the prisoner's attitude and behavior, recidivism risks and their ability to cope with responsibilities due to extended liberties. Participation in these programs can be granted to motivated detainees when:

- they have served at least five- sixths of their sentence or at least six months;
- the remaining term to serve is at least four weeks and one year maximum; and
- no contra indications for participation in a penitentiary program exist.

Not eligible for participation in a penitentiary program are prisoners who still have to serve their entrustment order, prisoners who after serving their sentence will be ex-

pelled or deported or have to leave the country and prisoners who serve their sentence in an extra high security prison.

The convicted person is supervised by the person who is responsible for the daily running of the penitentiary program. As a rule, this is a probation officer. The prisoner is obliged to participate in activities aimed at reintegration and rehabilitation outside the prison.

The penitentiary program consists of activities for at least 26 hours per week aimed at improving social skills, improving the likelihood of later employment, the provision of education and special medical or psychiatric care, or a general attempt to ensure adequate preparation for the return to free society.

Penitentiary programs are combined with electronic monitoring during at least the first one third term of the period of the penitentiary program.

10.3 Types of penitentiary institutions

Prior to the introduction of the 1998 Penitentiary Principles Act a number of statutory criteria were developed for the classification of prisoners, such as age of the prisoner and the length of prison sentence. The PPA no longer recognizes age and length of sentence as statutory criteria for differentiation; however, in practice they still play a role. The differentiation based on gender is still in use. Men and women may be detained in one penitentiary establishment but as a rule, in separate wings. They may, however, participate in common activities. The main differentiation criterion since the PPA came into force is the level of security.

The various penitentiary establishments can be distinguished on the basis of their destination and their level of security. There are five levels of security (sect. 13 PPA):

- very low security;
- low security;
- normal security;
- extended security;
- extra high security.

There are at present (2007) twenty penitentiary establishments for adults, many of which include one or more remand houses and one or more types of prisons. In nine penal establishments, separate wings or departments exist for female prisoners. Dutch penitentiary establishments are rather small. The largest has a capacity of approximately seven hundred cells. The total detention capacity for adults is around 18,000.

Many prisoners are so-called self-reporters. Those are convicted persons who are not serving their sentence immediately on the imposition of the prison sentence. Those convicted persons are not deprived of their liberty at the time the prison sentence is imposed but, after a period of time, they are summoned to report to a penitentiary establishment to serve their prison sentences. It is assumed from the fact that they themselves report, that they accept the sentence and will not try to escape. They therefore present a minimal security risk and can be kept in a restricted security penitentiary establishment.

Penitentiary establishments are as a rule either prisons, remand houses or establishments for persistent offenders. In special cases, the Minister of Justice may designate an institution as both a remand house and a prison or an establishment for persistent offenders (sect. 9 subsect. 1 PPA). The prisons account for a total of approximately 4,600 (2007) cells. The various kinds of prisons are:

Extra high security level prisons

After a number of spectacular escapes in 1991, the system of extra high security units was introduced for prisoners who present a high escape risk, and who were labeled as extremely dangerous. In four prisons, units of twelve cells each were established. The weak point of the extra high security unit was that facilities for outdoor exercise, sport and visits were not located in the unit but in other parts of the prisons. Several extremely dangerous prisoners attempted to escape, using extreme violence and taking hostages.

A decision was made to build one fully-fledged EHS-prison in Vught. All the facilities are inside the walls of the prison. The EHS-prison in Vught comprises eighteen cells (12 prison cells and 6 remand house cells). In fact, it is a prison within a prison. Given the limited capacity, placement in an extra high security prison takes place only after a thorough assessment of risks of escape. Prisoners who present an extremely high escape risk, and whose escape would be unacceptable for society in terms of recidivism for serious violent crimes or in terms of considerable societal unrest, may be placed in an EHS-prison. Detention in an extra high security unit is for a period of six months but can be extended each time by six months, provided that the risks of escape still exist. The prisoner as a rule will serve the final 18 months of his sentence in a lower security level prison.

A prisoner can challenge a decision to place him in an EHS-prison or to renew his placement.

The regime in the EHS-prison is very restricted. No contact is allowed with prisoners of other units. Regular body-checks and special cell-check take place. Visits by family and friends take place in a room separated by a glass wall. Visitors are searched prior to the visit. Prisoners are checked prior to and after the visit. All talks with visitors are recorded. In exceptional cases the prisoner has to wear handcuffs outside the cell. At least twice a week forty five minutes sport is allowed, and at least six hours a week recreational activities are permitted.

Extended security level prisons

Prisons with a level of extended security hold prisoners that pose an extended risk of escaping or an extended societal risk. These prisoners are not fit for detention in full association with others or are suffering of mental disorders. Many of them are violent, have a subversive nature or have a manipulative attitude. In these prisons as a rule an individual regime is applied.

Normal security level prisons

Prisons with a normal security level are as a rule for prisoners who have to serve a remaining detention period of three months and are fit for a full association with other inmates or who did not report themselves after being requested to do so. They are arrested and placed in a normal security level prison.

Low security level prisons

These prisons house two kind of prisoners: prisoners serving the last phase of their (long) sentence and so called self-reporters, detainees who, at the time they were sentenced by the court for less than two years, were not detained in pre-trial detention, and who report themselves after having been requested to do so.

Prisoners generally begin their sentence in a normal security level prison but can be placed in a prison with restricted security when he does not pose an escape risk or societal risk and still has to serve between six and eighteen months, and furthermore shall have a leave address, because in this prison he might have the right once every month for a weekend leave.

Very low security level prisons

These prisons play a role in the detention phasing. Prisoners in these prisons sometimes come from low security level prisons. Prisoners in very low security level pris-

ons do not form escape risks or societal risks. Their sentence must have been at least six months imprisonment and at least half of the sentence must have been served. The remaining part of the sentence must be at least between six weeks and a maximum of six months. In these prisons, there are possibilities for re-education and participation in labor projects.

There are at present around 12,500 (2007) places available in remand houses. The major kinds of remand houses are:

- Police cells at police stations, in cases of detention capacity problems, may be used to detain persons who are remanded into custody or have been arrested for a crime. The stay in a police cell is restricted to ten days maximum. The PPA is not applicable in police cells.
- Remand houses for pre-trial detainees. The daily activities mainly consist of prison labor. A pre-trial detainee may take part in educational programs. Participation in programs is not obligatory.
- Remand houses for convicts who have to serve a remaining deprivation of liberty of three months maximum.
- Remand houses for detention of illegal immigrants who are not allowed to enter the country or who are ordered to leave the country (sects 56 and further Aliens Act). Detention of illegal immigrants is an administrative measure, but is executed in a secure institution. The conditions are identical to those for pre-trial detention. Around twenty five percent of the annual remand house population consists of illegal immigrants.
- Penitentiary establishments for persistent offenders.

In 2001 a new custodial measure was adopted: compulsory detention of persistent drug addicts who frequently commit less serious offences such as public violence, shop lifting or vandalism, but are nonetheless considered a serious public nuisance. In view of the pettiness of the committed offences, they were as a rule punished with short prison sentences. Therefore, it was not possible to start treatment in a penitentiary setting effectively. The new measure authorizes confinement of addicts in a special 'penitentiary treatment centre' for up to two years. During this period, detention will be used to get the addict to cooperate in a treatment program aimed at detoxification, normalization, and reintegration.

In 2004 the compulsory detention of persistent drug offenders was incorporated in a measure of compulsory detention of persistent offenders. The measure can be imposed by the court at the request of the prosecution service for an offender:

- who has committed a crime for which pre-trial detention can be ordered (crimes which carry a statutory maximum penalty of less than four years of imprisonment or specifically designated crimes), and
- who has, in the previous five years, been sentenced at least three times to a deprivation of liberty or community service, and
- who is likely to re-offend,

provided that the safety of individuals or goods requires such a measure.

Unlike the compulsory detention of persistent drug offenders, the 2004 measure mainly has as its objective the reduction of serious public nuisance. When the offender is addicted to drugs or suffering from a disorder related to the crime, the measure may contribute to the solution of the addiction or disorder, e.g. by a compulsory drug rehab.

The term of the compulsory detention is, as a rule, two years, and in exceptional cases, one year. The compulsory detention can be imposed on probation.

Detention for persistent offenders can be combined with a day program or without a day program. A day program is only offered to those who are motivated. The program focuses on the development of skills related to:

- self care and hygiene;
- labor;
- education;
- spending of leisure time;
- financial administration;
- unsupervised settling; and
- social attitude.

The Minister of Justice determines the designation of each penal establishment or wing and determines for each penitentiary institution the level of security. The Minister may designate parts of a penal establishment as a wing with a separate designation. Furthermore the Minister sets the rules concerning placing and transfer of prisoners.

Wings for suspects or convicts of terrorist crimes

Recently two special wings for terrorist inmates have been established, an eighteen cell wing in the penitentiary establishment in Vught and a twelve cell wing in the penitentiary establishment of De Schie in Rotterdam. The level of security in both wings is that of extended security. The main reason for concentrating the detention of terrorist suspects and convicts in two separate wings is the fear that they would other-

wise infect other inmates with their fundamentalist ideas. Therefore the risk for radicalization and recruitment needed to be reduced.

All terrorist inmates operate under an individual regime. The prison governor decides whether the detainee may take part in individual or common activities. Juvenile terrorist inmates (> 16 years) are detained in the same wing with adult terrorist inmates. The Netherlands has made a reservation with regard to section 27 sub c Convention on the Rights of the Child to this effect.

