CHAPTER 3

THE DUTCH PRE-TRIAL PROCEDURE

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DOI: 10.26650/B/SS26.2020.014.03

ABSTRACT

This chapter focuses on the Dutch pre-trial model, and explains the characteristics of the Dutch pre-trial phase. Succesively, the following topics are described: (i) the aim of the pre-trial phase under national law; (ii) which State organs perform which function in the system; (iii) the structure and use of investigatory methods in this phase; (iv) the role of the case-file in the Dutch preliminary proceedings and the trial and; (v) the major rights the suspect can exercise during the pre-trial phase. A lot of attention is given to point (iv) because the case-file fulfills a predominant role in the Dutch pre-trial procedure, and this is a fundamental character of the system that differs from many other criminal procedural systems. The public prosecutor is responsible for putting together the case-file, but the Dutch Code of Criminal Procedure obliges him to only submit findings which could reasonably be relevant to the decisions to be taken by the court. From his point of view – and keep in mind that Dutch public prosecutors only prosecute a case when a conviction is feasible and appropriate –, only incriminating evidence is relevant, and therefore the case-file is unbalanced in Dutch cases. After receiving the case-file in the weeks before the trial, trial judges prepare the trial on the basis of the (unbalanced) case-file. This practice has probably an (huge) psychological impact on judicial decision-making.

Keywords: Dutch pre-trial procedure, principle of immediacy, case-file

1. Introduction

This chapter focuses on the Dutch pre-trial model.[1] Throughout the chapter the following topics are described: (i) the *aim* of the pre-trial phase under national law; (ii) which State *organs* perform which function in the system; (iii) the *structure* and *use* of investigatory methods in this phase; (iv) the role of the *case-file* in the Dutch preliminary proceedings and the trial and; (v) some of the *rights* the suspect can exercise during the pre-trial phase. A lot of attention is given to point (iv) because the case-file fulfills a predominant role in the Dutch pre-trial procedure, and this is a fundamental characteristic of the system that differs from many other criminal procedural systems. In Dutch literature, the Dutch criminal procedure is called a "paper procedure", because the trial courts base their decision for a large part on the evidence reports from the case-file without questioning (expert-) witnesses themselves.

2. Aim of the pre-trial procedure

To understand the Dutch criminal procedure, this chapter begins by explaining the aim of the pre-trial procedure as mentioned in the Dutch Code of Criminal Procedure (CCP). The criminal proceedings are the necessary link between (a) the offence and (b) the criminal sanction to be imposed by the Judge. The criminal proceedings serve to investigate whether a criminal offence has indeed taken place, and if so, to investigate by whom and whether all circumstances of the case give rise to a need to respond with a sanction. In that sense, the criminal proceedings are the link between the behavior of the suspect/offender and the reaction by the State. Criminal procedural law regulates that link.

To this end, investigative powers are assigned to officials. This allocation of authority is at the forefront of criminal procedural law. The goal of the criminal procedure is to apply criminal sanction to the guilty and to prevent its application to the innocent. In particular, criminal procedure regulates everything that should enable the public prosecutor to take decisions in criminal proceedings, referring to the need to clarify the facts and circumstances under which the offence was committed so that the public prosecutor can decide if and how he wants to prosecute the suspect.

National law gives a definition of this part of the criminal procedure. The pre-trial procedure is defined in Article 132a CCP, but the Dutch Code of Criminal Procedure uses the wording "investigative phase". This phase "… shall be understood as the investigation in

1 This translation of the CCP is used throughout this chapter: 'Translation of the Dutch Code of Criminal Procedure' (*The European Judicial Training Network*) <http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf> accessed 23 May 2020.

connection with criminal offences led by the public prosecutor with the aim of taking decisions on the institution of proceedings under criminal law." The current legal definition of detection in Article 132a CCP can be divided into three elements.[2] It concerns (i) the investigation in connection with *criminal offences*; (ii) under the authority of the *public prosecutor*; and (iii) with the aim of *taking decisions* on criminal matters.

The first element hardly contributes to the definition, in the sense that investigations that are not related in any way to criminal offences will never lead to making decisions in criminal proceedings. At the same time, investigations that are related to offences need not necessarily have the purpose of taking decisions in criminal proceedings. It is possible that the investigation will only be carried out with a view to linking administrative consequences to certain behaviors (for example withdrawing permits of companies). Such investigations fall outside the scope of the criminal procedure. The concept of investigation therefore could be used to refer to investigations aimed at uncovering criminal offences, even though there is no concrete awareness of those facts at the outset of the investigation.

The second element can be considered on closer examination as a constitutive element of the concept. Based on Article 148 paragraph 2 CCP,[3] the public prosecutor can only issue orders to persons charged with investigation, that is to say: investigating officers within the meaning of Articles 141 and 142 CCP (which will be discussed below). If an (administrative) investigation is carried out by an official who is not (also) an investigating officer or if a citizen conducts an independent investigation into criminal offences and intends to make the results available for the prosecution of the suspect, the public prosecutor has no authority over it and therefore does not bear the responsibility for the actions of this official or citizen, even where the investigation carried out yields relevant results for the criminal investigation. As such, the pre-trial phase only takes place if the investigation (in connection with criminal offences) is carried out by persons who can (also) be regarded as investigating officers within the meaning of Articles 141 and 142 CCP, and therefore by persons who (partly) have the task of gathering information with a view to the criminal enforcement of the legal order.

The aim of the investigative phase is to gather information about criminal offences (under the supervision by the public prosecutor and carried out by investigating officers) to enable the public prosecutor to take prosecutorial decisions about the criminal offences. All in all,

2 Geert Corsters, Matthias Borgers & Tijs Kooijmans, *Het Nederlandse strafprocesrecht* (Kluwer 2018) 297 ff.

3 "[1.] The public prosecutor shall be charged with the detection of criminal offences which are tried by the District Court in the district in which he is appointed, and with the detection of the criminal offences within the area of jurisdiction of that District Court, which are tried by other District Courts.
[2.] To that end, he shall give orders to the other persons charged with the detection."

the focus of the pre-trial phase (or investigative phase) is to enable the gathering of evidence, as the evidence will be the basis for all the decisions the public prosecutor can legally take (e.g the arrest or subpoena of a suspect). In the next two paragraphs, the main actors and the structure of the investigative phase in the national law (Code of Criminal Procedure) will be examined in more detail.

3. Main organs of the criminal justice system

Various officials have a role in the Dutch pre-trial procedure. For a proper understanding of the operation of the system, it is first important to know which officials are assigned which role by the legislator. This section starts with a description of the term "investigating officers", a term which occupies a central position in the Dutch pre-trial procedure. Next, different groups are discussed that fall within this term, namely (i) police officers; (ii) the assistant public prosecutor[4] and; (iii) the public prosecutor. In addition, Dutch criminal procedure has an investigative magistrate (sometimes called examining magistrate) which is based on the French, inquisitorial, model of criminal proceedings.[5] This chapter only addresses those officials who act in the pre-trial phase and can exercise their authority there. Only when necessary, the organizational structure of the police and the public prosecutor's office are also discussed.[6]

3.1. Investigating officers

In the pre-trial phase, investigative actions are mainly carried out to ascertain the truth in relation to a criminal offence. To a large extent, these acts are carried out by officials who have the title "investigating officer" (Article 141 CCP[7]). To a much greater extent than citizens, powers have been assigned to these officers to investigate offences that have already been committed or are still committed.

4 In the translation of the Dutch Code of Criminal Procedural by the State, this organ is called the assistant public prosecutor. In *The Criminal Justice System of the Netherlands* (Piet Hein van Kempen, Maartje Krabbe & Sven Brinkhoff (eds.), *The Criminal Justice System of the Netherlands* (Intersentia 2019) 112) he is described as a senior police officer. A translation of the Dutch wording *hulpofficier van justitie* is assistant public prosecutor. However, this organ is part of the Dutch police and is a senior police officer with additional training.

