

The indictment as the basis for the judicial decision

A comparative law study into the framing of indictments and adherence thereto with respect to evidence, legal qualification, and punishment in the Netherlands, Belgium, France, Italy, and Germany

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Summary

Reason for this research

This report contains a comparative study into the form and content of indictments, and the extent to which judges are bound by the indictment when making decisions on evidence, legal qualification, and punishment. An indictment is an accusation prepared by a prosecutor or examining magistrate clarifying the actual conduct the suspect is being accused of and how that conduct may be qualified legally. The indictment lays the foundation for the examination in court as well as the judgment. The indictment not only informs the accused and possible victims about the charges, it also determines the scope of the criminal trial. The examination in court is conducted based on the punishable acts listed in the indictment. Moreover, judges may only decide upon facts laid down in the indictment, and may not convict accused for other, non-charged facts. In the Netherlands, this is known as the *grondslagleer* (i.e. the 'basis of assessment' principle).

The *grondslagleer*, pursuant to which judges, in principle, are bound by the literal wording of the indictment, is interpreted rather stringently in the Netherlands. In practice, this interpretation sometimes leads to complex and difficult to comprehend indictments, because often prosecutors will phrase alternative facts and legal qualifications in an attempt to prevent accused being acquitted due to a discrepancy between the indictment and the evidence. The *grondslagleer* has led to accused being acquitted or being convicted for a secondarily charged fact, because the (primary) charged fact could not be proved as a consequence of deficiencies in the indictment. The introduction of various 'rescue techniques' – such as modifying the indictment and remedying obvious writing errors – has not solved this problem entirely.

Recent discussions regarding the *grondslagleer* in light of the revision of the Code of Criminal Procedure have shown that the *grondslagleer* as such still enjoys support. It is generally accepted that the *grondslagleer* provides a clearly demarcated, efficient criminal trial, and that it benefits the right of the accused to be put on notice of the charges. However, criticism has been expressed with respect to the stringent interpretation given to the *grondslagleer* in the Netherlands. Therefore, the idea has emerged to retain the *grondslagleer*, but to apply it more leniently. A comparative study is useful in order to determine whether it is possible and advisable to make the current reading of the *grondslagleer* more flexible. Previous research has shown that other European countries also have expressions of this principle, but that they apply it less stringently than done in the Netherlands. Comparative research may be especially useful to help determine how the disadvantages of the *grondslagleer* in the Netherlands can be overcome without harming the rights of accused and the efficient completion of criminal cases.

Research questions

The central research question is:

In which way and according to which procedure are indictments framed in Belgium, France, Italy, and Germany, to what extent are judges in those countries bound by the indictment with respect to evidence, legal qualification, and punishment, and which insights does this yield for a possible reconsideration of the Dutch legal framework?

This central research question is divided into seven sub-questions:

1. What do law and jurisprudence require regarding charging punishable acts, and how are indictments edited?
2. Are preliminary indictments used (for instance, during the investigative phase when the investigation is not yet completed), and if so: how/when do these become final?
3. Is the indictment's revision open to discussion? If so, at which point during the criminal process and how is this discussion conducted? Do such discussions lead to delays in practice? If so: how is this regarded in legal scholarship?
4. To what extent is it possible to change the framed accusation during the criminal process?
5.
 - I. Are judges allowed to deviate from the indictment when making findings of fact? (for instance, by 'crossing out' or adding words, or by rephrasing)
 - II. Are judges allowed to qualify the facts as a different punishable act than the one aimed at in the indictment, and are judges allowed to qualify the proven facts themselves?
6. When determining the sanction, to what extent are judges at liberty to consider uncharged facts and circumstances?
7. Which bottlenecks and/or advantages exist regarding the aspects described in questions 1-6?

Research methods

This report contains a comparative study into the laws of the Netherlands, Belgium, France, Italy, and Germany. Germany and France are included in this study, because previous research has shown that the laws in these two countries – that have moderate inquisitorial procedural systems like the Netherlands – regarding the *gronslagleer* deviate considerably from the law in

the Netherlands. Belgian law is relevant, because the Netherlands and Belgium had similar legal systems at the beginning of the 19th century, but these have since deviated increasingly from one another. The choice for Italian law is inspired by the fact that the examination in court in Italy is based partially on adversarial principles. The assumption was that the Italian rules with respect to indictments could therefore differ considerably from the rules in countries with a more inquisitorial law system.

