NETHERLANDS REPORTS
TO THE EIGHTEENTH
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OF COMPARATIVE LAW
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EDITORS
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FOREWORD

It has already been four years ago that, under the auspices of the Netherlands Comparative Law Association, the XVIIth World Congress of Comparative Law was organised by the law faculty of Utrecht University. The upcoming XVIIIth World Congress will be held in Washington DC, co-organised by the American University College of Law, George Washington University Law School and Georgetown University Law Center. The programme offers a broad spectrum of topics. No doubt, the conference will be highly stimulating and fruitful for all those involved: national reporters, general reporters and all other participants.

In the past decades comparative law has become a generally accepted method of legal analysis and legal thinking, particularly in regions where economic integration cannot proceed without legal integration. One of these regions is the European Union (EU) where comparative studies, in all legal areas, pave the way towards possible harmonisation or unification of the law. A prime example is the work done by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), resulting in the Draft Common Frame of Reference (DCFR), containing principles, definitions and model rules of European private law. Unification of laws is, of course, a process going on in other regions as well. The Organisation pour l’Harmonisation en Afrique du Droit des Affaires (OHADA) is an important example. A world congress of comparative law can bring comparative lawyers from all these regions together to share their experience and perhaps even discuss new projects.

Comparative analysis begins with solid and reliable research on national law. A comparison loses much of its value if the legal systems to be compared have been described inadequately. The Netherlands Comparative Law Association is therefore grateful to all the Dutch national reporters who were willing to write a report. The national reporters provided clear and informative insights in the development of Dutch law.

A final word of thanks should be addressed to my co-editor and treasurer and associate-secretary of our association, dr. Lars van Vliet of Maastricht University. His invaluable help and perseverance are greatly appreciated. Many thanks also to Ms Marina Jodogne from Maastricht University for her final editing work. We are also indebted to Mr Kris Moeremans of Intersentia for making the publication of these national reports possible.

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1. General Introduction

This report addresses different influences that have shaped the Dutch legal system and legal culture over hundreds of years. It does not, therefore, deal with details, but with broad developments. It is also specifically limited in two ways. The Kingdom of the Netherlands consists of three countries: the Netherlands (Europe), the Netherlands Antilles (five Caribbean islands) and the island of Aruba (also Caribbean). I am concerned only with the European Netherlands, often incorrectly referred to as Holland (North and South Holland are two provinces bordering the North Sea). Then, I deal exclusively with criminal law, for the simple reason that I am a criminal lawyer (although this focus also has its advantages for the topic in hand). However, first an introduction on the relationship criminal law, legal culture, legal transplants, as I understand it, is indicated.

Civil and criminal law do not differ in their central definitional domain (the determination of appropriate institutional forms for ordering social practice)¹ nor in being cultural expressions of a desired social order. But, where the civil law regulates and normalises relationships between people in essential social and economic contacts and interactions, criminal law is concerned with the abnormal, a breakdown in social relationships that the state must address – by force if necessary. The state monopoly on force means that here questions of legal culture and legal transplants are as much, if not more, concerned with how the state enforces the law as with the norms that reflect what citizens should and should not do (substantive criminal law).

While legal culture may have characteristics transcending different legal disciplines (such as strict legalism or, conversely, informality), the most fundamental aspect of a culture of criminal justice is not social, but socio-political, highly political even: its reflects and defines how individuals see themselves, not in relationship to each other but to the state. Essentially, this is a top-down relationship, but that is not to say that the state can simply impose legal reform or introduce new concepts or institutions that are

¹ Brants & Field 2000, p. 84.
incompatible with the basic tenets of existing legal culture. Far from it: a
citizen’s (perceived) relationship to the state is grounded in legal culture, but
is also fundamental to its continued existence and to the very legitimacy of
norms of criminal law and the state’s efforts to shape and procedurally
enforce them. Addressing questions of legal culture and legal transplants in
this field thus requires first and foremost examination of procedures:
criminal process is the symbolic arena where the extent, but also the
limitations of state power to intervene in a citizen’s fundamental rights and
freedoms are played out. Changes here mean changes to the state-citizen
relationship. A focus on the criminal law and especially criminal procedure
therefore has the advantage of highlighting the influence of political change
in promoting legal transplants, while taking account of its significance in
relation to other, possibly interrelated influences such as legal-philosophical
ideas and doctrines. But forces of change – even revolutionary politics – find
a counterforce in continuing legal cultural characteristics that serve as a
means of resisting legal transplants, or of absorbing the alien into the familiar
and making it acceptable.

In the following pages, I will describe such processes in the
Netherlands. It should come as no surp rise that my main focus will be on
criminal procedure and policy, but always against the backdrop of political
events. First, however, I will address that most slippery of concepts, legal
culture, and relate it to common and civil-law traditions and concepts of
adversarial and inquisitorial procedure reflecting differing ideas about the
relationship citizen-state. I then examine the concept of legal transplant, and
how it relates to legal culture. The theoretical notions developed here form
the framework for understanding how and why legal transplants have been
absorbed into Dutch legal culture, altered in the process, or rejected.

2. Legal Culture and the Concept of Legal Transplants

2.1. What is Legal Culture?

Different legal cultures exist, and we experience the complications of the very
fact of difference whenever we engage in comparative research. But knowing
that something exists is one thing, defining it another, and legal culture is one
of those phenomena that tend to defy short, practical definitions. In practice,
abstract principles and rules of criminal law and procedure are translated
into criminal justice, which functions in an interrelationship between the
society it serves, the political arrangements that shape its organisation and
practice, and the (criminal) law that determines its normative limits. All
criminal justice systems share this triangular dialectical relationship, and that
is legal culture. It determines and is determined by perceptions and
expectations of law and justice: how authority and procedure should be
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organised and how to judge whether it is legitimate and effective, and decide whether in concrete cases justice has been done.2

Legal culture refers not only to the ‘insider culture’ of those schooled in law. Its normative power derives from the relationship between political, social and legal traditions and law, legal institutions, practice and the informal experience of legal culture – inside and outside of the legal community: deeply felt, ingrained attitudes about what law is and should be, and how it should translate into institutions, institutional roles and procedures and rules – in short, a legal system.3 Procedural traditions can be regarded as ‘deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society, about the proper organisation and operation of a legal system […]’.4 Understanding such historical roots is important to understanding modern day criminal justice, given the relationship individual-state reflected in the rules of criminal procedure that determine what different participants, one of whom is the state, may do, how they may do it and to what end. The internal dynamic of a legal culture generates its own self-evident expectations about what is acceptable justice and how it can be achieved and thus its own legitimacy. It follows that external change may be rejected for that very reason, or alternatively, may disturb the dynamic, altering (perceptions of) how criminal law and procedure should express cultural, social and political values and undermining legitimacy.

In researching the culture underlying criminal justice systems, the notion of ideal-typical adversarial and inquisitorial procedure and their common and civil law roots respectively allows us to relate a system to legal-cultural conceptions of fairness and truth-finding, to the roles and functions of participants in criminal process, and in the final event to the relationship individual – state. That can help explain normative expectations and notions of justice in a given society and tell us much about the idiosyncrasies of its criminal justice system, and about the extent to which there is room for approximation and convergence with other systems, or for the reception of foreign and/or trans-national concepts and norms. The dichotomy adversarial-inquisitorial is an analytical tool, not a universally applicable descriptive mechanism,5 in practice better conceived of as a continuum rather than a strict division.6 Adversarial systems are traditionally found in common law countries (e.g. England and Wales and the United States); inquisitorial systems predominantly in the civil law countries of continental Europe. This distinction cannot tell us whether one type of system is better than the other, but it can provide clues to the internal equilibrium in criminal justice systems – how guarantees of truth finding and fairness, organisational

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3 Williams 1979.
5 Damaska 1986.
6 Brants 2010.
structure and authority, procedural roles and rights hang together in a legitimising overall structure. Based on the historical-political roots of criminal process, it is particularly useful in tracing change and continuity over longer periods.

Modern adversarial and inquisitorial criminal procedures are both concerned with determining the truth in a way that allows scope for individual rights and interests. Neither lay claim to the absolute truth, but seek to establish a version of events that can be considered the relevant truth: acceptable and legitimate for all concerned and for society in general. Fairness relates to the way that legitimate truth is established, and procedural fairness is in itself a guarantee, albeit not an absolute one, that the truth will indeed be found. This relationship between truth finding and fair trial applies to both traditions. What makes criminal process predominantly inquisitorial or adversarial, however, is how the ideal search for the truth is conceived of and, in the light of their civil or common law roots, how the law is ‘found’. Here legal and political culture and the legal system and its procedural traditions are interdependent.

In inquisitorial procedure the emphasis has always been on pre-trial investigation by powerful authorities as a means of truth-finding. Modern versions are rooted in 18th century civil-law traditions of Enlightenment and Revolution, reflecting a concept of political society in which the state is seen as fundamental to the rational realization of the ‘interests of society’. The immensely intrusive powers needed for this represent a continuous threat to individual liberty by the state. Yet, it is the state that must ensure individual liberty precisely because it is seen as transcending individual interest, as an essential part of the interests of society. This paradox is resolved by curtailing the exercise of state power by written rules of law, by constitutional individual rights; and by the division of power within the state, judicial scrutiny of executive action on the basis of written law, and hierarchical monitoring and control within the executive. The procedural and organisational arrangements governing criminal justice reflect these underlying, essentially political ideas. In basic assumptions of the civil law tradition, the state is best entrusted with truth finding, but subject to a basis in written law and to judicial scrutiny and hierarchical monitoring and control within the executive. In such systems, the police (subordinate to the public prosecution service), the public prosecutor and in some cases an

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7 See for a misconception of the way in which the analytical distinction adversarial-inquisitorial can be used: Summers 2007. For a convincing rejection of this reasoning: Field 2009.
9 See for the classic description of the features of inquisitorial process that distinguish it from the adversarial: Damaska 1986; and for the specific features of Dutch criminal procedure in relation to its legal cultural tradition: Brants & Field 2000.
investigating judge, undertake a thorough criminal investigation and present evidence before the court: in this context ‘thorough’ means as complete as possible and non-partisan, taking both guilt and innocence into account. In inquisitorial tradition, the legitimacy of criminal justice and the fate of the individual depend to a large extent on the integrity of state officials and their visible commitment to non-partisan truth finding.

By contrast in the common law tradition, a benevolent state promoting common interests is not a given. Individuals define their relationship to the state in terms of freedoms from particular forms of state intrusion, which they themselves can assert. Built up of custom and judicial interpretation over (hundreds of) years, the common law simply ‘is’, law of and for the people, and the fundamental freedoms to be invoked against state intrusion attach to individuals as of right. There is no need to provide them in written law as they will be ‘found’ naturally through interpretation by the courts. Here, the emphasis in criminal process, conceived as a struggle between parties in which the individual defendant fights his own corner, is on individual participation and the capacity to assert one’s own rights directly. In the clash of opinions between prosecution and defence before an impartial tribunal, the truth, it is assumed, will eventually emerge. Such truth-finding is only possible if each party has equal rights to present their own evidence and contest the other party’s before a tribunal of fact. Not pre-trial investigation but trial is the focus and it is of necessity highly oral and ‘immediate’ in nature. The judge supervises a contest and adherence to the rules, but does not become involved in the actual process.

The above is an ideal-typical characterisation. The concept of legal traditions is not meant to – and cannot – provide a classification in which characteristics can be exclusively attributed to any one legal system. Rather than speak of inquisitorial or adversarial systems, it is more accurate to see jurisdictions as primarily ‘shaped by’ the inquisitorial or adversarial tradition. Glenn sees legal traditions as the embodiment of how people think the law should function (a definition very close to that of legal culture), noting that exchange of information between jurisdictions and debate about precisely such normative matters is normal and results in overlap and similarity. While such a definition of legal tradition has much to commend it, it fails to address the relationship between ideas and practice that underlies the concept of legal culture outlined above, and is so important to the feasibility of legal transplants.

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10 Some systems have both, some only a prosecutor. The division of power between them may also differ.
11 Although the tribunal of fact may be a jury, jury trials are not necessarily a distinguishing feature of adversary systems; they also occur in inquisitorial jurisdictions.
12 Field 2009, p. 4.
2.2. *What is a Legal Transplant?*

Watson maintains that a legal transplant is the ‘moving of a rule [...] from one country to another, or from one people to another’ and that change in the law is independent from the workings of ‘social, historical or cultural substrata, so that “historical factors and habit of thought” do not limit or qualify the transplantability of rules’. To comparative theorist Pierre Legrand, legal transplants are ‘impossible’, because the meaning of a rule is dependent on interpretation in a given legal context, and is a function of the interpreter’s historically and culturally conditioned epistemological assumptions. Any potential subjectivity is countered by the inter-subjectivity of a legal community’s articulated values that have developed over time and sustain the community’s cultural identity - a modality of legal experience that is intrinsically that community’s. Moving concepts or rules from the inter-subjective world of one community to another, is not transplantation, but translation; as with linguistic translations, words/rules take on new meanings in a new context. The idea of translation, however, raises some questions. It implies deliberate action: translation doesn’t happen of itself but needs a translator. While deliberate legal reform, introducing new legal institutions or ‘borrowed’ concepts, could be said to require translation into the terms of the legal system and culture where they are to function, acculturation is perhaps the more accurate term to describe the absorption of influential concepts and doctrines that may give rise to (gradual) legal reform, but require no borrowing of ‘foreign’ ideas because they are already familiar and have taken root, even if they have changed in the process.

The core question is how a legal tradition and legal culture relate to the reception through translation, adaptation and acculturation of alien institutions, ideas, concepts and rules or to their rejection. Tradition is often regarded as something left over from the past – ‘something inert and fixed historically. [An] alternative view stresses the invention and reinvention of tradition’. Although their impact on substantive criminal law, criminal procedure and the practice of criminal justice may be ‘reshaped by subsequent national and trans-national legal movements’, legal traditions ‘remain important to an analysis of contemporary (legal) cultures because the past continues to act upon the present’. Legal cultures are conservative in the literal meaning of the word: they ensure continuity and have an influence

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15 *Ibidem*.
16 *Ibidem*, p. 114-120. Legrand refers on p. 117 to Walter Benjamin, who wrote in 1923: ‘the word *Brot* means something different to a German than the word *pain* to a Frenchman’. See also: Grajzl & Dimitrova-Grajzl 2009, Article 26, whose research supports that local conditions crucially determine the path of institutional reform when considering legal transplants.
17 Field 2009, p. 5.
18 *Ibidem*, p. 4.
that goes beyond forms of procedure any given time, shaping the way in which problems are defined and constituted. ‘[T]he new is incorporated into the patterns of the old, while often transforming them in more or less subtle ways’.

3. Influences on the Development of Dutch Criminal Justice

If the determining underlying dynamic of a legal culture of criminal justice is the legitimisation and reflection of fundamental notions regarding the individual in relation to the state, it seems pointless to discuss the situation before the advent of state authority in the territory that is now the Netherlands, (then the ’Northern Lowlands’) i.e. in the late Middle Ages. Yet, the periods before then demonstrate the great difference between the developing inquisitorial system of justice and all that went before, and not only indicate how socio-political developments and tradition act as force and counter-force but also how in change there can still be continuity as tradition lingers on.

3.1. Towards Centralised Authority: before and during the Middle Ages

3.1.1. Germanic Period

Although the Rhine delta (home to, among others, the Germanic tribe of Batavians) was part of the Roman Empire, by the 5th century Roman influence had largely disappeared. There are few written sources from which to derive a picture of how Germanic (legal) life was experienced and regulated, although Roman authors give some indications, and later, when the Franks emerged as the leading tribe, written records of the law of the different Germanic tribes were compiled between the 7th and 9th centuries. There is, however, general agreement on some main issues. Germanic customs and rites centred on community and kinship ties in a given tribe, not on individuals. No central authority enforced ‘law and order’. Each sub-community or clan solved any breach itself, its members collectively liable for reconciliation through compensation of goods or life and limb. If no such peaceful solution could be reached, only ‘blood vengeance’ could restore the situation. The right and duty to compensation or vengeance for the consequences of the deed functioned to compensate the clan for the material, and the tribe for the immaterial consequences of the

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19 Brants & Field 2000, p. 83.
20 On Dutch history, see: De Voogd 1992.
21 De Monté ver Loren & Spruit 2000, p. 17.
22 Commentarii de bello Gallico by Iulius Caesar and De origine et situ Germaniae by Cornelius Tacitus.
23 Leges Barbarorum, see De Monté ver Loren & Spruit 2000, p. 73-79.
24 De Monté ver Loren & Spruit 2000, Ch. 2 and 3 and the authors referred to below.
breakdown of social relations. Actions threatening the tribe as such were punished by death or banishment from the community order. This may resemble individual punishment, but the ethical element derives not from a sense of individual guilt, but from a need to restore the self-evident order of the tribe. The procedural ritual whereby such decisions were reached (Ding) was described by Tacitus as a meeting of free men with a leader or ‘king’. Lesser misdeeds were decided by elders of the clan, matters affecting the interests of the tribe by the whole Ding. Little is known of the decision-making process, but no investigation or taking of evidence as we understand it existed. Ordeal or the taking of an oath formed the means of ‘proof’.

Two developments profoundly influenced Germanic tradition following a prolonged period of tribal warfare from which the Franks emerged victorious: the development of a rudimentary centralised authority and the Christianisation of the Frankish kings in the second half of the first Millennium. During the reign of Charlemagne (768-814) the Northern Lowlands also came under Frankish Carolingian rule. The Germanic Ding consisted of free men on a basis of strict equality, with the authority vested in ‘kings’ best described as that of primus inter pares. This was to disappear under the Franks and especially the Carolingian rulers. The size of their territory required territorial organisation under the authority of travelling ‘counts’, whose rights and duties derived from loyalty to the king and the privileges and immunities conferred on them (the beginnings of a feudal aristocracy). One of their most important duties was to maintain the ‘King’s peace’ and administer ‘justice’ in his name. There is no evidence that otherwise the form of the Ding altered. Germanic kinship ties and associated means of resolving conflict continued to co-exist, especially in the outposts of the Carolingian empire where the Northern Lowlands were situated.

Christianisation had a growing and lasting influence on the existing legal order. Since the reign of Charlemagne, Christianity had become the ‘official’ religion of the Empire, and with it came, eventually, a (religious) scholarly interest in Roman law, the right of the church to judge offences against religion under canonical law and the beginnings of criminal law doctrines that are still visible today: intent, guilt and their imputation after proof in individual cases. It is from the Church (and its accommodation of Roman law) that the origins of inquisitorial procedure derive.

25 Van Caenegem 1954.
27 This geographical position, plus the fact that the territory came relatively late under Carolingian rule, may well point to Germanic law and custom having existed for much longer in what is now the Netherlands than further south (De Monté ver Loren & Spruit 2000, p. 27).
3.1.2. Feudalism, Post-feudalism and the Rise of an Estate Society

The de facto dissolution of Charlemagne’s empire within a hundred years of his death resulted in numerous small kingdoms in which liege lords – the former counts, now in hereditary positions – held power in the sovereign’s name. Over time, they came to constitute an aristocracy of feudal lords and princes less tightly bound to the sovereign: while always owing him allegiance, they were more or less independent in their day to day dealings in their own territories. That ran counter to the centralising tendencies of the old Frankish empire. This feudal era, usually situated between the end of the first Millennium and the end of the Middle-Ages,29 changed with the passage of time as amalgamation of feudal dominions after marriage/conquest resulted in kingdoms or even empires ruled by great dynasties. One of the most important feudal rights (regalia)30 deriving from the sovereign was the right to the service of his subjects. Consequently, they were obliged to assist at the Ding in the administration of justice. Old sources reveal that, increasingly, the population was represented by schepenen (aldermen). Clans still settled differences through payment (composition) which, if not forthcoming, could trigger feuding. Kinship ties, however, were becoming insufficient as a protective legal circle, and the liege lords also took it upon themselves to maintain law and order and ban feuding and vengeance by making composition obligatory.31 This enhanced the authority of the lord, but also had pecuniary advantages, as some of the payment (peace money) would flow into his coffers. The development and economic success of towns and the amalgamation of feudal dominions culminating in the rise of Burgundy and Hapsburg dynasties, were the next step to centralised justice.

Despite the (economic) havoc of the Black Death and Hundred Years War elsewhere in Europe, the period between approximately 1250 and the end of the 16th century was one of growing prosperity in the Lowlands, with trading and manufacturing centres emerging in the North. Not as powerful as the great towns of Flanders to the south, during the second half of the Middle Ages these towns also gradually attained an autonomous position, i.a. through legal privileges (the right to enact and enforce laws). The growing urban population was no longer dependent on kinship ties for protection, but on citizenship (poorterschap) of a town. The town administration maintained law and order within its own walls or borders, taking over from victims and their kin the role of ‘reinstating’ community ‘peace’, with courts consisting of a public official – sheriff (schout) – and aldermen (schepenen).

29 De Monté ver Loren & Spruit 2000, p. 89.
30 The Holy Roman Emperor Frederick Barbarossa had these rights and entitlements recorded in the Constitutio de regalibus (1158). Its reception in Western Europe led to a general acceptance of the regalia as part of the law (Mitteis & Lieberich 1992, p. 180-181).
In the political mediaeval order the feudal sovereign was regarded as the caretaker and defender of the interests of the people (*procurator rei publicae*), a role increasingly important yet at the same time challenged under the Burgundy and Hapsburg rulers. Within a century and in the face of the new significance of the towns and the continued importance of the church, mediaeval feudalism was replaced by a new political order of the aristocracy, clergy and (powerful bourgeoisie or regents of) the towns, united against the sovereign in convocations of Estates (later known in the Netherlands as the States-Provincial). These sent delegates to a central body, the States General that met with the sovereign once a year and demanded and obtained far-reaching concessions that prevented him from interfering in matters of i.a. justice or taxation without consultation. As the significance of the authorities increased, criminal procedure evolved according to the model of canonical law and its inquisitorial process. This type of procedure, with an investigation conducted by a public official, the hearing of witnesses before public settlement of the case and in some cases torture to extract a confession, was gradually imported in the north from the southern province of Flanders, although by the middle of the 13th century, some northern towns had already obtained the right for their citizens not to be subjected to ordeal, and had developed pre-trial procedures for the taking of evidence. Substantive laws – and punishments – of the time were harsh. Eventually they came to replace composition – monetary settlement between parties – although this was slow process and (corporal) punishment by the authorities and monetary compensation agreed before a court, remained side by side as options.

There are descriptions in old law books of mixtures of new inquisitorial and traditional accusatorial procedures existing side by side. In the *Rechtsboek van den Briel* by Jan Matthijsen (1407/1417) traditional process is the rule, with two notable exceptions: the *Schout* could act as complainant in cases of assault, and prosecute ex officio murder, theft, rape and manslaughter if committed by a stranger (i.e. a non-citizen of the town). Torture was permitted to obtain a confession, although only against strangers. This book also records two other distinct types of procedure: summary (no further proof needed), and ‘ordinary’ (either *Schout* or complainant had three days to provide further proof). In the course of the 15th century a third, ‘extra-ordinary procedure’ was used if there were merely suspicions against a person. At this ‘silent truth’ (*stille waarheid*), a *schout* swore in seven *schepenen* to investigate a crime, identify the suspect, establish

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32 Van Leiden 1355. Filips van Leiden studied law in Orleans, France, and was granted a doctorate in canonical law in Paris. He worked both in the Netherlands and France.
33 Drenth 1939, p. 84-89.
35 I use the word accusatorial to distinguish between Germanic procedures where one family accused a member of another before the Ding and no procedure could take place without a complaint, and modern *adversarial* procedure, where the state is the ‘accuser’ regardless of what a victim or his family might want.
events and then bring him to trial: an investigation ex officio to find the truth and evidence of it, by torture if need be.\textsuperscript{36}

This state of affairs was further consolidated during the 15th and 16th centuries by the rise of first the house of Burgundy and then of Hapsburg, governing – in absentia through lieges and so-called stadtholders\textsuperscript{37} – huge tracts of Western Europe, including the Lowlands. Both dynasties strove to achieve centralisation in political and legal administration, establishing courts of law where the aristocracy, but also jurists schooled in Roman law held session, and a procurator, not parties sought justice. At the same time, a system of high and low jurisdiction was developed, with high jurisdiction attaching to some courts only for all forms of corporal and capital punishment. Like courts in the towns (schepenbanken) and the centralised provincial and royal courts, such courts - by the 16th century they were staffed solely by legally trained officials (noblesse de robe) – form a break with the Ding-courts where schepenen represented the people, not the sovereign or other public authority, and Germanic legal customs of composition prevailed.

The development of centralised courts represents a move towards modern criminal justice, but there were still distinct traditional (accusatorial) and inquisitorial procedures and the law differed from district to district, even from village to village. The highly centralised tendencies of the Hapsburg Kings Charles V and Phillip II did not bring uniform law or draw all legal cases into the burgeoning system of centralised jurisdiction and procedure, although Charles the V established three central councils of which the second – the Geheime Raad (secret council) was staffed by highly qualified jurists and charged with centralising legislation and judicial affairs. Both Hapsburg kings also made an attempt to ‘codify’ existing law in criminal cases, Charles in 1532 in the so-called Peinliche Gerichtsordnung or Constitutio Criminalis Carolina, and Phillip in the Criminele Ordonnantieën (Royal Criminal Decrees) of 1570. These codifications probably never applied officially in the Northern Lowlands. Yet the influence of the Decrees especially, was tremendous as an independent Dutch nation, criminal justice and legal culture began to take shape.

3.2. \textit{The Golden Age of the Republic of Seven United Provinces: 17th Century}\textsuperscript{38}

In 1568, the Northern Lowlands rose in rebellion against their Hapsburg sovereign and his administration in Brussels.\textsuperscript{39} The expansion of sovereign

\textsuperscript{36} Van Bemmelen 1957, p. 31.

\textsuperscript{37} Stadtholders (literally: place keepers) were appointed to represent feudal lords in their absence. A lord with several dominions could appoint a permanent stadtholder with full delegated authority, but held no title to the land.

\textsuperscript{38} Schama 1987, for this period of Dutch history. Also: Israel 1995.

\textsuperscript{39} See for information on the rebellion: Van der Lem 1995.
power at the expense of regions and towns, persecution of heretics and the presence of the Spanish army already made for a volatile situation. It came to a head because of a new tax, imposed on the territory without consultation that wealthy towns and regions feared would undermine their trading position. Underlying this was a fear that Phillip longer respected existing customs of law or autonomous privileges guaranteeing consultation with the Estates on legislation and tax. To which we must add the political ambitions of the high nobility, in particular stadtholder William, prince of Orange(-Nassau).

Officially, the final break did not come until the Peace of Münster in 1648, when the new Republic was recognised by other countries as an independent nation. In the interim period – the Eighty Years War – the rebellion became a war of Calvinist against Catholic, and the rebels split into factions. The Northern provinces united, signing an Act of Abandonment (Acte van Verlatinghe) in 1581 and ceasing to recognise the sovereignty of Phillip II. Towns in Flanders and Brabant joined the Act, but were re-conquered later by the Spaniards (and yet later recaptured). The Republic sought foreigners as new governors, but in the event this proved unsuccessful. In 1588, the States General decided to take government into their own hands (only to offer the office of stadtholder to William of Orange later).

The Republic of the Seven United Provinces represented a unique form of government. The provincial states had equal autonomous rights, including those of jurisdiction and legislation, and elected representatives to the States General in The Hague. Recaptured territories in the south – Generaliteitslanden or ‘Generality Lands’ – were not recognised as full partners and governed directly by the States General, which accounts for the name; they paid tax, but had no influence in the administration or rights of legislation. Their inferior position derived from their being predominantly Catholic, while in the Republic Calvinism was the state religion. But if certainly not a democracy, the Republic was also not a state under an absolutist ruler like France.

In its heyday, the Republic of the Seven United Provinces held a top position in the world in trade (exploiting a huge colonial empire in the Far East with a monopoly on spices), science, art and marine military power. The Republic and its provinces and towns were rich, powerful, independent and self-confident. This ‘Golden Age’ had important effects on society. Status,

40 There is evidence that persecution was not as widespread as the propaganda of the time, freedom of religion being one of the rallying points for William of Orange, would have us believe; certainly the Inquisition never functioned in the Netherlands, even under the Spanish Hapsburgs.

41 The Republic existed for approximately 200 years. This chapter is especially concerned with the 17th Century. The 18th will be dealt with in the following Chapter.

42 This religious division still persists today, most Catholics living south of the Rhine delta and Protestants in the north of the country.
power and influence no longer depended on birthright alone, but increasingly on wealth. In the States Assemblies, the typical constellation of three corporative Estates disappeared. The political power of the clergy was gone, that of the aristocracy diminished. In their stead, a rich class of burgher 'regents', merchants, ship-owners and professionals were the new figures of power and authority in the towns and had considerable clout in the States General in the Hague; many of the towns also voted in the States Assemblies and had rights of jurisdiction and legislation in their own territories.

This socio-political arrangement did not give the people as such political, let alone democratic influence and the patrician bourgeoisie in the towns was in a highly privileged position, followed by the group of citizens who were not without a certain wealth or possessions (small merchants, innkeepers, artisans and clerks). The rest however had no rights deriving from citizenship and few, if any others. Many were immigrants in search of work, and lacked in any event the legal protection against the criminal justice authorities that citizenship of a town entailed. An astonishing 50% of the population lived in the towns and, with the economy dependent on trade and, to a certain extent, the labour of foreigners, a culture began to develop in which consensus and tolerance, at least outwardly, were important and necessary. The Eighty Years War had been fought under the banner of religious tolerance and, probably more importantly, Protestants were not always in the majority, even if Calvinism was the state religion. In Amsterdam, many of the great families were (still) Catholic. Where money was necessary for trade, and money, not religion, determined status and position, peaceful co-existence was an economic and social necessity.

3.2.1. Fragmented Justice

In matters of criminal justice things did not change abruptly in the new Republic, despite the very different political circumstances. The Provinces regarded themselves as sovereign and delegated for reasons of unity (and practicality) to the States General matters such as defence, foreign affairs and religion. But, like the towns, they retained autonomous rights of (criminal)

43 As stadtholder for the States General, William of Orange was still 'merely' a civil servant employed by the Republic. Yet, six princes of Orange held the position of stadtholder, one also becoming King of England, the sixth eventually crowned as king of the Kingdom of the Netherlands. Their status, authority and administrative talents were such that, even before the end of the Republic, the office of stadtholder became hereditary, and their position was monarch-like. The House of Orange-Nassau reigns in the Netherlands to this day.

44 See for a detailed overview of the distribution of population between towns and countryside, and of the class structure that prevailed during the Eighty Years War: Van der Vrugt 1978, Ch. II, and Pieterman 1990, p. 12-19.

legislation and jurisdiction once won from the sovereign. In this political structure, with autonomy and shared sovereignty agreed not contested, the Republic was perhaps even less suited to legal unification than was the case under the Hapsburgs; indeed the most significant feature of the legal order appears on the surface to be fragmentation. This is apparent in the rights of jurisdiction, particularly in the province of Holland that had over 200 courts with high jurisdiction, entitled to impose all types of sanctions including the various, corporal and capital punishments available. There was rarely any form of appeal from such sentences. Inquisitorial procedures – paradoxically still known as ‘extraordinary’ – were becoming the rule in the towns and compulsory if sanctions other than financial were to be imposed. But accusatorial procedures were followed too; there is evidence that well into the 17th century, parties could bypass the authorities and solve ‘criminal’ cases themselves, though with the help of notaries.

However, it would be wrong to infer from this state of affairs that fragmentation of jurisdiction and the existence of different types of procedure necessarily meant legal inequality, insecurity and arbitrary justice, or that everything was done differently everywhere, conclusions often drawn by 19th and early 20th century scholars deploring the absence of uniform law. There were many unifying factors at work. Provinces and towns were autonomous in matters of justice yet a certain uniformity of procedure and sentencing was developing in the country as a whole. This played a role in ensuring that fragmented jurisdiction did not mean total arbitrariness, and in the emergence of a degree of consensus on how criminal justice should be ‘done’, what the legitimate role of the authorities was and when its results could be considered just – in other words, in the consolidation and emergence of a legal tradition embedded in a legal culture, uniquely suited to the political, social, economic and cultural context of the Republic and its cities and towns.

47 Diederiks, Faber & Huussen jr. 1988, p. 16.
48 Ibidem, p. 10.
49 Schama 1987, ascribes the emergence of a specific Dutch culture, first in the towns and later elsewhere, to the common language that was spoken, the influence of Protestantism and the beliefs, convictions and way of life that governed the existence of the bourgeois population in the towns.
3.2.2. Unifying Factors

3.2.2.1. Royal Criminal Decrees (Criminelle Ordonannantiën)

The Royal Criminal Decrees, one on criminal justice in general, one on style of proceedings and a less important one on the functionaries of the criminal justice system, form an extraordinary piece of legislation by Phillip II. Drawn up by eminent legal scholars in the Secret Council (Geheime Raad) and issued in 1570, they were intended to unify law and procedure in criminal matters, abolishing what was seen as diverse, but also ‘wrong and corrupt’ customary local law. Phillip’s legal advisers, basing themselves on Roman law in the Digests, assured him that whatever the sovereign decided would have force of law (plenitudo potestatis). But everywhere in the rebellious territories of the Lowlands, the Decrees were seen as an infringement of the very legal privileges he had sworn to uphold. In that sense they played their own role in fuelling the revolt. They were suspended by treaty between the Prince of Orange and the States General in 1576 (Pacificatie van Gent), and so they remained.

Although there has been much legal debate over what this suspension actually meant, that the Decrees may not have had formal force of law does not mean that they did not influence its practice extensively, even to the extent that some authors regard them as law de facto, if not de lege, at the time and later. In the mistaken view that the Sovereign’s authority was still such that his laws would be accepted, they were printed and distributed in a remarkably short time and were available all over the Republic. Although they were a codification of much that was already in practice, they were also far ahead of their time and form the first systematic codification to make a distinction between substantive and procedural criminal law.

The Hapsburg legislator left substantive law much as it was, although the first Decree provides a certain amount of doctrine, including the regulation of applicable punishments through an implicit classification of offences. Van de Vrught remarks how large the category of offences against public morals was, and how severe the punishment. She suggests that one of the differences between the northern and southern provinces of Phillip’s European dominions was the much greater freedom that women enjoyed in comparison with Spanish women; this substantive provision may have been meant to address this ‘problem’. Procedural law and inquisitorial process were regulated in detail. The second Decree centralised and harmonised criminal procedure to reinforce the position of the central authorities, and

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50 One of the most comprehensive studies of these decrees and their reception and influence in the northern Netherlands, later the Republic, is that by Van der Vrught 1978, on which part of this paragraph is based.

51 Van der Vrught 1978.

52 Van der Vrught 1978, p. 91-94.
improved it by introducing a systematic logic explicitly derived from Roman law, and setting out specifically what was legitimate and what not in the treatment of individual suspects.

3.2.2.2. Universities and Legal Scholars

The extensive and unifying influence of the Decrees is to no small degree due to the increasing availability of an infrastructure for their study and interpretation at new universities in important towns such as Leiden (1575), the northern town of Groningen (1614), Amsterdam (1632), Utrecht (1636). Here faculties of law trained legal professionals who were to staff the courts, and scholars interpreted and commented on the law (the Royal Decrees were the subject of much legal writing) and disseminated the (new) legal discourse. At the time of the Republic, professors and students from many countries – England, Scotland, France, Germany, Italy – taught and studied at the Republic’s universities, attracted by the openness of the culture and freedom of (scholarly) debate. Of the 35,000 students enrolled in Leiden during the 17th century, more than 40% were foreign, about half from Germany. Groningen and Leiden had professors from Germany in the law faculties and in Utrecht, between 1636 and 1815 one in four law professors was German.53

This interchange of people and ideas not only promoted scholarly discourse of very high quality – Grotius was one of the eminent scholars of Leiden – but also the reception of doctrine from Roman law and what has been called a cultural idea of Rome: a civilisation ideal in which a new, humanist vision of mankind produced rational scholars, free, critical and conscious of their individuality. From this vantage point, the rational logic of Roman law seemed of infinitely superior quality and usefulness than the fragmented local, often customary law.54 The influence of this unifying discourse was greatest in private law, but it also encouraged academic appraisal of the Royal Criminal Decrees and influenced jurists working in the practice of criminal justice. Provinces and towns might have disapproved of the idea of the Decrees in principle, their content was another matter. A rational codified procedure fulfilled the needs of an increasingly rich, urban society where criminal justice authorities were responsible for law and order. No wonder then that the Crimineele Ordonnantieën and university commentaries were much consulted and formed the example on which much subsequent local codification and practice could be based.

54 Ibidem, p. 287-289.
3.2.2.3. The Organisation of Police and Justice in the Republic

At first sight there is little uniformity in the organisation of justice in the Republic or in any event little difference to the situation before the rebellion. Provincial courts (Hof van Utrecht, Hof van Holland, etc.) also functioned as appeal courts, but provinces and towns usually had the privilege not to have decisions of their courts subjected to appeal; a central court with jurisdiction over the whole territory did not develop out of the Supreme Court installed in The Hague in 1581. Local authorities brooked no interference from 'above', and determined the manner and scope of police and justice in their own territory. Not yet two separate functions, local justice and politics were significantly intertwined. Regents in the towns appointed a schout and also schepenen to sit in judgment in the courts. But this does not mean that police and justice were inherently arbitrary or that fundamental differences existed in how they were organized or in expectations as to the roles of the different functionaries.

Everywhere, the Schout was a central figure, usually a member of the local elite, whose position was also his source of income. Appointments were for long periods of time (often 10 years or more), so that he would be well-versed in law and procedure, even though he was not necessarily legally trained. The position of schout was very influential. He presided over both administrative and judicial organs: the town council (vroedschap) and the court (schepenbank) in which he sat with the schepenen. He directed subordinates and their assistants in tracing suspects (the beginnings of the justice aspect of policing), collected evidence, interrogated arrestees, interviewed witnesses and prepared the case in a written document for presentation to the schepenbank. There he directed procedure and formulated a demand for punishment, but did not deliberate the verdict. As well as the Schout, a schepenbank consisted of five to ten well-born men (well-off protestant residents of the high jurisdiction) appointed for a year, reappointment later always possible. The office of schepen too brought administrative power, and the already powerful patrician families strove to monopolise it, making sure that appointments circulated among themselves. Unlike the judges in the provincial courts, schepenen were not

55 Ibidem, p. 270.
56 Pieterman 1990, p. 18.
57 There is also evidence of the exchange of information between jurisdictions on detection, arrest and prosecution of suspected criminals. Van Weel 1989.
58 Order was maintained by corps of burgher militiamen (schutterij), whose officers were recruited from and appointed by the town authorities. Again these were influential posts and the burgomaster would often head such a group. The most well-known is Frans Banning-Cocq, burgomaster of Amsterdam and head of the militia group Kloveniersdoelen: he and his men form the subject of the Nachtwacht (Nightwatch) by Rembrandt.
60 Egmond 1989, p. 16.
usually legally trained, although repeated appointments helped them gain legal knowledge ‘on the job’. They took crucial decisions in criminal trials, gave permission for arrest and (in writing) for torture at the Schout’s request, and determined guilt and punishment.\textsuperscript{61} It was the Schout who brought a case before the schepenen.

This brings us to the institution of composition, until the Middle Ages the way in which families settled criminal offences between themselves. By the time of the Republic it had become an out-of-court settlement between schout and suspect, a means of ‘buying off’ further prosecution at the former’s instigation. Formally regarded as a settlement between equal parties, the all-powerful position of the Schout meant that he dictated the terms. Given that he was dependent on the incidental gains from his office and that composition took place in secret, it was a recipe for corruption.\textsuperscript{62} Many instances of such abuse of power were recorded, sometimes leading to prosecution of the schout before a higher court.\textsuperscript{63}

The organisation of day to day criminal justice in the Republic, although there were small regional differences, had a number of specific characteristics. Schout and schepenen were not professionals but laymen, whose positions and manner of appointment meant that they represented the local community, were well acquainted with local circumstances and at the same time became well versed in the law. They were not democratic representatives in the sense that anyone could be elected to positions that were reserved for an elite class of burghers, but the distance between local justice authorities and their citizens was much smaller than between that same population and the professionalised provincial courts. An important effect was that citizens were familiar with and came to trust the administration of justice.\textsuperscript{64}

3.2.3. Procedure and Punishment

Procedure all over the Republic was very similar, with some minor local or regional variations. Here too we see the influence of universities and jurists through their interpretations of doctrine and the Crimineele Ordonnantien. In parts of the Republic, the schepenbank was always obliged to request advice from ‘impartial legal scholars’ – lawyers or professors of law from one of the universities – which had a particularly unifying effect on procedure outside of the towns.\textsuperscript{65} In this way, a gradual consensus was established on both inquisitorial procedure as the correct way of proceeding in criminal matters, and the form it should take. However, this procedure was not a direct

\textsuperscript{61} Ibidem.
\textsuperscript{62} Pieterman 1990, p. 20.
\textsuperscript{63} Hovy 1980, p. 413-429.
\textsuperscript{64} Egmond 1989, p. 19.
\textsuperscript{65} Egmond 1989, p. 16.
incorporation of the Royal Criminal Decrees, from which it deviated in a number of ways that specifically suited the circumstances of the Republic.

3.2.3.1. Inquisitorial Procedure

Inquisitorial procedure in extra-ordinary proceedings was aimed at establishing a true version of events, the guilt of the suspect and his mens rea. The investigation in extraordinary proceedings was secret and not conducted in public, a suspect was not informed of the information against him and had no right to an advocate. Extra-ordinary proceedings were always compulsory if the law set a punishment other than a fine.\textsuperscript{66} Prosecution could start after a complaint, but the \textit{Schout} could also act ex officio if he received information that a criminal offence had been committed. He would then hear witnesses, establishing (if necessary) the identity of the suspect, and request that the \textit{schepenen} order arrest and detention. Interrogation took place within 24 hours. What happened next depended on whether the suspect confessed. Confession formed a necessary central piece of evidence for it was required for a conviction in serious cases – i.e. cases that could end on the scaffold (corporal punishment or death), of which there were many. Torture thus came to be seen as a legitimate means of inducing reluctant suspects to confess. This did not mean it was always used and threats or demonstrations of the different instruments were often enough to get the suspect talking. If he confessed under torture, it was important that he did so again ‘without pain or iron bands’. Once a confession was obtained, the \textit{Schout} could present his findings to the court. A defendant convicted on confession had no appeal to a higher court (95\% of capital cases). If however the suspect denied the offence, even after torture, it was not unusual for the case to be continued under ‘ordinary proceedings’; the suspect would then have a right to legal assistance, to present his own version of the case to the court in writing and to appeal.

Many of these procedural rules, of which the above provides no more than a broad sketch, were directly derived from the Royal Criminal Decrees, but there were important procedural issues in which they differed: torture and the related matter of appeal.\textsuperscript{67} The Decrees had changed the situations in which extraordinary or ordinary procedure was indicated, with extraordinary procedure becoming in effect the rule, but were not entirely clear or consistent; at the same time, they substantially reduced cases in which torture could be used, namely only if there was some but insufficient evidence against the suspect, and always at the discretion of the court. An incorrect translation of the relevant Decree, in combination with the great

\textsuperscript{66} In this summary I have relied on Diederiks \textit{et al.} 1988, p. 17-19, and Egmond 1989.

\textsuperscript{67} See on torture in general in the Netherlands: Van Heijnsbergen 1925; and on the misunderstandings and interpretations of the \textit{Crimineele Ordonnantiën} on this point: Van der Vrught 1978, p. 112-127 and Van Bemmelen 1957, p. 31-32.
importance that Dutch legal scholars attached to the maxims regina probationum and confessus non appellat led to the rule that no conviction was possible without a confession, that torture was used on a much greater scale than the Decrees intended, and appeals were rarely allowed – an important issue for local jurisdictions. The Decrees are not specific, but indicate that appeal was to be regulated in legislation that in the event never materialised. Given the Hapsburg desire for unification and centralisation, it is unlikely that decisions by local courts were not meant to be subject to appeal.

3.2.3.2. Punishment

Like everywhere else at the time, punishment in the Republic was harsh and public but it was not arbitrary. Empirical research into punishment in two different provinces shows a remarkable consistency in sentencing by many different courts across a wide area of the Republic. They all impose the same type of punishment, mirroring the offence and take account of mitigating and aggravating circumstances in much the same way. 'Mirror-punishments' were common all over Europe from the Middle Ages onwards, but there was a sort of pattern of punishment too, a code by which it was possible to recognise the crime. Egmond maintains this uniformity can only be explained by its origins in customary law and gradual incorporation into ‘official’ criminal justice. This is not to say that the same crime was always punished in exactly the same way. Judges took many circumstances into account (intent, age, man or woman, mental impairment, recidivism). When these are factored in, sentencing and punishment in the Republic were certainly not arbitrary, although one aggravating circumstance does point to inequality of a different kind in sentencing: everywhere people of no fixed abode were regarded as a priori of bad character.

The apparent care with which courts examined each case, their attention to specific circumstances and reluctance to sentence more severely than a case warranted were based on developing doctrine of substantive law in the works of Dutch legal scholars and underlying ideas on criminal justice. Even those who supported the use of torture were moderates when it came

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68 In particular Simon van Leeuwen, scholar of Leiden University (1626-1682) interpreted the Royal Decrees as support for existing practice (see: Het Rooms-Hollands-Regt (1664), Proces Crimineel (1677), Manier van procederen in civile en criminelle saaken (1666)). His interpretation, that allowed extensive use of torture, remained essentially uncontested until the end of the 18th Century.

69 Egmond 1989.

70 In cases of murder or manslaughter, the criminal would be executed in the same or similar way as he had killed his victim; thieves could have fingers or hands chopped off before being hung; a woman who had killed her child might be executed holding a doll, etc.

71 Egmond 1989, p. 15.

72 Ibidem, p. 18.
to punishment, voicing their disapproval of unnecessary severity and cruelty that were presumed to be contrary to ‘our lenient and well-balanced land and people’. This is the more remarkable since all agree that the goal of punishment is deterrence (for which reason its public execution was paramount). Probably that is why none of the authors mention a specifically Dutch innovation, the houses of correction established in 1596 for men (rasphuis) and in 1597 for women (spinhuis) in Amsterdam.

These institutions represent an important change in thinking about punishment that originated in the Republic and was based on the writings of Dirck Volkertszoon Coornhert. Hard work and a moral education in a house of correction aimed at rehabilitation, not physical pain, and were said to be of greater importance to society than corporal punishment. The Rasphuis and Spinhuis were famous abroad and were something of a tourist attraction. That they first appeared in the Republic – and in Amsterdam – reflects both the Protestant work ethic and economic shrewdness, for their products were valuable. Equally important, perhaps more so, was the fact that the economically prosperous cities were confronted with a growing urban population living in poverty, with a large percentage of vagrants and/or migrants from overseas. Houses of correction became a means of maintaining public order by incarcerating, at a profit, unruly but also unproductive elements of the population.

With the houses of correction and their economic and social function, we have arrived at one aspect of criminal justice in the Republic that is certainly differs substantially from what was intended by the Royal Decrees, although this does not concern procedural rules but what could be called ‘criminal policy’. The obvious intention of the Hapsburg administration was increased frequency in prosecutions and severity in sentencing, particularly in cases involving public morals and public order. There are two empirical studies on the prosecution of such cases in 17th and 18th century Amsterdam, one on prostitution, the other on adultery. They show that, far from intensified prosecution and punishment, such behaviour was often tolerated as long as it was not too flagrant and/or did not become too much of a public nuisance. The belief that prostitution might be morally undesirable but should be tolerated – up to a point – did not appear suddenly with the event of the Republic. In the big (harbour) cities,

73 Van Leeuwen cited in De Monté ver Loren 1942.
74 Coornhert is regarded as the first and one of the greatest prison reformers – the John Howard of the Netherlands. Like Howard, there is a league that bears his name and strives for reform and greater humaneness in criminal justice.
75 On the relationship Rasphuis and Dutch mercantile capitalism: Sellin 1944; Garman 2005, p. 32-34.
77 The two are inevitably linked, as many married women turned to prostitution in order to avoid the poor house while their men were at sea, while many of their customers were married men.
authorities realised early on that prostitutes had an important social and economic role.\textsuperscript{78} Prostitution and other evidence of ‘loose morals’ were sometimes prosecuted (the sentences were relatively light), but contemporary (foreign) sources reveal that 17\textsuperscript{th} century Amsterdam was a city of gambling, drinking, and brothels (often in one and the same establishment). The authorities appear to have acted predominantly if the nuisance value of the ‘vice industry’ increased and threatened the city’s reputation. The Schout and schepenen also had other ways of tackling the problem. Houses of correction were a means of removing large numbers of disreputable elements from the streets; and composition could be ‘offered’ to the rich fathers of wayward sons and daughters or to men susceptible to such official blackmail because of their illegal association with whores (married men for example, or Jews who were forbidden sexual contact with Christians).

Criminal justice and punishment of the type envisaged by the Royal Decrees and common all over Europe as a means of dealing with social problems were not always the first solution that the authorities in the Republic turned to. Indeed, in 1705 the Dutch-English author Mandeville described what he called a ‘sensible’ policy designed to create the impression that vice was being tackled in Amsterdam while in reality it was tolerated.\textsuperscript{79} This was not simply a manifestation of liberal moral views but also a pragmatic way of solving a problem inherent in the city’s position as a world centre of maritime trade and commerce. It was a solution to which the authorities turned in other fields too. The religious and intellectual freedoms of the Republic were renowned, but Jews did not have the same rights as Dutch citizens and Catholicism was forbidden. Yet, Jewish refugees flocked to Amsterdam and contributed greatly to both its wealth and intellectual fame. And as to the Catholics, given that half the population was Catholic, including many of the wealthiest regent families, the sensible solution was to forbid visible manifestations of Catholicism and yet to allow it: today, one of the tourist landmarks in the city is an opulent Catholic Church hidden behind the gables of an ‘ordinary’ 17\textsuperscript{th} century house. It was not that no one knew it was there, simply that it shouldn’t be seen to be there.

3.3. \textit{Enlightenment and Revolution: the 18\textsuperscript{th} Century}\textsuperscript{80}

In its Golden Age, the Republic was admired all over the world. But its military and economic power also antagonised the French and particularly the English, with whom it fought four major maritime wars. Between 1672

\textsuperscript{78} One of the first bye-laws of the City of Amsterdam (1413): ‘Because whores are necessary in big cities and especially in cities of commerce such as ours – indeed it is far better to have these women than not to have them – the court and sheriff of Amsterdam shall not entirely forbid the keeping of brothels’.

\textsuperscript{79} Van de Pol 1996, p. 227.

\textsuperscript{80} As well as on Israel 1995 and Schama 1977, this introduction is partly based on Pieterman 1990, p. 21-24.
and 1678 (the Franco-Dutch third sea war), the Republic was attacked by English, French and German troops. The Dutch prevailed, but at the cost of civil unrest, plotting among the leaders – the followers Orange against the bourgeois regents – and a blow to the economy from which it never fully recovered. Still, the Republic continued to prosper until well into the 18th century, the colonies a seemingly never-ending source of exploitation and Dutch ships and merchants heavily involved in the slave trade. But the great economic, social and intellectual innovations of the previous era were not repeated. Political and economic decline began in the second and third decades of the 18th century. Although stadtholder William III became King of England in 1688, ending the rivalry between both countries, this also put an end to Dutch dominance in maritime commerce as merchants began to use London as their base.

William died in England and the States General took government into their own hands, but disastrous interference in a war between Austria and France led to the French invading the south of the Republic. In a panic the States General sent for the young prince of Orange – a superior negotiating position he exploited to gain hereditary rights of succession for his son, who became stadtholder William V in 1766. Under his leadership, the Dutch supported the American rebels in their war of independence against the British, which eventually led to the fourth sea war. Its outcome (the Republic lost many of its colonies and the monopoly on East Indian spices, the West India Company went bankrupt) plunged the country into economic crisis, then into political turmoil as William’s rivals attempted to undo his hereditary privileges in a bid for power, appealing to the people by referring to their (ancient) right to influence government. In this union of regents and citizens (Patriots – Patriotten), the two factions had contradictory aims: the regents a return to their privileged positions of power, the citizens claiming political rights and something like democratic influence. By the end of 1785 ‘emancipation of the democratic patriots from the tutelage of the regents had become […] open conflict between the two parties’. William went south, returning in 1787 to crush the Patriots with the aid of the Prussian army. In 1795, with military support from the Republican French, the Patriots again seized power. William fled to England and the revolutionary Batavian Republic was proclaimed. The Republic of Seven United Provinces was at an end.

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81 He was invited by English Parliamentarians to lead an army and overthrow (the Catholic) King James II of England – the Glorious Revolution.
82 Pieterman 1990, p. 23.
3.3.1. Enlightenment Philosophy and Criminal Justice

The great political sea change at the end of the 18th century obviously did not come out of the blue. Yet for a long time, much appeared the same. There had always been political strife between the Orange faction and other oligarchies that controlled the country. Socially, the middle classes were gaining in number, but life under the town regents went on much as usual, even if each war brought poverty and an increase in crime and public order disturbances. Neither did there seem to be any changes in criminal justice. Nevertheless, ideas of Enlightenment philosophers and revolutionary thinkers were eventually to affect thinking about criminal justice, although established traditions were to soften their revolutionary nature.

According to De Monté ver Loren, in the first half of the 18th century, ‘not a single work of significance on criminal law appeared’. A status quo in the field of criminal justice had set in: the organisation and structure of the courts remained as they had been for well over a hundred years, the position and role of the Schout, that unpaid (albeit usually rich) amateur dependent on the gains from his work, was unchanged, and procedure continued along the lines set out in the Royal Criminal Decrees, though with their specific Dutch adaptations. Despite the controversy on the legal status of this legislation, according to Van der Vruught it had force of law during the whole of the republican period. She bases this on official attempts by the States Provincial of Holland to amend it, even to the point of installing two legislative committees (1732 and 1774). Others have remarked that the resulting draft did not propose anything new but was a codification of procedure at the provincial court (Hof van Holland), which wanted to see its proceedings introduced in all other courts.

3.3.1.1. Philosophers of the Enlightenment

During the 18th century, French, English and German philosophers were developing the rationalist ideas already expounded at universities all over Europe in the previous century: the equality, and free and independent nature of man as a rational individual with an unlimited right of self-determination. After approximately 1750, many books appeared taking this a step further, relating it to the social and political arrangements of the time and criticising the foundations of the Ancien regime with its absolute power. As an institution and in its practical manifestations, the criminal justice system reflected the main object of their criticism. The situation under the absolute monarchs in France and elsewhere formed the yardstick for these

84 De Monté ver Loren 1942, p. 70.
85 Van der Vruught 1978, p. 172.
Although it differed fundamentally from that in the Republic, the great French and Italian works of the Enlightenment were not only translated and read in the Dutch Republic, their critique triggered both dissatisfaction and debate. Two books in particular profoundly influenced that debate: *De l’Esprit des Lois* by Charles de Montesquieu (1748), and *Cesare Beccaria’s Dei Delitti e delle Pene* (1764).

Montesquieu’s famous work is the basis for the continental idea of Rechtstaat. It is itself a legal transplant - or rather an adaptation, for the author derived his ideas from the situation in England, though misunderstanding it and adapting it to fit his continental legal schooling and the future he envisaged for his native France. His criticism of the criminal justice system was mild in comparison to later authors (focussing mainly on the proportionality of punishment, he also advocated a jury system in line with what he had seen in England), but his great influence results predominantly from his concept of trias politica). This involves a strict division between legislator, executive and judiciary: to make the law, to execute and enforce it and to apply it. Under the ancien regime, where all state power was in the hands of the monarch (’l’État, c’est moi’) and all law was regarded as emanating from the sovereign, criminal justice was also centrally concentrated. In reality, the professional legal scholars who formed the judges (noblesse de robe) had considerable influence; this uncontrolled position of power combined with the close relationship to the monarch was an important source of mistrust of the system.

By far the most influential 18th century book on criminal justice was *Dei Delitti e delle Pene*, and in it Beccaria brought together the humanitarian themes running through the works of different Enlightenment philosophers: Bentham’s utilitarianism, Rousseau’s social contract, Montesquieu’s trias politica and Voltaire’s criticism of secret inquisitorial justice. Beccaria embraced the idea that society rests on a contract between its members and that legislation should aim at the greatest happiness for the greatest number of people. He set out principles to remedy the defects of what he saw as cruel, arbitrary criminal justice, uninfluenced by the citizens it concerned. The principle of legality (nullem crimen, nulla poena) implies accessible and clear law that the judge may not interpret, that of proportionality maximum gains for a minimum of suffering: punishment should not be more severe than necessary. Subsidiarity means that the optimal sanction is the minimum that will have an effect: punishment deters not by cruelty but by inevitability, so that torture and the death penalty are unnecessary. Equality that criminal law should have no regard to social status. Transparency requires that trial

87 Melai 1989, p. 479.
88 There are still publications of both in many languages, and both books are also available on the internet on several different sites. A simple google search will turn up publications and text.
89 Foqué & ’t Hart 1990, p. 75-87.
and evidence be public, and secret procedure abolished. Beccaria was calling for a total reform of criminal justice, from legislation to accepted inquisitorial procedure, sentencing and punishment.

3.3.1.2. Dutch Reception of Enlightenment Ideas

Translated in 1768 and widely read by Dutch jurists, Dei Delitti e delle Pene has always been regarded as extremely influential, so much so according to De Monté ver Loren that he includes Beccaria in his history of Dutch legal scholars.91 Not everyone, however, shared Beccaria’s views and De Monté ver Loren’s overview of the opinions of contemporary Dutch authors shows that there was by no means agreement in the Dutch republic as to what direction – if any – reforms should take. Most agreed that the law should be clearer, some that courts should have no room for interpretation, but a lively debate ensued as to the necessity of torture and the death penalty, although most supported both practices.92 Of the two most influential authors, Willem Schorer (a judge at the high court in Zeeland) and Bavius Voorda, professor of law in Leiden,93 the former was against torture and punishment on the scaffold but for the death penalty, while the latter regarded both as – perhaps regretful – necessities ‘for practical reasons’. Schorer was also an explicit protagonist of a unitary state and trias politica. Voorda makes no mention of such constitutional matters, but was the only one to condemn the secrecy of pre-trial extra-ordinary proceedings and the lack of legal assistance as contrary to ‘all fairness and reason’, i.a. because it left the unsupervised Schout to his own devices.94 If there is any consensus to be gleaned from these writings, it is that ‘too much theory’ was impractical and, with very few exceptions, that any problems – in so far as they were seen to exist – could be repaired within the framework of the law as it stood. Voorda favoured revision of the Royal Criminal Decrees, which he regarded as excellent legislation, but ‘mutilated’ by incorrect interpretations of 17th century authors. These – the necessity of a confession for conviction and thus always torture to obtain it, the lack of appeal and of legal aid – formed the main subject of his criticisms. Like most other Dutch legal scholars, he was open to ‘enlightened’ ideas, but not to the radical reforms that Beccaria and (pre-) revolutionary French thinkers were advocating.

91 De Monté ver Loren 1942, p. 74.
93 Ibidem, on Schorer, p. 80-84 and on Voorda, p. 110-118.
94 Ibidem, p. 117.
3.3.2. A Dutch Revolution

3.3.2.1. Aims of the Dutch Revolutionaries

Dutch legal scholars obviously by no means favoured a total reform of criminal justice and seem unmoved by the notion that the system was arbitrary and cruel. It was indeed much more moderate than in many other European countries. Moreover, by the middle of the 18th century the bloody spectacle of the public scaffold was already in decline (at least, the ceremony that accompanied capital punishment was diminishing and there were legal scholars advocating its abolition). However, as long as public scaffolding was the norm it made an easy target for a growing and increasingly dissatisfied bourgeoisie to criticise, though the target was more the ‘uncivilised’ urban poor who were said to treat an execution like a carnival, rather than the criminal justice authorities directly. We have seen that neither procedure nor sentencing was as fragmented as 19th century authors often presumed and that later writers have concluded on the basis of empirical studies that the criminal justice system in the Republic was relatively coherent and by and large experienced as legitimate by the population. The main bone of contention was the corruption and abuse of the unpaid and unsupervised position of Schout.

General resentment and discontent among the bourgeoisie were aimed not at the criminal justice system, but directly related to the position of the regents and the stadtholder, and their monopoly of local, regional and central government. A broad class of sometimes wealthyburghers, belonging to neither the oligarchies by birth nor to the pre-industrial urban proletariat and artisan-class by social position, sought to break the autocratic reign of the regents through political emancipation. Because the constitution of the Republic with its autonomous components stood in the way of reform, their goal was a unitary state, which in its wake would bring unification of the legal order. It was this that formed the framework of events leading to the proclamation of the Batavian Republic in 1795.

3.3.2.2. The Batavian Republic

Despite its support by the French Revolutionary Army and, on paper in any event, its embracing of French Revolutionary ideas, the Dutch revolution was accomplished almost without bloodshed and bore very little resemblance to its French counterpart (even if an Assembly of Provisional Representatives of the people of Holland issued a ‘Declaration of the rights of man and of citizens’ (1795) based on the French Declaration of 1789). The office of stadtholder was abolished and a National Assembly elected in 1796 on the

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95 See Beijer & Brants 2002, p. 36.
96 Pieterman 1990, p. 25.
basis of suffrage – voting strictly for men of respectable income. The revolution also ended the second rate position of Jews and Catholics and differences in legal protection between citizens of towns and strangers, but the political leaders relied on disenfranchisement and arrests of ‘Orangists’ and the presence of French troops to remain in power. Provinces became departments on the French model, and departmental (appeal) courts and a national court in The Hague were established, only slightly changing the existing organisation.\(^97\)

Part of the driving force behind the revolution was a federalist faction of the regent class, eager to get rid of the stadtholder, less so to dissolve their own autonomous regional privileges. Neither did the other – democratic – faction lack political influence. It too had many members from the patrician and upper classes who had held positions in the (legal) administration of towns or regions. Immediately after 1795 such posts (e.g. schout or schepen) were opened to less influential citizens; infighting between unitarian and federalist ‘revolutionaries’ and a subsequent pact between them in 1801 forced many newcomers out again. In reality little changed and these positions were still reserved for those who had always held them.\(^98\) Under these circumstances, the practicality of a unitary state, of codification of unified law and radical reform of the legal order was remote. Nevertheless, the National Assembly saw as one of its first responsibilities the design of a Constitution promoting just such reforms.

The first draft (1798) in which the ideas of Montesquieu, Rousseau and Beccaria are clearly visible, was based on the principle of equality and trias politica. It proclaimed a unitary state, repeated the catalogue of rights enunciated in the Provincial Declaration and proposed a number of changes directly affecting criminal justice, including the principle of legality, codification and the abolition of torture, though not a jury system. A code of criminal procedure (\textit{Manier van procedeeren bij het Hof van Holland} – 1799), based on the draft of 1774, introduced procedure usual at the \textit{Hof van Holland};\(^99\) it never became law. The problem of torture remained (‘that barbaric support of conviction after confession’, said the draft constitution),\(^100\) the lower courts complaining they were unable convict without confessions. Judges at the \textit{Hof van Holland} (to the annoyance of the National Assembly) eventually proposed abolishing the practice in principle, while leaving the judge to ‘use all means he shall deem necessary’ to induce a suspect to speak.\(^101\) Very slowly, the use of torture declined. Despite four drafts for a

\(^{97}\) Bosch 2008, p. 29.


\(^{99}\) See under 3.3.1 supra.

\(^{100}\) Drenth 1939, p. 208.

\(^{101}\) Ibidem, p. 209.
The involvement of the French in the legislative endeavours of the Batavian Republic was no coincidence, for it had de facto been a vassal-state of France ever since the revolution. The government needed the presence of French troops (for which the Emperor Napoleon demanded an extortionate fee) and had no choice but to support France militarily in her wars against England. This quasi independent existence ended in 1806 when Napoleon set his brother, Louis, on the throne, renaming the territory Kingdom of Holland. Napoleon, unsatisfied with his brother’s performance (said to take too much account of Dutch and too little of French interests) annexed the Kingdom into the French Empire 1810. By the end of 1813, Napoleon was no longer emperor, the French were gone and William V’s son, William Frederick of Orange-Nassau, was back; not as hereditary stadtholder, but as king.

The ‘French era’ lasted little more than ten years. Despite attempts by King Louis to ameliorate the systematic exploitation of Dutch wealth, the economy declined steadily and poverty increased, especially in the countryside. But only the actual annexation and occupation from 1810-1813 – Frenchmen in important administrative posts, introduction of French as one of the official languages, extortionate taxation, the devastating economic consequences of Napoleon’s wars, his bartering of Dutch colonies and conscription of Dutchmen into his armies – brought real (economic) hardship and discontent, and led to resistance by the population. Not a full-scale rebellion it was more a series of demonstrations of civil unrest, and economic crisis brought many one-time defectors back to the Orangist ranks. After the defeat of Napoleon at Leipzig (October 1813), the French began to withdraw their troops, and Orange supporters, backed by the British and led by Gijsbert Karel van Hogendorp, proclaimed independence, forming a provisional government. At their invitation, the Prince of Orange returned on November 30.

William-Frederick was determined that he would only return as sovereign. Taking the title of King William I in March 1815, he was to have a decisive influence on political events for the first half of the 19th century, including transformation of the legislative inheritance of French rule. For if the French only governed the Netherlands for ten years, in that time they managed what the Batavian revolutionaries singularly failed to do: radically reform the organisation and structure of (criminal) justice and introduce...
The codification of unified law, including a code of criminal law and a code of criminal procedure. Many of these reforms proved lasting, although they were to change subtly and not so subtly in their translation and acculturation into the existing structure of criminal justice. The situation was complicated by the ‘rearrangement’ of Europe by the great powers after the defeat of Napoleon (1814-1815), when the northern and southern Netherlands were united to form one kingdom under William I. The predominantly catholic south did not share the (legal) culture of the north. It was not until the south gained independence as the Kingdom of Belgium in 1839, followed by the abdication of William I, that the contours of the modern Dutch state with its specific political arrangements began to emerge.

3.4.1. Criminal Justice under French Rule: Reorganisation and Legislation

3.4.1.1. Reorganisation of the Criminal Justice System

Immediately after the annexation of the Kingdom of Holland, the French imposed their own pyramid structure of (criminal) justice. At the top was the Court of Cassation in Paris followed by Imperial Courts of Justice, of which one was established in The Hague. Each of the seven ‘departments’ of the Netherlands had its Court of Assizes, with jurisdiction over serious offences (crimes), sitting with a jury every three months or whenever necessary. There was no appeal on the facts: to overturn a jury-verdict would have been to infringe the sovereignty of the people (appeal on points of law, cassation, was possible – in Paris). Each arrondissement (the next administrative layer) had a tribunal of correction with jurisdiction over less serious offences (délits), with appeal to the departmental courts. Finally, the arrondissements were divided into cantons, with a justice of the peace (juge de paix) and jurisdiction over misdemeanours (contraventions). Representatives of the prosecution service (part of the government administration of justice: ministère publique – public ministry) were attached to each court to make sure that the independent judges (professionals, except for the justices of the peace) did not deviate from the law.105

3.4.1.2. Criminal Legislation

The Batavian Republic had attempted codification of both criminal procedure and substantive criminal law and got no further than drafts, but even before the annexation in 1810 King Louis had developed and introduced a Criminal Code for the Kingdom of the Netherlands (Crimineel Wetboek voor het Koninkrijk Holland – 1809). Its structure and doctrine were heavily influenced by the French Code Pénal, the underlying ideology and system of

105 Bosch 2008, p. 75.
punishments were those of the Batavian draft. Louis’ code provided, for example, for a wide margin of discretion to the court on evidence and sentencing, and for the death penalty, the scaffold – e.g. whipping, branding, the pillory – combined with imprisonment and banishment, and fines. After personal intervention by King Louis composition was not included. This Code was replaced by the Code Pénal in 1811. It refined distinctions and dogma (such as attempt, participation, exculpatory and mitigating circumstances) and its structure was logical and clear. A curious mixture of enlightened, revolutionary and draconian attitudes (it was for example exceedingly liberal in matters of public morals) it deviated considerably from Dutch legal tradition in a number of aspects. It provided for the death penalty, but not corporal punishment other than branding, or public execution on the scaffold. Many offences were listed in the most serious category (crime) and subject to mandatory sentencing, overturning the wide margin of discretion that Dutch courts traditionally enjoyed. It did not allow composition.

De facto, criminal procedure in the Batavian Republic was still governed by the Royal Criminal Decrees of 1570. Together with the Code Pénal, the French also imposed their Code d’Instruction Criminelle, thereby unifying procedure in the whole country.106 It was a mixture of the enlightened ideology of the French Revolution and 17th century procedure that differed little from the Royal Decrees. Pre-trial procedure was secret and in writing, the suspect the object of investigation and without rights. Trials were public, with a jury in the most serious cases; the defendant had the right to defend himself and to legal assistance. The public ministry could bring a suspect of a less serious or minor offence directly before the tribunal of correction; for crimes a complicated system of hierarchical judicial monitoring protected against unnecessary prosecutions: a judge of instruction investigated serious offences, then sent his findings to the tribunal of correction who could stop the prosecution or refer the case to the tribunal or to the chambre d’inculpation at the Imperial Court; this would then refer the defendant to the Court of Assizes.107

The reorganised structure of criminal justice and the two Codes functioned for only two years under the French, but did not disappear with the advent of the United Kingdom of the Netherlands. On the contrary, parts of the French organisation proved permanent – especially the prosecution service, which replaced the unsatisfactory, pre-revolutionary system of the all-powerful but unsupervised Schout, although the organisation of the judiciary was more difficult to reconcile with Dutch tradition. The two codes remained in force until agreement was reached on national codification: the Code d’Instruction Criminelle was abolished in 1838, the Code Pénal not until 1886. But this is not to say that Dutch legal and political tradition did

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106 And overturning any existing regulation, including, e.g. the residual use of torture.
107 With some modifications, this system still exists today in Belgium.
influence both the reforms after the French had left and the practice of criminal justice. In many ways it acted as a counterforce to these alien impositions.

3.4.2. Dutch Adaptations before 1840

Even before William had officially taken the throne, on 11 December 1813 he issued a Decree (known as the Whipping and Strangling Decree – Gesel- en Worgbesluit), reinstating the scaffold and the traditional punishments for which the Code Pénal did not provide, and immediately doing away with ‘un-Dutch’ French innovations – i.a. the jury and public trial. This amended French legislation was to continue in force while the Dutch legislator set to work on codification of criminal law and procedure, and a code on the organisation of justice. It all proved exceedingly complicated in the new political structure of the Kingdom, where the forces of tradition and progress faced each other down. The issues that came most prominently to the fore as a result of a clash of legal traditions were the jury and public trials, the organisation of the courts and the position of the public prosecution service (ministère publique, renamed openbaar ministerie). They were influenced by both tradition and a need for change, against a stormy backdrop of the relationship between monarchy and government in the years up to 1840 and the growing political influence of enlightened liberals.

3.4.2.1. Constitutional Arrangements before 1840: the King and the States-General

King William I was a hardworking, authoritarian and contradictory man, who has been called ‘the last of the enlightened despots’. Known as ‘the merchant king’, he greatly contributed to economic recovery and was also concerned to further extend and centralise the system of social welfare and education (instigated by King Louis) for the impoverished population. In political matters he was an autocrat. Despite the fact that the constitutional principle was maintained and that 1813 and 1815 saw two versions of a Constitution for the new state, de facto neither trias politica nor sovereignty of the people were realised. The drafts favoured restoration of the situation from before the Batavian republic. This obviously required some sort of balance of power between the King, the provincial and urban patrician classes and some sort of bourgeois, not people’s, representation.

The first Constitution, approved in March 1814 by an Assembly of Notables personally appointed by the King, re-established the States General and the States Provincial. The States General, chosen per province by the States Provincial, formed the legislative power together with the King, but

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109 Pieterman 1990, p. 28.
had limited influence and no means of control over the sovereign, who could also govern by Decree and so bypass the other arm of the legislative body entirely. The Constitution of 1815 was made necessary by the unification of the North and South Netherlands.\footnote{It was approved by the States General in The Hague. Many of the notables from the south appointed by William simply stayed away and a majority rejected the draft. The King simply counted their votes as a yes and added a few abstainers. This example of ‘Dutch arithmetic’ made for a majority.} The States-General were split into a first and second chamber, the former appointed by the King, the latter by the States Provincial. This in no way changed the balance of power: the King could still rule by Decree, and the first chamber could merely approve or reject legislation. The bourgeoisie hardly featured in this political arrangement. Only citizens in towns had the vote and could only exercise it if they paid a substantial amount of tax. These voters elected a town administration (for life), which sent representatives to the States Provincial, who then appointed the second chamber.\footnote{Pieterman 1990, p. 29.} While not exactly a return to the pre-revolutionary Republic, it is obvious that the aristocracy (and Orange, now the King) again held the positions of power and that tradition was likely to dominate any reform of the French legislation. These reforms were set in motion immediately and in 1838 resulted in two pieces of codification relevant to criminal justice: a Code of Criminal Procedure (\textit{Wetboek van Strafvordering}) and a Law on the Organisation of the Judiciary (\textit{Wet Rechterlijke Organisatie}). The debate to which this legislation gave rise during its inception reflects the political and legal struggle between tradition and change.

### 3.4.2.2. Jury and Public Trial

In 1815, the first draft for a new code of criminal procedure was dominated by anti-French feeling and a desire to return to pre-revolutionary tradition. The Decree of 1813 that reinstated the scaffold and did away with public trials and jury had been a start. These three issues are interrelated, in that they refute Enlightenment ideas on the goal of punishment, the principle of legality and the role of publicity and participation by the people in preventing abuse by the judiciary. According to Beccaria, deterrence was not promoted by the cruel and emotional spectacle of the scaffold but by the rational knowledge that it was certain to follow a crime, knowledge engendered by legal transparency and public trials. The latter also served to ensure that the courts, knowing themselves on display before the public, would obey the letter of law (as they were bound to do in the then general view on the division of powers). The jury was an extra guarantee against
judicial abuse, which expressed sovereignty of the people and ensured participation of enlightened public opinion.112

Beccaria’s ideas were well known in the independent Dutch Republic but not accepted uncritically. The Decree of 1813 shows that the Dutch authorities – and most scholars – regarded not a public trial but the public spectacle of the scaffold as the best means of serving two major functions of criminal justice: deterrence and legitimacy. Logically, in 1815 the draft code of criminal procedure that was to replace the French Code d’Instruction Criminelle was a return to inquisitorial proceedings entirely in the hands of the state, and saw no need for either the presence or the understanding of the legal community; the verdict would be reached on the basis of secret pre-trial investigation and interrogation of the suspect. The draft was unacceptable to jurists from the South, who regarded it ‘en un mot, le retour de la procédure secrète’.113 The southern Netherlands had been occupied by the French for much longer, were both familiar and satisfied with open criminal proceedings, and distrustful of the new unified state with its Dutch king. At the vehemence of their response, the draft was withdrawn.

As the years went by, aversion in the Northern provinces to all things French made way for a certain admiration for the logic and clarity of French legislation,114 and the new draft code of criminal procedure that was presented to the States General in 1828 was a version of the Code d’Instruction Criminelle. The differences, however, are telling. Reluctantly accepting the need for some form of public procedure, the government now proposed a public trial with a closed and mainly secret pre-trial investigation.115 But while pleas and sentencing were open to the general public, the investigative stage at trial (the taking of evidence by the court) was open to certain (presumably well-off and well-educated) segments of the public only: ‘members of the States General, the States Provincial and town administrations, all lawyers and other jurists, university graduates and teachers, military and militia officers in uniform and other citizens of good repute, will receive on application tickets of admission from the procurator-general or president of the court’.116

The Second Chamber, however, favoured a trial open in its entirety to the general public; with rather bad grace the government gave way (with dire warnings about intimidated witnesses and public trials as a school for potential young criminals from the lower classes).117 From then on, the trial

112 See on these pre-revolutionary ideas on public trials and jury in extenso: Van Lent 2008, Ch. 2.
113 Voorduin 1840, p. 4.
115 It was not only closed to the outside world, but also secret as far as the suspect was concerned, although unlike old procedure, he had to be informed of the charge (De Bosch Kemper 1840a, p. 244 and p. 77-78 resp.).
116 Noordziek 1887.
117 Noordziek 1888, p. 204-205.
phase in the Netherlands would be public. The other form of public participation, the jury, was a different matter. The government was inundated with petitions calling for reinstatement of the jury, again from the South where the press accused the government of ‘taking away from the nation this bastion of freedom’.\textsuperscript{118} Many legal scholars in the North also wrote about the subject, but, like the Northern representatives in the States General, coming out against jury trial.\textsuperscript{119} The prevailing view was that the courts – where the judges were from the same social classes as they had always been – were much better able to conduct a rational investigation into the truth; allowing ‘people’s justice’ would be to introduce an undesirable and uncontrollable element of irrationality.\textsuperscript{120}

Because the Southern Netherlands were in the process of splitting off from the Kingdom after 1830, the draft was adapted to the new constitutional situation and was eventually accepted in 1838, the rules of procedure remaining more or less as they had been established ten years earlier. The position of the prosecution service was greatly strengthened. Not only did it retain one of the functions it had had under the French administration, monitoring of the court, the new code removed much of the ‘unconscionable power of the judge of instruction’\textsuperscript{121} in pre-trial investigation and gave a greater role to the prosecutor who could request the district court to allow the judge of instruction to start an investigation. It would also be the prosecutor, and not the judge, who could ask the court to admit a prosecution (replacing the complicated system of the \textit{chambre d’inculpation}).

This partly reflected criticism of the new code. While some thought it gave too few guarantees to suspects, others felt it protected individual freedoms but did not give the criminal justice authorities sufficient means to protect society against criminals. Sources differ on whether torture was still possible pre-trial,\textsuperscript{122} but there was a definite desire to be able to act quickly and efficiently in a criminal investigation and not to be burdened with (too much) judicial control.

\textsuperscript{118} Noordziek 1887, p. 1-2.
\textsuperscript{119} Bossers 1987, p. 102.
\textsuperscript{120} Noordziek 1887, p. 98.
\textsuperscript{121} Drenth 1939, p. 211.
\textsuperscript{122} Drenth 1939, p. 214 and p. 216 resp. cites the highly critical \textit{Courier des Pays-Bas} from 1829 as reporting that pre-trial-detention was possible in all cases and that the investigation was ‘\textit{Mise au secret. Torture à volonté}’. On the other hand, he also refers to the opinion of a contemporary author that the code of 1838 was less clear and concise than the 16\textsuperscript{th} century Royal Criminal Decrees, ‘however good the abolition of torture may be’. We may presume that, while the use of torture had probably not died out entirely, but it was gradually disappearing.
3.4.2.3. Reorganisation of the Judiciary: Prosecution Service and Provincial Autonomy

The drafts of the Law on the Organisation of the Judiciary contained the provision that public prosecutors must follow the King’s orders with regard to justice and policing. The government maintained it had the right to give orders to members of the public ministry, who were ‘gens du roi’. The following draft of 1827 brought the matter more clearly to the fore. Another provision provided for dismissal of a prosecutor, should he fail or refuse to obey the King’s orders. A principled debate ensued: was the public ministry part of the judiciary or of the executive: should it be free from all political influence and bound only by the law, or by the decisions of higher executive authority, i.e. the King. Liberal critics were adamant: only the law governed matters of criminal justice and thus prosecution, and the prosecutor should be completely independent from government, part of the third judicial power of the state. While he might represent the King before the court, he also represented the people: in short, the prosecutors were ‘gens de la loi’. Supporters of the opposite position were equally clear that criminal justice was not always a matter of law, because the public interest might not always require prosecution. The government left no doubt what this entailed: ‘a nation or civil community cannot be regarded as active in itself in the promotion of its interests, for it has entrusted them through the Constitution to higher authority’. A prosecutor therefore had a duty to prosecute if the public interest so required, but equally a duty not to prosecute if it did not. This draft was accepted in 1827 and became law in 1835 with the position of the prosecutor – appointed and dismissed by the King and under his orders – intact. Another, related matter for disagreement was who was to decide in cases of conflicting jurisdiction – the court or the executive, and whether decisions by the local and central administration could be subject to judicial review. While this is only obliquely related to criminal justice, one of its aspects, whether decisions by the administration could be reviewed by the courts at all, was to come up again in future in relation to the prosecution service. On this, no agreement could be reached, another indication of how reluctant the government and legal opinion were to accept the full consequences of legality and trias politica.

Control over the prosecution service gave the King considerable power in the unification of criminal justice, but it was undermined by the matter of the provincial courts – and here opposition came not from the liberals but from the aristocracy. Provincial Courts had replaced the Courts of Assizes (the Imperial court becoming a Dutch Supreme Court of cassation), but the question now arose whether each province was to have its own appeal court. A system whereby each province had its own court would allow justice not

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123 See extensively on this subject: Pieterman 1990. This paragraph is based on p. 29-54.
124 Original in Dutch quoted in Pieterman 1990, p. 43.
only to be dispensed according to local needs and customs, but also according to provincial aristocratic interests. This return to provincial sovereignty was both the main issue for the critics, and one of the main arguments of the supporters, who maintained that provincial courts fitted the mentality of the nation, whose forefathers had forfeited their blood for the right not to be called before another court: the system of provincial courts remained in the draft.

In all of these issues, the growing division between North and South played an important part, with the Southern representatives increasingly opposed to the government and the King. They did not have a history of provincial sovereignty and had been under centralist rule for many centuries, but they also had a hearty distrust of traditional administrative power and were much more open to the counterforce of such enlightened principles as trias politica and legality. The South’s discontent with its part in the Unified Kingdom of the Netherlands was further exacerbated by the fact that it had a much stronger economy but was heavily taxed to pay for the Northern deficit, while the matter of language had become a major issue after the King decreed in 1823 that Dutch was to be only language in Flanders. In July 1830, riots broke out and by October the independent state of Belgium was proclaimed, recognised by the major European powers a month later. William refused to accept the new state of affairs and embarked on an invasion in 1831 that was originally successful but had to be abandoned after the French intervened. He did not acknowledge the secession until forced to by international treaty in 1839 (when the country officially became the Kingdom of the Netherlands), and abdicated soon after.

3.4.3. 1840-1890

After the secession of Belgium, criticism of autocratic politics increased in the Netherlands and, as in the first Dutch Republic, two aristocratic factions emerged: the supporters of Orange, traditionalist and conservative, and his detractors, especially the merchant regents of Amsterdam, known as conservative liberals. While their adherence to liberalism was mostly lip-service, they nevertheless more than once joined forces with the bourgeois democratic movement – so paving the way for the success of its most prominent figure, J.R. Thorbecke, and for the end of the traditionalist aristocracy as a separate faction. Much of Thorbecke’s career was taken up with extending the franchise and designing a new Constitution.

The revision of the Constitution that took place at Thorbecke’s instigation in 1848 was strongly supported by the old king’s successor, his

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125 The well to do classes in Flanders spoke French and regarded Dutch (Flemish) as a peasant language. To this day, the ‘language issue’ continues to plague Belgium and Belgian politics.
126 Pieterman 1990, p. 82.
son William II, a much more amenable man than his father and, possibly the more plausible reason, fearful for his throne given revolutionary events elsewhere in Europe. The Constitution abolished the exclusive enfranchisement of town citizens, extending the vote to all tax-paying men of over 23, and to intellectuals with a university degree who also demanded that appointments to influential positions be no longer based on family connections and status but on expertise. This was not to be decisively effected until 1905, but what did immediately take effect was a constitutional principle against which William I had always resisted: ministerial responsibility for actions by an inviolable King that effectively took away the King’s direct powers of government.\textsuperscript{127} 1848 also saw the inclusion of an article declaring that criminal trials must be held in public.\textsuperscript{128} The Constitution also required yet another reorganisation of the judiciary. Unsurprisingly, these socio-political changes were not without consequence for the criminal justice system, for they heralded the general reception of enlightenment ideas whose consequences had been regarded as ‘un-Dutch’ before 1840. But as always, change was tempered by legal tradition and culture.

3.4.3.1. Another Reorganisation of the Judiciary

It took from 1848-1873 to reach agreement on the new organisation of the judiciary, one draft following another. In 1870, the Dutch Association of Jurists (\textit{Nederlandse Juristen Vereniging} – NJV) was established to reach consensus among legal scholars. It proved impossible. By 1873 the different positions had become entrenched.\textsuperscript{129} Again the appeal courts and the position of the prosecution service were major issues. How independent was the judiciary, was the prosecution service part of it and could a centrally unified state accommodate provincial autonomy?

Thorbecke’s commission that drafted the constitution was quite clear that public prosecutors were ‘\textit{gens de la loi}’. All members of the prosecution service were to be appointed for life and their decisions based solely on the law with no (‘arbitrary political’) interference from government. The Constitution of 1848, however, reserved a life appointment for the procurator-general at the Supreme Court only. By 1873, the debate had crystallised into what was really at stake. It was agreed that the law set limits

\textsuperscript{127} The Constitution of 1848 was the turning point at which the Kingdom of the Netherlands became a constitutional monarchy and the King lost much of his power. While William II made no problems about this, saying to Thorbecke in 1848 that he had ‘become a liberal overnight’, he died in 1849 shortly after addressing the new Second Chamber for the first time. His successor, William III, resembled his autocratic grandfather, but the constitutional monarchy with its restriction of royal power was a fact.

\textsuperscript{128} Tellegen 1883, p. 92 and p. 106.

\textsuperscript{129} See Pieterman 1990, Ch. 6 for a full discussion.
on the prosecution and the police they directed, and that their actions should not endanger civil freedoms of the people, but there was also the notion that their primary task was to maintain social order and stability. In fact, so general was this view that even liberal members of the States General remarked: ‘prosecutors have two tasks: the maintenance of law and order, but equally the protection of innocence’; and ‘that has always been so in this country’.130

Essentially this is a choice between the principle of legality (a prosecutor must prosecute if the law so requires, any other course of discretionary action is to invite – political – arbitrariness and abuse), and the principle of expediency (non-prosecution is discretionary and depends on whether it is in the interests of society – as defined by the authorities). The first principle is unwieldy, impractical and may go against the dictates of social stability. The second is pragmatic, but how can its legitimacy be secured if not the law but discretion is the guiding principle? The solution in 1873 was to leave the situation as it was, but there was a change in attitude. The prosecution, now under direct responsibility of the minister of justice, was nevertheless ‘somehow’ also part of the judiciary: there was talk of the magistrature debout (standing judiciary – the prosecutor stands during his performance in court) as opposed to the magistrature assise (sitting judiciary – the judges remain seated). The Procurator-General would be appointed for life, accountable only to the law, the rest of the prosecution service would be politically accountable through the minister to the States General. Extra guarantees ensured against abuse: the court should refuse to admit unlawful prosecution or acquit the defendant, and could in certain cases order prosecution to be brought if non-prosecution amounted to error or negligence.

Few actually maintained that the public ministry should be completely independent, but surprisingly, of those who did several were (liberal) conservative. This was in no small part a matter of political opportunism, for conservatives were in favour of maintaining the courts of appeal and thus united in opposition to a powerful central administration. The battle for provincial courts had already been lost, as the 1848 Constitution spoke of Courts of Appeal, not Provincial Courts and added ‘as many as shall be necessary, if any’. Despite it being a rearguard action, some conservatives still defended a system of (autonomous) provincial courts, in order ‘to regain our real Dutch originality’.131 Liberals, on the other hand, thought the current situation too backward-looking, too expensive and insufficiently equipped for the present and future, one member even advocating a jury (a suggestion ignored by everyone else). Eventually a compromise was reached: there were to be five courts of appeal. The relevant law was enacted in 1875 (at the same time providing for a life appointment for the Procurator General at the

131 This and other quotations in Pieterman 1990, p. 107-108.
Supreme Court) and appeal courts constituted in 1877, but it was to be another decade before the power to nominate appointees was removed from the States-Provincial and given to the appeal courts.

3.4.3.2. Sentencing and Punishment

After the scaffold and classic Dutch corporal punishments were reintroduced by William I in his 1813 Decree, sentencing was still governed by the French Code Pénal and so it was to remain until the Dutch Code of Criminal law of 1886. The French Code left little room for discretionary sentencing. In the first decades of the 19th century, public opinion was already turning against the public spectacle of punishment and it was increasingly difficult for Dutch courts to impose the harsh punishments envisaged by the 1813 Decree. Yet they had no choice if the Code Pénal with its mandatory sentences did not also stipulate imprisonment. In the first half of the 19th century, a pardon from corporal punishment – the only possibility – was a means for the government (formally the prerogative of the King) to mitigate the damage done to public order and authority through the execution of punishments no longer regarded as legitimate. It was used with increasing frequency. The public scaffold began to disappear. It was becoming socially unacceptable for the upper and middle classes to attend executions and to openly defend corporal punishment, while the death penalty began to arouse so much protest that the Minister of Justice suggested executing people behind prison walls. Most corporal punishment was abolished in 1854; capital punishment followed de facto in 1860 and by law in 1870.

While the debate on the abolition of the death penalty was heated, those in favour invoking deterrence but especially retribution (often on religious grounds), the abolitionists easily won the day. Their most important arguments were utilitarian: a sufficient level of crime control with as few material and immaterial costs as possible (the death penalty is not a necessary instrument to maintain public order); and humanitarian: the death penalty is cruel and unjust and violates both the ‘evolving standard of decency’ and principles of justice. Importantly, the minister also argued that deterrence was not about public punishment but about the inevitability that sanctions would follow law breaking, and raised arguments of legitimacy: the state would be emphasising its own inadequacy by attempting to maintain public order by means of capital punishment in the face of public disapproval.132

3.4.3.3. A Dutch Criminal Code

The abolition of corporal and capital punishment and the disappearance of the scaffold that were effectuated with a large majority in the States General, reflected the growing socio-political consensus on the nature and function of punishment, and the type of Criminal Code the Netherlands needed. Until then, it had been impossible to come up with a draft code that had any chance of acceptance by the States General. By 1870, the situation had changed. Since the middle of the century, scholarly debate had focused on imprisonment, and the best, most effective means of incarceration. In 1851 the government opted for a period of isolation and cellular confinement (rather than communal prisons). Said to enable and encourage the prisoner to admit, contemplate and regret his misdeeds, it fitted new insights that punishment was less about deterrence and retribution than about improvement and rehabilitation. There was also a general feeling that criminal justice was not always the best way of dealing with social problems, given that it might go against the public interest, and required scope for discretion – for the prosecutor in deciding whether to prosecute, but also for the judge in considering the facts of the case and the most fitting punishment. Aversion to French codification for the simple reason that it was French had disappeared, but it was obvious that the legalistic and yet draconian Code Pénal no longer met the requirements of this evolving legal culture. Dutch scholars were looking to Germany, where unification and the introduction in 1871 of a code for the whole territory (Reichsstrafgesetzbuch) had boosted legal scholarship and interest in legal methodology and doctrine.

The Dutch Criminal Code that was drafted by a committee between 1870 and 1879 and entered into force in 1886 was strongly influenced by German doctrine, though much tempered by the Dutch dislike of the over-theoretical. It is therefore something of a mixture for it also looked to King Louis’ 1809 Criminel Wetboek voor het Koningrijk Holland and maintained some elements of the Code Pénal. It tells us much about contemporary Dutch attitudes on criminal justice. In the new organisation of the judiciary, the abolition of Courts of Assizes, juries, and chambres d’inculpation, and the lesser role of the judge of instruction compared to his counterpart the prosecutor, there was no longer need for a three-tier system of offences. The Criminal Code knew only crimes (misdrijven) and misdemeanours (overtredingen) under the first instance jurisdiction of district and cantonal courts respectively, with appeal to the higher court. It was simpler, more systematic and infinitely less legalistic than the Code Pénal. It attempted no definitions of dogmatic concepts such as dolus, culpa, duress, preferring as the preparatory committee put it ’to rely on the judge’s common sense’.

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133 In general on the legislative history of this code: Smidt 1881; Bosch 1965.
134 Bosch 2008, p. 79.
135 Bosch 1965, p. 41.
And it not only removed mandatory sentencing, but introduced a wide margin of discretion for the judge: a general minimum sentence of 1 day in prison or 1 guilder fine and a specific maximum for each offence.\footnote{The legislator had a definite preference for imprisonment in cases of crimes (at the time, much was expected of prison in terms of both rehabilitation and deterrence) and deliberately kept the maximum fine low in order to induce the judge to impose a prison sentence.}

A very specific difference to both German and French criminal justice at the time, is not to be found in the law but in its ideological underpinnings about the function of criminal law and punishment, and the role of the state that were eloquently articulated by the Minister of Justice, Modderman. The minister brought to both the preparatory committee and to the explanatory memorandum and political debate a degree of scholarly wisdom not often found in politics (he had been a professor of law at both Amsterdam and Leiden Universities at a very young age). His magnificent speech to the Second Chamber on why the death penalty should not be reinstated (a minority had proposed it should), is still quoted today. But he also infused the Code with a general spirit: many injustices, said Modderman, can be dealt with by means that are less intrusive and painful to the perpetrator, victim and society than punishment under the criminal law. For that reason the criminal law must always be subsidiary to these lesser infringements on individual freedom, a last resort, ultimum remedium. This led to many criminal offences being abolished (the idea being that they were better dealt with in other ways). But, more fundamentally, it is also the substantive counterpart of the procedural principle of expediency.

### 3.5. The Modern Era: Dutch Criminal Justice in the 20th Century

It is a moot question whether a Dutch system of modern criminal justice began in the last decade of the 19th century or in the third decade of the 20th. The answer rather depends on what we call modern. By the end of the 19th century a criminal code and judicial organisation which still apply were already in place. However, a new code of criminal procedure did not appear until 1926, around which time insights from the new science of criminology were challenging the enlightened thinking about crime and punishment on which the Criminal Code was based. In any event, politically the Netherlands left the 19th century behind in 1917 when a new Constitution introduced universal suffrage – in the same year for men and in 1919 for women – and election to the Second Chamber according to a system of proportional representation.
3.5.1. From 19th to 20th Century: a New Political Order

The 19th century system of suffrage based on income and status ensured that only the upper classes and well-educated ever reached positions of power, so that the urban elite and professional classes were sorely over-represented. This favoured (conservative) liberalism, but its moderately enlightened ideas and libertarian individualism, and in particular the idea of an agnostic unified state, in no way reflected the feelings of the disenfranchised. It was too easily identifiable as the legacy of the life-style and mentality of the regents of Holland to attract the great mass of the people. Moreover, liberalism was ‘god-less’ and the great majority of the Dutch population was religious. At the same time, towards the end of the century the Netherlands was entering the industrialised age. The growing needs of industry, a rising birth rate and a crisis in the price of agricultural products led to rapid urbanisation and its accompanying phenomenon, the rise of an urban proletariat.

These factors undermined the position of the established elite. Growing social and political discontent was exacerbated by the sudden appearance on the stage of a charismatic, zealously protestant leader, Abraham Kuyper, a member of the elite but with a message that was eminently suited to the times. Kuyper organised the masses around an ideology that regarded the state as merely the ‘tool of divine will’, required to grant other forms of human organisation (family, association, community) ‘sovereignty in their own circle’. This by no means implied sovereignty of the people, which Kuyper regarded as a ‘deeply sinful view’. The political party he established in 1879 (the first in the Netherlands) was called Anti-Revolutionary Party, for he eschewed the ideology of Enlightenment and Revolution. His political ideal appealed to the religious sensibilities of the Dutch, especially the disenfranchised petty bourgeoisie, self-employed and small wage earners, while allowing for the social, local and religious divisions that still existed despite all attempts at unification.

The protestant ARP was followed by a Catholic party appealing to the Catholic segments of the same disenfranchised population. Socialism did not manage to organise in the same way at first, partly because aversion to its violent manifestations abroad led to inner divisions, and partly because many potential supporters were more attracted to political movements reflecting their religious beliefs yet professing to promote their economic interests. Moreover, the House of Orange, represented by the young Queen Wilhelmina, was again a binding element – a cause to rally in opposition to

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138 That this happened relatively late in comparison with other European countries, was due to a number of factors, most importantly excessive economic reliance on successful exploitation of the East Indian colony and the liberal aversion to government interference in social economic affairs.
calls for revolution after the First World War. But more than the monarchy, it was the paradoxical result of the political opposition to the liberals that held the country together. In 1896, an extension of the vote to house-owners, those with savings, wage earners above a certain level and those with an education brought the religious parties and one or two socialists into parliament. Yet their deep social and religious divisions did not prevent a compromise on the most pressing issues, including legislation to regulate abuses in industry and universal suffrage.

On the contrary, this development opened the way to a Christian democracy based on emancipation of the social groups who had been the ‘victims of history’. But it was a democracy in which those groups had no means of participation other than to vote every four years. In 1918, political representation was still in the hands of the elite, no longer the liberal elite but the leaders of the now enfranchised and politically organised segments of the population, or ‘pillars’ as they came to be known. Pillarisation (verzuiling), a modification of Kuyper’s vision of a state as a divine tool and sovereignty in one’s own circle, became the structure around which Dutch politics were to be organised until the 1960s. Pillarisation permeated every aspect of the community. Each pillar, protestant, Catholic, liberal and socialist, provided the social organisation of the lives of its members. Education, trades unions, hospitals, media, football clubs, holiday camps, political parties and much more, with an overarching structure provided by the national constitutional state, all were directed by the elite of the pillars with their specific ideological beliefs, who held the reins of political power. Proportional representation and universal suffrage meant that each pillar was represented, but that a coalition government would always be unavoidable. The result was a political structure in which elite representatives of different sections of the population governed by compromise and consensus on what the national and public interest required. Their respective electorates lived their own separate lives according to their own interests and ideology. It made for a peculiar form of stability and tolerance, guaranteed by the authority of the elite within each pillar, not based on recognition and acceptance of difference but on indifference to the existence of others as long as it did not intrude on the closed sovereignty of one’s own circle. Far from promoting participation of the people, let alone sovereignty, these politics of pacification and accommodation reinforced social acceptance of and confidence in the

140 The Netherlands remained neutral and did itself no economic harm in the long run, but the last year of the war brought rationing and discontent and a short-lived revolutionary movement.

141 De Voogd 1996, p. 204.

142 At first, the socialists were shut out of this political arrangement, but from the 1920s onwards, the more moderate party also became part of pillarised politics.

legislator and above all the government as the primary definers of the interests of society that would always override interests of the individual.

A legislator and executive secure in the belief of the electorate that they could be trusted to act in the public interests of society, has little need of external demonstration of its legitimate exercise of power. In the original concept of Rechtstaat and procedural guarantees that accompany it in criminal justice, external control by the judiciary secures the rule of law and completes the division of power. Legitimacy depends on legality and transparency, in its most radical form through the jury which guarantees participation of the people, but in any event through a public trial demonstrating supremacy of the law and subordination of the executive to it. These aspects of trias politica were already compromised in Dutch criminal justice.

3.5.1.1. The Prosecution Service

At the beginning of the 20th century, the issue of whether decisions by the administration could be subject to judicial review was still unresolved. After an initially fierce debate, by 1920 fewer and fewer politicians could be found to support the idea. The arguments of the protagonists were those of Rechtstaat. Those against judicial review, who carried the day, drew on the particular form of democracy that now characterised Dutch political arrangements and on the traditional reliance on pragmatic solutions rather than legalistic ones. The interests of citizens are those of the community, so ran the argument; in a parliamentary democracy that community administers itself through its representatives. It is thus for the administration to decide what best promotes the interests of society within the wide margin of the law. Legalistic adherence to rules, what the judiciary is qualified to monitor, is not necessarily the best way of promoting those interests, so that ‘objective social policies should have priority above abstract and theoretical demands of justice’. This is tantamount to saying that the citizen must simply trust the administration to deliver whatever form of pragmatic justice it regards appropriate.

This brought up the position of the prosecution service again. Since 1873 there had been consensus that the prosecution service formed part of the executive and at the same time of the judiciary: it was bound by the law and at trial answerable to the court, but also to parliament through the minister of justice to whom it was subordinate and whose orders it was bound to obey. It was also agreed that the principle of expediency governed prosecution that should not be instigated if the public interest required

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144 See under 3.4.2.3. On the whole debate: Pieterman 1990, Ch.7.
145 Pieterman 1990, p. 171.
otherwise.\textsuperscript{146} In 1905, because the prosecution service was choosing not to prosecute the new social-economic offences, the question arose as to whether expediency could set aside not only prosecution in specific individual cases, but the general enforcement of specific laws as a matter of policy. At the time, leading members of the prosecution service thought not,\textsuperscript{147} but the seeds were sown for the underpinnings of what had always been, since the Republic, pragmatic tolerance of criminal behaviour if other interests so dictated that was also supported by the idea of criminal law as ultimum remedium.

3.5.1.2. \textit{The Necessity of a New Criminal Procedure}

In criminal proceedings – from the decision to prosecute through the pre-trial and trial stages to the execution of any sentence if the court came to a guilty verdict – law and policy dictated the limits of what the executive could do in the maintenance of law and order. The only way of knowing whether it had kept within those limits was the external scrutiny of its actions by the trial court when it assessed the results of pre-trial investigation. But the court could not be regarded as an external monitor of proceedings under the 1838 Code of Criminal Procedure, with its totally secret pre-trial investigation, a suspect bereft of the assistance of a lawyer and a formalistic trial phase. The fact that a judge of instruction was involved in evidence gathering pre-trial did nothing to alleviate the problems of secrecy. Moreover, doubts were rising as to whether an independent judge – who could not be called to account for what was essentially a task of the executive – was the right person to undertake pre-trial investigation: in practice he was seen more as an investigator than a judge.

There were attempts to draw up a new code but they came to nothing in the volatile legislative climate of the 1850s -1870s.\textsuperscript{148} By the end of the century criminal procedure was generally seen as seriously outdated, and its highly formalistic regulations were thought to hinder effective prosecutions.\textsuperscript{149} A legislative committee was installed to draft a new code at the turn of the century. It looked at criminal procedure in a number of

\begin{footnotesize}
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\item \textsuperscript{146} It proved difficult for opponents of a politically dependent prosecution service to find examples of abuse. Pieterman (p. 185) gives an interesting insight into the use of this principle in practice. At the turn of the century the more militant wing of socialism was causing the government concern: the decision was taken and presumably communicated to the procurators-general to go after its leaders. The prosecution service took a different attitude. Offences would be difficult to prove, a lost case would undermine the authority of the prosecution and a case won would create martyrs. A curious mixture of legal and political arguments, neatly reflecting that the unique position in which the prosecution service found itself could also serve to boost its independence.
\item \textsuperscript{147} Pieterman 1990, p. 184.
\item \textsuperscript{148} Bosch 2008, p. 136.
\item \textsuperscript{149} \textit{Ibidem}, p. 137.
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European countries. The committee was very impressed by Germany and, to a lesser extent, by English adversary proceedings, and when the draft came before the Second Chamber members even advocated full adversarial debate of all the evidence between prosecutor and defence on an equal footing, including cross-examination, thereby guaranteeing the full scrutiny of the public gallery and the press. As always, the result was a compromise.

3.5.2. 1926-1945

3.5.2.1. Code of Criminal Procedure 1926

Its drafters presented the new Code of Criminal Procedure as moderately adversarial and this characterisation is sometimes still heard today. New were changes to two aspects of the secret nature of pre-trial procedure. Internal secrecy, i.e. towards the suspect (and the trial court), made way for legal assistance pre-trial (with rights of privileged communication), access to evidence being gathered by the prosecution and the judge of instruction, and thus a degree of influence on what was being put together in the dossier. At trial the defence would, in theory, be sufficiently prepared to contest all the evidence orally, thus bringing pre-trial investigation under the scrutiny of the judge and, in open court, of the public and the press (the German system).

Writers at the time were rightly sceptical about how adversarial this new procedure actually was, preferring to speak of ‘moderately’ or ‘modified’ inquisitorial proceedings.\(^{150}\) Undeniably the procedure had all the hallmarks of the inquisitorial: an investigation into the truth by the State, pre-trial investigation determining the scope of investigation by an active judge at trial, a strong prosecution service and a decidedly secondary role for the defence. The sharp edges of the inquisitorial tradition had been softened, but, as was remarked at the time: ‘the essentials of inquisitorial procedure are not removed by abolishing torture, nor by giving the accused a lawyer or by appointing public prosecutors who are not also judges’.\(^{151}\)

The reference to torture is interesting, given that the most contested provision of the new code forbade undue pressure against the suspect and prescribed a caution by the interrogator that he had the right to remain silent. Many thought this quite mad. Van Heijnsbergen called the caution ‘the product of a weak mind’, contradicting the principle that the state must search for the truth by all appropriate means; it was ‘a sign of decadent times that the legislator would stoop to undermining the authority of state organs’.\(^{152}\) Others protested that ‘surely criminal procedure is about revealing the truth and eliciting the facts’, in the first place from the suspect who knows best what happened. During the parliamentary debate, someone


\(^{151}\) Van Heijnsbergen 1929, p. 332-333.

\(^{152}\) Van Heijnsbergen 1929, p. 89.
muttered something about ‘fair play’; a fellow member shot back: ‘this is not a game of dice so that we have to worry whether the one party has more chance than the other – no, we must guarantee that the truth is found’.153 Evidently, the caution that the preparatory committee had admired in English law went against traditional thinking about pre-trial procedure in the Netherlands, where the whole point had always been to make the suspect speak. The caution however remained in the Code.

Whether prosecutors were not also judges, is debatable. The Code reinforced the position of the prosecutor by now legalising the principle of expediency, and in 1921 he had already been given the power, sharply reminiscent of composition, of what is known in Dutch as transactie, literally: transaction. The suspect could ‘buy off’ the prosecution by paying a sum of money while the prosecutor lost the right to prosecute. Restricted to misdemeanours, transaction was subject to judicial scrutiny only if an interested party complained.154 Formally, it was not considered an act of prosecution but a contract with the prosecutor and the money not a fine but a condition of the contract. It was for the prosecutor to decide, after impartially weighing the interests involved. Not appointed as a judge, his legal authority certainly extended to quasi-judicial decision-making.

3.5.2.2. Business as usual

The idea behind the new Code was that the suspect would be protected against undue (pre-trial) infringements of his freedoms by the impartial prosecutor, his hierarchical supervision over the police and that of the judge of instruction over the prosecutor; invasive investigative methods (such as a house search) were also required to be undertaken by the judge of instruction. At trial, the defendant would have the right to contest the evidence so that he was given a right of access to it pre-trial. Contestation rights at trial imply the so-called ‘principle of immediacy’ (all evidence to be produced in court) and were thought primarily to aid the court in its quest for the truth by preventing it from hearing the prosecutor’s version only. Public transparency – never of great concern or at least only in a negative sense in Dutch criminal justice – was not uppermost in the legislator’s mind, although contemporary legal scholars did interpret the Code this way. Some saw immediate problems – witnesses would be afraid to appear if their evidence were to be given in public, and be intimidated from the public gallery; others welcomed the greater transparency and its spin-off, public control of both prosecutorial and judicial action.

153 See Drenth 1939, p. 224-228 for these and many more examples of disbelief.
154 In case of both non-prosecution and transactie, an interested party such as the victim could request that the Court of Appeal review the prosecutor’s decision and order him to prosecute. If no request was brought in due time or was denied, the original decision was final and ne bis in idem applied, preventing further prosecution.
The Code of Criminal Procedure entered into force on 1 January 1926. On paper it looked like a mixture of inquisitorial and adversarial procedure and it brought a number of rights for the suspect that had been lacking before, improving his position both pre-trial and in court. The provision of legal aid especially was an improvement (although there was no right for the lawyer to be present during interrogation except if it was conducted by the judge of instruction; before the police and the prosecutor the suspect was alone). But it was the form that had changed, not the substance. In practice, tradition was to play a much greater part than the Code implied and the drafters, impressed by foreign systems, had counted on.

We have seen how the position of the prosecutor had gradually been reinforced, partly at the expense of the judge of instruction. Nevertheless, the Code gave the judge of instruction a quite prominent position, but it also used a system of so-called trickle-down powers (afdruijende bevoegdheden): each provision empowering the judge of instruction to undertake invasive investigative steps had a second paragraph in which his powers trickled down to the prosecutor ‘if the matter was urgent and the interests of the investigation made it impossible to await the judge of instruction’s arrival’. Parliamentary consensus on allowing the defence access to evidence was that this was a very risky thing to do. It would endanger the whole truth finding enterprise if the right were to be used to hinder the investigation. Thus, provisions granting rights of access to information – whether written information in the dossier or the right to be present at the interrogation of a witness or a descente by the judge of instruction – also had a second paragraph: ‘unless in the opinion of the judge of instruction (c.q. prosecutor) the interests of the investigation make the exercise of right X undesirable’ (or some such formulation).

Although the legislator may not have been too much preoccupied by external transparency, the internal logic of the Code points to a system whereby direct evidence in court was to be the rule; it also appears to exclude hearsay testimony. Still, it can hardly be said to embody an absolute principle of best evidence, for it allows written evidence – in particular the written and attested reports of police officers – to be taken into consideration on a (more than) equal footing with witness testimony in court. Almost immediately after the Code entered into force, the Supreme Court had to decide on whether this also allowed the use as evidence of reports by police officers containing hearsay witness testimony given to the police during pre-trial investigation. In a landmark decision it ruled that excluding such hearsay testimony would go against the ‘spirit of the Code’: i.a. because no source should be excluded that would allow the court to arrive at the truth. Opinions on this decision are divided to this day: some maintain that the Supreme Court was merely clarifying an apparent, albeit essential,

156 HR 20 December 1926, NJ 1927, p. 85.
inconsistency;\textsuperscript{157} others that, with this decision, it radically altered the
intended nature of criminal procedure by moving the focus of truth finding
from trial to pre-trial investigation.\textsuperscript{158} At the same time, this case-law, the de
facto meagre position of the defence in comparison with the prosecution and
the prosecutor’s wide of range of powers, defused criticism that the new code
took too much account of defendants’ rights and too little of society’s need
for crime control. The 1926 Code, received with at best lukewarm
enthusiasm, was soon regarded as reasonably effective and efficient. During
the first decades of the 20\textsuperscript{th} century however, the same criticism was levelled
at the Criminal Code.

3.5.2.3. \textit{A Clash of Paradigms: the Influence of Social Science}

The Criminal Code had introduced the system of cellular imprisonment with
a period of isolation, conditional sentencing and general sentence minima
that allowed the court to take individual circumstances of blameworthiness
into account. Such forms of (deferred) punishment reflect the (enlightened)
view of man as a rational creature possessed of a free will, and
indeterminism – whether or not one commits a crime (or repents of it) is a
matter of choice – was the fundamental justification for the whole Code, from
the principle of individual guilt to the imposition of punishment. Criminal
law did not provide for a defendant absolutely unable to exercise his will for
whatever reason; for those whose will was impaired but not entirely absent,
the court had no choice but to impose a mitigated sentence in accordance
with the degree of blame. In short, the Code did not take the factor of
dangerousness to society into account. These problems, real, potential and
imagined, figured increasingly in scholarly debate on criminal justice, where
two schools of thought had emerged with diametrically opposed ideas. The
‘Classical school’ represented Enlightenment: based on indeterminism, it
considered the goal and justification of punishment to be retribution in
proportion to individual guilt; laws that reflected this and restricted the
actions of judiciary and executive were essential to check the powers of
criminal justice that formed a potentially dangerous weapon in the hands of
the state. The ‘Modern school’ drew its ideology from the emerging science
of criminology. Its key word was determinism: criminality was determined
not by an individual’s free will but hereditary factors or by social and/or
economic circumstances (family, environment, society).

In the Netherlands, the work of the Italian Lombroso, the German Von
Liszt and the French doctor Lacassagne was particularly influential. Dutch
legal scholars founded an International Association for Criminal Law where
the ideas and implications of determinism were debated. If there was no free
will, then retribution and individual guilt were irrelevant to the justification

\textsuperscript{157} Reintjes 2009, p. 19.
\textsuperscript{158} Pompe 1959, p. 145.
of punishment. Rather, the criminal law should focus on the danger to society that criminals posed and thus on incapacitation, deterrence and improvement of their situation.\(^{159}\) As such notions filtered into the social and political discourse on criminal justice, they paved the way for the ‘modernisation’ of the obviously classical Criminal Code.\(^{160}\) In 1928, a new measure was added that, although a deprivation of liberty, was specifically not intended to be punishment. It aimed primarily at protecting society from disturbed and dangerous criminals while at the same time treating them to make their return to society possible. Known as detainment at the government’s pleasure (ter beschikkingstelling van de regering – TBR), the measure was imposed by the court for an indeterminate time, but subject to regular judicial review.

The shift from ‘classical’ to ‘modern’ reinforced the existing tendency in Dutch criminal justice and inquisitorial procedure to subordinate defence rights to truth-finding, and led to changes in the Code of Criminal Procedure. In 1935, defendants lost i.a. the right to appeal against convictions in absentia and in 1937 the caution before interrogation was withdrawn. It is sometimes said that the rise of fascist ideology in Germany and Italy, with its excessive emphasis on the subordination of the rights of the individual to the needs of the community in all aspects, including law (‘Recht ist was dem Volke nützt!’), also influenced criminal justice in the Netherlands. It is true that German doctrine had always been influential and some scholars did advocate the introduction of provisions reflecting the new ideology, such as interpretation by analogy and retroactive criminalisation. But, despite the apparent success of the modern approach, the classical school of thought was sufficiently established to prevent the excesses of fascism entering Dutch criminal justice.

3.5.2.4. Social-economic Criminal Law

A final development during the interwar years was the direct consequence of economic crisis and reflected the idea that acting in the interests of society implied the state’s involvement in all aspects of life, including the social-economic. It was therefore justified in using any means necessary. In other countries, governments were plagued by increasingly powerful trades unions, but pillarised Dutch politics took much of the sting out of labour unrest and promoted consensus and compromise between political parties and government: wages should be reduced, but the economically powerful should also be kept under control through the (potential) use of criminal law to control and monitor production, conditions of labour, wages, etc. This

\(^{159}\) The Dutch Criminologist Adriaan Bonger was profoundly influenced by Marxism, seeing improvement in the social and economic circumstances and eventually political victory of the proletariat as the only means of dealing with the problem of crime. Not surprisingly, in a country where even reasonably moderate socialism struggled socially and politically, in practice his influence was negligible.

resulted in broadening the scope of a burgeoning body of social economic criminal law but with modified principles and more powers of (administrative) policing, all under supervision of the prosecution service; at the same time it gave the prosecutors the opportunity to make extensive use of the principle of expediency and transaction.\textsuperscript{161} It was to set the trend for the post-war years.

3.5.2.5. The Second World War and Occupation: 1940-1945\textsuperscript{162}

The war years, when the Netherlands were occupied by Nazi-Germany, brought untold misery and hardship, ruining the country economically (in the aftermath it lost its most important colony, Indonesia), destroying the majority of its Jewish population, dividing the nation among itself and, on the legal front, introducing German (criminal) laws that had procedures and ensured a form of order, but beyond that could hardly be called justice.\textsuperscript{163} While government and Queen fled to London in 1940, most of the administration stayed at its post at home, including the judiciary, the prosecution service and the police. The great majority did not resist the imposition of Nazi-order, to put it mildly, and the introduction of Nazi-legislation, including that which excluded and eventually destroyed the Dutch Jews, proceeded smoothly.\textsuperscript{164} Only a small percentage of the general Dutch population (smaller than they would like to think) resisted actively, among them many students, intellectuals and workers. Their political views varied, with communists and anti-revolutionaries over-represented. Many died or were later liberated from prisons and concentration camps.

Not all new (criminal) law was of Nazi origin. The administrative head of the Ministry of Justice, still active in The Hague, produced (Dutch) legislation in the form of decrees. Given increasing shortages and a booming black market, one such decree on economic offences introduced a new judicial structure, substantially increased penalties and corporate criminal liability. Meanwhile, the government in exile drew up lists of legislation that was to be regarded as never having existed (e.g. the provision introducing interpretation by analogy into the Criminal Code), was to be abolished immediately after the liberation (e.g. on morality and sexual delinquency), or; was to remain in force, including that regarding economic crime. Although

\textsuperscript{161} Bosch 2008, p. 123.
\textsuperscript{162} The whole war has been chronicled by the official Dutch war historian L. de Jong in the numerous volumes spanning many years (De Jong 1972 and 1975).
\textsuperscript{163} Mulder 1995; Von Frijtag Drabbe Künzel 1999.
\textsuperscript{164} The Netherlands lost a greater percentage of the Jewish population than any other occupied country, with the exception of Poland. It also had the greatest contingent non-German SS-troops. On the attitude of population and civil service to the persecution of the Jews: De Voogd 1996, p. 238-249 and De Jong 1972, Vol. IV, Part 2 and 1975, Vol. VI, Part 1; Moore 1997.
almost all traces of the war disappeared from criminal law when it ended, economic crimes became a lasting feature of criminal justice.

Much less lasting, although manifestly the opposite was intended, was the effect of four Decrees issued in London between December 1943 and September 1944, on a system of extraordinary justice (Bijzondere rechtspleging) to deal with traitors and collaborators after the liberation.165 ‘Extraordinary justice’ aimed at ‘swift, severe and just retribution’; the people were to participate in exacting it. Special criminal courts with professional judges dealt with crimes committed during the war, but lay tribunals judged lesser offences, brought by members of the public, not a public prosecutor; disciplinary courts handled ‘dubious’ administrative officials. Tribunals had no sentencing discretion: ten years internment was mandatory. There was no appeal on the facts from a sentence by an extraordinary court; an appeal to the extraordinary Supreme Court on points of law depended on permission by the court that had passed the sentence. (Unconstitutional) reactive penalisation by death, confiscation of all assets, denial of civil rights, permanent removal from office or profession, reflected prevailing opinion in the resistance movement and was intended to deny the ‘politically unsound’ a place in the new order, ignoring that many of the ‘politically unsound’ had usually behaved no worse than the general population: simply stood by and done nothing. It also assumed there were no grey areas in the complex issues of collaboration and betrayal, even murder, under the peculiar circumstances of the occupation.166

Before long a deeply ingrained feature of Dutch criminal justice (re-) asserted itself: a need for discretion in prosecution and sentencing. Within a year, the severity of extraordinary justice was being mitigated. Realising that there were many shades of grey, judges began to impose ever more lenient sentences. The idea that criminal law and harsh punishment might undermine the social order rather than promote it and deprive the country of the people it needed to rebuild itself, led to mass amnesties. Public opinion turned against the death penalty because there was no right of appeal. Already by March 1946 executions only took place if the Crown had considered a pardon, this led to delays – another reason for protest: keeping a person more than year under threat of death was seen as inhumane. Of 135 death sentences, 43 were carried out, the others transmuted to life. After 1951, increasing numbers of prisoners were pardoned and released, including 67 who had originally received death sentences. By 1964, all convicted Dutch citizens were free. Most government employees who had been dismissed were rehabilitated by the beginning of the 1950s, successfully campaigning for restoration of their pension rights.

166 Bennett 1999.
3.6. **1950-1985: The Modern Era continued**

3.6.1. 1945–1970: Resoration and Rebellion

After the war, as well as dealing with its immediate consequences, Dutch politics were dominated by a war of independence in Indonesia and a movement for fundamental political innovation at home. The Indonesian question was both an economic and an international political matter. The Dutch were determined to retain their source of colonial wealth by armed force, but the international community, led by the United States, forced them to agree to independence in 1949. According to De Voogd this event, coming immediately after the humiliations of the occupation, brought about a sea-change in Dutch attitudes and diplomacy: the country was forced to seek active international cooperation in Europe and elsewhere in to survive, becoming an enthusiastic and very co-operative member of Council of Europe (and signatory to the European Convention on Human Rights) and the European Union.\(^{167}\) This was to have significant effects on criminal justice after the 1970s.

The institution of the monarchy came out of the war stronger than ever before, the traditional elites (judiciary, high ranking civil servants, ministers, political leaders) with their reputation tarnished for so far as they had played no part in resisting the Nazis. The communists on the other hand and some socialists were much admired for their role in the resistance. A number of highly respected intellectuals, among them Willem Pompe, professor of criminal law at Utrecht, had either gone into hiding or been interned together as hostages by the Germans and they joined together in the Dutch People’s Movement (Nederlandse Volksbeweging – NVB). Believing that the war had been a turning point in history, their programme for political innovation was individualistic socialism: ‘a national community’ based on the responsibility of mankind.\(^{168}\) Together with the socialists they formed a majority in a cabinet of national unity after the war, the States General a provisional assembly with limited powers. It looked as if time for innovation was ripe.\(^{169}\)

However, almost immediately the NVB came up against the entrenched positions of the pillarised parties. A united trades union, attempted in 1945, fell apart into the traditional pre-war unions, plans for a national radio station were torpedoed by the elites of the pillars and the elections of 1946 showed ‘the conformism of the population virtually intact’, the new States General having practically the same distribution of seats as before the war.

\(^{167}\) De Voogd 1996, p. 258-270.
\(^{168}\) De Voogd 1996, p. 275.
\(^{169}\) The Queen also wanted a break with the past but along quite different lines that would greatly empower not only the executive but the monarchy, even to the point of getting rid of parliament. But democracy, even if of the particular Dutch kind, was too entrenched to be unseated by autocracy.
(with the exception of the Communists who made substantial gains).\(^{170}\) By 1948 it was clear there would be no political innovation. A disillusioned Queen Wilhelmina abdicated in 1948 in favour of her daughter Juliana. Pillarisation continued to dominate politics and society.

Over the years, different coalition governments compromised and agreed on the best way to promote the interests of society, and spread that message though the pillarised churches, political parties, media, and myriad civil associations. The different segments of the population lived their separate lives, mixed with their own and ignored the others, confident that the powers that be knew best. That also applied in the field of criminal justice where the curious mixture of legal pragmatism and faith in the criminal justice authorities that had taken shape in the 19th century (thought with roots much further back) and been consolidated in the pre-war decades was still the accepted way of doing things. It meant that little was to change in criminal law or procedure. The legacy the war, however, did make itself felt in two areas: economic criminal law and the ideology of punishment.

3.6.1.1. Economic Criminal Law

During and immediately after the war, the system of sanctions for economic offences had become complicated and erratic. Some came under the jurisdiction of the specialised economic criminal court, but others were subject to sanctions by disciplinary boards. Offences from the 1920s and 1930s were judged in the cantonal courts. Consequently, there was disparate sentencing for similar offences. In 1950, a uniform Law on Economic Offences (Wet Economische Delicten) came into force. Next to the normal punishments contained in the Criminal Code – but with an emphasis on fines – it also provided for special and sometimes draconian economic sanctions against behaviour detrimental to the social-economic order. It maintained many features of the wartime decree, such as specialised courts and corporate criminal liability.\(^{171}\) Enforcement was in the hands of administrative agencies but under the overall supervision of the prosecutor, whose powers of investigation (but also of intervention with special interim measures even before the case came to court) were greatly extended. Prosecutors were also authorised to offer transactie not only for misdemeanours but also for crimes.

The Law on Economic Offences reflects a way of thinking about criminal law and society of which the origins go back to the 17th century Republic, namely that the use of criminal law is not only a matter of retribution and/or protecting society from (dangerous) criminals, but also a means of ordering social economic relations. It follows that the prosecutor and criminal courts and not, as in many other countries, administrative agencies and tribunals were authorised to deal with economic behaviour

\(^{170}\) De Voogd 1996, p. 278.

seen as detrimental to those relations. From the end of the 19th century, it had been agreed that the prosecution service was primarily a guardian of social order and that prosecutors could choose the means of best promoting it (through the principle of expediency). In this light, the extended powers of transaction are logical. They also reflect another pragmatic consideration: relieving pressure on the courts.

3.6.1.2. The Movement for Humane Punishment

While economic offences came under a separate legal regime designed to hit perpetrators financially, ‘traditional’ offences still came under the Criminal Code that, although fines were also possible, was primarily focussed on the deprivation of liberty. At the end of the 19th century, much had been expected of a prison sentence and period of cellular isolation to promote repentance and improvement. Isolation involved contact only with those likely to stimulate moral improvement (clerics, in some cases family members) but in no event fellow prisoners. To prevent all such contact, the inmates of Dutch prisons wore a black hood with two eyeholes; prison churches had small cubicles so that the prisoner could see no one but the preacher. Only after several decades was it recognised that such deprivation of social stimuli can lead to serious psychological problems more likely to harm than to improve, so that, in 1929, the Minister of Justice was authorised to decide whether a prisoner be allowed contact with fellow inmates. But it was not until after the war that the essential inhumanity of Dutch prisons was generally recognised, mainly for the simple reason that so many unlikely well-educated and ‘civilised’ people, including many students and leading intellectuals, had spent time in them (a phenomenon that was to occur in other previously occupied countries in Europe). In 1946 a commission charged with restructuring the prison service around more humane views of punishment prepared what was to become the 1953 Law on the Principles of Prison (*Beginselenwet gevangeniswezen*); it introduced the principle of community and differentiation in prison regimes according to the length of the sentence and the needs of the prisoner.

It is difficult to know to what extent these reforms were based on ‘foreign’ ideas, for not only the experience of the war but also a particular Dutch phenomenon was a driving force behind it: the Utrecht School, or *l’École d’Utrecht*. At Utrecht University a multi-disciplinary group of scholars, including Willem Pompe, were developing the ideas of French phenomenology into a comprehensive way of thinking about criminal justice that centred on the experience of the criminal as a human being with individual responsibility. They refuted the Modern School and deterrence as the basis for punishment and embraced enlightenment ideology, and saw criminal procedure as limiting (i.a. through trias politica), not providing invasive state powers of truth finding. The ideas of the Utrecht School were principled and yet easily incorporated into the pragmatism of Dutch criminal justice. They were and are greatly admired for what they attempted to do but
as an influence of change they should not be overestimated. They were critical of many tendencies in the criminal justice of their time, but their paternalistic espousal of the individual offender as a person to be ‘helped’ by the system fitted the needs for humanisation and was also very much the product of pillarised society and the type of criminal justice it produced.\textsuperscript{172}

\subsection*{3.6.1.3. The Rebellion of the Sixties}

During the 1950s, the pillarised structure of politics, society and the media, in which authority and justice were accepted without question, allowed established dogmas of prosecutorial discretion and ultimum remedium to flourish. It also protected the elites from fundamental criticism by the press – even the criminal justice authorities that had not particularly distinguished themselves during the war – and encouraged low key crime-reporting. It kept both the general population and those in positions of power safely cocooned in this arrangement, and relatively insulated from alien influence despite a greater tendency to look outwards in (political) foreign affairs.

The authorities were about to get a rude shock. Like everywhere else in Europe, the 1960s were a decade of change. A rising standard of living and education, broadening horizons (mass tourism, mass communications, television), the easy availability of contraception that was to change the relationship between men and women, secularisation, promoted a turning away from accepted and thus essentially conservative norms and values. The form that this (youthful) protest took in the Netherlands was less violent than, for example, in France or Germany, but it in the long run it was to prove more socially destructive. For one by one the principles of pillarisation were discredited: the passivity of the population, respect for authority and for the monarchy, the political monopoly of the elite and the isolation of the different segments of Dutch society from each other and from alien influence.\textsuperscript{173} It goes without saying that this also affected criminal justice, although not immediately.

\subsection*{3.6.2. 1970-1985: Changing Times?}

The 1970s brought significant changes to criminal justice and legislation. They were years in which critical legal studies and criminology – the latter traditionally part of the law faculties at Dutch universities – were seen to exert considerable influence on government policy and political thought. Dutch criminologists enthusiastically spread the ideas of their ‘critical’ American and British counterparts, criticising ‘repressive’ criminal policies as the result of ‘labelling’ of the powerless by the powerful, calling for

\textsuperscript{172} See on the history of the Utrecht School and its successor, the ‘New Utrecht School’: Brants 1999.

\textsuperscript{173} De Voogd 1996, p. 283-290.
decriminalisation and mechanisms of diversion, but also, in one of the most radical versions, for the abolition of prisons and even criminal law itself.\footnote{See in general the work of the Dutch abolitionist Louk Hulsman and Van Swaanningen 1997 on Hulsman and aspects of the critical movement in the Netherlands.} In Utrecht, the ‘New Utrecht School’ was at the forefront of ‘critical criminal law’. Its intellectual leader was a professor of criminal law (A.A.G. Peters) who had also studied sociology of law in the United States and advocated purely adversarial procedure, in which the defendant was no longer an ‘object of investigation’ but a ‘subject at law’, with intrinsic rights to be invoked against the all powerful state.\footnote{Brants 1999.}

Such ideas reflected the culture of protest and innovation from the previous decade, demanding a different sort of democracy, not representation by conservative elites but participation of the people and recognition of individuality and lifestyle autonomy. Again during these years, a commitment to human rights that had been developing as a counterforce to the traditional power of the executive in criminal justice since the end of the war, was further strengthened. There was a growing awareness among legal scholars of the significance of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Criminal process in the Netherlands manifestly did not live up to the guarantees and prescribed defence rights of the fair trial provision of Article 6, especially concerning transparency and contestation of evidence.\footnote{See on the fair trial provisions of ECHR: Brants & Franken 2009, p. 32-34.} (Although, like most original States-parties, the government had signed the ECHR confident that Dutch criminal procedure was in accordance with its provisions, and it was to be a while before Dutch lawyers started bringing cases before the European Court of Human Rights – ECtHR).

### 3.6.2.1. Regulated Tolerance

This changing discourse was not so much reflected in legislation on criminal procedure as in prosecution and sentencing policy. The interpretation of the principles of expediency and ultimum remedium changed from ‘prosecution, unless the interest of society require otherwise’, to ‘no prosecution, unless the interests of society so require’. This meant that the number of cases dropped by the prosecution or dealt with out of court increased each year. Trial judges too were reacting to the new ideologies: the use of non-custodial sentences increased, the length of prison sentences decreased. The new interpretation of expediency ended the unresolved question from the beginning of the century of whether the prosecution service could, on grounds of public interest, set aside the law in both individual cases and in general as a matter
Secularisation and the accompanying disappearance of shared moral attitudes to existential questions, threw doubt on whether crimes of ‘morality’ that took no account of changing ideas on autonomy and self-determination (pornography, prostitution, drugs, abortion, euthanasia), were matters for the criminal law. The answer, regardless of the law in the books was for it to be decided by the prosecution service (and in extreme or borderline cases, by the courts).

Prosecutors came to regard their judicial role as the role of preference, seeing themselves as independent and impartial ‘magistrates’, guardians of Rechtstaat and thus also of suspects’ rights, whose further contribution to society was to promote a stable social order with the least possible resort to the strong arm of the law. Dutch criminal justice was greatly admired abroad during these years. The freedom to be oneself without fear of interference by the criminal justice authorities seemed guaranteed, the prison population was one of the lowest in the world, and the Dutch reputation for tolerance received an enormous boost. David Downes attributed this to the tradition of pillarisation, consensus and compromise and its ability to accommodate new ideas. It is certainly true that outwardly, and in their foreign policies, the Dutch were forward-looking, progressive and tolerant and that legal culture had been enriched by a commitment to human rights. But it perhaps underestimates the resilience of Dutch (legal) tradition in the face of social change and alien influence, and the dark side of pacification and accommodation.

3.6.2.2. The Paradoxical Continuity of Change

The result of the 1960s ‘revolution’ was ‘paradoxical continuity’. Politically, very few if any of the advocated changes from representative to a form of participatory democracy were implemented. Proportional representation with a low threshold for parties to enter parliament and coalition politics of consensus and compromise remained unchanged, even if the main parties of the old pillarised era sometimes needed the support of newcomers, and the religious parties eventually joined together to form a single bloc. Even the reign of a progressive government dominated by the socialists did not bring real change as far as this is concerned. The new criminal justice policies of the Seventies were also essentially an elaboration on what had always been, not

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177 Drugs – use, possession, selling, producing – were not decriminalised but divided into 2 categories – hard (heroin, cocaine etc.) and soft (cannabis). Cannabis was not really regarded as a matter for the criminal law, and neither were use or possession for own use of hard drugs, although everything remained on the statute books. All of these issues were first decriminalised de facto and, with the exception of drugs, eventually legalised. Brants 1998, p. 621-635.

tolerance as such but regulated tolerance, a well-proved means of gently coercing people into not overstepping the line set by the executive in the interests of society. The new interpretation of expediency gave the prosecution even more power to set aside the law, but the law was always there in the background – the iron fist in the velvet glove. Although during these years a law establishing independent judicial review of the administration was enacted, it exempted decisions by criminal justice authorities. It was still possible for citizens to challenge prosecution decisions (before a criminal court, or, in the event of non-prosecution through a complaint to the appeal court) but only individual cases. The policy as such was subject to neither individual complaint nor judicial review.

Changes in criminal procedure were relatively few in the 1970s, though they reflect political receptiveness to the demands by the (critical) legal community that defendants’ rights be extended. In 1974, cautions were reintroduced at interrogation pre-trial and at trial; the rules on pre-trial detention were changed, shortening the period and providing more rights of judicial review, and thus implementing a greater degree of habeas corpus (Article 5 ECHR) than had hitherto been possible; and a system of duty lawyers was introduced to provide legal assistance at an early stage of detention. But the emphasis on truth finding by all available means remained. Lawyers still had no right to be present during police interrogation, despite concerted action by the Bar Association and critical legal scholars. There were no moves to introduce adversary trial procedure, put the defence on an equal footing with the prosecution and truly render the defendant a ‘subject at law’. Again the position of the prosecution pre-trial was strengthened by the practice (condoned by the Supreme Court) of continuing police investigations after the judge of instruction had opened his own (parallel investigation). As the defence had greater access to information before the judge of instruction, this undermined the degree of ‘equality of arms’ that did exist in Dutch procedure. The practice of using hearsay testimony continued unabated.

3.7. From 1985 onwards: a New Paradigm?

Although Dutch politics of the Eighties were structurally no different from the previous decades in that coalitions – predominantly Christian Democrat and Liberal – continued to govern, the spirit of the times, socially and economically, was very different. Economic crisis meant widespread unemployment, strikes and social unrest. The no-nonsense government response was cuts in wages and benefits, and in taxes. This is probably best characterised as a Dutch form of neo-liberalism, but not of the conflict-seeking ‘Thatcherite’ sort. It pushed and persuaded towards consensus, and the fabric of society and confidence in government appeared still strong enough to prevent the sort of violence that was seen, for example, in the
UK. But in criminal justice the first cracks in public trust were appearing. It was felt that over-tolerant criminal justice policies and over-indulgent social benefits had led to a massive increase in drug-taking, (petty) crime, nuisance behaviour and benefit fraud. The media, freed from the straightjacket of pillarisation that had kept them the mouthpieces of the elites until the Seventies, were now critical of the official response to crime, and in particular of the prosecution service. Investigative journalism blossomed. The government response was i.a. a series of policy plans in which gradually more of the iron fist and less of the velvet glove became visible.

3.7.1. Re-establishing Social Control

3.7.1.1. A Punitive Reaction without Prosecution

One of the first signs of the new times was a law promoting the use of financial penalties rather than imprisonment (Wet Vermogenssancties 1983). It also extended the type of cases in which the prosecution could opt for transaction beyond misdemeanours to crimes under the Criminal Code carrying a maximum sentence of 6 years (this ruled out such offences as murder, but included, e.g., theft, burglary and assault). The preparatory legislative committee was clearly influenced by the ideology of the Sixties and Seventies in its desire to reduce prison sentences and especially in stressing that transaction would spare a suspect the painful public stigma of standing trial. It mentioned in passing that this would also save time and money. Within a few years, the primary goal of this law became to streamline criminal justice by lightening the case load of the courts, while giving the prosecutor, whose only other option would have been to drop the case, a means of sanctioning unsocial behaviour.

By now, transaction was a theoretically well-established concept, a conditional waiver of prosecution with mutual rights and obligations: the prosecutor waiving his right to prosecute, saving time and trouble, and the suspect waiving his right to a fair and public trial before an independent and impartial tribunal, saving himself the public humiliation of a trial. Still seen as a contract, Dutch legal theory has it that it thus meets the criteria of the ECtHR that conditional waivers require informed consent and are not ‘tainted by constraint’. Many, especially foreigners, see transaction as the epitome of the consensus and compromise that make for mild criminal justice policies. But in the particular framework of Dutch inquisitorial justice it is neither consensual nor a compromise. The powerful position of the prosecutor and the fact that suspects always have much more to lose make it in practice simply a matter of ‘take it or leave it’. Transaction is a pragmatic

183 Corstens 1987, p. 73-82.
instrument of social control in the hands of the executive; that it takes place without public or judicial scrutiny is justified by the judicial role of the prosecutor, its legitimacy resting on public confidence in his ability to fulfil that role in the interests of society. It is not ‘diversion’, taking the reaction to deviance away from criminal justice, nor is it plea-bargaining: in no way is it intended to put the suspect in an autonomous position to negotiate the truth.\(^{185}\)

As the 1980s progressed, this non-public punitive penalising by the executive of a majority of common offences and of most social economic crime was still regarded as an adequate response to a growing crime problem. The first of the government plans for a new criminal justice policy proposed a two-tier system.\(^{186}\) Petty crime was to be dealt with by police, prosecution service and local authorities in collaboration, but with the prosecution service as the central authority: ‘like a spider in its web’.\(^{187}\) Transaction had a part to play here, but more important was the idea of enlisting public and private institutions such as schools, shops and businesses to ‘share with the state the responsibility of monitoring and control’ of (youthful) citizens, and ‘techno-deterrence’ (such as CCTV). Many of the proposals in the report were based on criminological research by the research department of the Ministry of Justice, which was strongly oriented towards Anglo-American theory. The report’s theoretical framework, however, was very Dutch: it stressed the decline of norms and values and informal modes of social control (inevitable result of depillarisation) and thus the necessity of external controls, tacitly discrediting assumptions of the 1970s. But criminal law remained a last resort, deterrence rather than repression the goal.\(^{188}\) More serious offences could be dealt with by transaction; only some, in particular organised crime, always warranted prosecution.\(^{189}\)

### 3.7.1.2. The Policing of Serious Crime: an ‘American’ Solution

Two issues in particular were to determine the response to serious crime and at the same time public perceptions of the problem and the adequacy of that response: (corporate) fraud and (international) organised crime, especially the trade in drugs. At the end of the 1970s, a group of prosecutors – doubtless influenced by the critical legal and criminological discourse of the previous era – turned their attention to white collar and corporate crime, traditionally


\(^{186}\) Ministerie van Justitie 1985.


\(^{188}\) The term petty crime, though never clearly defined, was understood to cover such offences as vandalism, bicycle theft, minor violence, traffic offences, but also shop-lifting and burglary; these being, in the government’s view, the offences that are both most frequent and cause most public concern.

\(^{189}\) Ministerie van Justitie 1985.
dealt with out of court as economic offences, in order to remedy what they saw as an unjust inequality between economically powerful perpetrators and, usually, lower class offenders of ordinary crimes. They started to prosecute these cases as common fraud and to claim attention in the media for their efforts; finding the evidence for a conviction proved considerably more difficult than taking corporations and their executives to court.190

Such cases attracted much publicity once they reached the court stage, but faced with powerful and wealthy defendants and specialised defence teams, the prosecution service failed in several spectacular trials in the curse of the 1980s. Moreover, corporate criminals are keen to avoid negative publicity and prefer not to stand on their right to a public hearing and an impartial tribunal. They are prepared to pay to stay out of court; the very fact that they may be able to successfully contest the case gives them a powerful means of persuading the prosecutor to be flexible and propose a negotiable transaction (not a concept that fits inquisitorial justice in which the prosecution is in control and the truth paramount). The result of the fraud offensive was to persuade the public that fraud was a serious crime, but at the same time to publicly demonstrate an apparent inability of the prosecution service to deal with it. Failed trials, mistakes by prosecutors and ‘deals behind closed doors’ fuelled adverse publicity and were the remit of many an investigative journalist.191

In the field of organised crime, the police and prosecution seemed to be having more success, backed up by yet more policy plans, this time from the prosecution service and the government,192 proposing i.a. to legislate for the use of invasive and pro-active techniques of police investigation. In the 1970s, American agents from the Drug Enforcement Agency had already carried the ‘war on drugs’ to Europe, and Dutch criminal justice authorities with their tolerant drug policies were a special target. They brought with them just such techniques (undercover policing, infiltration, wire tapping, bugging, ‘wired agents’, front store operations, controlled deliveries) and, more importantly, a common law ideology of policing (the police may do anything as long as it is not forbidden in law) that was completely at odds with Dutch civil law understanding (the police may not act unless they have a basis in law).193 Special units of the Dutch police began to use these techniques and some prosecutors and even courts to condone them. The Dutch Supreme Court accepted the use of undercover agents as early as 1979, subject to much the same criteria that apply in US law to entrapment. But, with the exception of

191 Brants 1988, and Brants & Brants 1991, Ch. IX.
193 Nadelmann 1993.
telephone taps, very few such means of investigation had any basis in Dutch law and were therefore illegal.

### 3.7.1.3. A Crisis of Justice

As the consequences of depillarisation (the end of an apparently homogeneous Dutch society) made themselves felt, coinciding with a growing immigrant population and problems of multiculturalism, criminal law was cherished as the embodiment of fundamental (Dutch) norms, and in the absence of consensus on how to ensure their lasting significance appeals to the criminal justice system for enforcement became ever more frequent. During and after the elections of 1981, crime became a contentious political and public issue.\(^{194}\) Despite yet more policy plans promising a harder approach to so-called petty crime and announcing more prosecutions and fewer transactions,\(^{195}\) by the 1990s, the reaction to crime was seen as soft and inadequate. There was widespread criticism in the media, stringent demands for justice seen to be done, and an inverse relationship between the fear of crime and public confidence in the authorities to deal with it, as journalists found one mistake after another by the prosecution service and uncovered scandal after scandal.\(^{196}\) Organised crime was the one area where justice was seen to be done, at least where police and prosecutors were very visible in the media and spectacular trials were taking place; it was also where the biggest scandal was to occur.

In 1994, the chief prosecutor and the mayor of Amsterdam called a press conference to announce that they could no longer take responsibility for the operations of some special police units because of the extent of their unlawful investigations. This triggered a public and political outcry: were the police somehow out of control? Was anybody in control? An official parliamentary inquiry was instigated to examine this visible breakdown of authority in criminal justice, ‘crisis in the Rechtstaat’. All concerned, including parliament and government, came in for criticism by the inquiry committee, though it was most circumspect towards the judiciary, and most harsh on the police and the prosecution service. It uncovered highly illegal police operations of which the prosecutors had lost control (or with which some had identified, confusing their role of ‘guardian of society’s interests with crime-fighting pur sang). Chiefs of police and prosecution service had failed to direct and supervise subordinates who had enjoyed almost complete autonomy, as if there were no such thing as hierarchical and prosecutorial authority.\(^{197}\) And all because of a portrayal of organised crime in police

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\(^{194}\) Brants 1986, p. 219-236.  
\(^{197}\) Report of the parliamentary inquiry committee 1996.
3.7.2. Legislation

Criminal justice as a contested political sphere had always been a foreign phenomenon. But interestingly, even it arrived in the Netherlands and (government) criminologists and jurists looked to other countries for analyses and solutions, these were translated into legislation only if they did not go against traditional ideas. Most traffic crime was removed from criminal law and became administrative offences, a system akin to the German Ordnungswidrigkeiten; from Britain – and from critical criminology – came the idea of community service orders. But these remained the remit of the professional prosecutors and judges. Ideas gaining ground elsewhere – e.g. restorative justice – and allowing non-legal professionals to become involved in matters of justice, usually got no further than the experimental stage and were later quietly buried. The procedural laws that were enacted rested firmly in the specifically Dutch variation of the inquisitorial tradition: based on the primacy of truth-finding, they presumed and reinforced a need for secrecy, especially pre-trial, a strong prosecution service and a secondary, non-adversary role for the defence. They were tempered only by the requirements of the ECtHR, where Dutch procedure was found wanting on exactly such points. Legislation in response to the major issues – overloading of the court system, how best to react to a growing crime problem and public fear and discontent, and how to regulate pre-trial methods of investigation – was thick on the ground in the last two decades of the previous century.

3.7.2.1. Anonymous Testimony

Ever since 1926, one of the salient features of Dutch procedure had been the use of hearsay testimony in police reports contained in the dossier. According to standard case-law – based on the presumption of integrity that underlies the whole system – courts proceeded on the assumption that the dossier was accurate and the evidence obtained legally further investigation and a reasoned decision being necessary only if the defence raised the issue and could show its relevance. In 1980, the Supreme Court ruled that such hearsay testimony could also be used as evidence if given by an anonymous witness. Seen as a necessary measure in the control of (organised) crime, anonymous testimony (or refusing to call a witness requested by the defence

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198 These were the findings of the criminologists who reported to the inquiry committee. Bovenkerk, Bruinsma, Van de Bunt & Fijnaut 1998.
and/or disallowing defence questions to protect the witness or to prevent
scrutiny of police investigation tactics) was widely used at the beginning of
the Eighties, effectively preventing the defence from being able to contest it at
trial. In 1989, the ECtHR ruled against this practice in the Netherlands: the
use of an anonymous witness did not in itself render a trial unfair, but in the
specific case the verdict was based solely or to a decisive extent on
anonymous testimony and the defence had had no chance at trial nor at any
other stage of the procedure to challenge it.201

Immediately the Dutch government installed a committee to prepare
legislation to remedy the problem. The resulting law on the protection of
threatened witnesses introduced such measures as allowing witnesses to
testify in disguise or from behind a screen. It also gave the judge of
instruction the task of examining the witness who wishes to remain
anonymous in camera, establishing the validity of his claim to be threatened
and recording his testimony under oath; the defence may put questions, if
necessary by telephone or on paper, but it is up to the judge of instruction to
decide whether these are asked (or must be answered).202 The court may not
convict on anonymous testimony alone and must give a reasoned decision as
to its use. The prosecution made wide use of this procedure. Again the
Netherlands was found wanting by the ECtHR: such restrictions on the
defence may not be imposed unless ‘strictly necessary’.203 The practice of
using anonymous testimony remains a feature of Dutch trials. It now meets
the requirements of the ECtHR, if only just.