5 Pieter Verrest, *Raison d'être. Een onderzoek naar de rol van de rechter-commissaris in ons strafproces* (Kluwer 2011) 18 ff.

6 Information on the organization of the police force and the public prosecutor's office can be found in Masha Fedorova, 'The Main Organs of the Criminal Justice System', in Piet Hein van Kempen, Maartje Krabbe & Sven Brinkhoff (eds.), *The Criminal Justice System of the Netherlands* (Intersentia 2019) 9 ff.

7 "The following persons shall be charged with the detection of criminal offences:
a. the public prosecutors; b. the police officers referred to in section 2(a) of the Police Act 2012, and the police officers referred to in section 2(c) and (d) of that Act, insofar as they have been appointed for the performance of police duties; c. the military personnel of the Royal Netherlands Marechaussee designated by Our Minister of Security and Justice in agreement with Our Minister of Defence; d. the investigating officers of the special investigation services referred to in section 2 of the Act on Special investigation Services."

Article 141 CCP indicates which officials are responsible for the investigation of criminal offences. These officials may apply their powers regarding all offences. Article 141 CCP mentions that all public prosecutors have the status of investigating officers. Public prosecutors are placed above all other investigating officers and can give them orders (Article 148 CCP),[8] but they are also investigating officers themselves. The second category of investigating officers is formed by three groups of police officers. First, it concerns police officials who are appointed for the execution of the police task, as referred to in Article 2, under a, Police Act 2012. Secondly, it includes voluntary civil servants appointed for the execution of the police task (Article 2, under c, Police Act 2012). Thirdly, it includes the civil servants of the National Criminal Investigation Service who have been appointed to perform the police task (Article 2, under d, Police Act 2012). The latter officials are responsible, amongst other things, for investigations against police officers within the police force. In addition, certain employees of other services, such as the investigation service of the tax authorities (FIOD), have been categorized as investigating officers. Article 142 CCP[9] also gives the status of investigating officers to some extraordinary investigating officers, but they have limited investigative powers. These officers are generally only authorized to investigate certain criminal offences. For example, the civil servants of the national tax authorities can only apply investigative methods and carried out acts to uncover tax related offences.

8 "[1.] The public prosecutor shall be charged with the detection of criminal offences which are tried by the District Court in the district in which he is appointed, and with the detection of the criminal offences within the area of jurisdiction of that District Court, which are tried by other District Courts.
[2.] To that end, he shall give orders to the other persons charged with the detection."

9 "[1.] The following persons shall be charged as special investigating officer with the detection of criminal offences:
a. the persons to whom a deed of investigative powers has been granted by Our Minister of Security and Justice, or the Board of Procurators General; b. the adult persons who are in the categories or are part of the units designated by Our Minister of Security and Justice; c. the persons who have been charged under special acts with the detection of the criminal offences referred to in these acts, with the exception of the investigating officers of the special investigation services as referred to in section 2 of the Act on Special investigation Services, or who have been charged under by-laws with supervising compliance therewith, insofar as such compliance involves said offences and the persons have been sworn into office.
[2.] The investigative powers shall extend to include the criminal offences indicated in the deed or the appointment; the deed or the appointment may stipulate that investigative powers cover all criminal offences.
[3.] Our Minister of Security and Justice may determine that in respect of categories or units of the special investigating officers referred to in subsection (1)(c) to be designated by him, the investigative powers also extend to include other criminal offences; subsection (2) shall apply mutatis mutandis.
[4.] Rules pertaining to the granting of the deed and the making of the appointment, the territory of application of the investigative powers, the swearing into office and the training of the special investigating officers, the supervision to which they are subjected and the manner in which Our Minister of Security and Justice may terminate the investigative powers of individual persons shall be set by Governmental Decree. In addition, rules pertaining to the requirements of competence and reliability, which they must meet, may be set.
[5.] Notification of a decree as referred to in subsection (1)(b), or (3) shall be given by its publication in the Government Gazette [Staatscourant]."

In summary, Article 141 CCP described which officials can carry out investigative acts and are charged to investigate criminal offences. The main categories are the public prosecutors and the officials appointed to carry out the police task. They all have general powers of investigation; they are authorized to exercise their powers of investigation regarding all offences.

3.2.1. The police officers

Whoever speaks of criminal law enforcement, sooner or later mentions the word "police". After all, the police have an important task in enforcing the law and investigating criminal offences. Article 3 of the Police Act 2012 states: "The police have the duty, subordinated to the legal authority and in compliance with the rule of law, to ensure that the legal order is enforced and to provide help to those who need it." So, the task of the police is to detect criminal offences because this effectively enforces the legal order. Police officers are therefore investigating officers in the sense as discussed above.

However, as mentioned above, Article 3 of the Police Act 2012 stipulates that the police are always subordinated to the "legal authority". In Article 11, paragraph 1 of the 2012 Police Act, it is stipulated that if the police in a municipality act to maintain public order and perform assistance to those who need it, it will be under the authority of the mayor of that municipality. According to Article 15 of the 2012 Police Act, the police is subordinated to the Minister of Justice and Security, insofar as this is necessary in the interests of the security of the State or the relations of the Netherlands with other powers. The Mayor is therefore not completely independent in the exercise of his authority over the police. When the police act to enforce the rule of law under criminal law, it is placed under the authority of the public prosecutor (Article 12 (1) of the 2012 Police Act). The public prosecutors are in, the hierarchical context, under the authority of the chief public prosecutor and through this under that of the Board of Procurators General.

3.2.2. Assistant public prosecutor

It is also important to note that within the Dutch pre-trial procedure a distinction is made between two different police officers, namely the ordinary investigating officers and senior police officer. In the translation of the Dutch Code of Criminal Procedural by the State, this senior police officer is called the assistant public prosecutor, which is the literal translation of the Dutch *hulpofficier van justitie*. However, this organ is part of the Dutch police force and not of the Deparment of Justice. The assistant public prosecutors have more investigative powers than ordinary police officers, but less than the public prosecutors. In contrast with

public prosecutors, assistant public prosecutors cannot bring cases to trial. The assistant public prosecutor therefore, has an intermediary position in terms of the arsenal of powers.

3.2.3. The public prosecutor and the public prosecutor's office

In addition to the police, the public prosecutor's office[10] is the second organization that plays a central role in Dutch criminal procedure law. The public prosecutor's office derives his role from their authority over the police officers investigating criminal offences, their prosecution monopoly and that prosecution is a discretionary power based on the principle of opportunity. Moreover, the public prosecutor's office is responsible for the enforcement of sentencing decisions of criminal courts. The public prosecutor's office is the hub of the Dutch criminal proceedings.

In relation to the authority exercised by the public prosecutor's office over the police (Article 12, paragraph 1, of the 2012 Police Act and Article 148 CCP[11]), some perspective is appropriate. The public prosecutor's office is highly dependent on the police. If the police do not detect or pass on the results of its investigation, the public prosecutor's office will remain empty-handed. The public prosecutor's office and the public prosecutors normally do not investigate criminal offences themselves. All investigatory methods are planned and carried out by the police. The subordination of the police to the public prosecutor may lead to instructions regarding evidence gathering and the hypothesis to investigate, but in the end the public prosecutor, in this respect, remains dependent on the cooperation of the police.

