Abstract
This article examines the workings of the right to silence in a system, which retains a large number of the original ‘inquisitorial’ elements. The right to remain silent was and is a highly contested issue in the Netherlands, which is reflected in the fragmented and often contradictory nature of the respective legal provisions. The Netherlands has diligently implemented the relevant EU Directives and the ECtHR case law in legislation and/or through case law, including the case law on adverse inferences. However, tensions with the right to silence arise indirectly through legislative provisions and case law. Relevant examples are the provisions on interrogative pressure, on the use of suspects’ statements made before invoking the right to silence and on the provision of access to digital data (such as phone passwords) by suspects for the purposes of investigation.

Keywords
Directive 2016/343, right to silence, Netherlands, police interrogation, phone password

Introduction

The right to silence in the Netherlands was originally derived from the privilege against self-incrimination, or the nemo-tenetur principle. Initially, the principle against self-incrimination was not foreseen by the legislator. In the travaux préparatoires for the 1926 Dutch Code of Criminal Procedure (DCCP), it was stated that the suspect ‘does not have to cooperate’ although the nemo-tenetur principle as such was not explicitly mentioned. The privilege against self-incrimination was recognised for the first time in the case law of the Dutch Supreme Court in a case of 1927, and it was

1. N Jörg, ‘Het nemo-tenanturbation, aantekening 8.1’, in AL Melai, MS Groenhuijsen e.a. Tekst en Commentaar: strafprocesrecht (2016) artikel 29 SV, aantekening 8.
2. Kamerstukken II 1917/18, 77, nr 1, 4 (Parliamentary Documents).
3. Dutch Supreme Court, case of 27 June 1927, NJ 1927, 926 m.n.t. T.

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further developed in the famous ‘Mollenvangers’ judgement. Here, the Supreme Court ruled that an order to stand still, under the risk of a criminal sanction, to enable the officer to confirm that the suspect is engaged in criminal activity would be contrary to the spirit of art 29 of the DCCP and the new Code of Criminal Procedure in general, as a suspect ‘would then be obliged to contribute to their own conviction, which would not be in harmony with the spirit of the new DCCP’.4

This case law demonstrates that art 29 of the DCCP and the right to remain silent therein are based on the principle that the suspect does not have to contribute to their own conviction. By recognising this, the Dutch Supreme Court seemed to go a step further than the legislator. Whereas the legislator primarily intended the right to silence to prevent excessive coercion during interrogations, the Dutch Supreme Court seemed to emphasise the autonomous position of the suspect within the system and explicitly link the right to silence to the nemo-tenetur principle. The recognition of the link between the right to silence and the nemo-tenetur principle, however, did not lead the Dutch Supreme Court to interpret the right to silence in such a way as to allow the suspect to refuse to cooperate with a blood test or a breath analyser test.5 Instead, the Dutch Supreme Court adopted a more narrow approach – in line with the Saunders judgement of the ECtHR – by stating that the nemo-tenetur principle can only be invoked in case of a criminal charge,7 and when this concerns material which is depending on the will of the suspect. This means that where material that is considered to exist independently from the will of the suspect (e.g. DNA, blood and breath, but also biometrical information to access a smartphone), the nemo-tenetur principle does not apply, and the suspect is obliged to cooperate.8 Due to this narrow approach of the Dutch Supreme Court, the added value of the nemo-tenetur principle in addition to the right to silence remains unclear.

This article deals with the right to silence in the Netherlands. First, a brief introduction on the Dutch criminal justice system is provided. Then, the scope of the right to remain silent is analysed and the legal consequences that suspects face when they invoke the right to silence are discussed. This article then provides for a critical analysis of the legal rules on suspects interrogations, followed by an overview of the limitations with regard to obtaining a remedy when procedural safeguards have been violated. Lastly, the right to silence is discussed in relationship to other procedural defence rights, particularly the right to legal assistance.

The Dutch criminal justice system

Dutch criminal proceedings are often referred to as moderate inquisitorial with accusatorial features.9 One of the most important inquisitorial characteristics of the Dutch system is that the judge will conduct inquiries ex officio to establish the truth.10 As a consequence, the suspect is seen as a subject of the investigation and as such he is obliged to cooperate with certain investigation

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4. Dutch Supreme Court, case of 16 January 1928, NJ 1928, 233.
5. PM van Russen Groen and TB Trotman, ‘Een Zwitserse skileraar en het nemo-tenetur beginsel—Een stand van zaken’, in PM van Russen Groen, D Schreuders and C Waling (eds), Lets bijzonders—Wladimiroff-bundel (Sdu uitgevers 2002) 96.
6. Saunders v United Kingdom App no 19187/91 (ECtHR, 17 December 1996) [68]. The distinction between material independently and dependently from the will of the suspect was first made by the ECtHR in this case. Although the case law of the ECtHR is not very clear on this matter, the Dutch Supreme Court has decided to interpret this very narrowly.
7. Dutch Supreme Court, case of 22 June 1999, NJ 1999, 648, [4.1] and [4.5.2].
8. Dutch Supreme Court, case of 21 October 1997, NJ 1998, 173, [5.2] and [5.4].
9. Kamerstukken II 1913/14, 286, nr 3, 55 (Parliamentary Documents).
10. CPM Cleiren, ‘Waarheid in het strafrecht: niet tot elke prijs’ in CPM Cleiren, RH de Bock and CJM Klaassen (eds), Het procesrecht en de waarheidsvinding (Boom Juridische Uitgevers 2001) 17.
methods. The system also has accusatorial aspects. The parties are responsible for proposing evidence in favour of their position; the establishment of guilt or innocence is therefore largely determined by what both parties bring to the proceedings. The judge merely monitors the rules of the process. The main sources of law dealing with criminal justice are the general Dutch Criminal Code (DCC) and the general DCCP, which both have the status of statutory legislation. The right to silence, as contained in Article 29 of the DCCP can be seen as an accusatorial element within the inquisitorial procedural form (at the pre-trial investigation stage). While everything that the suspect says may be used as evidence against them, they retain procedural autonomy, as they are not obliged to answer and any compulsion to do so is considered unlawful.

With respect to the hierarchy of national and international rules, art 94 of the Dutch Constitution determines that statutory provisions that are incompatible with international rules of law do not apply. The Dutch Constitution also contains some general principles, which are relevant in criminal proceedings. For instance, the right to liberty is protected in art 15, the presumption of innocence can be found in art 16 and art 18 determines that everyone has a right to legal assistance. However, as the judiciary is forbidden from testing laws and treaties against the Constitution (toetsingsverbod) and as there is no constitutional court in the Netherlands, the direct influence of the Constitution on criminal (procedure) law is limited.

The Netherlands applies a monistic system: all international and supranational law – both written and unwritten – that is in force in the Netherlands is automatically part of the domestic legal order (including inter alia, the European Convention of Human Rights (ECHR)). No transposition legislation is needed. Moreover, art 93 of the Dutch Constitution determines that provisions from international conventions are binding from the date when they have been officially published. In addition, art 94 establishes that international and regional human rights treaties – for example, the ECHR – take precedence over national law (even over formal statutes and the Constitution). It also determines that the provisions in those treaties can be invoked by individuals and must be applied by courts. Accordingly, the ECHR, the ECtHR case law and EU law are applicable directly as part of the national legal system. Note, however, that the interpretations of these sources given by the Supreme Court have great authoritative power nationally, as they are usually relied on by domestic courts. The Dutch Supreme Court has consequently been influential in defining the scope and conditions of the application of the right to silence.