3.7.2.2. Further Amendments to the Code of Criminal Procedure

The law on threatened witnesses was one of the amendments to the Code of
Criminal Procedure that came into force during the 1990s. Others were
prompted by ongoing problems of overloaded courts, a desire to speed up
criminal process, make it more efficient, a need to tackle serious (organised)
crime and violence and, in the light of ever growing public discontent, to be
seen to be doing so. Amendments to substantive criminal law reflect this
public discourse (i.a. increased penalties, new provisions criminalising group
crime and violence, decreased tolerance of e.g. secondary drug crime). The
challenge for criminal procedure was that, while the amendments were not,
as was the case with anonymous testimony, immediately prompted by
decisions of the European Court, they nevertheless had to take account of its
case law on fair trial but without prejudicing legal tradition – in particular
the role of the prosecution and the primacy of inquisitorial truth-finding.

201 ECtHR Kostovski v. The Netherlands, 20 November 1989, Series A-166.
203 The Dutch court had allowed undercover police agents to testify anonymously in
camera, though by now the law provided less extreme measures: ECtHR Van
Mechelen v. The Netherlands, No. 21363/93.
Serious problems within the prosecution service had been revealed during the parliamentary inquiry into unlawful methods of investigation. They were partly the result, a hundred years later, of the compromise that allowed prosecutors to be both *gens du roi* and *gens de la loi*, part of the executive yet also of the judiciary. The interpretation of this had allowed the prosecution service to become increasingly independent of the minister who bore political responsibility for its actions, for it was tacitly agreed that he did not interfere in prosecution decisions; a reorganisation had installed procurators general to monitor and control the district prosecutors, but the latter thought of themselves as autonomous members of the judiciary and were inclined to resist direction by hierarchical superiors despite an increasing number of central guidelines directing prosecution policy. On the one hand, such autonomy allowed the prosecution service to regulate social relations ‘in the interests of society’; on the other it let individual prosecutors interpret those interests as they saw fit, not prosecuting when the guidelines required prosecution and – the other end of the extreme – condoning the unlawful investigative methods that had given rise to the ‘crisis in the Rechtstaat’. Organisationally weak in that no central body controlled the prosecution effectively, it was not surprising that those at the top, including the minister and the parliamentary inquiry committee sought unequivocal changes in its hierarchical structure. In 1999, further reorganisation of the public prosecution service emphasised that enforcement of criminal law is the core task of the service, but at the same time that its actions are governed by quality and legitimacy of law enforcement. It remains part of judiciary, but is now centrally organised with a council of procurators general at its head. Prosecutors at the district courts remain responsible for directing police investigations and retain their authority over the police, but the council has unlimited authority to direct both general policy and, the handling of individual cases. This applies to both decisions on prosecution and on investigation, and considerably enlarges the (centralised) power of the procurators general. The Minister of Justice is also explicitly authorised to issue instructions on general matters and, if need be, individual cases, but subject to control by the States-General.204

While this reinforced hierarchical leadership authority within the prosecution service, at the same time the role of the prosecutor pre-trial was strengthened by amendments to the Code of Criminal Procedure that reduced the instances requiring the time-consuming procedures of pre-trial investigation by the judge of instruction and investing some of his powers directly in the prosecutor. The legislative committee that produced the proposals for this legislation205 also sought means of speeding up criminal

204 Wijziging van de Wet op de rechterlijke organisatie en enige andere wetten in verband met de reorganisatie van het OM en de instelling van het landelijk parket. See Corstens 2008, p. 111-115 and the literature cited there.
process. One suggestion that quickly became law was to allow the police to offer transaction for simple and less serious crimes. Another was a shorter court procedure for defendants who had confessed. This was immediately taken to mean a sort of plea-bargaining and severely criticised as ‘introducing an alien element into Dutch criminal procedure, undermining the very principles on which it is based’. The Minister of Justice decided not to present the proposal to parliament.

But what was needed, was to bring the use of pro-active, secret investigation into line with modern methods of crime control and constitutional requirements of legality, especially because, after publication of the parliamentary inquiry, the courts appeared less inclined to take police evidence at face value. An extensive addition to the Code of Criminal Procedure, specifically authorising secret proactive investigation entered into force in February 2000. It too furthered the position of the prosecutor (‘there can be no autonomous domain belonging to the police’, says the Explanatory Memorandum) and contributed to the new role of the judge of instruction: less and less an investigator, more and more a judicial official as part of hierarchical control of the prosecution (issuing warrants for invasive investigations such as telephone tapping and bugging), and an institution where information that cannot be shared with either defence or public is examined in camera (e.g. the use of specific investigative measures that the prosecution wishes keep secret). A controversial proposal for with ‘crown-witnesses’ (testimony in exchange for a reduced sentence or immunity, as in adversary criminal trials) did not make it into law. Prosecutors were authorised by directive from the procurators-general to enter into such deals anyway.

3.7.3. Policing the ‘Risk Society’ and Responding to Populism

The (legislative) changes in criminal justice in the Netherlands at the end of the 20th century can be seen as manifestations of what has been called a globalised ‘risk society’. In a (very simplified) summary, the concept of the risk society holds that (perceptions of) risk and insecurity, liberalisation, privatisation, erosion of the welfare state have led to an exclusionary society, both fragmented and individualised and at the same time searching for security in the collective that is familiar and therefore regarded as ‘safe’ – a search for utopia where individuals enjoy self-determination and state protection. The consequences for criminal justice have been a state

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206 Hildebrandt et al. 1993.
209 Tijdelijke aanwijzing toezeggingen aan getuigen in strafzaken, Stcr. 20 July 2001, No. 138. This was to become law after many years. Deals are strictly circumscribed and the prosecution may never promise immunity.
210 Beck 1992 (orig. in German, 1986).
response to public demand for more crime control focussed on guarantees of security and greater punitivity; a shift from reacting to deviance to prevention and the management of risk; actuarial justice based on risk prediction; (victim) emotion as a guide to an essentially rational institution.\footnote{Stenson & Sullivan 2000; Hollway & Jefferson 1997, p. 255-266; O’Malley 1998.}

It is tempting to see Dutch developments in this light, and these consequences can indeed be seen in what appears to be a new criminal justice paradigm. But the theory of the risk society has its own risks. It tends to a mono-causal explanation of global trends and makes abstract sense on the macro-level only. It takes no account of concrete differences of both public discourse and state response in disparate countries. One of the reasons for those differences is the existence of specific (political and legal) cultures.

3.7.3.1. Populist Politics and Demands on Criminal Justice

During the 1990s, the Netherlands were increasingly committed, in the framework of the European Union, to liberalising the economy, to toning down the welfare-state, to a new ideology of meritocracy, to law and order politics. A liberal-socialist government (1994 to 2002) was a signal development: a new consensus in a new coalition, promising effective answers to social problems – the most articulated of which was the fear of crime. It was under this government that the most salient features of ‘policing the risk society’ took shape. Yet, its political style was evocative of the days when decision-making was confined to elites in the backrooms of power: so-called ‘polder politics’ implied pragmatic recognition of pluriformity, cooperation despite difference, but depended on continued public trust that this was in the interests of society and that the government truly represented the people.

This apparently consensual boat was rocked by the appearance mid 2001 of populist politician Pim Fortuyn, the first to successfully link a generally felt sense of insecurity with both anti-immigration discourse and anti-establishment sentiments. He was murdered in 2002 (an event, together with the later murder of an outspoken anti-Islam journalist, that had an even greater impact on popular feeling than 9/11), but adversarial populist politics continue. While as yet no populist party has made into government, except for a very short-lived coalition in which the followers of Fortuyn participated after his death, it is expected that his even more radical political heir (Geert Wilders) will achieve huge electoral gains at the next elections. It is too soon to know whether this means a lasting change in Dutch politics or what it implies exactly. But, like the consequences of the risk society, it is a phenomenon to which the government has had to respond in the sphere of criminal justice.\footnote{See Pakes 2004, p. 284-298, linking political developments to new criminal policies.}
Since the first stirrings of public discontent with criminal justice policies in the 1980s, giving voice to a rising fear of crime, demands for less tolerance and more ‘law and order’, successive governments – regardless of their political affiliations – have responded with legislation and policy measures that have produced a decidedly harsher penal climate. The powers of the prosecutor increased dramatically, new offences and more severe penalties were added to the Criminal Code, defence rights curtailed in criminal procedure, and imprisonment rates rose sharply as there was move away from the ultimum remedium doctrine in some areas. At the same time, the ‘Europeanisation’ of criminal justice had added a new, contradictory dimensions to national justice: on the one hand more stringent and often secret policing of organised crime and illegal migration (a discourse linking ‘foreign’ mafia with immigrant populations in the Netherlands, in which attack by dark and foreign forces and the threat of Islam is always implicit). On the other, the requirements of the ECHR stress i.a. transparency, equality, fair trial. Even if some of the guarantees implemented in legislative changes were on the border of falling below ECHR-standards, the commitment to human rights was, with one or two exceptions sufficiently established to prevent them slipping over entirely.

3.7.3.2. The Demands of the 21st Century

There are two conclusions to be drawn about the response to these pressures, national and international, at the beginning of the new millennium. The first is that it accommodated change within the boundaries of Dutch legal tradition, the second that it did not have the desired effect of assuaging the public’s disquiet or silencing its demands. The two are linked by interrelated assumptions of that tradition, which have always had their counterparts in political culture. The first is that existential interests of society are best left in the competent hands of the relevant professionals so that transparency and external control are secondary considerations. The second that, if pragmatism requires adaptation to changing social circumstances and in response to public opinion, the rationality of the criminal justice system a priori bars actual public participation other than through the democratic election of representatives in the legislative body. Populist politics brought existential anxieties and a profound political cynicism together at the beginning of the 21st century. With criminal justice still in the hands of a small professional

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213 A 1999 report on prison overcrowding by the Council of Europe’s Council for Penological Co-operation shows that, of all European countries, only the Netherlands has seen a consistent rise in the prison population over the years: from 4,000 in 1983 to 13,618 in 1997, an increase of 240% in 14 years.

214 One of these exceptions was the special high security prison that housed dangerous organised criminals. The ECHR found that conditions there violated Article 3 ECHR that forbids cruel and unusual treatment: ECHR (Grand Chamber), 15 May 2007, Appl. 52991/99 (Ramzahai v. The Netherlands).
elite, whether they could be trusted to know best was now seriously open to question. The result was ever louder demands for participation rights, for the general public and for victims in individual cases. The right of suspects to the protection of the ECHR – fair trial, privacy – was openly questioned. As well having to respond to this populist discourse, government was also faced with the consequences of international terrorism.

3.7.3.3. Terrorism

The changes to both the Criminal Code and the Code of Criminal Procedure after 2001 have been many and took place within the agreements, guidelines and directives of both the United Nations and the European Union. All have been incorporated into ‘normal’ criminal law and procedure. In general they form an extension to the recently introduced measures for dealing with organised crime, further broadening the powers of the criminal justice authorities and the situations in which matters, pre-trial and at trial, may be kept secret, and thus restricting the rights of the defence. Investigative powers in cases of the new terrorist offences in the Criminal Code may be used against persons who have not (yet) committed a crime (pro-active phase). Detention, first by the prosecutor, then the judge of instruction and finally by court order before the trial starts can extend to up to more than two years and access to the file be restricted or even totally denied for the same period. At trial, as well as threatened witnesses, there are now also covert witnesses, agents of the General Intelligence and Security Service (AIVD) or Military Intelligence and Security Service (MIVD) who may be heard in camera by the judge of instruction, allowing (secret) intelligence to be used as evidence. These are far-reaching measures, though they did not engender the public controversy that surrounded terrorism legislation in, e.g., the U.K.. It should also be noted that a minimum of human rights guarantees has been maintained. But if terrorism was relatively easily accommodated into existing law and procedure and apparently drew public approval, the government has struggled to deal with the consequences of both popular demands for participation rights and increased puntivity.

3.7.3.4. Victims

Traditionally, victims of criminal offences have no place in Dutch criminal process which relieves the citizen of any responsibility for the outcome and, consequently of any right to participate. Victims, however, formed one of the first groups to demand just that. A procedure for compensation was

215 See in general on terrorism in relation to criminal process, in particular the protection of fundamental rights, Vervaele 2009, p. 63-103, <www.uterchlawreview.org>. This article also reviews changes in criminal process in relation to other (international) threats to law and order such as organised crime and drugs.

216 See on these changes to Dutch law and procedure, Van Kempen 2009.
introduced in 1995, allowing the victim to approach the prosecutor before joining the trial as an aggrieved party with a claim to compensation, and to attempt, with the help of prosecutorial staff at the court, to come to an agreement with the offender. Depending on the outcome, the prosecutor can base his decision on whether or not to prosecute on the principle of expediency; settlements reached in this way are not open to public judicial scrutiny. Victims may now also ask the prosecutor to have a police investigation reopened by a different police force (this after the police had bungled an investigation into the murder of a child).

Government has always been very reluctant to go any further, but was finally forced to by a European Union Framework Decision requiring legislation. Yet the Minister of Justice remains quite clear on the position of the victim in the Netherlands: criminal procedure is not geared primarily towards ‘solving a (social) conflict between victim and offender’, but towards ‘the state’s reacting to the defendant’s behaviour (punishing the offender)’.217 With this in mind, measures aim primarily at ensuring that victims are informed of any decision in the case in which they are involved and of ways of obtaining compensation, and at allowing them to inform the judge as to the trauma that the crime has caused (victim-impact statement). These are victim’s rights, but with the exception of the latter, not participation rights; the victim has no formal standing as a procedural party and even the victim impact statement is thought best done in writing and via the prosecutor to avoid unnecessary emotion in court.

3.7.3.5. Proposal for a New Code of Criminal Procedure

By the end of the 1990s, the Code of Criminal Procedure had lost its original structure as a result of all the amendments of the previous years. The government commissioned research by three universities to propose a completely renewed and restructured code. They produced three weighty volumes and a final report.218 It was an immense project and what emerged was a systematic and restructured procedure that spelled, in a way, a return to the idea of inquisitorial pre-trial proceedings and a moderately adversarial trial, though the latter in serious cases only. What is interesting is that the fundamental inquisitorial assumptions of Dutch legal culture remained intact. Criticism from another group of scholars on this tacit theoretical stance219 led to an explicit justification in the final report: the leaders of the project saw no need to change what they regarded as a fundamentally satisfactory system with a primary goal of truth finding (though by fair means) and based on public confidence in a professional judiciary and impartial public prosecutors of integrity. Considering these factors, there was

218 Groenhuijsen & Knigge 2001, 2002 and 2004 respectively.
no need for increased transparency, and certainly not for participation rights. Defence rights should be strengthened, but primarily in the ‘adversary’ procedure for serious offences.220

At almost the same time, the criminal justice authorities were seeking ways to repair the damage to public confidence and their reputation, including that of the professional judiciary, and a majority in parliament had asked the government to look into the possibilities of jury trial. More research, now into the jury, concluded what the government thought: juries were not necessary in the Netherlands though mixed panels might be an option.221 The minister of justice was of the opinion that the introduction of lay-judges in any form would be too much of a break with Dutch legal tradition. This (still unsolved) matter seems to have died down as a political issue for the moment. What will not go away is new case-law from the European Court.

Recently, Dutch pre-trial procedure has been challenged by the ECtHR that in a number of cases (albeit against other countries) has named the right to the presence of a lawyer during police questioning one of the ‘core’ rights of a criminal trial.222 The idea that the defence should be present during police interrogations has been floated many times by both legal scholars and the Bar Association, but has always been refuted because it would hamper the police investigation. This is no longer available as an argument in the light of the ECtHR’s recent judgments. The Dutch Supreme Court, however, has interpreted the matter strictly within the confines of the facts of the cases in which those decisions were given and come to the conclusion that it will be enough if a suspect is given the opportunity to consult a lawyer before interrogation and is informed that he has that right. As a rule, statements made by a suspect to the police without a lawyer present should not be used as evidence. But, specifically, a suspect does not have the right under Dutch law to have a lawyer present during police interrogation.223 It remains to be seen whether this will also be enough for the European Court.

3.7.3.6. Pressure on the Courts

By the turn of the century the prosecution service had stepped up the number of prosecutions and sentencing had become harsher, but this resulted primarily in overburdening the courts and the prison system. The traditional means of relieving that burden, transaction and regulated tolerance, were no longer considered a real option, indeed, seen rather as one of the causes of declining public confidence in criminal justice – invisible and

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221 De Roos 2006.
222 Salduz v. Turkey, No. 36391/02, 27 November 2008; Pishchalnikov v. Russia, 7025/04 24 September 2009. Others such judgments have followed.
223 HR 30 June 2009, LJN BH3079; LJN BH3081; LJN BH3084.
not the ‘real’ punishment’ that ‘real crime’ warrants. For some time, politicians had been pushing for other solutions that would provide a coherent security policy, reinforce waning confidence and at the same time reduce the overload. One such was put forward in a parliamentary motion calling for the introduction of plea-bargaining and abbreviated procedures after guilty pleas to increase the capacity of the courts and yet provide the spectacle of public sentencing. The minister of justice commissioned research into plea-bargaining, following which he informed parliament that little was to be expected from the introduction of such a corpus alienum into Dutch procedure. Not only did it not fit a procedural tradition of active judicial truth finding, capacity gains would be negligible; neither would plea-bargaining put an end to the ‘undesirable’ practice of negotiation between the prosecution and (powerful) defendants. Instead of plea-bargaining the minister proposed allowing the public prosecutor to impose fines in the form of penal orders. This proposal, now law, aims to catch a number of birds with one stone: unburden the courts and yet provide ‘real’ and visible punishment, and solve the problem of those who agree to transaction and yet do not pay (approximately 25%). The imposition of a prosecutorial fine is an act of prosecution, and the fine formally a criminal sanction; the prosecutor can enforce it directly. This law is being phased in, while transaction is phased out. It is a moot question whether it will reduce overload; of the courts perhaps, but if the prosecutor is to do his job properly, certainly not of the prosecution service. It is therefore also a moot question when (even if) transaction will disappear. But the minister was certainly right in one aspect. While it is not a foregone conclusion that (an adapted form of) plea-bargaining is incompatible with a modern inquisitorial system, the penal sanction does fit Dutch inquisitorial tradition perfectly. Justified with an appeal to the prosecutor’s judicial role, it has brought us full circle: an official who is both prosecutor and judge, as he was in the Republic of Seven United Provinces.

4. Conclusions

The opening chapter of this report sets out a framework within which three interrelated concepts of criminal law and procedure, legal culture and legal transplants could be interpreted in the field of criminal justice. It posited that...
criminal law, and especially procedure, are essentially political, reflecting an ideology of the relationship of the individual citizen to the state, and that criminal justice is both the practical realisation and justification of that ideology. Legal culture is best conceived of as a legitimising dialectical relationship between politics, law and justice, determining and determined by social perceptions and expectations that are also shaped by tradition. The success or failure of legal transplants depends on whether legal innovations fall on fertile ground, i.e. whether they can be accommodated into existing legal culture because they fit particular political arrangements and social needs society at a given time. Legal transplants are never the simple implementation of alien ideas, norms, institutions; they are a process of translation and acculturation into the existing idiosyncratic legal culture of the receiving society, undergoing subtle and less subtle changes as that process progresses and/or society changes. The rest of the report is devoted to more than 1500 years of Dutch legal history and cannot, of course, be in any way regarded as a comprehensive. What it attempts to do is sketch both internal and external influences that have shaped the development of an inquisitorial tradition of criminal justice within the framework of historical, political and social developments in the Netherlands.

During early Dutch legal history, a tribal Germanic society where maintenance of community order was governed by kinship ties and settled without external interference, evolved into a centralised Empire with criminal justice administered by public authorities, courts and the beginnings of a prosecution service and of codified law. Under profoundly changed social and economic conditions, towns and dominions controlled by sovereign lords engaged in power struggles for the control of ‘law and order’. By the 16th century, these changes were manifest in a form of justice in which the leading principles were investigation by a public official, obtaining evidence to discover the substantive truth and presenting it at trial (the essence of an inquisitorial type of procedure). Where change was also influenced by the reception of Roman law, its inherent rational logic flourished in the social, economic and political conditions and needs of the authorities and the populations they governed. These changes formed the basis of a legal tradition of inquisitorial criminal process and legal culture.

With the independent Republic of Seven United Provinces, the Netherlands stepped away from legal developments elsewhere. Though retaining inquisitorial process, in the specific situation of the ‘Golden Age’ of the Republic, the contours of a national cultural tradition of criminal justice can be seen: the maintenance of law and social order by elite regent classes; a legitimising familiarity with and confidence in that administration; and pragmatism in tolerating deviance when that best served social and economic interests. The Schout – both inquisitorial prosecutor and judge – was the most powerful representative in this system. A consensual and coherent society, the Republic developed a system of justice that was arguably more lenient than elsewhere, specifically Dutch, and as such accepted as legitimate. Legitimacy also depended on tradition. In sentencing,
it was customary law; in procedure the Criminal Decrees of the former - foreign - sovereign. They were not formally implemented, but that does not detract from their influence: they were transformed by scholarly interpretation to meet both traditional expectations and the organisational and political needs of the Republic’s criminal justice system.

The Republic of the Seven United Provinces ended with what was essentially a bid for power by a relatively small group of rival upper classes and enlightened intellectuals with French military aid. It did not bring revolutionary change. Its National Assembly can be seen as the beginning of parliamentary representation, but equal rights of political influence were compromised by the continued existence of traditionally powerful segments of society and there was little incentive for radical reform. Neither did Dutch legal scholars doubt the fundamental legitimacy of the existing criminal justice system (with the exception of the often corrupt Schout.) The major issue that divided them was the use of torture. Legal practice strongly resisted any change that was seen as detrimental to truth finding. The Batavian revolution was not a matter of principle, but of gradual difference, and substantive continuity was greater than any formal change. The preconditions were not there for radical reform of criminal justice. The Batavian legislative assembly saw no need for a jury system: direct representation of the people as a corrective to a powerful judiciary in which there was no public confidence - the arguments underlying the jury in France - carried little weight where the judiciary was a trusted institution; giving such potential rights to the really powerless was simply beyond the horizon of thought.

The real struggle between tradition and change occurred in the 19th century and accommodated the intellectual, social and political implications of 18th century revolutionary and enlightened ideals and the consequences of their sudden imposition in alien laws, procedures and institutions after military conquest by the French. Their imposition was the pure legal transplant of a complete criminal justice system. But the Netherlands in no way resembled Revolutionary France. Neither the revolution nor the switch to the monarchy essentially undermined procedural tradition or brought sovereignty of the people. We see this in the immediate reinstatement of the scaffold and secret proceedings and in the arguments for not changing traditional procedure, of which the most telling are the debates on the public accessibility of criminal trials and the necessity of a jury. Both are expressions of participation in and influence on criminal justice by the people. Previous, generally held objections to the jury were still regarded as valid: part of the legitimacy of the justice system was rooted in confidence in the judiciary. The government objections to public accessibility reveal a fear that the presence of uncivilised persons would endanger truth finding and disturb the order of the court. But nowhere were arguments put forward suggesting that public trials were an indispensable counterweight to existing power structures. Trust in the powers that be, confidence in the rationality of professional justice and a desire to exclude an uneducated and irrational underclass form
the generally accepted discourse. Yet, the French legacy of reform did not disappear entirely. The French Criminal Code remained in force until 1886. There is still a court of cassation at The Hague with the specific task of guarding legal unity, five appeal courts and districts called arrondissements; the prosecution service is still the ministère publique – openbaar ministerie.

It is telling that this institution was immediately absorbed into Dutch criminal justice and became pivotal in legal culture. The position of public prosecutor resembles that of the pre-revolutionary Schout, but without his predilection for corruption. It is equally telling that the prosecution service came to be the guardian of social order through the discretionary use of prosecution according to the principle of expediency, a power corresponding with the wide discretion in sentencing afforded to the courts by the Criminal Code of 1886 and with the substantive principle of ultimum remedium. It is governed by the law, but not in a legalistic sense and requires confidence in the criminal justice authorities and social and political consensus on the goals of criminal justice and the role of authority in defining the interests of society; participation of the people in criminal justice decisions is simply counter-productive. Fundamentally, this is a continuation of ingrained attitudes going back to the first Dutch Republic, tempered by enlightened humanistic thinking and, but only partly, by the principles of legality and trias politica.

Other enlightenment ideals entered this legal culture through the emancipation and enfranchisement of the (elite) bourgeoisie and intellectuals. Public punishment no longer fitted the internalised ideology of rational humanity among the middle and upper-classes. It is interesting that the early abolition of the death penalty in the Netherlands has been attributed to its remaining, to the end, public punishment and thus a visible affront to civilised sensibilities.228 The German poet Heinrich Heine apocryphally said that everything in Holland happens fifty years later. What he actually remarked, in 1835, was the backwardness of Dutch criminal justice with its public executions and lavish archaic ceremonies.229 This tells us something about why it took so long for socio-political consensus to emerge about the form enlightened criminal justice should take. The Dutch looked to the past with some satisfaction and the (legal) culture of the Republic continued to be as attractive as its powerful families were influential. The accommodation of Enlightenment thinking into the practice of criminal justice probably did happen fifty years later than in many other continental countries. It is best seen in the classic, but at the same time very Dutch principles of the Criminal Code of 1886.

The first few decades of the 20th century saw great political and social change as a result of universal suffrage and the introduction of proportional representation. The emancipation of the formerly disenfranchised deprived the elite liberal classes of their exclusive position of power; with it went the

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228 Franke 1985, p. 136 ff.
229 Heine 1982 (orig. 1835).
enlightened ideology of a unified secular state. In its place came segmentation of society and politics into ‘pillars’ based on different religious or secular convictions, ‘sovereign in their own circle’, around which all aspects of society were organised. Their respective political leaders, always in coalitions because of low-threshold proportional representation, ran the country through consensus, compromise and accommodation. This peculiarly Dutch democracy was purely representative – of particular ideologies living apart together, not necessarily of popular feeling. It made for a socio-political structure of isolation from, yet tolerance of groups other than one’s own in which the interests of society as a whole were defined as best pursued in social and political policies by the administration. That included the pragmatic administration of (criminal) justice. Pillarisation was a socio-political arrangement that created its own legitimacy and ensured its own continued existence, in which the pillarised media played an indispensable role in dispersing and reinforcing the consensual message from the elites at the top to their respective electoral basis. It was essentially paternalistic: legitimate authority simply ‘is’ and is accepted as such, needing little demonstration.

Pillarisation fostered established traditions in criminal justice: the primacy of truth finding by and confidence in powerful elite but benevolent authorities; a belief that transparency was therefore unnecessary and even destructive and thus a need for secrecy pre-trial and no need for transparency at trial or for adversarial defence rights; and control of society by the criminal law – or not as pragmatic interests dictated – in the first instance in the hands of the prosecution service. Most of this is clearly visible in the 1926 Code of Criminal Procedure. And, if the legislator intended to break with Dutch tradition by introducing foreign principles at trial, judicial interpretation brought criminal procedure back to the legal cultural fold within a year – to the chagrin of some legal scholars who stressed the potential danger to liberty that prioritisation of society’s interests above individual rights posed.

The Second World War shook to the core a nation generally satisfied with its own particular social, political and legal arrangements. Yet, after a short period in 1945 when it looked as if all were changed and a totally new order was about to emerge, things appeared to go on much as they had been before. Indeed, pillarisation now entered its heyday. While humanistic considerations, in part a result of the experience of the war, led to fundamental reform of the prison system, there was, as yet, little criticism of the fundamentally paternalistic structure of criminal justice. Compromise and consensus – so essential for accommodation and pacification – require flexible solutions for social problems such as crime, but less exclusive and conflictuous than the actual enforcement of criminal law, while still allowing it to be used to control and shape society as the state thought best in the public interest. This in its turn requires a flexible en pragmatic approach to rules: a prosecution policy based on expediency and criminal law as ultimum
remedium; again, public participation other than through political representation is unproductive.

It would be thought that a legal culture shaped by inquisitorial tradition, a strong presence of the executive in the institution of the public prosecution service as the guardian of social order, confidence in (judicial) authority, a distrust of participation of the people and essentially monitoring and controlling itself from within, would be particularly vulnerable to the type of public demands that were voiced from the middle of the 1960s onwards. Yet, until the 1980s it was perfectly able to accommodate and transform them. The principle of expediency allowed a policy of greater (regulated) tolerance, but there is an uneasy paradox between the subtlety of such social control, the disciplining of society through consensual persuasion, and the apparent commitment to the values of individual autonomy that figured so prominently in Dutch social arrangements in the Seventies. If it made for a tolerant society, it was tolerance that was permitted by the authorities and based not on acceptance of, but indifference to the ‘different other’.

At the time, the ease with which rebellious ideas were apparently accommodated into criminal justice hid from view a number of other matters that point more towards continuity than change. The pragmatic switch from critical principles of moderate abolitionism to pragmatic instrumentalism allowed the prosecutor to punish without being seen to do so (transaction) and strengthened the discretionary power of the prosecution service. The real commitment to human rights that infused the legal community, from legislator to lawyer, was nevertheless more difficult to accommodate. Inquisitorial tradition dictated the primacy of truth finding and Dutch legal culture refuted a need for external control and transparency of criminal process – its guarantees being primarily the integrity of its professionals and hierarchical supervision. The requirements of the ECtHR with regard to defence rights of access to information and contestation (and everything these imply for transparent, democratic justice) were never fully translated into criminal procedure.

The effects of the disappearance of the normative control inherent in pillarised society, really began to become apparent in the course of the Eighties, and the response of the criminal justice authorities not until the Nineties, while contradictory (external) influences were more prominently felt than at any time during the past 150 years. On the one hand, the growing influence of ECtHR case law on fair trial rights forced changes to criminal procedure as Dutch lawyers took an increasing number of cases to Strasbourg. On the other, policies of tolerance and (invisible) regulation no longer had the desired effect of promoting stable social relations. As crime rates and problems with second generation immigrants grew, or were at least perceived to grow, public opinion demanded harsher justice. Increasingly, contested politics of law and order rather than tolerance and consensus were to become the mainstay of criminal justice. International organised crime made its appearance and required new methods of (secret) investigation that
were encouraged both by the American war on drugs and by some members of an over-independent prosecution service, i.e. an organisation where traditional means of supervision and control no longer sufficed. In the wake of what was deemed a ‘crisis of Rechtstaat’, this was to lead, in the 1990s, to extended, centralised control over both the prosecution service and the police and to further strengthening the position of the Ministry of Justice and procurators general in matters of crime control.

Yet still, as the 20th century drew to a close, it is questionable whether the fundamentals of Dutch legal culture had changed fundamentally. The move towards greater severity can still be seen as accommodation within a tradition that places the judgment of the most adequate response to social problems in the hands of the authorities and trusts to coherent executive policy to deal with it. Although a new feature of these final decades was the interaction between an increasingly vehement press and parliament, it is also a measure of pragmatism that policies take into account such demands of what is supposedly public opinion. What is ‘in the interests of society’ is a flexible concept. It is the 21st century that has placed real and perhaps unbearable pressure on Dutch criminal justice.

Paradoxically, despite the effects of terrorism on public perceptions of risk and criminal procedure, which has been amended as a result of external influence (United Nations and European Union), this phenomenon rather reinforces than undermines the legitimacy of Dutch legal-cultural tradition. The dislike of transparency, and existing procedural arrangements and internal controls have made it easier to introduce measures that are not essentially alien to the system or even contrary to positive law. That these sit ill with a number of fair trial rights does not deviate from an already existing situation, in which fundamental rights ‘increasingly function as absolute minimum conditions which have to be met […] This applies to the European Convention on Human Rights, and holds to an even greater degree in relation to other Council of Europe instruments and the United Nations covenants and treaties’.230 Neither is there any indication that the population (or the media) feel that the government cannot be trusted to take the necessary measures to combat international terrorism, or that what they have done has gone too far.

However, like other European countries, the Netherlands have also been faced with public fear of (ordinary, especially violent) crime, a shift of focus from defendant to victim, a ‘dangerous other’ discourse and demands that government ‘do something’. These are phenomena well documented in other countries too, and they have been related to the emergence of the ‘risk society’. While no government promising law and order through more criminal law can deliver on those promises in post-modern society, the Netherlands have been particularly affected. The rise of populist politics has not only linked terrorism to the resident immigrant Muslim population, but

produced a profoundly cynical attitude to politics in general and government policy in particular, resulting in demands for direct participation of the people and accommodation of the vox populi, i.a. in criminal justice. This the Dutch version of the inquisitorial tradition is singularly unequipped to deal with and it is this that will form the real challenge of the coming years, perhaps decades.

Given that these are the times we live in, it is well-nigh impossible to judge whether Dutch legal culture will eventually manage to accommodate the changes that the new situation seems to demand, whether these demands are fundamental or a (fleeting) sign of the times, or whether, in the long run, a long established tradition of inquisitorial procedure without external controls by ‘the people’ and based on trust of judiciary and executive, will prevail. Whatever the outcome, any adaptation or translation of concepts alien to traditional justice may be expected to flourish only if the ground is fertile to receive them. That remains to be seen. But the reception and possible accommodation of such concepts in practice and the gradual change in legal culture that this may bring about will always find a counterforce in continuity. Indeed, ‘[T]he new is incorporated into the patterns of the old, while often transforming them in more or less subtle ways’. Should that prove not to be the case, then the first decade of the 21st century is indeed a watershed.
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1. Introduction: The Current Social Context

The relationship between religion and the secular state has again become a hotly debated topic not only in academia, but also in politics, in the mass media, on the internet, and at the work floor. An obvious reason for the renewed interest in the relationship between religion and the secular state in the Netherlands is the strongly perceived presence of Islam and, in its slipstream, what is often referred to as the ‘re-emergence’ of religion in general.

However, the notion ‘re-emergence’ ignores the fact that religion has never been away. Perhaps taken for granted by many, the presence of Christian and Jewish denominations has always been a strong undercurrent in Dutch society. Also, the presence of Islam in the Netherlands dates back some forty years, and its entry into the Netherlands did not go unnoticed. In those early days, the interest in Islam manifested itself mainly through concern for issues such as the availability of houses of worship, possibilities for taking a day off on religious holidays, or enabling Islamic burial rites.

No doubt, important changes have taken place in the domain of religion. However, the revival of interest in religion and the relationship between religion and the secular state is the result of a combination of changes, rather than just the presence of Islam or the increased visibility of religion in general. Apart from developments in the religious domain, such as Islam and a renewed self-consciousness and vitality in the Christian world, including those of immigrant churches, and the sprawl of new forms of religious consciousness and practice that are not linked to a church, other factors are as relevant. In the domains of society and the state, changes are taking place as well. For one, the belief that Dutch society was on a linear track of secularization has been defeated. Once again, it is realized that religion is not an isolated area of life, but that it is intrinsically connected with views of the human being, society, and the state, and, therefore, with values and cultural patterns. Furthermore, religion has become entwined with a huge societal and political issue like integration, and cannot be ignored in any debate on pluralism or social cohesion. As far as the state itself is concerned, the classic social welfare state is in a process of
transformation, a process which directly affects the relationship between state and society and, therefore, also religion.

Though these developments do not always lead to changes in laws relating to religion as such, they have re-introduced religion to the realm of politics, they influence the practice of church and state relationships, they have an impact on popular perceptions, and they certainly trigger public debate. This essay deals with the constitutional and legal expression of religion and the secular state against the background of these broader developments.

Two specific characteristics of the organization of Dutch societal and political life deserve to be mentioned. First, one characteristic of Dutch society is that of the traditional ‘pillarization’. Traditionally, churches or church-affiliated organizations in the Netherlands have been active in the social and cultural domain, for instance, in schooling, in youth activities, in health care institutions, in social support, and in mass media. With the expansion of the state in these domains from the 19th century onwards and typically in the 20th century, the state has accommodated these initiatives. This has resulted in a system of, on the one hand, state facilities in these domains, i.e., neutral from the point of view of religion and belief, and, on the other hand, the existence of similar facilities, but provided by faith-based organizations. Quality requirements and financing are usually the same. After the Second World War, in the development towards the social welfare state, pillarization diminished; in many existing organizations, the religious identity became less pronounced, with the exception maybe of those that had a strong educational character and were involved with (young) children, such as elementary schools.

A second characteristic of Dutch society is that political activities are organized, among other things, along confessional lines. A strong Christian Democratic Party (CDA) exists. This party resulted when the former Roman Catholic Party merged with two Reformed Parties. Apart from two government periods in the 1980s, this party or its predecessors have been part of government coalition ever since the establishment of the modern party system. Apart from the Christian Democratic Party, two other Christian parties are represented in both Houses of Parliament.

Dutch electoral laws are based on the model of proportional representation. This means that the variety of political opinions is reflected in Parliament. Because a large variety of political parties are represented in Parliament, the larger parties always need to build coalitions. A fairly new party, the Party for Freedom (PVV), has a strong anti-Islam profile. At the national level, it is currently only represented in the directly elected Lower House of Parliament. Opinion polls predict a strong growth of its number of seats.

Each church has its own criteria for membership and these may differ widely from one church to another. These, in turn, may differ from affiliation or (non-)affiliation as experienced by believers or non-believers themselves. There is no census, so figures on religious affiliation as presented in statistical
surveys tend to be quite rough. Depending on the way statistical surveys are set up, these figures may also differ quite significantly from one to another. According to a recent statistical survey, 58% of the population regards itself as having a religious affiliation. For 29% this is Catholic; for 19%, this is one of the larger protestant denominations, which have been united since 2004 in the Protestant Church in the Netherlands (two large reformed churches and the Lutheran Church in the Netherlands); 5% is Muslim; and 6% are affiliated with another religion or belief.¹

2. Constitutional Context

Keywords in any description of the constitutional context of the relationship between religion and the state in the Netherlands are: separation of church and state, neutrality of the state with regard to religion and belief, and freedom of religion and belief. The latter is explicitly guaranteed in the Constitution (Article 6).² The principle of neutrality can be read in Article 6 in conjunction with Article 1.³ The latter guarantees equal treatment on the basis of religion and belief. Separation of church and state is not explicitly mentioned in the Constitution or in any other legislation, nor has it ever been since it was first proclaimed in 1796, the year which definitely ended the system in which the Dutch Reformed Church was the established church. Nevertheless, it can be said that it is implicitly embodied in a combination of constitutional guarantees, notably those of Articles 6 and 1.⁴ That these principles form the core of the constitutional context of church and state relationships is uncontested.

The formulation of these articles dates from the general constitutional revision of 1983. This Constitution abolished the former chapter ‘On Religion’, that was introduced in 1814 and was amended in 1815, 1848, and 1972. Most of the remaining articles of the chapter ‘On Religion’ had become obsolete. Perhaps the most relevant change that the 1983 Constitution entailed in this respect was the fact that ‘churches’ were no longer mentioned as such. As the fundamental rights in the Constitution not only protect

² Art. 6 Netherlands Constitution: ‘1. Everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law. 2. Rules concerning the exercise of this right other than in buildings and enclosed places may be laid down by Act of Parliament for the protection of health, in the interest of traffic and to combat or prevent disorders’.
³ Art. 1 Constitution: ‘All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted’.
⁴ In conjunction with these two articles, Art. 23 of the Constitution should be mentioned. This article deals with education; it guarantees freedom of education and establishes the dual system of education with publicly-run schools and privately-run (usually denominational) schools which receive the same (government) funding as publicly-run schools.
individuals, but also groups and organizations (as far as applicable),
churches as organizations also enjoy religious freedom and are treated
equally.

The 1983 revision brought important changes in the formulation of
religious freedom. It also introduced a new system of limitation of
fundamental rights in general, which was meant to increase the liberties of
the individual. Due to the sensitivity of the subject, the formulation of Article
23, which guarantees freedom of education and introduces the dual system
of public education alongside private (confessional) education funded by the
state on an equal footing, was not altered.

The Dutch Constitution does not create a hierarchy of rights; all
fundamental rights are guaranteed on an equal footing. In and through
legislation, the balance between these liberties must be established for the
particular issue at hand, also where horizontal relationships are concerned,
i.e., relationships in the private sector. This is predominantly a task of the
parliamentary legislature, as the courts do not have the right to review the
constitutionality of parliamentary legislation. The courts do, however, apply
and interpret the law in individual cases. They also have the power to assess
the compatibility of such legislation with directly binding provisions of
international treaties or decisions of public international organizations.

The Constitution has no preamble and does not contain any reference to
the source of authority in the state or to particular values; it contains no
invocatio dei. A State Committee has been established to advise on a variety of
constitutional issues, including the desirability of a preamble and, if desired,
its possible content.

3. **Theoretical and Scholarly Interpretations**

As a result of the fact that the system characteristics of Dutch church and
state relationships are not explicitly mentioned in the Constitution and the
fact that the courts do not review the constitutionality of parliamentary
legislation, the principles of separation of church and state and of state
neutrality with regard to religion and belief hardly feature in court rulings. If
they do appear in official documents, it is usually during the legislative
process or, especially in the last few years, in parliamentary debates.

The analysis of the way in which the principle of separation of church
and state has been interpreted in the policy domain, in politics, or in
scholarly writings shows a variety of interpretations. This has largely been so
ever since the principle was formulated. The principle is sometimes
interpreted as requiring a ‘strict’ interpretation or – in line with the actual
historical development as well as the current reality – as refer allowing a
more ‘lenient’ interpretation. At the same time, the principle of separation of

5 Art. 120 of the Constitution.
6 Art. 94 of the Constitution.
church and state is sometimes used both normatively and descriptively: ‘The norm is separation of church and state and the Dutch situation is that of separation of church and state’; but also as: ‘We are on our way to a separation of church and state, but we are not there yet’. Sometimes, strict and lenient interpretations and normative and descriptive perspectives are used in an implicit way, thus creating confusion.

As mentioned above, these differences of interpretation have a long history. In the last few decades, discussions regarding the interpretation of the principle of separation of church and state lost their sharp edges. In the classic Dutch social welfare state, the state covered all the basic needs of the citizens. Secularization (which also seemed to affect many societal organizations (originally) based on a religion or belief) combined with the idea that this process would further continue was the predominant mood as regards religion. Ongoing debates on political issues were supported by an underlying consensus on basic values and norms in society.

In recent years, the situation has changed. Since the 1980s, the classic welfare state has been in a process of profound change. Religious issues feature more prominently in society and the strong presence of Islam is undeniable. Value pluralism is more apparent and seems to be more fundamental than before. This brings issues of church and state, state and religion, and religion and politics back into the limelight; the interpretation of the principle of separation of church and state is hotly debated yet again. In these debates, two widely differing views on this principle re-emerge: the one promotes a strict interpretation and the other favors the current system, based on the traditional Dutch way of accommodating religion in society and state. However, among those who used to favor a mild interpretation, the question has arisen whether or not a model that worked favorably in the past can continue to work under the current changed circumstances. The interpretation of state ‘neutrality’ with regard to religion and belief also moves along these two different lines, the one favoring a neutrality void of religion (in line with the French laïcité), the other including expressions of religion on an equal footing (the traditional Dutch way).7

In the meantime, public authorities regularly face concrete questions concerning their relationship towards religion or religious communities which pose dilemmas, for example, restoring specific church buildings which are not ancient monuments and are actively used as places of worship; providing subsidies for homework assistance in mosques; or supporting integration programs in which male and female participants are taught separately as a matter of principle. Often questions like these, and many others, are debated in terms of separation of church and state (or sometimes, neutrality). At the same time, these principles often hardly seem to be the ‘right’ labels for discussing these questions. First of all, predetermined

7 A representative of the former, for instance, Cliteur 2006, p. 252-266; a representative of the latter, for instance, Van der Burg 2009.
interpretations of these principles linearly predict the answers to the question and thus simply perpetuate already pre-existing differences of opinion. Second, they limit our ability to think and speak about these issues in other ways. This is all the more apparent as, over the last decades of relative ‘quiet’, society has grown unused to not only dealing with these dilemmas but also with finding the right words and concepts to do so.

However, there is a way forward. This is to circumvent discussions about ‘strict’ or ‘lenient’ interpretations of separation of church and state and to reduce the meaning of the label to its two-fold core: on the one hand, autonomy (institutional freedom) of the church from the state; and, on the other hand, a ban on any formal role for churches in the public decision-making process. Thus limiting the scope of the principle of separation of church and state leaves room for a debate on the whole range of other issues which do not need to be discussed in either a ‘strict’ or ‘lenient’ interpretation. Rather, this approach enables the development of a nuanced and differentiated perspective on how a modern liberal democracy in the 21st century should deal with religion, not only as a private issue, but also in its societal and public dimensions.8

4. Legal Context

Law Relating to Religion and Churches: General Characteristics

The legislator observes the freedom of religion. At the national level, this is done in and through specific legislation. For instance, educational law gives shape to the dual system of education outlined in the Constitution. Mass media law, amongst other things, grants broadcasting time to churches and religious organizations. Labor law and equal treatment law take religion into account in various ways. Ancient monument law also covers church buildings. In tax law, there is a special regime for charitable organizations, including churches. The Dutch Civil Code recognizes the legal personality of churches. In privacy law, ‘religion’ is classified amongst the ‘sensitive’ data. In penitentiary institutions and in the armed forces, chaplaincy services are available, which find their basis in the law. There are laws relating to religious processions and church bell ringing. These are a few examples of legislation directly relating to religion or churches. Legislation which favors Sunday as a weekly day of rest and the designation of certain Christian religious days as public holidays find their origin in respect for religion; obviously, they have also become part of a more general social and cultural pattern.

No specific ‘law on churches’ or ‘law on religion’ exists. Until 1988, the Religious Denominations Act (Wet op de kerkgenootschappen) was in force. This law dated from 1853. Already at the time of its enactment, it did not have a

much broader significance than appeasing tensions between Protestants and Catholics which surfaced after the restoration of the Roman Catholic hierarchy in the Netherlands in 1853. It only dealt with a few elements of the vast array of church and state issues. Its main importance at the time was the unequivocal acknowledgement of church autonomy; at present, this principle is expressed in the Dutch Civil Code in the provision dealing with the church as a legal entity. This principle is concretized in other areas of the law as well.

Other examples of law which takes religion into account are those concerning burial, certain forms of conscientious objection, and ritual slaughtering.

Interlocutors on the Part of the State

There is no body, agency, or minister in the state that deals exclusively with religion. All government ministers have to take religion into account in the area of their competence. If parliamentary legislation is concerned, the same is true mutatis mutandis for both Houses of Parliament. Therefore, for churches and other religious communities, in principle, every Ministry is relevant.

Having said that, two government Ministries play a special role, those of Justice and of Home Affairs. The special involvement of the Minister of Justice is not only a consequence of the fact that he deals with a variety of issues that are relevant to churches and religious communities, such as criminal law (non-discrimination, blasphemy, immigration also of clergy, including imams). It also has a historic background. The Ministry of Justice is the legal successor to the (former) Ministry for the ‘Dutch Reformed Religion, and other religions except the Roman Catholic Religion’ and that of the ‘Roman Catholic Religion’. These were both abolished in 1871.

The special involvement of the Ministry of Home Affairs is due to the fact that this is the ‘guardian’ of the Constitution; issues of religion have a constitutional dimension. Apart from that, issues of radicalization or polarization fall within the scope of this Ministry. The Ministry takes an interest in regional and local dynamics concerning religion.

On a different plane, the Ministry that deals with Integration should be mentioned. In integration issues, religion has turned from a ‘blind spot’ into a dominant pre-occupation over the last few years. With this change, the interest of this Ministry in religion has made a similar turnaround. The change gradually emerged at the end of the 1990s. As religion is now coming more to the fore, Ministries have become more aware of the ‘religious dimension’ in policy issues.

Over the last five to ten years, religion and issues of religion in the public domain have become a widely debated topic and the focus of the debate has changed from ‘refinements’ to fundamental dilemmas. Opinions in academia, society, and politics differ as to the place of religion in law and in the public domain. Therefore, assessments as to whether developments are ‘satisfactory’ in practice and policy also differ. Nevertheless, it is fair to say,
that at the level of the national legislature, by and large the traditional way of respecting religious liberty and of accommodating religion in legislation is upheld.

**Dialogue**

Characteristics of the way relationships between religious organizations and public authorities are structured are pluralism and informality. On the part of the Dutch Churches, two main bodies exist at the national level that serve as interface for dialogue with parliament and government. The first is the ‘Interchurch Contact in Government Affairs’. It is a co-operative organization set up after the Second World War by the Dutch Churches to monitor developments concerning legislation and administration that is of concern to churches and to jointly act on behalf of the member organizations vis-à-vis government and Parliament in these areas. It is not an ecumenical organization. Parallel to the re-emergence of the debate on religion in the public domain, its membership has expanded considerably. The other national body that serves as an interface for dialogue with Parliament and government is the Council of Churches, which has an ecumenical focus and aims at presenting a ‘prophetic’ voice of the joint churches in the Netherlands. As far as policy issues are concerned, they involved issues such as poverty or the environment. Apart from this, member churches can and do have contacts with public authorities, on an informal, more or less regular basis or with respect to particular issues. A tentative and preliminary observation may be that such contacts have become more appreciated and valued on the part of the state over the last few of years.

Muslim organizations are not included in either of the two organizations mentioned above. They have their own communication channels with the public authorities. Just as in many Western European countries, the process of self-organization of Muslims required time. For a long time, the public authorities took a passive attitude towards this process. In part, this had a practical reason; in part, it was also seen as the appropriate attitude in the light of the principle of separation of church and state.

In the course of time, it became clear to the state that it was desirable to also have interlocutors for the Muslim communities. The unrest after the terrorist attacks in Washington and New York on September 9, 2001, showed the public authorities that it was necessary to reach the Muslim population in the Netherlands and to speak with their representatives. Other incidents, such as the murder of a filmmaker, public indignation over statements by radical imams, and the tense climate at the time of the riots abroad over ‘the Danish cartoons’ in 2006, and the dreaded consequences of the release of an ‘anti-Islam’ film by the leader of the Dutch Party for Freedom (PVV) in 2008

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9 The Interkerkelijk Contact in Overheidszaken (CIO). It has a strong overlap in membership with the Council of Churches.
only reaffirmed this. The policy of wait and see changed to one in which the establishment of interlocutors and the practice of entering into dialogue were actively stimulated. Likewise, the initial position of standoffishness on the part of the state also changed with respect to the establishment of an imam training programme in the Netherlands (as this required a representative and authoritative interface). For the establishment of fully fledged chaplaincy services in, for instance, penitentiary institutions, such interfaces are necessary as well.

In the meantime, various organizations have been ‘recognized’ by the state as interlocutors on the part of Islamic communities. Hindu and Buddhist organizations have been recognized too. These developments illustrate that contacts between religious organizations and public authorities work two ways.

Local and Regional Dynamics

In recent years, a whole new dynamic has been developing at provincial and notably local levels. Local ‘interreligious platforms’ have been created spontaneously or are being created. These often fulfill a variety of functions, such as organizing their joint members and making them acquainted with each other (integration), practical mutual assistance, and especially serving as an interlocutor with the authorities, to the mutual benefit of their constituent organizations (and believers) and of the public authorities.

5. The State and Religious Autonomy

Although the definition and meaning of the principle of separation of church and state is contested in the public and academic debate, the core meaning is that the state respects the internal organization of the church and that the churches have no formal say in public decision-making. These are two sides of the same coin.

As was shown above, the church as an organization is no longer mentioned in the Constitution. However, Article 6, paragraph 1, of the Constitution guarantees everyone the free exercise of the liberty of religion or belief, without prejudice to his responsibility under the law. Article 1 states:

‘All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted’.

It is acknowledged that not only individuals and groups of persons but also organizations are protected under the Constitution, also by fundamental rights other than those directly relating to religion. As the history of its enactment makes clear, Article 6 of the Constitution does not only guarantee the liberty to hold an opinion but also to manifest one’s religion in practice.
Thus, church autonomy in the sense of freedom of church organization is protected by Article 6.

This idea is borne out by the Dutch Civil Code. Churches are legal categories *sui generis* and they enjoy legal personality as such. Article 2:2 of the Dutch Civil Code simply states:

‘Churches, their independent units, and bodies in which they are united have legal personality. They are governed by their own constitution in so far as this does not conflict with the law’.

This article serves both hierarchically organized churches, such as the Roman Catholic Church, and decentralized organized churches. No prior recognition of any kind is required. Most other articles in the Dutch Civil Code generally applicable to all legal entities are not applicable to churches, albeit that analogous interpretation is not excluded. Church autonomy is also respected by other laws. For instance, no prior dismissal permit from the public authorities is necessary for firing clergy. The Equal Treatment Act, which, in brief, forbids distinction on the basis *inter alia* of religion in a wide field of societal activities, is not applicable to churches or relationships within churches. However, this does not mean that churches can act at will. Fairness, good faith, a fair procedure are elements that courts can and will use in reviewing church decisions.¹⁰

Islamic bodies are usually organized as a foundation (or less usually: association) for the employment of an imam or the management of a place of worship. In such case, the usual rules for foundations (or associations) apply. However, within this framework, organizational freedom of religion is relevant as well.

Issues of the autonomy of religious organizations not only manifest themselves where the enactment of (national) legislation is concerned. Often more subtle processes of interaction are taking place in the context of subsidy requirements or contractual agreements or simply dialogue.

As to individual liberty, this is not only relevant in relation to the state. To a certain extent, it is also relevant vis-à-vis a church or a non-Christian equivalent. As far as the state is concerned, this includes the responsibility to guarantee a (realistic) right of persons to discontinue their membership of a church or to change their religion. This has recently become an issue with respect to Islam. In the Christian domain, remarks that a clergyman made in a prayer during a church service with regard to a former member of his church for quitting the church was regarded unlawful in court.¹¹

No specific legislation exists regarding peaceful coexistence and respect among religious communities. The former ‘Religious Denominations Act’ (see above, Section 4) contained a ban on erecting places of worship within a certain distance of another. The constitutional ban on processions, which

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¹⁰ Van Bijsterveld 2001, p. 147-163; see also Santing-Wubs 2002.
formally existed until 1983, was another example; as was the ban on wearing clerical garb outside buildings and enclosed places. Currently, provisions do exist which at the same time shape religious liberty and contain limitations, such as the power of local authorities to regulate church bell ringing and the Muslim call to prayer. They are not primarily or predominantly enacted to facilitate peaceful coexistence and respect among religious communities, but they may also fulfill this function to a certain extent. The same is true for the general law with respect to public manifestations and hostile audiences.

Tensions are present in society over issues relating to religion. They find an outlet in public debate and commentaries, sometimes with indignation, over judicial and other decisions. They are also channeled through dialogue and contact with religious organizations and public authorities, and efforts on the part of the public authorities or spokespersons on the part of the religious organizations.

6. Religion and the Autonomy of the State

Religious communities do not have any role in the secular governance of the country. This would conflict with the separation of church and state. There are no representative public bodies in which churches have a seat qualitate qua, or which are reserved to representatives of certain religious denominations. Generally, speaking however, in the Dutch pluralistic society, care is taken when composing the membership of advisory bodies or deciding on appointments in the public sphere for example of burgomasters that no obvious unbalances exist in relevant backgrounds, notably political backgrounds. In this very general way, religious preferences may also play a role implicitly. It must be stressed, however, that such appointments are not made on the basis of representation of various denominational or other backgrounds. The relevant personal qualities are decisive.

Between 1848 and 1887, the Constitution contained a ban for clergy to be a member of Parliament. For municipal councils, the Municipality Act contained a similar provision until 1931. No religion has the power to control other religious communities under the law.

7. Legal Regulation of Religion as a Social Phenomenon

The law contains specific arrangements for religious organizations. A number of these are already indicated above. The special status of a church as a legal entity and the non-applicability of the Equal Treatment Act are just a few examples of regulations that were either specifically created for churches or which exempt churches from generally applicable legislation. Usually such legislation is an expression of respect of religious freedom. Other examples include respect in the Criminal Code for religious worship or regulations meant to respect certain religious burial rites. For individuals, conscientious objection is recognized in specific areas, such as conscription.
for military service; another example is legislation which respects conscientious objection for religious reasons against all forms of insurance. Occasionally, the legislature deliberately decided not to enact legislation because of the expected conscientious objections, as was the case with inoculations. There are only a few specific legal restrictions. A well-known example is the ban on conducting religious ceremonies with respect to marriage before a civil marriage has taken place (see below).

The law in general has developed against the background of a Western culture based on a morality influenced by Christianity. Many arrangements which respect to religious practices are part of the general culture, such as the calendar, the religious holidays and festivities and Sunday as a day of rest. To accommodate believers with a different ‘religious calendar’, alternative facilities are set out in the law or collective employment agreements.

Religious organizations and religious believers may benefit from legal facilities not specifically aimed at them. Examples are tax benefits for charitable purposes or grants for the maintenance or restoration of ancient monuments, including church buildings. In data protection law, ‘religion’ belongs to the category of ‘sensitive data’ along with other data as health records or criminal records. Anti-discrimination legislation works with a variety of ‘suspect’ criteria for making distinctions, including religion. The same is true for restrictions to the freedom of speech in criminal law.

Opt-out facilities also exist in the law, which started as exemptions exclusively related to religion, but which have been extended in the course of time. An example is the possibility of conscientious objection against military service, which is also possible for reasons other than religious ones.

In a pluralistic society like the Netherlands in which dominant values have changed considerably over the last few decades, the frame of reference for dealing with issues of religion also changes. What until recently perhaps was a dominant view may have become a minority view. When such views have a religious dimension, issues of religious liberty and religious conscientious objection are at stake. With the introduction of same sex marriages, for instance, the issue of conscientious objection to performing such marriages may be raised by registrars.

The state no longer keeps mandatory records of religious affiliation. Censuses are no longer carried out either. However, with the recent rediscovery that religion is more than just a private matter, the state is increasingly interested in religious affiliation and beliefs, as well as in the social effects of religion. Religious sociology is undergoing a revival in the Netherlands, in part due to the interest that public authorities take in research results.
8. State Financial Support to Religion

Financial Relationships between Church and State in General

The basic situation is that churches are funded by the believers themselves. The system of church and state relations as it exists in the Netherlands does not allow general state funding of religious activities as such. However, there is a variety of ways in which funding of religious activities takes place. It is not possible to give a precise indication of the actual amount of financial support. Nevertheless, the following analysis will probably provide some insight into its scope.

Societal Activities Provided by Churches

As was shown above, prior to the development of the welfare state, churches and church linked organizations were active in the fields of education and health, and care for the elderly. With the development of the welfare state, the state started to organize and provide more activities in these fields as well. Thus, a system developed of parallel activities: those offered on a private, often denominational basis, and those offered by public authorities on a neutral, non-religious basis. This situation continues to the present day. The increase of regulation and financial intervention of the state in these domains also affected the private providers. As a result, these activities are usually regulated by the same body of law and share in the same financial system. The denominational background and inspiration of the activities provided on a confessional basis is respected by law.

Other Socio-cultural Activities

The Dutch state traditionally has a significant role in the redistribution of financial resources through the tax system. It has developed a well-organized and complex system of facilities for the well-being of its citizens. Traditionally, and certainly at the height of the welfare state, the state (notably, local authorities) has funded many activities in the socio-cultural sector. This is often done on a voluntary basis (not required by the Constitution or parliamentary legislation) and includes cultural activities, sports activities, or youth activities. They are often carried out by the private sector but are funded through public subsidies. If these activities are also offered on a denominational basis, and fall within the objective criteria under which these subsidies are offered, they cannot be excluded on the basis of the fact that they have a denominational background. Only if denominational activities result in objective differences that are relevant in terms of the subsidy regulation, this is different. Although these subsidies have decreased

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12 See also Section 1 and nt. 4.
in the last decades due to the overall necessity of public budget cuts, the general idea is still valid.

**Chaplaincy Services**

Public institutions like the armed forces or penitentiary institutions have chaplaincy services, funded by the state. The justification is freedom of religion for the individuals concerned: they live under extraordinary circumstances as a result which they cannot take part in ordinary religious life; the state has some responsibility for people living in these circumstances so the state has a positive obligation to meet for their religious needs. The chaplains are appointed by the Ministers of Defense and Justice, respectively. The religious denominations involved nominate the chaplain to be appointed (whether Christian, Jewish or other). The Protestant Churches co-operate for this purpose. Of course, the numerical situation must be such that the employment of a chaplain of a certain denomination makes sense. Where this is not the case (certainly in the beginning for the Islamic belief), the practice developed of hiring a chaplain on a contractual basis for the services delivered.

Hospital boards employ chaplains or hire them on a contractual basis. They are funded through the general hospital funds. An Act of Parliament guarantees the availability of such spiritual care as part of the overall care that the institution provides.

**Church Buildings**

The general rule is that church buildings are financed by the churches themselves. Many church buildings, especially Christian church buildings, are listed as historic monuments. For such buildings, there are public funds for maintenance and restoration. Such funds also exist for other monuments that form part of the cultural heritage of the country, such as castles, windmills, farms, and city houses. These funds only cover part of the costs. It is becoming increasingly difficult for churches to find the financial resources for the upkeep and restoration of their buildings, listed as well as the non-listed ones. With regard to church buildings, specific arrangements exist in the fiscal sphere; their purpose it to prevent undue burdens on the owners of church buildings.

In the past, temporary arrangements have existed to support church communities in the establishment of new church buildings. This was the case, for instance, where land was reclaimed from the (inland) sea and new villages and cities were erected. For the purpose of supporting Muslims in the establishment of mosques, temporary subsidies regulations have been enacted, which have now expired.
Tax Facilities

The final category of public support for religions is that of tax facilities. A variety of mechanisms exist in this field. Exemptions or reduced tariffs are available in the context of inheritance tax and donations by groups and individuals to churches. Thus, they encourage private financial donations to religious causes in particular and to churches in general. These facilities are not exclusively available for the religious sector but to all sorts of charities.

Current Issues

From the above, it is clear that the state does not allocate funds to support particular religious organizations or activities such as clergy salaries or church services; in the past (until approximately, the 1950s), however, support for clergy salaries or other particular religious activities did take place here and there at the local level. Currently, the question of funding religious activities has gained a new topicality, especially at the local level. This may occur, for example, in the context of creating favorable financial arrangements for the building of a particular place of worship or the restoration of a particular religious building. It also occurs with new forms of co-operation between state and religious organizations in the socio-cultural sphere. Especially in a time when the state ‘contracts out’ activities which, until recently, belonged to its own domain, such as the provision of particular youth work, and all the more when it is contracting out to one organization only, issues are raised in the public debate about the proper relationship between the state and religious organizations. In the first case, apart from financing, issues about subtle influencing of the religious organizations are debated. In the second case, issues of undue influencing of the public domain by religious organizations are raised. Leaving aside technicalities and the more subtle conditions of such arrangements, from a constitutional point of view, nothing speaks against such arrangements. It must also be borne in mind that the reasons of the state for entering into such arrangements are not promoting a particular religion as such, but fulfilling public policy goals which coincide with the aims of the religious organizations involved.

9. Legal Effects of Religious Acts

As legal persons, churches can enter into legal relationships under civil law, like any natural person. Buying and selling property, renting and letting property, hiring and firing personnel are common activities of legal persons and churches and religious communities can engage in such activities as well. Obviously, these legal acts need to be valid internally, that is, the persons or bodies acting on behalf of the church must be authorized to do so according to their own constitutions.
Churches have their own mechanisms for internal conflict resolution. These mechanisms and the decisions they produce do not have any status under public law; they are decisions made by legal entities under civil law. Where ‘purely’ religious issues are at stake – that is, issues which do not have any civil law dimension – secular courts have no jurisdiction. However, if civil law aspects are stake, secular courts do have competence. Article 17 of the Constitution states:

‘No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law’.

In cases in which a secular court is competent, this court when approached may step back temporarily pending an ecclesiastical procedure or if an ecclesiastical procedure is still an option. Afterwards, the court may test the case for reasonableness. The subtleties of the relationship between secular courts and ecclesiastical procedures are not fully crystallized, in part due to a lack of cases. It is clear, however, that ecclesiastical decisions as well as decisions of ecclesiastical conflict resolution procedures must comply with fundamental rules of fairness, such as *audi et alteram partem* and acting in good faith.

A special issue is the relationship between civil marriage and religious ceremonies relating to marriage. The only legally valid marriage in the Netherlands is a civil marriage conducted by a registrar. The Civil Code (Article 1:68) states that religious ceremonies with regard to marriage cannot take place prior to the performance of a legally valid marriage. The church minister who performs a religious ceremony with regard to marriage without having verified the existence of a legally binding marriage is liable to prosecution (Art. 449 Criminal Code). Discussions in the 1990s about the abolition of the requirement of a prior civil marriage before a religious ceremony with respect to the marriage have not led to any change in the law. The existing arrangement has been challenged under Article 9 of the European Convention on Human Rights. In 1971, the Dutch Supreme Court upheld this system as a justified restriction of religious freedom.13

10. Religious Education of the Young

As mentioned above, the Constitution outlines the main elements of a dual system of education. Freedom of education allows confessional education to exist alongside public non-denomination education. Freedom of education entails freedom to found a school, to administer a school, and to determine the confessional identity of the school and its teaching. According to the Constitution, elementary confessional schools are financed by the state on the same footing as non-denominational schools. For secondary and higher

education, including universities, this is system is adopted through ordinary legislation (as mentioned above). Currently, also Islamic schools are established and funded through this system, both at elementary and secondary levels. Confessional schools are quite popular in the Netherlands; about two thirds of the schools are based on a religious confession.

The confessional school authorities determine the confessional character of the school, which may range from strict to quite liberal. Generally speaking, school authorities may also determine whether they have an open admission policy for pupils and require loyalty to the religious denomination for (specific) staff only, or for both. However, in determining this, they need to keep within the margins of the law, e.g., the General Equal Treatment Act. This means at least that they cannot act at will, but must carry out their policy in a consistent manner.

Non-denominational schools teach religion as a subject on a neutral, non-confessional basis. Non-denominational elementary schools may, on a voluntary basis, outside the normal curriculum, offer the option for religious education on a confessional basis. If they do so, this education is funded by the state. Another requirement is that they do not only teach one denomination only but treat the various denominations on an equal basis. This also includes teaching non-religious philosophies like humanism. Of course, there are practical limits to this. The school authorities appoint teachers that represent a specific denomination.

11. Religious Symbols in Public Places

Dutch neutrality in the public domain does not entail that the public domain must be void of all religious expression. On the contrary, the plurality of religious expressions is respected. Where education is concerned, the Constitution states:

‘Education provided by public authorities shall be regulated by Act of Parliament, paying due respect to everyone’s religion or belief’ (Article 23, paragraph 3).

Practically, this means that there is room for religious expression by teachers and pupils (such as wearing headscarves or crucifixes); however, teachers must be committed to working in a ‘neutral’ environment, that is, to providing public education. The Equal Treatment Act which forbids making distinctions – in this case, by the authorities of the public school – on the basis of religion; other requirements may constitute an indirect distinction on the basis of religion, which is not allowed in principle, but for which justification grounds may exist. Where garments are concerned which completely cover the female pupil’s face, the Equal Treatment Committee set up under the Equal Treatment Act has accepted justification grounds in pedagogical and communicational situations.
The Equal Treatment Act is also applicable to the private sector. Obviously, it grants organizations based on a religion or belief room to require loyalty of its personnel to its religious identity, albeit not unqualified; in the case of schools, it also allows them to follow their own admission policy in this respect, again not unqualified. Although private organizations operate in the societal sphere and often provide important social services, they are, legally speaking, not ‘public’.

This system – with the Equal Treatment Act as a legal framework which covers many cases in the area of religious symbols in public places – is also applicable to domains other than education. The weighing of justification grounds is obviously not a completely technical or value-neutral operation. This may lead to the fact that similar cases are assessed differently. It also necessitates critical analysis and debate on the arguments and outcomes of specific cases.

As regards public buildings themselves, there is no specific law covering the use of religious symbols. Occasionally, a religious symbol such as a crucifix may be found in a town hall. A (non obligatory) prayer may take place preceding the meeting of a town council.14

12. Freedom of Expression and Offenses against Religion

Dutch criminal law contains a variety of explicit references to religion. These relate to expressions, gatherings, and religious rituals.15 Although they are the subject of discussion from time to time, until recently they have mostly been taken for granted. The last few years, however, an intense public debate has emerged over both the legal provisions and their application in concrete situations.16 Over the last few years, some of these provisions have been extended in terms of the grounds of defamation as well as the circumstances in which it takes place and in terms of the maximum penalty.

Article 137c of the Dutch Criminal Code penalizes, as serious offenses against public order defamatory statements about a group of persons on the grounds of *inter alia* their religion or personal beliefs. It also penalizes defamatory statements on other grounds: race, hetero- or homosexual orientation, and physical, psychological, or mental disability. This includes statements made on the basis of religious conviction (notably relevant with respect to homosexual orientation). The criterion is that the statements were

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14 In this context, mention must be made of a ruling of the European Court of Human Rights in an Italian case concerning a crucifix in a public school ECHR 3 November 2009, *Lautsi v. Italy* (Application No. 30814/06).

15 The Criminal Code Articles referred to are formulated in quite a detailed manner, as can be expected for such articles. In the brief reference we make to these articles, it is unavoidable that some of the nuance gets lost. The relevant provisions are Arts. 147, 147a, and 429bis; Arts. 137c-137e and 137f; and 429quater.

16 See Van Bijsterveld 2009.
made ‘publicly’ and ‘intentionally’; they include oral and written statements and images.

Similarly, the incitement of hatred of or discrimination against persons or violence against their person or property is penalized as a serious offense against public order (137d). Article 137e Criminal Code penalizes making a statement ‘for any reason other than that of giving factual information’, which the perpetrator ‘knows or should reasonably suspect to be offensive to a group of persons’ or ‘incites hatred of or discrimination against people or violence against their person or property’. The grounds are those mentioned above. The dissemination of an object or having it in stock for that purpose is prohibited as well.

Blasphemy is also covered by the Criminal Code: Article 147 Criminal Code penalizes, among other things, ‘a person who publicly, either orally or in writing or by image, offends religious sensibilities by malign blasphemies’ as a serious offence against public order.\textsuperscript{17} Article 429bis Criminal Code penalizes, as a lesser offense, exhibiting writings or images with such content in a place visible from a public road. In a civil lawsuit, an expression may be regarded as wrongful vis-à-vis another party, even if that same expression would not lead to a criminal conviction.

13. In Conclusion

This essay started with the observation that the relationship between religion and the secular state has again become a hotly debated topic in a variety of forums. Also for the state itself, the controversies that characterize these debates present real dilemmas. Although there is more to it, the integration of Islam into Dutch society is an important element in the debate. Current trends and developments in the legal and political spheres are not always mutually consistent. It will be a challenge to uphold the traditional way of respecting religious liberty and of accommodating religion in legislation as the basic pattern of Dutch law. It is a worthwhile challenge.

\textsuperscript{17} See also Art. 147a. Recently, a parliamentary initiative has been introduced to remove blasphemy from the Criminal Code.
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THE COMPLEXITY OF TRANSNATIONAL LAW: COHERENCE AND FRAGMENTATION OF PRIVATE LAW

Jan M. Smits

1. Introduction

It is generally acknowledged that laws are increasingly flowing from different sources. It is equally well established that this multiplication of sources deeply disturbs the idea of law as a coherent and unitary system. This incoherence and fragmentation of the law have been the subject of study in a wide variety of fields. For example, since 2006, significant attention has been paid to the report of the study group of the International Law Commission on the fragmentation of international law. This report made it abundantly clear that increasing globalisation not only leads to social life becoming more and more uniform, but also more fragmented because of the emergence of specialised and autonomous ‘spheres of social action’. There is no longer one general international law, but a myriad of specialised systems (e.g., human rights law, law of the sea, trade law and international criminal law), each having its own principles and often failing to take into account developments in neighbouring areas. Such fragmentation through the emergence of ‘functional regimes’ is not limited to (the subfields of) international law. Thus, fragmentation was also identified as an important characteristic of such diverse fields as (global) administrative law, constitutional law, environmental law and private international law. It is no coincidence that these are all areas particularly affected by internationalisation: especially the emergence of norms emanating from European and supranational actors next to the rules of national origin has disturbed the supposedly coherent legal systems of the past.

The aim of this contribution is to explore the increasing complexity of private law. As is the case in the fields already mentioned, this complexity is

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1. Thanks are due to Mark Kawakami for invaluable research assistance.
3. Fragmentation is not new at all in this field. See e.g. Martineau 2009, p. 1.
primarily caused by the multiplication of sources out of which private law flows, leading to a fragmentation of law at different levels (explored in Section 2). This phenomenon can be observed in all countries of the European Union and, be it to a lesser extent, also in other countries. It leads to the important question of how we should deal with this fragmentation. Section 3 explores how fragmentation of private law is perceived in the Netherlands and which strategies are adopted to remedy the problems it causes. We will see that the way in which this phenomenon is dealt with is not unique for the Netherlands. Section 4 contains some concluding remarks.  

2. Causes of Increasing Complexity and Types of Fragmentation

2.1. Multiplication of Sources

To truly understand the impact of increasing complexity or fragmentation of law, one must compare the present situation with a previous one. For most scholars, the traditional picture is one in which private law is a coherent, unitary and national system. In that picture (some would say 'narrative'), cases, rules, standards and concepts are all part of a consistent whole without any contradictions within the system itself. Except for systematic purity, such consistency serves the important goal of establishing equality before the law (and thereby legal certainty): only if rules and principles are applied in a uniform way, similar cases can be treated alike. Consistency can be achieved because all actors involved in the development of the legal system (legislatures, courts and legal scholars) are located in the same country and share a more or less uniform set of values. In such a view, private law can be a 'self-contained and self-referential system' with clear hierarchies among the actors involved in the making and application of the law.

Leaving aside the accuracy of this past view, it is abundantly clear that this view no longer represents present-day private law. The main reason for this is the multiplication of legal sources we have seen over the last decades. Next to the rules emanating from the national legislatures and courts, we now have at least three other types of actors involved in the making of private law.  

First, private law is increasingly a product of supranational lawmakers. The most important example in the context of private law is the United Nations Convention on Contracts for the International Sale of Goods (CISG). In the almost 75 countries that have adopted the CISG a new contract law

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9 This contribution attempts to answer the questions posed in the questionnaire prepared by Silvia Ferreri. It builds upon some of my previous publications, in particular on the articles referred to in footnotes 10 and 69.


12 See in more detail Smits 2009.
regime has come to exist next to the set of rules on national contract law. This means there is no longer one uniform and coherent contract law for the entire national territory; instead, it depends on the transactions involved (and on whether the parties have excluded the applicability of the convention or not) which legal regime (with its own rules, rationality and mode of interpretation) applies. The introduction of the CISG thus leads not only to fragmentation at the national level, but also to a fragmented harmonisation at the international level because of the autonomy of States in accepting the CISG. Thus, it is well known that the failure of the United Kingdom, Ireland and Portugal to ratify the CISG adds to existing complexity of commercial contract law within the European Union.

Second, we are all witnesses to the rise of the so-called ‘private global norm-production’.13 On one hand, norms and policy decisions are no longer being made by national States, but by other actors. Apart from organisations such as the IMF and the World Bank, in particular the activities of the WTO have an important impact on the conduct of private parties, more specifically, on the issues of free trade, taxes, intellectual property and protection of health. On the other hand, various types of voluntary law,14 such as norms adopted by corporate networks (the most important example being codes of conduct for corporate social or environmental responsibility), rules of standardisation organisations for technical standards (such as the ‘codex alimentarius’) and other types of self-regulation also influence the conduct of private parties. These norms would not be recognised as binding in a traditional conception of the law because they do not meet the formal criterion of being enacted by the relevant authorities and backed by coercive power. But they often do set the norms for specific groups of people and are therefore important in predicting their behaviour: in this sense, they are often more important as a source of private law than rules that are formally binding.

A third actor involved in the making of private law is the European Union. Over the last twenty years, the European legislature issued almost twenty directives that have all been implemented by the (now) 27 member states.15 These formally binding rules are accompanied by several sets of soft law that were prepared with the support of the European Commission. The two most important examples of such sets are the Principles of European Contract Law (PECL)16 and its more elaborate successor in the form of the Draft Common Frame of Reference (DCFR).17 These rules were prepared with a view to their future application by private parties, legislatures and courts. In private international law, the European legislature has even been more active: the far-ranging competences it has in this field since the enactment of

15 See for a recent overview e.g. Zimmermann 2009, p. 479 ff.
16 Various editions were published since 2000. See <http://frontpage.cbs.dk/law/commission_on_european_contract_law> for the latest versions.
the Treaty of Amsterdam led to the adoption of a number of important regulations.  

2.2. Fragmentation in Practice

How does this multiplication of sources affect the idea of private law as a coherent system? It is useful to try to answer this question in detail for the most important ‘new’ source, that of European legislation. I believe there are three reasons why Europeanisation disturbs the national systems of private law.  

First, European legislation is difficult to incorporate into national legal systems because it is functionally oriented: it is based on the rationality of the market (cf. Article 114 Treaty on the Functioning of the European Union). While national private law offers general rules, directives only provide rules for specific themes that are thought to be of particular importance for the development of the internal market (such as information duties of the professional party and rights of withdrawal of the consumer). These fragments of European law are often out of tune within the national legal order: if a directive provides rules for contract remedies, but not for the formation of contracts, this is seen as a violation of the coherent system that private law once was. Given that the national legislatures do not want to give up their competences in the fields covered by European directives, we end up having two legislatures dealing with the same topic. Complexity is even increased by the fact that the applicability of European law is not always obvious, leading to uncertainty for the parties.

Second, directives often contain detailed rules with terms that deviate from national legal terminology. Thus, the European legislature consciously makes use of neutral terms such as the ‘right to withdraw’ and ‘reduction of the price’. Implementation of these rules into national legislation would still be relatively easy if member states were free to transpose directives in the way they want to and could sometimes even refrain from implementation if national law can be interpreted in accordance with these directives.


19 The following is based on Smits 2006.

20 See e.g. Schmid 2006, p. 8 ff.


22 The so-called ‘jack-in-the-box’-effect of European law, identified by Wilhelmsson 1997, p. 177.


24 Art. 6 Directive 97/7 (distance contracts) and Art. 3 Directive 1999/44 (consumer sale).
However, reality is different: according to the European Court of Justice, the consumer should be able to immediately recognise its ‘European’ rights. This means that there is a duty for the member states to meticulously implement directives in the field of consumer protection: a national court interpreting existing national law in line with a directive cannot achieve the clarity and precision needed to meet the requirement of legal certainty. Thus, if European law allows a right to price reduction in case of non-conformity in consumer sales, it is not sufficient if the national court allows partial termination of the contract: the national legislature must explicitly the right to reduction of the price. This duty to implement detailed provisions reinforces the disruption of the national system: what already follows from the system of national law, still needs to be explicitly codified. Gunther Teubner coined the term ‘legal irritants’ to explain that the rule of European origin does not assimilate, but instead disorders the existing system.

Third, the unity of the national legal order is affected by the way in which (implemented) European law is to be interpreted. This interpretation is to take place ‘in the light of the wording and the purpose of the directive’. This is often at odds with the prevailing way of interpretation of national law that usually puts the legislative history and the system of law as a whole at the centre of attention. The legal certainty civil law countries seek to establish by reference to the legislative history and national system, the European Court of Justice finds in a foremost textual and teleological interpretation of directives.

Dutch law provides an example of the conceptual divergence caused by these different modes of interpretation. Article 7:5 of the Dutch Civil Code contains a definition of ‘consumer sale’. Dutch law generally holds that the interpretation of this term needs to take place in a subjective way: if the seller did not know – nor had to know – that the buyer bought a thing for private purposes (because it legitimately thought that the buyer bought it in a professional capacity), the buyer is still protected as a consumer. This seems to be different from the way in which the European term ‘consumer’ is to be interpreted: the ECJ favours a more objective approach. Thus, one term in the Dutch Civil Code (or in the German and French Code, for that matter) has two different meanings, dependent on whether the case in question falls within the scope of application of the European directive. There are many more examples of this phenomenon. Thus, when there is doubt about how to interpret a contract clause on which there have been no separate negotiations among the parties, interpretation of this clause must take place in favour of...
the consumer (the ‘European’ rule), while an interpretation contra proferentem is not required for other contracts (the ‘Dutch’ rule). Also the concept of (non-) conformity in contract law differs, dependent on whether we deal with a (European) consumer sale or a (Dutch) ‘normal’ sales contract. These types of divergence will only increase in the future. It even seems unavoidable that the ECJ will finally provide ‘European’ interpretations of all implemented European provisions and that these interpretations will not necessarily coincide with the national ones.

2.3. Even More Fragmentation

The previous sections clearly show that the emergence of supranational, ‘private’ and European sources has made private law more complex. The main reason for this is that private law is now dealt with at different and partly overlapping levels of governance without much coordination among these levels. Private law has become a building ground where there are several architects, located at the supranational, European and national levels. Political scientists have coined the term multilevel governance, describing when international integration leads to overlapping rules of national and other lawmakers.

To complete this picture of how private law is affected by fragmentation, there are two more phenomena to be observed. They do not have so much to do with the emergence of new producers of private law (for which the term ‘institutional fragmentation’ can be used), but with fragmentation of substantive rules and of procedural justice. The first development is the increasing use of the possibility to choose a foreign legal system as the applicable law. Within the limits set by private international law (that usually requires some connection between the parties or their activities and the designated State), people are often able to choose the substantive law that suits their interests best. This led to a ‘law market’ that is already very real in some areas (like commercial and contract law), forcing courts to apply foreign law where that is the parties’ wish. It does not need much explanation how this development affects the work of the courts that have to apply foreign law.

A second phenomenon is the increasing influence of fundamental rights on private law. The concern is in this respect not so much that the values laid down in the national Constitutions or in the European Convention on

31 See Art. 5 Directive 93/13 (Unfair terms), Art. 6:238 s. 2 Dutch Civil Code and Hoge Raad 18 October 2002, Nederlandse Jurisprudentie 2003, 258.
32 Arts. 7:17 and 7:18 Dutch Civil Code.
33 See for this metaphor Roth 2001, p. 488.
34 See for a definition e.g. Marks et al. 1996, p. 167: ‘overlapping competencies among multiple levels of governments and the interaction of political actors across those levels’.
35 See for the European Union e.g. Regulation 593/2008 on the law applicable to contractual obligations (Rome I), OJ EC 2008, L 177/6.
36 O’Hara & Ribstein 2009.
Human Rights are also important for relationships among private citizens, but much more that national Constitutional courts or the European Court of Human Rights come to deal with cases that are much better dealt with on the basis of private law. There is little doubt that one can decide most disputes among private parties by balancing competing fundamental rights, but it is equally clear that this approach is not very useful in so far as subtle rules developed by private law courts are available to deal with these same disputes. This is in essence a debate about the hierarchy between fundamental rights (as applied among private citizens) and private law. In countries with a Constitutional court, this court thus engages in a competition with the highest civil court, leading to procedural fragmentation. The Netherlands has been relatively unaffected by this phenomenon because it does not have a Constitutional court.

3. How to Deal with Fragmentation of Private Law? Dutch (and European) Answers

3.1. Introduction

This section considers the extent to which concerns about this increasing complexity are recognised in the Netherlands and which proposals (if any) are suggested to cope with the problems caused by it. In doing so, I will follow the structure of the previous section: I will first discuss institutional fragmentation (mainly caused by European legislation) and then go on to consider the two examples of substantive and procedural fragmentation (enhanced party choice and constitutionalisation of private law). This structure is indicative of how fragmentation is almost always perceived in the Netherlands: not as a general phenomenon cutting across several areas (the way in which it was presented in the previous section), but as something that is only observed in separate areas of the law.

3.2. Fragmentation through the Europeanisation of Private Law

The increased complexity of national private law, caused (mainly) by the implementation of European directives, has not gone unnoticed. The European Parliament already called for the drafting of a European Civil Code in 1989. This naïve call (the European competence to enact such a Code is lacking) was followed by a more fruitful debate initiated by the European

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37 The values behind fundamental rights are already largely incorporated in private law: see on this ‘indirect effect’ e.g. Cherednychenko 2007, p. 69 ff.
38 See on this, and other types of, competition Lavranos 2009.
39 According to Art. 120 of the Dutch Constitution constitutional review by the courts of acts of Parliament is not allowed.
Commission in 2001. This recently led to the publication of the Draft Common Frame of Reference for European Private Law. The Dutch government supports the use of this DCFR as a non-binding instrument to make existing directives more consistent, but does not regard it as a step towards a European Civil Code. The Dutch Minister of Justice took this position after Parliament raised questions about an article in a Dutch newspaper, claiming that the European Commission was trying to introduce a European Civil Code ‘through the backdoor’. I should add that, even if the European competence to introduce a binding European Civil Code would exist, this would not end present fragmentation: private law will still be dealt with at various levels of governance. One only needs to think of closely connected areas of procedural and administrative law (that will remain national) and competition law (that is largely European), leaving aside that a European Civil Code in whatever form will probably not contain rules on immovable property, family law and the law of succession. The DCFR may have some impact on the revision of existing directives and the drafting of new ones, but it is too early to say anything definitive about this at the moment.

If the efforts at the European level can only have a limited effect, what is it that can be done at the national level to deal with a fragmented private law? The Dutch legislature, well aware of the risk of fragmentation, made the reasoned choice to incorporate European directives into the Civil Code in order to keep the national legal system intact as much as possible. Implementation inside the Civil Code allows one to scrutinise the consequences of the directive for national law, including ‘where national law, in view of the coherence of the national legal system, is to be adjusted in a more far reaching way than the directive would possibly oblige it to’. Only by giving directives such a greater field of application (so-called ‘supererogatory implementation’) than strictly necessary, a ‘coherent system’ can be maintained. The solution to implement directives outside of the Civil Code would lead to ‘patchwork’ policies and ‘a poorly organised whole of separate statutes, having for a consequence inner inconsistencies

45 Smits 2006, No. 34 ff.
46 See e.g. Handelingen EK 1 March 2005, EK 17-759 ff.
47 For this term: Leible 2003, p. 1266, at p. 1268.
48 Handelingen EK 2005, 17-760 and 17-768.
and untraceable and obscure provisions’. Thus, provisions that the European legislature only intended to affect consumer contracts, were sometimes given a more extensive application and now also cover other types of contracts. This is, for example, the case with the duty to use plain intelligible language when drafting standard contract terms and with the concept of non-conformity in consumer sales. This is also a well-known technique in Germany, where the European directive on the sale of consumer goods was, for example, also made applicable to B2B and C2C contracts (see § 433 ff. BGB).

This implementation strategy has the important advantage of allowing the national Civil Code to retain its role as the major codification of private law. However, one can still question whether this strategy really enhances overall consistency. Even after supererogatory implementation, two of the three reasons for disturbance of the coherent system (see above, Section 2.2) remain intact: the detailed character of the European provisions and the way in which these provisions have to be interpreted. It was therefore observed in Dutch doctrine that with the fundamental choice for implementation inside the Civil Code, the Code has become a sandcastle, with European law as an incoming tide. This castle is bound to disappear, no matter how hard the national legislature tries to prevent this from happening. Other doubtful consequence of the present approach is that the Civil Code needs permanent updating and that it is often unclear which provisions are of European origin (although this can be easily remedied if publishers of commercial text editions of Dutch legislation would give the rules of European origin a different colour).

The prevailing view in the Dutch doctrine is that there is no easy way out of the dilemma posed by the Europeanisation of private law: a coherent implementation inside the Civil Code is never fully possible, whereas implementation outside the Code would damage the idea of the Code as a complete and consistent whole. At the 2006 annual meeting of the most important professional association of Dutch lawyers (the Nederlandse Juristen-Vereniging), the influence of European law on national law was widely discussed, but the participants were not unanimous in their view on how to deal with the fragmentation it causes.

When it comes to the application of European law, there are several schemes in place to enhance its uniformity. The most important one is the European Judicial Network (EJN) in civil and commercial matters, in

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49 Handelingen EK 2005, 17-760.
50 See Art. 4 s. 2 of Directive 93/13 (unfair terms) and Art. 2 s. 2 of Directive 1999/44 (consumer sale).
51 Van Boom 2003, p. 299.
52 See the discussion on the reports of the NJV: Nederlandse Juristen-Vereniging 2007.
53 The various implementation strategies were discussed at the 2006 annual meeting of the Nederlandse Juristen-Vereniging (NJV) on basis of a report written by the present author.
operation since 2002. The aim of this network is to facilitate judicial cooperation between the European member states, in particular where European legislation already exists. The network has been particularly active in the field of private international law. In addition, the Dutch training institute for the judiciary (SSR) provides special training to judges to increase their proficiency in dealing with international sources of law and provides traineeships for Dutch judges with foreign courts or with the European Court of Justice. These initiatives are generally seen as much needed mechanisms that enhance the uniform application of European law at the national level. Efforts to create even more enhanced methods of coordination, such as in the field of European competition law, are usually seen as enlightening examples of how coordination could also take place in other fields.

3.3. Substantive and Procedural Fragmentation

The other types of fragmentation distinguished in Section 2 have also been widely discussed in the Dutch literature. For example, the rise of private regulation was the topic of yet another recent meeting of the Nederlandse Juristen-Vereniging. The risks of trading in detailed private law rules for a rough balancing of fundamental rights were mostly highlighted in the doctrine. Although the problems associated with these developments – and with the multiplication of sources generally – are acknowledged in the Dutch literature, one cannot say that the doctrine provides the courts with strategies to deal with them. This means that courts often have to find their way in a complex web of rules on conflict of laws, international conventions on the law applicable to transnational relationships, domestic rules of a mandatory character limiting or affecting the applicability of international provisions, and a large variety of private codes of conduct, guidelines, restatements of trade usages and practices, as well as collections of principles by non-governmental organisations. Particularly in the field of private international law, this multitude of norms sometimes poses serious problems for the courts. These problems are even reinforced by the fact that often not one

56 The Dutch EJN-website can be found at <http://ec.europa.eu/civiljustice/index_nl.htm>.
57 Information on the European Judicial Training Network is provided at <http://www.ejtn.net>.
58 Within the European Competition Network, specific cases are allocated among national competition authorities on basis of soft law rules. See Commission Notice on cooperation within the Network of Competition Authorities of 2004, OJ EC C 101/43.
60 See e.g. Cherednichenko 2007. The opposite view is represented by Mak 2008.
61 As stated in the questionnaire prepared by Silvia Ferreri.
62 In private international law, the variety of sources is seen as a main characteristic of the field. See e.g. the main Dutch textbook on private international law: Strikwerda 2002, No. 9.
foreign legal system as a whole is applicable to all aspects of the case at hand. Thus, in cases of a divorce with international aspects, it could very well be that different laws apply to the divorce itself, to the claim for alimony, to child custody and to the distribution of matrimonial property. It led one Dutch author to recently state that, as a result of this differentiation, Dutch private international law has become a patchwork of subsystems, endangering its practical use.\textsuperscript{63} The emergence of a 'law market' (see above, Section 2.3) will only increase this problem.

An interesting debate took place in the Netherlands about how to deal with this plural private international law. This debate was heavily influenced by the old plan (going back to 1947, when work on the new Dutch Civil Code started) to codify Dutch private international law in a separate book (Book 10) of the Dutch Civil Code. On one hand, it was suggested to give up this idea especially because of the multiplication of sources and the far-ranging competences the European Union has in this field since the Treaty of Amsterdam. On the other hand, however, codification was presented as an answer to the existing plurality of sources: this plurality would even provide an incentive to codify. This is also the view of the Dutch government that sent a draft statute for a new Book 10 to Parliament in September 2009.\textsuperscript{64} The draft explicitly refers to the aim of bringing coherence among national, European and international rules and to facilitate the incorporation of future European rules. Reference in this context is made to Belgium, where private international law was codified in 2004.\textsuperscript{65}

This strategy fits in with the way in which the Dutch government implements European directives (see above, Section 3.2): it tries to create coherence by conflating all foreign elements into the Dutch system. The soundness of this reasoning must be doubted, for it is built on the assumption that by having one system (the Dutch one) prevail, coherence can be attained. As we already witnessed, however, this strategy will not work because the very essence of a pluralist law states that there is no one system, which prevails. If private law is made by different actors, it is no longer in the power of one of these actors to create a coherent system. Rather than to pretend that this is even possible, a better strategy may be to inform legal practice as much as possible about the other actors and their activities. The Dutch government has made a good start by providing information on all international agreements the Netherlands has concluded on a special website, including the exemptions and reservations it makes.\textsuperscript{66} It now refers to 6500 treaties ratified since 1961 and it considerably enhances the accessibility of relevant sources.

\textsuperscript{63} Polak 2009, p. 231.
\textsuperscript{64} TK 2009-2010, 32137 (Vaststelling en invoering van Boek 10 van het Burgerlijk Wetboek).
\textsuperscript{65} See e.g. TK 2005-2006, Aanhangsel, No. 892 and TK 2009-2010, 32137, No. 3, p. 4.
\textsuperscript{66} This Verdragenbank is available at <http://www.minbuza.nl/nl/Onderwerpen/Verdragen>. The database contains links to the full text consolidated versions of the treaties (in so far as published after 1981).
Courts also have techniques available to elude complexity. Although Dutch law does not accept the basic rule of the lex fori as a general principle, there are several rules that come close. Thus, the statute on the law of conflicts in case of divorce of 1981 states that Dutch law is to be applied if the parties before the court choose Dutch law to be applicable; if such choice was not made, foreign law can only be applied in exceptional circumstances. De Boer has suggested to accept the theory of ‘facultative choice of law’ in Dutch law.\(^{67}\) It means that the courts only need to apply conflict of laws if one of the parties asks for it. If this request is not made, the courts must apply the lex fori. The recent draft statute of 2009 (see above) explicitly rejects this view, meaning that the courts will have to apply foreign law at their own initiative wherever necessary. Their task is of course facilitated by the possibility to ask for information under the European Convention on Information on Foreign Law (1968). However, it is more likely that the parties (or their lawyers) provide the court with expert opinions or that the court looks into foreign law itself.\(^{68}\)

4. **The Need to Rethink Private Law as a National and Coherent System**

If anything should have become clear in the preceding paragraphs, it is that private law is much more fragmented today than it was in the past. This fragmentation is primarily caused by a multiplication of sources: different aspects of private law are dealt with by different ‘lawgivers’ without an overall responsibility for coherence and unity in the hands of one overarching institution. This has led to diverging substantive norms, all with an equal claim to validity.\(^{69}\) This phenomenon is not unique for the Netherlands, but can be observed in all countries of the European Union (and beyond).

The approach of the Dutch legislature in dealing with this fragmentation is to try to re-establish a coherent system. This is apparent from both the ways in which European directives are implemented and from the Dutch efforts to deal with the increasing complexity of private international law. European directives are implemented as much as possible inside the Dutch Civil Code in order to keep the private law system intact, even though this cannot take away the causes of increasing incoherence. Also the disperse rules on private international law are structured in a new part of the Civil Code, even though it is no longer in the power of the national legislature to create a coherent system. In my view, the strategy of the Dutch legislature is therefore clearly wrong: it should accept it has no longer the power to create a coherent system through legislation and seek new

\(^{67}\) De Boer 1996, p. 225.
\(^{68}\) The Dutch government indicates this possibility is facilitated by the internet: TK 2009-2010, 32137, No. 3, p. 9.
\(^{69}\) See in more detail, and with a theoretical embodiment in legal pluralism, Smits 2010 (forthcoming).
strategies to deal with the various legal regimes that exist on its territory. These strategies will have to take into account the multilevel structure of present-day private law. It must be accepted that the responsibility for coherence and unity of the legal system is no longer in the hands of one institution. Making available information about the various legal regimes in force within one country is a strategy many national governments (including the Dutch one) already adopted. Another possible solution is to enhance coordination among the various actors involved in the multilevel system.\textsuperscript{70} Most of all, however, we need to rethink our view of private law as a national and coherent system.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{70} Such as the Open Method of Coordination (OMC), accepted as a method of governance at the 2000 Lisbon European Council and since then applied in various areas.
\item \textsuperscript{71} See Smits 2010 for an attempt.
\end{itemize}
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1. Does Dutch Law accept Maternity for Another?

Yes, The Netherlands does accept maternity for another under certain very strict conditions. Dutch law has no special procedure geared towards transferring parental rights and duties from the surrogate mother (and her husband) to the commissioning parents.¹ The Dutch government has adopted a very reticent attitude with regard to surrogacy.² In particular, after the introduction of IVF in the late 1970s, a discussion arose as to whether or not surrogacy should be allowed. On the whole, the answer to this question was in the negative, which resulted in the introduction of art. 151b in the Dutch Criminal Code, making commercial surrogacy a criminal offence.³ It has become clear from subsequent parliamentary debates⁴ that it is not the intention of this provision to convict doctors co-operating with half- or low technological surrogacy, but to avoid the situation where women offer themselves as surrogate mothers for payment as this might lead to a form of trade in children.

High-technological surrogacy is very strictly regulated in The Netherlands. In 1989 the Ministry of Health, Welfare and Sport determined in its IVF regulation statement that surrogacy in combination with IVF was not allowed. After active lobbying by interest groups⁵ in combination with the fact that the passing of time had proven that there appeared to be less interest than expected in high technological surrogacy, the IVF regulation statement issued in 1997⁶ allowed for surrogacy in combination with IVF under very strict conditions. When this regulation statement was discussed in the Second Chamber, the minister stated that it was not his intention to adapt Dutch family law to accommodate surrogacy in combination with IVF. No special regulation for the transfer of full parental rights from the surrogate mother to the commissioning parents was envisioned. In the words

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¹ For this Questionnaire extensive use has been made of two earlier publicicides by the author: Vonk 2007 and Vonk 2008.


of the minister: ‘Transfer from one set of parents to another set of parents must take place by means of the voluntary divestment of parental responsibility of one set of parents, after which the intended parents can be vested with parental responsibilities and will eventually have to adopt the child’.

Moreover, the IVF regulation statement determines that IVF in combination with surrogacy must take place in accordance with the guidelines on high-technological surrogacy of the Dutch Society for Obstetrics and Gynaecology. These guidelines require IVF clinics to draw up their own protocol regarding IVF surrogacy. Such a protocol must at least ensure that the following conditions are met: there must be medical grounds for the procedure (specified in the regulation statement); the surrogate mother must have one or more living children whom she gestated and gave birth to without complications; there must be adequate information provision to the surrogate mother and the intended parents; and preceding the treatment the responsible doctor will draw up a statement to the effect that the above conditions have been met and that he deems the treatment to be justified.

In the early 1990s a trial was started to study whether or not surrogacy should be allowed as a means to help a certain group of infertile couples to have a child of their own. The intake centre that was established as a result of this trial was forced to close in July 2004, as Dutch IVF clinics turned out to be unwilling to participate in gestational surrogacy. However, in April 2006 one of the Dutch licensed IVF clinics announced that it will make gestational surrogacy services available to married couples (VUMC, 6 April 2006). At least one of the other IVF centres will make use of the screening facilities of this surrogacy centre and subsequently carry out the medical component in their own clinic.

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9 The guidelines also state that the surrogate mother must consider her own family to be complete, probably in order to minimize the risk that she decides to keep the child for herself.
10 Dutch Second Chamber 25 000-XVI, No. 51, p. 2.
11 The results of this trial are described in Dermout 2001.
12 <www.draagmoederschap.nl>. The initiator of the trial states, in a letter posted on the web-site referred to, that in the past 15 years she strove to make IVF surrogacy acceptable to the public, the media, the insurance companies, the Dutch Society of Obstetrics and Gynaecology and the medical profession in general. She and others managed to do all that, however ‘the internal obstacles in the Academic Hospitals themselves, the ethics commissions and/or the board of directors are elusive, in particular because they do not send a reasoned rejection, just a message without any further comments that the hospital has decided nor to offer IVF surrogacy services. It is impossible to discover their real reasons’.
13 See also the letter of 15 May 2006 to the Second Chamber by the then Secretary of State on this issue (vws0600778).
14 UMCG sends prospective foursomes who want to participate in gestational surrogacy to VUMC to be screened and will subsequently perform the medical
The transfer of full parental rights in surrogacy arrangements will not occur against the will of any of the parties involved. This means that the surrogate mother has no legal duty to hand over the child, nor are the commissioning parents under a legal duty to accept the child. If the child is not yet 6 months old the commissioning parents may only take the child into their home with the consent of the Child Care and Protection Board (Article 1:241(3) DCC and Article 1 Foster Children Act).

2. If the Answer is yes, what is the Legal Situation?

2.1. Is Maternity for Another under the Control of a Judge?

Parenthood can only be transferred from one set of parents to another set of parent through a judicial decision. The legal parental relationship that is established at birth cannot be changed at will by the child’s legal parents or the commissioning parents. See section for the procedure to transfer legal parental status from the birth mother (and her partner) to the commissioning mother (and her partner).

2.2. Is it purely Contractual?

There has been a lot of discussion regarding the validity of surrogacy contracts in The Netherlands.\(^{15}\) Such contracts may contain many different kinds of clauses, ranging from the surrogate mother agreeing that she will not smoke during the pregnancy, to her agreement to abort the child if serious birth defects are discovered.\(^{16}\) However, the main clause concerns the obligation of the surrogate mother to surrender the child to the commissioning parents after the birth. Whereas not all authors agree on the validity of the subsidiary clauses and the possibility for damages if the surrogate mother does not fulfil her obligations, they all agree that the main clause is void and cannot be enforced.\(^{17}\) Under Dutch law, juridical acts (including agreements) that violate mandatory statutory provisions or are contrary to good morals will result in the agreement being regarded null and void, which means they are treated as if they never came into being and can thus not be enforced.\(^{18}\) Contracts concerning the surrender of children after birth are considered to be a breach of good morals. Contracting about the legal position of children, for instance who will be the child’s legal parent,


\(^{16}\) See for instance Boele & Oderkerk 1999, p. 23 for a list of such clauses; see also Asser-De Boer 2006, No. 696 and Vlaardingerbroek 2003, p. 171-178.

\(^{17}\) For an overview of the discussion see Vlaardingerbroek 2003, p. 171-178.

\(^{18}\) Art. 3:40(2) DCC.
may violate the mandatory statutory provisions of parentage law and parental responsibility which would render such a contract illegal and void. Nevertheless there are authors who propose that under certain conditions surrogacy contracts should play a role in the process of transferring parental rights from the surrogate mother to the intentional couple.

At present, however, adults cannot legally enter into contracts concerning the status of legal parenthood if this deviates from mandatory statutory provisions and they cannot be obliged on the basis of a contractual provision to surrender ‘their’ child to the other contractual party. This does not mean that such contracts are completely without meaning. For instance, one of the licensed IVF centres that recently opened a surrogacy centre, requires the parties to draw up a contract. The contract itself cannot alter the legal status of the parties involved, but the idea is that it can give a court supportive evidence about the intentions of the parties involved at the time the contract was drawn up and thus may facilitate decisions in the adoption process.

2.3. What are the Rights of the Woman who carries the Child?

The woman who carries the child is the legal mother of the child on the basis of the fact that she has given birth to the child (Article 1:198 DCC). No distinction is made between birth mothers who give birth to their own genetic children and birth mothers who give birth to children who are not genetically related to them. The surrogate birth mother has the same rights as any other birth mother and cannot be made to give up her child when she decides to keep the child for herself.

2.4. What is the Filiation of the Baby?

2.4.1. Who is the Child’s Mother ex lege?

Under Dutch law, the woman who gives birth to the child is the child’s legal mother, whether or not she is also the child’s genetic mother (1:198). This is a mandatory statutory provision from which parties cannot deviate.

2.4.2. Does the Infant have one or several Mothers?

No, the child will only have one legal mother ex lege. Under Dutch law it is possible for a child to have two mothers after adoption, but that will only

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19 See Asser-De Boer 2006, No. 696. With regard to parental responsibility see for instance Art. 1:121 lid 3 DCC.
21 For an overview of how Dutch courts have taken contracts into consideration when judging on the voluntary transfer of rights from the surrogate mother to the commissioning parents see, Vonk 2008.
happen if the intentional parents are a lesbian couple and they subsequently adopt the child in accordance with the procedures described below.

2.4.3. How can Parenthood be transferred from the Legal Parent(s) to the Intentional Parent(s)?

There are a number of ways (all of which are uncertain) in which parental rights may be transferred from the surrogate parent(s) to the commissioning parents. The option available for a particular couple depends on whether the surrogate mother is in a formalised relationship or not. The status of the relationship of the commissioning parents is also relevant for the transfer of parental rights, but only in relation to the status of the relationship of the surrogate mother. There are basically three routes to full parental status for the commissioning parents: 1) divestment of parental responsibility followed by adoption (surrogate mother is married); 2) recognition by the commissioning father followed by divestment of parental responsibility and partner adoption (surrogate mother is in a registered partnership); 3) recognition followed by transfer of sole parental responsibility from the surrogate mother to the commissioning father followed by partner adoption (surrogate mother is not in a formalised relationship).

Whether or not the commissioning parents are married is only relevant for the issue of recognition by the commissioning father. The married commissioning father may under certain circumstances recognise the unmarried surrogate mother’s child with her consent. This is only possible if there is no other legal parent than the surrogate mother since a child can only have two legal parents (Article 1:204(1)(f) DCC). Moreover, there needs to be a close personal relationship between the married commissioning father and the child (Article 1:204(1)(e) DCC). This may for instance be the case if the child has been living with the commissioning parents for some time after its birth. For the subsequent course of action to be taken by the commissioning parents see the relevant sections below. Recently one of the Dutch district courts decided on an application by a married man who was the biological father of the child carried by his wife’s sister to find as a matter of fact that there is a close personal relationship between him and the child his sister in law was carrying so that he might recognise the child after his or her birth.

23 However, as is clear from the policy guidelines of the surrogacy centre established at the VUMC, only married commissioning parents at present have access to gestational surrogacy services.
24 See Rechtbank Almelo, 24 October 2000 (FJR 2001 (3) 91) for a case in which a married commissioning father had begotten a child through sexual intercourse with an unmarried surrogate mother. The court judged that recognition by the married commissioning father of the surrogate mother’s child would not be void given the circumstances of the case.
26 His wife’s sister was married to a woman, which meant that at the moment of the child’s birth the female couple would have joint parental responsibility over the child. However, the child would only have one legal parent.
However, the court stated that there was no close personal relationship between the man and the unborn child, since such a close personal relationship can only come into existence after the child’s birth.27

In the following sections the possibilities for transferring full parental status from the surrogate mother (and her husband) to the commissioning parents will be discussed. First, the possibility of divestment of parental responsibility followed by adoption (surrogate mother is married) will be discussed, subsequently the possibility of recognition by the commissioning father followed by divestment of parental responsibility and partner adoption (surrogate mother is in a registered partnership) and finally the possibility of recognition followed by the transfer of sole parental responsibility from the surrogate mother to the commissioning father followed by partner adoption (surrogate mother is not in a formalised relationship).

2.4.3.1. Divestment of Parental Responsibility followed by Joint Adoption

The surrogate mother will be the child’s legal mother and if she is married her husband will be the child’s legal father;28 both will have parental responsibility over the child by operation of law.29 In the very unlikely situation that the surrogate mother’s husband did not consent to the act that led to the conception of the child, he may deny his paternity.30 However, given the complexity and invasiveness of gestational surrogacy it is highly unlikely that he will succeed. Moreover, in cases of surrogacy in combination with IVF the requirements are such that the surrogate mother’s husband’s consent is required.31 In the rare case that the surrogate mother’s husband successfully denies his paternity, it is unclear whether the commissioning father may recognise the child. There is no provision in the DCC which prevents this, but it does not seem to be in line with the system of the law.

All this means that full parental status can only be transferred to the commissioning parents through joint adoption. However, before the child can be adopted by the commissioning parents, the surrogate parent(s) will first have to be divested of their parental responsibility.32 Divestment of parental responsibility is essentially a measure of child protection used in cases where parents are unable or unfit to look after their child.33 Parents

27 If the man were to divorce, recognise the child and subsequently remarry his ex-wife, he would be the child’s legal father.
28 Art. 1:198 DCC (mother) and Art. 1:199(a) DCC (father).
29 Art. 1:251(1) DCC.
30 Art. 1:200(3) DCC.
31 Richtlijn hoogtechnologisch draagmoederschap, NV0G 1998, paragraph 3.3. VUMC treatment protocol: ‘If the surrogate mother has a partner, the partner has to give his written agreement to the surrogate mother’s decision to carry a surrogate pregnancy’ (<http://www.vumc.nl/communicatie/folders/folders/IVF/Hoog-technologisch%20draagmoederschap%20.pdf>).
32 Art. 1:266 DCC.
cannot apply to the court to be divested, only the Child Care and Protection Board and the Public Prosecution Service can apply to the court to have the surrogate parents divested of their responsibility. The outcome of such a procedure is uncertain as the Dutch Supreme Court has not yet had the opportunity to decide on such a matter. However, decisions by various courts of appeal allow for the divestment of the surrogate parents on the ground that they are unable or unfit to care for this particular child since they did not intend to have it for themselves.

If the divestment procedure is successful, the commissioning parents may be attributed with joint guardianship. Normally, when parents are divested of parental responsibility, parental responsibility will be transferred to an institution for family guardianship. However, in IVF surrogacy cases that have been published, guardianship was attributed to the commissioning parents if the court considered this to be the best possible solution for the child concerned. If the commissioning parents have taken care of the child together for a year they may instigate adoption proceedings, provided they have been living together for three years on the day the adoption request is filed. The normal criteria for adoption apply in such cases, which means that the legal parents of the child need to consent to the adoption. Only in a very limited number of circumstances may the court disregard a parent’s refusal to consent to adoption.

2.4.3.2. Recognition followed by Divestment of Parental Responsibility and Partner Adoption

If the surrogate mother is in a registered partnership, she will be the child’s legal mother and have parental responsibility over the child. Her male or female partner will automatically have joint parental responsibility over the surrogate mother’s child, unless the child at the moment of its birth has another legal parent outside the relationship. However, the registered partnership in itself has no consequences with regard to the child’s parentage as would be the case in a different-sex marriage. This means that the unmarried commissioning father may recognize the child with the surrogate mother’s consent. If he does so before the birth of the child, only the surrogate mother will be attributed with parental responsibility; if he

34 Art. 1:267 DCC.
35 The Dutch Supreme Court did however judge in a case unrelated to surrogacy that parents may be unable or unfit to take care of a specific child (Hoge Raad 29 June 1984 NJ 1984/767). This judgement has been used by Courts of Appeal to justify divestment in surrogacy cases.
37 Art. 1:275 DCC.
38 Art. 1:228(2) DCC.
39 Arts 1:253aa and 1:253sa DCC.
40 For more detailed information on legal parenthood in a same-sex or different-sex registered partnership, see Vonk 2007, Chapters 3 and 6.
recognises the child after its birth both the surrogate mother and her partner will be attributed with parental responsibility. The first situation will be described in the following section. In the second situation, where both registered partners have parental responsibility, a divestment procedure before a court is required, despite the fact that the commissioning father is a legal parent. If the divestment procedure is successful and the commissioning father (who is already the child’s legal parent) is attributed with parental responsibility, the commissioning mother may adopt the child after she has taken care of that child together with the commissioning father for one year, provided they have been living together for three years on the day the application is made and all the other criteria for adoption have been met. The commissioning mother will be attributed with parental responsibility as a consequence of the adoption.

If, however, the surrogate mother refuses to consent to the recognition of the child by the commissioning father, he has no recourse to the court to apply for the surrogate mother’s consent to be replaced. The surrogate mother may even have her male partner recognise the child with her consent, if she is determined not to give up the child.

2.4.3.3. Recognition followed by the Transfer of Parental Responsibility and Partner Adoption

If the surrogate mother is not in a formalised relationship, the child will only have one legal parent by operation of law. Moreover, the surrogate mother will be the only holder of parental responsibility. The commissioning father may recognise the child with the surrogate mother’s consent. Once the commissioning father has acquired the status of legal parent through recognition, he may apply for sole parental responsibility, to the exclusion of the surrogate mother. The commissioning father can only file such an application if the surrogate mother is the sole holder of parental responsibility. The commissioning mother may subsequently adopt the child after she has been taking care of that child with the commissioning father for a year and all the other criteria for adoption are met. This latter procedure is also possible where the surrogate mother is in a registered partnership and has sole parental responsibility because the commissioning father has recognised the child before its birth.

It is unclear whether the unmarried commissioning mother will be attributed with parental responsibility by operation of law through partner adoption. If one follows the system of the law regarding parental

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41 Art. 1:228(1)(f) DCC.
42 It is unclear whether the adopting co-mother who has not entered into a formalised relationship with the child’s father will acquire parental responsibility by operation of law. See Vonk 2007, Sections 5.5.3 and 4.4.1.2.
43 Art. 1:253c DCC.
44 Dutch law is ambivalent on this point, an in-depth discussion of this issue can be found in Vonk 2007, Chapter 6 on partially genetic primary families.
responsibility, joint parental responsibility does not come about by operation of law for cohabiting couples as a result of adoption. However, in particular in the case of joint adoption it would be rather awkward to attribute parental responsibility to only one of the adoptive parents, while the other can only obtain it through registration in the parental responsibility register (as is normally the case for cohabiting parents). In the case of partner-adoption it might be more defensible not to attribute parental responsibility to the adopting partner by operation of law, although it might well be contrary to the adopter’s expectations.45

Just like a surrogate mother in a registered partnership, a surrogate mother who is not in a formalised relationship may have her partner recognise the child if she is unwilling to give the child to the commissioning parents.

2.5. **Is the Situation the Same when the Carrying Mother is a Foreign Person, or when the Baby is born outside the Country?**46

If a Dutch couple travel abroad for the purpose of engaging in a surrogacy arrangement and return from abroad with a child, the Dutch rules of private international law will apply in order to determine questions related to the legal status of the child. There are broadly speaking two different scenarios.47

1. The couple have become the child’s legal parents in accordance with the parentage laws of the country where the child was born. For instance, this could have occurred by operation of law, by recognition or registration on the birth certificate, or by means of a judicial or administrative legal determination of parenthood.

2. The couple (have) become the parents of the child pursuant to an adoption order either in the country of the child’s habitual residence or in the country where the parents habitually reside.

It is important to distinguish between these two methods of establishing legal parenthood, because the laws applicable for the recognition of the established legal parenthood will differ in these two cases. In the first case, Dutch international private law rules on the recognition of legal parenthood will be applicable. These rules have been codified in the Private International Law (Parentage) Act (*Wet conflictenrecht afstamming*).48 In the second case, three different legal instruments may be applicable, namely the Hague Convention...
on Protection of Children and Co-operation in respect of Intercountry Adoption 1993, the Dutch international private law rules on the recognition of adoptions (Wet conflictenrecht adoption)\(^49\) and the Dutch law regulating the adoption of foreign children (Wet opneming buitenlandse pleegkinderen ter adoptie abbreviated to Wobka).

In principle Dutch law will recognise parenthood established abroad, unless it does not comply with the provisions of the Wet conflictenrecht afstamming.\(^50\) An example where the establishment of parenthood abroad may be contrary to the provisions of the Wet conflictenrecht Afstamming is the case where a Dutch married man travels abroad and recognises the child of a woman other than his wife. If the man in question has not had a relationship with the child or the child’s mother prior to the recognition, the Dutch court may refuse to recognise the man’s status as the legal father of the child.\(^51\) The reason for this refusal is based on the assumption that recognition can be used as a means to circumvent the Dutch rules on the international adoption.\(^52\)

With respect to the second scenario, in which a couple adopt a child, two different situations need to be distinguished depending upon the habitual residence of the adoptive couple. If the couple is habitually resident in The Netherlands, it is vital that the adoption does not violate the Dutch rules on intercountry adoption.\(^53\) Dutch residents wishing to adopt a child from abroad will first need to acquire permission to adopt (beginnelloo stomming) from the Minister of Justice.\(^54\) If they fail to acquire the Minister’s permission the adoption will in principle not be recognised in The Netherlands.\(^55\) The couple must furthermore satisfy all the conditions laid down in the Wobka. However, in case of a surrogacy arrangement with the genetic material of the commissioning couple, it can be questioned whether the adoption of a child that is genetically related to the commissioning parents residing in The Netherlands, but born abroad as a result of a surrogacy arrangement, falls within the scope of the Wobka. Such a case has recently come before the District Court in The Hague in 2007.\(^56\) A Dutch couple had travelled to England where they had entered into a surrogacy arrangement in accordance with English regulations. The genetic material of the commissioning couple had been used. After the birth the surrogate mother signed a declaration that she agreed with the adoption of the child by

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\(^{49}\) Ibidem.

\(^{50}\) Arts 9 and 10 of the Wet Conflictenrecht Afstamming. See also Saarloos & Van Berkel 2008, p. 117-124.

\(^{51}\) Art. 10(2) under a Wet Conflictenrecht Afstamming.


\(^{53}\) Arts 6 and 7 Wet Conflictenrecht Adoptie.

\(^{54}\) Art. 2 Wobka.

\(^{55}\) Art. 7(1) under a Wet Conflictenrecht Adoptie.

\(^{56}\) Rechtbank ’s Gravenhage, 11 December 2007, LJN BB9844.
the commissioning parents. The court stated that Article 2 of the Wobka only allows for the adoption of foreign children if the prospective adoptive parents have obtained the consent of the Minister of Justice to adopt a foreign child. However, the court reasoned that according to the parliamentary history of the Wobka, this law was not intended to also cover the situation where the child to be adopted from abroad was conceived using the genetic material of the prospective adopters. In such cases the rules that apply in The Netherlands to adoption subsequent to IVF surrogacy are applicable. The surrogate mother and the commissioning couple had complied with the laws in England and with the rules that apply to adoption after IVF surrogacy in The Netherlands. The court, therefore, granted the adoption order, despite the fact that the couple had not obtained prior consent of the Minister of Justice to adopt a child from abroad.

However, bringing a child unrelated to either partner to The Netherlands without prior consent of minister (begijnseltoestemming) will result in problems for both the commissioning parents and the surrogate mother. The most notorious example of such a case is the so-called Baby Donna case. The case concerns a Belgian surrogate mother who agreed to carry a child for a Belgian commissioning couple with the sperm of the commissioning father. Towards the end of the pregnancy, the surrogate mother informed the commissioning parents that she had miscarried. However, this turned out to be a lie. After the baby was born in February 2005 she handed the child over to a Dutch couple. The Dutch couple had informed the appropriate authorities that they would receive a new born baby into their family for the purpose of adoption, but not that it concerned a child from abroad. This is important, since the couple had not followed the necessary procedure for intercountry adoption. At the time the court was confronted with the question whether the child could stay with the couple despite the fact that the couple had not proceeded in accordance with the relevant provisions, the child had been living with the couple for some 7 months. The District Court in Utrecht (Rechtbank Utrecht) decided that there was ‘family life’ between the child and the couple on the basis of the fact that the child had been living with them since her birth. Accordingly, the child was allowed to stay with the couple for the time being.

Meanwhile, the Belgian commissioning parents discovered that the surrogate mother had given birth to ‘their’ child. More than 2 years after the baby was born, DNA-testing revealed that the commissioning father was the child’s biological father, a fact that had been contested by the surrogate mother form the start. The commissioning father subsequently started proceedings with the Dutch courts to have the child turned over to him and his wife. The court decided it would not be in the interest of the child to leave the home and family she had been living with since birth, despite the fact that the commissioning parent (her biological father and his wife) were very

58 Rechtbank Utrecht, 26 October 2005, L/JN AU4934.
willing and eager to raise her themselves. Presently the surrogate mother, the commissioning couple and possibly the Dutch couple may be facing criminal charges in Belgium.

Secondly, if the couple is not habitually resident in The Netherlands at the time of the adoption, the adoption will be recognised if they can provide the necessary documents and the adoption procedure complies with the requirements laid down in Article 6 Private International Law (Adoption) Act (Wet Conflictenrecht Adoptie). All in all, it is not always clear what the situation is after surrogacy abroad and whether the commissioning parents will be considered the legal parents under Dutch law or will be able to become the legal parents under Dutch law.

3. If the Answer is no, are there any Sanctions?

3.1. Civil Sanctions?

3.2. Criminal Sanctions?

See question 1.

4. Is your Law about to change?

No, there are at present no proposals in Parliament to change the existing legislation regarding surrogacy. However, there has been debate in Parliament about the desirability of surrogacy after a number of baby buying cases and surrogacy scams reached the courts (and the press) in the Netherlands. These cases created a lot of publicity and again raised the question whether or not surrogacy should be forbidden in its entirety. If the law on surrogacy will develop on the short term, it is more likely that these measures will further restrict the possibilities there are than that they will broaden them.

See for instance Rechtbank Utrecht, 7 May 2008, LJN BD1068 and Hof Amsterdam, 25 November 2008, LJN BG 5157. In the most recent decision the Utrecht District Court decided that Donna’s foster parents will have to tell her that they are not her biological parents before she starts school. The court feared that given the amount of media attention Donna’s case had received, Donna would hear from children at school how she had been conceived and that her parents are not her biological parents (Rechtbank Utrecht, 10 June 2009, LJN BI9334).

The adoption will not be recognized if there was no proper investigation or legal procedure prior to the adoption, if the decision would not be recognized by the State where the child and/or the parents had their habitual residence at the time of the adoption decision or of the recognition of the decision would violate Dutch public policy. Art. 6(2) Wet Conflictenrecht Adoptie.

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THE DUTCH PRIVATE INTERNATIONAL LAW CODIFICATION: PRINCIPLES, OBJECTIVES AND OPPORTUNITIES

K. Boele-Woelki & D. van Iterson

1. Preliminary Observation

This contribution has been drafted on the eve of the completion of the codification of the rules of Private International Law in the Netherlands. Within a short period of time – possibly in 2011 or 2012 – the core of Dutch Private International Law will be codified as part of the Dutch Civil Code. The present contribution to the 2010 Congress of Comparative Law focuses on the efforts which have been undertaken in the last thirty years in order to complete the national codification of Dutch Private International Law. According to Dutch law the term Private International Law is the generic term which covers the rules on jurisdiction, on the applicable law and on recognition and enforcement. The main focus of this exposé is on the rules on applicable law which are generally designated as conflict of laws or choice of law rules. The contribution aims to analyze and explain the coming into existence of Book 10 of the Dutch Civil Code containing the national codification of mainly conflict of laws rules, its underlying principles and objectives as well as its opportunities.

The national report for the Netherlands, which was prepared in 1998 for the Fifteenth International Congress of Comparative Law, contains a survey of the history of Private International Law in the Netherlands in the 19th and 20th centuries as well as an analysis of a number of its characteristics. The authors of the present contribution would like to stress that since the 1998 report no significant changes have occurred in the basic concepts and techniques used in this area of law in the Netherlands.

1 See on the terms private international law and conflict of laws: Boele-Woelki 2010, Vol. 6, Nos. 13 and 18.
2. Historical Overview

2.1. Towards a National Codification of Private International Law

The decision to go ahead with a national codification of private international law was taken at the end of the 1970s. For twenty-five years, Belgium, Luxembourg and the Netherlands had been trying to reach an agreement on a Uniform Benelux code of private international law (conflict of laws). The name of the late Professor E.M. Meijers, the designer of the new Dutch Civil Code, remains indissolubly associated with this project which was regarded by the other two countries as a Dutch initiative. A first text had been drawn up in 1951. A final version had been drafted in the form of a convention in 1969. The failure of these attempts was announced in a formal letter addressed to the Dutch Parliament in 1976.

A second step which paved the way towards fresh efforts was the denouncement of five ‘old’ Hague Conventions of 1902 and 1905 concerning marriage, divorce, matrimonial property regimes, custody and guardianship. These conventions were based on nationality as a connecting factor. The main problem lay in the fact that they gave priority to the husband’s national law in the event that the spouses’ nationalities differed.

A further element that motivated the government’s decision to proceed was that national codifications were being developed in several other European countries during that period. The main examples which inspired the initiators of the national project were the codifications of Austria, Switzerland and the Federal Republic of Germany. At later stages, inspiration was also drawn from the Italian and Belgian codifications. It was generally felt that there was surely enough scope for a project in the Netherlands, in particular for subjects which lent themselves less for international codification, such as personal status. Ever since the Second World War, no complete doctrinal work had seen the light of day in the Netherlands. This was generally seen as lacking by practitioners. It is indeed true that since 1963 the Dutch Supreme Court had always provided outstanding guidance in this field, but it is also true that the courts cannot adopt the role of the legislature.

2.2. The Step-by-step Method

A first comprehensive provisional draft, prepared by the services of the Ministry of Justice, was submitted for advice to the Dutch Standing
Government Committee on Private International Law⁴ in the early eighties. That draft, which was never given an official status, was subsequently used by this advisory body as a working paper. It was agreed between the Standing Committee and the Government that Bills on the various subjects would be prepared separately, one after the other. At the end of the exercise the separate Acts would be merged into one single Act and there would be further consultation on the need, if any, to insert an introductory chapter containing general provisions. This working method was retained until the completion of the project.

One reason for using the step-by-step method was that it was preferred first to gain experience with the practical operation of legislation in selected areas and to see if legislation was at all helpful. The need for a national codification had indeed been questioned by some authors.⁵ Another important reason for adopting that method was that it leaves room for the incorporation of new international instruments. As set out in the previous report, the Dutch Government’s policy has always been to accept multilateral instruments - in particular, but not only, conventions of the Hague Conference on Private International Law – to the largest possible extent. The Netherlands’ openness towards international codification is understandable in view of the traditional international mobility of Dutch people and businesses. Moreover, the Netherlands, as the Hague Conference’s host country, has always been strongly committed to the work of that organisation. Conventions are usually incorporated in Dutch legislation by direct reference to the Convention rules, where necessary with the addition of specific provisions on aspects which are not covered and which the national legislature is free to regulate itself. In some specific cases, however, for practical reasons it was decided to reproduce provisions from conventions in the relevant Dutch Acts.

2.3. **Discussions about the Codification Project**

In 1993, as the codification project went on, an ‘Outline of a Code on Private International Law’ was published by the Ministry of Justice. This outline was

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⁴ The Standing Government Committee was established in 1897 by Royal Decree. Its statutory task is to assist the Dutch Government in all matters of Private International Law legislation. Moreover, until 1 April 2007 it was formally the governing body of the Hague Conference on Private International Law. Following the amendment of the Hague Conference’s Statute, it retained its role as an advisory body to the Council of the Hague Conference (Art. 4 of the Statute of the Hague Conference, as amended). The Committee’s reports are accessible at <http://www.justitie.nl/onderwerpen/wetgeving/over_wetgeving/privaatrecht/commissies-privaatrecht/staatscommissie-ipr.aspx>.

⁵ See De Boer 1990 (Professor of Private International Law at Amsterdam University) who firmly objected to the efforts to codify Private International Law, whereas Polak 1990 (Professor of Private International Law at Leyden University) clearly favoured the government’s approach.
commented by many legal authors. Among other things it triggered a
discussion on the scope of the project. Was the codification to be
comprehensive in the sense that it should include a complete set of rules on
jurisdiction and recognition (the Swiss model), or was it to focus on the
conflict of laws and become part of the Civil Code (the German model)?
Early in the 1990s preparations had started for a revision of the Dutch Code
of Civil Procedure. The draft for that Code included an initial chapter
containing general rules on jurisdiction. This new Code entered into force in
2001. After this stage had been reached, it was preferred not to remove the
chapter on jurisdiction from the Code of Civil Procedure but rather to insert a
Book on the conflict of laws in the Civil Code. This solution was expected to
make the subject-matter more accessible while retaining the links with Dutch
internal law. It should be pointed out that in the scheme chosen, the
borderline between rules of jurisdiction and recognition and enforcement, on
the one hand, and conflict of laws rules, on the other, is not as strict as one
might think. This can be partly explained by the references to conventions
dealing with both aspects. Some of the existing Acts on conflict of laws issues
also contain some provisions on the recognition of legal acts and legal facts.

2.4. The Preparation of General Provisions

Consultations with the Standing Committee on a set of general provisions
Committee’s report was published in 2004. It contains a summary in English
and a translation of the proposed provisions. The actual consolidation,
which started after 2004, consisted of carefully reviewing the existing
provisions in the light of the general provisions proposed and, where
appropriate, reassessing the need for certain general provisions. It also
included the removal of inconsistencies in terminology and drafting and the
testing of legislation in the light of case law and legal practice. These
investigations led to the finding that no fundamental changes to the existing
Acts are necessary. On the whole the consolidation turned out to be a highly
technical operation. The outcome, in the form of a complete draft and
explanatory memorandum, was submitted to the Standing Government
Committee for advice before being finally prepared for submission to
Parliament.

2.5. Book 10 of the Dutch Civil Code

The Bill providing for the establishment of Book 10 of the Dutch Civil Code
and consolidating existing legislation, completed with a title containing
general provisions, received the approval of the Council of State and was

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6 The Dutch version of the report can be consulted at the Ministry of Justice’s website,
submitted to Parliament on 18 September 2009. It does not cover all issues of Private International Law which are considered worthwhile. Further pieces of legislation can be inserted. For example, a subtitle has already been reserved for the forthcoming ratification by the Netherlands of the 2001 Hague Convention on the international protection of adults. Existing titles may also be amended in order to take new international instruments into account. Thus, the subtitle on maintenance obligations will be changed in the foreseeable future so as to refer to the new 2007 Hague Convention and Protocol and the new Regulation on this subject, as well as legislation implementing those instruments.

The main body of the Bill submitted to Parliament contains 165 articles. The order of the subjects is the same as the order of corresponding parts of the Dutch Civil Code dealing with substantive law. The 15 titles are the following:

1. General provisions
2. The name of natural persons
3. Marriage, with subtitles on the celebration and recognition of marriages; legal relationships between the spouses; the matrimonial property regime; the dissolution of marriage and separation
4. Registered partnership (with subtitles corresponding to the subtitles of the Title on marriage)
5. Filiation
6. Adoption
7. Other issues of family law, including subtitles on parental responsibility and child protection; international child abduction; maintenance obligations
8. Corporations
9. Agency
10. Property law
11. Trust law
12. Succession to estates
13. Contractual obligations
14. Non-contractual obligations
15. Some provisions on the conflict of laws relating to maritime, inland water and air transport

7 Vaststelling en invoering van Boek 10 (Internationaal privaatrecht) van het Burgerlijk Wetboek (Vaststellings- en Invoeringswet Boek 10 Burgerlijk Wetboek), Second Chamber, 32 137. An English translation of the 17 general provisions included in Title 1 of the Bill is appended to the present report.

3. **Current Legal Sources**

The current legal sources of Dutch Private International Law consist of three different types of instrument: Conventions, European Regulations and Statutes. Book 10 of the Dutch Civil Code will contain both statutory provisions of Private International Law and references to Conventions and European Regulations.

3.1. **Conventions**

Although the precedence of international treaties over national legislation follows from Article 94 of the Dutch Constitution, for the sake of clarity it was considered appropriate to add a general provision in the Bill stating that the rules contained in the national legislation do not waive any international instruments in force. The following multilateral conventions, most of which contain conflict of laws rules, are expressly referred to in the Bill. They are listed in chronological order.

- The 1948 Geneva Convention on the international recognition of rights in aircraft;
- The 1956 Hague Convention on the law applicable to maintenance obligations towards children;
- The 1961 Hague Convention on the conflicts of laws relating to the form of testamentary dispositions;
- The 1961 Hague Convention on the jurisdiction of authorities and applicable law in matters of protection of minors;
- The 1962 ICCS Convention on establishment of maternal descent of natural children;
- The 1967 ICCS Convention on the recognition of decisions relating to the matrimonial bond;
- The 1970 Hague Convention on the recognition of divorces and legal separations;

- The 1970 ICCS Convention on legitimation by marriage;
- The 1971 Hague Convention on the law applicable to traffic accidents;
- The 1973 Hague Convention on the law applicable to products liability;
- The 1973 Hague Convention on the law applicable to maintenance obligations;
- The 1978 Hague Convention on celebration and recognition of the validity of marriages;
- The 1978 Hague Convention on the law applicable to matrimonial property regimes;
- The 1978 Hague Convention on the law applicable to agency;
- The 1980 ICCS Convention on the law applicable to surnames and forenames;
- The 1980 European Convention on recognition and enforcement of decisions concerning custody of children and restoration of custody of children;
- The 1980 Hague Convention on the civil aspects of international child abduction;
- The 1985 Hague Convention on the law applicable to trusts and on their recognition;
- The 1989 Hague Convention on the law applicable to the estates of deceased persons;
- The 1993 Hague Convention on protection of children and co-operation in respect of intercountry adoption.

3.2. European Regulations

The legislative technique which consists of directly referring to international texts is also used for Community legislation. This process began with references to the Brussels I and Brussels II Regulations in the Code of Civil Procedure. It continued with the insertion of references to the Rome I and Rome II Regulations in the Bill which is under consideration. The above-mentioned general provision also reminds the reader of the precedence of Community instruments over national law, a precedence which follows from general Community law. The following Regulations containing rules on the applicable law\textsuperscript{10} are or will soon become binding law in the Netherlands:

- Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II');
- Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations ('Rome I');

3.3. Statutes

The following pieces of national legislation came into force during the 30-year period between 1980 and 2010:12

- 1981: Act on the conflict of laws relating to divorce, also implementing the Hague and ICCS Conventions on the recognition of divorces listed above.
- 1990: Act on the conflicts of law on marriage, also implementing the 1978 Hague Marriage Convention.
- 1990: Act on the conflict of laws relating to names, also implementing the 1980 ICCS Convention on names. This Act was supplemented in 1999 with provisions on the recognition of names recorded abroad.
- 1992: Act on the conflict of laws relating to matrimonial property regimes, also implementing the 1978 Hague Convention on the law applicable to matrimonial property regimes. This Act was supplemented in 1999 with a provision on the equalization of pension rights, which in the Netherlands is regarded as an issue falling under matrimonial property regimes.


11 The Regulation is due to apply from 18 June 2011.
- 1993: Act regulating the conflict of laws on the spouses’ legal relationships not covered by the rules on matrimonial property regimes.
- 1993: Act regulating conflicts of laws issues of maritime and inland water transport.
- 1997: Act regulating the conflict of laws on corporations.
- 2001: Act regulating the conflict of laws on tort.
- 2003: Act regulating the conflict of laws on filiation.
- 2004: Act regulating the conflict of laws on adoption.
- 2004: Act regulating the conflict of laws on registered partnerships. The Act implementing the Marriage Convention was amended in such a manner as to take into account registered partnerships and same-sex marriages.
- 2006: Act implementing the 1996 Hague Child Protection Convention and the Brussels IIbis Regulation. This Act anticipates the entry into force of the Hague Convention for the Netherlands and other EU Member States, which will hopefully take place in the course of 2010.
- 2008: Act regulating the conflict of laws relating to property rights. As the latter subject is regarded as a cornerstone of the codification, the consolidation was not finalized until early 2009.

4. Legal Certainty and Flexibility

On the whole, the statutory provisions in specific areas are detailed. They contain hard-and-fast rules for a large spectrum of cases. The proposed general provisions include various escape clauses and therefore leave a certain degree of discretion to the courts when applying the conflict of laws rules.\(^\text{13}\) This is in line with developments in case law. The 1998 national report states that since 1963, in nearly every case which was finally decided by the Supreme Court, it was held that a conflict of laws rule which was considered appropriate in the case at hand was to be applied only in principle.\(^\text{14}\) In certain circumstances, which were frequently not further specified, another connecting factor could have been applied. This trend in Dutch case law is clearly reflected in both the overall structure and individual provisions of the Bill under consideration. The answer to the

\[\text{13}\] See Struycken 2004, in particular Chapters VI (The ‘classical’ approach); IX (Conclusions as to the classical approach); X (Abandoning the classical approach); XIII (Public policy in its Private International Law function); and XIV (‘Lois de police’).

question whether the Dutch conflict of laws system contains any devices granting courts discretion in deciding individual cases is therefore yes.

In exceptional circumstances Sections 6 to 9 of the Bill permit an adjustment of the outcome of the application of rules on particular subjects. These escape rules will be discussed below under 4.1. Another feature of the codification, to be discussed under 4.2, is the use of so-called soft or composite connecting factors. In several instances the last step of a multi-stage rule designates the law which has the closest connection with the case. There is only one example in the Dutch conflict of laws system of a so-called ‘malleable approach’ which is described under 4.3.

4.1. *Escape Clauses*

4.1.1. Public Policy

Like many other codifications, the Dutch draft codification contains a general public policy clause (Section 6) which is worded in a way which is similar to provisions of this kind in international instruments. The Explanatory Memorandum draws the courts’ attention to the words ‘manifestly incompatible’. A waiver of the application of foreign law may only be based on public policy considerations in exceptional cases. It is explained that a distinction should be made according to whether the content of foreign law is concerned (the ‘outer limit’ of public policy) or the consequences of its application in the actual case (the ‘inner limit’ of public policy). Examples of the ‘outer limit’ criterion are a foreign law which provides for a person’s ‘civil death’, i.e. his loss of all rights and capacities, or a foreign law which contains an impediment to marriage based on race. An example of the ‘inner limit’ criterion is the case where under the foreign law designated by the conflict of laws rules, a bigamous marriage concluded between two Dutch nationals is valid.\(^{15}\)

Section 6 also covers the case of incompatibility with supranational public policy. Public policy has a European and an international dimension which the courts may not neglect. However, the clause does not cover foreign public policy as such. But obviously the court may take into account the incompatibility of a provision of the applicable law with the public policy of a state with which the case bears a close connection.

\(^{15}\) Boele-Woelki, Curry-Sumner & Schrama 2009. An important conclusion of this report which was drawn up at the request of the Dutch Ministry of Justice is that, measured by standards of comparative law, the Dutch legal system with regard to polygamous marriages generally functions well. Dutch law generally resembles the law of other jurisdictions examined (Denmark, England and Wales, France and Germany). No points of contention or other problems have emerged from legal practice. Furthermore, it was established that the number of registered polygamous marriages is insignificant.
When a court determines that a foreign law rule is incompatible with public policy the question arises what other law should be applied to the case at hand. The Explanatory Memorandum stresses the exceptional nature of the application of the public policy provision. The designated foreign law is only left aside to the extent that it is incompatible with public policy. However, no general rule is given in the event that the public policy exception does apply. The decision is left to the courts. One possibility is to resort to the application of the lex fori.

4.1.2. Overriding Mandatory Rules of Dutch Law

Section 7 deals with mandatory rules or rather (in the terminology adopted in the Rome I Regulation) overriding mandatory rules. The notion and the way in which such rules were applied in Dutch case law were discussed at length in the 1998 national report. The wording of Section 7, the first subsection of which contains a definition of the term ‘overriding mandatory rules’, is very similar to that of Article 9 of the Rome I Regulation, but extends its application beyond the area of contract law. The second subsection makes it clear that an overriding mandatory rule of the lex fori takes precedence over the law designated by the conflict of laws rule only to the extent that such an overriding mandatory rule applies. Otherwise, the law designated by the conflict of laws rule continues to apply.

Some statutory overriding mandatory provisions of Dutch law contain a scope rule, i.e. unilateral rules delineating the scope of application of the relevant provisions of Dutch substantive law. Book 10 does not contain all the conflict of laws rules in force in the Netherlands. In particular, it was preferred not to move provisions on Private International Law which are part of existing statutes implementing several European directives on consumer law. These statutes were incorporated in Book 6 of the Civil Code. For example, Section 247 of Book 6 provides a scope rule for the provisions of Dutch substantive law implementing the European directive on unfair terms in consumer contracts. Other examples of scope rules which are not part of Book 10 are Section 4 of the Minimum Wages and Minimum Holiday Allowances Act and Section 46 of the Consumer Credit Act. Where there is such a statutory scope rule, there is no need to verify if the rule of substantive law to which it applies is an overriding mandatory provision. In the field of labour contracts, if the employer wishes to dismiss an employee, Section 6 of the Extraordinary Labour Relations Decree (Buitengewoon Besluit Arbeidsverhoudingen) requires him to request permission from the Employee Insurance Schemes Implementing Institute (Uitvoeringsinstituut werknemersverzekeringen). This provision includes no statutory scope rule but is consistently regarded as an overriding mandatory provision in Dutch case

16 The 1998 national report, p. 207-209.
17 See Art. 9, para. 2, Rome I.
law. In the absence of a statutory scope rule, it is up the court to assess whether a mandatory Dutch provision indeed has the nature of an overriding mandatory rule. No hard-and-fast criteria are given. The overriding mandatory nature of a rule should not be too readily assumed.

4.1.3. Overriding Mandatory Rules of Foreign Law

In line with several other national codifications in Europe and with the Rome I Regulation, Section 7 contains, in its third subsection, a provision which allows a court to take into account foreign overriding mandatory rules. The provision covers not only third countries’ overriding mandatory rules, but also overriding mandatory rules of the lex causae. In fact, under Dutch Private International Law, the lex causae designated by a conflict of laws rule or by the parties’ choice does not automatically include rules which could be overriding mandatory rules, as these rules (also) aim to protect the public interest. The court will therefore have to assess in each particular case whether these rules should be taken into account. The Dutch courts are not formally bound by a foreign scope rule. In accordance with the criteria in the third subsection they will have to determine the extent to which effect has to be given to a foreign overriding mandatory rule.

4.1.4. General Escape Clause – the Social Reality Test and the Accessory Connection

Section 8 contains a general escape rule. It offers a device for adjusting the result of the application of conflict of laws rules if, in a given case, the close connection which is presumed in a conflict of laws rule actually only exists to a very limited extent, whereas there is a much closer connection with another law. In such a case the much more closely connected law may be applied instead of the law designated by the conflict of laws rule. A similar rule is contained in Section 15 of the Swiss Private International Law Act and Section 19 of the Belgian Code of Private International Law. The Explanatory Memorandum sets out that this provision may also be applied only in exceptional cases.

Those who have proposed the Bill reject the idea of a ‘broad’ escape clause in the sense of a public policy clause which would be applicable if the outcome of applying the law designated by the conflict of laws rule is manifestly unfair or unreasonable. The application of such broad clauses might lead to a ‘better law approach’ and might thus reduce legal certainty.

20 Reference was made to the debate on this topic in the 1998 national report, p. 210-211.
The wording of the provision is neutral in the sense that whatever law is designated by a conflict of laws rule – even if it is the *lex fori* – that law may be replaced by another law with which there is a far closer connection.

The clause should be applied *ex officio* (see the general provision in Section 2). Of course, if the court contemplates doing so, it should offer the parties the opportunity to express their opinion on its application. The provision only applies to statutory conflict of laws rules and it cannot be used to waive the application of a rule contained in a Convention or a European Regulation.

The second subsection of Section 8 provides that the escape clause does not apply if the parties have made a valid choice of the applicable law, even if the case is much more closely connected with another law.

The Explanatory Memorandum establishes that the closest connection should only be determined on the basis of objective factors and that these factors should be weighed using only arguments borrowed from private international law concerning the uniformity and effectiveness of solutions. Arguments borrowed from substantive law, such as the content of the designated law or the result aimed at, should be disregarded. The application of conflict of laws rules based on the ‘favour principle’ or the ‘protection principle’ cannot be waived by using this clause. The escape clause may not be used in order to resort to the *lex fori* when the application of the foreign law designated by a conflict of laws rule gives rise to problems.

In the Explanatory Memorandum it is observed that the so-called social reality test (i.e. the check as to whether a party’s actual social ties with the country of his nationality are strong enough to justify the application of a rule which designates the law of (common) nationality is to be considered as a species of this general escape rule. The same is said in the Memorandum with respect to the so-called accessory connection. See for an example of such a connection Article 4, paragraph 3, of the Rome II Regulation.

4.1.5. Recognition of Acquired Rights

Section 9 offers a device for adjustment in a category of cases in which the application of a Dutch conflict of laws rule would lead to an unacceptable result. It embodies the so-called doctrine of the accomplished fact, which is also known as the doctrine of recognition (or protection) of acquired rights. It addresses the question whether legal consequences may be attached to a legal fact in accordance with the law designated by a foreign conflict of laws rule, even though such consequences are not attached to that fact by the law designated by the Dutch conflict of laws rule. The question is therefore whether the Dutch conflict of laws rule may be set aside by the foreign conflict of laws rule. The clause answers this question in the affirmative, though only in exceptional cases, i.e. ‘to the extent that failure to attach such consequences would constitute an unacceptable violation of the parties’ justified expectations or of legal certainty’. The clause cannot be applied where the case is governed by a convention or a European Regulation.
The doctrine of the accomplished fact was inspired by the Supreme Court’s case law in the field of matrimonial property law. The idea underlying this doctrine is that the principle of respect for justified expectations places a certain limit on the applicability of Dutch conflict of laws rules.

The application of this clause presupposes that legal consequences are attached to the fact by the law applicable according to the Private International Law of a ‘concerned foreign state’. The clause will therefore not apply where different legal consequences ensue from different laws designated by two successive Dutch conflict of laws rules. Such a difference may occur when a conflict of laws rule developed in Dutch case law is replaced by a statutory rule with a different content.

