Punishment And Purpose ~ Intermezzo: Legal Context Of The Study

5.1 *Introduction*

This chapter provides a concise outline of the legal context of the empirical studies that are reported in the following chapters. As such, it aims at describing only those aspects of the Dutch legal system and some of the practical issues involved that are considered to be the most relevant for our purposes.**[i]**

Section 5.2 first describes the organisational structure of Dutch criminal courts. The internal structure of the courts as well as hierarchy and competences amongst them are discussed. Subsequently, section 5.3 provides a brief outline of the Dutch sentencing system. A number of aspects of Dutch criminal procedure are described and the roles of the police, prosecutor, defence, probation service and judge(s) are discussed. Section 5.3 concludes with describing the main provisions in Dutch penal code (P.C.) pertaining to sanctions and sentencing. It will be demonstrated that Dutch penal code invests judges with wide discretionary powers in sentencing. Section 5.4 discusses these discretionary powers in more detail. The discretionary powers have prompted concerns for equality in sentencing. A number of (informal) aspects that influence and constrain judges' discretion in sentencing are discussed as well as the main controversies that surround the issue of equality in sentencing.

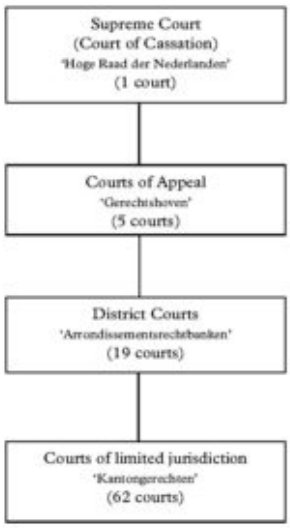

Figure 5.1 Four layers in the organisational structure of Dutch courts

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5.2 *Organisation of Dutch criminal courts***[ii]**

All cases in the Netherlands are tried by professional judges. Juries or layassessors are unknown. Candidate judges are appointed after completing six years of magistrate training (RAIO-training) subsequent to obtaining a law degree from a Dutch university. Aside from following a six year magistrate training, candidates with a law degree who have more than six years of experience in a legal profession may also be eligible for appointment. The organisational structure of the Dutch judiciary is regulated in the 'Judicial Organisation Act' (*Wet op de Rechterlijke Organisatie*). The court system is organised in four layers. Figure 5.1 shows the organisational structure of Dutch courts.**[iii]** Conventional Dutch terminology is printed in smaller typeface in Figure 5.1. The courts of limited jurisdiction form the lowest level in the hierarchy shown in Figure 5.1. In criminal cases these courts hear mostly misdemeanors ('summary offences').**[iv]** Cases in these courts are tried by judges sitting alone and are open for appeal to district courts by both the prosecution and the defence. The district courts will try the appeal cases de novo.

Felonies (serious cases) are tried by district courts.**[v]** The internal structure of a district court in criminal cases is such that a distinction can be made between judges sitting alone (*unus iudex*), panels of judges and judges of instruction (*investigative judge*). The most common types of judges sitting alone are judges handling juvenile cases (*kinderrechter*) and judges who hear cases in which the

prosecution demands a penalty up to six months imprisonment. The latter type of judge bears the somewhat misleading name 'police judge' (*politierechter*), while they have nothing to do with the police. A special type of police judge is the economic police judge who hears cases involving the 'Economic Offences Act'. Since by law (art. 369 C.C.P.) police judges cannot impose harsher sentences than six months of imprisonment, all more serious cases are brought before a chamber of the court which sits in panels of three judges.

Although there is a panel of judges for economic cases, in practice virtually all economic criminal cases are heard by the economic police judge sitting alone (Nijboer, 1999). If the defendant is found guilty, single sitting judges generally give their oral verdict immediately. When a case is tried before a panel of judges the verdict will be given on a later date after the judges have deliberated in chambers. Deliberations in chambers are secret. The verdict of a panel of judges is unanimous and will be given two weeks after the trial. The judge of instruction, also called 'investigative judge' is, in specified circumstances, responsible for pre-trial decisions pertaining to investigations and detention (art. 63 C.C.P.). The decisions of a district court, sitting as a court of first instance, are open for appeal to one of the courts of appeal. Courts of appeal are organised at a regional level and try *cases de novo.* The territorial jurisdiction of a court of appeal is called Hofressort. Each of the five hofressorts accommodates a number of district courts (up to four). All cases in courts of appeal are tried by panels of three justices.

