



MASTER THESIS RESEARCH MASTER IN LAW

**The actual role of the principle of immediacy in the Dutch
criminal procedure**

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Introduction

The topic of immediacy is one which has given rise to a substantial literature and has been the subject of much discussion on the part of legal scholars in many European countries. The principle of immediacy requires that all evidence is presented in court in its most original form. Since the introduction of this principle in the Dutch criminal procedure, many scholars discussed the role of this principle. This role seems to be limited since the Supreme Court introduced the written hearsay in the '*de auditu*' judgment. 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 also has allowed the use of 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 began to play again an increasingly important role in the Dutch criminal procedure. Against this background the aim of this research entails analysing the actual role of the principle of immediacy in the Dutch criminal procedure.

The structure of this thesis is as follows. Chapter 1 provides an analysis of the historical development of the principle of immediacy in the Dutch criminal procedure. Chapter 2 will be devoted to give a definition of the principle of immediacy. This will firstly require an analysis of the opinions of the German legal scholars, and, secondly, an analysis of the opinions of the Dutch legal scholars. Chapter 3 describes the role of the principle of immediacy in the Dutch criminal procedure since 1926. Subsequently, Chapter 4 will address the principle of immediacy and the right to a fair trial. In this chapter landmark cases of the ECtHR will be analysed in order to understand the view of the European Court regarding the principle of immediacy. Chapter 5 will be devoted to the influence of the ECHR case law in the Dutch criminal procedure. In this important chapter, the recent developments in the Dutch criminal procedure regarding the principle of immediacy will be also outlined. The paper ends with a chapter concerning the proposals for reform.

1. The historical development of the principle of immediacy

The principle of immediacy finds its origin in the penal procedure laid down in the *Code d'Instruction Criminelle* of 1808. The Code had been heavily influenced by English procedural principles. This Code strongly followed an inquisitorial model, especially in the pre-trial phase. In essence the criminal procedure in this Code was a secret and written criminal procedure. However, a predominant safeguard of this procedure was the public and oral character of the investigation at trial.¹

The requirement that the investigation at trial be conducted orally was set out in Article 317 of the Code. According to Hélie the principle, that the evidence be examined orally and in front of the judge, was a fundamental procedural principle of the French criminal law set out in the Code.² The reasoning behind this is that oral discussions in which the accused and witnesses were confronted with each other were the best way of providing for the uncovering of the truth and were far preferable to written alternatives.³

Further, only oral proceedings could be considered compatible with the principle of '*conviction intime*', which required the decision maker to take personal responsibility for determining the accuracy of the charge.⁴ This principle can be considered as a fruit of the enlightenment and it was in contrast to the traditional rules of formal evidence that prescribed exactly when the evidence amounted to proof. However, the rules of evidence in the *Code d'Instruction Criminelle* was a closed system. The only allowed evidence were the interrogation of the accused, witness testimony, supporting legal documents, expert testimony and the inspection of the judge. The interrogation of the accused formed the center of the evidence. However, the accused had no speaking rights during the investigation at trial.⁵

As regards to the witness testimony, it can be stated that the summoned witnesses were obliged to appear before the judge. This rule stemmed from the requirement of the '*débat orale*', which can be seen as a fundamental rule of the new French criminal procedure. This rule originates from the English criminal procedure. As the name suggests, the '*débat orale*' was a verbal battle between the parties. The witnesses or experts had to be present

¹ D.H.R.M. Garé, *Het onmiddelijkeheidsbeginsel in het Nederlandse strafproces*, Arnhem: Gouda Quint, 1994, p. 21-23.

² Hélie, *Traité de L'instruction Criminelle*, Paris: Henri Plon 1866, vii, at p. 487: '*l'instruction qui se fait à l'audience doit être exclusivement orale. C'est là l'une règle fondamentale de notre procédure criminelle*'.

³ *Ibid.*

⁴ *Ibid.*, at p. 488.

⁵ Garé 1994, p. 22-23.

during the investigation at trial and give their statements orally. Consequently, it was possible for the accused to contradict the statements of the witnesses. The principle of '*oralité*' also required that the legal documents had to be read aloud in court.⁶

After the occupation of the Netherlands by the French in 1811, the *Code d'Instruction* entered into force in the Netherlands by order of Napoleon. The French occupation endured until 1813. Immediately, the Netherlands started to prepare its own Code of Criminal Procedure. Much debate was conducted regarding the adoption of the public and oral character of the French criminal procedure. Eventually, these principles were seen as positive aspects of the French criminal procedure, which had to be adopted in the Dutch criminal procedure.⁷

The Netherlands first adopted its own Code of Criminal Procedure in 1838, which was however basically a copy of the *Code d'Instruction*.⁸ Therefore, the public procedure was adopted in the Dutch Code in Article 170. As a consequence the principle of '*oralité*' was also included in the Dutch criminal procedure. The requirement for oral proceedings ensured that witnesses appeared before the judge in person to give a testimony. In his comment on Article 170, De Bosch Kemper notes that the guarantee for an optimal uncovering of the truth lies in the oral and public character of the trial stage. He continues to describe the oral proceeding as '*onmiddellijk*' (immediate) and he uses those terms as synonyms.⁹

The Dutch procedure was also a closed system regarding the rules of evidence. The system was a negative statutory system of evidence. There were only 4 types of evidence allowed for a conviction: the witness testimony, supporting legal documents, the confession and indications.¹⁰ The judge had to base its evidentiary decision on these sorts of evidence. However, the Code of 1838 had no obligatory indications as regards the persuasive force of the means of proof.

The choice for this system was not explicitly linked with the principles of the public and oral procedure. Garé suggest that perhaps of this there is no unanimity in the literature on the meaning of the principle of immediacy in the Dutch criminal procedure.¹¹ The next chapter will be devoted to give a definition of the principle of immediacy. This will firstly

⁶ Garé 1994, pp. 23-24.

⁷ Garé 1994, pp. 33-34.

⁸ The trial by jury had although been abolished.

⁹ *Ibid.* at. pp. 36-37. And see also J. de Bosch Kemper, *Wetboek van Strafvordering, naar deszelfde beginselen ontwikkeld, en in verband gebragt met de algemeene regtsgeleerdheid*, Amsterdam 1840, pp. 388-391.

¹⁰ Garé 1994, p. 39.

¹¹ Garé 1994, pp. 40-41.

require an analysis of the opinions of the German legal scholars, and, secondly, an analysis of the opinions of the Dutch legal scholars.

