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Procedural Justice Seen to Be Done

The Judiciary's Press Guidelines in the Light of Publicity and Procedural Justice

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1. Introduction

The aim of this article is to assess the recent attempts by the Dutch judiciary to gain more public acceptance of its tasks and functioning in criminal justice by enhancing its relationship with the press. The central question to be answered is to what extent the current stance towards the media, as expressed in the press guidelines, corresponds with the principle of publicity, as well as with the empirical findings in the field of procedural justice. Both the principle of publicity and the procedural justice research, each in their specific context, aim at contributing to the judiciary's legitimacy. Firstly, this article will describe how the relation between the judiciary and the public and press concerning criminal proceedings has developed to what it is today, against the background of societal developments and the characteristics of the Dutch criminal justice system. Then, the principle of the publicity of criminal proceedings is outlined. This principle aims at securing the legitimacy of the (criminal) justice system in general and of the judiciary in particular and is therefore the primal normative foundation of the relationship between the courts, the press and the public. In the third part, some relevant findings of (psychological) procedural justice research are discussed. The concept of and research into procedural justice are likely to be of value to this article's aim, since they offer empirical data on how and by what standards people assess judicial procedures and authorities. These data thus provide an insight into how to gain more public confidence in the judiciary. Fourthly, the values of publicity are combined with the procedural justice concept. The penultimate part outlines the content of the current judiciary's press guidelines. The conclusion entails an evaluation of these guidelines in the light of normative notions of publicity and empirical procedural justice findings.

2. Developments in the relation between the judiciary and the public

2.1. 'The great unease'

The judiciary in the Netherlands is said to be the only public institution that had remained relatively unaffected by the decline of authority since the 1960s.[1] It seems, however, that those days are over.

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1 Notwithstanding the important but isolated points of criticism voiced since the 1960s, Th. Kempe, 'De publieke opinie en de strafrechter in de laatste halve eeuw: enkele inleidende opmerkingen', in G.Th. Kempe et al. (eds.), *Dilemma's in het hedendaagse strafrecht*, 1975, pp. 13-15.

Today, there is a general recognition that the judiciary, like all other public authorities, can no longer regard its authority as natural and unconditional; it must be earned.[2] This is of course not a Dutch phenomenon, it is one of many expressions of what modern democratic society demands of its public institutions: transparency and accountability.[3] Although surveys show that a stable 60% of the Dutch public are of the opinion that Dutch judges do their jobs well,[4] still during the last two decades the Dutch judiciary has been confronted with a negative public opinion voiced by a significant minority.[5] Not only has the Dutch judiciary been regarded as out of touch with modern society on such general issues as organizational efficiency and customer-friendliness, but also the core values of the judiciary have been called into question. Discussions about additional offices held by judges and the position of honorary judges have brought the integrity of the judiciary into question.[6] More recently, the increase in the number of disqualifications of judges (in recusal procedures) has provided ground for the conclusion that the public confidence in the judiciary's core qualities is declining.[7] The occurrence of miscarriages of justice in high-profile criminal cases has added to the negative attention towards the criminal justice system and the judiciary.[8] More generally, the media consistently question the ability of the system to fight crime and to successfully investigate, prosecute and try criminal cases; the criminal justice system and the judiciary's functioning in criminal cases have become a topic of political debate.[9] The opinion that the police have too little power to fight crime and that the judiciary imposes too lenient sentences in (high-profile) criminal cases has now been heard for many years. The public dissatisfaction with the criminal justice system has even obtained its own label: 'the great unease' (*het grote onbehagen*).[10] Against this background, several reports and academic articles about the advantages and disadvantages of lay participation in criminal adjudication were written. The most significant political activity that has come from this debate has been Parliament discussing the introduction of lay participation in the adjudication in criminal cases. The Minister of Justice concluded that the level of public confidence in the criminal justice system and the gap between public and judiciary were not of such a nature and degree that they necessitated the introduction of lay participation, which would be very costly and time-consuming.[11] Although research into public opinion concerning the judiciary shows contradicting outcomes and does not indicate compelling legitimacy problems of great urgency, the public confidence in the criminal justice system and the judiciary is still regarded as a subject of serious concern.[12]

2.2. Critical pinpointers

Just as any other, Dutch society has undergone many changes during the last few decades that have influenced public opinion towards crime and criminal justice and have had an impact on the criminal justice system itself. The Dutch developments however can be regarded as exceptionally sharp in several respects. The Dutch post-war criminal policy was famous for its mildness in penal matters, as evidenced in particular by its low prison rates. It has been characterized as institutionalized resistance towards criminal prosecution and imprisonment, firmly rooted in the minds and work of prosecutors and judges,

2 H. Gommer, 'Afscheid van het mythische gezag', 2008 *Trema* 31, no. 2, pp. 54-55.
3 A.M. Hol, 'Adjudication and the public realm. An analysis based on the work of Hannah Ahrendt', 2005 *Utrecht Law Review* 1, no. 2, p. 40.
4 A. Klijn & M. Croes, 'Public opinion on lay participation in the criminal justice system of the Netherlands. Some tentative findings for a panel survey', 2007 *Utrecht Law Review* 3, no. 2, p. 157.
5 H. Elffers & J.W. de Keijser, 'Het geloof in de kloof: wederzijdse beelden van rechters en publiek', in J.W. de Keijser & H. Elffers (eds.), *Het maatschappelijk oordeel van de strafrechter. De wisselwerking tussen rechter en samenleving,* 2004, p. 81. J. van Spanje & C. de Vreese, 'De rechtspraak in de media: drie negatieve trends', in D. Broeders et al. (eds.), *Speelruimte voor een transparantere rechtspraak,* 2013, p. 414.
6 L.E. de Groot-Van Leeuwen, 'Criticizing judges in the Netherlands', in M.K. Addo (ed.), *Freedom of expression and the criticism of judges. A comparative study of European legal standards*, 2000, pp. 154-159.
7 I. Giesen et al., 'Op weg naar een nieuwe wrakingsprocedure. Meer legitimiteit en minder oneigenlijk gebruik', 2013 *Nederlands Juristenblad*, no. 8, pp. 466-477.
8 Y. Buruma, 'Betrouwbaar bewijs', 2009 *Delikt en Delinkwent*, no. 4, p. 303.
9 T. Cleiren & T. de Roos, 'Democratisering van het strafproces?', in K. Boonen et al. (eds.), *De weging van 't Hart. Idealen, waarden en taken van het strafrecht*, 2002, pp. 178-179 and C.H. Brants, 'Trial by media: publiciteit in het vooronderzoek', in A.H.E.C. Jordaans et al. (eds.), *Praktisch strafrecht. Liber amicorum Jan Reijntjes*, 2005, pp. 51-54.
10 Th. de Roos, *Het grote onbehagen. Emoties en onbegrip over de rol van het strafrecht*, 2000 *Nederlands Juristenblad*, no. 45/46, pp. 2170-2172.
11 *Kamerstukken II* 2006/07, 30 800 VI, no. 118, pp. 2-3.
12 J.W. de Keijser et al., 'Strafrechters over maatschappelijke druk, responsiviteit en de kloof tussen rechter en samenleving', in J.W. de Keijser & H. Elffers (eds.), *Het maatschappelijk oordeel van de strafrechter. De wisselwerking tussen rechter en samenleving*, 2004, pp. 21-22.