**Scope of the right to silence**

The right to silence can be invoked in the Netherlands in several ways. A suspect can use their right to silence by refusing to answer all questions or by refusing certain questions or, for instance, only

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11. Ibid.
12. See arts 77a–77h of the DCC and arts 485–505 of the DCCP.
   The DCC and DCCP are largely based on the Code Napoléon (Code d’Instruction Criminelle 1808) applied during the time of the French Empire. After declaring their independence in 1813, the Netherlands decided to preserve the Code Napoléon, but tempered it with a more rehabilitative penological focus.
13. LCA Wijsman, ‘Nemo-tenetur in belastingzaken’ (Wolters Kluwer, 2017) 388. See also: DAG van Toor, ‘Het schuldige geheugen?’ (2017) 32 Serie Staat en Recht. Article 29(1) of the DCCP states that ‘the suspect or the defendant shall not be obliged to answer any questions’. In addition, art 29(3) states that ‘the statement of the suspect or the defendant, in particular those statements that contain an admission of guilt, shall be included as much as possible verbatim in the official record of the questioning’.
14. The so-called toetsingsverbod can be found in art 120 of the Dutch Constitution. The reason for this is that the Constitution is seen as an act of parliament, the will of the people. Due to the trias politica, it is considered to be inappropriate that the judiciary is able to determine the constitutionality of acts of parliament.
15. Although EU Directives on procedural rights must be transposed in domestic law as required by EU law.
one question. They can also decide (voluntarily) to waive the right to remain silent. This waiver has to be done ‘unequivocally’. If, however, after making a statement the suspect decides, on reflection, that they did not want to give a declaration or that they wish to change their present statement as compared to the statement(s) which they had previously made, the earlier declarations will not fall within the scope of the right to silence. When a suspect changes or withdraws their statement and invokes their right to silence, the original statement may still be used as evidence before the court. Furthermore, under the so-called ‘crown witness regulation’, a regulation designed for a witness who is also a suspect, but who is willing to make a statement against one or more other suspects in exchange for a reward, a crown witness can waive their right to remain silent in exchange for more favourable treatment by the judicial authorities.

According to Dutch law, the right to silence can be invoked from the moment in which someone is regarded as a suspect. Article 27 of the DCCP states that ‘a person shall be regarded as a suspect when a reasonable suspicion that he is guilty of having committed a criminal offence can be derived from the facts or the circumstances’. In addition, the right to remain silent can only be exercised in the case of an interrogation. According to Dutch case law all questions asked to a person designated as a suspect, by investigating officers, concerning that person’s involvement in a criminal offence are to be regarded as an interrogation. Although the right to silence is most relevant during the investigative stage, it applies throughout the entire criminal proceedings, that is, also during court hearings. It is not limited to incriminating evidence, but it also includes all information of a factual nature. The right to remain silent also applies with regard to personal details, such as name, address et cetera. If the suspect refuses to provide their personal details, measures can be taken for identification, including the possibility of extending the period during which the suspect can be held up for questioning by 6 hours. Providing the police officers with a false name does not fall under the right to silence and is a criminal offence.

A suspect not only has a right to remain silent, but as per the formulation under art 29 of the DCCP, they have a right to be informed of this right: art 29 contains an instructional norm for the interrogating official to caution the suspect. The purpose of the caution is to explain a suspect’s right to silence as a protection against self-incrimination and to ensure that suspects are aware and understand the meaning of the caution, so that they are able to understand the consequences of exercising or waiving their right to silence. The obligation to inform the suspect about their right to remain silent applies to all persons in charge of taking statements during the criminal investigation.

16. Th OM Dieben and J. Boksem, Tekst en Commentaar Strafvordering - commentaar op art. 29 Sv (Wolters Kluwer 2017) aantekening 4b.
17. Dutch Supreme Court, case of 16 September 2014, ECLI:NL:HR:2014:2670; Dutch Supreme Court, case of 19 February 2013, ECLI:NL:HR:2013:BY7886; Court of Appeal of the Hague, case of 19 July 2010, ECLI:NL:GHSGR:2010:BO0950.
18. Wijsman (n 13) 96.
19. Dutch Supreme Court, case of 9 December 1986, NJ 1987/541.
20. Dieben and Boksem (n 16) aantekening 4f. For the crown witness regulation, see: Dutch Supreme Court, case of 23 April 2019, ECLI:NL:HR:2019:602 (Liquidatieproces Passage).
21. Dutch Supreme Court, case of 2 October 1979, NJ 1980, 243.
22. Dutch Supreme Court, case of 29 October 1996, NJ 1997, 232 ( annotation Schalken).
23. Wijsman (n 13) 102.
24. Art 61a in conjunction with art 56b of the Dutch Code of Criminal Procedure.
25. Art 435(4) of the Dutch Criminal Code.
26. T Blom, Formen verzuimd tijdens het politieverhoor (Vossiuspers UvA 2010) 8.
27. GJM Corstens, Het Nederlandse strafprocesrecht (Wolters Kluwer 2018) 325.
and trial. This means that it rests with interrogating officials and investigating judges, but that it also applies to the trial judge.  

The case law on art 27 and art 29 (2) of the DCCP shows that a person is regarded as a suspect only when the criminal suspicion is sufficiently formalised. It follows from the case law that it is not easy to assume when someone is considered to be – or has become – a suspect. An example is the well-known ‘Plastic bag case’, in which police officers saw a man known to them walking across the street with a plastic bag; suspecting him, they stopped him to ask what was inside the bag. The man answered four books. The police officers then asked him where he had bought these books, to which he replied that he had stolen these books. He was subsequently arrested on suspicion of theft. The defence held that the suspect’s statement should not be used as evidence because he had not been cautioned. The Supreme Court disagreed and stated that the person had only been regarded as a suspect upon his answering the second question. At the moment of asking the questions there was no ‘reasonable suspicion’ that the suspect had committed a criminal offence. Therefore, he need not have been given the caution and his statement could be used as evidence. It may be argued that this leads to a situation where ‘potential’ suspects receive insufficient protection until the suspicion is formally confirmed. On the other hand, accepting that in this situation a caution should have been provided implies that a person may be regarded as a suspect from a very early stage. As a consequence, various kinds of coercive measures could be applied to persons, who are only vaguely connected with the suspected criminal offence(s), a circumstance that leaves much to be desired.

Article 29a of the DCCP stipulates that a statement about the fact that the suspect is informed about their right to remain silent is to be included in the written record of the interrogation. This will normally be done with the standard wording ‘you are not obliged to answer any questions’. If the statement is missing from the written record, then it shall be assumed that no caution was provided.

Regarding the scope of the right to silence, there is no doubt that it extends to oral statements. The Dutch Supreme Court has ruled that the right to silence is also applicable to written statements produced in the context of interrogations. However, whether other written statements also fall within the scope of the right to silence does not follow from the case law of the ECtHR or of the Dutch Supreme Court.

28. See art 273(2) of the Dutch Code of Criminal Procedure. Investigating officers using their control powers – for example, the police monitoring compliance with the Traffic Act or when conducting customs control – also have a compulsory obligation to provide caution when they are interrogating a person. See: Dutch Supreme Court, case of 1 November 2016, ECLI:NL:HR:2016:2454. See also: Dutch Supreme Court, case of 20 February 2018, ECLI:NL:HR:2018:247; Dutch Supreme Court, case of 16 April 2013, ECLI:NL:HR:2013:BY5706 and Dutch Supreme Court, case of 20 February 2018, ECLI:NL:HR:2018:247 [3.3].

29. For instance: Dutch Supreme Court, case of 1 May 1984, NJ 1984, 687; Dutch Supreme Court, case of 8 January 1985, NJ 1985, 381; Dutch Supreme Court, case of 26 March 1985, NJ 1985, 756; Dutch Supreme Court, case of 16 April 1985, NJ 1985, 806; Dutch Supreme Court, case of 23 December 1986, NJ 1987, 890; Dutch Supreme Court, case of 18 October 1988, NJ 1989, 479 and Dutch Supreme Court, case of 31 October 1989, NJ 1990, 258.

30. Dutch Supreme Court, case of 29 September 1981, NJ 1982, 258.

31. AL Melai, ‘Inleiding rubriek rechtspraak’ (1982) Delikt en Delinkwent 53. See also: JTK Bos, Stelselmatige rechtspraak (Gouda Quint 1986) 228–235.

