"An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU"
JLS/D3/2007/01

The Netherlands

1. Introduction

The Dutch Code of Criminal Procedure dates from 1921 and came into effect in 1926. The code initially bore a strong resemblance to the French Code d'Instruction Criminelle, but has since changed significantly, partly due to the influence of the case law of the European Court of Human Rights, partly to the national and international developments in combating crime.[1] In connection with pre-trial detention, we refer in particular to the case of Brogan vs. UK, which resulted in changes in the police detention rules as well as the judicial monitoring of pre-trial detention in the Netherlands.[2] Similarly, combating (international and) national terrorism was a reason for major amendments to the regulations for pre-trial detention in 2006.[3] (See paragraph 8 for more information on this matter.)

Title 4 of book 1 of this Code of Criminal Procedure contains the provisions for the coercive measures that can be applied within a criminal investigation. Preliminary detention is also called "pre-trial detention" in the literature. However, one must remember when applying this term that preliminary detention is not necessarily limited to untried prisoners (on whom no court decision has yet been reached) who are still in the pre-trial phase, but can also apply to sentenced prisoners in the trial phase who have appealed or who are within the statutory time limit for doing so. The term "pre-trial detention" is used in this chapter in the broad sense of "preliminary detention".

Pre-trial detention itself can be further divided into three phases: remand in custody (Article 63, CCP), remand detention (Article 65, CCP) and detention pending trial (Article 65, CCP). Prior to pre-trial detention, a person suspected of having committed a criminal offense can also be deprived of his liberty for a short time by means of police arrest for questioning (Articles 53-54, CCP) and by means of police custody (Article 57, CCP).[4] Police arrest, police custody and remand in custody form part of the pre-trial stage, which is mainly inquisitorial. On the other hand, remand detention can be applied not only during the pre-trial stage, but also after the investigation for the trial has commenced (Article 65, paragraph 2, CCP). Although police custody is not part of pre-trial or preliminary detention, the time spent in police custody, together with the time spent in pre-trial detention, is deducted from a sentence to imprisonment (Article 27, CCP).

The competence to issue a police arrest is vested in the public prosecutor or a (senior) police officer (should seeking the permission of the prosecutor cause undue delay). Remand in custody, remand detention and detention pending trial always require a decision by a judge. This can be a single judge or a full bench of the court (for more details, see paragraph 3).

The type of coercive measures, such as pre-trial detention, that can be imposed on a person, as well as the moment at which they can be imposed, depends on various factors. These include the type of the offense, the seriousness of the suspicion, the statutory maximum of the penalty that can be imposed, and the existence of specific grounds prescribed by law. Unlike many other countries, Dutch criminal law does not have a system of special minimum penalties, but the same minimum penalty applies to all offenses. For the most serious offenses, the crimes, the minimum prison sentence is one day imprisonment, while for the lesser contraventions this is one day of detention (Articles 9, 10 and 16).

This report will thoroughly discuss the pre-trial stage. The aim is to give an analysis of the minimum standards in pre-trial detention and the grounds for regular review in the Netherlands. Empirical background information will be dealt with in the 2nd paragraph, after which paragraph 3 discusses the legal basis (scope and notion of pre-trial detention). The 4th and 5th paragraphs concern the grounds for detention and other prerequisites, and grounds for review of pre-trial

[1] See: G.J.M. Corstens, *Het Nederlandse Strafprocesrecht*, Kluwer, Deventer, 5th edition, 2005.
[2] ECtHR 29 November 1988, A145B.
[3] Laws of 20 November 2006, Stb. 2006, 580 and Stb. 2006, 370.
[4] The English terminology comes from the terminology used by P.J.P. Tak in his study *The Dutch criminal justice system*, Wolf Legal Publishers, Nijmegen, 2008.

detention respectively. The length of pre-trial detention is treated in paragraph 6, followed by other relevant aspects in relation to pre-trial detention in paragraph 7. Paragraph 8 will focus on the system of pre-trial detention regarding vulnerable groups. A summary of all the paragraphs mentioned above is given in paragraph 9.

2. Empirical background information

Statistics for the numbers within the prison population, pre-trial detention / remand imprisonment, etc. in the Netherlands are provided by various sources. This paragraph presents data from international sources: the Council of Europe's SPACE 1, International Centre for Prison Studies of King's College London, and the Ministry of Justice of the Netherlands. First, we will present the data, then explain and compare the statistics.

Tables 1 to 5 are based on SPACE 1 (Annual Penal Statistics)[5] from the Council of Europe. The numbers relate to the 1st of September 2006 (stock). They include the total prison population, not only those who are held in penal institutions. No measures (legislative or otherwise) directly influencing the trends in the number of prisoners have been taken during the course of the last twelve months.

The statistics in tables 6 to 8 are derived from the International Centre for Prison Studies (ICPS). Every year, this centre publishes the "World Pre-trial / Remand Imprisonment List"[6] and the "World Female Imprisonment List".

Tables 9 to 13 present various statistics based on data published by the Dutch Ministry of Justice, such as the evolution of the prison population between 1997 and 2008.

Data from the Council of Europe Annual Penal Statistics, SPACE 1, Survey 2006[7]

Table 1, the Netherlands and its prisoners in general

Population 2006, annual estimates (thousands)	16,379
Total number of prisoners (including pre-trial detainees)	20,463[8]
Prison population rate per 100,000 inhabitants	124.9
Total capacity of penal institutions / prisons	22,000
Prison density per 100 places	93

Table 2, Special groups of prisoners

Prisoners under 18 years old	38 (0.2%)
Of which: number of juveniles in pre-trial detention	Not available
Prisoners from 18 to under 21 years old	1,224 (6%)
Number of female prisoners (including pre-trial detainees)	1,051 (6.4% of total prison population)
Of which: number of female prisoners in pre-trial detention	Not available
Number of foreign prisoners (including pre-trial detainees)	5,339 (32.7%)
Of which: number of foreign pre-trial detainees	1,306 (24.5%)
Percentage of European prisoners (as a part of foreign prisoners)	Not available

[5] http://www.coe.int/t/e/legal_affairs/legal_cooperation/prisons_and_alternatives/Statistics_SPACE_I/List_Space_I.asp#TopOfPage

[6] http://www.kcl.ac.uk/depsta/law/research/icps/downloads/WPTRIL.pdf

[7] 23 January 2008, PC-CP (2007)9 rev3, by M.F. Aebi, N. Delgrande: University of Lausanne, Switzerland.

[8] In tables 1 to 5, figures refer to the total number of prisoners, of which 16,331 were detained in penal institutions for adults, 2,452 in juvenile institutions and 1,680 in custodial clinics.

