Tilburg University

The principle of immediacy in Dutch criminal procedure in the perspective of European Human Rights Law

Groenhuijsen, M.S.; Selçuk, Hatice

Published in:
Zeitschrift für die Gesamte Strafrechtswissenschaft

DOI:
[10.1515/zstw-2014-0014](https://doi.org/10.1515/zstw-2014-0014)

Publication date:
2014

Document Version
Other version

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):
Groenhuijsen, M. S., & Selçuk, H. (2014). The principle of immediacy in Dutch criminal procedure in the perspective of European Human Rights Law. *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 126(1), 248-276. <https://doi.org/10.1515/zstw-2014-0014>

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Prof. Dr. Marc S. Groenhuijsen and Hatice Selçuk

The Principle of Immediacy in Dutch Criminal Procedure in the Perspective of European Human Rights Law

DOI 10.1515/zstw-2014-0014

I. Introduction

The principle of immediacy requires that all evidence is presented in court in its most original form. Since the introduction of this principle in Dutch criminal procedure, many scholars discussed the role and scope of this principle. This role seems to be limited since the Supreme Court accepted written hearsay evidence in the '*de auditu*' case. This judgment has opened the door widely to introduce indirect evidence. As a result, the principle of immediacy was encroached and not much has come of the immediate character of the trial stage. Even more so because the Supreme Court has also allowed statements of anonymous witnesses admissible as means of evidence. However, under the influence of decisions by the European Court on Human Rights (ECtHR), the principle of immediacy has regained some ground in our domestic criminal procedure. Against this background the aim of this paper entails analysing the actual role of the principle of immediacy in current Dutch criminal procedure.

II. The definition of the principle of immediacy according to Dutch legal scholars

The topic of immediacy is one which has given rise to a substantial literature in The Netherlands and has been the subject of much discussion among Dutch legal scholars. One of the first to express views on the principle of immediacy was *Simons*. He wrote in his classic work '*Beknopte handleiding tot het Wetboek van Strafvordering*' (Concise treatise on the Code of Criminal Procedure) that the judge

Marc S. Groenhuijsen: Professor of Criminal Law, Criminal Procedure and Victimology at Tilburg University, and director of the International Victimology Institute Tilburg, INTERVICT

Hatice Selçuk: practicing lawyer at the office of Durdu c.s. Advocaten in Rotterdam

should ground his judgment only on evidence which he had heard during trial. The judge cannot – even partly – found his verdict on depositions written by police officers. According to Simons all witnesses and the accused have to appear before the judge in person to give testimony¹. Simons' view is similar to that of the German legal scholar *Zachariä*, who alleged that the court should base its findings only on evidential sources which it had actually heard, and not on inquiries or conclusions drawn from another time, place or person². In more recent times, the Dutch law professor *Stolwijk* argued that the principle of immediacy is a principle necessitating that the primary sources of evidence be produced in court, so that the judge will base his judgment solely on evidence he was able to examine independently as to its quality and reliability. *Stolwijk* does not elaborate the underlying reason for this necessity³. *Nijboer* on the other hand provides a more detailed account on the principle of immediacy. In his endeavour to clarify the meaning of the principle in Dutch criminal procedure, *Nijboer* distinguishes two perspectives on the meaning of this principle in the academic literature. He describes the first one as the formal view: in this view the format of the investigation at trial forms the basis. This formal view requires that there has to be a direct link between the evidence and the judge, in order that there is an enhanced possibility of verifying information. Thus, the formal principle of immediacy demands that all evidence that could possibly influence the judgment should be subject to challenges during trial. The second view is the substantive view: the principle of immediacy is a principle that pursues the use of the most immediate evidence. The ratio behind this view is that reproduction of evidence bears the risk of distortion⁴. Consequently, the material immediacy principle requires that during the trial the evidence should be based on the most primary sources in order to ensure the verifiability of the information it contains. *Nijboer* also points out that the elaboration of the principle of immediacy in the Dutch criminal procedure is, compared to other countries, 'extremely minimalistic' and without doubt the least comprehensive⁵.

Perhaps the most interesting and profound elucidation of the principle of immediacy is made by *Garé*. In her doctoral thesis, *Garé* argues that the principle of immediacy is the result of an effort to improve the fact finding process⁶. The

1 *Simons*, *Beknpte handleiding tot het Wetboek van Strafvordering*, Haarlem 1925, pp. 31–32.

2 *Zachariä*, *Handbuch des deutschen Strafprozesses*, 1861, pp. 50–51.

3 *Stolwijk*, *Het onderzoek ter terechtzitting in strafzaken*, Arnhem 1976, p. 6.

4 *Nijboer*, *Enkele opmerkingen over de betekenis van het onmiddellijkheidsbeginsel in het strafprocesrecht*, NJB 1979, 821–823.

5 *Nijboer*, *De waarde van het bewijs*, Deventer 1999, p. 108.

6 *Garé*, *Het onmiddellijkheidsbeginsel in het Nederlandse strafproces*, Arnhem 1994, p. 76.

principle is based on the idea that the use of original evidence is preferable to any reproduction of evidence which bears the risk of distortion. Consequently, this requires that the judge must have the closest possible relation to the facts of the case. This requirement follows from the insight that the risk for distorted information increases when it is often transferred. This is indisputable, since each transfer of information includes a subjective evaluation. Hence, witness testimony in front of the judge is preferred to written statements by witnesses. There has to be a direct link between the evidence and the judge. Therefore, according to Garé, the principle of immediacy requires that the judge uses the most immediate evidence⁷. Nevertheless, Garé argues against Stolwijk's view that the ratio behind the principle of immediacy can be found in the greater reliability of immediate evidence. This nuance has to be carefully explained. According to Garé the ratio of the principle can be found in an enhanced possibility of verifying information, since the most immediate evidence is not necessarily the most reliable⁸. It follows that Garé acknowledges that in establishing the reliability and quality of the evidence, the production of the primary sources of evidence in court in the presence of the defence has major benefits over presenting the judge with evidence which is reproduced from secondary sources⁹. According to Garé there are three advantages¹⁰:

1. The first advantage is that the judge can examine primary sources in case of conflicting information;
2. The second is that the judge can scrutinise primary sources in case of ambiguities;
3. And thirdly, the judge is able to confront the primary sources with each other and with the defence.

As a conclusion, Garé subdivides the principle of immediacy in two elements. Firstly, Garé states that the principle of immediacy is an evidential principle necessitating that the primary sources of evidence be produced in court, so that the judge will base his decisions solely on evidence he was able to examine independently as to its quality and reliability through his own observation, examination and confrontation with other evidence and or the defence¹¹. Secondly, the principle of immediacy is also a structural principle. Compliance with this principle has

⁷ Garé (note 6), pp. 74–75.

⁸ Garé (note 6), pp. 75–76.

⁹ Garé (note 6), p. 78.

¹⁰ *Ibid.*

¹¹ Garé (note 6), p. 77. See also *Geppert*, *Der Grundsatz der Unmittelbarkeit im deutschen Strafverfahren*, 1979, pp. 136–145.

implications for the systematic organisation of criminal procedure itself. If criminal procedure allows for insufficient room for the principle of immediacy, this is tantamount to a similar degree of violating the principle of public hearings, the autonomy of the judiciary and the adversarial character of criminal proceedings¹².

Garé concludes that the principle of immediacy is the result of an effort to improve fact finding. It is important to remember that the principle is based on the idea that any reproduction of evidence bears the risk of distortion. Consequently, the principle of immediacy requires that the judge no longer bases his knowledge of the facts on what was conveyed by secondary sources of information.

III. The concept of truth in the Dutch criminal procedure

The most important objective of the Dutch procedure is the establishment of truth. But what do we actually mean by ‘truth’? How can we define this concept? It is useful to devote some theoretical observations on this concept in order to answer this question. Perhaps the most persevering theory of truth is the correspondence theory of *Tarski*. According to this view, a statement is true if and only if it corresponds to the facts. Thus, ‘*Das Gras ist grün*’ corresponds to the facts if, and only if, grass is actually green. Nevertheless, there is a problematic aspect to this theory. What do we exactly mean with “correspondence between a statement and a fact”? *Popper* addresses this problem and he explains how it can be meaningfully claimed that a statement corresponds with a fact¹³. *Popper* concludes that *Tarski*’s theory has solved this problem simply and handsomely by introducing the idea of a meta-language. The meta-language allows for speaking both about facts and about statements, or, in other words, it is capable of referring both to statements in the object language and of describing facts. *Within the meta-language* one “can speak about correspondence between statements and facts without any difficulty”¹⁴ *Popper* considers *Tarski*’s theory as “a great philosophical achievement” and as “a rehabilitation of the correspondence theory”¹⁵.