on the basis of a relatively 'tolerant' public opinion.[13] The Netherlands did not engage 'in the "war on crime" around which all can unite' since social integration and solidarity were organized by pillarization and the politics of accommodation, which seem to have accounted for the relative mildness of Dutch reactions to crime.[14] The collapse of this all-important social and political structure has, amidst the more general societal developments of the decline of authority and individualization, left Dutch society strongly fragmentized. The media, no longer subjected to the constraints of pillarization, professionalized and commercialized quickly and have played an important role in creating positions on crime and criminal justice that sharply contrast with the once famous 'culture of tolerance'.[15] Since the 1980s crime and criminal justice have become a political topic of major importance. Politicians turn to the criminal law to provide solutions to societal problems, and the public expects the criminal justice system to provide social cohesion.[16] Due to a deeply felt unease about the decline of the shared identity or self-image of society, the collective rejection of causing harm and of victimhood, so obviously found in criminal justice, has become a point of focus.[17] These developments have brought about a more 'punitive' public and political opinion, calling for harsher punishment and critical of safeguards protecting the defendant.[18] Changes in the sentencing practice of the last two decades reflect these developments. Courts impose significantly longer prison sentences[19] and the legislator has, referring to public debate and criticism, raised the term of the maximum temporary prison sentence, ended the automatic reduction of the term of imprisonment and has restricted the possibilities to impose community sentences.[20]

In the light of the above (very roughly) sketched developments it comes as no surprise that the perceived lack of punitiveness has been pinpointed as underlying the so-called 'great unease' as to the judiciary.[21] The Dutch judiciary has had a long tradition of lenient sentencing, which was part of the more general penal policy operated throughout the system, but in which the judiciary's own anti-prison stance has been very important.[22] Downes concludes that the Dutch 'culture of tolerance' was operated on two mutually reinforcing levels to produce a relatively low post-war prison rate up to the 1980s: the judiciary's resistance to (lengthy) imprisonment and the absence of authoritarian public opinion, articulated through the media and expressed in daily life, playing upon the judiciary to enforce harsh penal sanctions.[23] Although 'tolerant' public opinion as to crime diminished between 1970 and 1983, the media became very critical and public and political demands of the criminal justice system rose, the judiciary, though aware of these developments, still professed a mild attitude towards sentencing in the mid-1980s.[24] Sentencing has become significantly harsher since then, but surveys show that the public feels that the criminal justice system is too soft on crime and judges impose too lenient sentences.[25] However, research providing members of the public with more information on a criminal case and the defendant generally finding a much less punitive opinion,[26] and research directly asking after the main

13 D. Downes, *Contrasts in tolerance. Post-war penal policy in the Netherlands and England and Wales*, 1988, particularly pp. 29-44.
14 Downes, supra note 13, pp. 73-74.
15 C.H. Brants & L. van Lent, 'aant. II-6 bij Algemene beschouwingen bij het onderzoek ter terechtzitting', in A.L. Melai/M.S. Groenhuijsen (eds.), *Het Wetboek van Strafvordering*, suppl. 126, 2001.
16 C.H. Brants, *Over levende gedachten. De menselijkheid van een functioneel strafrecht*, 1999, pp. 27 and 29-30.
17 H. Boutellier, *Solidariteit en slachtofferschap*, 1993.
18 F. de Jong & L. van Lent, 'De onschuldpresumptie onder de wals van een nationale identiteitscrisis', in C. Kelk et al. (eds.), *Veelzijdige gedachten. Liber amicorum prof.dr. Chrisje Brants*, 2013, pp. 265-266.
19 H. Elffers et al., 'News paper juries', 2007 *J Exp Criminol* 3, no. 2, p. 165.
20 *Wet van 22 december 2005 tot wijziging van het Wetboek van Strafrecht en de Wegenverkeerswet in verband met de herijking van een aantal wettelijke strafmaxima, Stb*. 2006, 11; *Wet van 6 december 2007 tot wijziging van het Wetboek van Strafrecht en enige andere wetten in verband met de wijziging van de vervroegde invrijheidstelling in een voorwaardelijke invrijheidstelling*, *Stb*. 2007, 500 and *Wet van 17 november 2011 tot wijziging van het Wetboek van Strafrecht in verband met het beperken van de mogelijkheden om een taakstraf op te leggen voor ernstige zeden- en geweldsmisdrijven en bij recidive van misdrijven*, *Stb*. 2012, 1. See for the references to developments in public notions concerning crime and sentencing and public criticism the Explanatory Memoranda: *Kamerstukken II* 2005/06, 30 513, no. 3, *Kamerstukken II* 2001/02, 28 484, no. 3 and *Kamerstukken II* 2009/10, 32 169, no. 3.
21 Klijn & Croes, supra note 4, p. 158.
22 Downes, supra note 13, pp. 36, 41 and pp. 81-87 showing a resistance of the Dutch judiciary against (long-term) imprisonment post-war up to the early 1980s.
23 Downes, supra note 13, p. 70.
24 Downes, supra note 13, pp. 86-87.
25 Klijn & Croes, supra note 4, p. 160; Elffers & De Keijser, supra note 5, p. 79.
26 W.A. Wagenaar, 'Strafrechtelijke oordelen van rechters en leken', 2008 *Research Memoranda*, no. 2 and research referred to by Elffers et al., supra note 19, pp. 166-167.

task and characteristics of the judiciary finds that the classic judicial characteristics and defendants' safeguards are highly valued.[27] It has therefore been concluded that the public may want a more punitive criminal justice on an abstract level, but that this wish stems significantly from people's ignorance about the criminal justice system.[28]

The other point of focus of the public's criticism of the judiciary is described as its lack of 'responsiveness',[29] referring to the degree in which judges are aware of the needs and wishes of society and expressly take them into account.[30] Research shows that the public thinks that judges operate in a rather isolated fashion, and especially do not explain their judgments well enough to the general public.[31] Responsiveness does not however figure among the most important characteristics of a judge: justice, impartiality and independence were considered more important than the judge's awareness of society's wishes or his ability to listen.[32] This last finding in particular shows that the issue of 'responsiveness' does not as such provide a 'new' perspective, since it has always been the judiciary's essential task to balance society's needs and concerns with the forming of an independent judgment, doing justice in the individual case.[33] What is new is that one of these scales in the balance seems to demand greater attention. Thereby, the real issue is how this greater attention can be provided.

2.3. The absence of the public

What the debate on public confidence in the judiciary and the gap between society and judiciary has done is to turn the spotlight on the vulnerability of the Dutch criminal justice system: its inability to deal with a decline in public confidence, to sooth the 'great unease'. The Dutch system does not have the mechanisms and organization nor the culture to give public opinion a role in the administration of criminal justice. First of all, the criminal justice system is unusually professionalized, even by continental standards.[34] There are no lay elements involved in the whole criminal process; all decisions in criminal cases (on investigation, prosecution, the verdict, the sentence) are taken by trained legal professionals.[35] The organization of the justice system as well as the criminal procedure is rooted in professionalism. Dutch criminal justice has a strong inquisitorial nature, in that the legitimacy of the criminal justice system and truth-finding reflecting the rule of law and upholding fair trial standards are largely dependent on the integrity of state officials – being neutral: impartial and independent – and their (visual) commitment to non-partisan truth-finding.[36] Although typically the pre-trial phase in which the dossier is compiled is more important than the trial itself in terms of fact-finding, the Dutch trial judge has a pivotal role in this system as the ultimate guarantor of justice. Not only does he figure at the end of the chain as the impartial and independent assessor of the pre-trial fact-finding, seeking the truth and deciding the case on the basis of a thorough examination of the case file and active questioning, his decision-making framework also determines the pre-trial decision-making by the public prosecutor. The professionalism and neutrality of the authorities, of the professional judge in particular, are regarded as the safeguards for the integrity of the system as a whole.[37] Moreover, in the Dutch tradition the value of professionalism is found particularly in the protection it offers from undue external influence.[38] The prosecutorial monopoly of the public prosecution service and the professional judge have both been based on the protection of