The foreign rules regarding the *grondslagleer* have been studied within the context in which they function. Therefore, each country report begins with a brief account of the criminal trial, the parties and their competencies and rights, and an outline of criminal procedure. Subsequently, the sub-questions outlined above are answered per country. Legislation, literature, and jurisprudence have been consulted for this. Also, approximately eight experts per country have been asked for information about the workings of these foreign laws as well as potential bottlenecks and advantages. These experts have been interviewed (by telephone) or have answered the questions in writing.

A comparative analysis was conducted based on the results from the country reports. In this analysis, the similarities and differences between the studied countries have been mapped. It also involved searching for explanations for the choices countries have made, the advantages and disadvantages of those choices, and the possible connection to different procedural aspects. In particular, attention was paid to the *grondslagleer's* influence on four relevant criminal law interests, namely (i) the demarcation of the examination in court, (ii) defence rights of the accused, (iii) preventing that the innocent are prosecuted and convicted, and (iv) the efficient completion of criminal cases. Furthermore, the relationship between the parties has been taken into account, in particular the relationship between the prosecutor and the judge.

Findings and conclusions

Content indictment

In accordance with article 6 ECHR, the law and jurisprudence of all the studied countries require that the indictment state with sufficient specificity the facts the suspect is charged with (cause or accusation) and how those facts may be qualified legally (nature or legal qualification). However, these requirements are construed differently in the studied countries.

In the Netherlands, Belgium, France, and Italy the charge of one set of facts is phrased in one sentence. In the Netherlands, Belgium, and France, this contains both the elements of the crime and a concrete description of the charged facts, resulting in those facts and the preliminary legal qualification being strongly intertwined. In Italy, it is not necessary to include the elements of the crime in the indictment. It suffices to include an actual description of the charged conduct. In Germany, unlike in the other countries, the facts and preliminary legal qualification are included in the indictment separately. The indictment thus consists of two components: one in which the supposedly fulfilled elements of the crime are included, and one in which the conduct the accused is accused of is described.

The extent to which facts are specified in indictments differs per country. In German indictments, the conduct for which the accused stands trial is sometimes described very elaborately, while in Belgium and France it suffices to specify this rather summarily. The

Netherlands represents a middle ground between these two extremes. Typical for Dutch indictments is the use of alternative facts (for instance, by means of alternative or primary-secondary indictments), alternative elements of crime, and alternative specifics (for example 'on or about'). This practice – that does not or barely exist abroad – has to do with the Dutch interpretation of the *grondslagleer*, according to which judges are, in principle, bound by the literal wording of the indictment. Nevertheless, there are various possibilities for phrasing indictments more clearly with the current interpretation of the *grondslagleer*. First, the elements of the crime could be left out of indictments – like in Italy – or the facts and the elements of the crime could be included in indictments separately, as it is done in Germany. Second, the facts – like the German and Italian examples – could be phrased using more clear, non-legal language, and indictments could be broken up into multiple sentences. Third, indictments could be phrased less specifically – like in France and Belgium – by including less factual details in them.

In order to make indictments of large-scale crimes less complex, a practice has emerged recently in the Netherlands with respect to large-scale child pornography cases, according to which only a selection of images is included in indictments. The non-charged images then do not play a role with respect to findings of fact, but they can have an influence on the punishment, because judges regard the large-scale nature of the crime as a circumstance that may increase the severity of the punishment. This is not allowed in Germany. In Italy, however, a similar practice exists, but there the possession of large amounts of child pornography counts as a statutory aggravating circumstance. The question remains whether such an aggravating circumstance should also be included in Dutch law, considering the fact that there are significant disadvantages to this. It would still have to be clear from the evidence that a large amount of images exists, while beforehand, it would be unclear why these images would not have to be specified. Moreover, such a provision would then need to be included with all crimes that may be committed upon a large scale. And finally, legal practice already appears to have found a solution to indictment problems in child pornography cases.