Every twelve months the penitentiary consultant assesses whether a prisoner's stay in the special wing for terrorists has to be continued. The governor may refuse visits by visitors or telephone calls with persons for a total of 12 months in order to maintain order and safety of the prison establishment, to protect public order and national security, to prevent criminal offences and to protect victims of crime.

The main objective of the regime in the wing for terrorists is re-socialisation. The prisoners' rights are similar to the prisoners' rights in regular prisons; there is however no possibility offered to take part in labor activities. Many prisoners' rights in the terrorists wings may be restricted in order to maintain order and safety in prison, to protect public order and national security, to prevent criminal offences and to protect victims of crimes.

Selection of prisoners

The variety of penitentiary institutions for adults means that detainees have to be selected. Selection is made by a penitentiary consultant (sect. 15 PPA) on the basis of a risk profile. Such a profile is made for each detainees and consists of data on his previous attitude in penitentiary establishments, the characteristics of the crime committed, his financial position and, if applicable, his membership of a criminal organization. Using this risk profile, the penitentiary consultant decides in which penitentiary institution a person must serve his or her sentence. If during the course of the sentence it becomes clear that the person does not fit in well with the institution selected, he can be transferred to another institution. In practice, one of the most important reasons for transfer is that the convicted person is not fit to associate with other inmates.

A detainee has the right to lodge a complaint against his committal to the selected penitentiary institution, or his transfer to another institution. The complaint is dealt with by the penitentiary consultant (sect. 17 PPA). When the prisoner still disagrees with the decision of the penitentiary consultant, he can lodge an appeal with the

Council for the Administration of criminal justice and youth protection in The Hague, which serves as an administrative High Court.

Level of association in prisons

Prison sentences as a rule are implemented in association. The Minister of Justice decides the level of association of each individual penal institution (sect. 19 PPA).

A distinction is made between complete freedom of association (sect. 20 PPA), and limited association (sect. 21 PPA).

Under the regime of complete freedom of association, prisoners spend their daytime in common quarters. They have common meals, common recreational activities and common labor activities. The penitentiary rules lay down the number of hours weekly they can spend outside their cells. At present, they may spend at least 59 hours outside their cells and between 18 hours and 63 hours activities are offered.

Under limited association, prisoners are confined to their cells except for periods of communal or group activities. In the case of complete association, communal activities are the rule and confinement to cell an exception; in the case of limited association it is the other way round. Thus, for example, in a prison for those deemed unfit to mix with other prisoners, association is restricted to work, outdoor exercise, church services and, in special cases, educational and recreational activities. The level of association can therefore vary from being let out of the cell only for work, exercise, church and recreation, to staying out of the cell all day long. Whatever the level of association, night-time is always spent in the cell.

In order to decide under what level of association a prisoner's sentence will be implemented, the Minister of Justice sets criteria. Based on these criteria, a decision is taken as to whether a prisoner is placed in a single cell or in a common cell with two or more prisoners. For prisoners who are not able to serve their prison sentence in full or restricted association with others, an individual regime is applied (sect. 22 PPA). The characteristic of an individual regime is that even on a daily basis it can be decided whether and to what extent the prisoner is fit to participate in common activities. Otherwise he has the right to take part in activities without association with others.

Until 1993, the Dutch prison system operated a principle whereby no more than one prisoner may occupy each cell. By force of circumstances, in particular the lack of prison capacity in the early 1990's, the one-prisoner-per-cell rule came under pressure. Exceptions to the rule were adopted. Since 1993, prisoners for fine default, and those who are placed in detention due to an expulsion order, may be accommodated in a

common cell. Furthermore, in emergency situations pre-trial detainees and prisoners in remand houses may be accommodated in common quarters, which, since the adoption of the 2002 Provisional Act on Emergency Capacity for Drug Traffickers (State Journal 2002, 124), is also the case for the so-called drug mules or drug swallowers. The regime for these drug couriers was not covered by the PPA but by the Provisional Act. The regime was of a very sober character with restricted rights. Prisoners did not have the right to take part in prison labor, education, recreation and sports. Although the Act expired in 2005, the sober regime is still applied.

Since the reform of section 21 PPA in 2004, prisoners who serve their sentence under a limited association in some penitentiary establishments can be placed in a double cell provided that they consent. Recently, a new prison for short-term prison sentences has been constructed in which six prisoners per cell are housed as a pilot. By placing two prisoners in a cell, prison capacity can be extended and there seems to be a constant need for more capacity. One can question whether a prisoner's consent is needed for him to be placed in a double cell. The majority of prisoners serve only short-term prison sentences. For them a double cell or a multi-person cell as a rule may be appropriate. The reconstruction of single cells into double cells will have beneficial effects on prison capacity and may also have beneficial effects on the prison regime because money used for the construction of new prisons cannot be spent for prison regime activities.

10.4 Prison regime

The 1994 prison memorandum formulated the new prison policy. The core of that policy was that a standard regime for all detainees in closed (secure) penitentiary institutions would be applied, in which productive labor for 26 hours was a central element. The intention was that labor would be profitable and could increase the budget of the penitentiary institution. Next to the 26 hours of labor, a daily activity program including open air visits, recreation and sports was offered.

Labor, however, never became the core of regime activities nor became profitable. Nowadays in virtually all remand houses prison labor has been abolished due to high costs and small profits. This means that pre-trial detainees spend most of their time in their cells.

In 2003 proposals for a new prison regime were formulated, aiming at a flexible and functional implementation of deprivation of liberty sanctions and measures. The effect of these proposals was that the day program in the regime of full association is 59

hours minimum of which between 18 hours and 63 hours should be offered for activities and visits.

There exists a minimum of 18 hours and a maximum of 63 hours for activities and visits for the regime of restricted association. For detainees this means that only between the hours of 08.00 and 17.00 hours can they have activities outside their cell and that an evening program is no longer offered. At 17.00 hours, detainees are locked in their cells and remain there until 08.00 hours the next morning.

The main elements of a day program are:

- *Meals.* In the majority of the prisons, meals are served in the cell except in penitentiary establishments with complete freedom of association. In some penitentiary establishments, prisoners are occasionally allowed to prepare their own meals.
- *Stay at cell.* In order to make it possible for all prisoners to enjoy activities, sometimes other prisoners have to spend time in their cell watching tv, listening to music, writing letters et cetera.
- *Open air visit.* The prisoner has the right to spend at least one hour daily in the open air. In some prisons in summer, open air visits are more frequent or last longer. For prisoners, open air visits are used for exercise, to talk with other prisoners or just to relax.
- *Visit to the library.* There is a library in many prisons. In the library, prisoners can select books or cd's or can read newspapers or play games. Books and cd's may be taken to their cells. Sometimes prisoners cannot visit a library but can order books or reviews by selecting these from a list.
- *Creativity.* Prisoners are offered means to express their artistic creativity.
- *Sports/fitness.* Every prisoner may participate in sport activities such as football or basketball or fitness twice a week for at least 45 minutes each time. Bodybuilding and the like is very popular with prisoners.
- *Recreation.* During recreation-time, prisoners can play games (cards, chess, table tennis, play billiards), watch tv or chat together. Recreation time is also used for making telephone calls.

10.5 New detention concepts

Since 2003, two new detention concepts have been developing. The reasons for developing new concepts are twofold:

- the constant increase of the need of prison capacity; and
- the reduction of the prison service budget.

The increase in the incarceration rate (1992: 49, 1995: 66, 1998: 85, 2001: 93, 2006: 128) is the result of a wider application of pre-trial detention and of a more punitive climate. More short-term prison sentences as well as more long-term sentences are now imposed. Initially the reaction to the increase in prisoner numbers was to construct new prisons. This resulted in a substantial increase to the prison budget. As an unlimited increase of the budget is impossible, a reduction in the budget for other elements, such as certain conveniences and provisions, was the result.

Although the prison budget substantially increased, the increase was insufficient and plans were developed to implement prison sentences more efficiently, effectively and in relation to demand, taking into consideration the need to increase the security for society, the reparation of the legal order and the safety of detainees and prison staff.

Against this background, two new detention concepts are developing:

- the Tailored Detention and Treatment for Adults Concept; and
- the Detention Concept Lelystad (hereafter: DCL).

The first concept is still under discussion. Let us therefore look at the second concept, which, since January 2006, has been in operation.

In the new penitentiary institution at Lelystad, there is place for 150 short-term detainees who have (still) to serve four months.

What are the characteristics of DCL?

The first characteristic is that all cells are multi-person cells of 55 m² with three bunk beds. At the footboard of every bed a touch screen is placed through which the detainee can watch tv, make telephone calls as long as his budget suffices, put orders through to the prison shop, make an appointment with the prison physician, notify prison staff that he desires halal or kosher food or can read newspapers or books. Every cell is equipped with a microwave to heat meals, with a separate shower and wash stand, a toilet, a washing machine and a dryer. Detainees have to keep their cells clean and do their own laundry.

The cell is unlocked between 08.45 and 12.15 hours and after the lunch between 13.15 and 17.00 hours.

Detainees can choose five activities per day: sports, recreation, education and cleaning duty in groups. Participation in the cleaning duty and education is compulsory three times a week.

During the education activity, societal and personal items are discussed such as alcohol and drugs, health and debts. Education takes place through group discussion or e-learning.

