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The requirement of a fair process and the law of evidence in Dutch criminal proceedings[1]

Abstract

This text discusses the actual Dutch 'style' in adjudication of criminal cases from the perspective of emerging international standards.

1. Introduction

A. The Netherlands in Europe

The Netherlands, a relatively small country in the northwest of Europe, has about 15 million inhabitants and about 750 full time judges. The Scandinavian countries, the Federal Republic of Germany, and the Netherlands all offer prominent examples of private economies mixed with a considerable social welfare infra-structure. In the 70's and 80's, public funding alleviated the consequences of underemployment to a remarkable extent.

At this moment, it is not possible to predict the extent to which the existing social-welfare structure will remain intact. On an international and national political level, critics of the Netherlands' social welfare policy have noticed flaws in the country's economic base. The Netherlands is not in a political crisis at the moment. Nevertheless, the influence of European integration compels the country to adjust its policies to harmonize with more general European standards.

Equalizing the Netherlands' policies with the policies of the European neighbours will not only affect its social welfare climate, but also influence its penal climate. During the last century, the Dutch penal climate was relatively mild. It still has one of the lowest incarceration rates: 50 prisoners per one hundred thousand inhabitants. Working in tandem with the enormous social welfare structure in the Netherlands, Dutch penal policy has been based on the idea that criminal law enforcement has to be a kind of *ultimum remedium*. The Netherlands has tested numerous techniques for coping with criminality in addition to punishment, varying from diversion to medical treatment. One cannot say whether, taken as a whole, these experiences have succeeded. Some individual efforts have clearly been successful. One example of a successful effort is the so-called '*Halt Projecten*', a kind of diversion project, in a number of cities. The success of some of these special projects has even resulted in changes in the Penal Code, e.g. in creating special provisions for juveniles.

At the moment, however, an overall view of the Dutch situation shows a country that is more and more subject to external influences. For example, cross-border criminality seems to be on the increase. There is a tendency in the Netherlands to adopt new substantive provisions that extend the scope of criminal law in order to criminalize forms of conspiracy and 'risky' behaviour. This tendency has international parallels. In line with international perceptions, Dutch lawmakers consider hard forms of violent behaviour more threatening than they might have before the increasing internationalization of the Dutch perspective. Currently, the average level of criminality in the Netherlands is about the same as in Spain or in Western Germany (before the German Unification in 1990).

[1] With acknowledgement to Craig Callen, Professor of Law, Mississippi College School of Law, for editing the draft.

A totally different, but at least equally significant, aspect of the internationalization of the legal culture in the Netherlands is the influence of the decisions of the Strasbourg Court on Human Rights. A number of this court's decisions have compelled Dutch courts and the Dutch legislature to alter traditional methods of adjudication. We will return to this topic later.

These remarks are necessary in order to provide a background against which one can understand and appraise typical Dutch practices in regard to the law of evidence.

B. Dutch legal system and culture

Originally after Dutch independence from Spain (1648), the Dutch law consisted of its own variant of the received Roman Law, the so-called Roman Dutch Law. Elements of that law can still be found in some former colonies, for example, the southern part of the African continent. Prior to the French occupation of the Netherlands in 1810, procedural practices differed among different parts of the country. During the French occupation, from 1810 until 1813, the Napoleonic Codes were introduced in the Netherlands. The Penal Code remained in force with some modifications until 1886. The Code d'Instruction Criminelle remained in force until 1838, when an original code of criminal procedure replaced it. The latter code was revised in 1886 and the present code replaced it in 1926. Although the present Wetboek van Strafvordering 1926 is a relatively young code, serious discussions about substantial alterations have begun.

Of course, statutes are not the sole determinants of criminal law and criminal procedural law. The jurisprudence of other countries has a decided effect. The first example was the French legislation of the Napoleonic Codes, followed by the increasing influence of German dogmatics at the end of the nineteenth century. Anglo-American influences have had several effects, for instance, in the formulation of some of the provisions of the procedural code of 1926, and in recent decades by way of the more 'adversarial' view of procedure in the European Convention on Human Rights and its application in international and national courts.