The public prosecutor's authority over the police also follows from Article 124 Law of the Judicial Organization[12]. This article stipulates that the public prosecutor's office is charged with the criminal enforcement of the legal order and with other tasks determined by law. This primarily includes the detection and prosecution of criminal offences. It is undisputed that the public prosecutor has an investigative task and can give orders to the police. The public prosecutor is mentioned in Article 141 CCP as the principal investigative officer (see above as well) and in Article 148 paragraph 2 CCP has been assigned authority over the

10 See for a more detailed description of the organization of the public prosecutor's office: Henk van de Bunt & Jean-Louis van Gelder, 'The Dutch Prosecution Service', 2012 *Crime and Justice* 1, 117-140

11 "[1.] The public prosecutor shall be charged with the detection of criminal offences which are tried by the District Court in the district in which he is appointed, and with the detection of the criminal offences within the area of jurisdiction of that District Court, which are tried by other District Courts.
[2.] To that end, he shall give orders to the other persons charged with the detection.
[3.] In the event that he carries out the detection personally, he shall report his findings in an official record prepared under oath of office; in addition, the sources of knowledge must also be explicitly stated as much as possible."

12 "The Public Prosecution Service is responsible for the criminal enforcement of the legal order and for other tasks determined by law."

investigation. Although the public prosecutor himself has general investigative powers, he will not use them in most cases. Only in important cases will the public prosecutor himself use investigative powers or give specific instructions in that regard. For the rest, he will issue general instructions and exercise supervision. In addition, the limited capacity of the public prosecutor's office requires the public prosecutor to impose these restrictions, and it is recognised that the police generally have more expertise with regard to investigation techniques and tactics than the public prosecutor does.

The main reason that public prosecutors will only supervise investigations is because their prime, and exclusive, task is the prosecution of criminal offences. Prosecution is described as the involvement of a criminal court or a judge in a criminal case based on referral by the public prosecutor. Prosecutorial acts are thus (*inter alia*) the summons of the suspect for the trial, the order of pre-trial detention (because pre-trial detention is ordered by the examining magistrate or the court of first instance) and the order to the investigating judge to perform investigative acts. A second form of prosecution, which has been in place for some ten years now, is the issuing of a punishment order (Article 257a CCP;[13] *strafbeschikking*). It does not fall under the original definition of prosecution but is a relatively new method to overcome

13 "[1.] The public prosecutor may, if he establishes that a minor offence or a serious offence which carries a statutory term of imprisonment not exceeding six years, has been committed, issue a punishment order.
[2.] The following punishments and measures may be imposed:
a. community service up to a maximum of one hundred and eighty hours; b. a fine; c. withdrawal from circulation; d. the obligation to pay the state a sum of money for the victim; e. disqualification from driving motor vehicles for maximum six months.
[3.] In addition, the punishment order may contain instructions which the suspect must comply with. They may contain:
a. relinquishment of ownership to objects that have been seized and are liable to confiscation or withdrawal from circulation; b. surrender of objects liable to confiscation or payment of their assessed value to the State; c. payment in full to the State of a sum of money or transfer of objects seized for the purpose of special confiscation, in whole or in part, of unlawfully obtained gains which are liable to special confiscation pursuant to section 36e of the Criminal Code; d. payment of a sum of money, to be set, to the Criminal Injuries Compensation Fund [Schadefonds Geweldsmisdrijven] or to an organisation that aims to represent and advocate the interests of victims of criminal offences, whereby the amount may not exceed the maximum fine prescribed by law for the criminal offence; e. other instructions pertaining to the behaviour of the suspect, with which said suspect must comply within a probation period of maximum one year to be set in the punishment order.
[4.] A punishment order shall be imposed and instructions as referred to in subsection (3)(e) shall be given subject to the condition that the suspect provides, for the purpose of establishing his identity, an identity document as referred to in section 1 of the Compulsory Identification Act for inspection and cooperates with fingerprinting.
[5.] In the execution of the community service order and supervision of compliance with the instructions referred to in subsection (3)(e), the identity of the suspect shall be established.
[6.] The punishment order shall be in writing and shall state:
a. the name and the known address of the suspect; b. a statement of the offence as referred to in section 261(1) and (2), or a brief description of the conduct for which this punishment order was issued, and the time at which and the place where this conduct took place; c. the criminal offence that this conduct constitutes; d. the punishments, measures and instructions imposed; e. the day on which it was issued; f. the manner in which an objection may be filed; g. the manner of execution."

the burdens of the enormous case load. With a punishment order, the public prosecutor can issue a sentence (excluding imprisonment as a possible sentence) without referring the case to a judge for minor cases.[14]

As mentioned above, prosecution is an exclusive task for the public prosecutor's office. After all, the public prosecutor is the *only* competent authority to subpoena a suspect and thereby submitting the case to the court, or by issuing a punishment order. The public prosecutor therefore has a monopoly position. This means that, with the only exception being when an appellant asks a court of appeal to issue an order to the public prosecutor to revoke his decision *not* to prosecute a suspect,[15] only the public prosecutor may bring criminal cases to the criminal court. Even in the aforementioned exception, it is still the public prosecutor who must subpoena the suspect, but he cannot go against the decision of the court of appeals. There is no other office or official that also has the authority to prosecute, nor can a citizen prosecute a suspect.

In addition, based on the principle of opportunity, the public prosecutor has the discretionary power to select from the range of criminal cases that lend itself to prosecution. The second paragraphs of Articles 167[16] and 242[17] CCP explicitly state that prosecution can be discontinued on grounds of the public interest. A distinction is made between positive and negative application of the principle of opportunity. The positive application implies that the public interest must necessitate prosecution for the public prosecutor to proceed. This is the opportunity principle applied in practice, despite the fact that the law appears to prescribe a negative application. Negative application means that the public prosecutor prosecutes every offence, unless the public interest yields a contra-indication. So, in practice the public prosecutor has a discretionary power to select cases on the basis that the public interest necessitate prosecution.

14 See for more information Geert Corstens, '25 years of criminal procedure in the Netherlands', in Marc Groenhuijsen & Tijs Kooijmans, *The Reform of the Dutch Code of Criminal Procedure in Comparative Perspective*, (Leiden 2012), 3-8.

15 "If a criminal offence is not prosecuted, the prosecution of a criminal offence is discontinued, or the criminal offence is prosecuted by means of the issuance of a punishment order, the directly interested party may file a complaint against said decision with the Court of Appeal within whose area of jurisdiction the decision of non-prosecution or discontinuance of prosecution is taken or the punishment order is issued. If the decision is taken by a public prosecutor at the National Office of the Public Prosecution Service or at the National Office of the Public Prosecution Service for Financial, Economic and Environmental Offences, the Hague Court of Appeal shall have jurisdiction."

16 "A decision not to prosecute may be taken on grounds of public interest."

17 "[1.] If as a result of the preliminary investigation instituted the Public Prosecution Service considers that continued prosecution is required by issuing a punishment order or otherwise, it shall proceed to do so as soon as possible.
[2.] As long as the court hearing has not yet started, a decision to discontinue prosecution may be taken, also on grounds of public interest."

The public prosecutor can then opt for a specific form of prosecution, for example, to bring it before a chamber of three judges or a single judge (*unus*). Between the decision to subpoena (before a chamber or a single judge) and the decision to dismiss a case, there are the settlement offer and the punishment order. During the settlement, the case is not yet brought to court, but the suspect receives a formal proposal to fulfill certain requirements (mostly the payment of a lump sum) to prevent prosecution. This modality will disappear from the arsenal of possibilities in the near future and be replaced by the punishment order. With the punishment order, the public prosecutor imposes a punishment that becomes irrevocable if the suspect does not appeal in time. Only in the latter situation will the case go to court.

In summary, the public prosecutor and the public prosecutor's office have the exclusive task of the prosecution of criminal offences. The decision to prosecute or dismiss a case is based on the principle of opportunity, which means that the public prosecutor will only prosecute when the public interest necessitate it. There is no obligation to prosecute certain offences, with the only exception when a court of appeals order the public prosecutor to prosecute an offence.