Table 3, Legal status of prison population I

Untried prisoners (no court decision yet reached)	4,596 (28.1% of total prison population)
Convicted prisoners (but not yet sentenced)	Not applicable
Sentenced prisoners who have appealed or who are within the statutory time limit for doing so	1,018 (6.2% of total prison population)
Sentenced prisoners (final sentence)	7,814
Other cases[9]	2,903
Total	16,331

Table 4, Legal status of prison population II

Percentage of prisoners not serving a final sentence	52.2%
Rate of prisoners not serving a final sentence per 100,000 inhabitants	52.0
Percentage of untried prisoners (no court decision yet reached)	28.1%
Rate of untried prisoners (no court decision yet reached) per 100,000 inhabitants	28.1

Table 5, Evolution of prison populations between 2000 and 2006[10]

Year	Total number of prisoners (including pre-trial detainees) on 1 September	Prison population rate per 100,000 inhabitants on 1 September
2000	13,847	90.1
2001	15,246	95.4
2002	16,239	100.8
2003	18,242	112.7
2004	20,075	123.5
2005	21,826	133.9
2006	20,463	124.9

Data from the International Centre for Prison Studies (ICPS, King's College London)

Table 6, Prison Brief 2008[11]

Prison population total (including pre-trial detainees / remand prisoners)[12]	16,416 (includes 1,679 illegal aliens, 1,750 in juvenile institutions and 1,893 in custodial clinics) at 31 August 2008 (National Prison Administration)
Prison population rate (per 100,000 of national population)	100 Based on an estimated national population of 16,416 million in June 2008 (from Eurostat figures)

[9] The category "Other cases" includes:
- Mentally ill prisoners kept in detention for security reasons;
- Prisoners sentenced under the Law on social protection;
- Aliens handed over to the Aliens Office (illegal aliens held for administrative reasons);
- Wanderers / beggars handed over to the Government;
- Recidivists / habitual offenders handed over to the Government;
- Persons temporarily detained against the revocation of the release on parole;
- Suspension of the release on parole.

[10] Council of Europe Annual Statistics – Space 1-2006, p. 29.

[11] http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=157

[12] http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb

Pre-trial detainees / remand prisoners (percentage of prison population)	34.7% (31 August 2008)
Female prisoners (percentage of prison population)	8.75% (31 August 2008)
Juveniles / minors / young prisoners (percentage of prison population)	7.6% (31 August 2008 – under 18)
Foreign prisoners (percentage of prison population)	30.5% (31 August 2008)
Official capacity of prison system	21,408 (31 August 2008)
Number of establishments / institutions	99 (56 prisons for adults, 22 institutions for juveniles, 7 for illegal aliens and 14 custodial clinics)
Occupancy level (based on official capacity)	76.7% (31 August 2008)

Table 7, World Pre-trial / Remand Imprisonment List[13]

Prison population according to legal status	
Total number in pre-trial / remand imprisonment	6,378
Date	01 March 2007
Percentage of total prison population	33.3%
Estimated national population (at date shown)	16.37 million
Pre-trial / remand population rate (per 100,000 of national population)	39

Table 8, World Female Imprisonment List[14]

Female prison population (number of women and girls in penal institutions, including pre-trial detainees / remand prisoners)	1,767
Date	01 July 2004
Female prisoners (percentage of the total prison population)	8.8%

Data from the Ministry of Justice of the Netherlands

Table 9, Prison population at 30 September (2004 – 2007)[15]

Year	Total Prison Population	Of which Pre-trial	Percentage
2007	12,789	5,756	45.0%
2006	13,718	5,862	42.0%
2005	15,206	6,194	40.7%
2004	14,847	6,364	42.9%

[13] Roy Walmsley, January 2008, http://www.kcl.ac.uk/depsta/law/research/icps/downloads.php?searchtitle=World%20Pre-trial&search=search&type=0&month=0&year=0&lang=0&author The List refers to those persons who, in connection with an alleged offense or offenses, are deprived of their liberty following a judicial or other legal process, but have not been definitively sentenced by a court for the offense(s).

[14] Roy Walmsley, August 2006, http://www.kcl.ac.uk/depsta/law/research/icps/downloads.php?searchtitle=world+female+imprisonment+list&type=0&month=0&year=0&lang=0&author=&search=Search

[15] This information comes from the Cel Informatie Systeem (CIS). The owner of the system is the Minister of Justice, and before him the director of the Prison Service. The information is stored centrally and managed by ICT Services DJI in Gouda.

Table 10, Prison capacity according to its purpose[16]

Year	Total capacity	Remand prison	Closed prison	Low security level prisons	Very low security level prisons
2007	12,433	9,259	1,979	940	255

Table 11, Prison inflow[17]

Year	Total prison Inflow	Of which pre-trial detainees	Percentage
2007	53,499	19,847	37.1%
2006	57,311	20,344	35.5%
2005	57,091	21,029	36.8%
2004	47,631	22,768	47.8%

Table 12, Pre-trial detainees according to their country of origin[18]

Country of origin	Total	Of which pre-trial detainees	Percentage
The Netherlands	7,185	2,991	41.6%
Rest of the EU	1,933	799	41.3%
Africa	2,533	706	27.8%
Asia	1,432	253	17.6%
South America	2,457	947	38.5%
North and Central America	215	95	44.1%
Australia / Oceania	11	7	63.6%
Unknown	464	61	13.1%
Total	16,230	5,859	36%

Table 13, Minors (<18) in (pre-trial) detention

Year	Minors	Of which in pre-trial detention
2007	2,768	16%
2006	2,674	18%
2005	2,581	23%
2004	2,495	23%

Comparison

The volume of the total prison population in the different tables varies greatly, which makes it difficult to compare the figures. The large difference in figures can be attributed mostly to the system by which the various sources calculate the prison population. In table 1, the 20,463 detainees held in the Netherlands on 1 September 2006 also included the 2,452 juveniles in juvenile institutions and the 1,680 detainees in custodial clinics for mentally disturbed offenders. If this number is deducted from the total prison population of 20,463 then, in accordance with the statement by SPACE 1, there were 16,331 adults detained on the date mentioned in 2006. However, according to the statement by the Ministry of Justice (table 9), the total prison population at the end of September 2006 amounted to only 13,718. A possible explanation for this difference is that the SPACE 1 statement also includes the illegal aliens. The Prison Brief 2007

[16] As of 1 September 2007, source DJI.
[17] http://www.dji.nl/Organisatie/Feiten_en_cijfers/gevangeniswezen/dji
[18] As of 3 October 2006, WODC publication *Criminaliteit en Rechtshandhaving 2007*, p. 493.

reports a total prison population of 16,416, of which 1,679 were illegal aliens, 1,750 juveniles and 1,893 detainees in custodial clinics for mentally disturbed offenders. Without these groups, the number of adult detainees in the prisons and remand centres would have been 11,009 on the reference date of 31 August 2008. It is difficult to compare the different sources, as the composition of the prison population is not based consistently on the same criteria. This also explains why the statement of SPACE 1 reports an increase in the total prison population between 2000 and 2004 of about 68% (13,847 vs. 20,075), whereas the prison population between 2004 and 2006 (20,075 vs. 20,463) remains almost unchanged (table 5). According to the report from the Ministry of Justice, there was actually a drop of 14% (14,847 vs. 12,789) (table 9) in the latter period.

