

LEGAL CULTURE AND LEGAL TRANSPLANTS:
NETHERLANDS NATIONAL REPORT

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I. 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. 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,

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¹ Brants, Chrisje and Field, Stewart, "Political Cultures and Procedural Traditions", *Contrasting Criminal Justice. Getting from here to there*, David Nelken (ed.), Aldershot, Ashgate, 2000, p. 84.

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: it 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 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 surprise 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.

II. LEGAL CULTURE AND THE CONCEPT OF LEGAL TRANSPLANTS

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 in 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 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. It’s 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 that dynamic, altering (perceptions of) how criminal law and procedure should express cultural, social and political values and undermining legitimacy.

² Brants, C. H., Comparing criminal process as part of legal culture, in: *Comparative Criminology and Globalisation*, D. Nelken (ed.), Aldershot, Ashgate, 2010 (forthcoming). See also, Cotterell, R., The Concept of Legal Culture, *Comparing Legal Cultures*, D. Nelken (ed.), Aldershot, Dartmouth, 1997, pp. 13-32.

³ Williams, R., *Politics and Letters*, London, NLB, 1979.

⁴ Merryman, A., *The Civil Law Tradition*, 2nd ed., Stanford, CA, Stanford University Press, 1985.

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 structure and authority, procedural roles and rights hang together in a legitimising overall structure.⁷ Based on the historical-political roots of criminal process, it is particularly useful in tracing change and continuity over longer periods.⁸

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. That fairness in the way it is established, and procedural fairness is in itself a guarantee, albeit not an absolute one, that the truth will 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

⁵ Damaska, M., *The Faces of Justice and State Authority: a comparative approach to the legal process*, New Haven, Yale University Press, 1986.

⁶ Brants, *op. cit.*, 2010.

⁷ See for a misconception of the way in which the analytical distinction adversarial-inquisitorial can be used: S.J. Summers (*Fair Trials: The European Criminal Procedural Tradition and The European Court of Human Rights*, Oxford: Hart Publishing, 2007). For a convincing rejection of this reasoning: S. Field, Fair Trial and Procedural Tradition in Europe, 29 *Oxford Journal of Legal Studies* 365, 2009.

⁸ Brants, Chrisje and Franken, Stijn, “General Report on Fundamental Rights in Criminal Process for World Conference AIDC, Mexico 2008”, *Utrecht Law Review, Special Issue: Developments in the Protection of Fundamental Human Rights in Criminal Process*, Volume 5, Issue 2, October 2009, pp. 7-65.

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.⁹ 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 investigating judge,¹⁰ 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

⁹ See for the classic description of the features of inquisitorial process that distinguish it from the adversarial: Damaska, *op. cit.*, 1986; and for the specific features of Dutch criminal procedure in relation to its legal cultural tradition: Brants and Field, *op. cit.*, 2000.

¹⁰ Some systems have both, some only a prosecutor. The division of power between them may also differ.

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.¹¹ 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.¹² 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.¹³ 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.

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'¹⁴ 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'.¹⁵ 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

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, *op. cit.*, 2009, p. 4.

¹³ Patrick Glenn, H., Comparative Legal Families and Comparative Legal Traditions, *The Oxford Handbook of Comparative Law*, M. Reimann and R. Zimmerman (eds.), Oxford, OUP, 2008, pp. 421-440.

¹⁴ Legrand, Pierre The Impossibility of Legal Transplants, 4 *Maastricht Journal of European and Comparative Law*, p. 111, 1997, p. 112, quoting Alan Watson, *Legal Transplants*, 2nd ed., Atlanta, University of Georgia Press, 1993.

¹⁵ *Idem.*

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.¹⁶ 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'.¹⁷ 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'.¹⁸ Legal cultures are conservative in the literal meaning of the word: they ensure continuity and have an influence 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'.¹⁹

III. INFLUENCES ON THE DEVELOPMENT OF DUTCH CRIMINAL JUSTICE²⁰

If the determining underlying dynamic of a legal culture of criminal justice is the legitimisation and reflection of fundamental notions regarding

¹⁶ *Ibidem*, pp. 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, Peter and Dimitrova-Grajzl, Valentina, "The Choice in the Lawmaking Process: Legal Transplants vs. Indigenous Law", *Review of Law and Economics*: Vol. 5, Iss. 1, 2009 Article 26, whose research supports that local conditions crucially determine the path of institutional reform when considering legal transplants.

¹⁷ Field, *op. cit.* p. 5.

¹⁸ *Idem*, p. 4.

¹⁹ Brants and Field, *op. cit.*, p. 83.

²⁰ On Dutch history, see: Voogd, Christophe de, *Geschiedenis van Nederland*, Amsterdam, Arena, 1996 (orig. in French: *Histoire des Pays-Bas*, Paris: Les Editions Hatier, 1992).

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.

1. *Towards centralised authority: before and during the Middle Ages*

A. *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,²¹ although Roman authors give some indications,²² 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.²³ There is, however, general agreement on some main issues.²⁴ 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 breakdown of social relations.²⁵ 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.²⁶ The procedural ritual whereby such decisions were reached

²¹ De Monté ver Loren, J. Ph. and Spruit, J. E., *Hoofdelijnen uit de ontwikkeling der rechterlijke organisatie in de Noordelijke Nederlanden tot de Bataafse omwenteling*, 7th ed., Deventer, Kluwer, 2000, p. 17.

²² *Commentarii de bello Gallico* by Julius Caesar and *De origine et situ Germaniae* by Cornelius Tacitus.

²³ *Leges Barbarorum*, see de Monté ver Loren and Spruit, *op. cit.*, 2000, pp. 73-79.

²⁴ *Ibidem*, ch. 2 and 3 and the authors referred to below.

²⁵ van Caenegem, R. C., *Geschiedenis van het strafrecht in Vlaanderen van de XIe tot de XIVe eeuw*, Verhandelingen van de Koninklijke Vlaamse Academie voor Wetenschappen, Letteren en Schone Kunsten van België. Klasse der Letteren, vol.19, Brussel, 1954.