The Explanatory Report states that the question of what is a ‘concerned foreign State’ cannot be addressed in a general way. It will have to be answered in the light of the particular circumstances.

4.2. Determination of the Closest Connection: the Use of ‘Soft’ Connecting Factors

As mentioned in par. 15, the Dutch codification contains various examples of ‘soft’ connecting factors. However, this type of connection is only used as a last resort, when other connections do not apply to the particular case at hand. Examples can be found both in the general provisions and in the titles devoted to specific subjects. The factors to be taken into account do not depend on the location of a single contact but rather on multiple elements and circumstances to be evaluated in the light of the particular case. Two categories can be distinguished. The first category is that of open rules. The second category requires the court to select one law or another, depending on which has the closest connection. In many instances the Explanatory Memorandum offers guidance as to which criteria are relevant when applying such open formulae. Moreover, the Memorandum refers to the Supreme Court’s case law which in some cases further refines the application of certain statutory conflict of laws rules.

4.2.1. Examples of Open Rules

Section 15 provides general rules for cases where a conflict of laws rule designates the law of a multi-unit state. In its two first subsections, which deal with rules based on nationality and habitual residence, it refers to the relevant rules in force in the multi-unit state in order to establish the unit whose legal system applies. In the absence of any such local rules or if these rules do not identify an applicable legal system, the legal system with which – having regard to all circumstances – the person concerned is most closely connected shall apply.

Section 36 determines the law which is applicable to the spouses’ non-property relationships. It provides that in the absence of a choice of the
applicable law by the parties, such relationships are governed by the law of the state of their common nationality or, failing this, by the law of the state where they both have their habitual residence or, failing this, by the law of the state with which – having regard to all the circumstances – they are most closely connected.

Similarly, Article 4, paragraph 3 of the 1978 Hague Convention on the law applicable to matrimonial property regimes provides that if the spouses do not have their habitual residence in the same State, nor have a common nationality, their matrimonial property regime is governed by the internal law of the State with which, taking all the circumstances into account, it is most closely connected.

Unlike Article 4 of the Rome Convention, Article 4 of the Rome I Regulation contains hard-and-fast rules for determining the law which is applicable to a number of specific contracts in the absence of a choice of applicable law. However, where the applicable law cannot be determined on the basis of those rules, the contract is governed by the law of the country with which it is most closely connected.

4.2.2. Examples of Open Rules which require a Selection

The general provision of Section 11 designates a person’s national law as applicable to issues of capacity. It states that where the person concerned is a national of more than one state and has his habitual residence in one of those states, the law of that state shall be deemed to be his national law. Where he does not have his habitual residence in any of those states, the law of the state of his nationality with which – having regard to all the circumstances – he is most closely connected shall be deemed to be his national law.

Section 19, second subsection, contains a rule which designates the law which is applicable to the names of a non-Dutch person who has several nationalities. It contains the same rule for cases of multiple nationalities as Section 11. Section 146 governs a person’s capacity to make a will. The rule for cases of multiple nationality is, again, identical to that of Section 11.

4.2.3. An Example of the Two Categories: ‘Open Rules’ and ‘Open Rules which require a Selection’

Rules of both categories are found in Article 3 of the 1989 Hague Succession Convention. In the absence of a choice of applicable law, succession is governed by the law of the State in which the deceased was habitually resident and of which he was a national at that time. The law of the State of the deceased’s habitual residence also governs succession if at the time of his death he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if, at the time of his death, he was manifestly more closely connected with the State of which he was then a national, the law of that State applies. In other
cases the law of the State of the deceased’s nationality applies, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

4.3. **Rules providing a List of Factors which the Court must consider in choosing the Applicable Law (‘Malleable Approach’)**

There is one example of a malleable formula in the Dutch codification. It is contained in Article 7 of the 1985 Hague Trust Convention. That Article provides that where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected. In ascertaining the law with which a trust is most closely connected reference shall be made in particular to: the place of administration of the trust designated by the settlor; the situs of the assets of the trust; the place of residence or business of the trustee; and the objects of the trust and the places where they are to be fulfilled.

4.4. **The Application of the Laws of different States to different Aspects or Issues in the same Cause of Action (dépeçage)**

In the Dutch legal literature the mere fact that different aspects or issues of a certain type of cross-border legal relationship fall within different Private International Law categories and are therefore governed by different laws is not regarded as dépeçage. Moreover, the fact that overriding mandatory rules may claim application in a case which is otherwise governed by one particular law is not regarded as dépeçage either. Consequently, in Dutch Private International Law the notion of dépeçage is used in a narrow sense. Dépeçage only occurs when the parties designate different laws to be applicable to different issues falling within a single Private International Law category (for example, different laws governing different sets of terms in one contract) (subjective dépeçage) or when, in the absence of such a designation by the parties, a court determines that different rules apply to different aspects in such a case (objective dépeçage). The fragmentation of conflict of laws rules is a very common phenomenon in Dutch Private International Law. By contrast, there are few examples of conflict of laws rules which allow subjective or objective dépeçage. The examples provided below (4.4.1. differentiation of applicable laws, 4.4.2. subjective dépeçage and 4.4.3. objective dépeçage) follow the basic structure of the proposed Book 10.

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21 See in particular Polak 1994.
4.4.1. Examples of a Differentiation of Applicable Laws within the same Cause of Action

By way of a general remark it is observed that the application of escape clauses (Sections 6, 7, 8 and 9, as discussed in Chapter III) is likely to lead to a differentiation of applicable laws within the same cause of action.

In addition, Section 4 of the Bill contains a general provision addressing the issue of preliminary questions. It provides for an autonomous connection of preliminary questions and may thus lead to a differentiation within one cause of action. There are, however, exceptions to this general rule in the individual titles of the Bill. One example of such an exception is in Title 2 on names. Section 19, first subsection, provides that the names of a non-Dutch person are governed by the law of the state of his nationality. In this provision the term ‘law’ is to be understood as including the rules on private international law in that law. For the sole purpose of determining a person’s names, the elements on which these depend shall be assessed in accordance with that law (which is not necessarily the same law as the law that governs the person’s filiation).

Family Relations

Title 3, subtitle 1, differentiates between the material and the formal aspects of the conclusion of a marriage. Moreover, certain impediments to marriage are considered to belong to Dutch public policy and are thus governed by Dutch law. The latter aspect is dealt with in more detail in Chapter IV below.

Title 3, subtitle 2, contains different rules for different aspects of the non-proprietary relationships between spouses. Under Section 35 the parties may choose the law which is applicable to their mutual personal relationships. In the absence of such a choice these relationships are governed by the law of their common nationality; failing this, by the law of the state where they both have their habitual residence and, failing this, by the most closely connected law. Under Section 39, a spouse’s liability for debts incurred by the other spouse in the normal running of the household is governed by the law of the state where they both have their habitual residence; failing this, by the law that governs the obligation. Finally, under Section 40, the question whether a spouse needs the other spouse’s consent for certain legal acts, whether such consent can be replaced by a court decision and what are the consequences of a lack of such consent, are governed by the law of the state where the spouse who performed the act – i.e. the person who is to be protected – was habitually resident at that time.

Title 3, subtitle 3, contains a number of provisions supplementing the 1978 Hague Matrimonial Property Convention. It provides for the applicability of some provisions of substantive Dutch law regarding, in particular, the spouses’ liability towards third persons in certain specific
cases, and this may lead to a differentiation. Similar provisions can be found in Title 4 on registered partnerships.

Title 5, on filiation, contains a good example of differentiation. According to Section 95, a man’s capacity to acknowledge a child’s paternity and the conditions for such acknowledgement are, in principle, governed by that man’s national law. However, the mother’s and/or the child’s consent to the acknowledgement are, in principle, governed by the mother’s and the child’s national law, respectively.

Title 6, on adoption, provides in Section 105 that an international adoption is governed by Dutch law. By contrast, the consent, the consultation or the informing of the child’s parents or other persons or bodies are governed by the child’s national law.

The 1989 Hague Succession Convention governs the actual succession to the estate. Article 7 does not include the settlement of the estate within the scope of the applicable law (although a Contracting State is not precluded from extending the Convention’s regime to this matter). Title 12 of the Bill supplements the Convention with specific rules for the settlement and the distribution of the estate, which differ from the rules in the Convention. Section 149 provides that the settlement is governed by Dutch law if the deceased had his last habitual residence in the Netherlands. The same rule applies to the distribution of the estate unless the heirs agree to designate the law of another country. These rules are without prejudice to the requirements of the property law of the country in which the assets are situated.

Patrimonial Law

Title 9 deals with agency and refers to the 1978 Hague Agency Convention. That Convention contains several provisions, the application of which leads to differentiation. In particular the principal’s relations with the third party are determined by rules which are different from the rules governing the relations between the principal and the agent.

Title 10 on property law contains some examples of a differentiation. Under Section 128, the proprietary effects of a reservation of title are governed by the law of the state where the property is situated at the time of delivery. This is without prejudice to the obligations which may arise from the reservation of title clause under the law which is applicable thereto.

Section 129 provides that the creation and content of a right of retention are determined by the law that governs the underlying legal relationship. However, a right of retention may only be enforced insofar as the law of the state in whose territory the tangible property is situated permits this.

Article 14 of the Rome I Regulation partially regulates the assignment of claims. It provides that the relationship between the assignor and the assignee is governed by the law that applies to the contract between them.
The law governing the assigned claim determines whether the claim is assignable as well as the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor’s obligations are discharged. Pending the possible addition of a provision to the Regulation, Section 135 of the Bill completes this regime by providing that the law governing the contract which lays down the obligation to transfer the claim not only determines the contractual relationship between the assignor and the assignee, but also governs the proprietary aspects of the transfer. The conditions for the validity of the transfer in respect of third parties other than the debtor are therefore governed by the law which is applicable to the contract. Section 135 reflects a decision by the Dutch Supreme Court in a case decided on 16 May, 1997, which was welcomed by practitioners.

4.4.2. Examples of Subjective Dépeçage

Family relations

Article 6 of the 1978 Hague Matrimonial Property Convention provides that the spouses, whether or not they have designated a law applicable to their matrimonial property regime, designate with respect to all or some of the immovables the law of the place where these immovables are situated. They may also provide that any immovables which may subsequently be acquired shall be governed by the law of the place where such immovables are situated. A similar rule is contained in Section 70 of the Bill for property regimes of registered partners. However, in this case the choice is limited to law systems which have introduced registered partnership.

Article 6 of the 1989 Hague Succession Convention provides that a person may designate the law of one or more States to govern succession to particular assets in his estate. However, any such designation is without prejudice to the application of the mandatory rules of the law applicable according to Article 3 or Article 5, paragraph 1.

Patrimonial law

For contracts see in particular Article 3, first paragraph, last sentence, of the Rome I Regulation which explicitly allows the parties to select the law applicable to the whole or to part of a contract. Subjective (or objective) dépeçage in respect of a particular non-contractual obligation would not appear to be possible under Article 14 of the Rome II Regulation.

Title 11 concerns trusts and refers to the 1985 Hague Trust Convention. That convention provides in its Article 9 that in applying its rules on the law

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applicable to a trust, a severable aspect of the trust, particularly matters of administration, may be governed by a different law.

4.4.3. Examples of Objective Dépeçage

**Patrimonial law**

Title 12 addresses issues of contract law. Reference is made here to the ECJ’s first preliminary ruling on the 1980 Rome Convention on the law applicable to contractual obligations, dated 6 October, 2009. One of the questions put forward by the Dutch Supreme Court was concerned with the court’s possibility to divide a contract into a number of parts for the purpose of determining the law applicable under Article 4 of the Convention. The ECJ holds that the second sentence of Article 4(1) of the Convention must be interpreted as meaning that a part of the contract may be governed by a law other than that applied to the rest of the contract only where the object of that part is independent. Unlike Article 4 of the Rome Convention, Article 4, second paragraph, of the Rome 1 Regulation forbids objective dépeçage with respect to contracts which are not the subject of a choice of applicable law.

Objective dépeçage is also possible under Article 9 of the 1985 Hague Trust Convention.

5. **The Closest Connection Approach combined with Content-oriented Law Selection**

Most conflict of laws rules in force in the Netherlands are based on the traditional centre of gravity approach or, rather, the ‘closest connection’ approach. However, even where this is the case, the courts are allowed, within certain limits, to consider the content of the conflicting laws and to make the choice dependent on that content. This is the main function of the general provisions described in Chapter III (public policy, general escape clause, mandatory laws and accomplished facts). A combined approach was also taken in a number of provisions on specific subjects and was described in some detail in the 1998 national report and the information provided there has not become obsolete.

In the next few paragraphs examples of this combined approach are provided. The following distinctions are made: 1. choice of law rules which

23 C-133/08, Intercontainer Interfrigo SC (ICF)/Balkenende Oosthuizen BV, MIC Operations BV.
25 An outline of the two conflict of laws approaches generally indicated as ‘State-Selection’ combined with ‘Conflicts Justice’, on the one hand, and ‘Content-Oriented Law Selection’ combined with ‘Material Justice’, on the other, as is apparent in Dutch Private International Law, was given in paragraph 6, headed ‘Dilemma between conflicts justice and material justice’, of the 1998 national report, p. 215-224.
are, to a greater or lesser extent, determined by the underlying substantive law policies (functional allocation): 2. choice of law rules which are not impartial with respect to the substantive outcome of the dispute (favour approach): 3. choice of law rules which are aimed at protecting the interests of one of the parties of a certain relationship (protective rules) and 4. conflict of law rules which allow the parties to designate the applicable law (party autonomy).

5.1. **Functional Allocation**

5.1.1. Family Relationships

Reference is made to the comments on this category of rules in the 1998 national report.\(^26\) The international instruments mentioned there as examples of a functional approach have been replaced by other instruments containing provisions of the same type. The 1996 Hague Child Protection Convention contains rules on the applicable law which take into account underlying substantive law policies to a larger extent than its 1961 predecessor. A functional approach is also taken in the 2007 Hague Maintenance Protocol, which was borrowed from the 1973 Convention on this subject: under Article 3 the law which basically applies to maintenance obligations is that of the creditor’s habitual residence. However, this rule is subject to an exception in the case of spousal maintenance in Article 5 if one spouse objects and ‘if another state, in particular the State of their last common habitual residence, has a closer connection with the marriage’.

5.1.2. Multiple Nationality

The existing Dutch codification contains a core of provisions relating to personal status which use nationality as a basic connecting factor. In its 2002 opinion on the general provisions, the Dutch Government Standing Committee proposed a general provision for cases of multiple nationalities. According to that proposal, in such cases the law of the country of which the person was a national and where he was habitually resident was to be applied. In the absence of such habitual residence in such a country, the law of the person’s nationality with which he was most closely connected was to be applied. In the course of the preparations for the consolidation the Standing Committee changed its mind and accordingly it was decided to drop the idea of a general provision. In fact, the provision proposed did not properly address cases where the law applicable is that of the common nationality of the parties involved. Moreover, in certain instances the rule is inconsistent either with the favour approach or with the protection approach

envisaged. Consequently, in the Bill submitted to Parliament issues of multiple nationalities are dealt with in the individual sections using nationality as a connecting factor. Examples of the use of the basic rule described above are in the two general provisions on the status of stateless persons and of refugees (Sections 16 and 17), in Section 19 on the name of a non-Dutch person who has several nationalities, and Section 146 on a person’s capacity to make a will.

The conflict of laws rules using common nationality as a connecting factor contain the following provision on multiple nationality. Where the parties have a single common nationality, the law of that nationality applies irrespective of whether a party has yet another nationality. Where the parties have several common nationalities, they are deemed to have no common nationality and the fall-back rule (usually the law of the State of their common habitual residence) will apply. This type of solution was chosen in Section 37 (non-proprietary spousal relationships), Section 92 (filiation of children born within the marriage, Section 93 (denial of paternity) and Section 97 (judicial establishment of paternity).

It should be stressed once again that the functional approach does not necessarily lead to the application of the law which is most favourable to the weaker party. There are mechanisms which allow for an adjustment of the rule for that particular purpose and these mechanisms will be discussed in the next paragraph.

5.2. **The Favour Approach**

The favour approach focuses on the actual outcome of the application of a rule which favours a party or the parties in a relationship.

5.2.1. **Marriage**

An alternative is available for future spouses who wish to marry in the Netherlands. Section 28 provides that either a. the parties should each meet the requirements of Dutch substantive law and at least one of them should be a Dutch national or be habitually resident in the Netherlands, or b. the parties should each meet the requirements of their national law, it being understood that in the event of multiple nationality it is enough that the party concerned complies with the requirements of any of those national laws.

5.2.2. **Paternity**

A cascade system was adopted in the rules determining the law that is applicable to the requirements which a man must meet in order to

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27 See the examples below.
acknowledge paternity. These rules are laid down in Section 95. The primary rule refers to the man’s national law and specifies that in the event of multiple nationality, any of his national laws which allows for the acknowledgement will be accepted. If the national law thus designated denies him the right to acknowledge paternity, the law of the child’s habitual residence applies; if, again, the result is negative, the law of the child’s nationality applies, it being understood that in the event of multiple nationality any one of the national laws is accepted. If the result is still negative, the law of the man’s country of habitual residence applies. It should be noted, however, that the favour approach taken here is mitigated by the protective rules in subsection 2 of the same Section. This approach is discussed in paragraph 3.

The 1970 Convention on legitimation by marriage was incorporated in the Dutch codification by reference in Section 98. It uses a number of alternative connections in order to achieve the desired result, i.e. the child’s legitimate status. Section 98 even adds a further reference to the law of the child’s habitual residence.

5.2.3. Maintenance

In the 1998 national report reference was made to the two Hague Maintenance Conventions of 1956 and 1973. The new 2007 Hague Maintenance Protocol uses the ‘cascade technique’ which can be found in Articles 4 to 6 of the 1973 Convention in order to make sure that the creditor will obtain maintenance (although the order of the steps to be taken in this cascade has been changed and although the provision has a more limited material scope).

5.2.4. Form of Testamentary Dispositions

The 1961 Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions, which was incorporated in the Bill by reference thereto in Section 151, uses a number of alternative factors with a view to favouring the validity of wills as to their form. Likewise, Section 12 contains general provisions on the formal validity of acts providing for an alternative connection in cases where the parties are, or are not, in the same state.

5.3. Protective Rules

Some of the rules mentioned under 2., which embody a favour approach, are combined with rules which aim to protect another party in the same relationship from the possible adverse effects of the favour regime.

29 The 1998 national report, p. 218.
5.3.1. Marriage

Public policy in matters of marriage is specified in Section 29, which provides that on grounds of public policy a marriage may, in any event, not be entered into in the Netherlands if the future spouses have not reached the age of 15; if they are related as parent and child or brother and sister either by birth or by adoption; if the free consent of the future spouses is lacking; if either spouse is mentally disturbed to the extent that he/she cannot express his/her will or understand his/her statements; or if the marriage would contravene the monogamy principle. The same section provides that the conclusion of a marriage may not be refused on the grounds of an impediment which would be manifestly incompatible with public policy (for example, an impediment based on race).

5.3.2. Matrimonial Property Law

Section 47 on the settlement of the matrimonial property regime contains a rule on so-called Näherberechtigung. If, as a result of the application of the law applicable under Private International law of the situs of property, a spouse has enjoyed a benefit which he/she would not have enjoyed if the law applicable under Dutch Private International Law had been applied, the other spouse may claim compensation on the occasion of the settlement of the matrimonial property regime. A similar rule can be found in Section 147 on succession.

5.3.3. Paternity

Section 95, second subsection, mitigates the favour regime for the acknowledgement of paternity described under 2. by providing that irrespective of the law applied under the first subsection, Dutch law determines whether a married Dutch national may acknowledge the paternity of the child of a woman who is not his wife. This rule applies irrespective of whether in addition to Dutch nationality the man has another nationality. This rule was included in the existing statute in order to take account of the restrictive approach taken in Dutch substantive law towards married men acknowledging the paternity of children born out of wedlock.

Under Section 95, subsection 4, the mother’s or the child’s consent to the acknowledgement of paternity are governed by the mother’s (or the children’s) national law. In the event of multiple nationalities any of her national laws that require consent shall apply. Where the mother (or the child) is a Dutch national, Dutch law shall apply even where the mother (or the child) also has another nationality. This regime, which aims to protect the mother against an acknowledgement of paternity against her will, is completed with an equally protective set of rules for cases where the
applicable law does not contain the institution of acknowledging paternity.
An identical rule can be found in Section 105 on adoption.

5.3.4. Recognition of Filiation Relationships

Sections 100 and 101 deal with the recognition of filiation relationships which have come into being abroad. Recognition is afforded, in principle by operation of law, irrespective of the law that was applied by the foreign court or civil status authorities. It suffices that the local formal conditions were met. There is, however, one important restriction to this regime. An acknowledgement of paternity is not recognized if the man was a Dutch national and did not meet the requirements of Dutch substantive law. The acknowledgement is also not recognized if the mother was a Dutch national and she did not consent to the acknowledgement. Both rules apply irrespective of whether the parties concerned had yet another nationality. An acknowledgement of paternity is not recognized either if it was fraudulent (which is the case if it was made for the sole purpose of acquiring Dutch nationality).

5.4. Party Autonomy

Party autonomy is quite common in Dutch Private International Law. Examples can be found in the titles on both family law and patrimonial law. Section 10 contains a general provision providing that where a choice of the applicable law is admissible, it should be express or otherwise sufficiently manifest. As stated in the 1998 national report, the underlying objective of party autonomy is usually to achieve maximum legal certainty, but there are other objectives as well. The 1998 report mentions matrimonial property law and succession law as examples. The relevant Hague Conventions both provide for (limited) possibilities to choose the applicable law. Title 3, subtitle 2, of the Bill, which deals with the non-proprietary relationships between spouses, now also introduces party autonomy. Under Section 35 the parties may designate the law of (any) common nationality or the law of their common habitual residence. The corresponding rule can be found in Section 64 on registered partnerships. The partners may designate any law which has introduced the institution of registered partnership.

5.4.1. Divorce

The opportunity to consolidate existing legislation was seized in order to revise the conflict of laws rules on divorce. Research on the case law led to the conclusion that under the existing Statute (which dates from March 1981 and takes the applicability of the law of the parties’ common national law as

a starting point) Dutch law is actually applied in a vast majority of cases. The proposal is therefore to reverse the existing cumbersome regime and to provide for the application of the Dutch lex fori unless the common national law is designated by the parties or unless such designation by one party is not contested by the other party. As set out in the 1998 national report, the main reason for the preference given to the lex fori is the presumption that it makes it easier to obtain a divorce (favor divortii). The rule providing for limited party autonomy is mainly intended to avoid problems of recognition in countries which apply the nationality criterion as a standard for recognition.

Somewhat different provisions were included in Title 4, Sections 86 and 87, on registered partnerships. The termination by mutual consent or the dissolution of a registered partnership entered into in the Netherlands is always governed by Dutch law. Only if the registered partnership was concluded abroad may the parties designate the law of the country of conclusion as being applicable.

5.4.2. Maintenance

The new 2007 Maintenance Protocol introduces party autonomy in two ways. Under Article 7, the parties are allowed to jointly designate the lex fori for the purposes of any specific maintenance proceedings. This rule was introduced for practical reasons. The lex fori is easy to ascertain and apply and may make proceedings more expeditious and cheaper. It also allows spouses to escape from the uncertainty inherent in the rule on spousal maintenance which applies in the absence of a choice. Alternatively, for forms of maintenance other than child maintenance the parties can avail themselves of the wider possibilities of Article 8, which allows them to designate inter alia the law applicable to their divorce or the law applicable to their matrimonial property regime. This Article was introduced specifically in order to take into account the practice of maintenance agreements which is developing in a number of countries. A designation of an applicable law under Article 8 can be made at any time. However, the court may set aside the law chosen if it leads to manifestly unfair results for any of the parties.

5.4.3. Denial of Paternity

Section 93 of the Bill regulates the judicial denial of paternity. Such an action is, in principle, governed by the same law as the existence of the ex lege filiation (the primary connecting factor is the parents’ common nationality, failing this their common habitual residence, and failing this the child’s habitual residence). If paternity cannot be denied under the law thus designated, the court may, at the parents’ request and if this is in the child’s

31 The 1998 national report, p. 222.
best interest, apply one of the other laws listed in the first subsection or the
law of the child’s habitual residence. This type of court-controlled party
autonomy was inspired by the court-controlled party autonomy in divorce
proceedings.

5.4.4. Torts/Delicts

Party autonomy in the field of tort was already accepted in the 2001 statute
regulating the conflict of laws in matters of tort. That statute has now been
replaced by the Rome II Regulation to which Title 14 of the Bill refers. The
same title supplements the Regulation with some additional provisions and
lays down that the Regulation’s rules shall also apply to non-contractual
obligations not included in the material scope of the Regulation.

5.4.5. Contracts

Likewise, in the field of contract law, party autonomy under the Rome I
Regulation is similar to that provided for in the 1980 Rome Convention. Title
13 of the Bill refers to the Regulation and contains some additional provisions
on contract law. In the context of Rome I specific reference is made to Section
135 of the Bill (in the title on property law) which deals with the proprietary
aspects of the assignment of claims. An element of party autonomy is
contained in this section, according to which the law applicable to the
contract which provides for the assignment also governs the proprietary
aspects of the assignment.

5.4.6. Property Law

Section 128 of the Bill concerns the proprietary aspects of the reservation of
title. Such effects are governed by the law of the situs of the property at the
time of delivery. This is without prejudice to the (contractual) obligations
arising from the reservation of title clause under the law applicable to it.
Section 128 is completed with a rule that provides that where the goods are
to be exported, the parties may designate the law of the country of
destination to be applicable to the proprietary effects of the reservation of
title, provided that under that law the reservation does not lose its effect
before the price has been paid in full and provided that the goods are
actually imported into the country of destination.

Section 133 regulates the proprietary regime with respect to goods
transported under an international contract of carriage. The law of the
country of destination applies in principle. However, in the event of a
contract providing for the transfer of the goods, the law designated as
applicable in that contract is deemed also to cover the proprietary aspects of
the transaction.
5.4.7. Trusts

In Title 11, Section 142, reference is made to the 1985 Hague Trust Convention. Article 6 of that Convention stipulates that a trust shall be governed by the law chosen by the settler. A choice is not effective where the law chosen does not provide for trusts or the category of trust involved.

6. Unilateral Conflict of Laws Rules

The Dutch Private International Law codification contains a number of ‘inward-looking’ unilateral rules, i.e. rules which designate the law of the forum (in this case Dutch law) to be applicable and delineate its reach. The codification contains no ‘outward-looking unilateral rules’, i.e. unilateral rules which designate a specific foreign law as applicable.

6.1. Differentiation according to the Place where the Relevant Facts occur or where the Relevant Relationships are established

In dealing with the issue of unilateral rules it should be borne in mind that in a number of areas the Dutch rules on Private International Law differ according to whether the relevant facts have occurred in the Netherlands or abroad. Some rules in these areas provide for the applicability of Dutch law where the relevant facts occur in the Netherlands. Examples are Section 28, sub. a, for marriages and Section 60 for registered partnerships. Where the relevant facts have occurred abroad, they are recognized in the Netherlands when they have been validly established abroad, no matter what law was actually applied under foreign Private International Law, except where such facts are manifestly incompatible with (Dutch) public policy. See also Chapter VII, sub. 1 below on renvoi.

6.2. Unilateral Rules addressing Specific Issues of Applicable Law

Other unilateral rules address specific issues of applicable law solely by designating Dutch law and delimiting their scope of application. Some of these rules leave open the question of what law applies in cases which do not fall within that scope. These rules are mainly concerned with the settlement of certain proprietary issues in the Netherlands.

6.2.1. Matrimonial Property

For example, under Section 48 of the Bill, the applicability of Section 92, subsection 3, Book 1 of the Dutch Civil Code is limited to redress sought by a third party in the Netherlands against a spouse whose matrimonial property regime is governed by Dutch law or against a spouse whose matrimonial property regime is governed by foreign law and against whom redress is
possible under the conditions specified in Section 46. A similar rule is contained in the Title on registered partnerships (Section 82).

Section 50 of the Bill provides that Section 131 of Book 1 of the Dutch Civil Code (concerning the distribution of assets between the spouses where there is a dispute as to ownership) applies even where the spouses’ matrimonial property regime is governed by foreign law. Again, a similar rule is contained in the Title on registered partnerships (Section 83).

Section 51 of the Bill provides that the equalization of pension rights is governed by the same law as the spouses’ matrimonial property regime. However, under Section 1, subsection 7, of the Act on the Equalization of Pension Rights upon Divorce, pension rights acquired under Dutch pension schemes and certain foreign schemes are equalized between the ex-spouses in accordance with that Act, irrespective of the spouses’ matrimonial property regime. A similar rule is contained in the Title on registered partnerships (Section 85).

6.2.2. Denial of Paternity

Section 93 (which was discussed earlier in par. 77) concerns the law which is applicable to the denial of paternity. It provides that Section 212 of the Dutch Civil Code (which requires the representation of the child by a guardian ad litem) applies irrespective of the law which is applicable to such a denial.

6.2.3. Company Law

In the area of company law, Section 121 of the Bill provides for the applicability of a number of provisions of Dutch substantive law on the directors’ liability in the event of the bankruptcy of a foreign company which is subject to Dutch taxation. Likewise, under Section 122 certain provisions of Dutch law will apply where, at the request of the Public Prosecutor, the court determines that the object or activity of a foreign company is incompatible with public policy.

6.2.4. Law of Succession

Section 149 provides that Dutch law applies to the settlement of the deceased’s estate where the deceased had his last habitual residence in the Netherlands. No rule was provided for cases where the deceased’s last habitual residence was abroad. The assumption is that in such cases part of the estate will in any event have to be settled in the country of the deceased’s last habitual residence. If assets have to be settled in the Netherlands, the most likely solution is to apply the law which is applicable under the rules of the Private International Law of the country of the deceased’s last habitual residence.
Under the same Section, Dutch law equally applies to the distribution of the estate where the deceased had his last habitual residence in the Netherlands, except where the parties entitled to the estate have jointly chosen another law.

Likewise, Section 150 provides that the task and powers of the executor appointed by the deceased are governed by Dutch law if the deceased had his habitual residence in the Netherlands. In the event that the deceased had his habitual residence abroad, upon the request of an interested party the court may order that with respect to assets situated in the Netherlands the law which is applicable under the 1989 Hague Convention must be respected.

6.3. Scope Rules for overriding Mandatory Laws

In par. 20 the issue of overriding mandatory laws was discussed. As explained, some statutes which were not incorporated in Book 10 contain scope rules for overriding mandatory laws.

7. Other General Principles

7.1. Exclusion of Renvoi

7.1.1. Exceptions to the General Exclusion – Gesamtverweisung

Section 5 contains a general provision excluding renvoi. The provision was formulated along the same lines as the model which can be found in a number of Hague Conventions. However, the titles of Book 10 on specific subjects do contain several provisions which refer not only to the substantive rules but also to the rules of Private International Law of the foreign law which they designate (Gesamtverweisung). Examples mentioned in the 1998 national report are Article 4 of the 1989 Hague Succession Convention and what is now Section 19, subsection 1, of the Bill (on the law applicable to the names of a non-Dutch person). A more recent example is Section 65 on the non-proprietary relations between registered partners. In the absence of a choice of the applicable law, these are governed by Dutch law where the registered partnership was entered into in the Netherlands. Where the partnership was concluded abroad, they are governed by the law of the state where the partnership was concluded, including its rules on Private International Law. An identical rule is that in Section 71 on the registered partners’ property regime. A Gesamtverweisung was introduced for the latter two subjects in order to avoid designating a substantive law which does not regulate registered partnerships.

7.1.2. Rules on the Recognition of Facts and Relationships – Gesamtverweisung

The rules providing for the recognition of relationships or facts established abroad, as previously discussed in par. 93, can also be regarded as implying a Gesamtverweisung. Examples are Section 25 (recognition of names acquired abroad); Section 31 on the recognition of marriages (implementing Article 9 of the 1978 Hague Marriage Convention); Section 61 on the recognition of registered partnerships concluded abroad) and Sections 100 and 101 on the recognition of parent-child relationships established abroad. It should be stressed, however, that recognition cannot be refused on the mere ground that the authorities of the country where the facts occurred applied a law other than the law that would have been applied if the facts had occurred in the Netherlands.

7.1.3. Characterization

As explained in chapter IV, sub. D, in the last few decades there has been a clear trend towards an ever stricter delimitation of the material scope of application of conflict of laws rules on specific subjects (fragmentation of Private International Law) both in international and national Private International Law legislation. Characterization has become an intrinsic element in the process of determining the applicable law in most cases. No general provision on characterization was inserted in the draft of Book 10. To the extent that issues of characterization arise in national Dutch Private International Law, they are usually addressed in accordance with the law of the forum.

8. Final Observations

The issues which national reporters were instructed to address in their contributions to the 2010 Private International Law topic of the Washington conference on Recent private international law codifications are largely the same as those selected for the 1998 Private International Law topic of the Bristol conference on Private International Law at the End of the 20th Century: Progress or Regress? However, current legislative developments concerning the Dutch codification of Private International Law provide a good opportunity to present an updated description of a number of approaches taken in this field of law in the Netherlands and illustrate these with examples. With the given selection of issues, regrettably there was no room for a more in-depth analysis of the substance, title by title, of the Bill which is currently being considered by the Dutch Parliament. In addition to the conclusions drawn in the 1998 national report the following observations can be made.

After 1980 a large number of issues of Dutch Private International Law were regulated by statute. The Bill establishing Book 10 of the Dutch Civil
Code compiles the existing statutes into one Private International Law Act and adds an introductory title containing general provisions. This first title sets out the main principles underlying the codification and reflects the general approaches taken to conflict of laws in the Netherlands. The consolidation project included a careful examination of existing provisions in the light of the general provisions proposed and of case law during the period since the entry into force of individual statutes. It was found that no significant amendments were necessary except in the title on divorce. The Explanatory Memorandum refers to case law of the Supreme Court which offers further guidance for the application of a number of provisions. From a comparative law perspective the legislative method applied in the past 30 years is unique. As far as these authors were able to verify, a step-by-step codification of Private International Law was not undertaken in any other jurisdiction.

In early 2006, at an advanced stage of the codification project, parliamentary questions were raised following the publication of an article which, once again, questioned the need to complete the codification of Dutch Private International Law in view of, inter alia, the growing body of European legislation. In his response the then Minister of Justice reminded Members of Parliament of the main purpose of this codification, which is to facilitate the access to and understanding of Dutch Private International Law by legal practitioners and to show them the way to non-Dutch sources of law. In his opinion, precisely the plurality of those sources is an overriding reason to carry on with the codification. The fact that the subject-matter falls within the competence of a number of international organisations is not a valid argument to renounce the project. Three years later, this view was confirmed in the present minister’s Explanatory Memorandum concerning the Bill.

The Netherlands will continue to actively participate in efforts to achieve a global unification of Private International Law. At the European level the Netherlands is involved in the drafting and adoption of regulations in the field of cross-border relationships. As was also put forward in the minister’s response just quoted, the national codification of Dutch conflict of laws rules is not an obstacle to the process of unifying Private International Law through Conventions and European Regulations. The national codification takes the international and Communitarian obligations into account by referring and incorporating international and European instruments while adding national provisions where necessary. In areas not covered by international and European legislation, the need for national legislation is obvious. The Bill reveals the coherence and articulation of legislation from the various sources mentioned. It will facilitate, in the future, the integration of new international and European instruments. At this stage no redundant overlap of or disharmony between the various provisions can

be detected. The national codification will make Dutch Private International Law more accessible and transparent.
Appendix
Sections 1-17 of the Bill establishing and introducing Book 10 (Private International Law) of the Dutch Civil Code, Book 10 – Private International Law

Title 1 – General Provisions

Section 1
The rules of private international law contained in this Book and in other statutes shall not prejudice the effect of international and Community legislation that is binding on the Netherlands.

Section 2
The rules of private international law and the law designated by those rules shall be applied *ex officio*.

Section 3
Dutch law shall apply to matters of procedure before Dutch courts.

Section 4
Where the question whether legal consequences ensue from a fact arises as a preliminary question in connection with another question that is subject to foreign law, the preliminary question shall be regarded as an autonomous question.

Section 5
Application of the law of a state means application of the rules of law that are in force in that state other than its rules of private international law.

Section 6
Foreign law shall not be applied to the extent that such application is manifestly incompatible with public policy.

Section 7
1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a state for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable.

2. The law designated by a rule on the conflict of laws shall not be applied in so far as rules of overriding mandatory Dutch law apply to the case at hand.

3. Where the law designated by a rule on the conflict of laws is applied, effect may be given to overriding mandatory rules of the law of a foreign
state with which the case has a close connection. In deciding whether to give effect to such overriding mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Section 8
1. The law designated by a statutory rule based on the presumption of a close connection with that law shall exceptionally not be applied if – having regard to all circumstances of the case – the close connection assumed in that rule manifestly exists only to a very small degree and a far closer connection exists with a different law. In such a case, that other law shall be applied.

2. Subsection 1 shall not apply where the parties make a valid choice of the applicable law.

Section 9
Where legal consequences ensue from a fact under the law that is applicable according to private international law of a concerned foreign state, the same legal consequences may be attached to that fact in the Netherlands – even where this would depart from the law that is applicable according to Dutch private international law – to the extent that failure to attach such legal consequences would constitute an unacceptable violation of the parties’ justified expectations or of legal certainty.

Section 10
Where a choice of the applicable law is admissible, such choice shall be express or be otherwise sufficiently manifest.

Section 11
1. Whether a natural person is a minor and to what extent he is capable of performing legal acts, is determined by his national law. Where the person concerned is a national of more than one state and has his habitual residence in one of those states, the law of that state shall be deemed to be his national law. Where he does not have his habitual residence in any of those states, the law of the state of his nationality with which – having regard to all circumstances – he is most closely connected, shall be deemed to be his national law.

2. With respect to a multilateral legal act which falls outside the scope of application of Regulation (EC) no. 539/2008 of the European Parliament and the Council of 17 June, 2008 on the law applicable to contractual obligations (Rome I) (OJ EU L 177), Article 13 of that Regulation shall apply by analogy to a plea of incapacity by a natural person who is a party to such a legal act.
Section 12
1. A legal act is formally valid if it satisfies the formal requirements of the law that is applicable to the legal act itself, or of the law of the state where the legal act was performed.

2. A legal act performed between persons who are in different states is formally valid if it satisfies the formal requirements of the law that is applicable to the legal act itself, or of the law of one of those states, or of the law of the state where any of those persons has his habitual residence.

3. Where the legal act has been performed by an agent, a state as referred to in subsections 1 and 2 means the state in which the agent was present at the time of performing that act, or of the state where he had his habitual residence at that time.

Section 13
The law governing a legal relationship or legal fact shall also apply to the extent it establishes a presumption of law or contains rules apportioning the burden of proof with respect to that legal relationship or that legal fact.

Section 14
Whether an action is barred or a right extinguished by a statute of limitations shall be determined by the law that is applicable to the legal relationship on which that right or claim was based.

Section 15
1. Where a person's national law is applicable and the state of that person's nationality has two or more legal systems that are applicable to different categories of persons or in different territorial units, the relevant rules in force in that state shall determine which of these legal systems applies.

2. Where the law of a natural person's habitual residence is applicable, and the state of that person's habitual residence has two or more legal systems that are applicable to different categories of persons, the relevant rules in force in that state shall determine which of these legal systems applies.

3. In the absence of any rules as referred to in subsections 1 and 2 in a state, or if these rules do not, in the particular circumstances, identify an applicable legal system, the legal system of the state with which – having regard to all circumstances – the person concerned is most closely connected, shall apply.

Section 16
1. Where a natural person's national law applies and where that person is stateless or where his nationality cannot be ascertained, the law of the state of his habitual residence shall be deemed to be his national law.
2. The rights previously acquired by such a person, which are based on his personal status, in particular the rights arising from marriage, shall be respected.

Section 17

1. The personal status of an alien who has been granted a residence permit as referred to in section 28 or section 33 of the Aliens Act 2000, or of an alien who has been accorded equivalent residence status in another state shall be governed by the law of his domicile, or, if he has no domicile, by the law of his residence.

2. The rights previously acquired by such an alien, which are based on his personal status, in particular the rights arising from marriage, shall be respected.
References

**Boele-Woelki 1994**

**Boele-Woelki 2010**

**Boele-Woelki, Curry-Sumner & Schrama 2009**

**Boele-Woelki, Joustra & Steenhoff 1998**

**Boer de 1990**

**Jessurun d’Oliveira 2005**

**Polak 1990**

**Polak 1994**

**Strikwerda 2008**
Strikwerda 2009

Vlas 2009

Struycken 2004

Warendorf & Curry-Sumner 2003

Warendorf & Curry-Sumner 2005
1. The Basic Rules: Who Pays?

1. What is the basic rule of cost and fee allocation – that each party bears its own or that the loser pays all? Are attorneys’ fees and court costs treated differently? What is the principal justification for this rule?

The starting point is that the loser pays all costs (Article 237 para. 1, first sentence, Code of Civil Procedure). This is considered to be justified on grounds of procedural risk and policy.¹ This also applies in cases where the losing party was not assisted by an attorney or when he was provided with legal aid on behalf of the state. However, in normal cases, the fees of the other party’s attorney(s) will be compensated only in accordance with the so-called liquidated tariff.² This prevents the making of excessive costs.

2. If the loser pays all, are all of the winner’s costs and fees reimbursed or just a part (e.g., a reasonable amount)?

In principle, all costs are compensated, provided that they are reasonable. However, with regard to the costs of attorneys, the scheme for liquidated costs indicates that a reward for specific services and acts of the attorney only. Additional costs, for instance based on the fact that in reality, the attorney had to spend an extra amount of time on the case without performing additional procedural acts, are not compensated by the losing party.

3. Are there special rules for appeals? How are the additional costs and fees allocated?

No, the same rules apply.

¹ Snijders, Yznardes & Meijer 2002, No. 117.
4. Who pays for the taking of evidence, especially the costs of (expert and other) witnesses? Are such costs a significant factor in the overall costs of litigation?

Witnesses are entitled to be compensated for the costs of travelling and, if need be, of accommodation, as well as for the loss of income. These costs are to be advanced by the party that has summoned them.\(^3\)

As regards expert opinions that are requested by the court (usually upon a request by one of the parties), the court determines that one or both parties are required to pay an advance of the costs of the expert opinion (Article 195 Code of Civil Procedure). Starting point is that these costs are to be advanced by the claimant, but the court may derogate from this, in particular when facts are to be established for which the defendant bears the burden of proof.\(^4\)

Both the costs of expert opinions and of witnesses are ultimately to be borne by the losing party. The costs involved will depend on how complicated the case is, in particular with regard to the taking of evidence, but are usually only a fragment of the overall costs of litigation. These overall costs are dominated by the attorney fees.

5. How are costs and fees typically allocated if the parties settle their dispute? (and what percentage of civil suits is typically settled?)

The division of costs in case the parties settle, is normally kept secret from the outside world. In practice, the parties will often make an estimate on the chances of winning and losing, and apportion the costs accordingly, or simply agree that each party bears its own costs.

2. Exceptions and Modifications

1. Are there (statutory or other) exceptions to the basic rule (e.g., for specific kinds of situations, cases or parties)?

Article 237 para. (1), second and third sentence, Code of Civil Procedure provides that the court may compensate the costs in full or in part if the parties are married to each other or each other’s registered partners or otherwise live together, if they are family in the direct vertical relation, or each other’s siblings or the partner thereof. Similarly, the court may compensate the costs in full or in part if the parties have both won and lost aspects of the case.

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\(^3\) Art. 182 Code of Civil Procedure.

\(^4\) D.J. Beenders 2009 (*T&C Rechtsvordering*) Art. 196, aant. 2.
2. Are there any mandatory pre-litigation procedures (e.g., mandatory mediation) with an impact on cost and fee allocation?

No.

3. Are party agreements (in a contract) allocating costs and fees in case of litigation common? To what extent are such agreements enforceable (e.g., even against consumers)?

No. Where such agreements would be included in standard contract terms that are invoked against a consumer the terms may be considered unfair under standard contract terms legislation. In this regard, such a term may have the effect that consumers are deterred from litigating, implies that it may withhold consumers from invoking their contractual rights or from opposing a claim by the other party, which means that the term falls within the wording of point q of the annex to the unfair contract terms directive.

4. Are parties allowed to represent themselves? If yes, in all cases or only in some? How common is self-representation?

Parties are free to represent themselves if the claim is within the competence of the kantonrechter (subdistrict court, justice of the peace). This is the case if the claim is no more than € 5,000 (including the interest accumulated until the date of the summons), cases of undetermined value, if there are clear indications that the value is below that amount. Moreover, all cases pertaining to labour law, collective labour agreements, commercial agency, rental contracts and hire-purchase contracts are within the competence of the kantonrechter. According to a bill pending before Parliament, in the future all cases with a value up to € 25,000, all cases on the basis of a consumer sales contract and all cases on the basis of the Consumer credit act will belong to the kantonrechter's competence.

3. **Encouragement or Discouragement of Litigation**

1. Are the rules governing cost and fee allocation designed to encourage or to discourage litigation
   - in general?
   - in particular kinds of cases?

The system of liquidated costs is, among other things, designated to discourage excessive litigation. Moreover, according to Article 237 para. (1), last sentence, the court may leave costs that were spent or caused needlessly, outside the normal allocation of costs on the basis of the ‘loser pays’ principle, implying that such costs will always have to be borne by the party who has incurred them, even if that party has won the case. Where a claim is
submitted to the court without prior communication between the parties (rauwelijks dagvaarding), the court may determine that the summons was premature (as the defendant may have been willing to voluntarily perform his obligations and/or to settle the claim). In such case, the court may determine that the costs of the procedure have needlessly been made and refuse to award the compensation of these costs by the defendant.\(^5\)

2. How much do parties (especially plaintiffs) typically have to pay up front, e.g., in the form of
- court costs (into court)
- attorneys fees (retainer)
- costs of taking evidence
Do up-front payment requirements have a deterrent effect on potential litigants?

As of 1 January 2009, the cost of bringing a summons was € 72.25.\(^6\) The court fees depend on the value of the claim and the question which court is competent. Where the *kantonrechter* is competent, the court fees vary (as of 1 January 2009) from € 36 (in case of a claim for payment in a labour case) or € 63 in the case of another monetary claim with a value of no more than € 90, up to € 297.\(^7\) Where the *sector civiel* (the ‘normal’ court for civil cases) is competent (i.e. when the *kantonrechter* is not competent, see above), the fees vary from € 110 (in the extraordinary case where the normal court are competent to hear a labour case) to € 4,941 in a case of expropriation, where the party is not a consumer.\(^8\) These amounts are amended yearly. In the case of appeal, higher court fees apply.\(^9\) Where the competent court is the *kantonrechter*, the defendant need not pay any court fees, in other cases the defendant is required to pay the same amount if he opposes the claim.\(^10\)

The costs of witnesses are to be advanced by the party that has summoned them.\(^11\) The costs of expert opinions that are requested by the court are to be advanced by the party indicated by the court, usually the claimant (Article 195 Code of Civil Procedure).

Attorney fees are advanced by the party that has incurred them, subject to the contractual arrangement between that party and the attorney. As these costs are generally considerable, these costs may operate as a deterrent for submitting a case to court or opposing such a claim, in particular where the

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\(^7\) Cf. Art. 2 para. (2) sub 1° Wet tarieven in burgerlijke zaken.
\(^8\) Cf. Art. 2 para. (2) sub 2° Wet tarieven in burgerlijke zaken.
\(^9\) Cf. Art. 2 para. (3) Wet tarieven in burgerlijke zaken.
\(^10\) Cf. Art. 2 para. (1) Wet tarieven in burgerlijke zaken.
value of the claim is relatively low. In this respect, it should be noted that Klaassen, in her national report to the European research project of Hodges, Vogenauer and Tulibacka indicated that the hourly fees in the Netherlands vary from € 75-700.12 Even the most simple procedure will take several hours (including the time spent at the intake of the case and the preparation of the trial), implying that the hourly would have to be multiplied by at least 3 or 4 to give an impression of the costs of legal assistance. Indicative is the research by Van der Torre, dating back to 2005. He estimated the costs for legal assistance between € 979-1,400 for a commercial lawyer in an ordinary case, where the total amount of time invested in the case does not exceed 6.6 hours.13 This would imply an hourly fee of (on average) € 180.

4. The Determination of Costs and Fees

1. What determines the amount of court costs – the type of court? The amount in controversy? Other factors?

The court fees are primarily determined on the basis of the value of the claim, but specific (relatively lower) court fees are charged in the case of labour cases and in family law cases.

2. How are lawyers’ fees determined? By statute (schedule), and if so, are the rates binding or can clients and their attorneys agree to in- or decrease them? By the market? What are the main criteria?

The fees of attorneys are to be determined on the basis of the contractual agreement between the parties. Where the parties have not determined the amount of the fee, the client is required to pay the ordinary fee charged by the attorney, or – if no such fee may be established – a reasonable fee, cf. Article 7:405 para. (2) Civil Code.

In practice, several ways of calculating the fee are used. Most common is a fee based on an hourly tariff. It is allowed to agree to a different hourly tariff in a case where the case is won and the case where the client loses the case. Parties may also agree to a fixed price for the services of the attorney. It is not allowed to agree to a tariff based on ‘no win, no fee’.

3. Who finally determines the concrete amount to be awarded to the party/parties? Does the decision maker have discretion? What form does the decision take (integral to the judgment, separate court order, etc.)?

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13 Van der Torre 2005, p. 55.
The court ultimately decides on the amount of the costs that the losing party is to compensate the winning party. As indicated above, the court has some discretion. The decision is an integral part of the judgment.

5. **Special Issues: Success-Oriented Fees, Class Actions, Sale of Claims, and Litigation Insurance**

1. Are success-oriented fees allowed? In particular
   - contingency fees (a percentage of the sum won)?
   - no win-no fee arrangements?
   - success premiums (higher fees in case of a victory)?
   - other fees depending on the outcome of the litigation?

   If yes,
   - are such fees a recent development (since when)?
   - are they regulated by law (e.g., capped)?
   - does the loser have to pay the enhanced (success) fee?

   Are such fees allowed or common across the board or in particular cases only?

Contingency fees and no win-no fee arrangements are not allowed in the Netherlands. Article 25 para. (1) of the *Gedragsregels 1992* determines that the attorney is required to demand payment of a reasonable fee, taking into account all circumstances. Para. (2) adds that the attorney may not agree that the client is only required to pay if a certain result is achieved (no win, no fee). Moreover, the attorney may also not agree to a fee determined as a percentage of the result achieved in court (para. (3)). The *Orde van Advocaten*, the organisation of attorneys, which has regulatory powers in this matter, contemplated an experiment with ‘no win, no fee’ in of personal injury cases, but the Dutch Council of Ministers (cabinet) declared that it would forbid the experiment in a press release of 4 March 2005, as the experiment was seen as contrary to the principle of good professional practice, which requires the attorney to avoid any risk of a conflict of interest. According to the responsible Minister of Justice, in the case of ‘no win, no fee’, the attorney has an important financial interest in the outcome of the case, which results in a clash between his financial interest and his obligation to properly represent the client. Moreover, it may lead attorneys to only litigate cases with a high chance of success or cases with a high financial value, and to disregard cases with a lower chance of success or with a lower financial value, as the chance of a (sufficient) financial reward would become too low. The experiment never took place.

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2. Is it allowed to sell claims for purposes of litigation? (i.e., can a plaintiff subrogate his claim to an attorney, a law firm, or an entrepreneur who finances the litigation and thus assumes the litigation risk?)

A client may sell a claim, as the claim represents monetary value. In practice, companies often sell their claims to attorneys or to bailiffs, who then claim the amount themselves in their own name.

3. Are there special rules for class actions, group litigation or other types of lawsuits (e.g., actions brought by consumer organizations)?

The Wet collectieve afwikkeling massaschade provides the possibility of a collective settlement being declared binding on all victims of the party or parties liable for a damage, but an individual may opt out of the settlement.\textsuperscript{15} The individual consumers that are represented by a consumer organisation bear no costs for the procedure to declare the settlement binding. However, in practice the consumer organisation negotiating the settlement is created ad hoc to represent the interests of its members and is financed by a (relatively modest) membership fee. These membership fees serve to facilitate the process of negotiating the settlement (and thus to pay for the attorney costs on the part of the ad hoc consumer organisation). Often, a settlement also includes an arrangement for the compensation of these costs.

4. Can one insure against the costs (including fees) of litigation? By buying specific litigation insurance? By buying coverage in other policies (e.g., automobile liability or homeowners insurance)? Is such insurance common? How does it work in practice?

Legal aid insurance is freely available in the Netherlands and becoming increasingly popular. In the highest income classes, in 2003 53.6% of all respondents to an enquiry into the manner how disputes are settled, indicated they have legal aid insurance, as against 22.6% in the lowest income class.\textsuperscript{16}

6. Legal Aid

1. Is there a publicly funded legal aid system? If yes, roughly how does it work (through financial support, court appointed counsel, or otherwise)?

\textsuperscript{15} See extensively Loos 2008.
\textsuperscript{16} Van Velthoven & Ter Voert 2003.
Under Dutch law, the starting point is that each party bears its own costs during the court procedure.\textsuperscript{17} For financially less prosperous consumers (citizens), these costs weigh more heavily than for parties that have sufficient finances. As a result, there is a risk that such consumers for no other than financial reasons abstain from defending their rights in court. This obviously puts these consumers access to the court system in jeopardy.\textsuperscript{18} The Legal aid act (\textit{Wet op de rechtsbijstand}) aims at securing the access to the court system of consumers with a low income. On the basis of this act, a consumer is eligible for legal aid if his yearly income in 2007 was no more then € 23,800 before income tax, but after deducting the costs of interest for the mortgage for a house, in case the consumer was single and does not have a patrimony of more then € 20,661. (For consumers that are married or live together, other amounts apply.) The monetary ceiling for people eligible for legal aid is only slightly above the minimum wage, which amounts to € 18,000 on the basis of a fulltime employment (as of 1 January 2009). Moreover, each consumer that wishes to invoke legal aid is required to pay a contribution to the costs of legal aid. The amount of the contribution depends on the income and resources of the consumer and varies (as of 1 January 2009) from € 98 for the poorest of consumers to a maximum of € 732 for the party with the highest income and patrimony who is still eligible for legal aid. Drastic financial cutbacks on the money invested in the legal aid system have already been announced, restricting the access to legal aid even further.

When a consumer who is awarded legal aid loses the case, he is nevertheless required to pay for the (liquidated) costs of the other party.\textsuperscript{19} Given the risk of having to pay a high amount of costs, such a consumer may hesitate to submit a claim to the court or to defend his position against such a claim.

2. Is there privately organized help for indigent or other clients (e.g., through pro bono work)?

In particular law students offer legal assistance free of charge through \textit{rechtswinkels} and \textit{wetwinkels} (legal aid clinics). Law firms may offer pro bono services, but only relatively few lawyers do so on a regular basis. In fact, ‘pro bono’ implies that they offer their services on the basis of the Legal aid act, which means that they will receive a (rather modest) remuneration from the state.

3. Is legal aid generally available to all parties in need or is it rather awarded/available selectively?

\textsuperscript{17} Hugenholtz & Heemskerk 2006, No. 128.
\textsuperscript{18} Ibidem.
\textsuperscript{19} Hugenholtz & Heemskerk 2006, No. 129; Stein & Rueb 2007, p. 204.
An application for legal aid is evaluated by the Raad voor de Rechtsbijstand (Council for Legal aid). The Council determines whether the consumer is eligible for legal aid and whether the claim of the consumer justifies the involvement of legal aid by an attorney or mediator.

4. Are litigation costs and fees considered a serious barrier excluding certain parties from access to justice?

Yes. In consumer cases, the value of the claim in practice prevents consumers from going to court.\(^{20}\)

5. Are litigation costs a barrier to bringing certain kinds of cases, e.g., because the amount in controversy is too low to make litigation economically feasible?

See under 4.

7. **Examples**

1. small claim, e.g., (the equivalent of) € 1,000
   
   - Summons € 72.25\(^{21}\)
   - Court fee for plaintiff € 158
   - No attorney necessary

   Total amount of costs: € 230.25 if neither party makes use of an attorney, otherwise the amount of the costs will probably be higher than the claim itself is, plus the costs of gathering evidence.

2. small to medium claim, e.g., € 10,000
   
   - Summons € 72.25
   - Court fee for plaintiff € 313
   - Court fee for defendant € 313
   - Fees for attorneys: on the basis of an hourly fee of € 180 and the involvement of 2 lawyers, each working 6.6 hours on the case: € 2,376

   Total amount of costs: € 3,074.25, plus the costs of gathering evidence.

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\(^{20}\) Cf. Loos 2010, par. 3.5.

\(^{21}\) All figures apply as for 2009. More recent figures are not available to me at this moment, but are expected to be slightly higher.

\(^{22}\) See on the calculation of these numbers above, under 3.2.
3. medium to large claim, i.e., € 100,000

- Summons € 72.25
- Court fee for plaintiff € 2,200
- Court fee for defendant € 2,200 (€ 1,185 if the defendant is a natural person)
- Fees for attorneys: same calculation as above; if one assumes that for such a case, the double amount of time is needed to prepare and try the case, the amount of attorney fees is € 4,752.

Total amount of costs: € 9,224.25, plus the costs of gathering evidence.

4. large claim, e.g., € 1,000,000.

Idem, but again the amount of attorney costs will probably rise again as well.
References

**Hodges, Vogenauer & Tulibacka 2009**

**Hugenholtz & Heemskerk 2006**

**Ingelse & Mölenberg 1998**

**Loos 2008**

**Loos 2010**

**Mierlo van, Nispen van & Polak 2008**

**Mierlo van, Nispen van & Polak 2009**

**Snijders, Ynzonides & Meijer 2002**

**Stein & Rueb 2007**
Torre van der 2005

Velthoven van & Ter Voert 2003
1. **General Information on Collective Actions in the Netherlands**

1.1. **Introduction**

The Dutch collective redress system has witnessed important development over the last few years as incidents of mass damages increased. After having implemented representative group actions in its legal system, a mass bodily harm case prompted the Dutch legislator to look for a comprehensive device to handle many claims against a plurality of defendants. Without adopting a US class action-style mechanism, the collective settlement device has some shared characteristics as the Dutch legislator had to arrange its implementation promptly.

Consequently, the Netherlands currently has two collective redress mechanisms: the representative collective action in Articles 3:305a-c of the Dutch Civil Code (*Burgerlijk Wetboek; BW*), and the 2005 Dutch Act on Collective Settlements Mass Damages (*Wet collectieve afhandeling massaschade; WCAM*). Dozens of group action have been filed over the years and several settlements have been litigated under the WCAM regime. In addition, it is expected at least some mass disputes regarding unit linked insurances involving thousands of Dutch households and several insurers and banks will be resolved under this Act in the near future. Before elaborating on these two collective redress regimes, the context within which the group litigation operates is briefly described in this section. Subsequent sections follow the questionnaire in the sense that it distinguishes between general (s. 2) and procedural issues (s. 3).

1.2. **Background Information on the Dutch Legal System**

The Netherlands is a civil law country. It originates from the European continental canonical procedure and has the same origin as e.g. French procedural law. After 1838 the Code of Civil Procedure was introduced and
developed independently as to have taken a character of its own.\footnote[1]{Asser, Groen, Vranken & Tzankova 2006. From the end of the eighteenth century until 1813 the Netherlands was a French vassal State (from 1811 a group of departments in the French empire) and French legislation was introduced. See generally on the Dutch judicially and legal system: \url{http://www.rechtspraak.nl/Gerechten/RvdR/Information+in+English/}.}

The judges are appointed, not elected, and the Netherlands is not familiar with a jury. Furthermore, there is no US-style discovery. There are only limited possibilities to obtain documents, but various court orders may remedy these limitations.

First of all, parties may voluntarily produce documents to base their arguments in their briefs. Secondly, the courts orders can relate to (expert) witnesses. Where a court orders the parties to provide certain documents, under the *exhibitieplicht* (exhibition obligation), and a party refuses to comply, the court may ‘draw any conclusions it deems appropriate’. However, no contempt of court is known. The court may however reverse the burden of proof where a party fails to comply with a court order obliging the party at any stage of proceedings to provide access to the records or documents that party is obliged to draw up and to keep.\footnote[2]{Cf. Art. 162 Rv. See also Art. 843a Rv in case a party shows a legitimate interest the court can order the other party to produce specific documents related to the parties’ legal relationship. In practice, these orders are not often issued.} In commercial litigation, very detailed information concerning the facts and circumstances of the case can be obtained through the inquire procedure.\footnote[3]{Art. 2:344-359 BW. And see further the country report by J. van Bekkum, J.B.S. Hijink, M.C. Schouten en J.W. Winter on the conditions to request such a procedure. The employment of the procedure as a fact-finding mechanism for a non-contractual liability case, or fishing expedition, is accepted.} These reports produced in commercial litigation can be brought as evidence into any civil procedure. Witnesses can be heard by the judge before and after the commencement of the legal proceedings and in case of an interim judgment to substantiate certain allegations. Although the lawyers of the parties to the legal dispute may ask questions; no cross-examination is provided for.

These general rules of civil procedure do not differ in cases of collective actions or settlements, except that the WCAM regime has an in-built hearing stage during which individual persons and representative organizations can bring objections forward. Subsequently, the court must address all objections before declaring the settlement legally binding.

1.3. **Background on the Introduction of the Collective Settlements Procedure**\footnote[4]{See the DES websites: \url{http://www.descentrum.nl} and \url{http://www.desfonds.nl}, and Ch. Hodges, p. 70 (referring to Lunsingh Scheurleer & Tzankova 2007 containing an undated note of the Ministry of Justice).}

The Dutch ‘class actions’ system needs some further elaboration as the Dutch legislation on collective settlements has been implemented against a very specific background, *i.e.* the DES litigation initiated by six persons against
thirteen manufacturers of DES (a hormone drug) in 1986. After the Dutch Supreme Court’s decision, a centre was established to register the DES users that sustained bodily harm in order to preserve future rights against the DES procedures. Within a few weeks 18,000 members were registered. Next, the pharmaceuticals and insurers that initiated the negotiations for a final settlement as the total number of persons negatively affected by the drugs in the Netherlands was estimated to amount to 440,000. A settlement was concluded and a fund established that contained €35 million, provided that the settlement was final for all Dutch victims. In order to effectuate the settlement including the concluded condition statutory regulation was necessary. As further potential mass damages either consisting of bodily harm or non-bodily damages were anticipated in an era of globalization, the collective settlement device was implemented partly in the Civil Code (Articles 7:907-910 BW) and partly in the Code of Civil Procedure (Articles 1013-1018 Rv).

Although generally very positively evaluated by practitioners and scholars alike, some problems or matters are not fully addressed: several relate to the globalization, e.g. jurisdiction. The recent orders on the settlements Shell and Vedior demonstrate another trend of judicial ingenuity or activism.

2. General Issues on Dutch Collective Actions

The Netherlands is familiar with two collective regimes designed to deal with a series of homogeneous claims: the already-mentioned representative group action in Articles 3:305a-c BW; and the WCAM procedure, which is a settlement procedure. The first procedure fits the principles and general rules of Dutch civil procedure, as an association or foundation represents the interested individuals, who are known to the parties and who have actively bestowed the representative body with the power to initiate legal proceedings on their behalf. Thus, this action adopts a kind of opt-in approach. Further, no questions of causation or damages are addressed, since one can only litigate for an injunctive or declaratory relief under Articles 3:305a-c BW. It is mainly about the alleged conduct of the defendant.

However, the second procedure provides for an innovative collective resolution where certain persons are represented that are even unknown to the representative parties. It consists of an opt-out approach. As such an approach departs from the ‘ordinary’ civil procedural principles, several additional rules of procedural law had to be included in the Code of Civil Procedure to allow WCAM procedures that aim for legally binding settlement covering all similar claims. Consequently, no further claims will be litigated in the future, unless one has timely opted out.

The arguments for the introduction of the first type of collective or group action were: to enable people with individual non-recoverable claims
to bring actions; to enhance access to justice; and prevention. As described in the Introduction, the WCAM had a specific background that might explain why it has introduced a collective settlement device on an opt-out basis and why it had the support of the industry. Principles of legal certainty and predictability were central to its introduction and design. However, the Dutch legislator did not aim at a transformation of the Dutch legal system into a perceived aggressive American litigating society. This may explain the lack of pressure tools for ‘coerced’ settlements. The WCAM starts with an out-of-court-settlement that can be brought about by public media coverage and public outcry.

2.1. Nature and Number of the Actions

‘The Netherlands is unusual, in that its procedure deals only with the settlement of a multi-party litigation, (…).’

The law does not restrict the actions based on the WCAM to a particular area of law or to certain sectors, such as banking and financial services, product liability or competition. Rather, the WCAM was moreover introduced to address the problems surrounding the bodily harm cases concerning the DES drug. Notwithstanding its broad scope, more recent WCAM procedures concern financial mass damages, e.g. in Dexia (securities lease); Vie d’Or (life insurance policies); Shell (misleading information in securities case); and Vedior (securities); bringing the number of WCAM cases at 5 and 1 pending within a time span of approximately 4 years, (with a dramatic increase in 2009).

The representative group action has however been used more frequently. Within the timeframe 1994-2007, thirty-two cases have been reported and the number of these group action increases. The latter group actions are also not limited to a particular field and they are employed with respect to a variety of affairs. For instance, they may concern the lawfulness of an asylum procedure and the representation of women in a political party, but also webpages offering free mp3 files; pyramid schemes; the

6 Hodges 2008, p. 70 (original emphasis).
7 Amsterdam Court of Appeals 25 January 2007, LJN: AZ033 (Dexia).
8 Amsterdam Court of Appeals 29 April 2009, LJN: BI2717 (Vie d’Or).
13 HR September 2004, NJ 2005, 474 (SGP I); and see also Court September 2005, NJ 2005, 473 (SGP II).
stopping of the lay off of a group of employees;\textsuperscript{16} the legionella bacterium on the West Friese Flora causing the Legionnaire’s disease to various visitors to the Flora;\textsuperscript{17} misleading prospectus by market introduction of World Online;\textsuperscript{18} bankruptcy cases;\textsuperscript{19} annual accounts;\textsuperscript{20} prospectus liability;\textsuperscript{21} general terms;\textsuperscript{22} securities;\textsuperscript{23} collective labour agreement.\textsuperscript{24}

The Netherlands does not provide for these actions within a criminal law context. After a conviction, and depending on the circumstances, a subsequent case can be brought before civil courts to obtain additional redress. As a crime is a violation of the law, it also constitutes a private wrong.

\textbf{2.2. Relief}

However, the group action does explicitly not provide for monetary relief\textsuperscript{25} nor can a declaratory judgment on liability for sustained damages be asked for.\textsuperscript{26} As pointed out above, group actions can only provide injunctive or declaratory relief. This is one of the main shortcomings of a group action. The WCAM addresses this defect. Consequently, where one would like to obtain pecuniary compensation, the represented interested persons on whose behalf the group action has been brought before the court, must seek monetary compensation in a subsequent case. Therefore, the group action is considered as a springboard to further individual or joined litigation or a (WCAM) settlement. The \textit{Vie d’Or} instances provide for a fine illustration. They were initiated as representative group actions but in order to obtain monetary compensation the Supreme Court referred to the possibility of the WCAM procedure.

\textsuperscript{16} Court Zutphen 9 December 2003, \textit{NJ} 2004, 158; \textit{LJN}: AN9739 (Duneco). See also: Court of Appeal The Hague, 3 June 2005, publ. 27 July 2005, \textit{LJN}: AU0185 (ABVAKABO FNV v. Knamzorg NL B.V.)

\textsuperscript{17} Court Alkmaar 12 December 2002, \textit{NJ} 2003, 689; \textit{LJN}: AF1817 (Legionella).


\textsuperscript{20} Court Amsterdam April 2004, \textit{JOR} 2004, 131 (Ahold).

\textsuperscript{21} Court Amsterdam December 2003, \textit{JOR} 2004, 79; (ABN AMRO v. WOL et al); Court Amsterdam 11 June 2008, publ. 12 December 2009, \textit{LJN}: BH2720 (Stichting Claim Lengai v. Feederlines B.V. et al.)

\textsuperscript{22} Court of Appeals The Hague August 1998, \textit{JOR} 1999, 78 (Consumentenbond v. ASR).

\textsuperscript{23} HR 5 June 2009, \textit{LJN}: BH2822 (Effectenlease).

\textsuperscript{24} HR November 1997, \textit{NJ} 1998, 268 (Kuiipers Logistics).

\textsuperscript{25} Art. 3:305a(3)(last sentence) BW: ‘[The action] on pecuniary compensation cannot …’.

\textsuperscript{26} Confirmed in HR 13 October 2006, \textit{LJN}: AW2077, 2080, and 2082 (consequently referring the case to Amsterdam Court of Appeals for WCAM procedure: Court of Appeals 29 April 2009, case No. 200.009.408).
2.3. Initiation of Collective Actions

The Netherlands has innovative legislation under which settlements of mass damage claims may be certified by a court and so become binding on all members of the group unless they opt out.27

The following sections summarize the initiation of the two Dutch collective actions by the representative bodies in s 2.4 and s 2.5 respectively, as the Netherlands is not familiar with non-representative actions. Another question addressed in the section 2.5 concern the transnational aspects of the WCAM as the Court transformed the Dutch procedure into a global collective settlement mechanism. There are no limitations to the quality of defendants. For instance, group actions have been brought against private and public persons, e.g. the State, in the SGP II and the Asylum cases. Most cases – especially, under the WCAM regime – are however brought against private legal persons. As the WCAM regime is however initiated by a petition, not by a writ, it is not apposite to label those companies as defendants. Further, there are no explicit limitations as to the quantity of defendants; but the cases must be manageable.

2.4. Representative Group Actions

2.4.1. Types of Organizations

The group action must be commenced by representative organizations such as a generic investors’ or consumers’ organization, or a special purpose vehicle. According to Article 3:305a (1) BW, it concerns ‘a foundation or association with full legal capacity’. Where an organization has its registered office abroad but is nevertheless placed in the list referred to in Article 4(3) EU directive 98/27/EC on consumer protection,28 that organization may represent the interested persons as well. In accordance with Article 3:305d BW, the Dutch Consumer Protection Organization, the foundation Authority on Financial Markets (AFM), and foundations or associations with full legal personality in accordance with its articles of association protecting the collective interests of consumers can demand the person who violates the Act on the protection of consumer interests to terminate its allegedly illegal acts before the Court of Appeals of The Hague. According to Article 3:305b BW, ‘legal persons’ ex Article 2:1 BW can include public law bodies. Thus, certain public legal bodies can also initiate a complaint, provided that they represent the similar interests of other persons and to the extent that they protect the interests of those persons. In sum, where it concerns consumer protection many more bodies can thus be considered to be representative bodies in a group action. Beyond the context of consumer protection, the generic investors’ organizations in the

Netherlands are the VEB and Eumedion. Additionally, special purpose foundation or association can be easily established, if a legal opportunity presents itself. For instance in the bankruptcy Vie d’Or case, the Foundation Vie d’Or was established especially for the purpose to represent the negatively affected insured and other creditors in these civil legal proceedings against several supervisors of the bankrupted Vie d’Or.29

In Best Sales B.V. case,30 the British Office of Fair Trading as a foreign consumer organization could successfully initiated a group action in accordance with Article 3:305c (1) BW. In the World Online case, the VEB created the additional foundation (stichting) Stichting VEB-Action WOL31 only for this particular case, so as to ensure all interested investors, including foreign investors, could be represented, even though the VEB’s articles of association does not limit itself to Dutch shareholders; its activities are territorially confined in practice.

2.4.2. Requirements: Representativeness, Commonality, and Numerousity

With regard to representation, particular emphasis is given to the articles of associations of the organizations that aim to represent the injured persons. The interests of the group the organization is seeking to protect must be covered by its articles. Otherwise, the foundation or association has not satisfied the condition of representativeness and the organization would be inadmissible. This approach to the rules on standing also means two or more organizations can bring separate collective actions in respect to the same issue, if the court finds both of entities satisfy the test of representativeness. However, the courts take also into account the actual practice of the foundations or associations.32

Furthermore, the law requires that the interests of the group members must be similar33 for a collective action. As evidenced by courts’ practice and as intended by the legislator, standing can be obtained relatively easily, because the collective action does not provide for monetary compensation, and no individual assessments on causation need to be made.34

Finally, there are no explicit requirements concerning the number of persons involved. However, the cases must be manageable.

29 See Court of Appeals The Hague 27 May 2004, LJN: AP0151, 01/1086 (Vie d’Or).
32 See SPG I and SPG II cases.
33 Cf. Art. 3:305a(1) BW: ‘gelijksoortig’ [similar]; and also in: Art. 3:305b(1) BW.
34 According to the legislator in MvT 22 486, No. 3, at 2.
2.4.3. Conclusion on Group Actions, and Initiation of the WCAM

Apart from the shortcoming that no monetary damages can be claimed under Article 3:305a BW, several additional drawbacks of the representative group action for both plaintiffs and defendants alike are identified. First, these judgments bind only the organization and the defendant, not the represented nor the non-represented persons that have omitted to opt in. Hence, the representative action will not prevent the injured parties from bringing individual actions on the same grounds but rather serves as a stepping stone to bring multiple cases before courts for monetary redress. Plaintiffs must initiate subsequent individual actions and establish causation, liability, and damages. In other words, group actions can stretch and strain court proceedings, if they are regarded (and actually initiated) as a springboard to another legal action for instance for monetary compensation, which is becoming more and more important in modern economies.

According to the legislator in the early 1990s, an examination of the individual ‘particularities’ would take more time for rendering a judgment on the classification of the acts as a wrong. Nevertheless, individual particularities such as causation and damages are simply being passed on to another court, which does not make the court system more efficient. Collective group actions may thus not satisfy the objectives of legal certainty and efficiency. These drawbacks of opting in; not addressing individual particularities; and not providing monetary compensation were addressed by the WCAM, which was inspired by American-style class actions, without copying them.

2.5. WCAM

2.5.1. Provision

Pursuant to Article 7:907(1) BW

‘[a]n [settlement] agreement concerning the compensation for damages caused by an event or similar events entered into by a foundation or association with full legal capacity with one or more other parties, who undertake thereby to compensate these damages, may, upon the joint request of the parties that have concluded the agreement, be declared binding by the court upon [the class of] persons to whom the damages have been caused, provided the foundation or association, by virtue of its articles of association, represents the interests of these persons’.

35 Tzankova & Lunsingh Scheurleer 2009, footnote 21: ‘Recent experiences show that this may happen especially in so-called “two-stage” collective actions, where the representative organization seeks [a] declaration that the defendant acted unlawfully so individual group members can try to obtain damages in subsequent individual proceedings. This does not seem to happen in collective actions for injunctions’.

36 See the website of the Department of Justice: <http://www.justitie.nl/onderwerpen/wetgeving/wet-collectieve-afwikkeling-massaschade/> (an English version is provided as well).
‘Persons to whom the damages have been caused’ also comprise those who have acquired a claim with respect to these damages by general or particular title.

The Act was originally intended to apply only to the resolution of mass bodily injury claims, such as the DES case. This is however not true for the subsequent cases that were already outlined. Potential defendants and representative organizations can try to reach an out of court settlement, which can be brought about by the pressure from politics, the ombudsman, and media. After the conclusion of such a settlement, the parties jointly petition to the court to obtain a court order declaring the agreement legally binding. If approved, no further claims that are covered by the settlement can be brought before courts. Thus, the WCAM aims at legal certainty.

2.5.2. Contents and Approval of the Settlement Agreement

The agreement shall include the description of the group or groups of persons and the various subclasses on whose behalf the agreement was concluded, according to the nature and seriousness of their loss. Besides, it must provide information on the (estimated) number of members of the groups; the compensation to be awarded; eligibility criteria for compensation; the procedure to determine and to obtain the compensation or the method of payment; and the name and place of residence of the person to whom the written notification referred to in Article 7:908 [i.e. the opt-out] can be sent.

The following requirements must be met for the approval of the settlement agreement: (a) the compensation amount may not be unreasonable; (b) the defendant’s performance must be sufficiently guaranteed; (c) the representative organization must adequately represent the class; and (d) the number of class members must be sufficient to warrant ‘certification’. Nonetheless, no fixed number or threshold is set. In the Shell order, a threshold of 5% or more of the estimated class members was agreed upon in the settlement agreement which was approved by the court. On a case-by-case basis, the court decides whether such a threshold is fair and reasonable.

The court may reject the settlement agreement. Thus, the court must take account of the nature, cause and extent of loss suffered; the simplicity and expediency of the payment method; the defendant’s assets; the nature of the legal relationship between the defendant and the interested persons (class

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38 As they are not held liable, since they can settle the case before any civil liability procedure is pending. This is one of the reasons why this collective action in principle does not fully compensate all damages; the principle of proportionality.
40 Art. 7:907(2)(a)-(f).
41 Cf. Art. 7:907(3) BW.
members); adequate representation; the group of persons for whom the agreement is concluded must be sufficiently large to justify the declaration; a legal entity, which is not a party to the agreement, will provide the compensation, pursuant to the agreement; and the availability of insurance.

Furthermore, the opt-out period must be stipulated in the agreement that must be at least three months. One may however freely opt for a longer opt-out period, for instance, if the number of affected interested persons is very large. An approved settlement is deposited at the court registry for inspection. The court may also decide the order to be published by other means, e.g. through websites. This allows for flexibility. As the opt-out approach provides legal certainty and brings conclusion of the case, it allegedly departs from the principle of an individual’s consent to be bound. Therefore, procedural issues for instance notification has to be scrutinized attentively by the court. As is recognized, collective settlement agreements are based on proportionality. Hence, the individual compensation amount may be lower compared with individual litigation. On the other hand, where an individual claim is rather small, a separate individual may not litigate as the legal costs may be greater than the claim. United together these small claims may be brought before court on a cost-benefit analysis. Again, the opt-out approach allows for the possibility to litigate independently, where one’s claim is assumed to be more successful or greater, compared to the other claims. As the claims are not similar in that particular case, one of the conditions for collective settlement may however not be satisfied, i.e. commonality. The opt-out approach is moreover favoured since it is more efficient as it lowers the burden on the court system for all interested persons are included. Ignorance, inertia, or unfamiliarity with the legal possibility may prevent interested persons to take the affirmative step of opting in, and so effectively lose their rights.

2.5.3. Representative Organizations

The requirement of representation is codified in Article 7:907(1) BW. However, the requirement is not specified in the Act. Nonetheless, Parliamentary history stated that representativeness can be derived from various factors. Several factual circumstances are mentioned to be relevant: the other activities of the representative foundation or association on behalf of the persons involved; the acceptance of the organization by those persons to represent their interests and the number of persons represented by the

42 Cf. Art. 7:908(2) BW: ‘The declaration that the agreement is binding shall have no legal consequences for a person entitled to compensation who has notified (…) in writing, within a period to be determined by the court of at least three months following the announcement of the decision referred to in Article 1017(3) of the Code of Civil Procedure that he does not wish to be bound’. This is the opt-out period for class members; the opt-out period for ‘defendants’ may continue no longer than 6 months after the end of the opt-out period for the class members, provided this latter opt-out is stipulated in the agreement.

entity; and the extent to which the representative organization has actually acted on behalf of the persons involved and has represented itself as such in the media.44

In the *Dexia* order, the Court examined the objective of the foundations and associations concerned by its articles of association, the activities of these foundations and associations next to the filing of the WCAM request, such as their websites, their mailings to the interested persons, their activities in the media, and earlier activities in the field of litigation in connection with the issues that concerned the settlement agreement. Moreover, the Court held it is not required that each petitioner is representative for all concerned persons. It suffices the joint petitioners are adequately representative for a substantive large group of interested persons.45

Additionally, the Court further elaborated upon this requirement in its *Shell* order. The Dutch foundation representing the interested persons had a significant number of foreign participants and supporters. The VEB represents the interests of investors generally and has been very active in representing the interests of investors especially in commercial litigation. The two other representative organizations were pension funds and as such they do not represent the affected investors as they serve another purpose.46

3. Procedural Issues concerning Dutch Collective Actions

This part addresses various procedural matters, such as jurisdiction, damages approach, case management and costs issues. Especially, the WCAM proceeding is concentrated upon, as it partly departs from the ‘ordinary’ procedural rules. This part is mainly limited to the WCAM procedure, because the group action – as elaborated above – does not touch upon the matters of ‘individual particularities’, such as damages. The (consumer) group actions are only with regard to ‘jurisdiction’ worth mentioning.

3.1. Jurisdiction

3.1.1. Representative Group Action in Article 3:305d BW

Concerning the group action, no additional jurisdictional rules apply. Where a group action is initiated for declaratory relief, namely that the conduct of the defendant is unlawful, the case is initiated by a writ. Consequently, the place of residence of the defendant determines the jurisdiction of the district courts. In case of legal persons, the place of incorporation or registered office or headquarters determines the courts’ jurisdiction. However, as already

45 *Dexia* order, para. 5.26.
46 *Shell* order, paras. 6.3-6.4 (concerning Art. 7:907(1) BW) and paras. 6.21-6.25 (concerning the requirement in Art. 7:907(3)(f) BW).
mentioned above, in case of consumer protection, the court of appeals of The Hague has exclusive jurisdiction in these consumer group action cases.47

3.1.2. The WCAM procedure

The Amsterdam Court of Appeals has exclusive jurisdiction in first and final instance.48 Although cassation is possible, it is hardly feasible since all parties must agree to it, while they all requested the legally binding order in the first place. When the Dutch legislator introduced the WCAM for remedying the consequences of the internal (DES) case, no due regard had been paid to transnational cases.49 The Shell securities case and the later Vedior case illustrate the extraterritorial effects of certain acts.50 As the Shell securities case delivers the authority to rely on whether the WCAM settlement could include non-Dutch residents as well, this case is examined here.

The Shell case is the first international or transnational mass damage case that has been settled under the WCAM regime. Excluding the US shareholders, the settlement was concluded for the benefit of the worldwide group of Shell’s shareholders, who purchased their shares from 8 April 1999 through 18 March 2004 on many stock exchanges other than the NY SE. One of the issues in a transnational case to be resolved was whether the Court of Appeals had international jurisdiction to declare the settlement binding.51 The matter is governed by the EU Brussels I regulation as the case can be qualified as a ‘civil or commercial’ matter under Article 1(1) Brussels I and the 1968 Brussels Convention and the Lugano Convention, and the interested persons are regarded as persons in the sense of Article 2(1) and 3(1) of these legal documents that are to be sued before the courts of the State where they have their domicile.52 Thus, the supranational Brussels I regulation and the

47 Art. 3:305d BW. The Consumer Authority has the power to enter into collective settlements, but it has announced to exercise this power with restraint because private law enforcement should be left to private parties, such as the Dutch Consumer Organization (Consumentenbond).
48 Art. 1013(3) Rv.
49 It was held that Dutch foundations or associations can ‘normally’ not be expected to represent a group of foreign claimants. See MvT II 2003-2004, 29 414, No. 3, at 16. Despite this position, the government is moving towards supporting the position that it may be possible. See MvA I 2004-2005, 29 414, No. C.
50 In the Vedior case, the WCAM settlement was a global settlement as the American interested persons were covered by it as well, whereas in the Shell securities case, the US court had jurisdiction concerning the claims of Americans. See for the American Shell case: De Jong 2007, p. 311-316; and De Jong 2008, p. 31-32; see for the extraterritorial implications: Polak 2006, p. 2346-2355; see for an overview of all proceedings i.e. the SEC settlement and the US class action and the Dutch WCAM proceeding: <http://www.royaldutchshellsettlement.com/Documents/RDS%20Settlement%20Schema_EN.pdf>.
51 See ILA International Civil Litigation and the Interests of the Public, Transnational Group Action, Report and Resolution, submitted to the ILA 73rd Conference, August 17-21, 2008 (identifying that jurisdiction and notification are problematic). See for a European approach e.g. Tzankova 2007b, p. 2634-2642.
52 Shell order, paras. 5.15-5.27.
international documents supersedes applicable Dutch private international law provisions.

However, one may question whether there is a person ‘to be sued’ in such a case where the parties have agreed to a settlement agreement and jointly request a binding declaration under the WCAM. Nevertheless, one may argue that the represented interested persons for whose benefit the settlement has been concluded are the persons to be sued, because these persons are being affected, i.e. bound, by the legally binding declaration, but so are the Dutch Shell Petroleum N.V. and the English The Shell Transport and Trading Company Limited (STT). Yet, only those represented persons are to be notified of the request for the declaration and they may submit objections. Thus, they may be considered as ‘defendants’ for the purpose of applying Brussels I.

With respect to the persons domiciled in the Netherlands, the Court had jurisdiction on the basis of Article 2(1). With regard to the interested persons that were domiciled outside the Netherlands, but domiciled in one of the other EU Member States or Contracting Parties the Court could base its jurisdiction on Article 6(1) provided the stipulated condition – of such a close connection between the claims that good administration of justice demands the simultaneous resolution in order to prevent irreconcilable decisions – was satisfied. The argument of good administration of justice prevailed to concentrate jurisdiction in the Netherlands. Besides, STT and the Dutch Shell Petroleum N.V. acted in concerted action, they were closely interwoven entities and moreover the parties did not object the jurisdiction of the court.

Regarding the persons that were neither domiciled in the Netherlands nor in Europe, the Court further based its international jurisdiction Dutch private international law, for five out of the six petitioning parties (Shell Petroleum N.V.; the special purpose foundation Shell Reserves Compensation Foundation; the generic investors’ association VEB; the foundation Pensioenfonds ABP; and the foundation Stichting Pensioenfonds Zorg en Welzijn) are located in the Netherlands. In a procedure initiated by a petition to the court, Dutch courts can have jurisdiction on Article 3 Rv, if at least one of the parties requesting the legally binding declaration is domiciled in the Netherlands. So, even if the case is substantially unconnected to the Netherlands, but one of the parties to the settlement is a Dutch foundation or

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53 Shell order, para. 5.18.
54 Shell order, para. 5.20. See on Art. 6(1) Brussels I ECJ Freeport v. Arnoldsson (on the strict connection between the claims); and ECJ Roche (spin in the web theory was not upheld). On the enforcement of judgment see recently ECJ 23 April 2009, Case C-167/08, Draka NK Cables Ltd et al v. Omnipol Ltd (holding that Art. 43(1) Brussels I regulation must be interpreted as meaning that a creditor of a debtor cannot lodge an appeal against a decision on a request for a declaration of enforceability if he has not formally appeared as a party in the proceedings, at para. 31; and the redress procedure is made available only to the applicant and the defendant, at para. 30). The latter judgment may have implications for the represented interested persons as they are not formally parties to the legal proceedings, the representative organizations however are.
association, or a special purpose foundation or association is ad hoc established, the Amsterdam Court of Appeals will have jurisdiction. This broad jurisdictional scope concerning non-Europeans transformed the WCAM-procedure into a global settlement procedure. It also highlights the importance of adequate representation.55

3.2. Notification

Next to the jurisdictional question, the Shell case also demonstrated how to deal with transnational notification problems. Notification is important (1) for starting the negotiations for a settlement agreement or litigation, and (2) after the agreement has been declared legally binding. The WCAM provides for direct notification to the ‘known’ interested persons and public notification through advertisements in Dutch and foreign newspapers to the ‘unknown persons’.

In accordance with the WCAM provision in Article 1013(5) Rv, notification must be done through newspapers and at websites. As far as the known persons are domiciled in the EU, direct notification is governed by Council Regulation No. 1393/2007.56 In the Shell case, 111,588 notices were sent to the shareholders. The direct notice to the known class members may be given by ordinary mail. Bailiffs must notify the other non-Dutch Europeans. Regarding the non-European persons, notification must be in accordance with treaties that may apply. Additionally, a public notice can be published in newspapers worldwide. Further publications are issued by the petitioners and media coverage may be taken into account when deciding whether the notification requirement has been sufficiently satisfied. The emphasis on the notification is justified by the opt-out approach of the WCAM; as many as reasonably possible must have had the knowledge of the (possible) commencement of the collective action.

After the order is delivered, the notification is further relevant as the opt-out period starts as of the day of the publication in the newspapers that the order is final. Thus, notification is provided twice. The WCAM procedure consists of following steps: first the negotiations start between the representative organizations, secondly where the out of court settlement has been agreed upon a petition is filed for the court approval, the first

55 See for the same finding on its implications: Polak 2009, p. 12: ‘This implies that if the persons for the benefit of whom the settlement agreement is concluded are located in several countries, each national group may be represented by a separate entity. One would think that it is not required that each entity will become a party to the settlement agreement, but that these entities can form a Dutch association (…) that acts as party to the settlement agreement and as petitioner, or that these entities agree to become a participant (…) in a Dutch foundation’. The global scope is affirmed in the subsequent WCAM Vedior.

notification of the interested members is initiated, after which the filing of objections by the individual group members or by other representative organizations is possible, this is followed by a fairness hearing. Then the court approves the settlement agreement and determines the opt-out period. The second notification is sent and after the opt-out period the settlement becomes legally binding. If the persons has not timely opted out, in principle no legal action can be made concerning the same legal issue.

### 3.3. Case Management

Although the power of the court to interfere with the contents of the settlement agreement is rather limited as the settlement has been negotiated and concluded between the relevant parties and the aim for a swift settlement was expressed during the implementation of the WCAM. The court can only hold that either the amount of compensation or the process of determining the compensation is unfair. However, the Dexia case demonstrates the court can exercise discretionary powers. For instance, the court appointed on its own initiative an expert panel with regard to issues that were brought up by some objectors. The court established a team of 30 people including 10 judges to deal with the individual claims of those opted out. Consequently, judicial activism is stimulated within the context of the review process of the settlements in order to satisfy the main purpose of the WCAM, an efficient legal device to deal with mass damages.

### 3.4. Damages Approach, Legal Costs, and Funding Issues

The WCAM introduced a ‘damage scheduling’ approach, under which compensation is awarded to claimants not on the basis of their personal characteristics but rather on the basis of the characteristics of the group of which the particular individual claimant is a member. According to Article 7:907(2)(a)-(c) BW the settlement must contain categories of loss and it ought to determine the appropriate category for a victim by using a number of factors. A victim will then make a claim for the corresponding class compensation payment. In paragraph (d) it is required that the agreement describes the conditions to be met by a victim in order to be eligible for such a compensation payment. Thus, this approach corresponds to the method of ‘subclassing’.

In the Netherlands, punitive damages are not allowed, nor are contingency fees possible yet. In the Dexia opt out cases, the individuals were often represented by claims management intermediaries that work on a ‘no

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57 Tzankova & Lunsingh Scheurleer 2009, at footnote 24; and see Bestebreurtjes & Van der Krans 2007, p. 48 (expert research by AFM ordered by the Court of Appeals 20 June 2006, LJN: AX8970.)
58 Hodges 2008, p. 74 and note 90 (information provided by Tzankova, April 2008).
cure no pay' fee basis. Claims management companies are able to agree to 'no cure no pay' fees, whereas lawyers cannot.\textsuperscript{60}

The free rider problem is well-known in these procedures where the interested persons are passive members of a class or group. In the Dexia case, the persons represented by the leading parties contributed each 45 euro.\textsuperscript{61} The costs in a Dutch civil action are primarily lawyers' and experts' fees. In the Netherlands, financing legal actions is structured through legal aid and legal insurance. The latter is increasing in the Netherlands, as free legal aid is income-dependent. Furthermore, the loser pays principle applies, but the compensation will not cover the total lawyers' fees incurred. Under Dutch law the loser pays only a small portion of those costs. The amount awarded is based on fixed figures by the courts and based on the amount in the dispute and the number of court-related activities. The successful party is entitled to recover legal expenses reasonably incurred in the pre-action phase; this test is known as the double fairness test.\textsuperscript{62} Court fees are awarded but they are capped at €5,916 (court of appeal). Attorneys' fees in collective action do not have to be approved by the court.

3.5. Miscellaneous

Various proposals are currently been brought forward. Examples of several proposals are to establish a separate fund or insurance; or a pilot of contingency fees or no cure no pay that would stimulate law firms to specialize in this type of litigation. Currently, the generic investor association VEB finances its actions through membership fees and donations.

In the Shell case, all costs linked to the establishment and the execution of the settlement agreement are being born by Shell. These include the costs concerning the escrow and cash accounts where the compensation amount is deposited and potential costs of a possibly to be established dispute settlement body concerning the payments. Shell also pays for copies of the order and of the settlement agreement to those persons.\textsuperscript{63} After the opt-out period, the amount is transferred from the escrow account that is supervised by Shell and the Compensation Foundation together to the cash account managed by the Foundation. The latter must pay the interested persons and an Administrator is the subcontractor to execute the settlement agreement. These costs do not decrease the compensation for the interested persons, which amounted to the unconditional USD 352,600,000.\textsuperscript{64} The reasonableness of the compensation was assessed by the court through expert opinion; experts who were designated by the Shell in the Shell case. The Court must

\textsuperscript{60} Hodges 2008, p. 74.
\textsuperscript{61} Tzankova & Lunsingh Scheurleer 2007, p. 19, No. 28. See more on funding: Schonewille 2007, p. 2633 (proposal to establish a fund); Hartlief 2007, p. 2595-2596 (proposal of insurance); and Tzankova 2007a, p. 171-204.
\textsuperscript{62} Art. 6:96(2)(b) and (c) BW and further developed in case law.
\textsuperscript{63} Shell order, paras. 6.28, 6.32, and 8.7.
\textsuperscript{64} Shell order, para. 6.10.
examine whether the claims of those persons on whose behalf the agreement was concluded is sufficiently guaranteed. Although there are yet only a few WCAM orders, it is illustrative that in the DES case the settlement fund was €35 million; in Dexia €1 billion for 300,000 claimants; €45 million for 11,000 former policy holders in Vie d’Or; in Shell, the amount is USD 352,6 million; and in Vedior, the court approved a settlement of €4,25 million.

4. Summary

The Netherlands is familiar with two representative collective action: (1) a ‘group action’ in Article 3:305a BW; and (2) the WCAM procedure where an out-of-court settlement is brought to the Amsterdam Court of Appeals to declare it legally binding.

One can only be represented by a foundation or association that according to its articles of association is representing the interests of the persons and aims to protect their interests. Group actions concern a range of affairs, but in cases of consumer protection some additional rules are provided. For instance, the Court of Appeals of The Hague has exclusive jurisdiction, and potentially more bodies may represent consumer interests. Although the WCAM can also be applied to all kinds of mass damages, it is currently employed mainly in financial affairs.

The group action can only be brought for injunctive or declaratory relief, not for monetary damages. Consequently, the action can be employed as a stepping stone to other legal actions before a Dutch civil court to obtain monetary compensation. The judgment is only binding between the representative organizations and the defendants. These drawbacks are addressed by the WCAM that was introduced because of the mass bodily harm caused by the DES drug.

As of 2005, the WCAM (Act Collective Settlement Mass Damages) provides for a rather effective and efficient mechanism to deal collectively with similar numerous claims. Since the 2009 Shell order, which has been implicitly affirmed in the Vedior order, the WCAM can be applied beyond the Dutch national borders. Notification in such transnational cases is even more important than in internal instances, but more problematic. Nevertheless, it is important to address this problem as the WCAM departs from ‘ordinary’ civil procedural rules and provides for an opt-out approach. As a result of the opt-out, the allegedly injured persons are bound by the settlement if the settlement is approved, and if the opt-out period of at least three months has expired. Furthermore, the WCAM is generally positively evaluated. However, it lacks pressure tools to force a potential defendant into a settlement. Moreover, it does not provide for proper adjudication. Some may view this positively as the WCAM can be considered as an ADR mechanism. Besides, the Amsterdam Court of Appeals that has exclusive jurisdiction in these instances has developed some case management techniques that

65 Art. 7:907(3) BW.
counter the original envisaged marginal judicial scrutiny of the out-of-court settlements.

Current proposals and debates concentrate on funding issues that relate to the free rider problem.
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1. Introduction

Comparative studies of national and sub-national legal climate change approaches can help us to understand the strengths and weaknesses of different governmental choices made in practice. This chapter aims to provide a modest contribution to such comparative research. It provides a first overview and discussion of the current state of affairs with respect to developing national climate legislation in the Netherlands. In advance, it needs to be stated that providing a complete overview is an extensive task, since the amount of Dutch climate related rules is already enormous. Moreover, this vast framework is quite fragmented. This chapter hence intends to discuss only the most important current climate related laws and initiatives for such laws in the Netherlands, but this will be done under the recognition that more research is needed to get a full overview and, more importantly, to understand not only the content of each applicable law but also the linkages between the several relevant rules.

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1 This contribution has been finalized on April 1st, 2010.

2 Thus far, most of the legal literature concerns international (en European) legal approaches, but attention to building national climate legislation is growing. See about a proposal for national approach towards climate legislation in the US: Wiener 2008. An example of what, in a federal state like the US, specifically states can do with respect to climate change policies is given by Dernbach, McKinstry Jr. & Peterson 2010. See for discussions of Canadian and Australian climate policies respectively Bernstein, Brunnée, Duff & Green 2008; Lyster 2007a, 281-321 and Lyster 2007, 450-479.

3 The fragmentation is partly caused by EU law, also because of the presence of regulations which are directly applicable in the national orders to the addressees like industries. The enforcement of compliance with the rules given by a regulation is usually the task of the Member States. An example of such a regulation relevant for climate law is Regulation (EC) No. 842/2006 of the European Parliament and of the Council of 17 May 2006 on certain fluorinated greenhouse gases, OJ L 161/1, 14 June 2006. See also the Treaty on the Functioning of the European Union, Art. 288.

4 A report to the Dutch Ministry of the Environment has given a first, but not yet complete overview, see Peeters & Van Asselt 2010.
The structure of this contribution is as follows. First, Section 2 will elaborate on the relevance of studying national climate law. Section 3 will turn to the Dutch laws containing mitigation measures (mitigation refers to the reduction of greenhouse gases), where also the influence of international and EU-law for the national policy discretion will be discussed. Section 4 will subsequently focus on adaptation measures (adaptation refers to the protective measures against the negative effects of climate change). Section 5 will provide a conclusion and forward look with an eye on further research.

2. The Relevance of Studying National Climate Law

The Netherlands is a party to the United Nations Framework Convention on Climate Change (UNFCCC)\(^4\) and the Kyoto Protocol,\(^5\) and is also a Member State to the EU. In that regard, much of its national climate law is heavily influenced by the supranational legal order. The international and European climate dossier has become already broad and complex, and it has become already quite a challenge to understand the core characteristics, let alone the details of these two legal frameworks.\(^6\)

There are nevertheless several reasons why it is important to study also national climate law. First, national legal systems will be the frameworks through which international and European obligations will be implemented and/or enforced. Hence, in addition to the examination of international and European legal frameworks aiming at climate protection, it is also important to discuss national regulatory approaches that are needed to effectively implement and enforce the international and European obligations. Specifically the EU has already established a binding package that should lead to 20% reduction of greenhouse gas emissions in 2020 compared to 1990. That binding commitment is divided into (1) the European greenhouse gas emissions trading scheme that covers a large part of industrial installations

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\(^4\) The Netherlands has ratified the UNFCCC (date of signature: 04 June 1992; date of ratification: 20 December 1993). The ratification has been done without adopting national laws: Staten-Generaal, 1992-1992, 23 299 (R 1479), Nos. 358 and 1. Later, in 2005, a Royal Decree has been adopted to regulate the national emission inventory as required by Art. 4(1) of the UNFCCC.


\(^6\) There is ample literature with regard to the international climate law regime. A standard work that discusses the regime in an elaborated way is: Yamin & Depledge 2004. See also Bothe & Rehbinder 2005; this book also contains a part dedicated to EU climate change policies. For EU climate policy see the overview made by Peeters 2007, p. 179-210. See also Peeters & Deketelaere 2006. A recent discussion of EU climate law from a viewpoint of principles is provided by De Cendra de Larrañag 2010.
(commonly called the EU ETS, which stands for the European emissions trading scheme), and (2) emission reduction targets for Member States concerning emissions not covered by the EU ETS (the so-called Effort sharing decision). The latter approach, which counts for approximately 60% greenhouse gases EU-wide, leaves in principle ample discretion for Member States to develop a national policy for meeting such targets. Quite some flexibility has been provided to Member States in the form of emissions trading, which inter alia means that Member States can trade with each other part of their emission rights (which is in fact the possibility to emit as far as is allowed by the binding targets addressed to the Member States). In addition to these two core instruments (the EU ETS and the Effort sharing decision) a number of other climate related directives and regulations are applicable. Given this broad package of EU climate legislation it is necessary for EU Member States to examine which discretion is left to the national legislature for establishing a national climate policy.

From a viewpoint of accountability and compliance, it is furthermore important to see how national emission reduction targets are vested into binding law within national (and lower) legal regimes. Such targets can be a consequence of binding international law, like the emission reduction targets for the period 2008-2012 as concluded in annex B to the Kyoto Protocol. However, as progress on negotiating further international binding targets for the years after 2012 is lacking, it can also be the case that such targets follow from unilateral announcements (like the adherence to the Copenhagen Accord), or are even autonomous national choices without any clear link to an international document. As explained above, EU law already provides binding emission reduction targets for EU Member States to be complied with in the period 2013-2020, which leads to the question what should be regulated on the national level in view of ensuring compliance with such binding targets. The design of a national accountability mechanism to ensure compliance with those EU-targets, the distribution of the burden among the responsible sectors, and the decision-making by the national government to

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8 European Commission, 2008 (Question 1).

use international emissions trading are core topics in this regard. But also the role of scientific advice with regard to for instance the adoption of further going thresholds, like more intensive short-term targets, or the adoption of long-term targets and the specific national regulatory instruments in order to reach such targets deserve discussion with regard to their incorporation in national law.

And, finally, also the legal and economic position of private actors deserves a close examination from the viewpoint of national law. First, national climate law can heavily impinge upon sources, and it can be that they want to defend their case against for instance disproportional measures. Second, the need to develop alternatives for fossil fuel energy brings along changing circumstances for both economic operators as citizens. The latter can become confronted with wind-mills near their house or with a carbon storage area below their living. Third, the need to adapt the country to potential dramatic effects of climate change can affect the position of private actors (both economic actors and citizens). Moreover, decisions with regard to adaptation determine the level of protection towards possible victims. All in all, national climate law is extremely important not only for the protection of the climate but also for a balanced and justified approach towards private actors. Those actors are on the one hand economic operators whose activities possibly need to be restricted – but of course always in a justifiable way – in view of climate protection, but on the other hand also possible victims who need to be prevented from damaging effects or, in case that has not been done, who might need compensation for such damage.

And, last but not least, there is also a need to determine in particular both the incentives and barriers for national legal initiatives that would go beyond the ambition of the international and/or European obligations. The international decision-making process under the UNFCCC has thus far failed to produce a binding agreement with regard to emission reduction targets after the year 2012, and the EU has provided targets only up to 2020. In that regard, it will be interesting to see which responsibility will be taken by countries themselves, and whether such responsibilities will be vested into binding national law. Some Member States indeed have already announced further going targets for the year 2020 and/or have announced long-term targets, although these are not always yet concluded into national binding law.10 The UK, however, has already adopted in its Climate Change Act 2008

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10 Some Member States – like the UK and Germany – promote further going reductions as currently adopted by the EU (minus 20% in 2020 compared to 1990). The UK has already stipulated an emission reduction target of 26% in 2020 compared to 1990 of in its Climate Change Act 2008 (Part I sub 5), while in Germany an emission reduction target of 40 % in 2020 forms part of the political agreement of the current government (Koalitionsvertrag zwischen CDU, FDP, CSU: ‘Wir werden für Deutschland einen konkreten Entwicklungspfad festlegen und bekräftigen unser Ziel, die Treibhausgas-Emissionen bis 2020 um 40% gegenüber 1990 zu senken’). Within the Netherlands, the emission reduction goal of minus 30% in 2020 is part of the political agreement of...
binding targets for 2020 and 2050, of which the 2020 target is more stringent compared to what this country should do according to EU law.\(^{11}\) By having done so, this country gives an interesting example of providing a National Climate Act that indeed goes beyond the supranational legal order. In the meantime, also on subnational levels binding targets have emerged, like in Scotland and Upper-Austria.\(^{12}\) Within the Netherlands, a coalition of NGO’s started in 2007 to lobby for a specific Climate Act, with binding targets, but this idea has not got political support thus far.

3. Mitigation

3.1. The Supranational Context

Since climate change is a global problem, coherent international action is needed but this is thus far short falling. If we follow the projections given by the Intergovernmental Panel on Climate Change, action should be undertaken in order to avoid the risk of dramatic climate change and resulting significant damage to nature and people. In this respect, a precautionary emission reduction of minus 25-40% in 2020 is given as policy guidance for developed countries by the IPCC.\(^{13}\)

the government formed by CDA, PvdA and ChristenUnie, albeit that it is expressed that this target preferably should be followed within the EU (Coalitieakkoord tussen de Tweede Kamerfracties van CDA, PvdA en ChristenUnie, 7 February 2007, <http://www.regering.nl/Het_kabinet/Beleidsprogramma_2007_2011>, accessed 23 December 2009). However, in the fifth national communication to the UNFCCC the 30% target has been mentioned, see Ministry of Housing, Spatial Planning and the Environment Fifth Netherlands ‘National Communication under the United Nations Framework Convention on Climate Change’, December 2009.


\(^{12}\) Information obtained during the UNFCCC side-event ‘The Federated States and Regional Governments – active players in combating climate change’, organized by inter alia The Climate Group, 2 June 2010, Bonn. The precise definition and bindingness of those targets have yet to be examined in further research.

\(^{13}\) The IPCC fourth assessment report states that with a low stabilization goal of 450 ppm CO\(_2\) equivalent an emission reduction target of 25-40% in 2020 compared to 1990 should be followed by Annex I countries (which are the countries being mentioned in Annex I to the UNFCCC). See IPCC 2007, Chapter 13, Box 13.7, p. 776. See also <http://www.ipcc.ch/presentations_and_speeches/presentations_and_speeches_presentations.htm#2>, slide 6. However, if a less ambitious stabilization goal will be followed, which implies a greater risk, the emission reduction target is – of course – less intense. An update of scientific findings stated that if society wants to stabilise greenhouse gas concentrations at the level of global warming between 2.0 and 2.4 degrees Celsius, ‘then global emissions should, theoretically, be reduced by 60-80% immediately, the actual amount being dependent upon the amount that will be taken up by oceans and land’, and ‘The 400 ppm CO2-equivalents target, about the same as today’s concentrations, is estimated to give a 75% chance of confining global
The UNFCCC establishes a managerial framework for international decision-making with regard to climate change. The threshold for action is high: according to Article 2 of the UNFCCC, the ‘ultimate objective of this Convention … is to achieve … stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’ (emphasize in italic by this author). The term ‘dangerous’ suggests that the prevention of non-severe damage – which could for instance be economic damage – is not part of the UNFCCC framework. This means that national (and regional) approaches need to consider how to deal with non-dangerous but still damaging effects like economic effects of climate change.

The EU has set as a policy goal to prevent global warming that would exceed a two degrees Celsius temperature rise. By setting this policy aim, the EU in fact accepts a factual global warming up to two degrees and hence this is not the most stringent goal one strives for. The two degrees target is also part of the non-binding Copenhagen Accord from 2009, though it is stated that by 2015 a consideration needs to be done in view of strengthening the long-term goal towards 1.5 degrees Celsius.14

In the Netherlands the political parties do even not agree with regard to the existence of the global warming threat: one new and fast developing right wing party that is currently high in the polls contests the need to take climate protection actions.15 The national elections on 9 June 2010 will hence be important in view of any further action to be taken on the national level, but it is expected that the new national government will consist of some political parties that take the need for climate action at least to some extent serious. However, the recent mistakes of the IPCC contribute to further debates with regard to the need of climate policies. Remarkably, there is no case law yet within the Netherlands dealing with the need for climate change measures. One can imagine that possible victims would ask for some mitigation of adaptation measures, while the ones that are addressed with obligations would argue that it is not necessary to take such action. It is hence to be seen whether such arguments will be discussed for the Dutch courts.

As already said in the previous paragraph, the EU has adopted an extensive climate and energy policy package aiming at 20% reduction in 2020 coupled with a 20% renewable energy target also for 2020.16 This package

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14 Copenhagen Accord, Section 12, posted at <unfccc.int>.
15 This party is called ‘Partij voor de Vrijheid’, the members in Parliament belonging to this Party have submitted several questions to the Dutch government critically questioning the need for a climate policy.
entails quite a lot of binding measures for the Member States or – through regulations – direct for private actors. The package has largely reduced the discretion of the Member States, but still some room for manoeuvre exist. There is a need however to investigate how large that policy discretion really is given the broad and complicated set of EU climate law.

In principle, it is possible for EU member states to follow a more ambitious approach compared to the EU, but it always needs to be investigated whether a specific national measures additional to EU law is indeed lawful. This depends inter alia on the legal basis of a specific already adopted EU regulation, directive or decision. The room for additional measures is quite restricted in case an EU measure has been based on Article 114 TFEU (the internal market competence) compared to Article 192 TFEU (the EU competence for environmental legislation) or the new Article 194 TFEU (EU competence for energy legislation).

The Netherlands has chosen to adopt such a more ambitious approach compared to EU law, albeit only in policy terms. In 2009 the following set of climate protection policy goals has been reconfirmed by the central government of the Netherlands:17

- 30% reduction of greenhouse gases in 2020 compared to 1990;
- 20% renewable energy use in 2020;
- An annual energy-saving with 2% in 2011 to 2020.

In December 2009 the ‘Fifth National Communication under the United Nations Framework Convention on Climate Change’ has been submitted by Dutch government to the UNFCCC secretariat.18 Also this document states an emission reduction target of minus 30% greenhouse gas emissions in the year 2020 compared to 1990. These policy goals go beyond the legally binding commitments for the Netherlands as required by EU law, but have not been vested in a legal binding document. Hence, it remains to be seen whether they will be upheld and complied with. Again, the elections in June 2010 will be crucial for the question whether the more ambitious targets will be upheld. The current binding emission reduction targets for the Netherlands are:

1. The Kyoto Protocol target for the period 2008-2012, which is according to the internal EU burden sharing decision a 6% reduction of greenhouse gas emissions compared to 1990;19

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18 Posted at <unfccc.int>.
2. A 16% reduction target to be reached in 2020 compared to 2005 following the so-called effort sharing document.\textsuperscript{20}

The National Environment Assessment Agency has already warned in September 2009 that with current approaches the climate policy goals will not be reached in 2015. The ‘National Inventory Report 2009 – Greenhouse gas Emissions in the Netherlands 1990-2007’ (published at \textless www.broeikasgassen.nl\textgreater ) shows that in 2007 the total direct greenhouse gas emissions – excluding LULUCF emissions – are estimated at (only) 2.7\% lower than the emissions in the base years 1990 and 1995 (p. 31). In the period 1990-2007 carbon dioxide emissions increased with 8\%, while emissions of non-CO\textsubscript{2} greenhouse gases decreased with 36\%. The effectiveness of the combined EU and national legal mitigation measures hence deserve close attention.

3.2. \textit{Mitigation Laws in the Netherlands}

3.2.1. Relevant Laws

\textit{No Climate Protection Act}

With regard to mitigation, we can first determine that no national legislative framework has been established for developing national emission reduction targets and for a procedure to control whether compliance will be reached with the binding supranational targets. There are also no binding rules for the use of international emissions trading by the country itself, and for the establishment of specific advice to the government in the field of climate change. Such specific provisions lack in the Netherlands. The governmental approach in the field of climate change can be qualified as quite informal, and it is even not always clear how the political responsibilities for climate policies have been allocated between the concerned Ministers like between the Minister for Housing, Spatial Planning and the Environment and the Minister for Economic and Energy affairs. Despite the pressure from the side of Environmental NGO’s to establish a specific Climate Act with carbon budgets and a control mechanism for compliance with such targets, this idea has not been taken over by the national government. Such a national Climate Change Act (or, in other words, Climate Act or Climate Protection Act) should not necessarily be a sole Act standing on its own, but could be integrated – for instance as a separate Chapter on Climate Change – into the

Environmental Management Act. This Act dates from 1993 and is intended to be the central legislative framework in the field of environmental law.

Environmental Management Act

Despite the lack of a national climate act, there are several laws that facilitate the imposition of restrictions towards private actors with regard to the emissions of greenhouse gases. Most of the climate related mitigation actions are included within the Environmental Management Act. This Act contains the following core instruments relevant for the reduction of greenhouse gases:

1. The national legal framework for the implementation of the European emissions trading scheme (Chapter 16);
2. A framework for the fluorinated gases which adds up to European legislation which mainly has been put into regulations (Chapter 9);
3. A permit regime for industrial installations, which is meant to implement the European directive on integrated pollution prevention and control (IPPC-directive).\(^{21}\) This directive – currently under revision\(^{22}\) – obliges the Member States to use a system of integrated environmental permits. This permit regime includes greenhouse gases as far as they can be regulated in addition to the EU ETS (see further below).
4. The competence to issue general rules to installations which are not covered by the integrated permit regime.

Some members of Dutch Parliament have tried to enhance the use of emissions limit values in the environmental permits for coal fired power plants. According to the IPPC-directive, however, an IPPC-permit for such a plant may not include an emission limit value for direct emissions of that gas unless it is necessary to ensure that no significant local pollution will be caused.\(^{23}\) The rationale for this rule is that the functioning of the carbon market as provided by the EU ETS, and in this vein the freedom for operators to decide whether to reduce emissions or to buy carbon emission rights, should not be frustrated by ‘command and control’ emissions limits imposed.


by the IPPC-permit. According to the IPPC-directive and the EU ETS directive, Member States may allow permitting authorities to impose obligations with regard to the energy efficiency of carbon emitting utilities, but the Dutch legislator has chosen to exclude that possibility. Instead of that, the government has entered into a voluntary agreement with representatives from several industrial sectors stating that they shall develop and execute energy-efficiency plans.

Meanwhile, it is still open for consideration whether Member States would nonetheless be allowed to impose in one way or another greenhouse gas limits for sources covered by the EU ETS, in particular in view of Article 193 of the Treaty on the Functioning of the European Union. That article states that Member States may adopt further going environmental laws. Clearly, both directive 2003/87/EC and directive 1996/96/EC state that emissions limit values shall not be prescribed for direct carbon emissions from installations covered by the EU ETS. This qualifies as a rule of total harmonization. If one would nonetheless argue that Member States can always adopt such stringent measures – as long as they are compatible with the EC Treaty (now: Treaty on the Functioning of the European Union), then another problem arises: from 2013 onwards all these sources will fall under one EU-wide cap, hence the limitation of emissions for instance from power installations in one country will mean that other sources can use the allowances that are not needed anymore by these power installations. This effect – meaning that despite emission limit values in one country, the greenhouse gas emissions can still rise in another country – can only be prevented if the emissions saved by the emission limitations will be covered with the withdrawal of allowances: the government should then for instance decide not to auction such rights... this option seems however not a very realistic one. In sum, the current approach as laid down within the EU legislation is that power installations covered by the EU ETS will most likely not be confronted with emission limitations with respect to the direct emissions of carbon dioxide. In view of the wish of some Member States, like the UK, to move beyond the climate ambition of the EU, there is a debate whether in view of Article 193 TFEU Member States should nevertheless be able to adopt further going commitments such as a tax for the EU ETS installations like in particular coal fired power plants.

24 According to Art. 8.13a (2)(b) of the Dutch Environmental Management.
26 See about the role of Art. 176 EC Treaty (now Art. 193 TFEU) in view of total harmonisation Jans & Vedder 2008, p. 107. See also the recent interesting opinion of AG Kokott in case 378/08.
Energy Legislation

The Environmental Management Act provides some important regulatory tools, but in addition a range of other acts is relevant, notably in the field of energy law. The applicable legislation needs to be amended soon since the European Renewable energy directive has to be implemented before 5 December 2010.\(^{28}\)

With respect to renewable energy, the Dutch government has notified to the European Commission in December 2009 that it expects no problem with complying to the binding European renewable energy target, which is, for the Netherlands, 14% renewable energy of the total energy consumption to be reached in 2020. This notification by the national government is obligatory (Article 4(3) directive EC/2009/28; the targets are specified in annex I to that directive). In the notification document the government states not to expect to use the flexibility mechanisms included in the Renewable energy directive in order to compensate a short falling compliance (these flexibility opportunities in fact mean that over-compliance in one member state will be used to offset under compliance by another state). The Dutch government however states to be interested into the ideas and initiatives of other member states. The government stipulates that it endorses a more intensive target than obliged by the directive, but fails to explain in the document how much stronger that national target is. Anyhow, the stronger national target is only a policy target, and has not been codified in national law.

In order to promote climate friendly energy also other legislative approaches are needed. Currently, access to the grid is a major problem: the government has proposed to adopt an act to give better access to renewable energy.\(^{29}\) In order to advance the establishment of works in view of combating (not climate change but) the economic crisis, the government has proposed a ‘Crisis and Restoration Act’, which aims at relaxing substantive and procedural requirements for major construction activities like highways but also energy projects (like windmills and geological storage of carbon). This legislative proposal has been adopted – after much discussion about its usefulness – by Dutch Parliament and entered into force on 31 March 2010.\(^{30}\) Just before the adoption, members of Parliament (the Senate) requested to leave the geological storage of carbon dioxide out of the scope of this project,

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\(^{29}\) ‘Wijziging van de Gaswet en de Elektriciteitswet 1998, tot versterking van de werking van de gasmarkt, verbetering van de voorzieningszekerheid en houdende regels met betrekking tot de voorrang voor duurzame elektriciteit’.

\(^{30}\) See the Official Journal of the Kingdom of The Netherlands: Staatsblad van het Koninkrijk der Nederlanden, 135, 2010 (see also the Nos. 136 and 137).
but that has not been supported by the majority. In the meantime, a legislative initiative has been proposed to Parliament in order to implement the European directive concerning the geological storage of carbon dioxide.31

3.2.2. Case Law

In the meantime, some conflicts arise between on the one hand climate protection and, on the other hand, the establishment of alternative approaches likes renewable energy and the geological storage of carbon. First, one can note certain cases with strong resistance against windmills on land or near the land on water, and hence, viewable from land: the latter is at hand in a small town called Urk, an old fishery community. The establishment of a windmill park which would be visible from that town is a very sensitive case for the local community.32 Second, there is a strong local resistance against the storage of CO2 – in the form of a pilot project – just below a living area in a town called Barendrecht. The resistance by the people who live there is supported by the local government (municipality). Case law can be expected with regard to such conflicts.

As a result of the European greenhouse gas emissions trading scheme, there have been several rulings by the Administrative Court of the Council of State with regard to the allocation of tradable allowances in the Netherlands. Only a minor part of the appellants found their arguments justified by the court. The ruling shows (again) how complicated the administrative allocation of allowances is, and that the transparency and reviewability of the decision-making falls short. In this respect, it needs to be noted that the ‘Court of Audit’ (not a judge, but an independent institution that checks the spending of the government) has concluded that even this Court of Audit was not always in the position, due to lack of information, to check the validity of the allocation of the allowances.33

3.2.3. Conclusion

In sum, there is already a quite a lot of climate related legislation in the Netherlands. This largely results from EU climate law, as on that level a wide


32 See for another case with respect to the wind-energy AB RvS 25 February 2009, Milieu en Recht 2009, 42 annotated by KB.

array of measures has been established that have to be implemented and/or enforced by the Member States. The national climate legislation needs to be amended in 2010 or short there-after in order to implement the EU climate and energy package that provided new rules with regard to emissions trading, renewable energy, and the geological storage of CO₂. In the meantime the transparency and structure of the national climate legislation has become a great concern: it is far from easy to understand the content of the several measures and their interrelationships. However, the first step to improve the legislative framework has to be done on the EU level, as the EU climate and energy package has become extremely complicated. The package is provided through several types of legislation (directives, regulations, decisions) and, hence, is not provided through one single legislative framework. In addition, there is a need to discuss whether and how national law can even go beyond the EU climate legislation, as is currently debated with regard to additional restrictions to be imposed upon coal fired power plants. Moreover, Dutch law lacks specific arrangements with regard to target setting, international emissions trading by the national government, and specific independent climate advice.

4. Adaptation: Relevant Laws

Much attention in the Netherlands goes to adaptation: how can we protect this country against negative climate effects, in particular flooding? The Netherlands might suffer from sea-level rise and floods, while also wetter winters and drier summers are expected, and changes in biodiversity. There is a growing common opinion within the Netherlands and by the European institutions that governments have a crucial role to play with regard to adaptation to climate change. The Dutch Scientific Council for Government Policy in 2006 quite strikingly advised the national government to pay substantially more attention to adaptation in the Netherlands (such governmental investments benefit the Dutch people directly) instead of conducting mitigation efforts (from which the whole world benefits on a rather long term).36

Another Dutch council, the Council on Housing, Spatial Planning and the Environment, argues that the government should take a leading role with respect to dealing with climate change effects, especially since citizens have hardly any knowledge or awareness about risks from changing weather patterns. Moreover, (Dutch) citizens appear to have a strong confidence in the government in order to protect society against these risks, specifically where it concerns water related policies. Following these observations, the

35 See for instance about the justification to focus on adaptation policy as such Berkhout 2005, p. 377-391.
36 WRR 2006.
37 VROM-raad 2007, p. 33.
Council advices that citizens and firms should not be expected to bear important responsibilities with regard to climate related risks. The Dutch Council on Housing, Spatial Planning and the Environment argues furthermore that there should be one responsible authority for adaptation and strategic spatial planning. By nature, this adaptation strategy should however be a flexible one, given the many uncertainties with regard to the development of global warming and its precise effects.

Given these observations, the Dutch government has started in November 2007 a ‘national adaptation strategy’ in order to make the Netherlands ‘climate proof’. The focus of this strategy goes to spatial planning policies in order to make them fit for dealing with climatic change. Besides safeguarding the dikes, the policy focuses on giving water more space. In the meantime, specific legislation has been proposed in order to support the adaptation policy. In early 2010 the Dutch government submitted to the Dutch Parliament a legislative proposal for a Delta Act (Deltawet waterveiligheid en zoetwater-voorziening). The proposed Act aims to protect specifically against flooding and to protect the availability of freshwater. The proposed act entails a Delta-Program, a Delta-Committee, a Delta-commissioner (who has to manage the implementation of the Delta-Program) and a Delta-Fund. However, the procedure for the adoption of this legislative proposal has been suspended after the fall of the government in early 2010. Only after the elections in early June 2010, resulting in a new Second Chamber and a new government, the deliberations will be resumed. The fact that one of the fast-growing political parties questions the need for climate policies – also in view of the mistakes within some IPCC reports – has been a major factor for the decision to delay the procedure. In anticipation of the Delta Act some institutional steps have nevertheless already been made, like the appointment of the Delta-commissioner and the Delta-committee: both took office from 1 February 2010.

In the meantime, existing laws already provide a legislative framework within which the government can undertake adaptation measures. First, a comprehensive Water Act (Waterwet) provides a broad framework for water-related management issues. This Act is new and has entered into force late 2009. It aims at the protection against floods and water shortages, water quality, and the fulfillment of societal needs with regard to water. It

38 Letter to the Second Chamber of the House of Representatives of the Netherlands (2 November 2007), File 31 269, No. 1.
39 VROM 2005.
40 Deltawet waterveiligheid en zoetwatervoorziening, Second Chamber 2009-2010, File 32 304.
41 This party is called ‘Partij voor de Vrijheid’. Other parties that supported the suspension are the VVD (liberal party) and the SP (Socialist Party). Smeets 2009.
42 The act has entered into force on 22 December 2009: Staatsblad 549, 2009 (entry into force), Staatsblad 490, 2009 (text of the Act) and Staatsblad 489, 2009 (implementing legislation).
provides safety-norms for dikes, the development of water plans (the first Dutch National Water Plan has been concluded in December 2009), and permit systems. The proposed Delta Act would become integrated into this Water Act. The National Water Plan connects to the framework as being regulated in the Spatial Planning Act, which means that instruments to manage spatial planning can be used in the course of implementing the National Water Plan. The proposed Delta Program is to be seen as an instrument to implement the National Water Plan. Furthermore, the recently adopted a ‘Crisis and Restoration Act’ is to a limited extent also relevant to for adaption measures (for example with regard to strengthening of the coast) as well.

The Water Act and the proposed Delta Act focus on water. However, other effects can be caused by climate change as well, like hot summers and heat-waves. Contrary to the Climate Change Act in the UK, there is no general legislative duty for the Dutch government to assess all the significant risks (so, not only water-related risks) specifically for the country in view of the possible impact of climate change.

5. Conclusion

5.1. General Picture: A Differentiated Approach to Mitigation and Adaptation

The Netherlands is both a developed and a low-lying country. In view of climate change the Dutch government is hence faced with at least two challenges: this is on the one hand mitigation, which is the need to fulfil its responsibility to reduce greenhouse gas emissions in order to help to avoid damaging global warming. On the other hand there is a need for adaptation, which concerns the protection of the country and its society against the possible damaging effects resulting from climate change, like notably flooding. A third complementary challenge is to develop an international policy with regard to funding towards developing countries for mitigation and adaptation purposes, the latter especially with regard to the most vulnerable countries.

With regard to national mitigation and adaptation the Netherlands has already adopted a range of legislative measures while additional legislative measures have been initiated. The national mitigation laws are for a large part resulting from EU law, while in the field of adaptation to a larger extent sovereign national choices can be made.

The Dutch Environmental Management Act serves as the core act where it concerns the direct mitigation of greenhouse gases. However, a coherent set of climate rules for the reduction of emissions, including in particular
rules for (further) target-setting and target-implementation like has been done in the United Kingdom, lacks. In fact, there is no overall national regime covering the whole set of greenhouse gases, stipulating which authorities are responsible for the reduction of these gases. There is hence a need to investigate how to systemize and complement the fragmented national climate related regulations. In general, the need for integrating laws has already got large attention within the Netherlands. The adoption of the Environmental Management Act in 1993 is an illustrative example of this. More recently, the Dutch government conducted a legislative project to harmonise and integrate its environmental and spatial permit regimes, which has led to a new General Ambient Law Act (Wet algemene bepalingen omgevingsrecht). This would indeed mean that two central acts will be relevant, also for climate policies: the Environmental Management Act and the General Ambient Law Act. Besides that, other acts will stay relevant, like the rather new integrated Water Act which deals with all water-related issues among which water quality, and a separate Soil Protection Act. There is yet no initiative at the side of the government to systemize or codify the climate related rules into one Climate Act or into one Chapter to the Environmental Management Act. The environmental movement, a coalition of Environmental NGO's, urged the government by means of a large press campaign to establish a Climate Act, with long-term binding emissions targets and an accountability mechanism for ensuring compliance with such targets. According to the proposal the Climate Act should set emission budgets and would make governmental authorities responsible for complying with them. There is however not (yet) enough political support for adopting such an act, let alone an Act that would go beyond EU obligations. On the contrary, there is an overall resistance against adopting further going legally binding measures compared to what international and European law asks for (no ‘goldplating’ of European law).

For adaptation however, a much stronger and coherent national legislative approach is developing within the Netherlands, in particular with regard to the protection against flooding and fresh water-scarcity. The proposal for a specific ‘Delta Act’ aims at floods and fresh water, and provides for the establishment of a Delta Commissioner together with a Delta-Committee, a Delta-Fund and a Delta-Program. In fact, the Delta-Commissioner and the Delta-Committee have already been appointed in advance of the adoption of the relevant legislation. In the field of mitigation, such a steering approach with for instance a Climate Commissioner, a Climate Program, a Climate Committee and a Climate Fund lacks. It remains

\footnote{Here, a translation problem arises. In Dutch law and doctrine, a distinction is made between environmental law, which can be qualified as the law with regard to polluting activities and polluting products and substances, nature conservation law, water law (encompassing all the water-related aspects) and ‘ambient’ law, which encompasses all the law relevant for the protection of space, nature, water and the protection against pollution.}
to be seen however whether after the election in early June the suspended procedure with regard to the adoption of the Delta Act will be resumed by the new Parliament. This inter alia depends on the composition of the new government but also on the trust into the IPCC projections with regard to climate change.

In sum, we can conclude that within the Netherlands different legislative frameworks exist for mitigation and adaptation. In the field of mitigation the fragmentation and the lack of a comprehensive steering and accountability mechanism in order to reach the needed emission reduction goals (or even further going goals compared to EU and international law) are core concerns, while in the field of adaptation a directive (but not comprehensive) legal framework towards establishing adaptation measures is foreseen. Given this picture, one could indeed get the impression that the need to protect the country itself is much stronger felt by the Dutch politicians than the need to contribute to combating the global problem of climate change.

5.2. Points for Further Research

In contrary to the just explained fragmentation of climate law in the Netherlands, the UK has adopted a ‘Climate Change Act’ that contains provisions for mitigation and adaptation. It is however yet to be examined what kind of governmental approach and connected legislative framework fits best for dealing with climate protection, and hence also the British Climate Change Act (and its relationship with other legislation, like planning and/or energy legislation) needs a close review. Moreover, in course of the strive towards developing a coherent national climate law the structure and content of EU climate law is a major concern. The EU climate legislation in the form of directives, regulations and decisions has become a complicated framework in the field of mitigation. Moreover, also in the field of adaptation the EU is already adopting regulation.\footnote{Notably Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks.} This vast package of EU legislation heavily influences and perhaps even limits national legislators in their attempt to provide a well-structured and transparent legislative approach. Moreover, it is not yet clear to what extent EU law limits or stimulates national measures that go beyond the EU ambition. The use of emissions trading, in particular also for Member States as provided by the Effort Sharing Decision, implies that if a Member State would strive for a tougher reduction target than the applicable EU one, this Member State might be able to sell part or in full this room for emission. This would mean that any achieved reduction in one country would be balanced with extra emissions in another country. Whether this so-called ‘waterbed effect’ of EU wide emissions trading implies a stimulus (the emission-saving Member State can
make a financial profit by selling) or even a barrier to further going national climate targets remains to be seen. After all, if a Member State with a national target which is stricter than the EU sells its emission right to a country which then accordingly will have additional emissions, the total EU emissions will not decrease. Whether hence the possibility of trading among Member States serves as an incentive or not for further going national policies, remains to be seen.

This chapter has focused on the current state of affairs with developing a national legislative framework towards climate protection, which is a new question of environmental law. It is also a challenging one, because the climate change problem is extremely complex with many different sources and quite some uncertainties. The legislator needs to consider how to require reductions of greenhouse gas emissions from many different sources, how to reform the energy structure, and how to establish a range of adaptation measures. Besides legislation, the state can invoke climate protection action by other means. We can think of education, although also that needs to be guided with sound procedures notably ensuring sound information and freedom of education. Second, in particular in the Netherlands, the conclusion of voluntary agreements with industries and decentralised governments is a popular approach of the central government, also in the area of climate change, and the effectiveness of this approach (and its relationship with regulation) should be assessed as well. Moreover, also purely voluntary initiatives pop up within society, among which the voluntary offsetting of emissions, which raises new questions from a legal perspective. Furthermore, insurance companies increasingly consider the risks of climate change, which can move private parties to get engaged into considering or even adopting preventive measures. And, last but not least, even the possible meaning of liability law for taking mitigation and adaptation action should be examined in order to get a full understanding of how and to what extent law can contribute to climate protection.

47 The term waterbed effect has been used for the context of the EU ETS applying to European industries by the Netherlands Environmental Assessment Agency 2008, p. 38.

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1. General Information on Corporate Governance in the Netherlands

The corporate governance system in the Netherlands has witnessed important changes over the last decade. Following a very public debate about the maintenance of the wide arsenal of defensive measures against takeovers in the first half of the 1990s, a first attempt was made to produce corporate governance recommendations for listed companies. The 40 recommendations of the Peters Committee, published in 1997, triggered general awareness of corporate governance questions.

The discussions on corporate governance were held against the background of the Dutch corporate law system that imposes a stakeholder rather than shareholder orientation of executive and supervisory boards of companies. The Dutch corporate law system includes distinct elements of employee co-determination: far-reaching works council powers and the Dutch structure regime for large companies, allowing employees to have a say in the appointment of supervisory directors. Dutch corporate law also, in general, allows a wide-ranging set of mechanisms that can be used to not only defend companies against hostile takeovers, but also substantially reduce shareholders’ involvement in corporate affairs under normal circumstances, including non-voting depositary receipts for shares, priority shares with special control rights, and structural delegation of authorities to the executive board.

The 40 recommendations of the Peters Committee heralded a fundamental overhaul of Dutch corporate law to restore the position of shareholders, through a combination of changes in 2004 to Book 2 of the Dutch Civil Code (DCC), containing the companies act, a Corporate Governance Code issued by the Tabaksblat Committee in 2003 and case law of the Enterprise Chamber of the Amsterdam Court of Appeal (the Enterprise Chamber). This court has broad authority to order investigations into the

* The authors are grateful to Stephen Machon for editorial assistance. This paper takes into account developments in Dutch corporate governance prior to 1 October 2009 only and does not constitute legal advice.
affairs of companies and to order immediate measures to be taken for the duration of the proceedings.

The 2004 changes of Book 2 DCC included:

(i) the introduction of the authority of the shareholders meeting to approve major transactions that will have a material impact on the nature of the company, including acquisitions or divestures of a value exceeding one-third of the company’s balance sheet total;
(ii) the right of shareholders holding 1% of share capital or shares with a market value of €50 million, to submit items for the agenda of the general meeting;
(iii) the right of holders of depositary receipts for shares to receive a power of attorney to vote on the underlying shares, which can be refused when the company is or will become subject to a takeover threat;
(iv) the right of the general meeting to adopt the remuneration policy for executive directors and to specifically approve share-based schemes; and
(v) the right of the general meeting of companies governed by the structure regime to appoint supervisory directors (who previously appointed themselves) and to dismiss the supervisory board as a whole.

Application of the 2003 Corporate Governance Code through a comply-or-explain mechanism was made mandatory in a Royal Decree as of 2004 for Dutch companies with a share listing. The Code was adopted by a committee chaired by Mr. Tabaksblat, consisting of representatives of listed companies, shareholder associations (both retail and institutional) and independent governance experts, which committee was set up by relevant associations of business and shareholders. The acceptance of the Code was helped by corporate governance scandals in 2003, the most prominent of which were the misleading financial statements issued by Royal Dutch Ahold and the oil reserves statements of Royal Dutch Shell.

The Corporate Governance Code includes principles that are held to be generally accepted and detailed best practice provisions on the executive board (key issues: risk management and executive remuneration), the supervisory board (key issues: increased monitoring commitment, committees, independence), the general meeting (call to institutional investors to use their voting rights, procedure), and the auditing process and external auditor. A Monitoring Committee was set up following the adoption of the Code. This Committee has issued annual monitoring reports, reflecting on the level of compliance with the Code. In 2008, the Monitoring Committee also adopted a set of revisions to the Code.¹

In the same period, securities regulation for listed companies has changed fundamentally. Prior to 1990, securities regulation was primarily a self-regulatory affair, with a minimum of rules promulgated by the Amsterdam Stock Exchange. In the 1990s, more and more mandatory rules were introduced into this system, first of all with the introduction of criminal prohibitions on insider trading and notification obligations for substantial holdings. As of 2000, the self-regulatory system was completely overhauled and replaced by mandated securities regulation, of which the core can now be found in the Act on Financial Supervision (Wet financieel toezicht; ‘AFS’) and decrees issued under this Act.

The supervision of compliance with securities regulation, and general supervision of conduct on financial markets, has been delegated to the Autoriteit Financiële Markten (AFM), a private body with public law powers of investigation that may also levy administrative fines for non-compliance. The AFM’s authority ranges from investigating insider trading and notification of substantial holdings, approving prospectuses for securities issues and offer documents for public offers as well as supervising the offer procedure to reviewing financial statements of companies with listed securities and supervision of trading on the Euronext Amsterdam exchange, including suspension of trading. Most of the decisions of the AFM are subject to appeal before the administrative court in Rotterdam, which has resulted in the AFM operating in a litigious environment.

Share ownership of listed companies in the Netherlands is mainly dispersed, with a relatively low number of controlling shareholders. Recent numbers indicate that as many as 70% of the shareholders of Dutch listed companies are foreign shareholders. This has made Dutch companies particularly vulnerable to shareholder activism by hedge funds, as seen in the cases of Stork, ASMI and ABN AMRO. In these cases, the Enterprise Chamber intervened with immediate measures mostly to preserve the status quo and allow for an orderly process of debate and conflict resolution. The financial crisis has strengthened sentiments in the media and among politicians that the movement to restore shareholder rights has gone too far, and that this should be curbed since this has made companies subject to excessive short-term activist pressure from certain shareholders. The government has submitted proposals to parliament that seek to increase the transparency provided by investors by lowering the threshold for notification of substantial holdings from 5% to 3% and requiring notifying shareholders to state whether they object to the strategy of the company. More fundamental revisions have not been announced to date.

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2. Internal Corporate Governance

2.1. Boards

2.1.1. One-tier and two-tier Models

Dutch listed companies predominantly apply the two-tier board system, comprising a management board and a supervisory board. This is the classical Dutch board system that can be traced back to the first listed company in the world, the VOC, incorporated in 1602 and that introduced a form of a supervisory board in 1623 following shareholder pressure to improve the company’s governance.

The two-tier model is required for companies governed by the structure regime, in which case the employees, through the works council, have the right to nominate candidates for one-third of the members of the supervisory board (see section 2.3.2, below for further information). Most large listed companies are exempt from the structure regime, as a result of which they may opt for a one-tier board. Of the larger listed companies only one has actually adopted the one-tier board, Unilever N.V.

An amendment to Book 2 DCC, which is currently being discussed in parliament, will further facilitate the introduction of the one-tier model, mainly by clarifying that a company’s articles of association may distinguish between the roles of executive and non-executive directors, thus also affecting directors’ liability. The proposed amendment also allows for companies governed by the structure regime to adopt a one-tier board, in which case the co-determination rights of the works council relate to the appointment of non-executive directors. The Corporate Governance Code contains some provisions on the one-tier board, stipulating that the majority and the chairman of the board must be non-executive members.

In practice, the operation of a one-tier and a two-tier board in a Dutch setting may not differ fundamentally. The one-tier board is often associated with a higher number of meetings of the board, more extensive information to non-executives and in general in stronger involvement of non-executive directors. However, all of this can be achieved without any formal difficulty in a two-tier model. The differences appear to exist more in perception than in legal reality. The liability of non-executive directors in a one-tier board is unlikely to differ fundamentally from the liability of supervisory directors in a two-tier board. In the remainder of this paragraph we primarily refer to the two-tier model, as this is the predominant model.

2.1.2. Composition, Size, Term of Office

Book 2 DCC contains little on the composition, size and term of office of the supervisory board. The sole mandatory provision is that only natural persons can be appointed as supervisory directors (Article 140 Book 2 DCC). The Corporate Governance Code provides that a profile of the composition of the board is to be made and that the supervisory board is to aim for a diverse composition in terms of gender and age. The profile is to state what specific objective is pursued by the supervisory board in relation to diversity. Currently, proposals are being debated in parliament to impose a ‘comply or explain’ provision in the DCC, holding that companies should fulfil a quota of at least 30% women supervisory directors.\(^4\)

The size of the supervisory board is not regulated, apart from companies governed by the structure regime, in which case the minimum size of supervisory board is three members. Typically, supervisory boards range from three to nine members. Larger boards are rare.

The Corporate Governance Code provides that a supervisory director may hold office for a maximum of three four-year terms. Supervisory directors are typically appointed and re-appointed on the basis of a rotation scheme. Systems of staggered board elections, as far as we are aware, are not applied by listed companies. Instead, listed companies often contain provisions in their articles of association that members of the management board and of the supervisory board can only be dismissed by the general meeting upon the proposal of the supervisory board, or that they can only be dismissed by the general meeting with a majority of two-thirds of the votes cast. Following a provision in the Corporate Governance Code, such provisions have often been replaced by a provision that dismissal is possible on the basis of an absolute majority representing at least one-third of share capital.

2.1.3. Task, Orientation

Article 140 Book 2 DCC expressly provides that the supervisory board is to act in the interest of the company and its enterprise, which is understood to mean to act in the interest of all stakeholders. Case law, among which the recent decision of the Supreme Court in *ABN AMRO*,\(^5\) confirms that the interests of shareholders do not take priority over the interests of other stakeholders.

The duties of the supervisory board are to advise and supervise the management board (Article 140 Book 2 DCC). These duties are elaborated in

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the Corporate Governance Code. According to the Code, the supervision of the management board at least includes:

(i) achievement of the company’s objectives;
(ii) corporate strategy on the risks inherent to the business activities;
(iii) the design and effectiveness of the internal risk management and control systems;
(iv) the financial reporting process;
(v) compliance with primary and secondary legislation;
(vi) the company-shareholder relationship; and
(vii) corporate social responsibility issues that are relevant to the enterprise.

In addition, the supervisory board is typically charged with setting the executive remuneration under the policy adopted by the general meeting. Also, supervisory directors are often charged to represent the company when a managing director has a conflict of interests with the company. In companies governed by the structure regime the supervisory directors are authorised to approve major decisions of the management board, such as large acquisitions or disposals and issuance of share capital. Similar approval rights are typically also included in the articles of association of companies not governed by the structure regime.

2.1.4. Operation

Book 2 DCC to date does not contain any mandatory rules on the operation of the supervisory board. The Corporate Governance Code contains a number of best practices related to committees, the role of the chairman, induction of new board members and board evaluation. The Corporate Governance Code provides that companies are to have three committees: audit, remuneration and nomination. The function of these committees is to prepare decision-making by the full supervisory board. The committees, therefore, do not have separate powers and do not reduce the responsibility of the full board for these matters.

The audit and remuneration committees may not be chaired by the chairman of the supervisory board (in order for the discussion in the full board to be relevant) or a former member of the management board. In practice, the remuneration and nomination committees are sometimes combined. The audit committee has been made mandatory for listed

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6 Art. 135 Book 2 DCC.
7 Art. 146 Book 2 DCC.
8 Issuance of share capital in principle is a shareholder decision but the general meeting can delegate this decision to the management board for a period of up to five years, in which case the decision to issue share capital is often subject to the approval of the supervisory board.
companies by means of a governmental decree,\(^9\) as a result of the implementation of the European Statutory Audit Directive.\(^{10}\)

The chairman of the supervisory board ensures a proper functioning of the supervisory board and its committees, ensuring that (i) supervisory directors receive sufficient and timely information, (ii) there is sufficient time for consultation and decision-making by supervisory directors, and (iii) the performance of management board and supervisory board members are assessed annually. The chairman also functions as the main contact for shareholders regarding the functioning of the management and supervisory boards. The chairman should not be a former member of the management board. The Corporate Governance Code also provides that a vice-chairman is to be appointed who will replace the chairman when he is absent and who also acts as the main contact for management and supervisory board members concerning the performance of the chairman.

The supervisory board must discuss at least once a year, in a meeting without the executives present, its own functioning and that of the management board. The supervisory board's report in the company's annual report must include how its evaluation has been carried out. There is a growing practice for boards to have evaluations conducted by external agencies at least once every three to four years.

As to information, the Corporate Governance Code provides that the supervisory board and its individual members each has his own responsibility for obtaining from the management board and the external auditor all information the supervisory board needs to properly fulfil its oversight duties. If the supervisory board considers it necessary, it may obtain information from officers (beyond the management board) and external advisors of the company, and may require them to attend meetings.

2.1.5. Independence

The Corporate Governance Code is rather strict on the issue of independence of supervisory board members. All members of the supervisory board must be independent, save for one member, according to the list of independence criteria included in the Code. The independence criteria exclude, among others, employees or members of the management board for a period of five years prior to appointment to the supervisory board, those with an important business relation to the company during the year prior to appointment (including in-house counsel, external auditor, banker), a member of the management board of a company where a member of the management board is a supervisory director, a holder of ten percent or more of the company's


shares, or a board member of a company holding ten percent or more of the company's shares, unless such holding company is a group company. Also, for supervisory board committees, the Code provides that only one member may be non-independent according to these criteria.

2.1.6. Audit, Control, Risk Management

The Corporate Governance Code includes extensive provisions on internal control and risk management, and audit. The internal control and risk management system is to at least include:

(i) risk analysis of the operational and financial objectives of the company;
(ii) a code of conduct to be published on the company’s website;
(iii) guides for the lay-out of financial reports and procedures to be followed in drawing up the reports; and
(iv) a system of monitoring and reporting.

The management board must describe in the company's annual report the main risks related to the strategy of the company, the design and effectiveness of the risk management and control systems for the main risks during the financial year, any major failure in these systems observed in the financial year, and any improvements made to the systems as a result. In addition, the management board must also state, concerning financial reporting risks, that the internal risk management and control systems provide reasonable assurance that the financial reporting does not contain any errors of material importance and that these systems worked properly in the year under review, all with clear substantiation. The supervisory board, and specifically the audit committee, is to supervise all of this.

The external auditor is appointed by the general meeting. The supervisory board nominates a candidate for appointment on the advice of the audit committee and the management board. The supervisory board also decides on non-audit services to be provided by the external auditor, on the recommendation of the audit committee and after consultation with the management board. The external auditor should be present at the general meeting and may be questioned by shareholders.