32. Corstens (n 27) 325.

33. Dutch Supreme Court, case of 26 June 1979, NJ 1979, 567.

34. Dutch Supreme Court, case of 1 October 1985, NJ 1986, 405 and 406 (annotation Van Veen).

35. Wijsman (n 13) 100.
Scope of the right to silence and nemo-tenetur in a digital world

The development of new (digital) technologies raises many questions in the context of the right to silence. One of these questions is whether forcing a suspect to provide access to a locked smartphone amounts to a violation of the right to silence and the privilege against self-incrimination. In this regard, a distinction is made between providing a password or PIN-code on the one hand, and unlocking the phone with a fingerprint (or other biometric modality such as face recognition or iris scan) on the other. According to Dutch case law, the right to remain silent applies to all information and evidence that exists depending on the will of the suspect, such as a password. The Dutch Supreme Court considers all material, which exists outside of the suspect’s ‘psyche’ – and which therefore can be obtained without requiring the suspect to speak – as ‘material that exists independently from the suspect’s will’.36 The right to silence and privilege against self-incrimination do not apply to such material. Consequently, when material that exists independently from the will of the suspect is taken with the use of compulsory powers, the privilege against self-incrimination is not violated.37 This interpretation implies that the right to silence and privilege against self-incrimination can only be triggered when a testimonial statement is used which has been obtained under coercion. Thus, the privilege against self-incrimination and the right to silence seem to have an identical scope of application, with the former offering no additional protection for suspects in the Netherlands as compared to the right to silence.

This rather limited interpretation – and thus the lack of added protection from the privilege – is well illustrated in recent case law on the forced unlocking of smartphones. In 2019, the District Court of North Holland rendered a judgement which permitted the police to forcefully press a suspect’s thumb (by using handcuffs) on their smartphone in order to unlock it and extract data for the purpose of the investigation.38 In its decision, the Court relied on the interpretation of the privilege against self-incrimination given earlier by the Dutch Supreme Court derived from the Saunders judgement of the ECtHR.39 The Dutch Supreme Court endorsed the reasoning of the lower court. It found that – as a rule – forcing a suspect to provide biometric material to unlock an electronic device does not violate the Saunders criteria, because the material exists independently from the suspect’s will. This practice also does not violate the Jalloh criteria as long as the biometric material is forcefully obtained in a proportionate manner. In the circumstances of the present case, the Dutch Supreme Court ruled that the force used was indeed proportionate, as forcefully placing the suspect’s finger on the phone by using handcuffs was considered a very limited intrusion of bodily integrity.40

36. This is in accordance with the interpretation of the Saunders judgement given by the Dutch Supreme Court. See case of 1 July 2014, ECLI:NL:HR:2014:1569 and case of 1 July 2014, ECLI:NL:HR:2014:1562. This interpretation has been questioned: see Van Toor (n 13) 370–371.
37. Dutch Supreme Court, case of 29 October 1996, NJ 1997, 232. See also: Dutch Supreme Court, case of 19 September 2006, NJ 2007, 39 and Dutch Supreme Court, case of 21 December 2010, NJ 2011, 425. It should be noted that this case law does not concern the smartphone but, inter alia, written materials in economic offences.
38. District Court of Noord-Holland, case of 28 February 2019, ECLI:NL:RBNHO:2019:1568.
39. The Dutch Supreme Court provided for its interpretation on the nemo-tenetur principle in: Dutch Supreme Court, case of 5 November 2011.
40. Dutch Supreme Court, case of 9 February 2021, NJB 2021/588. This finding is based on the earlier case law, where the Supreme Court found that once an electronic device containing information is lawfully seized, it contents can be examined without further warrant. Dutch Supreme Court, case of 4 April 2017, ECLI:NL:HR:2017:584; ECLI:NL:HR:2017:588. ECLI:NL:HR:2017:592. This conclusion was criticised in: DAG van Toor and T Beekhuis, ‘Annotatie Hoge Raad 09-02-2021’ (2021) Computerrecht 63.
The reasoning of the Dutch Supreme Court implies that the outcome will be different if the electronic device is locked with a password, since a password would be considered as ‘will-dependent’ material. However, previously lower courts have allowed for some exceptions, for instance, where entering the password forcibly was found to be justified due to the urgency of the matter (the suspect was suspected of assault and deprivation of liberty of two missing children).41

**Caution**

Article 27d(1) of the DCCP determines when a caution must be given. It envisages that when a person is invited by an investigating officer to make a statement – and thus has not been arrested as a suspect and is not being held for investigation – the investigating officer must state whether this person is being questioned as a witness or as a suspect. When this person is questioned as a suspect, they must be cautioned; if they are heard as a witness then caution is not necessary. This provision aims to prevent confusion as to the legal status of the persons being questioned. Despite this, there is a risk that its practical application may conflict with the fairness of the proceedings. Van Zwieten argues that sometimes the police deliberately postpone the moment in which the suspect is informed about their right to remain silent because when the caution is not granted, the interrogated person is not regarded as a suspect and is obliged to cooperate.42 Note that if the timing of the caution is challenged at trial, the court will have to objectively establish from which moment onwards the person concerned should have been regarded as a suspect and to what extent the suspect’s right to a fair trial has potentially been harmed. Should the court find this to be so, however, the extent to which a suspect may be grant a remedy is limited.

**Legal consequences of invoking the right to silence**

Exercising the right to silence during the investigative stage is not without risks. When the suspect does not answer some questions (i.e. they exercise partial silence), adverse consequences for them might occur. The court is allowed to take the silent attitude of the suspect into account in terms of evidence and sentencing. At the same time, the right to remain silent is considered to be a guarantee against self-incrimination, involuntary cooperation and forced confession. The latter two are explicitly prohibited by art 29 of the DCCP which states that the interrogating authorities may not exercise such pressure on the suspect that it cannot be said that the statement is taken in freedom. The fact that the court is allowed to draw conclusions from a suspect’s use of silence does seem to conflict with the rationales behind the right to silence and the privilege against self-incrimination. On the legal consequences of the use of the right to silence, two aspects are of particular interest: the influence on sentencing and access to financial compensation. Each will be addressed in turn.

Following a conviction, the court may also take the suspect’s silence into account when determining the appropriate sentence for the criminal offence(s). The Dutch Supreme Court decided that it is not incompatible with the purpose of art 29 of the DCCP to consider the refusal to provide (a) statement(s) as an aggravating circumstance which could lead to a higher sentence.43 Exercising the right to silence may have a negative effect on the length of the sentence. When a suspect remains silent, the Court may consider that they ‘have not taken responsibility for their own actions’ and are

41. District Court of The Hague, case of 12 March 2018, ECLI:NL:RBDHA:2018:2983.
42. LJA van Zwieten, *Bijzondere verhoormethoden en art. 29 Sv* (Quint Deventer 2001) 23–24.
43. Dutch Supreme Court, case of 18 November 1980, *NJ* 1981, 134.
behaving disrespectfully towards victims or relatives because the exact story remains unknown. In this sense, invoking the right to silence may be perceived an aggravating circumstance which could lead to a higher sentence.\textsuperscript{44}

The exercise of the right to silence may also influence the chances of obtaining compensation for the time spent in pre-trial detention. Article 89 of the DCCP provides for financial compensation for the time spent in pre-trial detention (i) when the criminal case ends with an acquittal or (ii) with a sentence for an offence for which pre-trial detention was not admissible. ‘Unjustified\textsuperscript{45} lawful detention is compensated with a payment for immaterial damages of around €90 per day of deprivation of liberty. The decision on compensation will be taken by the court on the basis of grounds of fairness. In doing so, the former suspect’s circumstances shall be taken into account.\textsuperscript{46}

Although the Court of Appeal in Amsterdam held in a 2007 case that the mere fact that the person concerned has invoked their right to remain silent is insufficient to refuse this request for compensation,\textsuperscript{47} practice shows that it is still often rejected on this ground.\textsuperscript{48} In such cases, the Court often holds that there are no grounds of fairness for granting compensation under art 89 of the DCCP. It is argued that although invoking the right to silence should be respected ‘the consequent choice to invoke their right to remain silent for a long time meant that no grounds of fairness were considered to be present to award damages to the suspect who was acquitted of the charges against them’.\textsuperscript{49} The Court in Haarlem held that due to invoking his right to silence, the former suspect had made no attempt to prove their innocence and therefore no grounds of fairness were present.\textsuperscript{50} In essence, this reasoning implies that the Court finds that the former suspect is themselves responsible for his detention, because they invoked the right to silence.