²⁶ Van Caenegem, *op. cit.*, 1954; Immink, P. W. A., *De wording van staat en soevereiniteit in de Middeleeuwen*, mededelingen van het Rechtshistorisch Instituut RUG, num. 3, Groningen, 1969; Köbler, G., *Deutsche Rechtsgeschichte: Ein systematischer Grundriß der geschichtlichen Grundlagen des*

(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 Ding consisted of free men on a basis of strict equality, with the authority vested in Germanic ‘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 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.²⁷

Christianisation had a growing and eventually lasting influence on the existing legal order.²⁸ 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.

B. 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 kingships in which liege lords – the former counts, now in hereditary positions – held power in the

deutschen Rechts von den Indogermanen bis zur Gegenwart, 6th ed., München, Verlag Vahlen, 2005; Mitteis, Heinrich and Lieberich, Heinz, *Deutsche Rechtsgeschichte*, 19th ed., München, C.H. Beck Verlag, 1992.

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 and Spruit, *op. cit.*, p. 27).

²⁸ De Monté ver Loren and Spruit, *op. cit.*, p. 48.

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*).

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

²⁹ De Monté ver Loren and Spruit, *op. cit.*, 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 and Lieberich, 1992, *op. cit.*, 1992, pp. 180 and 181).

³¹ Hazewinkel-Suringa, D., *Inleiding tot de studie van het Nederlandse strafrecht*, 5th ed., Groningen, H. D., Tjeenk Willink, 1971, p. 19.

Burgundy and Hapsburg rulers.³² 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.³³ 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.³⁴ 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.³⁵ 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

³² Filips van Leiden, *De cura reipublicae et sorte principantis* (1355), 1st printed ed., 1516 (facsimile-ed., Amsterdam 1971) 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, J. H., *De historische ontwikkeling van het inquisitoire strafproces*, Amsterdam, N.V. NJoord-Hollandsche Uitgeversmaatschappij, 1939, pp. 84-89.

³⁴ van Bemmelen, J. W. and van Veen, Th. W., *Strafprocesrecht*, 11th ed. (bewerkt door D.H. de Jong and G. Knigge), Alphen a.d. Rijn and Deventer, Samson H.D. Tjeenk Willink and Gouda Quint, 2005, p.19.

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.

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 events and then bring him to trial: an investigation *ex officio* to find the truth and evidence of it, by torture if need be.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 stadtholders³⁷ – 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.

³⁶ van Bemmelen, J. W., *Strafvordering. Leerboek van het Nederlandse Strafprocesrecht*, 's-Gravenhage, Martinus Nijhoff, 1957, p. 31.

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

2. *The Golden Age of the Republic of Seven United Provinces: 17th Century*³⁸

In 1568, the Northern Lowlands rose in rebellion against their Hapsburg sovereign and his administration in Brussels.³⁹ The expansion of sovereign power at the expense of regions and towns, persecution of heretics⁴⁰ 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 Provinces⁴¹ 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

³⁸ Schama, Simon, *The Embarrassment of Riches. An Interpretation of Dutch Culture in the Golden Age*, New York, Alfred A. Knopf Inc., 1987, for this period of Dutch history. Also: J. I. Israel: *The Dutch Republic, Its Rise, Greatness, and Fall 1477-1806*, New York, Oxford University Press, 1995.

³⁹ See for information on the rebellion: Anton van der Lem, *The Revolution and Civil War in the Netherlands (1555-1609)*, <http://dutchrevolt.leidenuniv.nl> (Onderzoeksschool en Opleiding Geschiedenis Universiteit van Leiden), orig. published in Dutch, Utrecht, 1995.

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.

Catholic, while in the Republic Calvinism was the state religion.⁴² 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, 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.⁴³ 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.⁴⁴ 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

⁴² This religious division still persists today, most Catholics living south of the Rhine delta and Protestants in the north of the country.

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: M. van der Vrugt, *De Criminele Ordonnantien van 1570*, Zutphen: De Walburg Pers, 1978, Ch. II; and Roel Pieterman, *De plaats van de rechter in Nederland 1813-1920*, Arnhem: Gouda Quint BV, 1990, p.12-19.

was necessary for trade, and money, not religion, determined status and position, peaceful co-existence was an economic and social necessity.

A. *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.⁴⁵ But, like the towns, they retained autonomous rights of (criminal) 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.⁴⁶ 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.⁴⁷

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.⁴⁸ 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

⁴⁵ Fruin, R. and Colenbrander, H. T. (ed.), *Geschiedenis der staatsinstellingen in Nederland tot de val der Republiek*, 's-Gravenhage, 1980 (repr. of orig. 2nd ed. 1922).

⁴⁶ Florike Egmond, *Fragmentaire rechtsverscheidenheid en rechtsongelijkheid in de Noordelijke Nederlanden tijdens de zeventiende en achttiende eeuw*, in: *Niemi licht op oude justitie. Misdaad en straf ten tijde van de Republiek*, Sjoerd Faber, ed., Muiderberg: Coutinho, p. 9.

⁴⁷ Diederiks, H. A. et al., *Cahiers voor Lokale en Regionale Geschiedenis, Strafrecht en criminaliteit*, Zutphen, De Waalburg Pers, 1988, p. 16.

⁴⁸ *Ibidem*, p. 10.

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.⁴⁹

B. *Unifying factors*

a. Royal Criminal Decrees (Crimineele Ordonnantien)⁵⁰

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 Vrugt remarks how large the category of offences against

⁴⁹ Schama, *op. cit.*, 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.

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 Vrugt, *op. cit.*, 1978, on which part of this paragraph is based.

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'.⁵¹ Procedural law and inquisitorial process were regulated in detail.⁵² The second Decree centralised and harmonised criminal procedure to reinforce the position of the central authorities, and 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.

b. 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

⁵¹ Van der Vrugt, *op. cit.*

⁵² *Ibidem*, pp. 91-94.

⁵³ De Monté ver Loren/Spruit, *op. cit.*, 2000, p. 286 and 287.

⁵⁴ *Ibidem*, pp. 287 and 289.

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.

c. 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*, etcetera) 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 1581.⁵⁵ 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.⁵⁶ 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.⁵⁷

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),⁵⁸ 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

⁵⁵ *Ibidem*, p. 270.