The basic structure of the written penal law in England does differ from that in the Netherlands, because the countries are representative of common law and civil law, respectively. Nevertheless, in the field of corrections, there has often been a certain interrelation and interaction between England and the Netherlands. An example is the introduction of the *Community Service Order* into the Netherlands' penal system, in part relying on the prior British experience.

Unlike the law of its continental neighbours, the Dutch Code of Criminal Procedure of 1926 includes a number of provisions regarding the law of evidence. I will discuss them more fully later. It is most important now to note that there has been an enormous gap between the law in the books and the law in action since 1926 with respect to the law of evidence (see infra 4).

C. Sources of the penal law

The most obvious source is legislation. The *Acts of Parliament*, including the *Codes and Bills To Amend the Codes*, form a major part of the written law. In addition to this, there is some *local legislation*, for example that of the Regional Water Boards. Judicial decisions, especially those of the Court of Cassation (Hoge Raad der Nederlanden) are more-or-less a part of the written law as well. Although the Netherlands has no formal 'stare decis' the impact of such decisions is great.

The Supreme Court of the Netherlands considers guidelines of the public prosecution service as form of law, and some argue that such guidelines should be treated as the equivalent of written legal rules. Debate on this issue continues. The guidelines of the prosecution services (ministère publique;

openbaar ministerie), relate to matters such as decisions whether to prosecute and to the formal duration of the penalty that the prosecutor will request when the case is prosecuted. In addition, standard practices of the police and lower courts can be considered as a part of the law, even though it is not clear whether they are the equivalent of written law.

D. The judiciary, prosecution service and bar

The organization of the Netherlands' judiciary is based on that of the French judiciary around 1810. There are four levels, from lowest to highest, (1) *Courts with limited jurisdiction,* (2) *District Courts*, (3) *Courts of Appeal,* and (4) *Supreme Court*. The manner in which a case is processed and tried depends on the nature of the offence involved. In Dutch legal language, the name 'delict' is synonymous with the English 'offence'. The statutes divide delicts or offences into *two* categories: 'misdrijven' (crimes) and 'overtredingen' (contraventions). Contraventions are normally prosecuted before courts with limited jurisdiction, generally with a right of appeal to the district court for both defendant and prosecutor. District courts try crimes with the right of appeal to the court of appeals for both parties. For the Anglo-American readers, it must be stressed that appeal in the continental setting normally includes an inquiry into and the dispute over the facts in the case, i.e., a trial de novo. Under the constitution the judiciary is independent from the executive. Judges are appointed for life, with their salaries fixed in statute. Although the organization of the judiciary is hierarchical, there is no formal hierarchy between the courts with respect to appeals.

The public prosecution service is more hierarchically organised. It is partly supervised by the Prosecutor-General (Procureur-Generaal) at the Supreme Court and partly by the Minister of Justice.

The Bar, consisting of '*advocaten*' (attorneys) is not hierarchical. All attorneys who are registered and have met the educational requirements, are authorized to serve as defenders for indigent defendants. The government bears the cost of such representation. Finally, there is a considerable *police organization* in the Netherlands. Insofar as their judicial tasks are concerned, the police are subordinate to the public prosecution service.

E. Remedies

The Code of Criminal Procedure includes a complicated system of legal remedies. Nevertheless, the judicial system reaches a definitive decision in every case, with the Supreme Court as the final authority. The situation is slightly more complex with respect to the protection of human rights, where other courts and bodies may decide a case after the parties exhaust the national remedies.

II. National and international safeguards for the protection of human rights

A. National

Dutch law includes a number of provisions that protect individual rights and freedoms from arbitrary intrusion by the police or other governmental agencies or officials. For example, it includes the right to *equal legal treatment*, and the guarantee of *the rule of law* in the establishment of crimes, the so-called 'nulla poena sine lege' principle. A third example is the *freedom of speech*. Without attempting to exhaustively enumerate all relevant provisions, other chapters of the constitution directly or indirectly guarantee individual rights; for instance, article 116 deals with the independence of the judiciary. The Code of Criminal Procedure (1926) includes other provisions relating to individual rights that are generally consistent with the constitution; those provisions go into far more detail than the constitution could.