2.1.7. Duty of Loyalty, Conflict of Interest

Dutch law does not contain an explicit duty of loyalty applicable to the members of the management and supervisory boards. However, the core instruction to act in the interests of the company and its enterprise can certainly be understood to mean that no director should be guided by his or her own interests. The Corporate Governance Code has increased the responsibility of dealing with conflicts of interest. For both management and supervisory board members, there are provisions in the Code to the effect
that a board member with a personal, direct or indirect conflict of interest may not participate in the debate and decision-making of the board on the relevant subject matter, as is discussed in detail below. The Netherlands Supreme Court held these provisions to be mandatory as a matter of law in Versatel, also discussed in detail below. The proposal now pending in parliament introducing new rules on the one-tier board also provide for a mandatory provision that managing and supervisory directors may not participate in the debate and decision-making when they have a personal, direct or indirect conflict of interest with the company.

2.1.8. Business Judgment Rule, Standard of Care

The US style business judgement rule does not exist as such in the Netherlands. But it is clear from case law on liability that managing and supervisory directors have a natural discretion in performing their duties. Liability only arises when a director has performed his duties improperly, for which serious personal culpability must be established. There will be an improper performance of duties if a director acted in a way that no reasonable director in similar circumstances would have acted. This standard has been lowered from gross negligence in the 1980s.

The standard applied in inquiry proceedings by the Enterprise Chamber as to whether to grant an inquiry is that there must be sound reasons to doubt the proper policies of the company and/or the conduct of its business (gegronde redenen om aan een juist beleid te twijfelen). If the Enterprise Chamber, after inquiry by experts, finds that there has been mismanagement (wanbeleid), it is authorised take certain measures, including dismissal of directors. In deciding whether or not there has been mismanagement, the Enterprise Chamber reviews whether elementary principles of responsible entrepreneurship have been breached (elementaire beginselen van verantwoord ondernemerschap). All of these terms again suggest a level of discretion for managing and supervisory directors in performing their duties.

2.1.9. Remuneration

The remuneration of supervisory directors is typically decided by the general meeting. There are no mandatory rules or limitations on this remuneration. The Corporate Governance Code provides that supervisory directors may not be granted shares or stock options as a form of remuneration. Shares held by supervisory directors should be held for the long term. The company may also not extend personal loans or guarantees to supervisory directors unless in the normal course of business.

The remuneration of managing directors in practice is determined by the supervisory board within a policy adopted by the general meeting.\textsuperscript{12} Stock option schemes and other share-based incentive schemes require the specific approval of the general meeting. In practice, many listed companies remunerate their managing directors through a combination of fixed pay, cash bonus, stock options or long-term incentive share grants. In addition, pension contributions are often substantial. The pay of individual directors must be disclosed in the annual accounts.\textsuperscript{13}

The Corporate Governance Code contains a number of provisions on executive remuneration, focused mainly on process and transparency. One significant provision is that the severance payment of a managing director after his dismissal may not exceed his fixed annual pay. The relation between fixed and variable pay should be reasonable, but recent recommendations for banks in a separate Code for Banks include that variable pay should not exceed fixed pay.\textsuperscript{14}

2.1.10. Liability

Liability of directors under Dutch law is primarily liability towards the company. Managing and supervisory directors are liable towards the company if they have improperly performed their duties. Liability only arises if there is serious personal culpability that can be attributed to a director. In such case, the director or directors are liable for the damages caused to the company.

Shareholders cannot sue directors directly for losses they have incurred as a result of damages caused to the company. Moreover, shareholders are unable to file a derivative suit for those damages on behalf of the company. Shareholders are able, however, to claim damages from managing and supervisory directors when the company has published misleading annual accounts, and from managing directors for misleading interim financial statements. Case law on this basis is relatively scarce to date, although the provision has been part of Dutch company law since 1928.

In bankruptcy, the liability of managing and supervisory directors may extend to the whole deficit of the bankrupt estate, if the trustee in bankruptcy provides evidence that it is plausible that apparent improper management (or supervision of management) has been an important cause of the bankruptcy. Lack of proper bookkeeping and publication of the required financial statements is deemed to constitute improper management and creates an assumption of apparent improper management being an important cause of the bankruptcy. These specific provisions have been

\textsuperscript{12} Art. 135 Book 2 DCC.
\textsuperscript{13} Art. 383b and Art. 383c Book 2 DCC.
applied often in bankruptcy, leading to extensive case law, often with smaller, non-listed companies. In the case of a bankrupt listed company, the District Court of Utrecht has recently found managing and supervisory directors liable for improper management.\footnote{District Court of Utrecht, 12 December 2007, JOR 2008, 66.}

Creditors of the company can hold managing directors liable on the basis of tort if these directors engaged in transactions for the company when they knew or should have known that the company would not be able to pay the resulting debts (wrongful trading).\footnote{Supreme Court 6 October 1989, NJ 1990, 286 (Beklame)]. This tort-based liability of managing directors has been extended to a wide range of actions, including a recent case where the director of a company that owned shares in another company had induced another shareholder of that company to assume a risk of liability towards the bank financing the company, and when this risk was considerably higher than the third party knew or could have known, also in considering the (lack of) recourse against the other company-shareholder.\footnote{Supreme Court 26 June 2009, NJ 2009, 148 (Eurocommerce).}

\section{Shareholders}

As indicated earlier, shareholders continue to play an increasingly important role in the governance of Dutch listed companies. Contemporary thinking about the role of shareholders is reflected in the Corporate Governance Code, which states that

\begin{quote}
‘The management board is responsible for weighing up the different interests with respect to the company’s strategy, while the supervisory board must oversee this process. Both these organs are accountable to the general meeting for the performance of their roles. Unlike the management board and the supervisory board, the other stakeholders of the company are not in principle guided exclusively by the interests of the company and its affiliated enterprise. For example, shareholders can give priority to their own interests with due regard for the principle of reasonableness and fairness. The greater the interest that the shareholder has in a company, the greater is his responsibility to the company, the minority shareholders and other stakeholders. (...) [These] principles can cause tension (...). How this tension should be resolved will differ from case to case’.\footnote{Dutch Corporate Governance Code (2008), at 7.}
\end{quote}

The Dutch government recently endorsed this view, and has added that shareholders can express their opinion on the company’s strategy by making use of the rights conferred upon them, amongst others, at the general meeting of shareholders.\footnote{Parliamentary Proceedings II 2008/09, 32 014, No. 3.} Perhaps the most significant of these rights, at least in terms of corporate governance, is the right to appoint and dismiss members of the management and supervisory boards (Articles
132/134/142/144 Book 2 DCC. Different rules apply if the company is
governed by the structure regime, as discussed in detail below. This article
focuses on the various powers of shareholders in Dutch listed companies and
the standards that apply to shareholders when exercising these powers.

2.2.1. Fiduciary Duties of Controlling Shareholders

While Dutch law does not explicitly state that controlling shareholders have
a fiduciary duty towards minority shareholders, a controlling shareholder’s
behaviour is subject to certain legal norms. In particular, stakeholders (e.g.,
the board, shareholders, and employees) in Dutch companies are required by
law to behave towards one another in a manner that is reasonable and fair
(Article 8 Book 2 DCC). Inquiry proceedings before the Enterprise Chamber –
including the ability to request provisional measures, see below – provide
minority shareholders with an efficient means to subject the controlling
shareholder’s behaviour to judicial scrutiny if they believe the principle of
reasonableness and fairness is violated.\textsuperscript{20}

Indeed, the responsibility of large shareholders is a subject that is
receiving increasing attention from courts as well as policymakers. In 1999, in
a case dealing with the controversial takeover of luxury goods manufacturer
Gucci, the Enterprise Chamber held that Article 8 Book 2 DCC implies that
the acquirer of a significant stake should, in his dealings with the company,
take into account not only his own interests but also the interests of the
company and its stakeholders.\textsuperscript{21} This notion is now reflected in the preamble
of the Corporate Governance Code, which, as mentioned earlier, states that
‘[t]he greater the interest which the shareholder has in a company, the greater
is his responsibility to the company, the minority shareholders and other
stakeholders’. The Dutch Cabinet recently endorsed this principle.\textsuperscript{22}

Once the acquisition has been completed, Article 8 Book 2 DCC implies,
for example, that if a controlling shareholder tries to squeeze out the minority
by initiating a merger between the company and another one of its
subsidiaries (instead of following the regular squeeze-out procedure as
discussed below), this may be considered a violation of the principle of
reasonableness and fairness.\textsuperscript{23}

The principle of reasonableness and fairness may also be violated if the
controlling shareholder uses his power not to directly determine the
company’s course of action, but to appoint directors. This is illustrated by a
recent case concerning telecommunications company Versatel, which had
been the subject of a public offer by Tele2. Subsequent to the offer, Versatel
had a controlling shareholder (Tele2) and several minority shareholders,

\textsuperscript{20} For a discussion of two such cases, see Timmerman 2002, p. 409, p. 415.
\textsuperscript{21} Enterprise Chamber 3 March 1999, JOR 1999, 87 (Gucci I).
\textsuperscript{22} Letter from the Dutch Minister of Finance dated 25 May 2009 (Kabinetreactie op de
\textsuperscript{23} Enterprise Chamber 20 December 2007, JOR 2008, 36 (Shell).
notably hedge funds that were opposing the triangular merger initiated by Tele2 in order to squeeze out the minority. Tele2 intended to use its power to change the composition of the supervisory board such that it would consist of four supervisory directors who were also executive directors of Tele2 and one director unaffiliated with Tele2. The Supreme Court confirmed that as a general matter, Article 8 Book 2 DCC requires that the company (in this case Versatel) act in a prudent manner vis-à-vis the interests of all of its shareholders, and prevent unacceptable conflicts of interest. In the case at hand, the Supreme Court then considered that such conflict of interest existed as a mere consequence of the fact that the relevant supervisory directors had irreconcilable interests, raising doubt as to whether, in acting as supervisory directors of Versatel, they would be guided solely by the interests of Versatel. Accordingly, the Supreme Court upheld the lower court’s decision to, by way of a provisional measure, prevent Tele2 from appointing the conflicted supervisory directors and to instead appoint three independent supervisory board members with broad-ranging powers. The case thus serves as a strong reminder that controlling shareholders’ ability to exercise their statutory powers is limited by the requirement to act in a manner that is reasonable and fair towards the other shareholders.

To be sure, this requirement applies not only to controlling shareholders, but also to other shareholders, whose conduct too can become subject to scrutiny. This is exemplified by a recent case involving industrial company Stork. In this case, the Enterprise Chamber ordered an investigation into the affairs of Stork that would take into account the conduct of Centaurus, an activist hedge fund that had played a major role in the governance crisis that occurred at Stork. The conduct of shareholders may become subject to closer scrutiny in the future, in light of pending bills before the parliament to grant companies the right to request the Enterprise Chamber to order an investigation into the affairs of a company, including the conduct of shareholders. The right to request such investigation is currently granted to shareholders only.

2.2.2. Conflicted Transactions, Transfer of Assets and Profits out of Firms for the Benefit of their Controlling Shareholders (‘tunnelling’)

As far as conflicted transactions are concerned, as mentioned earlier Article 146 Book 2 DCC provides that in case of a conflict of interest between the company and members of the management board, the company shall be represented by a member of the supervisory board, unless the articles of association provide otherwise (which they frequently do). In any event, the general meeting of shareholders is authorised to designate a person who will represent the company. This implies that the board has a duty to timely

24 Supreme Court 14 September 2007, JOR 2007/ 237 m. nt. Bartman (Versatel), r.o. 4.3.
25 Enterprise Chamber 17 January 2007, JOR 2007/42 (Stork), r.o. 3.9.
notify the general meeting of shareholders that there is a conflict of interest. A conflict of interest is deemed present not only in case of a transaction between the company and a member of the management board, but also in case of a transaction between the company and third party that a member of the management board is affiliated with (an ‘indirect conflict of interest’).

If a transaction has been entered into on behalf of the company by a member of the management board who, due to a conflict of interest, was unauthorised to represent the company, only the company can invoke the nullity of the transaction. Conflicted transactions are thus not subject to prior approval by (disinterested) shareholders nor can they, in principle, be declared null at the initiative of shareholders. However, case law has produced a set of norms that should be adhered to in case of conflicts of interest, relating to, for example, transparency and the involvement of independent experts.

In addition, the Corporate Governance Code sets forth the principle that any conflict of interest or apparent conflict of interest between the company and management or supervisory board members must be avoided (principles II.3 and III.6). The Code also reflects a number of related best practices, including that board members may not provide unjustified advantages to third parties to the detriment of the company, may not take advantage of business opportunities to which the company is entitled and must immediately report any potential conflict of interest. Conflicted transactions should be (i) agreed on terms that are customary in the sector concerned, (ii) approved by the supervisory board and (iii) published in the annual report.

Importantly, the Corporate Governance Code provides that transactions between the company and legal or natural persons who hold at least ten percent of the shares in the company are subject to the same requirements. If these norms are not adhered to, this could, depending the circumstances, result in a court rescinding the resolution to enter into the transaction at the request of one or more (minority) shareholders, on the basis that the principle of reasonableness and fairness of Article 8 Book 2 DCC has been violated (Article 15(1)(b) Book 2 DCC).

The Corporate Governance Code also considers best practice that a management or supervisory board member may not take part in any discussion or decision-making that involves a subject or transaction in relation to which he has a conflict of interest with the company. In a bill that is currently pending before parliament, the Dutch Cabinet has proposed to introduce a statutory provision to the same effect. As a result of this amendment, minority shareholders who wish to oppose a conflicted transaction will be able to request a court to rescind the resolution to enter into the transaction, on the basis that the applicable procedural rules governing the decision-making in the management board or supervisory board were violated (Article 15 (1)(a) Book 2 DCC).

It should be borne in mind that the rescission of the underlying resolution does not directly affect the validity of the conflicted transaction. It does, however, represent a first step in terms of enabling the company to claim damages from those who have committed a wrongful act by entering into the transaction, such as the conflicted director or the counterparty that knowingly benefited from the conflict (Article 9 Book 2 DCC and 162 Book 6 DCC, respectively).

2.2.3. Shareholder Rights and Minority Protection, in Particular Information Rights

Perhaps the most important provision in terms of minority shareholder protection is the principle that shareholders must be treated equally (Article 92 (2) Book 2 DCC), as also reflected in the Second EC Company Law Directive and the EC Shareholders’ Rights Directive. Specifically, this principle requires that the company treat shareholders who are in equal circumstances in an equal way. The principle derives from the broader principle of reasonableness and fairness discussed earlier.

There are three main ways through which (minority) shareholders can obtain company-specific information, including information on conflicted transactions. The first is through mandatory disclosures by the company. As discussed in greater detail below, annual accounts of listed companies have to be prepared in accordance with the International Financial Reporting Standards as endorsed for use in the EU (IFRS). This includes IAS 24, which requires extensive related party disclosures. At its core, the requirement of IAS 24 has already existed as part of Dutch law on financial reporting for quite some time. In a 1980 case that essentially involved tunnelling by the controlling shareholder, the Enterprise Chamber held that if the extent of the company’s revenues is influenced by the relation between a company and its controlling shareholder, the explanatory notes to the company’s annual accounts should indicate this fact, and explain the nature and terms of the relevant transactions.

Second, pursuant to Article 2:107 (2) Book 2 DCC (and pursuant to the Corporate Governance Code), shareholders may ask questions during the general meeting of shareholders, and the board is required to provide answers to such questions unless this would be contrary to an overriding interest of the company.

Lastly, inquiry proceedings provide a powerful tool for minority shareholders to obtain information, since one of the purposes of the right of inquiry is indeed to obtain clarity with respect to the affairs of the company.

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27 For an extensive discussion of minority shareholder protection in general, see Timmerman & Doorman 2002.
2.2.4. Shareholder Activism

The issue of shareholder activism has received considerable attention in the Netherlands in recent years for two related reasons. First, the recent wave of shareholder activism was preceded by a series of legislative reforms aimed at expanding the rights of shareholders, as discussed earlier. In some respects, these reforms constituted a move away from the ‘stakeholder model’ towards the more shareholder-oriented model that prevails in the US and the UK. For this reason, the legislative forms have deeper cultural and societal meaning. Second, the recent wave of shareholder activism has involved some high profile cases that have sparked controversy, notably the activism of hedge fund TCI, which set in motion a string of events that led to the hostile takeover of a major Dutch bank, ABN AMRO, by a consortium of three banks, including another Dutch bank, Fortis. This takeover, combined with the recent financial crisis, ultimately led to Fortis’s demise, necessitating a bailout by the Dutch government and fuelling public scepticism of shareholder activism.

The fact that shareholder activists have been able to have a real impact on a number of companies is due to some extent to the various powers conferred upon them by statute and to another extent to the ownership structure of Dutch firms.29

2.2.4.1. Ownership Structure of Dutch Firms

The ownership of Dutch firms is relatively dispersed. A 2009 Risk Metrics study showed that Dutch listed companies had the lowest(!) degree of ownership concentration in Europe. Shareholders with a stake of 5% or larger together held, on average, 20.8%, while the European average was 35% and the percentage for Italy, for example, was 53.2%.30 Moreover, by 2007, no less than 70% of market capitalisation was owned by foreign investors.31

2.2.4.2. Shareholder Powers

In terms of shareholder powers, one statutory right (other than the right to dismiss and appoint directors) that has significantly facilitated the efforts of shareholder activists is the right to put items on the agenda. Pursuant to Article 114a Book 2 DCC, shareholders holding shares representing at least 1% of market capitalisation or a value of EUR 50m have such right. Another relevant shareholder right is the right to approve major transactions entered into by the company (Article 107a Book 2 DCC).

29 For an empirical analysis of shareholder activism in the Netherlands, see De Jong, Roosenboom, Verbeek and Verwijmeren 2007.
30 Risk Metrics Group 2009.
31 Federation of European Securities Exchanges (FESE) 2008.
Also noteworthy is the statutory requirement that companies have a remuneration policy that is approved by the general meeting of shareholders (Article 135 Book 2 DCC). Led by institutions such as Risk Metrics and the influential association of securities owners, the Vereniging van Effectenbezitters, (VEB) discussed below, shareholders have recently rejected the remuneration policies of companies such as Philips and VastNed Retail. Corporate Express, another blue chip company, recently decided to withdraw the proposed remuneration policy out of fear that shareholders would reject it, which suggests that this statutory power has broader impact than can be deduced only from those instances where the remuneration policy has actually been rejected. The developments at the companies mentioned above are consistent with shareholder dissatisfaction with remuneration practices at foreign companies, as illustrated by the recent rejection by shareholders of the remuneration report of Royal Dutch Shell, an English plc with a large Dutch shareholder base.

Finally, shareholder activists have frequently initiated inquiry proceedings, requesting the Enterprise Chamber to intervene in, for example, takeover situations, by taking provisional measures. Such measures may include prohibiting the company from taking defensive measures (discussed in more detail below), or appointing independent members to the supervisory board. The Enterprise Chamber has intervened with various decisions in two drawn-out cases, Stork and ASMI, in which activist shareholders attempted to force companies to change their strategy by selling off parts of their business.

Two conclusions can be drawn from these cases: (i) setting the strategy of the company is the authority of the management board subject to the approval of the supervisory board and is not the power of the general meeting, (ii) when there is a major disagreement with shareholders on the strategy of the company in the end a solution must be found, which the Enterprise Chamber typically tries to resolve through a process of preserving the status quo, denying management and shareholders from taking irreversible acts and instructing the parties to continue to find a solution, where necessary aided by independent outsiders.

A revised Corporate Governance Code was published in 2008, which states that the Corporate Governance Code ‘is based on the principle accepted in the Netherlands that a company is a long-term alliance between the various parties involved in the company,’ and emphasises the fact that the management and supervisory boards have a responsibility to weigh these various interests, with a view to ‘ensuring the continuity of the enterprise.

32 In the case of Versatel, for example, the Enterprise Chamber intervened several times on behalf of minority shareholders to stop a post public offer squeeze-out merger that would prejudice minority shareholders.

while the company endeavours to create long-term shareholder value’. This translates into several provisions that appear to be aimed at mitigating the influence of activist shareholders. An example is the provision stipulating that if a shareholder intends to put an item on the agenda that may result in a change in the company’s strategy, the management board ‘shall be given the opportunity to stipulate a reasonable period in which to respond,’ which may extend to 180 days (best practices II.9/IV.4.4). The Dutch Cabinet has generally approved of the revisions, and, as mentioned earlier, has recently proposed additional legislative measures that have the practical effect of limiting shareholder power, such as increasing the threshold for shareholders who are entitled to put an item on the agenda from 1% to 3% and expanding disclosure requirements of major shareholders. This also includes lowering the threshold for initial disclosure from 5% to 3% and introducing a much criticised requirement for notifying shareholders to indicate whether or not they agree with the company’s strategy.

2.2.5. Proxy Voting

Proxy voting is still in a development stage in the Netherlands. Recent legislative amendments have enabled shareholders to issue proxies electronically (Article 117 (6) Book 2 DCC), and permitted companies who so desire to amend their articles of association in order to allow shareholders to vote electronically (Article 117a (1) Book 2 DCC). The implementation of the European Shareholder’s Rights Directive, which implementation is expected fairly soon, will further enable proxy voting, for example by introducing a uniform voting record date 21 days prior to the general meeting of shareholders. Still, major obstacles to the development of a well-functioning proxy voting system remain. Notably, due in large part to the fact that most shares in Dutch listed firms are dematerialised bearer shares, companies are still having difficulties in tracing the identity of their shareholders. This makes it difficult for companies (and others who wish to reach out to the shareholders) to distribute information and solicit proxies.

Two significant attempts have been made to address this issue. The first is a private sector initiative (Communicatiekanaal aandeelhouders, or ‘CA’) that channels information from participating companies to shareholders who have indicated they wish to receive such information, and channels voting instructions from these shareholders to the company, in each case without disclosing their identity to the company. The CA is also actively promoting electronic voting.

35 Parliamentary Proceedings II 2008/09, 32.014, No. 2.
36 Parliamentary Proceedings II 2008/09, 21 746, No. 2 (proposed amendment to Art. 119 Book 2 DCC).
The second attempt is currently being made by the Dutch Ministry of Finance, which has proposed legislative amendments that should enable issuers to request information on the identity of their (ultimate) investors from financial intermediaries, so they can distribute information to their shareholders prior to the general meeting. The proposal will also enable investors to communicate with one another. Investors individually or collectively holding 10% of the shares will be entitled to request the issuer to collect information on the identity of its investors, and once that information has been collected (at the issuer’s own initiative or at the request of these 10% shareholders), investors individually or collectively holding 10% of the shares will be entitled to request the issuer to distribute, on their behalf, information to the shareholders. While this proposal potentially represents a significant step forward, it also leaves many technical issues unresolved, and as a result it remains to be seen whether the proposal will translate into tangible benefits for issuers and shareholders in the short term.

2.3.  Labour

Employees play a relatively prominent role in Dutch corporate governance. The influence of employees within companies is mainly exercised through works councils and trade unions.

2.3.1.  Works Councils

Works councils are corporate bodies, in addition to the managing board, the supervisory board and the general meeting of shareholders. Under the Works Councils Act (Wet op de Ondernemingsraden; WCA) a company established in the Netherlands – regardless of its legal form – is obligated to institute a works council if, in short, it employs more than 50 employees within the Netherlands (Article 2 WCA).

Most Dutch listed companies have a works council. However, since a works council must be instituted if a company employs more than 50 employees within the Netherlands, a works council is often instituted at the level of the Dutch top holding, and not at the level of the international top holding. As a result, a works council may not be able to exercise its rights at the international level, but only at the Dutch top holding level. Depending on the size of the company, a works council has from 3 to 15 members who are elected by and from among the employees (Article 6 WCA).

The works council is entitled to discuss the general affairs of the company twice a year and initiate additional discussions between itself and management on virtually any issue that requires discussion according to the

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37 Parliamentary Proceedings II 2008/09, 32 014, No. 2.
38 There are situations, however, in which a Dutch top holding works council will be able to exercise its influence at the international top holding level as well.
works council (Article 23 WCA). In addition, the company is required to enable the works council to advise on the appointment and dismissal of managing directors (Article 30 WCA). Management also needs the consent of the works council for a number of decisions that directly affect employees, such as decisions on pensions, working hours, remuneration systems, employment conditions, etc. The works council is entitled to nullify these types of decisions if made without its consent (Article 27 WCA).

The rights described in the preceding paragraph establish a prominent role for the works council within companies established in the Netherlands. The most prominent role of the works council in Dutch corporate governance, however, is revealed in relation to major corporate decisions, such as decisions regarding a change of control over the company, a change of the companies’ business or organization, large investments and divestments, a discontinuation of operations and obtaining or granting important loans. With respect to these types of decisions, the WCA provides for a mandatory advice procedure (Article 25 WCA). If the works council is not consulted in accordance with the applicable rules, this may seriously endanger or delay the execution of the decision. For even though the works council’s advice is not binding, if the management’s decision conflicts with the advice or if the management has not properly informed the works council in connection with the advice, the works council may have the decision reviewed by the Enterprise Chamber (Article 26 WCA). The Enterprise Chamber may require management to withdraw (parts of) the decision or to undo any consequences and may even prohibit management from executing the decision. The Enterprise Chamber will not, however, easily impose these sanctions. It will generally only do so if explicitly requested by the works council and if the management could not reasonably have taken its decision after balancing the interests connected with the decision.

If the interests of the managing board and the works council run parallel, for example in fending off a hostile takeover, the management may grant the works council the right to institute inquiry proceedings (Article 346(c) Book 2 DCC). If so, the works council can request that the Enterprise Chamber assess the conduct of different corporate bodies of the company.

Currently, a bill to enhance the rights of the works council of listed and non-listed public companies with respect to decisions of the general meeting of shareholders is pending before the Dutch parliament. The bill establishes a right for the works council to be given the opportunity to form an opinion on a request for the consent of the general meeting of shareholders on corporate decisions regarding important changes in the identity or the character of the company, and on proposals to the general meeting of shareholders regarding the appointment, suspension or discharge of managing and/or supervisory directors, and the remuneration policy.

The written opinion of the works council must be provided to the general meeting at the same time that the request or proposal is presented to it. The chairman of the works council, or another member appointed by him, will have the right to explain the opinion of the works council in the general meeting. It does not affect the decision of the general meeting if no opinion of the works council is rendered. For international situations, the bill establishes that the enhanced rights of the works council will only apply if the majority of the employees of the group are employed within the Netherlands. Notably, the bill and the WCA are not aligned. If the bill is passed, situations will occur in which the works council does not have a right to advise on the basis of Article 25 WCA, but does have the right to form and express an opinion on a certain request or proposal to the general meeting.

2.3.2. Works Councils – the Structure Regime

The rights of works councils are even enhanced in the structure regime. This regime is designed to apply to large companies and was introduced in 1971 to stabilise the decision-making process in large listed companies and enhance the position of employees in the decision-making process. Under the structure regime, the appointment and dismissal rights of the general meeting of shareholders are restricted to a large extent.

The structure regime applies if:

(i) the issued share capital and the reserves of an issuer amount to EUR 16 million or more, according to its latest balance sheet (including explanatory notes);
(ii) the issuer, or one of its ‘dependent companies’ (see Appendix), has set up a works council pursuant to a legal obligation to do so; and
(iii) the issuer, together with its dependent companies, normally employs at least 100 employees in the Netherlands.

If the structure regime applies, the otherwise optional institution of a non-executive board becomes mandatory (Articles 153 and 158 Book 2 DCC). This mandatorily instituted supervisory board (and not the general meeting of shareholders) appoints, suspends and dismisses the executive directors (Article 162 Book 2 DCC). The general meeting of shareholders appoints the supervisory directors. 40 Candidates must, however, have been nominated by the supervisory board, in accordance with a ‘profile’. The supervisory board must discuss the ‘profile’ in the general meeting of shareholders and with the works council, but the approval of shareholders or the works council is not required. The general meeting of shareholders has the right to reject the non-

40 The bill described in the preceding paragraph entitles works councils of companies governed by the structure regime to have the opportunity to form and express an opinion on such appointments as well.
executive board’s nominated candidate by a simple majority of the votes cast representing at least one-third of the issued share capital, upon which rejection the procedure will start over again.

The general meeting of shareholders and the works council have a right of recommendation with respect to the candidates put forward by the supervisory board. The works council has an enhanced right of recommendation with respect to one-third of the members of the supervisory board.

Shareholders may dismiss the entire supervisory by adopting a resolution of no-confidence, which requires a simple majority of the votes cast representing at least one-third of the issued share capital. A no-confidence resolution may not be adopted unless the competent works council has been allowed the opportunity to express its views (Article 158 Book 2 DCC).

In addition, under the structure regime, a number of executive board actions require prior approval by the supervisory board (Article 164 book 2 DCC), including but not limited to:

(i) the issue and acquisition of shares and bonds in the issuer;
(ii) application for listing or delisting on the official list of any stock exchange of shares or, as the case may be, depositary receipts for shares or bonds issued by the issuer;
(iii) a proposal to amend the articles of association;
(iv) a proposal to dissolve the issuer;
(v) the filing of a petition for bankruptcy and for a suspension of payments (‘moratorium’); and
(vi) a proposal to reduce the issued share capital.

A full exemption to the structure regime applies, among other things, if the relevant company is, substantially, purely a financing and holding company, provided that the majority of its employees and the employees of the companies which belong to its group are employed or resident outside the Netherlands (Article 153 (3) Book 2 DCC). As a result of this exemption, most large listed companies are exempted from the structure regime. Instead, the structure regime is often only applied at the Dutch top holding level, and not at the international top holding level.

A partial exemption, allowing a ‘mitigated structure regime’, will apply, in short, if at least 50% of the issued share capital of the company is held by a legal entity, the majority of whose employees (or of the employees of its dependent companies) are employed outside the Netherlands (Articles 155 and 155a Book 2 DCC). The mitigated structure regime differs from the full structure regime in that the members of the executive board of companies subject to the mitigated structure regime are appointed, suspended and dismissed by the general meeting of shareholders. Otherwise, the mitigated regime is in its effect more or less the same as the full structure regime.
2.3.3. Trade Unions

Trade unions generally have less influence on Dutch corporate governance than works councils. At a sector level, trade unions may be dominant in negotiations on collective labour agreements, which can be declared generally applicable in certain (private or public) sectors. At the level of individual companies, trade unions may play a role as negotiators on behalf of (a part of) the employees in connection to decisions that directly affect employees, such as decisions regarding reorganisations and lay-offs.

Most relevant in connection to Dutch corporate governance, however, is the institutionalised role of trade unions through the Merger Code (SER Fusiegedragsregels 2000). This code, which is non-binding, serves to protect the interests of employees by ensuring that trade unions are timely involved in the process of a takeover by or of a Dutch company.

The Merger Code applies where there is a direct or indirect change of control in an enterprise (with at least 50 employees in the Netherlands) or any part of the enterprise, regardless of how such change was effected (Article 2 Merger Code). A key principle is that the trade unions must be given an opportunity to discuss the acquisition, insofar as it may affect employees’ interests, with the parties concerned (Article 4 Merger Code). Unlike the works council, the trades unions are not entitled to render advice or to have the decision of the management reviewed by a court. The Merger Code itself does, however, provide for a tribunal (Section 6 Merger Code). And although the Merger Code lacks statutory force, if the tribunal finds that certain acts of the acquirer or the company are not in accordance with the Merger Code, the tribunal may issue a public reprimand.

Trade unions or other employee associations that have full legal capacity, whose members are employed by the company, are (generally) entitled to institute inquiry proceedings (Article 347 Book 2 DCC). Therefore trade unions may request that the Enterprise Chamber assess the conduct of different corporate bodies of the company. However, trade unions instituting inquiry proceedings seldom occurs.

2.4. Audit

2.4.1. Mandatory Auditing by External Auditors

Mandatory auditing by external auditors of the annual accounts of Dutch companies is based on Article 393 Book 2 DCC. Article 393 (1) Book 2 DCC requires the company to assign an external auditor to audit its annual accounts. An external auditor in the meaning of this subsection can be either a natural person approved to carry out statutory audits or an auditing firm.

According to Article 393 (2) Book 2 DCC, the general meeting of shareholders is authorised to appoint the external auditor. If the general meeting fails to appoint an auditor, the supervisory board or the
management board is then authorised to do so. The external auditor may be appointed for one year or for an indefinite period. Although the corporate body that appoints the external auditor preserves the right to terminate the engagement at any time, termination only can occur on the basis of ‘well-founded reasons’. These reasons do not include disputes concerning accounting principles or auditing activities.

Article 393 Book 2 DCC does not limit the number of consecutive financial years for which the external auditor may audit the company’s accounts. Such a limitation is, however, included in the Audit Firms Supervision Act (‘AFSA’). Based on the AFSA, the AFM supervises auditing entities that provide audit reports relevant to the Dutch capital markets. Article 24 AFSA states that an audit firm may not allow a statutory audit to be conducted by an external auditor who has been responsible for conducting statutory audits for that public interest entity during the previous seven consecutive financial years.

2.4.2. Auditors’ Tasks

The tasks of external auditors derive from Article 393 (3), (4) and (5) Book 2 DCC, which provisions in their turn form the implementation of articles 51 and 51a of the Fourth Council Directive on Company Law.\(^{41}\) The audit of the external auditor, according to Article 393 (3) Book 2 DCC, consists of the determination as to whether the annual accounts give a true and fair view in accordance with the relevant financial reporting framework. Furthermore, the external auditor is to examine whether the annual accounts as presented in the annual report meet the requirements of Book 2 DCC and are consistent with the company’s own annual accounts for that financial year.

The external auditor reports his results to the supervisory board and to the management board. The results of the audit are to be reflected in the audit report. The audit report must include the auditor’s opinion as to whether the annual accounts give a true and fair view in accordance with the relevant financial reporting framework and an opinion concerning the consistency or otherwise of the annual report with the annual accounts for the same financial year. Furthermore, Article 393 (5) Book 2 DCC requires the external auditor to include in the audit report at least:

(i) an introduction which identifies the annual accounts that are the subject of the audit, together with the financial reporting framework that has been applied in their preparation;
(ii) a description of the scope of the audit which identifies the auditing standards in accordance with which the audit was conducted; and

(iii) a reference to any matters which the statutory auditors may wish to emphasise without qualifying the auditor’s opinion.

Article 393 (6) Book 2 DCC states that the auditor’s opinion may be either unqualified, qualified, an adverse opinion or, if the external auditors are unable to express an opinion, a disclaimer of opinion. The audit report must be signed and dated by the external auditors.

2.4.3. Auditors’ Independence

Several new provisions have been added to Dutch legislation recently concerning external auditors' independence. These provisions can be found in the AFSA, which implements the provisions of the European Statutory Audit Directive. The AFSA includes rules concerning the qualifications of auditing entities and auditors. Based on the AFSA, the government issued the Decree on the Supervision of Audit Firms, which also includes detailed rules. These detailed rules derive from the requirements included in the International Standard of Quality Control, a standard of the International Federation of Accountants (IFAC).

With regard to external auditors’ independence, the AFSA distinguishes between requirements applicable to auditing firms and to natural persons. Auditing firms, pursuant to Articles 14 and 15 AFSA, must ensure that the external auditors employed by or affiliated with the firm comply with the requirements prescribed in the Act. In addition, the integrity of the persons who determine or co-determine the day-to-day policies of the auditing firm is to be beyond any doubt. Article 16a AFSA also states that the majority of the voting rights in the auditing firm must be held by auditing firms, auditing entities or persons that meet the requirements in regard to their (auditing) competence. The auditing firm is also required to meet the requirements in the AFSA regarding independence. 42

Finally, other provisions on the independence of auditing firms and external auditors are included in Articles 23 and 24 AFSA. These include that an auditing firm may not conduct a statutory audit for a public interest entity, which includes Dutch listed companies, if in regard to that organisation the auditing firm compiled the financial accounts on which the statutory audit is based at any time during the previous two years or if the auditing firm was responsible for a substantial part of the financial administration during the period to which the financial accounts refer and on which the statutory audit will be based. As has already been mentioned above, the auditing firm may not allow an external audit to be conducted by an external auditor who has been responsible for conducting statutory audits for the same company during the previous seven consecutive financial years.

42 Art. 19 AFSA.
The AFSA requires individual external auditors to meet the requirements regarding competence, independence, objectivity and integrity. The AFSA also prohibits individual external auditors from accepting a position as a policymaker of a company that qualifies as a public interest entity within two years after termination of his position as external auditor for that company.

2.4.4. Direct Liability towards the Company and Shareholders (Third-party Liability), Caps, Concrete Cases

There is no specific provision in the DCC, or in other Dutch legislation, which deals with the liability of external auditors. Thus the general rules of civil liability are applicable. This means that liability towards the company can arise in case of breach of contract and on the basis of tort. Since it is the company that is party to the contract, only the company itself can initiate proceedings for breach of contract. In this respect, individual shareholders are considered a third party.

Whether third parties, including individual shareholders, can rely on the information of the audit report has led to academic discussions and several legal proceedings. In an important and recent case, the Netherlands Supreme Court stated that an audit report has a type of public character. The purpose of the audit report is to inform the general meeting and the shareholders of the true and fair view of the annual accounts. Third parties may expect that if the annual accounts are published with an unqualified auditor's opinion, the external auditor's opinion is that the annual accounts give a true and fair view and are in accordance with the relevant financial reporting framework. However, if subsequently the audited annual accounts are found to be misleading or inaccurate, this does not automatically lead to liability of the external auditor towards third parties on the basis of tort. External auditors are only liable towards third parties if there are specific circumstances showing breach of a duty of care that the external auditor owes to the third parties, for instance if the external auditor has made a professional error in the audit.

There is no statutory liability cap, but the auditor and the audited company can set a liability cap by limiting the obligations of the external auditor in the engagement contract. Nevertheless, liability for gross negligence or wilful misconduct cannot be excluded and setting a cap has no effect on third parties.

43 Art. 25 and 25a AFSA.
44 Art. 29 AFSA.
45 Supreme Court, 13 October 2006, JOR 2006/296 (Vie d’Or).
3. External Corporate Governance

3.1. General Overview

The rules applicable to takeovers and disclosure obligations stem from Book 2 DCC and the AFS, as well as case law. The DCC contains requirements that apply to Dutch companies, i.e., companies incorporated in the Netherlands. The AFS focuses on listed companies, Dutch and foreign, which have their securities admitted to trading on a regulated market in the Netherlands (Euronext Amsterdam by NYSE Euronext). The AFS includes some provisions that are applicable only to Dutch listed companies, as well as provisions implementing the EU Takeover Directive, the EU Prospectus Directive, the EU Market Abuse Directive and the EU Transparency Directive.

3.2. Takeover Regulation

3.2.1. Mandatory Bid and Bid Price

An obligation to make a bid is triggered upon acquiring ‘control’ of a Dutch listed company that has its shares admitted to trading on a regulated market (Article 5:70 AFS). ‘Control’ is defined as the ability to exercise at least 30% of the voting rights in the general meeting of shareholders. There are a number of exceptions to the mandatory bid rule, such as an exception for parties who have control at the time of the company’s shares are first admitted to trading on a regulated market.

Acquisition of control by acting in concert with other parties also triggers a mandatory bid. Parties will be deemed to ‘act in concert’ if they enter into an explicit or implicit agreement aimed at acquiring control or frustrating an offer for the company. This implies that parties who are merely exchanging information, or having discussions on corporate governance related issues with a view to arriving at a joint position, will not be considered to be ‘acting in concert’ for purposes of the mandatory bid rule, as long as their cooperation is not geared towards acquiring control.

The mandatory bid can be made in cash, equity or a combination of the two, and should be made at an equitable price. If the bidder has acquired any target securities in the year prior to the bid, the equitable price will be the highest price paid by the bidder for such securities during that year (Article 5:80a (2) AFS). If the bidder has not acquired any target securities in the year prior to the bid, the equitable price will be the average share price during that year (Article 25(2) of the Decree on Public Offers). Notwithstanding these rules, in each case, the Enterprise Chamber can be requested to determine the equitable price at its sole discretion. In 2008, a Dutch organisation representing minority shareholders filed the first such request in
a case concerning the takeover of the retailer Schuitema.\textsuperscript{46} Part of the consideration paid by the acquirer to the seller of the majority of the Schuitema shares (i.e. retail giant Ahold) was in kind, as a result of which it was not immediately clear what the equitable price to be paid to the minority shareholder was. Based on expert advice, the court decided that the price paid by the bidder to Ahold (the presumed equitable price) was in fact higher than the price subsequently offered by the bidder in the mandatory bid.\textsuperscript{47}

3.2.2. Post-bid: Anti-frustration or ‘just say no’ Rule, Breakthrough, Options, Reciprocity

The Dutch legislature has implemented the board neutrality rule and the breakthrough rule contained in the Takeover Directive in such a way that companies can choose whether they wish to include these rules in their articles of association, and whether adherence to the rules is subject to reciprocity. Since few, if any, companies have amended their articles of association accordingly, the two rules have little to no relevance in practice.

By contrast, case law on the permissibility of post-bid defensive measures is highly relevant. In a landmark case concerning the real property fund Rodamco, the Netherlands Supreme Court, perhaps inspired by the Delaware Chancery Court’s decision in \textit{Unocal}, held that defensive measures can be justified if they are necessary with a view to the (long-term) continuity of the company and its various stakeholders, provided that the measures are taken in order to maintain the status quo pending negotiations between the target and the bidder, and provided that they constitute an adequate and proportional response.\textsuperscript{48} The deployment of defensive measures for an indefinite amount of time will, as a general matter, not be justified.

In 2007, in a high-profile case dealing with the sale of LaSalle bank by ABN AMRO, which some felt amounted to a ‘crown jewel sale’ defence, the Supreme Court, while acknowledging the importance of a level playing field between competing bidders, held that in responding to an offer, the target board should ultimately be guided by the interests of the (long-term) continuity of the company and its various stakeholders, and thus not only by the interests of the shareholders.\textsuperscript{49} Nevertheless, the case did not overthrow the principle set forth in \textit{Rodamco} (i.e. that the deployment of defensive measures for an indefinite period of time will generally not be justified),


\textsuperscript{47} Enterprise Chamber 21 August 2009, LJN: BJ5764 (Schuitema). Because the difference between this higher amount and the average share price in the three months prior to the filing of the request was less than 10% of the average share price, the request that the court determine the equitable price at its sole discretion was inadmissible.

\textsuperscript{48} Supreme Court 18 April 2003, JOR 2003, 110 m.nt. Blanco Fernandez (RNA), r.o. 3.7.

\textsuperscript{49} Supreme Court 13 July 2007, RO 2007, 69 and NJ 2007, 434 m.nt. Maeijer (ABN Amro).  

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which continues to be the guiding principle in terms of permissibility of defensive measures.  

The most common post-bid defensive measure is the issuing of preference shares to a friendly foundation. Because the preference shares are issued at par value and need not be fully paid up, a large number of shares can be issued to the foundation at relatively low cost. Since, under Dutch law, voting rights depend on the nominal value of the share (regardless of whether the shares are fully paid up and of their market value), this enables the foundation to obtain a large voting block cheaply, thus in effect neutralising the hostile bidder’s (or activist shareholder’s) actual or anticipated voting power.

Two recent court decisions in high-profile cases – involving blue chip companies Stork and ASMI – have specified the factors that are relevant in determining whether such a defensive measure is permissible. Two factors are particularly important.

First, the scope of the resolution by which the general meeting of shareholders has delegated the authority to issue shares to the board. Key issues in this respect are whether the delegated authority includes the authority to grant a call option (to a friendly foundation), and if so, the circumstances under which the call option may be exercised according to the resolution. Typically, the call option may be exercised to fend off unsolicited takeovers, i.e. to prevent raids. In *Stork*, the court held that the mere intended use by a major shareholder of the statutory right to dismiss the entire supervisory board of a company subject to the structure regime, did not qualify as a ‘raid’ in this sense.  

By contrast, in a case concerning computer chip manufacturer ASMI, the court essentially held that the intended use by a major shareholder of the statutory right to replace certain members of the executive board including the CEO, as well as the entire supervisory board, did qualify as a raid, and therefore justified the exercise of the option right.

Second, the foundation’s objective in exercising the option. Typically, the foundation’s objective, at least formally, is to ensure the independence and (long-term) continuity of the company, with a view to safeguarding the interests of the company and its various stakeholders. In case of an unsolicited takeover, the foundation may deem it necessary to serve this purpose by exercising the option, thus diluting the bidder’s (potential) voting power in the target. In *Stork*, the court held that the intended effect should be to maintain the status quo pending negotiations between the target, the

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50 In fact, *ABN AMRO* did not deal directly with the permissibility of defensive measures, only with the question of whether the relevant transaction was subject to shareholder approval.

51 *Centaurus v. Stork*, supra note 25, r.o. 3.12.

52 *ASMI*, supra note 33, r.o. 3.25.

53 The foundation’s purpose is determined by its articles of association, and will also be referred to in the agreement pursuant to which the option is granted by the company to the foundation.
bidder and other shareholders and pending the exploration of alternative options by the board. In *ASMI*, the court found, on a preliminary basis, that the foundation that had exercised the option acted insufficiently independently of the board, and therefore appeared to have exercised the option with a view to protecting the incumbents rather than maintaining the status quo.

3.2.3. Pre-bid: most important Defensive Measures

The most common pre-bid defensive measures are priority shares and depositary receipts for shares. While the administration office holding the underlying shares is required by law to issue proxies to holders of depositary receipts who so request, Article 2:118a DCC permits the administration office to refuse to issue proxies in a hostile scenario. The Corporate Governance Code, however, is less forgiving towards the use of depositary receipts. The Code stipulates the principle that depositary receipts for shares may not be used as an anti-takeover measure, and that the management of the administration office must issue proxies in all circumstances and without limitation to the holders of depositary receipts who so request.

Research indicates that the number of companies using depositary receipts for shares has significantly declined over the recent years. More generally, it has become less common for companies to accumulate various types of defensive measures.

3.2.4. Takeover Bids from Abroad

The applicability of Dutch rules primarily depends on whether the target shares are admitted to a regulated market in the Netherlands. From this perspective, the nationality of the bidder is irrelevant.

If the bidder wants to make an offer for a company whose shares are admitted to a regulated market in the Netherlands by using an offer document that has been approved by a regulator of another EU Member State, the AFM may require that additional, specific information be included in the offer document, and that parts of the offer document are translated into Dutch (Article 11 (3) Decree on Public Offers).

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54 *Centaurus v. Stork*, supra note 25, r.o. 3.12. This standard is broadly consistent with the standard set forth by the Supreme Court in *RNA* mentioned earlier, and underlines that in order to be permissible, defensive measures should be of temporary nature.


56 Raaijmakers, Van der Elst & De Jong 2007, p. 56 (showing that in 1992, 39% of the listed companies had issued depositary receipts for shares, against 15% in 2006).

57 Raaijmakers, Van der Elst & De Jong 2007, p. 57 (showing that in 1992, listed companies that were governed by the structure regime on average had approx. 2.1 defensive structures in place (approx. 1.6 for regular companies), against approx. 1.7 in 2003 (approx. 1.0 for regular companies in 2006).
Finally, if a bidder wants to make an offer for a Dutch company, certain rules of Dutch company law will apply regardless of whether the offer is subject to Dutch takeover rules or foreign takeover rules. Notably, the target company is required to convene a meeting of shareholders to discuss the offer, and to publish, prior to such meeting, certain information regarding its position on the offer (Article 18 Decree on Public Offers). In addition, the target is required to provide its employees with certain information regarding the offer (Article 27 Decree on Public Offers).

3.2.5. Squeeze-out and Sell-out, other Exit Rights, Compensation

In addition to the conventional squeeze-out right of shareholders who own at least 95% of the share capital (Article 92a Book 2 DCC), the implementation of the EU Takeover Directive has resulted in an additional squeeze-out right for shareholders who have acquired at least 95% of the share capital and of the voting rights pursuant to a public offer (Article 359c Book 2 DCC). The distinctive feature of the latter squeeze-out right is that the law provides that the minority shareholders should receive an equitable price for their shares, which price is presumed to be equal to the offer price. However, this presumption applies only if the bidder acquired, through the offer, at least 90% of the shares not otherwise acquired by him. 58

Conversely, minority shareholders who are confronted with a shareholder that has acquired at least 95% of the share capital and of the voting rights pursuant to a public offer, have a sell-out right (Article 359c Book 2 DCC). The same equitable price requirement applies, and both the squeeze-out right and the sell-out right should be exercised within three months of the expiration of the offer period.

3.3. Disclosure and Transparency

3.3.1. Annual Financial Information

In general, Dutch companies have to file their annual accounts with the Trade Register of the Chamber of Commerce within eight days after adoption of the annual accounts by the general meeting of shareholders. Article 101 Book 2 DCC requires the company’s management board to prepare the annual accounts, in principle, within five months after the end of the financial year. For Dutch listed companies, Article 5:25c AFS contains a more specific provision that requires an annual financial report be published within four months after the end of each financial year, which period cannot be extended.

Article 5:25c AFS includes the implementation of Article 4 of the EU Transparency Directive. Article 5:25c AFS states that the annual financial report must include:

(i) the audited annual accounts, together with the auditor's report;
(ii) the annual management report (within the meaning of Article 391 Book 2 DCC); and
(iii) statements of the persons responsible for the annual financial report indicating that, to their knowledge:
   a. the annual accounts give a true and fair view of the assets, liabilities, financial position and profit or loss of the listed companies and their consolidated companies; and
   b. the annual management report gives a true and fair view of the position as per the balance sheet date and the state of affairs of the listed companies and their affiliated companies to which the report relates during the financial year and the principal risks the listed companies face.

At the time of publication of the annual financial reports, the annual accounts do not already need to be adopted by the general meeting of shareholders. The annual financial report must remain publicly available for at least five years. 59

The annual accounts in principle comprise the consolidated accounts and the company annual accounts. 60 The requirement to prepare consolidated accounts – accounts which include the financial data of subsidiaries and other group companies or legal entities that these companies control – derives from Book 2 DCC. 61 Consolidated annual accounts have to be prepared in accordance with IFRS. 62 Dutch companies may, at their option, prepare their company annual accounts in accordance with Dutch GAAP, IFRS, or Dutch GAAP using the recognition and measurement principles set out in IFRS. 63

3.3.2. Semi-annual Financial Information

Article 5:25d AFS implements Article 5 of the EU Transparency Directive, and requires Dutch listed companies to prepare semi-annual financial reports that include:

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59 Art. 5:25c (1) AFS.
60 In the extremely rare case a listed company is not required to prepare consolidated accounts, the annual accounts must comprise the company's annual accounts.
61 Art. 101 (1) in connection with Arts. 361 (1) and 406 Book 2 DCC.
63 Art. 362 Book 2 DCC.
(i) the semi-annual accounts;
(ii) the semi-annual management report, including at least
   a. an indication of important events that have occurred during the first six months of the relevant financial year, and their impact on the semi-annual accounts;
   b. a description of the principal risks and uncertainties for the remaining six months of the relevant financial year;
   c. major related party transactions;
   d. statements of the persons responsible for the semi-annual financial report, with more or less the same information as in the statements on the annual financial information.

The semi-annual accounts do not need to be audited. If the semi-annual accounts have been audited or reviewed, the auditor's report must be made public together with the semi-annual financial report. If the semi-annual accounts have not been audited or reviewed, this should be stated in the semi-annual management report.

The semi-annual financial reports have to be made public as soon as possible and at the latest two months after the end of the first six months of the financial year. They must remain publicly available for at least five years. If a company is required to prepare consolidated accounts, it must prepare its semi-annual accounts as well in consolidated form and in accordance with IFRS.

3.3.3. Interim Statements

Dutch listed companies are required to make public an interim statement during the first and the second half of their financial year. This interim statement must contain information covering the period between the beginning of the relevant six-month period and the date of publication of the statement. It must provide an explanation of the important events and transactions that have taken place during the relevant period and a general description of the financial position and performance of the company and its controlled undertakings during the relevant period. The interim statements must be made public in the period between ten weeks after the beginning and six weeks before the end of the relevant six-month period.

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64 Art. 5:25d (3) AFS.
65 Art. 5:25d (4) AFS.
66 Art. 5:25d (1) AFS.
67 Art. 5:25d (1) AFS.
68 Art. 5:25d (5) (a) AFS.
69 Art. 5:25e AFS.
3.3.4. Publication of Price-sensitive Information

Based on Article 5:25i AFS and Article 5:53 AFS, Dutch listed companies are required to promptly disclose price-sensitive information. The AFS defines ‘price sensitive information’ as any information of a precise nature, relating directly or indirectly to an issuer or to the trade in the financial instruments of the issuer concerned, which information has not been made public and publication of which could significantly affect the trading price of those financial instruments (irrespective of any movement in price). Under specific circumstances, publication of price-sensitive information may be postponed.

3.3.5. Other Transparency Requirements

The AFS includes several other transparency requirements for Dutch listed companies. These requirements are:

(i) publication of a prospectus if securities are offered to the public or admitted for trading on a regulated market in the Netherlands;70
(ii) publication of an annual disclosure document, including information on, or referring to, all information that the company has made generally available during the preceding twelve months pursuant to the securities supervision laws of any state;71 and
(iii) prompt disclosure of all information on amendments to rights attached to a particular class of ordinary shares, such as changes in rights pursuant to the articles of association.72

Besides these transparency requirements, listed companies are required to publish their strategy on their own websites.

3.3.6. Notification Requirements

The AFS provisions on the disclosure of holdings and capital interests in companies impose requirements on both the issuer and the holder of an interest. The most important requirement is in Article 5:38 AFS. This article provides for any person who acquires or transfers shares or whose voting rights are increased or diminished as a consequence of which his interest in the capital or voting rights reaches, exceeds or falls below – as he knows or should know – any of the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95%, to promptly notify the AFM (the ‘numerator notification’). In addition, a person must notify the AFM if his interest in capital or voting rights reaches, exceeds or falls below any of these thresholds

70 Art. 5:2 AFS.
71 Art. 5:25f AFS.
72 Art. 5:25h AFS.
as a result of a ‘denominator notification’. The latter notification must be made not later than the fourth business day after the publication of the denominator notification in the AFM’s register.\textsuperscript{73} As mentioned earlier, it is expected that the threshold of 5% will be lowered to 3% in the near future, and persons exceeding this threshold of 3% will be required to disclose whether or not they agree with the published strategy of the company. If these persons change their opinion on the strategy, this also has to be disclosed promptly.

A person who acquires or transfers one or more shares to which special controlling rights are attached (such as priority shares or ‘golden shares’) must forthwith notify this to the AFM. To make these notifications work in practice, listed companies must promptly notify the AFM if certain changes in their capital occur.\textsuperscript{74} Companies also must periodically, i.e. within eight days after the end of each quarter, notify the AFM of changes in their capital in the previous quarter that did not result in a change in their capital totalling 1% or more. Finally, listed companies are to notify the AFM of changes in voting rights attached to their outstanding shares and of changes in the outstanding amount of depositary receipts for shares or similar tradable instruments that are or were issued with the relevant company’s cooperation.

There are several notification requirements for persons related to listed companies. Article 5:48 AFS requires notifications to be made in relation to the shares or voting rights held by members of the management and supervisory boards of listed companies. The most important notifications are the following:

(i) a newly appointed member of management or supervisory board must notify his shares and voting rights to the AFM within two weeks after his appointment;\textsuperscript{75}

(ii) a member of the management or supervisory board must forthwith notify the AFM of each change in his shares or voting rights. A notification must be made both in case of a change in the number and in the type of interest.

In addition to this requirement, a notification requirement under Article 5:60 AFS applies. Under this article, persons related to listed companies - such as management board members, members of the supervisory board and their spouses, registered partners, dependent children and other relatives who share the same household – are required to notify a transaction in shares in the capital of the company (or in financial instruments of which the price is co-determined by the price of these shares) to the AFM within five business days after that transaction. There might be – and often will be – concurrence

\textsuperscript{73} Art. 5:39 AFS.
\textsuperscript{74} Art. 5:34(1) AFS.
\textsuperscript{75} Art. 5:48(3) AFS.
between the disclosure requirements of members of the management and supervisory boards under Articles 5:60 and/or 5:38 AFS. Under certain circumstances no duplicate notifications need to be made.

4. Enforcement

4.1. Available Sanctions and their Relevance

4.1.1. Civil Law, Administrative Law, Criminal Law

The enforcement of corporate governance in the Netherlands can be described as a mixed model. Based on civil law, more in particular in company law, the (general meeting of) shareholders can influence the corporate governance of companies by using their approval rights for certain decisions. Also, enforcement ex post can take place, in the form of litigation by shareholders. Part C elaborates on this below.

Administrative law, on the other hand, plays a smaller role. Most enforcement decisions of the AFM are embedded in administrative law. These AFM decisions, however, usually are not related to direct subjects of corporate governance, but only involve corporate governance in an indirect way. For example, if the AFM imposes an administrative fine, or makes a company subject to an incremental penalty for not publishing information on time.

Criminal law hardly plays a role in enforcement of corporate governance in the Netherlands, although some forms of corporate conduct is subject to criminal liability. Two executive directors and one supervisory director of Royal Dutch Ahold NV have recently been held criminally liable for forgery in relation to the publication of consolidated accounts on the basis of fabricated control letters and were sentenced to pay criminal fines and, in the case of the former CFO of Ahold, to a prison sentence with probation.76

An important enforcement tool of the AFM is based on the Act on Supervision of Financial Reporting (Wet toezicht financiële verslaggeving) (‘ASFR’). Based on the ASFR, the AFM supervises the correct application of statutory accounting requirements by Dutch listed companies. The AFM has the authority to demand listed companies to provide information if the AFM doubts the correct application of the accounting requirements in annual or semi-annual financial reports. After having received the information,77 the AFM can conclude that the reports do not satisfy the standards and recommend that the company make a public statement. Once the company in

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77 If the company does not provide the information requested, the AFM may request the Enterprise Chamber on the basis of Art. 452 Book 2 DCC to obtain this information by means of a legal order. The fact that the AFM is making a request will be made public.
question has followed the AFM’s recommendations, it must file the statement with the AFM. The statement will subsequently be included in the public register held by the AFM. If a company does not follow the AFM’s recommendations, or does this to an insufficient extent, the AFM may request the Enterprise Chamber to order the company to further explain its financial reports.78

4.1.2. Non-legal Sanctions, such as Naming and Shaming, Peer Pressure, Market Constraints

There is an element of a non-legal sanction in the ‘comply or explain’ principle, which is applied in the Corporate Governance Code. Companies subject to the Code must comply with the ‘comply or explain’ rule: that is, they must comply with its provisions or expressly explain any deviation from the Code. Expectedly, peer pressure will influence the decisions of companies to comply with the best practices.

Enforcement of the ‘comply or explain’ principle in the Corporate Governance Code cannot, strictly speaking, be seen as ‘non-legal’. Dutch listed companies are required to include in their annual report a corporate governance statement in which they explain to what extent they apply the Code and explain any deviations. If a company does not include this statement, a shareholder can request the Enterprise Chamber to order the company to further explain its application of accounting requirements. Based on the ASFR, the AFM too can make this request to the Enterprise Chamber. In this way the AFM enforces, in an indirect manner, the ‘comply or explain’ principle in the Code. The Dutch legal framework is based on the assumption that the AFM does not assess the corporate governance of Dutch listed companies directly – that is to say: the AFM does not make its own judgement on the ‘quality’ of corporate governance of Dutch companies and does not assess the correctness of the corporate governance statement – but only indirectly, by assessing whether companies provide a corporate governance statement in which they set out their application of the Code. In practice, the AFM’s supervision seems to take place in accordance with this assumption in the legal framework.

4.2. Supervision

4.2.1. Capital Market Authority and the Relevance for Corporate Governance

In the Netherlands, the AFM is viewed as the market supervisory and regulatory authority. The AFM has no direct involvement in corporate governance enforcement. However, its decisions in approving prospectuses
and offer memoranda, as well as its ability to request the Enterprise Chamber
to order companies to further explain their application of accounting
requirements, do have relevance for corporate governance.

4.2.2. Takeover Panel or other Self-regulatory Body

With regard to the regulation of takeovers in the Netherlands, the Enterprise
Chamber and the AFM each have a role. The Enterprise Chamber may take
provisional measures or issue orders if a party that acquires control refuses to
make a mandatory bid. Supervision of the bidding process, including
approving the offer memorandum, is exercised by the AFM. In addition, the
tribunal on the basis of the Merger Code plays a role in the process of a
takeover by or of a Dutch company. Besides these actors, there is no other
self-regulatory body involved in takeover regulation in the Netherlands.

In the aftermath of the takeover of ABN AMRO, some politicians and
scholars made a plea for introducing a takeover panel in the Netherlands.
The suggested task and powers of this panel would be comparable to the UK
Takeover Panel, for instance by having this panel be self-regulatory, with
exclusive powers to regulate the takeover process, including the power to
issue 'put or shut up' notices. Recently, the Minister of Finance stated that
introducing a takeover panel in the Netherlands is likely to be unnecessary.
The Minister stated that the current framework for regulation of takeovers,
with roles for the Enterprise Chamber and the AFM, in principle is sufficient.
However, some improvements of the takeover process seem to be desirable,
in particular with regard to the length and orderly development of the
process. The Minister therefore announced the introduction of a 'put up or
shut up' rule in the Decree on Public Offers.

4.2.3. Relevance of Courts

Judicial intervention, in particular inquiry proceedings before the Enterprise
Chamber, are extremely relevant for corporate governance in the
Netherlands. Inquiry proceedings are discussed immediately below.

4.3. Shareholders

4.3.1. Inquiry Proceedings

The most effective mechanism at the disposal of shareholders to enforce rules
and principles of corporate governance are inquiry proceedings before the
Enterprise Chamber (Article 344-359 Book 2 DCC). As stated earlier, inquiry
proceedings are an effective tool for shareholders to acquire information on
the company's state of affairs and its management, which would otherwise
not be available to the shareholders.
Inquiry proceedings proceed in two stages. In the first stage, a request is filed with the Enterprise Chamber to appoint one or more experts to investigate the policy of the company and the conduct of its business. The Court will award the request and grant an inquiry if there are sound reasons to doubt the policies of the company and/or the conduct of its business. If the request is awarded, the Enterprise Chamber appoints one or more investigators. The investigators produce a report that is filed with the Enterprise Chamber and is made publicly available if the report relates to a listed company.

In the second stage, the plaintiffs, the Attorney General in the public interest, and, in case of a listed company, any other party who meets the requirements to request an inquiry, may request the Enterprise Chamber to conclude that the report indeed demonstrates ‘mismanagement’ and to order remedies to address these problems. Such remedies can be far-reaching and may be, amongst others,

(i) nullification of one or more resolutions of a corporate body of the company;
(ii) suspension or dismissal of one or more managing or supervisory directors;
(iii) appointment of one or more temporary managing or supervisory directors;
(iv) temporary deviation from one or more provisions of the articles of association of the company;
(v) temporary transfer of shares; and
(vi) dissolution of the company (Article 356 Book 2 DCC).

Shareholders are entitled to file an inquiry request if they, individually or collectively, hold shares or depositary receipts representing at least 10% of the issued share capital or with a par value of EUR 225,000 (or less if provided for in the articles of association) (Article 366 Book 2 DCC). The Ministry of Justice has recently proposed that for large companies, the thresholds be amended such that shareholders will need to hold at least 1% of the issued share capital or shares with a market value of at least EUR 20 million.  

In addition, inquiry requests may be filed by (i) trade unions representing persons employed by the company, (ii) persons empowered to do so on the basis of the articles of association or of an agreement with the company or (iii) the Attorney-General at the Court of Appeal in Amsterdam for reasons of public interest. A plaintiff should give advance written notice to the management board (and the supervisory board, if any) of his objections to the company's policy or the conduct of the business (Article 349.

79 The proposal is available at <http://www.internetconsultatie.nl/enqueterecht>.
Book 2 DCC). Ample time should be given to the company to examine the objections and to address the underlying problems.

Finally, as mentioned earlier, the Ministry of Justice has also proposed that companies will be entitled to file an inquiry request.

Over the last 30 years, the Enterprise Chamber has developed a rich case law as to the question of what may amount to ‘mismanagement’. This includes the purchase (or sale) of subsidiaries without a proper assessment of their value, transactions between the company and its directors without having secured that there is no conflict of interest, failure of the company and/or its directors to provide correct information to the general meeting of shareholders, neglecting the interests of minority shareholders, issuance of a controlling block of shares to a third party without sound business reasons, etc. An important category of cases relates to deadlocks in the board of directors, and often in those situations in the general meeting as well. Indeed, ‘mismanagement’ does not necessarily require acts by the board of directors. Decisions made by the shareholders’ meeting, for example, are attributed to the company and may also be deemed ‘mismanagement’.

In addition, when ordering an inquiry, the Enterprise Chamber may limit the scope of the investigation to a part of the company’s policy or to a specific period in time. The inquiry may focus on the policy of (the members of) the managing board and/or supervisory board, but this is not always the case. It may in some cases focus on other corporate bodies of the company, or even on the role played by specific shareholders.

It is important to note that even before the Court orders an investigation and/or before the investigation has ended, the Court may order all provisional measures it may deem fit. Such provisional measures may include:

(i) the suspension of voting rights of certain shareholders;
(ii) orders not to execute certain resolutions or business decisions;
(iii) the suspension of managing and/or supervisory directors, and
(iv) the appointment of interim managing and/or supervisory directors.

The Court has repeatedly demonstrated a willingness to act fast and take rigorous action.

Inquiry proceedings are not meant to establish the liability of (former) managing and supervisory directors for damages that the company or shareholders may have suffered as a result of mismanagement. However, since the report drawn up by the investigators is likely to be made public, the plaintiffs or other claimants may use the information compiled in the course of the inquiry as evidence to support their claim for damages in other proceedings. In practice, inquiry proceedings appear to be a useful stepping stone for plaintiffs seeking damages from (former) managing and supervisory directors.
4.3.2. The Dutch Semi-’class action’

There is a semi-’class action’ under Dutch law pursuant to the Regulation for the Collective Settlement of Mass Damages (the ‘RCSMD’) (Articles 907-910 Book 7 DCC). Pursuant to this regulation, a settlement agreement for the compensation of damages caused by an event or by similar events, entered into by a foundation or association possessing full legal capacity with one or more other parties, who undertake thereby to compensate these damages, may, upon the joint request of the parties that have entered into the contract, be declared binding by a court upon the class of persons to whom the damages have been caused, provided that the foundation or association, by virtue of its articles of association, represents the interests of such persons. Persons to whom the damages have been caused also comprise those who have acquired a claim with respect to these damages by general or particular title. The RCSMD can be used by shareholders that have united under a foundation or association. The basis of the regulation, however, is a settlement agreement. The essence of the regulation is that this settlement agreement may be declared binding by a court on the class of persons to whom the damages have been caused. Therefore, this regulation differs widely from US-type class actions pursuant to which a class of shareholders can bring proceedings against an issuer. This is not possible in the Netherlands.

In addition, a foundation or association with full legal capacity may bring proceedings in the Netherlands for the protection of the interests of other parties (e.g. a group of shareholders), provided that this foundation or association, by virtue of its articles of association, represents the interests of such other parties (Article 3:305a-305c DCC). Under this rule it is not possible to claim damages. The RCSMD, however, can be combined with this possibility. For example, a foundation representing the interests of a group of shareholders may bring proceedings against an issuer, claiming a declaratory judgment that the issuer has acted wrongfully. If such judgment is awarded, the shareholders may each individually try to claim damages from the issuer on the basis of the declaratory judgment, but the foundation may also use the declaratory judgment to obtain a favourable settlement, which can subsequently be declared binding under the RCSMD.

For example, in proceedings instituted against World Online for publishing a misleading prospectus with EUR 3 billion damages as a result, a foundation that commenced proceedings against World Online received a declaration that World Online, and the underwriting banks, acted wrongfully against the shareholders. The next step would be to obtain a settlement and have this declared binding upon World Online, the underwriting banks and the shareholders that suffered damages.

Furthermore, the regulation for the RCSMD can be combined with other proceedings. With respect to the damages resulting from Shell decreasing its reserve estimates in the beginning of 2004, shareholders brought class actions in the U.S. to obtain damages. Then the non-U.S.
Managers can be held jointly and severally liable by shareholders for damage suffered as a consequence of a misrepresentation in the annual accounts, the annual report or interim figures (Articles 139 and 249 Book 2 DCC). An individual manager can fend off liability if he proves that he cannot be held culpable for the misrepresentation, but the threshold for such proof is high, since giving a true and fair view of the financial condition of the company through the annual accounts, the annual report or interim figures is an elemental collective duty of the management board. Supervisory directors can be held liable as well for a misrepresentation in the annual accounts (Articles 150 and 259 Book 2 DCC), but not in the annual report or in interim figures. Shareholders rarely institute claims on the basis of Articles 139, 150, 249 or 259 Book 2 DCC. The combination with the semi-class action may, however, lead to an increased application of these provisions as a basis for collective settlements of claims based on misleading financial statements.

4.3.4. Other

Shareholders and other interested parties may try to force the company to organise the annual accounts and the annual report in accordance with statutory requirements (Article 447 Book 2 DCC). This can be done by filing a request to this extent with the Enterprise Chamber. In addition, the AFM may request the Enterprise Chamber to order a Dutch listed company to further explain its application of statutory accounting requirements (Article 447 Book 2 DCC).

Dutch law does not provide for derivative suits brought by shareholders against managing directors. This means that a shareholder cannot hold a managing director personally liable for breach of his fiduciary duties towards the company. A shareholder can, however, hold a managing director personally liable for breach of duties directly aimed at protecting the shareholder, but such liability is rarely established.

That the consent of the general meeting of shareholders is required for the management board to file for bankruptcy is included in the articles of association of many companies. Without this consent, the resolution of the management board to file for bankruptcy may be nullified by the general meeting of shareholders (Article 15 Book 2 DCC). In addition, a company can be dissolved by a decision of the general meeting of shareholders (Article 19 Book 2 DCC). This authority, however, does not play a major role in corporate governance.
4.4. Others

Two shareholder associations play an important role in Dutch corporate governance: VEB and Eumedion.

VEB is an association of securities owners. It aims to protect the interests of shareholders in listed companies through active participation in general meetings (VEB holds shares in most Dutch listed companies) and through legal actions such as inquiry proceedings. VEB often figures prominently in Dutch financial news and has been highly successful in several large court proceedings against, for example, Shell, Ahold, Unilever, Philips, Numico and World Online. Currently, VEB plays an active role in, *inter alia*, proceedings against Fortis. Recently, European Shareholders Group (’ESG’), an organisation of the former director of VEB, entered the domain of Dutch corporate governance in the Fortis proceedings as well. ESG will possibly try to perform a role in Dutch corporate governance similar to VEB.

Eumedion represents the interests of institutional investors in the field of corporate governance. It is the most prominent voice of institutional investors in the Netherlands. It is the explicit objective of Eumedion to maintain and further develop good corporate governance in the Netherlands and Europe. Eumedion aims to achieve this objective by disseminating publications on shareholder participation in general meetings, encouraging joint consultations between institutional investors and listed companies, consulting with public authorities, and lobbying.
References

De Jong, Roosenboom, Verbeek & Verwijmeren 2007

Federation of European Securities Exchanges 2008

Raaijmakers, Van der Elst & De Jong 2007

Risk Metrics Group 2009

Timmerman 2002

Timmerman & Doorman 2002
1. The Netherlands and International Work on Leasing and Secured Transactions

1.1. Unidroit Work on Leasing

The Netherlands has been a member state of Unidroit since 11 April 1940 and has contributed to various Unidroit work on leasing. The Netherlands has participated in the Unidroit diplomatic conferences and has signed the final acts of the 1988 Ottawa Convention on International Financial Leasing; the 2001 Cape Town Convention on International Interests in Mobile Equipment and the Protocol and Matter Specific to Aircraft Equipment; and the 2007 Luxemburg Protocol on Matters Specific to Railway Rolling Stock to the Cape Town Convention. Furthermore the Netherlands (including Dutch industry representatives) is involved in the preparation of the Preliminary Draft Protocol on Matters Specific to Space Assets to the Cape Town Convention.

Despite its participation in the preparation of Unidroit instruments, the Netherlands has not signed or ratified any of the Unidroit conventions on leasing, nor has it adopted or implemented the 2008 Unidroit Model Law on Leasing.

The European Union, of which the Netherlands is a member state, acceded to the Cape Town Convention and the Aircraft Protocol on 28 April 2009, in force as of 1 August 2009. Furthermore, the European Union has signed the Luxemburg Protocol on 10 December 2009.

1.2. Work of other International Organisations

Other work on leasing and secured transactions by international organisations include the UNCITRAL Legislative Guide on Secured Credit Transactions and the 1994 Model Law on Secured Transactions prepared by the European Bank for Reconstruction and Development. The Netherlands currently does not intend to adopt or implement these instruments. The reason for this could be the relatively recent reform of the Dutch Civil Code (Burgerlijk Wetboek). After more than forty years of preparations, a completely reformed Civil Code entered into force in 1992, thereby replacing the Civil Code dating from 1838. In addition to this, a modernised set of provisions on
‘hire’ (huur) entered into force on 1 August 2003. However, the general provisions on ‘hire purchase’ (huurkoop) date from 1936.

2. An Introduction to Leasing in the Netherlands

2.1. Leasing as an Economic Term

In the Netherlands the use of the English terms ‘lease’ or ‘leasing’ is not confined to a specific legal meaning. Rather, it is an economic term used to describe financing arrangements which share certain characteristics. In general, leases involve one party (the lessor) granting the use of a certain capital good to another (the lessee) in return for certain (periodic) payments. However, in practice the term ‘lease’ is sometimes used to describe a loan secured by a non-possessory right of pledge. The Netherlands has not enacted any legislation specifically targeted at lease transactions, nor are there any plans to do so.

2.2. Operational and Financial Lease

A distinction is made between operational and financial leases, both in practice and in legal literature. In the case of a financial lease the purpose of the transaction is, foremost, the financing of the leased asset. The aggregate of payments made by the lessee serves as a full compensation for the costs of investment made by the lessor. Furthermore the duration of the contract is linked to the economic lifespan of the leased asset. In general the leased asset is accounted for on the balance sheet of the lessee. This is not the case with an operational lease. The payments made by the lessee then serve as a compensation for the use of the leased asset. Here, the lease object is generally accounted for on the balance sheet of the lessor. Despite this usage, the terms ‘operational lease’ and ‘financial lease’ were never introduced as such in legislation. Nevertheless, the categories of operational and financial lease roughly correspond with two types of contract provided for by law: ‘hire’ (huur) and ‘hire purchase’ (huurkoop). Operational and financial leases are also treated differently for tax purposes.

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1 Cf. the definition of ‘lease’ in Art. 2 Unidroit Model Law on Leasing.
2 Art. 3, Section 3 Wet conflictenrecht goederenrecht serves as an exception to this. See subparagraph 3.2.
3 Cf. the definitions of ‘financial lease’ in Art. 2 Unidroit Model Law on Leasing; and Art. 1 Convention on International Financial Leasing.
4 See paragraph 4.
5 See paragraph 12.
2.3. **Leasing Industry**

The leasing industry in the Netherlands has a substantial economic value. According to the Association of Car Lease Companies, their members leased out nearly 700,000 cars in 2008, thereby realising a turnover of € 7.8 billion.\(^6\) However, the share of financial leases is relatively small. Only about 54,000 cars were leased financially. Statistics of the Dutch Association of Lease Companies show that their members had an aggregate turnover on leasing transactions of € 6.1 billion, mainly divided between the leasing of machines (€ 1.7 billion), computers (€ 1.2 billion) and transport equipment including aircraft (€ 3 billion). Leasing of immovable property only contributed € 119 million to the turnover.\(^7\) The share of financial leases is unknown.

The Dutch leasing industry is largely made up of independent leasing companies, leasing companies that are subsidiary companies of major banks and leasing companies closely related to a supplier of capital goods (so-called ‘captive leasing companies’).

Leasing companies and their asset acquisitions are financed and refinanced in numerous ways. The shareholding structure of a lease company may influence the financing techniques used. For example, where a lease company is a subsidiary of a bank or a supplier this will affect the financing structure. In general, leasing companies employ a variety of modern financing techniques, including receivables financing, such as factoring and securitization, and the issuance of shares or bonds.

3. **International Leasing and Private International Law**

The leasing industry has internationalized to a great extent. Leasing can, for example, be used to finance the export of capital goods. Furthermore, the large amount of capital involved in certain lease transactions, for example the leasing of aircraft or immovable property, or the utilisation of differences in tax laws may result in the calling in of foreign parties.\(^8\) Leases with an international character lead to questions regarding the applicable law.

3.1. **Law Applicable to Contractual Aspects**

Under Dutch private international law, the law governing the contractual aspects of a leasing transaction must be determined in accordance with the conflict-of-law rules of the Rome I Regulation.\(^9\) Parties are free to choose the

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\(^6\) The 2008 annual report of the Vereniging van Nederlandse Autoleasemaatschappijen is accessible through <www.vna-lease.nl>.

\(^7\) Statistics of the Nederlandse Vereniging van Leasemaatschappijen are accessible through <www.nvl-lease.nl>.

\(^8\) See subparagraph 12.2 for the tax aspects of cross-border leasing.

\(^9\) Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation). Please note that certain financial leases may fall
law governing the lease contract. They can select the law applicable to the
lease as a whole or to parts of it.\textsuperscript{10} In the absence of a choice of law, which
rarely occurs, the lease of movable property would be governed by the law of
the country where the lessor has its habitual residence; the lease of
immovable property would be governed by the law of the country where the
asset is situated.\textsuperscript{11} Notwithstanding a choice-of-law, there are special regimes
for, \textit{inter alia}, consumer contracts, and mandatory provisions of the law of
another country or European Union law may apply.\textsuperscript{12}

3.2. \textit{Law Applicable to Proprietary Aspects}

The proprietary aspects of a leasing transaction must, under Dutch private
international law, be determined in accordance with the conflict-of-law rules
of the Property Law (Conflict of Laws) Act (\textit{Wet conflictenrecht goederenrecht}).
The main rule is that the proprietary aspects are governed by the law of the
country where the asset is located at the time.\textsuperscript{13} The proprietary regime in
respect of registered ships and aircraft is governed by the law of the country
where the ship or aircraft is registered.\textsuperscript{14} The proprietary consequences of a
retention of title of ownership (\textit{eigendomsvoorbehoud}), which may be relevant
for certain financial leases, are governed by the law of the country where the
asset is located at the time of delivery. However, where an asset is destined
for export, parties can choose the law of the country of destination as the law
governing the proprietary aspects of the retention of title. Parties to an
international leasing transaction regarding movable assets created in one
country, but destined for use in another country, are in a similar manner
allowed to choose the law of the country of destination to govern the
proprietary aspects of the lease.\textsuperscript{15}

3.3. \textit{Recognition of (Foreign) Rights in rem}

Dutch private international law recognises rights in \textit{rem} validly created or
transferred under the law of another country. Furthermore, where an asset is
moved to another country (\textit{confit mobile}), the proprietary rights in the asset
will remain as such. These rights will therefore not be automatically
transformed into a local proprietary interest. However, rights in \textit{rem} cannot

within the scope of the 1980 United Nations Convention on Contracts for the
International Sale of Goods (CISG). The provisions of the CISG apply directly in such
cases.

\textsuperscript{10} Art. 3(1) Rome I Regulation.
\textsuperscript{11} Art. 4(2) respectively 4(1)(c) Rome I Regulation.
\textsuperscript{12} Art. 6 respectively Art. 3(3) and 3(4) Rome I Regulation. In addition, overriding
mandatory provisions may be applied (Art. 9 Rome I Regulation).
\textsuperscript{13} Art. 2, Section 1 Property Law (Conflict of Laws) Act.
\textsuperscript{14} Art. 2, sections 2 and 3 Property Law (Conflict of Laws) Act.
\textsuperscript{15} Art. 3 Property Law (Conflict of Laws) Act.
be exercised in a manner incompatible with the law of the country where the asset is located at the time of the exercise.  

4. The Lease Agreement

4.1. Rights and Duties under a Lease Agreement

The legal consequences of a lease contract are, under Dutch law, primarily determined by the contents of the agreement and the rules of contract law. Within the boundaries set by good morals, public policy and mandatory law, lessor and lessee are free to agree upon the exact stipulations of the lease. As mentioned above, there is no legislation specifically targeted at lease agreements as such. However, various provisions of both general and specific contract law may apply to a lease contract. In particular, two types of contract provided for by law can play an important role in the characterization and the legal effects of a lease contract: ‘hire’ (huur) and ‘hire purchase’ (huurkoop).

4.2. Hire

The contract of hire under Dutch law corresponds with the legal notion of ‘lease’, as in civil law systems often derived from the Roman law concept of locatio-conductio, denoting a transaction under which the owner of property, the lessor, contractually grants possession of the property to another person, a lessee, for a specified or unspecified period of time (the lease term) in return for periodic payment of money (the lease payments). At the end of the term, the property is returned to the lessor. Under Dutch law the transaction so defined is characterized as ‘hire’ (huur). Hire must be distinguished from sale (koop): the former agreement intends to grant a right of use of property to another person, whereas the latter is aimed at a transfer of the property. Furthermore hire is distinguished from loan for use (bruikleen): a hire agreement requires the lessee to give something in return for the use of the asset, whereas a loan for use does not. A hire agreement will in economic terms often correspond with an operational lease. The characterization of a lease contract as a hire agreement is hardly problematic, as nearly all provisions on hire, in particular in relation to movable property, have a directory nature. The parties are free to deviate from the provisions on hire provided for in the Dutch Civil Code.

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16 Art. 5 Property Law (Conflict of Laws) Act.
18 Arts. 7:201 to 7:310 Dutch Civil Code.
4.3.  Hire Purchase

Dutch law has special legislation on 'hire purchase' (huurkoop). There is a set of general provisions dating from 1936. However, these provisions do not apply to immovable property, registered aircraft and most seagoing and inland waterway vessels. The hire purchase of inland waterway vessels and of immovable property are regulated separately.

Hire purchase is defined as an instalment sale in which title in the supplied goods is retained until the purchaser has fulfilled all its obligations under the contract of sale. Under Dutch law, retention of title is construed as a transfer under the suspensive condition of payment of the relevant obligations. The opening of a bankruptcy proceeding in respect of the lessor does not obstruct the fulfilment of the suspensive condition. The lessee acquires the leased asset if the remaining obligations under the lease are paid to the lessor's administrator.

The legislator at the time believed that the purchaser was in need of special protection against entering into a hire purchase agreement hastily and against an overly strong position of the seller. The legislation therefore regulates in detail the formation of hire purchase agreements and the rights of the hire purchaser. For example, a hire purchase agreement must be concluded in writing in order to be valid.

Furthermore, the purchaser has a right of early redemption, and if the termination of a hire purchase (as a result of nonperformance of the purchaser) puts the seller in a more favorable position than would have been the case if the contract was properly executed, the seller has the obligation to hand over the surplus to the purchaser. The provisions on hire purchase are for the greater part mandatory. The characterization of a lease contract as a hire purchase can therefore have a serious impact on the parties' mutual rights and obligations.

To prevent circumvention of the protective mandatory rules on hire purchase, the legislator has extended their scope to transactions with similar purpose, including transactions involving a third-party financier who

19 Arts. 7A:1576h to 7A:1576x Dutch Civil Code.
20 Art. 7A:1576, Section 4 Dutch Civil Code.
21 Arts. 8:800-812 Dutch Civil Code (inland waterway vessels); and the 1973 Temporary Act on the Hire Purchase of Immovable Property (Tijdelijke wet huurkoop onroerende zaken).
acquires ownership of the asset while granting credit to the purchaser. This means that for the characterization of an agreement as a hire purchase, it is decisive whether the agreement intends to ultimately transfer ownership. This raises the question of whether lease agreements not intending an automatic transfer of ownership, but containing an option to buy the leased asset, can be characterized as a hire purchase. If the proportion between the amount of money involved with the exercise of the option and the value of the leased asset at that moment would strongly urge the lessee to exercise its option to buy, this forms a strong indication that the lease intends to transfer ownership to the lessee. In our opinion the provisions on hire purchase apply in such cases. Although contrary views have been expressed in legal literature, we believe that there are no good grounds to limit the application of these provisions solely to hire purchases concluded with consumers and other weak parties.

Despite some criticism in legal literature, there are currently no plans to amend or delete the general provisions on hire purchase. A legislative proposal, submitted in 1995, to replace the Temporary Act on the Hire Purchase of Immovable Property, has been withdrawn in 2005. In practice, the hire purchase of immovable property has fallen out of use due to the extensive and mandatory protection of hire purchasers against sellers (and due to tax legislation).

4.4. Various other Rights and Duties

The rights and duties of lessor and lessee are furthermore determined by various statutory provisions of contract law. Dutch contract law however, is for the far greater part directory in nature. In practice, parties often derogate from these provisions in lease contracts. Some rules of directory law and the most customary derogations to these rules are mentioned below.

4.4.1. Quiet Enjoyment of the Leased Asset

The right to a quiet enjoyment of the leased asset can be considered an essential element of the lease to the lessee. The rules on hire agreements and hire purchases contain directory provisions ensuring the lessee’s enjoyment of the leased asset. In practice, the lessor generally warrants that the leased asset is free from attachments and security interests other than permitted.

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28 Arts. 7:203 and 7A:1576m, Section 1 Dutch Civil Code.
However, the lessee carries the risk of disturbances of its enjoyment attributable to an external cause.  

4.4.2. Risk of Loss

An important aspect of a financial lease concerns the allocation of the risk of loss or depreciation of the leased asset and the point in time the risk passes from one party to the other. If a financial lease is characterized as a hire purchase, the risk of loss or depreciation is in principle transferred from the lessor to the lessee at the time of actual delivery of the leased asset.  

In practice, lessor and lessee generally stipulate the allocation of these risks. For example, parties may agree that the risk of loss and depreciation is carried by the lessee as of the conclusion of the lease agreement.  

4.4.3. Maintenance and Insurance

The maintenance and insurance of the leased asset form other important aspects of the lease agreement. In practice, lessor and lessee agree on each party’s duties regarding maintenance and insurance of the leased asset in a detailed manner. Under a financial lease the maintenance and insurance will generally be the lessee’s responsibility.  

5. Consumer Leases

5.1. Protection of Consumers in General

In general, Dutch legislation does not distinguish between consumer leases and other leases. Nevertheless, consumers are protected in various ways against professional parties throughout the Civil Code and in other statutes. An important example is the protection of consumers against unreasonable standard contract terms. Additionally, many provisions regarding specific contract law, such as various provisions on hire and sale, are mandatory in case of a consumer transaction.

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29 Cf. Art. 16 Unidroit Model Law on Leasing; and Art. 8(2), 8(3) and 8(4) Convention on International Financial Leasing on warranties of quiet possession.
30 Art. 7:10 Dutch Civil Code.
31 Cf. Art. 11 Unidroit Model Law on Leasing on risk of loss.
32 Cf. Art. 18(1) Unidroit Model Law on Leasing; and Art. 9(1) Convention on International Financial Leasing on duties to maintain the asset.
33 The special provisions regarding the hire of housing accommodation (Arts. 7:230-282 Dutch Civil Code) could be considered as an exception to this.
34 Arts. 6:231 to 6:247 Dutch Civil Code.
5.2. **Protection under the Consumer Credit Act**

Consumer lessees may be protected particularly under the Consumer Credit Act (*Wet op het consumentenkrediet*), as certain financial leases may qualify as a credit transaction within the meaning of this act. A credit transaction in the sense of the Consumer Credit Act generally includes agreements that intend (or several agreements together intending) granting the use of movable property in exchange for one or more payments, or agreements that intend a financier paying the supplier of movable property in connection with granting the use of that movable property to another party in exchange for one or more payments. However, the Consumer Credit Act only regulates credit agreements between a professional financier (or supplier) and an individual. Furthermore, the scope of the act is limited greatly by excluding short-term credit agreements, transactions involving more than € 40,000 of credit, hire agreements and transactions connected with the business of the borrower.

Nearly all provisions of the Consumer Credit Act are mandatory and can have a serious impact on the parties' mutual rights and obligations. The protective rules include maximum costs of credit, a right of early redemption for the consumer, and an obligation to hand over any surplus if the termination of a credit agreement puts one party in a more favorable position than would have been the case if the contract was properly executed. Furthermore, the act limits the permissibility of security through a right of pledge or retention of title, and excludes the surrender of the security asset to the lessor after three-quarters of the credit sum has been paid off.

6. **Tripartite Leasing**

Leasing often occurs in the form of a tripartite arrangement between lessee, lessor and supplier. Basically, three types of tripartite leasing arrangements can be distinguished in Dutch leasing practice. Firstly, an arrangement in which the lessor acquires the asset from the supplier and then leases it out to the lessee. Secondly, an arrangement in which the supplier leases the asset out to the lessee, and the lessor then acquires ownership of the leased asset and the leasing receivables from the supplier. The third type of arrangement is a so-called sale-and-lease-back in which the lessee acquires the asset from the supplier, and sells it to the lessor, who immediately leases the asset back to the lessee. In all these arrangements ownership of the leased asset is transferred to (or remains with) the lessor.

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35 The Consumer Credit Act was adopted in 1990, partly to comply with the European Directive 87/102/EEC. As of 12 May 2010 a new Directive on credit agreements for consumers (Directive 2008/48/EC) must have been implemented.
36 Arts. 1, 2, 3 and 4 Consumer Credit Act.
37 Arts. 34, 35, 37 and 44, Section 2 Consumer Credit Act.
38 Arts. 40 and 41 Consumer Credit Act.
Such tripartite leasing arrangements, comprising elements of both a supply contract and a lease, can either be in the form of several separate agreements or in the form of one multiparty agreement. Dutch law does not require parties to strictly keep the supply contract and the lease separated. More than that, the use of separate contracts does not exclude the possibility that the contracts share certain legal consequences by operation of law. The Dutch Supreme Court (Hoge Raad) has ruled that separate contracts can be so closely connected that the termination or avoidance of one of the contracts results in the termination or avoidance of the other, or that a right to suspend performance of the lessee in one of the contractual relationships can also be exercised in the other. This close connection of contracts is particular likely in the case of tripartite leasing arrangements with separate supply and financing contracts that fall within the scope of the hire purchase provisions. Whether such a connection exists in a specific case must be determined by way of interpretation of the legal relationship between the parties.

In addition, several agreements together may qualify as one credit transaction under the Consumer Credit Act, giving the consumer under certain circumstances the right to suspend its payments to the financier in case the supplier fails to fulfil its obligations to the consumer.

7. Security Interests and Leasing

7.1. Approach to Security Interests in General

The Dutch Civil Code contains comprehensive provisions on secured transactions. In particular security can be provided in the form of a right of mortgage (hypotheekrecht) on property subject to registration (registergoederen), such as immovable property, or a right of pledge (pandrecht) on all other property, such as movable property and receivables. The Dutch Civil Code provides for both disclosed and undisclosed, and possessory and non-possessory rights of pledge. Rights of mortgage and rights of pledge provide the secured creditor with a proprietary interest in the security asset, entitling it to take recourse against the security asset for its secured claim, with preference over other creditors. In addition, a supplier can ‘secure’ its claim by way of retention of title of ownership (eigendomsvoorbehoud) in the supplied assets.

39 Cf. Art. 7 Unidroit Model Law on Leasing; and Arts. 10, 11 and 12 Convention on International Financial Leasing on legal consequences of tripartite financial leasing.
41 Art. 45, Section 1 Consumer Credit Act.
7.2. **Public Registration of Security Interests**

Mortgages are the only security interests to be disclosed in a public registry. Registration of the notarial mortgage deed is a requirement for the creation of the security interest. After filing, the registrar enters the deed in the public registry after having verified the fulfilment of certain formal requirements. However, the registrar does not verify the validity of the mortgage as such.

Although the creation of a right of pledge may require some kind of registration, pledges are not disclosed in a public registry. For example, an undisclosed or non-possessory pledge can be created through a private deed provided that the deed is registered with the tax authorities.\(^{42}\) This registration is primarily intended to prevent antedating of the private deed as the tax authorities mark the deed with the date of registration.

7.3. **Prohibition of Fiduciary Transfers**

A typical feature of Dutch legislation on security interests is the so-called prohibition of fiduciary transfers. A juridical act intended to transfer ownership for purposes of security (*fiducia cum creditore*) or which does not have the purpose of vesting title in the acquirer (*fiducia cum amico*), cannot constitute a valid legal (basis for a) transfer of ownership.\(^{43}\) This prohibition is closely linked to the introduction in the Dutch Civil Code of the aforementioned undisclosed and non-possessory rights of pledge.

In practically all leasing arrangements, ownership of the leased asset remains with or is transferred to the lessor and is used to secure the lease payments by recovering the asset in case the lessee fails to pay. The prohibition of *fiducia* has therefore raised questions on the validity of transfers of ownership as part of a financial leasing arrangement, especially for the sale in a sale-and-lease-back transaction. However, a restrictive interpretation of the aforementioned prohibition by the Dutch Supreme Court has removed most questions.\(^{44}\) According to the Supreme Court the prohibition of *fiducia* does not affect every transfer of ownership which is connected with credit granted to the transferor. The prohibition only affects transfers for purposes of security in the sense that they intend to provide the acquirer a security right similar to that of a right of pledge or mortgage, meaning a right to take recourse against the transferred asset with preference over other creditors. By contrast, a juridical act intending an actual transfer of ownership forms a valid legal basis for the transfer of ownership. The ownership of the lessor resulting from a retention of title is clearly valid as it is a form of security explicitly permitted by statute.\(^{45}\) Whether parties to a

\(^{42}\) Arts. 3:237 and 3:239 Dutch Civil Code.

\(^{43}\) Art. 3:84, Section 3 Dutch Civil Code. Under the former Civil Code the Dutch Supreme Court had recognised these forms of fiduciary transfer.

\(^{44}\) Hoge Raad 19 May 1995, NJ 1996, 119 (*Keereweer v.q./Sogolease*).

\(^{45}\) Arts. 3:92 and 3:91 Dutch Civil Code.
sale-and-lease-back have intended an actual transfer, is a matter of interpretation of the lease agreement.\textsuperscript{46} Besides the restrictive interpretation of the Supreme Court, the significance of the prohibition of \textit{fiducia has been reduced through the implementation of the Financial Collateral Directive.\textsuperscript{47} A transfer on the basis of a financial collateral arrangement (\textit{financiëlezekerheidsovereenkomst tot overdracht}) is explicitly considered not to be in violation of the prohibition of \textit{fiducia.}\textsuperscript{48} However, financial collateral can only consist of money of account, financial instruments and, after implementation of the latest amendments to the Financial Collateral Directive, credit claims.

### 7.4. Position of the Tax Authorities

Another aspect of Dutch legislation regarding security interests in leasing transactions is the position of the tax authorities. As a starting point, tax claims are privileged on all of the debtor’s assets. This is hardly problematic as rights of mortgage and pledge rank before this privilege. However, the tax authorities have an even stronger right to take recourse for certain tax claims against so-called \textit{bodemzaken}. Bodemzaken are movable assets located at the debtor’s premises which serve a permanent use of the premises in accordance with its purpose. Provided that they are independent movable property, fixtures and fittings, production machinery and equipment all fit this definition. Stock and transporting equipment are not considered to be bodemzaken.

The tax authorities’ right of recourse in respect of bodemzaken is twofold.\textsuperscript{49} Firstly, the tax privilege ranks before non-possessory rights of pledge on the debtor’s bodemzaken. Secondly, the tax authorities have a right of recourse against bodemzaken, irrespective of the ownership of these assets. The tax authorities’ rights in relation to bodemzaken are limited to the collection of certain taxes, in particular sales tax (\textit{omzetbelasting}) and tax on wages (\textit{loonbelasting}).\textsuperscript{50} Income tax (\textit{inkomstenbelasting}) and company tax (\textit{vennootschapsbelasting}) fall outside the scope of these rights.

It’s important to note that the tax authorities will refrain from taking recourse against assets that are the actual property of a third party, meaning that the asset belongs to the third party in both a legal and an economical sense. Generally, financial leases largely allocate the economic risk of depreciation of the leased asset with the lessee, and therefore do not constitute actual property of the lessor.\textsuperscript{51} The State Secretary of Finance has

\textsuperscript{46} Hoge Raad 18 November 2005, JOR 2006/60 (BTL Lease/Van Summeren c.s.).
\textsuperscript{48} Art. 7:55 Dutch Civil Code.
\textsuperscript{49} Arts. 21 and 22 \textit{Invorderingswet} 1990.
\textsuperscript{50} Art. 22, Section 3 \textit{Invorderingswet} 1990.
\textsuperscript{51} \textit{Leidraad Invordering}, § 22.8.10.
issued a regulation in which the conditions are specified under which the lessor is considered to be the owner of the leased asset for this purpose, the Lease Regulation (Besluit Leaseregeling). This regulation is further discussed under paragraph 12.

The tax authorities’ rights in relation to bodemzaken are controversial legal instruments. For years the abolition of these instruments has been strongly advocated in legal literature. The Insolvency Law Committee, appointed by the Minister of Justice, presented recommendations to this effect in 2007, in the form of a preliminary legislative proposal for a new insolvency act.

8. Transfer of Rights and Duties under the Lease Agreement

During a lease, a party to the contract may want to transfer one or more of its rights or duties under the lease agreement, or transfer the contractual relationship as a whole.

8.1. Transfer of the Lease as a Whole

Under Dutch law, a party to a contract, e.g. a lease or sub-lease, may transfer its contractual relationship to a third party by way of a takeover of contract (contractsoverneming). A takeover of contract results in the replacement of one of the parties to the contract and the transfer of generally all existing rights and duties to a third party. Furthermore, all ancillary rights (nevenrechten) to these rights, such as a right of pledge or rights under a contract of suretyship, automatically pass to the third party. A takeover of contract requires a tripartite agreement. Besides an agreement between the transferring party to the contract and the third party, the consent of the other party to the contract is necessary. However, the other party to the contract can give its consent in advance, resulting in a takeover as soon as the transferring party and the third party have agreed on the takeover and have notified the other party of this fact in writing. In practice, lease agreements often contain the lessee’s consent in advance to a takeover. However, if such a consent forms a standard contract term in a consumer lease, it is considered unreasonably onerous and therefore voidable.

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52 Art. 6:159 Dutch Civil Code.
53 Art. 6:142 Dutch Civil Code.
54 Art. 6:159, Section 3 in conjunction with Art. 6:156 Dutch Civil Code. Cf. Art. 15(2) and 15(3) Unidroit Model Law on Leasing on the transfer of rights and duties under a lease and consent in advance.
55 Art. 6:233 in conjunction with Art. 6:236 under e Dutch Civil Code.
8.2. Transfer of Duties under the Lease

Individual duties can be transferred to a third party by means of a takeover of debt (schuldoverneming).\textsuperscript{56} A takeover of debt requires an agreement to that effect between the debtor and the third party. However, the takeover has effect vis-à-vis the creditor only after its consent thereto. The creditor's consent can be given in advance, resulting in a takeover as soon as the debtor and the third party have agreed on the takeover and have notified the creditor of this fact in writing.\textsuperscript{57}

8.3. Transfer of Rights under the Lease

Individual rights arising from the lease agreement are in principle transferable. Nevertheless, personal claims arising from the lease may be rendered non-transferable by an agreement to that effect between lessor and lessee.\textsuperscript{58} The lessor's right of payment of the lease receivables can be transferred in accordance with the provisions on the assignment of personal claims (rechten op naam). Subject to a valid legal basis and the lessor’s power of disposition of these assets, the lease receivables can be assigned either in a disclosed or an undisclosed manner. Disclosed assignment requires an authentic or private deed to that effect between the creditor and third party and notification to the debtor of the assigned claim. Undisclosed assignment solely requires an authentic deed or a registered private deed.\textsuperscript{59}

Future claims can be assigned in advance, meaning the formalities required for an assignment are already fulfilled and will result in a transfer of the claim at the time of its inception.\textsuperscript{60} However, the undisclosed assignment of future claims is limited to claims that will arise directly from a pre-existing legal relationship, such as a contract.\textsuperscript{61} Furthermore, the opening of bankruptcy proceedings in respect of the assignor before the inception of the assigned claim, will prevent the transfer to the assignee.\textsuperscript{62} Whether lease receivables that are not yet due and payable are to be considered as existing or future claims is somewhat uncertain as Dutch law does not provide general rules distinguishing future claims from existing claims (in particular existing claims under a suspensive condition or time period). However, there

\textsuperscript{56} Arts. 6:155 to 6:158 Dutch Civil Code.
\textsuperscript{57} Art. 6:156, Section 1 Dutch Civil Code. Cf. Arts. 15(1) 15(b) and 15(3) Unidroit Model Law on Leasing on the transfer of duties under a lease and consent in advance.
\textsuperscript{58} Art. 3:83, Section 2 Dutch Civil Code.
\textsuperscript{59} Art. 3:84, Section 1 in conjunction with Art. 3:94 Dutch Civil Code. Registration of the private deed is in a non-public registry administered by the tax authorities. Cf. Art. 15(1)(a) Unidroit Model Law on Leasing; and Art. 14 Convention on International Financial Leasing on the transfer of rights under a lease.
\textsuperscript{60} Again subject to a valid legal basis and the lessor's power of disposition over these assets at that time. Art. 3:97 in conjunction with Arts. 3:84 and 3:94 Dutch Civil Code.
\textsuperscript{61} Art. 3:94, Section 3 Dutch Civil Code.
\textsuperscript{62} Arts. 20, 23 and 35, Section 2 Dutch Bankruptcy Act (Faillissementswet).
is certainty regarding lease receivables under leases that can be characterized as hire agreements. The Dutch Supreme Court has ruled in respect of hire agreements that the receivables corresponding with future periods in time, are considered future claims.\textsuperscript{63}

Unless agreed otherwise by contract, the transfer of lease receivables does not affect the lessee's defences nor does it fully prevent a right of set-off for the lessee.\textsuperscript{64}

9. **Transfer and Loss of Ownership of the Leased Asset**

9.1. **Transfer by the Lessor**

Besides the transfer of the rights and duties under a lease, the lessor may want to dispose of the ownership of the leased asset. Under a typical lease agreement the lessor has the ownership of the leased asset and can dispose thereof. Under Dutch law, the transferability of ownership of movable and immovable property cannot be limited by agreement.\textsuperscript{65}

To what extent the lessee's rights are protected against the acquirer of the asset primarily depends on the - contractual or proprietary - character of these rights under the lease. If a lease is characterized as a hire agreement, the rights of the lessee are generally of a contractual nature and can only be exercised against the lessor. The lessee does not have a proprietary interest in the asset. However, a transfer of the leased asset results in the transfer by operation of law of the hire agreement to the acquirer of the asset. This provison is only mandatory for hire agreements regarding immovable property.\textsuperscript{66} If a lease is characterized as a hire purchase agreement, the lessee's right to acquire the leased asset is protected against a transfer of the asset by the lessor.\textsuperscript{67} Furthermore, if the lease involves a transfer under retention of title, the lessee has a proprietary interest in the leased asset resulting in the acquisition of ownership of the leased asset after fulfilment of its obligations under the lease. A transfer of the leased asset by the lessor cannot affect this position.

9.2. **Transfer by the Lessee**

In general, it cannot be said that, in a financial lease, the lessee acquires a proprietary interest in the leased asset which to some extent commensurates with the payments made. A distinction should be made between financial

\textsuperscript{63} Hoge Raad 30 January 1987, NJ 1987, 530 (WUH/Emmerig q.q.).


\textsuperscript{65} Art. 3:83, Section 1 Dutch Civil Code.

\textsuperscript{66} Art. 7:226 Dutch Civil Code.

\textsuperscript{67} Art. 7A:1576l Dutch Civil Code. Cf. Art. 5 Temporary Act on the Hire Purchase of Immovable Property.
leases that provide for an automatic transfer of ownership of the leased asset to the lessee and other leases.

The automatic transfer of ownership of the leased asset to the lessee after fulfilment of its obligations under the financial lease agreement is, under Dutch law, construed as a retention of title. The proprietary interest of the transferee under retention of title is a much debated subject of Dutch property law. Legal literature is basically divided into two views. The first view is that until fulfilment of the relevant obligations the transferee merely has an expectation of acquiring ownership. The lessee can only transfer the lease object as a future asset. The second view, somewhat inspired by the German legal concept of the Anwartschaftsrecht, holds that already before fulfilment of the relevant obligations, the lessee has an existing proprietary interest in the leased asset which can be transferred. This proprietary interest is generally characterized as conditional ownership (voorwaardelijke eigendom) or ownership under suspensive condition (eigendom onder opschortende voorwaarde). The second view has been adhered to by a great majority in recent legal literature.68

Other leases do not provide the lessee with a proprietary interest in the leased asset.

9.3. Loss of Ownership through Accession

Proprietary interests in the leased asset, most notably the lessor’s ownership, may be lost as a result of the affixation of the asset to another object. Affixation may lead to accession (natrekking) of the asset by another movable or immovable property, resulting in the loss of existing proprietary interests in the leased asset.69

Accession occurs when the leased asset becomes a component part of another property (the principal property). As ownership of a property comprises all component parts, the ownership of the principal property will include the leased asset.70 Whether a leased asset has become a component part, is determined by common opinion or follows from such a physical connection that the asset cannot be separated from the principal property without causing considerable damage to one of them.71 More specifically, the leased asset becomes a component part according to common opinion if either (a) the principal property is considered incomplete without it or (b) the asset and principal property are specifically geared to one another in a constructional sense. The question of which of the relevant assets should be

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68 See Faber 2007, p. 33-58, with further references.
69 Cf. the definition of ‘asset’ in Art. 2 Unidroit Model Law on Leasing; and Art. 4 Convention on International Financial Leasing on affixation of the asset.
70 Arts. 5:3 and 5:14, Section 1 Dutch Civil Code.
71 Art. 3:4 Dutch Civil Code.
considered the principal property is generally determined by common opinion.\textsuperscript{72}

Additionally, accession by immovable property will occur when the leased asset, either directly or indirectly, forms a permanent part of the land.\textsuperscript{73} The leased asset does not need to be physically connected to the land for this. An asset has become a permanent part of the land when it is intended to permanently remain at the location. This follows from the nature of the asset, the construction and the intention of the constructor to the extent ascertainable for third parties.\textsuperscript{74} However, accession of the leased asset by the land may be interrupted by creating a right of superficies (\textit{opstalrecht}).\textsuperscript{75}

10. Failure of Performance

10.1. Failure of Performance and Remedies

In the event of the other party failing to fulfil its contractual obligations under the lease, the remedies of a party are primarily governed by rules of general contract law. A party can demand specific performance of the obligation at law\textsuperscript{76} or be entitled to rely on a right to suspend performance of its own obligations.\textsuperscript{77} Furthermore, a party can demand additional and reliance damages in case of an attributable failure to perform.\textsuperscript{78} A failure to perform may also form a reason to rescind the lease agreement.\textsuperscript{79} In both operational and financial leases, the termination of the lease ends the lessee's right of use, allowing the lessor to claim the return of the leased asset.\textsuperscript{80}

10.2. Contractual Remedies

The remedies mentioned above are in principle rules of directory law, allowing parties to contractually deviate therefrom. For example, parties may agree to the events that constitute an attributable failure to perform or the events that give the right to early termination of the lease.\textsuperscript{81} Parties may also

\textsuperscript{72} Arts. 3:4 and 5:14, Section 3 Dutch Civil Code.
\textsuperscript{73} Arts. 3:3 and 5:20, Section 1, sub e Dutch Civil Code.
\textsuperscript{74} Hoge Raad 31 October 1997, JOR 1997/152 (\textit{Portacabin}).
\textsuperscript{75} Arts. 5:101 et seq. Dutch Civil Code.
\textsuperscript{76} Art. 3:296 Dutch Civil Code. Cf. Art. 14 (1) Unidroit Model Law on Leasing on demanding a conforming asset.
\textsuperscript{77} Arts. 6:52 et seq. and 6:262 Dutch Civil Code.
\textsuperscript{78} Arts. 6:74 et seq. Dutch Civil Code. Cf. Art. 21 Unidroit Model Law on Leasing; and Art. 13(1) and 13(2)(b) Convention on International Financial Leasing on damages.
\textsuperscript{79} Art. 6:265 Dutch Civil Code. Cf. Arts. 13(2)(a) and 14(2)(a) Unidroit Model Law on Leasing; and Arts. 12(1)(c) and 13(2) Convention on International Financial Leasing on termination.
\textsuperscript{80} Cf. Arts. 18(2) and 24 Unidroit Model Law on Leasing; and Arts. 9(2) and 13(2)(b) Convention on International Financial Leasing on the lessee's duty to return the asset.
\textsuperscript{81} Cf. Arts. 19 and 23 Unidroit Model Law on Leasing on default and termination.
determine whether an aggrieved party is required to give the other party a notice of default and a reasonable opportunity to cure. Other examples are the extension, restriction or exclusion of rights of suspension or termination.

Customary events of default in a financial lease are (a) the lessee failing to pay the lease receivables; (b) the opening of insolvency proceedings against the lessee and (c) the lessee failing to properly maintain or insure the leased asset. The lessee is generally granted a right to suspend payment of the lease receivables in case its quiet enjoyment of the leased asset is disturbed, but only if the cause of the disturbance is attributable to the lessor. Customary events that give right to termination of the lease are often linked to the complete economical loss of the leased asset. Parties may agree on early termination charges, penalties or payoffs.

10.3. Damages

As mentioned above, a party can demand additional and reliance damages in case of an attributable failure to perform. However, the parties can exclude or restrict their liability. The parties may also agree on penalty clauses, although mandatory provisions entitle the debtor to request in court the moderation of evidently unfair penalties.

11. Insolvency Aspects

11.1. Bankruptcy in General

The opening of bankruptcy proceedings essentially results in a general attachment on the debtor's assets, including assets acquired after opening of the proceedings, for the benefit of its joint creditors. The debtor loses the right to manage and dispose of its assets and creditors can only enforce their pre-bankruptcy claims against the debtor through submission of their claims to the administrator. However, creditors of claims against the insolvent estate can demand immediate payment from the administrator and can take recourse against the debtor's assets included in the bankruptcy. Secured creditors can enforce their rights as if bankruptcy proceedings had not been

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82 Cf. Art. 20 Unidroit Model Law on Leasing; and Arts 13(5) and 14(2) Convention on International Financial Leasing on notices.
84 Cf. Art. 12(2) Unidroit Model Law on Leasing on damage to the asset.
86 The Dutch Bankruptcy Act (Faillissementswet) contains three types of insolvency proceedings: (i) bankruptcy (faillissement), (ii) suspension of payments (sursèance van betaling) and (iii) debt reorganisation for natural persons (schuldsaneringsregeling natuurlijke personen). The main text only refers to bankruptcy proceedings.
opened. Revindicatory creditors, such as the legal owner of the leased asset, can demand from the administrator the surrender of their assets.87

### 11.2. Effect on Leases

As a starting point, the opening of bankruptcy proceedings in respect of one of the parties to a contract has no influence on the existence of that contract. However, the Dutch Bankruptcy Act contains special provisions for certain types of contracts, which can be of particular importance for leasing contracts. One provision deals with reciprocal contracts in general that are not or not fully performed by both the bankrupt debtor and the other party at the time of the opening of the bankruptcy proceedings,88 which will often be the case with existing leases. The other party can request the administrator to declare within a reasonable period of time whether he intends to perform the contract. If the administrator fails to do so or declares that he will not perform the contract, he loses the right to demand performance from the other party. If the administrator declares that he intends to perform the contract, he is obliged to give security for the proper performance. As a result the other party's claims under the lease contract are claims against the estate.

Furthermore, there are special provisions for the termination of hire purchase and hire agreements.89 If the bankrupt is a lessee under a hire purchase agreement, both the administrator and the lessor can terminate the contract. The lessor's claim against the lessee is an ordinary bankruptcy claim.90 If the bankrupt is a lessee under a hire agreement, both the administrator and the lessor are entitled to early termination of the contract with a maximum notice period of three months. Where lease receivables are paid in advance, the lease cannot be terminated before the end of the period that has been prepaid. The lease receivables due from the date of bankruptcy are claims against the estate.91 The Dutch Bankruptcy Act does not contain specific rules for the case the bankrupt is lessor under a hire purchase or hire agreement.

### 11.3. Moratorium

In bankruptcy, the court may order a moratorium (afkoelingsperiode) for a maximum period of two months, which can be extended once with a maximum of two months. The moratorium blocks the enforcement of rights of recourse in respect of assets included in the bankruptcy (in particular the

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87 Cf. Art. 7 Convention on International Financial Leasing on the lessor’s real rights in the equipment.
88 Art. 37 Dutch Bankruptcy Act.
89 Approximately the same rules apply to hire and hire purchase contracts in suspension of payments or debt reorganisation for natural persons proceedings.
90 Art. 38a Dutch Bankruptcy Act.
91 Art. 39 Dutch Bankruptcy Act.
enforcement of a right of pledge or mortgage) or the surrender of assets
under the control of the debtor or the administrator. The moratorium does
not prevent creditors with claims against the estate from taking recourse
against the debtor's assets. In the event of a bankrupt lessee, the moratorium
prevents the lessor (under either a financial or operational lease) from taking
control over the leased asset.92

12. Tax Aspects

12.1. Tax Benefits

The characterization of a lease as either operational or financial is of
importance for the levying of various types of tax, in particular income,
company and sales tax. The Minister of Finance and the State Secretary of
Finance have issued regulations on the characterization of leases for tax
purposes.

For income tax and company tax purposes the character of a lease
determines whether the lessor or lessee must be regarded as the owner of the
leased asset. The fiscal owner enjoys certain tax benefits, such as investment
allowances and early depreciation of the costs of acquisition. The Lease
Regulation (Besluit Leaseregeling) specifies the conditions under which the
lesser is considered to be the owner of the leased asset for tax purposes and
the application of the tax authorities' right of recourse against bodemzaken,
described in subparagraph 7.4. The lessor will be regarded as the owner of
the leased asset if it (a) behaves as such; (b) has legal ownership of the leased
asset; and (c) carries the positive and/or negative residual value risk in
respect of the leased asset. The regulation gives further economic criteria to
determine whether the lessor carries the residual value risk, thereby taking
into account end-of-term options. The Lease Regulation provides a safe
harbour, meaning that, through fulfilment of the requirements, parties can
obtain certainty on the characterization of a lease as an operational lease for
certain tax purposes.

For sales tax purposes financial and operational lease are treated
differently. A financial lease constitutes a delivery, whereas an operational
lease constitutes a service. This distinction is of importance for the manner of
taxation, the tariff and the application of tax exemptions. The VAT
Regulation specifies the criteria to distinguish leases for this purpose.93

92 Arts. 63a to 63e Dutch Bankruptcy Act. A moratorium may also be applied in
suspension of payments or debt reorganisation for natural persons proceedings.
12.2. Cross-border Leasing

Leasing arrangements where the lessor and lessee are situated in different countries may provide parties with substantial tax benefits. Recent years show examples of cross-border lease-back arrangements between Dutch lessees and American lessors to finance, for instance, power stations. A cross-border lease can be used in particular to utilize differences in national tax laws in respect of leases. Important tax benefits can be differences in tariffs and tax sparing credit opportunities. Dutch companies are often used in international leasing transactions to avoid or decrease foreign tax claims. Depending on the tax regimes of the countries involved and tax treaties, a lease arrangement may even result in an absence of taxation or the collection of tax benefits, such as investment allowances, in both jurisdictions, commonly called a ‘double dip’. Double investment allowances can be the result of differences in determining ownership for tax purposes of a leased asset.

The Dutch legislator has not considered it necessary to intervene with this practice. However, the United States (a jurisdiction that was often involved in cross-border leasing arrangements) has taken measures to render this kind of transactions unattractive as far as taxes are concerned.

There is no Dutch legislation specifically addressing the involvement of governmental entities and local authorities entering into cross-border leasing transactions. However, the Minister of the Interior and Kingdom Relations and the State Secretary of Finance are of the opinion that local authorities should refrain from entering into these arrangements and other transactions that aim at obtaining financial benefits at the cost of another (foreign or internal) authority. Furthermore, the Minister expressed the intention to prevent or reverse such transactions.94

13. Accounting Aspects

According to the Dutch Civil Code any enterprise is obliged to keep books showing the state of their assets and liabilities and everything concerning their business, in accordance with the requirements for that business, and to keep all records in respect thereof, so that its rights and obligations may be ascertained at any time.95 Moreover, legal persons are obliged to draw up annual accounts. For most legal persons, the drawing up and publication of the annual accounts is extensively regulated. The annual accounts comprise both a balance sheet and a profit-and-loss-account and must, according to acceptable standards in society, offer such an insight that a sound judgment can be made into the legal person's assets and liabilities, its results, and (to the extent possible) its solvency and liquidity. Furthermore, European Union

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95 Arts. 3:15i and 2:10 Dutch Civil Code.
legislation obliges publicly traded companies to draw up their consolidated accounts in compliance with certain IAS/IFRS accounting standards adopted by the European Union for this purpose.\textsuperscript{96}

A commonly used set of accounting standards in the Netherlands are the \textit{Richtlijnen voor de Jaarverslaggeving} (Guidelines on Annual Reporting). Although commonly used, it should be noted that these guidelines are a private initiative. The guidelines are highly influenced by the IAS/IFRS accounting standards.

14. \textbf{Supervision Aspects}

14.1. \textbf{Licensing Requirements}

The commercial activity of leasing is not subject to a licensing requirement under Dutch law as such. However, if a leasing company is financed by raising or having repayable funds from the general public, e.g. loans or deposits, the lessor may qualify as a credit institution within the meaning of the Financial Supervision Act (\textit{Wet op het financieel toezicht}) and as such be in need of a banking licence issued by the Dutch Central Bank.\textsuperscript{97}

Furthermore, if the lessor enters into certain consumer leases it may require a consumer credit licence issued by the Authority for the Financial Markets.\textsuperscript{98}

14.2. \textbf{Integrity Legislation}

Financial leasing companies in the Netherlands may be subject to obligations and supervision under the Prevention of Money-Laundering and Terrorist Financing Act (\textit{Wet ter voorkoming van witwassen en financiering van terrorisme}). The act requires certain financial institutions to conduct customer due diligence when establishing new business relationships, carrying out certain transactions or if there are indications that a customer is involved in money laundering or terrorist financing. Additionally, these institutions have to report so-called ‘effected or intended unusual transactions’, such as cash transactions over € 15,000 and transactions with persons established in designated countries or territories. Compliance of financial leasing companies with the act is supervised by the Dutch Central Bank.

\textsuperscript{96} Regulation (EC) 1606/2002 on the application of international accounting standards.

\textsuperscript{97} Arts. 3:5 and 2:11 \textit{et seq.} Financial Supervision Act.

\textsuperscript{98} Art. 2:60 Financial Supervision Act.
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1. Introduction

Intellectual property law is by definition international in scope. Immaterial objects, like inventions, designs, brands or works of authorship cross borders easily and in the cyberspace era such travels literally only require the push of a button. Consequently, issues of jurisdiction and applicable law arise on a regular basis when it comes to enforcing intellectual property rights (IPRs) vis-à-vis alleged infringers or exploiting the economic value of IPRs through transferring or licensing IPRs to third parties.

Against this background one might assume that there is a well developed body of case law by Dutch courts available in which such issues have been tackled in great detail. That assumption, however, leads to disappointments. Compared with the large volume of IPR-cases that are brought before Dutch courts each year, the number of cases in which matters of private international law have centre stage in the debate among the parties or the judgment of the courts is relatively low. The bulk of the cases were this did happen also date back to the nineties of the last century when Dutch courts gained some notoriety by taking the lead within Europe by granting cross border injunctions in international patent infringement cases. However, with the 2006-judgments of the European Court of Justice (ECJ) in GAT v. LuK and Roche v. Primus – discussed below – the number of cross border cases has dropped dramatically.

2. European Union Law and National Conflict Rules

That two ECJ decisions had such a major impact on Dutch IPR litigation is also evidence of the fact that issues of jurisdiction and applicable law with regard to IPRs have increasingly become a matter of European Union (EU)
law instead of national law. This is primarily due to increased legislative activities by the European Union in the last decade in the field of private international law.

International jurisdiction is governed by the Brussels I Regulation of 2000, which replaces the earlier Brussels Convention of 1968. Since 2002, similar jurisdictional principles are also incorporated in the Dutch Statute on Civil Procedures.

Applicable law to contractual obligations is the subject of the EU regulation of 2008 referred to as Rome I, which replaces the 1980 Rome Convention.

Non-contractual obligations are governed by the Rome II Regulation of 2007, which contains a specific section dealing with IPRs. Rome II makes the earlier Dutch Statute on conflict of laws regarding torts of 2001 (Wet Conflictenrecht Onrechtmatige Daad) obsolete.

3. International Jurisdiction

International jurisdiction is primarily governed by the Brussels I Regulation of 2000. That regulation does - with regard to IP matters - not substantially differ from its predecessor: the Brussels Convention of 1968. Therefore the case law of the European Court of Justice as developed under the Brussels Convention is still fully relevant.

The Brussels I Regulation applies to ‘persons domiciled in a Member State’ of the European Union. This underscores that the goal of this instrument of European law is to enhance the functioning of the internal European market. The Lugano Convention of 1988 serves the same purpose with regard to the three Contracting States – Iceland, Liechtenstein and Norway – of the European Free Trade Association (EFTA) that are part of the European Economic Area (EEA) and thus participate in the European single market without actually being a Member State of the EU. The Lugano principles are basically the same as those of the Brussels I Convention.

With regard to defendants that are not domiciled in an EU or EEA country, Dutch national jurisdiction rules still govern. However, as from January 1, 2002 the principles of the Brussels Convention and the Brussels I

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10 Switzerland is an EFTA Contracting State but not a member of the EEA.
International jurisdiction primarily means that a court may have jurisdiction over a foreign defendant, i.e., a defendant not having a domicile in that court’s national jurisdiction. If such jurisdiction is established it will come as no surprise that this national court is then entitled to order the defendant to refrain from certain acts within that court’s jurisdiction.

However, international jurisdiction becomes a more controversial issue if that national court also may use its jurisdiction over the defendant to order him to refrain from any acts outside that national court’s own territory. Within the context of intellectual property rights this may lead to a situation in which, for instance, a Dutch court may render a judgment with regard to infringement of an IPR in one or more foreign jurisdictions and order the defendant to refrain from such infringements outside that court’s own jurisdiction. This principle is referred to as cross border jurisdiction.

3.1. Cross Border Jurisdiction

In an era in which IPRs are still for the most part national rights – and a proprietor mostly owns a bundle of national IPRs instead of one supranational IPR11 – having to deal with an infringement in multiple jurisdictions still means, as a starting position, that one may have to litigate in a great number of countries to enforce one’s IPR. Needless to say that the financial and economic costs of such an exercise are horrendous and that the outcome usually very much resembles a ‘patchwork quilt’ with different results for different countries (and changing over time).

It is against this background that the Dutch Supreme Court ruled in its landmark decision of 1989 in Focus Veilig v. Lincoln Electric12 that as a matter of Dutch private international law there is no reason why an order by a Netherlands court should have to be limited to acts that take place in The Netherlands. The Dutch Supreme Court argued in this trademark case that it would be disadvantageous to general business interests if, when a tort is committed in a number of jurisdictions, one would be forced to commence separate proceedings in all national jurisdictions concerned. In this context the Court specifically mentioned international infringements of intellectual property rights, next to international acts of unfair competition and international environmental torts. After Lincoln, Dutch courts have granted a great number of cross border injunctions, in particular in intellectual

11 The Community IPRs for trademarks, industrial designs and plant variety rights being the exception to that rule.

12 IEPT19891124, HR, Focus Veilig v. Lincoln Electric.
property cases dealing with trademarks, copyrights and – for the most part – patents.

In 2004 the Dutch Supreme Court underscored the strength of this doctrine by ruling in *Philips v. Postech*\(^{13}\) that if a Dutch court has jurisdiction it generally can issue a cross border injunction and that there was no need to apply restraint, for instance in case of preliminary injunctions. In the *Philips*-judgment, the Dutch Supreme Court reversed a decision of the Court of Appeals of The Hague that had applied such restraint in connection with a preliminary injunction for patent infringement against Swiss and Taiwanese defendants.

When granting a cross border injunction, a court will have to apply the applicable national law of the place of the infringement, given the *lex loci delicti* or *lex loci protectionis* rule. That explains why cross border injunctions have been granted mostly in patent cases. First of all, because European patent law is to a large extent unified law under the European Patent Convention – that provides unified rules on validity and scope of protection, the two main issues in any patent case. Second, technology is not perceived differently by users in different markets or speaking different languages. As a result thereof, a finding of infringement will not be biased by national languages or market conditions as opposed to what may be the situation with regard to trademarks or copyrights.\(^{14}\)

That national courts may have cross border jurisdiction with regard to infringements of IPRs has since the *Lincoln*-case been an established principle of Dutch private international law. One can also note that prior to the *Lincoln*-judgment by the Dutch Supreme Court similar judgments had already been rendered during a number of years by lower Dutch courts. Therefore, the *Lincoln*-ruling as such did not bring new Dutch private international law but basically confirmed lower court precedents.

Since the *Lincoln*-case, the Benelux Court of Justice has also embraced the concept of cross border jurisdiction. The Benelux Court of Justice has jurisdiction in trademark and design matters that are subject to a multi-jurisdictional unified law for the three Benelux countries (Belgium, The Netherlands and Luxembourg). In its 1993 *Barbie*-ruling\(^{15}\) the Benelux Court found that no rule of Benelux law opposed the granting of a cross border injunction by a national court in case of infringement of a Benelux trademark.

\(^{13}\) IEPT20040319, HR, *Philips v. Postech*.

\(^{14}\) In a recent judgment in *Safeway v. Kedge*, the District Court at The Hague did however, deny cross border relief in a patent case because the national patent law differs with regard to, for instance, the use of the prosecution history and the potential scope of allowing a doctrine of equivalence. The court took the position that it needed to be briefed by the parties on the status of these issues under the relevant national patent laws. Before this judgment, it was generally assumed that since all jurisdiction need to apply article 69 of the European Patent Convention, any subtle differences as to how this was actually done under national patent laws could be ignored. See: IEPT20100310, Rb Den Haag, *Safeway v. Kedge*.

\(^{15}\) IEPT19930326, BenGH, *Barbie*. 
One year later, the Benelux Court found in its Renault-judgment that the granting of a cross border injunction for the entire Benelux actually is the default rule. Consequently, in cases where the injunction is not expressly limited to only the national jurisdiction of the national court issuing the injunction, the injunction has by operation of law Benelux wide effect.16

More important is that as a matter of European Union law it also has become an established principle that courts of a Member State may issue a cross border injunction in case of an infringement of one of the Community IPRs that were introduced since the ‘90s for community trademarks, community designs and community plant variety rights. All three EU-regulations contain a regime that provides that the national courts that are designated as community courts for purposes of the respective Community IPR shall have jurisdiction in respect of acts of infringement committed or threatened within the territory of any of the Member States, if that court has jurisdiction because it is the home court of the defendant.17

Below we will concentrate on the specific jurisdictional regimes and the extent to which they may provide for cross border jurisdiction. In that context we will look at European Union law under the Brussels Regulation – which is applicable when a defendant is domiciled in a Member State – as well as Dutch national private law rules, which national rules are relevant when the Brussels Regulation does not apply.

3.2. General Rule: Defendant entitled to a ‘Home Game’

Article 2 of the Brussels I Regulation provides the general rule of jurisdiction as emphasized by the ECJ in its case law. Starting point is that a defendant is entitled to a ‘home game’. For that reason Article 2 provides that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. The same rule is provided for in Article 2 of the Dutch Statute on Civil Procedures, in which it is provided that Dutch courts have jurisdiction in case the defendant has its domicile in The Netherlands.

Article 3 of the Brussels I Regulation underscores this leading principle by providing that persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in the Regulation.

As a matter of Dutch private international law, the court of the defendant’s domicile, having jurisdiction on the basis of Article 2 of the Brussels I Regulation, has cross-border jurisdiction over that defendant. This follows, among others, from the ruling of the Dutch Supreme Court in Philips

16 IEPT19940613, BenGH, Renault v. Reynolds.
17 Art. 98(1)(a) Community Trademark Regulation; Art. 83(1) Community Design Regulation; Art. 101(2) Community Plant Variety Rights Regulation.
v. Postech of 2004\textsuperscript{18} and, for instance, the judgment of the Court of Appeals at The Hague in EGP v. Boston Scientific.\textsuperscript{19}

As a matter of European law, the same principle applies under the three Community IPR Regulations for community trademarks, community designs and community plant variety rights. If the competent national court – as a community court – has jurisdiction because it is the court of the domicile of the defendant that court has jurisdiction over infringements (committed or threatened) throughout the entire European Union.\textsuperscript{20}

The European Court of Justice has not directly ruled on the question whether a national court having jurisdiction on the basis of Article 2 of the Brussels I Regulation – or its predecessor, the Brussels Convention – may have cross border jurisdiction. One may perhaps also take the position and probably assume that this question is as such not a matter of European law. The Regulation only provides which particular national court has jurisdiction without necessarily dealing with the actual scope of that jurisdiction. That scope of the jurisdiction is then – unless the Regulation expressly addresses that scope, such as in the context of Article 5(3) or Article 6(1) (see below) – to be regarded as a matter of national law.\textsuperscript{21}

However, one may argue that the European Court of Justice has – indirectly – already ruled on the possibility that the court of a defendant’s domicile may have cross border jurisdiction under Article 2 of the Brussels Convention. In the Shevill-case\textsuperscript{22} the ECJ had to answer questions with regard to the special jurisdiction of Article 5(3) of the Brussels Convention. The case concerned a publication by France Soir, which publication also had a limited distribution in the United Kingdom, where France Soir was sued by the plaintiffs. In that case the ECJ ruled that the UK courts only had jurisdiction over France Soir with regard to the damages that had actually been suffered in the United Kingdom. However, the court also expressly ruled that the plaintiff always

‘has the option of bringing his entire claim before the courts either of the defendant’s domicile or of the place where the publisher of the defamatory publication is established’.

\textsuperscript{18} IEPT20040419, HR, Philips v. Postech en Princo.
\textsuperscript{19} IEPT19980423, Hof Den Haag, EGP v. Boston Scientific.
\textsuperscript{20} Art. 98(1)(a) Community Trademark Regulation; Art. 83(1) Community Design Regulation; Art. 101(2) Community Plant Variety Rights Regulation.
\textsuperscript{21} An alternative approach might be to assume that European law might as such be opposed to national courts having cross border jurisdiction, so that any judgment in which cross border jurisdiction might be assumed could not benefit from Regulation in that it has to be enforced in other Member States. However, given the fact that the three Community IPR Regulations do grant cross border jurisdiction with regard to infringements if the court is the home court of the defendant, it seem hard to imagine that the principle of cross border jurisdiction might be regarded as a violation of European law. If anything, cross border jurisdiction has been acknowledged to facilitate efficient legal procedures with the single common market.
\textsuperscript{22} IEPT19990307, HvJEG, Shevill v. Presse Alliance.
Although this case did not concern infringement of IPRs and also did not actually concern the scope of Article 2 of the Brussels Convention as such, it does seem to indicate that the European Court of Justice does favor broad jurisdictional authority for the defendant’s home court.

3.3. Special Jurisdiction: Court of the Place of the Harmful Event

In case of a tort, a defendant can also be sued before the courts of the place where the harmful event occurred or may occur. This is provided for in Article 5(3) of the Brussels I Regulation and in Article 6(e) of the Dutch Statute on Civil Procedures.

With regard to Article 5(3) of the Brussels I Regulation, or more in particular Article 5(3) of the Brussels Convention, the case law of the ECJ has learned that there may be multiple locations that can qualify as the place where the harmful event occurs. Both (i) the place of the event giving rise to the damage as well as (ii) the place where the damage occurred may qualify in this regard and consequently the courts of each of these locations may have jurisdiction under Article 5(3). This was first decided in the context of environmental torts and further developed with regard to defamatory publications in the Shevill-case.

There are a number of cases by Dutch courts in which it is held that when a court’s jurisdiction is based on Article 5(3) of the Brussels I Regulation, that court does not have cross-border jurisdiction with regard to infringements of IPRs. This view is also in line with the system as incorporated in the three community regulations for community trademarks, designs and plant variety rights respectively. For instance, Article 98(2) of the Community Trademark Regulation provides that a community trademark court whose jurisdiction is based on Article 97(5) – the equivalent of Article 5(3) of the Brussels I Regulation – does have jurisdiction only in respect of acts committed or threatened within the territory of the Member State in which that court is located.

23 After a few judgments in the nineties in which cross border jurisdiction on the basis of Art. 5(3) was denied as well as awarded, the District Court at The Hague has from DSM v. Orffa of 29 September 1999 [IEPT19990929, Rb Den Haag, DSM v. Orffa] consistently ruled that Art. 5(3) of the Brussels Convention does not allow for cross border jurisdiction. See, for instance the District Court at The Hague in Acco v. Noble of 27 February 20008 [IEPT20080227, Rb Den Haag, Acco v. Noble] and in Vacu Products v WMF of 24 March 2010 [IEPT20100324, Rb Den Haag, Vacu Products v. WMF].

24 Art. 98(2) Community Trademark Regulation (CTM-Regulation); Art. 101(3) Community Plant Variety Rights Regulation (CPVR-Regulation) and Art. 83(2) Community Design Regulation (CD-Regulation).

25 The view that cross border jurisdiction is lacking in case of article 5(3) is usually based on the Shevill-judgment of the ECJ. In Shevill the European Court of Justice ruled that the courts of the places where the damage only was suffered – as opposed to the place giving rise to the damage – only had jurisdiction with regard to the
To the extent jurisdiction because of the place of the harmful event is based on Dutch law only – i.e., in case the Brussels I Regulation does not apply – the judgment of the Dutch Supreme Court in Philips v. Postech of 2004 learns that a Dutch court will nevertheless have cross border jurisdiction, in spite of the approach by Dutch courts with regard to Article 5(3) of the Brussels Regulation. However, the Philips-judgment concerned a case that was decided under Dutch private international law as it stood prior to the implementation of the New Dutch Statute on Civil Procedure in 2002. The new statute basically did away with old private international law rules, such as outdated “exorbitant jurisdiction provisions” under which Dutch courts might have jurisdiction simply when there is a Dutch plaintiff. The new code of 2002 aimed at implementing the principles of the Brussels I Regulation. Although Philips v. Postech does not contain any reservation in this regard, it does not seem unthinkable that Dutch private international law as its stands under the new code as from 2002 will eventually turn out to be different with regard to the broad view on cross border jurisdiction as still taken in the Philips-judgment of 2004.

3.4. Special Jurisdiction: Court of Co-Defendant’s Domicile

Article 6(1) of the Brussels I Regulation (and the Brussels Convention) deals with the situation that there are multiple defendants in ‘one case’. Article 6(1) of the Brussels Convention simply stated that in case of a number of defendants, a defendant can be sued in the State where one of them is domiciled. The ECJ narrowed this broad language down in its judgment of 1988 in Kalfelis v. Schroder, where it required that there must be a ‘connection’ between the claims against the various defendants. That connection must be of

’such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting form separate proceedings’.

This case law has been codified in Article 6(1) of the Brussels I Regulation, which clause now expressively requires that the claims are so closely connected damage in their territory. However, In Shevill, the ECJ also ruled that the court of the place of the event giving rise to the damage, has jurisdiction to hear the action for the total damages caused by the unlawful act. It does not seem clear from Shevill whether this view is taken because the ECJ expressly found in Shevill that the place giving rise to the damage in case of a libelous publication is the same as the domicile of the publisher. Therefore the jurisdiction with regard to all damages as mentioned in Shevill can be seen as (i) based on Art. 2 or (ii) as based on the place giving rise to the harmful event within the meaning of Art. 5(3). It therefore does not seem that it necessarily follows from Shevill that jurisdiction based on Art. 5(3) does indeed not allow for cross border rulings.

26 IEPT20040419, HR, Philips v. Postech and Princo.
that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

The Court of Appeals at The Hague has used Article 6(1) of the Brussels Convention as a basis for cross border jurisdiction in its 1998 judgment in EGP v. Boston Scientific. In that case the Hague Court of Appeals primarily reversed earlier precedents in which Article 6(1) was used as a platform for cross border jurisdiction against any group of defendants that infringed in their respective territories national patents that are part of the same “bundle of national patents” originating from a European patent as granted under the European Patent Convention. The Court of Appeals basically found that Article 6(1) did not allow for cross border jurisdiction simply because certain defendants infringed the same European bundle of patents. By dismissing that line of reasoning, the Court of Appeals at The Hague effectively reversed a great number of cases in which this was used as the basis for establishing cross border jurisdiction of Dutch courts in European patent cases. However, the Court of Appeals did not completely do away with Article 6(1) as a basis for cross border jurisdiction against a group of international defendants. It allowed cross border jurisdiction if the defendants formed part of a group of companies and that group markets identical products in different national markets and acts on the basis of a joint plan. In such a situation, the Court of Appeals took the position that the court of the domicile of the ‘head office’ of that group, which court would have jurisdiction against that company on the basis of Article 2, also had cross border jurisdiction against all members of the group on the basis of Article 6(1). This doctrine as introduced by the Court of Appeals at The Hague has become known as the spider in the web doctrine.

Whether this spider in the web doctrine was indeed valid as a matter of European law was not ruled upon by the European Court of Justice until its Roche v. Primus judgment of 2006. In the Roche-judgment the ECJ clearly did away with the application of spider in the web doctrine with regard to European patents. However, it seems a mistake to believe that Roche v. Primus made the spider in the web doctrine completely obsolete.

In Roche v. Primus, the ECJ ruled that it is not sufficient for judgments to be irreconcilable under Article 6(1) that there can be a divergence in the outcome of the dispute. For Article 6910 to apply such a divergence should arise in the context of the same situation of law and fact. The European Court was of the opinion that in case of a European (bundle) patent with infringement proceedings involving a number of companies established in various contracting states in respect of acts committed in one or more of those states, the existence of the same situation of fact cannot be inferred, since the defendants are different and the infringements they are accused of are committed in different Contracting States and are therefore not the same.

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28 See footnote 4.
The Court argued that possible divergences between decisions therefore would not arise in the context of the same factual situation. In addition, the ECJ also observed that it is clear from the Articles 2(2) and 64(1) of the European Patent Convention that such a patent is governed by the national law of each of the Contracting States for which it has been granted. It is against this background that the ECJ ruled that any divergences between decisions given by national courts would also not arise in the context of the same legal situation.

This decision has been criticized in patent circles because the ECJ does not seem to properly appreciate that under Article 2 of the European Patent Convention the so-called ‘bundle of national patents’ under a granted European patent is for all practical purposes subject to unified European law as provided for in that convention with regard to most of the topics that really matter in patent infringement litigation. Article 2(2) EPC does provide that a European patent shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the national patent granted by that State, but it adds that such is only the case ‘unless this Convention provides otherwise’. Given that the European Convention fully governs all issues with regard to both the validity of European patents as well as its scope of protection, the application of national law is effectively limited to issues of ownership and acts of infringement. Therefore, the ECJ’s finding that these various national courts deciding on the national parts of a European patent – as it is to be called as Article 2(1) EPC provides – do not deal with the same legal situation is not necessarily very convincing. As a matter of European Union law, however, Roche v. Primus seems to be the final word and seems to mean that cross border jurisdiction based on Article 6(1) is not possible in case of a European patent.

Nevertheless, in cases where the Brussels Regulation does not apply – i.e., in case of non-EU-defendants - national law may take a different view. Therefore, it might be possible that the Dutch Supreme Court does perhaps not come to the same findings as the ECJ on the issue of ‘the same legal situation’ in case of an infringement of a European patent in different European countries.

The Court of Appeals at The Hague also made it clear in its Bacardi v. Mad Bat-judgment of 2007 that a close reading of Roche v Primus learns that there still is room for the spider in the web-doctrine in the context of the three Community IPRs for trademarks, designs and plant variety rights. Under point 34 of the Roche-judgment the ECJ does seem to conclude that the factual situation may be the same in a situation where defendant companies, that belong to the same group, have acted in an identical or similar manner in accordance with a common policy elaborated by one of them. Contrary to European patents granted under the European Patent Convention, the Community IPRs granted under the applicable Community Regulations do

29 IEPT20070823, Hof Den Haag, Bacardi v. Mad Bat.
create truly single, supranational IPRs that are effective throughout the entire European Union. That also seems to justify the conclusion that this results in the same legal situation in case such defendants infringe a single unitary Community IPR in various Member States. That means that that both requirements for ‘irreconcilable judgments’ – the same factual and legal situation – are met. The Roche-judgment therefore seems to leave room for an itsy-bitsy-spider in that the spider in the web-doctrine has survived with regard to Community IPRs.

3.5. **Special Jurisdiction: Provisional Measures Only**

Article 31 of the Brussels I Regulation – as well as Article 24 of the Brussels Convention – provides that a court may grant provisional relief if its national laws so allow, even if the courts of another State do have jurisdiction with regard to the proceedings on the merits.

Dutch law allows for this special jurisdiction with regard to provisional measures. Article 13 of the Dutch Statute on Civil Procedure states that jurisdiction with regard to preliminary or conservatory measures cannot be refused on the sole ground that Dutch courts do not have jurisdiction with regard to the case on the merits.

Confirming earlier precedents of the District Court at The Hague, the Court of Appeals ruled in EGP that any jurisdiction that is based on Article 24 of the Brussels Convention is limited to that court’s national territory. As a matter of European law this special jurisdiction that is limited to provisional measures, is therefore regarded as not giving a platform for cross border jurisdiction.

However as matter of Dutch law – i.e., in situation where European law does not apply – the judgment of the Dutch Supreme Court of 2004 in Philips v. Postech learns that this type of jurisdiction may nevertheless allow cross border measures.

3.6. **Exclusive Jurisdiction: Validity of Registered IPRs**

In addition to the special jurisdiction rules as provided by Article 5(3) and Article 6(1), Article 22(4) of the Brussels I Regulation provides for exclusive jurisdiction of national courts. It states that in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place shall have exclusive jurisdiction, regardless of domicile. Article 16(4) of the Brussels Convention contains the same provision. The mandatory character of this exclusive jurisdictional rule is underscored by the circumstance that Article 25 of the Brussels I Regulation provides that if a court is confronted with a claim which is principally
concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall of its own motion declare that it has no jurisdiction.

As to the scope of this exclusive jurisdiction regime, the ECJ ruled in its judgment of 1983 in *Duijnstee v. Goderbauer* that the term proceedings concerned with the registration or validity of patents is limited to proceedings where the validity of the right or the existence of the registration is at issue. It does not apply when there is a dispute about who is entitled to the patent as was the matter in the *Duijnstee*-case. There the dispute was between an employee and the receiver in the bankruptcy of his employer concerning the entitlement to the patent rights for inventions made under an employment contract. In that judgment the ECJ also spoke of the restrictive nature of this provision, referring to the *Jenard*-report on the Brussels Convention.

Since validity of a patent, trademark or design is an issue in almost all infringement cases, if only as a means to ring fence scope of protection, the question arises what the impact of this exclusive jurisdiction is when validity is raised as a defense in cross border infringement proceedings. Does it mean that the infringement court no longer has jurisdiction with regard to those jurisdictions for which validity is made an issue or does it only mean that the infringement case can still proceed as long as it only gives a preliminary estimate of the chances of success of the invalidity defense?

In its *EGP v. Boston Scientific*-judgment of 1998, the Court of Appeals at The Hague had found that infringement and validity are indeed inseparable, since infringement of an invalidated patent – which invalidation also has retro-active effect – does not seem feasible. Therefore, in case of proceedings on the merits, a court will have to apply restraint if confronted with a nullity defense that cannot be brushed aside as ‘frivolous’. As a general rule, a court will then have to stay the infringement proceedings and await the outcome of the foreign validity proceedings, according to the Court of Appeals in *EGP*. The court also made it clear that it did not applaud this result, but that it was of the opinion that an amendment of the Convention would be required to be able to achieve another result. The Court also indicated that in the context of provisional measures less restraint was required. In that particular case the The Hague Court came to the conclusion that it could not beforehand rule out that the nullity arguments might be successesul, so that it had to deny the cross border relief requested.

In its *Roche v. Primus*-judgment of 2003 the Dutch Supreme Court found that a Dutch court, having cross border jurisdiction with regard to infringement, can still rule on infringement even though there might be serious indications as to the invalidity of the patents concerned. In that *Roche*-case, the Dutch Supreme Court did not even find it necessary to submit

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30 IEPT19831115, HvJEG, *Duijnstee v. Goderbauer*.
32 IEPT20031219, Hoge Raad, *Roche v. Primus*.
questions for a preliminary ruling to the ECJ on this issue, even though it did submit questions to the ECJ on the implications of Article 6(1).

On the same day as its judgment in the Roche-case, the ECJ also rendered judgment in GAT v. Luk.\(^3\) In that judgment, the ECJ made it very clear that the impact of Article 16(4) of the Brussels Convention is that when nullity is an issue a foreign court ruling on infringement has to step on the brakes. The provision is to be interpreted as meaning that the rule of exclusive jurisdiction concerns all proceedings relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or only a defense. To allow a foreign infringement court to establish, indirectly, the (in)validity of the IPR at issue would undermine the binding nature of this exclusive rule of jurisdiction and circumvent its mandatory nature. In addition, the alternative would have the effect of multiplying the number of courts having jurisdiction and undermine the predictability of the rules of jurisdiction and consequently undermine the principle of legal certainty. Finally, to allow decisions in which other courts than the courts of the state in which the IPR is registered rule indirectly on the validity of that right would also multiply the risk of conflicting decisions.