On the basis of the latest figures from the Ministry of Justice, which reports a prison population on 30 September 2007 of 12,789, this means that for a national population of an estimated 16.379 million inhabitants, there was a prison population rate per 100,000 inhabitants of about 78 in 2007 (table 9). On the basis of an equal population volume, this decreased to 67.2 in 2008. Conversely, the report of SPACE 1 is based on a prison population rate per 100,000 inhabitants in September 2006 of 124.9 (table 1). The Prison Brief report is based on a prison rate of 100 per 100,000 inhabitants of the national population on 31 August 2008 (table 6). Here too, these apparently significant differences must be explained by the inclusion / exclusion in the count of juveniles, illegal aliens and mentally ill offenders in custodial clinics. In addition, the prison population dropped considerably, particularly between 2006 and 2008, which partially explains the difference in the figures provided by SPACE 1 and those of the Prison Brief and the Dutch Ministry of Justice.

Unlike many other countries, the detention capacity available is greater than the size of the detention population, resulting in the occupancy level being about 25% under official capacity. Therefore, overcrowding has not been an issue at all over the past few years, due in part to new building projects, the reopening of old prisons, and low detention figures.

As the various sources do not base their figures on the same prison population, or on the same survey date, the reported percentages of the pre-trial detainees for the total of the prison population differ greatly. They vary between 33.3% (table 7), 34.2% (table 3), 34.7% (table 6), 42-45% (table 9) and 52.2% (table 4) for the period 2006 – 2008. Based on the data in table 3, we may conclude that virtually the majority of pre-trial detainees (82%) consisted of untried prisoners, for whom no court decision had yet been reached (n=4,596), while 18% involved sentenced prisoners who had appealed or who were within the statutory limit for doing so (n=1,018).

By calculating the percentage of pre-trial detainees on the basis of the prison population, minus the mentally disturbed offenders and illegal aliens, then, of the remaining prison population, the percentage of pre-trial detainees detained on the basis of the Migration Act varies between 33% and 45% in the period 2006 – 2008.

Of all 53,500 detainees of the inflow in 2007, 19,850 detainees were pre-trial detainees. This is a percentage of 37.1%.

The proportion of women in the total prison population varies from 6.4% (table 1) to about 8.8% (tables 6 and 8). No information is available about which proportion of that number is in pre-trial detention.

For minors, the percentage of the total prison population lies between 6% and 7.6% (tables 1 and 6). Figures from the Research and Documentation Centre of the Ministry of Justice (WODC) show that pre-trial detention is the most common type of legal residency in a judicial young offenders institution. The inflow in juvenile prisons in 2007 amounted to almost 2,760 young people. The majority, 60%, flowed in for pre-trial detention.[19] The percentage of juveniles in pre-trial detention of the total number of detained juveniles on the day of the survey in 2004 amounted to 23% (table 13). Partly due to the relatively large number of preventive detained minors, the capacity of the judicial young offenders institutions has grown from just over 970 places in 1995 to 2,670 places in 2006.[20] Of the juveniles placed in pre-trial detention in 2007, around 21% had committed a property offense without violence, whereas 71% had committed a violent offense against persons.

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[19] *Criminaliteit en rechtshandhaving 2007* (WODC, 10-10-2008), p. 198.

[20] *Criminaliteit en rechtshandhaving 20067*(WODC), p. 198.

Between 1990 and 2005, the number of pre-trial detainees grew by 130%. Reasons for this, as provided by Boone and Moerings, include the sharp rise in the clearance rate of offenses, the less flexible attitude of the judiciary with respect to (less serious) violent crimes in particular, the intensified prosecution of small drugs smugglers, and the ample attention paid by law enforcement agencies to repeat offenders since the mid-1990s. The number of repeat offenders is estimated at about 6,000, many of whom have a drug addition – not infrequently combined with mental problems – and commit property crimes to feed their drug addiction. They cause a lot of trouble, not due to the gravity of their crimes, but because they repeatedly shoplift, break into cars and houses, spread needles around, and sleep in public places. "Especially for this category, offenses that may lead to pre-trial detention have been extended to include vandalism, which is a minor offense but a big nuisance. In 2004, this resulted in about 150 extra places (for pre-trial and convicted offenders); in 2005, 250 extra places; in 2006, 450; and in the first months of 2007, 500 for these repeat offenders." [21] The Penal Code contains a special penal measure for sentencing repeat offenders to a custodial sentence of up to two years, irrespective of the seriousness of the crime for which they are indicted. According to the guidelines of the Public Prosecution Service, repeat offenders are always placed in pre-trial detention beforehand.

Another group that forms a large proportion of the pre-trial detainees is the foreign nationals. Apart from the large number of foreign nationals locked up in Dutch prisons based on the administrative Migration Law, the proportion of both convicted and preventively detained foreign nationals is high. Of the total detained population, between 30.5% (table 6), 32.7% (table 1) and 52.9% (table 9) are not Dutch nationals. When divided into convicted and preventive detainees, according to table 12, 41.6% of the Dutch detainees were in pre-trial detention, whereas the non-Dutch detainees amounted to 32.8%. If the approximately 1,700 illegal aliens are not included in the calculation, the number of Dutch detainees in the total prison population is about 51%, and that of the foreigners about 49%. This method of calculation places the percentage of foreign nationals in the pre-trial population not at 32.8% but at 40.7%, which corresponds approximately with the percentage of 41.6% of the Dutch detainees. Of the foreign detainees in pre-trial detention in 2006, 28.4% came from Europe, 33.7% from South America and 25.1% from Africa (table 12) Article 67, paragraph 2 of the CCP provides broader possibilities for applying pre-trial detention to suspects without a fixed address in the Netherlands: this – together with the risk of absconding, one of the reasons for pre-trial detention specified in Article 67a of the CCP – means that foreign nationals run a far greater risk of being placed in pre-trial detention than offenders with the Dutch nationality.

3. Legal basis: scope and notion of pre-trial detention on remand

Pre-trial detention is the deprivation of liberty in the scope of an investigation in criminal cases, and violates the right to personal liberty as specified in Article 15 of the Dutch Constitution. This article guarantees that:

1. Other than in the cases laid down by or pursuant to an Act of Parliament, no person may be deprived of his liberty.
2. Anyone who has been deprived of his liberty, other than by order of a court, may request a court to order his release. In such a case, he shall be heard by the court within a period to be laid down by an Act of Parliament. The court shall order his immediate release should it consider the deprivation of liberty unlawful.
3. The trial of a person who has been deprived of his liberty pending trial shall take place within a reasonable period.
4. A person who has been lawfully deprived of his liberty may be restricted in the exercise of fundamental rights, insofar as the exercise of such rights is incompatible with the deprivation of liberty.