General opinion within the Netherlands is that it is anomalous that the constitution does not provide for judicial review of legislation for consistency with the constitution (article 120). Only national, as opposed to local, legislation is free from judiciary review for constitutionality. The anomaly seems particularly acute because the constitution allows courts to review legislation, including national legislation, for consistency with the *international* standards established by in self-executing articles of international treaties. There is a current proposal to abrogate the provision that restrain the courts from judiciary review of (national) Acts of Parliament for constitutionality.

B. International

In regard to international legal relationships, the Netherlands have accepted the application of international standards for the protection of fundamental rights and freedoms. The following treaties are relevant:

I. Universal Declarations on Human Rights (Paris, 1948), only as statement about intentions
II. Convention on the Elimination of All Forms of Racial Discrimination (New York, 1966, in force 1972);
III. International Convention on Economic, Social and Cultural Rights (New York, 1966, in force 1979);
IV. International Covenant on Civil and Political Rights (New York 1966, in force 1979);
V. Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 1984, in force 1989);
VI. Convention on the Rights of the Child (New York 1989, ratification by the Netherlands expected soon).
VII. European Convention on Human Rights and Fundamental Freedoms (Rome, 1950, in force 1954), Protocols 1, 2, 3, 4, 5, 8 already in force.
VIII. European Convention for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (Strasbourg, 1987, in force 1989);

III. Criminal Proceedings

Taken as a whole, the organization of the Dutch criminal procedure is based upon a rather 'pure' model, which includes a sharp division between the non-public *preliminary* stage and the *trial*[2] itself, succeeded by a separate trial to determine the appropriate remedy. This system has three other distinctive characteristics of particular importance here. *The first* is that courts decide all issues in criminal cases, *without any form of lay participation.* The Netherlands abolished the French jury in 1813 and have never restored it. *Second,* it must be emphasized that the *public prosecution* service has an *absolute monopoly* in criminal cases. The victim has only a very limited right to be involved in a kind of parallel proceeding, a form of proceeding accessory to the criminal process. As opposed, for example to French and Belgian practice, the Dutch victim, as such, has no legal standing in the criminal proceeding. Basically, Dutch law sees the victim's claims as civil claims that have to be litigated within the context of civil procedure. The *third* important characteristic is the importance of *written* materials in the resolution of factual issues.

The Code of Criminal Procedure is built upon a chronological model. The pre-trial stage normally consists solely of investigations by the police. At the parties' request, there can be a second pre-trial phase: preliminary investigations by an investigative judge (juge d'instruction; rechter-commissaris). The investigative judge has the power to apply a larger variety of coercive means, such as detention, than other investigative agencies may do. When the investigative judge is introduced into a case (normally as a

[2] The trial includes the discussion about and decision on questions of proof **and** the eventual punishment.

result of the prosecutor's request, although sometimes by the accused), procedure may become more adversary than it would be without the judge.

The public prosecutor and the defendant, finally, have standing as real legal parties in the trial itself, subject to effective domination of proceedings by the court itself (onderzoek ter terechtzitting). The court is supposed to be impartial, and to act impartially. *Nevertheless the role of the judges (during the trial, before the trial and after the trial) is a very active one.* The parties' duty to produce evidence is very limited: the prosecutor need merely establish that the prosecution is justified. The defendant has no formal obligation to produce evidence. At most, if the defendant does not disclose data favourable to himself or herself, the defendant bears the risk that the court of the prosecution may not in fact be aware of that data.

Currently, there is some controversy about whether judges are adequately impartial, because the Code allows the same judge to play more than one role during a particular prosecution. (Such dual roles do sometimes occur). Most noteworthy, the Code does not prohibit judges who have been involved in one or another way in preliminary decisions from taking part in the trial. For instance, a judge may be involved in a trial even though he or she has ruled on the defendant's pretrial detention. As yet, there has been very little discussion or debate about whether the very active role of the judge in Dutch proceedings violates the standards of impartiality implicit in the very notion that the state is obligated to provide fair process. In practice, Dutch judges can read the files from the preliminary stages, which heavily influence their decisions. Such influence, along with the fact that Dutch judges also decide cases speedily, often without hearing witnesses at all, may seem unfairly disadvantageous to the defendant. We will come back to this.