¹² Garé (note 6), pp. 77–78. See also *Mols*, *Staande de zitting. Een beschouwing over het onmiddellijkheidsbeginsel* (oratie Maastricht), Arnhem 1989; *Garé/Nijboer*, *Onmiddellijkheid heroverwogen*, AA 1999, 877–884.

¹³ *Popper*, *Objective Knowledge. An Evolutionary Approach*, Oxford 1972, p. 224.

¹⁴ *Popper* (note 13), p. 314.

¹⁵ *Popper* (note 13), p. 308.

It is important to underline the fact that Popper explicitly denies that Tarski's theory supplies any *criterion* of truth. In fact, Popper states this theory has proved that there can be no criterion of truth. Therefore, the *concept* of truth serves primarily as a regulative idea: it is an ideal to which we must aspire but we can never know for sure whether or not we have achieved it. This fundamental idea is also of paramount importance for Dutch criminal procedure. Conceptually we know what truth is, but in concrete cases we can never be sure whether we have attained it¹⁶. This demanding objective of determining truth is considered in the Netherlands to be primarily and predominantly the responsibility of the judge. The applicable *criterion* of truth is the 'judicial conviction' (*rechterlijke overtuiging*) as referred to in Article 338 Code of Criminal Procedure (CCP). This provision states that the charges can be considered proven if the court is convinced, based on the legal evidence, that the accused committed the alleged offence beyond reasonable doubt. Therefore, this article necessitates that the primary sources of evidence be produced in court, so that the judge will base his judgment solely on evidence he was able to examine independently as to its quality and reliability (*betrouwbaarheid en zorgvuldigheid*) through his own observation. Thus, it can be stated that the formal principle of immediacy is closely linked to the core value embodied in Article 338 CCP. However, the role of the principle of immediacy in the Dutch criminal procedure is limited. In order to better understand this limited role of the principle of immediacy, some special features of the Dutch criminal procedure will be explained in the next section.

IV. The principle of immediacy in Dutch criminal procedure since 1926

The primary source of Dutch criminal procedural law is the Code of Criminal Procedure. In 1926 the current Code of Criminal Procedure (CCP) replaced its predecessor of 1838. The new CCP robustly changed the nature of the criminal investigation by regulating the powers of the police and the public prosecutor, by providing citizens with legal protection against State power and allowing procedural rights for the suspect during the preliminary investigation and the accused (after the decision to prosecute has been taken)¹⁷. The Dutch criminal

¹⁶ See also Groenhuijsen, *Waarheidsvinding in het strafrecht*, in: *Waarheid en waarheidsvinding in het recht*. preadvies Nederlandse Juristen-Vereeniging. Handelingen Nederlandse Juristen-Vereeniging 2012–1, Deventer 2012, pp. 233–241.

¹⁷ *Minkenhof*, *De Nederlandse Strafvordering* (bewerkt door J.M. Reijntjes), Deventer 2009, p. 12.

justice system can be characterised as being moderately accusatorial. In fact, it is neither typical inquisitorial nor accusatorial, but has elements of both¹⁸. The Dutch criminal process in the CCP of 1926 can be divided into three main stages: the preliminary investigation stage, the trial stage and the execution stage. The first two stages will be outlined in the following sub-sections.

4.1. The preliminary investigation stage

The preliminary stage consists of the criminal investigation¹⁹. This investigation is supervised by the public prosecutor (*officier van justitie*)²⁰. The examining judge oversees the quality of the criminal investigation, in particular to ensure the legitimate use of the most invasive investigative powers and the progress, balance and completeness of the criminal investigation (Article 170 sub 2 CCP)²¹. He functions as a warrant judge for *ex ante* judicial control over the criminal investigation and in particular over the use of the most intrusive investigative methods, like electronic surveillance. The examining judge is considered to have the highest level of independency and objectivity which is required to balance all the interests involved before authorizing investigative techniques which seriously interfere with the privacy of citizens²².

The examining judge is also empowered to perform additional investigative actions during the entire preliminary investigation at the request of the public

18 MvT, Kamerstukken II 1913/14, 286, nr. 3, par. 3.

19 *Corstens/Borgers*, Het Nederlands strafprocesrecht, Deventer 2011, p. 227.

20 *Groenhuijsen/Simmelink*, Criminal procedure in the Netherlands, in: *Vogler/Huber* (eds.), Criminal procedure in Europe, 2008, pp. 384.

21 Since January 2013 the Act on Strengthening the Position of the Examining Magistrate (*Wet versterking positie rechter-commissaris*) came into effect, in which the “preliminary judicial inquiry” was abolished. The preliminary judicial inquiry used to be part of the preliminary investigation stage. If the public prosecutor considered that there was sufficient reason, he could request the examining judge to initiate a preliminary judicial inquiry. The criminal investigation was continued by the prosecutor with his own pre-trial investigation parallel to that of the examining judge. In its most original form, the inquiry conducted by the examining judge was an essential part of the criminal procedure and it was regarded as an extra guarantee that the investigation would be impartial. However, over time the preliminary judicial inquiry became of very little practical significance. Upon the entry into force of the new Act, the criminal investigation under the supervision of the public prosecutor is the only preliminary investigation for the purpose of truth-finding in preparation for a criminal prosecution.

22 Kamerstukken II 1997/98, 25 877, No. 3, 99. See also *Kwakman*, De nieuwe Wet versterking positie rechter-commissaris, *Trema* 2012, 228–233.

prosecutor, at the request of the defence or *ex officio*²³. The use of investigative actions at the request of the public prosecutor, the defence or *ex officio* may concern, *inter alia*, hearing witnesses under oath, and recording their statements so that they can be used in court as evidence. Most frequently, the examining judge examines witnesses whom the defence wants to challenge but who will not be called in court.

Once the criminal investigation is completed, the public prosecutor must decide whether to prosecute. The prosecutor has the exclusive prerogative on the decision whether or not to prosecute, and on which charge(s). The prosecutor can dismiss the case or the case can be brought to trial. Traditionally, we refer to this discretionary power as the expediency principle as opposed to the procedural principle of legality. Besides these two options it is also possible to conclude the case extra-judicially by an out-of-court settlement (transaction) or a conditional dismissal. However, by implementation of the Act on *OM-afdoenig* (Public Prosecution Dispositions Act, July 18 2006) a new form of adjudication of criminal matters is introduced: the sentence arrangement²⁴. The sentence arrangement provides the public prosecutor with an autonomous authority to impose penalties and measures for offences carrying a prison term of a maximum of six years and misdemeanours that carry alternative sentences. The sanctions which can be imposed by the public prosecutor are community service, fines, removal of goods, compensation orders and revoking drivers' licences. In addition to imposing these penalties, the public prosecutor's office can give the accused behavioural instructions by which he must abide²⁵.

4.2. The trial phase

The trial phase has a predominantly accusatorial character. The parties are increasingly being made responsible for setting the agenda of the trial. As soon as the trial has started, the prosecutor becomes a party in the process. To a large extent there is an equality of arms between the public prosecutor and the accused.

²³ Kamerstukken II 2009/10, 32177 No. 3, 8–11. See also Articles 181–183 CCP.

²⁴ Wet OM-afdoenig van 7 juli 2006, Stb. 2006, 330. See also *Groenhuijsen/Simmelink*, Het wetsvoorstel OM-afdoenig op het grensvlak van juridische techniek en strafprocessuele uitgangspunten, in: *Jordaans* (ed.), *Praktisch strafrecht. Liber Amicorum J.M. Reijntjes*, Nijmegen 2005, pp. 178–180.

²⁵ *Kooijmans/Meijer*, De positie van het openbaar ministerie in de executiefase na inwerking-treding van de Wet OM-afdoenig, DD, 2007, 446–464. See also *Kessler/Keulen*, De strafbeschik-king, Deventer 2008, pp. 121–131.