2. The definition of the principle of immediacy

2.1. The principle of immediacy according to German legal scholars

The topic of immediacy is one which has given rise to a substantial literature and has been the subject of much discussion on the part of legal scholars in many European countries. The term ‘immediacy’ is most commonly referred to in the context of German procedural law and was discussed by German legal scholars in the nineteenth century. The scholars seized upon the notions of oral and immediate procedure as integral to the establishment of the reformed German procedural system. Consequently, immediacy was seen by some German scholars to be “*eine unabweisbare forderung der Gerechtigkeit*”.¹² The legal scholar Holtzendorff describes the principle of immediacy as follows:

*“..eine noch wichtigere und bedeutungsvollere Gewähr als die Oeffentlichkeit für unparteiische Rechtspflege und für Erzielung einer möglichst genauen Übereinstimmung des richterlichen Urtheils im Strafverfahren mit der materiellen Wahrheit, ist die Mündlichkeit, oder, wie richtiger gesagt wird, die Unmittelbarkeit des Verfahren”*¹³

According to Holtzendorff there is a close relationship between principle of oral procedure and the principle of immediacy. He states that the terms are frequently referred to together or interchangeably, and he also states that it is not uncommon for reference to be made to only one of the principles. However, in the German literature the exact relationship between these principles is unclear. Holtzendorff assumes that these two principles seem to suggest that they guarantee the same concept. He explains this by stating that these principles mean that the hearing of the accused and of all the evidence relevant to the charge are to be led immediately before the trial judge in such a way that it would enable the judge to hear the live testimony of the accused and the witnesses and not to experience them through reading written statements.¹⁴

On the other hand, Von Feuerbach in his famous work on public and oral trials does not refer to the immediacy principle, although it is clear that it is incorporated within his

¹² See A. von Hye, *Die Leitenden Grundsätze der österreichischen Strafprozessordnung*, Vienna: F Manz 1854, p. 26.

¹³ See F. von Holtzendorff (ed), *Handbuch des Deutschen Strafprozessrechts*, Berlin: Carl Habel 1879, p. 63.

¹⁴ *Ibid.*

conception of the principle that the investigation at trial takes place orally.¹⁵ Similarly to Von Feuerbach the legal scholar Mittermaier states that the principle of oral proceedings is identical to the principle of immediacy. The scholar refers to the ‘oral (immediate)’ procedure requirement as necessitating that the entire determination of the charge, the hearing and use of the various pieces of evidence which the judgment should be based, and the arguments of the prosecution and the defence should take place in front of the judge with the responsibility for determining the case.¹⁶

The Austrian legal scholar Glaser, suggested that, while the principle of oral procedure and the principle of immediacy are connected, each principle is charged with the regulation of a different aspect of the proceedings. The primary role of the principle of immediacy concerns the regulation of the hearing of the evidence. On the other hand, the requirement that the hearings be conducted orally is connected to the importance of enabling discussion and the challenging of the evidence.¹⁷ Thus, the two principles can be seen to be a response to two separate issues: first the judicial role in the supervision of the determination of the evidence and, secondly, the adequacy of the opportunity of the accused to challenge the evidence.¹⁸

In 1861 the legal scholar Zachariä suggested that the discussion whether the investigation at trial should be conducted orally or in written form could be regarded as settled.¹⁹ According to Zachariä it was generally accepted that the oral procedure was the most essential guarantee for the establishment of the material truth. Consequently, there could be no exception to the principle and it was certainly unacceptable for the oral procedure to be replaced by a written process, at least in relation to the main hearing (*Hauptverhandlung*).²⁰ According to this reasoning the court should ground its judgment only on evidential sources which it had actually heard, and not on inquiries or conclusions drawn from another time, place or person. Zachariä expressly states that this meant that the judgment must not be based

¹⁵ A.R. von Feuerbach, *Betrachtungen über die Oeffentlichkeit und Mündlichkeit der Gerechtigkeitspflege*, Band I Gießen 1821, pp. 9-10.

¹⁶ C.J.A. Mittermaier, *Die Gesetzgebung und Rechtsübung über Strafverfahren nach ihrer neusten Fortbildung*, Erlangen 1856, p. 307.

¹⁷ J.A. Glaser, *Handbuch des Strafprozesses*, Leipzig: Duncker & Humblot 1883, at p. 247. See also S.J. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, Hart Publishing Oxford 2007, p. 68.

¹⁸ S.J. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, Hart Publishing Oxford 2007, p. 49.

¹⁹ H.A. Zachariä, *Handbuch des deutschen Strafprozesses*. Göttingen, Verlag der Dieterichschen Buchhandlung, 1861, i, at p. 50.

²⁰ *Ibid.* at pp. 50–51.

on the files of the written preliminary investigation.²¹ Furthermore, the judgment had to contain a summary of the evidence which had been heard (*unmittelbare Beweisaufnahme*).²²

Maas was one of the first German legal scholars who defined immediacy as an independent principle. Maas states that the principle of immediacy consists of two elements: '*die Unmittelbarkeit der Tatsachenerschliessung*' and '*die Unmittelbarkeit des Verkehrs*'.²³ The first one requires that the judge must be in direct 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. Because, according to Maas, each transfer of information includes a subjective evaluation. Therefore, a witness testimony in front of the judge is preferred to a written witness testimony. There has to be a direct link between the evidence and the judge.²⁴ The second element, '*die Unmittelbarkeit des Verkehrs*', requires that the judge has to hear and see directly the trial participants and the evidence.²⁵

In recent literature, Löhr divides the principle of immediacy into '*Prinzip der Form*' and '*Prinzip der Wahl*'. The concept of '*Prinzip der Form*' requires that the evidence is put to the judge in the most direct manner possible. Therefore, Löhr's '*Prinzip der Form*' is similar to the concept '*die Unmittelbarkeit der Tatsachenerschliessung*' of Maas which requires that there has to be a direct link between the evidence and the judge. Löhr's '*Prinzip der Wahl*' requires the judge to use the most immediate evidence. Therefore, this concept determines which evidence should be used and that is the immediate evidence.²⁶

More interestingly is the view of Geppert. This legal scholar divides the principle of immediacy into two forms: the formal and the material principle of immediacy. The formal principle of immediacy demands that all evidence that could possibly influence the judgment during the investigation at trial should be able to be questioned. The material immediacy principle requires that during the trial the evidence should be based on the most primary source of evidence as to ensure the controllability of the evidence. Therefore, the use of original evidence is preferable to any reproduction of evidence which bears the risk of distortion.²⁷

²¹ *Ibid.* at p. 52.

²² *Ibid.* at p. 52.

²³ S. Maas, *Der Grundsatz der Unmittelbarkeit in der Reichsstrafprozessordnung*, Breslau 1907, p. 13.

²⁴ Maas 1907, at p. 14.

²⁵ Maas 1907, at p. 15.

²⁶ H.E. Löhr, *Der Grundsatz der Unmittelbarkeit im deutschen Strafprozeßrecht*, Berlin 1972, pp. 39-41.

²⁷ K. Geppert, *Der Grundsatz der Unmittelbarkeit im deutschen Strafverfahren*, Berlin 1979, pp. 147-162.