⁵⁶ Pieterman, *op. cit.*, p. 18.

⁵⁷ There is also evidence of the exchange of information between jurisdictions on detection, arrest and prosecution of suspected criminals. Toon van Weel, *De interjurisdictionele betrekkingen in criminele zaken van het Amsterdamse gerecht (1700-1811)*, in: *Nieuw licht op oude justitie. Misdaad en straf ten tijde van de Republiek*, (Sjoerd Faber, ed.), Muiderberg: Coutinho.

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.

punishment, but did not deliberate the verdict.⁵⁹ 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.⁶⁰ Unlike the judges in the provincial courts, *schepenen* were not 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.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.⁶² Many instances of such abuse of power were recorded, sometimes leading to prosecution of the *schout* before a higher court.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.⁶⁴

⁵⁹ Pieterman, *op. cit.*, p. 19.

⁶⁰ Egmond, *op. cit.*, p. 16.

⁶¹ *Idem*.

⁶² Pieterman, *op. cit.*, p. 20.

⁶³ Hovy, L., ‘Schikkingen in strafzaken tijdens de Republiek’, *Nederlands Archievenblad* 84, 1980, pp. 413-429.

⁶⁴ Egmond, *op. cit.*, p. 19.

C. *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.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 incorporation of the Royal Criminal Decrees, from which it deviated in a number of ways that specifically suited the circumstances of the Republic.

a. 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.⁶⁶ Prosecution could start after a complaint, but the *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 *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 *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.

⁶⁵ *Ibidem*, p. 16.

⁶⁶ In this summary I have relied on Diederiks *et al.*, *op. cit.*, pp. 17-19, and Egmond, *op. cit.*

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.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 importance that Dutch legal scholars⁶⁸ 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.

b. 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.⁶⁹ They all impose the same type of punishment, mirroring the offence,⁷⁰ 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.⁷¹ Egmond maintains this uniformity can only be explained by its origins in customary law and gradual

⁶⁷ See on torture in general in the Netherlands: P. van Heijnsbergen, P., *De pijnbank in de Nederlanden*, Groningen, Noordhoff, 1925; and on the misunderstandings and interpretations of the *Crimineele Ordonnantien* on this point: Van der Vrugt, *op. cit.*, pp. 112-127 and Van Bemmelen, *op. cit.*, pp. 31-22.

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 criminele saaken* (1666)). His interpretation, that allowed extensive use of torture, remained essentially uncontested until the end of the 18th Century.

⁶⁹ Egmond, *op. cit.*, 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, etcetera.

⁷¹ *Ibidem*, p. 15.

incorporation into ‘official’ criminal justice.⁷² 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 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’.⁷³ 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.⁷⁴ 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.⁷⁵

⁷² *Ibidem*, p. 18.

⁷³ van Leeuwen, Simon, cited in de Monté ver Loren, J. Ph., *Geschiedenis van de wetenschap van het strafrecht*, Amsterdam, s.e., 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, Thorsten, *Pioneering in Penology*, University of Pennsylvania Press, Oxford Press, 1944; Garman, James C., *Detention*

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,⁷⁶ one on prostitution, the other on adultery.⁷⁷ 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, the authorities realised early on that prostitutes had an important social and economic role.⁷⁸ Prostitution and other evidence of ‘loose morals’ were sometimes prosecuted (the sentences were relatively light), but contemporary (foreign) sources reveal that 17th 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; 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

Castles of Stone and Steel. Landscape, Labor and the Urban Penitentiary, Knoxville, University of Tennessee Press, 2005, pp. 32-34.

⁷⁶ On prostitution: van der Pol, Lotte, *Het Amsterdams boerdom. Prostitutie in de zeventiende en achttiende eeuw*, Amsterdam, Wereldbibliotheek, 1996; on adultery: Verhaar, Veronique and van den Brink, Frits, *De bemoeienissen van stad en kerk met overspel in het achttiende-eeuwse Amsterdam*, in Diederiks *et al.*, *op. cit.*, 1988, pp. 64-93.

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.

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’.

that vice was being tackled in Amsterdam while in reality it was tolerated.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' 17th century house. It was not that no one knew it was there, simply that it shouldn't be seen to be there.

3. *Enlightenment and Revolution: the 18th Century*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 and 1678 (the Franco-Dutch or 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 1688,⁸¹ 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

⁷⁹ Van de Pol, *op. cit.*, p. 227.

⁸⁰ As well as on Israel, *op. cit.* and Schama, Simon, *Patriots and liberators. Revolution in the Netherlands 1780-1813*, New York, Alfred A. Knopf, 1977, this introduction is partly based on Pieterman, *op. cit.*, pp. 21-24.

⁸¹ He was invited by English Parliamentarians to lead an army and overthrow (the Catholic) King. James II of England – the Glorious Revolution.

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.⁸² By the end of 1785 'emancipation of the democratic patriots from the tutelage of the regents had become [...] open conflict between the two parties'.⁸³ 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.

A. *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'.⁸⁴ 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 Vrugt it had force of

⁸² Pieterman, *op. cit.*, p. 23.

⁸³ Schama, *op. cit.*, p. 96. Also cited in Pieterman, *op. cit.*, p. 24.

⁸⁴ De Monté ver Loren, *op. cit.*, p. 70.

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.⁸⁵

a. 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.⁸⁶ The situation under the absolute monarchs in France and elsewhere formed the yardstick for these authors.⁸⁷ 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).⁸⁸

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.⁸⁹ 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

⁸⁵ Van der Vrugt, *op. cit.*, p. 172.

⁸⁶ van Lent, Leonie, *Externe Openbaarheid in het Strafproces*, Den Haag: Boom juridische Uitgevers, 2008, p. 17.

⁸⁷ Melai, A.L., Een verstrekkende uitbarsting, *Delikt en Delinkwent* 19, 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, R. and 't Hart, A. C., *Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie*, Arnhem, Gouda Quint, 1990, pp.75-87.

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.⁹⁰

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 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.

b. 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)

⁹⁰ Van Lent, *op. cit.*, p. 18.