The penitentiary institution consists of compartments of five cells each. Detainees do not meet inmates from other compartments.

Only six prison wardens are present for 150 detainees, two of which sit in a room with observation cameras, two who supervise the fatigue duty and the situation in the compartments and two who supervise open air visits, sports and recreation activities.

During the night, two prison wardens are in the observation room. In situations of emergency, a support team can be ordered.

Detainees can communicate through intercom with the observation room.

Detainees wear an electronic bracelet which they need to log in their touch screen.

The electronic bracelet is furthermore a locator for the tracing and tracking system. In the observation room the position of a detainee is traceable on a computer screen.

The prison wardens all carry a palmtop computer containing information on detainees. Through this computer wardens can communicate and watch the observation cameras.

Furthermore experiments are running with the electronic detection of aggression through voice frequencies.

In order to stimulate good behavior and personal responsibility positive behavior is rewarded. There are four types of rewards: a telephone card of € 5, a pack of hand-rolling tobacco, extra visits or one night in a cell other than his regular one. The most popular reward is the telephone card. Non-compliance with the prison rules may result in a placement in a penitentiary institution with less activities and conveniences.

This rather new detention concept has been evaluated. Neither detainees nor prison wardens have been negative about the regime, although some negative elements have been expressed: for the detainees, there is too little privacy, too much boredom and idleness; and for the wardens, feelings of insecurity and negative evaluations of the reward scheme for detainees.

It may reasonably be expected that the use of electronic devices in the DCL concept will be expanded to other prisons as well.

Although the first concept is still under discussion, the main lines of the Tailored Detention and Treatment for Adults are already set.

The basic principle is that the implementation of detention is made dependent on the specific groups of detainees.

Based upon two objective criteria – the title of detention and the length of the detention – detainees are divided into three categories (the so-called domains):

- Pre-trial detainees (domain 1). These detainees have not yet been sentenced or their sentences are not yet final and appeal or cassation is pending.
- Short-term detainees (domain 2). These detainees are serving a (remaining) prison sentence of four months maximum. The court either imposed a short-term sentence or the time to serve is short because the time spent in pre-trial detention is to be deducted from the imposed prison sentence.
- Long-term detainees (domain 3). These are detainees who are serving (remaining) prison sentences of more than four months.

The division into three categories affects various factors of the detention regime, the day program and the security measures.

For the pre-trial detainees, the day program is restricted to activities such as sports, recreation, religious care, visits and open air visits. For this category, they must be at the disposal of the organs of the criminal justice system (police, prosecution service, court) for a smooth running of the pre-trial investigation or court trial.

The short-term detainees receive a basic day program similar to that of the pre-trial detainees, as well as additional practical support to prepare for their return to free society.

Long-term detainees receive the basic day program but may also receive a supplementary program consisting of behavioral training provided that they are motivated and suitable.

The prison staff receives training to stimulate long-term prisoners into making use of these supplementary programs.

Labor and education are not part of the basic day program. In order for education programs to be effective, they are only offered to those detainees who are imprisoned for a longer period. It is only available for detainees in domain 3.

Labor is also only available for long-term detainees. In the past, productive labor was a major part of the day program. It was however only profitable in a number of areas yet it consumed part of the prison budget.

Prerequisites for prison labor are now that the possibility to take part in prison labor will only be offered when it is budget neutral or profitable.

Within this various categories, tailored detention is frequently related to security, accommodation and treatment as well as to the content and intensity of the day pro-

gram. Furthermore, it is possible to tailor detention in relation to various risk factors (escape, managerial and recidivism risks).

Detainees are co-responsible for their own detention track. Good behavior will be rewarded (more visits, more activities); bad behavior will be discouraged by sanctions such as restriction of visits.

10.6 Prisoners' rights

The PPA provides rules for the prison regime and the legal position of detained persons. The main rights are related to contacts with the outside world, the right or duty to take part in prison activities in leisure time or to take part in religious services, aspects of food, clothing, personal belongings, open air visits, medical and mental care, disciplinary measures, safety and order in the penitentiary institution, complaints procedures, and so forth.

In the Netherlands, a detainee may have a television and video in his cell, at his own expense, as well as books and a bird or a small aquarium.

The model prison rules (*buisregels*) establish which objects are forbidden in a prison cell. All these objects are statutorily forbidden:

- objects similar to those which have already been provided by the State as inventory of the cell;
- flashes, candles, oil lamps, vibrators, sex puppets, film and video equipment, binoculars, telescopes, photo equipment, a transmitter and communication equipment;
- pets, except one or two fishes to be held in an aquarium not bigger than 40 by 25 by 30 cm, and a birdcage not bigger than 35 by 35 by 50 cm with one or two small birds;
- objects with a discriminating, militant or indecent nature.

The model prison rules determine, sometimes in detail, the provision or possession of other objects such as clothes (7 pairs of underwear), shoes and other personal belongings that may be held in the cell. Objects, other than those explicitly forbidden or allowed, may be allowed or refused by the prison governor. He may allow the prisoner to keep a personal computer, a CD player, an electric kettle and a hairdryer in the cell.

Visits

The inmate has a right to receive visitors for at least one hour per week at the times and places determined in the model prison rules (sect. 38 PPA). Pre-trial detainees, however, who are detained under restrictions set by the examining judge, do not have this right unless the public prosecutor or examining judge issues directions to the prison governor to allow the pre-trial detainees to receive a visitor.

Those who wish to visit an inmate must obtain prior permission by telephone or in writing. Visitors may be refused in the interest of maintaining order and safety of the penitentiary establishment, the protection of public order and national security, the prevention of criminal offences or the protection of victims of a crime.

The governor may limit the number of visitors simultaneously admitted to the detainee if it is in the interest of maintaining order or safety of the penitentiary establishment. The visit takes place in visiting rooms supervised by prison wardens. In visiting rooms, as a rule, other prisoners receiving their visitors are present as well. Individual visits, however, may be granted by the prison governor.

The conversation between the inmate and his visitor may be overheard or intercepted, provided that the prison governor informs the inmate prior to the visit that this may happen.

As a rule, there is no glass or plastic screen between the inmate and his visitor. The governor, however, may decide that such a screen will be placed and that communication must take place through intercom. Visitors must wear an identity card and their clothing may, prior to the visit, be examined for the presence of objects that may be a risk to order or safety in the institution. The examination may also concern objects brought by the visitor. The governor has the authority to confiscate objects for the duration of the visit. The visitor must pass a detection gate. Visitors may not hand over anything to the inmate.

Before and after visiting hours, the inmates' clothing may be searched or the inmate may be ordered to undergo a bodily examination.

Lawyers may visit their clients without time restrictions. Lawyers must identify themselves and pass a detection gate. Their belongings may be examined.

Prisoners serving a long-term prison sentence may be granted the right to receive a so-called non-supervised visit. These visits may be used for sexual relations. The request for non-supervised visits by pre-trial detainees, however, will be granted only in very, very exceptional circumstances. A long stay in pre-trial detention and deterioration of the relationship with the prisoner's partner are not seen as sufficient reasons for granting a non-supervised visit.

Telephone calls

Except where restrictions have been placed upon a pre-trial detainee, every detainee has the right to have telephone calls with persons outside the penal establishment for ten minutes at least once a week. Telephone calls are at the expense of the detainee, unless the prison governor determines otherwise. The detainee can buy telephone cards in the prison canteen (shop). If he is found in possession of more telephone cards than are needed for regular use, this may constitute an offence against the order in the penal establishment, which may be punished with a disciplinary sanction.

The governor may decide to supervise telephone calls conducted by or with the pre-trial detainee if this is necessary to establish the identity of the person with whom the detainee calls or for the following reasons:

- the maintenance of order or safety in the penal establishment;
- the protection of public order and national security;
- the prevention or investigation of criminal offences; or
- the protection of victims of crimes.

The supervision may include interception or recording of the telephone conversation. Prior to the telephone calls, the detainee must be informed of the nature and reason for the supervision.

The governor may deny the detainee the opportunity to make telephone calls, or may terminate a telephone conversation within the time allotted for the reasons previously mentioned.

The decision to deny the detainee the opportunity to make telephone calls remains in force for a maximum of twelve months.

Free telephone calls without restrictions can be made to persons and bodies listed in section 37 PPA (e.g. judicial authorities, the Ombudsman, and so forth), provided that the necessity and opportunity for those telephone calls exist. No other supervision shall be exercised over these telephone calls than that necessary to establish the identity of the person called. Lawyers frequently complain that telephone conversations are supervised, despite the statutory guarantee that telephone calls with their clients may not be intercepted. The Minister of Justice has issued instructions to prison governors to stop supervision of telephone calls between inmates and their lawyers. Pre-trial detainees, who are detained under restrictions as set by the examining judge, are not allowed to make telephone calls except to their lawyers, in urgent cases at any time, in non-urgent cases during regular telephone hours.

E-mail, telefax and mobile phones are outside the legal scope of section 39 PPA, and therefore may not be used.

Chapter 10

Letters and parcels

As a rule, a detainee can send, at his own expense, and receive as many letters as he wishes. The prison governor, however, has the authority to restrict the number of letters in order to maintain order and safety.

The prison governor has the authority to examine covers and other postal items and check the content for contraband. He may also supervise letters or postal items sent by or intended for a detainee. This supervision may comprise the copying of letters or of other postal items. The detainee shall be notified beforehand that letters or postal items will be examined and supervised.