Both the defence and the prosecution have the right to appeal for cassation on a decision from a court of appeal by the Supreme Court (court of cassation). In a full hearing, the Supreme Court sits in panels of five justices. The Supreme Court cannot reconsider the facts of the case; it can only decide on issues of law. If the Supreme Court decides the facts to be in need of further consideration, it refers the case to a lower court after reversal.**[vi]**

The decision of the prosecutor in relation to which court and which type of judge or panel of judges should try a case is, first, a matter of socalled absolute and relative competence of the courts. Second, it is a matter of competence of different types of judges within the courts. Absolute competence relates to the question which type of court is competent to try a particular case. This depends largely on the severity of the offence. Absolute competence is regulated in the 'Judicial Organisation Act'. Relative competence concerns the question which court, *given a certain type*, is competent to try a particular case. This depends

largely on geographical borders between jurisdictions. Relative competence is regulated in the Dutch Code of Criminal Procedure. Competence of different judges or panels of judges within a court depends on type of offence, type of offender and severity of the offence.

5.3 *The Dutch sentencing system*

General criminal law (*commune strafrecht*) in the Netherlands is laid down in two codes. The substantive law is codified in the Penal Code (P.C.) and criminal procedural law in the Code of Criminal Procedure (C.C.P.). Other areas of criminal law include military criminal law, criminal law of war, socio-economic criminal law, fiscal criminal law and traffic criminal law. This brief discussion, however, will concentrate on general criminal law.

In section 5.2 the organisational structure of Dutch criminal courts was presented. In order to clarify the judicial context for the study still further, this section will provide an outline of the Dutch sentencing system. Following a concise introduction to criminal proceedings in the Netherlands, sentencing and criminal sanctions will be elaborated upon.**[vii]**

A criminal case first enters the system through the police (except for tax cases). Police investigations are carried out under the authority of the public prosecutor's office or an investigative judge. Police officers are required to produce written records (*processen-verbaal*) of their investigative activities. These written records then become part of the official case file. Case files play a significant role in Dutch trials. They provide important sources of evidence and information relevant for sentencing decisions.

The police reports cases that are eligible for criminal prosecution to the public prosecutor's office. The public prosecution is organised according to the same structure as the courts (see section 5.2). Public prosecutors' offices (*parketten*) are attached to the district courts and courts of appeal. The prosecutor's work involves supervision of criminal investigations, prosecution at trial and execution of imposed sentences. During pre-trial investigations, a suspect may be kept in police custody without the possibility of bail. After pre-trial investigations are concluded, the prosecutor may decide to bring the case to court. The Dutch prosecutor is granted discretionary powers (expedience principle; *opportuniteitsbeginsel*) in deciding which cases are to be brought to trial (art. 167 and art. 242 C.C.P.). Before trial, the case file, including all relevant written

reports, is available to the prosecution, the judge and the defence.

The probation service, a non-governmental organisation, may be involved in all stages of a criminal process. Its tasks include producing presentence social enquiry reports on defendants for the criminal justice agencies, providing assistance to offenders in all stages of the criminal process, and preparing and implementing alternative sanctions.**[viii]** If requested, social enquiry reports by the probation service are usually included in the case file.

In court, interaction between judge(s), prosecutor, accused and his counsel focuses on the evaluation of the written reports in the case file. In general, the parties make little use of their right to summon witnesses or experts to the trial (Nijboer, 1999). Unless the court has decided otherwise, the accused is not obliged to be present at trial (Tak, 1993). Such proceedings *in absentia* may, or may not, be in the presence of a defence counsel. During trial, the judge plays an active role in questioning the defendant and witnesses (if present). Interaction during trial unfolds according to a standardised sequence of events. After the trial is formally opened and the judge**[ix]** has identified the accused by name, age, date of birth, profession and residence, the prosecutor recites the summons and presents a list of witnesses and objects that have been seized.**[x]** Subsequently, the judge(s) question(s) witnesses, experts and the defendant. The prosecutor then proceeds to request conviction and the specific sanction that he wishes to be imposed (*requisitoir*). Next, the defence counsel may speak and then the defendant is always given the final word.**[xi]**

When the hearing is concluded, the phase of deliberation and judgement commences. As mentioned in section 5.2, judges sitting alone (*unus iudex*) usually give their judgement immediately while panels of judges present their judgement after a period of two weeks. Deliberation and judgement have to proceed according to requirements dictated in the articles 348 and 350 C.C.P. First a number of formal questions need to be answered explicitly. These questions concern the validity of the summons, the (relative and absolute) competency of the court, the prosecutor's right to institute criminal proceedings and absence of reasons to suspend prosecution (art. 348 C.C.P.). Only after each of these questions has been answered in the affirmative may the court proceed to examine the socalled 'material' questions (art. 350 C.C.P.). These involve examining whether or not the facts alleged by the prosecutor have been proven, whether these facts constitute an offence codified in the penal law, whether the accused is

eligible for punishment (i.e., absence of justifications and excuses) and, finally, deciding on the sanction.