In this respect, scholars have argued that the mere fact that the former suspect invoked their right to silence should not be a sufficient ground to refuse his request.\textsuperscript{51} In their opinion, a request should be refused only when the custody would have been discontinued if the suspect had made a statement. One can think of the situation where the suspect provides a statement at a very late stage of the proceedings and this statement would have probably led to the lifting of the pre-trial detention. However, if it is likely that the pre-trial detention would have continued even if the accused had made statements, it is arguably not fair to reject the requested compensation due to the use of the right to remain silent.\textsuperscript{52} One may question whether the use of the right to remain silent justifies a total rejection of the claim for compensation for unjustified detention. After all, the arrest and the first days or weeks of pre-trial detention will, as a rule, apply even if a suspect made a statement.

\begin{footnotes}
\item[44] District Court of Amsterdam, case of 23 July 2012, ECLI:NL:RBAMS:2012:BX2326. See also: District Court of Amsterdam, case of 10 July 2018, ECLI:NL:RBAMS:2018:4822.
\item[45] Although this might be a contradictio in terminis, this term encompasses the situation in which a person was detained in pre-trial detention on legal grounds (i.e. they were considered as a suspect); however, the court acquits this person because they were innocent. In such a case, the detention itself was lawful, however it was not justified.
\item[46] Art 90(1) and (2) of the Dutch Code of Criminal Procedure.
\item[47] Court of Appeal of The Hague, case of 21 January 2016, AV-nummer 001346-15.
\item[48] JL Baar and DJGJ Cornelissen, ‘Est, et fidei tuta silentio merces: het loon voor trouw zwijgen blijft niet uit’ (2017) 12 TPWS 5.
\item[49] See for instance: Court of Appeal of Arnhem-Leeuwarden, case of 16 June 2004, LJN AQ1837.
\item[50] District Court of Haarlem, case of 12 February 2004, LJN AO4244.
\item[51] Baar and Cornelissen (n 48) 5.
\item[52] Ibid.
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Interrogations: A lack of rules and limitations

There is no legal provision in Dutch law providing for a definition of ‘interrogation’. Interrogation is defined in case law as ‘all questions stated to a person – who is considered a suspect – concerning his involvement in an alleged criminal offence’. The concept of interrogation needs to be viewed separately from the ‘hearing of the suspect as a party to the proceedings’. The latter reflects the opportunity for the suspect to express their view, perceptions and position in relation to possible decisions on prolongation of the deprivation of liberty and other measures restraining liberty. These interrogations are called ‘formal interrogations’ as opposed to ‘material interrogations’, that is, a police interrogation conducted to retrieve evidence or information. In Dutch legislation, this distinction is not consistently made: the words ‘hearing’ (horen) and ‘interrogating’ (verhoren) are often used interchangeably.

Some questions asked by the police to a (potential) suspect do not fall under the definition of an interrogation. The Dutch Supreme Court has determined, for example, that questions aimed at the identification of the suspect should not be viewed as an interrogation. This is even the case if the personal data are part of the suspicion, for instance, regarding allegations of false identity information. Questions to the suspect as to whether they are willing to cooperate in a (preliminary) breath test or analysis, or a blood test, also do not amount to an interrogation within the meaning of art 29(2) of the DCC, so there is no need to caution the suspect before posing these questions. Lastly, a spontaneous declaration of the suspect is not the same as a statement given during interrogation. According to the Dutch Supreme Court, a spontaneous declaration in the back of a police van – made during transport to the police station – does not constitute an interrogation and these statements can be used as evidence without the suspect being cautioned beforehand.

Use of pressure

Article 29(2) of the DCCP prohibits obtaining a suspect’s statement against their free will. It states that ‘interrogating authorities may not exercise such pressure on the suspect that it cannot be said that the statement is taken in freedom’. Whether improper or ‘undue’ pressure has been applied during the interrogation is not defined by procedural or substantive law. It is for the court to decide on a case-by-case basis. Well established research has demonstrated that improper pressure during the interrogation increases the risk of false confessions. This also happened in the Netherlands in rather controversial cases of the Puttense murder case, the Schiedammer park murder and the Ina Post case. In all of these cases, the suspect(s) confessed to having committed the offence (for each, murder), which later turned out to be a false confession. Nonetheless, the Dutch Supreme Court has

53. Dutch Supreme Court, case of 2 October 1979, NJ 1980, 243.
54. For instance, art 29 of the DCCP which stipulates: ‘in all cases in which someone is heard as a suspect, the interrogating public servant’.
55. Dutch Supreme Court, case of 6 January 1981, NJ 1981, 500, ECLI:NL:HR:1981:AB9268; Dutch Supreme Court, case of 9 June 1981, NJ 1981, 584, ECLI:NL:HR:1981:AC0906; Dutch Supreme Court, case of 18 September 1989, NJ 1990, 531, ECLI:NL:HR:1989:AD0883.
56. Dutch Supreme Court, case of 23 April 2013, ECLI:NL:HR:2013:BZ8166.
57. Dutch Supreme Court, case of 14 September 1981, NJ 1981, 666, ECLI:NL:HR:1981:AC3698.
58. Dutch Supreme Court, case of 15 May 2012, LJN BU8773.
59. Court of Appeal of Arnhem-Leeuwarden, case of 24 April 2002, LJN AE1877.
60. Court of Appeal of Amsterdam, case of 4 May 2006, LJN AW8270.
61. Court of Appeal of ’s-Hertogenbosch, 6 October 2010, LJN BN9444.
determined that in criminal cases – especially those involving serious allegations such as murder and rape – certain verbal and non-verbal pressure is permissible, even if the manner of questioning is very intrusive and at times inappropriate. Despite the vagueness of this description, the Dutch Supreme Court has decided that pressure in the form of threats, deception or promises is prohibited. Each will be further elaborated upon.

The use of certain threats as additional pressure during the interrogation is considered a violation of art 29(2) of the DCCP. Threatening with violence or torture, with eviction or with losing custody over the suspect’s children or threats that family members will be arrested and detained are not allowed. Also forbidden is making shooting movements next to the suspect’s head, telling them that the court will take the accusations against them for granted, and telling the suspect that ‘we will cut and paste’ their statement to present the suspect in the most incriminating light. However, it is permissible to point the suspect to their weak evidentiary position or to confront them with existing evidence or with lies and inconsistencies in their story. The suspect may also be reminded of the possible consequences of their attitude, the length of time they can be detained and the measures that the police can take against them, including the possible use of custodial coercive measures. According to the Dutch Supreme Court, threatening the silent suspect with police custody is allowed; furthermore, interrogations in which the police have said ‘can we cut off one finger of your hand for every lie?’ and ‘it is possible to make your face profile fit in the composition drawing’ were not considered to have met the threshold of improper pressure.

Promises, trickery and gifts in exchange for cooperation are, in some cases, also considered to be improper. The Court of Appeal in ‘s-Hertogenbosch ruled that during questioning, interrogators should refrain from making false statements and false promises with the aim of obtaining a confessional statement from the suspect. Some (realistic) promises have been accepted in the case law, for instance, the statement ‘if you fully declare you can go home’ and the crown witness regulation. Misleading information, however, of the kind of incorrect information that influences the suspect’s statement is not allowed. Deception also takes place if suggestive and guiding questions are asked and the suspect is subsequently, unjustifiably, accused of having knowledge of the facts.