In accordance with Article 15 of the Constitution, the right to personal liberty can be infringed only on the basis of an Act of Parliament. With regard to pre-trial detention and other forms of

[21] M. Boone and M. Moerings, "Growing prison rates", in: M. Boone and M. Moerings, *Dutch prisons*, BJu Legal publishers, The Hague, 2007, p. 57.

deprivation of liberty in the scope of the criminal proceedings, this basis can be found in the Code of Criminal Procedure. As mentioned briefly in paragraph 1, the deprivation of liberty in the pre-trial and trial stages can be divided into 5 phases: 1) police arrest in order to be questioned, 2) police custody, 3) remand in custody, 4) remand detention, and 5) detention pending trial.

Police arrest allows any citizen or criminal investigator to arrest a person caught in the act of committing a criminal offense. If he is not caught red-handed, arrest is only possible in case of offenses for which pre-trial detention is allowed. Arrests must be ordered by a public prosecutor; or by a senior police officer ("hulpofficier van justitie"), should waiting for the order from the public prosecutor cause undue delay; or, in urgent cases, by any police officer. The police officer must inform the public prosecutor of the arrest as quickly as possible (Article 54, CCP).

The aim of the police arrest is to bring the suspect to a place of questioning – usually the police station – where the suspect is interviewed by a (senior) police officer. During this first interview, the lawfulness of the arrest is established and a decision is made on whether the suspect should be detained any longer for the purposes of the investigation. The maximum period for detention at the police station is six hours – not including the hours between midnight and nine a.m. – which can be extended once by another six hours, in order to further investigate the suspect's identity (Article 61, CCP). The verification interrogation is the most appropriate moment at which to comply with the obligation to inform the arrested person of the reasons for his arrest (Article 52, ECHR).[22]

Before the interview starts, the suspect must be informed of his right not to answer questions (Article 29, CCP). Although suspects have the right to legal assistance, the defence counsel is not allowed to attend the interrogations carried out by the police, or to speak to the suspect prior to the first interrogation. An experiment has been initiated in two court districts, whereby defence counsels are allowed to be present at police interrogations for homicides.[23]

When the specified period of the police arrest has expired, the suspect must be released, unless he is taken into police custody (Article 57, CCP). The objective of police custody is to make the suspect available for further investigation. Police custody can only be applied in the interest of the investigation of criminal offenses for which pre-trial detention is permitted. The competence to apply police custody is vested exclusively in the public prosecutor or a senior police officer. The maximum period of police custody, where the suspect is held in a police station, is three days. This can be extended by another three days by the public prosecutor (Article 58, CCP). Before issuing a police custody order, the suspect must first be interrogated. The suspect has the right to be assisted by a chosen or assigned defence counsel. This counsel has free access to the police files on the case. Article 40 of the CCP provides a duty counsel scheme offering legal aid to suspects in police custody. The lawyers participating in this scheme are compensated for their work by the State.

During his stay at the police station, the suspect may also receive visits from a probation officer.[24] However, other contacts may be restricted if considered vital to the investigation.[25]

In accordance with Article 5, paragraph 3 of the ECHR, a suspect held in police custody must be presented promptly before a judicial authority, in order to assess the lawfulness of his detention. As a result of the case Brogan vs. UK[26], the period within which this must occur has been reduced to three days and fifteen hours, counted from the moment of apprehension.[27] The suspect must be brought before the investigating judge ("rechter-commissaris"), a single judge of the court district, who decides whether the suspect may be further detained or released. In the event of minors, the juvenile court judge acts as investigating judge. The suspect is questioned personally and may be assisted by his defence counsel (Article 59a, CCP).

If the suspect is not released, police custody can be succeeded (after six days and fifteen hours) by remand in custody (Article 53, CCP). This can also take place without prior police custody.

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[22] P.J.P. Tak, *The Dutch criminal justice system*, op cit, p. 92.
[23] Parliamentary Papers, II, 2006-2007, 30800, VI no. 30.
[24] Anton van Kalmthout and Leo Tigges, "The Netherlands", in: Anton M. van Kalmthout and Ioan Durnescu (eds), *Probation in Europe*, p. 703.
[25] M.S. Groenhuijsen et al., *Het wetboek van strafvordering*, Deventer, note 3 with Article 62.
[26] ECtHR 29 November 1988, A 145-B.
[27] Act of 21 April 1994, Stb. 307.

4. Grounds for pre-trial detention

Pre-trial detention starts with remand in custody, as the previous police arrest – if any – and police custody are not considered part of pre-trial detention. The remand in custody order is issued by the investigating judge, at the demand of the public prosecutor. The defence counsel may be present at this interrogation.

Pre-trial detention is allowed only if the statutory requirements for the application of pre-trial detention have been met. These requirements are summed up in Articles 67 and 67a of the CCP. Article 67 contains the cases in which pre-trial detention may be applied, while Article 67a specifies the grounds.

According to Article 67, pre-trial detention can be ordered only if there are grave presumptions that the offender has committed an offense:

- that carries a statutory prison sentence of four years or more; or
- that is specifically designated by law; or
- that carries the penalty of imprisonment whilst the suspect does not have a fixed domicile or residence in the Netherlands.

The term "grave presumptions" ("ernstige bezwaren") implies a high degree of suspicion that the suspect has in fact committed the offense of which he is suspected. According to subsection 4 of Article 67, the requirement of grave presumptions is not imperative, if the suspicion concerns a terrorist crime.

Article 67a of the CCP specifies the grounds on which pre-trial detention may be applied. According to this article, pre-trial detention can be applied only if there is a serious risk of the suspect absconding, or if public safety requires the immediate detention of the suspect. Important reasons requiring immediate detention are considered to exist:

- if the suspicion relates to an offense carrying a maximum statutory sentence of twelve years or more, and public order has been seriously affected by the offense; or
- if there is a serious risk that the suspect will commit a crime that carries a maximum statutory prison sentence of at least six years, or will commit a crime that may jeopardize the safety of the state or the health or safety of persons, or that creates a general danger to property; or
- if there is a serious suspicion that the offender, suspected of having committed one of the offenses designated by law, will re-offend, and less than five years have passed since he was sentenced to a penalty or measure containing a deprivation or restriction of liberty, or was sentenced to a task penalty (i.e. labor penalty or educational penalty); or
- if reasonably it is considered necessary to detain the suspect, in order to establish the truth, other than by his own statements (risk of collusion).

Pre-trial detention cannot be applied if these conditions are not met. Pursuant to the anticipation instruction of Article 67a, paragraph 3 of the CCP, this is also the case if the suspect is not expected to be sentenced to an unconditional custodial penalty or measure. Moreover, pre-trial detention must be terminated as soon as the pre-trial detention period together with the period of police custody equals this anticipated sentence.

Remand in custody is implemented in a penitentiary institution. This is usually a remand prison, but pursuant to the Penitentiary Principles Act (PPA), pre-trial detainees can also be housed in a police station for a maximum of ten days, should there be a shortage of cells in a penitentiary institution (Article 15a, PPA).