In Dutch penal code a distinction is made between punishments and measures; both are sanctions. The principal punishments (*hoofdstraffen*) are imprisonment, detention,**[xii]** community service and fine (art. 9 P.C.). A fine may be combined with imprisonment or detention. Community service was introduced into the penal code in 1989 (art 22b P.C.). By law, community service may only be imposed as a substitute for an unconditional prison sentence with a maximum of six months. If substituted, six months of imprisonment is equated with 240 hours of unpaid work.**[xiii]** The defendant is required to make a formal request to the court for a community service order instead of going to prison.**[xiv]** Punishments may be combined with measures. The most important measures are the compulsory hospital order, deprivation of the proceeds of crime, withdrawal of seized objects from free circulation and the compensation order (discussed in section 2.7).

The penal code specifies minimum terms for the principal punishments in general. For instance, the penal code specifies a minimum of one day imprisonment (art. 10 sub 2 P.C.) and a minimum fine of five Dutch Guilders (art. 23 section 2 P.C.). Furthermore, specific maximum terms are specified for each separate offence codified in the penal code, for instance, four years imprisonment for theft (art. 310 P.C.). The difference between the general minima and specific maxima for sentences implies a high degree of discretionary power for Dutch judges (discussed in more detail in section 5.4).**[xv]**

A conditional or suspended sentence is considered to be a mode (or modality) of punishment. Apart from some provisions, a sentence may be completely or partially suspended (art. 14a P.C.).**[xvi]** The court usually specifies certain conditions which have to be met by the defendant during the operational period (*proeftijd*) of the suspended sentence. The general requirement that the convicted person must not re-offend during the operational period of the suspended sentence is always part of the condition (Tak, 1993). Additional special conditions may include damage compensation, admission to a psychiatric care institution, deposit of a sum of money in a fund for victims of crimes, deposit of bail or other special conditions pertaining to the offender's behaviour (art. 14c section 2 P.C.). This latter type of special conditions frequently involve participation in courses such as social skills training, vocational training and alcohol or drugs education,

mostly supervised by the probation service.

Recently a change of legislation on alternative sanctions has been proposed (Tweede Kamer der Staten Generaal, 1998). When this legislation is enacted, community service and training and educationprogrammes will merge into a new formal principal punishment called 'assignment punishment' (*taakstraf*)**[xvii]**. This principal punishment, constituting a maximum of 480 hours, will be independent of the prison sentence. In the proposed change of legislation, it would even be possible to combine the assignment punishment with a prison sentence. Since at the time of carrying out our empirical studies this legislation was still in the draft phase, it will not be considered further.**[xviii]**

5.4 *The discretionary powers of Dutch judges*

The previous section pointed out that Dutch courts have a wide discretion in sentencing. The formal limits of this discretion are determined by the difference between the general minima (applicable to all offences) and the specific maxima (per individual offence) of principal punishments. Over and above, combinations of principal punishments with various measures and special conditions concerning (partly) suspended punishments provide the court with an enormous array of sentencing options.

In the practice of punishment, apart from the general requirement of equality, discretion in sentencing is subject to a number of influences and constraints. First of all in the phase of judgement and deliberation, the punishment requested by the prosecutor is the starting point for determining the sentence.**[xix]** As such, it has a strong directive influence on sentencing. The extent to which the prosecutor and investigative judge in the pre-trial phase have employed remand in custody also tends to have a (strong) directive influence at sentencing. Sentencing discretion of individual judges in panels of judges is further influenced by deliberations in chambers. Dissenting opinions are not permitted. In order to reach a common verdict, judges need to negotiate and compromise (cf. Van Duyne, 1987; Van Duyne & Verwoerd, 1985). Furthermore, within each court judges aim for consistency through mutual consultation and by formulation of sentencing policies for distinct categories of offences.