The governor may refuse to distribute certain letters or other postal items and he may confiscate objects if this is necessary in order to maintain order or safety in the penal establishment, to protect public order and national security, to prevent or investigate criminal offences, or to protect victims of – or those involved otherwise in – criminal offences.

Non-distributed letters are returned to the sender, kept for the detainee, destroyed with his consent or handed over to the police in order to prevent or investigate a criminal offence. Each detainee has an unrestricted right to send letters to Members of the Royal Family, Members of Parliament, the Minister of Justice, judicial authorities, the National Ombudsman and the Council for the Administration of Criminal Justice and Youth Protection (sect. 37 PPA).

The right to send and receive letters is also restricted for pre-trial detainees who are detained under restrictions. All letters they send or receive must be checked and supervised.

The refusal by the governor to distribute or post a letter must be substantiated in writing, and signed by the governor.

A late distribution of a letter, because the letter had to be translated, is not a ground for complaint.

On the occasion of a birthday or at Christmas, the detainee may receive a parcel of a restricted value (€ 33 maximum).

Food, clothing, and personal hygiene

The penitentiary establishment provides the inmate with food (sect. 44 PPA). If the doctor of the establishment prescribes a special diet for health reasons, or if the prisoner is not allowed to eat the regular meal for religious or ideological reasons, special food will generally be provided. The expenses for food are limited but in conformity with the recommendation of the National Nutrition Information Office. Every in-

mate may buy, at his own expense, supplementary sandwich fillings, fruit, snacks, soft drinks, confectionery, cigarettes and tobacco in the prison canteen. As a rule, smoking is permitted in remand houses and prisons. The governor may order that smoking is forbidden in certain areas and at certain times. During the daily open-air visit, smoking is always permitted.

The inmate is entitled to wear his own clothes and shoes or footwear, unless these pose a possible risk to order and safety or personal health. He may be obliged to wear specially adapted clothes or footwear during work or sport. If the inmate refuses to wear these clothes or footwear, he may be excluded from labor or sport. The penitentiary institutions take care that clothes are laundered.

For personal hygiene, the penitentiary establishment provides soap, toothpaste, a toothbrush, shaving equipment, a comb and shampoo, and sanitary towels for female inmates. In the prison canteen an inmate may buy supplementary products for personal hygiene. In principle, an inmate may have a beard or moustache. The governor ensures that a hairdresser is regularly available to cut hair, beards or moustaches.

After sport activity, and at least twice a week, an inmate is obliged to take a shower. No right to a daily shower exists, but it is quite often permitted.

Prison labor

A detainee has the right to participate in prison labor. The prison governor controls the availability of prison labor, provided that this labor is not in conflict with the nature of the detention.

Convicted prisoners are obliged to perform properly the prison labor ordered, either within or outside the prison establishment. Pre-trial detainees cannot be obliged to work. If they are willing to participate in prison labor, they are to be treated in the same way as convicted prisoners.

Working hours are to be laid down in the model prison rules in conformity with good practice outside the prison.

The Minister of Justice enacts rules concerning wages for prison labor. The prison governor takes care of the assessment of wages and payment.

Those inmates who are obliged to work but refuse to do so, are generally disciplined by way of confinement to their cell or separation in a cell. Other disciplinary punishments, such as deprivation of visiting rights or denial of leave, may be imposed as well.

Those inmates who are not obliged to work and are unwilling to participate in prison labor have to stay in their cell during working hours.

Refusal to participate in prison labor may mean a lack of money to buy tobacco or other canteen-goods (such as extra sandwich filling), no money to rent a TV or pay for telephone cards or stamps. Hence, by refusing to work, a prisoner further diminishes the quality of his stay in prison.

Since 1996, penitentiary establishments have been allowed to keep the profit of prison work instead of donating that money to the State-treasury. In exchange for the payment of detainees, no financial subsidy is available anymore. Since 1996, the penitentiary institutions have had to pay the 'wages' of detainees themselves.

In 1996, a provisional set of rules on payment of detainees was introduced. On January 1, 1999, the current Rules on Payment of Detainees came into force. For every hour an inmate works he is paid € 0,64. The prison governor may decide upon a supplementary payment of 100% maximum.

In case there is no work available, or the inmate cannot work due to illness, he receives 80% of the average daily income. Special rules apply to work requiring a higher level of skill. In very low or low security penitentiary establishments, detainees can work outside prison and earn around € 110 per week.

The money an inmate can earn is not a real payment for the work since it is not market related or related to the Minimum Wages Act. It is in fact merely pocket money and the new set of rules does not lead to a substantially higher income for the inmates than in the previous period.

The penitentiary institutions also have to pay for the machinery, the equipment, the depreciation of equipment and the cost of materials.

The canvassing of labor is a task for the prisons themselves. Annually, more than 2.5 million hours are available for prison work.

A number of limitations negatively affect the quality of prison work.

Some limitations concern the inmates. Inmates often originate from deprived social backgrounds. They lack sufficient vocational education. The majority of them have been unemployed or were not used to employment before they ended up in jail. Half of the inmates are foreigners, who may not be able to understand work instructions. Quite a number of inmates are drug addicts or suffering from psychological or psychiatric problems, and so forth. These are important differences compared with the situation 'outside'. Unlike in the outside world, where employees can be selected on the basis of their capacities and skills, in prisons a selection on the basis of those criteria cannot take place at all, or only to a limited extent.

Some limitations concern labor facilities. Prisons are not constructed like factories, since prison labor was merely incidental to their main purpose. That means that only recently constructed prisons could take into account the emphasis on prison labor. New prisons contain more modern work facilities.

In a number of prisons, reconstruction activities are carried out to improve the work facilities.

Other limitations concern the kind of work that is carried out in prisons. Much of that labor can be called 'general labor', which in fact is labor that can be carried out without investment in machineries and equipment, and which does not require intensive coaching or supervision. This work can be repetitive, boring and relatively low grade. The main labor consists of packaging activities. There is also prison work available at a higher level, which requires more special equipment and supervision. This work consists of offset printing, bookbinding, carpentry, metalwork, fabrics and textile fashioning, leather manufacture, and assembly. For this type of work vocational training can be offered. In prisons, there is restricted vocational training for welders, lathe-operators, carpenters, painters and bricklayers.

In recent years, due to budgetary cuts, the expenses to provide detainees with prison labor facilities had to be reduced. The provision of labor facilities annually amounted to tens of millions of Euros. Reduction in these expenses could be realized through a large scale, centralized and demand related prison industry and conform market prices.

Furthermore, maintenance labor carried out by prisoners for the penitentiary establishment or labor for governmental organizations could also reduce the expenses for the prison industry.

Prison labor in conformity with the level of skills and education of the prisoner may enhance his smooth return into society and reduce his recidivism risk.

Money

The possession of cash money by detainees is as a rule prohibited (sect. 46 PPA). A (pre-trial) detainee must hand over any money he is carrying when he arrives at the remand house or prison. He will be given a receipt for it. The money is kept by the administration and credited to the detainee's personal account. Any money which is transferred or sent to the detainee is also put into this account. Earnings out of prison labor are added to the personal account as well. From this personal account, a detainee may buy supplementary articles from the prison canteen of up to € 90 maximum, of which € 22,50 maximum may be spent on buying telephone cards. If a

detainee does not possess any money when he arrives at the penitentiary establishment, some money may be loaned to him to be deducted from earning out of prison labor. Of course the detainee, in such cases, must be prepared to work.

Religious care

The prison governor has to ensure sufficient religious or spiritual care in his prison, which should as far as possible fit to the religious or ideological beliefs of the detainees (sect. 41 subsect. 2 PPA).

The registration of the religious belief of a detainee is laid down in his individual detention file. On the basis of that registration, he may attend services or contemplative meetings of his choice, but there is no right to do so. The prison governor shall make it possible for detainees to attend religious meetings and services and to have contact with the religious minister of his choice connected with the prison service or who otherwise may visit him on his request. The governor may deny participation in religious meetings and services when the order or safety of the prison demands so (sect. 23 PPA).

Detainees in disciplinary cells may also attend religious meetings except when their behavior will disturb the service.

When a detainee is in pre-trial detention and the judge has ordered that he has to stay apart from other inmates, participation in a religious service as a rule is allowed except when there is no personnel to supervise this separation.

Detainees of various denominations are present in Dutch penitentiary establishments. The major religions present are Catholic, Protestant and Muslim. There is a small group of Serbian/Greek orthodox, Buddhist, Jewish, Hindu and humanist detainees.

Food is provided to specific religious detainees in conformity with religious dietary laws as far as possible. Kosher and halal food is ordered from a special caterer. Kosher food is provided daily, halal food at least three times a week. Unlike kosher food, halal food can be substituted by vegetarian food. Vegetarian food is provided on a daily basis.

Detainees may have in their cells various religious objects, such as a crucifix, prayer rugs, Jewish prayer shawls (Tallit), Buddhist prayer beads, images of Sakyamuni Buddha, the Koran, Koran chains, religious books and reviews. Some objects are forbidden, such as incense sticks and candles, which are used on Shabbat or on Jewish holidays.

For the possession of religious objects the prisoner needs the consent of the prison governor. The governor can refuse a request when the possession of the object is in conflict with the interest of maintaining order or safety in the prison or the interest of limiting the governor's liability for the objects.