2.2. The principle of immediacy according to Dutch legal scholars

One of the first Dutch legal scholars who wrote his findings on the subject of the principle of immediacy is Simons. This scholar wrote in his work '*Beknopte handleiding tot het Wetboek van Strafvordering*' that the judge should ground its judgment only on evidences which it had heard during the investigation at trial. The judge cannot ground his judgment on testimonies written by police officers. According to Simons the witnesses and the accused person have to appear before the judge in person to give a testimony.²⁸ Simons' view is similar to that of the German legal scholar Zachariä, who states that the court should ground its judgment only on evidential sources which it had actually heard, and not on inquiries or conclusions drawn from another time, place or person.²⁹

The legal scholar Stolwijk states 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 (*betrouwbaarheid en zorgvuldigheid*) through his own observation. Stolwijk does not explain the reason for this necessity.³⁰

Nijboer gives a more detailed account on the principle of immediacy. In his endeavor to clarify the meaning of the principle of immediacy in the Dutch criminal procedure, Nijboer distinguishes two global views on the meaning of this principle in the Dutch 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. The second view is the material 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 distortion.³¹ Nijboer also points out that the elaboration of the principle of immediacy in the Dutch criminal procedure is, compared to other countries 'extremely minimalistic'.³²

Perhaps the best elucidation of the principle of immediacy is made by Garé. In her thesis, Garé states that the principle of immediacy is the result of an effort to improve fact

²⁸ D. Simons, *Beknopte handleiding tot het Wetboek van Strafvordering*, Haarlem 1925, pp. 31-32.

²⁹ H.A. Zachariä, *Handbuch des deutschen Strafprozesses*, Göttingen, Verlag der Dieterichschen Buchhandlung, 1861, at pp. 50-51.

³⁰ S.A.M. Stolwijk, *Het onderzoek ter terechtzitting in strafzaken*, Arnhem 1976, p. 6.

³¹ J.F. Nijboer, 'Enkele opmerkingen over de betekenis van het onmiddellijkheidsbeginsel in het strafprocesrecht', *Nederlands Juristenblad* 1979, pp. 821-823.

³² J.F. Nijboer, *De waarde van het bewijs*, Deventer: Gouda Quint 1999, p. 108.

finding.³³ The principle is based on the idea that any reproduction of evidence bears the risk of distortion. Therefore, the principle of immediacy requires that the judge no longer based his knowledge of the facts on what was conveyed by secondary sources of information.³⁴ 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. 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 reliable.³⁵ However, Garé recognizes 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 accused has advantages over presenting the judge with evidence which is reproduced.³⁶ According to Garé there are three³⁷ advantages:

1. The first advantage is that the judge takes cognizance of the original sources is that he may examine primary sources in case of ambiguities or conflicting matters.
2. The second is that the judge may examine 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 divides 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 judgment 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 defence.³⁸ Secondly, the principle of immediacy is also a structural principle. Hence, the fulfillment of this principle has consequences for the systematic organization of criminal procedure itself; if in criminal procedure either no room or insufficient room is allowed for the principle of immediacy, this constitutes to a similar degree a violation of the principle of public hearings, the autonomy of the judiciary and the contradictory character of criminal proceedings.³⁹

³³ Garé 1994, p. 76.

³⁴ Garé 1994, pp. 74-75.

³⁵ Garé 1994, pp. 75-76.

³⁶ Garé 1994, p. 78.

³⁷ *Ibid.*

³⁸ Garé 1994, p. 77. See also K. Geppert, *Der Grundsatz der Unmittelbarkeit im deutschen Strafverfahren*, Berlin 1979, pp. 136-145.

³⁹ Garé 1994, p. 77-78.

2.3. Conclusion

There is a close relationship between the principles of oral procedure and immediacy. Nevertheless, the terms are not interchangeably. Although the concepts are closely connected, only through distinguishing the scope of each principle is it possible to understand the full extent of the reasons for their existence in order to give a definition of the principle of immediacy.

The primary role of the principle of immediacy concerns the regulation of the hearing of the evidence. However, the requirement of the principle of oral procedure is connected to the importance of enabling discussion and challenging of the evidence. Thus, the principles can be seen as a response to two separate issues: first the judicial role in the supervision of the determination of the evidence and, secondly, the adequacy of the opportunity of the accused to challenge the evidence.

Perhaps the best elucidation of the principle of immediacy is made by Garé. This legal scholar divides the principle of immediacy in two elements. The first element is the principle of immediacy as an evidential principle. This element 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 through his own observation, examination and confrontation with other evidence and or the defence. Secondly, the principle of immediacy is also a structural principle. Hence, the fulfillment of this principle has consequences for the systematic organization of criminal procedure itself.

Therefore, Garé states that the principle of immediacy is the result of an effort to improve fact finding. 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 based his knowledge of the facts on what was conveyed by secondary sources of information.

3. The principle of immediacy in the Dutch criminal procedure since 1926

In 1926 the current Code of Criminal Procedure (*Wetboek van Strafvordering*) replaced the old version of 1838. The *Wetboek van Strafvordering* importantly changed the character 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).⁴⁰ The reforms aimed to turn the inquisitorial character of the criminal justice system in the Code of 1838 into more accusatorial. The Dutch criminal justice system can be characterized as being moderately accusatorial. In fact, it is neither typical inquisitorial nor accusatorial, but has features of both.⁴¹

The Dutch criminal process in the *Wetboek van Strafvordering* of 1926 can be divided into three main stages: the preliminary investigation stage, the trial stage and the execution stage. The preliminary investigation stage consists of the criminal investigation and the preliminary judicial inquiry.⁴² The criminal investigation is formally led by the public prosecutor.⁴³ If the public prosecutor considers that there is sufficient reason, he can request the examining judge to initiate a preliminary judicial inquiry (Article 181 Sv). The authority of the preliminary inquiry lies with the examining judge (*rechter-commissaris*). The examining judge is a judicial authority. As such, his role is characterized by independence with respect to the executive and the parties to the proceedings. The criminal investigation is, however, continued under the responsibility of the public prosecutor under the condition that the public prosecutor informs the examining judge (Article 177a Sv).⁴⁴ In its most original form, the inquiry conducted by the examining judge was an essential part of the criminal procedure. However, over time the preliminary judicial inquiry has become of very little practical significance. Nowadays, the most important reason for initiating a preliminary

⁴⁰ A. Minkenhof, *De Nederlandse Strafvordering* (bewerkt door J.M. Reijntjes), Deventer: Kluwer 2009, p. 12.

⁴¹ MvT, Kamerstukken II 1913/14, 286, nr. 3, par 3.

⁴² G.J.M. Corstens & M.J. Borgers, *Het Nederlands strafprocesrecht*, Deventer: Kluwer 2011, p. 227.