Nevertheless, a formal guilty plea by an accused does not exist in the trial stage. At least not in the sense and with connotations and legal consequences it has in many (common law) adversarial jurisdictions. At the beginning of the trial, it is not required for the defendant to state whether or not he pleads guilty. Obviously, the accused can confess. And usually, in some 85% of cases, he does. This confession provides no basis for allowing the accused to control the adjudication of the case, nor for bargaining. The confession has the legal status of a 'statement by the accused', and it constitutes legally admissible evidence. However, contrary to conventional wisdom in common law systems, this statement alone is not sufficient for a conviction. Hence, the court must still establish – according to the evidentiary rules – that there is sufficient additional evidence to conclude the case. There is no doctrinal differentiation in procedures for confessing or denying defendants. In each set of circumstances, the judge remains equally responsible for fact-finding. For instance, the judge can be convinced of the guilt of the accused on the basis of his confession, but if there is not enough additional legal evidence he will still have to acquit the defendant. The sole statement by the defendant or by a single witness does not suffice (*unus testis nullus testis*).

Further, the trial stage is the podium for a debate amongst the actors (the judge, public prosecutor and accused) with an active role for the court, which shall result in the determination of the material truth by the judge. Therefore, the Dutch trial stage cannot be regarded as a purely adversarial one. For instance, cross-examination does not exist²⁶. The framers of the CCP of 1926 had the intention of making the trial stage an open and oral court procedure governed by the applicability of the principle of immediacy²⁷. According to *Langemeijer* and *Reijntjes* the formal principle of immediacy forms the basis of Article 338 CCP²⁸. As noted before, the principle, elaborated by Nijboer²⁹, demands that all evidence that can possibly influence the judgment should be directly contestable during the trial. Article 338 CCP states that the charges can be considered proven if the court is convinced, based on the legal evidence, that the accused committed the alleged offence. Moreover, it enables the trial participants to challenge the

²⁶ To avoid confusion on this point: it is not the party who called the witness who will take the lead in taking the statement (direct questioning) and then the opposing party (on cross-examination). In our system it is primarily the court who performs the questioning; the parties have a right to ask subsequent and additional questions, but this right is usually exercised in a cautious way in order to avoid the impression that the judge did a sloppy job.

²⁷ Kamerstukken II 1913/14, 286, nr. 3, p. 3. And see also *Garé* (note 6), p. 79.

²⁸ *Langemeijer*, Het onmiddellijkheidsbeginsel in het militaire strafproces, DD 1976, 97; *Reijntjes*, Strafrechtelijke bewijs in de wet en praktijk, Arnhem 1980, p. 44.

²⁹ *Supra* section 2.

evidence. In principle, the judge is free to select and to assess the information gathered from the case file and the court sessions. The guiding criterion is, thus, personal conviction regarding the truth of the evidence. However, the discretion of the court is limited in a number of ways, which are listed in the CCP and in case law. For instance, Article 339 CCP provides a statutory system of an exhaustive recital of the sources of knowledge on which the judge may base his evidentiary decision: 1. The judge's personal observation (Article 340 CCP); 2. Statements by the accused (Article 341 CCP); 3. Witness statements (Article 342 CCP); 4. Expert opinions (Article 343 CCP); 5. Written records (Article 344 CCP).

The Dutch evidentiary system is a 'negative system' in the sense that the law has no obligatory indications as regards the persuasive force of the means of proof³⁰. Judges can only rely on evidence that has been explicitly addressed at the trial. The court can further only rely on personal observation during trial. An exception is made for facts and circumstances of general knowledge, rules of experience and the content of the law. Furthermore, according to Article 359 sub 2 CCP, the judge must give specific reasons for his decision if and when it directly deviates from explicit and substantiated views of one of the parties to the trial. However, this requirement for justification does not limit the judge in his discretionary powers, but it does do justice to the adversarial nature of criminal proceedings. The arguments provided during trial compel the judge to provide an explanation to the relevant parties as to the grounds of his decision³¹.

The material principle of immediacy is reinforced by the strict requirement of Article 342 sub 1 CCP that witnesses can only testify about their own experience. Hence, it was clearly the intention of the legislator that witnesses had to appear in court to give testimony about matters they personally observed. There was only one exception to this general principle: the documentary form of evidence that was permitted was the testimony by investigating officers³². Written hearsay evidence was excluded as a means of evidence. *Rozemond* claims, alternatively, that the legislator did not intent to exclude hearsay evidence³³. Nonetheless, the legislator was not conclusive about the admissibility of oral hearsay evidence. Garé argues that this failure to provide clarity must be appreciated in the light of the public and oral character of the investigation at trial³⁴. Thus, in 1926, the very same year the CCP was adopted, the Supreme Court was confronted with the

³⁰ Groenhuijsen/Simmelink (note 20), pp. 452–453.

³¹ Groenhuijsen/Knigge (red.), Het onderzoek ter zitting. Eerste interimrapport onderzoeksproject Strafvordering 2001, Groningen 1999, pp. 448–452.

³² MvT, Kamerstukken II 1913/14, 286 nr. 172. And see also Garé (note 6), p. 84.

³³ *Rozemond*, De mythe van het de auditu-bewijs, AA 1999, 146.

³⁴ Garé (note 6), p. 87.

question whether oral hearsay was admissible³⁵. The Supreme Court, inspired by Justice *Taverne*, ruled that a literal interpretation of Article 342 sub 1 CCP should decide the issue³⁶. As it turned out, the Supreme Court accepted admission of oral hearsay, because its prohibition was of no practical effect; the judges are simply unable to ignore what they already know from reading the case file. According to Garé this crucial ruling of the Supreme Court reflects a sense of judicial duty that does not accord with the underlying system of criminal procedure, in which the investigation at trial serves to legitimise the acts of the administration³⁷.

4.3. The ‘*de auditu*’ judgement and its influence on the trial stage

In the ‘*de auditu*’ judgment, the Supreme Court held that a witness who informs the court of what someone else told him can be qualified as a witness who personally made sensory observations of certain facts pursuant to Article 342 sub 1 CCP, because it is a pure aural impression, that is perceived or experienced by the witness and is communicated to the court. On the basis of this interpretation, oral hearsay is not contrary to the law³⁸. Though at odds with the initial intention of the legislator, the Supreme Court thus inevitably also accepted and admitted hearsay statements via the written testimony of investigating officers³⁹. As *Van Dijk* stated, the judge can rely on written statements of oral hearsay and consequently the summons of witnesses to trial is no longer indispensable⁴⁰.

It can be persuasively argued that the ‘*de auditu*’ judgment has opened the door widely to accept indirect evidence and the principle of immediacy is ever since no longer interpreted as requiring that all evidence is directly produced in court. From then on, the hearing of witnesses at trial has become an exception rather than the rule. Instead, the case file contains the written statements of witnesses heard by the police investigator or the examining judge and during the trial stage these statements are read out loud – usually in the form of a summary – and subsequently discussed and verified by the judge. The court does

35 HR 20 december 1926, NJ 1927.

36 See also *Taverne*, Het testimonium de auditu, TvS 1926, 115–146; *Taverne*, Een nieuw de-auditu-arrest, NJB 1928, 445–450.

37 Garé (note 6), pp. 106–107.

38 *Besier*, Het nieuwe de-auditu-arrest, NJB 1928, 489–492.

39 *Dreissen*, Bewijsmotivering in strafzaken, Den Haag 2007, p. 59

40 *van Dijk*, Het de-auditu-arrest, NJB 1927, 52. See also *van Dijk*, Nog eens het de auditu-arrest, NJB 1928, 309–313.

not have to hear the evidence directly. The judge can rely on written documents, provided that such material has been read out during trial. According to the Articles 301 sub 3, 374 and 417 CCP, the judge can even replace this comprehensive 'reading' out by a brief summary of the testimonies.

According to *Pompe*, the effect of this narrow interpretation of the principle of immediacy has been that the preliminary investigation stage has gained increasing importance. The events during the preliminary investigation stage have become crucial for the final judgment⁴¹. Therefore, the most significant consequence of the admission of hearsay evidence is that the material principle of immediacy – that was supposed to warrant adequate fact finding – is compromised. The possibilities for the court and for the other trial participants of verifying evidence to its quality and reliability have undeniably been somewhat curtailed⁴².

The current situation is that the witness's statement given to the police or the examining judge during the preliminary investigation usually is reduced to a recorded written statement and this document is then reviewed at trial by the parties and the judge. Garé concurs that this state of affairs implies that the preliminary investigation, initially only intended as a preparation for the trial, has acquired an essential importance in its own right⁴³. Of course, there are some safeguards to protect the integrity of this stage of the procedure. First, the public prosecutor must always be impartial and objective in compiling the case file. All the relevant information (incriminating as well as exonerating) has to be made available for the judge to consider⁴⁴. As a second safeguard, the public prosecutor and the defence lawyer have the right to be present when the examining judge questions witnesses. The examining judge can also allow the accused himself to attend the examination. The witness is generally not under oath when he provides his testimony. If the interview involves a witness who is expected not to be able to appear at trial, the examining judge has an obligation to invite the public prosecutor and the defence counsel to attend the questioning. In these circumstances, the witness will be heard under oath. The witness is obliged to obey a summons or call to appear⁴⁵.

