Chapter 8

Pre-trial detention in the Netherlands

Absolutely low, relatively high

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Introduction

In this chapter, we give an outline of Dutch legislation and practice of pre-trial detention. We also consider some important facts and figures relating to pre-trial detention and we will address the extensive academic debate on pre-trial detention that has been continuing over the last years in the Netherlands. As partners in the DETOUR research project (see Chapter 1 for details), we have carried out comprehensive empirical research in 2016 and 2017, which has been documented in a National report on the Netherlands (Boone et al., 2017). In this chapter we elaborate on these findings that are still very much relevant today, complemented by more recent research findings in the area of pre-trial detention in the Netherlands and case law from the European Court of Human Rights (ECtHR). We will also share some findings on the effect of COVID-19 on pre-trial detention in the Netherlands.

The Dutch criminal justice system

The pre-trial phase plays a pivotal role in the Dutch criminal justice system (a civil law system with a moderate inquisitorial character). During this phase, virtually all evidence is gathered, assessed and documented by the police and the prosecution (Van Toor, 2020). Defence lawyers have a marginal role in this phase. The Public Prosecution Service (PPS) is responsible for all criminal investigations and has authority over the police in that matter. Also, based on the opportunity principle (*opportuniteitsbeginsel*), public prosecutors have the monopoly (and broad discretionary powers) on the decision to prosecute a case or not and/or to enter in out-of-court proceedings (e.g. by way of a penal order, *strafbeschikking*) (Holvast and Lindeman, 2020; Brinkhoff et al., 2019: 115–119; Fedorova, 2019: 17). In the cases that do appear before a judge, the application of unconditional prison sentences is relatively scarce (Meijer et al., 2022).

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Prison population and numbers of pre-trial detainees

According to the SPACE statistics of the Council of Europe (Aebi et al., 2022: Table B and table 3), the Netherlands has a "very low" prison rate for adults with a prison population ratio of 53.9 per 100,000 inhabitants in January 2021.[1] After a strong increase between 1990 and 2005, the prison population has been declining until 2016, and has been on a (slight) rise again since (see Figure 8.1). In September 2021, prison population was 9,329 (Meijer et al., 2022). The percentage of foreign inmates in the prison population (23.3%) is considered to be "very high" in the SPACE statistics (Aebi et al., 2022: Table B, Table 13). This percentage also indicates that foreigners are overrepresented in prisons, as 7.1% of Dutch population does not have the Dutch nationality (CBS, 2022). According to a recent quantitative study of 10% of all criminal cases referred to the Public Prosecutor's Office in 2012 (N = 18,274), foreign nationals were 1.7–2 times more likely to be in pre-trial detention than Dutch citizens when all measured, legally relevant variables were taken into account (Wermink et al., 2022).

The rate of pre-trial detainees in absolute terms is 24.4 per 100,000 in January 2021 (Aebi et al., 2022: Tables 3 and 8). However, pre-trial detainees form a significant part (roughly between 40% and 50%) of the total prison population in the past years. The percentage of pre-trial detainees declined from 48.9% in 2012 to 42.1% in 2017 but since then increased to 44.2% in 2019 and 47.3% in 2020, only to decrease to 41.0% in 2021 (Meijer et al.,