3.3. Examining magistrate

As described above, the police have the task of maintaining the rule of law, and this takes place under the authority of the public prosecutor. The public prosecutor is also responsible for prosecuting criminal offences (based on his prosecutorial monopoly and the principle of opportunity). For some powers in the pre-trial phase, however, investigating officers require the permission of a magistrate. Each court has one or more examining magistrates/ investigative judges. For the more profound powers, such as the pre-trial detention for 14 continuining days and the subsequent 90 days or intercepting telecommunication, the public prosecutor must refer the decision to the examining magistrate. The examining magistrate is expected to judge this request more neutral than the public prosecutor. Article 180 paragraph 1 CCP[18] also instructs the examining magistrate to guard against unnecessary delays in the investigation.

3.4. Conclusion

The major actors in the Dutch pre-trial phase are investigating officers and the examining judge. Article 141 CCP describes which officials can carry out investigative acts and are charged to investigate criminal offences. The main categories are the public prosecutors and the officials appointed to carry out the police task (police officers and assistant public

18 "The examining magistrate shall see to it that the criminal investigation is not unduly delayed."

prosecutors). They all have general powers of investigation; they are authorized to exercise their powers of investigation regarding all offences.

The public prosecutor and the public prosecutor's office, alongside their investigatory powers, have the exclusive responsibility of prosecuting criminal offences. The decision to prosecute or dismiss a case is based on the principle of opportunity, which means that the public prosecutor will only prosecute when the public interest necessitates doing so. There is no obligation to prosecute certain offences, with the only exception when a Court of Appeals orders the public prosecutor to prosecute an offence.

Examining magistrates must provide for some checks and balances in the system. Especially when the public prosecutor wants to carry out methods that interfere with the suspect's rights in a more profound way, such as pre-trial detention (an interference with Article 5 ECHR) and intercepting telecommunication (an interference with Article 8 ECHR), the public prosecutor has to refer the decision to the examining magistrate.

4. Allocation of investigative power in the pre-trial procedure

In the section above, it is described which officials are assigned which role by the legislator in the Dutch criminal proceedings during the pre-trial phase. This section discusses the allocation of powers during the pre-trial phase under national law: so what type of investigative powers may be deployed at the pre-trial stage and how does this system of allocation of powers work?

At the outset, attention is paid to how the legality principle regulates the allocation of power. In particular, based on the legality principle, it will be discussed whether it is necessary under national law that all methods are based on a specific and explicit legal basis. Secondly, this section discusses what normal provisions that allocate investigatory power to a State organ look like. Normally, it defines by whom, against whom, for which offences and for what purpose the authority can be deployed. Finally, the types of powers that can be exercised in the pre-trial procedure are described. In this regard, a distinction is made in this chapter between support measures, evidence-enforcing measures and custodial powers (although the Code of Criminal Procedure does not categorize the powers in this way).

4.1. Legality principle

The legality principle plays an important role in the Dutch pre-trial procedure when allocating investigative powers. Article 1 CCP states that: "Criminal proceedings shall be solely conducted in the manner provided by law." Based on Article 1 CCP, the allocation of

investigatory powers must take place in a law in the formal sense. The more stringent procedure for enacting a law in a formal sense (submission of the law by the government, approval first by the House of Representatives and then by the Senate), offers a safeguard that not too lighthearted (and far-reaching) criminal powers are allocated that violate fundamental rights.[19]

These safeguards work in two ways. Firstly, by guaranteeing that violations of citizens' fundamental rights are only possible after thorough discussion and balancing of interests by the formal legislator (and not only by the government or a single minister). Secondly, the weighing of interests most likely does not lead to *blanco cheques*. In the allocation of (unlimited) power, there is a danger of grossly restricting the freedom of suspects and third parties and possibly also abuse of power (by arbitrarily dealing with the power).[20] By requiring the government to submit an amendment to the Dutch Code of Criminal Procedure and then getting the amendment approved by subsequently the House of Representatives and the Senate, checks and balances are in place. This should (in theory) lead to balanced allocation of powers.

In addition, abuse of power in practice is prevented (at least in some cases) by limiting the allocation of power, by stipulating that it may only be used by a specific authority (for example an examining magistrate and not normal police officers), against designated persons, in specific cases and for a specific purpose. The importance of the explicit legal basis for (far-reaching) investigative powers therefore lies in the protection of the individual that fundamental rights are not infringed without good reason. The proposition that criminal proceedings may only take place on the basis of a formal legal basis needs to be put into perspective on two points. This is linked to the wording of article 1 CCP: "Criminal proceedings shall be solely conducted *in the manner* provided by law" (emphasis added), which will be discussed in the next section.

4.1.1. The allocation of general powers

The Dutch Supreme Court (*Hoge Raad*, court of cassation[21]) has accepted that not every investigative method must have an *explicit* basis in a law in a formal sense.[22] Sometimes a general allocation of authority is sufficient, such as the standard found in Article 3 of the Police Act 2012: "The police have the duty, subordinated to the legal authority and in compliance with the rule of law, to ensure that the legal order is enforced and to provide help to those who need it." The Supreme Court accepted that minor investigative methods can be based on that provision, when

19 Tineke Cleiren, *De openheid van de wet, de geslotenheid van het recht*, (Gouda Quint 1992) 9.

20 Geert Corsters, Matthias Borgers & Tijs Kooijmans, *Het Nederlandse strafprocesrecht* (Kluwer 2018) 8 ff.

21 The Dutch court system does not have a Constitutional Court.

22 HR 18 October 1983, *NJ* 1984, 97.

those methods contribute to the effective enforcement of the legal order. So, Article 3 Police Act 2012 allocates powers based on the description of the task of the police. Thus, the police must enforce the legal order and to be effective they need to use investigatory methods.

However, only *minor* interferences with human rights can be based on the allocation of powers via a general provision. For example, there was no explicit legal basis for the IMSI catcher[23] and stealth SMS, and the Supreme Court had to assess the use of these methods under Article 3 of the 2012 Act.[24] When assessing whether Article 3 of the Police Act 2012 provides a sufficient legal basis, it is important to what extent a fundamental right is limited by the use of the investigative method. If the method only interferes with the privacy of the person in a minimal way, the Supreme Court considers Article 3 of the Police Act 2012 to be a sufficient legal basis.[25] According to the Supreme Court, a more than minor infringement is made if the method "is suitable for obtaining a more or less complete overview of certain aspects of the person's personal life".[26] With regard to the IMSI catcher and the stealth SMS, the Supreme Court ruled that the infringement was limited because it only obtained the number by which the user of an unregistered SIM card can be identified (IMSI catcher) or that at a certain moment in time the location of the SIM card (and therefore most likely the user) can be determined (stealth SMS). With the IMSI catcher, no content data can be obtained and with the stealth sms the user of the SIM card cannot be followed for an uninterrupted period, such as with a GPS tracker. Therefore, both methods only interfere with the right to respect of privacy in a minor way, and a general allocation of power is a sufficient legal basis for such methods. In summary, according to the Supreme Court, methods that interfere in a minor way with human rights can be implemented on the basis of general provisions and no *explicit and specific* legal basis is necessary.

4.1.2. Abstract allocation of powers

The second perspective is based on how the powers are defined in law. According the legality principle, criminal proceedings take place *in the manner* provided for by law, but it is precisely the description of the manner that leaves room for placing new forms of the method under an "old" description because the description is abstract. For example, the primary rules about DNA testing do not make explicit which form of analysis should / may be used. Article 138 CCP states: "DNA testing shall be understood to mean the testing of cellular material which is aimed

23 An International Mobile Subscriber Identity-catcher, used to "catch" not registrated mobile numbers while they are used (to combat the use of anonymous prepaid SIM cards by criminals).