⁴¹ *Pompe*, Vooronderzoek of eindonderzoek beslissend?, TvS 1959, 141–151.

⁴² Garé (note 6), p. 71.

⁴³ Garé (note 6), pp. 100–101.

⁴⁴ Franken, De betekenis van het dossier in het strafproces, in: *Melai/Groenhuijsen e.a. (red.), Het Wetboek van Strafvordering*, comment 4.1, pp. 460–472.

⁴⁵ There is a limited circle of persons related by blood or marriage, persons who by virtue of their office or profession are bound by confidentiality or a witness who would place himself or

However, in practice it is rare that a witness is asked to appear at the trial to give his testimony again orally and in public. According to Article 260 CCP, the public prosecutor may call experts, victims, witnesses, victims, experts and interpreters to trial. The accused may, on the basis of Article 263 CCP, request the public prosecutor to call experts and witnesses. The accused can also request the public prosecutor to call witnesses on behalf of the defence. To that end, the accused needs to present a list to the public prosecutor in a timely manner. There are only a limited number of reasons available to the public prosecutor to refuse to summon a witness. Pursuant to Article 264 CCP, the public prosecutor is allowed to refuse if: 1. The judge's personal observation (Article 340 CCP); 2. Statements by the accused (Article 341 CCP); 3. Witness statements (Article 342 CCP); 4. Expert opinions (Article 343 CCP); 5. Written records (Article 344 CCP).

In case of a refusal, the public prosecutor must provide reasons for his decision and bring it to the attention of the accused. The accused has the power to appeal this decision to the court at the trial stage. The accused can, immediately following the opening of the case, request the judge to authorise calling a witness or expert. The judge may refuse any such motion on similar grounds to those which apply for the public prosecutor (Article 288 CCP).

Even when the accused did not request the public prosecutor to call witnesses or experts, then he can still ask the court to use its authority (Article 315 CCP) to call witnesses or experts to trial (Article 328 CCP). It must be noted, though, that this kind of request is rarely sustained.

The court rules on a case-by-case basis whether it is essential to call a witness to appear at the trial. Article 315 CCP mentions the criterion of 'necessity' (*noodzakelijkheid*) which means that the judge will only grant such a request if, in the context of finding the material truth, it is compulsory to test the credibility of the statement of the witness or expert through a direct and public interrogation. The more crucial their evidence, the more it is important to hear witnesses during trial⁴⁶.

What are sufficient reasons not to call witnesses? The Dutch system has acknowledged as compelling arguments that a witness is dead, cannot be traced, or is otherwise unavailable despite all reasonable efforts, or the witness has already been examined by an examining judge in the presence of the prosecutor and defence who were given an opportunity to ask questions to the witness, or the

members of his immediate family at risk of prosecution if he were to testify, can excuse himself from the obligation to appear as a witness to testify.

⁴⁶ Dreissen (note 39), pp. 356–357.

witness is regarded as a threatened witness, or when the interests of the witness not to appear at trial outweighs the interests of the accused to directly challenge the witness⁴⁷. This enumeration is not exhaustive: the judge can consider on a case-by-case basis whether it is necessary for a witness to appear at the trial. This criterion of necessity is, however, mostly applied as a justification for rejection. Nevertheless, when the accused makes an explicit and well-argued request to the judge to call an incriminating witness to appear at trial, substantial efforts must be made to ensure that the witness appears at trial. Further, such a request can only be denied in a separate and reasoned decision (Article 330 CCP). When the court fails to provide proper arguments for declining the request, a written document containing the prior witness statement cannot be used against an accused. Conversely, if the accused does not make any request for an incriminating witness to be called at trial, such a person is not likely to be called. The defence has to take some solid initiative. The legal scholars Nijboer and Van Hoorn describe this practice as '*onmiddelijkheid op bestelling*' (i.e. 'immediacy on demand')⁴⁸. This starting principle is abandoned when the witness has given mixed evidence. For instance in situations when his testimony to the examining judge is different from his incriminating testimony to the police investigator. In these circumstances the court should *ex officio* call the witness to trial in order to scrutinise the discrepancies between the two testimonies⁴⁹. Thus, the witness's apparent lack of credibility is a mandatory reason for the judge to call a witness even when the defence did not make a request to that effect. An adamant refusal of a witness who gave a statement to an investigator to be subsequently interviewed by the examining judge is also a sufficient reason to be forced to appear in open court⁵⁰.

Similarly, in certain circumstances, the statement of a witness to a police investigator cannot be relied upon as evidence if the witness later refuses to testify at the trial notwithstanding a summons to do so⁵¹. This is not an absolute rule. Exceptions obtain, for instance when the accused did not indicate that he wished to directly question the witness. It is a case-by-case determination depending on the extent to which the evidence is corroborated, the extent to

⁴⁷ *den Hartog*, De getuige in het strafprocesrecht; voorstellen voor een nieuwe regeling, in: *Groenhuijsen/Knigge* (red.), Het onderzoek ter zitting. Eerste interimrapport onderzoeksproject Strafvordering 2001, Groningen 1999, pp. 326–327.

⁴⁸ This sentence can be translated as 'immediacy on demand'. See further: *Nijboer/van Hoorn*, Om de persoon van de getuige, DD 1997, 569.

⁴⁹ HR 12 september 2006, NbSr 2006, 393. See also *Dreissen* (note 39), p. 71.

⁵⁰ HR 1 februari 1994, NJ 1994, 427.

⁵¹ HR 29 oktober 1991, NJ 1992 199; HR 28 May 1991, NJ 1991, 711; HR 1 februari 1994, NJ 1994, 427.

which the allegations made in the statement are denied by the accused, whether such a statement was later withdrawn or significantly changed, the level of inconsistencies and the efforts made to have such a witness appear and testify⁵².

As said before, in actual practice most witnesses do not appear at trial. Their statements can and will be used as evidence against the accused even if no opportunity has been provided to the accused to examine the witness at the preliminary investigation stage, for instance when the interview is video-recorded, or the statement is corroborated by the live testimony of one or more non-anonymous witnesses, or other facts established by the judge. However, where the accused contests the evidence, specific reasons must be given in the verdict for proceeding in this way. In a ruling of fundamental significance, the Dutch Supreme Court has held that those exceptions to the general rule that witnesses appear in court to testify are consistent with the ECtHR case law⁵³. The Dutch Supreme Court ruled that the use of such statements does not violate the ECHR and that there is certainly no issue of incompatibility if the defence at any stage of the proceedings had had the opportunity to directly challenge the reliability of a statement or when the statement is substantially corroborated in other pieces of evidence.

4.4. Videoconferencing in Dutch criminal procedure

In 2007 new provisions in the CC (Article 78a) and CCP (Article 131a) were introduced allowing for hearings of witnesses and questioning of the accused by videoconferencing. Videoconferencing has several obvious benefits. Obvious examples are cutting down the witnesses expenses such as travelling costs and speeding up the court process. It can also be beneficial in alleviating the plight of vulnerable witnesses. For instance, in the United Kingdom, remote witness room videoconferencing links have been installed in a handful of Victim Support Offices and police stations. In most European countries, including the Netherlands, video-mediated interpreting facilities have been inserted into courtrooms,

⁵² HR 10 mei 1994, NJ 1994, 643. In this case three similar incriminating statements made to the police were used even though the three witnesses had each withdrawn their statement before the examining judge. See also HR 21 mei 1996, NJ 1996, 611. In this case it was found acceptable to use the statements of six incriminating witnesses who refused to testify at trial. They were accepted because they corroborated and strengthened each other, and found support in additional evidence.

⁵³ HR 1 februari 1994, NJ 1994, 427.

so that an interpreter can be used in proceedings in which a number of defendants speak a foreign language⁵⁴. The increasing use of videoconferencing in national and cross-border criminal proceedings, calls for regulation. The Netherlands has put much effort in the development of a set of recommendations for the use of videoconferencing in legal proceedings and this resulted in a publicly available handbook on videoconferencing⁵⁵. This handbook has become the basis for the handbook on videoconferencing developed by the European Council Working Party on Legal Data Processing⁵⁶. Nevertheless, at present videoconferencing is not widely used in Dutch criminal proceedings, mostly because of the few facilities available in courts, prisons and police stations. There is a widespread sentiment among professionals and academics alike that this should change, and videoconferencing also ought to gain momentum for decisions on pre-trial detention and for interviewing foreign witnesses⁵⁷.