The order for a remand in custody is issued by the investigating judge at the request of the public prosecutor or *ex officio*. Prior to the issue of this order, the suspect must be heard by the investigating judge. The suspect is entitled to advice from his defence counsel. The maximum period of remand in custody may not exceed fourteen days, during which time the suspect may be released by the investigating judge or the public prosecutor (Article 64, CCP).

Following remand in custody, the suspect can – at the request of the public prosecutor – be further remanded by order of the court in chambers for a period that may not exceed ninety days, should the grounds for pre-trial detention after the expiry of the term of remand in custody still be valid. If the order is given for a shorter period, this request can be repeated twice, as long as the total period of remand in custody does not exceed the prescribed ninety days. The order can also be issued by the court at trial, even if the suspect had not been previously deprived of his liberty, if the court maintains that there are (new) grounds to proceed to pre-trial detention. The court can

also order pre-trial detention if this is deemed necessary to have a suspect extradited from abroad (Article 65, paragraph 3, CCP).

The total period of pre-trial detention may last no longer than 104 days, until the case is brought by the prosecutor to court for trial. If the case is not ready for trial, the court may adjourn the trial for one month, and in exceptional cases for three months: this may be repeated several times (Articles 281-282, CCP). The pre-trial detention order may remain valid until sixty days subsequent to the final court decision. It can be revoked officially in the meantime by the court, or at the request of the suspect, or at the demand of the public prosecutor, or, in the case of a remand detention, at the recommendation of the investigating judge (Article 69, CCP). As mentioned previously, pre-trial detention must also be terminated if the verdict in first instance or on appeal results in a prison sentence exceeding the period spent in detention. In the case of an acquittal or discharge, pre-trial detention must be ended immediately. This is also the case if the offender is sentenced to a non-custodial sentence, or to an unconditional custodial sentence that does not exceed the period spent in pre-trial detention.

5. Grounds for review of pre-trial detention

The Code of Criminal Procedure contains no legal remedies to challenge the lawfulness of the police arrest and the first term of police custody. The first moment at which the lawfulness of the police detention is checked is the prescribed check by the investigating judge. As mentioned previously, this check must be performed within a maximum of three days and fifteen hours, calculated from the moment of apprehension. During this check, the investigating judge assesses whether the required reasonable presumption of guilt is present, whether the suspicion is a punishable offense for which pre-trial detention can be imposed, or whether the legal condition has been met – i.e. that police custody is required in the interests of the investigation – and whether there are other reasons for the deprivation of liberty not being lawful.

In the application of pre-trial detention (remand in custody, remand detention and detention pending trial), the Code of Criminal Procedure prescribes that the suspect has the right to be heard and to be assisted by his defence counsel in decisions about imposing or extending detention. This allows the suspect to make known his opinion of the detention and to submit a request for termination. He can also utilize the following possibilities to dispute his pre-trial detention, or the order to prolong it, with a judicial authority:

- He can appeal to the Court of Appeal against the remand detention order, or the order to prolong it. This appeal can be lodged only once (Article 71, paragraphs 1 and 2, CCP);
- He can repeatedly request the judge who issued the remand in custody order or the remand order to terminate this (Article 69, CCP); he can appeal to the Court of Appeal against a negative decision of the court (Article 87, paragraph 2, CCP);
- He can repeatedly request the judge who issued the order to suspend his pre-trial detention (Articles 80-87, CCP); he can appeal to the Court of Appeal against a negative decision of the court (Article 87, paragraph 2, CCP).

The appeal specified in Article 87, paragraph 2 of the CCP can be lodged only once. If the Court of Appeal rejects the appeal to cancel the negative decision on suspending pre-trial detention, it is no longer possible to appeal against the rejection of the request to suspend pre-trial detention and vice versa (Article 87, paragraph 2, CCP). Furthermore, the possibility of appeal is restricted, as it is only possible to appeal against the rejection of the first request for suspension or termination. Requests for termination or suspension of pre-trial detention can also be made during the hearing.[28]

If the existing possibilities for disputing pre-trial detention, within the circumstances of the case, do not offer any prospect of a swift decision, the suspect can always submit a request for termination or suspension to the civil judge by means of summary civil proceedings. This method can also be used to challenge police arrest and police custody, for which the Code of Criminal Procedure contains no legal remedies.

[28] Nederlandse Orde van Advocaten, *Strafprocesrecht*, The Hague, 1998, p. 60-61.

6. Length of pre-trial detention

As stated in paragraph 3, Dutch law gives no maximum period for pre-trial detention. The period of 104 days (calculated from the commencement of remand in custody) is the maximum pre-trial detention period permitted before the hearing must commence. According to the above-mentioned conditions, pre-trial detention can be extended subsequently for sixty days following the final judgment (Article 66, paragraph 2, CCP). If pre-trial detention has not been terminated in the meantime, it ends as soon as the judgment has become irrevocable. In practice, this means that, especially in complicated cases, pre-trial detention can sometimes last for years.
No information is available on the average duration of pre-trial detention. We know that the average time in 2007 between registering a case with the Public Prosecution Service and the case being dealt with in first instance by the judge varied from 180 days (10,500 cases) for the single police judge, to 248 days for the three-judge court (about 12,000 cases). For the more than 11,000 cases handled by the juvenile court judge, this period amounted to 164 days.[29]

7. Other relevant aspects

Several elements in relation to pre-trial detention have already been discussed in previous paragraphs. This paragraph will deal with a number of relevant questions which remain, such as whether the time spent in pre-trial detention will be taken into account, whether there is a mechanism for compensation if the accused is not sentenced, whether there are alternatives to pre-trial detention, the rights of the pre-trial detainee, and the practice regarding the implementation of pre-trial detention.

7.1 Deduction of preliminary detention

The provision for the deduction of preliminary detention is not part of the Code of Criminal Procedure, but is part of Article 27 of the Penal Code. It specifies that if the accused is sentenced to temporary imprisonment (imprisonment or detention) or to a task penalty (labour penalty or educational penalty), the time he has already spent in police custody or in pre-trial detention must be deducted fully from that punishment. When passing the sentence of a task penalty, the judge must specify the criterion according to which this deduction will take place. In practice, the calculation standard usually implemented is the one used to convert a non-completed task penalty into a subsidiary detention. This means that for every two hours of task penalty, no more than one day of subsidiary detention can be imposed (Article 22d, Penal Code). In the event the accused person is sentenced to a fine or to placement in an institution for repeat offenders, the judge can choose to deduct the time already spent in police custody or pre-trial detention (Article 27, paragraph 3 and Article 38n, Penal Code). No deduction is possible following the imposition of a psychiatric order or an entrustment order (Articles 37 and 37a, Penal Code).
According to article 27 and 27 a PC the time spent in detention in another country has to be deducted if this detention was imposed because of a Dutch request for extradition.