27 Elffers & De Keijser, supra note 5, pp. 78-79.
28 Elffers & De Keijser, supra note 5, p. 79.
29 Klijn & Croes, supra note 4, p. 158.
30 This definition is taken from Elffers & De Keijser, supra note 5, p. 53. The term was introduced by P.H. Nonet & P.H. Selznick, *Law and society in transition. Towards responsive law*, 1978.
31 Elffers & De Keijser, supra note 5, p. 68.
32 Elffers & De Keijser, supra note 5, pp. 64-65.
33 De Keijser et al., supra note 12, pp. 21-22.
34 Downes, supra note 13, p. 18.
35 T. de Roos, *Is de invoering van lekenrechtspraak in de Nederlandse strafrechtspleging gewenst?*, 2006, p. 7.
36 C.H. Brants & S. Franken, 'The protection of fundamental human rights in criminal process', 2009 *Utrecht Law Review* 5, no. 2, p. 24.
37 C.H. Brants & L. van Lent, 'aant. II-4.1 bij Algemene beschouwingen bij het onderzoek ter terechtzitting', in A.L. Melai/M.S. Groenhuijsen (eds.), *Het Wetboek van Strafvordering*, suppl. 126, 2001.
38 See for further elaboration, L. van Lent, 'Externe openbaarheid: fundamenteel en onbeduidend', in A. Beijer et al. (eds.), *Openbare strafrechtspleging*, 2002, in particular pp. 14-23.

the rule of law against private or political interests, revenge or bias.[39] On an institutional level that same thought has led to members of the judiciary not being elected or chosen, and to the fact that they are not obliged to account for their work and decisions to any external institution. Accountability is shaped in a system of hierarchical and professional monitoring:[40] the police are supervised by the public prosecutor, whose decisions are made accountable to the court before which the case is put, and the court (decisions) are reviewed by appeal courts. All of these characteristics exclude citizens not only formally from exerting any direct influence on prosecution and trial – placing even defence counsel in a passive position – but also contradict the notion of public involvement on a more fundamental level. The entire criminal justice system has been built on the trust placed in the professional judicial authorities and ultimately in the professional judge. Professionalism and internal monitoring safeguard the quality of the Dutch criminal justice system; participation of the public is therefore not only unnecessary but even unwelcome because external influence would be a disturbance of those safeguards.

2.4. Reaction by the judiciary

The confrontation with a negative public opinion has made the judiciary become aware of the necessity to assess its position in society and its relation with the general public. The gap between the judiciary and society, whatever its actual extent and character, is not to be taken lightly and serious efforts must be made to overcome it.[41]

In the light of the above described characteristics of the Dutch criminal justice system, there can be no surprise about the decision not to introduce lay participation. The more general notion of responsiveness has however been firmly embraced and is now generally regarded as a standard for the judiciary: judges are expected to foster and show awareness of societal concerns.[42] Still, since responsiveness in this context refers to the ability of the criminal justice system to give room to public opinion, to open the door to influence from outside, it contradicts the Dutch tradition of distance as the safeguard of independence, impartiality, fairness as such. Since institutional openings to public opinion are not available, the solution is primarily sought in providing more transparency and improving communication.[43] The Dutch Council for the Judiciary (*Raad voor de rechtspraak*) shows much ambition in making the courts fulfil the demands of modern society in trying to make the judiciary come closer to the public. Enhancing transparency has been one of its primal targets for a decade now,[44] and the needs and problems of society are positioned as one of the two foundations – next to the enhancement of independence, impartiality, integrity and professional quality – of the judiciary's current mission.[45] Every year the Council has initiated and published research on the topics of the public's perception of criminal justice and the relationship between the judiciary and the public.[46] Its aim of ensuring that the judiciary is firmly rooted in society implies, according to the Council for the Judiciary, that the judiciary should be in dialogue with society, visible in the media, following up on criticism and providing openness. The press guidelines of 2013 are presented as the expression of this openness.[47]

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39 See the arguments put forward in the Explanatory Memorandum of the Code of Criminal Procedure: *Kamerstukken II* 1913/14, 268, no.3, pp. 53-55.

40 C.H. Brants, 'Mag het volk ook meedoen?', in E. Prakken et al. (eds.), *KriTies: Liber amicorum et amicarum voor prof. mr. E. Prakken*, 2004, p. 141.

41 B. Kester et al., 'De Persrichtlijn in een veranderd medialandschap', 2001 *Research Memoranda*, no. 5, p. 33.

42 De Keijser et al., supra note 12, p. 22.

43 Klijn & Croes, supra note 4, p. 168.

44 See *Agenda van de Rechtspraak 2005-2008*; *Agenda van de Rechtspraak 2008-2011*; *Agenda van de Rechtspraak 2011-2014*; *Agenda van de Rechtspraak 2015-2018*; *Visie op de rechtspraak 2020*, <http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/Agenda-van-de-Rechtspraak-2015-2018/Pages/default.aspx> (last visited 7 September 2014).

45 *Agenda van de rechtspraak 2011-2014,* supra note 44, p. 16 and *Agenda van de rechtspraak 2015-2018*, p. 1.

46 <http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/publicaties/Pages/default.aspx> (last visited 7 September 2014).

47 *Agenda van de rechtspraak 2011-2014*, supra note 44, p. 10.

3. The principle of publicity

3.1. Foundations of the publicity requirement and the Dutch reserve

The primal aim of the principle of publicity is the legitimization of the criminal justice system. This can be deduced from the principle's history of ideas.[48] The French influence and domination brought the concept of the publicity of criminal proceedings, originating in the criminal justice reforms of the Enlightenment, to the Netherlands. The basis of the normative call for publicity lies in two related historical phenomena: the deeply felt distrust of the old (ancient regime) type of criminal procedure in continental Europe[49] – secrecy having been qualified by Beccaria as 'the greatest shield of tyranny'[50] – and the strong belief in reason and verifiability as mechanisms for truth-finding. The distrust being primarily centred in the judiciary,[51] reform thinkers of the 18th century considered public proceedings to be of fundamental importance for the protection of the individual involved in criminal proceedings.[52] Thus established public scrutiny would force the courts to take the human rights of the accused into account and to establish the truth by rational and law-abiding decision-making only.[53] This process was expected to result in the criminal justice system regaining public legitimacy. Publicity would thus not simply result in legitimacy because it would make criminal justice reforms visible to the public, but publicity itself was regarded as an important means to bring about those reforms. The presence of the enlightened critical public opinion would make the judiciary renew its orientation and adapt to the public perception of a legitimate criminal process.[54] This line of thinking reveals how the concept of publicity came to encompass the very idea of the participation of citizens in government. Starting out with proposals to have the public discuss the case with the judge during the public sessions, this resulted in the codification of citizens monitoring the judge of instruction (later reformed into the *jury d'accusation*), of trial by jury and of the election of judges, all considered aspects of the enlarged concept of publicity: the institutionalization of the public opinion in the criminal justice system.[55]

Interestingly, the latter connotation became completely lost in the Dutch implementation of the principle of publicity. After the end of the French domination the French legislation on criminal procedure was provisionally retained, but the jury and the publicity of the proceedings were immediately abolished.[56] After a long legislative process in which the Belgian Members of Parliament strongly opposed the Government's proposals for a new criminal procedure, based on '*en un mot, le retour de la procédure secrète*',[57] Parliament demanded – against the express wishes of the Dutch Government – that the whole of the trial proceedings be made accessible for all members of the public.[58] The jury was not reintroduced;

48 L. van Lent, *Externe openbaarheid in het strafproces*, 2008, pp. 17-46.

49 Such general public distrust was absent in England, where neither the criminal justice system nor its underlying assumptions were subjected to fundamental criticism until concerns about punishment effectiveness and humaneness started reforms in that respect. J.M. Beattie, *Crime and the Courts in England 1660-1800*, 1986, pp. 623-624. Although the courts were viewed favourably in their attitude towards the defendant (pp. 345-346), the treason trials in the 1680s brought them into disrepute which led to reforms of the trial procedure after the Revolution (1688), of which the abolition of the prohibition of defendants to use defence counsel was the most significant (pp. 357-358).

50 C. Beccaria, *Over misdaden en straffen. Ingeleid, van aantekeningen voorzien en vertaald door J.M. Michiels*, 1971, p. 337.

51 About the many measures taken to disempower the judiciary, see J.H. Merryman, 'The French deviation', 1996 *The American Journal of Comparative law* 44, pp. 111-114.