⁴³ M.S. Groenhuijsen & J.B.H.M. Simmelink, Criminal procedure in the Netherlands. In: R. Vogler & B. Huber (Eds.), *Criminal procedure in Europe* 2008, pp. 384.

⁴⁴ Groenhuijsen & Simmelink 2008, pp. 385-386.

judicial inquiry is for examining witnesses and recording their statements so that they can be used in court as evidence.⁴⁵

The trial stage constitutes a debate amongst the actors (the judge, public prosecutor and defence) with an active role for the judge, which shall result in the establishment of the material truth by the judge. The framers of the *Wetboek van Strafvordering* of 1926 had the special intention of making the trial stage an open and oral court procedure. Hence, at the moment of the adoption of the *Wetboek van Strafvordering*, the legislature aimed to create a system with emphasis on the truth-finding process within the trial phase, subject to the applicability of the principle of immediacy.⁴⁶

According to Langemeijer and Reijntjes the formal principle of immediacy forms the basis of Article 338 Sv.⁴⁷ The formal principle of immediacy, as elaborated by Nijboer and Geppert⁴⁸ demands that all evidence that could possibly influence the judgment during the trial should be able to be questioned. Article 338 Sv states that the charges can be considered proven if the court is persuaded, based on the legal evidence, that the accused committed the alleged offence. 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.⁴⁹ Moreover, it enables the trial participants to challenge the evidence.

Article 339 Sv provides a statutory system of an exhaustive recital of the factual sources on which the court may base its evidentiary decision:

1. The judge's own observation (Article 340 Sv)
2. Statements from the accused (Article 341 Sv)
3. Witness statements (Article 342 Sv)
4. Expert statements (Article 343 Sv)
5. Written records. (Article 344 Sv)

⁴⁵ Groenhuijsen & Simmelink 2008, pp. 385.

⁴⁶ MvT, Kamerstukken II 1913/14, 286, nr. 3, p. 3. And see also Garé 1994, p.79.

⁴⁷ F.F. Langemeijer, 'Het onmiddelijkheidsbeginsel in het militaire strafproces', *Delikt en Delinkwent* 1976, p. 97; J.M. Reijntjes, *Strafrechtelijke bewijs in de wet en praktijk*, Arnhem 1980, p. 44.

⁴⁸ See Chapter 2.

⁴⁹ S.A.M. Stolwijk, *Het onderzoek ter terechtzitting in strafzaken*, Arnhem 1976, pp. 4-6. See also W.H.B. Dreissen, *Bewijsmotivering in strafzaken*, Den Haag: Boom juridische uitgevers 2007, p. 57.

The Dutch evidentiary system is a ‘negative system’ because the law has no obligatory indications as regards the persuasive force of the means of proof.⁵⁰ The judges can only rely on materials that have been explicitly addressed at the trial. Judges can further only rely on their personal observation at the trial. An exception is made for facts and circumstances of general knowledge, rules of experience and the law.

The material principle of immediacy is strengthened by the strict requirement of Article 342(1) Sv, 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 their testimony about matters they personally observed. However, there was one exception; the only written form of evidence that was permitted was testimony by investigating officers.⁵¹ Written hearsay evidence was excluded as a means of evidence. Rozemond states, on the other hand, that the legislator did not intent to exclude hearsay evidence.⁵² Nonetheless, the legislator was not conclusive about the admissibility of oral hearsay evidence. Garé states that this shortcoming must be appreciated in the light of the public and oral character of the investigation at trial.⁵³

In 1926, the same year the *Wetboek van Strafvordering* was adopted, the Supreme Court was confronted with the question whether oral hearsay was admissible.⁵⁴ The Supreme Court, inspired by Justice Taverne, ruled that a grammatical interpretation of Article 342(1) Sv should decide the issue. The Supreme Court favored admission of oral hearsay, because its prohibition was of no practical effect; the judges are unable to exclude what they already know. According to Garé the view of the Supreme Court represents a sense of judicial duty that does not accord with the underlying system of criminal procedure, in which the investigation at trial serves to legitimize the acts of the administration.⁵⁵

In their ‘*de auditu*’ judgment, the Supreme court held that a witness who informs the court of what someone else told him or her can be qualified as a witness who personally observed pursuant to Article 342(1) Sv, because it is a mere aural impression, that is perceived or experienced by the witness. On the basis of this interpretation, oral hearsay is no contrary to the law. Against the intention of the legislator, the Supreme Court thus introduced

⁵⁰ M.S. Groenhuijsen & J.B.H.M. Simmelink, Criminal procedure in the Netherlands. In: R. Vogler & B. Huber (Eds.), *Criminal procedure in Europe* 2008, pp. 452-453.

⁵¹ MvT, Kamerstukken II 1913/14, 286 nr. 172. And see also Garé 1994, p. 84.

⁵² K. Rozemond, ‘De mythe van het de auditu-bewijs’, *Ars Aequi* 1999, p. 146.

⁵³ Garé 1994, p. 87.

⁵⁴ HR 20 december 1926, NJ 1927.

⁵⁵ Garé 1994, pp. 106-107.

the written hearsay statement via the written testimony of investigating officers.⁵⁶ As Van Dijck stated, the judge can rely on written statements and summoning of witnesses to trial is no longer indispensable: “*De rechter zal voortaan uitsluitend recht kunnen doen op stukken, de dagvaarding van getuigen is voor het bewijs niet langer onmisbaar.*”⁵⁷

The ‘*de auditu*’ judgment has opened the door widely to introduce indirect evidence and the principle of immediacy was no longer interpreted as requiring that all evidence is directly produced in court. Rather, the hearing of witnesses at trial has become rather an exception. Instead, the dossier contains the written statements of witnesses heard by the police investigator or the examining judge and during the trial stage these statements are discussed and verified. Therefore, the judge does not have to hear the evidence directly. The judges can rely on written material provided that such material has been read out at trial. According to Articles 301(3), 374 and 417 Sv, the judge can replace this ‘reading’ out by a short summary of the testimonies.

According to Pompe, the preliminary investigation stage has obtained increasing importance because of this narrow interpretation of the principle of immediacy and the events during the preliminary investigation stage have become crucial for the final judgment.⁵⁸ Therefore, the most significant consequence of the admission of hearsay evidence is that the material principle of immediacy – that underlies the importance of the material truth finding - is compromised. The possibilities for the judge and the trial participants of verifying evidence to its quality and reliability is to an extent limited.⁵⁹

The current situation is, thus, that prior witness statements are contained in the dossier compiled by the public prosecutor or the examining judge during the preliminary investigation. According to Garé, this state of affairs implies that the preliminary investigation, in preparing for the trial and in particular gathering evidence, is of essential importance.⁶⁰ Franken adds to this that the public prosecutor must always be impartial and objective in compiling the case file so that all the relevant information is available for the judge to consider.⁶¹

According to Article 260 Sv, the public prosecutor may call experts, victims, witnesses, victims, experts and interpreters to trial. The accused may, on the basis of Article

⁵⁶ W.H.B. Dreissen, *Bewijsmotivering in strafzaken*, Den Haag: Boom juridische uitgevers 2007, p. 59

⁵⁷ J.V. van Dijck, ‘Het de-audit-arrest’, *Nederlands Juristenblad* 1927, p. 52.