24 HR 1 July 2014, ECLI:NL:HR:2014:1562.

25 HR 6 November 2018, ECLI:NL:HR:2018:2050.

26 HR 1 July 2014, ECLI:NL:HR:2014:1562, par. 3.5.2.

solely at comparing DNA profiles, establishing externally observable personal characteristics of the unknown suspect or the unknown victim or establishing consanguinity." This may lead the court to recognize that Y-chromosomal, mitochondrial, autosomal and genetic genealogy fall under the rule as embodiments, creating four sub-rules for conducting DNA testing.

Whether new forms can be recognized depends on the degree of similarity between the core elements that, according to the legislator, are understood to be the primary rule and the core elements of the new application. Characteristics of DNA testing could be that (i) *cellular material* of the suspect must be obtained (ii) to analyze a *DNA profile* (iii) which can be *compared* with other DNA profiles. In step (i) all kinds of forms of obtaining body material can be accepted under Article 138 CCP, such as the taking of hair with appropriate force or the taking of blood. The same applies to step (ii). Every possibility to create a DNA profile can be used. It is unimportant under Article 138 CCP that with the Y-chromosomal only the paternal line and with mitochondrial only the maternal line can be established. Finally, the description of step (iii) is also open and allows the authorities to compare only the DNA profile of the suspect with the DNA profile of traces found at the crime scene or to compare the DNA profile with DNA profiles included in a database. In all cases, the core elements – taking body material, drawing up the DNA profile and comparing – are very similar. In this way, the core elements of an investigative power can be used as material norms to recognize new sub-rules (although the sub-rules are not *explicitly* recognized by law).

4.2. The structure of the allocation of powers

Investigatory powers are not *blanco cheques* issued by the legislator. This would be contrary to the principle of legality, because the manner in which the power is exercised is not based on a law in a formal sense. The powers are always stipulated, for example by granting the power only to certain officials, having them used only investigating certain crimes, stating the ground on which they may be used, or binding them to specific deadlines. So, the allocation of powers is always accompanied by limitations. This demonstrates the ambivalence of criminal procedural law. On the one hand, it legitimizes the government to act in a certain way. On the other hand, limits are set at the same time that the users of the power have to comply with. That is the flip side of the coin. The two aspects of criminal procedure law, on the one hand the allocation of powers, and on the other hand the limitation of that power, are essentially connected. This leads to a standard structure in the allocation of powers in the Dutch Code of Criminal Procedure. The legislator has designed a system in which, broadly speaking, the attribution of a power is more restricted the more intrusive they are. For example, when a power is more intrusive is has to be issued by a higher authority.

To explain this, a specific provision is used as an example. Namely, Article 126l of the CCP, which includes the provivison for wiretapping. Article 126l CCP states:

> "[1.] In the case of suspicion of a serious offence as defined in section 67(1), which serious offence in view of its nature or the relation to other serious offences committed by the suspect constitutes a serious breach of law and order, the public prosecutor may, if urgently required in the interest of the investigation, order an investigating officer as referred to in section 141(b) and (c) to record confidential communications by means of a technical device. […] [4.] The warrant may only be issued following authorisation to be granted by the examining magistrate on application of the public prosecutor. […] [5.] The warrant shall be issued for a period of maximum four weeks. The term of validity may be extended for a period of maximum four weeks each time."

First of all, limitations are set in the issuing authority. In this case, the public prosecutor must ask permission from an examining magistrate before he can intercept confidential communication. Secondly, this allocation of power does not include a limit on the people to be tapped. This power can therefore not only be used against the suspect, but also against relatives of the suspect. This may be important, for example, if the telephone number of the suspect is unknown but the authorities do know the telephone number of his wife. If his wife's phone is tapped, information about the suspect can also be obtained. Thirdly, the power may only be exercised in the case of certain suspicions, and it is precisely here that there is a strong limitation with regard to the possibility of tapping all persons. Wiretapping is only possible for serious offences (offences that are punishable by imprisonment of four years or more) and that offence, in view of its nature or the relation to other serious offences committed by the suspect, form a serious breach of law and order. Fourth, the deployment must be strictly necessary. This means that the information that may be obtained cannot be obtained in a less radical way, for example by "simple" stake-outs. Finally, the power can be applied for a maximum of four weeks, after which the examining magistrate must re-test whether the conditions are still met before he can give permission for an extension.

This description shows the standard way in which powers are limited in the Dutch pre-trial phase. Normally, restrictions are imposed in the sense of (i) who can execute the power; (ii) against whom; (iii) for which offences and; (iv) for what purpose. The powers are always discretionary powers. This means that the competent person is never obliged, if the conditions laid down by law are fulfilled, to apply the method. The competent person must decide whether and, if so, how to use the power.

4.3. Types of powers

The Dutch Code of Criminal Procedure has an extensive collection of powers that have an explicit basis in the law. More than 100 provisions[27] deal with the conditions under which a specific power may be used. This includes general powers with which minor violations of the right to privacy may be made – for example, the pursuit and observation of a person on foot – and specific allocation of powers. According to the Dutch principle of legality (Article 1 CCP), larger violations of human rights must have an explicit legal basis. As a result, support powers – such as entering a home[28] – for freedom restricting powers – such as arrest[29] – have an explicit legal basis. The custodial powers (pre-trial detention) are explicitly allocated.[30],[31] In addition, many investigative methods, such as infiltration,[32] DNA testing,[33] wire-tapping[34] and search and seizures,[35] have an explicit description in the law. In principle, this is necessary because, according to the Dutch principle of legality, only those powers may be executed in accordance with the (written) law.

27 Ranging from Article 52 CCP (arresting suspects) to Article 126ii CCP (gathering stored data from providers regarding terrorism).

28 Article 55a CCP: "[1.] In cases where the suspect is caught red-handed in the commission of a criminal offence or where he is suspected of having committed a serious offence as defined in section 67(1), any investigating officer may search any place for the purpose of arresting the suspect."
However, to search a home an additional warrant from the investigative judge is necessary.

29 Article 53 CCP: "[1.] If the suspect is caught red-handed, any person may arrest the suspect".

30 Article 57 CCP, Articles 63 CCP and further.

31 See for a detailed description of the pre-trial detention Jan Crijns, Bas Leeuw & Hilde Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality*, (Leiden University 2016). Online accessible https://www.fairtrials.org/wp-content/uploads/j.h.-crijns2c-b.j.g.-leeuw-h.t.-wermink-pre-trial-detention-in-the-netherlands.-legal-principles-versus-practical-reality.pdf.

32 Article 126h CCP: " [1.] In the case of suspicion of a serious offence as defined in section 67(1), which serious offence in view of its nature or the relation to other serious offences committed by the suspect constitutes a serious breach of law and order, the public prosecutor may, if urgently required in the interest of the investigation, order an investigating officer as referred to in section 141(b) to participate in or render assistance to a group of persons which may be reasonably suspected of planning or committing serious offences."

33 Article 138: "DNA testing shall be understood to mean the testing of cellular material which is aimed solely at comparing DNA profiles, establishing externally observable personal characteristics of the unknown suspect or the unknown victim or establishing consanguinity."

34 Article 126l CCP: '[1.] In the case of suspicion of a serious offence as defined in section 67(1), which serious offence in view of its nature or the relation to other serious offences committed by the suspect constitutes a serious breach of law and order, the public prosecutor may, if urgently required in the interest of the investigation, order an investigating officer as referred to in section 141(b) and (c) to record confidential communications by means of a technical device."