In GAT v. Luk the ECJ did not indicate exactly what the infringement court has to do when validity of a foreign registered IPR is raised. It its second judgment in Roche v. Primus of 30 November 2007, the Dutch Supreme Court found that the consequence of the issue being raised is not that the infringement court loses its jurisdiction as to the foreign infringements, but that it has to stay the infringement proceedings and should refrain from judgment until the competent foreign Court has ruled on validity. It also indicated that once this issue is raised the plaintiff should be given the option to amend his claims, so that by dropping the cross border questions, he may create jurisdiction for the infringement cases with the relevant national courts. Otherwise these national courts would not have jurisdiction since under the *lis pendens* rule – see below – the same case was already pending before another court.

3.7. **European Litigation Strategies: Mind the Torpedo’s**

In cross border European IP infringement cases, it will of course be crucial for both the plaintiff as well as the defendant to have the case tried in a court that is likely to be most favorable to their point of view. A plaintiff will have on his shopping list any jurisdiction (i) of which the national laws allow for cross border relief, (ii) in which proceedings are relatively fast and not too expensive, and (ii) in which courts tend to be friendly to IPRs. It will come as no surprise that the potential defendant has a list that contains the same items, but is looking for the exact opposite. This has on occasion resulted in situations where the plaintiff and the defendant ended up in a race to the

\(^3\) IEPT20060713, HvJEG, GAT v. Luk.
court house of their preference, in order to take advantage of the *lis pendens* rules.

The *lis pendens*-rule of Article 27 of the Brussels I Regulation – and Article 21 of the Brussels Convention – provides that if a case involving the ‘same cause of action’ and the ‘same parties’ is already before a court, any court that will be involved at a later stage shall of its own motion stay its proceedings, until such time as the jurisdiction of the first court is established. The consequence of this regime is that if one commences litigation to obtain a cross border judgment, like a cross border declaratory judgment of non-infringement, before one court any other court that is involved at a later date to grant an injunction in an infringement case must stay its proceedings while the jurisdiction of the first court is still to be established. If one then chooses to start litigation in a jurisdiction where the ‘wheels of justice’ grind at a slow pace, one can effectively wreck an offensive strategy that would take advantage of the possibilities to obtain preliminary cross border relief at short notice, as would for instance be possible in a jurisdiction like The Netherlands. Such defensive proceedings that have as their primary objective to wreck any offensive litigation strategy by the IPR proprietor are referred to as ‘torpedo’s’. Italy and Belgium have in the past gained some notoriety in this respect, as jurisdictions were the fact that the courts were faced with an overload of cases could be taken advantage from. The cynical observation is that the fact that the court before which the so-called torpedo is launched will in all likelihood decline cross border jurisdiction under its national law is irrelevant, provided that it will take a long time before that this is finally decided. During that entire period all other foreign cases will then simply have to be put on hold and that is the exact aim of these torpedo-cases.

Since the torpedo-strategy seems to amount to a clear abuse of rights, it may be tempting to try to dismantle the torpedo by allowing the court that is seized at a later stage for the infringement case to go ahead if, for instance, it is beyond dispute that the first court lacks jurisdiction. However, the judgments of the ECJ in *Overseas Union* (27 June 1991)34 and *Gasser v. Missat* (9 December 2003)35 make it clear that there is little ‘wiggle room’ in this regard. The one exception the ECJ did make in *Gasser v. Missat* was with regard to exclusive jurisdiction. Therefore, if the court first seized is to rule upon validity or registration of a foreign registered IPR, a later seized court that has exclusive jurisdiction under Article 22 of the Brussels I Regulation does not have to abide by the *lis pendens* rule with regard to the validity questions brought before it. This was also applied by the District Court at The Hague in its *Nooteboom*-judgment of 2007.36

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34 IEPT19910621, HvJEG, *Overseas Union*.
35 IEPT20031209, HvJEG, *Gasser v. Missat*.
36 See the The Hague District Court: IEPT20070926, Rb Den Haag, *Nooteboom v. Faymonville*. 
As a matter of Dutch law, the *lis pendens* rule as laid down in Article 12 Rv is less strict than its European counterpart. It provides that when a case is pending before a foreign court whose judgment can be recognized or enforced in The Netherlands, a Dutch may stay its proceedings. Therefore, this is not a mandatory regime, but a regime that gives discretionary room to the Dutch courts. In such cases torpedo’s can therefore be dismantled more easily.

### 3.8. Conclusion Cross Border Jurisdiction

After the 1989 *Lincoln*-judgement of the Dutch Supreme Court, The Netherlands experienced a Bonanza of European patent infringement cases, taking full advantage of (i) the cross border relief awarded by the District Court at The Hague and the The Hague Court of Appeals\(^\text{37}\) combined with (ii) the fast track proceedings that the District Court made available and – to top it of – (iii) the relative broad scope of protection granted by Dutch Courts. Patent owners where rushing to get their cases on the docket not only to take advantage of these opportunities but also in fear of the threat of the potential defendant taking a counter-initiative and commencing torpedo-proceedings in jurisdictions that might frustrate the whole case for a number of years.

Following the *EGP v. Boston Scientific*-judgment of the Court of Appeals of 1998 – introducing the *spider in the web*-doctrine – those hectic days already quieted down substantially. However, it took the rulings of the European Court of Justice that finally came with the judgments of 2006 in *GAT v. Luk* and *Roche v. Primus* to bring things back to normal. The combined effect of the broad impact of the regime of exclusive jurisdiction with regard to validity as determined in *GAT v. Luk* and the restrictive reading of the possibilities to combine cases against multiple defendants as indicated in *Roche v. Primus*, has – as a practical matter – resulted in a dramatic downturn in the number of cross border European IPR infringement cases being brought before Dutch Courts.

However, the possibility to commence such cases still exists and as the The Hague Court of Appeals has made clear in its judgment in *Bacardi v. Mad Bat*, the three Community IPRs – for trademarks, designs and plant varieties – are an area where the *spider in the web*-doctrine can still play a role (as an *itsy bitsy spider*).

\(^{37}\) The courts at The Hague have exclusive jurisdiction in patent infringements litigation.
4. Applicable Law: IPR Enforcement - Rome II Regulation

4.1. International Enforcement of IPRs

In the context of international enforcement of IPRs the following questions arise in particular: (i) which law applies to the alleged infringement of an IPR, (ii) which law applies to the sanctions that may be available once an infringement is determined. International enforcement law assumes jurisdiction. As discussed in the previous chapter a Dutch court can have cross border jurisdiction. Jurisdiction can also be present in case the parties have agreed to arbitrate an international dispute. Once the international jurisdiction of a judicial panel is established the question needs to be addressed which law has to be applied by that panel to the alleged violation of rights in the territories over which the court has assumed jurisdiction.

When it comes to determining which law applies to an infringement of an IPR, it seems that the Rome II Regulation that came into effect on 11 January 2009 will decide most, if not all, of the issues that can be thought of. Article 8 of the Rome II Regulation\(^\text{38}\) has introduced a special regime for the law applicable to non-contractual obligations arising from an infringement of intellectual property rights. Shortly put, Article 8 states that (a) the law of the country for which protection is claimed – the \textit{lex loci protectionis} – shall apply, and that (b) parties have no freedom of choice with regard to the applicable law.

The application of Rome II is not limited to situations in which one or more parties is domiciled in the European Union or the event giving rise to the claim is situated within the European Union. The applicability of Rome II is basically tied to a court of an EU Member State\(^\text{39}\) having jurisdiction.\(^\text{40}\) Consequently, as of 11 January 2009, Rome II replaces national conflict of law rules, such as the Dutch Conflict of Laws Tort Act of 2001 (\textit{Wet conflictenrecht onrechtmatige daad}).

Article 3 of Rome II indicates that the applicable law under Rome II is not limited to the laws of EU Member States only, but that it subscribes to what is referred to as ‘universal application’:

‘Any law specified by this Regulation shall be applied whether or not it is the law of a Member State’.


\(^{39}\) Art. 1(4) of Rome I: For the purposes of this Regulation, ‘Member State’ shall mean any Member State other than Denmark.

\(^{40}\) Kramer 2008, p. 417. Recitals 6 and 7 mention that the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, for certainty as to the law applicable and the free movement of judgments under the Brussels I Regulation and the Rome II Regulation.
4.2. Law Applicable to Infringement of IPRs – Lex Protectionis

Article 8 of Rome II concerns infringement of ‘intellectual property rights’. That leads to the obvious question what the actual scope of that term is in the context of this Regulation. Recital 26 sheds some light on this issue. It states that

‘for the purposes of this Regulation, the term “intellectual property rights” should be interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights’.

This ‘definition’ does not strike one as being very exact, but that should probably be seen as an indication that the term should not be interpreted too narrowly. Further guidance can probably be found in the fact that the European Community is a signatory to the ‘Agreement on trade-related aspects of intellectual property rights’ – better known as TRIPs. Rights that are within the scope of TRIPs include the IPRs covered by the Paris Convention (patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin), the Berne Convention (copyright), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and the Treaty on Intellectual Property in Respect of Integrated Circuits. In addition, it seems clear that the unitary Community IPRs are within the scope of Rome II, if only because Article 8(2) contains a special rule for these rights. That pretty much covers most rights that are generally considered to be IPRs, but there still will be room for discussion.

Most national laws have (sui generis) forms of protection for certain subject matter that may be regarded as intellectual property. This is, for instance, the case with rights related to (i) the use of a portrait or likeness of (well-known) persons (also known as the right of publicity), (ii) non-original writings and (iii) slavish imitations or passing off. One may question whether such rights or forms of protection do qualify as IPRs in the context of Rome II.

Another kind of borderline legal regime concerns the protection of (iv) technical ‘know-how’ or trade secrets in general. The protection granted to trade secrets is very much a matter of national law, and the actual protection available differs from country to country. Since these various ‘border-line’ rights and forms of protection probably may also qualify as ‘unfair competition’, this qualification issue does not seem critical in that it would mean that such obligations might be outside the scope of Rome II altogether. However, the issue seems not to be of only academic interest, since the regime that applies to acts of unfair competition under Article 6 does substantially differ from the regime that applies to IPRs under Article 8.

See also: Van Engelen 2008, p. 440-448.
What strikes one as odd is that the regime of Article 8 of Rome II provides only for a general rule to determine the law that applies to an infringement of an IPR: the *lex loci delicti* for Community IPRs and the *lex loci protectionis* for all other IPRs. There is no set of additional sub-rules that may further refine the choice of law process for IPRs. On the contrary, Article 8(3) of Rome II expressly excludes the possibility for parties to derogate from the law that is applicable as a result of Article 8(1) or (2). This effectively means that the choice of law process for infringements of IPRs is a one way street without any crossroads or possibility for detours.

Rome II therefore does not allow for any flexibility with regard to determining the law that applies to non-contractual obligations arising from an infringement of IPRs. Consequently the value of predictability and certainty has displaced the other values that should also be taken into consideration for a choice of law process ‘such as the need for sensible, rational, and fair, decisions in individual cases’ as Symeonides observes.42

4.3. *The Multiple Jurisdiction Infringement under Rome II*

One of the clear problems facing litigants with regard to infringements of IPRs is that the alleged infringements may occur in numerous countries simultaneously. In this regard, one only has to think of an internet publication or the distribution of a product throughout the entire, single European market.

Application of the *lex loci protectionis* will mean that the national IP laws of all 27 Member States will have to be applied. It seems obvious that such is nothing less than a nightmare for the parties, whether they are plaintiffs or the defendants. However, it seems that both the plaintiff and the defendant will just have to live with this nightmarish scenario. Article 8(3) of Rome II states that ‘the law applicable under this article may not be derogated from by an agreement’. As a result, the parties to an IPR infringement case are not allowed to choose the law that will apply to their dispute. The same prohibition on choice of law is provided for in Article 6 with regard to non-contractual obligations arising out of acts of unfair competition. Party autonomy is denied as neither pre-tort nor post-tort choice of law agreements are allowed.

The reason to block party autonomy is not directly clear. The Explanatory Memorandum of the Commission simply states that ‘Freedom of will is not accepted […] for intellectual property, where it would not be appropriate’. Why party autonomy would not be appropriate for IPRs, is not explained. The basis for this exclusion can probably be traced back to the point of view of the Hamburg Group that party autonomy should not be allowed ‘where public interests are or may be involved’.

42 Symeonides 2008a, p. 16.
However, the mere fact that public interests are involved, and the parties may therefore not be completely free to agree as they please, does not seem to be a convincing reason to ban party autonomy altogether. I fail to see why the public interests involved cannot properly be served by restraining party autonomy by competition (anti-trust) law and public policy exceptions. To the extent that unequal bargaining power between the parties is feared, again competition law (abuse of a dominant position) and general principles of contract law seem to be able to provide for the necessary ‘checks and balances’.

One should not lose sight of the fact that in case of an (allegedly) infringing activity throughout the entire, single European market, the lex loci protectionis rule will result in the laws of 27 Member States being applicable. A total ban on a freedom of choice for the parties, forces the litigants to fight a ‘27-headed-lex-loci-protectionis-dragon’, which will require gruelling legal fees and will be a true nightmare for the parties (if not for the judge(s) that have to render judgment). I fail to appreciate that ‘public interests’ cannot allow for at least a post-tort agreement between the parties to manage their conflict and make it possible for them to agree on a practical and efficient way to resolve their conflict and manage their costs. That also qualifies as a public interest to me. One wonders what actual problem is supposed to be solved by this absolute ban on party autonomy in the absence of any known aberrations in case law.

Given that Rome II applies irrespective of the domicile of the parties or the location of the place giving rise to the non-contractual obligation, the impact of this mandatory regime for IPRs is broad. Once a tribunal within the EU has jurisdiction, Rome II is to be applied. Consequently is also applies to litigation before a Dutch court with regard to a infringement of for instance a copyright both in The Netherlands, where the allegedly infringing goods may have been marketed, as well as in China, where these goods may have been produced. In such a case the litigants will not have to option to agree to have Dutch law apply to both the alleged infringements in The Netherlands and in China, if only to provide for an efficient regime to have their dispute settled in a cost effective way.

This approach was taken by and at the initiative of the Dutch District Court at Zutphen of 3 March 2010, with regard to acts committed prior to the date of application of Rome II. This approach will not be available under the Rome II regime.

4.4. Scope of Applicable Law: Liability, Remedies and Evidence

The national law that pursuant to Article 8 applies to an IPR infringement does not only apply to the infringement as such but also to the damages and remedies that may be available because of the infringement.
Article 15 of Rome I deals with the scope of the applicable law and lists that the applicable law shall govern in particular the following:

(a) the basis and extent of liability, including the determination of liable persons;
(b) the grounds for exemption from liability, any limitation of liability and any division of liability;
(c) the existence, the nature and the assessment of damage or the remedy claimed;
(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
(f) persons entitled to compensation for damage sustained personally;
(g) liability for the acts of another person;
(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

The effect is that most, if not all, issues of liability are governed by the lex loci protectionis or the lex loci delicti, respectively.

Given that Article 8(3) of Rome I expressly provides that the law applicable to an IPR infringement cannot be derogated from by party agreement, the result of this regime is that in case of an infringement in multiple jurisdictions, any court that may have cross border jurisdiction over one or more defendants will have to apply not only the various national IP laws with regard to the local infringement but also all other provisions of that applicable foreign law with regard to liability, damages and available remedies. This will mean that in a lot of cases it will probably be of little advantage to try to concentrate any multiple jurisdiction IPR infringement with one court because the efficiency advantages will be limited at best.

Article 16 of Rome II makes one exception to these rules. Provisions of the law of the forum which are mandatory irrespective of the law otherwise applicable to the non-contractual obligation, shall not be set aside.

Article 22 of Rome II deals with the burden of proof as an issue that may have a material effect on the chances in litigation. Article 22(1) provides that rules of the applicable law which raise presumptions of law or determine the burden of proof shall also apply. In addition, Article 22(2) states that acts intended to have legal effect may be proven by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum. All in all, the applicability of the law of the forum therefore seems limited.
4.5. Conclusion Applicable Law to IPR Infringement

It seems that Rome II provides a major set back with regard to any efforts to try to provide for efficient and cost effective ways to act against infringements of IPRs in multiple jurisdictions by trying to concentrate such cases in one court that may have cross border jurisdiction. Given the immaterial nature of the objects protected by IPRs and given the ease with which multiple infringements can be a reality, the regime of Rome II does not support efforts to streamline the enforcement of IPRs and to support IPR owners in their fight against infringements and counterfeit products.

As I stated before,\(^4\) the rigid and inflexible IPR regime of Rome II does not seem to be warranted by any major issues that need to be fixed with regard to multiple jurisdictional IPR infringements and cross border litigation. If there is no real problem that needs fixing or – if there would be such a problem – the proper solution has not fully matured, a wise legislator will allow for flexibility, so that courts can fine-tune the solution and properly balance between conflicting interests. Good legislation should only give a rigid body of law, if the subject matter concerned has been fully explored and the law has been fully developed. This is certainly not true today for issues of applicable law to international IPR infringements, which means that any legislation concerning this subject matter that does not provide for (some) flexibility, is 'bad law' by definition.

The fact that the first draft of Rome II did not contain any provisions for IPRs, indicates the absence (i) of the perception that there was a problem or (ii) of a clear picture of the optimal solution. When Article 8 was included at a later stage, the ambition was not to create new law, but simply to codify 'the universally acknowledged principle of the lex loci protectionis', as recital 26 states. The ambition was simply to protect this universally acknowledged principle against the lex loci damni rule that Article 4(1) introduces as the general rule for non-contractual obligations arising out of torts in general. If the lex loci damni would indeed apply to IPRs, such could create the problem that the lex loci protectionis might be set aside.

Because of the poor quality of the end product, one might have hoped that the impact of Rome II is limited to the level of European law only. In that case one could have tried to achieve a more flexible outcome via the route of the various national lex loci protectionis. If the conflict of laws provisions of those applicable national laws have (i) a 'manifestly closer connection' sub-rule for IPR infringements or (ii) allow for a choice of law by the parties, the litigants could then start chopping off a few heads of the dragon – if not all but one – via the private international law rules of the applicable national laws. However, Article 24 of Rome II seems to cut off that escape route by stating that the 'application of the law of any country specified by this Regulation means the application of its rules of law in force in that country

other than its rules of private international law. *Rome II* therefore seems to have preemptive effect.

Against this background, it seems that *Rome II* is probably worse for IPR infringements than simply ‘a missed opportunity’, as Symeonides concludes with regard to *Rome II* as a whole.45 I am afraid that Article 8 of *Rome II* is effectively the equivalent of ‘one step forward and at least one – if not two – steps back’ compared with a situation in which the European legislator would have left these issues to be first further developed by national law and waited for case law to mature.

5. **Applicable Law: IPR Agreements – *Rome I* Regulation**

In the area of private international law that applies to contractual obligations, Dutch private international is also primarily governed by European law. The *Rome I* Regulation – which replaces the Rome Convention of 198046 – does to the applicable law for contractual obligations what the *Rome II* Regulation does for non-contractual obligations.

The default contract with regard to IPRs is a license and therefore I will focus on the law applicable to a license agreement in the following paragraphs.

5.1. **Freedom of Choice**

Contrary to *Rome II*, *Rome I* does not contain specific regimes for IPRs and it basically subscribes to the freedom of contract as the guiding overall principle. Article 3 provides that *a contract shall be governed by the law chosen by the parties*. Article 2 also contains the principle of so-called universal application by stating that *any law specified by this Regulation shall be applied whether or not it is the law of a Member State*.

Article 3 requires that the choice of law shall be made expressly or shall be clearly demonstrated by the terms of the contract or the circumstances of the case. Although this standard seems to provide for a somewhat high threshold, reality seems to be that it is easily met. Most, if not all, license agreements – in particular those in an international setting – seem to contain a choice of law clause. Dutch case law on this topic is therefore almost non-existent.

5.2. **Applicable Law in the Absence of Choice: Franchising**

When a contract does not contain a clear choice of law Article 4 of *Rome I* gives some default rules to determine the applicable law. New – compared

45 Symeonides 2008a. See also: Symeonides 2008b, p. 1741-1800.
with the Rome Convention – is that Article 4 of Rome I starts by giving some clear rules for certain types of contracts, before then spelling out the familiar sub rules that will provide guidance, such as the rule that place of the habitual residence of the party that is required to effect the characteristic performance of the contract (Article 4(2)).

Article 4(1)(e) contains a new default rule that may seem to be of relevance for IPR since it deals with franchising. It provides that a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence. However, recital 17 of Rome I makes it clear that this rule for franchise agreements is driven by the perspective that franchise contracts – as distribution contracts – are regarded to be contracts for services and that this rule for franchise agreements wishes to connect to the special rules of jurisdiction as provided for in Article 5 of the Brussels I Regulation. The service rendered in a franchising contract – as in a distribution contract – is then apparently believed to be situated in the country where the franchisee has his habitual residence. That does indeed seem to be the default situation. However, in case a (master) franchisee’s territory would cover more than one jurisdiction or the franchisee does not have its habitual residence in the territory of the franchise, Article 4(3) may come to the rescue. It provides that where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

Does this rule for franchising give guidance for IPR licenses in general? Given that the European legislator sees franchising as a contract regarding the provision of services – comparable with a distribution relationship – giving franchising such a leadership role for IP licenses does not seem obvious.

However, one must also admit that Dutch law lacks a definition of what a license is supposed to look like even though the Dutch IP legislator does give various rights to licensees vis-à-vis third parties in, for instance, the Dutch Copyright Act, the Patent Act and the Benelux Treaty on Intellectual Property, which governs Benelux trademark rights and Benelux industrial design rights. In practice a license may vary from a mere authorization of what would otherwise be an infringement – what I refer to as a license in a broad sense – to a position in which the licensee does in effect take over the

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47 Recital (17) As far as the applicable law in the absence of choice is concerned, the concept of ‘provision of services’ and ‘sale of goods’ should be interpreted in the same way as when applying Art. 5 of Regulation (EC) No. 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.
role of the proprietor and bears the full economic exploitation risk of the IPR
cconcerned. This is what I refer to as a *license in a narrow sense.*

With the judgment of the European Court of Justice of 23 April 2009 in the
*Falco*-case, it seems clear that an IP license is not be treated as a
franchising agreement. That case concerned a claim for royalties under a
copyright license for sales of video recordings of a concert. The issue was
whether the courts at Wien had jurisdiction. That jurisdiction was assumed
by the first instance court by qualifying the license as the provision of a
service and thereby facilitating jurisdiction under Article 5(1)(b) of the
*Brussels I* Regulation. That clause allows for jurisdiction of the court of the
place where, under the contract, the services were provided or should have
been provided. That first instance judgment was reversed by the
Oberlandesgericht Wien. The Austrian Oberster Gerichtshof then referred the
matter to the ECJ. The ECJ ruled that a contract under which the owner of an
intellectual property right grants its contractual partner the right to use that
right in return for remuneration is not a contract for the provision of services
within the meaning of Article 5(1)(b) of *Brussels I* Regulation.

Recital (7) of *Rome I* learns that the substantive scope and the provisions
of *Rome I* should be consistent with the *Brussels I* Regulation and *Rome II.*
Against that background the question whether licenses may be regarded as
services and whether the rule of Article 4 for franchise agreements is leading
for license seems answered with the *Falco*-judgment of 2009.

5.3. *License: Characteristic Performance – Close Connection*

Article 4(2) of *Rome I* contains as a general default rule that if the contract is
not covered by paragraph 1 that it shall be governed by the law of the
country where the party required to effec t the characteristic performance of
the contract has his habitual residence. Therefore the questions arises what
the characteristic performance of a license is?

Generally speaking and with a view to a license in a broad sense – i.e., a
mere authorization to do what otherwise would constitute an infringement –
it seems that the characteristic performance of a license is the non-enforcement of the relevant IPR by the licensor. However, under Article 4(2)
of *Rome I* that would not mean that the national law under which regime the
license is granted would apply, but that the national law of the habitual
residence of the licensor would apply. Therefore in case of a simple license
for The Netherlands granted by a foreign – i.e., German – licensor, that
foreign – i.e., German – law would apply under Article 4(2) of *Rome I*.

48 Please note, however, that this distinction is not made in Dutch legislation or case
law. It is simply a distinction I make to give direction to the analysis of what a license
should or could entail.

IEPT20090423, HvJEG, *Falco Privatstiftung en Rabitsch v. Weller-Lindhorst*
In case of a license that covers more than one jurisdiction this seems to make sense. It also seems to make perfect sense in case a license effectively makes the licensee the place holder of the IPR proprietor in one or more jurisdictions and in particular if that license is a sole and exclusive license. In that situation – i.e., a license in narrow sense – it seems to make sense that the law of the habitual residence of the licensor will indeed govern that contractual relationship in the absence of a clear choice of law in the license contract. From the licensors perspective that would also make a bundle of licenses with various licensees for different jurisdictions better manageable since they would all be subject to the same law, i.e., the law if his habitual residence. As a default rule Article 4(2) of Rome I seems to play out well in this regard.

The exception may perhaps be the situation in which a license in the sense of a simple authorization is given that only applies to one jurisdiction. In that case – i.e., a license in a broad sense – it may be that the ‘close connection’ – exemption rule of Article 4(3) of Rome I may have a role to play. Article 4(3) provides that where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. With a mere authorization, i.e., a promise not to enforce an IPR, the national law under which that IPR may probably be seen as more closely connected than the law of the domicile of the licensor.

Case law on these topics does not seem to be available in The Netherlands, which can probably be explained by the fact that in most international situations a written contract will exist and such a contract is likely to contain a choice of law clause. The practical implications of the regime of Article 4 of the Rome I Regulation therefore seem limited with regard to IPR licenses.

6. Applicable Law: IPRs as Object of Property

In the context of IPRs as an object of property, the following issues seem to be of particular relevance: (i) which law determines who has the original title to an IPR and (ii) which law applies to the transfer of title.

6.1. Original Title to IPRs

As IPRs are national rights, the starting position is that it is the law of the jurisdiction where the right is invoked – the lex protectionis – that determines who the proprietor of the right is upon its origination. The problem with this approach is that ownership of the IPR may therefore vary from country to country dependent upon what regimes national laws do contain. It certainly seems to leave something to wish for if one prefers a situation that can be easily managed by the interested parties.
One can defend that the law of the domicile of the proprietor should govern this issue, but that results in a circular reasoning, because one then still would have to determine first who that original proprietor is. A more objective approach could be that the law of the place where the intangible was created – the *lex originis* – determines original ownership of the related IPRs under applicable national law. This will probably not provide a solution for all problems, but it does seem to be a step forward towards a more uniform and predictable result. As a matter of Dutch private international law, this approach seems defendable, but case law on the subject seems missing. Given that the ultimate value of an IPR is that the proprietor is able to prohibit third parties form infringements, and given that infringement is governed by the *lex protectionis*, it also does seem prudent not to put too much faith on a *lex originis* approach while this subject is not yet codified in any EU Regulation or IPR treaty.

Initial ownership can in particular be troublesome in case of IPRs for intangibles that are made by employees or by third parties under a contract (as with ‘works made for hire’). Which law then distributes ownership as between these parties? Also here, the *lex protectionis* is the undeniable starting point. However, the distribution of ownership rights between these parties to a contract seems primarily to be a subject that can and should be governed by that contract, without any public policy issues being involved. Therefore, the generally held view seems to be that the law of the contract should determine this issue. Consequently the regime of the *Rome I* Regulation may provide for a manageable solution here. However, one always has to bear in mind that it will ultimately the law of the jurisdiction for which protection is sought that has to subscribe to this view as well, at the risk of being left empty handed when one finally wants to enjoy the blessings of the IPR that one always assumed to be the proprietor of.50

### 6.2. Transfer of IPRs – *lex protectionis*

Once it is determined who the original proprietor of an IPR is, the second question that may then have to be addressed is whether and how that original proprietor can transfer (title to) the IPR to a third party.

Also here the *lex protectionis* will have to be the starting point that cannot be interpreted away, if only to avoid not being able to enforce the IPR in the jurisdiction concerned. This principle is also codified in Article 74 of

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50 In *Duijnste v. Goerbauder*, in which case the ECJ ruled in its judgment of 15 November 1983 (see footnote 30), the District Court and the Court of Appeals had ruled that the *lex protectionis* governed and that therefore Art. 10 of the Dutch Patent Act determined ownership with regard to the Dutch patents involved only, and did not apply to the ownership of the foreign patents. The Dutch Supreme Court did not address this issue in its judgment and the case was eventually settled after the ECJ ruling, before final judgment by the Dutch Supreme Court. The lower court rulings have received critical reviews in Dutch literature.
the European Patent Convention where it is stated that, unless the Convention provides otherwise, a European patent application as an object of property shall, in each designated Contracting State and with effect for such State, be subject to the law applicable in that State to national patent applications. From a property law perspective, the Convention therefore treats a single European patent application already as a bundle of national rights. Given the fact that the end product of the European Patent Convention – a granted European patent – does not really exist but immediately falls apart into a bundle of national patent rights, this solution only seems practical and efficient. If the granted European patent has to be treated as a bundle of national patents, which national patents are subject to the laws of the relevant, designated states, one might as well do the same with regard to the application that is the stepping-stone towards these granted patents?

However, the result of a lex protectionis approach is that it does not necessarily result in low transaction costs for a transfer of IPRs, since the national laws of numerous jurisdictions may have to be checked before one can conclude that the transfer that the parties agreed to, has indeed materialized and that the buyer has indeed become the new proprietor of the IPRs. Under the lex protectionis rule one will have to determine whether a given transfer is indeed legally valid, binding and enforceable in each jurisdiction involved. In this context, one has to think of issues like (i) does a transfer need a valid title and what happens if that title is invalidated at a later stage, (ii) when does a transfer actually occur and what are the requirements for a valid deed of transfer, (iii) when can the assignor be deemed to be authorized to transfer, and (iv) when does a transfer have effect as between the parties involved and when vis-à-vis third parties or a receiver in the bankruptcy of the owner of the patent application. These subjects may not seem to be that ‘sexy’, but if one pictures these questions against the background of a transfer being done, or a security interest being created, one day before a bankruptcy, one can probably imagine that these issues can turn out to be very critical and to require close scrutiny.

6.3. Transfer of IPRs – lex proprietas

A more manageable system has been introduced for the three Community IPRs for trademarks, design rights and plant variety rights. Although these IPRs created pan-European, supra-national IP rights, the European Union does not yet have a pan-European civil law system that could be applied. Trying to address all such issues in the Community Regulations probably was a bridge too far. Therefore, the European legislator has provided that these Community IPRs as an object of property shall be dealt with in their entirety, and
for the whole area of the Community, as a national IP right. The consequence of this regime is that property aspects of a community IP right are governed by a dual track system: the provisions of the applicable Community regulation as well as the provisions of one national law.

The national law that will govern is – shortly put – the law of the domicile of the proprietor. If the owner does not have a domicile within the EU, nor an establishment, then the law of the relevant IP office will apply. This means that with regard to foreign – in terms of not having an establishment within the European Union – owners of Community IP rights, Spanish law applies in case of a Community trademark or Community design right, while French law governs in case of a Community plant variety right. Although I fail to see why the applicable civil law has to be the law of a Member State, the system as such seems to provide a practical solution. Given that property is primarily concerned about establishing a legal connection between an object and its owner, it certainly seems to make perfect sense to have the civil law aspects of ownership of intangible properties governed by the law of the domicile of the proprietor. That law is also, for instance, likely to be the law that will govern the bankruptcy of that proprietor. I refer to this regime, as introduced by the three Community IPRs, as the lex proprietas.

As a matter of Dutch private international law this lex proprietas approach also seems to be possible as a default rule. Although legal scholars are divided on the subject, the Court of Appeals at Den Bosch applied this approach in its judgment of 14 October 2008 in *Michaud v. Owens*. The Court had to rule on a transfer of, among others, Dutch copyright on the design of a plastic bottle for honey and applied French law, being the law of the transferor (as well as of the transferee).

Guidance as to the actual scope of what aspects will be governed by the lex proprietas can probably be found in the regime that the Rome II Regulation provides for the assignment of claims in Article 14. Although that regime only applies to the contractual obligations to assign a claim under, for instance, a purchase agreement, the Dutch Supreme Court has in its *Hansa-* judgment of 1997 also applied that regime to the actual transfer of the claims. If one looks at that regime for inspiration, the lex proprietas will govern the transfer of the IPRs as between the transferor and the transferee.

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52 I happen to be in favor of the lex proprietas approach (Van Engelen 2007). Van den Burg (IER 2006, p. 131, in Dutch) takes the position that the lex protectionis has to apply.


However, an IPR is still a right under national law and a right that can be invoked against third parties. Therefore, the aspects of a transfer that protect the interests of third parties, as well as the question whether the IPR concerned is transferable to begin with, will be issues that will remain governed by the *lex protectionis*. This is in line with the regime that Article 14 of *Rome I* provides for the contractual obligations to assign a claim. Article 14(1) learns that the relationship between assignor and assignee under a voluntary assignment shall be governed by the law that applies to the contract between the assignor and assignee. However, the law governing the assigned claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged. This can - mutatis mutandis - be applied to the assignment of IPRs. Consequently, any issues related to third party effects of a transfer of an IPR, such as the right to be able to enforce that right against an infringer would still be subject to the *lex protectionis*. This would, for instance, means that if national law requires that the proprietor is registered as such in the relevant IP-register, such a requirement of the *lex protectionis* will need to be fulfilled, even though the *lex proprietas* law would provide differently.

These issues do not exist in case of the transfer of a Community IPR, since the relevant Community Regulation does address those third party effects in the relevant Regulation and they are therefore a matter of Community law. In case of the transfer of bundles of national IPRs such a general applicable law is missing and therefore demarcation lines between the one - *lex proprietas* - law that may apply to the transfer as between the transferor and the transferee, and the various national law that may govern the rights of the proprietor vis-à-vis third party infringers – the *lex protectionis* – will still need to be investigated.

### 6.4. Transfer of IPRs – Choice of Law

If one accepts the possibility that one national law can govern the transfer of IPRs as between the transferor and the transferee and that the *lex proprietas* gives a proper default rule to determine which law then has to govern, it is only a small step to also allow for a choice of the applicable national law by the parties.

As a matter of Dutch private international law, such a choice of law has been accepted by the Court of Appeals in The Hague in its *Technip*-judgment of 20 September 2007.\(^{55}\) In that case the Court of Appeals had to deal with an assignment of international copyrights in a computer program. The contract between the parties contained a choice of law for Swiss law and the Court of Appeals accepted that this chosen law also governed the actual transfer of the copyrights, and more in particular the Dutch copyright. Consequently,

\(^{55}\) IEPT20070920, Hof Den Haag, *Technip Kinetisch stroomschema*.  

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the transfer was held to be valid even though the formal requirement of a deed of transfer – that is necessary as a matter of Dutch copyright – was not met, since – according to the Court of Appeals – Swiss law does not require a deed for a valid transfer of copyrights.

6.5. Conclusion: Transfer of IPRs

Although guidance from the Dutch Supreme Court is missing, it seems that one can be reasonably optimistic that Dutch private international law can accommodate a transfer of international IPRs in a cost effective way, either by applying the *lex proprietas* approach as is also possible as a matter of European law with regard to Community IPRs, and by allowing a choice of law. However, until the Dutch Supreme Court has ruled on these issues, one should be cautious and cannot take this for granted.

Another observation is that it is all nice and fine if Dutch law allows these regimes, but that such is not very meaningful if the foreign law that applies to the national IPR concerned does not accept these regimes but takes the view that its national law – as the *lex protectionis* – is the sole law that must be applied.

A prudent party will therefore at least have to look at the national laws of the most relevant countries concerned to avoid that he or she may be confronted with unpleasant surprises later on. International harmonization and codification of these property issues is therefore dearly needed.
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THE PROHIBITION OF AGE DISCRIMINATION IN LABOUR RELATIONS

L.C.J. Sprengers & G.A. Stouthart

1. Which Statutory Instruments Addressing Age Discrimination have been enacted in your Country? If none, what Alternative Means of Protection are available?

Since 1 May 2004 the prohibition on age discrimination is regulated in the Dutch Equal Treatment in Employment Age Discrimination Act (Wet Gelijke Behandeling op grond van Leeftijd bij Arbeid) (WGBL). By means of this law the European Council Directive 2000/78/EC was implemented, insofar as this had not already been done by means of the Dutch Equal Treatment Act.

The introduction of the Dutch Equal Treatment Act (Algemene Wet Gelijke Behandeling) in September 1994 was meant to ‘promote participation in a number of areas which are of great importance for the possibility of the individual to participate in public life, or at any rate to take away impediments caused by discriminatory actions’. The Dutch Equal Treatment Act lists eight grounds of discrimination, but it does not contain a prohibition on age discrimination.

2. Which Age Groups are protected?

Both young and old people. Not a specific age group.

3. Are there Rules of Preference connected to Age in Labour Relations?

No, not specific connected to the factor age.

In the AWGB e.g. positive action policies are explicitly permitted when they concern women or persons belonging to a certain ethnic or cultural minority (Section 2, paragraph 3 AWGB). As a consequence, an employer is, in principle, allowed to strive for equal representation of females or people from ethnic minority groups in the organisation.
4. Is Age Discrimination prohibited in Active Labour Relationships only, or are Situations outside the Contractual Relationship, like Occupational Pension Schemes, included?

The WGBL pertains only to – contrary to the Dutch Equal Treatment Act – prohibited discrimination in labour situations, however in the broadest sense of the word. Although the Dutch legislature has discussed extending the prohibition on age discrimination to other areas, the WGBL is limited to the area of labour. The Minister of Social Affairs and Employment explained this decision by pointing out that age is a special ground of discrimination, which cannot be earmarked in advance as a suspicious criterion for making a distinction, contrary to, for instance, the grounds of discrimination of race and gender. After all, people do age, and making a distinction on the grounds of age can therefore be justified more easily. Extending the WGBL to other areas would make the possible exceptions to the prohibition on discrimination too complicated. For that reason, it was decided to first gain experience in the field of labour.

Section 3-6 of the WGBL stipulates the aforesaid:

Section 3 Employment
It shall be unlawful to discriminate (on age) with regard to:

a) the recruitment, selection and appointment of personnel;
b) job placement;
c) entering into or terminating an employment relationship;
d) the appointment and dismissal of public servants;
e) conditions of employment;
f) education and training during or prior to an employment relationship;
g) promotion;
h) working conditions.

Section 4 The liberal professions
It shall be unlawful to discriminate with regard to the conditions for and admission to the liberal professions, and to the opportunities to practise such professions or develop professional skills within them.

Section 5 Vocational training
It shall be unlawful to discriminate with regard to:

a) access to and provision of careers advice and vocational guidance;
b) access to and provision of training directed at entering and functioning on the labour market and the holding of tests in connection with and completion of such training.

Section 6 Membership of organizations
It shall be unlawful to discriminate with regard to membership of or involvement in an employers’ organization or trade union, or a professional or occupational association. This shall also apply to the benefits which arise from membership of such organizations and associations.
5. **What Type of Contractual Relationship is covered by Age Discrimination Provisions? (Labour Relations only or also Self-employed Persons?)**

Besides the labour relation in the broadest sense of the word, also self-employed persons are covered by age discrimination provisions.

Section 4  *The liberal professions*

It shall be unlawful to discriminate with regard to the conditions for and admission to the liberal professions, and to the opportunities to practice such professions or develop professional skills within them.

6. **What Types of Discrimination are prohibited (direct, indirect)? How are they defined?**

Both direct and indirect. Just like the Council Directive 2000/78/EC, the Dutch equal treatment legislation distinguishes between direct and indirect distinction. In case of age discrimination, *both direct and indirect distinctions can be justified objectively*. This is contrary to discrimination on other grounds where only indirect distinction can be justified objectively.

**Direct Distinction**

When the age criterion can be qualified as the direct reason for a distinction which has been made, it constitutes direct distinction on the grounds of age. An example of this is when age-dependent employment conditions are granted, such as extra vacation days for the aged employee. Another example concerns the age limits frequently applied in job advertisements.

**Indirect Distinction**

If the distinction appears to be neutral but actually favors or disfavors persons belonging to one or more age groups when compared to persons belonging to one or more other age groups, this constitutes indirect distinction on the grounds of age. An example of this is a job advertisement for a student or school leaver. Students or school leavers are usually between 18 and 28 years old. Other age groups will not be considered or least not as quickly, and are therefore placed at a disadvantage.

In the field of employment, indirect distinction on the grounds of age specifically occurs by applying the criterion of length of service when granting secondary elements of remuneration. If, for instance, being granted extra vacation days depends on the length of service, this will mostly benefit
the older employees. The length of employment of an older employee is often
greater than the length of employment of his younger colleague.

In the event of dismissals due to economic reasons, the employee also
benefits from a long length of service. Before March 2006 the so-called 'last-in-first-out' principle used to be applied in these kind of dismissals. It was
used in order to determine the selection for redundancy upon a collective
dismissal. The employees employment for the shortest period were
dismissed first. The justification for this approach was the thought that the
younger employees had a greater chance of finding a new position
elsewhere. An objection against the 'last-in-first-out' principle was that after
such a collective dismissal mainly older staff remained. Therefore the 'last-in-
first-out' principle was replaced by the so-called principle of
'proportionality'. According to this principle the redundancies are allocated
per position among five age groups(15-25 years, 25-35 years, 35-45 years, 45-
55 years and from 55+). Each age group will bear a proportional part of the
dismissals due to economic reasons. Because of this method a greater
diversity of ages will exist within the company after the dismissal.

Upon granting a severance payment in dissolution proceedings, the
aspect of age and the number of years in service play both a part. The
severance pay is calculated in accordance with a fixed formula, the so-called
Cantonal court formula (Kantonrechtersformule). According to this formula,
the salary is multiplied by the number of years in service. Moreover the years
of service are weighted. The years of service until the age of 35 count as 0.5,
the years of service from the age of 35 until 45 count as 1, the years of service
from the age of 45 until 55 count as 1.5 and the years of service from the age
of 55 and older count as 2. By weighting the years of service, the more
difficult position of the older employee on the labour market is taken into
account. The outcome of the multiplication of the salary by the number of
weighted years of service will be corrected by multiplication by means of an
adjustment factor (correctiefactor). The culpability of the employer or the
employee with regard to the termination of the employment agreement is
expressed in this multiplication. If neither party can be blamed for the
situation, the adjustment factor will be neutral (i.e.1.).

7. Does a Prohibition against Harassment based on Age exist?

Yes, it has been laid down in Paragraph 1, Section 2 WGBL

Harassment

1. The prohibition on discrimination laid down in this Act shall also
include a prohibition on harassment.

2. Harassment as referred to in the preceding subsection means conduct
related to age that has the purpose or effect of violating the dignity of a
person and creating an intimidating, hostile, degrading, humiliating or offensive environment.

8. **Are there Exemptions from the Prohibition? How are those Exemptions defined? Are they provided for solely in Statutory Provisions or are Social Partners, Employers, or other Entities allowed to develop additional ones?**

Yes the exemption in the sense that the WGBL does not apply to admission ages as determined and laid down in pension schemes, nor to the determination of different admission ages and pensionable ages for employees or groups or categories of employees. The WGBL is also not applicable to actuarial calculations for pension schemes whereby age is taken into account.

Further, positive discrimination has been exempted by the WGBL from the prohibition on distinction on the grounds of age, provided that the positive distinction is laid down by law and is based on employment or labour market policy for the purpose of promoting labour force participation of certain age categories. An example is the Dutch legislative bill 'Investing in Young People'. This bill pertains to the labour force participation of youngsters. This bill creates an obligation for municipalities to make an offer to young people between the age of 18 and 27 if they are unemployed or studying. The offer is aimed at entering the labour market and therefore consists of work or schooling, or a combination of both.

9. **Are there Specific Grounds justifying Age Discrimination? Do General Grounds of Justification apply to Age Discrimination?**

Yes, there are both general and specific grounds of justification age discrimination (see section 7 WGBL).

The Council Directive 2000/78/EC states that `differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

As stated, the aforementioned objective justification test has been included in the WGBL in:

Section 7  Exceptions to the prohibition on discrimination (Objective justification)
1. The prohibition on discrimination shall not apply if the discrimination:
   a) is based on employment or labour-market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament;
b) relates to the termination of an employment relationship because the person concerned has reached pensionable age under the General Old Age Pensions Act (AOW), or a more advanced age laid down by or pursuant to an Act of Parliament or agreed between the parties;
c) is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary.

2. The preceding subsection shall not apply to cases of harassment as referred to in section 2.

Ad b)
The prohibition on distinction on the grounds of age is not applicable to dismissal on the grounds of reaching the pensionable age of 65. The legitimate purpose of ending the employment relationship upon reaching pensionable age is that it is effectuated that, without fear of favor, an objective criterion is provided which is applicable to the entire working population, whereby it no longer needs to be assessed if the employee is still able to perform. The age of 65 has broad public backing and also connects to the system of social security; there is also a replacement income. It is also discussed in the parliament. The discussion lead to the conclusion that the question whether the method is appropriate and necessary can be answered affirmatively (see Parliamentary publications: Parliamentary Papers 1 2003/04. 28 170, No. c.). Also the Dutch Supreme Court concluded as above said in Hoge Raad 1 November 2002, NJ 2002/622.

10. What Legal Consequences derive from violating Age Discrimination Law? Who is entitled to bring a Cause of Action under the Discrimination Law?

Legal consequence:

Section 13 Invalidity
Conditions that are in breach of this Act shall be invalid.

Who is entitled to bring a cause of action?

Section 12 of the AWGB specifies that complaints can come from
- individuals; or
- organisations that act on behalf of individuals; or
- work councils; or
- representative bodies.

In addition section 12 specifies that certain organisations, which campaign against Discrimination, can ask the Equal Treatment Committee (for further explanation on the Equal Treatment Committee see question 12) to investigate cases of alleged discrimination (class actions). The AWGB thus provides for an association or foundation to take legal action to protect the interest of other persons, as far as these interests are in accordance with the association’s constitution or statutes. The possibility of bringing a class action
is extremely important because victims of discrimination are often reluctant to take other forms of action, out of fear that this may lead to a deterioration of their (working) conditions. A class action can help to restore the unequal balance of power between the parties involved in cases of unequal treatment.

Moreover, everyone who is responsible for taking decisions on matters of discrimination, including judges, can submit a request to the Equal Treatment Committee in order to get an expert judgment.

11. With whom lies the Burden of Proof in Discrimination Cases?

Section 12  WGBL Burden of proof
1. If a person who considers that he has been wronged through discrimination as referred to in this Act establishes before a court facts from which it may be presumed that discrimination has taken place, it shall be for the respondent to prove that the action in question was not in breach of this Act.
2. Subsection 1 shall apply mutatis mutandis to legal actions as referred to in article 305a of Book 3 of the Civil Code and to appeals instituted by interested parties within the meaning of section 1:2, subsection 3 of the General Administrative Law Act.

12. What Types of Proceedings are applicable for enforcing Age Discrimination Provisions? (Civil, Criminal, or Administrative Proceedings)

In addition to implementing the principle of equal treatment and prohibition on discrimination as laid down in the Constitution and International Treaties, the Dutch Equal Treatment Act (AGWB) also established an enforcement committee in 1994. This so-called Equal Treatment Committee (CGB) may investigate and judge, either at its own initiative or at the request of a party concerned (at no charge), whether a distinction exists. Representation by a lawyer is not required. In addition to natural persons, legal entities also may request the Equal Treatment Committee to give a judgment, for instance parties to a collective bargaining agreement or employers who wish to know if they are guilty of making an unjustified distinction by applying a certain arrangement. Under the WGBL, the Equal Treatment Committee also may be asked for its judgment with regard to the prohibition on distinction on the grounds of age. One-third of the judgments given by the Equal Treatment Committee concern age discrimination. The Equal Treatment Committee can only examine for compatibility with the equal treatment legislation. The judgments given by the Equal Treatment Committee are not legally binding. However, in practice, the judgments of the Equal Treatment Committee are usually adhered to. A Court on the other hand may also take into account the requirements of reasonableness and fairness and the general principles of proper administration. Should the Court deviate from the judgment of the Equal Treatment Committee, this must be supported by reasons.
The Court can attach several different legal consequences to the decision that an arrangement or behaviour was contrary to the WGBL. Termination of an employment agreement in violation of the WGBL is voidable. If the voidability is awarded, the employment must be continued. The employer who does not accept the offer to resume work may be faced with a claim for continued payment of wages and a claim for reinstatement. Provisions in breach of the WGBL are void.

13. **Is a Government Agency responsible for enforcing Age Discrimination Provisions? What Competences are assigned to that Agency?**

As stated before (under 12), this is the Dutch Equal Treatment Committee. The Dutch Equal Treatment Committee is an independent organization that was established in 1994 by the Dutch government to promote and monitor compliance with this legislation. The Committee receives a request for an opinion about alleged differentiation, it investigates whether the equal treatment law has been violated. In some respects, the CGB is similar to a court. An important difference is that the CGB searches for information itself. Other differences are that filing a petition is free of charge and that people do not need a lawyer.

Furthermore, the CGB does not necessarily need to receive a petition in order to investigate whether the equal treatment law has been violated. It also conducts so-called ‘investigation on its own initiative’. In the course of time, the CGB has acquired a great deal of knowledge. Therefore, it regularly gives advice to among others the government about issues regarding equal treatment.

14. **Are Unions, Interest Groups or Non-governmental Organizations provided the Right to bring Suit to enforce Age Discrimination Provisions?**

As stated before, section 12 of the AWGB specifies that complaints can come from

- individuals; or
- organisations that act on behalf of individuals; or
- work councils; or
- representative bodies.

In addition section 12 specifies that certain organisations, which campaign against discrimination can ask the Commission to investigate cases of alleged discrimination (class actions). The AWGB thus provides for an association or foundation to take legal action to protect the interest of other persons, as far as these interests are in accordance with the association’s constitution or
statutes. The trade unions promote and represent the interests of the employees. They attempt to identify and remedy any form of unequal treatment, not only in the event of collective bargaining negotiations, but also for instance in the event of mergers and acquisitions.

One of the tasks of the trade unions regarding unequal treatment on the grounds of age, is illustrated by their involvement in reorganizations. Reorganizations can lead to collective dismissals. Under the Dutch Collective Redundancy Notification Act (Wet Melding Collectief Ontslag) the employer must notify – supported by reasons – the trade unions of an intent to terminate the employment contracts of at least twenty employees before requesting dismissal permits at UWV Werkbedrijf. The purpose thereof is timely consultation and negotiations with the trade unions. After negotiations the conditions for re-employment, dismissal, and discharge is laid down in a redundancy plan. In such a redundancy plan special arrangements can be included with regard to older employees. Often a distinction is made with regard to the financial concessions to which the older employees are entitled, compared to the younger employees. Until 2007, the Equal Treatment Committee and the Court applied a strict assessment, as a result of which these older workers’ arrangements would quickly constitute a prohibited distinction on the grounds of age. However, the Equal Treatment Committee has become less strict because of the following reasons:

- The weak position of the older employee on the labour market is accepted as a legitimate purpose for an older workers’ arrangement in a redundancy plan.
- For the older workers’ arrangement to be appropriate, it is important that the chosen age limit can be based on the supposed labour market position of the older employees threatened by dismissal.
- Consequently, the older workers’ arrangement should have more than a financial purpose only. The fact that parties to a collective bargaining agreement have given their consent to the age limit as set by the employer, is reason for the Equal Treatment Committee to be restrictive in carrying out their assessment. As a result of the consent of the parties to a collective bargaining agreement, it can be assumed that the interests of the employees have been taken into account and that the solution which has been found can be considered as adequate.
- If the employer can proof that he has developed within his company a broad and good policy regarding the employability of employees in various age groups (so-called Levensfase bewust personeelsbeleid).
15. Effects of prohibiting Age Discrimination on the Recruitment Process (Exemplary Headings for Orientation Purposes)

- formulation of employment offers/ advertisements;
- application files;
- job interviews;
- guidelines for selection;
- notice of refusal.

When making a distinction on the grounds of age in the event of a job vacancy, the reason for making this distinction must be given. This motivation requirement is supposed to result in a restricted use of distinction on the grounds of age in the event of vacancies.

However, stating the reason for making the distinction does not automatically mean that the distinction is justified. Applying the objective justification test should therefore be seen as separate from the aforementioned statutory requirement. This also entails that the reason for making the distinction should be mentioned even if the prohibition of distinction is not applicable. An example of this is the vacancy policy of the organization called UWV Werkbedrijf. In the Netherlands, UWV Werkbedrijf is actively involved in the labour force participation of unemployed people. For that purpose they act as intermediaries – as do temporary employment agencies – between employers and potential employees. Moreover, they have access to an extensive nation-wide vacancy database. From time to time, UWV Werkbedrijf will state an age limit in job advertisements, as a result of which certain age categories are given priority. This kind of distinction on the grounds of age is not governed by the prohibition of distinction. For the prohibition is not applicable in the event of employment policy or labour market policy for the purpose of promoting labour force participation of certain age categories.

The job applicant who is refused because of his age does not have any possibilities available to him to force an entry into employment after all. In the Netherlands, total freedom of contractions is recognized, as a result of which no party can be forced to enter into an agreement. However, the job applicant may sue for damages due to the discriminatory act of the employer. He will need to provide evidence of the damage he has incurred.

16. Effects of prohibiting Age Discrimination on Working Conditions (Exemplary Heading for Orientation Purposes)

- composition of remuneration, partly depending on age or length of service;
- seniority – related bonus payments;
- length of vacation, depending on age;
- privilege to demand shorter working hours, depending on age;
- maintenance of contractual remuneration despite job transfer due to age-related diminishing capabilities;
- further education on the job available;
- the development of a broad and good policy regarding the employability of employees in various age groups (levensfase bewust personeelsbeleid).

17. Effects of prohibiting Age Discrimination on Termination of Employment (Exemplary Headings for Orientation Purposes)

- dismissal protection due to old age or length of service;
- age-dependent loss of capability as a valid reason for dismissal;
- age-dependent composition of compensation for termination of employment contracts;
- age-dependent justification for concluding fix-term contracts.

Statutory Notice Period

With regard to the termination of an employment agreement, the employer must observe a statutory notice period. As the length of service of the employee increases, the notice period also increases from one month to at most five months. Older employees will therefore often enjoy more protection due to their length of service.

Dismissals due to Economic Reasons

In the event of dismissals due to economic reasons, the employee also benefits from a long length of service. The last-in-first-out principle used to be applied in order to determine the selection for redundancy upon a collective dismissal. Those employees with the shortest employment contract were dismissed first. The justification for this approach was that many young employees had a short length of service and that a dismissal had less impact on them than it would have on older employees with a longer length of service. The younger employees had a greater chance of finding a new position elsewhere. One of the objections against the last-in-first-out principle was that after a collective dismissal, mainly older staff remained. For that reason, as of 1 March 2006, the last-in-first-out principle was replaced with the principle of proportionality (afspiegelingsbeginsel). Since then, the forced redundancies are allocated per position among five age groups, from 15 to 25 years, from 25 to 35 years, from 35 to 45 years, from 45 to 55 years and from 55 years and older. Each age group will bear a proportional part of the dismissals due to economic reasons. Incidentally, within each age group, the last-in-first-out principle is once again applied. As the forced redundancies are carried per position by the entire personnel, a greater diversity of ages is left behind within the company after the dismissal.
Severance Payment

Upon granting a possible severance pay in dissolution proceedings, the aspect of age also plays a part. The severance pay is calculated in accordance with a fixed formula, the so-called Cantonal court formula (recently changed in January 2009). According to this formula, the salary is multiplied by the number of years in service, by means of which loyal service is rewarded. The years of service are weighted. The years of service until the age of 35 count as 0.5, the years of service from the age of 35 until 45 count as 1, the years of service from the age of 45 until 55 count as 1.5 and the years of service from the age of 55 and older count as 2. By weighting the years of service, the more difficult position of the older employee on the labour market is taken into account. The outcome of the multiplication of the salary by the number of weighted years of service will be corrected by multiplication by means of an adjustment factor. The culpability of the employer or the employee with regard to the termination of the employment agreement is expressed in this multiplication. If neither party can be blamed predominantly, the adjustment factor will be neutral, therefore: 1.

Redundancy Schemes

Redundancy schemes which are agreed upon between the employer and the employee cannot have the same characteristics as those of an early retirement scheme. An early retirement scheme exists when the reason for dismissal is not the disfunctioning of an employee, or that jobs are lost, but it is motivated by the intent to have older employees retire early. The Dutch legislature wants employees to work up to their pensionable age. If the employer accommodates the early retirement of older employees and subsequently compensates their loss of income until their pensionable age, many older employees will not return to the labour market. In order to prevent this, a penalty may be levied by the tax authorities regarding the early retirement scheme. The employer is liable for a penalty of 26% on the agreed severance pay.

Dismissal on the Grounds of reaching a certain Age

In Dutch case-law, only a few examples are known in which the dismissal on the grounds of reaching a certain age – lower than the pensionable age – was upheld. Dismissal of a fireman upon reaching the age of 55 was justified objectively because of the physical and mental requirements of the work of a fireman. The protection of the employee and third parties was – according to the Court – a legitimate purpose with regard to functional dismissal on the grounds of age. Moreover, applying a fixed age limit was practical and necessary in order to prevent any discussions regarding individual suitability at a later age. The dismissal of pilots due to reaching the dismissal age of 56 as included in the collective employment agreement, could be justified
objectively according to the Dutch Supreme Court. The early dismissal was
to allow pilots to move forward in their careers. The planning of pilot careers –
starting with their training and ending with early retirement – was based
on the knowledge that it would thus be possible for all pilots to reach the
highest level before their early retirement. This was judged to be a legitimate
purpose by the Supreme Court. Moreover, by applying a fixed age limit,
security was also provided regarding the latest date on which the
employment contract would end. There was no alternative for this regular
and predictable moving forward of the employees. For that reason, this
method was judged to be appropriate and necessary.

18. Is there a Mandatory Retirement Age set by Law? Are Social
Partners competent to set (or alter) Age Limits for Retirement?
If so, which Age Limits are admissible and which Grounds of
Justification are acknowledged for imposing a Mandatory
Retirement Age?

Pensionable Age of 65 (will become 67!)

There will seldom be an objective justification for dismissal on the grounds of
reaching a certain age, with the exception of reaching pensionable age. A
dismissal permit which is requested when reaching the pensionable age will
be granted, provided that the application thereto is submitted before or on
the day that the employee reaches the pensionable age. Likewise, an
application for dissolution will nearly always be granted if it is based on
reaching pensionable age. No compensation will be granted in such a case,
unless the employer has acted in a culpable way. The prohibition on
distinction on the grounds of age is not applicable to dismissal on the
grounds of reaching the pensionable age of 65 (in 2020: 66, in 2025: 67). The
legitimate purpose of ending the employment relationship upon reaching
pensionable age is: that it is effectuated that, without fear of favour, an objective
criterion is provided which is applicable to the entire working population, whereby it
no longer needs to be assessed if the employee is still able to perform. The age of 65
has broad public backing and also connects to the system of social security;
there is also a replacement income. As a result, the questions whether the
method is appropriate and necessary can be answered affirmatively.

Aside from the aforementioned substantiation of the legitimate purpose
for the dismissal upon reaching pensionable age, it is also important that by
applying a fixed age limit, it is effectuated that employees are able to move
forward on the labour market in a regular way. Any position which becomes
vacant due to an employee reaching the pensionable age can thus be filled by
a younger employee.

It is possible to make arrangements either by law or in a collective
bargaining agreement or an individual employment agreement with regard
to the continuation of the employment relationship after having reached the
The discussion has been going as to whether the pensionable age should be raised to 67. In October 2009 the government had decided to fix the pensionable age at 67. The legislation still needs to be drafted. The intention is that in 2020 the pensionable age will be 66 and in 2025 67.

19. Are there Incentives to induce Older Employees to leave even before they reach the Mandatory Retirement Age?

Yes, flexible pension schemes. For instance the civil servants of municipalities have the possibility to apply for a flexible pension at the age of 62,9 years.

20. Please mention any Additional Topics Characteristic to the Anti-discrimination Legislation in your Country

The WGBL explicitly states – following on from Article 11 of Council Directive 2000/78/EC – that it is forbidden to place persons at a disadvantage due to the fact that they have invoked this law judicially or extra judicially or provided assistance thereto. The wording of this provision prevents people from refraining from acting against unjustified distinction for fear of possible disadvantageous consequences. This is all the more valid for persons who are only indirectly involved in a specific situation, for instance a colleague who does not dare to act as witness for the benefit of an employee who is discriminated against. Pursuant to this provision, he is also protected under the WGBL. A possible termination of the employment relationship by the employer due to the fact that provisions of the WGBL have been invoked, or that assistance has been given in the event of such invoking, is voidable.
References

**Bokum ten & Hoekerd 2009**

**Burg van der 2004**

**Sources:**
- <www.cgb.nl/artikel/leeftijd>
- <www.cgb.nl/node/14851> (evaluation WGBL)
- <home.szw.nl/> (in Dutch subject: werkgelegenheid, sub subject: langer aan het werk; in English subject: employment conditions)
- <www.ser.nl/nl/themas/vergrijzing.aspx>
1. **Introduction**

This report concerns the legal situation of regulations applicable to the Dutch exclusive economic zone (EEZ), with one exception namely fiscal legislation. After a short discussion on the history of the Dutch EEZ I will report on the general laws and regulations applicable. Consequently I will present the special legislation thematically.

2. **General: Zones at Sea**

2.1. **Territorial Waters**

Since Grotius and Bynkershoek the boundaries of Dutch territorial waters ended at three miles off the low tide line. In 1985\(^1\) the Act defining the boundaries of the territorial waters (*Wet grenzen territoriale wateren*) came into force; this Act extended the boundary to twelve miles off the coast. Through this Act, the area which forms the Dutch part of the continental shelf was in fact reduced by nine miles.

In 2005 the Act which suggested a contiguous zone\(^2\) of twelve miles adjacent to the territorial waters was introduced. This zone enables authorities to enforce regulations in the field of customs, tax, immigration and health which are applicable to the territory or in the territorial waters of the Kingdom of the Netherlands. The outside boundaries are fixed in a Statutory Order, implementing Articles 2 and 3 of the Act.\(^3\) The Act, as well as the Statutory Order, went into effect on 1 August 2006.

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2.2. **Continental Shelf**

The Netherlands accepted and ratified the 1958 Convention on the Continental Shelf through the Act of 7 July 1965. As a consequence, the outer limit of the Dutch part of the continental shelf was to be laid down in treaties with Belgium, the United Kingdom, and Germany. These treaties respectively went into effect on 1 January 1999 (Belgium), 23 December 1966 (United Kingdom), and 7 December 1972 (Germany).


2.3. **Exclusive Economic Zone**

In 2000 an EEZ was introduced by the Act of 27 May 1999 (Rijkswet Instelling Exclusieve Economische Zone); this Act went into effect from 28 April 2000. It defines the boundaries of the EEZ as running from the territorial waters up to 200 nautical miles off the baselines from which the territorial waters are measured. The coming into effect of this Act and the outer boundaries will be indicated for the Netherlands and the Dutch Antilles by Statutory Order; in Article 1, subparagraph b, this Order (Besluit grenzen Nederlandse exclusieve economische zone) of 13 March 2000 defines as outer boundaries the boundaries of the Dutch part of the continental shelf. It went into effect on 28 April 2000. Thus the Dutch EEZ is effectively equal to the Dutch part of the continental shelf.

The actual Dutch EEZ runs from twelve miles off the coast up to the central boundary line which marks the borders between the Dutch, English and German parts of the continental shelf.

3. **General Legislation**

Preliminary remark:
Since the Kingdom of the Netherlands is one of the Member States of the European Union I will mention certain subjects regarding implementation of

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10. Tractatenblad 1972, 137.
European Directives into Dutch legislation. Through the internal free market of the European Union, the Member States are obliged to adapt their national legislation in order to prevent obstacles for the free internal movement of persons or goods within the European Union.

3.1. **Installations North Sea Act (Wet installaties Noordzee)**

The *Installations North Sea Act* went into effect on 5 December 1964. According to the legal preamble, the *Installations North Sea Act* intends to protect the legal interests with regard to installations placed on the seabed of that part of the North Sea whose boundaries coincides with that part of the continental shelf connected to the Netherlands.

Article 2 of the *Installations North Sea Act* declares the applicability of the Dutch Criminal Code to anybody committing an offence on or with regard to an installation at sea. This means that misdemeanors committed on board a ship or otherwise affecting an installation in any sense are covered by the Dutch Criminal Code.

Article 3 of the *Installations North Sea Act* states the same with regard to Dutch legal rules designated by Statutory Order.

Article 4 of the *Installations North Sea Act* provides for a Statutory Order by which jurisdictions of authorities are regulated and servants charged with execution of regulations by virtue of Article 3 or with execution of legal verdicts. This Order dates from 12 December 1964 and points out in Article 2 that with regard to the jurisdiction of the criminal judge and the prosecuting office, offences committed on installations at sea will be prosecuted and judged by the district Court of Amsterdam.

Article 3 of the same Order assigns authority and jurisdiction to all criminal investigation police officers and the specially designated criminal investigators to perform their duty in the same manner as they would onshore. This is the basis for the criminal investigational capacity of amongst others (the inspectors of) State Supervision of Mines.

Article 5 of the *Installations North Sea Act* provides for a Statutory Order by which the applicability of the Criminal Code and other rules designated by virtue of Article 3 can be excluded or limited with regard to specifically designated installations. This makes the rule of Articles 2 and 3 less general. However, to November 2009 this option has not been taken up.

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14 *Staatsblad* 1964, 447.
15 *Staatsblad* 1964, 460.
3.2. Waterworks Management Act (Wet beheer Rijkswaterstaatswerken)

The Waterworks Management Act\textsuperscript{16} essentially went into effect on 1 January 1997. Its purpose is to protect waterworks owned by the Kingdom of the Netherlands against damage of any kind and to promote an efficient and safe use of these waterworks.

Although the intention is clearly to make the Waterworks Management Act applicable to the EEZ, (regulated by Act of 15 November 2000\textsuperscript{17} which went into effect on 6 December 2000) one might conclude the method to achieve this result is not effective. In Article 1, paragraph 2, the definition of waterworks has been extended to the EEZ as well. This deserves critical consideration; I propose that applicability beyond the boundaries of the territorial waters can only exist by means of an explicit article in the Act stating its applicability. Here the only mention is of extension of a definition to cover the EEZ as well, which is quite different from the explicit statement of applicability outside of the territorial waters. The Act’s explicit statement that it is not applicable to extractive activities in the EEZ,\textsuperscript{18} leading to the contrary rationale that the Act is applicable to the EEZ regarding all other aspects does not convince me. This exemption of applicability to the EEZ is caused by the fact that the Extraction Act has its own system for licensing and supervision by authorities.

The Waterworks Management Act introduces the requirement of a license for use of waterworks and protects these works against damage (including pollution of the environment) by activities by third parties.\textsuperscript{19} Licenses can be granted under conditions; besides conditions to safeguard the proper function of the waterworks, environmental protection interests are to be taken into account as far as these are not covered by other regulations. The Waterworks Management Act regulates the licensing for the construction and exploitation of wind parks as well.

Specifically with regard to installations in the EEZ, the Ministry of Transport and Public Works has issued a set of policy rules specifying obligations of Articles 2, 3 and 6 of the Waterworks Management Act. These policy rules are not part of the formal legislation; they specify how certain regulators in practice deal with rules of the Act. In this particular case the policy rules lay down, amongst others, criteria for granting a license and requirements for an application for a license.

\textsuperscript{16} Staatsblad 1996, 645 and 646.
\textsuperscript{17} Staatsblad 2000, 510.
\textsuperscript{18} Water Management Act, Art. 1b.
\textsuperscript{19} Water Management Act, Art. 2.
3.3. **Water Act** (Waterwet)

The *Water Act* dates from 2009 and is going to replace a family of old acts with regard to management and protection of water infrastructure. The *Waterworks Management Act* will be replaced partially by the *Water Act*.

Article 1.4 of the *Water Act* explicitly states its applicability in the Dutch EEZ. With regard to this, the *Water Act* is better than its (partial) predecessor, the *Waterworks Management Act*. However, the *Water Act* is not yet in effect; it will replace, amongst others, parts of the *Waterworks Management Act* as far as the EEZ is concerned. As the *Water Act* comes into force, the licenses created by virtue of the *Waterworks Management Act* will be considered to be licenses according to Article 6.5 of the *Water Act*. The act to introduce the *Water Act* has come into force on 22 December 2009.

4. **Traffic Management**

4.1. **The Shipping Traffic Act** (Scheepvaartverkeerswet)

The *Shipping Traffic Act* went into effect on 1 September 1988. It is intended to set regulations for ship navigation on internal waters and the sea, as well as providing a legal basis to implement several international treaties.

The *Shipping Traffic Act* itself does not state its applicability to the EEZ. However, by Statutory Order, rules can be given to implement ‘Treaties or Decisions of Organizations according to International Law for Dutch ships in full sea or in all non-Dutch waters connected to full sea and navigable by seagoing vessels’.

As with the extension of a definition in the *Waterworks Management Act*, one could think this means material applicability to the EEZ, where navigation lanes are positioned. Once again I am of the opinion that applicability beyond the boundaries of the territorial waters can only exist by means of an article in the Act explicitly stating its applicability. Therefore, in my opinion, the *Shipping Traffic Act* is not applicable to the EEZ.

Fortunately, I can find support for this opinion in the Note of clarification to the *Water Bill*. An almost identical option exists to implement ‘Treaties or Decisions of Organizations according to International Law’ for navigational traffic along the Dutch coast outside territorial waters according to Article 21, first paragraph, of the *Shipping Traffic Act*. Up to November 2009, however, no use has been made of the option to draw up a Statutory Order.

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20 *Staatsblad* 2009, 107 and 2009, 490 (text in accordance with Art. 1.10 of the Implementing Act).

21 Bill to introduce the Water Act, Art. 2.23.

22 It passed the Lower House in August 2009 and the Upper House in November 2009.

23 *Staatsblad* 1988, 352 and 389.

24 Art. 20, first paragraph.

25 Lower House document 30818, No. 3, p. 54.
The shipping lanes, as far as they exist in the EEZ, are arrangements with other Member States of the International Maritime Organization. They are made known to shipping companies by the normal means of publication for merchant shipping in the Netherlands.

4.2. Merchant Shipping Act (Schepenwet)

The Merchant Shipping Act dates from 1909 and is applicable to Dutch ships wherever they are, regardless of whether they have crossed into the EEZ or not. Article 65 states that the penalty clauses of this Act, or by virtue of it, can be applied to anyone committing an offence within or outside the Kingdom. This includes offences committed within the EEZ.

The Merchant Shipping Act’s intention is to prevent marine disasters, to organize a proper investigation procedure in case of a marine disaster, and to arrange corrective measures for captains, helmsmen, and engineers.26 The Merchant Shipping Act introduces safety measures such as certificates and it creates the authority of the Shipping Inspectorate’s supervision. It also forms the legal basis for the Disciplinary Council and sets out the corrective measures this Council can impose.

4.3. Act on Aviation (Wet Luchtvaart)

The Act on Aviation dates from 18 June 199227 and went into effect on 1 January 1993. It regulates air traffic in Amsterdam’s flight information area and is applicable to Dutch aircraft and transport, as well as flights made by Dutch aircraft outside the flight information area of Amsterdam. In my opinion the intention of this Act is to extend applicability to Dutch aircraft both on and above the EEZ, although an explicit statement on applicability in or above the EEZ is lacking. From the air navigation map I have seen, it seems that the flight information area of Amsterdam has a complete overlap with the EEZ; as far as flight operations taking place in the EEZ with Dutch aircraft, the Act on Aviation is applicable. For the transport by means of helicopter to and from the installations in the EEZ this Act also applies.

4.4. Telecommunications Act (Wet Telecommunicatie)

The Telecommunications Act states in Article 1.2 that regulations in or by virtue of this Act apply to and with regard to installations at sea as defined in the Installations North Sea Act. This broad definition was chosen to cover all types of installations at sea. This raises the question of whether by this reference to the North Sea Installations Act the Telecommunications Act itself becomes applicable to the EEZ. I am of the opinion that applicability beyond

26 See Preamble of the Merchant Shipping Act.
27 Staatsblad 1992, 368.
the boundaries of the territorial waters only can exist by means of an explicit article in the Act stating its applicability. So, in my opinion, the Telecommunications Act is not applicable to the EEZ.

5. Working Conditions


The Working Conditions Act regulates the safety and health of employees in their professional activities and was renewed in 1999. The Working Conditions Act implements the Working Conditions (framework) Directive of the EU of 1989, including the 21 implementing EU Directives for different aspects of professional activities. The Working Conditions Act itself is a very short act; it’s implementing Statutory Order (the Working Conditions Order) and Regulations (Working Conditions Regulations) contain the most concrete rules for employees and employers.

The Working Conditions Act was not, in principle, applicable to the EEZ or continental shelf. The applicability was extended in two steps; from 2003 the Working Conditions Act (including the implementing Order and Regulations) became applicable to the EEZ and continental shelf as far as extractive activities are concerned. This was a result of the overall restructuring of the legal system for extractive industries; the Extraction Act went into effect from 1 January 2003, and through this Act the applicability of the Working Conditions Act, with appurtenances, was extended through the Dutch part of the continental shelf. The Extraction Act amended Article 2 of the Working Conditions Act in the sense mentioned above.

The restriction to the extractive industries was terminated by an amendment in 2007; as from 1 January 2007 the Working Conditions Act has unlimited applicability to the EEZ. The reason for the extension of the applicability was that the construction of offshore wind parks was expected in the near future. The legislature considered it inappropriate not to protect workers at those working areas at risk because of their professional activities.

The Working Conditions Act Order and Regulations have a very clear structure; after general regulations based on EU Directives, the specific regulations for each category of activity follow. Thus we can see specific

28 Staatsblad 1999, 184 and 450.
30 Staatsblad 1997, 60 and 263.
31 Staatscourant Supplement 1997, 63.
34 Art. 184 Mijnbouwwet.
regulations for the extractive industry by means of drilling after general rules applying to all professional work.

The Working Conditions Order lays down regulations in far more detail than the articles of the Working Conditions Act; the same applies for the Working Conditions Regulations. They also specify what should not be done on the job site.

5.2. **Commodities Act (Warenwet)**

The Commodities Act dates from 1935 and went into effect 1 January 1936. Amongst other things it regulates the technical requirements for equipment used in professional activities and the basic requirements for food. For technical products this Act implements European Directives as well.

Since 2003 the Commodities Act applies to technical products used in the EEZ with work on or on behalf of civil technical constructions, or with the demolition of them, and on food that is provided on civil technical constructions in the EEZ. It safeguards the technical quality of equipment and tools used during professional activities of any kind. The Commodities Act deals with the hardware aspects of professional activities, whereas the Working Conditions Act regulates the software aspects such as human behaviour. For food, the Commodities Act applies only to ‘food that is negotiated on civil technical constructions in the EEZ’. After consultation with the regulator, it seems that an expansive interpretation of the word ‘negotiated’ implies the consumption by human beings. This author wonders if this interpretation would be valid in the eyes of a judge.

5.3. **The Working Hours Act and Order (Arbeidstijdenwet en –besluit)**

The Working Hours Act dates from 23 November 1995. The Working Hours Act aims to safeguard the safety and health of workers as far as these depend on working hours.

The applicability to the continental shelf was established in 1995 and changed in 2006 by amendment of Article 2:8 introducing the term ‘EEZ’. This amendment went into effect on 1 January 2007.

The Working Hour Order specifies the actual concrete opportunities for services and working hours per trade, and thus contains a special paragraph for seagoing employees as well as the extractive industries.

35 Staatsblad 1935, 793 and 822.
36 Commodities Act, Art. 1a sub b.
37 Staatsblad 1995, 600.
38 Staatsblad 2006, 673.
39 Arbeidstijdenbesluit, paragraph 5.14.
5.4. **The Water Supply Act (Waterleidingwet)**

The *Water Supply Act* dates from 1957\(^{40}\) and came into force on 1 April 1958.\(^{41}\) It outlines rules for a proper supply of drinking water and sets rules for the supplying companies. Article 1, paragraph 4, makes this Act applicable to both a collective water supply system and a mining installation situated on the Dutch part of the continental shelf.

6. **Environmental Protection**

Preliminary remark 1:
Since the Kingdom of the Netherlands is one of the Member States of the OSPAR Convention, I would like to mention here that national legislation implements regulations of the OSPAR Secretariat\(^{42}\) in conformity with the OSPAR Convention.\(^{43}\) The OSPAR Convention covers the North-East part of the Atlantic Ocean and oversees the protection of the environment in the Atlantic against pollution by navigation, extractive industries, or land-based sources of pollution.

Preliminary remark 2:
Due to the membership in the EU of the Kingdom of the Netherlands, I have to draw attention again to the European dimension, especially with regard to environmental protection. The European Court of Justice ruled in a judgment of 20 October 2005\(^{44}\) that the Habitat Directive of the EU\(^{45}\) is applicable to the EEZ as well. This judgment led to the introduction in Dutch Parliament of a bill extending some parts of the Dutch environmental legislation to the EEZ (see below). However, the licensing policy established on the basis of the *Waterworks Management Act* takes European Directives into account (see above).

Preliminary remark 3:
With regard to environmental protection, some of the acts presented hereafter implement regulations of the Law of the Sea Convention as well.

\(^{40}\) *Staatsblad* 1957, 150.
\(^{41}\) *Staatsblad* 1958, 217.
\(^{42}\) See <www.OSPAR.org>.
\(^{43}\) *Tractatenblad* 1993, 16.
\(^{44}\) Judgment in the case C-6/04 *Commission of the European Communities* v. *UK*.
\(^{45}\) EU-Directive 92/43 of the Council of the European Communities of 21 May 1992 with regard to the preservation of natural habitats and wild flora and fauna (L 206).
6.1. **Environmental Management Act, including Environmental Management Order and Environmental Management Regulation (Wet milieubeheer)**

The Environmental Management Act dates from 13 June 1979. It is the general set of regulations for the protection of the environment against the consequences of professional behaviour or activities. It is a system of Act, Order and Regulations by itself and applies indirectly to a small part to the EEZ as well. This comes via the Extraction Act where certain parts of the Environmental Management Act are stated to apply accordingly to extractive activities (see below).

6.2. **Act to Prevent Sea Pollution (Wet verontreiniging zeeewater)**

The Act to Prevent Sea Pollution dates from 1975 and went into effect on 1 January 1977. Amongst others, it implements the Oslo Convention of 15 February 1972 (Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft) and regulates pollution of the sea from ships and/or aircraft. Article 1a of the Act to Prevent Sea Pollution (effective as of 18 May 2005) applies the Dutch Criminal Code to anyone who violates the regulations of or by virtue of this Act in or above the EEZ. This Act will be withdrawn when the Water Act enters into force.

6.3. **Act to Prevent Pollution by Ships (Wet voorkoming verontreiniging door schepen)**

The Act to Prevent Pollution by Ships dates from 1983 and came into effect on 15 April 1986 and implements the Maritime Pollution Treaty (International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL)).

According to Article 2, this Act applies to all Dutch ships wherever they are present and to foreign ships in Dutch waters. Article 36(1) states the applicability of the Dutch Criminal Code to anybody violating the regulations by or by virtue of Article 5 of this Act outside the Netherlands. Article 36(2) declares that the Dutch Criminal Code is applicable to anybody violating the regulations by or by virtue of Article 12 of this Act in the EEZ.

The Act to prevent pollution by ships does not apply to dumping or other behaviour from or on board vessels as defined in Article 5(1) where

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46 *Staatsblad* 1979, 442.
47 *Staatsblad* 1975, 352 and 1976, 628.
48 *Tractatenblad* 1972, 62.
49 *Staatsblad* 2005, 49 and 240.
50 See Act to implement the Water Act, Art 2.1 sub d.
regulations have been promulgated by or by virtue of the Act to Prevent Sea Pollution.

6.4. **Act on Liability of Oil Tankers (Wet aansprakelijkheid olietankschepen)**

The Act on Liability of Oil Tankers dates from 21 June 1975\(^{52}\) and went into effect on 21 July 1975. Article 3 holds the shipowner liable for damage from pollution caused by an incident. Article 1 defines damage by pollution as follows: ‘loss or damage outside the ship in the Netherlands … in the Dutch EEZ … caused by pollution as a consequence of leaking or dumping oil from the ship…’\(^{53}\)

6.5. **Act to Prevent Against Accidents on the North Sea (Wet bestrijding ongevallen Noordzee)**

The Act to Prevent against Accidents on the North Sea dates from March 1992\(^{54}\) and went into effect in November 1992. Its intention is, amongst others, to implement the Brussels Convention (International Convention on Civil Liability for Oil Pollution Damage) of 29 November 1969\(^{55}\) and the London Protocol of 2 November 1973.\(^{56}\) Article 2 of the Act to Prevent against Accidents on the North Sea states its applicability at marine waters adjacent to Dutch territorial waters between 51°10’ and 56° North latitude, which includes part of the EEZ. Installations and ships involved in extractive activities are not covered by this Act, according to Article 1 paragraph 6.

6.6. **Order Containing General Rules for Environment Extractive Activities (Besluit algemene regels milieu mijnbouw)**

The Order Containing General Rules for Environment Extractive Activities dates from 2008.\(^{57}\) It replaces a set of general rules attached to the environmental permit required for extractive activities required under the Extraction Act Article 40 (see below). The Order refers to ‘installations on the continental shelf’ rather than ‘in the EEZ’ which does not prevent its applicability to the EEZ.

\(^{52}\) Staatsblad 1975, 321.

\(^{53}\) Art. 1 sub g.a. Wet aansprakelijkheid olietankschepen.

\(^{54}\) Staatsblad 1992, 211 and 567.

\(^{55}\) Tractatenblad 1970, 197, Treaty holding action at full sea after accidents causing potential pollution by oil.

\(^{56}\) Tractatenblad 1977, 162, Protocol holding action at full sea after accidents causing potential pollution by other material than oil.

\(^{57}\) 3 April 2008, Staatsblad 2008, 125.
6.7. **Bill to amend the Nature Conservation Act and the Flora and Fauna Act with regard to Extension of their Applicability to the EEZ (Voorstel tot wijziging van de natuurbeschermingswet 1998 en de Flora- en Faunawet in verband met de uitbreiding van de werkingssfeer van beide wetten naar de exclusieve economische zone)**

The *Nature Conservation Act*\(^59\) dates from 25 May 1998 and went into effect on 22 January 1999.\(^60\) It serves to protect natural areas against deterioration by introducing various policy instruments such as management plans, licenses for activities in designated protected areas, etc. The *Flora and Fauna Act* dates from 25 May 25\(^61\) and went into effect on 2 July 1999.\(^62\) Its objective is to bring together in one Act different regulations regarding the protection of wild plants and animals in order to coordinate these regulations. This Bill was introduced in the Lower House on 3 July 2009 and serves to implement two European Directives in the area of nature conservation (see preliminary remark 2 above).

7. **Management of Natural Resources**

7.1. **Extractive Activities**

7.1.1. Extraction Act including Order and Regulations (Mijnbouwwet, – besluit en –regeling)

Legislation with regard to extractive activities on the continental shelf was introduced with the 1968 *Mining Act Continental Shelf*, which was replaced by the *Extraction Act* from 1 January 2003. The *Mining Act Continental Shelf* regulated the exploitation of minerals on the continental shelf beyond three miles. Extractive activities within three miles of the coast were regulated by the *Act of 21 April 1810*. The Act of 21 April 1810 (drafted by Napoleon) was the last act in French that remained applicable up to 1 January 2003. It was replaced at that time by the *Extraction Act*. Extractive activities are covered only for the exploration and exploitation of minerals situated more than 100 meter under the seabed. The production of other minerals is covered by the *Soil Removal Act* (see below).

The *Extraction Act* includes a system of licensing for exploration and exploitation of minerals. Additional chapters are dedicated to proper performance of activities and financial and fiscal aspects. The *Extraction Act*

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\(^{58}\) Tweede Kamerstuk (parliamentary documentation Lower House) 32.002, Nos. 2 and 3.


\(^{60}\) Staatsblad 1999, 15.

\(^{61}\) Staatsblad 1998, 402.

\(^{62}\) Staatsblad 1999, 264.
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covers activities in the EEZ as well. The most important section concerning operations is Chapter 4, entitled 'The proper performance of activities'. In this Chapter, Article 40 introduces the environmental permit for extraction. Further, the article states that part of the Environmental Management Act is applicable in cases where the Environmental Management Act itself is not applicable. The Environmental Management Act does not apply to the EEZ since the Act itself does not say so; therefore, the Extraction Act makes some parts of the Environmental Management Act applicable in the EEZ. Contravention of the regulations of the Environmental Management Act will be treated as contravention of Article 40 of the Extraction Act.

The Extraction Order expands upon the more open norms of the Extraction Act and is herewith applicable to the EEZ as well.

The Extraction Regulations are even more detailed than the Extraction Order. Their applicability is similar to that of the Extraction Act and Order.

7.1.2. Soil Removal Act (Ontgrondingenwet)

The Soil Removal Act dates from 1965\textsuperscript{63} and regulates the exploitation of minerals situated in the first 100 meters of the soil of the seabed.

Article 4a of the Soil Removal Act extends its applicability to the exploitation of minerals on the continental shelf as defined by the Extraction Act. Article 4(b) introduces State ownership of minerals in the seabed up to 100 meter below the seabed. Both articles went into effect on 1 January 2003. The Soil Removal Act introduces a system of licenses for the exploitation of natural resources in the seabed.

7.2. Fisheries

7.2.1. Fishery Zone Boundary Authorizing Act (Wet houdende machtiging tot het instellen van een visserijzone)

The basis of all fishery regulations, the Fishery Zone Boundary Authorizing Act of 8 June 1977, controls authorization to create a fishery zone.\textsuperscript{64} It includes the option to institute an exclusive fishery zone to a maximum of 200 nautical miles from the baselines of the territorial sea.

Article 2 of the Fishery Zone Boundary Authorizing Act states that the boundaries within which the Kingdom of the Netherlands carries out its exclusive jurisdiction with regard to fisheries are limited to 200 miles from the baselines of the Dutch territorial sea. The Act itself does not mention the EEZ. Since the Dutch EEZ is situated totally within the 200-mile boundary it follows that this Act is applicable to the EEZ.

\textsuperscript{63} Staatsblad 1965, 509 and 1971, 520.

\textsuperscript{64} Staatsblad 1977, 345.
The Statutory Order of 23 November 1977\textsuperscript{65} implements Article 1 of the Act; it went into effect on 25 December 1977. The boundaries of the fishery zone coincide with the boundaries of the Dutch part of the continental shelf.

7.2.2. The Fisheries Act 1963 (Visserijwet)

The Fisheries Act 1963\textsuperscript{66} dates from May 1963, and went into effect on 1 June 1964.\textsuperscript{67} It regulates different aspects of fisheries at sea and in internal waters. With regard to the EEZ, the Act does not explicitly state its applicability; however, Article 5 paragraph 1 of the Fisheries Act 1963 prohibits fishing in the waters situated within the fishery zone. As noted above, this zone stretches partly out over the EEZ. The Fisheries Act 1963 regulates, amongst others, the requirements for fishing vessels, fishing equipment, and the fish that is to be caught.

Article 58 of the Fisheries Act 1963 extends the applicability of the Dutch Criminal Code to whoever commits the offences by virtue of Articles 3(a), 4 and 5 (Fisheries Act 1963) in the fishery zone, which is effectively the EEZ.

8. Miscellaneous

8.1. Labour Act Extractive Activities North Sea (Wet arbeid mijnbouw Noordzee)

The Labour Act Extractive Activities North Sea dates from November 1992\textsuperscript{68} and went into effect on 1 February 1993.\textsuperscript{69} The Labour Act Extractive Activities North Sea is quite different from the other legislation presented here; it extends applicability of parts of the Civil Code to work performed on the continental shelf under Article 2 in combination with Article 1. It defines an employee as ‘someone performing work according to an employment agreement on or from a mining installation on the continental shelf’. Under Article 3 of the Labour Act Extractive Activities North Sea the employee who gets sick and is therefore not able to perform his/her work is still entitled to his/her salary for the duration of, at most, 104 weeks if this employee has no insurance in accordance with the relevant Dutch legislation for social security.

Article 10 of the Labour Act Extractive Activities North Sea deserves special attention as it gives exclusive authority to resolve disputes to the district Court of Alkmaar. Execution of judgments on the continental shelf is regulated by Article 10, paragraph 2.

\textsuperscript{65} Staatsblad 1977, 665.
\textsuperscript{66} Staatsblad 1963, 312.
\textsuperscript{67} Staatsblad 1964, 142.
\textsuperscript{68} Staatsblad 1992, 592.
\textsuperscript{69} Staatsblad 1993, 44.
Most likely this Labour Act Extractive Activities North Sea has lived its longest time. See final remarks.

8.2. **Nuclear Power Act (Kernenergiewet)**

The Nuclear Power Act dates from 1963 and went into effect on 27 March 1963. Article 2 announces the applicability of rules and regulations by of this Act on extractive activities defined in the Extraction Act, as far as these take place on the continental shelf. According to its preamble, the intention of the Nuclear power Act is to set rules to foster development of nuclear energy and the use of radiation-emitting equipment, as well as to protect against the dangers involved in these activities. In the extractive industries, some radiation-emitting equipment and measuring methods use nuclear materials, which explains the applicability of this Act to the EEZ for these extractive industries.


The Patent Act dates from 1994 and went into effect on 1 January 1995. It protects all products and activities to which a patent has been applied. Article 55, paragraph 2, and Article 57, paragraph 3, of the Patent Act extend the protection of these articles to the Dutch part of the continental shelf. Article 74 extends the validity of rights and obligations in, on, and above the Dutch part of the continental shelf. These three extensions are only for activities intended for, and performed during, exploration of natural resources or their exploitation.

8.4. **Social Security Regulations**

Apart from the applicability of the acts and regulations presented above, I would like to draw attention to certain other aspects in Dutch legislation applicable in the EEZ.

Article 2, paragraph 3 of the Industrial Disability Insurance Order (Besluit uitbreiding en beperking kring verzekerden WAZ) states that workers in the EEZ are not considered to be working abroad. Therefore they have the full benefit of the national social security system as far as disability insurance is concerned. This means that a part of the Dutch social security system has extraterritorial applicability. This is not the only example.

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70 *Staatsblad* 1963, 82.
72 *Staatsblad* 1995, 51.
74 *Staatsblad* 1997, 797.
Article 12, paragraph 3 of the Extension and Limitation Circle Insured People National Insurance Order 1999\textsuperscript{75} (Besluit uitbreiding en beperking verzekerden volksverzekeringen 1999) contains the same extension concerning national insurance in favour of workers in the EEZ.

8.5. Management of the EEZ

An overall policy statement of the Dutch government concerning the management of the North Sea, including the EEZ, can be found in the Integrated Management Plan North Sea 2015 (Integraal Beheerplan Noordzee 2015\textsuperscript{76}), which was drafted in 2005. It embodies the North Sea paragraph of the general Space Memorandum (Nota Ruimte\textsuperscript{77}) published by the Dutch Government in 2006 and in force until 2030.

9. Supervision and Law Enforcement

9.1. Supervision

Many of the abovementioned acts allocate authority for supervision and criminal investigation to bodies of the central government. There are very few government supervisors active in the EEZ. This supervision includes administrative enforcement of regulations.

9.2. State Supervision of Mines

State Supervision of Mines is an old supervisory service of the government, founded in the old Napoleonic Act of 21 April 1810. State Supervision of Mines performs an overall supervisory role over extractive activities; due to its experience with conditions of the offshore oil and gas industry, it also supervises the construction of offshore wind parks. In the offshore area it takes on the position the Labour Inspectorate has onshore, supervising all professional activities according to the rules of the Working Conditions Act. On behalf of the Environmental Inspectorate of the Ministry of Environmental Management and Spatial Planning, State Supervision of Mines supervises the environmental aspects of the extractive activities as well.

In the extractive industries, two other supervisory bodies are active: the Aviation division of the Inspectorate of Public Waterworks and Transport (Inspectie Verkeer & Waterstaat) supervises all aspects of air transport to and from the mining installations. The Telecom Agency, part of the Ministry of Economic Affairs, supervises all the telecommunication aspects of the offshore extractive industries. Servants of the two bodies are appointed

\textsuperscript{75} Staatsblad 1998, 746.
\textsuperscript{76} See <www.noordzeeloket.nl>, ruimtelijk beheer.
\textsuperscript{77} See <www.minvrom.nl>, ruimte > nota ruimte.
separately according to Article 131 of the *Extraction Act*. They have exclusive authority for their professional working areas, i.e. telecommunication equipment and operations, infrastructure procedures and skills for helicopter operations.

9.3. **Netherlands Coastguard (Kustwacht)**

Several ministries are involved in supervision off territorial waters. To organize these activities in a proper and effective manner, the Netherlands Coastguard was officially instituted by Decree of the Cabinet of 10 March 2006, effective as from 1 January 2007. This Decree is signed by the Minister of Public Works and Transport and the Minister of Defense. The management of the Coastguard lies with the Ministry of Defense. The Coastguard performs a variety of tasks in the field of search and rescue and emergency response.

9.4. **North Sea Directorate (Directie Noordzee)**

The management of all activities of the Ministry of Public Works and Transport with regard to the North Sea is undertaken by the North Sea Directorate, which represents the minister in administrative procedures. The North Sea Directorate distributes licenses according to the terms of the *Waterworks Management Act*. This Directorate is the administrative enforcement authority for this Act and the *Soil Removal Act*.

With regard to the management of the North Sea, a policy statement published in 2005 entitled ‘Integrated Management Plan North Sea 2015’ sets out the goals the Ministry of Public Works and Transport. The management plan includes the EEZ as well.

9.5. **Inspectorate Traffic and Public Works (Inspectie Verkeer en Waterstaat)**

The Inspectorate Traffic and Public Works has administrative supervision for the *Shipping Traffic Act*, the *Ship Act*, the *Act to Prevent Pollution by Ships*, and the *Act on Aviation*. It performs this function in the EEZ as well. It exclusively supervises the regulations of the *Extraction Act* with regard to helicopter operations for extractive industries and their support/supply companies.

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79 Besluit instelling kustwacht, Art. 2, paragraph 2.
80 See p. 13.
9.6. General Inspection Service (Algemene Inspectiedienst)

The General Inspection Service comes under the Ministry of Agriculture, Nature Management and Food Quality. The General Inspection Service supervises the acts with regard to fisheries and nature conservation that apply in the EEZ.

9.7. Law Enforcement

Law enforcement begins with investigation which is a job for the police; the Dutch police also have a special branch for the North Sea, and conduct regular patrols in the EEZ. Some of the inspectors of State Supervision of Mines have the authority to perform criminal investigations, particularly with regard to accidents and suspicion of a criminal offence directly related to extractive activities. Their authority is limited; investigation into general offences is not to be undertaken by State Supervision of Mines unless upon explicit request of the Public Prosecutor. Criminal investigations by State Supervision take place under the authority of the Public Prosecutor.

The Netherlands Coastguard is charged with criminal investigations for legislation regarding environment, fisheries, extractive activities, and navigation.82

I would like to draw attention to the fact that only the Public Prosecutors Office in Amsterdam is authorized for criminal enforcement. This has its basis in the Order based on the Installations North Sea Act. Similarly, only the Court in Amsterdam has the authority to hear cases concerning criminal offences committed in or on the EEZ.

10. Final Remarks

The Kingdom of the Netherlands has a quite well developed legislative framework as far as the EEZ is concerned. One of the main reasons for all of these regulations is the development and exploitation of natural resources, including minerals and wind energy, which increasingly takes place in the EEZ. This exploitation, however, should be profitable for the environment and people, which is demonstrated by the extension of legislation regarding environmental protection. At the time of writing this report, the procedure had commenced for extension of the Act to protect the natural resources in the EEZ. The development in international legislation, more specifically in the European Union, also is a factor in the Netherlands’ legal regime in the EEZ.

Due to the development for the use of renewable energy, I have made a recommendation to the Minister of Social Affairs and Employment to extend the applicability of the Labour Act Extractive Activities North Sea (Wet arbeid

82 Besluit instelling kustwacht, Art. 4, paragraph 2.
to workers other than those in the extractive industries. The reason for this call is similar to the one that led to the extension of the Working Conditions Act (Arbeidsomstandighedenwet) to other workers than those in the extractive industry: no justification exists to limit the protection given to employees in the field of extractive activities. I am proud of having received a positive response to this request.

On 7 May 2010 a bill\(^3\) was introduced in Parliament leading to the result I proposed to the minister of Social Affairs. This bill aims to extend quite a large part of the social security system to employees on the Dutch part of the continental shelf. The introduction was caused by a Notification of the European Commission to the Netherlands in 2007. The Dutch government likes to bring this bill into effect from 1 January 2011. It will lead to expiration of the Labour Act Extractive Activities North Sea (Wet arbeid mijnbouw Noordzee).

\(^3\) 32 383 Wet verzekeringen continentaal plat.
INTRODUCTION

E.A. Alkema

Introduction

The Netherlands have emerged as an independent State from Habsburg rule after separation in 1581 from Spain. Over time it developed into an independent republic uniting seven provinces in a confederation structure.

During a turbulent period from 1795-1813 it successively went through the phases of a unitary republic, a kingdom and an integral part of the French empire. In 1813 it revived as a kingdom and independent State and, from 1814-1839, was united with present-day Belgium. Gradually, it became a constitutional monarchy. Over time the Netherlands also evolved from a colonial power into a post-colonial State.

The Kingdom of the Netherlands maintained special constitutional ties with its former colonial overseas territories which were laid down in the 1954 Charter of the Kingdom (Statuut). Nowadays the Kingdom consists of three autonomous entities or Countries (Landen): the Netherlands (sometimes referred to as the ‘Kingdom in Europe’) and the Caribbean islands, Aruba and the Netherlands Antilles. In the near future the latter will probably be split up into two autonomous territories, Curaçao and Sint Maarten (Saint-Martin), whereas three smaller islands, Bonaire, Sint Eustatius and Saba will be politically integrated into the Netherlands.

The Kingdom’s internal relations are governed not only by domestic law but by international law as well, particularly so, as far as the right to self-determination of the overseas territories is concerned. In international relations the Kingdom acts as the legal entity exercising in particular the treaty-making power. Occasionally, the Kingdom’s twofold constitutional structure tends to complicate matters. In this paper we use the term ‘the Netherlands’ as indicating the subject of international law. Where the relations between the Countries (Landen) is concerned we will refer to the ‘Kingdom’.

Running ahead of what will be addressed in more detail later, the attitude vis-à-vis international law in the Netherlands could and can be characterised by a relative openness of the written and unwritten constitution towards international law. In doctrine, the Netherlands system has been qualified as moderately monistic. In a recent summary of the present-day State practice the Government has endorsed this view. It
explained that term in pointing to the fact that the Constitution sets some conditions for the internal effect of international law such as Parliamentary approval and official publication and does not treat all sources of international law equally.\footnote{See Doorwerking internationaal recht in de Nederlandse rechtsorde (Governmental note on the effect of international law in the Netherlands legal order), Parliamentary documents 2007-2008, 29861 No. 19, p. 3.}

Further, as a typical development of foreign relations can be mentioned what has been called its ‘democratisation’. Parliamentary approval increasingly has become a precondition for the internal effect of international treaties. The last two centuries saw an extension of the categories of treaties subject to such approval at the expense of the powers of successively the King and the Executive.

1. **Constitutional and Legislative Texts**

1.1. **Provisions of the National Constitution referring to International Agreements, Treaties, Customary International Law and other Sources of International Law**

International relations are dealt with in the Constitution under subsection 2 of Chapter 5 ‘Legislation and Administration’, entitled ‘Miscellaneous Provisions’ the following articles are relevant here:

Art. 90 The Government shall promote the development of the international rule of law.

Art. 91

1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament.
2. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.
3. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour.

Art. 92 Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Art. 91 para. 3.

Art. 93 Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

\footnote{See Doorwerking internationaal recht in de Nederlandse rechtsorde (Governmental note on the effect of international law in the Netherlands legal order), Parliamentary documents 2007-2008, 29861 No. 19, p. 3.}
Art. 94 Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

Art. 95 Rules regarding the publication of treaties and decisions by international institutions shall be laid down by Act of Parliament.

These articles are followed by specific provisions (Articles 96-102) on declaring the Kingdom in a state of war, conscription and, generally, on the military; they are less relevant here.

Finally, mention should be made of Article 120 restricting the judiciary’s competence to review:

Art. 120 The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

The quoted articles of the Constitution lend direct effect or – to borrow a term from US constitutional law ‘self-executingness’ – to some provisions of international law i.e. of treaties and of decisions of international organisations on the condition that they are ‘binding on all persons’. Such provisions of international law rank high in the hierarchy of legal norms; they enjoy priority over Acts of Parliament as well as over the Constitution itself. Besides, Article 120 precludes the courts from reviewing the constitutionality of treaties, a question which is of special relevance with regard to treaties deviating from the Constitution and thus requiring under Article 91 para. 3 a qualified majority for approval.

The Act referred to in Articles 91 paras. 1 and 2 and 95 is the (Kingdom) Act of Parliament on (parliamentary) approval and publication (Rijkswet goedkeuring en bekendmaking verdragen). It elaborates the conditions for and exceptions from parliamentary approval of treaties and also lays down some rules about the publication of treaties and of some decisions of international organisations in an official journal called Tractatenblad.

The Constitution thus refers explicitly only to treaties and decisions of international institutions (i.e. organisations). It is silent on customary international law, general principles of law, the decisions of international tribunals and international texts of a declarative nature.

Inter alia in its judgment of 1959 – to be discussed in Section 4 on customary international law below – the Supreme Court has sketched roughly the contours of the courts’ constitutional competencies with respect to international law, in general. This judicial attempt to fill the gap in the written Constitution is neither perfect nor hard. Yet, it has been accepted as valid and legal practice conforms to it.

2 This provision is nowadays merely hypothetical since conscription has been terminated as from 1996.
3 Staatsblad (Official Gazette) (hereafter abbreviated as Stb.) 1994, 542.
It boils down to the following. The application of self-executing provisions of treaties and decisions of international organisations generally excepted, the courts ought to avoid an open confrontation with the parliamentary legislature; they should not review Acts of Parliament and squash them for non-conformity with international law. The underlying idea, apparently, stems from the implied constitutional supremacy of Parliament as the democratically elected legislator. Sometimes even self-executing international law may be denied that effect. Such is the case when the courts prefer to ‘abstain’ as will be explained in § 2.3 below.

That being said, international non-self-executing law from whatever source, of course to the extent that it is fit for judicial application, may produce all sorts of effects. These effects range from mere relevancy to great authority and from recommendatory to fully legally binding effect. In applying such international law the judiciary has the power to review delegated statutory law but not Acts of Parliament. The situation is different for the administration and the legislature which are under the international and constitutional obligation to comply with international engagements even if they are not cast in self-executing form.\(^4\) A complicating factor in this respect is that the latter obligations of the administration in some circumstances may subsequently as yet permeate into the case-law and become subject to judicial review viz. in tort actions against the authorities for non-compliance with international law.\(^5\)

1.2. Legislative Provisions calling for the Application of International Law within the National Legal System

There are several statutory provisions about the application of international law. The most important ones are: Article 13a of the Wet algemene bepalingen (General Provisions Kingdom Legislation Act of 1829) (Stb. 28) lays down:

‘The courts’ jurisdiction and the enforceability of judgments is subject to the exceptions recognised in international law’.

‘International law’ in this provision is considered to extend to all sources of international law including customary international law, general principles of law and decisions of international tribunals. It excludes notably the courts’ jurisdiction with regard to acts of State and has been elaborated in Article 3 para. 3 of the 2001 Gerechtsdeurwaarderswet (Bailiffs Act).\(^6\) A bailiff is not to enforce a judgment if he has been informed by the Minister of Justice that the

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\(^4\) So Governmental note (supra note 1), p. 5.

\(^5\) Fleuren 2004, p. 304.

\(^6\) Stb. 2001, 70. A similar earlier provision, Art. 13 of the Regulations for Bailiffs (Deurwaardersreglement), had been applied by Supreme Court 25 November 1977 (‘t Hart/Helsinki), NJ 1978, 186; see Erades 1993, p. 633; see also President Judicial Section Council of State 24 November 1986, Kort Geding, 1987, 38 (see also Section 4.2 infra).
he wishes to stay the enforcement of a court order because such enforcement would run contrary to obligations of the State under international law. Similar provisions are to be found in the Criminal Code and the Code of Criminal Procedure. Article 8 of the Criminal Code stipulates:

‘The applicability of the previous Articles 2-7 is subject to the exceptions recognised in international law’.

The Articles 2-7 concern especially the territorial scope of the Criminal Code. Further, Article 539 Section (a) (3) of the Code of Criminal Procedure reads:

‘The powers conferred under the provision of this Title can be exercised only subject to the law of nations and the rules of inter-regional law’.

This section of the Code establishes to what extent the powers in Title VI (A) relating to criminal procedure outside a court’s area of jurisdiction (including jurisdiction for seizure on the high seas), can be exercised when rules of international law and the rules in force between the constituent parts of the Kingdom are involved.7

In both provisions international law is to be understood as international law originating from any source, not just treaties or decisions of an international organisation.

The Algemene Wet inzake rijksbelastingen8 (State Taxes Act) in Articles 37-39 contains some provisions for the prevention of double taxation. Article 39 provides specifically:

‘In cases where international law or in the opinion of the Minister of Finance international usage (in Dutch: ‘gebruik’) so requires exemption of taxation is granted. Our Minister is authorized to issue further regulations on the matter’.

Again the scope of the provision is comprehensive: international law from any source. Besides, the notion of usage is generally understood to be wider than customary international law; it includes also unilateral practices of the Netherlands State or of its administration.

The Wet internationale misdrijven (Act on international crimes) of 19 June 2003 (Stb. 270) also frequently refers to international law with respect to international humanitarian law. The 1922 Wetboek militair strafrecht (Code of Military Criminal Law) (Stb. 1352), in Article 38, mentions the laws of war in connection with impunity, especially, of the military.

8 Of 2 July 1959, Stb. 301 as amended.
1.3. **Federal Systems: the System of the 1954 Charter for the Kingdom of the Netherlands**

As mentioned in the *Introduction* the Kingdom (i.e. the Netherlands in Europe and the Caribbean overseas territories) has an uncommon structure; it is neither federative nor confederative in the strict sense. Recently it has been described as a ‘cooperative structure’ or ‘constitutional association’ since it is more of a procedural device ‘for the Dutch organs to consult with the Netherlands Antilles and Aruba before acting on their behalf’ than a body politic encompassing all elements and performing the traditional activities of an ordinary State.\(^9\)

In matters of international law the Kingdom acts as an indivisible single legal entity according to Article 3 para. 1b of the Charter, the functions as a subject of international law being exercised mostly by the authorities of the European mother country.

With regard to formal acts such as treaty making and the membership of international organisations, however, the Charter contains specific rules (Articles 24 *ssqq.*). The gist of it is that the Kingdom formally has the monopoly of conducting the international relations. However, the separate entities (i.e. motherland as well as the overseas Countries) may take considerable influence on the material contents of the international obligations to be engaged in, particularly so, where autonomous matters (not belonging to the ‘Kingdom affairs’) are concerned. Agreements with other powers and with international organisations affecting an overseas Country shall be submitted to its representative assembly. The overseas Countries of the Kingdom have the opportunity to opt in or out international agreements, especially those dealing with economic or financial matters. Article 28 even enables the Antilles and Aruba to accede to – separate – membership of international organisations. Moreover, these territories have been associated with the European Community under Part four of EC-treaty as ‘overseas countries and territories’.

The above quoted Articles 90-95 of the Constitution also apply to the Kingdom in virtue of Article 3 para. 1\(^10\) and Article 3 para. 1b of the Charter; the latter qualifying foreign affairs as an ‘affair of the realm’. This implies *inter alia* that provisions of international law which ‘may be binding on all persons’ take priority even over the Charter of the Kingdom.

There is no special court charged with adjudicating any conflicts between international law and the law of the Antilles and Aruba. However, the Netherlands Supreme Court (*Hoge Raad*) is – in civil, criminal and fiscal matters – as is the Council of State’s judicial branch (*Raad van State Afdeling*

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\(^10\) Art. 5 para. 1: ‘The Kingship and the succession to the throne, the organs of the realm referred to in the Charter, and the exercise of royal and legislative powers in affairs of the realm shall be governed, if not provided for by the Charter, by the Constitution of the realm.’
bestuursrechtspraak) – in other administrative law matters – acting as a cassation court (French: 'cours de cassation') and applying the law of the Country involved (i.e. Antillean and Aruban law). Thus, although the statutory substrata are not the same, it is unlikely that the judicial methods and practice of applying international law (discussed in the following paragraphs) will differ with respect to Antillean and Aruban law. The more so, because the just quoted provisions of the Constitution apply equally to the overseas Countries.

2. Treaties and other International Agreements

2.1. Definitions

The Articles 93 and 94 of the Constitution cited above treat the self-executing provisions of treaties and decisions of international organisations on an equal footing. The treaties will be discussed here, whereas the decisions will be discussed below in section 3.

The Constitution refers to 'verdragen' (i.e. treaties) in order to ascertain that – irrespective of their designation – formally and materially the same instruments are meant as in international law. This qualification is of importance in the first place for Parliament, since in principle a treaty needs to be approved as a condition for being binding on the Netherlands State. When approved by Parliament there is little or no reason for the courts to still question the qualification as a treaty. Besides, Article 120 of the Constitution precludes the courts from reviewing the qualification given by the Government and Parliament and from deciding for their part the nature of an international text under domestic law.

A treaty which merely implements another treaty does not require parliamentary approval.11 Nevertheless, on one occasion, the Government gave in to political pressure and submitted a treaty, implementing a treaty approved by Parliament, to Parliament for approval. It concerned an agreement with the USA about the deployment of nuclear weapons on Dutch territory. The Government did so in order to rally more democratic support.12

In order to be applicable the treaty must have been duly published in the Tractatenblad (the official journal containing treaties and other international documents). It is for the courts to test the publication.13 With that formal exception they will – as a rule – rely on international law for the interpretation and application of a treaty.

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11 Art. 7 b of the 1994 Kingdom Act on (Parliamentary) approval and publication.
13 See Hoge Raad (abbr. HR) (Supreme Court) 24 June 1997, Nederlandse Jurisprudentie (NJ), NJ 1998, 70.
It is, particularly at the occasion of the Constitution’s revision in 1983 that, both in doctrine and administrative practice (but not so much in case-law), the distinction between legally binding and legally non-binding international texts has been elaborated. With regard to the latter there is a further distinction, though not a very sharp one, between ‘international policy agreements’ and ‘international administrative arrangements’. The former are usually referred to as ‘memoranda of understanding’. They commit politically but cannot be held in law against the State. The term ‘international administrative arrangements’ is used for engagements entered into by e.g. the Government or a Cabinet Minister with a foreign counterpart. Here the demonstrable intention of the authorities – either domestic or foreign – is required for their non-binding character. Otherwise such a document is deemed to be a treaty.\textsuperscript{14} \textsuperscript{15} It is likely that the courts, in line with this approach of doctrine and administration and, in similar circumstances, will accept the binding force of such an agreement.

The ‘upgrading’ of an administrative arrangement or any other originally non-binding text does not necessarily imply that parliamentary approval would be needed, as yet. The 1994 Kingdom Act on approval and publication in Article 7 lit. b provides that agreements for the implementation of approved treaties do not need to be approved themselves unless Parliament decides to the contrary (Article 8). This seems most practical since implementing treaties and administrative arrangements are often hard to distinguish.

2.2. Effect of Ratified Treaties

Ratified treaties that have been explicitly or silently approved by Parliament and have entered into force do not, as far as self-executing provisions are concerned, need special acts of incorporation provided they have been duly published.

On the other hand, implementing legislation is needed to make the non-self-executing provisions applicable by the courts. If and to the extent that implementation might encompass (elements of) self-executing provisions such implementation does not, however, preclude the courts from testing the implementing domestic statutory law for conformity with the original treaty. Generally, implementation by legislation does not create an irrefutable presumption of non-self-executingness because the legislature often leaves it – explicitly or implicitly - to the courts to consult the \textit{travaux préparatoires} and other relevant data in order to interpret and apply properly the domestic legal texts implementing a treaty.

\textsuperscript{14} Fleuren 2004, p. 149. See also Alkema 2008, p. 184-186.
\textsuperscript{15} HR 7 November 1984, NJ 1985, 247.
2.3. The Doctrine of Self-executing and Non-selfexecuting Treaties

Since the Constitution embraced in 1953 a doctrine of self-executingness the courts are inclined to adhere to that doctrine. The criteria taken into account are a mixture of international and domestic law. So self-executingness is not esteemed to be entirely dependent on the intention of the States parties. In the leading case the Supreme Court considered that it was not relevant whether the

'States parties intended to recognise the direct effect of Art. 6 para. 4 of the European Social Charter, since neither from the text nor from its travaux préparatoires it could be inferred that such effect had been excluded. In those circumstances, according to Netherlands law, only the contents of the provision is decisive: does it oblige the Netherlands legislator to make rules of a certain content or import or is that provision of such nature that it can be applied as objective law right away'.

In the case-law those criteria have been further elaborated. Fleuren mentions in this respect inter alia the following criteria:

- the way in which the engagements of the States parties to a treaty have been couched;
- is a provision fit to be applied by the courts;
- is it sufficiently concrete;
- is gradual implementation provided for;
- is the provision binding the State in its relations to other States only;
- does the provision contain a ‘positive’ obligation (particularly relevant with respect to social fundamental rights as opposed to classical fundamental rights).

A most interesting development in the case-law is that the courts have created some sort of an escape in order to avoid a direct conflict with the political branch, the so-called ‘abstaining’. Occasionally the courts have ruled that even if the provision of international law is to be considered as self-executing it would – under certain circumstances – lay outside their competencies to apply the international law provision and let it prevail over the domestic statutory provision. This is particularly so, when those circumstances call for a weighing of different alternatives which the courts deem is beyond their judicial task and rather a matter for the political branch to decide. Apparently for constitutional reasons, the courts in those circumstances shrink from setting aside domestic statutory provisions. In

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17 Supreme Court HR 30 May 1986 (NS/FNV), NJ 1986, 688 § 3.2.
doing so they clearly abstain from giving effect to an international law provision, in spite of their recognising it being self-executing.

Sometimes the courts leave the question of self-executingness undecided. They can do so because they first preliminarily examine whether the contested domestic legal provision or decision is in conformity with international law.\textsuperscript{20} If so, the question of self-executingness becomes moot.

Especially in connection with the International Covenant on Economic, Social and Cultural Rights (\textit{ICESCR}) the matter of self-executingness has been discussed amply in the literature.\textsuperscript{21} With respect to that Covenant the courts – with a few exceptions – have not considered its provisions as self-executing. The Government when submitting the treaty for parliamentary approval observed that most of its provisions will not be directly applicable. In support of that view it pointed to Article 2 para. 1 where the State

\begin{quote}
‘undertakes to take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights concerned in the present Covenant.
\end{quote}

Although this reasoning has been criticized by the UN Committee supervising this Covenant as early as 1998. Still the courts are not inclined to lend direct effect to the Covenant’s provisions. In the doctrine, to the contrary, it has been suggested that there could and should be exceptions. For one, it would be conceivable that some of these fundamental social rights would be applied by the courts, notably when newly introduced domestic legislation threatens to reverse a progressive development with respect to such a right into a retrograde development.

It is to be noted here that international law – whether self-executing or not – does not obligate just the State as a single entity but can address and obligate its component parts, notably the local authorities, as well. Disputes between central and local authorities including disputes about questions of international law used to be subject to administrative (non-judicial) review by the Crown and could result in annulment or non-approval of the local authorities’ acts or regulations. Nowadays – since the appeal to the crown has been abolished following the ECtHR judgment in \textit{re Benthem}\textsuperscript{22} – most such disputes are no longer finally decided by the administration but by the Judicial Branch of the Council of State. There is no reason to believe that this judicial body in future disputes between central and local authorities would not apply non-self-executing international law provisions either.\textsuperscript{23} Though

\begin{footnotes}
\footnotetext{20}{Vlemminx & Vlemminx-Boekhorst 2005, p. 32.}
\footnotetext{21}{See \textit{ibidem} p. 28-40 and Fleuren 2004, p. 299 ssqq.}
\footnotetext{22}{ECtHR 23 October 1985, \textit{Benthem v. the Netherlands}, Series A 97.}
\footnotetext{23}{Royal Decree of 19 February 1993 (Eem-Dollard treaty Art. 48), \textit{Administratief rechtelijke beslissingen} (abbr. \textit{AB}) 1993, 385; see also Royal Decree of 19 July 1974, Stb. 496 and Royal Decree of 10 September 1974, Stb. 556 both squashing regulations of the City of Rotterdam for non-compatibility with the Convention on the Elimination of All Forms of Racial Discrimination.}
\end{footnotes}
non-self-executing, those provisions indirectly may benefit the legal position of private parties in disputes with local authorities.

2.4. **Treaties and Private Parties**

The foregoing already sheds some light on the conditions or circumstances under which treaties can be invoked and enforced in litigation by private parties. Generally, there are no special conditions nor special tests applied in such disputes with regard to the standing of private parties.

They may claim, as noted before, that the authorities have acted contrary to self-executing and non-self-executing treaty provisions and bring civil actions for tort and damages. However, private actions for an injunction with respect to the ratification or non-ratification of international treaties by the political branches are not permissible. In this and other instances the courts for obvious – constitutional – reasons have refrained from interfering in matters of foreign relations.

2.5. **Judicial Interpretation of Treaties**

In interpreting treaty law the courts are not obliged to defer to the views of the government or the legislature. In principle, they have full power to interpret treaties. If deemed necessary, they even may review a treaty under international law itself, notably with respect to compatibility with other treaties or international law. It goes without saying that they also may cite the Vienna Convention on the law of treaties. Occasionally, the Advocates-General attached to the Supreme Court as well as the Government have referred to that Convention. The Vienna Convention as such is not being subjected to the test of self-executingness; the application of its rules on interpretation rather precedes the decision about the self-executingness of other international law and ought to be distinguished there from.

The courts do, however, take note of the information and opinions voiced at the occasion of a treaty’s submittal for approval to Parliament and are used to accept these as a guidance. Such guidance is the more important since the power to review under Articles 93 and 94 is a ‘diffuse’ one: all courts have to apply international law but some of them, in particular courts of first instance, may lack the proper expertise or experience to do so.

On the other hand, as mentioned before (§ 2.2), the political branches often explicitly leave the interpretation of international law to the judiciary on the assumption that the courts may meet the dynamic development of international law more flexibly and effectively than the legislature itself.

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25 HR 10 November 1989 (Stichting verbiedt de kruisraketten/Staat), NJ 1991, 248 § 3.4.
26 Ibidem the Advocate General Mok’s brief § 5.4 and 6.1 and Governmental note (supra note 1) p. 7.
2.6. Reservations

Courts have the power to decide whether a statement attached to an international instrument by the government or legislature during treaty approval indeed is a reservation. However, they may review the question only under international law, not under constitutional law (the latter ban follows from Article 120 of the Constitution). Case-law to that effect has not been reported; neither is there a reported instance of a court deciding on the scope or legality of a reservation.

2.7. Effect of Treaties among Third-parties

Courts do refer to treaties to which the Netherlands is not a party. Here a distinction can be made. Firstly, treaties can be binding although they have not yet been approved by Parliament. Article 10 para. 1 of the 1994 Kingdom Act on approval and publication allows for provisional application of treaties if such is considered to be particularly urgent; in those instances parliamentary approval has to follow as soon as possible. Secondly, treaties which have not yet entered into force for the Netherlands (e.g. because they have been signed but not yet ratified) are formally not binding. Nevertheless the courts occasionally apply them in anticipation or may pray in aid such treaties where they have to determine (the contents of) a rule of positive law. It is noteworthy that this has happened also in cases with respect to constitutional principles, such as the ban on discrimination and the fundamental ‘right of person’ or the fundamental ‘right to a personality’. Thirdly, it is conceivable but not very likely that a court would refer to a treaty to which the Netherlands is not a party nor has taken steps to become a party. Such reference, however, could only support but not be a decisive element in the courts’ reasoning.

Comparable rules apply with respect to the far more rare cases of termination or of withdrawal from a treaty.

2.8. Federal Systems

The foregoing is fully relevant with respect to the Kingdom and the Countries (overseas territories). As mentioned in § 1.3 the provisions of the Netherlands Constitution on foreign relations are equally applicable and likely to be interpreted within the entire Kingdom in the same manner.

28 HR 29 May 1996 (V/ZB), NJ 1996, 556; see further Fleuren 2004, p. 236, nt. 2.
29 See for examples of such anticipatory interpretation or enforcement: Erades 1993, p. 282; p. 559; p. 561-563; contrary: HR 24 January 1984 (Magda Maria), NJ 1984, 538 § 5.6.
30 HR 15 April 1994 (Valkenhorst), NJ 1994, 608.
3. Decisions of International Organisations, Tribunals and Bodies

Since the Netherlands Constitution places in juxtaposition the provisions of both treaties and decisions of international organisations ‘which may be binding on all persons by virtue of their contents’ a few remarks will be made about the latter category which is of increasing importance nowadays.

We will not dwell long on the decisions of the European Community since that international organisation has its own rules for and judicial supervision over interpretation and implementation of ‘secondary’ community law by the member States. Yet, one comment should be made. Since the Court of Justice of the EC judgment in re Van Gend & Loos/Netherlands31 ruled that the Community constituted itself an autonomous legal order, in the Netherlands the doctrine has been prevailing that the Articles 93 and 94 were not instrumental in giving effect to European Community law within the domestic Netherlands legal order, European Community law being supposed to have such an effect in its own capacity.

Moreover, this understanding seems to have been confirmed by the Supreme Court and has firmly been adopted by the administration.32 In spite of such evidently well established constitutional practice, recently some authors have questioned that understanding.33 They point to the fact that the present Articles 93 and 94 were introduced in the Constitution in 1953 precisely for enabling European Community law to have effect within the domestic legal order and, they argue that therefore, these provisions still have to be considered as instrumental in that respect.

Decisions originating from other international organisations pose problems with regard to binding force, legality and legitimacy. Their binding force does not depend solely on the sovereign State’s will as the decisions may have been taken by a majority of the membership within the international organisation. Further and in contrast to the treaties instituting the international organisations, these decisions are not subject to parliamentary approval and they rarely have been translated and published officially.34

The constitutional notion of decisions of international institutions (i.e. organisations) still is unclear in some respects. The Supreme Court turned

33 See for this discussion further: Van Emmerik 2008, p. 145-161, especially p. 149-150; see also Governmental note (supra note 1), p. 5-6; see also Besselink & Wessel 2009 who advocate priority for the Constitution over international law in virtue of the ‘principle of democracy’, p. 84 ssq., and p. 106-109.
34 So-called ‘rulings’ made by the tax authority with respect to (foreign) taxpayers are an exception; their official publication takes place in the Staatscourant. See Alkema 2008, p. 184, note 421.
down the argument advanced by a taxpayer that the Universal Declaration of Human Rights qualified as ‘a decision of an international institution’; it found that the United Nations General Assembly from which the Declaration originates has no power to issue decisions that are binding on the Netherlands.35

With respect to judgments of the European Court of Human Rights (ECtHR) establishing a violation of the European Convention on Human Rights (ECHR) by the Netherlands, in theory, a similar reasoning could have been followed considering those judgments as ‘decisions’ in the sense of Articles 93 and 94 of the Constitution. Indeed, those judgments – though not explicitly qualified so in case-law nor in doctrine – have such effect. The same effect, however, has been given as well to judgments rendered against other States parties to the ECHR. Yet, Article 46 of that Convention only provides that judgments are binding *inter partes*.

Therefore in literature, the binding force or *erga omnes* effect of the latter has been explained in a different manner as some sort of ‘incorporation’: the case-law of the ECtHR being construed as an authoritative interpretation of the ECHR and, therefore, entailing the same binding force as has been attributed to the Convention itself. In this manner the doctrine evades qualifying the ECtHR’s case-law as ‘decisions’ in the sense of the Constitution.

The doctrine as well as the courts have extended this reasoning to the views of the UN Human Rights Committee supervising the Covenant on Civil and Political Rights (ICCPR) and other international bodies supervising the interpretation and application of human rights, though formally non-binding.36

Judgments and views of international (quasi-)judicial bodies often are concrete, elicited by and addressed to individuals; they, therefore, often easily meet the constitutional requirements for self-execution and so do the underlying treaty provisions. Although so far, these international texts do not have exactly the same constitutional status as decisions of international organisations occasionally, they may take priority over contrary domestic statutory law.

The process of implementing international decisions, not only those concerning human rights but also more technical decisions originating from Specialised Organisations as the World Health Organisation, International Civil Aviation Organisation, International Monetary Fund etc. shows a great variety and lacks a proper statutory or constitutional structure. All branches of government: the executive, the legislative and the judiciary, are involved. Sometimes they act consecutively e.g. the administration can take provisional

36 Occasionally, Netherlands courts also refer to General Comments of the Committee supervising the ICESCR; an example albeit negative is: *Centrale Raad van Beroep* (Supreme court in matters of social security), 11 October 2007 (*LJN* BB 5687).
measures or the courts may adapt - for the time being - their internal organisation awaiting the amendment by the legislature.

Implementation within the Kingdom can be even more complicated. Yet, a proper procedure is lacking here too.

Exceptionally, special implementation procedures are provided for. With respect to the implementation of judgments of the ECtHR in criminal matters the Code of Criminal Procedure in Article 957 para. 1 sub 3 provides for reopening of the contested proceedings.

As for the interpretation and implementation of international judgments and decisions, especially those taken by international supervisory bodies in matters of human rights, the political branches often can offer little or no guidance to the courts. Whenever the State itself has been participating in drafting the treaties or participating in the proceedings before the international tribunals or supervisory bodies it has acted in the completely different role of a defendant State, whose interpretations carry, of course, little or no special authority.

4. Customary International Law

4.1. Status in Domestic Law

The Netherlands Constitution is silent on customary international law. Articles 93 and 94 are not applicable. Therefore, in principle, customary international law does not prevail over Acts of Parliament, the Constitution or the Charter of the Kingdom. There are, however, some specific statutory provisions recognizing it as a source of law. These few exceptions have been mentioned above in § 1.2; they concern the execution of court judgments as well as some matters of criminal and fiscal law. In virtue of these statutory provisions customary international law - provided it is self-executing and in the circumstances therein indicated - prevails over all other domestic legal norms.

In other instances, customary international law is being recognised as a source of international law that could and should be applied by the courts but take priority over domestic delegated legislation only.

The leading case with respect to customary international law still is the Supreme Court’s judgment in re Nyugat dating from 1959. In that case, the

39 District Court of Rotterdam 8 January 1979, NJ 1979,113 (Stichting Reinwater e.a. MDPA) where the court considered: ‘this law [i.e. the law prevailing in the Netherlands] includes the unwritten rules of international law; Dutch courts are not only empowered, but even obliged to apply unwritten international law where appropriate’, NYIL XI (1980) p. 329.
40 So Governmental note (supra note 1), p. 5.
Supreme Court, strongly relying on the article’s drafting history, found that Article 66 (now Article 94) of the Constitution had as its purpose to define the courts’ competence to review domestic law for compatibility with international law and that, for that matter, any such review was limited to self-executing provisions of treaties and of decisions of international institutions. In the instant case this precluded the application of customary international law on prize.

The judgment, though leading, in fact – it is submitted here – is atypical in several respects: in matters of prize the Supreme Court exercised exclusive jurisdiction in two instances; that jurisdiction had not been used for over a century; the case concerned emergency legislation with retroactive effect while the facts had occurred in wartime. Nevertheless, during the 1983 overall revision of the Constitution the Government explicitly upheld the Supreme Court’s narrow doctrine in Nyugat: matters of customary international law lay outside the courts’ reviewing mandate. It did so notwithstanding the judicial tradition before 1953 and the opinions held in literature which were more favourable to applying customary law.

It is possible, though, that customary law is taken into account when the courts or the administration have to decide preliminarily about the validity under international law of (self-executing) treaties and decisions of international organisations. Neither is it to be excluded that the courts, in the future, might refer to customary international law in support of an interpretation of domestic law in conformity with customary law.

4.2. The Judiciary and Customary International Law

In view of the above, answering the questions on customary international law posed by the general rapporteur is not always possible and often will be hypothetical. Yet, the following can be remarked.

As mentioned before customary international law is referred to rarely in the case-law. Incorporation nor implementation, however, is necessary in order to enable the courts to give effect – if any – to it. Courts may apply customary international law – to the extent it is self-executing – in those instances where domestic law explicitly refers to it (see supra § 1.2). A case in point is a court ruling about the interference of the administration with the execution of a judgment providing for seizure of the bank account of the Turkish Republic’s embassy in order to ensure the payment of salary to a Dutch citizen and former employee. At that occasion the judge expressly rejected the State’s assertion that the jurisdiction would be restricted with respect to interference with the execution of judgments. The court conceded though that, generally, in matters of customary international law it has to be

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41 HR 6 March 1959 (Nyugat), NJ 1961, 2.
42 President of the Judicial Division of the Council of State 24 November 1986, Kort Geding 1986, 38.
taken into account that the Government represents the State in international relations and is as such a law-making actor. Therefore, it may be appropriate for the courts to hear the Government's advisors in international law. However, the instant case – in the opinion of the court – did not require such a hearing since the customary international law about State immunity was sufficiently clear on the point at issue: it allows for immunity from execution in cases where assets to be seized – as in the present case – are meant for public purposes.43

4.3. Ex officio Application and Scope of Customary International Law

As appears from this case-law the courts take judicial note of customary international law and, incidentally will apply it ex officio. This can be inferred from the just mentioned judgments of the District Court of Rotterdam and of the Supreme Court about the Universal Declaration of Human Rights.44 In the latter case it would have been conceivable that the court had examined whether the Universal Declaration in the meantime had acquired binding force as customary international law45 but it did not do so.

From the above it follows that customary law has plaid a role with respect to State immunity. It is likely that it will also permeate into the case-law about (military) criminal and fiscal law. In those areas legislation explicitly gives leeway to do so.

5. Hierarchy

5.1. The Rank of Treaties and Customary International Law

As explained before in § 1.1, the Netherlands Constitution focuses in particular on self-executing treaty law and on decisions of international organisations. Self-executing international law enjoys top rank in the hierarchy. Article 94 of the Constitution provides that all statutory regulations in force, i.e. also the Constitution itself and the Kingdom’s Charter, are not applicable if in conflict with self-executing international law. This is affirmed also by Article 120 of the Constitution: the courts have no power to review such international law for constitutionality.

43 The Court made a distinction with respect to a Supreme Court judgment, of 26 October 1973, NJ 1974, 361. There the Supreme Court held that the Socialist Federal Republic of Yugoslavia, although not a party to the Treaty of 10 June 1958 of New York in matters of recognition and execution of foreign arbitral awards, could not be received in its claim - based on customary international law - for immunity from an award to which it is a party.

44 HR 7 November 1984, NJ 1985, 247; See, generally, on the conflicts between treaties in Dutch case-law, Mus 1996.

45 See Humphrey 1979, p. 38 ssqq.
The Constitution does not refer to other sources of international law nor to non-self-executing international law. In principle, this does not imply a lower priority for such international law provisions. In doctrine it is held that according to constitutional customary law international law not provided for in the Constitution - if binding on the Netherlands - equally enjoys priority. However so far, that is not born out by practice (see with regard to customary international law the previous section).

With respect to the non-self-executing provisions of treaties and of decisions of international organisations there is no doubt priority. This is especially relevant for the administration and the legislature. The political branches are firstly responsible for the regulations and measures implementing international law and, generally, for compliance with international law engaged into by the State. In addition Government and Parliament have to test, in virtue of Article 91 para. 3, whether international law is in conflict with the Constitution but not in order to let the latter prevail. A positive test requires – at least in theory – a stronger legitimacy through an approval of the treaty by a qualified majority of votes in Parliament. Rarely however, the procedure of Article 91 para. 3 has been followed. An omission, that is recently being criticized in Parliament, notably in the Senate, with respect to Treaties establishing the EC and EU and also with respect to the Treaty on the International Criminal Court. This criticism is understandable; if a treaty considered to be conflicting with the Constitution has not been approved with such a qualified majority but with a simple majority only it, nevertheless, will have the effect of amending the Constitution materially. The conditions for a formal revision of the Constitution are much stricter. They are spelled out in Articles 137-142 providing for a twofold reading by Parliament and a two thirds majority in its Lower House.

Like the customary international law the general principles of law are so to speak in limbo. During the last decades, however, several of these principles have been codified in (multilateral) treaties e.g. the principles of equality and non-discrimination, abuse of rights and of other principles essential to the Rule of Law. Such codified principles, of course, have the same status as other treaty law.

5.2. **Reconciling or Conforming Domestic Law to International Law?**

In contrast to the judiciary in some Scandinavian countries, the Netherlands courts are not used to explicitly referring to a ‘rule of presumption’. Rather they interpret domestic law in conformity with international law implicitly. Some thirty years ago they occasionally did so in a reverse manner. Several international legal rules were bended so as to conform to domestic notions

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and rules.\(^{47}\) Apparently, at the time the courts not being accustomed to apply the new power (dating from 1953) to review domestic statutory law preferred avoiding an overt conflict with the political legislative branches.

As for the technique of ‘abstaining’: when the courts for political and constitutional reasons refuse to apply international law although it is considered self-executing, we refer to § 2.3 \textit{supra} and § 5.4 \textit{infra}.

5.3. \textit{Ius cogens}

The courts recognize the doctrine of \textit{ius cogens} norms.\(^{48}\) An old but somewhat shaky precedent dating back to the 1948 Constitution is the Supreme Court’s judgment of 28 November 1950.\(^{49}\) It concerned the winding up of a colonial heritage: the question where to demobilize the former colonial military troops mostly originating from the Moluccan Islands: in – at the time hostile – newly independent Indonesia or in the motherland in Europe. The Court, rejecting the Government’s argument derived from international law and from the Union treaty with Indonesia, referred to other ‘rules and principles of law’. Although it did not use the term \textit{ius cogens} as such it ruled that not demobilizing the troops in the Netherlands would have been illegal and constituting a tortuous act endangering the fundamental right to life of the persons concerned. At that moment the Netherlands was not yet bound by a treaty spelling out the right to protection of life, the ECHR not yet being ratified by the Netherlands. Since the Constitution does not contain a guarantee for the right to life either, the norm referred to was in fact unwritten and probably part of international customary law.

At a first glance the more recent record of case-law about \textit{ius cogens} appears to be scanty. Again this may be a matter of codification. Over time much \textit{ius cogens} norms have been laid down in treaties, particularly human rights treaties. Notably Article 3 of the ECHR and Article 3 of the European Convention for the Prevention of Torture, have exercised and still do exercise a considerable influence in the courtrooms and affect directly the policy of e.g. the immigration and penitentiary authorities.

It goes without saying that the courts and the administration when applying these norms strongly subscribe and defer to the case-law of the ECtHR, of other international tribunals and to the reports of supervising quasi-judicial bodies like the European Committee for the Prevention of Torture. It is in this context that the ‘technique of incorporation’ (see \textit{supra} section 3) often plays an important role.

\(^{47}\) Erades 1993, p. 429, note 132.

\(^{48}\) See HR 10 November 1989 (\textit{Stichting verbiedt de kruisraketten/Staat}), \textit{NJ} 1991, 248 rejecting the applicability of \textit{ius cogens} in the instant case and the Advocate General Mok’s brief § 6, pointing to the codification of \textit{ius cogens} in the Vienna Convention on the Law of Treaties.

\(^{49}\) HR 2 March 1950 (\textit{demobilization of KNIL military troops}), \textit{NJ} 1951, 217.
5.4. Effect of International Law on the Case-law

International law guarantees for human rights have had and still have an enormous impact on domestic case-law. This is particularly so for the civil and political rights laid down in the ECHR and International Covenant on civil and political rights (ICCPR). Most of them are considered to be self-executing. Through the aforementioned technique of ‘incorporation’ the judiciary takes due account of the interpretation by the ECrHR and the UN Committee on Human Rights.

The huge influence of the self-executing human rights law finds its cause in so to speak a contradiction within the Constitution.50 Firstly, pursuant to Article 120 Acts of Parliament are not subject to review for unconstitutionality, whereas Acts of Parliament and any other domestic statutory regulation are subject to judicial review for compatibility with self-executing international law (Article 94) as was noted before. However, both the Constitution and international treaties contain similar provisions, notably fundamental rights. Consequently, any dispute about the alleged illegitimacy of Acts of Parliament concerning such fundamental rights, necessarily tends to revolve around the application of international law and is not being considered under the comparable constitutional provisions.

Secondly, the 1983 revision of the Constitution has not been used to mend that flaw. To the contrary, Government and Parliament did not avail themselves of that occasion to adapt and complete consistently the existing catalogue of constitutional fundamental rights and thus missed the opportunity to make the Constitution more protective or at least as protective as the international fundamental norms. Therefore, in practically each case about an alleged conflict between fundamental constitutional rights and delegated legislation or administrative decisions both constitutional and international fundamental rights are invoked and to be applied side by side. The more so, since the courts have to let the most protective provision prevail (see i.a. Article 53 ECHR and Article 5 para. 2 ICCPR). As a consequence, interpretation and application of international human rights have become a matter of daily routine in the courtrooms and also in legislators’ quarters.

Other international fundamental rights that are not self-executing firstly need implementation in domestic legislation; an example is the Convention on the Elimination of All Forms of Racial Discrimination. Yet, the courts in interpreting certain notions from that treaty have referred to the treaty itself.51

Some treaties, such as the European Social Charter (Turin, Italy, 1961) and the International Covenant on Economic, Social and Cultural Rights, are less influential. Here the non-self-executing character of most rights is a hurdle – if not a barrier – in domestic court proceedings. A similar divide in

effects can be observed with regard to ‘mixed’ treaties protecting specific
groups of persons e.g. the Convention on the Rights of the Child containing
civil and political rights as well as social rights.52

A special problem is posed by the internationally guaranteed principle
equality and non-discrimination. That has been enshrined in numerous
treaties, including the Treaties, regulations and directives of the EC. The
principle is considered to be self-executing. Claims combining this principle
with social fundamental rights tend to make the latter in that respect apt for
judicial review, as yet. It is precisely in this context that the technique
mentioned in § 2.3 of ‘abstaining’ has developed. Disputes about social
fundamental issues linked with discrimination may be of such a political
calibre if not ‘explosiveness’ that the judiciary tends ‘to pass the buck’ to the
legislature and, in doing so, in fact declines to apply the self-executing non-
discrimination principle.

It can be concluded that the effect of international fundamental rights
on constitutional matters is considerable and so is the impact, generally, on
the interpretation and application of the constitutional provisions concerning
international law. Rarely, other elements of the Constitution, to my
knowledge, underwent any such influence. An exception perhaps are the
specific provisions introduced in 1983 in the Constitution (Articles 42 ssqq.)
singling out the Prime Minister among the other cabinet ministers. Before,
the Prime Minister was considered a primus inter pares. The amendments
have been introduced to reflect the new coordinating role for the Prime
Minister necessitated by his membership of the European Council of the
European Union. On the other hand, following the discussion briefly
mentioned in § 3 (supra) it has been advocated – but so far in vain – to
introduce a general provision about the status and effects of European
Community law.

5.5. Differences in Status for Specific Parts of International Law?

The Constitution does not foresee any hierarchy neither between treaties and
decisions nor among decisions of international organisations. It is likely,
though, that the courts will attribute a higher rank to the treaties establishing
an international organisation than to the decisions originating from such an
organisation. A comparable hierarchy is made by the Court of Justice of the
EC with respect to the Treaties establishing the EC and the EU and the EC’s
so-called secondary rules like regulations and directives.

Conflicts between Community law and other international legal
obligations may occur. This was the case in the Barber judgment of the Court
of Justice (CoJ)53 which was followed by a ‘view’ of the UN Committee on

53 Court of Justice E.C., Case of 17 May 1990 C—262/88 (Barber).
Human Rights in a case concerning the Netherlands. The legal dispute revolved around the date as from which a distinction based on sex with regard to pensions was to be illegitimate. The Government endorsed the point of view of the EC CoJ and a similar judgment of the Centrale Raad van Beroep (Supreme Court in matters of social security) and reacted by stating that it was unable to share the ‘view’ for compelling reasons of legal certainty.

Sometimes this type of conflicts can be resolved outside the domestic legal system by the EC CoJ. A case in point is the CoJ’s judgment in re Kadi and Al Barakaat/Council. In that case the Court of Justice tested the EC regulation implementing a decision of the Security Council Committee against fundamental principles underlying Community law, notably those concerning a fair trial, and concluded that the regulation did not meet this standard.

In another case about a conflict between treaties the Netherlands Supreme Court exercised a comparable test. The facts concerned a handing over under the NATO Status Treaty of an American military billeted in the Netherlands and suspected of the murder of his spouse. Handing over of the man to the American authorities would have conflicted with Article 2 of the ECHR and Article 1 of the 6th Protocol to the ECHR since it was likely that he would be sentenced to death. The Court weighed the conflicting international law: at the one hand the interests of the individual protected notably by Article 2 of the ECHR (prevention of the death penalty) and at the other hand the obligation derived from the international NATO Status Treaty obligation. It ruled that fundamental principles (i.e. the human rights provisions) had to prevail. No doubt this judgment was inspired by Soering v. UK of the ECtHR.

The conclusion can be that there are no general unqualified answers to questions of status or rank of different types of international law in the Netherlands legal order.

6. **Jurisdiction**

6.1. **Universal Jurisdiction over International Crimes?**

Generally, pursuant to Article 13A of the General Provisions Kingdom Act 1829 the courts' jurisdiction is subject to the exceptions recognised in international law. This article was inserted during the 1st World War. The reason for the amendment was that a District court had been neglecting state
immunity and had ordered, contrary to international law, the seizure of a German state-owned vessel. The incident was politically very serious and could have been a ‘casus belli’ for Germany since the Netherlands at the time was a neutral state.

The jurisdiction with respect to criminal law is laid down in Articles 2 to 7 of the Criminal Code (see also § 1.2 supra). They provide for the applicability of the Criminal law (viz. jurisdiction) in the following cases: crimes committed within the Netherlands territory and on board of Dutch vessels and aircrafts; certain crimes committed by whomsoever outside the Netherlands (i.e. universal jurisdiction stricto sensu); crimes for which the prosecution has been taken over from another state; certain crimes committed by Dutch nationals abroad.\(^{59}\) Further, it is provided for that foreigners with a fixed abode in the Netherlands who have committed war crimes or certain other special crimes abroad come under Netherlands jurisdiction.

Following the institution of the International Criminal Court in The Hague the Wet internationale misdrijven (International Crimes Act) 2003 (Stb. 270) has been adopted. It establishes universal jurisdiction for crimes like genocide, torture and war crimes as defined in the relevant specific international treaties and conventions. The District Court of The Hague is competent in these matters.

Criminal courts are equally competent in the adjudication of indemnifications connected with the afore-mentioned crimes on conditions that victims or their relatives have joined as civil parties in the criminal proceedings.

6.2. **Civil Courts’ Jurisdiction for International Law Violations?**

The civil courts also have jurisdiction in matters of indemnification. Moreover, they exercise jurisdiction with respect to non-compliance with international law in actions for tort against the State. This is the case where the State or the state authorities allegedly have failed to comply with international law obligations e.g. if they do not take the proper administrative action or pass the required legislation. It even is conceivable that state acts in conformity with international law nevertheless are subject to civil actions where the measures taken affect civil parties unevenly and therefore violate

\(^{59}\) A recent example is HR 30 June 2009 (v. A./State) (conviction for supplying the Sadam Hussain regime with raw material for chemical weapons), LJN BG 4822. Subsequent to this penal judgment also private law suits for damages have been initiated. Jurisdiction – international or national – with respect to piracy (notably by Somalia nationals) is under discussion now (see Parliamentary documents II 2009/2010, 29521 No. 124). Especially, the trial of pirates arrested by the Netherlands navy acting within the framework of the EU or UN poses a problem. So far, it resulted in some pirates being released, some others being extradited, while one criminal case is still pending.
the principle of égalité devant les charges publiques. In this context it is to be noted again that the distinction between self-executing and non-self-executing tends to become blurred. In principle, tort actions can be brought against the State for not complying with international law irrespective whether it is self-executing or not.

7. Other Sources of International Law

In the Netherlands Constitution there is no explicit reference to the general principles of (international) law. Yet, occasionally the courts have referred to these principles. They are legally binding. In principle, they do not take priority over Acts of Parliament. In the case-law, however, one exception, although not concerning a principle of international law as such, has been recognised. On condition that during the legislative process a possible conflict with principles of (international) law has not been addressed explicitly the courts may, incidentally, consider the contrary statutory provision as inoperative. In doing so they exercise a sort of ‘mitigated review’: the statutory provision is not applied in the instant case but nevertheless remains valid. It is likely that the courts will follow a similar reasoning with regard to disputes about domestic law allegedly conflicting with general principles of international law.

Another source of international law rarely is referred to in the case-law: comitas gentium. It is not clear, though, which legal force has been attributed to it.