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62. Dutch Supreme Court, case of 9 June 2017, ECLI:NL:HR:2017:3189, para 12.10.
63. Dutch Supreme Court, case of 22 January 1980, NJ 1980, 203; Dutch Supreme Court, case of 10 June 1980, NJ 1980, 591; Dutch Supreme Court, case of 19 April 1988, NJ 1989, 15 and Dutch Supreme Court, case of 3 July 1989, NJ 1990, 122.
64. Dutch Supreme Court, case of 9 January 2018, ECLI:NL:HR:2018:18.
65. JAW Lensing, Het verhoor van de verdachte in strafzaken (Gouda Quint 1988) 169–175; J Naeyé, Heterdaad (Guida Quint and Van den Brink & Co 1990) 235–241 and C Fijnaut, De toelating van raadslieden tot het politiële verdachtenverhoor (Kluwer and Gouda Quint, 1987).
66. Gafgen v Germany App no 22978/05 (ECtHR, 1 June 2010) [117].
67. Dutch Supreme Court, case of 27 November 1984, DD 15 (1985), 85.146.
68. Dutch Supreme Court, case of 9 June 1987, NJB 1987, nr. 248, 1040.
69. Dutch Supreme Court, case of 15 January 1985, DD 15 (1985), 85.201.
70. Dutch Supreme Court, case of 9 May 2000, NJ 2000, 251.
71. District Court of Dordrecht, 30 September 2003, LIN AL3225.
72. Dutch Supreme Court, case of 18 February 1986, NJ 1986, 695.
73. Court of Appeal of Arnhem-Leeuwarden, case of 12 December 2000, ECLI:NL:GBARN:2000:AA8995, upheld by the Dutch Supreme Court, case of 12 March 2002, ECLI:NL:HR:2002:AD8906.
74. Dutch Supreme Court, case of 19 April 1988, NJ 1989, 15.
75. District Court of Zeeland-West-Brabant, case of 11 April 2019, ECLI:NL:RBZWB:2019:1589.
76. Court of Appeal of ’s-Hertogenbosch, case of 4 March 2008, LIN BC5638.
Exaggerations and making unnuanced or hard-to-substantiate statements, surprisingly, are not seen as unlawful.77 Thus, a limited degree of deception is allowed.

Abuse of the interrogation situation or one’s authority is another category which may be found to amount to unacceptable pressure. Abuse is the use of coercive measures which are lawful in themselves, but which are used on improper grounds. It includes situations in which a suspect is interrogated for too long or is placed in pre-trial detention on incorrect grounds. Factors such as the duration of interrogation, its intensity, the number of breaks given to the suspect, whether the suspects are afforded the opportunity to eat and drink, and the seriousness of the crime all play a role in deciding whether the threshold of unacceptable pressure is met.78

Abuse may also occur where a suspect may end up in an interrogation situation in which ‘the guarantees of a formal interrogation by a police officer are lacking’, and thus ‘statements are obtained in violation of the freedom to give a statement’, for instance, during an undercover operation.79 A particular type of an undercover operation used in the practice of Dutch law enforcement is the so-called ‘Mr. Big method’, which is employed to elicit confessions of serious crimes from ‘silent’ suspects. Usually, undercover officers befriend the suspect and gradually lure the suspect into a fictitious criminal organisation by involving the suspect in a series of minor crimes and paying the suspect generously. Once committed to the organisation, the suspect is interviewed for a promotion in the group. However, upon meeting the leader of the organisation (Mr. Big) the suspect is pressured to confess to a serious crime.80

Recently, the Dutch Supreme Court ruled, reviewing the judgements of appellate courts81 – in two cases concerning the Mr. Big method, that several factors should be taken into account when determining whether the (confessing) statement made under the Mr. Big method is obtained in compliance with the suspect’s freedom of explanation or not. In order to assess this, the following factors are important: (i) the course of the investigation process; (ii) the procedural attitude and strategy, if any, of the suspect in respect of the offences of which he is suspected; (iii) the degree of (psychological) pressure which was exerted on the suspect during that course; (iv) the degree and manner of deception of the suspect during that course; and (v) the interference which investigating officers have had with the contents of statements made by the accused. When assessing these factors, it is important to consider (a) the duration and intensity of the process; (b) the scope and frequency of contacts with the suspect themselves; and (c) the consequence for the suspect if he does or does not provide information about certain matters. In order for the courts to assess these factors, the Dutch Supreme Court emphasised the great importance of adequate reporting by the investigating authorities, so judges have an insight into the concrete course of the implementation of the investigation method and the interaction with the suspect that has taken place. In addition to the actual actions of investigating officers, the legal basis on which the actions of investigating officers took place is also important. After explaining the framework for review, the Dutch Supreme Court decided that in both cases the Courts of Appeals had not sufficiently explained why the freedom of

77. Court of Appeal of ’s-Hertogenbosch, case of 29 November 2006, LJN AZ4141.
78. Blom (n 26) 10.
79. Dutch Supreme Court, case of 17 December 2019, ECLI:NL:HR:2019:1982 (Kaatsheuvel-case) and Dutch Supreme Court, case of 17 December 2019, ECLI:NL:HR:2019:1983 (Posbank-case)
80. SM Smith, MW Patry and V Stinson, ‘Using the “Mr. Big” technique to elicit confessions: Successful innovation or dangerous development in the Canadian legal system?’ [2009] Psychology Public Policy and Law 169–170.
81. Court of Appeal of Arnhem-Leeuwarden, case of 15 March 2008, ECLI:NL:GHARL:2018:2415 (Posbank-case). And Court of Appeal in ’s-Hertogenbosch, case of 5 February 2018, ECLI:NL:GHSHE:2018:421 (Kaatsheuvel-case). Both of the appellate courts concluded that no unlawful pressure was used during the Mr. Big operation.
explanation of both suspects has not been substantially affected by the use of the Mr. Big method. If
the freedom to give a statement is affected by the use of the Mr. Big method then, according to the
Dutch Supreme Court, the only remedy is to exclude the statement made from evidence.82

Recently the District Court of Amsterdam applied these requirements of the Dutch Supreme
Court in two cases where both suspects were acquitted for murder. In both cases, the suspects had
made confessional statements via the Mr. Big method. According to the Court, the confessions
could not be used as evidence because they did not fulfil the requirements laid down in the law and
in the case law of the Dutch Supreme Court and because both suspects had found themselves in an
interrogation situation without the accompanying guarantees of an interrogation (such as being
cautioned).83 These recent cases show that applying the new stricter requirements formulated by the
Dutch Supreme Court may make it more difficult for Dutch authorities to use the Mr. Big method to
elicit a confession from a (silent) suspect and then using this confession as lawful evidence.84

Although the Dutch Supreme Court did not (yet) go so far to abolish the use of Mr. Big method, it is
worth nothing that Mr. Big-style investigations have been prohibited in the United States, the United
Kingdom and Germany because of the abovementioned concerns with regard to the right to silence
and the risk of unlawful pressure.85

Limitations with regard to obtaining a remedy

In principle, it is up to the judge to determine whether procedural safeguards are violated and – if so
– what the consequences of this violation 1should be. If it appears that procedural requirements were
not complied with during the preliminary investigation and that these can no longer be remedied, the
court may accordingly determine, unless another specific remedy is provided by the law, that

(1) the severity of the punishment will be decreased in proportion to the breach, or
(2) the results of the irregular investigations may not be used as evidence, or
(3) in cases of severe violation of procedural rules, the public prosecutor will be banned from
pressing charges (described in Dutch law as ‘declaring the prosecution inadmissible’).86

82. Dutch Supreme Court, case of 17 December 2019, ECLI:NL:HR:2019:1982 (Kaatsheuvel-case) and Dutch Supreme
Court, case of 17 December 2019, ECLI:NL:HR:2019:1983 (Posbank-case). Thereafter, both of the cases were referred
back to the Court of Appeal in the Hague. In the Posbank murder case, the Court of Appeal decided that the statements
made by the suspect to undercover agents could not be used for evidence, because these statements were made in
violation of suspect’s freedom of explanation. However, the Court of Appeal selected other evidence, which contributed
to the evidence for a conviction for murder. See Court of Appeal The Hague, case of 26 February 2021, ECLI:NL:
GHDHA:2021:293. In the second case, related to the Kaatsheuvel murder, the substantive hearing has yet to take place,
but the suspect’s pre-trial detention has been suspended.