35 Article 95 CCP: "[1.] Any person who arrests or stops and questions a suspect may seize objects which he has with him and are liable to seizure."
Article 96 CCP: "[1.] In cases where the suspect is caught red-handed in the commission of a criminal offence or where he is suspected of having committed a serious offence as defined in section 67(1), the investigating officer shall have the power to seize objects liable to seizure and to enter any place for that purpose.
[2.] The investigating officer may, while awaiting the arrival of the judge or civil servant who is authorised to search the place for the purpose of seizure, take any measures that are reasonably necessary in order to prevent objects liable to seizure being disposed of, rendered unusable, inactivated or damaged. These measures may restrict the freedom of persons who are at the location in question."

5. The case-file

It has been discussed above how investigative powers are normally granted to organs charged with investigating criminal offences (investigating officers) under the authority of the public prosecutor, and that the public prosecutor has the prosecution monopoly. In this section, the use of the case-file in the Dutch criminal procedure will be described because it is the author's view, that it is the key to understanding Dutch criminal procedure. A unique characteristic of the Dutch pre-trial procedure is that everything must be recorded in writing,[36] and the court will be given access to the case-file prior to the trial. The case documents (translated literally, *processtukken*) are read and analyzed during the preparation of the trial by the judges and the clerk prior to and during the trial. This is possible because of the very limited interpretation given to the principle of immediacy.[37] The Supreme Court's rulings[38]

> "has opened the door widely to accept indirect evidence and the principle of immediacy is no longer interpreted as requiring that all evidence is directly produced in court. From then on, the hearing of witnesses at trial has become an exception rather than the rule. Instead, the case file contains the written statements of witnesses heard by the police investigator or the examining judge and during the trial stage these statements are read out loud – usually in the form of a summary–and subsequently discussed and verified by the judge."[39]

In order to make optimal use of the case documents in the current criminal proceedings, judges must prepare the trial on the basis of the indictment. This preparation for the trial means that the judges already get a picture of the evidence present in the case-file, and can subsequently present the relevant case documents as evidence at trial.[40] Van Oorschot – who

36 Article 152 CCP: "[1.] The civil servants who are charged with the detection of criminal offences shall prepare as soon as possible an official record of the criminal offence detected by them or of their detection activities or findings.
[2.] The preparation of an official record may be omitted under the authority of the Public Prosecution Service."
Article 153 CCP: "[1.] They shall prepare the official record under oath of office or, insofar as they have not taken the oath of office, shall attest it before an assistant public prosecutor who shall place a statement of such attestation on the official record within two times twenty-four hours.
[2.] They shall personally prepare, date and sign it; in addition, the sources of knowledge must also be stated as much as possible. An official record which has been electronically prepared or converted shall be considered as equivalent to a signed official record, provided that it meets the requirements set by or pursuant to Governmental Decree."

37 See for an extensive analysis Marc S. Groenhuijsen & Hatice Selçuk, 'The Principle of Immediacy in Dutch Criminal Procedure in the Perspective of European Human Rights Law', 2014 *ZSTW* 126.

38 Especially HR 20 December 1926, *NJ* 1927.

39 Marc S. Groenhuijsen & Hatice Selçuk, 'The Principle of Immediacy in Dutch Criminal Procedure in the Perspective of European Human Rights Law', 2014 *ZSTW* 126, 257ff.

40 This could lead to confirmation bias. However, this problem will not be discussed here but more information can be found in Dutch in Dave van Toor, 'Vooringenomen rechter? Voorbereiding als gevaar voor de waarheidsvinding in strafzaken', [2007] 3 *Expertise en Recht* 85-92; Dave van Toor, 'Het dossier als fundament voor de rechterlijke beslissing', [2018] *Platform Modernisering Wetboek van Strafvordering* 10.

observed several judges as part of her dissertation research during their work in the courtroom and behind their desk – writes that clerks and judges create a "*story-before-the-trial*" by "[*j*]*igging, coding, highlighting, juxtaposing and summarizing*" the case documents/the case-file.[41] Dutch judges spend more time with case-files at their desk than with suspects in courtrooms.[42] Without doubt, the preliminary work of the clerk[43] and the preparation of the judges have become indispensable practices of criminal justice (and this leads to very short trials, for minor offences with clear evidence (like drunken driving) under 30 minutes. It is seldom that a trial's duration is more than a couple hours).

According to the explanation given in Dutch criminal procedural law to the principle of immediacy,[44] judges are required to present the case documents that they wish to use as evidence during the trial, but there is only a need to have a witness who gave evidence during the investigation to attend the trial under certain circumstances.[45] Their preparation based on the case-file, allows the judges to present the relevant case documents and to ask specific questions to the suspect (and to any witnesses and experts present). Criminal law practice has resulted in a (paper) criminal procedure that is as efficient and fast, with the case-file and the judicial preparation being indispensable. Based hereon Dutch criminal proceedings are often described as "paper proceedings". In practice, this means that the entire pre-trial phase is all about preparing the case-file for the court.

Practically, the importance of the case-file is evident. This working method – preparing the trial on the basis of the file – does not follow from any legal provision, but has become an organizational practice to ensure an efficient and effective criminal procedure. Because the case-file plays such a major role in Dutch criminal procedure law and the case-file is assembled during the pre-trial phase, attention is paid to the provisions on the case-file in this section.

5.1. Case documents

Article 149a CCP, which introduces the concept of case documents, states: "[1.] The public prosecutor shall be responsible for the compilation of the case documents during the criminal investigation. [2.] The case documents shall include all documents which could

41 Irene van Oorschot, *Ways of Case-Making* (Ipskamp 2018) 190.

42 Irene van Oorschot, *Ways of Case-Making* (Ipskamp 2018) 173.

43 Nina Holvast, *In the Shadow of the Judge: The Involvement of Judicial Assistants in Dutch District Courts* (Eleven International Publishing 2017).

44 See for detailed informatie: Marc S. Groenhuijsen & Hatice Selçuk, 'The Principle of Immediacy in Dutch Criminal Procedure in the Perspective of European Human Rights Law', 2014 *ZSTW* 126

45 This is the case, in line with the ECtHR's cases *Al-Khawaja & Tahery* and *Schatschaschwili*, when the evidence is sole or decisive for the application's conviction. Of course, the Court can demand that the witness attends the trial, as to establish the credibility and reliability of the witness.

reasonably be relevant to the decisions to be taken by the court at the court session, subject to the provisions of section 149b." Paragraph 2 provides a substantive criterion for determining when something belongs to the case documents: the relevance criterion.[46] If a document can reasonably be of importance for a court decision to be taken during or after the trial, that document will have the status of a case document. Strictly speaking, Art. 149a CCP does not state that the document is a case document or that the document is or will be added to the case-file.[47] It only contains a material criterion about when document will have the status of a case document. Paragraph 1, cited above, stipulates that the public prosecutor is responsible for compiling the case documents in a case-file, so the practical side of merging the case documents into a collection of case documents. This collection is called the case-file. When both paragraphs of Article 149a CCP are read together, the public prosecutor must therefore add the documents that are relevant to the any judicial decision during the trial to the collection of case documents. The public prosecutor has the primary authority to designate a document as a case document and to add it to the collection. However, he does not have the last word: on the basis of Article 34, paragraphs 3 and 4 CCP,[48] the examining magistrate can set a time limit for adding case documents, and Article 315 CCP[49] provides that the trial judge/court can order the submission of case documents to the case-file.

Paragraph 3 of Article 149a CCP[50] provides that further rules on the composition and organization of case documents may be laid down by govermental decree. This has been done in the *Decree on case documents in criminal cases*. What is special about the Decree is that the government decided, unlike it did in the Code of Criminal Procedure, to use the term "case-file". In Article 1 (c), the Decree stipulates that the case-file is "a collection of case documents that

46 "The case documents shall include all documents which could reasonably be relevant to the decisions to be taken by the court at the court session, subject to the provisions of section 149b."