52 Despite the absence of distrust to the extent of the French resentment of the *noblesse de robe*, and the presence of the public trial, protection from the judiciary also became a prominent value in the English ideas on publicity. Jeremy Bentham found the public trial '(…) the surest of all guards against improbity. It keeps the judge himself, while judging, under trial', J. Jaconelli, *Open justice. A critique of the public trial*, 2002, p. 36.

53 Beccaria, supra note 50, pp. 329-337.

54 G. Haber, *Strafgerichtliche Öffentlichkeit und öffentlicher Ankläger in der französischen Aufklärung. Mit einem Ausblick auf die Gesetzgebung der Konstituante*, 1979, p. 179.

55 Haber, supra note 54, pp. 201, 206-211.

56 *Besluit van 11 december 1813*, no. 1, *Stb*. 10.

57 J.C. Voorduin, *Geschiedenis en beginselen der Nederlandsche wetboeken, deel VII: Wetboek van Strafvordering*, *deel II*, 1840, p. 4.

58 J.J.F. Noordziek, *Geschiedenis der beraadslagingen gevoerd in de Kamers der Staten-Generaal over het ontwerp Wetboek van Strafvordering en over het vraagstuk der jury, zittingsjaar 1828-1829*,1887, pp. 237-238, 259, 281, 306, 318, 336, 370 and J.J.F. Noordziek, *Geschiedenis der beraadslagingen gevoerd in de Kamers der Staten-Generaal over het ontwerp Wetboek van Strafvordering en over het vraagstuk der jury, zittingsjaar 1829-1830*, 1888, pp. 204-205.

the majority of Parliament preferred the professional judge to laymen who would be led by personal preference and bias instead of rational and legally correct reasoning.[59]

After its introduction in legislation in 1838 the public nature of proceedings gained a secure position in legislation (having found its way into the Dutch Constitution of 1848) and ever since then it has been described by scholars and legislators as a fundamental principle.[60] This has however not put an end to the objections against the principle; in the explanatory memorandum to the current Code of Criminal Procedure (*Wetboek van Strafvordering*) the legislator once again voiced concerns.[61] This paradox can be explained by the fact that although the abolishment of the publicity requirement was never considered (which would have been against the spirit of the age in which the public nature of the proceedings had gained a strong normative appeal abroad[62] and which would hardly have served any purpose considering that there is no mention of the public nature causing any problems),[63] the Dutch criminal justice system is built upon a totally different view of the relation between criminal justice and the public than the ideas from which the publicity requirement emanates.[64] These founding ideas entail that public influence is needed to induce the courts to uphold the rule of law (lawfulness, human rights, truthfulness, independence), whereas, as discussed above, the Dutch criminal justice system traditionally finds those safeguards within itself, in the neutrality and integrity of the criminal justice authorities and of the professional judge in particular.[65] The conclusion as to the Netherlands is that the publicity requirement has become part of Dutch criminal procedure primarily because of developments and circumstances beyond Dutch control (French domination, Belgian procedural tradition, influential support in Germany). Any clear conviction or reasoning as to the necessity of the publicity principle cannot be found. On the contrary, the principle has encountered mostly reserve and reticence.

3.2. Two categories of legitimization

It follows from the history of the concept of publicity that the public nature of the criminal procedure clearly has a protective pretention – it is meant to ensure protection for the individuals subjected to the criminal process by forcing the judge to provide fairness,[66] as well as a democratic one – it is meant to open up the criminal proceedings to input by the public. Therefore, two categories can be discerned within publicity's primal aim of (re)gaining public legitimacy for the judiciary: the proceedings' public nature must serve as a mechanism for monitoring its adherence to the rule of law, and it must provide modes for public participation that contribute to democratic legitimacy.[67]

Historically, these categories are interrelated, since the influence by the public was supposed to bring about the required fairness since the judiciary was distrusted to provide that itself. Within the context of the Dutch criminal justice system, where fairness is found in the absence of outside influences, this interrelation has not been realized. The marginal meaning of publicity, in law and in practice, can be explained from the fact that the essence of this principle just does not fit the Dutch system. By its very aim the principle requires that the proceedings and the judgment are adapted to their public nature, but in the Dutch interpretation the principle of publicity requires merely the accessibility of the courtroom to the public, presuming that, once this accessibility has been realized, there 'is' publicity.[68] Its goal, however, is not only to show the public how the court operates (which may be upholding the rule of

59 Voorduin, supra note 57, pp. 526-527.

60 *Kamerstukken II* 1993/94, 23 705, no. 3, pp. 20-21 (Explanatory Memorandum in which the pain of being null and void for not complying with the publicity requirement was expressly retained intact).

61 *Kamerstukken II* 1913/14, 386, no. 3, pp. 60, 117 and 119.

62 See, about Germany, M.T. Fögen, *Der Kampf um Gerichtsöffentlichkeit*, 1974, pp. 14-18.

63 J.A.G. de Vos van Steenwijk, *Artikel 156 der Grondwet* 1885, p. 40 claims that experience had taught that the legislator's objections at the beginning of the 19th century were unfounded.

64 Van Lent, supra note 48, p. 16.

65 C.H. Brants & L. van Lent, 'aan. II-4.1 bij Algemene beschouwingen bij het onderzoek ter terechtzitting', in A.L. Melai/M.S. Groenhuijsen (eds.), *Het Wetboek van Strafvordering*, suppl. 126, 2001.

66 Jaconelli, supra note 52, pp. 34-39 terms this 'the disciplinary rationale of open justice'.

67 See about the need to differentiate between the 'rule of law' component and the 'democratic' component of the concept of legitimacy, A.C. 't Hart, 'Democratie en rechtsstaat: de dubbele legitimatie van strafrechtelijk beleid', in F. Bruinsma et al (eds.), *Precaire waarden. Liber amicorum A.A.G. Peters*, 1994, pp. 33-41.

68 Dutch legislation and case law have not developed a concept of publicity that can be tested; publicity means no more than that the doors have not been closed, see Van Lent, supra note 48, p. 125.

law, or not), but of itself to further the aim of a fair trial. Only if the principle is operationalized as a procedural standard of fairness having, as such, implications for the application of other procedural standards can its normative meaning be properly realized. This has been strongly expressed in the case law by the European Court of Human Rights that reads the requirement of a public hearing as imposing requirements as to the content of the proceedings. This is most evident in the case law in which the Court has derived from the right to a public hearing the defendant's right to an 'oral hearing' or 'to be heard'.[69] The requirement of a public hearing encompasses the requirement that the judge may not decide a case without hearing the accused in person, and the right of the defendant to defend himself before the judge deciding his case.[70] The same idea is apparent in the case law in which the Court finds that compliance with the publicity requirement on appeal only remedies the non-compliance at first instance if a complete rehearing – including previously heard witnesses – takes place before the appeal court.[71] This case law is based on the notion that a public hearing is a session where something really *happens*, where the public can actually witness the case being heard. Therefore the concept of a public hearing must be understood to demand an 'articulate' process, i.e. oral and immediate.[72] Here we can find the meaning of publicity as a procedural standard of fairness: by its call for focusing on the lay public, it serves to secure the moulding of the procedure to the presence of outsiders who must be made to understand the proceedings in the case. The principle of publicity contributes to the judiciary's legitimacy as to the rule of law in demanding the 'articulation' (more directly realized through the application of other standards such as the right to confront witnesses) that is necessary for public scrutiny.[73] A similar approach has been taken as to the conduct and attitude of the judges. In calling the publicity requirement a safeguard for efforts to find the truth, as well as a means to convince the accused of the impartiality and independence of the court, the Court implies that the public nature must be understood by the judge as an incentive to adapt his conduct and attitude to the lay public. A clear example of the Court demanding that public opinion be given relevance for the procedure is to be found in the so-called 'appearances doctrine' concerning the fair trial requirements of equality of arms and impartiality.[74] The Court has held that, because of the 'public's increased sensitivity to the fair administration of justice', appearances must be taken into account in assessing the fairness of proceedings. This may mean that certain aspects of the procedure (such as the visible opportunity of only one party to address the judge; the previous involvement of the judge with the case), even though they have had no bearing on the decision, cannot be upheld. 'For the sake of the confidence the courts must inspire in the public', the public conception is taken into account in rephrasing a procedural standard.