83. ECLI:NL:RBAMS:2021:805 and ECLI:NL:RBAMS:2021:806.
84. See more elaborate on these judgements: JH Crijns and MJ Dubelaar, ‘Mr. Big een maatje te groot voor Nederland?’
(2020) 9 Ars Aequi 748–764.
85. TE Moore, P Copeland and RA Schuller, ‘Deceit, Betrayal and the Search for Truth: Legal and Psychological
Perspectives on the ‘Mr. Big’ Strategy’, (2014) 348(55) Crim LQ 353. See also: SM Smith, V Stinson and MW Patry,
‘Using the “Mr. Big” technique to elicit confessions: Successful in- novation or dangerous development in the Canadian
legal system?’, (2009) 3 Psychology Public Policy and Law 168–194; D Aben, ‘De twee sirenen van het bewijs: over
daderkennis en over ongewilde bekentenissen (aan Mr. Big)’ (2020) Expertise en Recht 1; S Brinkhoff, ‘De stelselmatige
informatie-inwinning van artikel 126j Sv: transparantie als noodzakelijke voorwaarde voor een effectieve
rechtmatigheids- en betrouwbaarheidstoets’, (2020) 79 NTS.
86. Art 359a of the Dutch Code of Criminal Procedure.
As a rule, declaring the prosecution ‘inadmissible’ will only be done in exceptional cases. Namely, only if the officials in charge of the investigation or prosecution have seriously infringed the ‘principles of due process, through which the suspect’s right to a fair trial has been harmed purposefully or with severe negligence’. An additional discretionary power has been granted by the Dutch Supreme Court. It held that if non-compliance with the procedural rights does not affect the suspect’s interests, then – as a rule – no legal consequences need to be attached to the failure to comply with the procedural rules.

The Dutch case law on remedies of violations of the right to silence covers two types of violations: the failure to provide the right to silence caution, and excessive interrogative pressure. The main rule with regard to a failure to provide caution is that in principle it leads to excluding the statement from evidence. This is well-settled case law. However, there is no automatic application of the rule on the exclusion of evidence. If it is deemed that the suspect has not been harmed in their interest by the failure to provide the caution, then the given statement may be used as evidence. Whether or not the suspect may be deemed to have been harmed in their interests has to be considered on a case-by-case basis. For instance, the suspect who is an expert in the field of criminal law (i.e. if they are a university lecturer or lawyer) is not deemed to have been harmed in their interests by the failure to provide a caution. However, such expertise is not considered to be present where a suspect has already been in contact with the police and judicial authorities on several other occasions concerning former (or other) criminal offences. Accordingly, this could be different if it is proven that the suspect was made aware of the relevant legal provisions in the past.

Whether or not the suspect has been harmed in their interests also depends on the procedural attitude taken by the suspect in court. If they make different statements at the court hearing (under caution) and during the preliminary investigations (without having been given a caution), then they may be harmed in their interests. However, if the suspect (a) indicates that they have no objection to the failure to provide them caution during the investigation; (b) makes the same statement at the court hearing as during the investigation; or (c) has legal assistance at their court hearing and their lawyer does not object to it, then they are deemed not to be harmed in their interests. There is no question of infringement of interests if the suspect knows or is deemed to know that they are not obliged to answer. This could be the case, for example, if in a series of interrogations, the caution was not provided at the second and third interrogation, but it was given at the first interview. The assumed rationale for the approach chosen by the Dutch courts as described above is safeguarding the suspect’s autonomy and the freedom of the choice of their own procedural attitude.

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87. Dutch Supreme Court, case of 30 March 2004, NJ 2004, 376. See also, for example, Dutch Supreme Court, case of 5 June 2018, ECLI:NL:HR:2018:845.
88. Dutch Supreme Court, case of 30 March 2004, NJ 2004, 376.
89. Dutch Supreme Court, case of 26 June 1979, NJ 1979, 567; Dutch Supreme Court, case of 2 October 1979, NJ 1980, 243 and Dutch Supreme Court, case of 16 April 2013, ECLI:NL:HR:2013:BY5706.
90. Dutch Supreme Court, case of 20 January 1981, NJ 1981, 339. See also: Dutch Supreme Court, case of 26 January 1982, NJ 1982, 353.
91. Dutch Supreme Court, case of 7 June 1977, NJ 1978, 482 (conclusion of A-G Kist).
92. Dutch Supreme Court, case of 28 October 1980, NJ 1981, 124. See also: Dutch Supreme Court, case of 16 March 1982, NJ 1982, 591.
93. Dutch Supreme Court, case of 12 May 1981, NJ 1981, 565.
94. For instance, in Court of Appeal of Arnhem-Leeuwarden, case of 25 May 2071, ECLI:NL:GHARL:2017:4883.
95. Dutch Supreme Court, case of 19 February 2013, LJN BY5322, para. 2.4.1–2.4.4. See also: Dutch Supreme Court, case of 20 January 1981, NJ 1981, 339 and Dutch Supreme Court, case of 16 April 2013, LJN BY5706.
96. L Stevens, Het nemo-teneturbeginsel in strafzaken: van zwijgrecht naar containerbegrip (Wolf Legal Publishers 2005) 57.
suspect is deemed to have exercised the final choice (in the court’s view) of procedural strategy, they cannot obtain a remedy for a potential violation of the right to silence anymore. This places a high burden on suspects (especially those who are not legally represented): only those suspects who contest the content of their pre-trial statements and object against a potential violation of the right to silence at the investigative stage have an opportunity to obtain a procedural remedy.

If the suspect was first questioned without being informed about their right to silence, but was cautioned later, they are not deemed to be harmed in their interest if they made the same statement during the second interrogation. Nevertheless, it can be argued that if, following the caution, the suspect changes their (earlier) statement or invokes the right to silence, they run the risk of coming across as unreliable and/or untruthful – as both the first and the second statements will be available to the judge. An important rationale for the right to silence in the Netherlands is the interest in finding the material truth, in the sense that statements given by the suspect, without pressure, are considered to be reliable. Judges generally have freedom in deciding which evidence they would consider truthful and rely on in their judgement: art 338(1) of the DCCP. This creates a pressure on the suspect to give the same statement during the second interrogation as given without a caution.

If the statement of the suspect during the investigation (given without a caution) differs from the statement given in court under a caution, but without the assistance of a lawyer, the first statement may not be used as evidence. However, such a statement may be used if the suspect was assisted by a lawyer during the court hearing and the latter has not objected to its use. This reflects the same reasoning as described earlier in this section concerning the rationale for the right to silence being the procedural autonomy of the suspect. Here, the suspect and their lawyer are considered to be an autonomous party to the proceedings, who determine their own strategy and attitude during the investigative and trial stage. This does not provide any protection to the suspect against ineffective legal assistance.

Thus, the reach of the rule of exclusion of evidence with regard to infringements of a suspect’s right to silence is seriously undermined both by the requirement that the suspect must be harmed in their interests and by the restrictive interpretation of this requirement by the Dutch Supreme Court (which allows for many exceptions where a suspect is not deemed to have been harmed in their interests).

With regard to unacceptable pressure during the (police) interrogations, the Dutch Supreme Court has accepted – in the so-called Zaandam case – a reduction of the sentence imposed on the accused. In the Zaandam case, interrogation tactics were used to obtain a statement from the suspect. These consisted of the (threat of) using physical force, exercising strong psychological pressure and the abuse of authority to intimidate. The method involved two or more (police) officers

97. Dutch Supreme Court, case of 4 March 1980, NJ 1980, 415. See also: Dutch Supreme Court, case of 25 March 1980, NJ 1980, 437 and Dutch Supreme Court, case of 22 September 1981, NJ 1981, 660. In addition, see: Dutch Supreme Court, case of 9 May 2017, ECLI:NL:HR:2017:830.