⁵⁸ W.P.J. Pompe, ‘Vooronderzoek of eindonderzoek beslissend?’, *Tijdschrift voor Strafrecht* 1959, p. 141-151.

⁵⁹ Garé 1994, p. 71.

⁶⁰ Garé 1994, pp. 100-101.

⁶¹ A.A. Franken, *Algemene beschouwingen bij het onderzoek ter terechtzitting*, I De betekenis van het dossier in het strafproces. In: A.L. Melai / M.S. Groenhuijsen e.a. (red.), *Het Wetboek van Strafvordering*, pp. 460-472.

263 Sv, may call experts and witnesses. The accused may request the public prosecutor to call them. The accused may also request the public prosecutor to call defence witnesses. Pursuant to article 264 Sv, the public prosecutor may refuse:

1. If he or she considers it unlikely that the witness or expert will appear at trial for example, due to illness or non-traceability.
2. If he or she is of the opinion that the health and wellbeing of the witness or expert would be put in danger by giving such a statement and that this danger carries more weight than the interest to hear the witness or expert at trial.
3. If he or she is of the opinion that the accused would not reasonably be harmed in his defence.

In case of a refusal, the public prosecutor must give reasons for his or her decision and bring it to the attention of the accused. According to Article 287(3)(a) Sv, the accused may, immediately after the opening of the case, ask the judge to authorize the calling of a witness or expert. The judge may refuse on similar grounds to those for the public prosecutor (Article 288(1) Sv). If the accused did not request the public prosecutor to call witnesses or experts, then he may pursuant to Article 328 Sv ask the judge to use its authority (Article 315 Sv) to call witnesses or experts to trial.

Only in a very limited number of cases does the judge believe the witnesses should be examined at the trial. This practice means that if there is a good cause not to call the witnesses to give in-court testimony, judges can rely on their written statements instead of oral testimony. The judge may consider on a case-by-case basis whether it is necessary to call a witness to appear at the trial. Article 315 Sv mentions the criterion of necessity (*noodzakelijk*) which means that the judge will only grant such a request if, in the context of finding the material truth it is necessary to test the correctness or credibility of the statement of the witness or expert through an interrogation. The more crucial their evidence, the more it is deemed important to hear witnesses.⁶²

What is a good cause not to call witnesses? This may be the case where a witness is dead, cannot be found, or is otherwise unavailable despite all reasonable efforts, or the witness has already been examined by an examining judge in the presence of the parties who were given an opportunity to ask questions to the witness, or the witness is regarded as a

⁶² W.H.B. Dreissen, *Bewijsmotivering in strafzaken*, Den Haag: Boom juridische uitgevers 2007, pp. 356-357.

threatened witness, or where there the interests of the witness not to appear at trial outweighs the interests of the accused to question the witness.⁶³ Nonetheless, these exceptions are not exhaustive, the judge may consider on a case-by-case basis whether it is necessary to a witness to appear at the trial. This criterion of necessity is, however, mostly applied as a rejection criterion.

However, when the accused makes an explicit request to the judge to call an incriminating witness to appear at trial, all efforts must be made to ensure that the witness appears at trial. Further, such a request can only be denied or accompanied by an explicit and reasoned decision according to Article 330 Sv. When the judge fails to give reasons, a written witness statement cannot be used against an accused. On the other hand, if the accused does not make any request for an incriminating witness to be called at trial, such a person is likely to be called. The defence has to take the initiative. The legal scholars Nijboer and Van Hoorn describes this practice as '*onmiddellijkheid op bestelling*'.⁶⁴

This principle is abandoned in those cases where the witness is both heard by police investigators and the judge and, subsequently, his testimony to the judge is different than his incriminating testimony to the police investigator. In this case, the judge should call the witness to the trial in order to question the discrepancies between the two testimonies.⁶⁵ Subsequently, the witness's apparent lack of credibility is a reason for the judge to call a witness despite that the defence did not request the witness to be called. The explicit refusal of a witness who gave a statement to an investigator to be subsequently interviewed by the examining judge is also a reason.⁶⁶

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 demand to do so.⁶⁷ Nevertheless, this is not an absolute rule, particularly where the accused did not indicate that it wished to question the witness. It is a case-by-case determination depending on the extent to which the evidence is corroborated, the extent to which the allegations made in the statement are denied by the accused, whether such a

⁶³ A. den Hartog, 'De getuige in het strafprocesrecht; voorstellen voor een nieuwe regeling'. In: M.S. Groenhuijsen & G. Knigge (red.), *Het onderzoek ter zitting. Eerste interimrapport onderzoeksproject Strafvordering 2001*, Groningen 1999, pp. 326-327.

⁶⁴ This sentence can be translated as 'immediacy on demand'. See further: J.F. Nijboer & A.M. van Hoorn, 'Om de persoon van de getuige', *Delikt en Delinkwent* 1997, p. 569.

⁶⁵ HR 12 september 2006, *NbSr* 2006, 393. See also W.H.B. Dreissen, *Bewijsmotivering in strafzaken*, Den Haag: Boom juridische uitgevers 2007, p. 71.

⁶⁶ HR 1 februari 1994, *NJ* 1994, 427.

⁶⁷ See HR 29 oktober 1991, *NJ* 1992 199; HR 28 May 1991, *NJ* 1991, 711; HR 1 februari 1994, *NJ* 1994, 427.

statement was later withdrawn or significantly changed, the level of inconsistencies and the efforts made to have such a witness appear and testify.⁶⁸

Nevertheless, in practice, many witnesses do not appear at trial. Their statements may be used as evidence against the accused even if no opportunity has been proved to the accused to examine the witness at the preliminary investigation stage, for instance because 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, particularly when such witness is not heard by the court, reasons must be given for such reliance. The Dutch Supreme Court has held that those exceptions to the rule that witnesses appear in court to testify are consistent with the ECtHR jurisprudence.⁶⁹

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. Even more so because the Supreme Court also has allowed evidence by anonymous witnesses. The use of anonymous witnesses and sources of information was a response to the increase of organised crime.⁷⁰ Accordingly, the Supreme Court has accepted extensive use of anonymous witnesses, albeit with the provision that it should be used with caution.⁷¹ As a consequence, police investigators frequently used anonymous sources for information without relying on their testimony as evidence.⁷²

However, under the influence of decisions by the European Court on Human Rights, the principle of immediacy began to play again an increasingly important role in the Dutch criminal procedure. In the next chapter, 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 influence of these cases in the Dutch Criminal Procedure will be outlined in Chapter 5.