7.1. Non-binding Declarative Texts

Non-binding declarative texts like the Universal Declaration of Human Rights and the UN and European standards for the treatment of prisoners are relevant and often authoritative for the courts. Of course, they can become legally binding if enhanced by later developments e.g. if reference is made to these standards in subsequent binding or recommendatory resolutions of international organisations or conferences, in judgments of international tribunals or through state practice to that effect. The courts have considerable discretion in these matters and also may be influenced by the stance taken by the administration as to the quality of these norms.

60 In connection with the International Court of Arbitration award in re Belgium/Netherlands (Iron Rhine) 2005.
61 Erades 1993, p. 115; p. 117 and p. 131.
63 Erades 1993, p. 37.
64 HR 28 November 1950, NJ 1951, 137 (Tilburg).
7.2. Application or Enforcement by the Courts of Binding and Non-binding Decisions or of International Tribunals’ Judgments

As explained before, the Netherlands courts are used to apply the decisions of international tribunals to the extent that they can be considered as self-executing. This is notably the case with respect to the judgments of the ECtHR and the Court of Justice and the Court of first instance of the EU.

There is few case-law reported in which decisions of non-judicial treaty bodies have been applied. The Commentaries on the OECD Model Tax Convention might be an example. More frequent are the references to the interpretations of the UNHCR of the Refugee Convention. In this context also are relevant the General Comments of the Committee supervising the ICESCR, mentioned before. It can be concluded that the courts, generally, will react favourably to those resolutions of international organisations and may refer to them or even might ‘incorporate’ them and treat them as part of the interpreted treaty itself and lend it the same legally binding force and rank.

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65 See HR 21 February 2003, BNB/177C where the Supreme Court observed – merely ex abundancia – that its interpretation would conform to such a commentary; see also Alkema 2008, p. 180.
66 District Court The Hague 27 August 1998, referring for its interpretation to a position paper of the UNHCR.
67 See supra note 36.
References

Alkema 1984

Alkema 2006

Alkema 2008

Besselink & Wessel 2009

Buergenthal 1992

Emmerik van 2005

Emmerik van 2008

Erades 1980

Erades 1993
Fleuren 2004

Hillebrink 2008

Humphrey 1979

Meijers & Siekmann 1982

Mus 1996

Vlemminx & Vlemminx-Boekhorst 2005
In the Netherlands, the main principle for the right to vote is the Dutch nationality. As a rule the right to vote (active as well as passive) is reserved for Dutch nationals. This principle has been introduced gradually in Dutch constitutional law. In the Constitution of 1814 for example, the requirement of the Dutch nationality was only applicable to the Staten-Generaal, the Dutch parliament. Subsequently, the Constitution of 1848 required the Dutch nationality for the right to vote for provincial and municipal councils. The Dutch Electoral Law of 1850 established the requirement of the Dutch nationality for the right to be voted for provincial and municipal councils. Not before the Constitution of 1887 the requirement of the Dutch nationality was provided for all representative bodies.¹

Yet, since 1983 the absoluteness of the principle of Dutch nationality has been abandoned. Since then, the Dutch Constitution and (since 1985) the Electoral Law include the right to vote and to be voted for foreigners for the members of municipal councils. The Electoral Law also provides for the foreigners’ right to vote for the European Parliament. Though, foreigners do not have the right to vote for the Staten-Generaal, nor for the provincial councils. From time to time, such a right has been advocated: the principle of nationality should be abandoned in favour of the principle of domicile. In this contribution, I will elaborate the rights of foreign voters in the Netherlands and discuss the possible enhancement of the foreigner rights to vote.

Firstly, I will give a short introduction on Dutch constitutional law from the point of view: which institutions are elected directly? Subsequently I will discuss the right to vote in general. Then I will deal with the right to vote for foreigners for 1.) the municipal councils; 2.) the provincial councils; 3.) the Tweede Kamer der Staten-Generaal; 4.) the European Parliament. This bottom-up approach is inspired by the extensive regulation on this subject for local councils.

¹ Stam 1988, p. 118.
1. Introduction to the Directly Elected Bodies

The Dutch Constitution provides for several layers of administration. Besides the central authority, the Constitution establishes provincial and local authorities. The Netherlands consist of 12 provinces and 441 municipalities (as of January 2009).

The Dutch system of central government is a parliamentary system within a constitutional monarchy. The Dutch parliament, the Staten-Generaal, consists of two Houses: the Lower House (Tweede Kamer) and the Upper House (Eerste Kamer). A system of proportionate representation is provided for both Houses. The Lower House is directly elected by the people of the Netherlands; the Upper House is indirectly elected, by the members of the provincial councils. Both Houses are involved in the process of legislation; yet the Upper House lacks the powers to initiate or amend bills. Both Houses of parliament have the parliamentary rights to ask questions, of interpellation and enquiry. The Upper House is seen as a chambre de réflexion. It is not involved in the process of cabinet formation and it can only consider bills when these bills are adopted by the Lower House. Executive powers mainly belong to the government. The process of cabinet formation is unwritten; at the end of the day the cabinets need to have the confidence of parliament. The vote of no-confidence is one of the cornerstones of the Dutch parliamentary system. This means that the members of government, including the prime minister, are not directly elected; their appointment and dismissal (by Royal Decree) depends on the confidence of parliament.

The organisation of the institutions of the provinces and the municipalities is roughly similar. The provinces and municipalities are headed by the provincial councils (provinciale staten) and the municipal councils (gemeenteraad). The members of these councils are elected directly by a system of proportionate representation. The councils provide for bye-laws and they control the provincial and municipal executive. The provincial executive is gedeputeerde staten. It consists of the Royal Commissioner (commissaris van de Koning) and the deputies (gedeputeerden). The municipal executive is the college van burgemeester en wethouders. It consists of the mayor and the aldermen. The deputies and aldermen are appointed by the provincial and municipal councils. The rule of no-confidence applies to them. The Royal Commissioner and the mayor are appointed by Royal Decree. The provincial and municipal councils can, however, recommend two candidates to the Minister of the Interior, who nominates these candidates for the King for appointment. Although the vote of no-confidence does not apply to Royal Commissioners and mayors, the provincial and municipal councils can present a recommendation of dismissal to the Minister. From 2001 until 2008,

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2 In this contribution I will not discuss the so-called waterschappen (water boards), as these authorities do not fulfil tasks of general interest, but only tasks concerning the interest of the quality and quantity of water.
the municipal councils could apply for the possibility of a referendum on the appointment of the mayor. In this procedure, the municipal council proposed two candidates for the referendum, the citizens could vote for them. The candidate with the largest amount of votes was recommended by the municipal council to the Minister of the Interior. Because of procedural problems and the low attendance of voters, the Dutch government proposed to revoke this referendum procedure.

As the Netherlands are a member of the European Union, it has its members of the European Parliament. 27 seats are occupied by Dutch representatives. Also at this level the seats are allocated by the system of proportionate representation.

2. The Right to vote according to the Dutch Constitution

The right to vote can be seen as a right that is inherent in a democratic constitutional state. It is often and deservedly seen as a human right. For this reason the right to vote is included in the catalogue of basic rights in the Dutch Constitution. Article 4 of the Constitution prescribes:

‘Every Dutch national shall have an equal right to elect the members of the general representative bodies and to stand for election as a member of those bodies, subject to the limitations and exceptions prescribed by Act of Parliament’.

This provision is elaborated in the Articles 54, 129, par. 1. and 130 of the Constitution. These articles read as follows:

Article 54:

(1) The members of the Second Chamber shall be elected directly by the Dutch nationals who have attained the age of eighteen, with the exception of any Dutch nationals who may be excluded by Act of Parliament by virtue of the fact that they are not resident in the Netherlands.
(2) Anyone who has committed an offence designated by Act of Parliament and has been sentenced as a result by irrevocable judgement of a court of law to a custodial sentence of not less than one year and simultaneously disqualified from voting, is not entitled to vote.

Article 129, par. 1:

(1) The members of provincial and municipal councils shall be directly elected by Dutch nationals resident in the province or municipality as the case may be who satisfy the requirements laid down for elections to the Second Chamber of the Parliament. The same conditions apply to membership.

Article 130:

The right to elect members of a municipal council and the right to be a member of a municipal council may be granted by Act of Parliament to residents who
are not Dutch nationals provided they fulfil at least the requirements applicable to residents who are Dutch nationals.

These articles require for the right to vote and to be voted: 1.) the Dutch nationality; 2.) the age of eighteen. Subsequently, one may not be excluded from this right by a judgement of a court of law.

As we can deduce from the articles above, the right to vote for the provincial and municipal councils, is gathered from the right to vote for the Tweede Kamer. With regard to the municipal councils, there is though a main completion in the form of Article 130 of the Constitution: non Dutch nationals can vote for municipal councils. These provisions have been elaborated in Chapter B of the Dutch Electoral Law. We will discuss this elaboration in the next paragraphs.

3. Foreign Voters for Municipal Councils

3.1. The Parliamentary Discussion on Article 130 of the Constitution

One of the main criteria for the right and the eligibility to vote is, as we have seen above, the Dutch nationality. As a rule the right to vote is reserved for Dutch nationals. Still, the Dutch Constitution initiates the possibility for the right to vote for foreigners for the municipal councils. This possibility has been introduced in the Constitution during the last complete revision of the Constitution, in 1983. By then Article 130 has been included in Chapter 7 of the Constitution, concerning ‘Provinces, municipalities, water boards and other public bodies’.

As early as 1975, when the complete alteration of the Constitution was prepared, the Dutch government proposed an article with the same purpose.3 It read as follows:

The right to elect members of a municipal council and the right to be a member of a municipal council may be granted by Act of Parliament to residents who are not Dutch nationals.

This bill provides for the (optional) possibility for the legislator to grant foreigner the rights to elect and to be elected. The government gives in its explanatory notes the following reasoning. It recognises an international development for the decrease of the meaning of nationality for the right and the eligibility to vote for municipal councils. The longer someone stays in a country, the more he desires to take part in political discussions.4 Furthermore, foreign inhabitants of a municipality do have a great

3 See for a comprehensive description of the parliamentary debate on the right to vote for foreigners in Belgium and the Netherlands: Jacobs 1998; see also Schutte 1980, p. 223-232.

involvement with that municipality. This involvement of citizens is not defined by their nationality. The government admits that there are some practical difficulties; the decision to grant the right to vote to foreigners may not be taken too rashly. According to the government, the legislator should answer some elementary questions. How long has one to stay in the Netherlands before granting this right? Does he have a thorough command of the Dutch language? These questions may, however, not be a hindrance for laying the right to vote down in the Constitution, as the legislator is entitled to decide on the specific criteria for granting the right to vote to foreigners. The government establishes that it will not distinguish between the active and the passive right to vote. The legislator may, however, require different qualifications for these rights. He can also discriminate between categories of foreigners, for example between citizens of member states of the European Communities and of other countries or between Moluccan citizens (who originally lived in former Dutch colonies) and others.\footnote{TK 1978-1979, 13 991, No. 8, p. 2.}

The Dutch Raad van State, the Council of State that advises the government on bills, makes critical comments: it will not be easy to find sound and working criteria to grant the right to vote for foreigners.\footnote{TK 1975-1976, 13 991, No. 4.} In reply to questions of the Tweede Kamer regarding these requirements, the government explains that a specific length of stay in the Netherlands will be one of the requirements.\footnote{TK 1976-1977, 13 991, No. 6, p. 2.} The government assumes that the legislator can stipulate specified conditions for the right to vote for foreigners.\footnote{TK 1976-1977, 13 991, No. 6, p. 5.} The Tweede Kamer proves to be very critical with regard to the bill. Some parliamentary groups pronounce their disapproval, as the right to vote is an essential right, that cannot be granted to persons that are bounded to another country. Still, the government upholds the bill when alleging that this argument is applicable with regard to the right to vote for the Tweede Kamer, but that this argument is less appropriate regarding the municipal councils. Foreigners will develop strong ties with the Dutch society, especially on the local level. The government furthermore ascertains an increase of long-lasting stays of foreigners in the Netherlands.\footnote{TK 1976-1977, 13 991, No. 6, p. 3.} Moreover, currents in the European Communities induce to the introduction of this right, as other countries carry out the same right and the European Commission is considering a proposal to grant nationals of its member states the right to vote for foreigners for municipal councils in the (European) country they are living.

The government maintains the presumption that nationality is more of importance on the national than of the local level. This is connected with the issues the national parliament deals with, such as defence and foreign relations. By introducing the right to vote for foreigners for the Tweede Kamer and for the provincial councils, the composition of these representative
bodies will be influenced and through that, also the decision-making in these bodies.\footnote{TK 1976-1977, 13 991, No. 6, p. 5.} We will go into this matter later on in the next paragraphs, when we discuss the right to vote for foreigners for the provincial councils and the Tweede Kamer.

Some political groups in the Tweede Kamer ask whether municipalities could decide their selves on the right to vote for foreigners. The government points to the principle of equality before the law: foreigners should be treated equally in all Dutch municipalities, at least when it concerns the right to vote. The uniformity of the municipality elections would be undermined.\footnote{TK 1978-1979, 13 991, No. 8, p. 1.}

The government modifies the bill after this discussion. It added the clause:

\begin{quote}
‘provided they fulfil at least the requirements applicable to residents who are Dutch nationals’.
\end{quote}

The government substantiates this phrase that it ought not to leave any discussion on the minimum criteria of the right to vote for foreigners. The legislator cannot provide for less requirements for foreigners, compared to Dutch citizens. The phrase doesn’t alter the fact that the legislator can supply for extra criteria, such as the length of stay in the Netherlands.\footnote{TK 1978-1979, 13 991, No. 9.}

Member of the Tweede Kamer Brinkhorst handed in an amendment to introduce the foreigners right to vote for provincial councils. See under 4. Though the Tweede Kamer criticized the bill, the bill was adopted by this chamber of parliament by a vast majority. During the discussion in the Dutch senate, the Eerste Kamer, no new points of view were exchanged. This was neither the case in the second reading of the bill (which is in Dutch constitutional law needed for a constitutional revision).

### 3.2. The Parliamentary Discussion on the Implementing Legislation

The act that gave effect to the constitutional provision of the right to vote for foreigners is the Act of the 29th August 1985.\footnote{Stb. 1985, 478.} This act leaded to an alteration of the Municipal Act and the Electoral Law. As Article 130 of the Constitution gave the legislator some fundamental options, the bill leaded to some discussion. These options were the following: does the act need to make a distinction between different groups of foreigners, such as EC- and non-EC-citizens?; does the act need to distinguish between Moluccan and other foreign citizens?; do the requirements for the right to vote be different from the right to be voted?; how long do foreigners need to stay in the
Netherlands, before granting the right to vote?; is there a necessity to speak Dutch accurately for the right to be voted?\textsuperscript{14}  

The Dutch government does not want to make a distinction between groups of foreigners. The main consideration that led to the current constitutional provision of Article 130, was that the foreign inhabitants of a municipality do have a great involvement with that municipality. The involvement of citizens is not defined by their nationality.\textsuperscript{15} The government also grants, in a separate bill, the right to vote to Moluccans, without further requirements such as the length of stay.\textsuperscript{16} Regarding the proposed requirement of command of the Dutch language, the government considers it the responsibility of the political parties, recruiting candidates for the elections.\textsuperscript{17} Such a requirement would be a subjective element in the electoral procedure. All other requirements are objective criteria. Political parties can, however, require such a subjective obligation.\textsuperscript{18}  

The government decides not to oblige other needs for the right to be voted, compared to the right to vote.\textsuperscript{19} This means, that a foreigner that has been elected in the municipal council, can be elected as a wethouder, an alderman, as well.\textsuperscript{20} Yet, foreigners need to dispose of a valid residence permit and the minimum length of stay in the Netherlands is five years. The government admits, that the choice for the length of stay is slightly arbitrary, but after a stay of five years foreigners experienced one term of the municipal council.\textsuperscript{21} The Dutch government considered this period as long enough to develop a strong relationship with the Dutch society. Furthermore, there is some certainty on their future stay in the Netherlands.\textsuperscript{22} Their stay in the Netherlands will be of long standing, also because the grounds for a termination of the stay will become more confined.\textsuperscript{23} Though, the requirement of length of stay has been discussed in the Dutch constitutional literature. Whether a length of stay of five years is sufficient for a close bond with Dutch society, in other words whether a foreigner is integrated in society, can, according to Wisse, only be answered from person to person and will depend from individual circumstances as a job, housing et cetera.\textsuperscript{24}  

\textsuperscript{14} TK 1984-1985, 18 619, Nos. 1-3, p. 5-6.  
\textsuperscript{15} TK 1984-1985, 18 619, Nos. 1-3, p. 7.  
\textsuperscript{16} TK 1984-1985, 18 619, Nos. 1-3, p. 8.  
\textsuperscript{17} In constitutional literature, the requirement of command of a language was seen as a reintroduction of the right to vote as a right of ability. Braam 1977, p. 42.  
\textsuperscript{18} Elzinga 1997, p. 69-70.  
\textsuperscript{19} TK 1984-1985, 18 619, Nos. 1-3, p. 9.  
\textsuperscript{20} Braam 1977, p. 42.  
\textsuperscript{21} The Dutch Electoral Council proposed a term of three years to acquire the right to vote and a period of five years for the right to be voted. Jesserun d’Oliveira 1983, p. 598.  
\textsuperscript{22} TK 1984-1985, 18 619, Nos. 1-3, p. 10.  
\textsuperscript{23} Ibidem.  
\textsuperscript{24} Wisse 1986, p. 68.
The bill leads to (for the most part) approving response in the Tweede Kamer. Some left-wing political parties emphasize the requirements for foreigners to vote: these obligations are, in their perspective, unnecessary. Two amendments concerning the requirement of the length of stay, holding a shortening of this length to three years, are rejected. Few small right-wing parties reiterate the pleas of their negative response of the constitutional provision. Some political parties fear the establishment of political parties by foreigners, especially to attend to their own interests. These objections do not lead to rejection of the bill, as the main and largest political parties support it. Also the Eerste Kamer agreed with the bill with a vast majority; the bill passed without voting.

3.3. The Current Meaning of Article 130 of the Constitution

The municipal elections of 1986 were the first elections in which foreigners could participate. Though the partaking of foreigners was considerably lower than the participation of Dutch voters: 40% and 73.2% respectively. Since then, some minor changes with regard to the right to vote for foreigners have been made. In 1996 the requirement of the length of stay was abolised for EU-citizens. A year later the requirements for non-EU-citizens were sharpened: this group of foreigners needs to have a valid residence permit and a minimum continuous length of stay in the Netherlands for five years.

Article 130 of the Constitution is seen as an essential breakthrough of the principle of nationality, until then the main principle for the right to vote. Since 1983, the right to vote for foreigners for the municipal councils has not been discussed fundamentally. We can state it has been an socially acknowledged right. Some discussion arose on a side effect of granting the right to vote to foreigners: several persons lost their Dutch nationality due to joining hostile military services in the Second World War and as an effect of granting the right to vote to foreigners, these persons, generally stateless people living in the Nederlands, also obtained that right. Yet, the Dutch government assessed only few persons were part of this category and stated that the loss of their Dutch nationality had nothing to do with the seriousness of their misbehaviour in the War. He did not want to alter the rules because of this outcome.

25 TK 1984-1985, 18 619, No. 4, p. 3.
27 TK 1984-1985, 18 619, No. 4, p. 3-4.
28 Stam 1988, p. 123.
3.4. **The Dutch Electoral Law: the Current Elaborated Rules**

The Dutch Electoral Law carries, as we have seen in par. 3.2., Article 130 of the Constitution into effect. Article B3 of the Electoral Law provides for the right and the eligibility to vote for the municipal council and is (partly) an elaboration of Article 130 of the Constitution. This article initially requires in par. 1 that those who assert the (active) right to vote need to be residents\(^\text{32}\) of the municipal concerned and that they have reached the age of eighteen. It reads as follows:

(1.) The members of the municipal councils will be elected by those who are, on the day of the nomination of candidates, resident of the municipality and, on the day of the voting, have reached the age of eighteen.

In this article there is no requirement of nationality included. Par. 2 of this article concerns foreign voters:

(2) Those who are not a citizen of a Member State of the European Union need, in order to be entitled to vote on the day of the nomination of candidates, also to fulfil the requirements that:
   (a.) they lawfully stay in the Netherlands, pursuant to Article 8, under a, b, d, e, or l, of the Immigration Law Act of 2000 or on the basis of an agreement between an international organisation and the State of the Netherlands concerning the seat of this organisation in the Netherlands, and
   (b.) they immediately preceding to the day of the nomination of candidates during a continuous period of at least five years were resident of the Netherlands and disposed of a legal residency as meant under a, or stayed lawfully in the Netherlands, pursuant to Article 8, under c, of the Immigration Law Act f 2000.

First of all, this article makes apparent that it does not apply to citizens of EU Member States. For this category, par. 1 of Article B3 is *a contrario* applicable, as it does not mention any nationality. We can conclude that EU citizens have the right to vote for municipal councils, when they are resident of the municipality concerned and at least eighteen years old. Besides, Article 10 of the Dutch Municipal Act provides for exact the same criteria.

The rules concerning non-EU citizens are more complicated. The conditions under (a.) and (b.) are enumerative. The general rule is that one has to stay in the Netherlands lawfully and for more than five years. Article B3, par. 2, also mentions some additions. The foreign employees of an international organisation with its seat in the Netherlands (and the foreign family of these employees), who stay in the Netherlands for more than five years, have the right to vote for the municipal council as well. One can think of the employees of the International Court of Justice or the International

\(^{32}\) The term resident has been worked out in artikel B4 of the Electoral Law: residents are those, who have their real domicile in the municipality.
Criminal Court. Par. 3 makes an exception for foreign employees of diplomatic or consular services and their foreign relatives, as they are in service of another State; they are not entitled to vote.

Finally, we can mention the inner municipal decentralisation: in Amsterdam and Rotterdam the local government has established boroughs: sub municipals within the cities. At this level, the principle of domicile seems to be of greater value than the principle of nationality. For that reason, also on this sub municipal level the right to vote has been granted to foreigners. Article 87 par. 5 of the Municipal Act prescribes that the members of the councils of the boroughs will be elected by those who have the right to elect for the municipal councils. Par. 6 of the same article lays down that this elections will be arranged by analogy of the Electoral Law. According to Article 88 of the Municipal Act the right to be voted is granted to those who can be voted for at the elections of municipal councils.

4. Foreign Voters for Provincial Councils

4.1. The Constitutional Revision of 1983

Article B2 of the Dutch Electoral Law is unambiguous: the members of the provincial councils will be elected by the residents of the provinces, that are Dutch and older than eighteen. Exclusion of the right to vote for foreigners is justified from the point of view that the provincial councils elect the Upper House, the Eerste Kamer. Indirectly, the electorate of the provincial councils elects the Eerste Kamer as well. This means, that the electorate of the provincial states is also the voting public of a body of the national layer of government.

The relationship between citizens and the central, national layer of government is, according to the Dutch government all through the constitutional revision of 1983, of another nature than the relationship between citizens and the local government. As the latter relationship is characterised by many (practical) connections and contacts between citizens and their municipality, the first relationship, thus to the national government, is characterised by nationality. Whatever that may be, there are also more practical arguments against granting the right to vote to foreigners. On the national level, decisions can be taken with regard to foreign affairs and defence policy. These decisions can concern the country from which foreigners hold nationality. These foreigners could, when granting the right to vote for the Staten-Generaal influence the decisions and policy regarding their country. This tension does not exist on the local level, as the local government do not pursue foreign or defence policy. Moreover, foreigners have the possibility to be naturalized. Member of the Tweede Kamer

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Brinkhorst handed in an amendment to introduce the foreigners right to vote for provincial councils, but this amendment was rejected.\textsuperscript{34}

According to Elzinga, these arguments of the government are not convincing. The Dutch foreign and defence policy is increasingly a matter of European and NATO-policy and decreasingly a matter of national policy. Moreover, the influence of foreign voters on the foreign and defence policy is not strong; as Elzinga states, this influence is negligible, considered the number of Dutch voters. Only in exceptional cases, there will be a conflict of loyalty.\textsuperscript{35} As Stam states, the voter for the provincial councils does not take into account that his vote is also a vote for the \textit{Eerste Kamer}. The political issues on the national level, especially the exterior and defence policy, do not play a predominant role in the election campaigns for the provincial councils.\textsuperscript{36}

As we can conclude from this, the Dutch constitutioner had the intention to grant the vote to right for foreigners for representative bodies that do not influence the national policy concerning foreign affairs or defence. On the contrary, such a right to vote is not granted for representative bodies that do pursue policy concerning these matters. The provincial councils do however, because they elect the \textit{Eerste Kamer}.

4.2. \textit{A Parliamentary Initiative}

In the 1990s the discussion on the right to vote for foreigners became topical again. There were some elaborated ideas to introduce the so called city regions, a new layer of administration for metropolitan areas, to supply the place of the provinces as well as the municipalities in for example the areas of Amsterdam en Rotterdam. These city regions should assume tasks and competences of the provinces, while the municipals would be divided in boroughs. As these city regions do not have any relationship with the national layer of government and do not pursue national policy concerning foreign affairs or defence, it would be, from the one hand, sound to grant the foreign voters of the body of representatives of the city regions the right to vote. Granting a right to vote for foreigners for these city regions should on the other hand mean that foreigners in the provinces should be granted the right to vote as well, as these regions come in the place of provinces in these metropolitan areas. As the government did not want to cut this knot, some members of the \textit{Tweede Kamer} initiated a bill, purporting to introduce the right to vote for foreigners for provincial councils (see the next paragraphs). Apart from that, as the people of Amsterdam and Rotterdam rejected the

\textsuperscript{34} TK 1978-1979, 13 991, No. 11.
\textsuperscript{35} Elzinga 1997, p. 79.
\textsuperscript{36} Stam 1988, p. 122.
In 1996 the bill as mentioned above was initiated into the Tweede Kamer by three (mostly left-wing) members of this chamber of Parliament: Rehwinkel, Singh Varma and De Graaf. The bill grants the right to vote for foreigners for the provincial councils. It concerns a constitutional revision, as Article 130 of the Constitution nowadays only provides for the right to vote for foreigners for municipal councils. The initiators propose to add the right to vote and to be voted for the provincial councils to the wording of the article.38

The initiators give the following reasons for the bill. They state in the first place, that the right to vote has developed from a privilege for them who pay a certain amount of taxes to a right that is due to one and all. This should imply a right to vote for foreigners, more extensive than only for the municipal councils. These foreigners have more and more enduring residence in the Netherlands. Nowadays, foreigners are involved into the Dutch society, as they live and work therein, pay taxes, have children at school, but they have not the same civil rights as Dutch citizens.39 This bill will enlarge the civil rights of foreigners by granting them the right to vote (and to be voted) for the provincial councils. Furthermore and comparable to the plea to grant foreigners the right to vote for municipal councils, the initiators declare that the provincial policy is of major interest for all citizens, as it concerns the environment, area planning, housing, employment, traffic et cetera.40 Moreover, the boundary line between municipal and provincial tasks, competences and policy is become more and more indistinct.41 The initiators state further, that an integration of foreigners in the Dutch society means a removal of all differences in the legal status of Dutch and foreign citizens.42

The authors of the bill defend the restriction of the enlargement of the right to vote for only provincial councils – and thus not for the Tweede Kamer – that such an extension was not current at that moment. Their bill is meant as a response on the ideas of the city provinces. Besides, such an enlargement is politically seen not realizable.43 The plea, that the voters for the provincial councils directly influence the elections of the Eerste Kamer and therefore the national policy on the foreign affairs and defence, is according to the initiators, not convincing. This influence is only relative. Most constituents

37 Elzinga 1997, p. 76-77.
41 TK 1996-1997, 24 803, No. 4, p. 4-5.
do not comprehend that their vote is for the provincial states as well as for the *Eerste Kamer.*

The *Tweede Kamer* responds in a very divided manner. The political parties to which the initiators belong are enthusiastic and propose to lower the requirements for the right to vote for foreigners, such as the minimum length of stay, and to grant the right to vote for the *Tweede Kamer.* Other political parties emphasise the relationship between citizenship and nationality. These parties underline that the differences between Dutch nationals and foreigners justify dissimilarities in rights and duties. They also mention the (for them unwanted) foreigner’s influence on the national foreign and defence policy.

In their answer to the *Tweede Kamer,* the initiators reiterate that the arguments to grant foreigners the right to vote for municipal councils are as well applicable for granting the right to vote for provincial councils. This last right should, in their opinion, be arranged as the first right is. Therefore, the authors of the bill prefer to supply Article 130 of the Constitution with the provincial councils.

Subsequent to this answer to the *Tweede Kamer,* a long period of sudden hush begins. Probably, the initiators do not want to leave it to a parliamentary vote that would almost certainly be negative. In the meanwhile, the Dutch parliamentary landscape changes fundamentally since 2001 and as a result of the parliamentary entrance of new political parties, such as the parties of Fortuyyn and Wilders, the tenor of the discussion on foreigners becomes more and more quarrelsome. Furthermore, in the intervening time, all the initiators resign from parliament, because of illness, the appointment as a mayor and as a minister. In Dutch constitutional practice, members of parliament of the same political party of the initiator take over the parliamentary discussion of the bill. Only in 2005 one of the political parties of the initiators declares that none of its members in the *Tweede Kamer* would carry on the parliamentary debate on the bill. Likely, the political situation (the bill would almost certainly be rejected as well as a lack of grassroots support) is guilty of this decision. The bill has been withdrawn.

### 5. Foreign Voters for the Tweede Kamer

The members of the *Tweede Kamer,* the Dutch chambers of representatives, will be elected, according to Article B1, par. 1 of the Electoral Law, by those who are Dutch and have reached the age of eighteen (unless they have their residency in the Netherlands Antilles and Aruba).

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When introducing the right to vote for foreigners for municipal councils, the right to vote for the Tweede Kamer has been considered, but dismissed. The pleas before and against granting the foreigners’ right to vote for the Tweede Kamer are in a large degree similar as to the arguments that have been put forward with regard to the foreigners’ right to vote for the provincial councils. The Dutch governments states, while justifying the right to vote for municipal councils, that it will not depart from the requirement of the Dutch nationality. The right to vote on the national level is closely connected to nationality, more than it is on the local level. The government maintains, as we have seen above, the presumption that nationality is more of importance on the national than of the local level. This is connected with the issues the national parliament deals with, such as defence and foreign relations. By introducing the right to vote for foreigners for the Tweede Kamer and for the provincial councils, the composition of these representative bodies will be influenced and through that, also the decision-making in these bodies. Foreigners, with close ties to the country of their nationality and perhaps with certain interests, could accordingly persuade the outcome of discussions of defence and foreign relations.

The rejection of the right to vote for foreigners for the Tweede Kamer (and otherwise the provincial states) did not mean that the discussion with regard to this topic was over. A parliamentary commission on political modernisation recommended to re-open it. According to this commission, a lot of topics parliament discusses about, is of international interest. Moreover, also the foreign and defence policy are less of utter Dutch affairs as it was some decades ago. Besides, foreigners pay taxes (but do not fulfil some duties, such as the military services) and the integration of minority groups in society is one of the main points of Dutch government policy. The recommendations of the government did not lead to any change of the electoral franchise.

In constitutional literature, some authors, for example Stam and Jesserun d’Oliveira, argue the argumentation of the Dutch government, that the right to vote for foreigners is mostly of interest on the municipal level, because in particular the municipal policy affect foreigners. These authors state that also national policy, such as on education, welfare, housing and social affairs, concerns foreigners. Decisions on these areas can affect foreigners more than municipal policy. The statement that foreigners may not influence the Dutch exterior and defence policy is, according to Stam, not valid, as these policy areas are not wholesome Dutch any more. The margins for such a Dutch policy is reduced as a result of the Dutch membership of international organisation, in particular the European Union and the

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49 TK 1976-1977, 13 991, No. 6, p. 5.
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Furthermore, foreigners pay taxes as well as Dutch nationals. From the adage ‘no taxation without representation’ should result influence on the way the local, provincial and national authorities convert tax money and therefore the right to vote. Besides, foreigners receive, as well as Dutch nationals, human rights, including the right to vote. Grating the right to vote would improve the legal status of foreigners. Moreover, granting this right could contribute on the integration of foreigners in Dutch society. As Van Wissen affirmed: granting the right to vote for foreigners is an appraisal of the integration and emancipation of foreigners on the one hand and the intrusion of the principle of nationality on the other.

These arguments however, did not convince the legislator (government and parliament). At the moment, the right to vote for foreigners for the Tweede Kamer is not current any more. As we have seen above, the Dutch political landscape changed fundamentally. Within this new political setting a proposal to grant foreigners the right to vote for the Tweede Kamer is not favourable.

6. Foreign Voters for the European Parliament

Similar to the situation on the municipal level and unlike the provincial and central layers, foreigners that are citizens of a EU Member State have the right to vote for the European Parliament. In 1993 the Council of the European Communities promulgated a directive concerning the active and passive right to vote for citizens of an EU Member State that live in another Member State at the moment of the European Parliament elections. According to this directive, these citizens should have the possibility to participate in the elections of the Member State where they live, in accordance to the rules of the right to vote of that Member State. This means, that the principle of nationality is not guiding with regard to the European elections, but the principle of domicile. The EU-foreigners’ right to vote for the European Parliament is well-reasoned from the idea of reciprocity: EU-citizens in the one EU-Member State should have the right to vote in other and vice versa.

The general rule for the right to vote for the European Parliament for Dutch nationals is the right to vote for the Tweede Kamer.Foreigners, however, who are citizens of another Member States of the European Union are entitled to vote, on condition mentioned in Article Y3 under b of the

52 See for international development as a plea for the right to vote also: Talhaoui 1999, p. 61-68.
54 Stam 1988, p. 128.
56 Directive 93/109 EC, L 329/34. The directive has been converted into the Electoral Law in 1994.
Electoral Law: 1.) have their actual domicile in the Netherlands at the day of the nomination of the candidates; 2.) they have reached the age of eighteen at the day of the voting; 3.) are not excluded from the right to vote, neither in the Netherlands, nor in the Member State, from which they are citizen.58

The Articles Y31 until Y38 of the Electoral Law contain a special procedure for participation of foreigners in the European Parliament elections. Article Y31 states that the enfranchised foreigner, who lives in the Netherlands but is a citizen of another EU Member State, can participate in the elections either in the Netherlands or in the Member State of which he is a citizen. If a foreigner desires to vote in the Netherlands, he can request the municipal college van burgemeester en wethouders to file his right to vote. The Articles Y32 until Y33a provide for this procedure. The Articles Y34 until Y36 contain procedural provisions for the (passive) right to be voted for foreigners for the European Parliament elections.

In the Netherlands, the right to vote for Dutch nationals living on the Dutch Antilles and Aruba (overseas territories) for the European Parliament was brought up for discussion. The Dutch government stated that the EC-Treaty does not have effect on the Dutch Antilles and Aruba and that as a result the Dutch nationals living on these islands may not vote for the European Parliament. The European Court of Justice answered on preliminary questions of the Dutch Council of State, the highest administrative court, that the inhabitants of the Dutch Antilles and Aruba do have the right to vote for the European Parliament, not because of the effect or influence of the EC-Treaty for these inhabitants, but because of the inequality in the Dutch legislation, as it makes a distinction between Dutch nationals living in the Dutch Antilles or Aruba on the one hand and Dutch nationals living in a third country on the other. The first category of nationals did not have the right to vote, the second did.59 In other words, the Court makes clear that the EU Member States have a certain autonomy concerning the question to whom they grant the right to vote, but with due regard to the principles of Community law, such as the principle of non-discrimination.

7. Conclusion

To summarize: foreigners have the right to vote and the right be voted for municipal councils and (as an EU-citizen) for the European Parliament. They do not have the right to vote for provincial councils and the Tweede Kamer. The most convincing reason, according to the Dutch government, to introduce the foreigners’ right to vote for municipal councils, is that foreign inhabitants of a municipality do have a great involvement with that municipality and that this involvement of citizens is not defined by their

58 Article Y4 of the Electoral Law mentions the same requirements for the passive right to vote.
59 ECJ 12 september 2006, C 300 04.
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nationality. The introduction of the right to vote for the European Parliament is initiated by the European Communities and implemented in the Dutch legislation, well-reasoned from the principle of reciprocity: EU-citizens in the one EU-Member State should have the right to vote in other Member State and vice versa.

The idea of a foreigners’ right to vote for provincial councils and the Tweede Kamer has been rejected from the point of view that foreigners may not influence the foreign and defence policy. Decisions concerning these policy areas can concern the country from which foreigners hold nationality. By granting them the right to vote for the Tweede Kamer they could influence these topics directly; by granting them the right to vote for the provincial councils they could influence these topics indirectly as the provincial councils elect the Eerste Kamer.

We can draw some conclusions from the introduction of the foreigner’s right to vote for municipal councils and the European Parliament and from the discussion of this right for the elections of provincial councils and the Tweede Kamer. We can perceive that the requirement of nationality more and more seems to yield for the requirement of citizenship. This last requirement already has been established for the right to vote for municipal councils and the European Parliament. From time to time a discussion is brought up to introduce the last requirement for the elections of the provincial councils and the Tweede Kamer. Nevertheless, we can state that at the national layer of government nationality still is the guiding principle for the right to vote.

The time seems not yet ripe for granting foreigners the right to vote for the provincial states and the Tweede Kamer. In other words: the principle of nationality cannot be replaced completely by the principle of domicile. Currently, the balance of powers in Dutch politics is in such a way, that a proposal to that effect will be rejected. Besides, there exist some elementary objections against such a foreigners’ right, as they could influence the national policy concerning the country they come from. At the same time, we can establish that Article 130 of the Constitution, the right of foreigners to vote and to be voted for municipal councils can be seen as an undisturbed achievement.
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1. Introduction

With respect to constitutional fundamental rights review by the judiciary, the Netherlands has always been a bit of a stranger in Europe. Comparatists usually describe the way judicial review of statutes in Europe is shaped as rather different from the American system, where the Supreme Court has basically empowered itself to review the constitutionality of statutory laws. The authority to strike down legislation in the New World is therefore exercised by the judiciary at large and it is the highest appellate court that ultimately decides upon the matter. By contrast, the European tradition is closely connected to the existence of ‘Kelsenian’ constitutional courts specialized in reviewing the constitutionality of statutes and executive action. Such courts notably exist in for instance Germany, Italy, Austria, Spain and Belgium, but also in the relatively younger liberal democracies like Poland and the Czech Republic. Constitutional courts almost by definition engage in a critical dialogue with the national legislature. When Hans Kelsen famously described constitutional courts as ‘negative legislators’, he was referring to their power to annul acts of the legislature.

It is at this point that the Dutch differ from most of their European neighbours. Their legal system does not involve concentrated review by a specialized constitutional court. This is largely because judicial review of primary legislation is traditionally prohibited pursuant to Article 120 of the Dutch Constitution. It is clear from the outset that this ban on judicial review reduces the need for a specialized court. One would be mistaken, however, to conclude that there is no such thing as judicial fundamental rights review in the Netherlands. Quite the contrary, Dutch courts usually subject executive action and occasionally Acts of Parliament to rigorous fundamental rights review in a way that Mark Tushnet would probably describe as ‘strong

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1 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
3 See e.g. Von Beyme 1988, p. 24-25.
4 Kelsen 1945, p. 268-269.
judicial review’. This kind of review is dispersed in the sense that it is carried out by any court in the country. They do so on the basis of another provision in the Dutch Constitution, Article 94. It contains the duty to set aside any kind of regulation – be it statutory or not – if the application of these regulations conflicts with provisions of treaty law that ‘bind all persons’, which means that they have direct effect or contain – as one might say – judicially manageable standards. Statutes can therefore be reviewed by the judiciary for their consistency with written provisions of international law. The gradual growth of human rights treaty systems such as the International Covenant on Civil and Political Rights (ICCPR) and, even more notably, the European Convention on Human Rights and Fundamental Freedoms (ECHR) has resulted in an increasingly self-conscious attitude of the courts towards parliamentary legislation. This is strengthened by the fact that the Dutch courts are moreover obliged to ensure the effective application of European Union law – that also contains fundamental rights – in the domestic legal order as a matter of EU law itself. They must therefore carefully examine whether national law is compatible with the law of the European Union and, if necessary, either construe national law consistently with EU law or set it aside if such an interpretation proves impossible under national constitutional law.

In this contribution we will describe the way the Dutch courts have – in a sometimes rigorous, sometimes cautious and sometimes downright activist way – engaged in rights review of parliamentary legislation. As we will note, the case law of the highest courts shows a tendency to assume a positive lawmaking role in a limited number of cases. Yet, simultaneously the courts have gradually adopted a cautious doctrine to draw a line between, what they consider to be, acceptable and illegitimate judicial lawmaking. Although, as we have observed, it is not a constitutional court, our account will focus on a specific court, called the Hoge Raad (literally: 'High Council').

It is usually referred to as the Supreme Court of the Netherlands. As the highest court in civil, criminal and taxation cases, it ultimately rules on the lawfulness and interpretation of statutory law in a majority of cases. However the Court has a very limited jurisdiction over the administrative courts. This particular field of law has its own highest courts (most notably the Administrative Jurisdiction Division of the Council of State) carrying out

7 European Court of Justice (ECJ) judgments of 5 February 1963, Case 26/62 (Van Gend & Loos); 15 July 1964, Case 6/64 (Costa v. E.N.E.L.).
8 This duty for national courts is consistently underlined by the ECJ, for example in the Colson & Kamann case (ECJ 10 April 1984, C-14/83, Jur. 1984, p. 1891). For further reading, see: Craig & de Búrca 2008, p. 305-376; Claes 2006; Arnulf, Dashwood, Ross & Wyatt 2000, p. 60-83; Van Gerven 2000, p. 501-536.
a similar lawmaking role.9 For the sake of clarity, we will generally limit our account here to the case law of the Supreme Court. The highest administrative courts usually follow a comparable approach and use similar terminology when it comes to their constitutional position with regard to judicial lawmaking.10

Before starting our account of the lawmaking role of the courts in civil liberties adjudication, we will touch upon the way in which fundamental rights are protected in the Dutch domestic legal order by virtue of international law. This subject will be more extensively discussed by our colleague Evert Alkema in his national report with regard to the incorporation of public international law in the Dutch legal order.11 Before we do, it is noteworthy to underline that the position of national courts within the structure of European Union law is very different from their position under the European Convention on Human Rights and the other human rights treaties. We will touch only briefly on the subject of EU law and focus mainly on the human rights treaties. After discussing the international law framework, we will proceed with a discussion of the leading cases with regard to the lawmaking powers of the courts. To that end, we will analyse some of the more activist judgments of the Supreme Court in which it has tried to judicially reform legislation on the basis of international fundamental rights review. We will also attempt to offer some flavour of the dialogue in which the Court has sometimes tried to manipulate or guide the legislature in a certain direction. From that perspective we will moreover deal briefly with some of the reactions offered by legal scholarship. We will then cover some of the more procedural aspects of the lawmaking role of the courts, such as the means and effects of judicial review of legislation. This entails a brief account of the current legal actions open to individuals challenging the validity of statutes and the specific injunctions the courts are allowed – or expressly not allowed – to issue in such cases. We will end this contribution by summarizing very briefly the different issues we encountered, thereby dealing explicitly with the questions posed by the general reporter.

9 The others being the Central Appeals Court (Centrale Raad van Beroep) and the Industrial Appeals Tribunal (College van Beroep voor het Bedrijfsleven). For a brief account of the Dutch judicial organization, see Kraan 2004, p. 635.


11 To be published in the IACL series.
2. The Ban on Judicial Constitutionality Review and its Scope

2.1. Article 120 of the Dutch Constitution

As a convenient starting point for a debate on rights review in the Netherlands might serve the fact that the Netherlands does have a written constitutional document, which – like in Germany – is literally called the Basic Law (‘Grondwet’), but which is usually translated as the ‘Constitution’. It is a relatively sober document, outlining the system of government. The first chapter is devoted to civil liberties and social rights. Chapter six includes some provisions on the administration of justice. As we have already mentioned, the traditional cornerstone concerning the constitutional position of the courts in the Netherlands is Article 120 of the Constitution, which reads:

‘The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts’.12

The message this provision contains is threefold. First and foremost, there is to be no judicial review of the constitutionality of statutes.13 This means that there is no role for the courts to play when it comes to deciding either whether a certain statutory provision is in breach with the Constitution or whether the legislative process followed the correct procedural rules.14 Such matters are to be left to the legislature, which in the Netherlands is composed of both the government (i.e. the Queen and the Cabinet) and the First and Second Chambers of the parliament, or the ‘States General’ as it is properly called.15 We will henceforth use the terms Parliament and legislature interchangeably.

The term ‘constitutionality’ in Article 120 is to be interpreted broadly. The courts assume that they are not only banned from determining the unconstitutionality of statutes, but equally from declaring them incompatible

12 As derived from the jointly published translation of the Ministries of Foreign Affairs and the Interior (2002). A copy of this translation can be found at <www.minbzk.nl/english>. There is currently a bill pending in Parliament to amend Art. 120. This ‘Halsema proposal’ aims at allowing the courts to review statutes for their consistency with most of the civil liberties mentioned in the Constitution. See Heringa & Kiiver 2009, p. 165.

13 When using the term ‘statutes’, we refer to primary legislation, enacted by the national legislature, which – according to Art. 81 of the Constitution – is composed of Parliament and the government.


15 Cf. Art. 81 of the Constitution. For further research, see Heringa & Kiiver 2009, p. 103-107, supra note 13.
with the Kingdom Charter\textsuperscript{16} or general principles of law.\textsuperscript{17} They might occasionally refuse to apply a certain statute by reference to the fact that such an application violates a legal principle.\textsuperscript{18} However, they can do so only where there are exceptional circumstances which the legislature did not expressly consider at the time of passing the act. In such cases the refusal to apply the law does not in itself affect the binding nature of the Act in question. The courts then assume that Parliament would most probably have wanted them to ignore the statute. This was for instance the case in 1989, when a group of short-term civil servants were promised a pension benefit which, at the end of the day, the administration was not prepared to award them. In the \textit{Short-term volunteers} case, the government argued that the pensions of civil servants were carefully regulated by parliamentary legislation. As the Act in question had not incorporated the promise, the denial of the benefit was a matter of parliamentary legislation and the courts were not allowed to have a say on the matter.\textsuperscript{19} The Court decided differently and allowed the appeal. It considered that Parliament had not deliberately refused to meet its obligations and that the Court was thus in a position to disapply the statute in question.

Even if no such situation arises, the courts are not prevented from expressing their views on the issue put before them. In the 1989 \textit{Harmonisation Act} judgment – its landmark case on Article 120 – the Supreme Court maintained that it was clearly not entitled to review whether an Act of Parliament was compatible with legal principles but it made it painfully clear that – had it been allowed to do so – it would have ruled that the 1988 Harmonisation Act violated the principle of legal certainty. The court thus gave the legislature some piece of, what might properly be called, ‘expert advice’ and the latter, taking the hint, eventually changed the law. The ban on judicial review of legislation then does not prevent the judiciary to engage in a dialogue with the legislature, be it that such occasions remain rare.

Second, the prohibition against primary legislation review that Article 120 imposes on the courts is a narrow exception to the general rule that the courts are in fact competent to test any provision for its consistency with

\textsuperscript{16} The Kingdom of the Netherlands is more or less structured in a way between a federation and a confederation of states (the Netherlands, the Netherlands Antilles and Aruba). They are united by the Crown and a constitution for the federation called the Charter for the Kingdom of the Netherlands, or the Kingdom Charter (\textit{Statuut}). It is relatively concise, however, compared to the constitutions of the three member states. Unquestionably, the Charter takes precedence over the national constitutions but in reality those constitutions are far more relevant in practice. Charter review is therefore something quite rare.

\textsuperscript{17} Supreme Court judgment of 14 April 1989, \textit{NJ} 1989/469 (\textit{Harmonisation Act}).

\textsuperscript{18} See, for instance, the Supreme Court judgment of 9 June 1989, \textit{AB} 1989/412 (\textit{Short-term volunteers}).

\textsuperscript{19} \textit{Ibid.}
rules of higher law including general legal principles. Courts may therefore decide upon the constitutionality of ministerial decrees and administrative, provincial or municipal regulations. The competence to do so was already established in 1864 by the Supreme Court. A third message to be read in Article 120 of the Constitution is that the courts may not review written international law for its compatibility with the Dutch Constitution. This effectively means that in the Dutch legal order, treaties take precedence over any kind of national law including the constitution itself. Article 120 is complemented by Article 94 of the Constitution, which basically states that any law (including the Constitution itself) which is incompatible with justiciable provisions of treaties is not to be applied. Quite apart from Article 120, the Courts also consider themselves banned from deciding upon the constitutionality of European Union law. The Supreme Court has completely accepted the absolute supremacy of EU law over national law, emphasizing that the effect of EU law in the Dutch legal order is a matter of the Community rather than the national Constitution. As we will see, this has great consequences for the role of the courts.

2.2. **Summary**

The conclusion of this brief introduction to Article 120 of the Constitution may be that – as a general rule – it formally bans the courts from reviewing whether Acts of Parliament are compatible with higher law, with the notable exception of self-executing treaty provisions. Sometimes the courts do express their views on the constitutionality of primary legislation and consider themselves entitled to refrain from applying unconstitutional legislation on the basis that Parliament would not have wanted them to apply it in view of exceptional circumstances in a particular case. They are moreover empowered to review any other piece of legislation for its constitutionality and may review Acts of Parliament for their compliance with written provisions of international law to the extent that these provisions provide judicially manageable standards for review. This has practically led to a situation where international human rights law (most notably the ECHR) has taken over the role as the most important civil rights charter for the Netherlands. Judicial review – whether of legislation or of executive action – is primarily focused on the European Convention, the International Covenant and some other human rights treaties. As we limit our discussion here to judicial review of parliamentary legislation, we will from now on focus primarily on the role of the courts in reviewing on the

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20 See the Supreme Court judgment of 16 May 1986, *NJ* 1987/251 (*The State v. The Society for Agricultural Aviation*).


basis of these treaties. We will therefore proceed with a discussion of the constitutional framework for the implementation of international law.

3. Enforcing International Human Rights Law

3.1. Introduction: Monism and Article 94 of the Constitution

The Dutch are widely known to have a very friendly constitutional climate for international law. As we said before, international law takes precedence even over the Constitution itself. This friendly climate essentially originates from the traditionally rather monist approach of the Dutch legal profession. As early as 1919, the Supreme Court expressed its opinion that international law as such is automatically applicable in the domestic legal order. There is thus no need for any kind of conversion to norms of national law.\(^{23}\) Not only are treaty provisions as such accepted as valid law as a matter of customary law. They are also recognized to be of a higher order. Accordingly, the courts generally assume that unless Parliament expressly deviates from its international obligations, it must clearly have intended any provision in its Act to be consistent with a given treaty. This assumption is the basis for the courts’ usual practice to interpret national law as far as possible in a way consistent with the rights laid down in conventions such as the ECHR. And it is this practice that has given rise to a few of the most celebrated but also deeply notorious (some might even say activist) Supreme Court judgments. On such occasions it may well read in the statute some highly detailed rules that have very little to do with either the text of the statute in question or its legislative history.\(^{24}\)

To turn back to the supremacy rule: should Parliament legislate expressly against the text and the prevailing interpretation of a treaty, the treaty irrefutably takes precedence over the conflicting statute. This has arguably always been the case but as from 1953, there has been a clear provision in the Dutch Constitution empowering the courts to disapply the statute in question. This provision is currently laid down in Article 94 of the Constitution, which reads as follows:

> ‘Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions’.

\(^{23}\) Supreme Court judgment of 3 March 1919, NJ 1919, p. 371 (Treaty of Aachen). For a further discussion, see Zwaak 2001, p. 597-599.

\(^{24}\) See, for instance, the two Supreme Court judgments of 21 March 1986, NJ 1986/585 and NJ 1986/588 (Spring judgments) on parental authority. See further the judgment of 27 May 2005, 2005/485 (Parental authority II). We will discuss these cases at length further on.
The key question, which is ultimately for the courts to decide upon, is what exactly constitutes a provision of a treaty ‘that binds all persons’. The importance of the answer to this question lies in the fact that the courts may not disapply the national statute if it ‘only’ conflicts with provisions of international law that do not fit this description. According to Article 93, a treaty ‘binds all persons’ when it is proclaimed and in so far as it contains provisions that may by their very nature be eligible to ‘bind all persons’. This only shifts the issue to what kind of provision would be ‘eligible to bind all persons’.

3.2. ‘Eligible to bind all Persons’ and Judicial Lawmaking

In the current case law of both the Supreme Court and the highest administrative courts, this requirement comes down to two questions. First of all, whether the contracting state parties have expressly agreed upon the nature of the treaty provision. This is seldom the case, however. The courts therefore usually convert the question into a matter of justiciability. Does the text of the provision provide the courts with judicially manageable standards to decide the case? In the words of the Supreme Court in its 1986 landmark judgment concerning a major railway strike: ‘does the provision require the legislature to legislate on a certain subject or is it by its very nature eligible to function as “objective law” without further ado?’. The real question thus becomes whether the courts are able to derive from the provision some clues as to how to decide cases without having to engage in extensive judicial lawmaking. This brings us near the heart of our subject in this paper. Because if the courts decide wrongly on this issue, they might end up having to decide the case by reading into the treaty detailed rules which the treaty itself is really unable to yield. And they may then be legislating rather than judging the case, which makes them vulnerable to charges of judicial activism. The key criterion (whether the treaty provision textually provides a sufficient degree of manageable standards) therefore theoretically serves as a preliminary question for the courts to solve in order to keep them away from political territory.

What complicates matters, however, is that the decision whether a particular treaty provision is likely to ‘bind all persons’ is generally a ‘yes or no’ decision. Once the courts consider a provision to be self-executing (which we will, for the sake of simplicity, use interchangeably for the phrase ‘binding on all persons’), they consider themselves bound by such a ruling in further cases. Both the circumstances and the context of a specific case are therefore irrelevant when it comes to the question of the self-executing nature of the treaty provision. Deciding whether or not the provision is self-

26 Ibid.
executing is pretty much like deciding whether the patient is pregnant. She either is or is not, but that has little to do with the circumstances. Yet, this may confront the courts with a dilemma. Because although the text might produce a clear outcome in one case, it might equally fail to do so in the next. Phrased differently: the text might yield some clear standards, but those standards might prove insufficient in a particular national context. A clear example is furnished by the principle of non-discrimination as laid down, for instance, in Articles 26 ICCPR and 14 ECHR. These provisions provide the applicant with a relatively clear right so it is usually equally clear for the government what it must or may not do. The question whether a given statute constitutes unlawful discrimination might sometimes pose a challenge to the courts, but usually not one they cannot handle by using a balancing test. The text of these provisions may therefore be considered self-executing. Having met this challenge, however, the court might then face the equally difficult task of providing a remedy for the violation. In some cases there might be several different outcomes of the case, each of which could be equally lawful.

Suppose that the court holds that the exclusion of a certain group of people from a tax exemption is unjustified. Because it is clear what the government should not have done – exclude people from a benefit granted to others – the treaty provisions give the courts relatively clear guidance as to whether there is a violation. They are therefore ‘binding on all persons’. However, just disapplying the statute would either not provide the applicants with a remedy or it would take the courts in political territory because it would grant a benefit to a large group of people where the legislature might just as lawfully have denied it to anyone. The principle of non-discrimination only requires after all that both groups are treated the same, not that they should both have the tax benefit. In such cases the ‘binding on all persons’ requirement itself does not prevent the courts from having to engage in positive lawmaking.

This dilemma raised some discussion in legal literature on the question whether the decision to mark a provision as self-executing ought to be contextual (depending on the characteristics of a given case) or dichotomic by nature. The Supreme Court has never been very explicit on the subject. Several authors concluded from the above-mentioned judgment in the 1986 Railway Strike case that as it was either the agreement between the contracting parties or the text of the treaty provision which was decisive, it must logically follow that the nature of the case in question was not a relevant factor in the decision whether the treaty was self-executing or not. In their view, the Supreme Court took a dichotomic approach. Others maintained quite the opposite. In a case in 1984, the Supreme Court had for the very first time in its history explicitly acknowledged the fact that it had a

27 Fleuren 2004.
lawmaking role to play. But it pointed out that this lawmaking role would have been outstretched had it accepted the claim of an applicant who felt discriminated against and invoked the non-discrimination clause of paragraph 26 of the ICCPR to acquire a right to Dutch citizenship. The Court made it clear that it would have to choose between different outcomes, each of which were equally consistent with the non-discrimination requirement of Article 26. Since that would involve a choice the Court took to be essentially political by nature, it granted that the going practice of the government constituted a different treatment between men and women but it refused to rule on the question whether that constituted a violation of Article 26. Most scholars then concluded that the Court had meant to say that Article 26 was not self-executing in that particular case as it had otherwise refused judgment which the courts are not allowed to do under Article 13 of the General Provisions Act 1829.

Meanwhile, the general feeling has turned to the dichotomic view. It is important to note in this respect that the Supreme Court itself seems to have abandoned its practice of refusing to rule on the question whether there is a violation. It is still very reluctant to provide a remedy (other than an informal declaration of incompatibility) in cases where that would involve political decision-making, but it does deal with the argument of complainants that the statute in question is incompatible with fundamental human rights law. And so it reviews statutory legislation on the basis of treaty law – thereby implying that the treaty is self-executing – even in cases were the remedy remains a political issue. The Court moreover confirmed its new course in its Yearly Report of 1995-1996.

To sum up, fundamental rights review in the Netherlands primarily relies on international human rights documents such as the European Convention and the ICCPR. These treaties automatically have legal effect in the Dutch legal order. Courts may, on the basis of Article 94 of the Constitution, review Acts of Parliament for their compliance with Convention rights if the treaty is proclaimed and in so far as the individual provisions are self-executing. A provision either is considered self-executing at all times or it is not. The key criterion is whether the treaty provision textually provides a sufficient degree of manageable standards for the courts to decide the case upon. The ‘binding all persons’ requirement therefore theoretically serves as a preliminary question to be solved by the courts in order to keep them from having to decide between several political outcomes. However, because the specific constitutional characteristics of a given case do not play a role in deciding the issue whether or not a particular treaty provision is self-executing, the courts may frequently be confronted

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28 Supreme Court judgment of 12 October 1984, NJ 1985/230 (Dutch citizenship).
29 See, for instance, Brouwer 1992, p. 279.
30 The landmark case in this respect is the Labour expenses deduction judgment in 1999. See Supreme Court judgment of 12 May 1999, BNB 1999/271. This judgment will reappear frequently in the course of this article.
with a provision that in itself may provide some clear standards but which may nonetheless force the court to engage in positive lawmaking in certain specific situations. These days the courts are very aware of this dilemma and they have tried to cope with it in a careful manner. Before we turn to the case law of the Supreme Court and its reception by legal scholarship, let us first say something about the historical reception and current position of European human rights law in the Netherlands, as they are closely connected to the way the Dutch courts carry out their lawmaking role.

3.3. The Increasing Role of the European Convention in National Case Law

Although the Netherlands has usually lived up to its relatively monist tradition, it does not follow that the European Convention was always given the full weight in practice it ought to have had on a purely formal basis. As we have said before, with the introduction in 1953 of the current Article 94 of the Constitution, it became common ground that treaty law clearly takes precedence over any kind of legislation. Only a year later, on 31 August 1954, the Kingdom of the Netherlands joined the ECHR and yet, for nearly thirty years the courts remained very reluctant indeed to apply the Convention, let alone disapply legislation violating it.31 Until the 1980s, the judiciary was so cautious that there was hardly one case where the Supreme Court found a violation of a Convention right.32 If a Convention right was involved, the Court would either try to refer to a comparable right in Dutch law or it would deny the self-executing nature of the Convention right. It was also common practice to interpret Convention (or indeed Covenant) rights in such a way that they had either a very narrow scope or a very broad limitation clause.33 Conflicts between national legislation and human rights treaty law thus seemed very rare in the 1960s and 1970s. This led E.A. Alkema to conclude in 1980 that the courts had played only a very limited role in the implementation of the ECHR.34 However, things started to change rapidly soon after Alkema reached this conclusion and already in 1988 the story sounded very different.35 After a remarkable decision of the Maastricht District Court in 1977, disapplying a provision of the 1935 Road Traffic Act

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31 What might have played a role, though, was that the Convention was initially rarely invoked before the courts.
32 The notable exception being a judgment of the Supreme Court of 23 April 1974, NJ 1974/272.
33 Van Dijk 1988a, p. 640-641.
due to it violating Article 8 of the ECHR, an era began in which the courts overcame their initial reluctance within a few years.\(^{36}\)

The Supreme Court was no exception. In 1980 it ruled that Article 959 of the Civil Procedure Code was to be interpreted in the light of Articles 8 and 14 of the European Convention. The legislature had knowingly established a difference in procedural treatment between cases concerning the custody of legitimate and illegitimate children. In the latter case, it was impossible for relatives of an illegitimate orphan to appeal against a decision of the local magistrate withholding custody. The Civil Procedure Code granted a right to appeal only to legally recognised kin and the legislature had always explicitly taken the view that there was no kinship between illegitimate children and family members of the parents.\(^{37}\) The Court considered the views on the justification of this different treatment of legitimate and illegitimate children considerably changed. This was reflected in the case law of the European Court of Human Rights, notably in its 1979 Marckx judgment.\(^{38}\) This judgment thus served as an argument to replace legislative history as the appropriate method of interpretation. The Supreme Court might have made law in the sense that it created a right to appeal for relatives of illegitimate children. But it is clear that the Court’s understanding of the word ‘kinship’ was rooted firmly in the case law of the European Court interpreting the Convention which, as we know, takes a clear precedence over national law. The same story applied when in 1982 the Supreme Court spontaneously introduced the duty for parents to justify their decision not to let their underage children enter marriage.\(^{39}\) Where refusing their consent would be evidently unreasonable, the courts were allowed to substitute the parents’ withheld permission, ignoring Article 1:36 (2) of the Civil Code which prohibited the courts from allowing a marriage where one of the parents objected to it. Again, this judgment was backed up by several decisions of the European Commission on Human Rights.

Halfway through the 1980s, the Court’s case law was at its peak in terms of self-consciousness. In 1984 it actually went one step further when it explicitly ordered the District Courts to set aside Section 1:161 (1) of the Civil Code, thereby fundamentally interfering in Dutch family law. This provision requires the courts when allowing a divorce to appoint both a guardian and a supervising guardian, consequently implying that parental authority ends with the divorce. On the basis of Article 8 of the Convention, the Court maintained that it should be possible for the courts to leave (joint) parental authority intact when such a course would be in the best interest of the child.


in question. It such cases the District Court had to set aside Section 1:161 (1), thus effectively allowing for dual custody. 40 What was remarkable about this case – which, incidentally, is called the dual custody case – was that this time the Supreme Court had no clear mandate from either the European Court or the Commission when it held that the application of Section 1:161 (1) of the Civil Code violated the Convention. A more marginal and abstract review by the Court – leading to a different outcome – would probably have sufficed. 41 Furthermore, the case showed that the Court was prepared to make full use of its power under Article 94 of the Constitution to ignore an Act of Parliament in order to issue relief based on the violation of the Convention. 42 The Dutch judiciary evidently was no longer reluctant but appeared to be downright eager to apply Convention law. Some years later, in 1986, the Court issued its famous – or infamous – so-called Spring decisions. 43 They showed that the Court had not only overcome its reluctance to apply the Convention. It also developed a rather more self-conscious attitude towards legislation and its own ability to regulate certain areas of law such as family law. The decisions will be elaborated upon in the next section and we will consequently leave it at this for the moment.

The 1980s are usually regarded as the high watermark in the Supreme Court’s case law concerning fundamental rights review. They showed some of what few have called the more ‘activist’ judgments of the Court. But they marked the beginning of a slow retreat as well. In some cases, by contrast, it exercised considerable restraint. For instance in the dual custody case we mentioned previously, the Court categorically refused to engage in judicial lawmaking (or rather in a positive sense in any case), and was only prepared to set aside the impugned statutory provision. 44 The same year, 1984, witnessed the citizenship case, where the Court refused to remedy an alleged violation of Article 26 of the International Covenant because there were several ways of dealing with the unequal treatment (if there was indeed a difference in treatment) and choosing would mean encroaching on the policy prerogative of the legislature. 45 We already touched on this judgment

40 Supreme Court judgment of 4 May 1984, NJ 1985/510 (Dual custody).
42 This was not the only case in which the Supreme Court was prepared to go that far. See, for instance, its judgments of 1 July 1983, NJ 1980/463 (Insanity Act); of 22 June 1988, NJ 1988/955 (Additional Tax Claim); of 24 November 2000, NJ 2001/376 (Matos v. Dutch Antilles) and of 16 November 2001, NJ 2002/469 (Pig Farming Reform Act). Especially the lower courts have reacted rather enthusiastically to this development. See the judgment of the District Court of Amsterdam dated 14 January 1992, NJ 1992/401; District Court of Maastricht, judgment of 11 February 1993, NJ 1993/728; District Court of Amsterdam, judgment of 28 November 1995, NJ 1996/564, and Leeuwarden Court of Appeal 5 February 2003, NJ 2003/352.
43 Joint Supreme Court decisions of 21 March 1986, NJ 1986/585-588 (Spring decisions).
44 Supra note 40.
45 Supra note 28.
because it has led most authors to believe that the Court had applied the self-executing argument of Article 94 of the Constitution as an instrument to avoid entering into political territory. From the 1990s onwards, the Court explicitly recognised that it was not empowered to set aside national provisions for their inconsistency with Convention law, purely on the basis of its own interpretation of the Convention. In other words, it considered itself unable to offer claimants a broader understanding of the European Convention than the prevailing interpretation offered by the European Court. Accordingly, judicial lawmaking without a clear mandate by the European Court of Human Rights remains a phenomenon of the previous century.

3.4. Concluding Remarks

Together with the – as some might say – highly activist ‘Spring’ decisions, this case law created a difficult legacy, both for the Court itself and for legal scholarship. It did confirm that the Supreme Court considered itself competent to assume a lawmaking role – certainly in a negative, but sometimes even in a positive sense. But it raised questions as to what extent the Court was allowed to play such a role and what ought to be its obligations towards the victims of human rights violations. These questions will be discussed in the next section. What may be concluded from the current one is that although the judiciary was reluctant at first to apply the human rights treaties, it gradually overcame its cold feet. The 1980s constituted a phase wherein the Dutch courts accepted the human rights treaties, particularly the European Convention, as a judicially enforceable Bill of Rights for the Netherlands. Of course, the 1983 Constitution already provided a civil rights charter, but due to the ban on judicial review and its broad limitation clauses, it had only a limited role to play except perhaps for the political branches. The European Convention provided the courts with an enforceable equivalent.

To some extent, this came as a real novelty to them. For decades the relationship between the courts and Parliament had largely been shaped by the existence of Article 120 of the Constitution, prohibiting the courts from reviewing any Act of Parliament. For all its particularities and exceptions,
that provision constituted a bright-line rule for the courts to rely upon. Never before had they been confronted with the difficulties concerning the boundaries of their role with respect to the prerogatives of the legislature. Not to such an extent as they were confronted with in the 1980s and the years to follow in any case. Their approach to this new question was initially not unequivocal or clear. Legal arguments concerning the positioning of the courts, the Supreme Court in particular, and Parliament scattered among several already existing doctrines. The Court and legal scholarship for instance tried to cope with some of the constitutional difficulties by using Article 94’s self-executing requirement in a somewhat dexterous manner. They also tried to fit in the Supreme Court’s new role in the discussions about its lawmaking role in general, which primarily took place in the fields of civil and criminal law but certainly not constitutional law.49 This attracted the attention of constitutional scholars to the debate on the lawmaking powers of the judiciary. And it is that debate to which we too will now turn our attention.

4. The Lawmaking Role of the Courts

4.1. Introduction

As we have observed, fundamental rights review of parliamentary legislation in the Netherlands is highly dispersed in the sense that it is carried out largely by ordinary courts on the basis of international human rights law. This means that the constitutional position of courts engaging in fundamental rights review is essentially not different from that of the courts in general. Having a separate constitutional court to decide upon the constitutionality of statutes and their consequences might produce a separate set of rules regarding the proper boundaries for such a court. This is because it is not hierarchically subordinate to other courts nor can it, strictly speaking, subject other courts to its general jurisdiction. That is definitely not the case in the Netherlands, where constitutional review in the sense of rights review only takes place within the general judicial framework. The rules that govern the boundaries of ordinary statutory interpretation therefore apply equally to fundamental rights adjudication.

A general characteristic of a civil law system is the lack of a doctrine of judicial precedent. The Dutch are no exception in this regard. Here, the concept of res judicata traditionally has a rather narrow meaning; it prevents the same parties from litigating the same case over again. Moreover, what the Court has dictated in its judgment, either on points of law or on points of fact, is lawfully binding, but theoretically only on the parties before it.50 The

49 This was observed by Alkema in his article (in Dutch), Alkema 2000, p. 1053-1058. See also De Lange 1991.
Dutch legal system officially does not recognise a doctrine of *stare decisis*, where courts are bound by their own precedents or the precedents of higher courts. In practice, however, the reasoning of the Supreme Court is generally followed by lower courts and sometimes – on a voluntary basis – even by the highest administrative courts. As the Supreme Court has the power to reverse decisions of the ordinary courts, there seems little point for the latter to do otherwise. Following the case law of the Supreme Court is thus largely a matter of pragmatism besides the more fundamental reason of equality. The Supreme Court also considers itself to some extent bound by its own case law and frequently refers to it. In practice, therefore, the Court’s case law may be regarded as a source of law. However, that does not alter the fact that the Court operates in a civil law system, where the separation of powers traditionally places some weight on the fact that it is the duty of the legislature to make the law and that of the courts to apply it. And although this principle has, on the whole, never been applied very strictly in the Netherlands, it is certainly not an open-and-shut case that the courts have a lawmaking role to play. There is then a slight tension between Dutch constitutional theory on the one hand – more or less repudiating a lawmaking role for the courts – and current legal practice.

In this section we will first describe the case law of the Supreme Court on its supposed lawmaking function. We will then turn to the justifications and the critique legal scholarship has offered in reaction to this case law. And finally, we will discuss some of the proposals that have recently been put forward to facilitate the Court’s lawmaking function.

### 4.2. Defining the Process of Lawmaking

It has often been said that the courts have always assumed a lawmaking role, even from the outset. The legal process simply is inconceivable without some judicial lawmaking. Until the 1980s, the Dutch Supreme Court never actually said that it had a duty to do so, but clearly it had always been forced to interpret the law. However, according to one prominent author, the Court was not likely to engage in lawmaking before 1960. That raises the question what the term ‘lawmaking’ actually stands for. When former president Martens of the Supreme Court spoke of lawmaking as intrinsic to judging a

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51 See Loth 2009, p. 278.
53 That is even more true of the administrative courts, whose judgments are not under review from the Supreme Court. When the administrative courts follow the Supreme Courts case law they do so on an entirely voluntary basis, mainly to serve the coherence of the law in general. *Supra* note 51. Moreover: Koopmans 1999, p. 124-125.
56 See, for instance, a contribution by former Supreme Court president Martens 2000, p. 747.
case in his remarkable farewell speech for the Court, he evidently used it in a different way than the prominent author we mentioned just now. Martens evidently used a broader notion of what constituted judicial lawmaking than the other author, whose use of the term came closer to what one might call `judicial activism'.

Lawmaking in the spirit of Hans Kelsen is indeed intrinsic to the judicial process. The courts `create' law just by interpreting a statute and applying it to an individual case.58 In that view any interpretation means creating law, no matter how close the court sticks to the literal wording of the provision in question. However, such lawmaking is hardly something to get excited about. True as the description in legal-theoretical terms may be, such a definition is far too broad to distinguish between legitimate and illegitimate lawmaking. One may, however, also speak of lawmaking when the court deviates from the literal wording of a legislative text in order to fill a legal gap. In this sense, it is perfectly possible for the court to remain firmly within the boundaries of the system and the objectives (teleology) of the statute, but then again, it might not.59 Where that is the case, the court would have to assume a clearly political role. In such cases, the Court, rather than the legislature, gives direction to society.60

4.3. The Case Law of the Supreme Court concerning its Lawmaking Role

Since the beginning of the 20th century, the Dutch Supreme Court has increasingly assumed that it may not only apply the law but develop it as well.61 In 1959, in Quint v. Te Poel, it explicitly ruled that where an Act of Parliament leaves a legal vacuum, the answer must lie within the existing statutory system.62 The Court thus firmly implied that it was obviously empowered to fill the gap. Moreover, it marked a clear boundary between what the court understood to be legitimate lawmaking in the sense of developing the law on the basis of existing law, and illegitimate lawmaking. That boundary was to be comprised by the existing statutory system.

As we have already implied, the Court has explicitly recognised its lawmaking role in the 1980s. In the Citizenship case of 1984 it mentioned a `lawmaking duty' for the courts but quickly added that making policy

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58 See Kelsen 1934/1992, p. 68.
59 This is what German legal literature calls Gesetzesimmanente Rechtsfortbildung as opposed to Gesetzesüberschreitende Rechtsfortbildung where the courts exceed such boundaries. See Larenz 1991, p. 366-367.
60 For an example of this use of the term `lawmaking', see Stolker 1993, p. 57. See further Bell 1985, p. 6.
decisions clearly exceeded this duty. Several authors have since noted that when the Court speaks of lawmaking, it nearly always does so in a negative way - refusing to accept a specific interpretation or remedy because that would outstretch its judicial role. When it does feel that it may fill a gap, it hardly ever argues why lawmaking in this particular case is justified. This is very clearly illustrated by two cases we have already mentioned. In the citizenship case of 1984 it ruled that the limitations of its lawmaking duty would not allow it to remedy a violation of Article 26 of the International Covenant, whereas in the Spring decisions of 1986, it made no reference whatsoever to its lawmaking duty in order to justify its rather consequential judgment.

After the Supreme Court openly coined its own 'lawmaking duty' in 1984, the legislature quickly followed suit. In 1988 it adopted the proposed Bill for a revised Judicial Organisation Act, in which a new Article 101a (currently Article 81) included specifically as the duties of the Supreme Court, to 'secure the uniformity of the law and advance the development of the law'. With the 'development of the law' Parliament clearly recognised a lawmaking duty for the courts. However, the question remains what constitutes 'development of the law' and what exceeds mere development and turns into (illegitimate) lawmaking.

4.3.1. The Dual Custody Case: Distinguishing Positive from Negative Lawmaking

In its 1984 judgment on dual custody, the Supreme Court followed the line of reasoning it had already set out in the 1959 Quint v. Te Poel case and applied it for the first time to fundamental rights review. As we have seen before, this case concerned the applicability of Section 1:161 (1) of the Civil Code, which required the courts to appoint one guardian when granting a divorce. In a case before the District Court of Amsterdam, the parents of six-year-old Ingolf requested joint custody after the divorce. The District Court refused

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63 Supra note 28.
64 See, for instance (in Dutch) Kortmann 2005, p. 250.
65 Although admittedly, the Advocate General had extensively gone into the matter. See the Supreme Court judgments of 12 October 1984, NJ 1985/230 (Dutch citizenship), and of 21 March 1986, NJ 1986/585-588 (Spring Judgments).
67 Koopmans 1999, p. 131; Martens 2000, p. 747. Recognition of the lawmaking duty of the courts moreover appeared in some correspondence between the Minister for Justice and the Second Chamber of Parliament in 1989 (after the adoption of the Bill), where the minister mentioned three duties for the Supreme Court: securing the uniform application of the law, leading the development of the law and provide individuals with adequate legal protection. He marked the first two elements as a 'the lawmaking duty' (Kamerstukken II 1988/89, 21 206, No. 2, p. 42).

Supra note 62.
the request, arguing that its duty pursuant to Section 1:161 (1) to appoint one guardian clearly ruled out the possibility of appointing two. Appealing the decision, the parents invoked Article 8 of the ECHR. However the Supreme Court agreed with the District Court. It argued that the legal system did not allow joint guardianship, not even on the basis of Article 8 of the Convention. This interpretation of Article 1:161 (1) of the Civil Code would outstretch the judicial function as it would engage the Court in positive legislating. It considered that introducing dual custody would not easily fit into the existing statutory system. It did not explain why that was the case, nor had the Advocate General done so (he had actually argued the opposite), but there it was. Yet, the Court managed to find a solution. The justices pointed out that Article 94 may not have allowed them to positively engage in judicial rulemaking but it did give them the power to set aside certain provisions of the Civil Code on the ground that their application would violate the Convention. Considering that ignoring Section 1:161 (1) would leave parental authority - on the basis of Article 1:161 (4) of the Civil Code - intact, it subsequently ordered the District Court to enquire whether joint responsibility for both parents would serve the child’s best interest.

What the dual custody case shows remarkably well is that the Court made a crucial distinction between its power (based on Article 94) to set aside the Civil Code on the one hand and on the other, its lack of power to settle the issue by promulgating its own, more convenient, rules if those rules were incompatible with the existing statutory scheme. Ignoring one statutory provision in order to apply another hardly qualifies as doing justice to this statutory scheme but evidently the Court took Article 94 of the Constitution for a clear mandate to deviate from that scheme so long as it stayed on the negative side by ‘just’ ignoring a provision.

4.3.2. The Dutch Citizenship Case: Avoiding Policy Decisions

The 1984 citizenship judgment, in which the Court explicitly recognized its lawmaking duty, added a new dimension to this. In this case the Court was confronted with a claim of an illegal immigrant who, during his stay in the Netherlands, had married a Dutch woman. Because his stay in the Netherlands was illegal and because he had built up quite a remarkable criminal record, he was asked to leave. The applicant then informed the authorities of his wish to acquire Dutch nationality. He relied upon Article 8 of the Nationality Act, granting the foreign wife of a Dutch husband the right to acquire Dutch nationality by informing the authorities of her wish. However, the provision obviously applied only to women, not men. The applicant argued that Article 8 violated paragraph 26 of the International Covenant and had therefore to be interpreted in such a way that men too had the right to acquire Dutch nationality. The Court did not accept the
argument. It even refused to review whether the Act violated the Covenant because had it found a violation, it would not have been able to remedy the situation. Unlike in the dual custody case, setting aside the statute would clearly not benefit the claimant because the provision was positively phrased. It did not deny the applicant a right, just awarded it under-inclusively to women. Setting aside the statute would only deprive women of their privileged position, however women in general were not party to the case.

The question thus became whether the Court was allowed to read in the words ‘and men’ in the provision, thereby widening its scope. Under the Quint v. Te Poel reasoning, the issue would have been whether such ‘reading in’ would contradict the statutory scheme. It might have done, but the Court did not go into that. Instead, it argued that widening the scope to include men would not be the only lawful solution. Article 26 of the ICCPR merely prohibited unequal treatment and to abrogate the right for women was just as lawful as extending the right to men. This was a matter of policy and to choose between the two would be to encroach upon the political prerogative of Parliament. And so the Court left open the question whether the statutory provision violated Article 26 of the Covenant and turned down the applicant’s claim. It thereby added to its discourse a new ground to abstain from issuing a remedy: it was not prepared to choose between different policy outcomes. What might also have played a role though is the fact that at the time of the judgment a new statutory scheme had already been introduced in Parliament.

The citizenship judgment has received some criticism for its perceived overspill of judicial restraint. It is striking therefore that the Court delivered two judgments that are widely considered to be among its most activist only a year later.

4.3.3. The Spring Decisions: Judicial Activism or Prudent Lawmaking?

September 21, 1984: a child was born from two parents. That was not unusual. Indeed, most people are born from two parents. Nature will not have it any other way, at least not for the time being. What was so special about this case was that the parents were not married at the time of birth nor had they ever been married or had they any intention of doing so in the near future. They were happily living together and saw no need for marriage. That had been quite unusual for decades, but in the 1970s and 1980s more and more people in the Netherlands decided not to marry. Under Dutch law, such parents could exercise no parental authority at all. They could only obtain shared guardianship. The Court held that this distinction violated Articles 8 and 14 of the European Convention. What followed was an obscure mixture of setting aside certain provisions of the Civil Code while

71 Supra note 43.
extensively interpreting others so that they might be read consistently with the Convention. The Court thus elaborately tried to regulate the conditions under which a request for joint parental authority was to be granted by the courts. The Court devoted an entire page in the case reports to describe these conditions. It did not elaborate on the question as to what authorised the Court to issue such regulations. They were not formally proclaimed or anything, but were mentioned as part of the interpretation of the Civil Code. What the Court effectively did was providing lower courts with a manual how to work through these difficult cases by using their combined powers to set aside and reinterpret national law in a uniform and Convention-proof manner. It probably considered it necessary to do so in the interest of legal certainty. However, as one author wrote: ‘This is legislation rather than judgment’. The question may well be asked whether such an extensive interpretation suited the contemporary statutory scheme. It probably did not. To that extent, the judgment did not seem to meet the criterion of the 1959 Quint v. Te Poel judgment. Moreover, many political policy issues were involved here. The question might equally be asked why the Court did not make reference to the criterion it had set out in its citizenship judgment just one year earlier.

4.3.4. After the High Watermark: a Slow Retreat to Judicial Restraint

After the 1980s, the Supreme Court began its slow retreat to an attitude of greater judicial restraint. It increasingly refused to review Acts of Parliament based on the argument that it was not in a position to offer a remedy. In a vast number of cases it followed the reasoning it had already followed in the citizenship judgment. The Spring decisions had fundamentally changed Dutch family law, but they remained exceptions in the fundamental rights case law of the Court. What changed, though, was that the Court sometimes applied the citizenship reasoning even in cases where it might have had the opportunity to set aside a provision on the basis of Article 94 of the Constitution. The sharp contrast it had introduced in the dual custody case, when it said that it could not add something to the law but was able to set it aside (effectively reaching the same outcome) might not have really been abandoned but it was certainly blurred to some extent. The Court may have taken in some of the critique of Advocate General Moltmaker in the Spring cases. He argued that the difference between filling a gap and setting aside a provision is of a formal rather than of a substantive nature. For Moltmaker, there existed no clear distinction between negative and positive lawmaking.

72 Alkema in his Case Note under the judgment in NJ 1986/588.
74 See para. 6.1.3 of the Advocate General’s conclusion.
Whenever setting aside a statute would have rather undesirable consequences, either because that would create a legal gap or otherwise, the Court would abstain from doing so. In the 1998 Car expenses deduction case for instance, the Court refrained from setting aside a provision of the Income Tax Act 1964, because even though it would have solved the relevant inequality, it would instantly have introduced another inequality. In another case concerning court levies, its motive not to set aside the statutory provision probably resulted from fear for the financial consequences for public expenditure. Incidentally, the Court even applied the citizenship reasoning to cases where setting aside the statute would have been an appropriate remedy. Thus in a 1997 case concerning the possibility for two women to adopt a child, it refused to review whether Article 1:227 of the Civil Code – which effectively excluded same-sex couples from adopting a child – violated Articles 8 and 14 of the European Convention. It followed the reasoning of the Advocate General, who had argued that there were several possible policy outcomes and as setting aside the statute would lead to one of them, by doing so the Court would make a political choice, which of course would not do.

4.3.5. Towards a New Model: the 1999 Labour Expenses Deduction Judgment

In the 1990s, several scholars expressed their uneasiness with regard to the abstaining practice. Some of the questions that arose were whether Article 94 of the Constitution allowed such a move and how abstaining had to be considered from the perspective of effective legal protection of fundamental rights. The Court eventually responded with a landmark judgment in 1999, which addressed both questions by introducing a new model composed of elements of some of the cases we have just discussed.

The case itself concerned a technicality regarding the tax deduction for those with relatively high labour costs as compared to those with standard labour costs. We will not discuss the facts of the case here. What matters is that the Court was confronted with a relatively clear inequality between the two groups in Article 37 of the Income Tax Act 1964. It explicitly considered this provision to be in violation of Articles 14 and 1 of the European Convention’s First Protocol. The Court then proceeded to the question whether it was in a position to remove the inequality. It eventually concluded that it was not. But in doing so, it merged some of different lines of reasoning

76 Supreme Court judgment of 30 September 1992, BNB 1993/30 (Court Fees). Fear for a heavy burden also played a role in Supreme Court judgment of 28 May 2004, NJ 2006/430 (Probationary Release).
of its previous case law, adding to that a few drops of the concern articulated by legal scholarship.

For the very first time the Court connected its supposed lawmaking duty to the principle of effective legal protection. It implied that it was obviously under a duty to provide adequate protection and started off by stressing that to set aside the impugned provision was not a sound option, as this would not benefit the claimant. As was the case in the citizenship judgment, Article 37 of the Income Tax Act was positively framed in the sense that it allowed a deduction for an under-inclusively phrased group. The Court thus considered that to set aside the provision would not, on its own accord, create a right to the deduction for the discriminated group. This is important because what the Court appears to have implied is that if setting aside the statute had been a suitable remedy for the applicant, it would have done so – even if that had ultimately led to only one of several possible outcomes. Like in the dual custody case, the Court would then take Article 94 of the Constitution for a clear mandate to act. The Court may therefore have dismissed its cautious attitude in the 1997 Same-sex Parents case, where it had refused to set aside the statutory provision on the basis that there were other legitimate policy outcomes as well.80

The Court then proceeded to examine in what way it could possibly provide a remedy, given the fact that setting aside the statute on the basis of Article 94 was of no use. It considered that there was a legal gap concerning the question whether or not the applicant had a right to the deduction. It could either fill this gap on its own initiative or leave the matter for the legislature. The answer to the question which course to take, according to the Court, depended on the outcome of a balancing test involving on the one hand the principle of effective legal protection and on the other some desirable judicial restraint ‘in the current constitutional structure’. The Court finally gave some clues as to how such balancing should take place, using its earlier case law as a catalogue of topoi. From its Quint v. Te Poel reasoning it derived that if the existing statutory scheme provided clues for deciding the case, it would fill the gap.81 If on the other hand there were different policy outcomes to choose from, choosing between them would – for the time being – be a matter best left for the political branches.82 This consideration led some authors to carefully try and compare it to the political question doctrine of the US Supreme Court.83

The Court did also, uncharacteristically, explain why it was not prepared to interfere in the legislative process when there were different policy outcomes to choose amongst. It stressed that the courts had to observe some ‘desirable judicial restraint’ and that it had only limited possibilities to

80 Supra note 77.
81 See also the Supreme Court judgment of 17 August 1998, 8NB 1999/123 (Commercial registration number plates).
82 Which basically is the Dutch citizenship line of reasoning (supra note 28).
83 Unfortunately, only in Dutch: See Bovend’EerT 2009, p. 151; De Werd 2004, p. 69-126.
engage in a quasi-legislative process. Its explanation was of course primarily intended for the ears of those who had been critical of the Court’s restrained attitude in years leading up to the judgment. To that end the Court added one other remark. As we have seen, the Court had taken the view that if such a situation arose where there were different policy outcomes to choose from, it would for the time being leave the matter for the legislature to decide. It then explicitly stressed that the outcome of its ‘balancing test’ might be different if the legislature was familiar with the inconsistency and chose to ignore it. What the Court said in fact was that it assumed itself competent to engage in lawmaking even where that meant taking policy decisions, but it had to wait for the legislature to act first. Yet, if Parliament deliberately maintained the incompatible regulation, the Court would not hesitate to do whatever it thought Parliament evidently might or in any case should have done.

There is a remarkable paradox here with the approach taken by the Court in its case law concerning the ban on judicial review of the constitutionality of statutes as laid down in Article 120 of the Constitution. In its celebrated Harmonisation Act judgment of 1989, the Court had ruled that it may not declare statutory provisions void for their lack of consistency with either the Constitution or legal principles. But as we have seen, it made an exception for cases where Parliament could not have known about the inconsistency. It then implicitly assumed that Parliament would have wanted it not to apply the incompatible provision. This approach appears to deviate from the Labour expenses deduction approach, where the Court considered itself competent to legislate if Parliament had knowingly failed to do so.

The difference between the two approaches lies in the nature of the review undertaken by the Court. With respect to Article 120 of the Constitution, the Court has to observe the fact that the question whether a statute is in fact constitutional is ultimately for Parliament to decide upon. The Dutch version of parliamentary sovereignty (as far as it exists) therefore fundamentally differs from that of the United Kingdom where, as Dicey phrased it, ‘Parliament has the right to make or unmake any law whatever’. The Dutch Parliament may certainly not make or unmake any law whatsoever. Its powers are limited by the Constitution. However, Article 120 reserves for Parliament the right to have the ultimate say on the question whether it has overstepped such limitations. So the Courts may not only safely assume that it is Parliament’s desire to legislate in conformity with the

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84 Already in 1993, a study showed that the reasons for the Court to refrain from positive lawmaking (or as the study called it, ‘engaging in politics in the sense of giving direction to society’), were primarily of a rather practical nature, basically boiling down to the question whether the Court would be able to regulate an issue in society. See (in Dutch) Stolker 1993, supra note 60, and for a revised version Uzman & Stolker 2009, p. 475-496.

85 Supra note 17.

86 Dicey 1885/1959, p. 3-4.
Constitution, they must respect the fiction even when it is very clear that Parliament has actually no such intention at all. The situation is different with regard to treaty law. Here the same assumption applies: the legislator aims to legislate in compliance with its international obligations but the question whether it has actually done so is ultimately a matter for the courts to decide upon. Article 94 of the Constitution makes that painfully clear. If Parliament therefore knowingly ignores its obligation to legislate consistently with, for instance, the European Convention, the courts must intervene and ultimately issue a remedy. The relationship between the Supreme Court and the legislature is then much more one between equals than the relationship with regard to constitutional review where Parliament has the authoritative say.

In the case at hand, the Labour expenses deduction case, the Court developed a line of reasoning it had already put in practice some years before. In another tax decision, this time concerning commercial registration number plates, the Court had been willing to grant the victims of an unequal treatment the benefit they had been denied by the legislature. Of course, there was no clear obligation for Parliament to grant these car owners the impugned benefit. It could equally have decided to abolish the entire scheme. There were then two choices. And yet, the Court felt that it was entitled to choose the first option without leaving the matter for Parliament. There were two reasons for this. First of all, the government had actually warned Parliament that its amendment would most probably violate the Convention. Parliament had not in any way contradicted this statement but had nevertheless passed the bill amended. It was therefore painfully clear that Parliament had knowingly legislated inconsistently with the Convention. Moreover, granting the aggrieved car owners the benefit was exactly what the government had proposed to do in the first place. It therefore fitted in neatly with the existing statutory scheme and thus met the important criterion of the 1959 Quint v. Te Poel case.

On the other hand, it has now become clear that the Court is not very likely to assume that the legislature has consciously left a violation intact. After the 1997 Number Plates judgment the Court has never actually considered filling a gap when there were policy choices to make. Quite the contrary, when confronted with the alleged sluggishness of the legislature in amending the law in a few cases where the Court had declared the Act incompatible with Convention rights, it explicitly accepted the argument of the government that it had tried to amend the law with all deliberate speed.

In the same judgments it has also ruled that when remedying the

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87 Supra note 81. This was a case in 1997, but already in 1990 the Court had mentioned its readiness to issue a remedy if Parliament did not take up the matter after the Court had expressed its concerns. See the Supreme Court judgment of 31 January 1990, NJ 1990/403 (Unreasonable delay).

inconsistency, Parliament may freely choose to change the law only for the future in the sense that it need not necessarily enact its amendments with retroactive effect.89

The 1999 *Labour expenses deduction* judgment basically sums up the Court's attitude to positive and negative lawmaking in fundamental rights cases. It is now clear that the Court recognises its duty to provide effective redress to claimants who successfully invoke human rights treaties. Moreover, it has developed a kind of step-by-step plan in order to decide on the nature of the redress.

1. First of all, it will always try to interpret any indefinite provision consistently with the treaty provision in question;
2. Second, it will try to provide redress by means of negative lawmaking: it examines whether setting aside the impugned provision might settle the case.

Only if that is not the case does the question arise whether the Court may engage in positive lawmaking by using its interpretative mandate.

3. As a matter of principle, it considers itself empowered to do so when there is a clear alternative which agrees with the existing statutory scheme.
4. It should leave the matter for Parliament to resolve when there are policy decisions at stake. The Court will then not easily encroach upon the political prerogative of Parliament.
5. But it is – at least theoretically – prepared to do so when Parliament evidently has no intention of putting things right within a reasonable period of time.

The Court generally complies with its own framework and it may therefore be said that it usually exercises judicial constraint when it comes to positive lawmaking in the sense of issuing regulations on the basis of its duty to interpret the law. There is one notable exception, however, to this general rule. And we will turn our attention briefly to that exception.

4.3.6. The Exception to the Rule: European Union Law

Where a statute violates European Union law rather than the European Convention on human rights or one of the other human rights treaties, the Supreme Court does not consider it possible to leave the matter for the legislature. The basic assumption for the Supreme Court is that Articles 93 and 94 of the Constitution – regulating the effects of international law in the domestic legal order – do not apply to European Union law. As early as 1963,

the European Court of Justice (ECJ) ruled in its landmark cases *Van Gend & Loos* and *Costa v. E.N.E.L.* that the European legal order is fundamentally monistic, meaning that Community law is both of direct effect and superior to any kind of national law (including national constitutions) on its own accord.90 The Dutch Supreme Court has never challenged this claim and in 2004 it even accepted it explicitly.91 This effectively means that it is ultimately the law of the EU itself which, in the view of the Supreme Court, determines the extent to which Community law affects the Dutch legal order. To that end the European Court of Justice has derived some very stringent rules concerning the effective legal protection of Community law by the national courts from the EC Treaty. Although the ECJ has consistently ruled that the effects of an inconsistency between national and Community law are a matter for national courts to deal with, it has simultaneously laid down some minimum guidelines in order to secure the uniform and effective application of Community law throughout the Union.92 National courts are required to interpret national law as far as possible in conformity with Community law.93 Would such an interpretation, according to the national rules of adjudication, prove to be impossible, then the national court in question is obliged to set aside the national rule.94 The ECJ has moreover underlined that any national rule which handicaps the possibilities for courts to secure the uniform and effective execution of Community law must be put aside as well.95 Mitigating the undesired consequences of the application of Community law can be considered only by the ECJ itself.96 Last but not least, the ECJ takes a relatively straightforward approach to remedies in discrimination cases. In such cases the national courts will have to extend the more favourable rule to the aggrieved party as well.97 The ECJ does not consider such an extension to be any kind of policy decision, but a logical outcome of applying the principle of non-discrimination to a given case, thereby deviating considerably from the approach usually adopted by the Dutch Supreme Court.

The Supreme Court has faithfully carried out its duties under Community law in this respect. A recent example taken from the field of taxation might illustrate this. In the *Ilhan* case, the Court determined that...

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90 Supra note 7.
91 Supreme Court judgment of 2 November 2004, NJ 2005/80 (Compulsary break).
93 Supra note 8.
95 See, for instance, the *Simmenthal* judgment in the previous footnote.
96 ECJ judgments of 17 May 1990, C-262/88, (*Barber v. Guardian*); 1 April 2008, C-267/06 (*Taduo Maruko*).
97 See a.o.: ECJ judgments of 27 June 1990, C-33/89 (*Kowalska*), and of 26 January 1999, C-18/95 (*Terhoeve*).
Article 1 of the Car and Motorcycle Taxation Act constituted a violation of Articles 43 and 55 of the EC Treaty. It considered that modifying – and consequently interpreting the statutory provision consistently with Community law – would outstretch its lawmaking duties as the existing statutory scheme and its legislative history did not yield any particular way forward. However, it refused to consider leaving the matter for Parliament, as it surely would have done, had it concerned a case under a human rights treaty. Instead it decided to set aside the Act at large, thereby effectively annulling the entire tax measure. In order to provide the required redress, the Court thus fell back on its classical role of a Kelsenian negative legislator.

4.4. **Reactions of ‘la doctrine’ after 1999**

As we have seen, there has always been a considerable debate on the question whether the courts have a lawmaking role to play and if so, how far this role might be stretched. This has traditionally been a debate among civil lawyers interested in methods of interpretation. But as the role of the courts with respect to fundamental rights review changed and increased in the 1980s, the lawmaking powers of the ordinary courts clearly became a matter of constitutional law. This presented constitutional scholars with the basic question whether the traditional doctrines on the role of the courts were adequate in the field of fundamental rights review. However, such was the general consensus among civil lawyers by now that the courts were under a clear duty to develop and shape the law that there was also from the very outset among constitutional scholars a tendency to agree on the basic fact that the courts had a considerable lawmaking role to play. Dutch constitutional doctrine has therefore never been very fundamentally critical of the courts acting as a positive legislator. What is more, the term ‘positive legislator’ would hardly be used at all.

Consensus somewhat eroded in 2005 as a Nijmegen law professor questioned the lawmaking duty of the courts. He argued that this ‘so-called lawmaking duty’ was an invention by the Supreme Court itself, the creation of which was to a large extent itself a piece of lawmaking without any basis in written law. However, he was not the only one critical of the Supreme Court’s attitude. At the other end of the spectre, there had already...

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98 Supreme Court judgment of 14 November 2008, BNB 2009/3 (Ilhan).
99 The Judicial division of the Council of State seems to take a less rigorous stand. In the *Eman & Sevinger* case it did invoke the limits of its lawmaking duties in a case concerning EU law, *supra* note 10.
100 This attitude was expressed in 2000 by the parting president of the Supreme Court Martens in his farewell speech (*supra* note 56).
101 Kortmann 2005.
102 Ibid.
been scholars arguing that the Court’s attitude towards individual victims was possibly too restrained to provide effective legal redress. 451 In short, the debate was renewed.

Today legal scholarship can roughly be divided into three categories. First, there are those who are of the opinion that there is no legal basis whatsoever for the courts to engage in lawmaking. 452 Courts decide cases and in the process of doing that, they might ‘find’ and apply the law but they do certainly not go about creating it. Second, probably the vast majority of scholars argue that there is a role for the courts with respect to judicial lawmaking, but it is equally clear that it should primarily be Parliament that enacts the law. 453 They generally assume that Article 81 of the Judicial Organisation Act provides a clear basis for the courts to develop – and thus shape – the law, even if that means engaging in an activity close to legislating. They expressly reject the argument that the Supreme Court may never engage in lawmaking because it lacks the appropriate democratic legitimacy. Most of them assume that the courts do not derive their legitimacy no from any democratic principle but from the rule of law. 454 However, this group lacks coherence in the sense that although most scholars agree that the courts have a lawmaking role to play when reviewing legislation, they differ on the extent of the lawmaking duty. The basic question here is whether the courts may encroach upon the policy prerogative of the legislature. There are those who think the courts clearly incompetent to do so. 455 They consequently disagree with the stance the Supreme Court has taken in its Labour expenses deduction judgment, when it abstained from lawmaking but warned that it might in the future decide otherwise if Parliament remained inactive. 456 Others maintain that although it is usually improper for the courts to engage in politically sensitive issues, it may nonetheless be necessary for them to do so in order to provide effective redress. 457

Apart from this difference in opinion, the common denominator of this second group is that it regards lawmaking by the courts as possible but clearly the exception. It is first of all a spin-off of deciding individual cases and, in the case of fundamental rights review, something necessary but abnormal. Setting aside statutory law and subsequently formulating guidelines for society are not the core business of the courts but of

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453 See, for instance, Koopmans 1999, p. 154; Martens 2000, p. 751; Breninkmeijer 2001, p. 26; De Werd 2004, p. 120.
454 See the authors mentioned in the previous footnote. Critically however: Bovend’Eert 2009, p. 142-143.
455 Most recently for instance Bovend’Eert 2009, p. 143 (see the previous footnote).
456 See the previous section.
They stress, in other words, the primacy of Parliament in policy-making and legislating. There is, however, a third group of authors that appears to argue for a more sweeping understanding of the lawmaking role of the courts. For such authors, the courts – especially the Supreme Court – and the legislature are ‘partners in the business of the law’. Building firmly on the civilian tradition, they argue that Parliament is just not able to anticipate every sudden change of direction society takes. Therefore, judge-made law is now ‘an absolute must’, its contribution to the development of the law indispensable and it should certainly not be regarded as the exception but rather as the rule. Looking after the parties of the case at hand is not the only primary duty of the courts: they have an equally important duty towards the development of the law in general as well. However, one may wonder whether such scholars are still addressing the same subject. As we have seen, there is some disagreement about the extent to which the term ‘lawmaking’ ought to be used. The civil law approach is very much directed towards the filling of legal gaps the legislature is simply unable to fill. That situation substantially differs from what concerns constitutional scholars most, that is when the courts must set aside a clear statutory provision which nevertheless fails to produce an appropriate remedy for the case at hand. Still, the Dutch debate on the lawmaking powers of the courts is very much fashioned by the existence of this group. As we will see in the next section, their efforts seem to have influenced the Supreme Court as well as the legislature and reforms are now under way to adapt the Court’s position in the legal system to its lawmaking role.

5. Means and Effects of Judicial Review

5.1. Introduction

In this section we will offer a brief outline of the way in which dialogue between the courts, the parties of the individual case and the legislature is shaped. Particular topics include the specific procedures to attain a remedy for a human rights violation (including legislative omissions), specific injunctions concerning unlawful legislation, and the effects of decisions concerning rights review. Moreover, we will turn our attention briefly to the specific techniques the Supreme Court occasionally applies to mitigate the consequences of its lawmaking activities.

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111 See the outline drawn up by Bovend’Eert 2009, p. 140-142.
112 See also Adams 2009, p. 1098.
113 See e.g. Vranken 2006, p. 8-9.
114 Ibid.
5.2. Procedures available to Enforce Fundamental Rights Law

As we have said before, the Netherlands does not have a constitutional court. Consequently, there are no specific procedures for claimants to complain about infringements of fundamental rights. No *Recurso de amparo*, *habeas corpus* or *Verfassungsbeschwerde* exist in the Dutch legal order. As we have noted before, this does not mean that the courts have no role to play when confronted with violations of (international) human rights. As long as the right in question is laid down in a self-executing treaty provision, the courts may review legislation for its consistency with such rights both in a direct and an indirect way.

The power for the ordinary and administrative courts to review legislative rules for their consistency with higher laws was already established in 1864. 115 As we have discussed, rules of international law automatically take precedence over national rules and are therefore recognised as ‘higher law’ in the Dutch legal order. Should the courts conclude that national provisions are inconsistent with treaty law then, as we have seen, they must either interpret the provision in conformity with the treaty or, if that is impossible, set aside the national provision on the basis of Article 94 of the Constitution. The courts then apply either remaining national law or the norm of the treaty provision itself. This may ultimately lead to a remedy by way of granting the requested permit after all, awarding damages or acquittal of criminal charges, whatever the case may be. It is important, however, to stress that Article 94 of the Constitution does not empower the courts to declare statutes void. It only requires the courts to set aside individual provisions in individual cases.

Direct review of legislation is also a possibility, be it that it does not happen very often with regard to statutes. The bulk of both positive and negative legislating by the courts with regard to primary law takes place in procedures of indirect review. But having said that, it is certainly possible to start civil proceedings against the State for unlawfully enacting a statute. In a landmark judgment of the Supreme Court called *Pocketbooks II*, the Court ruled that Article 1401 of the Civil Code (currently Article 6:162), which concerns a general tort, was generally applicable to the legislative function of the government.116 Although successful appeals concerning the unlawfulness of primary legislation remain very scarce, it is by no means impossible that the Supreme Court may one day accept this kind of claim. In the 2001 (first) *Pig farming Reform Act* judgment, the Court was in any case prepared to review whether some of the Bill’s provisions constituted an unlawful act in

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the framework of Article 6.162 of the Civil Code, rendering the State liable for damages.\textsuperscript{117}

5.3. \textit{Remedies for Fundamental Rights Violations}

The difficult question, however, is not whether the courts may accept a claim concerning the lawful enactment and application of an Act of Parliament, but the question rather is what remedies they may issue when they conclude the Act to be inconsistent with international law.\textsuperscript{118} Perhaps the least difficult remedy in this particular respect is the power of the civil courts to award damages for unlawful legislation. This may certainly be an option.\textsuperscript{119} Another available remedy concerns the power of the courts to issue a declaratory judgment to the effect that the enacted bill is unlawful, where the unlawfulness may of course arise from incompatibility with international treaty law. Such declarations may be made by all ordinary courts whether low or Supreme, and as we will see in the next section, they can formally only bind the parties in the case at hand. In practice, however, the binding force of such declarations is rather substantive. The courts may also issue an injunction to the effect that the government may not apply to the impugned Act. This is called \textit{buitenwerkingstelling} (‘rendering inapplicable’). Like declaratory judgments and other decisions by the regular courts, this kind of injunction formally only binds the parties before the court.\textsuperscript{120} However, it is possible for interest groups, for example, to claim that the government be ordered not to apply the statute in question in any case.\textsuperscript{121} Third parties may therefore profit from such a judgment in the sense that applying the statutory provision in their cases would constitute another unlawful Act towards the original claimant.

There are also injunctions, however, which the courts consider themselves prohibited from applying. The courts do not have the power to annul Acts of Parliament or indeed any other kind of legislation. An injunction formally compelling the State to withdraw a particular piece of legislation – no matter how unlawful it is – cannot be issued.\textsuperscript{122} Such an order would be tantamount to quashing the provision, to which the courts have no constitutional power.

\textsuperscript{117} Supreme Court judgment of 16 November 2001, NJ 2002/469 (Pig Farming Reform Act). Moreover see Supreme Court judgment of 14 April 2000, NJ 2000/713 (Kooren Maritiem v. the State).
\textsuperscript{118} Cf. Schutgens 2009, p. 36-39.
\textsuperscript{119} See a.o. the Pig farming Reform Act judgment, supra note 117.
\textsuperscript{121} Ibid.
\textsuperscript{122} Supreme Court judgment of 1 October 2004, NJ 2004/679 (Fauna-protection v. Province of Friesland).
Another injunction the courts consider themselves not empowered to issue concerns the order to Parliament (or indeed any other legislator) to produce legislation where the inconsistency with higher law is a question of legislative omission rather than an express act. In its landmark judgment on this matter, the Supreme Court explicitly ruled that it could not issue such an order, even though the omission rendered the legislation incompatible with EC law and therefore unlawful. The Court ruled that the question whether the State should meet its international obligations and, if so, in what manner – was a political decision for Parliament. Furthermore, the question whether there ought to be legislation and, if so, what should be its content equally was a political matter on which the courts should have nothing to say. There is a curious paradox here, because on the one hand, the Supreme Court considers itself incompetent to order the legislature to enact or withdraw legislation because that would be a political matter, but on the other hand considers itself, as a matter of last resort, empowered to carry out its lawmaking duty to the extent that it issues positive legislation. Moreover, the Court has had no objection against warning the legislature that it might in the future carry out this duty if Parliament stayed inactive for too long a period. However, according to the Court, there is a clear difference between on the one hand setting aside a statute (and extensively interpreting it) and an order to Parliament to the effect that it should produce legislation. The difference is that the latter has a generally binding effect because the future legislation will of course have such an effect, whereas the effects of both setting aside the statute and interpreting it are, at least on a formal basis, limited to the parties at hand.

5.4. Effects of Judgments

We will now describe briefly the effects court decisions regarding the interpretation of statutory law usually have. Such effects may have two dimensions. The first dimension concerns their binding nature. Do judgments of the courts, those of the Supreme Court in particular, bind the legislature, the government and other courts? We will deal here mainly with the distinction between effects erga omnes and inter partes, and the concept of res judicata in Dutch law. The second dimension relates to the temporal effects of courts decisions. We will outline those effects in the next section and while we are at it, try to give some impression of how the Supreme Court tries to mitigate the more far-reaching consequences of its judgments.

The first question is whether Supreme Court decisions concerning the lawfulness and the interpretation of statutory law in the light of fundamental

123 Supreme Court judgment of 21 March 2003, NJ 2003/691 (the State v. Waterpakt).
124 Ibid.
125 Ibid.
rights have general (‘erga omnes’) effects. The simple answer is: they do not. First of all, the judicial system contains several columns which are not necessarily hierarchically subordinate to each other. The lack of any constitutional court having ultimate authority in that respect is clearly felt here. Moreover, as we have already outlined, the Dutch court system does not include a rule of judicial precedent.\(^{127}\) This means that the decisions of any court, including the Supreme Court, theoretically bind only the parties before it. Even within the ordinary judiciary, there is no formal obligation to follow Supreme Court precedents.\(^{128}\) On the other hand, as we have also remarked earlier, the practical effects of court decisions are not as meagre as they look at first sight, quite the contrary in fact. In the interests of equality and legal certainty, the courts generally observe each other’s decisions, particularly within the column of the ordinary courts where the lower courts are in fact bound by judgments of the Supreme Court. Even the administrative courts and the Supreme Court usually try to respect each other’s judgments, be it on a voluntary basis. There is then a relatively strong general effect. It has recently been argued that the Supreme Court has established this substantive approach in a judge-made rule, partly by using its doctrine on \textit{res judicata}.\(^{129}\)

To start with, the Court may of course reverse the decisions of the lower courts in its own columns, viz. the civil, criminal and tax divisions. If those courts do not observe the judgments of the Supreme Court, it will regularly make use of its power to do so. Problems arise primarily with respect to administrative law. Neither the Supreme Court nor the highest administrative courts exercises any true jurisdiction over each other. Neither is therefore forced to follow any case law of the other. In a series of judgments in 2004 and 2005, however, the Supreme Court considered itself bound by a ruling of the highest administrative courts to the extent that such a ruling determines the \textit{irapplicability} of a legislative provision because of its inconsistency with higher law.\(^{130}\) It did not matter whether the parties before the Supreme Court had been involved in the administrative procedure. Third parties were equally bound to this ruling of the administrative courts. Things may be different if the administrative court decides to declare the legislative provision consistent with higher law. In that case third parties – which had not been litigating in the administrative procedure – would not be bound to that ruling in the sense that they are allowed to bring an action in the civil court system.\(^{131}\)

\(^{127}\) \textit{Supra} note 51. Moreover, in Dutch: Bovend’Eert 2006, p. 157-177.

\(^{128}\) See Schutgens 2009, p. 221.

\(^{129}\) \textit{Ibid.}, p. 222.


\(^{131}\) Supreme Court judgment of 17 December 2004, \textit{NJ} 2005/152 (\textit{OZB v. the State}).
The question remains, of course, whether there is a similar rule compelling the administrative courts to give effect to the judgments of the Supreme Court. Although pleaded for by some scholars, there has not yet been any case law in that direction. However, one might argue that Supreme Court judgments generally bind the organs of the legal entity that is party to the proceedings. If the complaint about the unlawfulness of a legislative Act is brought forward in a direct action against the State, any organ of the state – including the administrative courts – should consider itself bound by a ruling of the Court. This argument does not apply, however, to the many cases in which a complaint against a statutory provision occurs indirectly in the course of proceedings before the ordinary courts. On the other hand, as we have said before, the administrative courts usually try to observe the rulings of the Supreme Court, irrespective of whether they consider themselves bound to them. It is therefore to be expected that they will comply with a ruling concerning the unlawfulness of legislation.

5.5. **Mitigating the Temporal Effects of Judgments**

The other dimension concerns the temporal effects of Supreme Court judgments. Such judgments usually have retrospective effect in the sense that the courts have traditionally always assumed that any interpretation regarding the law they might arrive at is part of the law itself. In this, rather old-fashioned, view, it is not the court shaping the law but rather the court ‘finding’ the correct interpretation of the law as rightfully intended by the legislature. The Supreme Court was never very clear, however, about the classic temporal effects of its judgments. In the older case law it just implicitly assumed that its new interpretation had retrospective effect. As we have showed in the previous section the Court’s view of its own role as well as that of legal scholarship has changed over the years and from the 1970s onward, the Court has increasingly become more willing to mitigate the temporal effects of its judgments. As the Court embraced a lawmaking duty, it became possible to openly discuss the consequences of judicial overruling. The last few decades have therefore showed some examples of judicial prospective overruling. Legal literature distinguishes both ‘true’ prospective overruling and ‘qualified’ prospective overruling. One may speak of the true variant if the Court does not apply its new interpretation in

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132 See, for instance, Schutgens 2009, p. 234.
135 See the Jansen v. Heiting case mentioned in footnote 133.
136 For a historical overview of the changing attitude of the Court, see Polak 1984, p. 231-244.
137 Polak 1984.
the case at hand but rather postpones it to some time in the future. One uses
the term ‘qualified’ prospective overruling when the Court immediately
applies its new interpretation or rule, but limits the possibilities for other
parties than those in the case at hand, to appeal to the new rule. An example
of the latter provides the 1981 Boon v. Van Loon judgment, where the Court
changed its case law on the ownership of pensions in divorce law.138 Here the
Court explicitly limited the temporal effect of its new course to the case at
hand and future cases. Where the divorce had already been pronounced, no
appeal to the new rule would be possible.

As a clear example of the first option (‘true’ prospective overruling)
might serve the classic case law concerning the Labour expenses deduction,
we have elaborately discussed in the previous section.139 Here, the Court ruled
that it would not – for the time being – intervene because doing so would
entail choosing from different policy options. But it made it clear that it
might think otherwise if the legislature knowingly persisted in its unlawful
course. It remained therefore open for the Court to overrule its 1999
judgment in the future on the basis that it had informed Parliament of the
unlawful nature of the provision in question. In the follow-up of this case, it
moreover explicitly ruled that Parliament was not obliged to add retroactive
effect to its subsequent amendments of the impugned Income Tax Act.140 This
judgment also shows, however, that the Court is usually not prepared to fix a
certain date before which the existing legislation should be amended. As far
as we know, the Court has not yet done so anyway.141

A mixture of both options can be found in a similar decision of the
Supreme Court in a case in which it ruled that the policy to exclude
ministers’ official cars from Income Tax violated the principle of equal
treatment.142 However, it temporarily limited the possibilities of third parties
to invoke the case in their own dealings with the tax authorities. It ruled that,
as long as the unequal treatment concerned a small privileged group and the
government was unaware of the legal principle at stake, it would not allow
complaints as long as it could be said that the tax inspector was unaware that
he was treating taxpayers unequally. The Court effectively said that the
government should immediately quit the impugned practice, but refused to
accept the argument for the sake of the claimants in the case at hand.

139 Supra note 79.
140 Supreme Court judgment of 14 June 2002, BNB 2002/289 (Labour expenses deduction II).
141 None of the other courts has ever fixed a specific date, but one of the three highest
administrative courts, the Central Court of Appeal in social security matters did
retrospectively consider once that time was up as it overruled an earlier judgment to
effectively give the government some time. See, for example, its judgment of 7
December 1988, AB 1989/10 (General Widows and Orphans Act).
142 Supreme Court judgment of 5 February 1997, BNB 1997/160 (Ministers’ official cars).
These examples show that, the Court occasionally eases some of the ‘pain’ of extensively interpreting or setting aside a statute by prospective overruling. It has even explicitly recognised so in a recommendation it made to the government in 1991 on questions about lifting the ban on judicial constitutional review by amending Article 120 of the Constitution.\textsuperscript{143} It effectively pleaded for such an amendment and argued that the fear for infringements on the principle of legal certainty might be dispelled by pointing at the possible ways of mitigating judgments which could pose a threat to legal certainty.

5.6. Judicial Reforms

In a recent report by members of the Supreme Court itself, concerns were expressed about the way in which the Court was forced to carry out its lawmaking duty.\textsuperscript{144} First of all, the commission responsible for the report emphasized the crucial role the Supreme Court had to play in the administration of justice and the development and, consequently, the creation of the law. It argued that the Court is currently flooded with cases that, from the perspectives of either legal protection of citizens or the development of the law, were of little importance. More importantly, however, the commission also drew attention to the fact that the Court was partly unable to fulfil its lawmaking duties because important cases might not necessarily reach the court or, if they do, reach it only after a lengthy period of time. The commission suggested two remedies. First of all, it pointed to an already existing instrument, which it thought would be worth using more extensively, which concerns ‘cassation in the interest of the law’ (cassatie in het belang der wet). The Procurator General at the Supreme Court may, under Article 78(6) of the Judicial Organisation Act, appeal to the Supreme Court on behalf of the government where both parties in the case are unable to do so and he is of the opinion that there is a need for a clear judgment by the Court. The judgment of the Supreme Court in such a case cannot affect the legal position of both parties in the case at hand, but it can provide clarity. Second, the commission pleaded for experimenting with a limited preliminary question procedure. This would allow a relatively speedy clarification of legal issues where there is massive uncertainty among the courts and the legal profession. Meanwhile, the Minister for Justice has expressed his endorsement of the proposals and has announced plans to establish a limited preliminary procedure in cases of mass claims.\textsuperscript{145} It remains to be seen how this development will affect the lawmaking role of the Supreme Court in due time. The reforms envisaged show however that

\textsuperscript{143} The recommendation of 31 October 1991 was published in NJCM Bulletin 1992, p. 243-259.

\textsuperscript{144} This is the Hammerstein report: Versterking van de cassatierechtspraak (‘Strengthening Cassation’), The Hague, 2008.

\textsuperscript{145} Parliamentary Reports of the Second Chamber 2007/2008, 29 279, No. 69.
both the Supreme Court itself and the responsible cabinet ministers openly acknowledge the positive lawmaking role of the Supreme Court.

6. Summary

In the introduction to this contribution we promised to briefly summarize our findings thereby attending to the questions posed by the general reporter. In the course of our analyses we touched upon three main themes. As a preliminary point of order we gave a brief account of how fundamental rights review takes place in the Dutch legal system. The Constitution contains a bill of rights but it also bans the courts from reviewing parliamentary legislation on the basis of the Constitution. Fundamental rights review thus mainly takes place on the basis of international human rights law.

With regard to the judicial means for judicial review, it should be emphasized from the outset that the Netherlands does not have a specialized constitutional court. Fundamental rights review is both highly dispersed and general in the sense that any court is empowered to review Acts of Parliament for their consistency with self-executing provisions of treaty law in the course of general statutory interpretation. This means that there are no specific constitutional complaints available to victims of fundamental rights violations, such as the recurso de amparo. Constitutional issues may be raised in any kind of judicial procedure but it should of course be noted that Article 120 of the Dutch Constitution prohibits the courts from reviewing the constitutionality of parliamentary legislation. With regard to violations of either the Constitution or any other provision containing fundamental rights, victims of violations may file a regular complaint in the civil courts on the basis of a general tort (Article 6:162 of the Civil Code). Consequently, no specific civil rights injunctions exist. Civil remedies typically include the award of damages and a formal declaration of the unlawful nature concerning the enactment or application of the statute in question. When courts consider a particular remedy outside the scope of their respective lawmaking duty, they may also issue a declaration to the extent that the statute in question is inconsistent with a fundamental right or liberty and leave it at that (besides awarding the victim the costs of the proceedings). Such declarations have no binding effect on the government, except when the State is party to the case at hand. However, the government generally recognizes the authority of the highest courts in legal matters and thus considers itself under a moral obligation to change the law. Although the courts may appeal to the legislature to enact legislation, they do not have any power to order either the government or the legislature to do so.

As a point of reference, we have chosen to offer an account of the role of the Supreme Court. The members of the Court do not have any ex officio powers, nor does the Court have an express power to remove and take over cases from lower courts or tribunals. As we have seen, however, the
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Procurator General at the Supreme Court does have the power to institute proceedings at the Supreme Court if a case is decided by lower courts and the parties are no longer in a position to appeal to the Supreme Court. Debates on the lawmaking duties and powers of the Court have resulted in proposals for a more ambitious use of this instrument. Such proposals have moreover resulted in an experiment to establish a preliminary question procedure in a limited number of cases in order to centralise and quicken the process of judicial lawmaking in the interest of uniformity and legal certainty.

We have furthermore elaborated on the Supreme Courts case law on judicial review and judicial lawmaking. As we have observed, the Court may, on the basis of Article 94 of the Constitution (or on the basis of EU law) set aside statutory provisions. Annulment is, at least theoretically, not possible as the Court’s decisions bind only the parties of the case. However courts are allowed to declare the inconsistent nature of statutes and such declarations issued by the Supreme Court come very close to an annulment in practice. Our account particularly showed that the Court is usually prepared to provide victims of human rights violations redress if such redress means setting aside the statute. Using its interpretative authority to alter and reform legislation is entirely another matter. Although the Court considers itself competent to play a modest lawmaking role, it is prepared to play that role only where it is not required to engage in political decision-making. This means that it will fill a legal gap on the basis of international human rights law only if there is just one legitimate outcome of the case, or if a specific outcome fits neatly in the existing statutory scheme. If these requirements are not met, the Court will abstain both from judicial lawmaking and accepting the claim. However, it does consider itself competent to overrule such a demonstration of restraint if it believes the legislature to be negligent. It thus only abstains for the time being.

This connects closely with our last point, concerning the effects of judicial decisions of the Supreme Court. As we have observed, the Court’s philosophy – from a purely theoretical standpoint – has always been that its case law is not a formal source of law. It binds only the parties before it. In practice, however, the judgments of the Court clearly have a binding nature, at the very least for the lower courts in its judicial columns (taxation, criminal and civil law). Again, on a purely formal basis, the judgments of the Court have only ex tunc or retrospective effects. This follows from the Court’s traditional approach that it ‘finds’, rather than creates, the law. However, in recent times the Court has adopted a more flexible view by using its practice to abstain in certain cases in order to provide the legislature with a limited period of time to remedy a particular violation. Some authors have attached the label of prospective overruling to this approach. However, the Court’s practice still shows that it is very reluctant to really enforce such a conditional overruling. Furthermore, the Labour expenses deduction case shows that the Court does not consider it necessary for the legislature to regulate the retroactive effects of a judicially declared violation.
The general impression the Dutch Supreme Court gives is that of a very prudent Court, exercising considerable restraint, at least when it comes to the question of remedies. It should be noted, however, that the Court does leave open the possibility of judicial lawmaking if it deems it necessary for an effective protection of fundamental rights. Moreover, the case law concerning fundamental rights and judicial lawmaking shows for a large part that the legislature usually pays a great deal of respect to fundamental rights. Most cases reaching the Court concern relatively minor breaches of fundamental rights provisions. The restraint the Court shows may therefore be considered to be somewhat justified. Apparently, the Dutch legislative process includes some mechanisms to ensure a reasonable degree of consistency, at least with internationally accepted human rights norms. Such mechanisms are certainly worth looking into. But that’s another story.
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Introduction

On 30 November 2009, a standing committee of the Dutch Parliament had an interesting discussion with the government on the ‘Temporary Act on Media Concentrations’, which is in force since 2007. The act contains specific rules, complementary to general competition law, for the markets in radio, television and newspapers. The act would expire on 1 January 2010, but this date could be postponed by royal decree. The key question was whether a postponement was desirable. Constitutionally, a royal decree is made by the government alone. However, it is customary for the government to consult parliament on sensitive matters. In the Dutch political system, governments are based on a majority in parliament (in 2009: Christian-democrats, Labour and the small Christian Union). It is important to keep all partners of the coalition happy. If one of them loses confidence in the government, the ministers are under a duty to resign.

The chance that the debate of 30 November 2009 would cause such a crisis was very small. Compared to other political issues of that time – the war in Afghanistan, the budget deficit and the future of retirement pensions – the Temporary Act on Media Concentrations was a minor subject. Nevertheless, the debate showed fundamental differences of opinion, even within the governing coalition. Speaking on behalf of the government, Minister Ronald Plasterk (Labour) said that he wanted to extend the temporary act with an additional two years. In his view, a specific legal instrument was needed to prevent a situation where one company has too much power over public opinion. General competition law would not suffice. A majority of parliament disagreed. The liberal opposition alleged that the Temporary Act on Media Concentrations had been an unnecessary hindrance for innovation. At least, the limitations on media concentrations should be diminished. The Liberal Party introduced a motion to that effect, which was

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2 The minutes of the meeting are published in Kamerstukken II 2009/10, 32123 VIII, No. 93.
adopted on 8 December 2009. The Christian Democrats voted with the opposition. A few days later, the government decided to prolong the act anyway.

This short introduction illustrates that the role of the State towards concentration in the media is a topic of present interest in the Netherlands. In the next paragraphs we shall discuss how plurality is promoted by media law on the one hand and competition law on the other. It is important to note beforehand that the Netherlands have a strong public broadcasting sector, which is now extending its scope to new audiovisual services, in particular services on demand. Private undertakings complain that State aid for these services is distorting competition. The objections against anti-concentration measures should be seen in this context. European Union law plays a significant role here. Moreover, we shall see that restrictions on media ownership are not the only way of promoting pluralism. Finally, attention shall be paid to factual developments and prospects for the future.

1. General Considerations

1.1. Definitions

In this report, the word ‘media’ is used in a narrow sense. We shall focus on radio, television and newspapers. It is generally thought that these media have the greatest impact on public opinion. Consequently, the Dutch Media Act only regulates audiovisual services and State aid for the printed press. Booksellers, libraries and cinemas are not affected. A more difficult question is what the words ‘radio’ and ‘television’ mean. Are they restricted to classic broadcasting services, meant for simultaneous viewing by the public on the basis of a programme schedule? The EU Directive on Audiovisual Media Services (AMS-Directive) obliges EU Member States, such as the Netherlands, to set rules for ‘linear’ as well as ‘non-linear’ television. The Media Act, therefore, contains several provisions regarding non-linear services. However, unlike the AMS-Directive, the Media Act does not use the word ‘programme’ for video on demand. It sounds like a technical detail, but there are important consequences for the scope of the Temporary Act on Media Concentrations. This Act concerns the markets for radio programmes, television programmes and newspapers. Due to the definition of ‘programme’ in the Media Act, the market for internet services falls outside

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3 Kamerstukken II 2009/10, 32123 VIII, No. 74.
the scope of the Act. Nevertheless, we shall pay attention to non linear services also.

1.2. **History**

Newspapers in the Netherlands have a history that is very different from radio and television. The first newspapers appeared in the 17th century, in the time of the Dutch Republic. In the absence of a king and a central bureaucracy, private entrepreneurs enjoyed more liberty than elsewhere in Europe. Famous were the papers written in French, providing news about current affairs abroad. As they were read by an international audience, one could compare the Dutch newspapers between 1618 and 1795 with the Luxemburg-based broadcasting stations between 1931 and now. Capital and creativity often came from outside, in particular from French refugees. A reluctance to intervene has been characteristic for the regulation of newspapers ever since. ‘The best press law is no press law’, one used to say. Around 1970, however, there was a growing concern that many newspapers would not survive the competition with television. After several titles had gone down, the government introduced limited financial support for newspapers. In order to prevent political interference in editorial matters, the power to subsidize was attributed to an independent authority. Introducing a specific merger regime took more time. It was only in 2007 that the Temporary Act on Media Concentrations was adopted.

Radio and television have always been under more government control. The first radio broadcasts were transmitted as early as 1919, television broadcasts followed in 1951. Government interference was considered as normal, because frequencies were scarce and radio and television were suspected of threatening public morals. However, there was a difference with other countries. In the Netherlands, a national monopolist has never been established. Public broadcasting has always been an activity for private associations, each representing a religious or political current in society. Although advertising was strictly prohibited, the associations cherished their autonomy. The word ‘public broadcasting’ was not known before 1991, when commercial radio and television were introduced. From that moment the associations became ready to cooperate and stress their common remit. Minding the public remit is no luxury, because the European Commission carefully watches that funding broadcasting services is not distorting the market.

As a consequence, the present Media Act reflects two opposing philosophies. On the one hand, there is a public media service. It must provide high quality programmes, in traditional broadcasting as well as new

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7 Schneider & Hemels 1979 and Baschwitz 1949.
electronic services. For historic reasons, private organizations still play an important role. Three television networks and seven national radio networks have been allocated to the public media service. The participants are licensed by the government, receive financial support and their activities are strictly regulated. For example, they may not enter the newspaper market. Private media are in a different situation. In relation to them, the philosophy is that free market principles should be respected. The Media Act implements the EU Directive on Audiovisual Media Services, but there is little other regulation as to private electronic media. Newspapers are regulated even less. A policy of non-intervention was felt to be justified, because a broad range of high quality programmes is already offered by the public media service. However, there are disputed territories. On the internet, for example, the public media service provides video channels, supported by public money. Private broadcasters and publishers see this as a distortion of competition.

1.3. Freedom of Speech

Article 7 of the Constitution deals with the fundamental right to freedom of speech. The provision makes a distinction between the printed press on the one hand and radio and television on the other. A licensing system is prohibited as far as books, newspapers and magazines are concerned. For radio and television a licensing system is allowed, unless it amounts to ‘censorship’. In principle, Article 7 of the Constitution is negative right. It protects against government interference, even if such interference is based on the wish to protect consumers, culture or democracy. For example, in 1958 the Government introduced a licensing system for book shops in order to protect high quality book shops against cherry-picking by supermarkets, tobacconists etc. The new regulation required a professional diploma for selling books to the public. In 1960, the Supreme Court decided that the regulation was an infringement of Article 7. The argument that plurality in the book market would benefit from a licensing system did not convince the Court. Similar judgments were made by the Supreme Court in relation to libraries and printing companies.9

The primarily negative obligations, implied in Article 7, are a major obstacle for specific legislation against press concentrations. If no license may be required for publishing a newspaper, it would be strange to require a license for the merger of newspapers. The constitutional objections become evident when the criterion is to be how much harm will be done to the plurality of the press. Such a test cannot be performed without establishing how useful a particular newspaper is. This runs counter to the very essence

of Article 7 of the Constitution. The question which newspapers must survive and which may disappear should be decided by the market, not a licensing authority. A similar interpretation of Article 7 was given by the Trade and Industry Appeals Tribunal – the highest court in competition matters – in 2001. The national competition authority had allowed the transfer of a newspaper to another company only after a commitment that the newspaper would remain focused on a particular geographical area. This condition was considered illegitimate, because it refers to the content of the paper.10

1.4. **Positive Obligations**

The text of Article 7 of the Constitution says nothing about positive obligations for the State to protect plurality of the media. Nevertheless, it is commonly accepted that it is a general principle of law that the government should prevent excessive press concentrations. This principle was explicitly mentioned by the former European Commission of Human Rights in a case against the Netherlands in 1976.11 In 1993, the European Court of Human Rights considered in case about Article 10 ECHR:

> ‘The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see, for example, mutatis mutandis, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely’.

The principle of pluralism is also embedded in Article 11, paragraph 2, of the Charter of Fundamental Rights of the European Union.12 In the context of freedom of speech, the concept of ‘plurality’ primarily refers to information and ideas on matters of public interest. Citizens must be able to inform themselves from several sources with different political perspectives. This is an essential condition for democracy. However, there are also cultural and linguistic reasons why a government should respect, protect and promote plurality in the media.13 For example, Article 22 of the

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12 OJ 2007 C303/1. Article 11-2 reads: ‘The freedom and pluralism of the media shall be respected’.

13 See Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content. It was adopted by the Committee of Ministers of the Council of Europe on 31 January 2007.
Dutch Constitution instructs the government to foster cultural development and innovation. Also relevant is the Convention on the protection and promotion of the diversity of cultural expressions, which was adopted by the General Conference of the Unesco in Paris on 20 October 2005.\textsuperscript{14} As for linguistic diversity mention should be made of the Framework Convention for the protection of national minorities, adopted by the Member States of the Council of Europe and others in Strasbourg on 1 February 1995.\textsuperscript{15}

It is important to keep in mind that the obligation to refrain from interference in freedom of speech is a hard rule, whereas the positive obligation to foster plurality of information is a legal principle. There is only one way in which a government can comply with the obligation not to interfere, that is: keeping their hands off. Legal principles can be fulfilled in several ways. A politician who strongly believes in the free market will choose other means than a supporter of the Welfare State. Consequently, judges will tread carefully. If the government violates freedom of speech by arbitrary interferences, a judge will not hesitate to declare this policy illegal. But he will find it more difficult to decide that a government should take measures to prevent media concentrations. Political discussions are better placed in parliament than in a court room. This does not mean that positive obligations can never be enforced. In particular, authorities may not sit still when people suffer from private wrongdoings. However, the legal principle that plurality must be protected cannot be used as an excuse for censorship. When confronted with media concentrations competition authorities must, therefore, be mindful of the limits set by Article 7 of the Dutch Constitution and Article 10 of the ECHR.

2. Media Rules against Concentrations

2.1. Temporary Act on Media Concentrations

On 1 July 2007, the Temporary Act on Media Concentrations entered into force. The Act has the following characteristics:

a. First, it has abolished former cross ownership limitations. Between 1991 and 2007 there had been a law prohibiting private broadcasters from having a dominant position in the market for newspapers and prohibiting newspapers with a dominant position from having substantial influence over a private broadcaster. ‘Dominance’ was defined as a market share of 25%. ‘Substantial influence’ was defined as

\textsuperscript{14} The Convention was ratified by the Netherlands on 9 October 2009 and entered into force for the Netherlands on 9 January 2010.

\textsuperscript{15} The Framework Convention was ratified by the Netherlands on 16 February 2005 and entered into force for the Netherlands on 1 June 2005. The Media Act has implemented the convention by providing for broadcasts in the Frisian language.
having one third of the votes in the shareholders meeting or control over one third of the Executive Board or Supervisory Board. This specific rule against multimedia activities was felt to be obsolete in 2007.

b. Today, media concentrations are prohibited that presumably endanger plurality of opinion. In particular, a newspaper may not acquire a market share over 35% in the user market for newspapers. Also, a media conglomerate may not acquire a market share over 90% in the combined user markets (300%) for newspapers, radio and television. In both cases the prohibition is limited to mergers and acquisitions. If a company transgresses a maximum through market success or failure of its competitors, there is no violation.

c. The market share of a newspaper is calculated on the basis of circulation. Market shares for radio and television are determined by measuring the listening time and the viewing time. The general competition authority, the Nederlandse Mededingingsautoriteit (NMa), must prevent media concentrations that violate the law. However, it is for the specialized media watchdog Commissariaat voor de Media (CvdM) to gather the necessary data and give advice to the NMa.

d. Finally, the CvdM is charged with the task to monitor developments in the national and international media markets and their consequences for plurality and independence. The findings are to be published in a yearly report, called the 'Media Monitor'. There is no need for the CvdM to limit its monitoring to newspapers, radio and television. It may also look at other media institutions, such as press agencies, search engines or social network services.

Originally, the Temporary Act was meant to expire on 1 January 2010. However, Article 15 states that the government can appoint a later date. On 21 December 2009 a royal decree was made in order to extend the validity of the Act. According to this decree, the Act will expire on 1 January 2012.

The introduction of the Temporary Act in 2007 was a compromise. In the past, some parties had submitted that the absence of a specific merger control system for the press was a serious danger for plurality of opinion. In their view, the government should take active measures against the continuing press concentrations. The disappearance of traditional newspapers with a diversity of political opinions worried them. Competition law was not enough to counter this development, so they said. Their plea was that press mergers should be forbidden, unless the companies could show that the existing plurality of opinion was guaranteed. Others objected that such a law would be ineffective and unconstitutional. Ineffective, because legislation cannot save independent newspapers when economic circumstances are bad. Sometimes a merger is the only way to keep at least one newspaper alive. Secondly, a specific law against press mergers would
be against Article 7 of the Constitution, that prohibits prior control over the printed press.\footnote{Nieuwenhuis 1991.}

Choosing a middle course, the Temporary Act tries to accommodate both sides. On the one hand, specific rules have been set for media markets in order to protect plurality of opinion. On the other, the Temporary Act is only an addition to the Competition Act. Under this Act the Nederlandse Mededingingsautoriteit (NMa) supervises markets in general. In principle, the NMa does not judge the quality of products, because that is for the consumers to decide. What the Temporary Act does, is specifying the maximum market shares that are acceptable for media concentrations. Exceptions cannot be allowed. However, the media watchdog Commissariaat voor de Media (CvdM) plays a role too. First, the NMa must ask its advise when a media concentration has been notified. Second, the CvdM can express its long term views in the yearly Media Monitor. The final decisions about media concentrations, however, are taken by the NMAs.

\subsection*{2.2. Scope of the Temporary Act}

The scope of the Temporary Act is limited to newspapers, radio and television. The definition of ‘newspapers’ includes free papers that are distributed on weekdays in railway stations, supermarkets etc. Article 1 of the Temporary Act states that a newspaper must be printed on paper and appear at least five days a week. There is no obligation that the consumer must pay. In this respect, there is a difference with the press subsidy rules under the Media Act 2008. Subsidies can be granted by an independent authority, the Stimuleringsfonds voor de Pers, to newspapers and magazines that appear at least once a month. Under Article 8.10 of the Media Act, one of the conditions is that the periodical is not free of charge. Readers must either take a subscription or buy single issues. Responding to written questions of Parliament, the government explained in 2007 why it was necessary to take account of free newspapers when calculating market shares. For a significant part of the population, so the government said, free papers have the same function as traditional newspapers.\footnote{Aanhangsel II 2006/07, No. 1745.} As a consequence, the total user market is defined in a broad way and the ceiling of 35\% will not be reached easily.

There is a second difference between the subsidy rules of the Media Act and the anti-concentration rules of the Temporary Act. Under the Media Act, subsidies can only be granted to periodicals ‘providing a substantial amount of news, analysis, comments and background information about current events in society, thus contributing to political opinion building’.\footnote{Art. 8.10, para. 2 sub b, of the Media Act 2008.} It is not necessary to deal with all categories of ‘news’, but a periodical must at least discuss a diverse segment of contemporary society. A hobby magazine or a
periodical that only aims at amusement does not qualify for press subsidies. The Temporary Act, on the other hand, makes no reference to the content of newspapers. If a paper appears at least five days a week, it automatically belongs to the user market for newspapers. The drafters of the Act aimed at transparency and simplicity. Making a distinction between papers that contribute to political opinion and papers that do not, would have demanded a more complicated administration. Furthermore, the Temporary Act makes no distinction between national and local markets.

In paragraph I, we have seen that the concepts of ‘radio’ and ‘television’ have a restricted meaning in the Temporary Act. The words do not include nonlinear services, such as video on demand. In the Explanatory Memorandum to the bill of 2006, the government admitted that internet has become an important tool for gathering information on matters of public interest, but it decided not to regulate internet services. Two reasons were submitted for this. First, the government held that it is practically impossible to ascertain which websites on the world wide web have a considerable influence on public opinion in the Netherlands and should, therefore, be counted as relevant market players. Second, the internet by itself prevents that a limited number of participants will determine the news and the public debate. One possible problem was touched upon briefly, namely the power of search engines. Indeed, there is a risk that the operator of a search engine can restrict access to sources of information for reasons that are not in the public interest. However, the government concluded that the Temporary Act on Media Concentrations was not the right instrument to regulate search engines.19

Radio and television programmes are supplied by public and private media. It must be remembered that public broadcasting in the Netherlands is provided for by private associations, but there is a clear difference with private broadcasting. The associations have privileges, such as state funding, must carry rights and access to radio frequencies, but these privileges correspond with the obligation to provide high-quality programmes and programmes for minority groups. Private broadcasters neither have the privileges, nor the obligations. They can make a profit with simple programmes that generate a lot of advertising revenue. In calculating market shares under the Temporary Act, both categories of broadcasting are counted. As there is no maximum market share for television and radio, the viewing and listening time spent on public programmes is only relevant for the rule that no conglomerate should acquire a market share of more than 90% of the combined markets for radio, television and newspapers (300%). Public broadcasters can reach this maximum only in theory, because the Media Act prohibits them from publishing a newspaper. It is fair to say that a strong public broadcasting system makes it easier for a newspaper company

19 Kamerstukken II 2006/07, 30921, No. 3, p. 3.
to acquire private radio and television stations without exceeding the maximum of 90% market share.\textsuperscript{20}

2.3. Implementation of the Temporary Act

The Temporary Act on Media Concentrations is an addition to the Competition Act. Later, we shall discuss the Competition Act in more detail. Now, it suffices that all concentrations of importance must be notified with the Nederlandse Mededingingsautoriteit (NMa). Under Article 34 of the Competition Act it is forbidden to establish a concentration without prior notification and before four weeks have elapsed. Article 3 of the Temporary Act states that the NMa must decide within four weeks whether or not the concentration will lead to market shares prohibited by this Act. The decision can be challenged before the Court of Rotterdam, which is specialized in competition matters.\textsuperscript{21} Appeal is possible with the College van Beroep voor het bedrijfsleven (Trade and Industry Appeals Tribunal), whose judgment is final.\textsuperscript{22} Finally, Articles 5 and 6 of the Temporary Act deal with inspections and sanctions. These articles refer to the Competition Act, which means that the NMa can impose fines up to € 450,000 or – if this is more – 10% of the turnover of the previous year. The NMa can also take coercive measures.

3. Media Rules Promoting Plurality of Information

3.1. Public Service Media

A principle aim of the Media Act 2008 is promoting plurality of information. In this respect, there is little difference with its predecessors. The establishment of a public media service is a central element in the Act. Before 2008, the focus was on public broadcasting. Today, the public service remit has been expanded to interactive electronic media. This is in line with a Recommendation of the Committee of Ministers of the Council of Europe, encouraging member states ‘to guarantee the fundamental role of the public service media in the new digital environment’. According to this Recommendation, public service media should offer:

\begin{itemize}
  \item \textsuperscript{20} The market shares of public broadcasting in 2008 were about 35% for television and about 30% for radio. See <www.mediamonitor.nl>.
  \item \textsuperscript{21} Art. 7 Temporary Act in connection with Art. 93 Competition Act. The Explanatory Memorandum suggests that it is not necessary to file an administrative appeal with the NMa first (\textit{Kamerstukken II} 2006/07, 36921, No. 5, p. 13). The government probably thought that a decision based on Art. 3 Temporary Act is comparable to a licensing decision based on Art. 44 of the Competition Act and that, therefore, Art. 93, subsection 2, Competition Act is applicable. However, the law itself is not clear on this.
  \item \textsuperscript{22} Art. 20 of the \textit{Wet bestuursrechtspraak bedrijfsorganisatie} (Act on administrative jurisdiction in regulated markets) in connection with the Annex to this Act.
\end{itemize}
‘a) a reference point for all members of the public, offering universal access;  
b) a factor for social cohesion and integration of all individuals, groups and  
communities;  
c) a source of impartial and independent information and comment, and of  
innovatory and varied content which complies with high ethical and quality  
standards;  
d) a forum for pluralistic public discussion and a means of promoting broader  
democratic participation of individuals;  
e) an active contributor to audiovisual creation and production and greater  
appreciation and dissemination of the diversity of national and European  
cultural heritage’.23

As to point d, the Recommendation specifies:

‘14. Public service media should play an important role in promoting broader  
democratic debate and participation, with the assistance, among other things,  
of new interactive technologies, offering the public greater involvement in the  
democratic process. Public service media should fulfil a vital role in educating  
active and responsible citizens, providing not only quality content but also a  
forum for public debate, open to diverse ideas and convictions in society, and a  
platform for disseminating democratic values.  
15. Public service media should provide adequate information about the  
democratic system and democratic procedures, and should encourage  
participation not only in elections but also in decision-making processes and  
public life in general. Accordingly, one of the public service media’s roles  
should be to foster citizens’ interest in public affairs and encourage them to  
play a more active part.  
16. Public service media should also actively promote a culture of tolerance  
and mutual understanding by using new digital and online technologies.  
17. Public service media should play a leading role in public scrutiny of  
national governments and international governmental organizations,  
enhancing their transparency, accountability to the public and legitimacy,  
helping eliminate any democratic deficit, and contributing to the development  
of a European public sphere.  
18. Public service media should enhance their dialogue with, and  
accountability to, the general public, also with the help of new interactive  
services’.

As mentioned before, the public media service in the Netherlands is
provided for by private media associations. They are coordinated by a body  
called Nederlandse Publieke Omroep (NPO), which means Netherlands Public  
Broadcasting. The name is a bit old-fashioned, since the public service remit  
is not limited to broadcasting anymore. The reason for not changing the  
name is that it has become a strong trademark. In the last fifteen years, the  
powers of NPO have grown. For example, NPO distributes government  
funds among the associations and makes the programme schedules for  
public radio and television. Furthermore, NPO represents the common

23 Recommendation Rec(2007)3 of the Committee of Ministers to member states on the  
interests of the associations. Acting on behalf of them, NPO concludes collective contracts with trade unions, copyright organizations, foreign broadcasters etc. Nevertheless, the associations have editorial responsibility. Under the Media Act they are entitled to certain amounts of time on the national networks. Each association has its own political, religious or cultural identity. Therefore, plurality of ideas in the public media service is mainly guaranteed by them.

Media associations obtain a licence from the government for a period of five years. In order to get a full status, 150,000 members are necessary. Members must be over 16 years, live in the Netherlands and pay a minimum subscription fee.\textsuperscript{24} New organizations only need 50,000 members for a preliminary status.\textsuperscript{25} They get a limited amount of transmitting time, which enables them to present themselves and appeal to a broader audience. If they succeed in attracting 150,000 members before the next cycle of five years begins, they can stay. If not, they are out. It is not possible to obtain a preliminary status for a second time. Established media organizations that have dropped below the 150,000 mark, must leave too. The amount of transmitting time for an association depends on the number of its members. Today, there are only two categories: those under 300,000 members and those above 300,000 members. This situation will change, starting from 1 September 2010. From then, each extra member above 150,000 will lead to extra broadcasting time until a maximum of 400,000 members.\textsuperscript{26}

Interestingly, the Media Act tries to promote plurality of opinion by stating that a newcomer must not merely duplicate what other associations are doing. A candidate applying for a preliminary status must promise that its programmes will significantly differ from existing programmes, in view of their ‘tendency, content or target groups’.\textsuperscript{27} The combination of quantitative and qualitative criteria tries to respond to changing preferences of the public. In September 2010, two new associations will enter with a preliminary status. They find themselves on the right side of the political spectre. A left-wing ecologist association that had a preliminary status between 2005 and 2010 must stop, because the government decided its programmes had resembled the others too much. Roughly speaking, the public media system as a whole will get a more conservative appearance from 2010. This might be a reaction to accusations that the programmes have been too ‘leftish’. Finally, the Media Act makes allowance for minorities that are not represented by a media association. One might think of immigrants, who cannot find their way into the complicated system. For such groups, the Media Act has created an organization without members, the Nederlandse Programma Stichting (NPS).