The interpretation of the publicity principle as requiring public-focused proceedings, articulate and fair in the public eye, emphasizes that fairness is not something that has an existence of its own and, in order to comply with the requirement of publicity, is simply made visible by allowing the public into the courtroom to see it. The fairness that is supposed to be achieved by conforming to procedural standards must be shown to happen to the trial participants and trial spectators at once, by taking into account how the procedure will be viewed by laymen (to which group also the defendant belongs). To achieve the aim of legitimizing the judiciary, visualizing fairness therefore implies an explicit performing of procedural actions in which fairness is expressed, as well as an adaptation of conduct and attitude to the perception of fairness of the lay public. In that sense, the principle of publicity as a procedural norm imports the public perception of justice, mediated by the procedural standards of fairness, into the procedure.

Its procedural meaning therefore also activates its democratic meaning. Considering that the former is not realized in the Netherlands, what options are left to realize the latter? There is no clear-cut answer to the question of how democratic legitimacy is to be achieved, since this strongly depends on societal

69 *Allan Jacobsson v. Sweden* [1998], appl. no. 16970/90, *Valova, Slezak and Slezak v. Slovakia* [2004], appl. no. 44925/98.

70 *Tierce a.o. v. San Marino* [2000], req. nos. 24954/94; 24971/94; 24972/94, Para. 95:*'Du príncipe de la tenue de débats publics dérive le droit d'accusé à être entendu en personne par les jurisdictions d'appel. De ce point de vue, le principe de la publicité des débats poursuit le but d'assurer à l'accusé ses droits de défense.'*

71 *Riepan v. Austria* [2000], appl. no. 35115/97, Para. 40.

72 Van Lent, supra note 48, pp. 135-136.

73 See also P.J.A. de Hert, 'Jury en leken in Nederland: een identiteitsonderzoek', 2006 *Nederlands Juristenblad*, no. 39, p. 2230 who has developed a similar line of thinking as to the jury.

74 *Bulut v. Austria* [1996], appl. no. 17358/90; *Josef Fischer v. Austria* [2002], appl. no. 33382/96.

developments and publicly-held notions of justice. It can roughly be defined as the notion that public authority be exercised in conformity with the wishes and expectations of those who are subjected to that authority. In modern democratic society, the involvement of citizens in the exercise of public authority is regarded as essential to ensure that their opinions are taken into account.[75] This involvement serves not only to satisfy the democratic demands of the public, but is regarded as important for the proper functioning of public authorities. According to the European Court of Human Rights, 'The administration of justice serves the interest of the community at large and requires the co-operation of an enlightened public. There is a general recognition of the fact that courts cannot operate in a vacuum'.[76]

As discussed above, the direct participation of the public in Dutch criminal justice is excluded and public influence is traditionally regarded as conflicting with the required judicial independence**.** Although it is therefore difficult to gain democratic legitimacy, the necessity of involving the public in the administration of justice cannot be ignored, and is now, as has been discussed above, a topic of serious concern and consideration.[77] The question then is how the principle of publicity – the primal normative reference to democratic legitimacy in the Dutch system – must be operationalized so as to realize its democratic potency. In order for citizens to somehow become involved in this system's functioning, the role of publicity is to offer the transparency which is necessary to that end. In its basic form, the public nature of proceedings and judgments seems to allow for the involvement of the public. Public proceedings provide a platform for prosecutor and judge to account for their work to the public, and the public judgment even more so, which serves to explain the decision (also) to the public and is thus an even more explicit platform for democratic accountability. In theory, the presence of the public at trial and the judgment's readership would provide the public with information to form an opinion on the judiciary. In order to ensure democratic legitimacy, the publicity principle should not only be understood as requiring transparency in terms of output, but should also be used as a route for input by the public.[78] These rudimentary democratic possibilities are hampered by the systematic and cultural absence of the public: the lack of public participation in the system allows the judicial authorities to operate without being confronted with or forced to consider public opinion, the Dutch procedural model and culture make the trial unsuitable as the platform for transparency and accountability – the pre-trial investigation laid down in the dossier dominates the trial and proceedings are not geared towards 'articulation' which is necessary for the lay public, and the judiciary, being traditionally reserved in providing extensive reasoning, is especially reluctant in becoming involved in and responding to public debate voicing 'the public opinion'.[79]

That seems to leave the public debate as the most important tool for the public to form and to voice a public opinion about criminal justice. It is clear that the media have an essential role to play in this design: to provide information and a platform for public opinion. The freedom of the media to gather and publish information and opinions on the administration of justice and the quality of this work therefore largely determine the extent and quality of the public scrutiny of criminal justice. The democratic legitimization that the principle of publicity has to serve therefore requires the authorities to provide information and otherwise to facilitate the media in gathering such information. That aspect is not only relevant for the Dutch situation; the European Court of Human Rights has consistently recalled the task of the press to provide the public with information and ideas on criminal justice as on any other topic of public interest. Its case law has shown a remarkable development in recent years, stressing the importance of media reporting on criminal proceedings in order to serve the 'legitimate interest of the public in information on criminal justice' in the light of the public scrutiny of the criminal justice system.[80] The role of the media in criminal justice may generally be factually and normatively important, it seems to be especially

75 E.R. Engelen & M. Sie Dhian Ho,'Democratische vernieuwing. Luxe of noodzaak?', in E.R. Engelen & M. Sie Dhian Ho (eds.), *De staat van de democratie. Democratie voorbij de staat* (WRR-Verkenning no. 4), 2004, p. 20**.**

76 *Sunday Times v. the UK* [1979], appl. no. 6538/74; *Craxi v. Italy* [2003], appl. no. 25337/94, applying this idea specifically to press reporting on criminal justice.

77 This is not to say that in other (types of) justice systems the democratic accountability of the justice system is unproblematic. See e.g. Justice Ronald Sackville, 'How fragile are the courts? Freedom of speech and criticism of the judiciary', 2005 *Monash University Law Review* 31, no. 2, p. 210.

78 Van Lent, supra note 48, pp. 199 and 205.

79 Particularly pointed out by C. Prins et al., *Speelruimte voor een transparantere rechtspraak*, 2013, pp. 85-99.

80 See the case law discussed in L. van Lent, 'Media en strafproces: eisen en grenzen ingevolge art. 6 EVRM', 2013 *Strafblad*, no. 5, p. 354.

crucial in the Netherlands where there are hardly any other tools to bring the criminal justice system and the public together. However, the conclusion that public participation in the Dutch criminal justice system is not provided inside the courtroom and hence should be provided outside bears important risks. It leaves the responsibility for the content and quality of the debate about criminal justice to the media. Even assuming that the authorities provide the media with adequate information while protecting the interests of justice and the participants (which is not always the case), for several reasons (media logic, the impenetrability of the system) the publicity thus generated does not in itself provide the transparency which is needed for the legitimization of the judiciary and may even jeopardize its legitimacy, as well as other interests served and protected by the criminal justice system.[81] And as (long as) the judiciary does not respond to that public debate, the media publicity does not enable public input, leaving the circle of democratic legitimacy still uncompleted.