Medical care

Medical care is provided by a physician who is (as a rule, part-time) employed by the penitentiary establishment (sect. 42 PPA). The inmate has a right to consult a physician of his choice, however, at his own expense. The physician or his substitute, employed by the penitentiary establishment, will have regular consultation hours or will be present if this is necessary in the interest of the prisoner's health and will examine inmates in order to assess whether they are fit to participate in prison labor, sports or other activities.

The prison governor is responsible for ensuring that medical care is properly arranged, that medication prescribed by a physician is provided, and that medical treatment prescribed takes place inside or outside the penitentiary establishment.

In many penitentiary establishments, a physician is assisted by one or more nurses who select the requests by inmates to consult the physician in order to set priorities.

The costs for medical care are borne by the State, except the costs of consultation of a physician of the prisoner's own choice.

There is one fulltime physician for every three hundred detainees, and one nurse for every fifty.

A physician provides medical care but has other responsibilities as well. He supervises inmates who are, by decision of the prison governor, confined to their cell as a disciplinary measure or placed in an isolation cell as a measure to ensure order. Furthermore, the physician, by request of the prison governor, may perform a bodily examination in cases where there is a serious threat to health.

Medical care includes regular dental care, but on request only. Some expensive or time-consuming dental care like inlays, false teeth, and so forth, is merely provided to long-term prisoners and not to pre-trial detainees, except when the inmate has maintained good dental care prior to his detention and the Dental Care Consultant at the Ministry of Justice gives permission for it.

The number of inmates with mental health problems is increasing. This causes serious problems in penitentiary establishments. Sixty percent of the prisoners have psychological problems due to drug addiction. For inmates who need special psychiatric or psychological help, Individual Treatment Wards are present in penitentiary establishments.

In situations of crisis, mentally disturbed (pre-trial) detainees can be transferred to the Forensic Observation and Treatment Ward (FOBA) in Amsterdam with a capacity of 60 male and 6 female inmates. In the Forensic Observation and Treatment Ward, permanent psychiatric treatment for mentally disturbed inmates is provided. In cases in which a (pre-trial) detainee is – due to his mental disturbance – unfit to be detained, he may be placed in a forensic psychiatric clinic or in a psychiatric hospital.

A serious problem is presented by HIV-infected prisoners, since a considerable part of the Dutch prison population comes from groups with an increased risk of HIV-infection. Exact data on the prevalence of HIV in Dutch prisons are not available since there is no compulsory testing for HIV. On the basis of conversations, or external symptoms, or other indications, the prison physician may be informed as to whether the detainee belongs to the group of high risk HIV-infection.

A circular on the policy to prevent HIV-infection in prisons has been issued. As to its key features, this policy does not deviate from Aids policy in free society. That policy is based on two pillars: information and prevention. The policy aims at informing prisoners and prison staff of the way in which transmission takes place, and calls for preventive measures to reduce the risk of infection. Prison wardens and prisoners are informed of the nature of the Aids problem, the ways in which infection may take place, and the nature of high-risk behavior. This information serves two goals: taking away needless feelings of anxiety on the one hand, and alerting everyone where necessary on the other.

The Aids policy is set up in such a way that it assumes that every detainee is potentially HIV-positive.

Part of the policy to prevent the spread of HIV is the supply of methadone (for prisoners who are drug addicts) and condoms. The exchange of clean syringes is under discussion.

In spite of numerous measures taken in prison to prevent drugs being brought in, it is generally known that drugs are available in Dutch prisons; mainly soft drugs like hashish or marijuana, but sometimes even hard drugs, such as heroin and cocaine. Drugs are smuggled in by visitors or detainees returning from prison leave or by prison personnel.

There are a number of drug addicts in Dutch prisons that ask for special care. A special drugs discouragement policy has been established. Care and counseling is offered at the Drugs counseling wing.

A number of prisons possess drug-free wings that function autonomously, and are for inmates this wish to kick their addiction. Transfer to a drug-free wing, where the

treatment is both of a medical and psychosocial nature, depends inter alia on the prisoner's acceptance of certain conditions. On the basis of the Penitentiary Rules, the prison governor may – for the benefit of order, security or the smooth operation of the penitentiary institution – require a prisoner to hand over urine for a test on the presence of drugs, order cell inspections or bodily examinations.

Protection against drugs cannot be offered outside the drug-free wings. The possession and use of drugs is of course forbidden and results in the application of sanctions. A positive urine test result or the refusal to submit to such a test will lead to disciplinary sanctions.

Short-term prisoners, who in open society took part in a methadone-program, may get their dose in the prison as well. For long-term prisoners (> 6 months) who were part of a methadone-program, a gradual reduction of methadone per day is advised by the medical advisor of the Ministry of Justice, except for those addicts with serious psychiatric pathology, or for HIV-infected or pregnant detainees.

Other rights

Every detainee has the right to stay outdoors in open air for at least one hour per day, generally together with other inmates. Where the pre-trial detainee is detained under restriction, he must remain in a segregated area outdoors.

The detainee has the right to take part in sports activities at least twice a week for three-quarters of an hour in total, if his health condition is favorable. As a rule, every type of sport may be done that is possible inside a penitentiary establishment. Combat sport is allowed, unless strong contra-indications exist. An inmate has the right to buy protein in order to take part in sports in the penitentiary establishment. Sports primarily consist of sport that is primarily aimed at increasing physical strength, i.e. weight lifting.

Every detainee also has the right to take part in recreation activities for at least six hours per week. More hours per week may be granted if the detainee is deemed to deserve them, for example due to his prison labor efforts. Recreation consists of table tennis, playing chess, watching television, et cetera.

In many penitentiary establishments there is a library with books and reviews, sometimes in foreign languages. A detainee may borrow books or reviews at least once a week. Books may also be borrowed from public libraries. Personal copies of books may be used after a thorough check on contraband. Books that may cause a danger to the order in the penitentiary establishment may be refused by the prison governor. Detainees may, at their own expense, order newspapers and reviews and rent a television set; they are entitled to stay up-to-date with news and current affairs.

A detainee may also follow educational courses and may participate in other educational activities, to the extent that these are deemed compatible with the nature and duration of the detention and the character of the inmate.

10.7 Disciplinary sanctions and special security measures

Disciplinary sanctions can be imposed by the prison governor where the behavior of the inmate is in conflict with good order, security and discipline (e.g. the possession of a small quantity of marihuana or alcohol or serious misbehavior during transport; sect. 50 PPA). Before a sanction can be imposed, the inmate must be heard, preferably in a language that he understands (sect. 57 1 sub j PPA). Disciplinary sanctions are:

- Solitary confinement of two weeks maximum. Solitary confinement is implemented in a cell separate from the premises. The cell contains only a toilet, a mattress and a foam rubber block to sit upon. During solitary confinement, the prisoner may not take part in prison labor and recreational activities. He may, however, receive mail and visitors, attend religious services and he may also spend one hour per day in the open air (sect. 55 PPA). The prison governor may, however, reduce these contacts with the outside world. In cases in which the solitary confinement exceeds 24 hours, the prison governor has to inform the Supervisory Committee and the prison physician or his substitute promptly;
- deprivation of the right to receive visits for four weeks maximum, provided that the behavior was related to the visit; for example where the visitor had attempted to smuggle drugs on the prisoner's request;
- exclusion from participation in one or more activities for two weeks maximum;
- refusal, withdrawal or restriction of the next prison leave; and
- a fine of two weeks' wages for prison labor. The prison governor may also impose a sanction where the fine is not paid on time.

The prison governor may also impose a combination of disciplinary sanctions. In cases in which the behavior of the inmate has caused material damage, the prison governor will have to negotiate with the prisoner on the payment of compensation.

The implementation of disciplinary sanctions can be suspended by a probationary period of three months. The prison governor shall immediately give the inmate a reasoned, dated and signed written notification of his decision, and inform the inmate that he can lodge a complaint with the prison complaints committee against any disciplinary sanction imposed (sect. 58 PPA).

In addition to disciplinary measures, the prison governor can also impose safety measures. Whereas disciplinary sanctions serve to correct the inmate's behavior, safety measures can be applied where the order and safety of the penitentiary establishment or the safety or well-being of the prisoner is at stake.

Safety measures are: the exclusion of a prisoner from regime activities or isolation in an isolation cell for two weeks maximum, either of which can be extended by an additional two weeks if circumstances so require. Contact with the outside world can be restricted or excluded, except contact with wardens and prison officers. Due to the far-reaching nature of these measures, the Supervisory Committee and the prison physician have to be informed within 24 hours (sect. 24 PPA).

Furthermore, the prison governor can order that a prisoner's body be examined if this is necessary to prevent serious risk to the order and safety in the penal establishment or to the inmate's health. Internal bodily examination includes anal or vaginal examination and the insertion of an endoscope. The examination takes place by a physician or on his instructions by a nurse.

This intrusion to the basic rights of the inviolability of the body or the right on privacy (sects 10 and 11 Dutch Constitution) may be necessary if there are serious reasons to assume that the inmate has concealed parts or ammunition of a firearm or cocaine in his body.

10.8 Prisoners' complaint procedure

In 1976, the Legal Status of Prisoners Act came into force, since which time prisoners have had the right to lodge a complaint against decisions taken by or on behalf of the prison governor:

- to impose a disciplinary sanction;
- to refuse to distribute or post letters sent to the prisoner or written by him or to refuse prison visits; or
- against any measure imposed by him or on his behalf which infringes the prisoner's statutory rights.

Complaints also can be filed on the grounds of delayed or the absence of decision-making. No complaints are possible on general rules or regulations, or concerning the actual behavior by, or on behalf of, the governor.