47 Matthias Borgers, 'Processtukken', 2014 *DD* 1, par. 2.1.

48 "[3.] If the public prosecutor fails to give a decision on the adding of the documents or their inspection, the examining magistrate may, on application of the suspect, set a period of time within which a decision has to be taken. The examining magistrate shall hear the public prosecutor and the suspect before taking a decision on the application.

[4.] The public prosecutor may refuse to add the documents or provide them for inspection if he is of the opinion that the documents cannot be deemed to be case documents or if he considers this to be irreconcilable with one of the interests referred to in section 187d (1). He shall require written authorisation for that purpose, to be granted by the examining magistrate on his application."

49 If the District Court finds that the questioning at the court session of witnesses, who have not yet been questioned, or the submission of documents or convincing items of evidence, which are not yet available at the court session, is necessary, it shall order that, if necessary with an attached order to forcibly bring them, these witnesses be summoned or called in writing to appear at the court session at a date and time to be set by it or that these documents or convincing items of evidence be submitted.

50 "Rules pertaining to the manner of compilation and organisation of the documents shall be set by Governmental Decree."

were or will be added to the case-file during the criminal investigation." Articles 2 and 3 of the Decree contain rules on the structure of the process file, for which the explanatory memorandum explicitly considers that these provisions only apply to the documents that have already been added to the case-file but not to the research file (which may therefore exist independantly from the case-file) which contains documents that are irrelevant for any judicial decisions to be taken.

Moreover, the existence of a case-file cannot be viewed separately from the obligation to report. Police reports can only be added to the documents when they have been drawn up. Article 152 CCP[51] provides that investigating officers must prepare as soon as possible an official report of facts and findings, after which an official report can be given the status of an official case document (because if it is not created, it is not a document). However, practice teaches us that the spirit of this provision is not as clear as the letter suggests.[52] Not all acts performed by investigating officers which lead to facts or findings that are of relevance for any judicial decision are reported as soon as possible. This means that the rules concerning the case documents and the case-file stand or fall with the rules and practice regarding the obligation to report.

5.2. What to include in the case-file

As discussed in short above, the compilation of the case documents in the case-file cannot be dissociated from the general obligation to report. However, it is essential to further examine which information is reported upon and is entered in the case-file. The compilation of the case documents in practice is central to this subsection. The discussion mainly concerns the obligation to report only *relevant* information. The author's central point of criticism is that the current practice with regard to the composition of the case-file, in which in principle only investigative acts that have led to incriminating evidence is identified as relevant by the prosecutor, leads to an unbalanced case-file. This is problematic in the light of the effect that the preparation of judges for the trial has on his judgments: if during the prepartation for the trial the judge only reviews relevant information as identified by the prosecutor, he will develop an unbalanced overview (which is difficult to change latter on (conformation bias, belief perseverance)).

Reporting on (investigative) acts is essential for the compilation of the case-file, and then for the trial. Article 152 CCP[53] states that investigating officers draw up an official

51 "The civil servants who are charged with the detection of criminal offences shall prepare as soon as possible an official record of the criminal offence detected by them or of their detection activities or findings."

52 Petra van Kampen & David Hein, 'Strijd om stukken: de Wet processtukken', 2013 *NJB* 2, 73.

53 "The civil servants who are charged with the detection of criminal offences shall prepare as soon as possible an official record of the criminal offence detected by them or of their detection activities or findings."

report as soon as possible "of the criminal offence detected by them or of their detection activities or findings". This seems to indicate that the legislator chooses a neutral starting position by obliging investigating officers to verbalize all investigative actions. Paragraph 2,[54] however, provides a reduction in the workload that would follow an absolute obligation to report on all actions: under the responsibility of the public prosecutor and on the basis of guidelines from the Board of Procurators General, the drafting of an official report can be omitted.

The question arises *when* it is possible to refrain from drawing up an official report:[55] actions and findings that are not *reasonably relevant* to a judicial decision to be taken (before or) during the trial can be omitted from verbalization. However, it is still obligatory to report in the case-file that verbalization is omitted. But when is an action or finding irrelevant? Are investigative acts that do not provide evidence against the suspect irrelevant?

The obligation to report is described in neutral terms: actions that have been carried out for the purpose of the investigation and their findings must be reported upon. According to the legislator, the official reports must provide a "clear picture" of what has been done during the pre-trial phase.[56] Against this background, the proposition can be defended that unsuccessful investigative acts (which did not lead to incriminating evidence to be gathered) should also be reported upon if they could reasonably be relevant to a judicial decision. This concerns acts that do not support the suspicion in any way, but the outcome of which could be of value (such as not finding (DNA) traces where that might be expected or witnesses who were on the spot but did not see anything). In this way, the report of investigative acts would amount to keeping a logbook of investigative acts.

However, practice shows a different picture. Anyone who has ever handled a Dutch criminal case-file knows that the file is not a logbook of all investigative acts. It is essentially a list of those investigative acts that have led to incriminating evidence. However, "relevance" and "incriminating evidence" are not synonymous. This practice leads to an unbalanced case-file, which is used by judges to prepare the trial, and could hold the potential of a psychological impact on judicial decision-making (but scholars and judges alike tend to see this as an essential part of the necessary efficiency of the Dutch trial, and therefore this practice is almost solely critized upon by defense attorneys).

54 "The preparation of an official record may be omitted under the authority of the Public Prosecution Service."

55 For example HR 5 October 2010, ECLI:NL:HR:2010:BL5629, par. 7.

56 MvT: Vaststellingswet Boek 2 van het nieuwe Wetboek van Strafvordering (Het opsporingsonderzoek), p. 26.

6. Rights of the suspect

In the sections above, the structure of the Dutch pre-trial procedure, the allocation of powers and the central role of the case-file are discussed. During the pre-trial phase the suspect can exercise his rights. The human rights protection of the suspect stem mainly from the rights protected in the European Convention on Human Rights. Article 120 of the Constitution[57] prohibits all Dutch courts from assessing the constitutionality of Acts of Parliament. However, Acts of Parliament can be assessed to be in violation with *supranational* law, such as international treaties. This makes the ECHR of great importance for the effective and practical legal protection of suspects. All standards that arise on the basis of the Convention and the relevant case law apply fully in the Dutch procedure, many of which also apply in the pre-trial procedure. The three most important (which have also been given a place in the CCP) are discussed below.

6.1. Access to a lawyer

In Article 18 of the Constitution the right to legal aid is formulated as a fundamental right. As explained above, the access to and the assistance of a lawyer, however, stems mainly from the case law of the European Court of Human Rights on Article 6 and the Directives on this topic.[58] Traditionally, Dutch criminal procedure did acknowledge the law of the suspect to be assisted by a lawyer *during* the police interrogation, nor to have contact with counsel *prior* to the first police interview. Traditionally, the first contact with a lawyer was after the interrogation (s), when the public prosecutor or assistant public prosecutor decided on the pre-trial detention. This has changed as a result of the Strasbourg case law, in particular the judgment in the *Salduz* case.[59]

In line with the case law of the ECtHR (and Directive 2013/48/EU), the Dutch Code of Criminal Procedure incoorporated the right to access to a lawyer (before the first interrogation) and assistance of a lawyer (during the first interrogation). The CCP makes a distinction between elected and appointed counselors. In a number of situations, the CCP provides for counsel so that – in particular in connection with the deprivation of liberty of the suspect – legal assistance is insured. This counselor is appointed by (the board of) the Council of Legal Aid. However, according to Article 38 (1) CCP the suspect is authorized at all times to choose one or more counselors.[60]

57 "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."