⁶⁸ See 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. They were accepted because they corroborated and strengthened each other, and found support in additional evidence.

⁶⁹ HR 1 februari 1994, NJ 1994, 427.

⁷⁰ See J.F. Nijboer, 'Kanttekeningen bij het rapport "De bedreigde getuige"', *Recht en Kritiek* 1984, pp. 80-93.

⁷¹ HR 4 mei 1981, NJ 1982, 268 m.nt. ThWvV.

⁷² J.F. Nijboer, 'Kanttekeningen bij het rapport "De bedreigde getuige"', *Recht en Kritiek* 1984, pp. 115-116.

4. The principle of immediacy and the right to a fair trial

Article 6(3)(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 a chance to put questions to adverse witnesses. Such a right is a fundamental element of a fair trial. As regards to this right, the *Unterpertinger* case is an important landmark case. In this case, there was no use of anonymous witnesses, hence, 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 although their statements were read out during the trial. The European Court observed that, although the reading out of their statements was not inconsistent with Article 6(3)(d) of the ECHR, “*the use made of them as evidence must nevertheless comply with the rights of the defence, which it is the object and purpose of Article 6(3)(d) to protect*”. This was especially so 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 hearing*”.⁷³ Since the applicant was prevented from having his former wife and step-daughter examined, or from having them examined on their statements in order to challenge their credibility, and given that the Court of Appeal treated their statements “*as proof of the truth of the accusations made by the women*”, the applicant did not have a fair trial and there was a breach of both Article 6(3)(d) of the ECHR.⁷⁴

Nevertheless, the Court did not seem to adhere immediately to the legitimacy of pre-trial hearings as the sole forum for the questioning of witnesses, as it stated in *Barberà, Messegue and Jabardo v. Spain* that, in view of the wording of Article 6 and the Court’s ruling that a person subject to a criminal charge is entitled to take part in the hearing and to have the case heard in his presence by a tribunal, Article 6 ought to be interpreted as requiring that “*all evidence*” must “*in principle*” be produced “*in the presence of the accused at a public hearing with a view to adversarial argument*”⁷⁵ This seemed to rule out 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.

⁷³ ECtHR, *Unterpertinger v. Austria*, Application No. 9120/80, 24 November 1986, para. 31.

⁷⁴ *Ibid.*

⁷⁵ ECtHR, *Barberà, Messegue and Jabardo v. Spain*, Application No. 10588/83, 6 December 1988, para 78.

However, three years later in *Kostovski v. Netherlands*, the ECtHR considered 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 before the accused 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 the Article 6 right to a fair trial because such statements do not allow the accused to confront his accusers.⁷⁶ The ECtHR also cited that it would be compatible with Article 6(3)(d) to permit the examination of witnesses to take place at an earlier stage in the proceedings, instead of during the trial itself. It again cited the general principle of examination at a public hearing and then qualified this, noting:

*“This does not mean, however, that in order to be used as evidence, statements of witnesses should always be made at a public hearing in court: To use as evidence such 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 respected.”*⁷⁷

It can be stated that Article 6 of the ECHR, requires that the accused has the opportunity at some stage in the procedure, to confront and question witnesses. However, the ECtHR interprets the immediacy principle in a supple manner. Hence, the control on the reliability of a witness is allowed to take place outside the public trial. The ECtHR reasons as follows:

*“All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This 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 in evidence (...)”*⁷⁸

In the *Saidi* case the court came to a similar conclusion by stating that the lack of any confrontation deprived the accused in certain respects of a fair trial.⁷⁹ What is thus essential is that the accused must have had the opportunity to examine the witness, as this should allow it to cast doubt on the witness’s credibility. In other words, an indirect confrontation, where the defence can question the police officers or public prosecutors who at their turn have examined

⁷⁶ ECtHR, *Kostovski v. The Netherlands*, Application No. 11454/85, 20 November 1989.

⁷⁷ ECtHR, *Kostovski v. The Netherlands*, Application No. 11454/85, 20 November 1989, para. 41.

⁷⁸ ECtHR, *Isgrò v. Italy*, Application No. 11339/85, 19 February 1991, para. 34

⁷⁹ ECtHR, *Saidi v. France*, Application No. 14647/89, 20 September 1993, para. 44.

the anonymous witness, does not sufficiently safeguard the rights of defence and thus violates Article 6. In the *Windisch* case this is worded as follows:

*“Neither the applicant nor his counsel ever had the opportunity to examine witnesses whose evidence had been taken in their absence (...) in these circumstances, the use of this evidence involved such limitations on the rights of defence that Mr. Windisch cannot be said to have received a fair trial.”*⁸⁰

In the *Delta* case the ECtHR repeated this ruling and stated that Article 6(3)(d) provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, 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 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 place.⁸¹ 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 Convention.⁸²

The right in Article 6(3)(d) of the ECHR is thus a right to challenge the witness evidence when the witness is making the statement – either at some point during the pre-trial investigation stage or at trial. The opportunity to challenge a 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 itself.⁸³

However, not every restriction of the principle of immediacy constitutes a violation of the right to a fair trial. What matters is that the proceedings as a whole had a fair character, taking all the stadia into account, including the pre-trial stage. In principle, ‘fair trial’

⁸⁰ ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990, para. 27.

⁸¹ G. 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, 126-127.

⁸² ECtHR, *Delta v. France*, Application No. 11444/85, 19 December 1990.

⁸³ ECtHR, *Isgrò v. Italy*, Application No. 11339/85, 19 February 1991, para 36. See also C.J.C.F. Fijnaut, *Officier van Justitie versus Bende van de Miljardair*, Arnhem 1993, p.65; Garé 1994, p. 125.

presupposes that all evidence is produced in court before the judge in the presence of the accused.⁸⁴ There are exceptions to this rule, but these require justification, which may be found in the impossibility of producing evidence in court, for instance, because a witness cannot be traced or wishes to invoke witness' privilege.

For example in the case *S.N. v. Sweden* the ECtHR stated that it has special features of 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 perceived victim. Consequently, 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 defence.⁸⁵ Therefore, there must be due respect for the rights of the accused in those exceptional cases.⁸⁶

This means that, at some stage of the proceedings, the accused must be given proper and adequate opportunity to question witnesses against them. 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 a witness against him/her, the relevant reproduced evidence may be validly considered in establishing proof. Providing the evidence is corroborated by another source of evidence and does not form the only proof available, this does not constitute a violation of the right to a fair trial. Against this background, 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 testify.⁸⁷

Nonetheless, it seems that the ECtHR focused on confrontation and adversarial argument, rather than on a strict application of the immediacy principle by calling all witnesses to trial. Therefore, it was impossible in view of the *Kostovski/Unterpertinger*/approach to claim that immediacy is solidly protected by the Convention.