4. Procedural justice and the judiciary's legitimacy

The concept of 'procedural justice' generally refers to the idea that judicial procedures are central in bringing about people's acceptance of the decision, independent of their actual outcome. Research shows that the willingness to accept the decision is strongly dependent on the perception of the procedure preceding and grounding it as fair.[82] Also, the perceived fairness of the procedure has been found to directly influence people's positive assessment of the judicial authority involved and indeed of the justice system.[83] An important procedural justice conclusion is that people's perception of the procedure has a huge impact on their views about the legitimacy of legal authorities, such as to state that the basis of legitimacy is the justice of the procedures.[84] Procedural justice research provides a tool for increasing the legitimacy of the courts and the justice system in society,[85] by 'making and implementing decisions in ways that the public thinks fair.'[86]

Where most of the procedural justice findings are based on judgments by participants in judicial proceedings, this article's concern is with the general public.[87] The idea that the procedural justice model provides a tool for the improvement of the legitimacy of the (criminal) justice system and the judiciary stems from research showing that people generally hold similar concerns in determining their opinion on the functioning of the judiciary.[88] The general public has been found to evaluate the courts on a basis very much similar to participants, centring around the fair treatment of people and their rights.[89] This has brought about conclusions such as that 'policies that promote procedural fairness offer the vehicle with the greatest potential for changing how the public views the state courts'.[90] Thibaut and Walker already analysed the reactions of direct observers of procedures to have two major components: their general trust in the trial procedure if they should be involved themselves, and the treatment of the individuals in the trial that they have witnessed (humaneness, dignity).[91] The same research shows, however, that personal experience with courts makes people 'dramatically' more sensitive to fairness in evaluating the courts. People without personal experience evaluate the courts more strongly based upon their confidence in the government in general and their general ideological views, such as that the courts are too lenient on criminals.[92] That does not essentially contradict the findings that attest

81 Cf. Brants, supra note 9, pp. 45-46.
82 T.R. Tyler, 'Public trust and confidence in legal authorities: what do majority and minority group members want from the law and legal institutions?', 2001 *Behav. Sci. Law* 19, no. 2, p. 216.
83 T.R. Tyler, 'Procedural justice and the courts', 2007 *Court Review* 44, no. 1/2, pp. 26-31.
84 See T.R. Tyler, *Why people obey the law*, 2006, pp. 270-272.
85 Tyler, supra note 83, p. 26.
86 Tyler, supra note 84, p. 162.
87 Although not the point of focus of the procedure justice literature, the non-involved public has not been excluded. and Thibaut and Walker already included the 'observer', stating that their concern does not only extend to the 'persons who have actually witnessed the resolution of disputes, but also the wider society, which by the relayed reports of these eye witnesses ultimately forms important opinions about the process.' J. Thibaut & L. Walker, *Procedural justice. A psychological analysis* 1975, p. 68.
88 Tyler, supra note 84, p. 157.
89 Tyler, supra note 83, pp. 28-29; Tyler, supra note 82, pp. 216-217.
90 Tyler, supra note 83, p. 29, citing from D.B. Rottman, *Trust and confidence in the California courts,* 2005.
91 Thibaut & Walker, supra note 87, p. 74.
92 Tyler, supra note 82, p. 227.

to people generally evaluating the courts by standards of fairness. It seems only logical that the more people are confronted with actual proceedings, the more their evaluation by general ideas is replaced by concrete assessment; procedural justice research shows that concrete assessments generally take place on the basis of notions of fairness and that the personal experience dominates when it comes to judging the legitimacy of the justice system.[93] The closer people get to actual proceedings, the more their perception of justice collides with that of the participants actually affected by the procedure, and the more they continually evaluate the courts by fairness. However, even finding that previously held views on the justice system are replaced by the concrete experience when people evaluate the system, those views do seem to influence the experience – a negative prior view is more likely to have someone experience the procedure as unfair – and hence the assessment in terms of legitimacy.[94]

What, then, is a 'fair' procedure in the eyes of the public? Tyler has categorized the elements recurrently found as 'the four key principles of procedural justice': voice (people should be granted the opportunity to bring forward their own perspective so that the decision-making authority can take this into account), neutrality (the judiciary should be transparent about the decision-making in order to show that they are the neutral and principled decision-makers that people expect them to be), respect (people should be treated with courtesy and politeness because they need to feel regarded as valuable and their rights taken seriously) and trust (since the assessment of the character of the decision-maker proves to be central to the public evaluation, the decision-maker should show sincerity and caring).[95] Upholding these principles in court will increase the legitimacy of the judiciary and the justice system.

5. Publicity and procedural justice: justice seen to be done

Both the principle of publicity and the notion of procedural justice boil down to the idea that procedures cannot be cut off from their societal surroundings, without risking losing legitimacy. Paradoxically, it is an essential aspect of judicial proceedings to shut out the outside world in order to guarantee a basis for fair and just decision-making. Court proceedings take place along the lines of rather stringent formalities and rituals that aim at enabling the participants to freely and adequately play the role attributed to them. This procedure is purposely autonomous, disconnected from the power imbalances, emotions and moral preoccupations of the 'real world'.[96] The notion that distance is needed to create room for fairness sits uneasily with the previously professed idea that public influence is needed and that the public perception of fairness should be taken into account in conducting the proceedings. This unease is resolved by the famous adage 'justice must not only be done but must also be seen to be done'. This adage succinctly phrases the requirement of doing justice and the need for society to perceive this as two objectives which are ('also') inseparable in terms of action – both must be achieved at once. This adage appeals to deeply-rooted (normative) ideas that are also reflected in the concepts of procedural justice and publicity. One of those is the notion that court proceedings are not only about reaching a decision, but indeed about 'doing justice' in the broad sense that the totality of the judicial dealings with the case, the decision and the preceding procedure can be called 'just'. In addition to that, the adage suggests that the aspiration of 'justice being done' is not fulfilled if the judicial dealings are performed without anyone witnessing them, or if its witnesses do not recognize what is done as 'justice' – according to the adage's original spokesman, justice should be 'manifestly and undoubtedly' seen to be done.[97] These last elements, signalling a relation between the quality of what judicial decision-makers do and the perception of their observers are of particular interest here, since they imply that the autonomy of the procedure should remain relative: it should not alienate the lay public that must be enabled to recognize justice when it is being done. Showing justice being done thus implies efforts to make the fairness laid down in procedural standards recognizable to the public by taking into account public ideas of fairness in

93 Tyler, supra note 84, pp. 104-107.
94 Tyler, supra note 84, pp. 107-108.
95 Tyler, supra note 83, pp. 30-31. See also Tyler, supra note 84, pp. 163-164.
96 A.A.G. Peters, 'Strafrecht als problematiek voor een moderne samenleving', in G.Th. Kempe et al. (eds.), *Dilemma's in het hedendaagse strafrecht*, 1975, p. 89.
97 Lord Hewart CJ's words in *The King v. Sussex Justices* [1924], 1 K.B. 256, 259 (1923): 'it is of fundamental importance that justice should not only be done, but also be manifestly and undoubtedly be seen to be done'.

conducting the trial. Involving the public like this ultimately serves the essential function of the criminal process that Peters referred to as the 'sublimation' of public emotions:[98] the process of framing emotions aroused by the offence in a rational scheme, thereby resolving their destructive potency. Put differently, the procedure should convincingly show 'the choice of discourse over violence'.[99] The confrontation of the public with procedural standards and the recognition of procedural fairness in them is therefore essential to the very aim of criminal justice.

The adage thus puts together the notion of procedural justice and the principle of the publicity of proceedings: their common idea is that the experience – by all, the defendant and the public alike – of a fair and adequate conducting of judicial procedures will lend legitimacy to the judiciary, including the general acceptance of its outcomes. The empirical research into procedural justice, revealing parameters for the public acceptance of court decisions, confirms the assumption behind the principle of publicity of a direct relation between experiencing good procedural practice and the legitimization of the justice system.

What, then, constitutes a good procedure for legitimization purposes? Procedural justice, grounding 'justice' in procedure, can to a certain extent be equated with open legal norms such as 'due process' or 'fair trial', but by its focus on the outsider's perception, it adds the – for legitimization purposes necessary – dimension of the public's standards of fairness. In that, it is the empirical counterpart of the principle of publicity which, by its objective of legitimization, calls for public influence and a public-focused procedure. The legal presumption is that abiding by procedural rules in which fair trial standards have been expressed results in procedural justice. Whether the application of procedural standards does in fact produce fairness in the eyes of the public is as such not a legal question. The concept of 'procedural justice' implies that there may be a 'gap' between the procedural rules that the judge follows and the perception of the participants undergoing the proceedings and the public watching them.

