Fewer decisions, more considerations

The WODC has been asked by the directorate *Rechtsbestel* of the Ministry of Justice to evaluate two statutes of November 16, 2004. One of these had to do with preliminary detention; the other with the grounds given in the judgment. The basic question was whether the new statutory rules have contributed to the improvement of efficiency of criminal proceedings. The statute regarding the introduction of a so called 90 days order regarding preliminary detention did; however, the statute, lessening the requirements of the statement of evidence in a verdict if the suspect has confessed, did not. Fewer decisions have to be made regarding preliminary detention because the judge is no longer required to decide each 30 days. But judges have to report their considerations regarding proof and punishment more often.

The research took place within two courts of first instance (in Rotterdam and Zwolle) and one appellate court (in ‘s Hertogenbosch). In order to assess the effect of the statutory changes samples have been taken of dossiers of completed criminal cases in which the decision was taken in the years 2004 (before the statutory change came into force) and 2007 (after). At the courts of first instance 150 files of the magistrate’s court (Politierechter – 1 judge) and 100 files of the full court (Meervoudige Kamer – 3 judges) have been studied. At the Appellate Court 200 files of the full court in 2004 and 2007 have been studied. Moreover 50 files of the detention chambers of the Appellate Court were studied, but this proved to be of no consequence for our investigations. Further an expert meeting has been held and members of the Prosecutor’s Office have been interviewed.

After the statutory change in 500 files of the courts of first instance of 2007 132 orders were found in which a 90 day order for preliminary detention has been decided. The order can be found especially in dossiers of cases that have been dealt with by the full court. Looking at all cases of the full court in no less than 60% the 90 day order has been given. In 70% of the cases where a person has been preliminary detained for 90 days this was decided after one decision. The most important reason to decide a 90 days order in one judgment is whether the preliminary criminal investigations have been almost finished or not. If not, than no 90 day order!

In the completed cases of the Appellate Court in ‘s Hertogenbosch the new statutory possibility was used much less. In 10% of the cases the possibility to give a 90 days order has been used – before the trial in the first instance – and the new possibility to lengthen preliminary detention after appeal with 120 days at once has not been used at all, although other appellate courts did.

Although judges tend to be circumspect with the possibility to order a 90 days preliminary detention for underage defendants – in some districts it never happens – we found 4 cases in which a 90 day order was given to an under aged person out of 24 cases (of all 74 with an underage defendant) wherein preliminary detention has taken place.

The use of the 90 days order doesn’t necessarily mean that efficiency is improved. It’s important to realize in that respect that the total amount of sessions of the detention chambers in the investigated files of 2004 was 868 against 422 in 2007. This reduction has not merely been caused by the introduction of the 90 days order. Part of the change can be explained because in 2007 in less cases preliminary detention has been ordered than in 2004. However, in both years an almost even amount of defendants (222 in 2004 and 221 in 2007) in the

investigated group have been detained for 90 days (be it in 3x30 and in 1x90 as well as 3x30 respectively). The 90 day order did not lead to an increase in the amount of requests to end the preliminary detention or to suspend it. Nor did the change lead to a dramatic lengthening of the preliminary investigations (which conclusion is based on the amount of so called pro forma trials that are purely held to make it possible that a person is preliminary detained for more than 110 days). However the gains in terms of efficiency did go together with an increase of the average length of the real detention with 4.5 days. But, this doesn't imply that the lengthening of the actual detention is a result of the statutory change that opened the way for a 90 days order. Roughly the statutory change has led to a yearly gain of 13 years work for judges and prosecutors for all courts of first instance taken together.

The second statute made it possible for judges to merely indicate the evidence in case the defendant confessed. So it was sufficient to indicate that the testimony of witness A had been used instead of writing down exactly what this particular witness had said. Although in the case law of the Supreme Court (Hoge Raad) on this article 359 paragraph 3 Code of Criminal Procedure) has been dealt with in 2006 and 2007 in our samples from 2007 no example of use of the provision has been found. The only conclusion can be that this statutory change is futile and didn't lead to more efficiency in criminal proceedings. However, that is no surprise. In the magistrate's court a so called 'record of oral verdict' already would suffice, or the slightly different 'stamped verdict' (art. 378 and 378a CCP). In both cases the grounds of the verdict are basically not written down. And whether the defendant confessed or not in the full court a so called shortened verdict would suffice (art. 365 CCP). The statutory change could have had only any relevance in cases of confessing defendants who appealed from a verdict of the full court.

The simultaneous change of art. 359 paragraph 2 CCP obliged judges to explain explicitly the rejection of 'explicitly underpinned views'. This did affect the working load of the courts. In the two courts of first instance in 2007 more than two times as many explicit rejections were found as in 2004. More views are brought up with an explicit underpinning and the rejection is also more elaborate than before. In 2004 51% of the views were explicitly underpinned according to our appraisal and in 2007 75%. Nevertheless verdicts in the magistrate's court ordinarily do not show any explanation of a rejection.

Again an assessment has been made of the consequences of this statutory change. The new art. 359 paragraph 2 CCP was accompanied by an increase of more than 1.900 cases in which an explicit rejection took place in all courts of first instance taken together. In total these courts have to deal annually with 127.000 cases. This comparison shows that an increase of cases that need explicit rejection does not mean immediately that the working load of the courts has increased dramatically. If we consider all courts of first instance as comparable, then the total increase per court per year is a mere 100 on a total amount of 6.700 in which an explicit underpinning of the rejection of a view is required. Thus, for the courts of first instance the effect of the statutory change is small.

However for the appellate courts this is different. These five courts deal with almost 23.000 cases annually. The court in our sample had to explicitly reject the views of the parties at trial in 50% of all cases. That means 2.300 cases in which extra considerations have to be written down in each Dutch court of appeal. The importance of the respective figures of 100 cases per court of first instance and 2.300 per appellate courts might be less revealing the figures regarding the 90 days order. More substantive issues are at stake as well. Most important of these is that not only the amount of the explicit rejections has increased but also the size of the

rejections. All in all the changes in grounding the decisions of the courts lead up to an increase of work for the courts, but especially for the appellate courts.