This right is regulated in sections 60-73 PPA. The complaint is put before the complaints committee, which is appointed by the Prison Supervisory Board attached to

every prison and consists of three members of this Board. The Chairman of the committee is preferably a member of the judiciary.

In the written complaint, the decision of the governor must be cited and the reasons for the complaint must be given. The written complaint has to be submitted within seven days after the day on which the prisoner was notified of the decision complained of. Within four weeks, a decision on the complaint has to be rendered.

The session of the complaints committee is not public. The prison governor sends in writing his reaction to the committee. Both the complainant and prison governor have the right to give oral statements related to the complaint. The complainant has the right to legal aid and interpretation. The verdict of the complaint committee is in writing and declares either the complaint inadmissible or ill-founded or declares the complaint well-founded.

In cases in which the complaint is declared well-founded, the complaints committee either takes a new decision or instructs the governor to take a new decision in conformity with the verdict of the complaint committee.

Where the complaint committee annuls the governors' decision, but the decision had already been implemented, (financial) compensation to the prisoner is possible.

The prisoner or prison governor may appeal against decisions of this committee to the appeal committee of the Council for the Administration of Criminal Justice and Youth Protection.

Several thousands complaints are filed annually with the complaint committee. A quarter of the complaints concern the enforcement of disciplinary measures; the majority of the complaints concern measures that deviate from what the prisoners see as their valid rights, for example placement in a single cell instead of a common cell, the refusal to grant leave or the prescription of medicaments by the penitentiary institution's physician. In exceptional cases, the prisoner may address the National Ombudsman, whose task, however, since the introduction of the PPA is very restricted.

10.9 Rules for prison leave

Various types of leave exist:

- general leave;
- regime related leave; and finally
- occasional prison leave.

The leave regulations are laid down in the 1998 General Provisional Leave Rules (*Regeling tijdelijk verlaten van de inrichting*). According to these rules, leave is granted on an individual basis. A number of objective criteria have to be met in order for general leave to be granted:

- one third of the sentence must have been served;
- the remaining sentence must be at least three months;
- the remaining sentence may not exceed one year; and
- the date for early release must have been fixed.

According to the General Provisional Leave Rules, the maximum occasions for leave is six. Leave is granted for up to sixty hours, including traveling time. The application of these general leave rules means that, during the last year of their sentence, prisoners are allowed sixty hours leave every two months.

The decision on whether or not to grant leave is as a rule taken by the prison governor. The decision to grant leave for the first time is taken by the Minister of Justice in cases in which the leave may cause public unrest.

Foreign nationals, who will be deported, expelled or extradited at the end of their sentence, and prisoners in an extra high security unit or in an extended security prison, are not allowed leave.

Regime related leave is granted to detainees who have served at least one month in low security level (RSL) prisons and in very low security level (VRSL) prisons. Prisoners in RSL-prisons have a monthly weekend leave and prisoners in VRSL-prisons have the right to stay every weekend outside prison.

The regime related leave is an instrument in the preparation of the prisoner's return to free society.

The monthly weekend leave is for 52 hours but may be twice extended to 76 hours. An extended weekend leave for public or Christian holidays such as Christmas, Easter or Whitsun, may be granted for good behavior.

There are a number of subjective indications that are applicable for all prison leave decisions. Leave must serve to prepare the prisoner for release. This criterion is almost always met by definition, except where there is a risk of the following:

- a risk of absconding, re-offending, breach of the peace or public commotion can be expected;
- a well-founded suspicion that leave will be used to smuggle in contraband goods, or will lead to drug or alcohol abuse;

- the convicted person is unable to keep to agreements;
- there is no leave address; or
- a risk of an unwanted confrontation with the victim of the crime can be demonstrated.

In such cases the prison governor can refuse any type of prison leave.

The rules on occasional prison leave are related to pressing personal circumstances such as serious illness, the death of a relative, the birth of a child, and for medical, psychiatric or psychological reasons as well as for the participation in exams or for study and vocational training. Occasional prison leave is granted as a rule for one day and may be supervised and secured.

Failure to keep the conditions of leave, for example, by returning too late or under the influence of alcohol, may be dealt with in a number of ways. If the prisoner is in an open prison, a breach of conditions usually results in transfer to a closed institution. Alternatively, weekend leave may be reduced or completely withdrawn. If a prisoner fails to return from normal leave, this affects future leave. In addition, it may be treated as a violation of prison order and discipline and be punished accordingly.

10.10 Aftercare

Prisoners are, while being detained, prepared for their return into free society in order to avoid re-offending. Long-term prisoners will receive behavioral interventions such as support to find a job, training to avoid aggression or aid to settlement debts.

For proper integration into free society, four conditions have to be met:

- the possession of an ID-card;
- a dwelling;
- income; and
- care.

Many prisoners leave prison without knowing where to sleep that night. This is detrimental for recidivism reduction. The National Agency for Correctional Institutions therefore has recently set up a project in which social workers in prisons communicate with representatives of municipalities in order to improve the aftercare for released prisoners.

11 Early release, pardon and aftercare of prisoners

11.1 Introduction

Conditional release

Conditional release provisions were incorporated in the Criminal Code as early as 1886. At that time, conditional release was intended as a gesture of leniency for good conduct, to be applied only in exceptional cases and only to prisoners who had served rather long sentences. This concept of conditional release was expressed in the legal prerequisites for conditional release, and the granting of release lay within the discretion of the prison administration.

In 1915, the regulations on release were changed considerably. Conditional release became a means of improving the rehabilitation of the offender into free society. The objective of the conditional release was to improve the offender's future conduct by means of supervision by the probation service and by attaching conditions to the release.

Following the 1915 reform, prisoners were eligible for conditional release after having served two-thirds of their sentence and at least nine months. The period of parole lasted a minimum of one year. The release decision was taken by the administration (the Prison and Probation Department of the Ministry of Justice) at the request of the local prison board.

The prosecution service was given the power to ensure compliance with the conditions. In addition to the mandatory general condition, the administration could attach special conditions to the release decision.

The general condition was that the released prisoner would not commit further offences during the probation period and would not misbehave in other ways.

Special conditions were related to the conduct of the released prisoner, but were not further specified. In practice, the special condition mostly used was that the released person should accept special supervision by a probation officer.

The prosecution service was vested with the right to control compliance with the conditions and the right to require revocation of the release.

A breach of conditions had to be reported by the supervising probation officer.

Decline of conditional release

In the 1960's and 1970's, the importance of the conditional release as a rehabilitative instrument decreased. This was partly a result of the decrease in the number of long prison sentences, which meant that the number of prisoners eligible for conditional release (1950: \pm 800; 1970: \pm 340) declined as well. Far more important, however, was the fact that the professionalization of probation work and the adoption of new probation work methods led to a tension between the probation work philosophy and the statutory tasks for the probation service, particularly concerning the post-release supervision.

The essence of this tension was that in the relationship between a probation officer and a client there is no room for any authoritarianism or for any compulsory supervision which, however, formed basic parts of the statutory probation tasks.

One consequence of this probation work philosophy was that reporting on breaches of conditions did not fit with the probation officer's duty as a helping agent; thus, since the early seventies such reporting was officially abolished in the Netherlands.

As conditional release was no longer seen as a bonus for good behavior in prison or as an instrument of rehabilitation, it became increasingly difficult for the Prison and Probation Administration to refuse to grant parole to an eligible prisoner. As a result, the release percentages went up from 50% in the early fifties to more than 90% in the early seventies and 99% in 1981.

Since in practice release was granted in most cases and only refused in very specific cases, a need was felt to create the possibility for a prisoner to appeal to a court when his request for release was turned down. Since 1976, prisoners eligible for release could lodge an appeal with the special penitentiary division of the Arnhem Court of Appeal against a decision to reject, suspend or revoke conditional release. The Court's case law was critical to the Prison and Probation Administration's release policy, and due to this case law the percentage of parole refusals dropped from 11% in 1975 to 1% by 1986.

The conditional release law reform committee

Gradually, the conditional release changed from being a favor to almost an automatic right. Against this background, in 1980 a Committee was set up to advise the Minister of Justice as to whether conditional release should be retained and if so whether it would be advisable to articulate in the penal code that eligible prisoners have the right to be paroled.

The Committee did not support the idea of an automatic release. Although automatic release would save on costs since the release procedure was time consuming and very bureaucratic, and although automatic release would stop prisoners feeling uncertain, it also has considerable drawbacks. With automatic release there is a risk that courts will take the release into account when deciding on the length of the sentence; automatic release would mean that dangerous prisoners would be released as well; with automatic release there is no longer any incentive for good contact between the prisoner and the wardens, and finally, automatic release would constitute a need for remission to be deserved for good conduct.

The conclusion of the Committee was that the conditional release regulations should be reformed. The criminal code should not regulate the grounds on which conditional release would be granted but the grounds on which it should be refused.

The Committee advocated retaining the possibility of attaching special conditions in order to provide the conditionally released prisoner with the possibility of continuing with his probation contacts.

The Government, however, preferred a system which would reduce the pressure on the prison system, get rid of red-tape, and save a great deal of money and time by introducing a system of automatic early release.

11.2 Present early release provisions

The new release legislation (sects 15-15d CC) came into force on January 1, 1987. The essence of the release rules is that:

- prisoners serving a sentence up to a maximum of one year must be released after having served six months plus one third of the remaining term; and
- prisoners serving a sentence of more than one year must be released after having served two thirds.