4.5. Conclusion

As a result of the practice described above, the principle of immediacy is encroached and not much has come of the oral and immediate character of the trial stage. The Dutch criminal procedure can be characterised as efficient and pragmatic. That is the indisputable advantage of the currently obtaining very restrictive and narrow interpretation of the principle of immediacy. It allows the Dutch system to conclude many cases with limited means available. For instance, courts, including courts of appeal, deal with up to twelve felony-cases in a single day. Of course, there are exceptions in the so-called mega-cases.

In general, efficiency and – during the early stages of proceedings – bureaucratic streamlining of the decision making process can be regarded as typical of the functioning of court bodies. This also results in the settlement of many criminal offences out of court. Thus, many cases will never make it to the trial stage.

The principle of immediacy has even been further eroded because the Supreme Court also has – under certain conditions – accepted evidence by anonymous witnesses as admissible. The use of anonymous witnesses as sources of

54 P. & R. van den Hoogen, True-to-life requirements for using videoconferencing in legal proceedings, in: *Braun/Taylor* (eds.), *Videoconference and remote interpreting in criminal proceedings*, Guildford 2010, pp. 187–197.

55 Handboek Telehoren, versie 01 januari 2010.

56 https://e-justice.europa.eu/attachments/vc_booklet_en.pdf.

57 Verrest, Het gebruik van videoconferentie in strafzaken, JV 2011, vol. 7, pp. 42–50.

information was a response to the increased level of organised crime in the Netherlands⁵⁸. According to the case law of the Supreme Court anonymous witnesses can have a distinct role, albeit with the provision that the content of their statements should be used with caution⁵⁹. As a direct consequence of these rulings, police investigators frequently used anonymous sources for information without relying on their testimony as evidence⁶⁰. This is obviously unsatisfactory, because it impedes the transparency – and hence the accountability – of the early stages of criminal proceedings. So it came not as a surprise that later on, under the influence of decisions by the ECtHR regarding the use of anonymous witnesses, the principle of immediacy regained some influence. In the next section, some landmark cases of the ECtHR will be analysed in order to understand the view of the European Court regarding the principle of immediacy. Subsequently, the impact of these cases on Dutch Criminal Procedure will be outlined in section VI.

V. The principle of immediacy and the right to a fair trial⁶¹

The right to a fair trial in criminal proceedings can be found *inter alia* in Article 6 ECHR. In fact it is a basic principle to ensure that everyone is entitled to a fair and public hearing before an independent and impartial tribunal within reasonable time. For instance, Article 6 § 3 sub d of the ECHR provides that ‘everyone charged with a criminal offence’ has the right to ‘examine or have examined witnesses against him’. This basically means that the accused should have an opportunity to question the incriminating witnesses. Such a right is a fundamental element of a fair trial. With respect to this right, the *Unterpertinger v. Austria* case is a landmark case. The applicant had been convicted of causing bodily harm to his step-daughter and former wife in two separate incidents. Both victims refused to give evidence in court. Their statements were read out during the trial. The European Court ruled that, although the public reading of their statements was not inconsistent with Article 6 § 3 sub d of the ECHR, the use of these statements as evidence must nevertheless comply with the rights of the defence. This is

58 *Nijboer*, Kanttekeningen bij het rapport “De bedreigde getuige”, R&K 1984, 80–93.

59 HR 4 mei 1981, NJ 1982, 268 m.nt. ThWvV.

60 *Nijboer* (note 58), 115–116.

61 In this section we will only deal with case law which has directly impacted on the Dutch system of administering criminal justice.

exactly the object and purpose of Article 6 § 3 sub d. In the present case this was particularly pressing, since the applicant had not had an opportunity at any stage in the earlier proceedings to question the persons whose statements were read out at the hearing⁶². The ECtHR found the applicant did not have a fair trial because he was prevented from having an opportunity to directly challenge his former wife and step-daughter on substance or credibility. Since the Austrian Court of Appeals treated their statements “*as proof of the truth of the accusations made by the women*” there was a breach of Article 6 § 3 sub d of the ECHR⁶³. When there has been no opportunity to effectively challenge the evidence given by witnesses, this is not compatible with rights of the accused, if the conviction is based solely or to a decisive extent on such statement.

The Court did not seem to accept pre-trial hearings as the sole forum for questioning of witnesses. In *Barberà, Messegue and Jabardo v. Spain* the ECtHR ruled that, Article 6 ought to be interpreted as requiring that – as a principle – all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument⁶⁴. This ruling seemed to ban the examination of witnesses at any stage in the proceedings other than at the trial itself, and seemed to uphold the strong emphasis on fairness, requiring that the trial itself be the forum for challenging the evidence.

However, three years later in *Kostovski v. Netherlands*, the ECtHR reaffirmed again the *Unterpertinger* ruling. In this case the Dutch court convicted the accused on the basis of accounts from two anonymous witnesses who did not appear in court. The ECtHR held that the use of the statements, without better safeguards set up to protect the rights of the defence, constituted a violation of Article 6 right to a fair trial because such statements do not allow the accused to confront his accusers⁶⁵. The ECtHR explicitly mentioned that it would be compatible with Article 6 § 3 sub d to permit the examination of witnesses to take place at an earlier stage in the proceedings, instead of during the trial itself. While it once again referred to the general principle of examination at a public hearing, the Court also noted that this does not mean that in order to be admissible as evidence the statements of witnesses should always be made at a public hearing

⁶² ECtHR, *Unterpertinger v. Austria*, Application No. 9120/80, 24 November 1986, para. 31.

⁶³ *Ibid.* at paras. 32–33.

⁶⁴ ECtHR, *Barberà, Messegue and Jabardo v. Spain*, Application No. 10588/83, 6 December 1988, para. 78.

⁶⁵ ECtHR, *Kostovski v. The Netherlands*, Application No. 11454/85, 20 November 1989. See also *Mols*, De zaak Kostovski, Adv.bl. 1989, 685–690; *Myjer*, Kostovski en de naamloos gebleven getuigen, NJCM-Bulletin 1989, pp. 12–19; *Swart*, Anonieme getuigen. Noot onder EHRM 20 november 1989 (*Kostovski-Nederland*), AA 1990, 315–327.

in court. The use of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6, provided the rights of the defence have been respected⁶⁶. The inference is that Article 6 of the ECHR requires that the accused has the opportunity at least at some stage in the procedure to confront and question witnesses.

The ECtHR conceives of the principle of immediacy in a subtle manner. Challenging the reliability of a witness is allowed to take place outside the public trial. The ECtHR reasons that all the evidence must ordinarily be produced in the presence of the accused at a public hearing with a view to adversarial argument. The ECtHR adds to this that this ruling does not mean, however, that the statements of a witness must always be made in court and in public if it is to be admitted as evidence⁶⁷.

The ECtHR came to a similar conclusion in the *Saidi* case by stating that the lack of any confrontation deprived the accused in certain respects of a fair trial⁶⁸. What is essential is that the accused must have had the opportunity to directly examine the witness, as this should allow it to cast doubt on the witness's credibility. An indirect confrontation, where the defence can question the police officers or public prosecutors who at their turn have interviewed the anonymous witness, does not sufficiently safeguard the rights of the defence and this violates Article 6.

In the *Delta* case the ECtHR confirmed this ruling. In this case the accused was convicted of robbery and sentenced to three years imprisonment. The national court based its decision exclusively on evidence given by a police officer who had not been present at the commission of the offence but had, shortly afterwards, taken statements from the victim and a friend who had been with her at the time. The Court of Appeals dismissed an appeal by the applicant, who claimed to have been wrongly identified as the perpetrator of the offence, together with his request that it should hear the victim and her friend and also two witnesses on his behalf. His further appeal on a point of law was dismissed by the Court of Cassation. The applicant alleged a violation of Article 6 § 1 (right to a fair hearing) and Article 6 § 3 sub d of the Convention (right to examine or have examined witnesses). The ECtHR held that, as a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question an adverse witness, either at the time the witness makes his statement or at some later stage of the proceedings. This can be done by enabling the defence to assess the witness's credibility at the pre-trial stage by permitting it to ask

66 ECtHR, *Kostovski v. The Netherlands*, Application No. 11454/85, 20 November 1989, para. 41.

67 ECtHR, *Isgrò v. Italy*, Application No. 11339/85, 19 February 1991, para. 34.

68 ECtHR, *Saidi v. France*, Application No. 14647/89, 20 September 1993, para. 44.

questions when the examining judge is conducting the hearing. This generally requires that the defence either is present when the witness is being examined or that there is a live TV link in place⁶⁹. Consequently, in the *Delta* case, where the applicant was convicted on the basis of testimony given by witnesses at the police-investigation stage whose credibility neither the applicant nor his legal counsel had been able to challenge, the European Court found a violation of the right to a fair trial in Article 6 of the Convention⁷⁰.