Nevertheless, the principle gained importance in the 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 7 accused. The Court composed of one professional presiding judge and 3 lay members. After the accused and 11

⁸⁴ Garé 1994, p. 133

⁸⁵ ECtHR, *S.N. v. Sweden*, Application No. 34209/96, 2 July 2002, para 47.

⁸⁶ Garé 1994, p.132-133; Fijnaut 1993, p. 69.

⁸⁷ W.H.B. Dreissen, *Bewijsmotivering in strafzaken*, Den Haag: Boom juridische uitgevers 2007, p. 63

witnesses had been heard, a new judge presided, and the court heard 2 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 also 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 witnesses.⁸⁸

This statement was repeated in the *Mellors v United Kingdom* judgment where it was noted: the Court has had regard to the principle 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 evidence.⁸⁹

In recent judgments, The ECtHR considers proceedings that respect the immediacy principle as the most preferable situation.⁹⁰ It can be stated 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, in person, form an image of 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 judge.⁹¹

In line with the significance the ECtHR attaches to the immediacy principle, States have been given a responsibility in realising the appearance and questioning of witnesses. Therefore, 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 manner.⁹²

Nevertheless, the ECtHR also ruled that the accused is also responsible for his right of a fair trial. In the *Cardot* judgment, the ECtHR have indicated that the failure of the accused to request from the national court the examination of prosecution witnesses could amount to a

⁸⁸ ECtHR, *PK v. Finland*, Application No. 37442/97, 9 July 2002.

⁸⁹ ECtHR, *Mellors v United Kingdom*, Application No. 57836/00, 17 July 2003.

⁹⁰ 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;

⁹¹ ECtHR, *Windisch v. Austria*, Application No. 12489/86, 27 September 1990, para. 29.

⁹² 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.

waiver of his Article 6 rights.⁹³ Therefore, as Garé states, the fact that the European court of human rights stipulates that the responsibility for adhering to the minimum requirements under the ECHR for a fair disposition of criminal cases is a national matter, calls for alertness on the part of the accused to ensure that they receive the treatment they are entitled to.⁹⁴ But also the judge remains responsible for ensuring that proceedings are conducted fairly.⁹⁵

⁹³ ECtHR, *Cardot v. France*. Application No. 11069/84, 3 April 1990.

⁹⁴ Garé 1994, p. 129

⁹⁵ Garé 1994, p. 130-131; See also L.C.M. Meijers, *Verdrag en strafproces; gedachten over een methode van werken*, Zwolle 1993, p.12.

5. The influence of the ECHR case law in the 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 likely to be called by the judge.⁹⁶ 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.⁹⁷ 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 used in evidence. Moreover, the accused need not to be given the opportunity to challenge the witness in case the establishment of proof is sufficiently corroborated by other evidence.⁹⁸ The Dutch Supreme Court has held that those exceptions to the rule that witnesses appear in court to testify are consistent with the ECtHR jurisprudence.⁹⁹

However, under the influence of the *Kostovski* case and severe criticism from legal scholars, additional conditions for using anonymous witness testimony were adopted. For example, in 1990, the Dutch Supreme Court held that a statement from an anonymous witness can only be relied upon where it was taken by a judge who knows the identity of the anonymous witness. The judge would then have to provide observations in the dossier 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 questions asked to the witness.¹⁰⁰ However, 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 without the appearance of such a witness and accused having asked questions.¹⁰¹

⁹⁶ HR 9 juni, NJ 1992, 772. m.nt. Knigge. See also Garé 1994, p. 135.

⁹⁷ Garé 1994, pp. 139-140.

⁹⁸ Garé 1994, p. 140. See also W.H.B. Dreissen, *Bewijsmotivering in strafzaken*, Den Haag: Boom juridische uitgevers 2007, p. 67.

⁹⁹ HR 1 februari 1994, NJ 1994, 427.

¹⁰⁰ HR 2 juli 1990, NJ 1990, 692. (Vrouwenhandelarrest) See also W.H.B. Dreissen, *Bewijsmotivering in strafzaken*, Den Haag: Boom juridische uitgevers 2007, p. 67.

¹⁰¹ 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.

On the other hand, if the defence contested the credibility of the anonymous witness or his/her testimony, the judges had to give reasons if they nonetheless relied on the evidence.¹⁰² In addition, judges had to give reasons for granting anonymity if contested by the defence.¹⁰³ Judges may also be required to give reasons for rejecting the hearing of anonymous.

Furthermore, to respond to the criticism of the ECtHR, the legislator found it necessary to provide a more explicit legal basis for the use of anonymous witness. Therefore, in 1994, the Witness Protection Act (*Wet getuigenbescherming*) was introduced.¹⁰⁴ This Act places restrictions on the use of anonymous testimony and contains more procedural safeguards for the accused than was formerly the case. Further, this act provided a legal basis for the hearing of threatened witnesses in the absence of the parties, which was a practice already been authorized by the Supreme Court.¹⁰⁵ According to this law 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. This category of anonymous witnesses is those who fear for their lives, health or safety, or the disruption of their family life or socio-economic existence. If the witness has indicated that he does not want to testify because of this danger, the examining magistrate may grant him full anonymity.¹⁰⁶ These witnesses are examined in accordance with the regulations set forth in respect of threatened witnesses. The principal conditions are:
 - i. The statement of a vulnerable witness made before the examining judge will be read out or summarized in court.
 - ii. It concerns a crime for which detention on remand 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.

¹⁰² See HR 25 september 1984, NK 1985, 426, 427. HR 11 juni 1985, NJ 1986, 59.

¹⁰³ HR 14 september 1992, NJ 1993, 416.

¹⁰⁴ Act of 1 February 1994 (Staatsblad 1993, 603).

¹⁰⁵ See A.M. van Hoorn, *De Wet getuigenbescherming – een uitzonderlijke regeling*, Leiden: RUL 1996.

¹⁰⁶ W.H.B. Dreissen, *Bewijsmotivering in strafzaken*, Den Haag: Boom juridische uitgevers 2007, p. 67.

2. Limited anonymity where the witness's identity is unknown in accordance with Article 290 Sv, and possibly other technical equipment is being used (such as voice distortion, closed video-conference, or disguise pursuant), but where the witness is nonetheless questioned by the defence. 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 apply to those protective measures, the judge must determine that there was a reasonable suspicion that the witness would be frustrated or limited in carrying out his or her profession due to the making of his/her statement. For instance, this could concern informants.¹⁰⁷

The act, thus, introduced important changes. It became clear that only the examining judge can decide on the basis of legal criteria whether someone has a legitimate ground for staying anonymous, and who will examine such a witness in accordance with the procedure described in the *Wetboek van Strafvordering*.¹⁰⁸ Nevertheless, where it is necessary to protect the identity of the threatened anonymous witnesses, the accused may still be excluded from such witness examination by the examining judge.¹⁰⁹ In accordance, statements of anonymous witnesses can still be relied upon without ever having been examined by the defence or the judge.