98. Kamerstukken II 1913/14, nr. 286, 70 (Parliamentary Documents).

99. Reliability refers to the fact that the statement appears real and credible to such an extent that it may be legitimately considered truthful. There are many different definitions for ‘reliability’, however according to Dubelaar it should be seen as different criteria that can be used to estimate the reliability of the evidence. See: MJ Dubelaar, Betrouwbaar getuigenbewijs—Totstandkoming en waardering van strafrechtelijke getuigenverklaringen in perspectief (Wolters Kluwer 2014) 55.

100. Dutch Supreme Court, case of 26 June 1979, NJ 1979, 567.

101. Dutch Supreme Court, case of 13 March 1979, NJ 1979, 268.

102. DAG van Toor, Het schuldige geheugen? Een onderzoek naar het gebruik van hersenonderzoek als opsporingsmethode in het licht van de eisen instrumentaliteit en rechtsbescherming (Wolters Kluwer 2017) 374–375.

103. Dutch Supreme Court, case of 22 September 1998, NJ 1999, 104.
questioning the suspect intensively for several days using different interrogation techniques, while a communication expert observed the interrogation from a room adjoining the interrogation and provided the police with instructions based on the suspect’s non-verbal signals.

However, remedies such as exclusion of evidence or stay of prosecution are used very rarely in respect of irregularities which occur during interrogations. As mentioned above, this is not the case when unlawful pressure has been used to obtain a (confessional) statement during a Mr. Big operation. In such case, the Dutch Supreme Court decided that this statement must be excluded from the evidence. In general, there has been only one case in which the prosecutor was banned from pressing charges for reasons related to how the interrogation was conducted. This case concerned a suspect with limited mental capacity who was told by interrogating officers that he could only be prosecuted for a maximum of three offences and therefore it would be better for him to just tell the truth. The Court of Appeal in Amsterdam ruled that this act was a serious violation of the principle of due process. In a recent judgement regulating the practice of application of procedural remedies, the Dutch Supreme Court ruled that, besides a purposeful or severely negligent breach of suspect’s rights by the officials in charge of investigation or prosecution, a prosecution may be declared ‘inadmissible’ in case of an ‘irreparable violation of the right to a fair trial’, which cannot be compensated and which renders the whole proceedings unfair. Given, however, the difficulties of proving the negative effects of pre-trial procedural violations on the entire criminal proceedings, this addition is unlikely to cause a significant increase in the use of stay of prosecution as a remedy for violations of the right to silence at the investigative stage.

Thus, the reach of the rule of exclusion of evidence with regard to infringements of a suspect’s right to silence is seriously undermined by the requirement that the suspect must be harmed in their interests and the restrictive interpretation of this requirement by the Dutch Supreme Court (which allows for many exceptions where a suspect is not deemed to have been harmed in their interests). Likewise, the effect of the rule on stay of prosecution is limited, because it requires either the establishment of a ‘purposeful or severely negligent breach of suspect’s rights’ or of an ‘irreparable violation of the right to a fair trial’ which renders the entire proceedings unfair.

The right to remain silent and other procedural defence rights: the right to legal assistance

Traditionally, a suspect in the Netherlands did not have the right to have access to a lawyer from the moment of police custody. Initially, the suspect had the right to legal assistance at the police station only after questioning. There was no legal right to consult a lawyer before or during the police interrogations. After arrest, suspects could be detained at the police station up to 6 hours without having access to counsel. Only after these 6 hours the police officer would offer legal assistance to the suspect. The suspect was cautioned following their arrest and the right to silence was considered to be sufficient to protect suspects before and during those first hours of arrest and interrogation. The idea that a suspect needed access to a lawyer to ensure that their rights were protected while interrogated by the police was not accepted.

104. Court of Appeal of Amsterdam, case of 29 April 2005, LJN AT5549.
105. Dutch Supreme Court, case of 1 December 2020, ECLI:NL:HR:2020:1889.
106. Art 58 of the DCCP.
107. R Heemskerk and C Peristeridou, ‘Interrogating Suspects’, in C Peristeridou and A Klip (eds), Comparative Criminal Procedure (forthcoming), 26.
There was an overall reluctance to allow the lawyer inside the interrogation room, a position which had been dominating the debate since the late 1980s. Since this time, the question whether a suspect must be given greater access to legal assistance while at the police station often arose. The Minister of Justice initiated two studies on this matter. The outcome of these studies indicated that suspects should in fact have greater access to a lawyer. In both instances, the Minister of Justice did not agree with the advice and rejected it. This predominant view in the Netherlands had to change with the ruling of the ECtHR in the case of Salduz v Turkey, in which the Court held that the right to a lawyer should be given from ‘the first interrogation of a suspect by the police’. The reason for this was found in the increased importance of investigations and the need to further support the right to silence. The Dutch Supreme Court initially interpreted the Salduz ruling as providing a right of access to a lawyer during the police interview but exclusively for juvenile suspects. Adult suspects could merely consult a lawyer before the first police interview. Despite criticism and the adoption of Directive 2013/48/EU, the Dutch Supreme Court continued to hold on to its restrictive interpretation of Salduz.

It took more than 6 years before the Dutch Supreme Court corrected this position by additionally recognising the right to have a lawyer present during police interviewing, after prompting the legislator to take a progressive approach to the matter. This means that only since 1 March 2016 have all criminal suspects in the Netherlands acquired a right to assistance of a lawyer during police interviews. A year later, on 1 March 2017, the new regulations – which aimed to implement Directive 2013/48/EU – entered into force in the Netherlands. The most important changes were: (i) the right to consult with a lawyer for 30 min before the first police interrogation (this can, upon request, be extended by another 30 min if this is compatible with the interests of the investigation) and (ii) the right to have a lawyer present during the interrogation.

108. GPF Mols, annotation to Dutch Supreme Court, case of 22 December 2015, ECLI:NL:HR:2015:3608.
109. Commissie Partiele Herziening Strafvordering (Commissie Duk), Advies over de aanwezigheid van raadsleden bij het politieverhoor (’s-Gravenhage 1979); C Fijnaut, De toelating van raadsleden tot het politi¨ele verdachtenverhoor (Kluwer and Gouda Quint 1987).
110. H Smits, Strafrechthervormers en Hemelbestormers (University Press 2008), 122–124.
111. Salduz v Turkey App no 3639/02 (ECtHR, 27 November 2008) [55].
112. ibid, para 54.
113. Dutch Supreme Court, case of 30 June 2009, ECLI:NL:HR:2009:BH3079.
114. Dutch Supreme Court, case of 22 December 2015, ECLI:NL:HR:2015:3608.
115. Dutch Supreme Court, case of 1 April 2014, ECLI:NL:HR:2017:770.
116. Beleid OM Raadsman bij verhoor per 1 maart 2016, Stcr. 2016, 8884.
117. The ‘implementation package’ consisted of two laws and an implementing regulation, which defined the rules of lawyer’s participation in the interrogation. See Wet van 17 November 2016, houdende implementatie van Richtlijn nr. 2013/48/EU van het Europees Parlement en de Raad van 22 Oktober 2013 betreffende het recht op toegang tot een advocaat in strafprocedures en in procedures ter uitvoering van een Europees aanhoudingsbevel en het recht om een derde op de hoogte te laten brengen vanaf de vrijheidsbeneming en om met derden en consulaire autoriteiten te communiceren tijdens de vrijheidsbeneming (PbEU 2013, L 294), Stb. 2016, 475; Wet van 17 November 2016, houdende wijziging van het Wetboek Strafvordering en enige andere wetten in verband met aanvulling van bepalingen over de verdachte, de raadsman en enkele dwangmiddelen, Stb. 2016, 476; Het besluit van 26 Januari 2017, houdende regels voor de inrichting van en de orde tijdens het politieverhoor waaraan de raadsman deelneemt (Besluit inrichting en orde politieverhoor), Stb. 2017, 29.
118. Art 28c(1) of the DCCP. The right to consult with a lawyer at the police station before the first interrogation is only applicable when the suspect has been arrested and is at the police station. If the suspect is invited to come to the police station for interrogation, it is understood that they have had the opportunity to consult with a lawyer prior to showing up at the police station.
119. Art 28d(1) of the DCCP.
No case law exists (yet) to clarify these matters. With the implementation of the abovementioned Directive, the Dutch legislator also adopted a regulation containing the rules of lawyers’ participation in the interrogation. According to this, the lawyer can address questions and comments to the interrogating officer but they can only do so before or at the end of the interview. During the interview, a lawyer may intervene to signal that undue pressure is allegedly being exercised, that the suspect does not understand a question or that the suspect is unfit for questioning due to their physical or mental state. If none of these three situations occur, the lawyer must sit still and keep quiet during the interrogation. The lawyer may not answer questions on behalf of the suspect, unless the officer conducting the interrogation and the suspect consent. The suspect and their lawyer can request a time-out followed by an additional private consultation, but the interrogating police officer can refuse the request if they believe that allowing multiple consultations would hinder the interview. At the end of the interrogation, the lawyer will be given the opportunity to make remarks on how the questioning and the suspect’s answers was reported in the official interrogation record.