The right in Article 6 § 3 sub d of the ECHR is a right to challenge the evidence when the witness is making the statement, either at some point during the pre-trial investigation or at trial. The opportunity to challenge a recorded written statement at trial will not suffice. It is not essential that the counsel of the accused is present when a confrontation takes place, as long as the opportunity to put questions to the witness has presented itself⁷¹.

It follows from this brief overview that not every restriction of the principle of immediacy constitutes a violation of the right to a fair trial. What is important is that the proceeding as a whole had a fair character, taking all the stages into account, including the pre-trial stage. It can be maintained that, in principle, 'fair trial' requires that all evidence is produced in court before the judge in the presence of the accused⁷². There are exceptions to this rule, but these require justification. Comply or justify. Suitable examples are situations in which it is just impossible to produce evidence in court, for instance because a witness cannot be traced or wishes to invoke witness' privilege. As an illustration, in the *S.N. v. Sweden* case the ECtHR accepted special provisions in criminal proceedings concerning sexual offences. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the victim. The ECtHR accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence⁷³. Even in

69 Vermeulen, EU standards on witness protection and collaboration with justice: Needs, preconditions and opportunities, in: The Stockholm Criminology Symposium, The Swedish National Council for Crime Prevention, Stockholm 2007, pp. 126–127.

70 ECtHR, *Delta v. France*, Application No. 11444/85, 19 December 1990.

71 ECtHR, *Isgrò v. Italy*, Application No. 11339/85, 19 February 1991, para 36. See also *Fijnaut*, Officier van Justitie versus Bende van de Miljardair, Arnhem 1993, p. 65; *Garé* (note 6), p. 125.

72 *Garé* (note 6), p. 133

73 ECtHR, *S.N. v. Sweden*, Application No. 34209/96, 2 July 2002, para 47. See also ECRM, *Baegon v. The Netherlands*, Application No. 16696/90, 20 October 1994.

these exceptional cases, there must be due respect for the rights of the accused⁷⁴. This means that, at some stage of the proceedings, the accused must be given proper and adequate opportunity to question adverse witnesses. For this purpose, the accused must be informed of the identity of the witness. In some cases, having been informed of the assumed identity of the witness will suffice. Even if the accused was not given proper and adequate opportunity to question an adverse witness, the relevant reproduced evidence may be validly considered in establishing proof. Provided the evidence is corroborated by another – independent – source of evidence and does not form the only substantive proof available, this does not constitute a violation of the right to a fair trial. Principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify⁷⁵.

It appears that the ECtHR has consistently focused on an opportunity for confrontation and adversarial argument, rather than on a strict application of the immediacy principle by calling all witnesses to trial. Against the background of the *Kostovski/Unterpertinger* approach it has been impossible to claim that immediacy is comprehensively protected by the Convention. Nevertheless, the principle gradually gained importance in subsequent judgments of the ECtHR. For instance, in 2002, the ECtHR for the first time made a direct reference to the principle in the case of *PK v. Finland*. This case concerned economic offences against seven accused. The domestic Court was composed of one professional presiding judge and three lay members. After the accused and eleven witnesses had been heard, a new judge presided, and the court heard two more witnesses. The accused did not object to the change and he did not request a rehearing of any of the witnesses. The ECtHR considers that an important element of fair criminal proceedings is the possibility of the accused to be confronted with the witness “*in the presence of the judge who ultimately decides the case*”. The ECtHR further states that such a principle of immediacy is an important guarantee in criminal proceedings in which observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused. Consequently, a change of the composition of the court during or after the trial should normally lead to rehearing of witnesses, at least the most important witnesses⁷⁶. This line of reasoning was repeated in the *Mellors v United Kingdom* judgment where it was noted: the Court has had regard to the principle

74 *Garé* (note 6), p.132–133; *Fijnaut* (note 71), p. 69.

75 *Dreissen* (note 39), p. 63.

76 ECtHR, *PK v. Finland*, Application No. 37442/97, 9 July 2002.

of immediacy, namely, that the decision in a criminal case should be reached by judges who have been present during the proceedings and taking of evidence⁷⁷.

In recent judgments, The ECtHR clearly considers proceedings that respect the immediacy principle as the most preferable situation⁷⁸. It is obvious that pre-trial examination of witnesses, unless repeated at trial, is incompatible with the immediacy principle. The ECtHR considers it of great importance that a judge can personally and directly assess the reliability of the witness. A declaration of the police regarding the reliability is not seen as an adequate alternative for the direct observation by a judge⁷⁹. In line with the significance the ECtHR attaches to the immediacy principle, the States have a responsibility in realising the appearance and questioning of witnesses. To that end, the State must undertake “*positive steps*” and make “*every reasonable effort*”. Such efforts form part of the diligence which the states must exercise to ensure the rights under Article 6 ECHR in an effective manner⁸⁰.

The ECtHR ruled that the accused also has some responsibilities in connection with his right of a fair trial. In the *Cardot* judgment, the ECtHR has indicated that the failure of the accused to request from the national court the examination of prosecution witnesses could amount to a waiver of his Article 6 rights⁸¹. Apparently the fact that the ECtHR stipulates that the responsibility for adhering to the minimum requirements under the ECHR for a fair disposition of criminal cases is a national matter, in its turn calls for alertness on the part of the accused to ensure that they receive the treatment they are entitled to⁸². It is quite evident that this requirement does not diminish the responsibility of the judge for ensuring that proceedings are conducted fairly⁸³.

⁷⁷ ECtHR, *Mellors v. United Kingdom*, Application No. 57836/00, 17 July 2003.

⁷⁸ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 40; ECtHR, *Kononenko v. Russia*, Application No. 33780/04, 17 February 2011, para. 62; ECtHR, *A.S. v. Finland*, Application No. 40156/07, 28 September 2010, para. 53; ECtHR, *Novikas v. Lithuania*, Application No. 45756/05, 20 April 2010, para. 32; ECtHR, *Musa Karatas v. Turkey*, Application No. 63315/00, 5 January 2010, para. 94; ECtHR, *A.L. v. Finland*, Application No. 23220/04, 27 January 2009, para. 36;

⁷⁹ ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990, para. 29.

⁸⁰ ECtHR, *Zhukovskiy v. Ukraine*, Application No. 31240/03, 3 March 2011, para. 43; ECtHR, *Kononenko v. Russia*, Application No. 33780/04, 17 February 2011, para. 64; ECtHR, *Bielaj v. Poland*, Application No. 43643/04, 27 April 2010, para. 56.

⁸¹ ECtHR, *Cardot v. France*, Application No. 11069/84, 3 April 1990.

⁸² *Garé* (note 6), p. 129.

⁸³ *Garé* (note 6), pp. 130–131; See also *Meijers*, *Verdrag en strafproces; gedachten over een methode van werken*, Zwolle 1993, p.12.

In a recent judgment the European court ruled that The Netherlands had violated Article 6 of the Convention. In this case the accused was convicted of drug trafficking between the Netherlands, Germany and Australia. The conviction was mainly based on the evidence of a German informer who refused to be questioned in court. The applicant complained that his conviction had been based solely or to a decisive extent on the statements of a witness whom he had been unable to examine. The European court held that, although it must be accepted that, as the Dutch Government had stated, reasonable attempts were made to allow the applicant to obtain answers from the informant, his persistence to remain silent made such questioning futile. The handicaps under which the defence labored were therefore not offset by effective counterbalancing procedural measures. The ECtHR concluded that there had been a violation of Article 6 § 1 and 3 (d) of the Convention⁸⁴.