Review and modification of (preliminary) indictments prior to the examination in court

In the Netherlands, sometimes preliminary indictments do not have to adhere to the requirements of article 261 of the Dutch Code of Criminal Procedure (hereinafter: Sv). It is not until the commencement of the examination in court that the indictment will be modified in such a way that it adheres to the statutory requirements. In Belgium, France, Italy, and Germany, this possibility does not exist. However, in all of the studied countries indictments can be reviewed by a judge prior to the examination in court, and if need be, modified within the framework of a so-called *ingangsprocedure* ('access procedure'). An access procedure is aimed at assessing the validity of the indictment and the feasibility of the criminal case. Especially in Italy and Germany, the access procedure has a prominent role in the criminal process. In these countries, an access procedure, during which a debate about the indictment takes place prior to the examination in court, generally happens in each case. Judges may modify the indictment as a result of this debate. In Belgium and France, the access procedure is connected to the judicial investigation, which only takes place when there is a suspicion of grave punishable acts. In those cases, a judge determines whether the charges brought by the

prosecutor are sufficiently supported by evidence, and decides for which punishable acts the suspect will be prosecuted.

In the Netherlands, the procedure of objecting to the indictment (art. 262 Sv) may be viewed as the equivalent of an access procedure, considering that this similarly involves a judge reviewing whether there are sufficient indications that an accused might be guilty. However, this is not an actual access procedure – like in Italy and Germany – because (i) at the moment of an objection procedure, the case is already pending due to the fact that the indictment has already been issued, (ii) an objection procedure can only be initiated by the defence, (iii) the procedure is predominantly aimed at the feasibility of the prosecution, not necessarily at the indictment's revision, and (iv) the judge is not permitted to modify the indictment himself – he may only indicate which changes must be made to the indictment when he finds the objection inadmissible or unfounded. Unlike in Italy, a judge that will also act as trial judge may deal with the objection.

It may be worth considering introducing an independent access procedure in the Netherlands – modeled on the Italian and German examples. That way accused may be protected against rash prosecutions and convictions, and could the subsequent examination in court be demarcated more clearly. Furthermore, an access procedure may lead to a more efficient criminal process, because debates regarding indictments then take place prior to the examination in court. However, the question remains whether these advantages will actually materialize in practice. The comparative analysis shows that access procedures in other countries are mainly applied in complex criminal cases, and that simplified procedures have been developed for the settlement of uncomplicated criminal cases. Moreover, it remains unclear whether the foreign access procedures lead to clearer indictments, better-demarcated criminal trials, and a more efficient completion of criminal cases. The access procedures cost time, money, and capacity, while the debate about indictments prior to the examination in court – to the extent that takes place – cannot always prevent that also during the examination in court such debates arise again.

Review and modification during the examination in court

In almost all of the studied countries, it is possible to modify the indictment during the examination in court, but it differs per country who takes such an initiative as well as who is authorized to carry out modifications. In Italy, within the limits discussed hereafter, the prosecutor is authorized to modify the indictment, both with respect to the facts and the legal qualification of those facts. The prosecutor does not need the trial judge's approval for this. The trial judge is only authorized to change the legal qualification of the facts of his own motion. In Belgium and France, the prosecutor loses his authority to make changes to the indictment as soon as the examination in court begins. From that moment on, only the trial judge may make certain limited adjustments to the facts and legal qualification, whether or not based on a prosecutor's motion. Germany is the only studied country in which the indictment cannot be modified once the examination in court has started. The prosecutor may, however, add new facts to the indictment if the accused agrees to this and the case can be completed without any significant delay – meaning without further investigation.

Like in Italy, but different than in Belgium and France, the initiative to modify the indictment lies with the prosecutor in the Netherlands. The prosecutor may add aggravating

circumstances to the indictment verbally during the examination in court (art. 312 Sv). The prosecutor is dependent upon the trial judge though when it comes to other changes regarding the facts or legal qualification, as it is the trial judge who eventually decides whether a suggested change is permissible (art. 313 Sv). In the latter case, the accused must be notified of the changed indictment in writing, and must be given the opportunity to prepare a defence against it. There does not seem to be a convincing argument in favor of granting the authority to modify to different parties, and for the differences regarding respect for defence rights. It may therefore be worth considering to introduce one single procedure for modifying indictments, in which respect an addition would also count as a modification.