⁹¹ De Monté ver Loren, *op. cit.*, p.74.

⁹² *Ibidem*, pp. 85-90.

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.

B. *A Dutch revolution*

a. 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.⁹⁵ 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.

⁹³ *Ibidem*, on Schorer, pp. 80-84 and on Voorda, pp. 110-118.

⁹⁴ *Ibidem*, p. 117.

⁹⁵ See Beijer and Brants, *op. cit.*, p. 36.

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 wealthy burghers, belonging to neither the oligarchies by birth or 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.⁹⁶ It was this that formed the framework of events leading to the proclamation of the Batavian Republic in 1795.

b. 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 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

⁹⁶ Pieterman, *op. cit.*, p. 25.

⁹⁷ A.G. Bosch, *De ontwikkeling van het strafrecht in Nederland van 1795 tot heden*, 5th ed., Nijmegen, Ars Aequi Libri, 2008, p. 29.

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 (*Manier van procederen bij het Hof van Holland* - 1799), based on the draft of 1774, introduced procedure usual at the 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 to convict without confessions. Judges at the 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 constitution, drawn up in consultation with the French government,¹⁰² the Batavians managed little in a practical sense.

4. *A Unitarian State and Codification: the 19th Century*

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,¹⁰³ William

⁹⁸ *Ibidem*, p. 26.

⁹⁹ See under 3.B *supra*.

¹⁰⁰ Drenth, J. H., *De historische ontwikkeling van het inquisitoire strafproces*, Amsterdam, Noord-Hollandsche Uitgeversmaatschappij, 1939, p.208.

¹⁰¹ *Ibidem*, p. 209.

¹⁰² De Monté ver Loren and Spruit, *op. cit.*, pp. 318-324.

¹⁰³ William died in 1806.

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,¹⁰⁴ 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 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.

¹⁰⁴ Among other things, he attempted to thwart Bonaparte's trade blockades that were aimed at impoverishing Holland and enriching France.

A. *Criminal justice under French rule: reorganisation and legislation*

a. 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

b. 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 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 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

¹⁰⁵ Bosch, *op. cit.*, p.75.

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 proved 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 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.

B. 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

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.

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.

a. 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’.¹⁰⁸ 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.¹⁰⁹

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 had limited influence and no means of control over the sovereign, who could also govern by Decree and so by-pass the other arm of the legislative body entirely. The Constitution of 1815 was made necessary by the unification of the North and South Netherlands.¹¹⁰ 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

¹⁰⁸ De Voogd, *op. cit.*, p 178.

¹⁰⁹ Pieterman, *op. cit.*, p. 28.

¹¹⁰ 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.

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.¹¹¹ 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 (*Wetboek van Strafvordering*) and a Law on the Organisation of the Judiciary (*Wet Rechterlijke Organisatie*). The debate to which this legislation gave rise during its inception reflects the political and legal struggle between tradition and change.

b. 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 it 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 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 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,

¹¹¹ Pieterman, *op. cit.*, p. 29.

¹¹² See on these pre-revolutionary ideas on public trials and jury *in extenso*: Van Lent, *op. cit.*, ch. 2.

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 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'.¹¹⁸ Many legal scholars in the North also wrote about the subject, but, like the Northern representatives in the States

¹¹³ Voorduin, J. C., *Gescheidenis en beginselen der Nederlandsche wetboeken*, VI, *Wetboek van Strafvordering deel II*, Utrecht, Robert Natan, Akademie-boekhandelaar, 1840, p. 4.

¹¹⁴ Tellegen, B. D. H., *Welke bepalingen omtrent de justitie zijn in de grondwet onmisbaar?*, *Handelingen der nederlandsche Juristen-Vereeniging-VI-II*, 's-Gravenhage, Gebr. Belinfante, 1883, p. 101; Pieterman, *op. cit.*, p. 30 and 60.

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. p. 244 and 77-78 resp.).

¹¹⁶ Noordziek, J. J. F., *Geschiedenis der beraadslagingen gevoerd in de Kamers der Staten-Generaal over het ontwerp Wetboek van Strafvordering en over het vraagstuk der jury, zittingsjaar 1829-1830*, 's-Gravenhage: Martinus Nijhoff, 1887.

¹¹⁷ *Ibidem*, pp. 204-205.

¹¹⁸ Noordziek, *op. cit.*, p. 1-2.

General, coming out against jury trial.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.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’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 *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,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.

c. Reorganisation of the judiciary: prosecution service and provincial autonomy¹²³

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.

¹¹⁹ Bossers, Geert, *Welk eene natie, die de jurij heft gehad, en ze weder afgeschafft?*, Delft, Eburon, 1987, p. 102.

¹²⁰ Noordziek, *op. cit.*, p. 98.

¹²¹ Drenth, *op. cit.*, p. 211.

¹²² Drenth (*Ibidem*, pp. 214 and 216 resp.) cites the highly critical *Courier des Pays-Bas* from 1829 as reporting that pre-trial-detention was possible in all cases and that the investigation was *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 16th 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.

¹²³ See extensively on this subject: Pieterman, *op. cit.*, This paragraph is based on pp. 29-54.

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.c. 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.'¹²⁴ 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 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.

¹²⁴ Original in Dutch quoted in Pieterman, *op. cit.*, p. 43.

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.¹²⁵ 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.

C. 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.¹²⁶ 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 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

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, *op. cit.*, p. 82.

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.¹²⁷ 1848 also saw the inclusion of an article declaring that criminal trials must be held in public.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.

a. 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 (Nederlandse Juristen Vereniging – NJV) was established to reach consensus among legal scholars. It proved impossible. By 1873 the different positions had become entrenched.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 '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 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

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.

¹²⁸ Tellegen, *op. cit.*, p. 92-106.

¹²⁹ See Pieterman, *op. cit.*, ch. 6 for a full discussion.

¹³⁰ Cited in Pieterman, *op. cit.*, p. 115 and 116.

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 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.

b. Sentencing and punishment

¹³¹ This and other quotations in Pieterman, *op. cit.*, pp.107 and 108.