As a consequence, 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 witness.¹¹⁰ However, the ECtHR also held that the judiciary should be more cautious in granting full anonymity to investigators.¹¹¹

Furthermore, the ECtHR held 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 procedure is that the accused has been offered sufficient opportunities to contest the reliability of the statement and the credibility of the witness.¹¹² 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

¹⁰⁷ HR 14 maart 2006, NJ 2006, 209. See also W.H.B. Dreissen, *Bewijsmotivering in strafzaken*, Den Haag: Boom juridische uitgevers 2007, p. 67.

¹⁰⁸ HR 5 november 1996, DD 97.067.

¹⁰⁹ J.F. Nijboer, *De waarde van het bewijs*, Deventer: Kluwer 1999, pp. 64-65.

¹¹⁰ ECtHR, *Doorson v. The Netherlands*, Application No. 20524/02, 26 March 2006.

¹¹¹ ECtHR, *Van Mechelen and Others v. The Netherlands*, Application No. 21363/93, 23 April 1997.

¹¹² J.F. Nijboer, *Ongehoorde getuige, Delikt en Delinkwent* 1992, pp. 1006-1014.

ECtHR prefers a personal confrontation between the witness and the accused. The Court would also accept an examination by means of telecommunication.¹¹³ 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 trial.¹¹⁴ However, the Dutch Supreme court stated that the accused need not to be given the opportunity to challenge the anonymous witness in case the establishment of proof is sufficiently corroborated by other evidence.¹¹⁵

Unfortunately, it can be concluded that the influence of European case law has not caused Dutch criminal proceedings to give up their written character. According to Garé, this can be explained by the Netherlands Supreme Court's interpretation of European case law, which is charitable with regard to the current practice in the Netherlands.¹¹⁶ Therefore, the principle of immediacy has a limited role in the Dutch criminal procedure. If the accused does not make any request for an incriminating witness to be called at trial, such a person is likely to be called. The defence has to take the initiative. (*onmiddellijkheid op bestelling*).

¹¹³ B.E.P. Myjer, 'Getuigende dienders en Staatsburgse rechtsbescherming', *Nederlands Juristenblad* 1997, pp. 883-889.

¹¹⁴ Garé 1994, p. 126-127.

¹¹⁵ HR 1 februari 1994, NJB-katern 1994, p. 158.

¹¹⁶ Garé 1994, p. 142.

6. Proposals for reform

The limited role of the principle of immediacy in the Dutch criminal procedure has led to proposals for reform. For instance, Garé wrote an article regarding the negative statutory system of evidence in the Dutch criminal procedure. Garé pleaded for the abolishment of this ‘negative evidence system’, she opted for the evidentiary system of free evaluation of the evidence by the judge. The reason for this plea lies, according to Garé, in the inconsistency that has arisen from the implementation of the Witness Protection Act. She states that the rules of evidence (338-344a Sv) has become inconsistent. Before the implementation of this act there was a certain inconsistency between the law and the practice regarding the principle of immediacy. The law and the practice were, however, clear. After the implementation of the Witness Protection Act nor the law and the practice are consistent anymore. Furthermore, Garé also pleads for a more important role of the principle of immediacy in the Dutch criminal procedure. The judge should be obliged to ground his judgment on the most immediate evidence.¹¹⁷ Nijboer does not agree with her reasoning. Nijboer states that maximizing the role of the principle of immediacy can also be enforced in a ‘negative evidence system’.¹¹⁸

Groenhuijsen, on the other hand, agrees with Garé, and also proposes for a free system of proof. According to Groenhuijsen, judges should be able to evaluate the available evidence produced in the dossier in complete freedom. Judges are expected to scrutinize the dossier and assess the weight of all available evidence in the context of the totality of the evidence.¹¹⁹

Further, in the prestigious project *Strafvordering 2001*, a proposal is made regarding the practice of the principle of immediacy. In this project it is noted that Article 315 Sv (the authorization for the judge to call witnesses to the trial) is too limited. In order to prevent unnecessary infringements of the interests of the trial participant, it is proposed to expand the authority of the judge so that he can call witnesses at trial prior to the start of the trial stage. Such an extension makes it possible for the judge to prepare sufficiently for the trial. Further, the authors of *Strafvordering 2001* also embraced the idea that in the more serious cases,

¹¹⁷ D.H.R.M. Garé, Heeft ons negatief-wettelijke bewijsstelsel zijn langste tijd gehad?, *Delikt en Delinkwent* 1996, pp. 119-133.

¹¹⁸ J.F. Nijboer, ‘De toekomst van het strafrechtelijk bewijsrecht’, *Delikt en Delinkwent* 1996, pp. 440-450.

¹¹⁹ M.S. Groenhuijsen, ‘Bewijsrecht als toetssteen voor de systematiek van een Wetboek van Strafvordering. Pleidooi voor een vrij bewijsstelsel’. In: A.H. Klip, A.L. Smeulers, M.W. Wolleswinkel (red.), *KriTies. Liber amicorum et amicarum voor prof.mr. E. Prakken*, Deventer: Kluwer 2004, p. 147-158.

which are brought to the panel of three judges (*meervoudige kamer*), the incriminating witnesses should be questioned at the trial stage. In order to prevent inefficiency, the hearing of these witnesses should be conducted by one judge, instead of three judges.¹²⁰

I agree with this proposal, hence, the appearance and questioning of a witness in open court, holding a contradictory debate about his or her statements in presence of the accused, forms an important 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 far preferable to written alternatives.

The high value attached to the immediacy principle, is not without reason. The procedure in line with the principle of immediacy can be of significant importance for the quality of the evidence. Moreover, an immediate procedure enables an effective control for the judge on the reliability and the credibility of the witness, which is crucial given the errors that might occur at the moment the witness memorises the observations about the facts, or at a later stage. The ECtHR already stated that such an absolute 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.

Furthermore, the importance of the immediacy principle is linked to the intrinsic advantage of allowing a judge to form a personal image of the witness and to put questions directly to him or her. As shown in Chapter 3, the ECtHR considers it of great importance that a judge could, *in person*, form an image of the reliability of the witness.

Therefore, I would recommend to adopt the proposal of *Strafvordering 2001* that in the more serious cases, which are brought to the panel of three judges (*meervoudige kamer*), the incriminating witnesses should be questioned at the trial stage.

¹²⁰ A. den Hartog, 'De getuige in het strafprocesrecht; voorstellen voor een nieuwe regeling'. In: M.S. Groenhuijsen & G. Knigge (red.), *Het eerste interimrapport onderzoeksproject Strafvordering 2001, Het onderzoek ter zitting*, Groningen 1999, p. 346.

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