7.2 Compensation

An accused person who has been subjected to police custody or pre-trial detention without the imposition of a punishment or measure – or for an offense for which pre-trial detention is not permissible – is entitled to compensation for the damage suffered. Apart from financial loss (loss of income as a result of detention), he may also be compensated for immaterial damage (Articles 89-91, CCP). The norm for compensation for immaterial damages is about 90.00 Euro per day of deprivation of liberty. Compensation is not only possible for unlawful detention, but also in retrospect for unjustified lawful detention.

A request for compensation must be submitted by the former accused person or his beneficiaries within three months of the termination of the case before the court. The request is treated by the criminal court in chambers. Preferably, this court should be composed of the judges who previously served as the trial judges, as they are fully acquainted with the case at hand (Article 89, paragraphs 3-4, CCP).

[29] WODC, *Criminaliteit en rechtshandhaving 2007*, The Hague, 2008, p. 170.

The judge must honour the claim for compensation if he deems, after taking all circumstances into consideration, that there are reasons of equity for the claim (Article 90, CCP). An appeal can be made to the Court of Appeal against the decision of the court (Article 91, CCP).

The compensation does not always have to consist of an amount of money. In accordance with Article 90, paragraph 4 of the CCP, it can also consist of reducing the duration of an unconditional prison sentence imposed for another criminal offense, or it can be balanced with fines and other financial sanctions to be paid.[30]

The number of decisions on a claim for compensation pursuant to Article 89 of the CCP rose considerably between 2000 and 2007. In 2007, more than 6,500 claims were accepted and an amount of almost 23 million euros was paid, almost twice as much as in 2000.[31]

The facility for compensation in the CCP does not prejudice the right of the pronounced accused person to lodge a civil action against the State for compensation of the damage suffered.[32]

7.3 Alternatives to pre-trial detention

The only possibility offered by the law for applying an alternative to pre-trial detention is the possibility mentioned in Articles 80 to 86 of suspending or postponing pre-trial detention. Contrary to the suspension, with the postponement, the execution of pre-trial detention has not yet commenced. For the rest, the same provisions apply to both. Where suspension is mentioned below, it can also be understood to mean postponement (Article 88, CCP).

The judge can recommend *ex officio*, upon demand by the public prosecutor, or upon request by the accused person, that pre-trial detention be suspended as soon as the accused person, with or without bail, declares that he will comply with certain conditions imposed by the judge. The law provides one condition that must always be imposed: that the accused person, upon cancellation of the suspension, or the imposition of punishment, will not evade the consequences of the implementation hereof. In addition, the judge can choose to impose other conditions, should they contribute "to the achievement of the objectives" of pre-trial detention.[33] A study in 2006 into the application of special conditions for pre-trial detention and suspended sentences showed that almost the same special conditions are imposed for the suspension of pre-trial detention as for suspended sentences. The study also showed that, insofar as suspension is decided upon, special conditions are imposed only in a limited number of cases (15.1%). The most common conditions were: the obligation to adhere to the instructions of the Probation Service, the obligation to follow a drugs treatment or day training program, the obligation to adhere to a restraining order, the obligation to co-operate in a social enquiry report, and the obligation to undergo ambulatory treatment.[34]

Pending a definitive statutory regulation, it is now also possible, by way of experiment, to attach electronic monitoring and electronic house arrest as a condition to the suspension of pre-trial detention. This was regulated in more detail in the "Instructions for electronic monitoring" issued by the Public Prosecution Service in 2005.[35]

Another condition that can be imposed is the payment of a security deposit. It has little practical significance, as this possibility is seldom put into practice.

If the accused person does not comply with the conditions, the suspension is revoked and pre-trial detention will be (further) implemented. This is also the case if certain circumstances indicate that there is a danger of the accused person absconding (Article 84, CCP).

7.4 The execution of pre-trial detention

Concerning the location where pre-trial detention is to be implemented, the Code of Criminal Procedure specifies only that the judge issuing the order for pre-trial detention may decide where pre-trial detention is to be served. Except for the ten days that can be spent in a police station, the designated location for pre-trial detention is usually a remand house. However, in consideration of

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[30] Parliamentary Papers II, 1994-1995, 23960, no. 3, p. 5).

[31] Centraal Bureau voor de Statistiek (CBS), *Rechtspraak in Nederland 2007,* p. 87.

[32] See: C.J.M. van Dam, *Schadevergoeding voor strafvorderlijk overheidsoptreden*, Celsus, Tilburg, 2008, and N.M. Dane, *Overheidsaansprakelijkheid voor schade bij legitiem strafvorderlijk handelen*, Celsus, Tilburg, 2009.

[33] Parliamentary Papers, II 1913/14, 286, no. 3, p. 85.

[34] M. Jacobs, M. von Bergh and A. van Kalmthout, *Toepassing van bijzondere voorwaarden bij voorwaardelijke vrijheidsstraf en schorsing van de voorlopige hechtenis bij volwassenen*, WODC, The Hague, 2006, p. 80-82

[35] Aanwijzing elektronisch toezicht (2005A026), Staatscourant 2005, p. 253.

the personal circumstances of the accused person, this may also be elsewhere (Article 78, CCP). Preventive detainees locked up in an institution other than a remand house include drugs couriers and accused persons who have already been convicted in first instance. The first group can be housed in special detention centres for drugs couriers, while it has been possible since 2006 to house persons convicted in first instance in a normal prison.[36] In accordance with Article 493, paragraph 2 of the CCP, minors can serve their pre-trial detention at any place designated for such a purpose (see paragraph 8 for more information).

In 2007, the total prison capacity consisted of 12,433 places, of which 9,259 places were in remand houses. These institutions do not all have the same regime. The applicable regime depends on the level of security of the institution. A distinction is made between the following degrees of security: very low security, low security, normal security, extended security and extra high security. A fixed selection procedure is followed when choosing the location where a suspect will serve pre-trial detention, whereby due consideration is given to the risk of danger, the place of residence of the person involved, and the court district where the criminal case is being handled. Pre-trial detainees are kept separate from sentenced prisoners. In institutions housing both categories of prisoners, pre-trial detainees stay in designated divisions, separated from the other prisoners.