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

c. A Dutch Criminal Code¹³³

The abolition of corporal and capital punishment and the disappearance of the scaffold that were effectuated with a large majority in

¹³² See on the abolition of capital punishment Beijer, A., The Debate on Capital Punishment in the Netherlands and Germany, *International Criminal Justice Review*, 2000-2001, pp. 98-112.

¹³³ In general on the legislative history of this code: Smidt, H. J., *Geschiedenis van het Wetboek van Strafrecht*, Haarlem, H. D. Tjeenk Willink, 1881; Bosch, A. G., *Het ontstaan van het Wetboek van Strafrecht*. Zwolle, N. V. Uitgeversmaatschappij W. E. J. Tjeenk Willink, 1965

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.¹³⁴

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 *Crimineel Wetboek voor het Koninkrijk 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 (*misdrifven*) 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'.¹³⁵ And it not only removed mandatory sentencing, but introduced a wide margin of discretion for the judge: a general minimum

¹³⁴ Bosch, *op. cit.*, p.79.

¹³⁵ Bosch, *op. cit.*, p. 41.

sentence of 1 day in prison or 1 guilder fine and a specific maximum for each offence.¹³⁶

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.

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.¹³⁷

¹³⁶ 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. *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.¹³⁸ 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.¹³⁹ 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'.¹⁴⁰ 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.

¹³⁸ De Voogd, *op. cit.*, p. 191.

¹³⁹ 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.

¹⁴⁰ De Voogd, *op. cit.*, p.200.

Moreover, the House of Orange, represented by the young Queen Wilhelmina, was again a binding element – a cause to rally in opposition to calls for revolution after the First World War.¹⁴¹ 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’.¹⁴² 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 Kuypers 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 1960’s. Pillarisation permeated every aspect of the community. Each pillar, protestant, Catholic, liberal and socialist,¹⁴³ 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

¹⁴¹ 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.

¹⁴² De Voogd, *op. cit.*, p.204.

¹⁴³ At first, the socialists were shut out of this political arrangement, but from the 1920’s onwards, the more moderate party also became part of pillarised politics.

and accommodation¹⁴⁴ reinforced social acceptance of and confidence in the 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.

a. 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.¹⁴⁵ 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.¹⁴⁶

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

¹⁴⁴ For an authoritative account: A. Lijphart, *The politics of accommodation. Pluralism and democracy in the Netherlands*. Berkeley: University of California Press, 1968, More recently: *Acta Politica* 37(2002)Spring/Summer: 'Still the Politics of Accommodation?'

¹⁴⁵ See note 150 supra. On the whole debate: Pieterman, *op. cit.*, ch.7.

¹⁴⁶ Pieterman, *op. cit.*, p. 171.

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 otherwise.¹⁴⁷ 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,¹⁴⁸ 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*.

b. 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 1850's -1870's.¹⁴⁹ By the end of the century criminal procedure was generally seen as seriously outdated,

¹⁴⁷ 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.

¹⁴⁸ Pieterman, *op. cit.*, p. 184.

¹⁴⁹ Bosch, *op. cit.*, p. 136

and its highly formalistic regulations were thought to hinder effective prosecutions.¹⁵⁰ 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 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.

B. 1926 – 1945

a. 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, 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.¹⁵¹ 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’.¹⁵²

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

¹⁵⁰ *Ibidem*, p. 137.

¹⁵¹ Van Heijnsbergen, P., *Het inquisitoire proces*, *Verspreide Opstellen*, Amsterdam: Uitg.Mij. De gulden ster, 1929; van Guns, S. J. M., *Verdachte en verdediger in ons strafproces*, *Tijdschrift voor Strafrecht*, 1935, p. 335; Drenth, *op. cit.*, p. 243.

¹⁵² Van Heijnsbergen, *op. cit.*, pp. 332 and 333.

‘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’.¹⁵³ 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 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’.¹⁵⁴ 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.¹⁵⁵ 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.

b. 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

¹⁵³ Van Heijnsbergen *et al.*, *Verspreide Opstellen*, Amsterdam, Uitg. Mij. De Gulden Ster, 1929, p. 89.

¹⁵⁴ See Drenth, *op. cit.*, pp. 224–228 for these and many more examples of disbelief.

¹⁵⁵ 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.

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.

The Code of Criminal Procedure entered into force on January 1 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 he 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 (*afdruipende 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.¹⁵⁶ 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.¹⁵⁷ Opinions on this decision are divided to this day: some maintain that the Supreme Court was merely clarifying an apparent, albeit essential, inconsistency;¹⁵⁸ 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.¹⁵⁹ 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 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 20th Century however, the same criticism was levelled at the Criminal Code.

c. 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

¹⁵⁶ Reijntjes, J. M., *Minkenbof's Nederlandse Strafvordering*, 11th ed., Deventer, Kluwer, 2009, p. 19.

¹⁵⁷ HR December 20th, 1926, NJ 1927, p. 85.

¹⁵⁸ Reijntjes, *op. cit.*, 2009, p. 19.

¹⁵⁹ W. P. J. Pompe, Vooronderzoek of eindonderzoek beslissend, *Tijdschrift voor Strafrecht*, 1959, p. 145.

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 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.¹⁶⁰ 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.¹⁶¹ 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,

¹⁶⁰ The Dutch Criminologist Adriaan Bongers 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.

¹⁶¹ A.G. Bosch, *op. cit.*, 2008, pp. 69-71.

the classical school of thought was sufficiently established to prevent the excesses of fascism entering Dutch criminal justice.

d. 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 resulted in both 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 the transaction.¹⁶² It was to set the trend for the post-war years.

*e. The Second World War and occupation: 1940-1945*¹⁶³

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.¹⁶⁴ 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.¹⁶⁵ Only a small percentage of the general

¹⁶² A.G. Bosch, *op. cit.*, p. 123.

¹⁶³ The whole war has been chronicled by the official Dutch war historian L. de Jong in the numerous volumes spanning many years: *Het koninkrijk der Nederlanden in de Tweede Wereldoorlog*, Den Haag: Staatsuitgeverij.