IV. The law of evidence in criminal cases

A. The law of evidence according to the Code of Criminal Procedure (1926)

Since the original Dutch Code of Criminal Procedure replaced the Code d'Instruction Criminelle, Dutch law has included a rudimentary kind of statutory law of evidence. In Dutch doctrine, this is called a *negative statutory system* because the courts freely admit evidence which might be relevant to declaration that a fact in issue has been proven. It is additionally a negative system because there are a number of provisions which prohibit a court from declaring guilt on certain sorts of evidence. The 'nulla confessio' rule prohibits a declaration based only upon the accused's confession. The rule called 'unus testis, nullus testis' prohibits a declaration of guilt if the only evidence derives from a single witness's statement. In practice, of course, the two rules' operation is much more complex – for our purposes this general account will suffice.

Furthermore, the Code of Criminal Procedure contains provisions which *limit the number of adaptable 'means of proof' (bewijsmiddelen). There are only five* acceptable 'means of proof' for a fact in issue in a criminal case: the courts' own perception of evidence during the trial, statements of the accused (in and out of court), a witness' statements in court, an expert's in-court statements, and written materials. As we will see infra sub C, the Achilles heel of the system lies in the last category.

Finally,[3] in addition to the legal provisions about the types of acceptable means of proof, the Code prohibits the court from convicting the defendant unless the court is itself *convinced* of the defendants' guilt.

[3] The regulation of proof in criminal cases was more complex in the former code, both in its form of 1838 and in the revised form of 1886.

B. Proof as a part of the law of procedure

As in other continental systems, evidence and proof in the Netherlands are considered subjects that must be regulated exclusively as a part of *the adjective law, rather than of the substantive law.* In contrast to the Anglo-American legal culture, Dutch civil evidence and proof is a part of civil procedure and differs substantially from evidence and proof under criminal procedure. In the Netherlands, for instance, a party can be a witness in a civil case, not in a criminal case. If the defendant in a criminal case makes a statement, he is – contrary to a witness – never under oath. In the formulation of the Code of Criminal Procedure 1926, the law of evidence relied on a number of principles that should promote a rather modern form of procedure, with great emphasis on the public hearing in the trial. (Although there is some difference of opinion, most authors agree that the legislature did *try* to make a break from the more or less inquisitorial style). The accepted means of proof were intended to be oral statements, made during a hearing open to the public, so that normally, not only the accused, but also (and mainly) witnesses and experts should be heard and examined during the trial. With this kind of regulation, the legislature tried to realize ideals such as a fair hearing, fair opportunities for the defendant to defend himself against the accusations, publicity of the hearing, control by an independent court, judicial impartiality and so on.

The main intent of the architects of the Code of Criminal Procedure 1926 was to facilitate the rule of law within and by a firm regulation of the proceedings, with the emphasis on the trial as the decisive stage in the proceedings, with equal opportunities for prosecutor and defendant – although a major role was reserved for the active judge. They treated preliminary investigations as only preparatory.

C. Hearsay

That legislation should have secured *dramatic change* in the preliminary investigations and the trial. Reality proved otherwise. Immediately after the introduction of the Code in 1926, an important decision of the Supreme Court limited the effect of this legislation. The Court held that a trial judge could rely on the statement of one witness, included in the in-court statement of another, in the absence of the first witness's testimony. It also held that the trial court could rely on written reports of the police, made in the preliminary stage of the proceedings, which contain statements of non-testifying witnesses. In such cases there was, according to the Supreme Court, no need to examine the original witnesses in the courtroom, although the prosecutor and the defendant of course could ask for in-court examination. In practice, this decision meant that old-fashioned inquisitorial elements of Dutch criminal procedure could survive it, especially preserved the function of the preliminary stage of the procedure as the only stage where evidence is assessed in practice. The trial remained important, for example, for the exchange of information about the defendant and for argumentation about the penalty. But trials were not, for all practical purposes, forums for a critical examination of the evidence. Only those defendants flatly denying allegations against them were able to call witnesses in the courtroom, although their success was mixed. Seen from a more international point of view, the situation has been rather unique for some decades: a moderate, tolerant and mild style was combined with elements of an old-fashioned inquisitorial kind of proceeding.