In general, there is a regime of limited association in remand houses. Under this regime, prisoners remain locked in their cells except for periods of communal or group activities. The minimum number of hours prescribed for these activities amounts to eighteen, the maximum being 63 hours per week. During the remaining hours, the detainees have to stay in their cells. This can be a single cell or a common cell with two or more (sometimes even seven or eight) other prisoners.[37]

Generally, the conditions in remand houses are more austere and severe than those in normal prisons. This is particularly so in institutions with extended and extra high security levels. It is not uncommon for the judge, particularly if the pre-trial detention period was lengthy, to take this into consideration when determining the severity of the final punishment and therefore apply a form of compensation that is not regulated by law.[38]

One major problem with the execution of pre-trial detention is the frequent use in practice of the possibility, intended as an exception, of carrying out the first ten days of pre-trial detention at a police station, before transferring the pre-trial detainee to a remand house. However, during its last visit to the Netherlands in 2007, the Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment noted "that a significant number of persons spent between 10 and 14 days detained in a police cell. This appeared particularly to be the case for juveniles between 16 and 18 years of age; apparently this was due to capacity problems in juvenile detention facilities." According to the opinion of the CPT's delegation, the findings "suggest that police cells are being used as surplus capacity for remand prisons and alien holding facilities. The CPT notes that a shortage of remand capacity, combined with a policy of keeping prison occupation rates below 100% (….) may encourage prolonged detention in police facilities. However, the fact remains that police facilities do not offer suitable accommodation for lengthy periods of detention, particularly as concerns juveniles." For that reason, "the CPT recommends once again that the Netherlands authorities take appropriate measures to minimize the time detained persons have to spend in police cells. Moreover, particular efforts should be made to ensure that juveniles are not detained in police cells for prolonged periods and are transferred to appropriate juvenile detention facilities expeditiously."[39]

7.5 Rights of pre-trial detainees

At various points, the previous sections have already treated the rights of accused persons during police arrest, police custody and pre-trial detention, such as the right to legal assistance, and the right to bail or to be released under conditions. With regard to the right to information about the suspect's rights, there is no legal obligation to inform suspects of their rights, apart from their right

[36] Wet doorplaatsing van in eerste aanleg veroordeelden, Staatsblad 2005, p. 280.
[37] Article 21 PPA and 3 Penitentiary Measure (PM).
[38] See: J.P. Balkema, "Strafrechter en vrijheidsbeneming", in: E.R. Muller and P.C. Vegter (eds), *Detentie, gevangen in Nederland*, Kluwer, Alphen aan den Rijn, 2005, p. 90, and Hoge Raad (Supreme Court) 23 November 2004, LJN AR 2435.
[39] CPT, Visit to the Netherlands 4-17 June 2007, http://www.cpt.coe.int/en/states/nld.htm

to silence. Neither does a suspect have a general right to have someone informed of his arrest and police custody, except for the notification of a lawyer and a probation officer. Article 62, paragraph 2 of the CCP does specify that no further restrictions may be imposed upon a suspect in police custody than those strictly necessary in the interests of the investigation, but according to the Committee for the Prevention of Torture (CPT), the restrictions that can be imposed in accordance with subsection 2 of this article "may lead to *de facto* incommunicado detention, particularly during the first stage of police detention when no contact with a lawyer is allowed". In the opinion of the CPT, the Dutch legislation and practice are not in line with the principle that "the right to notify one's deprivation of liberty should take effect as from the outset of deprivation of liberty. In other words, persons obliged to remain with the police should have the right to notify a third party immediately. This right could be made subject to certain exceptions designed to protect the legitimate interests of the police investigation, provided said exceptions are clearly circumscribed and made subject to appropriate safeguards. In particular, it must be ensured that the reasons for postponing contact with others are in order to protect evidence, and not to create hardship and put pressure on the detained person. Furthermore, postponement of the right to notify the deprivation of liberty should be balanced by the presence of other safeguards, such as immediate access to a lawyer. The threshold for the application of an all-restrictions regime should be particularly high in the case of minors." The CPT also commented critically that Dutch legislation does not recognize the right of access to a lawyer from the outset of the deprivation of liberty, and the fact that a person in police detention does not have the right of access to a doctor of his/her own choice.[40]

Dutch legislation does provide the right to an interpreter. A detained suspect without sufficient understanding of the Dutch language has the right to be assisted by an interpreter during interrogation and hearings. These interpreters are paid by the State. To a certain extent, the suspect also has the right to a written translation of documents. According to a decision by the Supreme Court[41], this right can be substituted by the presence of an interpreter during interrogation, or during the reading from the document at the (court) hearing, at which an interpreter is present.[42]

Apart from these rights, to which the pre-trial detainee is entitled as a suspect, he is also entitled to invoke rights under the Penitentiary Principles Act. In principle, his legal status is not that of a sentenced prisoner; however, he does have the right to employment, for instance, but is not obliged to take it up. The possibilities of leave, visits and programs that replace detention are more limited when pre-trial detention is served in a remand prison rather than a normal prison. Pursuant to Article 62, paragraph 4 and Article 76 of the CCP, the public prosecutor or the investigating judge may decide that certain restrictions be imposed on the suspect while in police custody and pre-trial detention, such as no visits, no contact with fellow prisoners, no free correspondence, and no telephoning. Suspects can submit a notice of objection against such a decision to the competent judicial authority.[43] Complaints about treatment in a penitentiary institution can be submitted to the independent complaints committee associated with each institution, appointed by the Prison Supervisory Board of that institution. Detainees can appeal against the decisions of this complaints committee to the appeal committee of the Council for the Administration of Criminal Justice and Youth Protection (Raad van de Strafrechtspleging en Jeugdbescherming) (Articles 60-73, PPA).

8. Vulnerable groups

Except for a single provision in the PPA, Dutch legislation does not offer any separate provisions for female detainees in pre-trial detention, as is the case with suspects who are minors, or those persons suspected of a crime of terrorism. With respect to female detainees, the PPA specifies only that male and female detainees must be housed separately – with the possibility of participating communally in certain activities – and that babies and young children may stay with their mother

[40] CPT, Visit to the Netherlands 4-17 June 2007, http://www.cpt.coe.int/en/states/nld.htm
[41] Supreme Court 116 December 1997, NJ 1998, 352.
[42] See: T. Prakken and T. Spronken, ‚The investigative stage of the criminal process in the Netherlands in: E. Cape, J. Hodgson, T. Prakken and T. Spronken, In: *ts in Europe*, Intersentia, Antwerp-Oxford, p. 166-167.
[43] G. de Jonge and H. Cremers, *Bajesboek, Handboek voor gedetineerden*, Papieren Tijger, Breda, 2008.

under certain conditions (Articles 11 and 12, PPA). Of the approximately 900 places in the five penitentiary institutions for women, about 600 have a designated use as remand prison.[44]

In principle, the Code of Criminal Procedure is also applicable to juvenile offenders from 12 to 18 years. There is no special statute on criminal procedure for this category of offenders. However, Articles 483-505 of the CCP contain some special provisions for juvenile trials, some of which are related to pre-trial detention. Major differences in this respect include the function of investigating judge being performed by a juvenile court judge, and the obligation to inform the Council for Youth Protection of a deprivation of liberty (Articles 490-492, CCP).

With regard to the deprivation of liberty of young suspects, the basic principle is that it should be avoided as much as possible, or at least restricted in its duration. To that aim, Article 493 of the CCP specifies that, if the judge decides to impose pre-trial detention, he must check whether it can be suspended immediately, or after a certain period. In addition, an order for remand detention may not exceed thirty days, if the young suspect has not been heard by the court during that period.