¹⁶⁴ Mulder, G. E., *Schijn van recht. De geschiedenis van de vredesrechtspraak gedurende de Duitse bezetting*, Arnhem, 1995; von Frijtag Drabbe Künzel, Geraldien, *Het recht van de sterkste. Duitse strafrechtspleging in bezet Nederland*, Amsterdam, Uitgeverij Bert Bakker, 1999.

¹⁶⁵ 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-

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 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 the manifestly the opposite was intended, was the effect of 4 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.¹⁶⁶ ‘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

troops. On the attitude of population and civil service to the persecution of the Jews: C. de Voogd, *op. cit.*, pp. 238-249 and L. de Jong, *op. cit.*, vol. IV, part 2, 1972 and volume VI, part 1, 1975; Moore, Bob, *Victims and Survivors: the Nazi Persecution of the Jews in the Netherlands 1940-1945*, London, Arnold, 1997.

¹⁶⁶ P. Romijn, Snel, streng en rechtvaardig. Politiek beleid in zake de bestraffing en reclassering van ‘foute’ Nederlander. 1945-1955, Groningen: De Haan, 1989. W.M.E. Noach, *De bijzondere rechtspleging. Straf- en tuchtrechtelijk optreden tegen onvaderlandslievend gedrag uit de bezettingsjaren*, 's-Gravenhage: Martinus Nijhoff, 1948; Brants, Chrisje, “Dealing with the holocaust and collaboration: The Dutch experience of criminal justice and accountability after World War II”, *Crime, Law and Social Change*, 2000, pp. 211-236.

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.¹⁶⁷

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 1950's, successfully campaigning for restoration of their pension rights.

6. 1950-1985: *The modern era continued*

A. 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.¹⁶⁸ This was to have significant effects on criminal justice after the 1970's.

¹⁶⁷ Bennett, Rab, *Under the Shadow of the Swastika: the moral dilemmas of resistance and collaboration in Hitler's Europe*, Basingstoke, Macmillan, 1999.

¹⁶⁸ De Voogd, C., *op. cit.*, 1996, pp. 258-270.

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'.¹⁶⁹ 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.¹⁷⁰

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 (with the exception of the Communists who made substantial gains).¹⁷¹ 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 through 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

¹⁶⁹ *Ibidem*, p. 275.

¹⁷⁰ 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.

¹⁷¹ *Ibidem*, p.278.

itself felt in two areas: economic criminal law and the ideology of punishment.

a. 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 1920's and 1930's 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.¹⁷² 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 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.

b. 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

¹⁷² A. G. Bosch, *op. cit.*, 2008, pp. 124 and 125.

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. 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.¹⁷³

¹⁷³ See on the history of the Utrecht School and its successor, the 'New Utrecht School' : C.H. Brants, *Over levende gedachten, De menselijkheid van een functioneel strafrecht* (inaug. lecture), Deventer: Gouda Quint, 1999.

c. The rebellion of the Sixties

During the 1950's, 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 1960's 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 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.¹⁷⁴ It goes without saying that this also affected criminal justice, although not immediately.

B. 1970-1985: *Changing times?*

The 1970's 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 – was 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 decriminalisation and mechanisms of diversion, but also, in one of the most radical versions, for the abolition of prisons and even criminal law itself.¹⁷⁵ In Utrecht, the 'New Utrecht School' was at the forefront of 'critical criminal

¹⁷⁴ De Voogd, *op. cit.*, 1996, pp. 283-290.

¹⁷⁵ See the work of the Dutch abolitionist L. Hulsman; and van Swaaningen, R., *Critical Criminology - Visions from Europe*, London, Sage, 1997 on Hulsman and other aspects of the critical movement in the Netherlands.

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.¹⁷⁶

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.¹⁷⁷ (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).

a. 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 of policy.¹⁷⁸ Secularisation and the accompanying disappearance of shared moral attitudes to existential questions, threw doubt on whether crimes of 'morality' that took no account

¹⁷⁶ Brants, *op. cit.*, 1999.

¹⁷⁷ See on the fair trial provisions of ECHR: Brants and Franken, *op. cit.*, 2009, pp. 32-34.

¹⁷⁸ 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.

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).¹⁷⁹

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.¹⁸⁰ 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.¹⁸¹ 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.

b. The paradoxical continuity of change

The result of the 1960’s ‘revolution’ was ‘paradoxical continuity’.¹⁸² 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 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

¹⁷⁹ All of these issues were first decriminalised *de facto* and eventually legalised. Brants, C. H., “The Fine Art of Regulated Tolerance: prostitution in Amsterdam”, *Law and Society*, num. 25, 1998, pp. 621-635.

¹⁸⁰ Van de Bunt, H. G., *Officieren van Justitie: verslag van een participerend observatieonderzoek*, Groningen, Tjeenk-Willink, 1985.

¹⁸¹ David Downes, *Contrasts in tolerance: post-war penal policy in the Netherlands and England*, Oxford: OUP, 1988.

¹⁸² De Voogd, *op. cit.*, 1996, p. 291.

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 or judicial review.

Changes in criminal procedure were relatively few in the 1970's, 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.

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.¹⁸³ But in criminal justice the first cracks in public trust were appearing.

¹⁸³ De Voogd, *op. cit.*, 1996, p. 312.

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.

A. *Re-establishing social control*

a. 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 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.¹⁸⁴

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’.¹⁸⁵ 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

¹⁸⁴ Corstens, G. J. M., *Transactie bij misdrijven*, in: *Straffen in gerechtigheid*, Arnhem, Gouda Quint, 1987, pp. 73-82.

¹⁸⁵ ECtHR, February 27th, 1980, *A 35* (De Weer v Belgium).

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.¹⁸⁶

As the 1980's 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.¹⁸⁷ 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'.¹⁸⁸ Transaction had a part to play here, but more important was the idea of enlisting of 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 1970's. But criminal law remained a last resort, deterrence rather than repression the goal.¹⁸⁹ More serious offences could be dealt with by transaction; only some, in particular organised crime, always warranted prosecution.¹⁹⁰

¹⁸⁶ C. Brants and S. Field., 'Discretion and accountability in prosecution: a comparative perspective on keeping crime out of court', in: Fennell, P. et al. (eds.), *Criminal Justice in Europe. A comparative perspective*, Oxford: Oxford University Press, 1995, p. 127-148; C.H. Brants, *Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure*, vol. 11.1 *Electronic Journal of Comparative Law*, May 2007.