\textsuperscript{24} Art. 2.25 and 2.27 Media Act.
\textsuperscript{25} Art. 2.26 and 2.27 Media Act.
\textsuperscript{27} Art. 2.26, sub d, of the Media Act.
Its task is to provide programmes that are complementary to those of the associations.

3.2. Other Ways of Guaranteeing Plurality

As to private media, the Media Act has only a few provisions aiming at plurality of information. One example is the obligation for media companies to establish a covenant with their employees, defining what the organization stands for. The obligation is created by Article 3.5 and 3.29d of the Media Act in relation to private broadcasting companies and providers of video on demand, respectively. As to newspapers and magazines, Article 8.10 of the Media Act contains a similar requirement if they receive a subsidy from the Stimuleringsfonds voor de Pers. This Article explicitly states that the editorial staff must work ‘independently’ of the owners. However, one should not overestimate the practical usefulness of these obligations. If employees content themselves with a very vague covenant, there is little public authorities can do. Moreover, a covenant offers no protection against economically hard times. If an employer can show that the only way to survive is to deviate from ideological principles, many journalists will conclude that keeping their jobs takes priority.

Other provisions focus on the technical infrastructure, such as terrestrial transmitters or cable networks. Before allocating radio frequencies to private broadcasters, the government can decide what kind of programmes must be transmitted over these frequencies. For example, some frequencies will be earmarked for news and current events, others for classical music or jazz. In the following auction or beauty contest, candidates can choose which category fits them best. The result is a mixed ‘bouquet’ of programming formats. However, the government has no authority to determine the political colour of the stations. Next, Article 6.24 of the Media Act states that private radio broadcasters cannot use more than one FM frequency network. A Royal Decree, implementing this Article, specifies when two related companies must be treated as if they were one. The definition closely resembles the definition of a ‘concentration’ in the Competition Act. Furthermore, the Royal Decree allows the minister of Cultural Affairs to make exceptions.

As far as cable networks are concerned, the Media Act contains a few must carry obligations. They will apply as long as cable is the most important instrument for receiving programming material by a significant part of the population in the Netherlands. Public service programmes must be carried, because they are paid for by the taxpayers. Due to a treaty with Belgium, the same is true for Belgian public service programmes in Dutch (with a maximum of two radio and two television networks). Apart from that, local governments must establish programming councils. Such a council must give

28 Art. 6.12 Media Act.
guidelines to the local cable operator on the programming of 15 television channels and 25 radio channels. If the guidelines are unreasonable, the cable operator may ignore them. However, the Commissariaat voor de Media can impose a fine if a guideline is ignored without good reason. The programming council is supposed to represent the interests of the consumers and their activities should aim at ‘pluralism’ in the selected programmes (Article 6.21 of the Media Act). The latter obligation is rather toothless. In general, there is little enthusiasm about the role of programming councils. Recently, the minister of Cultural Affairs wrote to parliament that the European Commission is not happy either. A bill amending the Media Act is expected soon.29

4. Competition Law

4.1. The Competition Act

The Competition Act 1997 entered into force on 1 January 1998. It regulates anti-competitive behaviour as well as merger control. The Act is strongly inspired by competition law of the European Union and uses familiar concepts. In the Explanatory Memorandum, the government stated that the provisions must be interpreted in the light of EU practice and EU case law.30 If necessary, a national court can request a preliminary ruling of the European Court of Justice. The fact that a case is governed by national law only does not preclude the procedure of Article 267 TFEU. This is shown by the landmark judgment Leur-Bloem. Dealing with Article 177 EC, a predecessor of Article 267 TFEU, the ECJ held:

‘The Court of Justice has jurisdiction under Article 177 of the EC Treaty to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation to Community law’.31

Before 1998, there was a much softer law on competition. In fact, there was no national merger control. Only the European Commission had powers under the EC Merger Regulation, regarding very large concentrations.32 However, the government could use the exception of Article 22 of the Regulation. Under this provision, a Member State may request the

31 ECJ 17 July 1997, C-28/95, Leur-Bloem.
Commission to examine a concentration although it has no ‘Community dimension’. This was the background of the famous case RTL/Veronica/Endemol in 1995. The three parties – two broadcasters and a production company – had created a joint company, ‘Holland Media Groep’, that would supply radio and television programmes to the Netherlands and Luxembourg. Because the Competition Act was not yet in force, the national authorities could not examine the concentration themselves. So, the government went to the European Commission for help. The Commission concluded that the concentration would lead to the creation of a dominant position on the Dutch market for television advertising and to the strengthening of an already existing dominant position of Endemol in the market for independent television production.33

The Competition Act introduced a national merger control. Executive powers are entrusted to the Nederlandse Mededingingsautoriteit (NMa). In the beginning, this authority was a government agency for which the minister of Economic Affairs was fully responsible. Parliament hesitated to create an independent body, for as long as a minister is responsible, parliament has more influence. Seven years later, the situation changed. A bill amending the Competition Act was adopted in 2004 and entered into force on 1 July 2005.34 It has given the NMa more independency. However, some political control still exists. For example, the minister of Economic Affairs can give ‘guidelines’ to the NMa (Article 5d of the Competition Act). If the board of the NMa seriously fails in its duties, the minister can take all ‘necessary measures’ (Article 5f). Finally, the minister can allow a concentration, for reasons of public interest, against a prior decision of the NMa (Article 47). However, Article 47 is not applicable in cases regulated under the Temporary Act on Media Concentrations.

4.2. Competition and the Media

The tasks of the NMa can be summarized as follows:

- promoting and safeguarding free competition;
- taking action against parties that participate in cartels, for example, by fixing prices;
- taking action against parties that abuse a dominant position;
- reviewing mergers and acquisitions;
- regulating the energy markets and transport markets in detail.

Radio, television, the press and internet are not excluded from its competences. Indeed, the NMa has taken several decisions concerning media markets. It has examined the refusal to sell programming data, access to cable networks, advertising facilities, television rights of football matches, concentrations of cable operators, newspapers etc. Details can be found on the website of the NMa, which is also available in English.\textsuperscript{35}

Sometimes, the general competences of the NMa overlap with specific competences of other regulatory bodies. If the provider of a public communications network arbitrarily refuses its services to a programming company, the independent telecommunications authority OPTA can intervene.\textsuperscript{36} More often than not, OPTA will have to interpret concepts which have their origin in competition law. Article 18.3 of the Telecommunications Act guarantees that OPTA and NMa operate in a coordinated way. A covenant between the two authorities lays down the procedures. A comparable situation exists between the Commissariaat voor de Media and the NMa. Under the Media Act, the CvdM can authorize non-broadcasting activities of public broadcasters only on condition that these activities do not violate the principle of market-conformity.\textsuperscript{37} In cases of doubt, the CvdM consults the NMa in order to avoid diverging interpretations of competition law. However, under the Temporary Act on Media Concentrations this risk does not exist. It is the NMa that decides on a planned media concentration. The CvdM only tenders an advice. Again, the procedural details are laid down in a covenant.\textsuperscript{38}

4.3. **Merger Control**

Under Chapter 5 of the Competition Act, the NMa has prior control over concentrations. The term involves mergers, acquisitions and joint ventures. The definition in Article 27 states:

1. The term 'concentration' shall be understood to mean:
   a. the merger of two or more previously mutually independent undertakings;
   b. the acquisition of direct or indirect control by
      i. one or more natural persons who, or legal entities which, already control at least one undertaking,
      ii. one or more undertakings of the whole or parts of one or more other undertakings, through the acquisition of a participating interest in the capital or assets, pursuant to an agreement, or by any other means.

\textsuperscript{35} See the website <www.nmanet.nl>.  
\textsuperscript{36} OPTA means ‘Onafhankelijke Post- en Telecommunicatieautoriteit’. The relevant provisions are Arts. 6a.6 and 8.7 of the Telecommunications Act.  
\textsuperscript{37} Art. 2.132 Media Act.  
\textsuperscript{38} Staatscourant 24 June 2008, No. 119, p. 35.
2. The creation of a joint undertaking, which performs all the functions of an autonomous economic entity on a lasting basis shall qualify as a concentration as meant in subsection (1)(b).

Only large concentrations are concerned. A ‘large’ concentration exists if the following conditions are met:

1. the joint annual turnover of the undertakings worldwide amounts to more than € 113,450,000 and
2. at least two of them have an annual turnover in the Netherlands of at least € 30 million each.

The procedure of prior control by the NMa consists of two phases: the notification phase and the licensing phase. Undertakings that wish to bring about a large concentration, must first notify the NMa of their intention to do so. The NMa investigates whether there is reason to believe that competition on the Dutch market will be significantly restrained, in particular because the concentration will result in the emergence or strengthening of a dominant position. Within four weeks of receiving the notification, the NMa will inform the applicant whether or not a licence is required. If this term lapses without a decision, a licence is not required. During the period in which the notification is assessed, it is prohibited to bring about the concentration.

If the NMa has decided so, the parties have to apply for a licence next. The NMa investigates whether the proposed concentration will indeed result in a significant obstruction of competition. In order to reach a decision, NMa defines the relevant market and determines the market shares of the undertakings involved in the concentration and the market shares of competitors. It also investigates, for instance, what opportunities are available to third parties to enter the market and the extent to which buyers and suppliers will be dependent on the new company that is to be created. A decision on the application for a licence must be taken within 13 weeks. During the period in which the application is assessed, the concentration is prohibited. If the period of 13 weeks lapses, without a decision having been taken, the licence is deemed to have been granted.

4.4. Remedies

A licence may be issued subject to limitations and instructions. Since 2007, the NMa can do the same when it decides that no license is required for a

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39 Art. 29 Competition Act.
40 Arts. 34-40 Competition Act.
41 Arts. 41-49 Competition Act.
42 Art. 41, subsection 4, Competition Act.
particular concentration. These measures, also known as ‘remedies’, aim at removing the potential harm a concentration can cause to competition. Guidelines of the NMa explain its policy. As a rule, limitations and instructions are imposed only after they have been offered by the parties themselves. The guidelines enable parties to foresee which commitments the NMa will find satisfactory.

In principle, there are two sorts of remedies: structural and behavioural ones. Structural remedies require a structural change, for example the selling of a part of a company or the withdrawal from a joint venture. A behavioural remedy obliges an undertaking to behave in a certain way in the future. The NMa prefers structural remedies, because behavioural obligations need permanent supervision. This is an administrative burden in the long run. Moreover, the latter obligations can leave room for different interpretations and, therefore, lead to a series of conflicts. Nevertheless, sometimes the NMa chooses for a behavioural remedy. For example, when a party acquires essential facilities through a vertical concentration, the NMa can impose an obligation to give equal access to competitors.

Failure to notify a contemplated merger, like other violations of the Competition Act, can be punished by the NMa. It can impose heavy fines in combination with coercive measures. The affected party has the right of administrative appeal to the NMa. If this appeal does not succeed, it is possible to file a judicial appeal with the Court of Rotterdam. Further appeal is possible to the College van Beroep voor het bedrijfsleven (the Trade and Industry Appeals Tribunal) in The Hague. Decisions relating to a license − for example the decision that a license is needed − are different. Here, the interested parties can go to the Rotterdam Court directly without having tried an administrative appeal first.

5. Relations between Media and Competition Law

5.1. Two Merger Regimes

The media-specific rules, embedded in the Temporary Act on Media Concentrations, and the general rules of the Competition Act are implemented concurrently. As we have seen in Section 2.1, the Nederlandse Mededingingsautoriteit (NMa) is competent under both laws. Parties, which are contemplating a large media concentration, have to notify their intention to the NMa by virtue of the Competition Act. The NMa must check first whether or not the concentration will lead to a market share above the
maxima specified in Article 2 of the Temporary Act (i.e. 35% market share in the user market for newspapers and 90% market share in the combined user markets for newspapers, radio and television). The aim is that there will be at least three independent newspaper companies. For radio and television such a guarantee was felt to be superfluous on account of the public broadcasting system. The government explained that it is very unlikely that mergers and acquisitions will bring about a situation where only one private broadcaster remains. Such a development can be prevented by the NMa with its normal powers.

Under the Competition Act, a merger control consists of two phases. First, the notification procedure. Second, when necessary, a licensing procedure. The Temporary Act on Media Concentrations creates a different system. Article 3 states that within four weeks of the notification, the NMa must decide about the market shares. The only question is whether or not the concentration transgresses the maxima, specified in Article 2. The answer is a simple yes or no. The NMa can make no exceptions, nor can it subject a positive decision to limitations and instructions. Finally, it should be remembered that Article 47 of the Competition Act is not applicable. Under this provision, the minister of Economic Affairs can allow a concentration, for reasons of public interest, setting aside a prior decision of the NMa. Article 2 of the Temporary Act explicitly deviates from this. Therefore, the procedure is quick and simple. If there is a transgression, the concentration may not take place. In the unlikely event that parties would carry out the concentration anyway, they can be punished by the NMa. After a negative decision the only remedy is a judicial appeal.

However, the maximum market shares in the Temporary Act are not the only relevant provisions. As mentioned above, the Temporary Act is implemented concurrently with the Competition Act. When the NMa decides – after a notification – that the concentration is not against the Temporary Act, it simultaneously decides whether or not a licensing procedure must follow. The concentration can still be prohibited. There can be specific reasons why competition in the user market is threatened, although there is no transgression of the maximum market shares. Furthermore, the NMa must look at other markets than the user markets alone. Also relevant are the markets for advertising and the production of television programmes, which are not mentioned in the Temporary Act.

Not every media concentration needs to be notified. It is possible that the joint annual turnover of the undertakings involved is less than €113,450,000 or that less than two of the participants have an annual turnover in the Netherlands of more than €30 million. Then, the concentration is not

47 Art. 3, subsection 1, of the Temporary Act.
48 Explanatory Memorandum to the Temporary Act on Media Concentrations, Kamerstukken II 2006/07, 30921, No. 3, p. 4.
49 See 4.1 above.
50 Art. 3, subsection 2, of the Temporary Act.
large enough according to Article 29 of the Competition Act. However, the Temporary Act remains relevant. For example, a big newspaper concern, that has grown autonomously to 35% of the user market, wants to buy a small local paper in order to extend its market share even further. The turnover of the local paper might be under €30 million, so that a notification is not necessary. On the other hand, the concentration violates Article 2 of the Temporary Act, because the joint market share is over 35%. In this case the NMa can only intervene afterwards by imposing a fine or giving a coercive order. Before doing so, the NMa will consult the Commissariaat voor de Media, just like in prior control cases. According to the Explanatory Memorandum to the Temporary Act, competitors could also start a civil lawsuit against the offenders. Their claim would be that the illegal acquisition is damaging to their financial interests.51

5.2. Working with the European Commission

Media concentrations with a Community dimension - very large, multinational concentrations - must be notified to the European Commission by virtue of the EU Merger Regulation of 2004.52 The Commission examines whether the concentration would significantly impede effective competition in the common market or in a substantial part of it (Article 2 Merger Regulation). Article 21 of the Regulation makes clear that the Commission has sole jurisdiction. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension. However, Article 21, paragraph 4, of the Regulation adds:

4. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

(...) The Temporary Act on Media Concentrations qualifies as an ‘appropriate measure to protect plurality of the media’. After consulting the media watchdog Commissariaat voor de Media, the NMa decides whether or not a concentration violates the Temporary Act. In order to prevent a situation in which the European Commission says yes and the NMa must say no, both authorities closely work together. One option is that the European Commission decides to refer a European notification in its entirety to the

51 Kamerstukken II 2006/07, 30921, No. 3, p. 5.
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NMa. Such a referral is allowed by Article 9 of the Merger Regulation under certain conditions.

5.3. Other Rules Promoting Plurality

In many European countries, State aid for public broadcasting is a matter of heated discussions. On the one hand, public funding is good for plurality. It enables public broadcasters to transmit programmes that would have no chance in a commercial environment, because of their high costs or because they attract a small audience only. On the other, State aid can harm plurality as well. Newspapers and private broadcasters in the Netherlands have been complaining since ages that they suffer from unfair competition. The stumbling-stone is the combination of government subsidies and the right of public broadcasters to sell advertising time. The subsidies are allegedly too generous, because they are not limited to costly high-brow programmes or programmes for minorities, but are spent for football and amusement as well. In 2006, the European Commission decided that the Netherlands had violated EU law, because the financing failed to comply with the principle of proportionality.53 The government and the public broadcasters have appealed to the Court of First Instance. These cases are still pending.54

Meanwhile, the Commission has updated its State aid policy regarding public broadcasting.55 One of the issues the Commission has dealt with is the question whether public broadcasters may use public subsidies for interactive media services, such as video on demand. In the Netherlands, political parties disagree on this subject. An expert committee, advising the government on the future of the press, submitted in 2009 that newspapers must find new ways to earn money with internet services.56 The problem is that public broadcasters make websites too. Consumers will not pay for news if they can get the same information elsewhere for free. A solution might be to allow newspapers to re-use video items that public broadcasters have published on the internet. This requires an amendment of the Media Act. Up to now, public broadcasters are forbidden to make joint ventures with commercial undertakings. However, one could argue that newspapers fulfil a public function, just like public broadcasters do. From this point of view, allowing joint ventures between public broadcasters and newspapers seems acceptable.

In November 2009, it became clear that private broadcasters do not like this idea at all. In their view, a new distortion of competition threatens. Private broadcasters also provide news and current events. So, why should only newspapers be given the privilege of getting video material from the

54 Cases T-231/06 and T-237/06, Kingdom of the Netherlands and NOS v. Commission.
56 Tijdelijke Commissie Innovatie en Toekomst Pers 2009.
public broadcasters? Their lobby has succeeded in gaining support in parliament. A motion was introduced by the liberal party stating that it is ‘undesirable that cooperation between public broadcasters and the printed press causes an unlevel playing field for private broadcasters’. The motion contains an urgent request to the government to consult all relevant parties – including private broadcasters – and keep parliament informed. Although the minister of Cultural Affairs advised against the motion, it was adopted on 8 December 2009. In theory, the government could ignore the request, but that would harm its relations with parliament. Therefore, one expects the government to start consultations in 2010, which can take a while.

6. **Practical Experiences**

6.1. *The Case RTL/Veronica/Endemol*

RTL, Veronica and Endemol intended to create a joint company ‘Holland Media Groep’ in 1995. RTL was a Luxembourg-based private broadcaster. Veronica was a broadcaster in the Netherlands with a colourful history. First it had been a pirate radio station, transmitting from a ship in the North Sea. In 1976 – when the government policy against pirate stations tightened – Veronica had entered the public broadcasting system, but it never concealed its commercial ambitions. Endemol was a production company, specialized in glamorous television shows. The plan was that ‘Holland Media Groep’ would transmit radio and television programmes from Luxembourg to the Netherlands in particular. In 4.1, we have seen that the concentration was examined by the European Commission after a request by the Dutch government under Article 22 of the Merger Regulation. The case reveals that there can be a tension between competition law and freedom of speech. After deciding in 1995 that the concentration could not be approved immediately, the Commission imposed a number of remedies in 1996. One of these included that one of three intended television stations – RTL5 – must be dedicated to ‘news’.

Arguably, it is a restriction of freedom of speech to tell a person what kind of programmes he must or may not transmit. In this case, the restriction was not too serious. The commitment to make RTL5 a news-station was voluntarily agreed to by the parties concerned. However, the maxim *volenti non fit iniuria* should not be used too easily. If an adult person voluntarily participates in a boxing game and subsequently gets a punch on his nose, of course he cannot complain about maltreatment. That is all in the game. But

57 *Kamerstukken II 2009/10, 32123-VIII, No. 76.*

58 *Kamerstukken II 2009/10, 32123-VIII, No. 93, p. 51.*

how about a prisoner agreeing to medical experiments on his body in exchange for a sentence reduction? In the Netherlands, that would be totally unacceptable. Such a prisoner is no real ‘volunteer’, because if he refuses he will have to stay in prison. This is not to say that media companies are comparable to prisoners and competition authorities to evil doctors, but freedom of choice depends on the context. Therefore, it is important to look at the precise content of the commitments. Prescribing a format of news and current events is acceptable, prescribing support for a political opinion is not.

6.2. **The Wegener Case**

In 1999, Wegener notified an intended take-over of VNU Dagbladen to the Nederlandse mededingingautoriteit (NMa). Wegener was the owner of 16 regional newspapers and 130 local magazines in the Netherlands. VNU Dagbladen owned 5 regional newspapers and 70 local magazines. The Temporary Act on Media Concentrations did not yet exist, so the only relevant legal background was the Competition Act of 1997. One element that worried the NMa, was that in the region Zeeuws-Vlaanderen competition would vanish. Before the take-over, there were two newspapers that covered Zeeuws-Vlaanderen: the Provinciale Zeeuwse Courant of Wegener and BN/De Stem of VNU Dagbladen. The NMa decided to allow the concentration on condition that both newspapers should remain separate and that they should keep covering the region of Zeeuws-Vlaanderen.

Wegener appealed against this condition, first to the Court of Rotterdam and subsequently to the College van Beroep voor het bedrijfsleven (Trade and Industry Appeals Tribunal). The key issue was whether the NMa had violated freedom of speech by interfering with editorial choices. In 2001, the College van Beroep voor het bedrijfsleven decided that there had indeed been a violation of Article 7 of the Constitution (freedom of speech). However, the tribunal added that it would not have been against the Constitution to oblige Wegener to distribute both newspapers in Zeeuws-Vlaanderen. Determining where a newspaper has to be distributed is different from determining its content, so the tribunal considered. This reasoning shows little understanding for economic reality. It is easy to say that an obligation to distribute a newspaper somewhere does not touch upon its content. Economic reality, however, dictates that a regional newspaper cannot effectively be sold in a region that gets no editorial attention. Therefore, the obligation to distribute a newspaper in a particular region is practically the same as an obligation to cover this region from a journalistic perspective. On the other hand, it is clear that the core values of freedom of speech were not at stake in this case.

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60 See footnote 10 above.
6.3. The Trauma of Apex

In the Netherlands, there are 5 paid national newspapers: De Telegraaf, Volkskrant, NRC-Handelsblad, AD and Trouw. In addition, there are 3 free national papers, 5 special interest papers (including two for orthodox Christians) and more than 20 regional papers. In 2004, four of the five paid national newspapers were in one hand: PCM (Perscombinatie Meulenhoff) that also owned several regional papers and a book publishing-house. Only De Telegraaf had its own company. The shares of PCM were owned by non-profit organizations, whereas shares of De Telegraaf could be bought on the stock market, as they still can today. In the years before 2004, PCM found it increasingly difficult to lend money for necessary investments. That is why the non-profit owners of PCM decided to sell a majority of their shares to a British private equity fund, called ‘Apex’. This proved to be a mistake. The costs of the take-over by Apex were transferred to PCM itself and three years later the financial situation was worse than before the operation took place. In 2007, one of the original share-holders bought back the shares of the impoverished PCM.

In 2008, the prospects of PCM deteriorated further, due to falling advertising income and the global credit crisis. The only solution was to sell 51% of the shares to a Belgian newspaper company, De Persgroep. The NMa agreed on condition that NRC-Handelsblad must be sold to a third party. This happened in December 2009. The new owners of NRC-Handelsblad are Dutch: a family investment fund (Egeria) and a small private broadcaster (Het Gesprek).61 The Apex-period is considered as a traumatic experience. The general feeling is, that it is all right to sell newspapers to a foreign company, such as the Belgian Persgroep, but preferably not to private equity funds, aiming at short term profits, such as Apex.

7. Prospects and Improvements

‘Prediction is very difficult, especially if it’s about the future’, Niels Bohr once said. However, a few observations can be made about the prospects for the Temporary Act on Media Concentrations.

First, the enthusiasm for specific anti-concentration measures in the media sector has diminished. The parliamentary debate on 30 November 2009, mentioned in the introduction, shows this. A maximum market share for newspapers of 35% in the user market was felt to be too restrictive. It is better to allow one media company to have a larger share, than forcing a sale of newspapers to a short-term investor. The memory of Apex still hurts. Furthermore, the 90% rule for the combined markets of radio, television and newspapers, seems to be superfluous. All multi-media concentrations since 2007 remained far away from this maximum. In all likelihood, the Temporary

61 <www.stdm.org/geschiedenis>.
Act on Media Concentrations will end on 1 January 2012. General competition law will suffice. Plurality of opinion can better be promoted in other ways. Requirements of internal plurality and financial support for public services seem more suitable. Only one element of the Temporary Act has proved to be valuable: the yearly Media Monitor of the Commissariaat voor de Media. This is a useful source of information for the general competition authority NMa.

Second, technology is changing rapidly. The phenomenon of papers printed with ink will lose ground. Today, publishers already offer the option that consumers do not receive tangible papers, but only a digital edition. The rise of mobile internet (through ‘netbooks’, ‘i-pads’ etc.) will accelerate this development. This makes it harder to define the relevant market. Maybe the criterion of circulation must be replaced by ‘viewing time’, which is the relevant criterion for television. However, the Commissariaat voor de Media already finds it difficult to determine which television programmes must be taken into account. Language is a starting point, but some television programmes in Dutch are specifically meant for Belgium and some programmes in another language are nevertheless meant for people in the Netherlands (Turkish, Arab or Frisian). The problems will increase when the borderlines between traditional television and video on demand fade away. If there is no real difference anymore, it is hard to justify why the Temporary Act should only regulate the user market for traditional television.

A final question is which role the European Union should play. Should there be European anti-concentration regulation instead of national rules? In a Resolution of 25 September 2008, the European Parliament was cautiously sympathetic towards this idea. The Resolution calls on the Commission ‘to ascertain by means of consultative procedures whether minimal guidelines or sector-specific regulation are needed to safeguard media pluralism’. However, Member States are inclined to stress that the protection of media pluralism is primarily a task for themselves. The Netherlands are no different. In particular, when the organization of public broadcasting is concerned, the Dutch are strongly attached to their own solutions.

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Tijdelijke Commissie Innovatie en Toekomst Pers 2009
REGULATION OF CORPORATE TAX AVOIDANCE IN THE NETHERLANDS

R.H.C. Luja

1. Introduction

This national report will provide an overview of the Dutch framework for dealing with corporate tax avoidance. It is not the intention to go into detail in respect of specific tax avoidance structures. The structure of this report will mainly follow the questionnaire provided by Prof. Brown (Georgetown University), the general reporter on Comparative Regulation of Corporate Tax Avoidance for the 28th International Congress of the IACL.

In paragraph 2 I will briefly address the Dutch legal system, the separation of powers and basic tax procedure (part I of the questionnaire). Paragraph 3 will cover to what extent tax avoidance is specifically addressed in Dutch law (parts II, III, V and XI). Paragraph 4 will deal with how the government deals with tax avoidance, i.e. which institutions are involved with defining and interpreting tax avoidance (part IV). Then in paragraph 5 I will address some requirements on disclosure of tax avoidance schemes for both the tax payer and the consultant (parts VI through IX). Paragraph 6 will then touch upon (the lack of) special anti-tax shelter provisions (part X). Some concluding remarks will follow in paragraph 7.

For the purpose of this report I will follow the definition of tax avoidance as provided for by the general reporter:

‘Tax avoidance [...] rests between mitigation and attempted evasion. Tax avoidance involves arrangement of a transaction in order to obtain a tax advantage, benefit, or reduction in a manner unintended by the tax law’.

This report will not be dealing with tax evasion, i.e. cases where there is a clear violation of the law as a result of fraud or intentional misstatement of facts.
2. The Dutch Legal System

2.1. Separation of Powers and Legislative Procedure

The Dutch legal system is a civil law system with a traditional separation of powers – judicial, legislative and executive. Members of the House of Representatives (Tweede Kamer der Staten-Generaal) can submit a proposal for tax legislation themselves, but the most common source of tax legislations are proposals submitted to parliament by the Government. Such legislation has to be adopted first by the House of Representatives and then by the Senate (Eerste Kamer der Staten-Generaal). The House of Representatives has a right to amend proposals made by the government before adopting them.

Many revisions in tax law are done on an annual basis, in particular in respect of the income tax and the corporate tax (for which the taxable year runs from 1 January – 31 December). Most changes are made as of 1 January of each year based on proposals submitted by the end of September (the start of the parliamentary year). The more substantial changes to tax laws, like replacing a corporate tax in full or for a major part, may be done by means of a separate legislative proposal and can be handled in accordance with a suitable time schedule. It should be noted that the excessive speed at which many legislative proposals find their way through the parliamentary process (because of the 3-month period available to adopt most tax legislation), at times gives rise to unanticipated tax avoidance structures and to retroactive or interim changes to tax law in order to deal with those structures accordingly.

It should be pointed out that in accordance with tax laws adopted by parliament the executive (i.e. the under-Secretary of Finance responsible for taxation) may be delegated to set part of second-level tax legislation itself by means of issuing regulations. In turn, the director-general of the Dutch tax authorities can be mandated by the executive to issue certain guidelines and regulations.

2.2. Tax Procedure

Taxes are to be enforced by the Dutch tax authorities (Belastingdienst), which is a branch of the Ministry of Finance.

In respect of income taxes, corporate taxes and inheritance taxes, tax payers first submit their assessment of taxes due, upon which the tax authorities will adopt a decision stating the amount of tax due (within 3 years after the end of the fiscal year or the decease). After receipt of that decision, taxes are to be paid. Often an interim-decision is taken (processed automatically) within some months after submitting the assessment which will be in line with that assessment, unless it is found to deviate unexpectedly from previous assessments or from information otherwise available to the tax authorities. This is done to expedite payment without
needing to wait for the final decision, thereby limiting additional interest payments. An interim-decision can also be handed down ex officio or on request at the beginning of the fiscal year in order to create a pay-as-you-go system where, based on this initial estimate, taxes are being paid on a monthly basis during the fiscal year.

In respect of wage taxes and value added taxes these are based on a self-assessment, which can be subject to review. Taxes are due upon submission of the self-assessment.

In respect of income taxes and corporate taxes the tax authorities will normally contact the taxpayer prior to deciding to divert from the initial assessment submitted. In the absence of an assessment the tax authorities may render a decision on their own authority. Once a formal decision has been taken stating the amount of taxes due, the tax authorities – upon receipt of new information not previously available to them (when taking the first decision) or of proof of bad faith of the taxpayer when he submitted his assessment – may take another decision in order to secure the payment of additional taxes due. Such decision should be taken within 5 years after the end of the fiscal year concerned. As for wage taxes and VAT a decision for additional payment of taxes may be taken within 5 years as well. For these taxes no new information is needed since, as a result of the self-assessment system, the tax authorities had not taken a decision in this case themselves.

If a taxpayer disagrees with a formal decision he/she must first go through an administrative review procedure, in which the tax authorities have the opportunity to review their initial assessment. This is normally done by a person not involved in the initial decision. (The tax authorities may give leave for a direct appeal, skipping the administrative review procedure. This happens rarely, often in test cases where court confirmation of a legal interpretation is sought.)

If the initial assessment is upheld, the taxpayer may go to court. First, the tax chamber of one of five regional courts of first instance (Rechtbank) is competent to do a full review of both facts as well as the law. If this court upholds the outcome of the administrative review (the initial decision as such is not subject to review, the decision to uphold that decision is) the taxpayer may go to the tax chamber of the regional court of appeals (Gerechtshof) which again can do a full review of both facts as well as the law. The tax authorities can also appeal against a decision of the court of first instance finding in favour of the taxpayer. Both the taxpayer and the tax authorities can go to the tax chamber of the Dutch Supreme Court (Hoge Raad) if they disagree with a decision of the court of appeals. This review, however, is limited to legal issues and to procedural shortcomings and not to a further review of facts. In case the final outcome of a case depends on facts not previously settled in the lower courts, the Supreme Court may, after giving its ruling on legal interpretation, refer the case back to the lower courts for further review (these lower courts would be within another region, in order to prevent the same regional court dealing with the same case a second time, after annulment of its previous decision).
As indicated above, tax controversies are normally dealt with by the tax authorities and regular courts, albeit in special tax chambers of those courts. In case of tax fraud or gross negligence it would be possible, upon a joint recommendation of the tax authorities and the public prosecutor to hand cases over to the public prosecutor’s office for criminal prosecution (next to the abovementioned process dealing with the settling of the tax due). This happens rather rarely, since the tax authorities are empowered to impose fines themselves. These fines can be very substantial in case of intentional filing of an incorrect assessment, amounting up to a 100% of taxes due in corporate tax cases.

3. The Definition of Tax Avoidance in Dutch Law

3.1. Introduction and Historic Background

The constitution does not provide any particular authority to address tax avoidance, apart from the general possibility to change or adapt laws to it. It is possible to do so retroactively (for those cases not already adjudicated), if the legislator expresses its intent to do so. Neither the Dutch constitution nor Dutch tax law provides for a general definition of terms like ‘tax mitigation’, ‘tax avoidance’ and ‘tax evasion’. Instead, more specific anti-abuse provisions have been introduced in Dutch tax law addressing tax avoidance. The general framework to deal with tax avoidance structures stems from jurisprudence.

First a general anti-avoidance provision (‘rightful levying’, in Dutch: *richtige heffing*) has been included in Dutch administrative tax law in 1925, applicable to direct taxes only. ¹ It allowed the tax authorities to address situations materially equal to taxable events while not fully covered by the law by eliminating (not substituting) certain legal transactions upon determining the amount of tax due. In order for the tax authorities to apply this provision, it was necessary to get approval from the Ministry of Finance as well as to go through separate procedure to establish avoidance. Once established, normal tax procedure would continue. While not formally repealed, the government decided not to use this provision anymore as of mid-1987. The reason for it no longer being used was a development in court which introduced the principle of *fraus legis* in 1926,² which was broader in application than the aforementioned legal provision and was administratively less burdensome. This principle had a break-through in

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¹ Nowadays Art. 31 ff of the General Tax Act (Algemene wet inzake rijksbelastingen).
² Hoge Raad, 26 May 1926, NJ 1926, 723.
1984 and the Supreme Court confirmed the possibility for its parallel application to Richtige Heffing in 1985.3

3.2. Fraus legis

Fraus legis can be called upon by the tax authorities. As a result of its application the tax authorities and the courts may either eliminate or substitute a legal action, resulting in the tax burden to be determined based on the legal circumstances as altered by the application of fraus legis. I.e. a substance over form approach would be taken in these cases putting the situation created on a par with the legal situation that would normally result in taxes being due as intended by the legislator.

In order to apply the principle of fraus legis, the absolutely decisive reason (i.e. the only or by far the most important objective) to go into a legal arrangement should have been to save a substantial amount of (Dutch) taxes. The way the arrangement has been put together must lead to a result that is contrary to the objective and purpose of the law. Moreover, the arrangement as such should have no other practical meaning than to save taxes.4

Fraus legis cannot be used if the legislative body foresaw the potential evasion and did not alter the law accordingly or if a legal action is provided to address a particular evasion. In such case no further action can be taken than the action provided, even if insufficient. If the legislative body did not foresee a situation at all (including situations comparable to but not caught by legal actions provided to address a particular evasion structure), fraus legis can only be applied if the avoidance is not the result of inherent flaws in the system of the law. If an action was not foreseen and if the resulting reduction in the payment of taxes is unacceptable to society at large, fraus legis can thus be applied. Should a substantial business motive be present for creating a particular legal situation next to the mere avoidance of taxes, then fraus legis is not to be applied.

In respect of value added taxation, this is an area of taxation mostly regulated by European Law. Since Dutch VAT law provides for an implementation of the European VAT directive, the application of national anti-avoidance principles in respect of this tax is largely governed by the scope of application of their European counterparts. The (restrictive) applicability of the fraus legis principle in this area has only been clearly confirmed relatively recently by the 2006 Halifax-judgment of the Court of Justice of the European Communities. In this decision the Court states the following:

3 Hoge Raad, 21 November 1984, No. 22 092, Beslissingen Nederlandse Belastingrechtspraak 1985/32 and Hoge Raad, 27 February 1985, No. 22 315, Beslissingen Nederlandse Belastingrechtspraak 1985/158.

4 See Hoge Raad, 21 November 1984, No. 22 092, loc. cit.
'The [VAT] Directive must be interpreted as precluding any right of a taxable person to deduct input VAT where the transactions from which that right derives constitute an abusive practice. For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the [VAT] Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. Where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice'.

As a result, if a legal arrangement can be explained by a business purpose other than to avoid taxation or to attain tax advantages there seems to be no room to apply anti-avoidance provisions even if tax avoidance would have been one of several objectives of such action.

3.3. Specific Anti-abuse Provisions

Fraus legis is being called upon rather rarely. The government’s primary response to tax avoidance structures is to include specific anti-avoidance provisions in the relevant tax laws. As a result, the scope of application of fraus legis becomes rather limited because – once anti-avoidance provisions are introduced – any gaps known to the legislator which have been left open are rather unlikely to be filled by the application of fraus legis in future.

Some of the anti-avoidance provisions introduced in Dutch corporate tax law are listed below:

- some intra-group interest deductions can be non-deductible, unless either a business objective has been proven (i.e. a transaction not aimed at avoiding taxes) or the presence of a sufficient compensatory levy at the recipient (the recipient being subject to tax on the interest received, with a minimum tax levied comparable to a 10% tax on a tax base similar to the Dutch one);
- deferral of tax in case of a merger or split-up will not be granted if the primary objective of such action is to avoid or postpone the payment of taxes. It is for the taxpayer to establish credibly that such merger or split-up serves a genuine business purpose (like corporate restructuring); if shares in entities involved in a merger or split-up are sold outside of the company’s group within 3 years there is a legal assumption that such genuine purpose is absent;

ECJ C-255/02 of 21 February 2006, European Court Records 2006, 1-1609; italics added. As a result of the entry into force of the Lisbon Treaty on 1 December 2009, the Court of Justice of the European Communities has now become the Court of Justice, which is part of the Court of Justice of the European Union.
- special rules have been introduced to address tax arbitrage between natural persons/shareholders and the incorporated companies they hold;
- intra-group transactions that are not at arm’s length and intra-group loans at extraordinary conditions may be revised or requalified;
- a thin-capitalization provision has been introduced in order to limit the deductibility of interest;
- the deduction of losses is limited in case of a company take-over, in particular in case previous losses remain while the actual business of a corporation is closing down, in order to prevent such losses to be used for new business purposes (which is allowed in the absence of a take-over of legal entities);
- the general participation exemption (applying to shareholdings as of 5%) is replaced by a system of foreign tax deductions, in case the participation held concerns a low-taxed corporation involved in (non-business related) portfolio investment.

In June 2009 there has been a white paper for changes to corporate taxation, in particular addressing issues of thin capitalization by private equity companies as well as a more general limitation on interest deduction (replacing the large number of single anti-avoidance provisions currently in place). Further action in this respect has been postponed until further notice.

4. Establishing Tax Avoidance

4.1. Burden of Proof and Standard of Review

As addressed in paragraph 3.2, the Netherlands does apply a general anti-avoidance rule by means of the *fraus legis* principle developed by the courts, although it de facto abandoned the general anti-avoidance provision provided by law. The scope of application of *fraus legis* is rather limited, however, because of the policy focus to include specific anti-avoidance provisions in tax laws. Should the tax authorities call upon *fraus legis* when deciding upon the tax burden or in court, they have the initial burden of proof to show that this anti-avoidance rule applies.

In respect of the application of specific anti-avoidance provisions, the burden of proof is split between the tax payer and the tax authorities depending on what is claimed. In respect of establishing the presence of income there is a burden of proof on the authorities. On the other hand, in respect of claiming interest deduction, participation exemption, etc. the burden of proof is on the tax payer. Special provisions may divide the burden of proof differently (see hereafter) or qualify the burden of proof that has to be met (varying from ‘making credible’, as a result of which the other party has to show differently, to actually proving that certain conditions have been met).
Corporations and individuals carrying out a business are under an obligation to keep books and a reliable administration. If they are found not to have kept their books in good order (or not to have kept books at all) the burden of proof may shift to the taxpayer as a result of a reversed-onus clause in the general administrative tax law, allowing the tax authorities to make reasonable assumptions about the tax burden requiring evidence of the contrary from the tax payer.

Sometimes the law itself provides for rather sophisticated provisions on burden of proof. For instance, certain intra-group financing arrangements are deemed to result in non-deductible interest. In order to get around some of these limitations it is possible for the taxpayer to make credible that (i) the loan transaction served a business purpose or (ii) the recipient of the interest is subject to a reasonable level of tax. The law provides that a 10% tax (with reference to a tax base comparable to the Dutch tax base) would suffice. While the initial burden of proof is thus on the taxpayer, once (ii) is proven the tax authorities may still make credible that – even in case of reasonable taxation – the transaction did not serve a business purpose. If a party has to make his position credible (a lighter burden of proof), it is up to the other party to provide evidence of the contrary (a heavier burden of proof).

Tax authorities will normally allow a court decision in respect of a previous year to serve as a precedent for upcoming years in respect of the same element of the tax assessment, as long as neither the facts nor the law does change. As far as their own actions are concerned, an explicit communication about a decision made in respect of previous transactions – other than the mere acceptance of a (self-) assessment at face value – may give rise to legitimate expectations in respect of future years if the situation remains unchanged (in fact or in law), unless the tax authorities indicate their intent to change their initial assessment for future years in time. The latter may call for an interim/phase-out period. In respect of the application of fraus legis, it should be pointed out that the tax authorities must bring it up in its decisions per separate year, although it is most likely that a court decision in respect of a previous year will be sustained for subsequent years under the same circumstances (if the taxpayer would go to court a second time around).

4.2. Applying fraus legis in Respect of International Transactions

The Dutch Supreme Court has not ruled out that the principle of fraus legis can be applied in cases where the application of double tax conventions is concerned (in which respect fraus legis is commonly referred to as fraus tractatus or fraus conventionis). Even so, the Court has allowed itself very little room to apply this principle in case of tax treaty interpretation. It seems possible to apply this principle in a legal setting that provides a result contrary to the objective and purpose of double tax convention (DTC)
provisions as intended by the parties involved. Unlike the legislative process often little is known about the preparatory phases of a DTC as a result of which in the absence of an explicit statement of intentions in the DTC or annexes thereto there seems little room for applying the fraus legis concept in respect of the application of DTC’s to date. For this reason, the application of fraus legis in the context of a DTC has hereto been unsuccessful. The Supreme Court made clear, however, that saving taxes by means of moving residency to the other contracting state, thereby shifting the power to tax to the other state thus resulting in the avoidance of Dutch taxes, normally falls within the objective and purpose of a DTC.

In respect of cross-border transactions, it should be pointed out that a number of special anti-avoidance provisions listed in paragraph 3.3 explicitly apply in cross-border situations, i.e. where the tax burden on interest receipt abroad or on profits made abroad is rather low or non-existent.

In order to overcome certain tax avoidances routes making use of DTC’s, subject-to-tax clauses have been introduced in respect of pensions in some tax treaties. Sometimes, special tax regimes may be excluded from a treaty in order to prevent that treaty benefits are granted to (nearly) exempt undertakings in the other contracting state. Moreover, some treaties contain special anti-avoidance provisions. For instance, the NL-UK tax treaty provisions on dividends, interest and royalties explicitly provide that exemption of withholding tax will not be granted if the respective share, loan or license has mainly been created in order to be able to benefit from these provisions in the absence of any bona fide business purpose. Furthermore, in conformity with the OECD Model Tax Treaties, beneficial ownership clauses have been included in most DTC-provisions on dividends.

Last but not least, it should be mentioned that limitation-on-benefits (LOB) provisions are rather rare in DTC’s signed by the Netherlands, also due to restrictions imposed by European Law (in particular in respect of LOB-provisions attached to nationality rather than residency). The NL-US DTC is the only one with a relatively long-standing tradition of containing over-all LOB-provisions.


7 Except for the application of this principle on a sort-of-DTC with the Dutch Antilles. Since the Antilles are part of the Kingdom of the Netherlands, the nature of this agreement is different from that of normal DTCs and will therefore not be discussed here.

4.3. **Penalties**

Penalties can only be imposed if a taxpayer’s position was not ‘pleadable’ in court, to say that he took a position so clearly contrary to the law that his position could not reasonably be considered an acceptable plea, essentially resulting in gross negligence or even intent to fraud. Given the complexity of a *fraus legis* analysis, a finding of *fraus legis*/tax avoidance would therefore not necessarily be sufficient ground for imposing tax penalties. To the contrary, most tax avoidance transactions are by their very nature often in accordance with the letter of the law (albeit not with the spirit and objective of the law as such) and therefore seldom qualify as a punishable offence.

Should fines be imposed by the tax authorities they would by their very nature be monetary. In the rather unlikely case of criminal prosecution of tax avoidance structures, where gross negligence could be proven, criminal penalties may either be of a monetary nature or – to the extent the actual managers of a corporation would be charged themselves next to their company – consist of a prison sentence. Again, this would be extraordinary and not common practice.

5. **Disclosure of Tax Avoidance Practice**

No specific disclosure provisions apply to either the tax payer or his tax consultant involved in anti-avoidance schemes. Neither is there an obligation to register any anti-avoidance schemes designed by tax consultants. However, corporate taxpayers have a general obligation to provide information relevant for the tax authorities on request. To the extent tax consultant communications reflect the determination of a tax payer’s legal position, even in respect of tax avoidance structures, such communication would normally be privileged.

Tax consultants are under an obligation to report cases of money laundering or the financing of terrorism. In order to do so they need to do an initial assessment of new clients. In case of potential involvement in illegal activities, a more in-depth analysis would be required, according to the Code of Conduct of one of the largest Dutch associations of tax consultants (*Nederlandse Orde van Belastingadviseurs*). As indicators of illegality this code mentions the use of intermediary corporations for which there seems not to

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9 While the Netherlands are said to have the highest number of tax consultants per capita in the world, it should be pointed out that being a tax consultant is not a government-regulated profession in the Netherlands. Most importantly, while many tax consultants may be lawyers most of them are not ‘advocates’ in court, partly because of the facts that in tax procedure there is no need to be represented by an ‘advocate’ in court. The tax payer may essentially hire anyone he prefers or represent himself. Most larger firms employ or hire in tax consultants next to their accountant and their corporate lawyer. Accountants normally refrain from handling tax affairs for the most part, except for small and medium sized enterprises.
be a ‘legitimate’ tax, legal or commercial reason as well as the use of foreign corporations that are located in a country known for its mild tax climate (and/or strict bank secrecy) for which their neither seems to be a legitimate reason. While both the use of intermediaries as well as the use of foreign corporations may be elements of certain tax avoidance (and/or evasion) structures, these indicators for an in-depth investigation are not meant to necessarily result in an obligation to report transactions aimed at tax avoidance, in the absence of any underlying illegal activity. I.e. the tax avoidance structure as such is not considered illegal for the purpose of this analysis.

It is interesting to see that the two largest associations of tax consultants in the Netherlands provide in their code of conduct provisions that indeed may cover their involvement in tax avoidance structures, while in practice such structuring is deemed acceptable practice to the extent there would be a ‘pleadable position’. One association (Nederlandse Federatie van Belastingadviseurs) provides that its members shall not take part in legal constructions that violate law and jurisprudence, albeit that taking a ‘pleadable’ position would be acceptable. Another association (Nederlandse Orde van Belastingadviseurs) introduced a special code of conduct stating that its members play their part in ensuring that tax laws are implemented in accordance with their nature and objective. The latter suggests that any involvement in tax avoidance schemes covered by fraus legis – as a result of which the objective of a law is deemed not to have been complied with – would already result in a violation of the code of conduct. It is unclear whether this was actually intended.

Larger taxpaying companies may apply for an alternative system of review by tax authorities called horizontal supervision (horizontaal toezicht). If the tax authorities are satisfied with the (certified) tax control framework in place and with the companies’ current and previous cooperation, they may be eligible for this less stringent system of review. As part of this review system, companies are expected to notify tax authorities of substantial changes in their tax position in advanced and to consult them in order to determine their tax position upon engaging in certain tax structures. Failure to inform the tax authorities in advance as well as cases of extreme tax avoidance may affect their eligibility; the tax authorities would probably respond by withdrawing from this horizontal supervision agreement and return to standard (if not more stringent) supervision methods (mostly ex-post).

As of 1 July 2009, administrative fines can be imposed by the tax authorities on tax consultants who assist their clients in actions for which the latter may be fined themselves as well (from small penalties for late payment or the late or non-filing of assessments to more severe penalties for filing incorrect assessment with the intent to pay insufficient taxes or in case of gross negligence). The government has committed itself to limit the fining of tax consultants to the more extreme and clear cut cases, requiring the tax inspector to be authorized by senior management. As a result, active
involvement in tax avoidance structures is unlikely to trigger such authorization, because – as stated in paragraph 4.3 – many tax avoidance structures are often ‘pleadable’ in court and would not have led to non-payment or insufficient payment of taxes in the absence of the application of fraus legis. (In accordance with criminal law, the tax consultant himself could already be tried as a co-conspirator if criminal charges were filed even prior to 2009, which, as stated in paragraph 4.3, would be very unlikely in respect of tax avoidance structures.)

6. Tax Shelters

No special penalty provisions apply to making use of tax shelters, although the use of such shelters may result in the application of specific anti-avoidance rules. For instance, (i) a tax shelter abroad resulting in low-tax portfolio investment by subsidiaries may forfeit the full application of the participation exemption or (ii) no relieve may be granted from an interest deduction limitation in the absence of a reasonable level of taxation at the recipient’s side (see paragraph 3.3).

Two of the most famous corporate tax shelters in the Netherlands will be mentioned here. First, the participation exemption is available which is a longstanding, integral part of the Dutch tax system. The latter essentially excludes any dividend income or capital gain from shares held in other companies. I.e. it operates under the presumption that business income will be taxed at the subsidiary operating the business (either in the Netherlands or abroad) and prevents double taxation of such profits at holding level.

Secondly, the absence of withholding taxes on interest and royalties paid from the Netherlands should be mentioned. Together with an elaborate tax treaty framework providing mostly for a rather low to nil withholding tax on royalty payments flowing into the Netherlands, the use of Dutch conduit companies may result in a flow-through of royalties at a relatively low tax rate (i.e. the normal tax due on the on balance royalty income based on an at arm’s length spread.) With the introduction of the EU’s Interest & Royalty Directive in 2004 this tax shelter has become less attractive in intra-EU situations, because of the EU-wide obligation to reduce such withholding taxes if the beneficial owner resides within the EU.

7. Concluding Remarks

The Netherlands has a long-standing tradition of providing tools to address tax avoidance. While a legal basis to do so was introduced in 1925 it effectively has been replaced since by the fraus legis principle developed in jurisprudence since 1926, which allows both for a broader application as well as for the substitution of legal transactions (next to elimination thereof) in

order to overcome tax avoidance structures that go contrary to the purpose and objective of tax law provisions. There is little room to apply the *fraus legis* principle as a general anti-avoidance rule in practice in those cases where the legislator foresaw constructions and failed to act at all or to act efficiently. In the last decennium corporate tax law has been extended by a large number of specific tax avoidance provisions regulating particular avoidance structures. Only recently a government white paper indicated a tendency to consider replacement of these specific provisions by broader anti-avoidance rules in order to reduce the complexity of the tax system albeit at the cost of overkill. A follow-up to this paper has been postponed for the time being.\(^\text{11}\)

\(^{11}\) This report has been finalized in January 2010.
1. Introduction

Both domestic law and international law are increasingly coming to recognize corporations, other private non-natural persons and even public juristic entities as subjects of criminal liability. A significant question for theory and practice, therefore, is whether such private or public juristic entities can find direct protection under international fundamental human rights norms when criminal law and criminal procedure are being applied against them. Moreover, if this is not the case, then a second issue merits attention, i.e. that of indirect protection of legal persons: is it possible for individual stakeholders in these entities - such as owners, shareholders, employees, and members - to invoke the protection of human rights when the violation is in fact directed against the organization in which they have an interest? The outcome of an assessment of these questions is not only relevant to legal person themselves, it has also consequences for the natural individual stakeholders of the entity, as well as for democratic society and the rule of law.

Yet this is not the only aspect in which human rights are relevant as regards legal persons. There is a growing awareness that legal persons are responsible for human rights violations around the globe. This responsibility not only concerns gross, large-scale human rights violations by multinational companies in developing countries, it also includes all kinds of more or less separate breaches of human rights by all sorts of entities throughout the world. For example, a public legal entity seriously discriminates against ethnic or religious groups, a company uses slaves or produces inferior food

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1 On corporate criminal liability in national legal systems, see for example Engle 2003, p. 288-292, with many further references, and the overview of some 35 countries in Lex Mundi Business Crimes and Compliance Practice Group 2008. For international law, see e.g., OECD 1997 (Art. 2); UN 2000 (Art. 3 § 4); Council of Europe Convention 2005 (Art. 22).
products or medicines that cause people to die or become seriously ill, a newspaper violates individuals’ right to privacy, a political party propagates hate speech, or an internet provider permits incitement to violence on sites it hosts. It is against this background that a third matter arises: do international human rights obligations to criminalize, prosecute and punish human rights violations by public and private authors apply analogously insofar as legal entities are responsible for such violations? This question in fact asks whether international human rights law requires states to provide for the possibility that juristic entities may be held criminally liable.

The three principle questions just posed are dealt with in this contribution’s Sections 2, 3, and 5 respectively. These sections entail detailed analyses and comparison of the four general international human rights instruments most relevant to criminal law, as well as of the international case law pronounced thereon. The instruments are the UN International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples’ Rights (AfChHPR). The assessment of these instruments and related case law should not only result in answers to the questions, it would also point at possible justifications – or the lack thereof – for differences in approach between these four systems. Before dealing in section 5 with the third question, that of the state’s positive obligation to provide for criminal liability of legal persons, section 4 offers a rather comprehensive catalogue of human rights that are actually found to be relevant to legal persons. This also entails an explanation of the conditions under which these rights apply to them, and if possible the rationale underlying such application. Finally, section 6, presents a synthesis and conclusions. I assert there that international human rights law should recognize legal persons both as possible victims and as possible perpetrators of human rights violations. I then go on to explain why and how the four international human rights systems’ approaches should be amended in this regard.

Finally, it seems useful to note that this contribution in principle understands legal persons – or juridical persons or juristic persons – in a rather broad sense, in that this term is intended to include all non-natural entities. Corporations are an important example of private legal persons, but the term also embraces other private organizations, such as associations, foundations, political parties, media organizations, churches, trades unions, banks and private medical institutions. Furthermore, it refers to public organs such as the government, state departments, municipalities, county councils, public conservancies, and other administrative bodies that are public legal persons.
2. **Direct Protection of Private and Public Legal Persons under Human Rights Law?**

Private and public legal persons or similar entities cannot complain about the violation of their fundamental rights to the Human Rights Committee (HRC), which monitors the ICCPR, nor is it possible under article 1 of the Optional Protocol to complain on their behalf. Legal persons thus do not have standing under the ICCPR. What is more, legal persons do not qualify as beneficiaries of the rights recognized in the Covenant (which does not as such follow from the procedural restriction that they may not submit a communication to the Human Rights Committee). Legal persons can therefore not acquire victim status as to the violation of the rights under the Covenant. Moreover, it is not possible to circumvent this restriction by complaining in the abstract about a law or a practice that affects the legal person, for the Committee does not consider *actio popularis* as a complaint.

That the ICCPR does not apply to legal persons does not necessarily follow from its purpose, although it does correspond to the preamble, which asserts that human rights derive from the inherent dignity of the human person. The exclusion of legal persons was moreover already the intention when the ICCPR was drafted. The Committee, however, has not elaborated on the reasons why corporations and other legal persons fall outside the protection that the Covenant aims to guarantee.

The situation under the European Convention is very much the opposite. Under Article 34 ECHR it is possible for corporations and other private legal persons to submit cases on their own behalf to the ECtHR. In order to be admissible in a complaint the plaintiff must qualify as a victim. This means that the legal person must be directly affected by the act or omission in issue. So the ECHR does not allow for an *actio popularis*. Although only Article 1 First Protocol ECHR on the right to property expressly recognizes legal

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6. This provision holds that the Court may receive applications from ‘any person, non-governmental organisation or group of individuals claiming to be the victim of a violation’.

persons as recipients of fundamental rights, several of the other human rights in the European Convention are granted to them as well. This also applies to rights that are relevant to criminal justice (see further below). That most rights seem to refer to natural persons, since they include terms as ‘anyone has the right’ and ‘no one shall’, is not taken as an impediment, and never has been. The ECHR always intended to include corporate entities and other non-natural persons. Referring to its constant case law that the European Convention is ‘a living instrument which must be interpreted in the light of present-day conditions’, the European Court of Human Rights (ECtHR) even manages to expand the protection of juristic persons, notably corporations, under the Convention. This might also apply to private legal persons caught in the criminal justice system. Nevertheless, this still does not mean that corporations and suchlike entities enjoy exactly the same protection under the rights as are applicable to them as individuals. All the same, private legal persons do have standing under the European Convention and they can claim to be victim of the human rights relevant to them. This harmonizes fairly well with the aim of the Convention as presented in its preamble, which emphasizes the value of human rights for maintaining and developing the rule of law as well as peace, unity and justice in Europe, rather than that human rights require protection because their basis lies in ideals of humanity and the value of human beings and humankind. An additional argument for the European Court is that in many cases it is not possible to draw distinctions between professional and non-professional activities. Nevertheless, legal persons that are in fact principally criminal organizations might be excluded from the protection that non-criminal organizations enjoy under the Convention.

Meanwhile, governmental organizations may in principle not submit individual complaints to the European Court, nor do the rights and freedoms embodied in the European Convention and Protocols apply to them. It is, however, not always evident if a legal person should qualify as a

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8 See (the former European Commission): ECtHR, Report of 3 October 1968, N.V. Televisier v. the Netherlands, Appl. 2690/65, p. 4; ECtHR, Report of 21 March 1975, Times Newspaper Ltd, The Sunday Times, Harold Evans v. the United Kingdom, Appl. 6538/74, par. 1. Both cases concern the right to freedom of expression in Art. 10 ECHR.

9 See Emberland 2006, p. 4 and p. 35-36.

10 See, e.g., ECtHR, Judgment of 16 April 2002, Société Colas Est v. France, Appl. 37971/97, par. 41 (right to freedom of expression in Art. 10 ECHR).

11 Cf. for example ECtHR, Judgment of 16 December 1992, Niemietz v. Germany, Appl. 13710/88, par. 29, 30 (right to privacy in Art. 8 ECHR). See also ECtHR, Decision of 5 May 1979, X. & Church of Scientology v. Sweden, Appl. 7805/77, par. 2.


13 See ECtHR, Judgment of 1 February 2001, Ayuntamiento de M v. Spain, Appl. 15090/89; ECtHR, Judgment of 23 November 1999, The Municipal Section of Antily v. France, Appl. 45129/98; ECtHR, Decision of 31 May 1974, 16 Austrian Communes v. Austria, Appl. 5767/72, under I. In inter-State cases, however, the State of course does have standing; see Art. 33 ECHR.
governmental or non-governmental organization. In some cases legal entities that formally had to be considered as public legal persons (public law entities) were regarded as non-governmental organizations within the meaning of the Convention, because their objectives and powers were not such as to enable them to be classed with governmental organizations established for public-administration purposes.\textsuperscript{14} The European Court’s jurisprudence reveals that public-law entities, such as governmental bodies or public corporations, can have the status of a non-governmental organization insofar as they do not exercise governmental powers, were not established for public-administration purposes and are completely independent of the State.\textsuperscript{15} Conversely, private legal persons, such as public companies that participate in the exercise of governmental powers or run a public service under government control will rank as governmental organizations.\textsuperscript{16} In common with normal public legal persons, such public companies cannot derive protection within the international supervisory system from the rights embodied in the European Convention.

Yet another regime applies under the American Convention. Article 44 ACHR offers rather wide possibilities for non-governmental organizations, including corporations,\textsuperscript{17} to submit complaints to the Inter-American Commission (I-ACionHR) (but not to the Inter-American Court (I-ACtHR), to which only States and the Commission may appeal).\textsuperscript{18} That private legal persons do have standing does not mean, however, that the American Convention provides protection for such entities. In fact, it follows from the treaty text that it does not. The American Convention only ensures the human rights of persons, which according to Article 1 § 2 ACHR means ‘every human being’.\textsuperscript{19} A legal person may consequently only complain to the Commission concerning concrete violations – and thus not through an actio popularis\textsuperscript{20} – of human rights of natural persons or a group of them. It is thus not possible to lay a complaint of human rights violations against

\textsuperscript{15} ECHR, Judgment of 13 December 2007, Islamic Republic of Iran Shipping Lines v. Turkey, Appl. 40998/98, par. 80; ECHR, Judgment of 7 December 2006, Österreichischer Rundfunk v. Austria, Appl. 35841/02, par. 46-54.
\textsuperscript{16} This was the case in ECHR, Decision of 27 January 2009, State Holding Company Luganksugiliga v. Ukraine, Appl. 23938/05.
\textsuperscript{18} Art. 61 § 1 ACHR.
private or, for that matter, public legal entities.\textsuperscript{21} They are not rights-holders and therefore cannot acquire victim status.\textsuperscript{22} As a result, companies and suchlike have no protection against criminal investigations, prosecutions and trials under the American Convention. The Inter-American Commission explains the grounds for the exclusion by emphasizing that legal persons are legal fictions and lack real material existence, while the essential rights of man are based upon ‘attributes of the human personality’ and the need to create conditions that will enable all persons to achieve ‘the ideal of free men enjoying freedom from fear and want’.\textsuperscript{23}

A fourth approach emerges from the African Charter. Under Article 55 AfChHPR the African Commission on Human and Peoples’ Rights (AfCionHR) does consider complaints submitted by (idealistic or other\textsuperscript{24}) nongovernmental organizations on behalf of (groups of) individual victims. The African Charter indeed offers very broad standing, in that a plaintiff need not even know or have any relationship with the victim.\textsuperscript{25} Even a complaint that is solely in the public interest (an \textit{actio popularis}) might be admissible. Consequently, plaintiffs do not need victim status in order for their complaint to be admissible.\textsuperscript{26} Still, the question is whether private legal persons do also have standing under the African Charter if they want to complain on their own behalf. Some cases do point out that they do, at least to some extent.

In the case of \textit{Article 19 v. The State of Eritrea} the African Commission found that banning several private newspapers constituted a violation of the right to freedom of expression under Article 9 AfChHPR.\textsuperscript{27} Unfortunately, it is not made entirely clear who the Commission regards as the victim of the violation: is it the newspaper organization itself, the journalists employed by it, the readers, or democratic society? So the question remains whether the

\textsuperscript{21} Nevertheless, see Lindblom 2005, p. 182-183, in which it is rightly asserted that several provisions in the ACHR (such as Arts. 13, 15 and 16, respectively on the right on expression, assembly, and association) indirectly afford protection to non-governmental organizations, while the wording of this provisions does not necessarily exclude their application to legal persons.

\textsuperscript{22} Meanwhile, the Inter-American Court has ordered provisional measures to protect the perimeter of the head offices of a broadcasting organization; see I-ACHR, Order of the then President of the Inter-American Court of Human Rights of 3 August 2004, \textit{Perozo v. Venezuela}.


\textsuperscript{25} Evans & Murray 2008, p. 102-105.


The Commission would also have found a violation if the newspaper had complained on its own behalf. The case nevertheless makes it clear that the private newspaper organizations themselves could have complained of the ban, if not on their own then on behalf of others. In the case of Civil Liberties Organization v. Nigeria (101/93) a complaint was brought in favour of the Nigerian Bar Association. In its decision the African Commission holds that the Nigerian Legal Practitioners’ Decree interferes with the free association of the Nigerian Bar Association and thereby constitutes a breach of Article 10 AfChHPR. The association is thus regarded as the victim of the violation, which implies that it is a rights-holder. Also of interest here is the case of Constitutional Rights Project and Others v. Nigeria, in which the sealing up of the premises of newspaper organizations was found to violate the right to property in Article 14 AfChHPR, without it becoming clear whether the rights of the corporations, the owners or both were violated, although, again, it seems the newspapers could have complained of the violations.

And in the case of Civil Liberties Organization v. Nigeria (129/94) the Commission came to conclude that the Nigerian Political Parties (Dissolution) Decree 1993, which severely limited the Article 7 AfChHPR right to have one’s cause heard, amounted to an attack on the jurisdiction of the courts. The Commission consequently found a violation of this provision. The implication of all of this is that not only the political parties, which are or correspond to private legal entities, are recognized as victims of the violation of the right to access to court, but also the judiciary. This is interesting since the judiciary of course is not a private but a public body. That, however, does not mean per se that public legal persons in general may derive protection from the African Charter, for the African Commission also bases its decision on Article 26 AfChHPR. This provision sets down the obligation of states to protect the courts.


31 Cf. also AfCionHPR, Decision of 2-11 October 1995, Free Legal Assistance Group and Others v. Zaire, Comm. 25/89, 47/90, 56/91, 100/93 (1995), par. 2 and 46 (the press), par. 3 and 45 (church property Jehovah’s Witnesses), and par. 4 and 48 (universities and schools).

32 See, however, AfCionHPR, Decision of 15-29 May 2003, Association Pour la Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia, Comm. 157/96 (2003), par. 63: complaint admissible, although it appeared ‘that the authors of the communication were in all respects representing the interests of the military
These cases as well as many others show that the African Commission considers complaints and finds violations without assessing who the victims of the human rights violation are or might be. In fact, the African Commission usually refrains from precise legal reasoning. Because of that it avails itself of the possibility to leave the victim question aside all together. Moreover, in the interests of the advancement of human rights the AfCionHPR tries to refrain as much as possible from raising procedural barriers against complaints.33 The Charter thereby entails an open system of protection. Meanwhile it is clear from all cases in which the Commission found a violation that natural persons were seriously affected by that breach. That case law therefore leaves the strong impression that private legal persons are at least admissible in complaints on their own behalf when a public human rights interest is involved, or when the violation obviously also affects individuals in or behind the corporation or other legal person. The African Commission thus does not consider the protection of fundamental rights of legal persons to be a Charter objective on its own; it merely seems to provide that protection as instrumental for the protection of human beings. This nevertheless leaves legal persons the possibility to acquire human rights protection when they are the object of criminal investigations or proceedings. It remains uncertain, however, when this criterion might be fulfilled. Could, for example, undue delay in a criminal trial against a large corporation result in the finding of a violation of Article 7 § 1 (d) AfChHPR? For the time being it is thus not feasible to establish the exact extent to which private legal persons may find protection under the African Charter. Of all international human rights systems, the African system just possibly entails the broadest application of human rights to private and even public legal persons, as well as the stakeholders in or behind them.34

3. Indirect Protection of Legal Persons through the Human Rights of Individuals?

While the fundamental rights guarantees, notably in the International Covenant and the American Convention, do not concern legal persons at all,
the European Convention and the African Charter do not apply all rights to such entities. It is therefore of particular importance whether these entities may find human rights protection through stakeholders in or behind them. In other words, is it possible for individual owners, shareholders, employees and other natural persons concerned to invoke the protection of human rights when the violation is in fact against the non-governmental organization in which they have an interest? As regards the ICCPR, ECHR and ACHR, the answer is that the possibilities are rather limited, but they are not the same under the three human rights treaties.35

Since the ICCPR, ECHR, ACHR and AfChHPR do grant rights to natural persons, obviously as such it is not impossible for individual stakeholders in a corporation or other legal person to find protection under the human rights guarantees in these treaties. We have just seen that there may indeed be few obstacles to individuals in this respect under the African Charter. As for the other treaties applies that stakeholders can obtain victim status, at least when, in that individual capacity, they are affected directly and personally in their human rights by the State’s actions or omissions against the legal person.36 The Committee and the Inter-American Commission in particular do not lightly accept that this criterion is met. In order to make their position and that of the other supervisory bodies clear, it is important to distinguish between two concepts by which violations of rights of legal persons may be protected via the human rights that apply to natural individuals. Both these concepts manifest themselves in international human rights case law, in which the nature of these fundamentally different approaches is nevertheless often confused.

3.1. Two Concepts

The first concept is that of identification or lifting the corporate veil. Identification means that the rights of the legal person and those of the stakeholders are approached as being one and the same. An act or omission by the State then thus causes a human rights violation that regards the organization and the individual jointly. The 'corporate veil' – i.e. the principle that separates the rights and duties of the legal person from those of the stakeholders because they belong to two distinct entities – is then thus lifted. A result of this might be that the exhaustion of domestic remedies (which is an admissibility requirement for individual complaints under all four human rights treaties) by one of them works for both of them.37

35 For a detailed inventory and analyses, see Emberland 2004, p. 264-275 (ICCPR, ACHR); Emberland 2006, p. 65-109 (ECHR).
37 See Art. 5 § 2(b) Optional Protocol to the ICCPR; Art. 35 § 1 ECHR; Art. 46 § 1(a) ACHR, and Art. 56 § 5 AfChHPR.
The second concept recognizes that an action or omission by the state against a legal person may also constitute a human rights violation of its own against interested natural parties. In this approach, then, the infringement against the corporation (or suchlike entity) and the violation against the individual are formally distinguished instead of being seen as one. The individual then claims and obtains protection of rights of his or her own rather than of the legal person, but the juridical entity might benefit indirectly from that. Under this concept the exhaustion of local remedies by either the legal person or individual, in principle, would not have as a consequence the fulfilment of the exhaustion requirement for both of them.

3.2. Concept I: Identification or Lifting of the Corporate Veil

Contrary to what some of the literature suggests, the Human Rights Committee and the Inter-American Court and Commission have so far never unambiguously acknowledged the possibility of identification. What they actually did on a few occasions is apply the second concept. Solely the European Court truly allows for piercing of the corporate veil, and then only in exceptional circumstances. In constant case law the ECtHR considers this approach particularly feasible "where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators." Although the European Court suggests that identification may also be practicable in other situations, its jurisprudence does not provide any examples in which the rights of the legal person were actually regarded as also belonging to the natural person. It therefore seems that, other than in this situation, the interests of a legal person cannot be protected through its stakeholders by lifting the corporate veil, nor will natural persons be able to protect their human rights in that way. They might, however, stand a chance with the other concept.

38 See Emberland 2004, p. 267-269 (ICCPR, ACHR), and Emberland 2006, p. 99-104 (ECHR), in which virtual applications by the supervisory bodies of the second concept (i.e., the infringement of a legal person’s rights by a State’s measure is formally distinguished from the violation of rights of the individual under the self-same measure) are in my view undeservedly qualified as identification. The point seems to be that whenever a legal person and an individual are practically conceived as one, this as such certainly does not mean they are also formally identified and that the corporate veil will be lifted.

3.3. **Concept II: A Measure against the Legal Person directly affects Human Rights of a Stakeholder**

In the case of *Singer v. Canada*, the Human Rights Committee found a violation of the plaintiff’s right to freedom of expression because the printing company of which he was the main shareholder was summoned by the Quebec authorities to replace commercial advertisements in English with French ones. The Committee explains that particularly the right of freedom of expression is by its nature ‘inalienably linked to the person’. The company and individual shareholder are thus not identified, the Committee instead considers that the contested advertisement provisions have personally affected the plaintiff himself.\(^\text{40}\) This is important jurisprudence for it signifies that in exceptional circumstances legal persons may find indirect protection against infringements on their ICCPR rights through the rights of individuals. The specific nature of the right to freedom of expression and the fact that the plaintiff was a 90-percent shareholder appear to be crucial in this case. With that the case of *Singer* is fairly exceptional. The mere fact that an individual is owner or sole or major shareholder of a legal person is generally insufficient for the Human Rights Committee to accept that infringements of rights of the legal person also personally affected the individual in his or her rights.\(^\text{41}\) Moreover, it is relevant here that the International Covenant does not entail a right to property.\(^\text{42}\) Consequently, it is hardly possible, if at all, for individuals to find protection against actions or omissions by the state that directly infringe the rights inherent in owning stocks or shares.

Much wider than the Committee, the European Court recognizes that measures relating to a company in certain cases may be regarded as directly

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\(^{40}\) HRC, View of 26 July 1994, *Singer v. Canada*, Comm. 455/1991, par. 11.2. For a similar case, see HRC, View of 25 July 2005, *Hoffman and Simpson v. Canada*, Comm. 1220/2003, in which the Committee circumvented a confirmation of its View in Singer. The Committee did suggest, however, that that the plaintiffs in this case could have met the requirement on the exhaustion of domestic remedies through their corporation. That does indeed imply identification, but it is far from certain that the Committee actually meant to imply such.


affecting the rights of an individual stakeholder of the legal person. The individual will then be able to acquire the protection of his human rights.

First, this might be possible when the natural person is the sole owner or shareholder of the company, or in effect is carrying out his or her business through the company.\(^43\) That the infringement against the company also personally affected the individual seems acceptable, especially when it would be artificial to draw distinctions between the legal person and its owner.\(^44\) Acts or omissions in criminal investigations or proceedings that cause an infringement of the rights of the legal person might, under these conditions, thus also constitute a distinguishable violation on its own against the natural person to whom the organization belongs. Meanwhile, employees, executive directors and majority shareholders as a rule cannot claim to be a victim of infringements of any rights of the legal person.\(^45\) Exceptions are conceivable, however. In case the legal person is a media organization and its right to freedom of expression (Article 10 ECHR) is violated because of criminal broadcasting or publishing restrictions, not only the sole shareholder but also employee journalists who are directly affected may themselves enjoy the protection of the European Convention.\(^46\)

Second, the European Convention offers human rights protection to an individual when measures against the company have a direct bearing on the rights inherent in owning stocks or shares.\(^47\) Cancellation of shares or the obligation to exchange them at a disadvantageous rate will qualify as such, although measures that severely influence the interest of the company will not, nor would they if they seriously affect the interests of large shareholders, employees or other interested parties. Not even if the company goes into liquidation\(^48\) or is placed in receivership\(^49\) will they be able to obtain the protection of the European Convention on their own behalf. So that will not be possible, either, when the rights of the company are violated in a criminal investigation or criminal proceedings.


\(^48\) ECtHR, Decision of 5 October 2006, *Pokis v. Latvia*, Appl. 528/02, under A.

As for the American Convention, the case of *Cantos v. Argentina* is most relevant. In that case the Inter-American Court holds that an individual in specific circumstances may resort to the inter-American supervisory system to enforce ‘his fundamental rights’ – apparently instead of those of the legal person. This even applies when they are encompassed in a legal entity.\(^50\) In this case the legal person was indirectly – *i.e.* through the sole owner of the company – protected in the fair trial rights of access to court (see Article 8 ACHR) and of effective remedy (Article 25 ACHR).\(^51\) Interestingly, the natural individual in this case was the sole owner of a business group that comprised eight companies and employed over 700 persons. The I-ACHR’s approach here is most in line with the case law of the European Court in that human rights protection is offered to an individual stakeholder who is the owner of the company. An important difference, though, is that the ECHR cases involve rather small companies that are in fact used as vehicles through which the owners operate, while the Cantos corporation was a very large entity that must have operated by itself. However, it must be pointed out that the authorities very much personalized their dispute with the Cantos company by systematically persecuting and harassing Cantos himself.\(^52\) One cannot therefore conclude that the owners of large-scale companies in general will find broader protection under the American Convention than under the European one. On the contrary: the Inter-American Commission is still very reluctant to grant the protection of the American Convention to interested individuals in or behind a legal person, even when they are the sole owners or shareholders.\(^53\) Ultimately, therefore, the case law of the Inter-American Court and Commission taken as a whole seems to be closer to that of the Human Rights Committee than that of the European Court. Meanwhile, there is one clear exception: just like the European Convention and contrary to the International Covenant, the American Convention offers owners of stocks or shares human rights protection when measures against

\(^{50}\) I-ACHR, Judgment of 7 September 2001, *Cantos v. Argentina*, par. 29; see also par. 30, in which the Court notes that submissions to all relevant national avenues of administrative and legal recourse in the case were done directly by Mr. Cantos in his own name and in the name of his companies (which means that he personally used the national remedies), and in which it speaks of ‘the alleged violation of the rights of Mr. Cantos’. See also I-AChonHR, Report of 14 June 2001, *Tomás Enrique Carvallo Quintana v. Argentina*, Report 67/01, par. 54, 56 and 61; I-AChonHR, Report of 16 October 1997, *Tabacalera Boqueron S.A. v. Paraguay*, Report 47/97, par. 27 and 32; I-AChonHR, Report of 22 February 1991, *105 shareholders of the Banco de Lima v. Peru*, Report 10/91, par. 3-4.


the company directly infringe their ownership rights. It is not clear, though, whether the American and European systems provide this protection to the same extent.

3.4. Evaluation and Critique

Again, the four international human rights systems under discussion here display four different approaches. Where the International Covenant already completely denies legal persons standing and direct protection, it also offers individuals at the most very limited protection against measures directed at legal entities of which they are stakeholders. Usually, therefore, legal persons will not be able to profit from human rights protection under the Covenant, even indirectly. At first sight the not-entirely-clear approach under the African Charter appears to be the most opposed to this: whenever a human rights violation against a legal person obviously also affects individuals in or behind that entity, the African Commission intends to guarantee their protection first and foremost. So it seems that at least private legal persons may find both direct and indirect protection of their rights under the Charter. However, the protection of legal persons as such may not be regarded as an objective within the African system. Moreover, the contents of the AfChHPR are not entirely well suited to the protection of legal persons, most certainly not in criminal cases. For example, a right to privacy is absent (which is of major importance during the criminal investigation stages), while the right to a fair trial is rather limited in scope and otherwise not very well developed, either. More limited still than the African mechanism is the American system, for the latter merely offers indirect protection to legal persons, and that only to a rather limited extent. So from the perspective of the interest of private legal persons, the European system will normally be the most adequate. Not only are private legal persons expressly recognized by it as entities that as such deserve direct human rights protection, that protection is indeed offered in practice, as is discussed further below (see section 4). In addition, legal persons may enjoy indirect protection through their stakeholders when there appears to be an insufficient possibility of direct protection.

In my view, though, the adequacy of the systems should not be assessed from the perspective of the protection of legal persons, or at least not principally so. After all, these systems have not been developed, certainly not predominantly, with a view to such protection. Considering the object and purpose of the international human rights treaties, more obvious criteria are whether the approaches adequately contribute to the protection of the fundamental rights of natural individuals, guaranteeing and safeguarding the democratic state and the rule of law, and an efficient application of the

supervisory mechanisms that attach to these human rights treaties. Interestingly, also under these criteria the approach by the European Court appears to be the most adequate and balanced of all.

Although an organization is much more and also something different than the sum of the individual persons who are part of it, state measures against the organization may certainly have fundamental consequences for the lives and wellbeing of these individuals. Affording protection to legal persons at the level of fundamental rights may therefore easily have as a consequence the collateral protection of individuals in their human rights. The protection of individuals’ human rights would also profit from the avoidance of rather formalistic approaches such as those taken by the Human Rights Committee and the Inter-American Commission. Much more broadly than they do now, these bodies should review whether a state action or omission that formally only affects the legal person, infringes the human rights of an interested individual indirectly but substantially. This is called for above all if, as particularly the European Court and furthermore the Inter-American Court intend, a natural person is in effect conducting his or her affairs through the legal entity. This is thus not a plea for application of the first concept, i.e. lifting the corporate veil. Instead it is argued that the Human Rights Committee and Inter-American Commission should in principle broaden the application of the second concept. This would certainly not force them to start recognizing legal persons as beneficiaries of the ICCPR and ACHR, while at the same time it would enhance the possibilities to protect the human rights of individuals. Such and approach is much less necessary for the European Court, since it offers fundamental rights protection to legal entities and, moreover, already implements the second concept on a broader scale. The same seems to apply to the African Commission.

Direct, or at least indirect protection of the fundamental rights of legal persons also seems to be favourable from the point of guaranteeing and safeguarding the democratic state and the rule of law. Human rights treaties are a reflection of the values that are held to be the most important for society and these treaties aim first of all to limit and control the power of the state through those values. Only a state that in principle proceeds in accordance with human rights standards may qualify as a democratic state based on the rule of law. So it is of primary importance that, for instance, the state respects privacy, applies the principle of legality (nullum crimen, nulla poena sine lege) and offers fair trials, while much less relevant in this respect is against whom exactly the state then acts (natural person of legal entity).

Meanwhile the supervisory bodies need not only secure that the international human rights monitoring systems are implemented practically and effectively, they also have to ensure that the systems work efficiently. The protection of human rights will of course be harmed if the system is

unnecessarily overburdened. It is therefore understandable that the European Court limits the possibilities for natural individuals to complain about fundamental rights violations that formally have been committed against legal persons. Since the Court can offer protection to legal persons it would be rather inefficient if the Court in the same case would have to deal with all interested parties, too. This argument does not apply to the ICCPR and ACHR, for these treaties are not applicable to legal persons. Were the Human Rights Committee and the Inter-American Commission to provide adequate protection to individuals through the second concept this would therefore not rank as insufficient. Consequently, there seems to be no obstacle in this regard for the HRC and I-AChE to apply the second concept more broadly than the European Court does. Considering the foregoing arguments, this would indeed be appropriate, in my view. Finally a word about the African Commission: its very broad acceptance of complaints is at present still very useful in order to enhance the protection of human rights in Africa. However, an increased caseload might eventually force the Commission to limit its open approach.

4. **A Catalogue of Human Rights relevant to Legal Persons in Criminal Proceedings**

Even if private legal persons may be recipients of human rights – as is the case at least under the European system – many of these rights are not relevant to them. Although, for example, the prohibition or dissolution of a specific company could, figuratively, be seen as killing that legal entity, it would be grotesque to regard this as an infringement of the right to life or of the prohibition of the death penalty. The same seems to hold for application to legal persons of the prohibitions of torture and of slavery, the right to marry and to equality between spouses.

For some rights, however, it is less obvious whether it is appropriate to apply them to legal entities. That might for instance be the case as regards the right to freedom of movement or perhaps even the right to liberty. The economic right of freedom of establishment – which is, for instance, one of the five major freedoms of EU law and is granted thereby to both natural and legal persons56 – shows that this right could be regarded relevant to companies and other organizations. This could even hold in criminal cases, for example if a company is convicted because it has settled somewhere without the necessary permits or if a criminal judgment prohibits a company from conducting its business in a certain area. At the same time, however, it is clear that natural individuals and legal persons are so different in nature that the idea of free movement and liberty cannot mean the same for both of

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them. It is therefore also – and in my view, more – justifiable that the right to freedom of movement and the right to liberty should refer to a human value that is not relevant to organizations. The European Court seems to adopt this approach in the sense that it reserves the right to liberty in Article 5 ECHR to ‘persons who have been arrested or detained’.57

Still, various rights may easily have significance for private legal persons that are the object of criminal law procedure. That applies, for example, to the right to a fair trial, the right to privacy, the principle of legality (*nullum crimen, nulla poena sine lege*), the freedoms of expression, religion and association, the right to an effective remedy, the right to property, the right to compensation for wrongful conviction, and the right not to be tried or punished twice (*ne bis in idem*). Indeed, numerous of these rights accrue to legal persons, but not necessarily under the same conditions as they apply to human beings. Since the ICCPR and ACHR do not apply to legal persons at all, while there is hardly any case law under the African Charter regarding such entities, what follows will be about the jurisprudence of the European Court and, infrequently, of the former European Commission of Human Rights (ECionHR). Although their jurisprudence in criminal cases is the first point of attention here, Judgments and Decisions in civil and administrative cases will be part of the assessment too, because Convention cases that concern legal persons and criminal justice are fairly scarce. When considering non-criminal cases it is important to realize that the ECHR in such cases often poses less strict requirements and leaves the national authorities greater latitude than in the criminal sphere.58 Consequently, when a fundamental right applies to legal persons under civil or administrative law, they are usually *a fortiori* protected by that right in criminal cases. Meanwhile, the limited number of European Court (and former Commission) Judgments and Decisions concerning legal persons and criminal law leaves the impression that criminal prosecution of legal persons is not a large-scale phenomenon in Europe, or is at least not problematic from a human rights point of view.

4.1. **The Right to a Fair Trial**

Companies and other private legal persons charged with a criminal offence are subject to the protection of the right to a fair trial in Article 6 ECHR.59 The extensive case law of the European Court does not seem to include a single

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case in which the ECtHR rejected a legal person’s fair trial complaint because the claimant was a company or other private juridical entity. What is more, when assessing a criminal case against the fair trial requirements, the Court does not at all appear to take into consideration whether the claimant is an individual or a legal person. In, for instance, the case of Fortum Oil and Gas Oy versus Finland the Court assumes that Article 6 applies to criminally charged legal persons in the same way as it does to charged individuals. Interestingly, Fortum Oil and Gas Oy is a multinational company specializing, inter alia, in the wholesale of petrochemical products. So the fair trial requirement might equally apply to natural persons, one-person private organizations and multinational corporations. From the European Convention’s case law it is indeed clear that legal persons enjoy wide protection against the criminal justice system under the right to a fair trial.

The case law on Article 6 § 1 ECHR affords legal persons at least the following fundamental rights. Legal persons have a right of access to court in criminal cases. As part of this right and of the right to a fair hearing, juristic entities moreover have a right to protection against state intervention as regards the outcome of court proceedings. When they are involved in a trial, an impartial and independent tribunal must conduct that trial. Besides, the prohibition of undue delay – i.e., the principle that the time between the criminal charge and the final determination of the case should

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61 ECtHR, Judgment of 12 November 2002, Fortum Oil and Gas Oy v. Finland, Appl. 32559/96, par. 2 (de facto criminal). See also ECtHR, Decision of 25 January 2000, Aannemersbedrijf Gebr. Van Leeuwen B.V. v. the Netherlands, Appl. 32602/96, par. 1, 2 (civil/criminal).

62 Cf. ECtHR, Judgment of 20 December 2007, Paykar Yev Haghtanak Ltd v. Armenia, Appl. 21638/03, par. 45 (criminal/fiscal).


64 As for the right to access to court under the American Convention, legal persons may be indirectly protected in this right; see supra Section 3 (under: Concept II).


be reasonable – seems to apply equally to individuals and legal persons. In case of interpretation by domestic courts of national (procedural) law, that interpretation must be compatible with the fair trial principle of legal certainty, and that is not different when legal persons are involved. Domestic courts should furthermore adequately state the reasons on which they base the decisions in regard to the legal persons. The principle of the presumption of innocence in Article 6 § 2 ECHR is also applicable to legal persons.

Fair trial rights are furthermore guaranteed by Article 6 § 3 ECHR. On the basis of that provision companies and other legal entities have the right to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them. No less important is that legal persons too must have adequate time and facilities for the preparation of their defence, and they have a right to disclosure of evidence. Legal persons also have the right to defend themselves, naturally through legal assistance of their own choosing. They probably even have the right, if they have not sufficient means to pay for legal assistance, to be given it free when so required by the interests of justice. The European Court does not seem to adhere to the idea that companies are always financially in the position to pay legal assistance on their own. At least in a different context (that of having to pay a court fee) the argument that a commercial entity...
should, unless it has been declared insolvent, have sufficient means to pay is rejected by the European Court as being hypothetical. The case law on Article 6 § 3 ECHR furthermore holds that legal persons have the right to hear witnesses and experts in criminal cases.

Another fair trial right that deserves some attention here is the right to freedom from self-incrimination, which is grounded in Article 6 §§ 1 and 2 ECHR. The right aims primarily to protect the defendant against having to give evidence that has no existence outside of his or her will. So the right first of all involves the right to remain silent. Additionally it offers a warrant against improper compulsion, including situations where the authorities try to obtain evidence that exists independently of the will of the defendant, such as documents. This means that obtaining documents from a suspect legal (or natural) person by using powers under compulsory criminal procedural law will normally not be in violation of the right against self-incrimination. As regards natural persons, this might however be different in case of ‘improper compulsion’, such as a threat or imposition of a criminal sanction, in order to compel the individual to produce documents or other material evidence, or to make a statement. As regards natural persons, this might however be different in case of ‘improper compulsion’, such as a threat or imposition of a criminal sanction, in order to compel the individual to produce documents or other material evidence, or to make a statement. Does the right against self-incrimination protect legal persons in a similar fashion? Naturally, a legal person cannot actually hand over documents etcetera or speak for itself; it can only do that through natural persons, such as directors, board members or employees. The question thus is whether it is acceptable to the European Court if the authorities compel such individuals to produce documents or offer witness statements against the company. As far as I have been able to verify the ECtHR has not yet had to deal with this question. However, as the Court applies all fair trial rights to individuals and legal persons, and, moreover, since it does this equally to both of them, it will most probably also apply the right to freedom from self-incrimination equally to natural and legal persons to the extent possible. This would first mean that the authorities have to respect the legal person’s right to remain silent, which would imply that they have to respect that the natural representatives and employees have the right to remain silent as regards confidential corporate information. Second, it would involve that the state may not use any ‘improper compulsion’ against the legal person or its representatives and employees in order to have them procure documents or other material evidence.

74 ECtHR, Judgment of 20 December 2007, Paykar Yev Haghtanak Ltd v. Armenia, Appl. 21638/03, par. 49 (criminal/fiscal); ECtHR, Judgment of 10 January 2006, Teltronic-CATV v. Poland, Appl. 48140/99, par. 34, 57 (civil).
76 ECtHR, Decision of 23 February 1993, Funke v. France, Appl. 10828/84, par. 44; ECtHR, Judgment of 29 November 1996, Saunders v. the United Kingdom, Appl. 19187/91, par. 70-76; ECtHR, Judgment of 21 April 2009, Marttinen v. Finland, Appl. 19235/03, par. 67-76.
Meanwhile, all the fair trial rights discussed above do not pertain only to a trial in first instance. Where appeal procedures are available, States are required to ensure that physical and legal persons within their jurisdictions continue to enjoy the same fundamental guarantees under Article 6 before the appellate courts as they do before the courts of first instance.\textsuperscript{77} Article 2 of the Seventh Protocol ECHR is also relevant in this regard (at least for those states that have ratified it). This provision guarantees to both natural and legal persons the right to review of a criminal conviction or sentence by a higher tribunal.\textsuperscript{78} Finally, two other applicable provisions need mentioning. These are, first, Article 13 ECHR, under which everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority, including when they are legal persons in criminal cases.\textsuperscript{79/80} Second, Article 4 of the Seventh Protocol ECHR guarantees that the principle of \textit{ne bis in idem} (i.e., the freedom from double jeopardy), applies to legal persons too.\textsuperscript{81}

A fair trial right not mentioned above, but which is nevertheless part of Article 6 § 3 ECHR, is the right to have the free assistance of an interpreter if the defendant cannot understand or speak the language used in court. A company or other legal person should in my view not be able to successfully claim this right if it can send someone (i.e. a director or board member) who can effectively represent the company in the trial and understands and speaks the language used. The possibilities available may depend on the domestic procedural provisions that establish by whom a legal person may be represented in a criminal trial. A similar approach might be desirable as to the right to be informed promptly of the nature and cause of the accusation, in so far as this must be done in a language that the defendant understands.

Another right that, in my view, merits a different approach as between individuals and legal persons is the right to a criminal trial within a reasonable time, which has already been mentioned above. This right is in essence not about the fairness of procedures. It serves primarily to protect against unnecessary delays which might jeopardize the effectiveness and credibility of the criminal justice system, and is furthermore designed,
particularly in criminal cases, to avoid a situation where a person charged should remain too long in a state of uncertainty about his fate. The first ground mentioned in regard to criminal trials is of quite equal importance as between individuals and legal persons, but that does not seem to be the case with the second ground. A long criminal trial will easily be very stressful for an individual defendant, while a legal person or its stakeholders (who are not themselves defendants in the trial) are much less affected, or at least differently. This of course probably applies more to large corporations and organizations than to small companies, for instance, through which an individual carries out his or her business. It nevertheless makes clear that the European Court’s approach to applying the right to trial within reasonable time in exactly the same way to individuals, small personal legal entities and large-scale legal persons, is not necessary. Such an undifferentiated approach is formalistic too, for it does not – even in the abstract – take the consequences of trial delays into consideration. Given that human rights aim to provide protection at a fundamental level, it would even seem to be undesirable.

Finally, it is relevant to note that under European case law the responsibility to achieve a fair trial not only falls to the authorities; the defence to some extent is also expected to actively guard, invoke and apply its fundamental rights. It seems reasonable to me to grant more such additional responsibility to corporations and other professional private legal organizations in proportion to their professionalism and scale.

4.2. Privacy and Protection of the Home and Correspondence

In criminal justice, the authorities’ respect for private life, family life, home and correspondence is particularly relevant during the investigation stages. Article 8 ECHR offers protection of these four interests. Thereewith it is an important guarantee against unlawful or unnecessary searches, secret surveillance, telephone tapping, examination or seizure of written correspondence and other documents or electronic data, the interception of e-mail, monitoring internet usage, etcetera, as well as the application of such powers without serving a legitimate aim. The protection under Article 8 ECHR also concerns companies and other private legal persons, albeit not in respect of all the interests covered, and also less extensively and on a lower level than individuals are protected under this provision.

Whereas the notion of ‘family life’ is without relevance to legal persons, the European Court recognizes that the ‘private life’ guarantees have significance for them, at least indirectly. The ECtHR holds that the notion of

82 ECtHR, Judgment of 24 October 1989, H. v. France, Appl. 10073/82, par. 58, respectively ECtHR, Judgment of 10 November 1969, Stögmüller v. Austria, Appl. 1602/62, par. 5.
83 Cf. ECtHR, Grand Chamber Judgment of 6 April 2000, Comingersoll v. Portugal, Appl. 35382/97, par. 35-36 (civil).
private life does not exclude activities of a professional or business nature. So, for instance, tapping an individual’s business calls or the calls he or she makes from business premises, as well as searches that are directed solely against a natural person’s business activities, fall within the scope of the right to privacy. That does not, however, mean that legal persons themselves are granted the right to privacy; it is the natural person who is protected here. While the Court leaves it open to doubt whether a juristic person can have a private life within the meaning of Article 8 ECHR, so far it has expressly circumvented decisions on this matter. Meanwhile, this makes it clear that legal persons and individuals are not equated.

A different stance is taken on the notions of ‘home’ and ‘correspondence’, which do apply to legal entities. In the case of Niemietz v. Germany, which involves the search of a lawyer’s office, the European Court holds that the right to respect for one’s home extends to a professional person’s office, while correspondence of a professional nature also falls within the scope of Article 8. This, however, still only involves the protection of the individual and not directly of the legal person. But in the case of Colas Est v. France, which concerns search and seizure of documents at the premises of the head and branch offices of three public limited companies, the Court extends the right to respect for one’s home to the legal entity itself. In later cases it did the same for the right to respect for one’s correspondence. So large-scale private organizations also have a certain right to respect for their home (offices, branches and other business premises) and for their correspondence (letters, documents, electronic data, telephone communication, e-mail, etcetera) under the European Convention.

85 Ibid., par. 29.
86 See, e.g., ECHR, Judgment of 28 June 2007, Association for European Integration and Human Rights & Ekimdzhiev v. Bulgaria, Appl. 62540/00, par. 60 (criminal/administrative); ECHR, Judgment of 16 October 2007, Wieser & Bicos Beteiligungen GmbH v. Austria, Appl. 74336/01, par. 45 (criminal).
89 ECHR, Judgment of 16 October 2007, Wieser & Bicos Beteiligungen GmbH v. Austria, Appl. 74336/01, par. 45 (criminal), and furthermore: ECHR, Judgment of 28 June 2007, Association for European Integration and Human Rights & Ekimdzhiev v. Bulgaria, Appl. 62540/00, par. 60-62 (criminal/administrative); ECHR, Judgment of 1 July 2008, Liberty v. the United Kingdom, Appl. 58243/00, par. 55-57 (criminal/administrative).
The scope of the protection of business activities, meanwhile, is more limited than the protection of non-commercial and non-business matters, especially as far as the right to respect for one’s home is concerned. The ECtHR, in principle, does not consider a farm specializing in pig production and housing several hundred pigs as a ‘home’, nor even as business premises, unless perhaps if the farm were to be regarded as a company’s head office or branch.\(^\text{90}\) The same may apply for instance to plots of land.\(^\text{91}\) Moreover, premises that are only apparently the home of a legal commercial or business organization, while in fact these constitute a cover for the conduct of criminal activities, fall outside the notion of ‘home’ in Article 8 ECHR.\(^\text{92}\) This approach is, at least in my view, problematic. Only after the application of criminal investigative powers will it usually be possible to ascertain whether an investigated organization is perfectly legitimate, is a legitimate organization that has offended, or is a criminal organization really. Whatever it may be is irrelevant to the rule of law, though, which requires that the authorities comply with fundamental rights requirements when applying criminal investigative powers. The Court’s approach de facto means that usage of such powers in violation of Article 8 ECHR (i.e., because the application is unlawful, unnecessary or does not serve a legitimate aim) might afterwards suddenly be acceptable. Namely, when it is then – and only then – ascertained that the organization is in fact a criminal organization whose offices thus fall outside the scope of this provision. Reasoning of this kind opens up the possibility to circumvent human rights norms all together when criminal legal persons – or for that matter, criminal individuals – are subject of criminal justice.

Finally, the level of protection of the ‘home’ might be lower for juristic entities than for individuals. It seems that the authorities under Article 8 § 2 ECHR have a broader margin of appreciation in limiting the right to respect for the home of such entities than when the home of a natural person is involved.\(^\text{93}\) The European case law does not suggest, though, that the same is true for the right to respect for one’s correspondence.\(^\text{94}\) The reason for this difference in approach is not made clear and is difficult to grasp.

\(^\text{90}\) ECtHR, Decision of 6 September 2005, Leveau & Fillon v. France, Appl. 63512/00.
\(^\text{91}\) Cf. ECtHR, Judgment of 15 November 2007, Khamidov v. Russia, Appl. 72118/01, par. 131 (administrative/civil; complainant is an individual).
\(^\text{92}\) ECtHR, Judgment of 28 July 2009, Lee Davies v. Belgium, Appl. 1870/05, par. 55-56.
\(^\text{93}\) See ECtHR, Judgment of 16 November 1992, Niemietz v. Germany, Appl. 13710/88, par. 31 (criminal), and with more reservation, ECtHR, Judgment of 16 April 2002, Société Colas Est v. France, Appl. 37971/97, par. 49 (criminal). See also ECtHR, Judgment of 28 April 2005, Buck v. Germany, Appl. 41604/98, par. 34-52, a (criminal) case in which the Court considers the intrusion on the private residential premises to be of a more serious nature than a similar intrusion on the business premises.
\(^\text{94}\) ECtHR, Judgment of 16 October 2007, Wieser & Bicos Beteiligungen GmbH v. Austria, Appl. 74336/01, par. 45 (and 53-68) (criminal): ‘the Court sees no reason to
4.3. **Principle of Legality**

Article 7 ECHR embodies the criminal law principle of legality: *nullum crimen, nulla poena sine lege*. The principle entails a prohibition of analogous interpretation in substantive criminal law, and implies that an offence and the sanctions provided for it must be clearly defined in the law. This also means that criminal law must be accessible and foreseeable. Article 7 applies unabridged to companies and other private legal persons. As regards the requirement of foreseeability, constant European case law nevertheless entails a standard that has its strongest affects on legal persons. The standard declares that the notion of foreseeability also depends to a considerable degree on the number and status of those whom the law addresses. In this connection it is relevant that a law may still be foreseeable even if the person concerned has to take appropriate legal advice to inform him or her about the law’s meaning. Considering that legal persons conducting a business activity are used to having to proceed with a great degree of caution when pursuing their occupation, the Court holds that particularly such legal persons – a *fortiori* if they are large-scale or multinational companies – can be expected to take special care in assessing whether or not a certain activity entails an offence. This might thus mean that they have to supply themselves with legal assistance.

4.4. **Right to Freedom of Expression**

Private legal persons have for a long time had a right to freedom of expression under Article 10 ECHR. First, the right is important here in connection with substantive criminal law. The right restricts the possibilities for the authorities to criminalize certain expressions of legal persons such as

distinguish between the first applicant, who is a natural person, and the second applicant, which is a legal person, as regards the notion of “correspondence”.

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96 ECtHR, Judgment of 12 November 2002, *Fortum Oil and Gas Oy v. Finland*, Appl. 32559/96, par. 3 (de facto a criminal).


98 As has been explained, in very specific circumstances legal persons may be indirectly protected in their right to freedom of expression under the ICCPR; see supra Section 3 (under: Concept II).
companies, newspapers, political parties, and activist organizations. Second, the freedom of expression of legal persons may protect them against the application of criminal investigative powers. So in the case of <i>Vereniging Weekblad “Bluf!” versus the Netherlands</i> the Court found a violation of Article 10 ECHR because the seizure and subsequent withdrawal from circulation of an issue of the association’s magazine “Bluf!” (in which a confidential report by the internal security service was disclosed) was not necessary in a democratic society. The European Court has furthermore recognized that Article 10 ECHR, for instance, protects media organizations from having to cooperate with the authorities in criminal investigations. So they may not be forced to handover journalistic materials (notes, photographs, film, documents) or to disclose journalists’ sources, unless it is justified by an overriding requirement in the public interest, for instance as regards the prevention of crime.

The rights of private legal persons under Article 10 ECHR concern both commercial and non-commercial expression, although the protection of the latter is much wider. Advertisements and commercials are forms of commercial expression, while examples of non-commercial expression are political speech and debate, artistic expression, and journalistic and scientific publications. The European Court’s standard to assess the legitimacy of infringements on the freedom of expression is much lower for commercial speech than the normally applicable standard. Not only do states have much wider latitude in deciding whether it is necessary to perpetuate the infringement in case of commercial speech than that which they normally have under Article 10 ECHR: what is more, the Court then only formally assesses whether the state has applied a test of proportionality, instead of itself materially reviewing whether the infringement of the freedom of commercial speech was indeed proportionate. On the other hand, as far as journalist, political or other general interest speech is concerned, the states’ latitude is rather limited, while the Court assesses whether the infringement

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101 See, e.g., ECHR, Decision of 8 December 2005, Nordisk Film & TV A/S v. Denmark, Appl. 40485/02 (journalistic sources; criminal); ECHR, Judgment of 31 March 2009, Sanoma Uitgevers B.V. v. the Netherlands, Appl. 38224/03, par. 57 (journalistic materials; criminal).


103 See ECHR, Judgment of 20 November 1989, Markt intern Verlag GmbH & Beermann v. Germany, Appl. 10572/83, par. 33, 36-37 (commercial speech), which has been confirmed in, e.g., ECHR, Judgment of 11 December 2008, TV Vest As & Rogaland Pensjonistparti v. Norway, Appl. 21132/05, par. 64.
on such speech is necessary more closely than in case of ordinary expression.104

As for non-commercial speech which is of general interest, the Court moreover acknowledges the vital role the press and other media organizations (being a ‘public watchdog’) as well as political parties play in a democratic and pluralist society.105 So it seems that the Court regards the press’s and political parties’ right to freedom of such expression as of even greater fundamental importance than such general interest speech from an ordinary citizen. The reason is not that the Court regards human rights protection of legal persons as of more importance than that of individuals. It just seems that the value of the media and political organizations for democratic society, and thus for the individuals as a collective, is afforded greater significance than the value of a single person’s speech. Ultimately, of course, the protection of these organizations entirely serves the right to freedom of expression of each individual. Not only are the media and political parties an important vehicle for individuals to express themselves, such organizations are also indispensable for the individual’s possibilities to receive information, which is also a part of the right to freedom of expression.

4.5. Right to Freedom of Religion and Belief

Initially the former European Commission held that a company, being a legal and not a natural person, is incapable of having or exercising the right to freedom of religion mentioned in Article 9 ECHR.106 This view has never been shared by the European Court, which holds the protection of legal persons’ right to freedom of religion instrumental to the protection of individuals: ‘Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable’.107 Legal persons with religious or philosophical objects are therefore protected under this provision in their own capacity. Additionally, a Church or an ecclesiastical body as such may

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106 ECtHR, Decision of 17 December 1968, Church of X v. the United Kingdom, Appl. 3798/68, par. 1. For the volte-face, see ECtHR, Decision of 5 May 1979, X. & Church of Scientology v. Sweden, Appl. 7805/77, par. 2.

107 See, e.g., ECtHR, Judgment of 22 January 2009, Holy Synod Bulgarian Orthodox Church v. Bulgaria, Appl. 412/03, par. 103; ECtHR, Grand Chamber Judgment of 27 June 2000, Ch’are Shalom Ve Tsedek v. France, Appl. 27417/95, par. 72 (administrative).
exercise on behalf of its adherents the rights guaranteed by Article 9 ECHR.108 In relation to freedom of religion, too, a special and important position of private legal entities is recognized by the Court: ‘Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is, thus, an issue at the very heart of the protection which Article 9 affords’.109 All of this is also relevant in relation to criminal justice. As far as substantive criminal law is concerned, the right may protect legal persons against criminalization that violates freedom of religion. This may for instance occur if criminal law were to regulate the leadership of religious communities,110 to prohibit religious communities from operating a place of worship,111 or were to limit religious expression or manifestation. As regards criminal procedure, the application of criminal investigative powers against religious organizations could violate the right to freedom of religion. It is conceivable, for example, that a certain search and seizure in a church would not only breach the right to respect for the home (see above) but also freedom of religion, under particular circumstances.

4.6. Rights to Freedom of Association and Freedom of Assembly

Private legal persons are furthermore beneficiaries under the European Convention of the rights to freedom of association and freedom of peaceful assembly112 in Article 11 ECHR. Although these rights in principle are applicable to all non-governmental organizations, under reference to the hallmarks of a ‘democratic society’ the European case law again offers the widest protection through these provisions to entities such as political

108 ECtHR, Judgment of 6 November 2008, Leela Förderkreis E.V. v. Germany, Appl. 58911/00, par. 79.
109 See, e.g., ECtHR, Judgment of 22 January 2009, Holy Synod Bulgarian Orthodox Church v. Bulgaria, Appl. 412/03, par. 103 (administrative); ECtHR, Judgment of 31 July 2008, Religionsgemeinschaft der Zeugen Jehovas v. Austria, Appl. 40825/98, par. 61 (administrative).
112 See, for example, ECtHR, Grand Chamber Judgment of 30 January 1998, United Communist Party of Turkey v. Turkey, Appl. 19392/92, par. 24-34 (administrative law); ECtHR, Judgment of 14 February 2006, Christian Democratic People’s Party v. Moldova, Appl. 28793/02, par. 62-78 (administrative); ECtHR, Decision of 31 July 2008, Religionsgemeinschaft der Zeugen Jehovas v. Austria, Appl. 40825/98, par. 61-63 (administrative).
113 See ECtHR, Decision of 10 October 1979, Rassemblement Jurassien & Unite Jurassienne v. Switzerland, Appl. 8191/78, par. 1-4 (administrative), and ECtHR, Judgment of 14 February 2006, Christian Democratic People’s Party v. Moldova, Appl. 28793/02, par. 62-78 (administrative).
parties, religious organizations and trades unions.\textsuperscript{114} The regulation of legal persons exercising freedom of association or assembly may be supported by and enforced through criminal law, but only in so far as this is lawful, necessary and serves a legitimate aim set down in Article 11 § 2 ECHR.

4.7. \textit{The Right to stand for Election}

Article 3 of the First Protocol to the European Convention states that the states parties ‘undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’. Based on this provision the European Court recognizes the right to vote and the right stand for election. The right to vote is confined to physical persons only, and that was initially also the case for the right to stand for election. However, in 2007 the Court came to accept that, when the authorities in violation of Article 3 of the First Protocol restrict individual candidates’ right to stand for election, the relevant party, as a corporate entity, could also claim to be a victim of the violation independently of its candidates.\textsuperscript{115} This right now thus applies to political parties, but not to legal persons in general. The rational for applying this right to legal persons may again be found in further strengthening the protection of democratic and pluralist society. States do nevertheless enjoy a wide margin of appreciation in regulating elections. If criminal law were to restrict the possibilities for a political party to stand for election, this might constitute a violation of Article 3 of the First Protocol.

4.8. \textit{Right to Property}

A provision in the First Protocol that is of more relevance to criminal law is the right to property in Article 1. It is moreover the only right in the European Convention and protocols thereto the formulation of which expressly holds that every natural and legal person is entitled to it. So it protects companies and all other private legal entities against state interference with their possessions through both substantive criminal law and criminal law procedure, unless the interference is lawful, necessary and serves a legitimate aim. The right might for instance serve as an impediment for imposing excessively disproportionate fines, confiscations or forfeiture in criminal trials.\textsuperscript{116} And as for criminal procedure, the right, \textit{e.g.}, requires

\textsuperscript{114} See, \textit{e.g.}, ECtHR, Grand Chamber Judgment of 30 January 1998, \textit{United Communist Party of Turkey v. Turkey}, Appl. 19592/92, par. 24-25 (administrative law).


sufficient procedural guarantees against seizure by the police or prosecuting authorities and a reasonable opportunity to challenge such seizures.\textsuperscript{117}

4.9. \textbf{Right to Freedom of Discrimination}

Private legal persons enjoy this right, which is guaranteed by Article 14 ECHR and by the Twelfth Protocol ECHR.\textsuperscript{118} So discrimination against an organization on the basis of the nature of that entity, its stakeholders or the people it represents or whose interests it promotes may be in violation of these provisions. It is important to note that the right to non-discrimination does not prohibit all differences in treatment in the exercise of the rights and freedoms.\textsuperscript{119} But in so far as this right protects against discriminating criminal law prohibitions or sentences, or discriminating application of criminal procedure, legal persons can probably derive the same level of protection from these provisions as natural individuals. A lack of relevant case law, however, means it is not possible to draw more unequivocal conclusions.

4.10. \textbf{Right to redress for Fundamental Rights Violations}

On the basis of Article 41 ECHR the European Court may ‘afford just satisfaction to the injured party’ of a human rights violation. Under this provision legal persons have for a long time been awarded financial compensation for pecuniary damage.\textsuperscript{120} In 1999 the European Court for the first time also acknowledged a private legal person’s right, \textit{i.e.} a political party, to financial compensation for non-pecuniary damage on account of the frustration its members and founders had suffered as a result of a violation of the right to freedom of association (Article 11 ECHR).\textsuperscript{121} Although the

\begin{itemize}
\item \textit{v. the United Kingdom}, Appl. 9118/80, par. 47-62 (administrative/criminal), and in the same case ECtHR, Report of 11 October 1984, par. 75, 80-93; and furthermore ECtHR, 16 September 2004, \textit{OOO Torgovyi Dom “Politeks” v. Russia}, Appl. 72145/01 (administrative).
\item\textsuperscript{117} ECtHR, Judgment of 9 October 2008, \textit{Forminster Enterprises Limited v. the Czech Republic}, Appl. 38238/04, par. 63-78 (criminal).
\item\textsuperscript{119} ECtHR, Judgment of 9 December 1994, \textit{The Holy Monasteries v. Greece}, Appl. 13092/87, par. 92; ECtHR, Judgment of 18 February 2009, \textit{Andrejeva v. Latvia}, Appl. 55707/00, par. 81.
\item\textsuperscript{121} ECtHR, Grand Chamber Judgment of 8 December 1999, \textit{Freedom and Democracy Party (ÖZDEP) v. Turkey}, Appl. 23885/94, par. 57.
\end{itemize}
compensation is awarded to the entity, the grounds for it lie in the damage to the individuals it represents. However, shortly thereafter the Court expressly recognized a company’s right under Article 41 ECHR to financial compensation for non-pecuniary damage it sustained as a result of a violation, in this case of the reasonable time requirement of Article 6 § 1 ECHR. Since then legal persons have also been granted financial compensation for non-pecuniary damage that resulted from violations of, for instance, the right to freedom of religion and the prohibition of discrimination, the right to property and the fair trial right to enforcement of final judgments, and the right to access to court in criminal cases. To understand the European Court’s approach, it is important to take into consideration that the ECtHR primarily starts from the international law principle that a violation imposes on the state a legal obligation to make reparation for its consequences and that this obligation secures the effectiveness of the Convention’s rights. The question whether the violation caused damage to a human being is thus of secondary importance. This does not mean, though, that the Court is indifferent to whether it deals with a legal persons or an individual. It will view the circumstances of the case and assess how the legal person was actually harmed, which will in principle be different from how a natural individual would have been harmed if he or she were affected by the violation committed by the state.

5. Human Rights Obligations to hold Public and Private Legal Persons criminally liable

The human rights systems that are under discussion here not only offer protection – to individuals, and some to legal persons too – against the application of criminal law by the state. The supervisory bodies that monitor these treaties all also hold that certain human rights imply positive obligations on the state to apply criminal law when that human right has been violated. So the question arises whether these positive obligations also

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122 ECtHR, Grand Chamber Judgment of 6 April 2000, Comingersoll v. Portugal, Appl. 35382/97, par. 27-37 (civil). See recently, e.g. ECtHR, Judgment of 6 October 2009, Desereire S.R.L. v. Moldova, Appl. 17328/04, par. 62. The question on whether a commercial company may allege that it has sustained non-pecuniary damage through anxiety was already raised, but not answered in ECtHR, Grand Chamber Judgment of 28 July 1999, Immobiliare Saffi v. Italy, Appl. 22774/93, par. 79 (administrative).

123 ECtHR, Decision of 31 July 2008, Religionsgemeinschaft der Zeugen Jehovas v. Austria, Appl. 40825/98, par. 129 (civil).


125 ECtHR, Judgment of 20 December 2007, Paykar Yev Hagnostak Ltd v. Armenia, Appl. 21638/03, par. 56 (criminal/fiscal).

126 ECtHR, Grand Chamber Judgment of 6 April 2000, Comingersoll v. Portugal, Appl. 35382/97, par. 29 and 35 (civil).
entail duties of the state to criminalize, criminally investigate, prosecute, criminally try, and punish legal persons that are responsible for breaching the human rights entailed in these treaties. In other words, does international human rights law require states to provide for the possibility of corporate liability in their criminal law systems?

In this respect it is important to note first that not a single provision in the ICCPR, the ECHR, the ACHR, or the AfChHPR does explicitly formulate positive obligations on states to apply criminal substantive law to legal persons or to use the criminal justice system against them. In fact, there is hardly a provision in these treaties that propounds an express obligation to utilize criminal law if the human right entailed in that provision is violated.127 Other than that, some provisions in these treaties – particularly in the ICCPR and ACHR – contain the more generally formulated obligations that certain conduct shall be ‘prohibited by law’ or, even vaguer, that the human right shall be ‘protected by law’.128 These provisions thus do not specify that criminal law should be employed to this end. Nevertheless, based on such formulations, as well as on many other provisions, the supervisory bodies of these treaties have come up with quite an extensive set of positive obligations to apply criminal law. Naturally, these obligations mostly attach to civil and political rights. They are after all the rights that are principally protected in the ICCPR, ECHR and ACHR; only the African Charter also contains a substantial number of economic, social and cultural rights.

In a General Comment, the Human Rights Committee emphasizes that the state has the obligation to protect individuals, not just against violations by state agents, but also against acts committed by ‘private persons or entities’ that breach human rights in so far as they are amenable to application between private persons or entities.129 This may involve the need to investigate or punish such private persons or entities. By way of illustration

127 The exception is Art. 13 § 5 ACHR where it maintains that propaganda for war and advocacy of national, racial, or religious hatred that constitutes incitement to lawless violence or to similar action on discriminatory grounds ‘shall be considered as offenses punishable by law’.

128 Prohibitions by law are required for slavery and the slave trade (Art. 8 ICCPR; Arts. 6 and 21 ACHR; Art. 5 AfChHPR), propaganda for war (Art. 20 ICCPR), national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Art. 20 ICCPR), discrimination (Art. 26 ICCPR), and torture, cruel, inhuman or degrading punishment and treatment (Art. 5 AfChHPR). Protection by law is primarily demanded for the individual’s life (Art. 6 ICCPR; Art. 2 ECHR; Art. 4 ACHR), privacy, correspondence, honour, and reputation (Art. 17 ICCPR; Art. 11 ACHR), family (Arts. 17 and 23 ICCPR; Arts. 11 and 17 ACHR; Art. 18 AfChHPR), children (Arts. 23 and 24 ICCPR; Art. 19 ACHR; Art. 18 AfChHPR), and women and different forms of equality (Arts. 23 and 26 ICCPR; Arts. 17 and 24 ACHR; Arts. 3 and 18 AfChHPR).

the Committee points out that states have to ensure that private persons or entities do not discriminate or inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. Interestingly, as regards, for instance, torture and inhuman treatment (including rape and female genital mutilation), killing and enforced disappearance, the Committee holds that adequate protection may entail positive obligations to criminalize such violations and to criminally investigate, prosecute, convict and adequately punish those responsible. The phrase ‘those responsible’ will at least be meant to refer to natural persons, including any directors, managers or employees of legal persons. The Committee does not however state in so many words that this also applies when the responsible party is a company or other legal entity. Yet, considering that states have to protect individuals against legal entities, while adequate protection may require the application of criminal law, it seems that states are also obligated to apply criminal law against such private entities when these are responsible for such human rights violations. Meanwhile, the Human Rights Committee neither finds nor implies any obligations to apply criminal justice against public legal persons that are responsible for human rights violations.

By now, the concept of positive obligations as regards criminal law seems most developed in the case law of the European Court. In order to protect the right to life the ECtHR holds that the state has a primary duty to put in place effective criminal-law provisions to deter the commission of offences against the person, and to criminally investigate breaches of the right, and prosecute, convict and punish perpetrators. These obligations are furthermore relevant as regards (certain) violations of, for example, the prohibition of torture and ill-treatment (including rape and domestic violence), prohibition of slavery, the right to privacy, and the freedoms of expression, religion and assembly. It is clear from the case law that these positive obligations not only apply if the perpetrator is a state official or a private individual (of


course including possible directors, managers and employees of legal entities), but also when a state body is responsible for the violation.\textsuperscript{133}

The Court here thus seems to require that states provide for the possibility of criminal liability of public legal persons being responsible for a violation of, \textit{inter alia}, the right to life. This conclusion finds further support in the case of \textit{Oneryildiz v. Turkey}, in which the Court rules: ‘Where it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, […], the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2’.\textsuperscript{134} It is not absolutely certain that the phrase ‘those responsible’ means to refer to state ‘bodies’ too, but such a reading of the sentence would be the most obvious one. Further confirmation may be found in the case of \textit{Rowley v. the United Kingdom}, which concerns the death of a boy in a residential care home due to negligence of this public corporation.\textsuperscript{135} The mother complains about a failure to prosecute for corporate manslaughter. The ECtHR rejects this complaint, because it was of the view that application of criminal law is not required in case of medical negligence. The fact that the prosecution would concern a public legal entity was on the other hand not at all considered to be relevant by the Court. All of this merits the conclusion that the ECHR probably requires that states can hold public legal persons criminally liable in case they commit certain human rights violations. However, the obligations are still framed in such a general fashion that it is not clear whether they are relevant to either central governmental bodies, or municipalities and other lower public offices, or both.

From the criminal liability of public entities, it seems only a small step also to require such liability for private legal persons. Although the Court may not yet have expressly confirmed this, the European case law does at least strongly suggest that application of criminal law against private entities may indeed be obligated in certain situations. Not only has the Court on several occasions stated that these positive obligations apply in any context:

\begin{itemize}
  \item \textsuperscript{134} ECtHR, Grand Chamber Judgment of 30 November 2004, \textit{Oneryildiz v. Turkije}, Appl. 48939/99, par. 95; see this paragraph also in relation to par. 91-92. See also ECtHR, Judgment of 24 March 2009, \textit{Mojsieiev v. Poland}, Appl. 11818/02, par. 53(c), in which the Courts point at the need ‘in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility’.
  \item \textsuperscript{135} ECtHR, Decision of 22 Februari 2005, \textit{Rowley v. the United Kingdom}, Appl. 31914/03, par. 1.
\end{itemize}
‘whether public or not’. More important is that the Court, when framing positive obligations in relation to criminal law, pays little attention in principle to the nature of the individual or entity responsible for a human rights violation. Instead it takes a pragmatic approach and reasons from the obligations of the state and the idea that the protection of human rights must be effective and that violations should be deterred and repressed. Seen from this perspective it seems implausible that the Court is not going to demand criminal liability of private legal persons when this emerges as being vital to the protection of human rights.

The obligation of states to criminally investigate, prosecute and punish those responsible for human rights violations, and thus to criminalize such breaches, is from its first Judgment acknowledged under the American Convention by the Inter-American Court. The obligations have been stressed in relation to, for instance, the right of life, the right to liberty, the prohibition of torture and ill-treatment, the right to a fair trial, and freedom of expression. In respect of the prohibition of forced disappearance of persons, the Court even holds that these duties ‘have attained the status of jus cogens’. Though apart from that, these duties ultimately may be relevant in respect of all human rights in the ACHR, since in its formulations the Court places no limits on the obligations to particular human rights, as the European Court does, but attaches them to ‘the rights protected by the American Convention’ in general. The Inter-American Court states that ‘Criminal proceedings should be resorted to where fundamental legal rights must be protected from conducts which imply a serious infringement thereof and where they are proportionate to the seriousness of the damage caused’. It is evident from the case law that the duty to criminalize human rights violations as well as the obligation to investigate, prosecute, try, convict, and punish the perpetrators apply in respect of violations by natural state agents or private individuals (obviously including possible directors, managers and employees of legal entities). There is, however, no indication

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139 With further references, see e.g., I-ACtHR, Judgment of 6 February 2001, Ischer Bronstein v. Peru, par. 186.
141 See, e.g., I-ACtHR, Judgment of 28 January 2009, Perozo v. Venezuela, par. 64, 118-120, 141; I-ACtHR, Order of 27 January 2009, Bámaca Velásquez v. Guatemala, par. 28; I-
that the Court also means to imply a state’s obligation to provide for corporate criminal liability. Although in some cases the Court speaks of ‘the authors of the violations’ and ‘those responsible for violations’ to which criminal law should be applied, which terms could as such be taken to refer to legal entities, in other instances it uses phrases as ‘the people responsible’, ‘individuals’ and ‘private persons or groups’ when formulating the general framework on positive obligations. The Inter-American supervisory bodies do nonetheless very much emphasize the need for effective deterrence and repression of human rights violations. It is therefore reasonably conceivable that the Court or Commission will start formulating positive obligations to apply criminal law against private and maybe even public legal persons if a specific case merits their doing so.

Finally, the African Commission has affirmed that ‘some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance’. In addition to that the Commission acknowledges positive obligations on states to exercise due diligence to prevent harmful acts of others, to impose sanctions on private violations of human rights and to take the necessary steps to provide the victims with reparation. Under this obligation states must also investigate, prosecute, and punish acts that impair any of the rights recognized under international human rights law. The scope of these positive obligations may depend on the kind of human right involved. The Commission assumes that they will go further for non-derogable human rights than for other rights. Meanwhile it is entirely clear that the duties as such are first of all relevant if the perpetrators are state officials. Nevertheless, also in case of so-called ‘non-state actors’, which

ACtHR, Order of 4 September 2004, Matter of “Globovisión” Television Station v. Venezuela, par. 11 and 22.


Idem, par. 143.

Idem, par. 146, 153, 160; see also par. 204-215.

term refers to individuals, organizations, institutions and other bodies acting outside the State and its organs, the state may be obligated to offer protection against human rights violations through application of criminal law and criminal procedure.\textsuperscript{148} However, in its most important decision on this issue the Commission seems to follow a much narrower approach than (particularly) the European and Inter-American Courts, for it largely only accepts the obligations in so far as there is collusion by the State to either aid or abet the non-state actors in committing the violations.\textsuperscript{149} So de facto the rather imprecise case law of the African Commission hardly requires per se that states hold private juristic entities criminally liable for human rights violations. Lastly, as for public legal persons, the Commission in no way appears to indicate that states have to provide for criminal liability of such authorities in their systems.

Criminal liability of public and private legal persons can be an important means to securing human rights.\textsuperscript{150} It adds importantly to the development of international human rights obligations for multinational corporations.\textsuperscript{151} This, however, does not seem to be the principle reason why international human rights supervisory bodies require the possibility of criminal liability of legal persons. As far as these indeed do require such liability – almost certainly the HRC, probably the ECtHR, possibly the I-ACtHR, and marginally the AfCionHPR – they will do so with a view to deterrence, which is after all the general rationale of the positive obligations on states to utilize criminal law to protect human rights. Although some of these bodies may differentiate between public entities and private legal persons, they might not want to categorize further between, for instance, multinational corporations and small organizations. Since in principle every human right can be violated by or under the responsibility of any sort of legal entity, a general approach requiring criminal liability for such entities, might be most effective in securing human rights. Furthermore, the international human rights supervisory bodies that may require the possibility of criminal liability of legal persons do not put forward or even imply a specific theory by which such liability should be constructed. This leaves states at complete liberty to implement a model of corporate criminal liability of their own choice.\textsuperscript{152}

\textit{Degrading Treatment or Punishment in Africa (Robben Island Guidelines),} 2002, principle 16.


\textsuperscript{149} \textit{Idem,} par. 162-164, 187 (however, for a somewhat broader approach, see par. 188-215). Deservedly critical of this (but not principally in relation to criminal law) is Amao 2008, p. 769-770.


\textsuperscript{151} See, for example, Kinley & Chambers 2006, p. 447-497.

\textsuperscript{152} On the variety of models, see e.g., Pieth 2007, p. 177-182.
The states are not left such liberty in respect of the obligation to affect criminal liability through adequate investigation, prosecution, trial, conviction and punishment. So, if a criminal investigations points out that a legal person committed a human rights violation, the prosecuting agencies will in principle have no discretion in deciding whether they want to prosecute the entity or not (that is when the positive obligation to prosecute applies to that violation). Since the obligation rests on the occurrence of a violation of a human right, it is without significance whether the violation was to the benefit of the legal entity. Such a factor, furthermore, most probably may not serve as an obstacle to a conviction for the violation. It seems to be different for such circumstances as whether the violation resulted from a defect in the organization of the entity, a lack of supervision of employees or systemic disorganization. Such factors, as well as national requirements on the culpability of the legal person, may be taken into consideration when assessing whether the legal person may be convicted or what sanction will be adequate. That is, as long as such factors are not abused to unacceptably shelter the entity from criminal liability. As for the sanction to be imposed on the entity, the authorities have a wider margin of appreciation. None of the supervisory bodies prescribes certain sanctioning principles, nor do they require particular sanctions. However, for example, the European Court – which has the most advanced case law in this regard – demands appropriate sanctions, and will intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed.¹⁵³

6. Conclusion: to full Recognition of Legal Persons under Human Rights Law

The International Covenant, European Convention, American Convention, and African Charter each represent a different regime in respect of how human rights relate to the application of criminal law against non-natural persons. The ICCPR does not recognize legal persons as beneficiaries of human rights, whereas it only offers such entities very restricted, indirect protection through individual stakeholders, but it does require that private legal persons can be held criminally responsible for certain human rights violations. On balance the by far the widest recognition of legal persons as relevant entities for human rights law follows from the ECHR. This does grant legal persons a wide range of human rights; additionally it offers a fair rate of indirect protection through natural owners and sometimes shareholders; and it requires that public legal persons can be held criminally responsible for certain human rights violations, while the same in all probability applies to private entities. The ACHR entails a regime that may basically be similar to that of the ICCPR, but which differs significantly in

detail and clarity. The status of legal persons is least clear under the African Charter. Through its open system it seems to be able both directly and indirectly to protect juristic entities, but it appear to require only that such entities can be held criminally liable for human rights breaches if the state has in some way colluded in that violation.

How should these differences be judged? It seems that human rights protection for legal persons may serve at least three interests. First it serves the non-natural entity itself. Although this may be a serious factual advantage, fundamentally it is hardly relevant, since international human rights law does not aim to protect entities as such. This, however, does not settle the matter at all; the point is that a human rights violation against a legal person can cause considerable inconvenience, uncertainty and other difficulties for directors, owners, shareholders, employees, members or those who are represented by it. This in fact entails the second interest: human rights protection of juristic entities may seriously advance the protection and wellbeing of natural individuals. Of course, one could argue that this not only applies to private legal persons but also to public entities. Ultimately, this cannot be decisive, though. International human rights protection of governmental bodies and other public legal persons would weaken the system, for it is exactly the authorities’ power that the human rights system aims to limit and control. Moreover, securing the human rights of private legal persons affords much more progress to the third interest, i.e. maintaining the rule of law and democratic society, than protection of public entities will. For that interest it is first relevant that the rule of law aims to safeguard against arbitrary governance. It requires that the authorities act and decide within the law. The rule applies regardless of whom the state deals with outside its own organization: individuals, groups or non-governmental organizations. Since human rights are the most fundamental principles of the democratic state of justice (the Rechtsstaat), it truly serves the rule of law to obligate states to comply with human rights when they subject legal persons to criminal justice. Another aspect of the third interest is that legal persons contribute significantly to the democratic state of justice. This applies rather directly, for instance, to the media, political, and non-profit organizations, but possibly also to companies, since history shows that economic prosperity is an important condition for the development of human rights protection.

The practical approach of the European Court, which recognizes legal persons both as possible victims and as possible perpetrators of human rights violations, serves the several interests rather well. This cannot be said of the ICCPR and ACHR. The rationale of these latter systems in their refusal of protection to legal persons is that human rights derive from the inherent dignity of the human person and that legal persons are legal fictions and lack real material existence. At a profoundly fundamental level this might be a sufficient reason to justify the approach of these systems, but it shows an
utter disregard for the important benefits of protection of private legal persons for individual stakeholders and society. I am therefore of the opinion that legal persons should be offered protection under each human right that can reasonably well be applied to them. Such protection does not have to involve completely equating individuals and juristic entities. The case law of the European Court illustrates that it is very well possible to adjust the protection system to the different nature of each entity, and to focus on the interests that individuals and society have in legal persons (see particularly section 4). In fact there are several rights, as has been pointed out, which require a somewhat different application to entities than to individuals. It seems that the European Court may want to pay a bit more attention to these differences than it does now.

Meanwhile there might be more compelling reasons to bear the specific nature of legal persons in mind when offering them human rights protection. This especially applies in relation to developing countries, where powerful multinational companies could abuse human rights protection to make it even harder for local authorities to submit such entities to the law or where such companies may even be able to interfere with a state’s democratic or fundamental legal structures. In such situations it is desirable to offer authorities a wide margin of appreciation in deciding that infringements of the entity’s human rights are necessary to the maintenance of law and order and the protection of individuals than when an individual would have been involved. Ultimately, it may even be indispensable in such situations to withhold human rights from the legal person. This would be possible through the application of the international law principle that prevents totalitarian regimes, groups or individuals from invoking human rights protection for activities that result in the destruction or unacceptable restriction of human rights.154

Recognition of legal persons within the human rights protection system seems moreover to be essential, in the sense that it is a reality that such entities are responsible for many human rights violations. So once it is found to be necessary to strengthen the protection of human rights by obliging states to apply criminal law against the perpetrators of certain human rights violations, it seems hard to argue that such positive obligations do not have to apply when these perpetrators are private legal entities. In this respect all the international human rights systems discussed here could do with some improvement. None of the systems is sufficiently clear about whether the duty of states to provide for the possibility in domestic law of criminal liability concerns either public or private non-natural entities, or both. Furthermore, it would seem useful if they were to give a general definition of legal persons to which the positive obligations are relevant. As far as the

154 This principle is enshrined in Art. 5 ICCPR, Art. 17 ECHR, Art. 29 ECHR; see for the African system Art. 27 AfChHPR, which does not as such entail this principle, but provides duties for private parties that may be relevant and useful here.
obligations concern both public and private entities, it could be useful to specify the obligations in respect of each of them, because they may not have to be the same in every case. For example, it seems that positive obligations in regard to the former could and should be more lenient than in regard to the latter. When a public body commits a human rights violation, that violation could result in the body’s international liability through the state, for the state is responsible for all of its organs. Consequently, international human rights law has possibilities at its disposal for controlling public entities rather than private ones. It might therefore be much less necessary to require the application of criminal law against public legal persons than against private entities. Apart from that, states are still very reluctant to provide for criminal liability of public entities. This, in my view at least, signifies that such liability should not be required from states that oppose such liability, while they actively employ alternative means that are also sufficiently effective to prevent public bodies from violating human rights. In addition, it would help states to know more specifically which sort of criminal punishments may be adequate for legal entities that seriously violate human rights. Criminal law will only be able to prevent the violation of human rights if it is clear to states and legal persons what kind of abuses and under which conditions will have to entail criminal liability according to the supervisory bodies.

Nevertheless, it is obvious that international human rights law offers compelling reasons for states that do not recognize criminal liability of legal persons to amend their criminal law systems. This may even become an additional cause of the phenomenon that legal persons are increasingly coming to be recognized as subjects of criminal law and criminal procedure. That, in turn, is an extra ground for offering them human rights protection against the power of the state within the criminal justice system.
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1. Introduction

This report will provide a brief overview of the concept of corporate criminal liability in the Netherlands. Following a description of the historic development of this concept, attention will be paid to the substantive law regarding corporate liability – including the concept of secondary liability and defences – and to specific rules for the trial and the punishment of legal persons. Special attention will also be paid to the position in Dutch criminal law of the public law legal person, such as the provinces. The report will be completed with a short evaluation of the concept of corporate criminal liability in the Netherlands.

2. Historical Development

At the time the Dutch Penal Code (DPC) came into force (1886), the legislator was of the opinion that criminal offences could only be committed by natural persons. This opinion was strongly influenced by the ‘classic ideas’ of German scholars such as Von Feuerbach and Von Savigny. There was, of course, an awareness of the fact that corporations existed. To deal with crimes committed in a corporate context, several offences were designed which addressed the officers of a legal person. This was done under regulatory law, but also within the DPC.

The next important step in the development of corporate criminal liability was taken outside the formal boundaries of criminal law. In the time of the Great Depression, the Dutch legislator was confronted with exceptional circumstances that called for exceptional measures. In order to combat the consequences of the depression effectively, the Dutch legislator

1 See, for a more extensive treatment of the subject, Gritter 2007. For a recent treatise in English, see De Doelder 2008.
2 In this report, the words ‘corporation’ and ‘legal person’ will be used as synonyms, although not every legal person in Dutch criminal law is necessarily a corporation.
3 Gritter 2007, p. 33 ff.
4 In particular bestuurders and commissarissen (managing directors and supervisory directors).
developed a special branch of law, disciplinary in nature, that made it possible, for instance, to prosecute and punish corporations. The legislator was of the opinion that the official body of criminal law was not a suitable mechanism with which to combat the depression. An adaptation of the criminal law was deemed inappropriate, because it was believed that the special measures would only be temporary. As soon as the depression ended, the special disciplinary law could be abolished. The depression, however, was followed by the Second World War. The special disciplinary law was maintained during the War in order to regulate – as far as possible – the economy in that period.

After the War the legislator paid special attention to the enforcement of economic law. Owing to the development of several special measures to address the depression and regulate the economic situation during the War – within and outside the field of criminal law – the rules governing the criminal and quasi-criminal enforcement of economic law had become quite diffuse. The state of the law had become such that in certain cases several criminal and quasi-criminal courts were competent. In 1951, a new act emerged that aimed to unify the rules governing the investigation, the prosecution and the punishment of economic crimes. The quasi-criminal, disciplinary branch of the law that had become so important was abolished.

This new act, the Economic Offences Act (EOA), applied – and continues to apply – only to the enforcement of economic offences. Economic offences were – and remain – a group of regulatory offences, usually but not always of an economic nature, that are labelled as such by the legislator. The legislator was of the opinion that the effective combating of these economic crimes required special substantive and procedural rules. According to the legislator, an economic offence had features that require a different approach than other, non-economic offences. One of the special substantive rules for the combating of economic offences was set out in Article 15 EOA. This article stated that economic crimes could be committed by legal persons, and that legal persons could be prosecuted and punished. Accordingly, since 1951, the criminal liability of corporations was accepted in the Netherlands in the field of economic regulatory law. In the explanatory notes, the Dutch legislator gave criminal liability not only a practical basis, but also a more fundamental one. It stated that the acceptance of corporate criminal liability made it possible to apply appropriate sanctions in this field of law, such as the suspension of business activities. In addition, the government expressed the view that corporations should have legal personality in this area of law, and were susceptible to punishment: ‘Corporations also have a name to lose’.

Subsection (2) of Article 15 EOA contained a number of factors that a criminal court could take into account when faced with the question of whether a corporation had committed a particular economic offence. It reads

that an economic offence is committed by a corporation, if – for instance – the
offence was actually committed by natural persons who acted within the
scope of the corporation’s activities (e.g. on the basis of employment),
regardless of whether any particular individual committed the offence, or
whether the offence was committed collectively. In the explanatory notes the
government stated that liability could also be established on other factors, for
example with relation to crimes addressed to persons acting in a certain
capacity – such as ‘employer’ – or with relation to crimes of mere omission.

Article 15 EOA was repealed in 1976, when a general provision
regarding corporate criminal liability came into force: Article 51 DPC. To this
day, this article is regarded as the basis for corporate criminal liability in
Dutch criminal law in every area of the criminal law.

3. The Dutch Concept of Corporate Criminal Liability

3.1. Introduction

Since 1976, a corporation has been able to commit any offence, in principle. Its liability is therefore no longer restricted to the class of ‘economic offences’. Article 51 DPC states:

1. Offences can be committed by natural persons and legal persons.
2. If an offence has been committed by a legal person, prosecution can be instituted and the punishments and measures provided by law can be imposed, if applicable, on:
   1. the legal person, or
   2. those who have ordered the offence, as well as on those who have actually controlled the forbidden act, or
   3. the persons mentioned under 1. and 2. together.
3. For the application of the former subsections, equal status as a legal person applies to a company without legal personality, a partnership, a firm of ship owners, and a separate capital sum assembled for a special purpose.

When an offence is committed by a legal person, the prosecution service decides whether the legal person will be prosecuted, or any other natural or legal person for ordering or controlling the offence. Criteria for this decision are not laid down in the DPC. The establishment of corporate criminal

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6 De Hullu 2009, p. 163. Some scholars tend to restrict the scope of Art. 51 DPC by excluding offences of a more physical nature, such as rape. In our opinion, a corporation can be criminally liable, regardless of the nature of the offence. Whether a corporation in a particular case should be prosecuted for a more physical offence like rape or battery is another matter (please note that the Dutch prosecution service (Openbaar Ministerie) does not operate a system recognising the principle of mandatory prosecution, meaning that the legality principle does not apply).

7 The translation is an adaptation of the one used by De Doelder 2008, p. 566.

8 In several cases, however, the prosecution service is bound by its own policy rules regarding this decision.
liability will be discussed in the following section. We will address the *actus reus* and the *mens rea* of an offence, as well as grounds for defence and justification. However, we will first consider the scope of Article 51 DPC – the legal entities that can commit an offence.

### 3.2. Legal Persons in Criminal Law

According to Article 51 DPC, offences can be committed by ‘legal persons’. The answer to the question of whether a particular entity has legal personality is to be found primarily in Dutch private law. In Articles 2:1, 2:2 and 2:3 of the DCC (Dutch Civil Code), legal personality is, for instance, attributed to the *besloten vennootschap* (BV: limited company) and to the *naamloze vennootschap* (NV; public limited company). Legal personality has also been attributed to state organs such as provinces. In section 4, special problems surrounding the prosecution of state organs will be discussed separately.

Article 51 subsection 3 widens the scope of the criminal law by stating that certain entities without legal personality in civil law can nevertheless commit an offence. The enumeration includes collective entities such as firms and partnerships, but it excludes sole traders. In the case of sole traders, the owner of the business may under certain circumstances be ‘vicariously liable’ for offences committed within the scope of that business.9

### 3.3. Secondary Liability

Subsection 2 of Article 51 DPC provides for secondary liability if an offence is committed by a legal person. It covers natural and legal persons who order the commission of an offence, and persons who ‘actually control’ the commission of the offence. This secondary liability is not limited to the ‘formal’ officers of a legal person (e.g. its directors), nor to persons who act as though they hold an official position within the legal person. As a result, employees without any authority may be held criminally liable within the framework of Article 51(2) DPC.10 In addition to crimes involving more active control, mere passive involvement in an offence committed by a legal person can also be punished. The Hoge Raad (the Dutch Supreme Court) has ruled that ‘conditional intent’ (*dolus eventualis*) in any event suffices for this form of secondary liability.11

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9 Usually, the liability of the owner of a business is termed ‘vicarious liability’. In Dutch law, however, the question of liability of the owner always amounts to a question of whether the owner has himself committed the offence. See also Section 3.4.1.

10 See Wolswijk 2007, p. 86.

3.4. Criminal Liability

3.4.1. Actus reus

In the course of the 20th century, Dutch case law developed several ‘criteria’ or ‘factors’ that were relevant to establishing the criminal liability of a corporation. The factors and criteria were of various natures, which made the doctrine regarding corporate criminal liability rather diffuse and elusive. In one case, the fact that the corporation had gained ‘profit’ from the offence committed was decisive;12 in another, criminal liability was grounded on finding that the offence – the pollution of water – was committed during the ‘normal conduct of the company’s business’.13 The substance that was illegally disposed of was one that emerged during the normal, everyday production process in the company’s factory.

Several cases indicated that the ‘criteria’ that had previously been developed to establish the vicarious liability of the owner of a sole-trader enterprise could also be decisive to establishing the criminal liability of a corporation. These criteria originated from a case in which a question arose about whether the owner of a business (a natural person) could be held criminally liable for several offences, actually committed by an employee.14 The conduct concerned the illegal export of goods and the making of untrue statements in export documents. In general terms, the Dutch Supreme Court ruled that an owner could be held criminally liable for the conduct of his employee if the conduct was at his ‘disposal’ (or if the owner was able to intervene in the conduct), and if – with regard to the course of events – it could be said that the owner had ‘accepted’ the conduct. These criteria – in short, ‘disposal and acceptance’ – were applied in relation to the establishment of corporate criminal liability in several cases under the Dutch Supreme Court.15 Several authors argued that these criteria ought to be regarded as the main factors for establishing corporate criminal liability.

In 2003 the Dutch Supreme Court settled the matter by providing a clarifying, general ruling on how corporate criminal liability should be established.16 The Supreme Court ruled that the basis for criminal liability is in any event an attribution of illegal conduct that can be considered ‘reasonable’. Accordingly, a corporation can only be held criminally liable if there is an illegal act or omission that can be ‘reasonably’ imputed to the corporation. To make this more concrete, the Dutch Supreme Court provided a guiding principle for this ‘reasonable attribution’: the attribution of certain (illegal) conduct to the corporation may under certain circumstances be

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12 HR 27 January 1948, NJ 1948, 197.
reasonable if the (illegal) conduct took place within the ‘scope’ of the corporation. The Dutch Supreme Court then enunciatively summed up four situations or ‘groups of circumstances’ in which conduct, in principle, may be said to be carried out ‘within the scope of a corporation’:

- where the case concerns an act or an omission of someone who works for the corporation, whether or not under a formal contract of employment;
- the conduct concerned fits the everyday ‘normal business’ of the corporation;
- the corporation gained profit from the conduct concerned;
- the course of action was at the ‘disposal’ of the corporation, and the corporation has ‘accepted’ the conduct – acceptance including the failure to take reasonable care to prevent the conduct from being performed.

The circumstances enumerated can all be traced back to earlier decisions and earlier legislation. However, the decision by the Dutch Supreme Court to extend the circumstances or criteria that are of relevance in establishing ‘vicarious liability’ – the criteria of ‘disposal and acceptance’ – was a remarkable innovation. The Dutch Supreme Court ruled in its 2003 case that a corporation can be found to have accepted the course of action that took place, if it failed to take reasonable care to prevent the conduct that was performed. Several authors had previously argued that the criterion of ‘acceptance’ came down to some form of intent. The 2003 case before the Dutch Supreme Court shows however that while acceptance can come down to proof of intent, proof of intent is not necessary. Mere proof of a failure to take appropriate steps to prevent criminal harm suffices to establish acceptance.

The Dutch Supreme Court case has clarified the concept of corporate criminal liability, but it has of course not solved every problem. The exact meaning of the case is still in discussion and will probably continue to be. The debate focuses on the precise meaning of the circumstances, the weight accorded to the various circumstances and the true meaning of the basis for corporate criminal liability - the ‘reasonable attribution of (illegal) conduct’.

The Dutch approach towards establishing corporate criminal liability can be characterized as a rather ‘open’ approach - there is no rigorous theory to turn to for guidance. In particular, Dutch criminal law does not recognise a theory like the ‘identification doctrine’, in which only top level directors can cause the corporation to be liable. In fact, in Dutch criminal law any employee can cause a corporation to commit an offence as long as it can be ultimately construed that the corporation ‘has committed’ the offence. In addition, as has been shown, other factors can also lead to corporate criminal liability.

The Dutch approach may put some pressure on legal certainty, but it has several advantages in our opinion. The open approach leaves room for
‘tailor-made’ jurisprudence, in which the courts are free to weigh relevant circumstances and factors. It acknowledges that the possible variation in cases is in fact endless. As long as the reasoning in a verdict is sufficient, the jurisprudence will be transparent.

3.4.2. Mens rea

In the 2003 case on corporate criminal liability the Dutch Supreme Court limited its considerations explicitly to the actus reus part of the offence. The case has therefore no direct relevance to the establishment of the mental element of a crime in relation to a corporation. Accordingly, the law on this point has to be deduced from other cases. It should be noted that this section is mainly concerned with offences that require proof of a mental element: the so-called misdrijven. As far as misdemeanours or contraventions (overtredingen) are concerned, the prosecuting authority is usually relieved of the burden to prove a mental element. In such cases, proof of a criminal actus reus suffices for punishment.