The conditions for suspension of pre-trial detention are the same as for adult suspects. In practice, this possibility is used much more often for juvenile suspects, particularly due to the establishment of special educational and training projects throughout the country as an alternative to pre-trial detention. These kinds of projects can be imposed as a condition of suspension of pre-trial detention, if the juvenile suspect agrees and the criteria listed in Article 493 of the CCP are met. Although pre-trial detention can be served at any place in accordance with Article 493, paragraph 4 of the CCP, generally it is served in a juvenile prison after a short stay of no more than ten days at the police station (three days for minors younger than 16 years). However, the law does offer the possibility to implement this in a privately run hostel, parental home or elsewhere. During the past few years, house arrest, combined with electronic monitoring, has been used increasingly. The possibility of "night detention" is also often used. This means that the investigating judge, following recommendations from the Council of Youth Protection or the Juvenile Probation Service, can give the young person permission to leave the institution during the day for work or educational purposes; he or she has to stay inside the institution only during the evening and night hours, as well as during the weekends.[45]

The Juvenile Detention Principles Act ("Beginselenwet Justitiële Jeugdinrichtingen"), rather than the PPA, is applicable to a stay in a juvenile prison. It comprises a broader daily program and offers more possibilities for education than the Penitentiary Principles Act. The legal status arrangement, including the right of complaint and supervision, is almost identical in both Acts.

The CCP and the PPA do not contain separate provisions for foreigners in (pre-trial) detention, except for foreigners who are to be expelled following detention (illegal or undesirable migrants). These foreigners are, for example, excluded from provisions such as transfer to a more open institution, weekend leave, electronic monitoring, and participation in penitentiary programs.[46]

Since 2004, the CCP has incorporated specific provisions for suspects of terrorist acts. That year, certain crimes were included in the Criminal Code as terrorist crimes, if they had been committed with a "terrorist intention".[47] In this respect, the penalties for these terrorist crimes were increased significantly, and in 2006 special procedural provisions were also included in the CCP for cases of suspected terrorism.[48] With regard to pre-trial detention, these new provisions also mean that if a terrorist crime is suspected, an order of remand in custody does not require "serious suspicion," but that "reasonable suspicion" will suffice (Article 67, paragraph 4, CCP). The period of remand detention can also be extended by nine months at a time until the start of the trial, up to a maximum of two years (Article 66, paragraph 4, CCP).

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[44] J.P.S. Fiselier, "Penitentiaire inrichtingen in soort en maat", in: E.R. Muller and P.C. Vegter, *Detentie, Gevangen in Nederland,* Kluwer, Alphen aan den Rijn, 2005, p. 189.

[45] M. Mehciz, G. Homburg and J. Bos, *Een verschil van dag en nacht, Nachtdetentie als modaliteit van voorlopige hechtenis bij jongeren*, SEC, June 2002, no. 3, p. 9-12; J.A.C. Bartels, "Justitiële jeugdinrichtingen", in: E.R. Muller and P.C. Vegter, *Detentie, gevangen in Nederland*, p. 273-274.

[46] See: A.M. van Kalmthout and F. Hofstee van der Meulen, "Netherlands" in: A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen and F. Dünkel, *Foreigners in European Prisons*, Wolf Legal Publishers, Nijmegen, 2007, p. 623-663.

[47] Wet terroristische misdrijven van 24 juni 2004, Stb. 2004, 290.

[48] Law of 20 November 2006, Stb. 2006, 580, Stb. 2006, 730 and Stb. 2006, 731.

Since 2006, suspects of a terrorist crime can be locked up in separate terrorist departments of two penitentiary prisons: in Vught (males) and Rotterdam (females). This placement takes place pursuant to Article 20a of the Regulation on classification, placement and transfer of detainees ("Regeling selectie, plaatsing en overplaatsing van gedetineerden"), whereby a person charged with – or sentenced for – a terrorist offense, or of spreading a message of extremism among fellow inmates, may be placed in a terrorism department by order of the selection office. At the time of the CPT visit to the Netherlands in 2007, eight male prisoners were being held at Vught prison and two women at Rotterdam prison.

During its last visit to the Netherlands, the CPT was highly critical of these terrorist departments with their restricted high-security regime. The major points of criticism particularly concerned the automatic placement of terrorist suspects in these departments, without a previous risk assessment, the lack of regular review of such a placement, the material conditions in Vught prison and the use of restraint in both departments.[49]

9. Summary

The proportion of pre-trial detainees within the total prison population varies between 33% and 52%, depending on the composition of the total prison population. If just the ratio with respect to the number of finally convicted persons is considered, this percentage amounts to about 42%. The majority involves untried prisoners on whom the court has not yet reached a decision. In the period 1990 – 2005, the number of pre-trial detainees rose by about 130%. This increase is due to a large extent to a sharp rise in the clearance rate, and to a harsher crime and prosecution policy with regard to repeat offenders and foreign offenders. The ratio of these foreign offenders in the total pre-trial population is almost the same as that of suspects with Dutch citizenship.

Before pre-trial detention, a suspect can be held in police arrest for a maximum of twelve hours, followed by a maximum of ten days in police custody. During police questioning, the suspect does not have the right to the presence of his lawyer at these interviews. After three days and fifteen hours, calculated from the moment of police arrest, the investigating judge must assess the lawfulness of the detention. If the suspect is not released, he can be placed in pre-trial detention. The law distinguishes between remand in custody (maximum of ten days) and remand detention. The latter can last a maximum of ninety days, before the hearing must commence. There are other (longer) periods for suspects of a terrorist crime. Once the hearing has commenced, pre-trial detention – depending on the duration of pre-trial detention and the expected punishment or punishment imposed in first instance – can continue under certain circumstances until the sentence has become final. The Code of Criminal Procedure, which specifies the conditions of pre-trial detention, does not specify a maximum period for pre-trial detention. Depending on the nature of the punishment imposed, the pre-trial period must or can be deducted from this punishment. Pre-trial detention can also be applied if the accused person is still free at the time of the legal proceedings.

Under certain conditions, the law provides for a right to compensation for unlawful detention but also for *in retro* unjustified lawful detention.

Pre-trial detention is served in a remand prison. The first ten days can also be spent at a police station. The means of execution is regulated in the Penitentiary Principles Act for adults and in the Juvenile Detention Principles Act for juvenile offenders, rather than in the CCP. The CCP and the PPA do not make any distinction in the means of execution of pre-trial detention for male, female and foreign offenders. On the other hand, there are a number of different provisions for juveniles.

With respect to the exception of juveniles, alternatives for pre-trial detention are not strongly developed and are applied especially in the suspension of pre-trial detention for minor offenders.

The requirements of Article 5, ECHR appear to have been fulfilled with regard to the fundamental rights of the defendant with respect to matters such as the right to information, to silence, to an interpreter, to be informed about the charge, to legal assistance, and to legal aid. However, the accused person has no right to legal aid during police questioning, nor a right to

[49] http://www.cpt.coe.int/en/states/nld.htm

notification or a right of access to a doctor of his own choice, which is a major stumbling block. These shortcomings were criticized by the CPT during its last visit in 2007.

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