District court judges also tend to take into account the policy of the court of appeal residing over their jurisdiction. An additional constraint on the discretion is the court's obligation to motivate its sentence.**[xx]** Moreover, a well-motivated

sentence would contribute to the public's confidence in the criminal justice system (cf. Enschedé, 1959). This obligation, has, however, resulted in predominantly superficial and evasive standard phrases. One important explanation presented for the vague and superficial level of motivation of sanctions is the absence of one *generally accepted* normative theory on the functions and goals of sentencing: there is no agreement on the goals of punishment (Corstens, 1995; Koopmans, 1997). We will return to this point shortly.

Dutch judges cherish their discretionary powers. They do so because they feel this allows them to 'do justice' to the unique aspects and circumstances of specific cases and individual offenders. At the same time, however, the principle of equality (in sentencing) is also valued highly in Dutch law. Obviously, both aspects may present conflicting demands on sentencing (cf. Blad, 1997; Corstens, 1995; Kelk & Silvis, 1992; Mevis, 1997). The wide discretionary powers of Dutch courts have prompted concerns for equality in sentencing. With respect to the principal punishments, a number of studies have shown significant (regional) differences in sentencing in the Netherlands (cf. Berghuis, 1992; Fiselier, 1985; Grapendaal, Groen, & Van der Heide, 1997). These findings have instigated wide ranging discussions in relation to (in)equality in sentencing as well as to various methods to attain a greater level of consistency in sentencing (e.g. Corstens, 1998; Fiselier & Lensing, 1995; Justitiële Verkenningen, 1992; Special issue Trema, 1992). Some authors, however, caution against an excessive fixation on equality in sentencing. They argue that current developments may lead to a type of bureaucratic equality at the expense of the ability to individualise sentencing to fit the unique aspects and circumstances of specific cases and individual offenders (Kelk, 1992; Kelk & Silvis, 1992). Lack of uniformity in sentencing is the inevitable outcome of attempts at individualisation (Green, 1961).

Initiatives to attain a greater level of consistency in sentencing include structured deliberations between chairpersons of the criminal law divisions of the courts, attempts to formulate 'band widths' or 'starting points' for sentencing in certain types of cases, and the development of and experimentation with computer supported decision systems and computerised databases (cf. Justitiële Verkenningen, 1998). Recently, an advisory committee has proposed the establishment of a 'council for the administration of justice' to co-ordinate these developments and to formulate nonbinding directives for sentencing (Leemhuis-

Stout, 1998).**[xxi]**

Although such initiatives may prove to be valuable, they seem to presuppose the existence of a commonly shared vision on the goals and functions of punishment (Lensing, 1998). As has already been suggested, the lack of such agreement may lead to superficial standard phrases being used in motivation of sentences. It may also have consequences for the acceptance and application by judges of, for instance, non-binding sentencing directives. The fact is that at the present time we know very little about judges' visions and preferences concerning the functions and goals of punishment.

NOTES

i. For more detailed and exhaustive discussions on the Dutch legal system, see, e.g., Chorus et al. (1999).

ii. This section is largely based on discussions on the organisation of the Dutch criminal justice system in Nijboer (1999) and Van Koppen (1990).

iii. This figure was extracted and slightly modified from Van Koppen (1990, p. 754).

iv. This discussion is limited to criminal cases.

v. Of course there are exceptions. These, however, are left undiscussed.

vi. The Supreme Court can render summary decisions if the appeal does not involve issues of law (art. 101a Judicial Organisation Act). Such is done by a panel of three judges.

vii. This discussion is largely based on Nijboer (1999) and Tak (1993).

viii. See Janse de Jonge (1991) for a detailed theoretical and historical analysis of the Dutch probation service.

ix. The chairperson in case of a panel of judges.

x. Usually these are already present in the case file (Corstens, 1995).

xi. In practice problems pertaining to evidence seldom arise during trial (Nijboer, 1999).

xii. Detention differs somewhat from imprisonment in terms of execution and consequences. Detention is reserved primarily as a principal punishment for lesser offences.

xiii. To convert a prison term to a number of hours of unpaid work, judges make use of a conversion table. See Vegter (1997).

xiv. Otherwise community service might qualify as slave labour in the sense of article 4 E.C.H.R.

xv. See De Hullu et al. (1999) for an inventory and discussion of the maximum sentences specified in the Dutch penal code.
xvi. Community service orders cannot be suspended.
xvii. In practice, the term taakstraf is already widely employed.
xviii. See Mevis (1998) and Valkenburg (1998) for detailed discussions of the proposed legislation.
xix. In appeal cases the sentence of the court of first instance is usually the starting point.
xx. See, especially, article 358 section 4 C.C.P. and article 359 sections 5 and 6.
xxi. In fact such a council has been proposed several times before (Leemhuis-Stout, 1998, p. 27).