One particular example of how procedural justice, in its very concept taking into account changing ideas on the position of the justice process in society, influences the application and thereby the content of procedural standards can be found in the case law of the European Court of Human Rights on the concept of 'appearances' in relation to the right to a fair trial under Article 6 of the European Convention on Human Rights. Referring to 'the public's increased sensitivity to fair administration of justice' the Court decided that 'appearances' must also play a role in the interpretation of important standards of procedural fairness. Even in the absence of indications of effects on the actual judicial decision, the fact that one party has the visible opportunity of addressing the judge is thus regarded as a violation of fair trial norms such as equality of arms and adversarial proceedings.[100] The concept of 'appearances' is particularly well known in the context of the requirement of judicial impartiality: certain situations, such as a relationship between the judge and someone associated with one party or the previous involvement of the judge with the case, may be regarded as a violation of the requirement of impartiality, not because they have in fact influenced the judge, but because they have created 'appearances' evoking doubts about his impartiality. This case law is a prime example of the implementation of the concept of procedural fairness which puts the perception of fairness first. By introducing appearances as part of legal standards of fairness, the Court pays tribute to the notion – apparent in 'justice must not only be done but must also be seen to be done' – that there is no 'justice' without the experience of it.[101] Procedural justice, embedded in the concept of 'appearances' in the Strasbourg case law, calls on the judiciary to take account of the layman's perception in its way of applying the procedural rules and giving the procedure form and substance. It is no coincidence that the doctrine of 'appearances' has been developed in the context of the rights to adversarial proceedings, equality of arms and to an impartial tribunal, which are the legal translation of the so-called key principles of procedural justice: voice, neutrality, respect and trust.

98 A.A.G. Peters, *Opzet en schuld in het strafrecht*, 1966, pp. 281-294.

99 P. Ricoeur, *The Just*, 2000, p. 130, adding that the 'most tenacious form of violence is an individual's claim to procure justice by himself' and finding the long-term end and the horizon of the act of judging in its contribution to the public or social peace. See about the educational, deliberation-stimulating function of the trial: A. Hol, 'The theatre of Justice', in C.H. Brants et al. (eds.), *Transitional Justice. Images and Memories*, 2013, pp. 74 and 84.

100 *Immeubles Groupe Kosser v. France* [2002], appl. no. 38748/97.

101 L. van Lent, 'Beeldvorming in de strafrechtspleging; openbaarheid, legitimatie en *appearences*', 2002 *Justitiële Verkenningen* 28, no. 6, pp. 42-51.

Although the procedural justice research does not address the issue of publicity, in its repetitive finding that the procedure is the central element in legitimization, it makes a case for facilitating the general public to witness proceedings. Their publicity would allow for interaction between procedural fairness and public opinions of fairness and thus for legitimization, by explicitly showing the public the values of judicial procedure and the way public opinion is embedded therin. Procedural justice places the key to legitimization in the hands of the judiciary. This implication fits well into the Dutch criminal justice system in which the professional judge deciding the case is the ultimate guarantor of fairness. But for the procedure to be perceived as fair, it must of course first be perceived. That the media should be allowed to visualize the proceedings and to provide the public with information on the criminal process can thus not only be derived from the principle of publicity – society at large (possibly) witnessing the proceedings can be seen as an important incentive to public-focused procedures[102] – but is also based on empirical findings.

6. The judiciary's press guidelines

Considering the lack of systemic opportunities for public influence, the responsiveness of the judiciary has only a limited playing field; it has to unfold through the principle of publicity, and can thus only be enhanced by means of bringing the outside debate inside the courtroom by showing and explaining how justice relates to the public debate on criminal justice. The attempts of the judiciary to come to a better reasoning of decisions reflecting societal concerns and wishes,[103] and more openness towards and better communications with the media, are therefore important routes to responsiveness. The press guidelines of 2013 are considered to reflect the values of transparency and responsiveness advocated by the Council of the Judiciary. Nevertheless, the character of the guidelines is obscure. They do not legally bind judges, nor can the Council force them to adhere to the rules of the guidelines. The guidelines do evoke justified expectations by the media which may result in particularly difficult situations as some of the criminal courts have strongly opposed the guidelines.[104]

The Dutch judiciary has come a long way in its relations with the press. The interest of the press in reporting on criminal cases has increased steadily during the twentieth century, peaking in the 1970s and 1980s. This has been explained by the 'de-pillarization', forcing the newspapers, which could no longer rely on their readers of the same religious or political background, to find new incentives to make the public buy and read them.[105] The orientation on what the public will find interesting to read has again increased after free newspapers entered the news market. Since the 1980s journalists have also started to become actively involved in the criminal justice system by gathering and bringing news on crime and criminal cases in order to influence the actions or policy of the criminal justice administration.[106] In that time, audiovisual media gained a big interest in criminal trials and the first television reports on parts of the trial were broadcast. For a rather long time, there was no uniform approach to the audiovisual media by the judiciary.

The press guidelines of the judiciary show the development in the ideas about relations between the judiciary and the press in the context of criminal proceedings. The distinction between the newspaper press and the audiovisual media that has always been dominant has gradually been relieved. Under the (first) guidelines of 2003, the audiovisual media were allowed to put a request to the court to register the entrance of the court, the reading of the indictment and the reading of the judgment. The guidelines of 2008 stated that in principle, notwithstanding exceptional situations, audiovisual registration was allowed of the entrance of the court, the opening of the session, the reading of the indictment, the pleadings of counsel and the pronouncement of the judgment. After having obtained their permission, the camera could also register the statements and actions of the non-professional participants (defendant, witness,

102 Van Lent, supra note 48, p. 154.

103 Kester et al., supra note 41, pp. 35-37. This aspect is put forward more explicitly than before in the *Agenda van de Rechtspraak 2015-2018*, supra note 44.

104 Th. de Roos, 'Media in de rechtszaal, een test case voor besluitvorming binnen de rechtspraak', in C. Kelk et al. (eds.), *Veelzijdige gedachten. Liber amicorum prof.dr. Chrisje Brants*, 2013, pp. 53-55.

105 Kester et al., supra note 41, pp. 26-27.

106 P.C. Scholten, *Trial by media. Wie beschermt de verdachte in een mediaproces?*, 2011, p. 28.

victim) and the public. The current press guidelines of 2013 take this a step further by generally allowing audiovisual media to register not only the parts mentioned in the 2008 guidelines, but also the discussion of the facts.[107] The guidelines still forbid the registration of non-professional participants, except when they have consented. A rather surprising new element in the current press guidelines is the rule that journalists are allowed to send out text messages (by phone or laptop) during the trial. The judge may restrict or disallow this, however, if it disturbs the session or prejudices the interests of justice.[108] The guidelines include the rule that the court must give reasons for any restriction on the rules allowing audiovisual registration referring to (one of) the legal restrictions to the publicity requirement. Also, this reasoned decision has to be made public on the judiciary's website.[109] Even the court's decision to disallow the sending of text messages during the trial must provide reasons and be pronounced during the public hearing itself.[110]

An important novelty is the rule stating that it is allowed to record the voice of the defendant. If the defendant objects, the judge may decide to disallow it or to rule that the voice must be made unrecognizable.[111] This is probably the most controversial rule in the guidelines, since it departs from the general rule that non-professional participants may not be registered audiovisually except with their consent. The introduction of this rule is explained by the judiciary´s wish to provide the public watching and listening through the media with a more complete perception of the trial, by allowing them to listen in on the interaction between judge and defendant. That the defendant may not be registered on camera is explained with reference to the presumption of innocence: if the defendant's image is recognizably broadcast, that would impose the risk of the defendant being publicly convicted before the court has come to a decision.[112]

7. Conclusion

The procedural justice research, in finding that in assessing the judiciary people will generally make procedural justice judgments focusing on the four values termed 'voice, neutrality, respect and trust', provides an empirical ground for the basic idea of publicity as a requirement of public-oriented proceedings and judgments. First of all, this research highlights the importance of the basic notion of publicity as a means for the confrontation of the public with the criminal trial and the judiciary, an opportunity to perceive the procedure. But also, in that it shows that the public perception of the judiciary as fair determines the social legitimacy of the judiciary and the criminal justice system, procedural justice research affirms the (historical) concept of publicity as a means for public influence and fairness at once: the judiciary should clearly apply standards of fairness taking into account the public perception of fairness so that the public can see justice being done. Thus, the procedural justice findings uphold the idea of 'democratic' legitimacy and the 'rule of law' legitimacy being intertwined (so prominent in the history of the idea of publicity but so marginally explored in the Dutch context); the procedural fairness benefiting the individuals involved is served by public influence, because that 'forces' the judiciary to articulate the fairness inherent in the procedure and to take account of the public opinion on fairness.