D. The inquisitorial style of procedure

Pure inquisitorial procedure is a phenomenon of the past. It must be stressed that most of the elements that often are designated as essential parts of adversarial proceedings are also present in most continental European proceedings, even the proceedings that often

are seen as rather different from Anglo-American adversarial proceedings. A major example is *the defendant's right to be silent* as set forth in a number of codes, as it is in the Dutch of criminal procedure. The same is the case for the *presumption of innocence.* This is not the place to argue about the usefulness of divisions between adversarial and inquisitorial or adversarial and accusatorial models of proceedings. In another publication I have analyzed the models developed by M.R. Damaska.[4] In that essay I come to the conclusion that it makes little sense to classify actual forms of proceedings according to such a dichotomy. The only thing that makes some sense is to use the label 'adversarial procedure' for a system where the parties of more or less equal means, or even equal arms, dominate the subject matter of the trial and the investigation and presentation of evidence. On the other hand non-adversarial forms of procedure contain some elements of inquisitorial proceedings. The remaining elements of such a form of procedure may be called an inquisitorial procedural style. The elements that still exist, for example in the criminal procedure of the Netherlands, Belgium, France, are: (1) emphasis on the pre-trial stage as the phase in which the evidence is gathered by the police and eventually by the investigative judge; (2) emphasis on the use of written materials during the trial; (3) and the courts' preference for taking the results of the preliminary investigation as a point of departure for the trial. For the Netherlands one point or element can be added that does not apply to Belgium and France: (4) the absence of any jury.

E. Criticism

At the time of the ratification of the European and international covenants on human rights (in the fifties and sixties), the Dutch legislature had the strong impression that our system would not be in conflict with those convenants. In an atmosphere of self-assurance, together with the mentioned moderate, tolerant, and mild social and penal climate within the country, the legislature had the strong impression that we were among the ten countries which most respected human rights. And in fact the Dutch society did cope with criminality very tolerantly. Despite some criticism of the style of procedure, Dutch authorities had little doubt about the quality of criminal adjudication beginning in the 20's, until about the 70's. Even now Dutch lawyers and judges doubt the utility of critical writings, for example the usefulness of the research of psychologists specialized in reconstructing police investigations with respect to the identification of an accused. Although a number of scholars aware of the law of evidence in other countries issued warnings, setting forth arguments based on the decisions of the European court in Strasbourg the decision in the Kostovski-case (1989) came as a kind of surprise for most Dutch judges. In that case the defendant was convicted upon anonymous statements, set out in written reports by the police and the investigative judge. The Strasbourg court held unanimously that the Netherlands, in convicting the defendant, had violated art. 6 of the EHRM. The violation mainly consisted of the absence of a fair trial in that the defendant had not had any opportunity to examine the witnesses (who remained anonymous) in any stage of the procedure.

I must qualify my remarks. It cannot be said that the courts never accepted criticism. During the 80's the misuse of anonymous witnesses had increased. For this reason the Supreme Court held in 1984, prior to *Kostovski,* that the use of anonymous statements that were not made in presence of the defendant or his counsel (and of course not heard in court) were unacceptable means of proof unless the decision of the court gave *very precise reasons* for reliance on that type of

[4] See M.R. Damaska, The faces of justice and state authority, New Haven 1986; see J.F. Nijboer, The American adversarial system in criminal cases; de achterkant van LA Law, Recht en Kritiek, 1992, p. 8-26.

information as evidence. The Netherlands' Supreme Court, six years earlier, similarly restricted reliance on evidence which the defendant argued to be improperly obtained. In the case of improperly obtained evidence, reliance on the disputed evidence is forbidden, unless the court can give reasons for its judicial validity.[5]

5. Evaluation of the Dutch criminal procedure (especially in relation to the law of evidence)

In this section I will address some characteristics of the Dutch criminal procedure. The form is the presentation of rather brief statements which allow the reader to draw own conclusions. The first reason for choosing this form is that it is very difficult for me as not only a Dutch legal scholar but also a practising Dutch judge, to distance myself from the Dutch system.