With regard to establishing ‘intention’ and ‘negligence’ – the main subjective elements in Dutch criminal law – the case law of the Dutch Supreme Court shows that there are roughly two approaches. A first ‘indirect’ way to establish mens rea comes down to the attribution of the mens rea of a natural person to the corporation. A natural person’s intention can thus in certain circumstances be ‘ascribed’ to the corporation. A second, more ‘direct’ way of establishing the mens rea of a corporation is to derive the mens rea from other circumstances closely related to the corporation itself, such as its policy and decisions. By means of its agents, a corporation may make a confession, for example. In court a corporation could state, for instance, that it was known within the corporation that fraudulent acts took place but that the management had decided not to take any action. It can thus be proved that the legal person intended the fraud.

The ‘direct’ way of establishing the mens rea of a corporation is particularly suited to cases of gross negligence. In Dutch criminal law, gross negligence can be derived ‘objectively’ from the failure to act according to standards of conduct. If the failure to meet the standards causes death, for instance, gross negligence manslaughter can in principle be established.

3.4.3. Justification and Excuse

Like natural persons, corporations can raise defences that, if accepted, will justify the conduct found, or excuse unlawful conduct. In theory, a legal

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17 The case concerned a misdemeanour that did not require proof of a mental element.
18 Insofar as grounds for excuse or justification are absent; see Section 3.6.3.
person may plead any defence a natural person could raise under Dutch criminal law. Of these defences, the extra-statutory (unwritten) general defence of 'lack of sufficient culpability' requires special attention. This excusatory defence contains several specific important grounds for disculpation, including the exercise of 'due diligence'. With relation to a corporation, a successfully raised defence of due diligence will most probably have the effect of rebutting proof of the actus reus. This is, at least in theory, a logical consequence of the 2003 Dutch Supreme Court case, in which the 'acceptance of conduct performed' (one of the criteria for vicarious liability) was said to include 'the taking of reasonable steps to prevent the commission of the offence'.

3.5. Sanctions

There is no section in the DPC regulating which sanctions can be applied when a legal person is convicted. It has to be deduced from the nature of the criminal sanction whether it can be given effect for legal persons.

As far as the primary sanctions are concerned, only the imposition of a fine is relevant. The DPC sets a maximum fine for each criminal offence. There are six categories. The first category maximum is EUR 370; the sixth category maximum is EUR 740,000. Every criminal offence is assigned to one of the first five categories. However, the DPC has a special provision for fines and legal persons. Where a legal person is convicted and the applicable category does not allow for appropriate punishment, a fine from the next higher category may be imposed (Article 23 DPC). Therefore, if the criminal offence is assigned to the fifth category (EUR 74,000) a fine of EUR 740,000 may be imposed on conviction of a legal person. However, the question remains whether EUR 740,000 is an appropriate punishment in the most serious cases.

Imprisonment is of course not an option in sentencing legal persons, and it is generally assumed that the same is true for community service because a legal person cannot be imprisoned where the community service is not performed. The DPC does not have the option of a subsidiary fine.

Secondary sanctions under the DPC are the forfeiture of certain rights, forfeiture of assets and publication of the verdict; only the latter two sanctions can be imposed on legal persons. Publication of the verdict can be a very effective sanction but is not often imposed, perhaps because the media attention surrounding the prosecution will usually have already done a lot of damage to the legal person.

In addition to these punitive and deterrent sanctions, the DPC also provides for the imposition of measures. Some relate to the mental health of

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21 See for this effect of the defence of 'lack of sufficient culpability', De Hullu 2009, p. 169 and Gritter 2007, p. 57.

22 Court of Rotterdam 13 June 2000, LJN: AA6189.
the convicted person, and are therefore irrelevant to legal persons. Another measure concerns the prohibition of the circulation of property (Article 36c/36d DPC). This measure can also be applied to property belonging to a legal person. Consider, for instance, shirts imported without a permit.23

The DPC also provides a measure permitting the imposition of an obligation to pay a specified sum of money corresponding to unlawful profit (Article 36e DPC). This measure can also be imposed on legal persons. The same is true for a compensation measure – an obligation to pay a specified sum to the State on behalf of the victim (Article 36f DPC). The State then hands the money over to the victim.

Beyond the DPC, there are specific secondary sanctions which can also be imposed on legal persons. Of particular relevance is the Economic Offences Act, regarding specified criminal offences related to the regulation of economic activities, including environmental law.24 If a legal person is convicted of such a crime, there is not only the possibility of publication of the verdict and an enlarged sanction of forfeiture, but some or all of the activities of the legal person can be suspended for a maximum term of one year. This sanction has, for instance, been imposed on a legal person convicted of selling dairy produce not fit for human consumption.25

If the interests in question require that action is taken immediately, the court can order that all or some of the activities are ended as a temporary measure. Such a temporary measure has for instance been imposed on a shipyard where working conditions were unsafe.26 Evading such a measure is a criminal offence according to the EOA. Another specific secondary sanction is the withdrawal of advantages granted to a corporation by public authorities for a maximum term of two years. Consider, for instance, a grant or a permit. This sanction is only occasionally imposed.

Where a criminal offence is specified as being related to the regulation of economic activities, there are also a few specific measures available. Firstly, the court may hand over control over specified economic activities of the convicted person to another. The court may also oblige the performance of whatever was omitted in breach of the law or the undoing of whatever was done contrary to the law, at the expense of the convicted person unless the court decides otherwise. These measures are also only occasionally imposed.

A legal person can be dissolved before, during or after prosecution for a criminal offence. This can have consequences on the options open for sanctions on a legal person and the possibility of executing them. If the legal person is indicted after its dissolution is knowable to a third party, the right to prosecute is lost. Those responsible for the criminal offence committed by

24 The EOA is not only applicable to legal persons: depending on the offence in question, a natural person can also commit an ‘economic offence’.
26 Court of Middelburg 9 February 2009, LJN: BH2342.
the legal person, however, can still be prosecuted. If the legal person is indicted before its dissolution is knowable to a third party, the right to prosecute is preserved.27

If a legal person transfers economic activities connected to a criminal offence to a second legal person, the first legal person can still be prosecuted.28

4. The Special Position of the Public Law Legal Person

Article 51 DPC states that criminal offences can be committed by natural and legal persons.29 The DCC states that the State and any province, municipality or district water board are legal persons. The same is true for many other public law organizations. Consequently, public law legal persons can in principle commit criminal offences.

The Dutch Supreme Court has indeed acknowledged this possibility. In 1987, for instance, the Dutch Supreme Court upheld the conviction of the University of Groningen.30 In Anloo a burial mound had been excavated without the requisite permit. The Supreme Court stated that the University could not claim immunity because it was not a public body falling under Chapter 7 of the Dutch Constitution.

Immunity can therefore only be claimed by this kind of public body. Little more than ten years later, the Dutch Supreme Court quashed a verdict of the Court of Appeal in Leeuwarden in which a municipality was granted immunity.31 The Supreme Court decided that the immunity of such a public body (falling under Chapter 7 of the Dutch Constitution) can only be accepted when the acts concerned can only, according to the legal system, be executed by civil servants acting within the framework of a task assigned to that body. This new criterion reduced the immunity granted to a public body falling under Chapter 7 of the Dutch Constitution. Since then, immunity has been rarely accepted. In 2008, for instance, the Dutch Supreme Court upheld the conviction of a municipality for tax fraud in connection with a housing project.32

The State, however, still enjoys immunity. In 1994 the Supreme Court decided that the State could not be convicted for acts that allegedly contravened environmental law committed by the Ministry of Defence.33 It stated that acts of the State are considered to further the public interest. To that end, the State can act on all matters, by legislation, government, etc.

29 See for a more extensive treatment of the special position of the public law legal person, Roef 2001.
Ministers can be held responsible for acts of the State in Parliament. Further, there is a special procedure by which they may be prosecuted for malfeasance. It is not compatible with this system that the State itself can be held criminally responsible for its actions.

Meanwhile, a bill that would change this state of affairs has been put forward by a number of members of Parliament. The bill proposes adding a subsection to Article 51 DPC that will state that public law legal persons can be prosecuted on an equal footing to private law legal persons. Punishment will, however, be excluded where the commission of a criminal offence by a civil servant or a public law legal person can reasonably be considered necessary for the execution of a task assigned by law. This bill, if and when enacted, will put an end to the immunity from prosecution of the State and all other public law legal persons listed in Chapter 7 of the Dutch Constitution. The Dutch State will be able to prosecute the Dutch State. It is only to be hoped that it will receive a fair trial, as it is doubtful whether a State has recourse to the European Court of Human Rights if the trial is not fair.

5. Procedural Law

Chapter VI of Book IV of the DCCP (Dutch Code of Criminal Procedure) is devoted to the prosecution and trial of legal persons. Firstly, the chapter contains a provision on the representation of a legal person in criminal proceedings. In criminal proceedings a legal person is represented by one of its directors (Article 528 DCCP). This article details when a legal person is deemed to be present at a trial and who may be empowered to exercise the rights of the defendant at the trial. These rights include the right to question witnesses and expert witnesses and also the right to appeal against the decision of the court on behalf of the legal person.

However, the corporate defendant not only has procedural rights, it is also a source of information. Article 528 DCCP does not specifically provide that a statement made by a director representing a legal person is to be regarded in a manner comparable to a statement made by a defendant. Nevertheless, the Dutch Supreme Court has seemed to equate the two types of statement to a large extent, in a series of cases concerning the right to remain silent. When a legal person is prosecuted, this right is possessed by the director representing the legal person. Moreover, a representative of a legal person cannot be called to testify as a witness against the corporation he

34 Official Parliamentary Documents 2007/08, 30 538.
35 See for a more extensive treatment of the subject, Van Strien 1996.
Legal persons and their representatives may also enjoy the privilege of non-disclosure. The choice of which director to have represent a legal person is up to the legal person. The legal person may also choose to be represented by several directors at the same time. Considered along with the jurisprudence concerning the right to remain silent, this decision implies that a legal person can supply each of its directors with the right to remain silent.

The court can order the appearance in person of a specific director – it can even order the police to bring him to trial (Article 528 DCCP). The court has the same power with regard to the defendant and any witnesses. These orders do not influence the rights and obligations of this director as a representative of the legal person.

The fact that a representative of a legal person has been granted the right to remain silent during the trial can be connected with the human rights recognized in the European Convention on Human Rights, especially Article 6. The Dutch Supreme Court has in some cases acknowledged that legal persons have human rights that can be violated. One of these rights is the right to be tried without undue delay. Legal persons also derive human rights from Article 8 ECHR. However, an attempt to raise the defence that Article 8 ECHR implies that legal persons cannot be punished for not publishing their annual accounts failed.

Chapter VI also contains some provisions regarding the communication of court notices. Article 529 DCCP is of crucial importance. It provides that court notices are notified at the address or the office of the legal person, or at the address of one of its directors. Notification can also be effected by sending the court notice by post.

A special form of notification, to which additional prescriptions are applicable, is that of ‘service’. Service of a court notice is effected by handing the notice to one of the directors, or to a person authorized by the legal person to receive the notice. The director of a legal person which is itself a director of a second legal person, is held to be a director of the second legal person. A person does not need a special mandate to be authorized to receive documents on behalf of the legal person. If a person is authorized to collect mail at the post office, he is also authorized to receive a court notice on behalf of the legal person. Furthermore, if a legal person chooses the address of its legal counsel to be its address, the legal counsel and his or her employees are considered to be authorized.

43 HR 8 July 2003, NJ 2003, 596.
44 HR 22 November 1994, NJ 1995, 188.
The service of a court notice to a director or a person authorized by the legal person can be made at the address of the legal person, at the office of the legal person or at the address of one of the directors. The mere attempt to serve the notice at the address of the legal person however does not suffice. If the notice cannot be served at this address, an attempt has to be made to serve the document at the address of one of the directors. The document can also be served on a director or authorized person at another place. Serving the document on one of these persons is considered as a notification in person. This is of special importance in the service of summons. When notification is effected in person, the period during which the legal person can have recourse to legal remedies ends two weeks after the judgement is pronounced.

A court notice can also be served on an employee of the legal person who declares that he is willing to deliver the notice to his superiors. This, however, is not a notification in person. If the judicial notification cannot be served in either way, it will be served at the registrar of the court where the trial will be held or was held.

6. **Jurisdiction**

The DPC is applicable to everybody who commits a crime on Dutch territory (Article 2 DPC). That can also be a foreign or Dutch legal person. The DPC is also applicable to every Dutch person who commits a crime outside the Netherlands, where this act constitutes a criminal offence according to the law of the State on whose territory the crime is committed. This provision is also arguably applicable to a Dutch legal person: the Dutch Supreme Court decided so in a case involving a comparable jurisdiction clause. A Dutch person found responsible for a crime committed abroad by a foreign legal person can also be prosecuted in the Netherlands. Moreover, it is not relevant whether the law of the State where the crime is committed recognizes the criminal responsibility of natural persons for crimes committed by legal persons.

7. **Evaluation**

In all, the concept of corporate criminal liability is not controversial in the Netherlands. The flexible approach to the matter adopted by the Dutch Supreme Court, as demonstrated in the 2003 case, is in line with the views of most leading authors on substantive criminal law. An important remaining contentious issue is the special position of public law legal persons,
principally the State. If the signs do not deceive us, this special position will be abolished or at least diminished within a few years.
References

Doelder de 2008

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1. The General Theory of Admissibility and Exclusion of Illegally Gathered Evidence

1.1. Some Starting Points of the Evidentiary System of Criminal Procedure

This report gives an overview of the way in which the Dutch law of criminal procedure deals with illegally gathered evidence, in particular when the suspect’s right to privacy or right to voluntary statement is violated. For a proper understanding of this element of the Dutch law of criminal procedure, it is important to outline several starting points of Dutch evidentiary law in criminal cases.

- The evidentiary system in criminal cases is based on the principle of establishing the substantive truth. This is expressed in the Dutch Code of Criminal Procedure (CCP) (Nederlandse Wetboek van Strafvordering (So)) in the requirement that a judge may assume that the offense charged is proven only if he ‘is convinced of it’. This means that a high degree of certainty must exist that the accused has committed the offense.

- The judge must be convinced by the contents of legal evidence. This is the evidence that the Code of Criminal Procedure considers admissible in criminal proceedings. It concerns: the judge’s own perception, statements by the accused, statements by a witness, statements by an expert and written documents (Section 339 CCP). This summary is so broad that hardly any evidence can be indicated that the law does not consider admissible.


2 There is no constitutional provision with the same purport.

3 An example of such an exception is what the lawyer puts forward during the hearing.
- The statutory provisions on admissible evidence contain a few so-called minimum evidence rules. These minimum evidence rules limit the free establishment of the truth by the judge for the purpose of facilitating establishment of the substantive truth.\(^4\) An example of a minimum evidence rule is the rule that proof that the accused has committed the offense charged must not be assumed (in principle)\(^5\) only on the basis of a statement by one witness or by the accused. Because there is always a chance that the witness or the accused will not tell the truth, the law requires a second statement to be used as evidence in these cases. In the judicial system, minimum evidence rules tend to have minimum explanations as well.

- Apart from the aforementioned minimum evidence rules, the provisions on admissible evidence do not contain any rules on the reliability of the evidence or how it is gathered. Consequently, unreliable or illegally gathered evidence is admissible in itself as legal evidence. Evidence can, however, be excluded: evidence admissible in itself may be set aside because of its unreliability or the way it was gathered. In such a case, the judge does not use that evidence as a basis for his opinion on whether the offence charged was committed.

- The above-mentioned reasons for excluding evidence – unreliability and illegal gathering – should be distinguished. If evidence is unreliable, its exclusion is based directly on pursuit of the substantive truth. The exclusion of illegally gathered evidence has a separate legal basis: Section 359a CCP. Gathering evidence illegally does not automatically result in exclusion of the evidence. As discussed in more detail below, other sanctions are also possible. In some cases, evidence is unreliable because certain legal rules on gathering evidence have been violated. In that case, in which unreliability coincides with illegal gathering of the evidence, the evidence is already excluded on the basis of unreliability. In principle, the rule of Section 359a CCP need not be applied.\(^6\)

1.2. Sanctions on Illegal gathering of Evidence

1.2.1. The Legal Framework

The Dutch Code of Criminal Procedure gives rules in Section 359a on the assessment of the illegal gathering of evidence. The text of Section 359a CCP reads as follows:

\(^5\) An important exception is contained in the rule that evidence that the accused has committed the offence charged can – not must – be assumed by the judge on the basis of an official report by an investigating officer. See Section 344(2) CCP.
\(^6\) For a detailed explanation of the distinction between unreliable and illegally gathered evidence, see Dubelaar 2009, p. 93-105.
1. If procedural rules prove to have been breached during the preliminary investigation, which breach can no longer be remedied, and the legal consequences of the breach are not apparent from statutory law, the court may rule that:
   a. the severity of the punishment will be decreased in proportion to the gravity of the breach if the harm caused by the breach can be compensated in this way;
   b. the results of the investigation obtained through the breach may not contribute to the evidence of the offense charged;
   c. the Public Prosecution Service will be barred from prosecuting if the breach makes it impossible to hear the case in compliance with the principles of due process.

2. In applying the first subsection, the court must take account of the interest that the breached rule serves, the gravity of the breach and the harm it causes.

3. The judgment must contain the decisions referred to in the first subsection. These must be reasoned.

Before discussing the way in which the rule in Section 359a CCP has developed in the case law of the Dutch Supreme Court (Hoge Raad), two parts of this provision require further attention for the purpose of a comparison with other legal systems.

The first subsection of Section 359a CCP refers to the court. By court, the Act means the judicial authority that handles the substance of the case. In all cases, this is a professional court. Lay justice does not exist in the Netherlands. The judge who rules on the attachment of consequences to illegal gathering of evidence also rules on the indictment of the accused. Owing to this, the situation can occur that the judge takes cognizance of the contents of an article of evidence and then decides that this evidence must be excluded because it was gathered illegally. The consequence is that the judge, even though he has knowledge of the contents of the evidence, may not use those contents as a basis for his opinion on whether the offense charged has been proven. This has not gone without criticism: there is a risk that the judge – consciously or unconsciously – will nevertheless be guided by the contents of the excluded evidence. Nevertheless, that criticism did not result in the introduction of separate proceedings in which a judge other than the judge hearing the case (exclusively) decides whether or not to remove the evidence from the file because it was gathered illegally. In the Dutch law of criminal procedure, there is trust that the (professional) judge will ignore the contents of the excluded evidence in forming his or her opinion.

The first subsection of Section 359a CCP also mentions the breach of procedural rules in the preliminary investigation. This means failure to observe written and unwritten rules that apply to gathering evidence. No distinction is made between the different types of rules. They can be rules on respecting fundamental rights, such as the right to remain silent. But they can also be rules that pertain ‘only’ to the contents of certain documents that have to be shown to the suspect when means of coercion are used. Section 359a CCP is intended to be a provision that applies to all these rules.
distinction is made either between violations of constitutional and non-
constitutional rights. The reason for this is partly that the Dutch Constitution
only regulates the manner of gathering evidence to a limited extent. Such
regulation ensues rather from ordinary legislation and also from the
European Convention for the Protection of Human Rights (ECHR).
Violations of the ECHR that take place in the context of gathering evidence
also count as breaches of procedural rules within the meaning of Section 359a
CCP.

1.2.2. Further Development in the Case Law of the Dutch Supreme Court

Section 359a was introduced in the Code of Criminal Procedure in 1996. To a
great extent, it codified the applicable case law up to then on illegal gathering
of evidence. After 1996, the rule of Section 359a CCP was again developed
further in the case law of the Dutch Supreme Court. A very important
judgment is that of March 30, 2004, in which the Dutch Supreme Court gave
a summary of the case law passed up to then on Section 359a CCP.7 The lines
the Dutch Supreme Court set out in this judgment can still be considered a
representation of the prevailing law. The standard judgment of March 30,
2004 is discussed point-by-point below and explained in more detail where
necessary.

1.2.2.1. General Starting Points

Based on the text of Section 359a CCP and its explanation by the legislature,
the Supreme Court formulated some general starting points for the
application of Section 359a CCP. These include first of all two preconditions
that have to be met:

- Section 359a CCP pertains only to breaches of procedural rules
committed during the preliminary investigation, in so far as that
preliminary investigation relates to the offense with which the accused
is charged and thus on which the judge has to decide.8 This means that
no legal consequences are attached to breaches of procedural rules
committed in the context of an investigation aimed at someone other
than the accused. An example: in the investigation of accused A, in
conflict with the rules, a telephone tap is placed. During the monitoring
of the calls, incriminating material is collected on B. This material can be
used in the criminal case against B, because the breach of procedural

7 Dutch Law Reports (Nederlandse Jurisprudentie) 2004, 376 annotated by Buruma.
8 In principle, breaches of procedural rules relating to custodial means of coercion,
which the accused could have put before the examining magistrate (the judge in the
preliminary investigation) at an earlier stage, are not assessed again by the session
judge on the basis of Section 359a CCP.
rules did not take place in the context of the investigation relating to the offense with which B is charged.9

Furthermore, Section 359a CCP only applies to irremediable breaches of procedural rules. If the breach has been or can still be remedied, there is no reason to attach a legal consequence to it. An example is failure to inform the accused of the results of a DNA test, through which the accused is not given the opportunity to request a second opinion.10 The session judge then needs to examine whether it is still possible to obtain a second opinion. If that is the case, the accused must still be given the opportunity to obtain it. This, of course, has to be a remediable breach of procedural rules. If a search of a home has been conducted without the required authorization, no remedy is possible. Such authorization must be granted prior to the search.

The Supreme Court stated further that in deciding whether a legal consequence will be attached to a breach of procedural rules, and if so, what consequence, the judge must take account of the points of view formulated in the second subsection of Section 359a CCP: i. the interest that the breached rule serves, ii. the gravity of the breach, and iii. the harm caused by the breach. These points of view deserve some further explanation.

- The interest that the breached rule serves. Here, the law refers to the so-called relativity requirement by a German term sometimes called the Schutznorm. One must see what interest the breached rule is intended to protect, and to what extent this interest relates to the accused. The rules relating to searches of homes are intended to protect the (privacy) interests of the occupant. So only the interests of the occupant are harmed if these rules are breached. An example is a situation in which someone uses a room in a house only as a storage place (for drugs), while not being an occupant of that house. In such a case, no consequences need be attached to a breach of the rules on searches of homes.11 Apart from that, the Supreme Court leaves some room to attach a sanction nevertheless to the illegal gathering of evidence in cases in which the relativity requirement is not met. This gives the judge a certain margin in responding to breaches of procedural rules that do not harm the accused’s interests, but regarding which he nevertheless considers it inappropriate not to respond. These are, however, exceptional situations.12

9 HR (Supreme Court) 18 October 1988, Dutch Law Reports (NJ) 1989, 306.
12 See for example HR 12 January 1999, Dutch Law Reports 1999, 290, in which evidence is excluded because a telephone call between a co-suspect and his lawyer was tapped. Tapping calls with professionals entitled to privilege constitutes a serious breach of procedural rules.
The gravity of the breach. This point of view is especially important for the choice of the sanction. In the event of very grave breaches of procedural rules, the most severe sanction – barring the Public Prosecution Service from prosecuting – is likely, while the most minor breaches are settled by some reduction of the sentence or by the mere determination of illegality. Under certain circumstances, the good faith of the investigating officers who caused the breach of procedural rules can play a part. For example: an investigating officer enters premises which he presumes to be vacant. After he enters, the premises prove to be occupied. In that case, the absence of the written authorization required to enter the premises does not have to result in exclusion of the evidence if the judge is of the opinion that this investigating officer could and was entitled to assume that the premises were unoccupied.13

The harm caused by the breach. If a rule is breached that was written in the interest of a suspect, this is as a rule harmful to the suspect. Under certain circumstances, however, no harm is done. An example is not informing a suspect his right to remain silent. This is in itself harmful to the suspect, unless the suspect is a lawyer. The suspect then knows, after all, without being told, that he has the right to remain silent.

The Supreme Court finally held that not every breach of procedural rules necessarily results in one of the legal consequences referred Section 359a (1) CCP. Section 359a CCP formulates a power, not an obligation. The rationale of Section 359a CCP is not that a breach of procedural rules has to result in some advantage for the accused, no matter what. The point is rather to see whether attaching a sanction to a breach of procedural rules is called for in light of the aforementioned points of view. It is possible, therefore, for a judge to find that procedural rules have been breached without attaching a legal consequence to the breach.

If the judge is of the opinion that a legal consequence should be attached to a breach of procedural rules, the judge will have a choice of the sanctions referred to in Section 359a (1) CCP: barring the Public Prosecution Service from prosecuting, excluding evidence and sentence reduction. The Supreme Court formulates the conditions to be met for each of these sanctions before the relevant sanction can be imposed.

1.2.2.2. Barring Prosecution

The Supreme Court has repeatedly ruled that barring prosecution is an option only in exceptional cases. There is room for this sanction only if investigating officers or the Public Prosecution Service has seriously breached principles of due process, through which, either on purpose or with gross disregard for the interests of the accused, his right to a fair trial has

been breached to a considerable extent. To date, this sanction has been imposed mainly in cases where the possibilities of judicial monitoring of the gathering of evidence were deliberately thwarted. Another instance is when an unacceptable agreement is made with a witness for the prosecution that, in exchange for acting as such, any prison sentence to be imposed will not be enforced.

1.2.2.3. Exclusion of Evidence

According to the Supreme Court, exclusion of evidence can be up for discussion only if the evidence was obtained through the breach, and is considered when a rule or legal principle (of criminal procedure) has been seriously breached by the illegal gathering of evidence. The Supreme Court thus actually sets two requirements. Firstly, a (sufficient) causal connection must exist between the breach of procedural rules and gathering of the evidence. Secondly, an important rule or legal principle must have been breached to a considerable extent.

It is not usually problematic to determine a causal connection between a breach of procedural rules and evidence. If, for example, a search of premises was not conducted in accordance with the applicable rules, evidence gathered during the search may be considered illegal. Nevertheless, it is a fact that relatively high requirements are set in the case law on the requisite causal connection. For instance, a temporal connection is not necessarily a causal connection. If, for example, a statement is made during unlawful detention, that statement will not necessarily count as a result of the unlawful detention. The causal connection can also be broken. An example of this is the situation in which a suspect is unlawfully arrested, while subsequently, when asked, the suspect gives permission for a search of his home. Giving such permission breaks, as it were, the causal connection between the arrest and the search.

The Supreme Court does not explain when a rule is important and under what conditions such a rule is breached to a considerable extent. In a certain sense, the Supreme Court refers to the viewpoints provided by Section 359a (2) CCP. After all, a rule that is not intended to protect (essential) interests of the suspect could generally be considered an unimportant or less important rule. The element of a breach ‘to a

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considerable extent’ indicates that there must have been a relatively serious breach and that harm has demonstrably been suffered as well. Exclusion of evidence will generally follow, for instance from a breach of rules pertaining to the suspect’s right to voluntary statement.\textsuperscript{20} This also holds if an illegal body search is conducted during which drugs are found in a natural cavity of the suspect’s body.\textsuperscript{21}

More generally speaking, the Supreme Court lets it be known that exclusion of evidence is a sanction that should be used with restraint. The Supreme Court emphasizes, for example, that exclusion of evidence is a power, not an obligation, of the court. The Supreme Court points out further that account must be taken not only of the points of view referred to in Section 359a (2) CCP, but also of the circumstances of the case. This leaves room to make allowance for the gravity of the offense, in the sense that evidence is less likely to be excluded if the offense is serious than if the offense is minor.

1.2.2.4. Sentence Reduction

The Supreme Court formulates four conditions for the use of sentence reduction as a sanction on a breach of procedural rules: a. the suspect has actually been harmed, b. the harm was due to the breach, c. the harm is suitable for compensation by sentence reduction, and d. sentence reduction is justified in light of the importance of the breached rule and the gravity of the breach. The first and last requirements reflect the viewpoints referred to in Section 359a (2) CCP, while the second requirement pertains to the requisite causal connection. It is especially interesting to pay attention to the third requirement: the harm is suitable for compensation by reducing the sentence. It is important that ‘compensation’ is concerned. Where exclusion of evidence can be considered to have remedied the illegal gathering of evidence, sentence reduction does not go as far. Nothing is remedied, but something is given in return for the breach. For that reason, sentence reduction is mainly an appropriate sanction for less serious breaches of procedural rules. Examples are a search during which the main, but not all legal requirements are met,\textsuperscript{22} or systematic surveillance of a home from the public road without permission from the public prosecutor.\textsuperscript{23} In addition, sentence reduction is also a sanction that can be imposed if unlawful actions do not result in evidence and evidence cannot be excluded for that reason. If such unlawful actions are not so serious that they must be followed by barring prosecution,
sentence reduction is an appropriate sanction. An example is an arrest lawful in itself that is accompanied by unnecessary force.24

1.2.2.5. **Fruit of the Poisonous Tree**

The Supreme Court does not pay specific attention to the doctrine of fruit of the poisonous tree, i.e. indirect obtaining of evidence. The reason is that, on closer analysis, the causality issue proves to be involved, which is already contained in the conditions set on application of the above-mentioned sanctions. There must be a **direct connection** each time between the breach of procedural rules and the deliberate or grossly negligent failure to consider the accused’s interests in his right to fair treatment on the one hand and, on the other, the obtaining of evidence or the harm actually suffered by the accused.25 In the discussion of the exclusion of evidence, it was already noted that a temporal connection does not suffice and that a causal connection can also be broken. This means that fruit of the poisonous tree will not easily be involved.26 Example: a man was arrested, and asked whether he had burglar’s tools on him. The man threw his bag and jacket on the ground and yelled: ‘See for yourself!’ Burglar’s tools were then found in the bag and jacket. It was argued in the criminal proceeding that the man had been arrested unlawfully (because there was no suspicion) and that finding the burglar’s tools had to be considered fruit of the poisonous tree of that arrest. The Supreme Court held that, insofar as the arrest should have to be considered unlawful, it cannot be said that this evidence was the direct result of the arrest.27 The discovery of burglar’s tools was primarily the result of throwing the jacket and bag on the ground and yelling ‘See for yourself!’ The fact that he did so after the arrest did not affect this.

Examples can also be found in the case law in which fruit of the poisonous tree is indeed excluded from the evidence. An example is a case where, in conflict with the applicable rules, a telephone conversation between the accused and a doctor was tapped. At the hearing, the accused was confronted with that tap report. The Supreme Court held that the way in which the accused reacted to confrontation with the tap report could not be

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25 Such a direct connection means that the fruit of the poisonous tree must **exclusively** be the result of the unlawful actions. It is not sufficient (any more) that the fruit of the poisonous tree is **largely** the result of those actions. The recent case law of the Supreme Court is at any rate interpreted in this way.

26 Other possible reasons not to assume a causal connection can be based on alternative causality (evidence arising from an unlawful act, but at the same time also from an independent source) or due to the ‘inevitable discovery exception’ (the evidence could most likely have been gathered legally as well). These reasons are put forth relatively rarely in the case law. See Embregts 2004, Note 5.10 to Section 359a.

used as evidence. The reaction could be considered a direct result of the breach of procedural rules.

2. Violations of the Right to Privacy

2.1. The Right to Privacy in Dutch Law

Section 10(1) of the Dutch Constitution provides that everyone has a right to respect of his privacy, barring restrictions to be set by or pursuant to the law. This gives the right to privacy the status of a constitutional right. In addition, the right to privacy is guaranteed by Article 8 of the ECHR. This convention provision has direct effect in Dutch law. This is very important, because the Dutch courts are not at liberty to test laws against the Constitution. Testing against the ECHR is, however, allowed.

In addition to the right to privacy, the Dutch Constitution also protects the right to inviolability of the home. Under Section 12(1) of the Constitution, entering a home without permission is allowed only in the cases specified by or pursuant to the law, by those designated to do so by or pursuant to the law. Section 12 Constitution prescribes further that prior identification and notification of the purpose of the entry are required. Moreover, a written report of the entry must be provided to the occupant as soon as possible. The right of inviolability of the home can be construed as a right partly for the purpose of protecting privacy. Protection of the inviolability of the home enables people to enjoy their privacy in their own homes as far as possible without interruption.

2.2. Violation of Privacy in the Context of a Criminal Investigation

The exercise of various powers of criminal procedure violates privacy. One can particularly think of searches of homes and telecommunication taps. The violation of privacy is justified by the existence of specific statutory provisions setting the conditions under which the powers in question may be exercised. Those conditions are for the purpose of ensuring that privacy is not needlessly violated. The law defines the offenses with respect to which the relevant powers may be used, while providing for judicial review of the need to use these powers. In principle, as long as the statutory conditions are observed, there is no question of illegally gathered evidence. Disregarding these conditions constitutes a breach of procedural rules. Sanctions are imposed on such a breach under the provisions of Section 359a CCP. To that extent, breaches of procedural rules that constitute an unacceptable violation of the right to privacy are not treated differently than other breaches of procedural rules. For that reason, this section suffices with

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a few comments on the Dutch provisions on searches of homes and telecommunication taps.

2.3. Searches of Homes

The Code of Criminal Procedure contains comprehensive rules on searches of homes. The central point is that the search must be conducted as far as possible by the examining magistrate. The (acting) public prosecutor conducts the search only if it is not possible to wait for the examining magistrate to arrive. In that case, authorization from the examining magistrate is required. Such authorization can be obtained by telephone if necessary. The fact that the examining magistrate plays an important part here is connected with the rights to privacy and inviolability of the home. If a home is searched without authorization from the examining magistrate, an important rule of criminal procedure will have been breached. As a rule, this is followed by exclusion of evidence.

Besides the rules in the Code of Criminal Procedure, the Act on Entry into Dwellings (Algemene Wet op het Binnentreden) is also important. The latter Act can be considered an elaboration of Section 12 Constitution, in which the right to inviolability of the home is laid down. The General Act on Entry into Dwellings is especially important to the situation in which investigating officers enter a home without searching it. Investigating officers are authorized to do so if an offender is caught in the act or in case a more serious offense is suspected. The purpose of the entry is to seize objects that can be found without a search. If necessary, the situation on site can be frozen with a view to the arrival of the examining magistrate to conduct a search. The General Act on Entry into Dwellings provides for this situation (among other situations) in a series of rules, such as the obligation to identify oneself and an obligation to report. Especially important is that this Act also sets the requirement that on entering a home without the occupant’s permission, investigating officers must have a written authorization from the public prosecutor or acting public prosecutor. The General Act on Entry into Dwellings entails rather a lot of paperwork for those involved in the practice. Because of this, things sometimes go wrong in filling out the required forms. Although this constitutes a breach of procedural rules, consequences need not always be attached by far in light of Section 359a CCP. For instance, the Supreme Court ruled that the lack of a signature on an authorization form did not result in exclusion of evidence, because it was plausible that such authorization had also been given orally.

30 Sections 97 and 110 CCP.
2.4. **Tapping Telecommunications**

As well as on searches of homes, the Code of Criminal Procedure also contains detailed rules on tapping telecommunications (including telephone taps). Telecommunications are tapped by order of the public prosecutor. Before this order is given, the public prosecutor has to demand an authorization from the examining magistrate. The examining magistrate will issue such an authorization only if the relevant statutory conditions are met. Tapping is allowed only in the event of i. a suspicion of an offense that constitutes a serious breach of the legal order, ii. a suspicion that an organization is plotting or committing serious crimes or iii. indications of a terrorist crime. The investigation must also urgently demand that telecommunications be tapped. This means that no other, less radical means of investigation can be used to establish the truth. Within this framework, the examining magistrate is the most important authority. Without the periodic authorization of the examining magistrate, the tapping of telecommunications is not allowed. Here, too, the lack of an authorization will in principle result in exclusion of evidence.

It is also worthy of note that the session judge is authorized to exercise the power to tap telecommunications. In doing so, the session judge checks whether ‘the examining magistrate could reasonably have formed his opinion on the authorization’, while also judging ‘whether the subsequent use by the public prosecutor of his authority to order the tapping of telecommunications by technical means is in accordance with that authorization and lawful as well’.

3. **Illegal Interrogations**

3.1. **Section 29 Code of Criminal Procedure: the Right to remain silent and the Right to Voluntary Statement**

The suspect’s right to voluntary statement and right to remain silent are laid down in Section 29 CCP. Subsections 1 and 2 of that section read:

[1] In all cases in which someone is interrogated as a suspect, the interrogating judge or official must refrain from doing anything for the purpose of obtaining a statement that cannot be said to have been made freely. The suspect is not required to answer.

[2] Prior to the interrogation, the suspect must be told that he is not required to answer.

The right to voluntary statement contained in subsection 1 of Section 29 CCP (the phrase ‘(…) that cannot be said to have been made freely’) and the right 32 Sections 126la-126nb, 126t-126ub and 126zg-zja CCP.

to remain silent (‘the suspect is not required to answer’) are considered the
core values that give shape to the position of the suspect in criminal
proceeding.34 A right to remain silent is effective only if the suspect is aware
of it. For that reason, the subsection 2 of Section 29 CCP contains the
obligation for the interrogating official to inform the suspect of his right to
remain silent, the so-called caution (reading the suspect his rights).

Much more than the right to privacy, the suspect’s right to remain silent
has been the subject of debate within Dutch criminal procedure. Because of
the importance of the right to remain silent and some interesting recent
developments, the suspect’s right to remain silent and the application of
Section 359a CCP to violation of the right to remain silent will be discussed in
detail below.

3.2. The Principles on which Section 29 CCP is based and their
Influence on the Scope of the Provision

3.2.1. Prohibition on Compulsion

Section 29 CCP is was introduced in 1926, owing to the need for protection
against improper interrogation methods.35 Section 29 CCP guarantees, not
just in a general sense, that the authorities will act appropriate toward the
suspect. The fact that a statement was made freely also enhances the
reliability of the establishment of the truth. Initially, the suspect’s right to
remain silent – the phrase ‘the suspect is not required to answer’ – was not
included in the text of Section 29 CCP. The point was that the suspect could
make a statement freely, not that he should not make any statement at all.
The right to remain silent ultimately ended up in the text of the provision,
not because the legislature held that suspects were indeed allowed to keep
their mouth shut, but because not having to answer was viewed as the
strongest guarantee for not having to make a statement under duress.36 That
the accent in later years remained on the viewpoint of preventing duress is
evident from the fact that the obligation to read a person his rights was
dropped for almost 40 years (between 1935 and 1974). Informing the suspect
of a right to remain silent was, as was reasoned at the time, confusing, and
above all inefficient.37

34 See among others Groenhuijsen & Knigge 2001, p. 33. See also Prakken & Spronken
2001, p. 57-63.
35 Stevens 2005, Chapter 4.
36 Parliamentary Papers II 1913/14, 286, No. 3, p. 71. Cf. also the Explanatory Memorandum to the Draft-Staatscommissie (Government Committee) 1913, p. 67-70;
3.2.2. The nemo tenetur Principle and the Autonomy of the Accused in the Trial

Although the regulation of government actions had traditionally been dominant, in the course of time, the point of view of the accused’s position in the trial has become more strongly visible. This was initially inspired by the English accusatorial system. Later, particularly as of 1993 when the European Court of Human Rights (ECHR) recognized the right to remain silent and the privilege against self-incrimination in its case law as essential elements of a fair trial, Section 29 CCP was interpreted more and more on the basis of the idea that the accused takes an autonomous position in a fair trial, as guaranteed by Article 6 of the European Convention on Human Rights (ECHR). The accused is not (merely) an object of investigation, but has the freedom to determine his position and defend himself from that position. The accused has no role in the trial under public law; he does not have to account for his attitude to the other participants in the trial. The expression and realization of that position is found particularly in Section 29 CCP. The accused has the freedom to state what he wants and even the freedom to make no statement at all. The accused should also be aware of that position. Reintroduction of the reading of rights in 1974 was therefore typical of the development in the ideas on Section 29 CCP outlined here.

The autonomy of the accused under Section 29 CCP is sometimes expressed by saying that the accused cannot be compelled to incriminate oneself, or indicated by the Latin adage nemo tenetur prodere se ipsum. As already noted, Section 29 CCP is not based only on the prohibition of pressure but also on the nemo tenetur principle. The accused’s freedom to determine his attitude toward the trial is not unlimited. The right to remain silent, for example, does not extend to giving answers to questions about personal details, although such information can indeed be incriminating for the accused under certain circumstances. Nor does the right to remain silent apply to a reply card that the driver of an illegally parked car has to fill out. Interrogating an accused by way of a so-called jail plant – an undercover investigating officer in the jail – is allowed as well. Whether or not the right to remain silent is violated in that situation

38 This development is described by Stevens 2005, Chapter 4, especially p. 51-53.
40 See among many others HR 18 September 1989, Dutch Law Reports 1990, 531, annotated by Van Veen. Asking for a telephone number can under certain circumstances come under the protection of Section 29 CCP, and in that case must be preceded by reading the suspect his rights. This does not apply, however, if the suspect has already given permission to investigate his telephone traffic. See HR 3 April 2007, Dutch Law Reports 2007, 209.
depends on the pressure exerted and the attitude taken by the accused to the trial up to the time in the criminal case.\footnote{HR 29 March 2004, Dutch Law Reports 2004, 263. In this case, the Supreme Court relies on European case law. See ECHR 5 November 2002, Dutch Law Reports 2004, 262 (Allan), annotated by Schalken. Even though the ECHR seems to dislike sneaky undercover practices somewhat more than the Supreme Court.}

In the court decision-making stage, the accused’s position is assessed in the context of the incriminating evidence available. A statement made by the accused may be considered ‘false’ by the judge and as such become part of the evidence against the accused.\footnote{HR 12 November 1974, Dutch Law Reports 1975, 41, annotated by Van Veen.} The judge can also, for example, reject a defense, arguing that the accused does not want to make statements on further questions regarding that defense.\footnote{HR 19 March 1996, Dutch Law Reports 1996, 540, annotated by Schalken.} Remaining silent, however, cannot as such contribute to the evidence.

3.3. \textit{Exclusion of Statements from Evidence due to Violation of the Right to Remain silent and related Rights and Principles}

3.3.1. Reading a Suspect his Rights

Pursuant to subsection 2 of Section 29 CCP, a suspect must be informed of the fact that he is not required to answer. Neither in Section 29 CCP nor elsewhere in the law are sanctions imposed on failure to observe the rule on reading suspects their rights. In the mostly somewhat older case law, it is nevertheless recognized that failure to read a suspect his rights can result in exclusion of evidence. The point of departure in these judgments is that Section 29 CCP (2) is for the purpose of protecting the suspect against compelled self-incrimination and that, if he was not read his rights during the investigation preliminary to prosecution or at the hearing, the statement may not as a rule be used as evidence unless the suspect’s interests or defense is not harmed.\footnote{See for example HR 17 January 1978, Dutch Law Reports 1978, 341 and HR 26 January 1982, Dutch Law Reports 1982, 353.} The subjective approach and relativity requirement of Section 359a CCP can be recognized in this.

Starting from autonomy in the trial as a background of the right to remain silent, accused persons must have had a real possibility to choose their attitude towards the trial as they saw fit.\footnote{Stevens 2005, p. 57.} Whether an accused’s defense has been harmed depends for example on the way in which and the circumstances under which the accused’s statement was obtained. If the accused’s lawyer was present during the interrogation, the judge will not easily assume that the accused was harmed by the lack of notification. The same holds if the accused knows or is expected to know that he is not required to answer. This can be the case, for example if in a series of...
interrogations, rights were not read to the accused in the second or third interrogation, but were in the first interrogation. Whether the accused’s defense is harmed, however, depends particularly on the attitude toward the trial the accused takes in court. If the accused makes a different statement in court than in the preliminary investigation, his interests may have been infringed. If the accused says that he has no objection to not having his rights read to him, or he is assisted in court by a lawyer and does not rely on such omission in that situation, his interests will not have been harmed. Even if the accused makes the same statement in court as in the preliminary investigation after having been read his rights, or if the accused confesses again in a second lawful interrogation during the preliminary investigation, he is deemed to have had a real freedom of choice. The reservation can be made to all this that it is sometimes difficult to determine how real the accused’s freedom of choice actually was. Once the accused has made a detailed statement during the interrogation, it will presumably not be easy for him to keep his mouth shut at the next interrogation.

The case in which, after a statement was obtained unlawfully, the suspect still makes a statement under lawful circumstances was ‘resolved’ in older case law by way of relativity. Regarding the statements made later, it may be more accurate to speak of broken causality. The reading of rights in the second instance prevents the lawfully obtained statement from being viewed as fruit of the earlier omission of the reading of rights.

3.3.2. Improper Compulsion and Improper Methods during the Interrogation in the Investigation Stage

3.3.2.1. What is Improper Compulsion?

Besides a right to remain silent for the suspect, Section 29 CCP contains an instruction for the interrogating officials: they may not use any unacceptable pressure or duress during the interrogation. This instruction rule is the necessary counterpart of the right to remain silent, and is intended also to guarantee the appropriateness of government actions. The boundary between appropriate and inappropriate is difficult to determine. The difficulty in applying Section 359a CCP is first of all to determine the unlawfulness itself.

For an overview of this case law, see Lensing 1988, p. 205-207. See also Jörg 2005, Note 16 to Section 29. Cf. also HR 14 June 2005, LJN AS8854.

Jörg 2005, Note 16 to Section 29.

HR 25 March 1980, Dutch Law Reports 1980, 437 and HR 26 January 1988, Dutch Law Reports 1988, 818. In this case, the judge did not use previous statements taken without rights being read, so the Supreme Court only had to deliberate on the question of the use of later statements that were lawful in themselves. Cf. also Embregts 2003, p. 148.

See Jörg 2005, Note 9 to Section 29.
There is no debate in this context over the unlawfulness of physical abuse. Such compulsion is not allowed either under any circumstances on the basis of Article 3 ECHR, the ban on torture and the ban on inhuman and degrading treatment. But duress can also be psychological. Exerting a certain degree of psychological pressure is allowed and is considered necessary to get a suspect to talk. There are no problems, for instance, in confronting a suspect with incriminating evidence. His attention may also be drawn to contradictions in his own story and the weakness of his position. It is allowed as well to tell a suspect that he can go home if he cooperates and stops remaining silent. Case law, however, stipulates that various interrogation methods must be considered unlawful. These methods are usually categorized as ‘threat and intimidation’, such as making shooting movements next to the suspect’s head, suggesting that the police could see to it that the suspect gets sentenced to twenty years imprisonment and that it was possible to have the suspect’s face match the composite drawing in the file, as well as suggesting that the suspect’s lawyer did not serve the suspect’s interests but those of the criminal organization. The most well known unlawful method is the so-called Zaandam interrogation method. With this method, with the aid of a communications expert in the interrogation room, the suspect was interrogated very intensively, for a long time and suggestively and surrounded by photos of both his family and the victim.

3.3.2.2. Exclusion of Statements obtained under Improper Compulsion

Once the unlawfulness of the interrogation method is established, a decision must be made on the consequences to be attached on the basis of Section 359a CCP and what the Supreme Court ruled on this in the standard judgment from 2004. If exclusion of evidence is to be considered, the unlawful interrogation method must constitute a considerable breach of Section 29 CCP (so actions must have been taken that were unacceptable beyond any doubt), the suspect himself must have made an incriminating statement by which he harmed his own position in the trial (relativity requirement), and that statement, as well as the fruits thereof, must have resulted exclusively from the improper interrogation (causality requirement).

Exclusion of evidence due to an unlawful manner of interrogation does not readily occur in judicial practice. It is also important in that context that evidentiary exclusion defenses must meet rather stringent requirements if the

51 Cf. on the historic background of Section 29 CCP, Stevens 2005, p. 40-46.
52 See Lensing 1988, p. 39 et seq. and Jörg 2005, Note 9 to Section 29.
53 For a detailed overview of the case law, see Jörg 2005, Note 10 to Section 29. See also Gerritsen 2000, p. 228-238.
54 HR 13 May 1997, Dutch Law Reports 1998, 152. The complaint to the ECHR that the method was in conflict with Art. 3 ECHR due to inhuman and degrading treatment was disallowed by the European Court of Human Rights. ECHR 14 March 2000, Appl. No. 47240/99 (Ebbing v. the Netherlands).
judge is to hear them. The defense counsel cannot suffice with general reliance on Section 29 CCP. He must also state specifically what the unlawfulness comprises and what consequence should be attached to this and why. Even if a defense meets these requirements, exclusion of evidence will not readily take place. In some cases, exclusion of evidence is not considered because there is simply nothing to exclude. This can be the case because the suspect did not make a statement in spite of the pressure exerted on him, the lower court did not include the questionable statements in its ruling on the evidence based on its freedom to select evidence and managed to obtain a conviction in a different way, or because only those (two) statements by the suspect were used that he made before the police started using unacceptable methods. The debate is thus limited to the question whether the Public Prosecution Service should be barred from prosecuting, which occurs only very rarely, or if the sanction of sentence reduction is an option.

In cases where exclusion of evidence is possible in principle, because the statement allegedly obtained under duress was indeed used as evidence, there may still be reasons within the assessment framework of Section 359a CCP not to exclude that evidence. In a case from 2002, for instance, the Supreme Court held that occasional unlawful actions can be compensated by the total of largely calm interrogations (this concerns the review of ‘the gravity of the breach’ pursuant to Section 359a(2) CCP). The same multiplicity of interrogations and statements also seems to result in the Supreme Court’s opinion that causality had been broken: the statements used as evidence were not made as a direct result of the unlawful actions and therefore did not necessarily lead to exclusion of evidence, according to the Supreme Court.

All in all, evidentiary exclusion defenses against unlawful interrogation methods do not easily achieve results. In our view, this is connected with the fact that the unlawful interrogation methods have remained relatively innocent to date. Difficult issues regarding torture have simply not occurred yet in the Netherlands. Moreover, the consequences of the unlawful actions for the accused are usually limited because most judges are able to circumvent the contaminated statements. The case law of the lower courts

57 HR 13 May 1997, Dutch Law Reports 1998, 152. The central issue was whether the methods were so unlawful that the Public Prosecution Service should have been barred from prosecuting. According to the Supreme Court, that was not the case.
59 HR 12 March 2002, LJN AD8906. An interesting question is the extent to which an accused is still free to choose his position and remain silent during lawful interrogations once he has confessed as a result of unlawful methods. See in that connection the judgment of the ECHR of June 30, 2008, Appl. No. 22978/05 (Gafgen v. Germany) (legal ground 108).
does, however, show that there has been more willingness in recent years to attach consequences to unreliable interrogation methods. Although strictly speaking, judges should not have to apply the rules of Section 359a CCP in such a case, in practice, reliability seems to be disposed of rather often within the unlawfulness issue.

An interesting question is the extent to which all qualifications in Section 359a CCP would apply if it were determined that the suspect had been tortured. It seems obvious that this is an important principle of procedural law that protects the suspect and has been breached to a considerable extent. After all, this follows not only from the prohibition of pressure but also from the absolute prohibition of torture under Article 3 ECHR that applies in the Netherlands. According to the ECHR, the use of statements obtained by torture as evidence comes down to a violation of the right to a fair trial under Article 6 ECHR, regardless of the circumstances of the case. On the basis of that case law, fruits of such statements could not be used in the Netherlands, either. The strict causality requirement does not apply in this case. Where not torture, but inhuman and degrading treatment is concerned, the ECHR nevertheless allows for a weighing of interests. Since it is very difficult to determine where the boundary lies between inhuman treatment and torture – and especially since the Court took account of the pressure on the interrogating officials due to the urgency of the situation in its ruling – the obligation to exclude evidence formulated by the ECHR ultimately seems more or less qualified.

3.3.3. Right to Consult with an Attorney and to have an Attorney present during Police Interrogation

3.3.3.1. Recent Developments

The debate over the question whether suspects are entitled to be assisted by a lawyer during the first police interrogation has been going on in the

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60 See Dubelaar 2009, p. 93. A good example of such a judgment is the judgment of the Breda District Court of 2 March 2009, LJN BH4358. Cf. also Duker & Stevens 2009.
62 Art. 3 ECHR prohibits both torture and inhuman and degrading treatment.
65 The question whether the Schutznorm applies in cases of torture has not yet been brought up in European case law, nor, in general, has it been answered by the Court of Justice. Van Kempen is critical of this. See the annotation by Van Kempen 2007, p. 367.
Netherlands for about forty years. Since 2007, developments have been in progress that compel a detailed discussion of this subject.

The Code of Criminal Procedure has several provisions pertaining to the suspect's right to free access to a lawyer.66 It is also provided that the suspect has a right to be visited by a duty attorney during detention.67 The Supreme Court, however, does not interpret these rights so broadly that they entail a right to assistance by a lawyer during a police interrogation, or that the suspect has a right to consultation prior to that interrogation.68

This restrictive interpretation can be placed in the Dutch tradition to place the accent in criminal proceedings on the interest of establishing the truth and the central role the suspect's statement obtained during the police interrogation plays in this. A lawyer who advises his client to remain silent thwarts that interest in a certain sense. Furthermore, as stated, the interrogation can be regulated by audiovisual recording of interrogations. Proponents of the right to a lawyer during the interrogation assert on the other hand that in this way, the autonomous position of the accused to which he should be entitled under Section 29 CCP is not sufficiently recognized. The right to remain silent and the freedom to make statements are effective rights only if the accused has been fully informed of the consequences of talking and remaining silent. Only then does the accused have a real option to choose his attitude toward the trial.69

As a result of several interesting recent developments, a change will soon be made in the situation described above. An initial development came in the wake of the so-called Schiedam Park murder case. In this case, a man was convicted, wrongly, as appeared later, partly on the basis of his own false confession. As part of a set of measures intended to prevent such miscarriages of justice in the future, the Minister of Justice started an experiment called 'Lawyer during Interrogation' ('raadsman bij verhoor'). For a period of two years, in two regions, lawyers will be admitted to the first police interrogation in murder and manslaughter cases under strict conditions.70 Based on the results of the research on that experiment, the Minister will decide if and to what extent there will be a future right for lawyers to attend certain interrogations.71

66 See Sections 28(2) and 50(1) CCP.
67 See Section 40(2) CCP.
69 About this debate, also for literature references, see, Stevens 2005, p. 62-64.
70 For instance, the lawyer must sit a small distance behind his client. The lawyer may not have eye contact with his client, may not say anything and will be removed from the interrogation room as soon as he interrupts the interrogation after being warned not to do so. See the protocol of the experiment on <http://www.advocatenorde.nl/newsarchive/Protocol_Raadsman_politieverhoor.def.pdf>.
71 See the Letter from the Minister of Justice, Parliamentary Papers II 2006/07, 30 800, VI, No. 86, Section 4.
debate over the consequences that should be attached to the judgments of the ECHR in the Salduz and Panovits cases. In these cases dating from 2008, the ECHR held that ‘access to a lawyer should be provided as from the first interrogation of a suspect by the police (…)’. The meaning of these words is not immediately clear. The bar in particular states that the judgments should be interpreted to mean that lawyers have a right to be present during police interrogations, which would be a reversal of the existing case law of the ECHR in which this right is not explicitly recognized. The Dutch Minister of Justice and Supreme Court, however, do not want to go that far. Both the Supreme Court and the Minister of Justice recognize the right of a suspect to consult with a lawyer before the interrogation by the police, as well as the obligation of the police to point this out to the suspect. Regarding underage suspects, the Supreme Court does recognize a right to be assisted during an interrogation, but such assistance can be provided by a lawyer as well as a trusted representative.

3.3.3.2. Exclusion of Evidence

A suspect has a right to assistance from his lawyer from the time he is taken into custody. According to the case law in the pre-Salduz situation, that right does not entail that the lawyer may be present during the first interrogation by the police or that a suspect must have spoken to his lawyer before the first interrogation. Totally in line with this starting point is the case law showing that reliance by a suspect on the evidentiary exclusion rule of Section 359a CCP, because he was not visited by a duty lawyer during his police custody is not easily honored. Even a suspect who initially makes incriminating statements and remains silent after the (late) visit by his lawyer cannot expect to benefit very much from Section 359a CCP because of the relativity requirement. Simply because, as long as he has been read his rights and other guarantees relating to the interrogation have been fulfilled, his interests will not have been harmed. The right to a lawyer during police custody does not, after all, protect the interest that the suspect can speak to his lawyer prior to the interrogation.

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73 See for example Spronken 2009, p. 94-100. See also Braanker 2009, p. 276-282. See also for a less far-reaching interpretation, also followed by the Minister and Supreme Court: Borgers 2009, p. 88-93.

74 See the letter from the Minister of April 15, 2009 on the presence of a lawyer during police interrogation, Sections 4.3 and 5 (Parliamentary Papers II 2008/09, 31700 VI, No. 117) and HR 30 June 2009, Dutch Law Reports 2009, 349, 350, and 351, with note by Schalken.

75 See e.g. HR 30 June 2009, LJN BH3081, legal ground 2.6.

76 Cf. HR 13 November 2007, Dutch Law Reports 2008, 116, in particular the note by Borgers. See also HR 29 May 1990, Dutch Law Reports 1990, 754 and HR 13 May 2006,
Things have changed since the Salduz judgment and its interpretation by the Dutch Supreme Court. In its judgment of June 30, 2009, the Supreme Court not only recognized the right to consultation, but also held that if this right is violated, as a rule, the statement obtained during the police interrogation will be excluded from the evidence – except for situations in which the suspect voluntarily waived his right to consultation and there are urgent reasons in a specific case to restrict the right. In reasoning this way, the Supreme Court almost literally embraces the words of the ECHR in Salduz and Panovits and holds in addition in the terminology of the standard judgment that it must be assumed that if the right to consultation is not honored, an important rule or legal principle of criminal procedure has been breached to a considerable extent. That right to consultation protects the suspect’s interest in freedom to make his statement, thus the relativity requirement, unlike the situation existing before the Salduz judgment, is no longer at issue. The requirement of direct causality still applies fully nevertheless. According to the Supreme Court, exclusion of evidence is not considered in principle in respect of statements made by a suspect after he was able to consult a lawyer and his rights were read to him.

3.4. Exclusion of a Lawfully Obtained Statement after an Unlawful Investigative Act?

In principle, unlawful detention does not prevent the use of a statement obtained in that situation according to the rules. In that case, there is a temporal and not a causal connection ('afterwards but not because'). Exclusion of evidence enters the picture as an option (naturally with all the corresponding preconditions already explained above) only if the defense can demonstrate that, for example, unacceptable pressure was also exerted during the unlawful detention or the suspect was not read his rights. Also if an unlawful search has taken place, the suspect is arrested and subsequently interrogated can the lawful statement be used as evidence without any problems because of the lack of a causal connection with the unlawful search. The situation is somewhat different if the suspect is confronted during a lawful interrogation with results of an unlawful search and then confesses. If it is plausible that the statement is only the result of the unlawful

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Dutch Law Reports 2006, 369, in which the statement already did not qualify for exclusion because it was not plausible that the lack of legal assistance by a duty attorney had influence on the contents of the statements made by the suspect. The suspect persisted in his confession; in short, there was no causal connection.

77 HR 30 June 2009, Dutch Law Reports 2009, 349, 350, and 351, legal ground 2.7.2.

78 The ECHR also mentioned exclusion of evidence ‘as a rule’. See ECHR (Grand Chamber) 27 November 2008, Appl. No. 36391/02, Dutch Law Reports 2009, 214 (Salduz v. Turkey), legal ground 55.

79 HR 30 June 2009, Dutch Law Reports 2009, 349, 350, and 351, legal ground 2.7.3.

80 See for example HR 26 January 1988, Dutch Law Reports 1988, 818.
confrontation, it should be excluded from the evidence.\footnote{See HR 22 October 1991, \textit{Dutch Law Reports} 1992, 218, legal ground 6.2, in which the Supreme Court used a broader causality requirement ('largely'). This is deemed to be restricted by the standard judgment from 2004.} That this does not readily occur is evident from a Supreme Court judgment in which the suspect was confronted during the interrogation with DNA material found at the crime scene that proved to come from him. This material should, however, never have been linked to the suspect because the match was made on the basis of material from the suspect that should already have been removed from the DNA database. The Supreme Court ruled that the confession may well have been made after a suggestion that DNA material from the suspect was available, but it was made before the suspect was confronted with the actual DNA hit. Exclusion of evidence was not considered for that reason.\footnote{HR 27 January 2009, \textit{Dutch Law Reports} 2009, 86 (retrial).}

4. Conclusions

It is evident from the description of Section 359a CCP and its elaboration in the case law of the Supreme Court that illegally gathered evidence and other sanctions set on illegally gathered evidence are dealt with in a balanced manner in the Netherlands. As is also evident from the description of the way in which violations of privacy and the right to voluntary statement/right to silence is assessed, there are numerous criteria and viewpoints that the judge must take into consideration in assessing breaches of procedural rules and choosing the appropriate sanctions on them. Because of that balance, the system of Section 359a CCP is not always easy to fathom. The interrelationship among the sanctions is not easy to denote, either. It can nevertheless be said that a bar to prosecution by the Public Prosecution Service is pronounced only in exceptional cases, and Dutch courts also tend to be relatively restrained in excluding evidence. Breaches of procedural rules are disposed of fairly regularly by sentence reduction or by merely establishing unlawfulness.

Criticism is expressed in the Dutch literature, particularly of the restrained manner of dealing with the exclusion of evidence. In many cases, this criticism is inspired from a constitutional viewpoint.\footnote{See e.g. Embregts 2003 and Van Woensel 2004.} In this context, the binding of the government by law is first and foremost. Important arguments for excluding evidence are that the government must demonstrate that it obeys the rules itself (the demonstration argument), that the government may not benefit from illegally gathered evidence (the reparations argument) and that future breaches of procedural rules should be prevented (the
prevention argument). If one chooses this approach, it is not very logical, for example, to place a lot of emphasis on the relativity requirement. Whether or not the suspect’s interests have been harmed is not particularly relevant if the focus is on the government’s behavior.

There are other approaches over and against this constitutional point of view. One can, for instance, reason on the basis of the suspect’s subjective rights. In that case, a response to unlawful government actions is appropriate only if those rights have been impaired. In this approach, there is every reason to apply the relativity requirement. There are other arguments as well for exercising restraint in excluding illegally gathered evidence. In this context, it is especially important to strive to establish the substantive truth. Moreover, the exclusion of evidence can result in social unrest, certainly if it leads to acquittal. The impression is quickly aroused that an accused is benefitting from exclusion of evidence, while the victim of the crime in question is left out in the cold.

Section 359a CCP and the related case law of the Supreme Court are not based on a fundamental choice of one approach or another. The case law of the Supreme Court tends to take a course in which the constitutional viewpoint outlined above, which focuses on the appropriateness of Government actions in a general sense, is pushed to the background and in which imposing sanctions on breaches of procedural rules concentrates on the specific interest of an individual suspect in a fair trial. But not just that specific interest is considered, as witnessed by the fact that the Supreme Court leaves a certain margin not to set the relativity requirement in certain cases. It also holds that the Supreme Court’s approach recognizes the importance of establishing the substantive truth and the (perceived) social need for satisfaction, without these viewpoints being automatically of decisive importance. To this extent, unification doctrine is involved, in which the various arguments and viewpoints all play a part, and in which a moderate response to breaches of procedural rules is chosen. The balanced, but not always easy to fathom system of rules on imposing sanctions on breaches of procedural rules is the result of this.

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84 One can, for that matter, put forth the same arguments to a certain extent for sentence reduction as a sanction, albeit that the response that then follows is less radical for the government.
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1. Introduction: Cybercrime and Cybercrime Legislation in the Netherlands

1.1. Background and Aim

In the history of cybercrime legislation, the Council of Europe’s Cybercrime Convention presents a landmark effort to harmonise national criminal law in the area of cybercrime. Its wide range of substantive, procedural, and mutual-assistance provisions as well as its supra-European scope – having been ratified, for example, by the United States – make it a potentially very valuable instrument in the fight against the intrinsically cross-border phenomenon of cybercrime. The Convention, however, allows for reservations and variations in national implementation. Moreover, a series of other supranational instruments exist that also aim at harmonising specific aspects of cybercrime, including several EU Framework Decisions and EC Directives. We therefore face a patchwork of national implementations of various international legal instruments, which may result in gaps in harmonisation, variations in implementation, and a consequent lack of clarity on national standards when mutual legal assistance is being sought.

To get a grip on this international patchwork of national cybercrime laws, and to overcome undesirable divergences among countries that hamper mutual legal assistance, it is important to comprehensively map national cybercrime laws. To contribute to that mapping, this chapter provides a country report for the Netherlands, written at the occasion of the Cybercrime Section of the 2010 International Academy of Comparative Law Congress. In this report, I aim to give a comprehensive overview of Dutch cybercrime legislation, both substantive and procedural, as of December 2009. I will particularly focus on the questions how Dutch law regulates cybercrime and cyber-investigation, whether any shortcomings exist in the legislation, and how the legislation relates to the international harmonisation instruments in the area of cybercrime. This analysis will articulate in which respects the Dutch implementation falls short of its obligations under international legal instruments, and, conversely, suggest elements from Dutch cybercrime legislation that are as yet unaddressed by the international cybercrime harmonization effort.
1.2. **General Characteristics of Dutch Criminal Law**

For a good understanding of cybercrime legislation, some general characteristics of Dutch criminal law may be useful to mention. Criminal law is primarily codified in the Dutch Criminal Code (*Wetboek van Strafrecht*, hereafter: DCC) and the Dutch Code of Criminal Procedure (*Wetboek van Strafvoering*, hereafter: DCCP).¹ Substantive law distinguishes between crimes (Second Book DCC), to which almost all cybercrimes belong, and misdemeanours (Third Book DCC). The Criminal Code has a system of maximum penalties, but does not use minimum penalties. Another important characteristic of Dutch criminal law is the right to exercise prosecutorial discretion (*opportuniteitsbeginsel*). This means that the Public Prosecutor decides whether or not it is expedient to prosecute someone for an offence. A consequence of this principle for substantive law is that criminal provisions may be formulated broadly, covering acts that may not in themselves be very worthy of criminal prosecution; for example, changing without authorisation a single bit in a computer already constitutes damage to data (Article 350a DCC), but will usually not be prosecuted.

The sources of Dutch law are domestic statutes and international treaties. The Dutch Constitution is not a direct source, since the courts are not allowed to determine the constitutionality of legislation (Article 120 Dutch Constitution).² Courts can, however, apply standards from international law, most visibly the European Convention of Human Rights and Fundamental Freedoms (ECHR), when deciding cases. For the interpretation of domestic statutes, the parliamentary history is a leading source, followed by case law³ (particularly from the Dutch Supreme Court) and by doctrinal literature.

1.3. **History of Dutch Cybercrime Legislation**

With respect to cybercrime legislation in the Netherlands,⁴ the most important laws are the Computer Crime Act (*Wet computercriminaliteit*) of

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¹ Both Codes are available in Dutch via [http://wetten.overheid.nl](http://wetten.overheid.nl), as are all other laws and regulations of the Netherlands.

² A Bill is pending to change Art. 120 of the Constitution and allow constitutional review, see *Kamerstukken I*, 2004/05, 28 331, No. A. This Bill has been accepted by both Chambers of Parliament in first reading, but yet requires acceptance, after elections, in second reading by a two-thirds majority of Parliament. The *Kamerstukken* are Parliamentary Documents. 'II' refers to the Second Chamber, 'I' to the First Chamber. All documents later than 1 January 1995 can be found at: [https://zoek.officielebekendmakingen.nl/](https://zoek.officielebekendmakingen.nl/), by searching on the series number, in this case 28331. Documents from before 1995 can be found at [http://www.statengeneraaldigitaal.nl/](http://www.statengeneraaldigitaal.nl/).

³ Case law is available in Dutch at [http://www.rechtspraak.nl](http://www.rechtspraak.nl), indicated with reference numbers LJN.

⁴ For a comprehensive discussion of Dutch cybercrime legislation, see Koops 2007. Extensive earlier discussions can be found in Kaspersen 1990 (substantive law); Wiemans 1991; Van Dijk & Keltjens 1995; Schellekens 1999 (substantive law), and Wiemans 2004 (procedural law).
CYBERCRIME LEGISLATION IN THE NETHERLANDS

1993\textsuperscript{5} and the Computer Crime II Act (Wet computercriminaliteit II) of 2006.\textsuperscript{6} Both are not separate Acts, but laws that adapted the Criminal Code and the Code of Criminal Procedure. As can be observed, the term most often used in the Netherlands to indicate crimes committed with computers as a target or substantial tool is ‘computer crime’ rather than cybercrime, which was not yet in use at the time legislation was initiated in the 1980s.

The Computer Crime Act was the result of an extensive legislative process, which started in 1985 with the establishment of a Computer Crime Committee (Commissie computercriminaliteit), also named, after its chairman Hans Franken, the Commissie-Franken. The committee made a thorough analysis of both the Criminal Code and the Code of Criminal Procedure, and presented an extensive report and recommendations in 1987.\textsuperscript{7} This led to the Computer Crime Bill that was submitted to Parliament on 16 May 1990. The Bill largely followed the committee’s recommendations, except for the search and seizure provisions.\textsuperscript{8} Various amendments and a heated debate in Parliament led to the definitive version of the Computer Crime Act that came into effect on 1 March 1993.

One of the most fundamental choices in this Act, and one of the most heatedly discussed topics in the literature in the 1980s and 1990s, was the choice to consider data as falling outside of the scope of the term ‘good’ (\textit{goed}).\textsuperscript{9} After all, a good in the criminal law need not be tangible as such, but it is definitely unique: only one person has possession of money in a bank account or electricity at the same time. Data, on the other hand, are multiple: when you ‘take away’ data from someone, you usually copy them and the original owner may still have access to them. Likewise, goods are the subject of property law, but data are the subject of intellectual property law. Therefore, the Dutch legislator decided that computer data were not to be considered as a ‘good’, so that all provisions in the DCC and DCCP were reconsidered when they contained an element of ‘good’, such as theft, damage to property, and seizure. It was not until 1996 that a case reached the Dutch Supreme Court for a final verdict on the matter, and it determined that data indeed are not a ‘good’.\textsuperscript{10}

\begin{itemize}
  \item \textsuperscript{5} Staatsblad 1993, 33. The Staatsblad is the Official Journal in which all Dutch laws and most decrees are published.
  \item \textsuperscript{6} Staatsblad 2006, 300.
  \item \textsuperscript{7} Commissie computercriminaliteit 1987.
  \item \textsuperscript{8} See infra, Section 2.2.1.
  \item \textsuperscript{9} See, \textit{inter alia}, Gerechtshof (Appeal Court) Arnhem 27 October 1983, \textit{NJ} 1984, 80 (controversially understanding data to be a ‘good’ that could be the object of embezzlement); Commissie computercriminaliteit 1987; Groenhuijsen & Wiemans 1989; Kaspersen 1990.
  \item \textsuperscript{10} Hoge Raad (Supreme Court) 3 December 1996, \textit{NJ} 1997, 574. The court decided that computer data could not be the object of embezzlement, since they are not a ‘good’: ‘After all, a “good” as mentioned in these provisions has the essential property that the person who has actual control over it, necessarily loses this control if some else takes over actual control. Computer data lack this property’. (All translations in this chapter are mine, BJK.) Incidentally, this did not help the defendant, since the court subsequently liberally interpreted the facts as embezzlement of carriers of computer
\end{itemize}

\textsuperscript{9}
In July 1999, a new bill was introduced in Parliament, the Computer Crime II Bill. This was intended to refine and update several provisions of the Computer Crime Act. The parliamentary handling of the Bill was slowed down because of the drafting of the Cybercrime Convention (hereafter: CCC), since it was thought wiser to integrate the Computer Crime II Bill with the implementation of this convention. On 15 March 2005, a bill to ratify the Convention was submitted to Parliament, and a week later a Memorandum of Amendments to the Computer Crime II Bill was published, that implemented, where necessary, the CCC. The Computer Crime II Act (Wet computercriminaliteit II) was accepted by Parliament on 1 June 2006 and entered into force on 1 September 2006. The Cybercrime Convention Ratification Act was accepted at the same time; it entered into force for the Netherlands on 1 March 2007.

In terms of other relevant international cybercrime instruments, the Netherlands, being member of the European Union, has implemented the EU Framework Decision 2005/222/JHA on attacks against information systems (hereafter: FD-AIS) in the Computer Crime II Act. It has signed but not yet ratified the Additional Protocol to the Cybercrime Convention on racist and xenophobic acts (CETS 189); it is generally felt that Dutch law already conforms to the Protocol provisions given the technology neutrality of the Dutch provisions criminalising racism. The Netherlands has also signed but not yet ratified the Lanzarote Convention on the protection of children against sexual exploitation and sexual abuse (CETS 201); a Bill is pending to implement this Convention.

2. Analysis of National Cybercrime Legislation

2.1. Substantive Criminal Law

The Computer Crime Act inserted two definitions in the Criminal Code. First, data are defined in Article 80quinquies DCC as ‘any representation of

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12 Kamerstukken II 2004/05, 30 036, Nos. 1-3.
13 Kamerstukken II 2004/05, 26 671, No. 7.
14 Staatsblad 2006, 301. The amendment to Art. 273d(2) DCC (criminalising interception of communications by non-public communication providers) entered into force on 1 September 2007.
15 Staatsblad 2006, 299.
16 Kamerstukken II 2008/09, 31 810, Nos. 1-3.
17 The numbering system in Dutch Codes may seem odd to, for example, common-law countries. The Criminal Code dates from 1886 and has frequently been amended since. To retain some system in the Code, new provisions are inserted where they seem most appropriate, and they have to be numbered ‘in between’ existing articles. In the past, this numbering was often done by adding Latin numerals – ‘bis’, ‘ter’, ‘quarter’, ‘quinquies’ etc. – to the article number after which they follow. Currently,
facts, concepts, or instructions, in an agreed-upon way,\textsuperscript{18} which is suitable for transfer, interpretation, or processing by persons or automated works.’

Second, a computer – in the terminology of the Act an ‘automated work’ (geautomatiseerd werk) – was defined in Article 80sexies DCC as ‘a construction (inrichting) designed to store, process, and transfer\textsuperscript{19} data by electronic means’. An earlier proposed definition was broader, but ultimately the definition was restricted to electronic devices. ‘The restriction to ‘electronic’ was suggested by the wish to exclude merely mechanically functioning information systems from the scope of the definition’.\textsuperscript{20} The minister noted that this was a more technology-specific definition, since the earlier ‘explanation spoke of the biochip. It does not seem a difficulty that this now falls outside the scope. It (the biochip) is still so far in the future that it does not have to be taken into account in the definitions now’.\textsuperscript{21} The restriction to electronic functioning implies that, if somewhere in the future quantum computers appear on the market, the definition will have to be adapted.

2.1.1. Offences against the Confidentiality, Integrity, and Availability of Computer Systems

2.1.1.1. Hacking

Hacking is penalized in Article 138a DCC as the intentional and unlawful entry into a computer or a part thereof. The maximum penalty is one year’s imprisonment for ‘simple’ hacking (para. 1), and four years’ imprisonment if the hacker after entry copies data (para. 2), or if she hacks via public telecommunications and uses processing capacity or hacks onwards to a third computer (para. 3).

In 1993, the legislator considered hacking only punishable if someone infringes a security measure or otherwise enters a computer by devious means. As a result, breaking of ‘some security measure’ (enige beveiliging) or using a technical intervention, false signals or key, or false identity was included as a requirement for the crime. In the legislative process leading to the Computer Crime Act, it was debated what level of security should be required: an absolute, maximum, adequate, minimal, or pro forma level of protection. The outcome was that a minimal level was sufficient, i.e., that

\begin{itemize}
  \item adding roman letters is preferred, e.g., 138a (hacking) was inserted after 138 (trespass), subsequently followed by 138b (denial-of-service).
  \item The 1993 definition used the rather cryptic formulation ‘whether or not in agreed-upon form’ (al dan niet op overeengekomen wijze) to indicate the form of representation of facts et cetera. Following criticism by Kaspersen 1993, p. 135 that this is a vacuous formulation, the clause ‘whether or not’ was deleted by the Computer Crime II Act in 2006.
  \item The clause ‘transfer’ was added to the definition in 2006.
  \item Kamerstukken II 1991/92, 21 551, No. 26.
  \item Handelingen II 24 June 1992, 93-8868. The Handelingen are the Parliamentary Proceedings of the debates in the Second (II) and First (I) Chambers.
\end{itemize}
there was some sort of protection, not merely a sign saying ‘do not trespass’. The security requirement was considered relevant as an incentive to induce people and companies to protect their computers, something which in the early 1990s was far from self-explanatory.

In 2006, however, the legislator decided to abolish the security requirement altogether. The argument held that the Cybercrime Convention and the Framework Decision on attacks against information systems did allow countries to pose a requirement of infringing security measures, but not a requirement of other types of deviance, such as using a stolen password or false identity. As a result, since the Computer Crime II Act, unlawfully entering a computer as such is punishable. The text now mentions as examples of ‘entry’: the breach of a security measure, technical intervention, false signals or key or identity. I consider this an odd construction, since infringing a security measure or using a stolen password (which is considered a ‘false key’) does not in itself constitute trespass. Moreover, the argument is still relevant that a security requirement functions as a warning to computer users that they should not leave their computers open to anyone who cares to drop by (or they should not complain that their computer is being ‘hacked’).

2.1.1.2. Illegal Interception

Illegal interception is criminalised in Article 139c DCC. This includes intercepting public telecommunications or data transfers in computer systems, including the interception of data between computer and keyboard or of the residual radiation from a computer screen. It excludes, however, intercepting radio waves that can be picked up without special effort, as well as interception by persons with authorisations to the telecom connection, such as employers. Covert monitoring by employers of employees is only an offence if they abuse their power.

Besides Article 139c, several other provisions contain related penalisations. Oral interception by technical devices is criminalised in Articles 139a (non-public premises) and 139b (public spaces). It is also prohibited to place eavesdropping devices (Article 139d DCC), to pass on eavesdropping equipment or intercepted data (Article 139e DCC), and to advertise for interception devices (Article 441 DCC). Despite this comprehensive framework regarding illegal interception, very few cases are published in which illegal interception is indicted.

Originally, the criminalisation was spread across different provisions by the Computer Crime Act, with penalisations of computer communications interception in closed premises (Art. 139a para. 2) or in public spaces (Art. 139b para. 2) and of public telecommunications interception (Art. 139c). These were integrated in Art. 139c by the Computer Crime II Act.
2.1.1.3. Data Interference

Data interference is penalised in Article 350a DCC, with a maximum penalty of two years’ imprisonment. This includes intentionally and unlawfully deleting, damaging, and changing data, but it goes further than the CCC and the FD-AIS by also including ‘adding data’ as an act of interference. Although adding data does not interfere with existing data as such, it does interfere with the integrity of documents or folders, so that it can be seen as a more abstract form of data interference. There is no threshold – even unlawfully changing a single bit is an offence – but minor cases will most likely not be prosecuted, given the Prosecutor’s right to execute prosecutorial discretion.

If the interference was, however, committed through hacking and resulted in serious damage, the maximum penalty is higher, rising to four years’ imprisonment (Article 350a, para. 2 DCC). ‘Serious damage’ includes an information system not being available for several hours.\(^{23}\) Non-intentional (negligent) data interference is penalised by Article 350b DCC, if serious damage is caused, with a maximum penalty of one month’s imprisonment.

Worms, computer viruses, and trojans are considered a special case of data interference, being criminalised in Article 350a, para. 3 DCC. The Computer Crime Act of 1993 used an awkward formulation to criminalise viruses: ‘data intended to cause damage by replicating themselves in a computer’ (emphasis added). Since only worms cause damage by the act of replication, this effectively only covered worms but not viruses or trojans. Still, it was generally assumed that the provision did cover most forms of malware through a teleological interpretation, in view of the intention of the legislator to penalise viruses. The Computer Crime II Act of 2006 replaced the text with a better formulation by describing viruses as data ‘designated to cause damage in a computer’. Even though trojans or logic bombs do not as such cause damage \textit{per se} in a computer, they are covered by this provision, according to the explanation in the Explanatory Memorandum.\(^{24}\)

2.1.1.4. System Interference

System interference is penalised in various provisions, depending on the character of the system and of the interference. If the computer and networks are for the common good, intentional interference is punishable if the system is impeded or if the interference causes general danger (gemeen gevaar) to goods, services, or people (Article 161sexies DCC). Negligent system interference in similar cases is also criminalised (Article 161septies DCC). Even if no harm is caused, computer sabotage is still punishable when

\(^{23}\) Hoge Raad (Dutch Supreme Court) 19 January 1999, \textit{NJ} 1999, 25.

targeted at computers or telecommunication systems for the common good (Articles 351 and 351bis DCC).

Whereas these provisions, all dating from the first wave of cybercrime legislation, concern computers with a ‘public value’, a relatively new provision concerns any computer interference. Article 138b DCC was included in the Computer Crime II Act to combat e-bombs and particularly denial-of-service (DoS) attacks: the ‘intentional and unlawful hindering of the access to or use of a computer by offering or sending data to it’.

Although DoS attacks have thus been criminalised only in 2006, prosecutors and courts were able to apply the ‘public-value’ provisions to some DoS attacks before 2006. The blockers of several government websites used for official news – including www.regering.nl (‘administration.nl’) and www.overheid.nl (‘government.nl’) – were convicted on the basis of Article 161sexies DCC to conditional juvenile detention and community service of 80 hours.25 Another district court, somewhat creatively, interpreted the hindering of an online banking service as constituting ‘common danger to service provisioning’.26 However, a DoS attack on a single commercial website was found not punishable under the pre-2006 law.27

Spamming is not criminalised in the Criminal Code, but regulated in Article 11.7 Telecommunications Act with an opt-in system (or opt-out for existing customers); violation of this provision is an economic offence (Article 1(2) Economic Offences Act). The supervisory authority, OPTA, has fined spammers in several cases with hefty fines.

2.1.1.5. Misuse of Devices

Misuse of devices has been penalised through the Computer Crime II Act in Article 139d, paras. 2-3 and 161sexies, para. 2 DCC. Article 139d, para. 2 threatens with punishment of up to one year’s imprisonment the misuse of devices or access codes with intent to commit a crime mentioned in Articles 138a (hacking), 138b (e-bombing or DoS attacks), or 139c (illegal interception). In para. 3, the punishment is raised to a maximum of four years if the intent is to commit aggravated hacking (as in Article 138a, para. 2 or 3, see above). Misuse of devices or access codes with intent to commit computer sabotage (as in Article 161sexies, para. 1) is covered by Article 161sexies, para. 2 DCC.

In these provisions, following the Cybercrime Convention, ‘misuse of devices’ covers the manufacture, sale, obtaining, importation, distribution or otherwise making or having available devices that are primarily (hoofdzakelijk) made suitable or designed to commit a certain crime, or the sale, obtaining, distribution, or otherwise making or having available computer passwords, access codes, or similar data that can be used for accessing a computer.

26 Rechtbank (District Court) Breda 30 January 2007, LJN AZ7266 and AZ7281.
27 Gerechtshof (Appeal Court) ’s-Hertogenbosch 12 February 2007, LJN BA1891.
An omission of the legislator is the misuse of devices with intent to commit data interference, such as spreading computer viruses. This is covered by the Cybercrime Convention, but the target offence of data interference in Article 350a DCC is not included in the new provisions on misuse of devices. The legislator argued that the criminalisation of spreading viruses, Article 350a, para. 3 DCC, is itself a preparatory crime, and therefore refrained from criminalising misuse of devices for data interference. The legislator’s argument is flawed, however, because the Dutch criminalisation of spreading a virus was introduced as criminal attempt of data interference rather than as a preparatory crime. Moreover, preparation of spreading viruses, such as making or possessing a virus toolkit, is not covered by Article 350a, para. 3 DCC, but it certainly falls within the scope of Article 6CCC as part of the black market of cybercrime tools that Article 6 is supposed to combat. This constitutes one of the rare instances where the Netherlands has insufficiently implemented the Cybercrime Convention.

Besides the new provisions of misuse of devices to implement Article 6 CCC, three provisions already existed that criminalised specific types of misuse of devices:

- Article 234 DCC penalises misuse of devices (goods or data) that the perpetrator knows to be designated for committing aggravated forgery (Article 226, para. 1 sub 2-5) or card forgery (Article 232, para. 1), with a maximum of four years’ imprisonment;
- Article 326c, para. 2 DCC penalises with a maximum of two years’ imprisonment the public offering, possession with the goal of distribution or import, and making or having available for profit of devices or data that are ostensibly designated for committing telecommunications fraud (the crime of Article 326c, para. 1 DCC). If this happens on a professional basis, the maximum penalty increases to four years’ imprisonment (para. 3);
- Article 32a Copyright Act penalises the public offering, possession with the goal of distribution, import, transport, export, and having available for profit of devices for software-protection circumvention, with a maximum penalty of six months’ imprisonment. This holds true only if the devices are exclusively designed (uitsluitend bestemd) to circumvent software-protection measures.

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28 Kamerstukken II 2004/05, 26 671, No. 7, p. 36.
29 Kamerstukken II 1990/91, 21 551, No. 6, p. 39.
30 Explanatory Memorandum to the Cybercrime Convention, §71.
31 The term ‘data’ was included in this provision by Act of 21 April 2004 (Staatsblad 2004, 180) to cover, for example, computer programs designated for forging traveller’s cheques or shares, implementing the European Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment, OJ 2 June 2001, L149/1.
2.1.2. Computer-related Traditional Offences

2.1.2.1. Computer Fraud

Computer-related fraud falls within the scope of the traditional provision on fraud or obtaining property or services through false pretences (oplichting), Article 326 DCC, with a maximum penalty of four years’ imprisonment. For example, the unauthorized withdrawing of money from an ATM with a bank card and pin-code is fraud. The Computer Crime Act of 1993 added that fraud includes deceiving someone into providing computer data with economic value in the regular market (geldswaarde in het handelsverkeer), such as computer programs or address databases. However, the falsely obtaining of pin codes or credit card numbers was not covered by this provision, as these data are not tradable on the regular market but only on black markets. As a result, phishing for personal or financial data did not constitute fraud if the data were merely being collected without being used. This lacuna was only recently addressed by, oddly enough, an omnibus anti-terrorism law, which replaced ‘data with economic value in the regular market’ with simply ‘data’.

Other fraud-related offences that also cover computer-related crime are extortion (Article 317 DCC) and blackmail (Article 318 DCC). The provision on extortion used a similar clause as fraud, but here, the clause ‘data with economic value in the regular market’ was already replaced by ‘data’ in 2004, so that it includes the obtaining of pin codes and other data under threat of violence. For blackmail, this clause was similarly changed by the aforementioned anti-terrorism Act in 2009.

A special case of fraud is telecommunications fraud, which is specifically penalised in Article 326c, para. 1 DCC: the use of a public telecommunications service through technical intervention or false signals, with the intention of not fully paying for it. This is punishable with up to four years’ imprisonment.

2.1.2.2. Computer Forgery

Computer-related forgery falls within the scope of the traditional provision on forgery (Article 225 DCC), which criminalises ‘forgery in writing’ (valsheid in geschrift) with a maximum penalty of six years’ imprisonment. In a landmark case, the term ‘writing’ (geschrift) in this provision was interpreted as covering computer files. This so-called ‘Rotterdam computer fraud’ case

33 Koops & Wiemans 2005.
36 Staatsblad 2009, 245.
concerned an administrative civil servant working for the municipality of Rotterdam, who added fraudulent payment orders to the automated payment accounts system. The court formulated two criteria for a computer file to serve as a 'writing' in the sense of Article 225 DCC: it should be fit to be made readable (i.e., the electronic or magnetic signs should be translatable into any understandable language, including computer languages), and it should be stored on a medium with sufficient durability. Even though in the present case the fraudulent orders were inserted in a temporary, intermediate file that only existed for a few minutes, the court held that the file had a legal purpose, since it was an essential link in the chain of proof of the accounts system, and that under these circumstances, the file was stored with sufficient durability. Since this case, computer forgery can regularly be prosecuted on the basis of Article 225 DCC.

Apart from the general provision on forgery, there is a specific penalisation of forgery of payment or value cards (Article 232, para. 1 DCC), introduced by the Computer Crime Act in 1993. In the Computer Crime II Act, this provision was extended to cover all kinds of chip cards that are available to the general public and that are designed for payments or for other automated service provisioning. This provision has been used in several cases to prosecute phone debit-card fraud and skimming. Article 232, para. 2 DCC penalises the use, provision, possession, receiving, obtaining, transport, sale, or transfer of a forged payment or service card with a maximum of six years' imprisonment.38

2.1.2.3. Data Theft

Although theft – taking away property – does not cover appropriation of data (see supra, Introduction), the Dutch doctrine that data are not a 'good' seems ripe for revision. With the advent of virtual worlds like Second Life and World of Warcraft, in which data constituting virtual property increasingly seems to acquire real-life economic value, the arguments underlying the doctrine no longer seem entirely convincing. In these virtual worlds, objects exist that do not consist of 'multiple' data but of data that are in the (almost39) unique possession of a platform or game user. Moreover, some of these objects, like valuable weapons or shields or fancy clothes, can only be acquired by investing significant time and/or money in the virtual world, and a market is emerging where such objects are traded.

Two Dutch cases have been published that apply a new interpretation of 'goods'. The most notable one concerned two boys playing the multiplayer online role-playing game of Runescape, who joined another boy to his home, where they hit the boy and forced him to log on to the game. They

38 The acts of provision and possession were penalised by the Act on concentrated penalization of fraudulent acts, Staatsblad 2000, 40; the other acts were penalised by the Fraud in non-circulating currency Act, Staatsblad 2004, 180, implementing the European Framework Decision 2001/413/JHA.
39 They are usually also under the control of the platform or game provider.
subsequently pushed him away from the computer and transferred a virtual amulet and mask from the victim’s account to their own account. The District Court and Appeal Court Leeuwarden held that the two boys had stolen goods, since they had taken away data that were unique (only one person could possess them at one point in time) and that had economic value. The other case concerned three fourteen-year-old boys who in Habbo Hotel, a popular virtual platform for children, had taken away pieces of furniture from other users, by logging in on their accounts with passwords acquired through a phishing website. The juvenile court convicted the offenders for hacking as well as for aggravated theft (Article 311 DCC).

These cases have been endorsed by some in the literature as a sensible re-interpretation of the doctrine concerning ‘computer data as goods’. It will be interesting to see whether, and if so in what kinds of circumstances, other courts will follow this line.

2.1.2.4. Identity Theft

Identity theft, or somewhat broader: identity fraud, refers to committing an unlawful act, typically fraud, by using the identity of someone else or of a non-existing person. It is largely a two-stage process, of collecting identification and personal data (stage 1) and using these to commit the unlawful activity (stage 2). Usually, the activities of stage 2 will be punishable under a variety of existing criminal provisions, such as fraud, theft, forgery, or impersonation. The stage 1 activities could fall under cybercrime provisions, such as hacking or illegal interception; they could also, perhaps, be considered criminal attempts to commit the target offence.

The patchwork of potential offences to qualify identity theft is not an ideal situation, particularly not for victims reporting the crime at the police. It is therefore being discussed in the Netherlands whether a separate criminal offence of identity theft should be introduced. So far, however, no proposals have been published for a separate identity theft offence.

2.1.2.5. Sexual Offences: Grooming

Grooming consists of paedophiles establishing a trust relationship with a minor in order to subsequently meet for sexual abuse. Online grooming, i.e., using the Internet to establish trust, is criminalised by the Lanzarote Convention (CETS 201), in Article 23:

40 Rechtbank (District Court) Leeuwarden 21 October 2008, LJN BG0939; Gerechtshof (Appeal Court) Leeuwarden 10 November 2009, LJN BK27764 and BK2773.
41 Rechtbank (District Court) Amsterdam 2 April 2009, LJN BH9789, BH9790, and BH9791.
‘the intentional proposal, through information and communication technologies, of an adult to meet a child (...) for the purpose of committing [a sexual offence], where this proposal has been followed by material acts leading to such a meeting’.

The sexual offences at issue are having sex with a child under the legal age for sexual activities, and producing child pornography. In this provision, the preparatory act of arranging a meeting and, for example, booking a train ticket, constitutes a crime, regardless of whether the meeting actually takes place. Of course, a key issue is whether it can be proven that the meeting has the purpose of having sex or making (child-porn) images, which will require considerable circumstantial evidence.

In Dutch law, grooming is not yet a crime. To implement the Lanzarote Convention, a new provision, Article 248e DCC, has been proposed. The provision is somewhat broader than the Lanzarote Convention, in that it criminalises using a computer or a communication service to propose a meeting with a minor under the age of 16 with the intention of committing sexual abuse or creating child pornography, if any act is performed to effectuate such a meeting. The proposed maximum penalty is two years’ imprisonment.

2.1.3. Illegal Content

Content-related offences are punishable regardless of the medium in which the content has been published. These offences include discrimination (Article 137c-g DCC), defamation of royalty (Articles 111-113 DCC), defamation of friendly heads of state (Articles 118-119 DCC), and defamation, libel, and slander (Articles 261-271 DCC). The aggravating circumstance of libel in writing (smaalschrift) will in all likelihood include publishing libellous statements by electronic means, such as in a message to a newsgroup.

2.1.3.1. Child Pornography

In Dutch law, child pornography is penalised in Article 240b DCC, carrying a maximum penalty of four years’ imprisonment. This includes the manufacture, distribution, publicly offering, and possession of pictures that show a minor in a sexual act. Doing this on a professional or habitual basis raises the maximum penalty to eight years’ imprisonment.45 To conform with

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44 Kamerstukken II 2008/09, 31 810, Nos. 1-3.
45 This penalty was raised by the omnibus antiterrorism Act of 12 June 2009, Staatsblad 2009, 245, from six to eight years in order to allow the special investigation power of direct interception (see infra, Section 2.1.5), in particular breaking into a house to place a bug in a suspect’s keyboard, for example in order to retrieve passwords or encryption keys. This investigation power, when it involves trespass into a house, can only be used in cases carrying a maximum penalty of at least eight years’ imprisonment. See Kamerstukken II 2007/08, 31 386, No. 3, p. 9.
the Cybercrime Convention’s preferred standard, the age limit for child pornography was raised in 2002 from 16 to 18 years.\footnote{Staatsblad 2002, 388.}

Although prosecutorial priority is given to child-porn manufacture and commercial distribution, many prosecuted cases involve intentional possession of child pornography by individual users. Particularly relevant from the perspective of computer crime evidence is when a computer user can be considered to intentionally possess child-porn images found on his hard disk, given that computer users are not always aware of, for example, temporary Internet files or unallocated clusters (deleted files that can be retrieved with forensic software). The courts generally apply the standard that someone is criminally liable for possessing child pornography on his hard disk if he is aware of the presence of these files, has power of disposal over these files, and has the intention of possessing them; in other words, he should know, be able, and want. In applying this standard, the courts look at a range of factors, many of which relate to whether or not the defendant had been actively involved in child pornography, for example, by searching for or frequently looking at child porn on the Internet.\footnote{Stevens & Koops 2009, based on a survey of over fifty Dutch cases of hard-disk possession of child pornography.}

Currently, watching child pornography without actually possessing it is not criminalised. This is going to change if the Bill to implement the Lanzarote Convention is passed, which will extend Article 240b DCC with ‘intentional access’ as a criminal act. To prevent accidental stumbling across online child pornography from being criminalised, evidence should show that the defendant was actively focusing on accessing child pornography, for example, by paying for accessing a restricted-access website.\footnote{Kamerstukken II 2008/09, 31 810, No. 3, p. 4.}

In 2002, to implement the Cybercrime Convention, virtual child pornography was included as a punishable offence in Article 240b, as sexual images ‘seemingly involving’ a minor (waarbij (…) schijnbaar is betrokken). ‘Seeming’ to involve a minor is a vaguer standard than the term ‘realistic image’ used in the Cybercrime Convention, raising questions how this element should be interpreted. The legislator has given different explanations, ranging from a high level of realism – ‘The image looks like the image of a real child. The image is indistinguishable from a real picture’\footnote{Kamerstukken II 2001/02, 27 745, No. 6, p. 16.} – via ‘the image should at first sight be indistinguishable from real’\footnote{Kamerstukken II 2001/02, 27 745, No. 6, p. 14 (emphasis added).} to a considerably lower level of realism: ‘Children’s interest can be equally at issue in cases where the images are less realistic. Also images that are not evidently lifelike (levensecht), can for example suggest sexual child abuse or be part of a subculture that advances sexual child abuse’.\footnote{Aanwijzing kinderpornografie (Art. 240b WvSr) (Guideline child pornography (Art. 240b DCCP), Staatscourant (Official Gazette) 2007, No. 162, p. 8.}

To date, only one case has been published of criminal virtual child pornography; in this case, the latter – lower – standard was applied. A man
possessed a cartoon movie, ‘Sex Lessons for Young Girls’, showing a young girl engaged in sexual activity with an adult man. The court considered this sufficiently realistic because an average child would not be able to distinguish between real and cartoon people. The ‘average child’, in this court’s opinion, is a relevant yardstick for cartoon movies like this one that are intended – as indicated by the title and form – as a sex course for young children. A conviction for virtual child pornography therefore fitted the rationale of combating a subculture that promotes child abuse.\(^{52}\) The particular circumstances of the case – such as the title of the movie and the fact that it was actually shown to a young child – are likely to have played a role in the stress put in this decision on the rationale of combating a subculture of child abuse. To date, this is the only conviction for virtual child pornography in the Netherlands, and it remains to be seen whether in future cases courts will adopt this court’s using the perspective of a minor to interpret the term ‘realistic’.

2.1.3.2. Racism

A Bill is pending for ratification of the Additional Protocol to the Cybercrime Convention on racist and xenophobic acts (CETS 189).\(^{53}\) The acts covered by the Protocol, however, are already criminal under existing legislation, since the provisions on racism do not refer to media and hence are applicable as well in an online context.\(^{54}\) These provisions are thus regularly applied to Internet publications.\(^{55}\) Article 137c DCC penalises insult of communities, i.e., utterances in public – orally, in writing or with images – that are intentionally insulting to groups of the population on the basis of their race, religion, philosophy of life, sexual orientation, or handicap. Article 137d DCC similarly penalises discrimination or inciting hatred of people on these grounds. Both offences are punishable by a maximum imprisonment of one year, or, if done by profession or custom or in alliance with others, two years. Article 137e DCC criminalises the publication of discriminatory statements as well as dissemination or stocking for dissemination purposes of carriers with discriminatory utterances, if done otherwise than for the purposes of professional reporting. This offence is punishable with a maximum of six months’ imprisonment, or, if done by profession of custom or in alliance with others, one year imprisonment. Finally, participating in or supporting discriminatory activities is punishable on the basis of Article 137f DCC with maximally three months’ imprisonment, and discriminating people in the performance of a profession or business is punishable with six months’ imprisonment (Article 137g DCC).

\(^{52}\) Rechtbank (District Court) ’s-Hertogenbosch 4 February 2008, LJN BC3225.
\(^{54}\) For a general overview, see De Roos, Schuijt & Wissink 1996.
\(^{55}\) See, for example, Gerechtshof (Appeal Court) Amsterdam 17 November 2006, LJN AZ2011, convicting someone for publishing discriminatory statements about Jews and homosexuals on a website.
The only provision from the Protocol that is not as such criminalised yet in the Netherlands, is article 6, concerning denial, gross minimisation, approval or justification of genocide or crimes against humanity. This offence is also included in Article 1 para. 1 sub (c) and (d) of the EU Framework Decision on racism and xenophobia.\(^56\) Often, genocide denial will nevertheless be punishable on the basis of Articles 137c, 137d, or 137e DCC, since these statements will generally be insulting or discriminatory for the groups subjected to the genocide or crimes against humanity.\(^57\) To make genocide denial more visibly punishable, a Bill was proposed to criminalise ‘negationism’ in a new provision, Article 137da DCC, which would fully cover the acts mentioned in Article 6 of the Protocol.\(^58\) This Bill has largely lain dormant after its submission in June 2006, and despite a reintroduction in July 2009, still awaits discussion in Parliament.

2.1.4. Infringements of Copyright and Related Rights

In Dutch law, copyright law is usually enforced by private law, but the Copyright Act 1912 (\textit{Auteurswet} 1912, hereafter: Copyright Act) contains several criminal provisions. Article 31 of the Copyright Act criminalises intentional infringement of someone else’s copyright, punishable with a maximum imprisonment of six months. Intentionally offering for dissemination, stocking for multiplication or dissemination, importing or exporting, or keeping for pursuit of gain of an object containing a copyright infringement is punishable with maximally one year imprisonment (Article 31a Copyright Act), which rises to four years’ imprisonment if done as a profession or business (Article 31b). Articles 34 through 35d contain further offences, the most important of which is the intentional altering of copyrighted works in a way that is potentially harmful to their maker (Article 34).

For cybercrime purposes, the aforementioned Article 32a Copyright Act is particularly relevant. This provision criminalises misuse of devices, without consent, for circumventing copyright-protection measures that protect software. This offence, punishable with up to six months’ imprisonment, was introduced to comply with the Software Directive, 91/250/EEC (1991). In contrast to the misuse of devices of Article 6 Cybercrime Convention, Article 32a only concerns devices \textit{exclusively} (rather than primarily) targeted at software-protection circumvention.

The Copyright Directive 2001/29/EC contains a provision more similar to Article 6 Cybercrime Convention, in that it declares unlawful misuse of devices primarily targeted at circumventing copyright-protection measures.


\(^{57}\) See, for example, Rechtbank (District Court) ‘s-Hertogenbosch 21 December 2004, \textit{L/N AR7891}, finding someone guilty of discrimination (Art. 137c DCC) for publishing on the Internet a website in Dutch with a text titled ‘The Holocaust that never was’.

\(^{58}\) \textit{Kamerstukken} II 2005/06, 30 579, Nos. 1-3.
of copyrighted works. This provision has been implemented in Dutch private law rather than criminal law: Article 29a Copyright Act defines as tort the intentional circumvention of effective technical measures (paragraph 2) and the misuse of devices primarily designed to circumvent effective technical measures (paragraph 3(c)).

2.1.5. Privacy (or ‘Data Protection’) Offences

2.1.5.1. Privacy Offences

Several offences in the Criminal Code concern violations of spatial or relational privacy, such as trespass (Article 138 DCC), but these generally do not relate to computer crime, with the exception of unlawful communications interception. Relevant for cybercrime, however, is the criminalisation of stalking in Article 285b DCC. This is defined as the unlawful systematic violation of another person’s privacy (persoonlijke levenssfeer) with the objective of forcing that person to do, not to do, or to tolerate something or of intimidating her; it carries a maximum penalty of three years’ imprisonment. Few court cases have been published concerning cyberstalking as such; most stalking cases in practice comprise combinations of physical and electronic means of harassment. The Supreme Court has hinted that repeatedly making obscene phone-calls to someone might constitute stalking. A lower court considered that posting threatening messages on a fan website of a famous person could not be considered stalking, since the time of posting – two days – was too brief for the behaviour to be considered systematic. Sending loads of email, sms, and Hyves messages during months or years, however, is a clear case of stalking. Various courts have also punished the placing of announcements on dating websites purporting to be from another person, thus causing this person to receive email responses, as stalking. Similarly, creating a profile page with pictures of someone else on the social-network site Hyves – in combination with other harassing activities – can also be considered stalking.

Somewhat related to cybercrime are the offences of secretly making visual images of people. If someone uses a camera, the presence of which has not been explicitly been made known, to intentionally and unlawfully make pictures of someone, he can be punished with up to six months’ imprisonment if it concerns non-public places (Article 139f DCC) or up to two months’ imprisonment if it happens in public spaces (Article 441b DCC).

50 See supra, Section 2.1.1.2.
51 Rechtbank (District Court) Rotterdam 28 April 2009, L/JN BI2713.
52 Hyves is the most popular social-network site in the Netherlands.
53 Rechtbank (District Court) Breda 30 October 2009, L/JN BK1696.
55 Rechtbank (District Court) Groningen 1 November 2007, L/JN BB6924.
2.1.5.2. Data Protection Offences

Behaviour that violates informational privacy – or data protection – could in some cases be prosecuted on the basis of data interference (Article 350a DCC, see above), but there is no provision in the criminal law that specifically targets data protection violations. The Data Protection Act (Wet bescherming persoonsgegevens, hereafter: DPA) is largely enforced by private or administrative measures. The DPA criminalises only three acts, in Article 75:

- failure to notify the Data Protection Authority of personal data processing (unless an exemption applies),
- processing of personal data on Dutch territory by a data controller established outside of the European Union, if the controller has not designated a person or organisation in the Netherlands who complies with the DPA on his behalf, and
- transfer of personal data to a third country outside of the EU if this has been prohibited by ministerial order.

These activities can be punished with a maximum fine of 3,350 Euros or, when committed intentionally, with imprisonment of at most six months. The literature has suggested, on the basis of examples from other EU member states, that more types of violations of data-protection rules should be enforced by criminal provisions rather than civil or administrative measures.66

2.1.6. Liability of Internet Service Providers

The liability of Internet Service Providers (ISPs) for illegal or unlawful content has been regulated as a consequence of the Electronic Commerce Directive.67 The major portion concerns civil liability, as regulated in Article 6:196c of the Civil Code (Burgerlijk Wetboek). ‘Mere conduit’ providers are not liable; caching providers are not liable if they do not change information and if they operate according to generally recognized procedures; and providers of information services are not liable if they have no knowledge of unlawful content and if they remove or make inaccessible the information as soon as they do gain knowledge.

One specific exemption from liability for ISPs has been inserted in the criminal law. Article 54a DCC determines that intermediaries who offer a telecommunications service consisting of transport or storage of data shall not be prosecuted as such68 if they do all that can reasonably be asked of

68 ‘As such’ means that they will not be prosecuted as a liable intermediary; they may, however, be prosecuted as a content provider if they have made or selected or
them to ensure that the data are made inaccessible, in response to an order from the public prosecutor. The prosecutor requires a warrant from the investigating judge for such an order, so that there is an independent check by the courts on whether the information at issue really is illegal or unlawful.

2.2. Criminal Procedure

In contrast to the Criminal Code, the Code of Criminal Procedure lacks definitions of ‘data’ and ‘computer’, and the DCC definitions do not as such apply to the DCCP. Paul Wiemans has therefore suggested to incorporate the same definitions in the DCCP as well.69

2.2.1. Coercive Investigatory Powers

Investigation powers can be used for investigation offences, depending on the invasiveness of the investigation power and the seriousness of the offence under investigation. An often-used threshold for allowing investigation powers is that the crime allows pre-trial detention, which generally is the case for crimes carrying a maximum of at least four years’ imprisonment (Article 67, para. 1 under a DCCP), but which is also possible for certain specifically mentioned offences (Article 67, para. 1 under b DCCP). Because digital investigation powers may also be required for ‘simple’ cybercrimes, for example hacking without aggravating circumstances, the Computer Crime II Act has inserted almost all cybercrimes specifically in Article 67, para. 1 under b DCCP. As a result, for most cybercrimes pre-trial detention is allowed regardless of their maximum penalty, and most investigation powers can be used to investigate them.

Investigation and prosecution of cybercrime can take place through a variety of means. The whole gamut of investigation powers can be used, including search and seizure. The traditional investigation powers have been supplemented by several computer-related investigation powers, such as a network search and production orders for traffic data. Many powers were introduced in 2000 by the Special Investigatory Powers Act (Wet bijzondere opsporingsbevoegdheden),70 which inserted a complex set of provisions in the DCCP after Article 126f DCCP. This set has subsequently been extended several times, and now comprises investigation powers focused on criminal investigation of a concrete crime based on probable cause in Articles 126g through Article 126ni, by and large the same provisions focused on investigating committed or planned organised crime in Articles 126o through 126z, again the same type of provisions but now focused on investigating terrorist crimes (which can start on the basis of mere ‘indications’ rather than on the normal standard of ‘reasonable suspicion’ (redelijke verdenking)) in

otherwise contributed to the content themselves. Cf. Gerechtshof (Appeal Court) Leeuwarden 20 April 2009, LJN BI1645.


70 Staatsblad 1999, 245.
Articles 126za through 126zu, and topped off with some general provisions on, for example, notification, data storage, and data mining, in Articles 126aa through 126ii. In this section, I will restrict myself to the set of provisions for investigating a concrete crime.

2.2.1.1. Production and Preservation Orders

The Computer Crime Act created a data production order in Article 125i DCCP, enabling the investigating judge to order someone – who probably had access to the data sought – to provide data or to give the judge access to data, if these data had a certain relationship to the crime or the suspect or logging data. The power was rather restricted and appeared insufficient, and therefore, a much broader set of provisions entered into force in January 2006 with the Data Production Orders Act (Wet bevoegdheden vorderen gegevens).71 These provisions allow the ordering of:

- **identifying data** by any investigating officer in case of a crime (but not a misdemeanor), according to Article 126nc DCCP. Identifying data are name, address, zip code, date of birth, gender, and administrative numbers;
- **other data** by the public prosecutor in cases for which pre-trial detention is allowed, according to Article 126nd DCCP; moreover, **future data** can also be ordered, including – in urgent cases and with permission of the investigating judge – real-time delivery of future data, for an extendible period of four weeks, Article 126ne DCCP. This enables law-enforcement officers to require production of all data that will come into being in the next few weeks or months;
- **sensitive data** by the investigating judge in case of a pre-trial detention crime that seriously infringes the rule of law, according to Article 126nf DCCP. Sensitive data are data relating to religion, race, political or sexual orientation, health, or labour-union membership.

The orders can be given to people who process the data in a professional capacity; an order of ‘other’ stored data and of sensitive data, however, can also be directed at people who process data for personal use. Suspects can not, however, be ordered to provide data, in view of the privilege against self-incrimination. If the data are encrypted, the people targeted by the production order – excluding suspects – can be ordered to decrypt them, according to Article 126nh DCCP.

71 Staatsblad 2005, 390. The provisions established in this Act (126nc-nf DCCP) replaced existing provisions with similar production orders that were limited to financial service providers. These provisions had been introduced earlier than the general production orders, by Act of 18 March 2004, Staatsblad 2004, 109, to implement in time the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OF C326 of 21.11.2001, see Kamerstukken II 2001/02, 28 353, No. 3, p. 1-2.
The Computer Crime II Act introduced a power to order the preservation of data, as required by the Cybercrime Convention. Article 126ni DCCP enables the public prosecutor, in cases of crimes for which pre-trial detention is allowed and which seriously infringe the rule of law, to order someone to preserve data stored in a computer that are particularly vulnerable to loss or change. The preservation can be ordered for a (once extendible) period of at most 90 days. If the data relate to communications, the communications provider is also required to provide the data necessary for retrieving the identity of other providers whose networks or services were used in the relevant communication (para 2).

2.2.1.2. Search and Seizure

There are no specific provisions on searching and seizing computer-related data. When the Computer Crime Act of 1993 was debated, the legislator decided – contrary to the suggestions of the Computer Crime Committee – that traditional search provisions cover computer searches (see Articles 96b, 96c, 97, and 110 DCCP). After all, a search comprises the systematic and in-depth looking for something, and includes the power to break, where necessary, security measures; a computer, in that respect, is no different from a closet or safe. The general seizure provisions (Articles 95, 96, 96a, and 104 DCCP) can be used to seize data-storage devices. Data as such can not be seized, since they are not considered 'goods', but they may be copied by law-enforcement officers during a search – comparable to the copying of, for instance, fingerprint marks.

A theoretical technicality was, however, that a search could only be effected for seizure or for arresting a suspect. Since data cannot be seized, a search for data investigation was theoretically impossible. (In practice, though, a search to seize storage devices sufficed.) The Data Production Orders Act therefore introduced in Article 125i DCCP (replacing the old Article 125i DCCP, supra, section 2.2.1.1) the power to search in order to 'secure' (vastleggen) data.

Since in certain cases there is a need to 'seize' rather than merely copy data (e.g., child porn or a virus program), the Computer Crime II Act introduced powers to 'make data inaccessible' (ontoeigend macht), Article 125o DCCP. This can be done with data that are the object or the means of a crime, by first copying and then deleting the data on the original device, or by encrypting them. The definitive deletion of the data – or the restoration, if the making inaccessible was unjustified – must be ordered by a judge in court, Article 354 DCCP.

The Cybercrime Convention also includes a power to conduct a network search, if during a search relevant data appear to be stored elsewhere on a network. The Netherlands had already enacted such a power in the 1993 Computer Crime Act. Article 125j DCCP allows the person who

72 See supra, Section 1.
conducts a search to also search computer networks from computers located at the search premises. The network search, however, may only be conducted to the degree that the network is lawfully accessible to the people who regularly stay in those premises. Under the current interpretation, the network search can not go beyond the Dutch borders. No information or experience is available yet about how the Netherlands will interpret the Cybercrime Convention's exception of extraterritorial network search with lawful consent from a lawful authority (Article 32 CCC).

A further ancillary power to the search and seizure procedures was introduced by the Computer Crime Act. This enables the investigating officer to order the undoing of a security measure (Article 125k, para. 1 DCCP) and to order the decryption, or handing over of a decryption key, of encrypted data (Article 125k, para. 2 DCCP). The orders may not be given to suspects, in view of the privilege against self-incrimination (Article 125k, para. 3 DCCP). These orders could initially be given while the officer conducted a search or network search, which was felt to be too restrictive, since often computers are seized and investigated at the office only some time after the search. Therefore, the formulation was adapted in the Computer Crime II Act, but for some reason or other the legislator replaced 'during a search' with 'when Article 125i or Article 125j has been applied'. The legislator has apparently overlooked the fact that Article 125i only concerns a search to secure data, not a regular search on the basis of Articles 96b, 96c, 97, or 110, and in practice, a search will most often be conducted based on one of these other articles. This implies that security-undoing or decryption orders can not be given for computers or data carriers seized during normal searches. This was undoubtedly not the intention of the legislator, but the clear wording of Article 125k hardly allows for an analogous, teleological interpretation to cover other forms of searches. Moreover, it does not cover other situations in which computers are seized, for example when someone is stopped or arrested on the street and her laptop or pda is seized; this gap already existed under the old Computer Crime Act legislation, but has so far not been addressed by the legislator.

As general safeguards in the procedures for investigating computers and data, obligations exist to delete retrieved data as soon as they are no longer relevant for the investigation, except if they have to be used for a different case or registered in a serious crime register (Article 125n DCCP), and to inform the persons involved when data have been copied or made inaccessible. The persons to be notified are suspects (unless she automatically

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73 The formulation of this clause in para. 2 was rather awkward; it was improved by the Data Production Orders Act of 2005.

74 Something went wrong in the legislative process when the provision that the orders may not be given to suspects was transferred from Art. 125m-old to Art. 125k, para. 3, since the former was abolished by the Data Production Orders Act as of 1 January 2006 and the latter only came into effect with the Computer Crime II Act on 1 September 2006. During the interval, the security-undoing order could theoretically have been given to suspects.

75 Koops 2000, p. 19.
is informed through the case file), the controller of the data, and the right-holders of the place searched, except in cases in which notification is not reasonably possible (Article 125m DCCP).

2.2.1.3. **User and Traffic Data**

When the general and comprehensive regime for production orders (*supra*, under 2.2.1.1) was prepared in the mid-2000s, a separate regime was established for telecommunications data, based on the argument that this sector had an long-standing, well-functioning, and in some respects singular practice of providing data to law enforcement, in particular to provide real-time access to future traffic data.

The provision specifically targeted at obtaining user data is Article 126na DCCP. This allows any investigating officer, in case of a crime, to order a communications service provider to produce user data: name, address, number, and type of service. Article 126n, concerning traffic data (*infra*), also comprises the collection of user data.

If the provider does not have these user data available – which will often be the case with pre-paid cards – she may be ordered, on the basis of Article 126na, para. 2 DCCP, to retrieve the phone number of a pre-paid card user by comparing registries; the police then provide her with two or more dates, times, and places from which the sought person is known to have called. To make sure that providers have these data available, a three-month data retention obligation was established (*infra*, under 2.2.3). As an alternative, the police can also, if comparing registries by the telecommunications provider is impossible or too inefficient, use an IMSI catcher, that is, a device that resembles a mobile phone base station and that attracts the traffic of mobile phones in its vicinity. This power is regulated by Article 126nb DCCP, complemented by Article 3.10, para. 4 Telecommunications Act (*Telecommunicatiewet*) to sanction the disturbing of the radio frequency spectrum. An IMSI catcher may only be used to collect someone’s unknown telephone number (or IMSI number), but not to collect traffic data or to listen in on communications.

The power to order the production of communications traffic data is regulated by Article 126n DCCP, which allows the public prosecutor, in cases of crimes for which pre-trial detention is allowed, to order the production of traffic and user data from communications service providers. This can apply to stored data, but also to incoming future data for a period of up to three months, which have to be provided real-time. Traffic data are listed in an Order in Council as comprising names and numbers of sender (and of the one who pays for her subscription) and recipient, data, time, duration, cell

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76 See *infra*, note 82 and surrounding text.
77 Recipient number includes Internet addresses, such as which websites were visited, including the URLs of individual pages within a website. Kamerstukken II 2001/02, 28059, No. 3, p. 7-8.
location in the mobile network, numbers of peripheral equipment, and types of services used.

2.2.1.4. Interception of Content Data

Interception of communications content is an important investigation power in the Netherlands, which has a very high number of yearly law-enforcement interceptions. Article 126m DCCP enables the public prosecutor, with authorisation from the investigating judge, to order recording of communications that are made by means of a communications service provider’s service. Interception is allowed in cases for which pre-trial detention is allowed and which seriously infringe the rule of law. If the intercepted communications turn out to be encrypted, an order to decrypt may be directed at the person who is likely to know the decryption means, but not at the suspect, according to Article 126m para. 6 and 7 DCCP.

Since 2000, there is no longer a restriction that the interception has to target suspects; in theory, everyone may be intercepted, as long as this can be considered as contributing to the investigation, for example, when people in the vicinity of a suspect are likely to reveal relevant information. Persons with a right to non-disclosure (lawyers, public notaries, clergy, medical practitioners), however, cannot be intercepted, unless they are themselves a suspect; if in a regular wiretap a conversation with such a person on duty is recorded, it should be deleted (Article 126aa, para. 2 DCCP). In practice, however, conversations with attorneys frequently appear to be stored and included in case files; to address this long-standing contentious issue, a system is now proposed in which designated phone and fax numbers of attorneys are automatically recognised and excluded from interception.

Until 2006, interception was restricted to communications via public telecommunications networks. To meet the demands of the Cybercrime Convention, the power was broadened by the Computer Crime II Act to all communications service providers. A communications service provider is defined in Article 126la DCCP as a natural or legal person who professionally offers to the users of his service the opportunity to communicate by means of a computer, or who processes or stores data for the benefit of such a service or the service’s users. This comprises both public telecommunications providers and private providers of closed communication networks, such as internal company networks. The Explanatory Memorandum notes that the

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78 The cell location of mobile phones is considered traffic data when the phone is used for an actual (or attempted) communication, but not when the phone is merely in stand-by mode. Kamerstukken II 2001/02, 28 059, No. 3, p. 8.
79 Art. 2 Telecommunications Data Production Decree (Besluit vorderen gegevens telecommunicatie), Staatsblad 2004, 394.
80 Interception statistics have only been officially published since late 2007. In 2008, 26,425 interception orders were given; on average, each day 1946 intercepts were in operation. Kamerstukken II 2008/09, 30 517, No. 13.
81 Kamerstukken II 2008/09, 30 517, Nos. 8 and 12.
definition has been closely modelled on the definition of a service provider in Article 1 under c of the Cybercrime Convention.\textsuperscript{82}

For the default mode of interception, a distinction is made between public and private service providers. Article 126m, para. 3 DCCP determines that public telecommunications will be intercepted with the cooperation of the telecom provider, unless such cooperation is not possible or is contrary to the interest of the investigation. For all other forms of communications, para. 4 stipulates that the service provider will be offered the opportunity to cooperate in the interception, unless this is impossible or undesirable.

Since 1 July 2004, some forms of cross-border interception are allowed,\textsuperscript{83} following the EU Mutual Assistance between Member-States Treaty.\textsuperscript{84} Article 126ma CCP allows interception from the Netherlands of someone located abroad, after the other state has given consent. Also, interception and direct transmission from another state to the Netherlands can be requested, and, conversely, the Netherlands can grant interception and direct transmission from the Netherlands to another state.

Interceptability, that is, making sure that telecommunication networks and services are technically equipped to allow interception, as well as ensuring that telecommunications providers cooperate, is regulated by Chapter 13 of the Telecommunications Act (Telecommunicatiewet). Article 13.1 requires providers of public telecommunications networks or services to ensure that their network or service enables interception. This includes Internet providers. The obligation is detailed in an Order in Council and a Decree.\textsuperscript{85} The costs for making and keeping their networks or services interceptable are borne by the telecommunications providers themselves; operational costs for concrete intercepts are borne by the state (Article 13.6 Telecommunications Act). The interceptability legislation was evaluated in 2005, in light of technical and market developments in telecommunications, but this did not lead to substantial changes.\textsuperscript{86}

2.2.1.5. Other

Another major computer-related investigation power is direct interception. Article 126l DCCP allows the public prosecutor, with authorisation from the investigation judge, to order an investigating officer to record confidential communications with a technical device, in cases for which pre-trial
detention is allowed and that seriously infringe the rule of law. Confidential communication is defined as ‘communication between two or more persons that takes place in private’ (in beslotenheid); this includes communication between a keyboard, computer, and monitor, and so it covers data in transport as well. Examples of relevant technical devices are directional microphones, bugs, and keystroke loggers. If necessary, the power includes entering premises to place an eavesdropping device; if the premise is a dwelling, this can only be done if the crime carries a maximum punishment of at least eight years’ imprisonment, and the judge has to authorise it explicitly.

Other than breaking into a premise to place a technical interception device such as a keystroke logger, and the power to conduct an online network search while doing a regular search the police has no power to remotely search or hack into computers.87

The police do have several other relevant computer-related investigation powers, introduced by the Special Investigation Powers Act of 2000, are:

- **undercover operations**: Article 126j DCCP allows law-enforcement officers to systematically gather information undercover. This includes participating in Internet forums, chat groups, etc.;
- **infiltration and pseudo-purchase**: infiltration (Article 126h DCCP) and pseudo-purchase (Article 126i DCCP) allow investigating officers to infiltrate criminal organisations, on the public prosecutor’s order.88 This includes infiltration in computer child-porn networks, chat groups, etc., and the officers can pretend they want to buy or pay for access to online child pornography (Article 126i was extended by the Computer Crime II Act to include pseudo-purchase of computer data);
- **observation by technical means**: Article 126g DCCP allow the public prosecutor to order systematic observation. A technical device may be used for the observation, as long as this does not record confidential communication (for that, the power of direct eavesdropping, supra, should be used). This includes location-tracking devices, but these may not be attached to persons, only to objects;
- **preliminary investigation (verkennend onderzoek)**: Article 126gg DCCP allows law-enforcement officers to collect information about potential crime in certain sectors of society; data mining may be a primary tool for this.89 If the preliminary investigation focuses on a terrorist crime, the prosecutor can, with authorisation from the investigating judge, order the production of databases, and combine these with other

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88 See Siemerink 2000 for a discussion of online infiltration and pseudo-purchase.
89 See Sietsma 2006 for a discussion of data mining as an investigation power.
databases for data mining, in contravention to the limitations of the Police Registries Act (Article 126hh DCCP).  

2.2.2. Law of Evidence

The yardstick for conviction is that the trial judge has obtained the inner conviction that the defendant is guilty of the offence, based on the statutory means of evidence (Article 338 DCCP). The statutory means of evidence are the judge’s own observation, statements in court from the defendant, witnesses, and experts, and written documents (schriftelijke bescheiden) (Article 339 DCCP). Written documents include various official documents that have evidential value on their own, and all ‘other writings’ that count only in relation to the contents of other means of evidence (Article 344, para. 1 DCCP). An official report by an investigating officer has special evidential value, since it can constitute proof that the defendant committed the charged facts (Article 344, para. 2 DCCP). Reports by investigating officers can currently be drafted only in signed paper form, but electronic reports will be made possible in the near future (Article 153 DCCP).  

The ‘other writings’ of Article 344, para. 1 DCCP are independent of a medium and can include electronic documents, as long as they can be read aloud. Forensic digital evidence can thus be used in court in various ways: as official documents written by experts, as expert statements made in court, as official reports by investigating officers describing their observations or as observations by the judge when the evidence is demonstrated on a computer in court.

2.2.3. Obligatory Retention of Traffic Data and Location Data

In 2002, the Netherlands introduced a limited obligation for public telecommunications providers to retain data. Based on Article 13.4, para. 2 of the Telecommunications Act (Telecommunicatiewet) and the underlying Order in Council, providers of mobile telecommunications are required to store the dates and times, location, and phone numbers of pre-paid card callers, for a period of three months. This obligation was created in order to enable the retrieval of identifying data of pre-paid card users (supra, 2.2.1.3).

90 The Police Registries Act (Wet politieregisters) was replaced by the Police Data Act (Wet politiegegevens) in 2008; the legislator forgot at the time to update the reference in Art. 126hh DCCP, which will be repaired by an Omnibus Act, Staatsblad 2009, 525, not yet in force.

91 Staatsblad 2005, 470, adding a clause to Art. 153, para. 2 that an electronic report has the same status as a signed written report, if it conforms to the requirements stipulated by Order in Council. This provision has not yet entered into force, pending the Order in Council, which is expected to be introduced somewhere in 2010.

92 Decree on Special Collection of Telecommunications Number Data (Besluit bijzondere vergaring nummergegevens telecommunicatie), Staatsblad 2002, 31.
To implement the European Data Retention Directive, a comprehensive data retention regime for traffic data has been established. The government initially proposed a retention period of 18 months, which was reduced by the Second Chamber to 12 months. The First Chamber was critical of the Bill, but accepted it after the Minister promised to submit an amending bill that would further reduce the retention period for Internet Service Providers to six months. The Telecommunications Data Retention Act (Wet bewaarplicht telecommunicatiegegevens) entered into force on 1 September 2009; the promised amending bill is yet to be submitted to the Second Chamber. The data to be retained by telecommunication providers are listed in the Appendix to the Data Retention Act.

2.3. Jurisdiction

Substantive jurisdiction is set out first and foremost in Article 2 DCC, which provides that the Code ‘is applicable to anyone guilty of any offence in the Netherlands’. Article 4 DCC provides jurisdiction grounds for many specific offences committed outside of the Netherlands. This includes forgery, including computer forgery, committed abroad by Dutch government employees (Article 4(11) juncto 225 DCC) and computer sabotage or data interference committed against a Dutch national if the act is related to terrorism (Article 4(13-14) juncto 161sexies and 350a DCC).

Article 5 DCC establishes jurisdiction for certain crimes committed outside of the Netherlands by Dutch nationals. This includes publishing corporate secrets acquired by accessing a computer (Article 5, para. 1 under 1 juncto 273 DCC), and child pornography (Article 5, para. 1 under 3 juncto 240b DCC). Jurisdiction also exists for child pornography committed by foreigners with a fixed residence in the Netherlands, even when they come to reside in the Netherlands after the crime was committed (Article 5a DCC).

The Computer Crime II Act has established jurisdiction over almost all cybercrimes from articles 2 through 10 of the Cybercrime Convention when committed by Dutch nationals abroad, in a new section in Article 5, para. 1 under 4 DCC. Also, racist, discriminatory, libellous, slanderous, and threatening crimes from Articles 3 through 6 of the Additional Protocol to the Cybercrime Convention on racist and xenophobic acts will soon also be subject to Dutch jurisdiction when committed by Dutch citizens abroad.

94 Kamerstukken II 2006/07, 31 145, No. 2.
95 Handelingen I (Parliamentary Proceedings First Chamber) 7 July 2009, 40-1858.
96 Staatsblad 2009, 333.
97 Staatsblad 2009, 525, not yet entered into force.
2.4. **Self-regulation and Co-regulation in Relation to Illegal Content**

2.4.1. Notice and Take-down

The provision on ISP liability in the Criminal Code, Article 54a DCC (*supra*, section 2.1.6) has the semblance of a notice-and-take-down (NTD) procedure, in that it suggests that the public prosecutor can order an ISP to remove content deemed illegal. However, there is no mirroring provision in the Code of Criminal Procedure that establishes a power for the prosecutor to order removal of content, and in light of the procedural legality principle, a substantive-law provision on ISP liability cannot be considered a basis for a law-enforcement power. In addition, other arguments, such as a lack of legal protection for the stakeholders, indicate that Article 54a DCC cannot be considered a legal basis for an NTD procedure. Legislation is now being prepared to provide an NTD procedure for illegal content in a law-enforcement context.

In the meantime, co-regulation has created an NTD procedure for unlawful content. Stimulated by the NICC, the Netherlands Infrastructure Cybercrime, an NTD code of conduct was drafted by government and industry, which was accepted in October 2008. The code of conduct can be adopted by ISPs or other intermediaries on the Internet. It provides guidelines for dealing with notifications of unlawful or illegal content. In case of a formal notification by a public prosecutor, in line with Article 54a DCC, the intermediary simply takes down the content. In other cases, the intermediary evaluates on the basis of the notification whether the content is unequivocally unlawful (*onmiskenbaar onrechtmatig*) — the standard applied in tort cases on liability for unlawful content. If so, then the intermediary will remove the content, if not, the intermediary informs the notifier accordingly. If the intermediary cannot readily judge the unequivocal unlawfulness of the material, he will inform the content provider with the request to remove the material or to contact the notifier. If the notifier and content provider do not come to an agreement, the notifier can report the content to the police or, with unlawful content under civil law, bring her dispute before the courts. In the latter case, if the content provider is unwilling to make herself known to the notifier, the intermediary can decide to provide the notifier with the content provider’s name and contact details or to remove the content concerned.99

98 Schellekens, Koops & Teepe 2007.
2.4.2. Filtering and Blocking Websites

In the Netherlands, initiatives to filter and block websites with illegal content have, so far, been restricted to websites containing child pornography. In 2007, in a co-regulatory effort, several ISPs and the Netherlands Police Agency (KLPD) signed an agreement to the effect that the ISPs would block child-porn websites based on a blacklist created by the KLPD. The KLPD drafts the blacklist using, inter alia, the national child-pornography database but also blacklists from other countries with a similar system, such as Norway. In principle, only foreign websites are blocked in this way; for Dutch-hosted websites, a notice-and-takedown order is preferred; in practice, however, some websites hosted in the Netherlands are blacklisted as well. The blocking occurs on the level of domain names; users trying to access a blacklisted webpage get to see a ‘Stop’ page, which includes a police email address where the user can complain if she thinks the website was unjustly blocked.

The co-regulatory effort has recently been stepped up in a new Platform Internet Safety (Platform Internetveiligheid). The child-porn hotline, Meldpunt Kinderporno op Internet, a private party, will henceforth be responsible for the blacklist, the first of which is expected to appear in early 2010.

3. The Process of Harmonisation

Having extensively surveyed Dutch cybercrime legislation, we can observe that the Netherlands has in general very faithfully implemented international legal instruments in the area of cybercrime. All the relevant EC Directives and EU Framework Decisions have been implemented, and national legislation has been, or is being, updated to meet the standards of the international treaties and conventions to which the Netherlands is a party. The only pertinent objection that could be made to Dutch implementation of international instruments is that the legislator is frequently slow: for example, the Electronic Commerce Directive was transposed more than two years late, the transposition of the Data Retention Directive was two years late for telephone data, and it took almost five years to adapt Dutch law to the Cybercrime Convention.

100 See, extensively, Stol et al. 2008, in particular p. 88-102, on which this paragraph is based.
101 The legality of these agreements can be disputed, since the KLPD has no formal power to block Internet traffic and making agreements with private parties to do so is at odds with the public task and public-law checks and balances to which the KLPD is subject. Ibidem, p. 98.
102 See <http://www.ecp.nl/platform-internetveiligheid>.
On the positive side, however, it should also be observed that the Netherlands has been a frontrunner in cybercrime legislation in some respects, particularly with its provisions on procedural law dating from the Computer Crime Act of 1993. Several powers introduced then, such as the network search and the power to order undoing of security measures, may well have inspired the drafters of the Cybercrime Convention, not the least because the Dutch chairman of the Convention’s drafting committee PC-CY, Rik Kaspersen, had been closely involved in the legislative process of the Computer Crime Act.104

The process of implementing international harmonisation instruments overall occurs quite smoothly, almost as a matter of course. The Dutch legislator hardly ever questions provisions from EU or Council of Europe instruments, but takes it for granted that these have to be implemented in national legislation. The provisions of international instruments are rarely challenged in the parliamentary process; where a harmonisation instrument leaves room for the national legislator, for example the retention period from the Data Retention Directive, parties in the Second and First Chambers argue about the implementation, but always within the margins set by the international instrument. Moreover, Parliament seldom forces the government to make reservations when ratifying conventions; significantly, no reservations were made with respect to the Cybercrime Convention, even though the Convention in several provisions allows reservations.

In fact, most international instruments are not often debated as such. They are paid attention to by the (staff of the) Minister when drafting Bills, who indicates in Explanatory Memorandums why and how certain provisions are needed in light of a particular international harmonisation instrument, sometimes illustrated with transposition tables showing which Convention or Directive article is transposed in which national provision. However, in the rest of the parliamentary discussion, the harmonisation background – for example, the scope or interpretation of particular terms of the Cybercrime Convention – no longer plays a substantial role.

Whereas the harmonisation effort thus occurs quite smoothly, it does tend to slow down the legislative process. In particular the Computer Crime II Act has suffered long delays because of international harmonisation instruments. The original Bill, submitted in July 1999, had to be amended already in April 2000, following a stand-still decision from the European Commission that its provisions on ISP liability diverged from the Electronic Commerce Directive regulation.105 Subsequently, after the parliamentary preparatory committee had submitted an extensive set of questions to the Minister in September 2000, the Minister decided to postpone debate on the Bill pending the Cybercrime Convention’s coming into being. The Convention prompted a thorough review of the existing and proposed

104 With good reason, the editors entitled the Liber Amicorum presented to Kaspersen on the occasion of receiving his emeritus status: Caught in the Cyber Crime Act (Lodder & Oskamp 2009).
105 Kamerstukken II 1999/2000, 26 671, No. 5.
cybercrime legislation to see which gaps existed, and the consequent extensive amendment proposal to the Computer Crime II Bill had to follow the same basic procedure as the original Bill, i.e., be circulated for comments to stakeholders and submitted to the Council of State for advice. The amendment was submitted in March 2005, and the parliamentary committee’s questions from 2000 were, finally, answered in May 2005. The rest of the process went quite speedily, but all in all, it had taken over seven years to update cybercrime legislation. This delay was warranted for the issues affected by the Cybercrime Convention, but the Computer Crime II Bill also contained numerous amendments unrelated to the Convention, and these would have merited more expeditious treatment by the legislator.

A final observation to make about the impact of harmonisation instruments on national legislation is that, in general, the provisions from Conventions and EU instruments fit well within the system of Dutch law; with a few exceptions, they have not led to significant changes in the scope or nature of criminalisation or criminal investigation in the area of cybercrime.

The exceptions, however, are not insignificant. A major systematic change has been the abolition of the security requirement for hacking (supra, section 2.1.1.1). The Computer Crime Act of 1993 introduced as a threshold for criminal liability that a security measure had been infringed or that access had taken place through devious means, such as technical intervention or a false key. The legislator argued that both the Cybercrime Convention and the Framework Decision on attacks against information systems do allow for a security measure as a condition for liability, but not for other conditions such as a false key. As a result, to meet the requirements of the international instruments, the legislator abolished the security requirement altogether. This reading by the Dutch legislator of the Convention and Framework Decision can be questioned; in my opinion, the ‘devious means’ mentioned on a par with infringing a security measure in the former Dutch provision also imply that a certain security measure is in place (or why else should an intruder employ devious means to enter the computer?). In light of the rationale of the security requirement as articulated by the national legislator in 1993 – incentivising computer users to secure their computers – it is to be lamented that the, perhaps flawed, interpretation of international instruments has triggered the Dutch legislator in 2006 to change the criminalisation of hacking.

Another exception is the interception of communications via communications service providers. Dutch law only allowed wiretapping of public telecommunications, and since the Cybercrime Convention’s definition of service provider also included private communication providers, the procedural powers were extended in 2006 with powers to intercept private communications, for example, closed company networks. This was a major shift in policy, which, even though it concerned implementation of the Convention’s requirements, would have merited more discussion in parliament and in the media than it did; as it happened, the broadening of investigation powers was hardly debated. Moreover, the change in policy led to a change in concepts: ‘providers of public
telecommunications’ was replaced by ‘providers of communications services’ in the provisions on interception and traffic data. However, this was not done systematically; Article 125la DCCP, for example, which regulates searching a telecommunication provider’s computers, still refers to ‘providers of public telecommunication networks or services’, implying that it does not apply to a search of a private communications provider. And Article 273 DCC, which criminalises the unlawful opening by a provider of communications not addressed to him, speaks of telecommunications providers rather than communications providers. Altogether, the implementation of the Cybercrime Convention’s term ‘service provider’ has not contributed to improving the system of the Dutch cybercrime legislation.

A final exception is the Cybercrime Convention’s provision on misuse of devices, which has been implemented with the same maximum punishment as the target offences. In the system of Dutch law, inchoate crimes usually carry less punishment than the result crime. The general criminalisation of preparation of crimes, for example, carries half the punishment as the crime under preparation (Article 46 DCC), and criminal attempt carries two-thirds of the maximum punishment (Article 45 DCC). Applying equal punishment to preparation of cybercrimes as the cybercrimes themselves is therefore a significant divergence of the existing system, not necessitated by the international instrument itself but caused, instead, by a conscious choice of the national legislator. The legislator argued that the criminalisation of misuse of devices requires the strongest form of intent (oogmerk) to commit a specifically mentioned target offence, in contrast to the general criminalisation of preparation which only requires ‘normal’ intent (opzet), so that the preparation can be considered equally worthy of punishment as the target offence. 106 This is not a convincing argument, given that a criminal attempt at hacking still comes closer to committing hacking than possessing a hacking tool with the purpose (oogmerk) of committing hacking, but the attempt is punishable with only two-thirds of the punishment of hacking. In this respect, the criminalisation of misuse of devices is dogmatically not in line with the system of Dutch law.

4. Conclusion

The Netherlands introduced computer-crime legislation in the early 1990s and has updated its legislation several times since. Most of the major changes were the result of implementing international legal instruments for harmonising cybercrime legislation, first and foremost the Cybercrime Convention. This is an on-going process; currently, for example a Bill is pending to implement the more recent Lanzarote Convention, criminalising grooming and intentional access to child pornography. This process of harmonising Dutch law with international requirements has generally occurred smoothly and without discussion, albeit rather slowly, causing

delay in updating national law, for example, in the criminalisation of email bombs and DoS attacks. Sometimes, the updating has also occurred in an unsystematic, piecemeal fashion; for example, the element ‘data with financial value in the regular market’ was changed into simply ‘data’ (to cover also black-market data like passwords and credit-card numbers) for extortion in 2004, but for blackmail and fraud only in 2009. Overall, however, Dutch cybercrime legislation is in good shape, particularly after the Computer Crime II Act of 2006, with a wide and comprehensive range of largely up-do-date provisions in substantive and procedural law to combat cybercrime.

Only in some – overall minor – respects, can the Dutch legislation be considered unsatisfactory. One issue is incomplete implementation of international harmonisation instruments. The only instance where the Cybercrime Convention has not been fully implemented in Dutch law is criminalising misuse of devices with intent of committing data interference; this is an omission that the legislator should redress. The one gap in the implementation of the Additional Protocol on racist and xenophobic acts and the EU Framework Decision on racism and xenophobia, namely to criminalise genocide denial or justification, is pending in parliament in a dormant Bill on “negationism”; in most cases, however, genocide denial will already fall within the scope of criminal discrimination.

Another issue is that the legislator has implemented some international provisions in a way that can be criticised. This holds for the abolishment of the security requirement in the criminalisation of hacking (which is a wrong signal to computer users on the need to apply computer security – the rationale for the 1993 legislator to pose the security requirement) and for criminalising the inchoate offence of misuse of devices with the same maximum punishment as the target offence, contrary to the system of Dutch law.

A final issue of unsatisfactory legislation concerns incomplete or unsystematic provisions in Dutch law itself, often caused by some oversight of the legislator. A serious error is that the power to order undoing of security measures (Article 125k DCCP) refers only to a ‘data or network search’ and excludes the regular, physical search, or other investigation powers through which the police can acquire protected computers or encrypted stored data. The provision of criminal liability for ISPs, Article 54a DCC, refers to an order by the public prosecutor to remove illegal content, but a legal basis for such an order in the Code of Criminal Procedure is lacking. The change from ‘public telecommunications providers’ to ‘communications service providers’, triggered by the Cybercrime Convention’s use of this term, has not been implemented systematically throughout the Code of Criminal Procedure and the Criminal Code, creating confusion what the rationale is, if there be one, for using different terms in the various provisions. Altogether, then, there is room for improvement in Dutch law.

Besides addressing the shortcomings outlined above – some but not all of which the legislator has announced an intention of addressing –
improvement can also be made by further clarification. Two topical issues are just starting to be addressed by the courts. The most important one regards the issue whether certain ‘virtual goods’ – notably ‘goods’ from virtual worlds that have real-world economic value and that are unique rather than multiple – can be considered a ‘good’ in the sense of property crimes like theft or embezzlement. Two lower courts have convicted people for stealing such virtual ‘goods’, deviating from the long-standing doctrine that computer data are not ‘goods’. These decisions have been acclaimed but also criticised in the literature, and it is to be hoped that a fundamental dogmatic discussion and a decision by appeal courts and the Supreme Court will follow soon to shed more light on this issue.

The second topic concerns the level of ‘realism’ required for virtual child pornography to be criminal. Dutch law applies a vaguer standard – an image ‘seeming’ to involve a minor – than the term ‘realistic image’ used in the Cybercrime Convention, and the parliamentary documents provide various explanations of this standard, raising questions how this element should be interpreted. A lower court has determined that a cartoon movie that is apparently targeted at seducing small children to have sex with adults, can be considered virtual child pornography because it is realistic to the average child and it is part of a subculture stimulating sexual child abuse. It remains to be seen how other – and higher – courts will interpret cartoons or other images that are not overtly realistic. For Dutch courts, comparative legal analysis would be helpful, surveying the standards of virtual child pornography applied by other countries, and the way in which their courts apply the Cybercrime and Lanzarote Conventions’ rationale of combating a subculture of child abuse.

Also for other topics, comparative legal research would be welcome. Looking at the overview of Dutch law, I see several topics that merit investigation at an international level, to stimulate further harmonisation as well as updating of cybercrime legislation. In the periphery of cybercrime, and thus beyond the Cybercrime Convention’s current scope, some effort at harmonisation may be required for issues that are crucial for cross-border ICT services. I am thinking, in particular, of data-protection offences, which are far from harmonised in practice by the European Data Protection Directive, and of requirements for interceptability of telecommunications infrastructures and services, which are the topic of a 1995 Council Resolution¹⁰⁷ that needs to be reconsidered in light of the many developments in ICT of the past decade.

Other topical issues may call for new initiatives at an international level. The Netherlands will not be the only country struggling with its concept of ‘good’ in light of ‘virtual property’ crime, and some international guidance how to qualify virtual property could help countries in dealing with this issue. Three other topics briefly mentioned in my discussion of Dutch law also merit being discussed at the international level in the context of

harmonising cybercrime legislation. The first is making visual images of people without their consent or knowledge, something that increasingly happens with miniature cameras, mobile-phone cameras, and webcams. Although it is not classic cybercrime, it is close enough to unlawful interception to be considered a topic for potential inclusion in the international cybercrime catalogue. The second is cyberstalking: systematically harassing someone via electronic means. The online variants of stalking someone from a distance – sms and email – will in most countries be considered functional equivalents of stalking through phone and mail. However, the element of creating a profile page with pictures and data of someone else on a social-network site, without that person’s consent, seems to add a notch to the possibilities of stalking someone online, and although this may fall under stalking or some other traditional crime, it could be worth while to discuss the added value of a separate criminalisation of cyberstalking to combat this new form of unlawful behaviour. That applies also to the third and final topic, namely identity theft. Like in the Netherlands, discussions are taking place at international levels whether or not to introduce identity theft as a separate criminal offence. Regardless of the outcome of these discussions, it is noteworthy here that they take place in diverging sectoral platforms (drugs and crime, consumer policy, fraud prevention). It would be wise to incorporate and concentrate these discussions in the context of harmonising cybercrime, given the close links between identity theft and phishing, computer forgery, and computer fraud.

While there is, as I have indicated, room for improvement and clarification of Dutch cybercrime legislation, and a need for debate on harmonisation of some upcoming topics at the international level, in conclusion I would like to stress that overall, cybercrime legislation is in good shape and largely up-to-date to meet the challenges of today’s cybercriminals. Of course, there is a continuing need for updating cybercrime legislation, as tomorrow’s cybercriminals are bound to invent new ways and means of committing crimes, and so we should stay alert on updating and further harmonising cybercrime legislation where possible. But at the end of the day, legislation is hardly the issue in the fight against cybercrime. Good legislative frameworks are in place. Now it comes down to using them and to actually investigate, prosecute, and convict cybercriminals. Seeing the mere handfuls of cases about hardcore cybercrimes that have appeared on the official Dutch case-law website www.rechtspraak.nl in the past decade, one can only conclude that there is yet a world to win in making cybercrime legislation actually work in practice.

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