The historical expectation was that the public opinion would 'enlighten' the previously secret and unfair administration of justice; the visibility of what was now to become a fair procedure would in its turn satisfy the enlightened public. Reference to these 19th century ideas seems questionable, knowing the impact that societal and political developments have (had) on public opinion on crime and criminal justice. It is a particular challenge in today's fragmented society both to adhere to the classic judicial values and to allow for public involvement. Seeing the way criminal cases and defendants are sometimes depicted by the media and discussed in the public debate, the judiciary's reluctance towards the media and the idea of public participation is hardly surprising. The findings of the procedural justice research

107 *Persrichtlijn 2013*, <http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Pages/default.aspx> (last visited 7 September 2014), rule 3.5.1.
108 Ibid., rule 3.2.1 and 3.2.2.
109 Ibid., rule 3.8
110 Ibid., rule 3.2.2.
111 Ibid., rule 3.5.5.
112 Ibid., p. 13.

that people generally foster similar notions of what doing justice is about, and that, in that sense, the public tends to identify with participants, seem to relieve that tension; doing justice to the participants does not conflict with gaining legitimacy with the general public, on the contrary. This however only applies if the general public actually witness the procedure or if they are provided with sufficient and adequate information on the proceedings for them to perceive the procedure as fair.

Both the principle of publicity and the procedural justice concept thus provide an important ground for the notion that the judiciary should allow audiovisual media to register and broadcast criminal proceedings and judgments. It is inside the courtroom that justice must be done and therefore must be experienced. The judiciary's 2013 press guidelines generally conform to that idea, by allowing for large parts of the trial to be audiovisually registered. A revolutionary step of the 2008 and 2013 guidelines is that they interpret the requirement of publicity as encompassing audiovisual registration and broadcasting. Thereby they provide an important means for the normative meaning of publicity – public-focused proceedings – to unfold and for a shift in public attention for criminal justice towards the procedure in which the ingredients for the legitimization of the judiciary are laid down.

It remains to be seen whether the guidelines actually attest to the notions underlying the allowance of audiovisual registration. The principle of publicity has been explained to contribute to fairness by forcing the judiciary to visualize fairness and make proceedings understandable and informative for the public. Thereby the public nature of the proceedings contributes to the legitimacy of the judiciary as the guarantor of the rule of law. Considering the democratic need for public involvement in criminal justice, the public nature of the proceedings should in addition be regarded as a platform for showing the public if, how and why public debate is taken into account, including an explanation of why the court goes in the other direction. From an empirical perspective, the procedural justice research underlines, in order for the judiciary to gain legitimacy, those same aspects of the visible application of public standards of fair trial. The press guidelines in general show adherence to those notions in that they clearly strive to allow for as many parts of the trial to be registered as is possible within the limitations of respect for the privacy of the participants, which is regarded as a prohibition on registering other elements of the trial. Although the remaining parts of the trial can be considered to offer an insight into important aspects for the decision-making (more especially the discussion as to evidence) and therefore to contribute to the public understanding of the decision, it is exactly the restriction of the registration to the professional participants that hampers the full implementation of the procedural justice findings. These findings evidence that it is first and foremost the treatment of the non-professional participants (defendant, witness, victim) that is taken as a point of evaluation, and therefore, according to the procedural justice model, has to be witnessed. Especially considering the importance that is generally attached to upholding the position of the victim for the justice system to gain more legitimacy, the fact that the general public are not able to witness the communication between judge and victim may cause a negative perception of the procedure. In a general sense, the restriction to professional participants means that the principle of publicity is not fully operated as a means for articulation which would imply witnessing the questioning of witnesses (if any).

The fact that the guidelines do provide for a departure from the general norm that non-professional participants may not be registered in allowing as a general rule the recording of the defendant's voice can be assessed positively from the perspective of both publicity and procedural justice. It shows the attempt to further (the aims of) the principle of publicity in providing the (physically absent) public with an insight into an essential part of the trial. More particularly, it applies the procedural justice principles by allowing the communication between the judge and the most important participant to be heard and thus to be measured on the basis of voice, neutrality, respect and trust as explained above. In trials with no other participants the media may register practically the complete trial and the broadcast then shows the public the entire communication. Seeing only part of the judicial communication in trials involving other non-professional participants may then be perceived as strange or even suspicious and be assessed negatively.

The principle of publicity and the concept of procedural justice imply that the proceedings should be the point of departure; that does not mean that the restriction to the professional participants cannot be justified. Media publicity may cause a great deal of harm in terms of privacy, the presumption of innocence

and the interests of justice and the reservations that judges hold towards audiovisual registration are in that respect fully understandable. As long as this harm is not attributable to judicial authorities and happens outside the procedural context, the publicity and the procedural justice concepts do not directly address this problem; they do however imply that the court should respond to fairness standards (most notably the presumption of innocence) being put in jeopardy outside the court, as norms of fair procedure must – following up on the publicity and procedural justice concepts – be visibly adhered to in the proceedings.

The press guidelines do not clearly attest to the requirement following from publicity and procedural justice to explicitly visualize fairness and show that public fairness standards are applied. It is assumed that the proceedings as such contain the necessary qualities, and to the extent that they do not, that is not regarded as something to be resolved by means of publicity.[113] The judiciary's adherence to the rule of law is considered to be outside the scope of public influence.[114] The notion that the publicity principle, in its fundaments as well as in its interpretation by the European Court of Human Rights, implies that the judicial authorities enable public debate about criminal justice, and seriously and explicitly consider the input it may offer to doing criminal justice, is not reflected in the guidelines. Democratic legitimacy is considered important, but is positioned in the public judgment by advocating better reasoning in terms of comprehension for the lay public and responsiveness to the public opinion.[115] Although the reasoning of the decision is potentially a very important aspect of the publicity principle, would it be operated as the judiciary's communication with and accountability towards the participants and the general public at once, this is too limited an opening in the light of the procedural justice concept. This emphasizes the experience of the procedure, a more direct contact with the work and conduct of the judiciary. A communicative judgment alone does not provide this.[116]

As a final conclusion, seeing that public distrust of the judiciary is an historical and conceptual ingredient of the publicity principle, the judiciary has rightly highlighted the public nature of its business in its attempts to overcome the gap with the public. The press guidelines are evidence of significant attempts to overcome the traditional Dutch reserve towards publicity in criminal trials in the face of the need to become more transparent and responsive towards society. One of the essential obstacles in increasing the judiciary's legitimacy by means of the public nature of the criminal proceedings remains, however: public influence is still kept apart from and in opposition to the judiciary's task of upholding the rule of law. Considering that not only the normative aims of the publicity principle but also procedural justice research contrast that vision and emphasize the connection between public influence and the fairness of the procedure, the judiciary needs to overcome its deeply-rooted ideas on public influence. The point of departure should be to see and take it the other way around: striving to make the fairness of proceedings visible in order to positively influence the public and to replace the media in providing images of criminal justice. ¶

113 Kester et al. supra note 41, p. 41.
114 Ibid., p. 33.
115 Ibid., p. 37.
116 Cf. T.M. Schalken, 'Naar een modern strafproces: minder bestraffing, meer publieke verantwoording', 2009 *Strafblad*, no. 5, p. 493.