¹⁸⁷ Ministerie van Justitie, *Samenleving en criminaliteit. Een beleidsplan voor de komende jaren*, Den Haag, 1985.

¹⁸⁸ A.C. 't Hart, *Openbaar Ministerie en rechtshandhaving*, Arnhem: Gouda Quint, 1994, p. 307

¹⁸⁹ 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.

¹⁹⁰ Ministerie van Justitie, *Samenleving en criminaliteit. Een beleidsplan voor de komende jaren*, Den Haag, 1985.

b. 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 1970’s, 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 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.¹⁹¹

Such cases attracted much publicity once they reach the court stage, but faced with powerful and wealthy defendants and specialised defence teams, the prosecution service failed in several spectacular trials in the course of the 1980’s. 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.¹⁹²

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,¹⁹³ proposing .i.a. to legislate for the use of invasive and pro-active techniques of police investigation. In the 1970’s, 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

¹⁹¹ Brants, C. and Brants, K., *De sociale constructie van fraude*, Arnhem, Gouda Quint, 1991.

¹⁹² Brants, 1988, and Brants and Brants 1991, ch. IX.

¹⁹³ Openbaar Ministerie, *Strafrecht met beleid. Beleidsplan van het Openbaar Ministerie voor de jaren 1990-1995*, Kamerstukken II, 1990/91, 21833; Ministerie van Justitie, *Georganiseerde criminaliteit. Dreigingsbeeld en plan van aanpak*, Kamerstukken II, 1992-1993, 22838.

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).¹⁹⁴ 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 telephone taps, very few such means of investigation had any basis in Dutch law and were therefore illegal.

c. 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.¹⁹⁵ Despite yet more policy plans promising a harder approach to so-called petty crime and announcing more prosecutions and fewer transactions,¹⁹⁶ by the 1990's, 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.¹⁹⁷ 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 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

¹⁹⁴ Nadelmann, Ethan A., *Cops across borders. The internationalization of U.S. criminal law enforcement*, S. L., University of Pennsylvania State Press, 1993.

¹⁹⁵ Brants, K., "Criminaliteit, politiek en criminele politiek: de Haagse receptie van een nieuwe heilsleer", *Tijdschrift voor Criminologie*, 5/6, 1986, pp. 219-236.

¹⁹⁶ Ministerie van Justitie, *Recht in beweging*, Kamerstukken II, 1990-1991, 21829

¹⁹⁷ Brants, C., "Vertrouwen en achterdocht: de driehoeksrelatie justitie, media, publiek", *Justitiële Verkenningen*, 2002, pp. 8-28.

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.¹⁹⁸ And all because of a portrayal of organised crime in police reports, based mainly on American sources and definitions that did not fit the situation in the Netherlands.¹⁹⁹

B. 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.²⁰⁰ 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: from the primacy of truth-finding, they presumed and reinforced a need for secrecy, especially pre-trial, a strong prosecution service and 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.

¹⁹⁸ Report of the parliamentary inquiry committee, *Inzake Opsporing*, 's-Gravenhage: Sdu Uitgevers, 1996.

¹⁹⁹ These were the findings of the criminologists who reported to the inquiry committee. F. Bovenkerk, F. et al., *The Nature of Organized crime in the Netherlands*, Dordrecht: Kluwer Law, 1998.

²⁰⁰ Wet administratiefrechtelijke handhaving verkeersvoorschriften, *Stb.1989*, 300; Wet dienstverlening, *Stb. 1989*, 482.

a. 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.²⁰¹ Seen as a necessary measure in the control of (organised) crime, anonymous testimony (or refusing to call a witness requested by the defence 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.²⁰²

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).²⁰³ 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’.²⁰⁴ The practice of using anonymous testimony remains a feature of Dutch trials. It now meets the requirements of the ECtHR, if only just.

²⁰¹ HR 5-2-1980, NJ 1980, 319.

²⁰² ECtHR *Kostovski vs. The Netherlands*, November 20th 1989, Series A-166.

²⁰³ Law of 11-11 1993, *Stb. 1993, 603*. See also: Beijer, A., *Bedreigde getuigen in het strafproces*, Deventer, Gouda Quint, 1997.

²⁰⁴ 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 vs. The Netherlands*, num. 21363/93.

b. 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 1990's. 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.

Serious problems within the prosecution service were 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 district the 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 *Rechtsstaat*'. 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 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 investigations by the police 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.²⁰⁵

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 legislation²⁰⁶ also sought means of speeding up criminal 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’.²⁰⁷ 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 2000.²⁰⁸ It too further 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

²⁰⁵ 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 G.J. Corstens *Het Nederlands strafprocesrecht*, 6th ed., Deventer, Kluwer, 2008, pp. 111-115 and the literature cited there.

²⁰⁶ Commissie Herijking wetboek van strafvordering (o.l.v. Ch.M.J.A. Moons), *De herziening van het gerechtelijk vooronderzoek*, Arnhem, Gouda Quint, 1992.

²⁰⁷ Hildebrandt, M. et al. (eds.), *Een afzonderlijke procedure voor de bekende verdachte?*, Arnhem, Gouda Quint, 1993.

²⁰⁸ Wet Bijzondere Opsporingsbevoegdheden, May 27th, 1999, *Stb. 1999*, 245.

prosecution wishes keep secret).²⁰⁹ 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.²¹⁰

C. 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.²¹¹ The consequences for criminal justice have been a state 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.²¹² 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.

a. Populist politics and demands on criminal justice

During the 1990’s, 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

²⁰⁹ Beijer, A.M. *et al.*, *De Wet bijzondere opsporingsbevoegdheden – eëndevaluatie*, WODC reeks onderzoek en beleid, nr. 222, Den Haag: Boom Juridische uitgevers, 2004.

²¹⁰ Tijdelijke aanwijzing toezeggingen aan getuigen in strafzaken, *Stcr.* June 20th, 2001, num. 138. This was to become law after many years. Deals are strictly circumscribed and the prosecution may never promise immunity.