A judge in the Netherlands is not allowed to change the indictment of its own motion. At first glance, such a power would also not sit well with the public prosecutor's exclusive authority to prosecute. Furthermore, it could raise questions in light of the impartiality of judges. If a judge would modify the facts on his own initiative, it could create the appearance of bias. However, an option could be to give judges the power to inform prosecutors about the advisability of a certain modification of the indictment. In Dutch legal practice, it at times occurs that judges address the indictment's revision during the examination in court. This method does not have to be problematic in light of the judge's impartiality. When determining whether such is the case, it may be of significance whether the revision leads to changing some factuality or to a modification of the facts that would result in a different legal qualification than the preliminary legal qualification when making findings of fact.

Dutch criminal procedure does not provide for the possibility – as in Germany – to add new facts to the indictment during the examination in court. The introduction of such a possibility could enhance the efficiency of the criminal process, but will most likely only be of added value in a limited amount of cases, because generally new facts will require further investigation.

In order to prevent that the criminal trial's scope can be adjusted unlimitedly, changing the indictment during the examination in court may never, in none of the studied countries, lead to charging a 'different fact'. In France and Italy there is an exception to this rule, namely when the accused agrees to a change that no longer entails charging the 'same fact'. It differs per country whether something may be regarded as a 'different' and a 'same' fact. The indictment's modification should never be at the expense of the accused's right to an effective defence. The accused must therefore be notified of the proposed change and be given the opportunity to respond to it.

Significance of the grondslagleer for findings of fact

In all the studied countries, judges may base their decisions only upon charged facts, in conformity with the *grondslagleer*. In the Netherlands, the judge is, in principle, bound by the indictment's literal wording when making findings of fact. He has very limited leeway to correct obvious writing errors or to 'read something into' the indictment. When such alterations are not possible, the judge will 'cross out' any parts in the indictment he considers not proven, and acquit the accused of those parts. Thus, the prosecutor primarily determines the case's scope.

In the studied foreign countries, judges have more leeway when deciding upon facts, and the 'crossing out' custom does not exist. In Belgium, France, and Germany, judges may deem aspects that are not included in the indictment proven, as long as in essence it can be

regarded as the same fact as was charged. Consequently, findings of fact may differ from the literal wording of the indictment. The answer to the question whether something is considered an essentially different fact differs per country and is not always easy to give. In all the studied foreign countries, it is a requirement that the accused be notified of possible findings of facts that were not part of the indictment, and be given the opportunity to respond to this. If necessary, the examination in court will be reopened to this end.

Due to the fact that Dutch judges are, compared to their foreign counterparts, strictly bound by the indictment when making findings of fact, the criminal trial in the Netherlands is clearly demarcated and the accused knows against what to defend himself. In other countries – in which not-charged parts may be found to be proven – the substance of deliberations is less clear. The judges' greater leeway in foreign countries does result in the guilty being acquitted less often because of deficiencies in the indictment, as minor discrepancies between the indictment and findings of fact are permitted. Moreover, appeals against decisions only because the evidence does not support certain aspects of the indictment, while other non-charged facts could be proven, can be avoided. This benefits the criminal trial's efficiency.

Significance of the grondslagleer for conclusions of law

In all the studied countries, the trial judge is not so much bound by the indictment when drawing conclusions of law but he is bound by the findings of fact. The more room the judge has to deviate from the indictment when making findings of fact, the less the indictment dictates the conclusions of law.

As stated above, Dutch judges making findings of fact are bound rather strictly by the indictment, which is a mixture of legal elements of the crime and factual specifications of those elements. Consequently, conclusions of law are usually a given once the findings of fact are made, leaving very little room for alternative legal qualifications. It hardly ever happens that a proven fact falls under more than one crime definition or that after crossing parts out of the indictment a punishable act falls under a different crime definition than the one envisaged by the prosecutor. Therefore, the preliminary legal qualification included in the indictment is decisive in the Netherlands. While this provides for a clearly delineated criminal trial in which the accused knows what to aim his defence at, it could lead to undesirable acquittals and delays when the public prosecutor has to appeal judgments only to adjust the legal qualification. If the indictment's wording were less binding and less legal in nature, judges would have more room to give different legal qualifications than indicated in the indictment to findings of fact, which could make criminal trials more efficient.