Early release at the request of the public prosecutor may be postponed or refused when:

- the prisoner, because of a mental disorder, is serving his sentence in an entrustment order treatment institution and the continuation of his treatment is deemed necessary; or
- the prisoner is sentenced for an offence for which the statutory punishment is imprisonment of four years or more, provided that the offence was committed whilst serving a sentence eligible for release; or

- the prisoner has been guilty of very grave misconduct (according to the case law of the penitentiary division of the Court of Appeal in Arnhem this means: being suspected of a criminal offence for which pre-trial detention would be allowed) after the commencement of the serving of the sentence; or
- the prisoner, after the commencement of the serving of the sentence, has removed himself from enforcement or attempted to do so.

The Board of Prosecutors General has issued an instruction on cases in which the public prosecutor shall request a postponement or refusal of early release (State Journal 2003, 60).

Such a request shall, for example, be lodged when a prisoner has committed a crime in prison for which pre-trial detention may be applied or when a prisoner has escaped or attempted to escape prison by threatening violence.

Unlike the former conditional release, the power to refuse or postpone early release rests not with the Prison and Probation Administration, but with the penitentiary division of the Court of Appeal in Arnhem. The penitentiary division decides whether the release should be postponed or refused on the request of the public prosecutor attached to the Court that had imposed the prison sentence upon the prisoner eligible for early release.

The decision is taken in a public trial at which the prisoner, assisted by his counsel, is heard. If the early release is postponed or refused, the penitentiary division sets the date of release. Refusals or postponements are both rather rare.

11.3 Reform under discussion

One of the disadvantages of the present early release policy is that an ex-prisoner can not be supervised or monitored after the date of his release because his release is unconditional. However, in the first months after the release social integration and the prevention of re-offending is of great importance and might be improved if conditions to his early release could be attached.

Therefore, a reform proposal is under discussion to re-introduce conditional early release. The essence of the new proposal is that:

- prisoners serving a prison sentence of more than one but less than two years will be released after having served one year and one third of the remaining term;
- prisoners serving a sentence of more than two years will be released after having served two thirds.

The release is conditional. Special and general conditions are set for a release. The general condition is that the parolee will not re-offend. Special conditions may be imposed, such as:

- mandatory participation in a program assisting in a smooth return to society or providing special care, such as treatment for addiction;
- restrictions of someone’s freedom to act or to move;
- electronic monitoring.

The special conditions may not restrict the freedom to practice one’s religion or personal belief or one’s civil liberties.

The special conditions are set by the public prosecutor after prior consultation with the probation service and the National Agency of Correctional Institutions.

The prosecution service supervises the compliance with the special conditions, and the probation service can be ordered to provide help and assistance to the parolee as well as reporting breaches of conditions to the prosecution service.

Early release may be postponed or refused when:

- the prisoner, because of mental disorder, is serving his sentence in an entrustment order treatment institution and the continuation of his treatment is deemed necessary; or
- the prisoner has been guilty of grave misconduct after the commencement of the serving of the sentence, which means
 - there are serious suspicions or a conviction for a crime whilst serving the original sentence, or
 - a number of disciplinary sanctions have been imposed; or
- the prisoner, after the commencement of the serving of the sentence, has removed himself from enforcement or attempted to do so; or
- the imposition of special conditions is unlikely to reduce recidivism risk; or
- a prison sentence imposed by a foreign court is implemented and the transfer of the prisoner by the foreign state was undertaken under the restriction that no early release would be offered.

Decisions to postpone or refuse conditional release are taken by a criminal court. Non-compliance with the general or special conditions may lead to a full or partial revocation of the conditional release.

11.4 Pardon

The 1998 Pardon Act, which was revised in 2003, empowers the Queen to grant a pardon when petitioned either by the person sentenced or by the prosecution service. Only clearly reasoned petitions will be processed by the Pardon Office of the Ministry of Justice.

Under section 122 of the Constitution and the provisions in the Pardon Act, pardon may be granted for all prison sentences and for fines over € 340 as well as for certain measures imposed by Dutch courts. Pardon furthermore may be granted for all sentences imposed by foreign courts but implemented in the Netherlands, provided that the foreign sentence is converted into a Dutch sentence or the prisoner is transferred to the Netherlands on the basis of a treaty.

There are two statutory grounds to grant pardon. The first is that the court when sentencing did not – or could not – take account of a circumstances that if the court had been aware of would have led to a different sentence or to no sentence at all. The second ground for pardon is that the (continuation of the) implementation of a sentence in all reasonableness cannot serve the purpose for which the implementation was intended.

The prosecution service and the court that imposed the sentence are, generally, to be consulted before the pardon may be granted. Pardon may involve a complete or partial remission of the sentence, the suspension of the implementation of the sentence or the conversion of the sentence into a less serious one, such as a task penalty. A pardon decision can have conditions attached. The conditions of a conditional pardon are similar to the conditions of a suspended sentence. The probation service can be ordered to support and assist the conditionally pardoned offender.

In recent years, the number of pardon requests has been rather stable (2006: 3,500) and 50% of requests are related to prison sentences. In 25% of petitions, a (conditional) pardon was granted. Prison sentences may be converted into a task penalty by way of a pardon.

11.5 Aftercare of released prisoners

When the sentence has been served, the ex-convict can not be obliged to stay in contact with the probation service. However, when a released prisoner asks for help on his or her own initiative, the probation service will transfer the client to other organi-

zations outside the criminal justice system, such as social services or health care services. These services provide all kinds of material help such as assistance in housing, employment, and debt relief. For the resettlement of released prisoners, aftercare projects have been set up in which volunteers play an important role.

Under the new conditional release regulations (2008), the ex-convict can be obliged to stay in contact with the probation service, which supervises the compliance with the imposed conditions but also supports and advises the ex-convict.

12 Figures on crime and sentencing

12.1 Crime patterns

Since 1970, with an exception for 1990, 1995 and 1996, the numbers of annually recorded crimes have increased. Until 1985, the annual increase was more than 10%, whereas for the later years the average increase has been around 2%. In recent years, there has been a decrease in registered crime.

Registered crimes x 1000

1970	265,7
1975	453,2
1980	705,7
1985	1,093,7
1990	1,150,2
1995	1,222,9
2000	1,315,3
2005	1,228,2
2006	1,218,4

When taking into account the increase in population, the number of crimes per 100,000 (12-79 years) almost quadrupled in the period 1970 to 2005.

Registered crimes per 100.000 inhabitants

1970	2,673
1975	4,246
1980	6,229
1985	9,168
1990	9,357
1995	9,654
2000	10,050
2005	9,211
2006	9,115

1994 was the peak, with 10,415 registered crimes per 100,000 inhabitants.

In 1970, 40% of all registered crimes were solved by the police. In absolute figures the number of cases resolved grew until 1984, but in later years the average clearance rate has dropped to around 14,3% in 2000. In recent years the clearance rate, has grown to 23% in 2006. In 2006, almost 10% of all registered property crimes were solved. Two thirds of all registered crime consisted of property crimes.

There are four main categories of crimes, which nowadays form 98% of all registered crimes:

- violent crimes, such as murder, homicide, rape, intimidation, assault and violent theft (total 2006: 109,000);
- property crimes, such as fraud, embezzlement and theft (total 2006: 703,000);
- vandalism, including crimes against public order (total 2006: 215,000); and
- traffic crimes, such as drink-driving and hit and run cases (total 2006: 153,000).

– *Violent crimes* have as a common characteristic the intentional use of violence, which leads to an assault on the physical integrity of a person. Between 1970 and 2006, the number of violent crimes increased seven fold: from 15,800 to 109,000. Per 100,000 inhabitants, the number of violent crimes in 1970 stood at 120; in 1995: 510; in 2000: 700; and in 2005: 829.

– *Property crimes.* The number of property crimes per 100,000 inhabitants increased from 1,287 in 1970 to 7,136 in 1995, to 6,834 in 2000 and to 5,571 in 2005. Since 1995, the number of property crimes, mainly bicycle theft, theft of cars or theft from cars, decreased annually by 8%. As two thirds of all crime consists of property crimes, the decrease in the overall crime rate is linked to decrease in property crimes.

– *Vandalism and crimes against the public order.* There has been a gradual increase in crimes of vandalism and crimes against the public order from 100 per 100,000 inhabitants in 1970, to 1,127 in 1995, to 1,461 in 2000, and to 1,585 in 2005. Vandalism/criminal damage is by far the most important crime of this category.

– *Traffic crimes.* Over the last thirty years the number of traffic crimes per 100,000 inhabitants has increased from 254 in 1970, to 704 in 1995, to 907 in 2000, and to 961 in 2005.

In 1980, following the introduction of a new section on drink-driving in the new Traffic Act, 50% of all traffic crimes consisted of drink-driving. In 2006, the figure

was around 39%. Since drink-driving as a rule is caught by specific controls by the police, this decrease could be the result of less emphasis on stop and breathalyse operations by the police. Around 57% of all traffic crimes are hit and run cases.

- *Drug crimes.* The absolute number of drug crimes increased between 1970 and 2006 from 442 to 16,360.

High levels of crime are predominantly a problem of larger cities. The average rate of registered crimes for the whole of the Netherlands in 2005 was 9,211 per 100,000 inhabitants. In small communities (< 20,000 inhabitants) this average was 5,443 in 2005; in larger towns (> 250,000 inhabitants) it was 16,805. In larger towns, the number of violent crimes is three times higher than in smaller towns.