Another reason is that we should not make categorical assumptions about the importance of adversarial gathering and presentation of evidence. Stories of spoilation of evidence and non-disclosure of available evidence are well known. The *social* structure of the Dutch criminal procedure until about the 80's was very lenient towards individual deviant behaviour. And, as John Griffiths argued earlier in his famous review of Herbert Packer's[6] work we should not take procedural safeguards as absolute values, without considering the total context of the repressive system of which the procedure is only a part. Nevertheless, the Dutch system is changing nowadays, adopting a firmer international orientation, including international standards for the presentation of evidence in the trial, and for other subjects as well, such as judicial impartiality and avoidance of undue delay.

Any evaluation of Dutch criminal procedure, as it developed since the Code of Criminal Procedure 1926 came into force, must touch on a number of particular points. First, the entire criminal justice system is under state control. Private citizens have little influence on the course of criminal proceedings. A few crimes may be prosecuted only if the victim complains (e.g. one spouse's theft from the other). In criminal procedure the victim has only a very limited standing to seek compensation, which is essentially a subject of civil law rather than penal law.[7] In the preliminary stage the Dutch procedure furthermore is dominated by the police, the prosecutor, and sometimes by the investigative judge. The accused's rights are very limited in this stage.

The trial *itself* is *dominated by the court.* The impartiality of the court is a basic assumption in the whole system. As a result in the Netherlands, readers may not take serious criticism of judicial decisions. Public opinion of the quality of the adjudication is still high. It may be also for this reason that the way the courts are evaluating evidence, presented by the public prosecutor and sometimes gathered on own motion of the court (and exceptionally offered by the defendant), is broadly accepted.

Another aspect is the possibility that the same judges take part in decisionmaking in several stages of the procedure. Currently a number of court decisions limit these possibilities by forbidding judges to take part in decisions in cases in which, in a former stage, they made a decision with some impli-

[5] The practice is very detailed and should not be regarded as a dispute over whether to accept the American exclusionary rule. Nevertheless it can be said that in the Netherlands, in principle, illegally obtained evidence should not be used, when the police or other agency violated fundamental rights of the accused.

[6] Yale Law Journal, 1970, (Vol. 79), p. 359-417/ 1388-1474.

[7] In the articles 332-337 CCP the victim is allowed to bringing a claim to a maximum of 1500 Dutch guilders, which is almost nothing. The limit is even lower in cases tried by a court of limited jurisdiction. When more is at issue, the victim must start a civil proceeding on his or her own.

cation for the question of guilt.

Dutch law enforces the parties' right to access to the judge designated by law very strictly. The only special tribunals, for the military and for juveniles, are based on legal provisions.

An Anglo-American feature of current Dutch procedure, also found in the Code of 1926, *is the strict limitation of the subject matter of the trial by the indictment.* The court may not declare anything, any fact, proven that was not described in the indictment.[8] This means that the prosecutor may well 'loose' the case, if preliminary investigations have not been very accurate or the prosecutor has not carefully prepared the indictment. Another characteristic feature of Dutch procedure is the *lack of a principle of mandatory prosecution.* As in France the so-called *opportunity principle* allows the prosecutor to decide whether to prosecute a case. As mentioned before, supra sub 1, there are guidelines on this point. The prosecution also may *negotiate* with the defendant for disposition of a number of crimes and for all contraventions, with the result that the defendant pays a kind of fine and also *waives his right* to have a trial. In recent months there have been some cases where the prosecutor's use of this discretion was the subject of considerable criticism.