In the studied foreign countries, the trial judge is not bound by the preliminary legal qualification given in the indictment. This makes sense, because judges in Belgium, France, Italy, and Germany are permitted to deviate from the facts in the indictment to a certain extent. In accordance with ECtHR case law, the accused must however be notified of the intended re-qualification and be given the opportunity to respond to it. With a view to efficiency, this notification preferably takes place during the examination in court, but sometimes the investigation has to be reopened. It is not unthinkable that giving such a competency to re-qualify to Dutch judges would lead to additional work, because judges would then have to assess the dossier independently – separate from the indictment – and pay

attention in their motivation to the reasons for deviating from the prosecutor's preliminary legal qualification.

Significance of the grondslagleer for sentencing

In all of the studied countries, the punishment must correspond to a proven fact that has been qualified as punishable act. There is a connection between the indictment and the punishment, because only charged facts can be deemed proven. This connection is rather weak, though. In none of the studied countries does the indictment form the *direct* basis for sanction decisions. When determining a concrete punishment, judges may take into consideration factual and personal circumstances that are not included in the indictment – such as previous criminal behavior. This relates to the starting point that judges must be able to take all relevant sentencing factors into consideration for an adequate sentencing determination.

In the Netherlands, the sentencing decision may be based on non-charged facts that the accused confessed to. This is called an addition *ad informandum*. None of the studied foreign countries have comparable settlement modalities.

Relationship between the prosecutor and the judge

The Dutch prosecutor has a prominent position compared to his foreign counterparts with respect to framing the indictment. He determines in large part the content and scope of the criminal trial. The prosecutor has the exclusive authority to prosecute: he determines whether and for which fact(s) a person will be prosecuted, and how the indictment will be framed. The indictment in the Netherlands is not by default reviewed by a judge prior to the examination in court. In no phase during the procedure do judges have the authority to change the facts or preliminary legal qualification of their own motion. He does decide upon motions to modify the indictment during the examination in court.

Also in the studied foreign countries, the starting point is that the prosecutor takes the initiative to prosecute, and the judge is, to a certain extent, bound by the prosecutor's choices regarding the indictment's phrasing. Particularly in Belgium and France, this starting point is maintained less stringently than in the Netherlands. In serious criminal cases, a judge decides whether to prosecute, and frames the indictment. Furthermore, only the trial judge is authorized to alter the indictment after the commencement of the examination in court, either of its own motion or pursuant to a request made by one of the parties, and he may, to a certain extent, deviate from the prosecutor's charged facts and preliminary legal qualification during deliberations. In Italy and Germany, a judge examines the indictment within the framework of an access procedure. This judge is authorized to decide that the indictment will only be admitted in modified form. In Italy, if the examination in court has already begun, only the prosecutor is authorized to change the charged facts. In Germany, changing the indictment during the examination in court is not permitted.

The judge's influence on the indictment in the studied foreign countries – amongst others, due to the indictment's review and possible modification during an access procedure – is at odds with the prosecutor's exclusive authority to prosecute, and may make it difficult to avoid the appearance of a judge's partiality. This is especially the case when judges from access procedures are allowed to also act as trial judges – as in Germany – or when judges inform the

accused during the examination in court that the indictment will be modified because the evidence offers more support to a different set of facts.

Possible interpretations of the *grondslag*

Based on the previous findings, it may be concluded that all studied countries have a *grondslag* in the sense that only charged facts can be subject to a judge's findings of fact. Even though the term *grondslag* is not used abroad, foreign judges must also base their decisions on the indictment. This comparative study makes clear that vast differences exist amongst the practical interpretations of the *grondslag*. Only in the Netherlands does the *grondslag* bind the judge to the indictment's literal wording when making findings of fact. This interpretation of the *grondslag* originated in practice; the Code of Criminal Procedure does not dictate this. Therefore, the *grondslag* could be interpreted differently within the boundaries of the law. In this report, three possible interpretations of the *grondslag* are presented that can be applied without needing to amend the law.