²¹¹ Beck, U., *The Risk Society. Towards a new Modernity*, London, Sage, 1992 (orig. in German, 1986)

²¹² Stenson, Kevin and Sullivan, Robert R. (eds.), *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies*, Portland, OR., Willan Publishing, 2000. Wendy Hollway, Wendy and Jefferson, Tony, “The Risk Society in an Age of Anxiety: Situating Fear of Crime”, *The British Journal of Sociology*, num. 48, 1997, pp. 255-266. O'Malley, P. (ed.), *Crime and the Risk Society*, Aldershot, Dartmouth, 1998.

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 of 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.²¹³

Since the first stirrings of public discontent with criminal justice policies in the 1980’s, giving voice to a rising fear of crime, demands for less tolerance and more ‘law and order’, successive governments – regardless of their political affiliations – responded with legislation and policy measures that 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.²¹⁴ 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

²¹³ See Pakes, Francis, “The Politics of Discontent. The Emergence of a New Criminal Justice Discourse in the Netherlands”, *Howard Journal of Criminal Justice*, num. 43, 2004, pp. 284-298, linking political developments to new criminal policies.

²¹⁴A 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 4000 in 1983 to 13.618 in 1997, an increase of 240% in 14 years.

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.²¹⁵

b. 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 that 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 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.

c. 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.²¹⁶ All have been incorporated into 'normal' criminal law and

²¹⁵ One of these exceptions was the special high security prison that housed dangerous organised criminals. The ECtHR found that conditions there violated article 3 ECHR that forbids cruel and unusual treatment: ECtHR (Grand Chamber), 15 May 2007, Appl. 52391/99 (*Ramzabai vs. The Netherlands*).

²¹⁶ See in general on terrorism in relation to criminal process, in particular the protection of fundamental rights, John A.E. Vervaele Special procedural measures and the protection of human rights. General report, *Utrecht Law Review*, Special Issue Developments in the Protection

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.²¹⁷ 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 punitivity.

d. 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 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 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).

of Fundamental Human Rights in Criminal Process, October 2009, p. 63-103, www.utrechtlawreview.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.

²¹⁷. See on these changes to Dutch law and procedure, Piet Hein van Kempen The Protection of Human Rights in Criminal Law and Procedure in The Netherlands, vol 13.2 *Electronic Journal of Comparative Law*, October 2009.

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)'.²¹⁸ 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; even the victim impact statement is thought best done in writing and via the prosecutor to avoid unnecessary emotion in court.

e. Proposal for a new Code of Criminal Procedure

By the end of the 1990's, 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. 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.²¹⁹ 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 stance,²²⁰ 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 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.²²¹

²¹⁸ *Kamerstukken II* 2004/05, 30 143, nr. 3, p. 9.

²¹⁹ Groenhuijsen, M. S. and Kigge, G. (eds.), *Het onderzoek ter zitting. Eerste interimrapport onderzoeksproject Strafvordering 2001; Het vooronderzoek in strafzaken. Tweede interimrapport onderzoeksproject Strafvordering 2001*, Deventer, Kluwer, 2001; *Dwangmiddelen en rechtsmiddelen. Derde interimrapport onderzoeksproject Strafvordering 2001*, Deventer, Kluwer 2002; *Afronding en Verantwoording. Eindrapport onderzoeksproject Strafvordering 2001*, Deventer, Kluwer 2004.

²²⁰ Brants, C. H., et al., (eds.) *Legitieme strafvordering. Rechten van de mens als inspiratie in de 21ste eeuw*, Antwerpen: Intersentia; and *Op zoek naar grondslagen. Strafvordering 2001 ter discussie*, Boom, 2003.

²²¹ Groenhuijsen, M. S. and Kigge, G., *op. cit.*, 2004, p. 1.

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.²²² 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.²²³ 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.²²⁴ It remains to be seen whether this will also be enough for the European Court.

f. 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

²²² Th.A. de Roos, *Is de invoering van lekenrechtspraak in de Nederlandse strafrechtspleging gewenst?*, Tilburg, November 2006.

²²³ *Salduz vs. Turkey*, no. 36391/02, November 27th, 2008; *Pishchalnikov vs. Russia*, 7025/04 September 24th, 2009. Others such judgments have followed.

²²⁴ HR. 30-06-2009, LJN BH3079; LJN BH3081; LJN BH3084

and not the ‘real’ punishment’ that ‘real crime’ warrants.²²⁵ 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,²²⁶ 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,²²⁷ 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.²²⁸ 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.

IV. 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

²²⁵ It should be noted that if ‘tolerance no longer is a driving force in penal matters [but] it continues to inform the governance of areas of ambiguous morality such as euthanasia and prostitution. The beneficiaries of the new tolerance are no longer offenders but rather those making certain life choices or preferring certain lifestyles’ (Francis Pakes, *Criminal Justice*, vol. 5, num. 2, 2005, pp. 145-161).

²²⁶ Chrisje Brants and Bart Stapert, *Voor wat hoort wat: plea bargaining in het strafrecht*, Den Haag: Boom Juridische uitgevers, 2004.

²²⁷ Wet OM-afdoening, July 7th, 2006, *Stb. 2006*, 330.

²²⁸ Letter from the minister of justice concerning plea-bargaining, October 23rd, 2003, *Kamerstukken II* 2003/04, 29200 VI, num. 31.

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.²²⁹ 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

²²⁹ Franke, Herman, *De dood in het leven van alledag*, Nijgh en van Ditmar, Den Haag, 1985, pp. 136 ff.

public executions and lavish archaic ceremonies.²³⁰ 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 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 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 ones 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

²³⁰ *Zur Geschichte der Religion und Philosophie in Deutschland*, Ditzingen, Reclam, 1982 (orig. 1835)

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 its actual enforcement, while still allowing the criminal law to be used to control and shape society as the state thought best in the public interest. This in its turn requires a flexible and 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 1960's onwards. Yet, until the 1980's 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 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 Rechtsstaat, this was to lead, in the 1990’s, 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 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.’²³¹ 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 alteration of such concepts in practice and the gradual change in

²³¹ Van Kempen, *op. cit.*, 2009.

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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