58 For example 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

59 ECtHR 27 November 2008, ECLI:CE:ECHR:2008:1127JUD003639102.

60 "The suspect shall have the right to choose one or more defence counsel at all times."

Still, in some situations Legal Aid is obligatory. Since March 1, 2017, Article 28b CCP[61] stipulates in which situations – for arrested suspects – legal aid is appointed by a government agency and therefore also paid by the government. First of all, this happens if the arrested suspect is vulnerable, regardless of the nature and seriousness of the offence. This applies, for example, to minors and people with a history of mental illness. If the suspect is not vulnerable in the sense of, for example, age or illness, a distinction is made between different categories of offences. Paragraph 2 of Article 28b CCP stipulates that the assistant public prosecutor must ask the suspect of crimes which can be punished for 4 or more years imprisonment if he wants counsel before and/or during the interrogation, and, if so, must inform the Council of Legal Aid as to appoint counsel. The suspect is entitled to consult with the appointed or chosen counsel prior to the first interrogation. At the request of the suspect, the counsel can attend the interrogation. The suspect must submit that request to the interrogating officer or the assistant public prosecutor.

6.2. Right to silence and privilege against self-incrimination

Based on Article 29 CCP[62] the suspect is not obliged to answer any question posed to him by investigating officers. It is also stipulated that the interrogating officer must refrain from anything that is intended to obtain a statement that cannot be said to have been obtained in freedom. Both prescriptions express one and the same thought. This means that the suspect is not compelled, either directly or indirectly, to make statements against himself. The right to remain silent is reinforced by the obligation to inform the suspect of his rights. Article 29 (2) CCP states: "Before the suspect is questioned, he shall be informed that he is not obliged to answer any questions." If these obligations are violated, the statement made by the suspect may not be used as evidence.

However, these obligations apply only during an interrogation, which has a formal definition in Dutch criminal procedural law. Firstly, these obligations apply when the suspect

61 "[1.] If a vulnerable suspect or a suspect of a crime, which can be punished with more than 12 years imprisonment, has been arrested, the assistant public prosecutor who orders that the suspect be detained for investigation must inform the the administration of the Legal Aid Council without delay of his arrest, so that the Board appoints a Counselor. This notification can be omitted if the suspect has chosen a lawyer and this or a replacement lawyer will be available in time.
[2.] If a suspect who has been arrested for a criminal offence for which pre-trial detention can be legally requested, seeks legal aid upon request, the prosecutor who orders that the suspect be detained for investigation, immediately must inform the Board of the Legal Aid Board thereof, so that the board appoints a lawyer. The second sentence of the first paragraph applies accordingly."

62 "[1.] In all cases where a person is being questioned as a suspect or defendant, the judge or officer, who is conducting the questioning, shall refrain from any act aimed at obtaining a statement which cannot be said to have been freely given. The suspect or the defendant shall not be obliged to answer any questions.
[2.] Before the suspect or the defendant is questioned, he shall be informed that he is not obliged to answer any questions."

knows that he is answering questions asked by an *investigating officer*. If the suspect is questioned during an undercover operation, the aforementioned obligations do not apply. Secondly, these obligations apply when the investigating officers ask questions *related to a certain offence*. This means that the Dutch "*Miranda*" rights are not violated when the suspect gives a complete confession when the officers only asked for his name (because his personal information is not related to a certain offence). Thirdly, these obligations apply when the suspect is interrogated *directly* by investigating officers. When the officers leave a questionnaire in the suspect's mailbox to be filled out, the obligations do not apply.

In addition to the right to remain silent, Dutch criminal procedural law acknowledges the privilege against self-incrimination. However, according to the settled case law of the Dutch Supreme Court, there is no *unconditional* right or principle in Dutch law that a suspect could not be obliged to cooperate in obtaining evidence that may be incriminating for him.[63] The principle mainly applies to the gathering of non-testimonial evidence that has an existence independent of the will of the suspect.[64] In addition to obtaining verbal or written information, enforcement of special legislation often requires reliance on all sorts of other information from the person concerned, especially in tax law. In the sphere of these (and other) legislation, there are various obligations to collect and administer data. The lion's share of the powers available within the framework of the enforcement of the special legislation is aimed at obtaining information. Making this information available to the authorities on the basis of an obligation to cooperate can, in fact, result in a person submitting self-incriminating material, which can then be used for criminal prosecution. According to the case law of the Dutch Supreme Court, the underlying principle does not preclude an obligation to issue administrative documents, even if there is already a suspicion or if a suspicion arises as a result of the issue of those documents.[65]

6.3. Challenging pre-trial detention

In addition to the cases in which the court is obliged to release the suspect from pre-trial detention, there is the general authority for judges to revoke the previsious decision. Article 69 paragraph 1 assigns this power to the trial court.[66] The court can exercise the power *ex officio*, at the request of the suspect, at the request of the public prosecutor or on the recommendation

63 HR 20 March 1984, ECLI:NL:HR:1984:AC8344 26 October 1993, ECLI:NL:HR:1993:ZC9475; HR 19 September 2006, ECLI:NL:HR:2006:AV1141.

64 ECtHR 17 December 1996, ECLI:CE:ECHR:1996:1217JUD001918791 (Saunders v. the United Kingdom).

65 HR 29 October 1996, *NJ* 1997, 232

66 "The District Court may revoke the pre-trial detention order. It may do so ex officio or on application of the suspect, or - insofar as a warrant of arrest or a remand detention order is involved - on the proposal of the examining magistrate or on application of the public prosecutor."

of the examining magistrate. In the latter case, the examining magistrate is the one who has performed or is still investigating (articles 181-183 CCP) or who has assessed the progress of the investigation (as mentioned above, article 180 CCP). He knows the case and may conclude that, for example, the investigation no longer requires the continuation of pre-trial detention.

The suspect can repeatedly request a decision of the court. Even though periodic judicial control takes place, the circumstances can change quickly and the suspect can justifiably give cause for the lawfulness or expediency of the pre-trial detention to be re-assessed by the judge. The power to request can of course be abused: the suspect could submit a request every day. In that case he does not always have to be heard. According to Article 69 paragraph 2 CCP,[67] this is only required if he requests termination for the first time.

7. Conclusion

In this chapter, the Dutch pre-trial procedure is described. With its predominant inquisitorial model, based on the French criminal procedure, it gives a great deal of power to the public prosecutor. He is (i) in charge of the investigation; (ii) has the authority over investigative officers; and (iii) the prosecutorial monopoly. The exercise of this monopoly is bound by the principle of opportunity: the public prosecutor determines which suspect he prosecutes for which criminal offenses on the basis of the public interest. Mandatory prosecution is only possible in very exceptional cases, namely when the Court of Appeals orders the public prosecution to prosecute a suspect after an applicant (mostly the victim) files a complaint against the decision not to prosecture a suspect with the Court of Appeals.

Another distinguishing part of the pre-trial procedure is the focus on enabling the courts to decide cases (more or less) solely based on the case-file. A unique characteristic of the Dutch pre-trial procedure is that everything must be recorded in writing, and the court will be given access to the case-file prior to the trial. The case documents are read and analyzed during the preparation of the trial by the judges and the clerk prior to and during the trial. This is possible because of the very limited interpretation given to the principle of immediacy: evidence is "proceduced" in court when the written statements of witnesses heard by the police are summarized and read out loud during the trial stage. Therefore, without doubt, the preliminary work of the clerk and the preparation of the judges have become indispensable practices of criminal justice.

67 "On the occasion of the suspect's first application for revocation of the pre-trial detention order, he shall, unless the District Court immediately decides to grant the application, be heard, or at any rate be called to be heard, on the application."

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