This ruling could have significant implications for Dutch criminal procedure. The *Vidgen* judgment is bound to lead to a re-examination of the admission of such evidence in Dutch trials, with no possibility of cross-examination or testing in open court. The court has to assess this kind of evidence cautiously, and where it is the main or decisive evidence, then the judge needs to be more careful, and effective counterbalancing procedural measures have to be taken. This is also underlined in the *Al-Khawaja and Tahery* judgment. In this case the ECtHR ruled that *a conviction based mainly or decisively on the statement of an absent witness does not automatically result in a breach of Article 6*⁸⁵. The ECtHR held that Article 6 requires the court to assess the overall fairness of criminal proceedings. The right to examine a witness contained in Article 6 § 1 and 3 (d) is based on the principle that, before an accused can be convicted, all the evidence must normally be produced in his presence at a public hearing so that it can be challenged. Two requirements follow from that principle. First, there has to be a good reason for non-attendance of a witness. Second, a conviction based mainly or decisively on the statement of an absent witness is generally considered to be incompatible with the requirements of fairness under Article 6 (*the sole or decisive rule*). The ECtHR also held that in making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted, and, where necessary, to the rights of witnesses. More importantly, the ECtHR recalled in this context that the admissibility of evidence is a matter for regulation by

⁸⁴ ECtHR, *Vidgen v. The Netherlands*, Application No. 29353/06, 10 July 2012.

⁸⁵ ECtHR, *Al Khawaja and Tahery v. United Kingdom*, Application No. 26766/05; 22228/06, 15 December 2011.

national law and the national courts. The ECtHR's only concern is to examine whether the proceedings have been conducted fairly⁸⁶. All in all, the court's traditional approach to the overall fairness of proceedings is to balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.

VI. The impact of the ECHR case law on Dutch criminal procedure

The Dutch Supreme Court interpreted the *Cardot* judgment in such a way that if the accused does not make any request for an incriminating witness to be called at trial, such a person is not likely to be called by the judge⁸⁷. If the defence omits to make a reasoned application to examine a witness in court, the judge is not obliged to examine that witness of his own volition (*ex officio*)⁸⁸. If the defence had the opportunity to question the witness during the preliminary stage of the investigation, the request to hear this witness in court does not need to be honoured for the statement the witness made during the preliminary investigation to be admissible as evidence. Moreover, the accused need not be given the opportunity to challenge the witness in court when the establishment of proof is sufficiently corroborated by other bodies of evidence⁸⁹. The Dutch Supreme Court has held in a landmark judgment that these exceptions to the rule that witnesses appear in court to testify are consistent with the ECtHR case-law⁹⁰.

However, under the influence of the *Kostovski* judgment and severe criticism from legal scholars⁹¹, additional conditions for using anonymous witness testimony were imposed⁹². For example, in 1990, the Dutch Supreme Court held that a

⁸⁶ *Ibid.* at paras. 118–119 and para. 131.

⁸⁷ HR 9 juni 1992, NJ 1992, 772. m.nt. *Knigge*. See also *Garé* (note 6), p. 135.

⁸⁸ *Garé* (note 6), pp. 139–140.

⁸⁹ *Garé* (note 6), p. 140. See also *Dreissen* (note 39), p. 67.

⁹⁰ HR 1 februari 1994, NJ 1994, 427.

⁹¹ See for instance, *Nijboer*, De anonieme informant als getuige in het strafprocesrecht, R&K 1980, 411–430; *Swart*, Anonieme getuigen en eerlijk proces, in: *ten Berge et al.* (red.), *Recht als norm en aspiratie*, Nijmegen 1986; *Schalken*, De strafrechter en de anonieme getuige. Enige conflicterende beginselen in het Nederlandse strafproces, in: *Beginnelsen. Opstellen over strafrecht* (G.E. Mulder-bundel), Arnhem 1981, pp. 325–343.

⁹² *Schalken*, Anonieme getuige en strafvorderlijke logistiek. Over de processuele gevolgen van de Straatsburgse jurisprudentie in de zaak *Kostovski*, NJB 1990, 8–13; *Spronken*, Anonieme getuigenverklaringen in strafzaken aan banden gelegd, NJB 1988, 1331–1336.

statement from an anonymous witness can only be relied upon where it was taken by an examining judge who knows the identity of the anonymous witness⁹³. The judge would then have to provide an assessment in the file on the credibility of the witness and the reasons for his or her anonymity. The defence must further have been offered an opportunity to ask questions or have put questions to the witness⁹⁴. At the same time the Supreme Court allowed an exception to these rules. When an anonymous witness statement was corroborated in important aspects by other evidence and the defence had at no point indicated that it contested the credibility of the testimony, or that it wished to question the witness, such evidence could be used after all⁹⁵. On the other hand, if the defence has actually contested the credibility of the anonymous witness or his/her testimony, the court was instructed to provide specific reasons if they nonetheless relied on that particular piece of evidence⁹⁶. In addition, judges henceforth had to give reasons for granting anonymity if using this instrument was contested by the defence⁹⁷. Likewise, the lower courts are also required to give reasons for rejecting the hearing of anonymous witnesses.

Furthermore, in response to the critical case law of the ECtHR, the legislature deemed it necessary to provide for a more explicit legal basis for the use of anonymous witness. In 1994, the Witness Protection Act (*Wet getuigenbescherming*) was introduced⁹⁸. This Act places restrictions on the use of anonymous testimony and contains more procedural safeguards for the accused. Moreover, this act serves as a legal basis for the hearing of threatened witnesses in the absence of the parties, which had in practice already been condoned by the Supreme Court⁹⁹. According to the 1994 Act there are two types of anonymous statements which are permitted:

1. *Full anonymity* where the witness qualifies as a threatened witness pursuant to Article 226a CPP. The examining judge can order the witness's identity be kept secret if two cumulative requirements are met. Firstly, there has to be a situation in which the witness feels threatened or intimidated to such an extent

93 *Spronken* (note 92), 1331–1336; *Spronken*, Anonieme getuigen: het strafproces op de helling, in: Jonge Balie Congres, Niets dan de waarheid, Zwolle 1988, pp. 25–44.

94 HR 2 juli 1990, NJ 1990, 692 (Vrouwenhandelarrest). See also *Dreissen* (note 39), p. 67.

95 HR 2 juli 1990, NJ 1990, 692 and HR 2 oktober 1991, 130. See for example also HR 2 oktober 1990, NJ 1991, 130; HR 16 oktober 1990, NJ 1991, 442 and HR 26 maart 1991, NJ 1991, 614 and HR 25 juni 1991, NJ 1991, 807. See also *Spronken*, Anonieme getuigen, *Nemesis* 1990, pp. 61–66.

96 HR 25 september 1984, NK 1985, 426, 427; HR 11 juni 1985, NJ 1986, 59.

97 HR 14 september 1992, NJ 1993, 416. See also *Nijboer*, Kostovski en de inquisitoire stijl van procederen, *NJB* 1990, 593–595.

98 Act of 1 February 1994 (Staatsblad 1993, 603).

99 *van Hoom*, De Wet getuigenbescherming – een uitzonderlijke regeling, Leiden 1996.

that it is reasonable to assume that life, health or security may be at risk or it is likely that the witness's family life or socio-economic existence may be disrupted. Secondly, the witness must have indicated an unwillingness to testify because of this danger¹⁰⁰. Before the examining judge decides on the status of a threatened witness, the accused and the public prosecutor must be heard. These witnesses are subsequently examined in accordance with the special regulations set forth in respect of threatened witnesses. The principal conditions are:

- a. The statement of a vulnerable witness made before the examining judge will be read out or summarized in court.
- b. It concerns a crime for which pre-trial detention is permitted (this means an offence punishable by at least four years imprisonment), while its nature or the organized manner in which it was committed, or the connection with other offences committed by the suspect constitutes a serious infringement of the legal order.

2. *Limited anonymity* for less serious cases where the witness's identity remains hidden (Article 290 CCP), but where the witness is nonetheless subjected to questioning by the defence. Both objectives can be reconciled by making use of technical equipment, such as voice distortion and closed video-conferences. This method is employed in situations where there are concerns that the witness will experience serious difficulties or will be hampered in the exercise of his profession, like undercover officers and informants. These witnesses are heard either by the examining judge or by the trial court. This means that the judge does not disclose the witness's identity and, where necessary, takes measures to prevent his identity from being disclosed. In order to be eligible for these protective measures, the judge must determine that there was a reasonable expectation that the witness would be frustrated or limited in carrying out his or her profession due to giving his/her statement¹⁰¹.