The number of juvenile suspects (12-17 years) increased from 25,800 in 1970 to 70,400 in 2006. The number of adult suspects increased from 113,400 to 307,600.

The number of female juvenile suspects increased from 2,100 in 1970 to 12,300 in 2006 and the number of female adult suspects from 11,300 in 1970 to 50,700 in 2006. Although the majority of suspects are male, the number of female suspects is increasing more rapidly than that of their male counterparts.

12.2 Sentencing patterns

On average, the present prison population serves considerably longer sentences than thirty years ago.

In particular, in the last twenty years there has been a constant need to extend the prison capacity. Between 1980 and 2006, the total prison capacity increased from almost 3,300 cells to more than eighteen thousand prison places.

In the early 1990's, the policy has been to extend the total prison capacity by building new prisons. In recent years, the extension of prison capacity has been reached by abolishing the rule of one cell per prisoner. Prison cells have been adapted to take two prisoners, and in recently constructed prisons multi-person cells have been established.

The core of the present criminal policy remains to slow down the pressure on the prison capacity by extending the options for the judiciary to impose non-custodial sentences.

The permanent pressure on the prison capacity is caused by a variety of factors, such as the rising crime rate, the increasing seriousness of the criminality, the more punitive penal climate et cetera.

Two aspects have a serious impact on the prison capacity:

- the average length of a prison sentence; and
- the number of prison sentences.

Prison capacity

year	penitentiary establishments for adults	penitentiary establishments for juveniles	for the implementation of entrustment orders in psychiatric clinics (TBS)
1985	4,827	667	402
1986	4,829	695	349
1987	5,170	707	358
1988	5,822	669	464
1989	6,240	691	470
1990	7,021	722	489
1991	7,650	802	528
1992	7,773	832	551
1993	8,151	846	578
1994	9,439	888	627
1995	10,249	1,045	650
1996	12,087	1,214	803
1997	12,553	1,410	866
1998	13,055	1,581	970
1999	13,207	1,700	1,175
2000	12,433	1,906	1,183
2001	12,764	2,122	1,222
2002	13,774	2,346	1,264
2003	15,440	2,399	1,303
2004	18,116	2,566	1,401
2005	18,095	2,579	1,637
2006	18,735*	2,674	1,738

* over thousand cells are under reconstruction and not currently available

The number of (partly suspended) prison sentences has increased considerably (1970: 12,954, 2005: 28,705). The same is true for the average length of (partly suspended) prison sentences.

Since 1980, there has been a constant increase in the number of detention years imposed by courts (1980: 3,000; 1985: 5,668; 1995: 10,473; 2000: 11,264; 2005: 12,399).

What can explain the fact that many more, and much longer, unsuspended prison sentences were imposed in 2005 than in 1980?

There are at least five possible causes:

- criminal law reforms, by which the statutory maximum sentences were increased;
- an increased willingness of the public to report crimes;
- changes in the detection and investigation policy and the expansion of the police force;
- changes in the seriousness, levels and type of criminality; and
- a more punitive sentencing policy.

Interviews with representatives of the police, the prosecution service, the judiciary and the bar suggested that two causes were most responsible:

- crime, in particular violent criminality, had become more serious; and
- judges and prosecutors had become more punitive.

Number of prison sentences

year	unsuspended prison sentence	partly suspended prison sentence	suspended prison sentence
1970	8.407	4.547	1,987
1975	10.099	4.698	2,327
1980	9.261	6.108	2,608
1985	10.361	5.390	6,046
1990	10.051	4.582	7,444
1995	19,846	4,803	9,312
2000	21,480	5,966	17,160
2005	20,070	8,635	15,210
2006	16,410	8,878	14,760

Sentencing patterns 1970-2006

length of sentence	1970	1975	1980	1985	
< 1 month	7.457	8.394	8.944	6.724	
> 1 < 3 months	2.161	2.787	2.541	3.558	
> 3 < 6 months	2.012	2.029	1.959	2.680	
6 months < 1 year	978	972	1.104	1.821	
> 1 < 3 years	311	502	646	1.281	
> 3 years	35	113	175	287	
length of sentence	1990	1995	2000	2005	2006
< 1 month	6.797	7.959	11.155	8,755	7,712
> 1 < 3 months	4.558	6.280	6.410	7,355	6,651
> 3 < 6 months	3.279	4.678	3.825	5,080	4,662
6 months < 1 year	2.394	3.062	2.895	3,765	3,214
> 1 < 3 years	1.507	2.732	2.285	2,655	2,200
> 3 years	612	970	875	1,095	846

Annex I

Demographic issues

The present boundaries of the country were established in the separation of the Netherlands from Belgium in 1830. The Netherlands consists of twelve provinces, two of which carry the name Holland: Northern Holland and Southern Holland. The word Holland has become popular as a *pars pro toto* for the entire country in the English language.

The Netherlands is surrounded by the North Sea on the north and the west, the Federal Republic of Germany on the east and Belgium on the south. The language spoken in the Netherlands is Dutch, which belongs to the Germanic language group. The language of court is either Dutch or Frisian. The latter is mainly spoken in the upper region of the Netherlands.

The total population of the Netherlands is approximately 16.4 million.

2007	male*	female*
0-20 years	2,024	1,933
> 20 years	6,064	6,336

* thousands

Allochtonous population

Over three million people living in the Netherlands are allochtones, i.e. are non-natives or have parents who are non-natives. There are a large number of immigrants who live in the Netherlands without permission, the so-called “illegals”. The exact number is by definition unknown and always subject to political dispute, but the number of illegals is estimated to be between 100,000 and 150,000.

The most important countries of origin among the allochtonous population (born abroad or one of the parents having been born abroad) are Turkey (360,000), Suriname (330,000) and Morocco (315,000).

Some 311,000 non-natives come from other European Union states such as Germany, the United Kingdom, Belgium, Spain and Italy.

Major urbanized areas

The Netherlands has an average of around 480 inhabitants per square kilometer. In the western part of the Netherlands, an area called Randstad, the population density is high ($> 1,100$ per km^2). The density in the Northern provinces is around 200 per km^2 and in the Eastern and Southern provinces 450 per km^2 .

In the Randstad, which forms 17% of the total land area, around 40% of the total population lives in urbanized areas and large cities such as Amsterdam (the capital), Rotterdam (largest harbor) and The Hague (the seat of Government) (figures 2007).

Unemployment rate

Approximately 5,5% of the working population (15-64 years) is unemployed. The unemployment rate among non-natives is 10,9%. More than 200,000 people have been unemployed for longer than twelve months. Unlike many other countries, women do not have the same employment levels as men. More than 7,4 million people are economically active: 4,2 million of them male and 3,2 million female (figures 2006).

Annex II

Statistical data

Law enforcement in figures

year	crimes registered by police	number of cases registered by the prosecution service	settled by prosecution service	tried by criminal court x 1000
1970	265,7	109,2	52,2	50,3
1975	453,2	149,6		
1980	705,7	210,1	97,5	82,8
1985	1,093,7	262,8	137,0	83,8
1990	1,150,2	255,6	141,3	83,7
1995	1,222,9	257,8	147,5	102,3
2000	1,315,6	233,3	118,4	111,0
2005	1,228,2	266,9	123,0	132,6
2006	1,218,4	267,1	126,0	134,3

Prosecutorial discretion

year	non-prosecution x 1000	of which due to:	
		technicalities	policy considerations
1970	37,6		
1975	45,5		
1980	72,3	22,8	49,5
1985	74,8	26,5	48,3
1990	70,5	32,5	38,0
1995	53,2	29,9	23,3
2000	24,3	13,9	10,4
2005	26,2	13,7	9,9
2006	30,6	14,3	16,3

Average prison occupation

year	year	year
1970 2,644	1985 4,608	2000 11,760
1975 2,526	1990 6,481	2005 14,877
1980 3,224	1995 9,540	2006 13,566

Annex III

Further reading

- F.J. Bruinsma Dutch Law in Action, *Ars Aequi Libri* 2003, (2nd ed.)
- J.A.W. Lensing The Netherlands (Criminal law) in: International encyclopedia of Laws, R. Blanpain (Ed.), *Kluwer Law International*, 1997
- Ministry of Justice – Legal infrastructure of the Netherlands in international perspective (Crime Control), The Hague, 2000
- Criminaliteit en rechtshandhaving 2006, Onderzoek en beleid no. 255, Boom Juridische Uitgevers, The Hague, 2007 (in Dutch)
- Peter J.P. Tak Essays on Dutch Criminal Policy, Nijmegen: Wolf Legal Publishers, 2002
- Ecorys Research no. 3 Bench Marking in an International Perspective: an International Comparison of the Mechanisms and Performance of the Judiciary Systems, Rotterdam, 2004

Dutch websites:

For statistics: www.cbs.nl (statline)

For criminal (procedural) law and penitentiary law Acts: www.overheid.nl

For criminal court decisions: www.rechtspraak.nl

Websites (English versions) of:

- the Dutch Ministry of Justice: www.minjus.nl
- the National agency of correctional institutions: www.dji.nl
- the Prosecution Service: www.openbaarministerie.nl
- the Police: www.minbzk.nl
- the Research and Documentation Center of the Ministry of Justice: www.wodc.nl
- the Dutch Bar Association: www.advocatenorde.nl/english/