This legislative implementation of the right of access to a lawyer during the interrogation has been met with much criticism. For instance, it was argued that the Dutch legislator interpreted this right in a ‘too restrictive’ manner and ‘entirely against the spirit of the Salduz case and the Directive 2013/48/EU’. The restrictions on the lawyer’s participation in the interrogation fostered concerns about whether suspects are able to effectively exercise their defence rights. The Dutch Association of Defence Counsel (NVSA) challenged these limitations in the light of the ECtHR case law before the court. It requested this practice be declared unlawful. The District Court decided to leave the response on the lawfulness of the Dutch regulations up to the Dutch Supreme Court. The Dutch Supreme Court ruled that these regulations were not unlawful by stating that ‘these rules did not, in any way, diminish a practical and effective access to a lawyer during the police interrogation’. A valid question is whether the Dutch regulations on the role of the lawyer during interrogations sufficiently enable the lawyer to ‘ask questions, request clarification and make statements’ as is provided by the Directive. According to Mols, further litigation on these issues, including before the Court of Justice of the European Union, is to be expected. In her opinion, Dutch lawyers currently face the difficult task of attempting to effectively fulfil their role while facing these restrictions.

The right to a lawyer can be waived. This must be done unequivocally and only after the minimum safeguards are observed: it must be a voluntary, and knowing relinquishment of the right. Suspects do not have to be explicit but they must show awareness of the consequences, for

120. Note 14 of the Besluit inrichting en orde politieverhoor.
121. Art 6 of the Besluit inrichting en orde politieverhoor.
122. Art 4 of the Besluit inrichting en orde politieverhoor.
123. Art 28d(1) of the DCCP.
124. Art 29a(3) of the DCCP.
125. Heemskerk and Peristeridou (n 107) 28.
126. KMG Demandt and ACM Klaasse, ‘Bijstand van de advocaat bij het verhoor: loopt Nederland in de pas met Europa?’ (2016) 14(6) Strafblad 360–369.
127. District Court of The Hague, case of 31 March 2016, ECLI:NL:RBDHA:2016:3367.
128. Dutch Supreme Court, case of 13 September 2016, ECLI:NL:HR:2016:2068 paras 3.6.7–3.6.8.
129. Recital 25 of the preamble to Directive 2013/48/EU.
130. V Mols, ‘Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers’ (2017) 8 New Journal of European Criminal Law 303.
131. Art 28a(1) of the DCCP.
example, by signing a form informing them about the right to a lawyer.\(^{132}\) Access to legal advice can be limited if it is necessary to avert serious adverse consequences for the life, liberty or physical integrity of a third person, or to avert serious adverse consequences for the ongoing investigation.\(^{133}\)

One of the reasons why the Dutch legislator has been reluctant to accept the right to a lawyer during police interrogations is the fear that suspects will increasingly invoke their right to silence, which could hamper truth finding.\(^{134}\) This is also the current perception of police officers. A recent study demonstrates that a large majority of surveyed police officers (74% of 1009) are of the opinion that due to the presence of a lawyer during the police interrogation, suspects are less likely to make a statement.\(^{135}\) However the exact effect seems to be more nuanced. In general, this research showed that 10% of the suspects (out of 409 studied cases) invoked the right to remain silent after 1 March 2016 (from this moment onwards all suspects had the right to legal assistance during the interview), which is not more often than before this date.\(^{136}\) More specifically, in this study the presence or absence of the lawyer at the interrogation made no difference in the use of the right to silence during the first interrogation.\(^{137}\) The reason for this may be that often during the first interrogation personal questions, unrelated to the criminal offence (i.e. where the suspect is from, about his family, etc.), are being asked. However, during the second interrogation the presence of a lawyer makes a difference: 38% of the suspects invoked the right to remain silent once or more, whereas only 6% of the suspects invoked it when not assisted by a lawyer. The researchers also found that the type of criminal offence matters: those suspected of a criminal offence carrying a sentence of 6–12 years’ imprisonment invoked the right to silence more often than those suspected of other offences carrying lower sentences.\(^{138}\) In addition, the age of the suspect also seems to matter: suspects between the age of 18 and 25 years old invoked the right to silence the most.\(^{139}\) Although the research found a link between the right to silence and the right to a lawyer during the interrogations, no evidence was found of the relationship between the right to silence and the right to consult the lawyer before the interrogation.\(^{140}\) It should be noted that the link between the right to silence and the right to a lawyer during police interrogations should be nuanced. Legal assistance is likely to have an effect on the exercise of the right to silence, however there are many other factors that may play a role in practice.

**Conclusion**

The analysis of the right to silence as defined by Dutch law and applied by courts reveals a pragmatic attitude of Dutch courts towards this important procedural right. The right to silence is laid down in art 29 of the DCCP and is stated as ‘the right of the suspect to not answer questions’. In addition, the caution and the ban on pressure also have their legal basis in this article. The right to silence is applicable from the moment that someone is regarded as a suspect and when this person is

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132. Heemskerk and Peristeridou (n 107) 22.
133. Article 28e of the DCCP.
134. Stevens (n 96) 62.
135. CM Klein Haarhuis, ‘Langetermijnmonitor: Raadsman bij verhoor—Cahier 2018-16’ (2018) WODC-onderzoek 96.
136. Ibid., 93. Before 1 March 2016, 12% of the suspects remained silent about their cases out of 77 studied cases. This research used different types of empirical research. They surveyed police officers, held focus groups with police, observed interrogations and conducted a case file analysis (of 558 case files).
137. Klein Haarhuis (n 135) 94.
138. Ibid.
139. Ibid., 95.
140. Ibid., 96.
interrogated. It applies to all information and evidence that exists depending on the will of the suspect. Before the interrogation, the suspect needs to be informed about his legal rights by the interrogating officer. In addition, unlawful pressure during the interrogation and the obtaining of a statement from the suspect against their free will is prohibited.

Although the right to silence has been formulated as an absolute right and its legal scope seems to be rather broad, the Dutch Supreme Court has decided that this right should be interpreted more narrowly and that it can be restricted. First, due to the narrow interpretation of the notions of ‘interrogation’ and ‘testimonial evidence’ the right to silence is not applicable during infiltration operations and the taking of bodily samples, which means that the suspect is granted a lower level of protection. Secondly, if the suspect has invoked his right to silence, the court may draw adverse consequences from silence in terms of evidence, sentencing and possible compensation for unjustified lawful detention. Thirdly, if the right to silence has been violated by the interrogating authorities, often this violation will not lead to the conclusion that this statement should be excluded from the evidence. Indeed, often the outcome will be that the violation will attract no legal consequences because there is no harm to the suspect’s defence. To conclude, it can be stated that the meaning of the right to silence in the DCCP and legal doctrine is broad. However, the Dutch Supreme Court has restricted the scope, the requirements, the consequences and the remedies for violations of the right to silence and thus it offers a limited degree of protection for the suspect.

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