The Act introduced important reforms. It became clear that only the examining judge can decide on the basis of legal criteria whether someone has a legitimate interest for staying anonymous, and who will interview such a witness in accordance with the procedure described in the CCP¹⁰². Where it is necessary to protect the identity of the threatened anonymous witnesses, the accused may still be excluded from such witness interviews by the examining judge¹⁰³. Accordingly, statements of anonymous witnesses can still be relied upon for evidentiary

100 Dreissen (note 39), p. 67.

101 HR 14 maart 2006, NJ 2006, 209. See also Dreissen (note 39), p. 67.

102 HR 5 november 1996, DD 97.067.

103 Nijboer (note 5), pp. 64–65.

purposes without ever having been challenged by the defence or directly examined by the trial judge. As a consequence, even with new legislation in place, the ECtHR has continued to criticize the Dutch practice regarding the use of anonymous witnesses. The ECtHR accepts that under certain circumstances, anonymity may be necessary to protect the safety of a witness¹⁰⁴. However, the ECtHR also held that the judiciary should be more cautious in granting full anonymity to investigators¹⁰⁵.

Furthermore, the ECtHR ruled that an important condition for the use of anonymous witnesses is that the defence has been offered full compensation for the prejudice caused by the use of anonymous witnesses. The essential counterbalancing procedural requirement is that the accused must be offered sufficient opportunities to contest the reliability of the statement and the credibility of the witness¹⁰⁶. An important instrument for the accused in order to expose the weaknesses and contradictions in a witness statement is the right to examine the witness. The ECtHR by nature prefers a personal confrontation between the witness and the accused. When this is deemed to be impossible or undesirable (according to standards set by domestic law), the Court would also accept an examination by means of telecommunication¹⁰⁷. Additionally, the ECtHR underlined the importance of guilt not to be established solely or to a decisive extent on anonymous witnesses, but that such evidence is sufficiently corroborated by non-anonymous evidence that was tested at trial¹⁰⁸. However, once again exploring the edges of the margin of appreciation, the Dutch Supreme court decided that the accused need not be given the opportunity to challenge the anonymous witness in case the establishment of conclusive proof is sufficiently corroborated by other evidence¹⁰⁹.

It can be concluded that the influence of ECHR case law has not caused Dutch criminal proceedings to fundamentally alter their nature¹¹⁰. The emphasis on pre-trial stages is still strong; the trial stage is still to a large extent focused on the content of the case-file rather than having an oral and adversarial contest in a publicly open court. As was demonstrated in the previous sections, this is primarily due to the Dutch Supreme Court's narrow interpretation of European case law, which is charitable with regard to the current practice in the Nether-

104 ECtHR, *Doorson v. The Netherlands*, Application No. 20524/02, 26 March 1006

105 ECtHR, *Van Mechelen and Others v. The Netherlands*, Application No. 21363/93, 23 April 1997.

106 *Nijboer*, Ongehoorde getuige, DD 1992, 1006–1014.

107 *Myjer*, Getuigende dienders en Straatsburgse rechtsbescherming, NJB 1997, 883–889.

108 *Garé* (note 6), p. 126–127.

109 HR 1 februari 1994, NJB-katern 1994, 158.

110 *Garé/Spronken*, Wet bedreigde getuigen niet Straatsburg-proof, Adv.bl. 1997, 545–550. See also *Garé*, Het blijft tobben met de anonieme getuige, NJB 1998, 1636–1640.

lands¹¹¹. Therefore, the principle of immediacy still has a limited role in the Dutch criminal procedure.

VII. Proposals for reform

The limited role of the principle of immediacy in Dutch criminal procedure has led to proposals for reform. Several issues are at stake here. One is the currently obtaining so-called ‘negative statutory system of evidence’¹¹². This means that the court can only rely on an exhaustive list of sources of knowledge for deciding on guilt or innocence. Some academic authors have argued that the features of this evidentiary regime are inconsistent with the premises of the Witness Protection Act 1994. Amongst others, Garé has strongly advocated a return to a more prominent position of the principle of immediacy¹¹³. In her view, this can only be achieved by discarding the ‘negative’ system of allowing and assessing the convincing power of evidence. Instead, she prefers the superior qualities of a so-called ‘free system of evidence’, in which each and every available source of knowledge can be used by the court to make up its mind and to justify its decision on the sufficiency of the evidence. Other scholars, such as Nijboer, do not agree with this kind of reasoning. He claims that maximizing the role of the principle of immediacy can also be enforced in a ‘negative evidence system’¹¹⁴. Viewed from the perspective of the principle of immediacy, the differences between the two approaches are probably not that big in actual practice. Nevertheless, on systemic and epistemological grounds we would favour a free system of accepting sources of proof. Judges should be able to evaluate all available evidence included in the case file in complete freedom. Courts are expected to scrutinize the contents of the file and assess the weight of all available pieces of evidence in the context of the comprehensive fact finding process¹¹⁵.

Some years ago, in the prestigious research project *Strafvordering 2001*, a proposal was made regarding the practice of the principle of immediacy¹¹⁶. The

¹¹¹ Garé (note 6), p. 142.

¹¹² See Articles 338–344a CCP.

¹¹³ Garé, Heeft ons negatief-wettelijke bewijsstelsel zijn langste tijd gehad?, DD 1996, 119–133.

¹¹⁴ Nijboer, De toekomst van het strafrechtelijk bewijsrecht, DD 1996, 440–450.

¹¹⁵ Groenhuijsen, Bewijsrecht als toetssteen voor de systematiek van een Wetboek van Strafvordering. Pleidooi voor een vrij bewijsstelsel, in: *Klip/Smeulders/Wolleswinkel* (red.), KriTies. Liber amicorum et amicarum voor prof. mr. E. Prakken, Deventer 2004, pp. 147–158.

¹¹⁶ An overview is provided by Groenhuijsen, Some main findings of ‘Strafvordering 2001’ and the subsequent reform of Dutch criminal procedure, in: *Groenhuijsen/Kooijmans* (eds.), The

researchers found that Article 315 CCP (governing the authority of the judge to call witnesses to the trial) is too limited. In order to prevent unnecessary infringements of the interests of the trial participants, it is proposed to expand this authority of the court in a way which would enable it to call witnesses – and meet them *in camera* in the presence of the prosecutor and the defence – prior to the start of the trial stage. Such an extension would make it possible for the judge to prepare in a better informed way for the trial. This pre-trial gathering could also serve as a basis to agree between all persons and agencies involved about which of the witnesses should be heard in person during the trial. Further, the researchers concluding *Strafvordering 2001* also embraced the idea that in the most serious cases, which are brought to the panel of three judges (*meervoudige kamer*) and in situations where a long prison sentence can be expected, *all incriminating witnesses* should be questioned at the trial stage. In order to prevent inefficiency, the interview of these witnesses should be conducted by one single judge, instead of the entire bench¹¹⁷. This proposal is important for reasons that hardly need explanation after everything that has been recounted in the previous sections of this contribution. The physical appearance and questioning of a witness in open court, having a contradictory debate about his or her statements in the presence of the accused, constitutes an intrinsically valuable part of the truth finding process, *especially* in the serious cases. The reasoning behind this is that oral discussions in which the accused and witnesses are confronted with each other is the best way of providing for the uncovering of the truth for the judge and is preferable to alternatives like discussing the contents of the case-file. If this proposal were to be accepted by the government, it could lead to a truly meaningful reform of the administration of criminal justice in the cases where the stakes are highest.

For The Netherlands, like any other jurisdiction, the significant value attributed to the immediacy principle is not without reason. Procedures respecting this principle can be expected to be more reliable in terms of quality of evidence. Procedures shaped along these lines allow courts more powerful control of assessing the credibility of witnesses and experts. The ECtHR has proclaimed over and over again that strict adherence to the principle of immediacy is an important guarantee in criminal proceedings, where observations made by the court about the demeanour and credibility of a witness may have important consequences for

reform of the Dutch Code of Criminal Procedure in comparative perspective, Leiden/Boston 2012, p. 45–80.

¹¹⁷ *den Hartog*, De getuige in het strafprocesrecht; voorstellen voor een nieuwe regeling, in: *Groenhuijsen/Knigge* (red.), Het onderzoek ter zitting. Eerste interimrapport onderzoeksproject Strafvordering 2001, Groningen 1999, p. 346.

the accused. As elaborated above (V), the ECtHR considers it of great importance that a judge can, *in a personal encounter*, give form and shape to the meaning of the statement made by the witness for the outcome of the case. Even though the current Dutch system may be superior in terms of efficiency, it is definitely in need of further reforms from the perspective of the legal principle under consideration in the present article.

Note: Written version of a paper given at the international conference of the German, Swiss and Austrian Criminal Law Teachers' Working Group, Hanover, 29th of September 2012.