The court must make findings on certain issues – the subject of so-called '*material truth*'. That means that no opinion or limitation or offer of evidence by the parties can ever be binding on the court. The court takes an *active* role in discerning the likelihood that allegations are true. Courts in the Netherlands sometimes acquit because the court's view of the truth does not correspond with the prosecutor's description of events in the indictment. This follows from the binding character of the account of the facts in the indictment.

[8] Within the trial the extent to which the prosecutor is allowed to correct the description given in the indictment is also very limited.

As I stated supra in 4, the Code departs from the idea that trial proceedings are mainly oral, in practice there is still a heavy emphasis on the use of *written materials* (especially those in the formal 'files').

Dutch criminal procedure does *not provide for separate stages for trial and sentencing.* The lack of such division follows from the fact that Dutch courts have trials regardless of whether defendants have admitted their guilt. In practice, of course, a case which includes the accused's confession will be rather simple: for a conviction there must only be some other evidence of guilt in order to comply with the rules of evidence. Dutch trials are generally concentrated into one session. The Code, moreover, sets a number of limits to the duration of the several stages of the procedure. Enforcement of these rules has not always been strict. Some improvement, however, has resulted from the undue delay jurisprudence of the Strasbourg court.

The trial is public. Dutch doctrine often makes the distinction between external publicity and internal publicity. External publicity means accessibility for the general public. Internal publicity means that all information is accessible to both of the *parties* in written form.

It is an element of the Dutch legal culture that the courts are very *strict in their interpretation of the substantive provisions.* The rule of law in the form of the '*nulla poena sine lege*'-*principle* is highly respected.[9]

The principle of guilt, in its procedural variant represented by the presumption of innocence, with no presumption of guilt and no conviction without the guilt of the accused being proven, is part of Dutch law: not only article 6, par. 2, European Convenant, but also a number of provisions within the Code of Criminal Procedure 1926. For

[9] Of course there are some exceptions in some cases. But the courts normally are stricter in applying provisions of substantive law than they are in applying provisions of adjective law.

instance: art. 302 CCP indicates that the court may not give any impression of belief or disbelief of the defendant during the trial itself.

My last general evaluative remark about Dutch procedure is this: the code requires that the courts always articulate the reasons for their decisions. Further, any decision that defendant has been proven to have committed the act alleged must be written down, together with all the statements and other evidentiary findings that have contributed to the conviction.

6. Closing remarks

A. Miscarriages of justice

After the cases of the Guildford Four and the Birmingham Six in the United Kingdom, discussion arose not only in that country, but also in the Netherlands, about the quality of factual investigation in criminal cases. At this moment a couple of law and psychology scholars[10] are analyzing weaknesses in the standard practices of the Dutch police and other agencies active in the criminal justice system. Their contributions seem likely to increase the quality of the investigation in criminal cases. One of the results is some fresh attention to discussions in Anglo-American evidence scholarship (about inferential processes, for instance, the use of Bayesian models). Personally I am sure that miscarriages of justice can be found all over the world, in each system. Therefore I do not contend that such cases cannot occur in the Netherlands. Judicial errors, on points of law and on points of fact are inherent to all human activity, including judging.

B. Reform

Finally, there are *proposals* for the extensive reform of the Code of Criminal Procedure, especially the regulation of the *pretrial stage(s),* which may be subject of major alterations and modifications in the next years. However, the proposals do not relate to the evidentiary aspects of such proceedings. Most of the proposals are related to the position of the *investigative judge* and the responsibility of the other authorities in the pretrial stage. There are also a number of proposals with respect to the use of modern techniques such as electronic eavesdropping.

C. The irony of Dutch criminal procedure

Personally I am not sure that Dutch criminal procedure altogether meets international standards of a fair and accurate procedure. On the other hand, it seems to be a rather efficient form of procedure, not in the least because of some remaining inquisitorial features. That may be the irony of the Dutch procedure. It seems a universal paradoxical situation that a hard society needs more strict procedures, and a 'softer' society can accept less strictness.

[10] See H.F.M. Crombag et alii, Dubieuze zaken, Amsterdam 1992.

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