According to the first option, which is closest to current legal practice, for each word in the indictment it must be determined whether it can be proven. An important advantage of this interpretation is that the scope of the case is clear for all participating parties. Such a strict interpretation of the *grondslag* could also be desirable from an efficiency point of view. With more lenient interpretations the case's scope widens, resulting in more investigative acts being relevant to deciding the case. On the other hand, efficiency could be at stake with a strict interpretation of the *grondslag* when an incorrect indictment is not corrected during the examination in court, the accused is subsequently acquitted, and the prosecutor appeals the judgment to realize a conviction. Furthermore, a strict interpretation of the *grondslag* could lead to unwanted acquittals, because the punishable act was not charged (comprehensively enough). In order to prevent this, the prosecutor will have to frame the indictment using phrasings in the alternative. This has as disadvantage that the indictment will be more difficult to understand for the parties, and that mistakes in the indictment are easily overlooked due to its complexity.

The second option entails that judges are only bound by the indictment's literal wording when it comes to the elements of the crime. With this option, judges cannot deem elements that are not included in the indictment proven, but they may deviate from the indictment's factual description thereof. Judges could then come to a finding of fact regarding a punishable act aimed at by the prosecutor if *other* specifics can be derived from the evidence than the ones included in the indictment as specification of an element of the crime. This way, judges could deem proven, when assault by means of 'kicking' was charged, that the accused assaulted the victim by hitting them. This should not lead to findings of fact that are considered different facts in the sense of article 68 of the Criminal Code (hereinafter: Sr). In certain instances, the accused will have to be notified of the possibility that an element may be explained in different factual terms, in order for him to adjust his defence accordingly. Because the judge – compared to the first option – has more freedom to reach findings of fact, the chance of acquittals due to mistakes in the indictment is smaller, and less often will it be necessary to alter the indictment. Furthermore, the prosecutor may include fewer alternatives in the indictment because the factual descriptions are not decisive for findings of fact, although he will probably still make use of primary-secondary indictments. This option is to some extent already visible in Dutch legal

practice. With respect to small, non-essential discrepancies between the evidence and the indictment, judges already deviate from the indictment's literal wording. The basis for the findings of fact appears to be mostly the *essence* of the specification of the charged elements of the crime.

With the third option, the essence of the charged conduct is the point of focus. Unlike the first two options, the literal wording of the indictment and the crime definition on which the indictment is based are not decisive. The judge may convict the accused based on a different crime definition than was charged, as long as the findings of fact are not considered different facts in the sense of article 68 Sr. This interpretation of the *grondslagleer* has as advantage that, in principle, acquittals due to mistakes in the indictment will not occur, and that the prosecutor does not have to include alternatives in the indictment. Indictments will therefore be easier to comprehend, and in that respect, do more justice to the right encompassed in article 6 ECHR to know exactly what one is being accused of. This third option is also efficient, because it is not necessary to alter the indictment when it does not correspond completely to the facts flowing from the evidence. A disadvantage is, however, that for the accused it is less certain for which punishable act he is being prosecuted and it is more difficult for him to conduct an adequate defence, because a different fact than literally charged may be considered proven, and moreover, that fact may fall under a different crime definition. In that respect, it adheres less well to the requirements of article 6 ECHR. The scope of the criminal trial is also less fixed. However, these disadvantages are negligible with respect to current Dutch law, given that the indictment can already be modified during the examination in court, in accordance with the same criterion central to this option: it may not be a different fact in the sense of article 68 Sr.

If option 2 or 3 is chosen for interpreting the *grondslagleer* in the Netherlands, jurisprudence must change. The Supreme Court will need to agree to Court of Appeal decisions in which they have deviated from the facts as charged. Moreover, with the third option, 'crossing out' parts of the indictment will no longer be possible, and when deviating from the indictment, the judge must formulate findings of fact that are tailored to the intended crime definition based on the evidence. With options 2 and 3, indictments can be framed in a less complex way. After all, the prosecutor does not have to mention various facts in the alternative when making the elements of the crime factually concrete. Moreover, with option 3 it would be unnecessary to work with primary-secondary and alternative indictments.

Judges may initiate such changes in legal practice by experimenting with findings of fact in which they deviate from the wording of the indictment, and by motivating well why such a deviation is allowed. Thereafter, it will be up to the Supreme Court to review whether a more flexible interpretation of the *grondslagleer* is permissible.