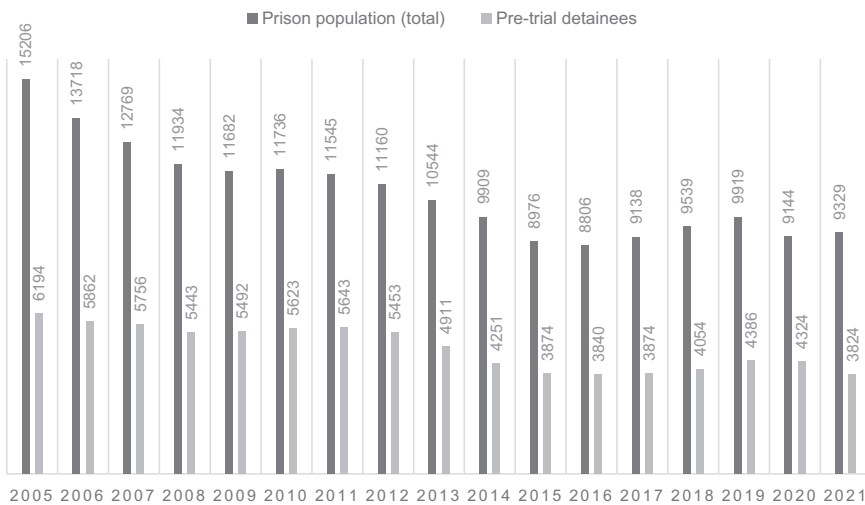

Figure 8.1 Prison population in the Netherlands, 2005–2021.
Source: Meijer et al. (2022).[2]

2022); the lowest percentage in a long time. Also, the absolute number of pre-trial detainees in 2021 (3,824; a significant drop compared to 2020) is the lowest in 15 years. This significant drop could perhaps be attributed to COVID-19, as there has been a drop of 9.1% of suspects in 2020 (Moolenaar and Choenni, 2021), but we are not certain. In sum, absolute numbers of pre-trial detainees have come down (most significantly between 2012 and 2015), but in relative terms, there does not seem to be a significant shift.

Research in 2016 suggested that between 2011 and 2014, a trend became visible in which the number of orders for pre-trial detention went down, the average length of pre-trial detention went down and the number of suspensions went up. Based on those numbers, Berghuis et al. (2016) concluded that judges seemed to have adopted a more cautious approach towards the application of pre-trial detention. Unfortunately, a similar analysis of statistics has not been made since, and the downward trend has come to a halt since 2015.

The percentage of pre-trial detainees related to the total population of prisoners currently is 41%. The relatively short prison sentences in the Netherlands are an important factor contributing to this high percentage. In the SPACE statistics over 2021, this percentage is ranked as "very high" in comparison with other European countries (Aebi et al., 2022: Table B). The Netherlands Court of Audit has expressed reservations regarding the SPACE comparisons, though[3]:

> For a variety of reasons, it is not possible to make a meaningful quantitative international comparison based on the data currently available. The legal systems, definitions and data registration methods used in the various European countries often cannot be compared with each other.
>
> (Algemene Rekenkamer, 2017: 17)

Current discussion and debates

Academics as well as defence lawyers and judges have criticised the extensive use of pre-trial detention in the Netherlands. They argue that pre-trial detention is not applied as an *ultima ratio*, but as a default and automatic measure for people awaiting trial and as a means for premature retribution. Often these critics refer to the high percentage of pre-trial detainees in the Netherlands compared to other European countries and the high number of compensations paid to pre-trial detainees that were acquitted (see Boone et al., 2019, for an extensive list of references).

In 2012, Stevens concluded that pre-trial detention was applied extensively rather than restrictively by judges and that it was used as a means to achieve swift punishment and to protect society against the suspect (Stevens, 2012, 2013). In 2013, three judges qualified Dutch judicial practice in decisions on pre-trial detention as an "efficient cookie-factory", in which

pre-trial detention is the rule rather than the exception (Janssen et al., 2013). In 2016, Crijns et al. concluded that the Dutch legislation on pre-trial detention meets the relevant standards of the ECtHR, but that there is indeed reason to criticise the way in which the legal rules on pre-trial detention are applied in practice. They conclude that alternatives to pre-trial detention are underused, especially in the first phase of pre-trial detention and state that "[m]ore research and discussion is necessary to fully develop alternatives in terms of new legislation and better use of existing alternatives such as bail and electronic monitoring" (Crijns et al., 2016: 7–8). In 2017, the Netherlands Institute for Human Rights (College voor de Rechten van de Mens, 2017) examined more than 300 case-files and found that judges often insufficiently substantiate their decisions concerning pre-trial detention. These findings created some awareness in Dutch Parliament[4] and the judiciary introduced so-called professional standards,[5] that underlined the importance of sound substantiation of pre-trial detention decisions. A slight tendency towards improvements has been reported since (Docter and Baar, 2017), but it has also been argued that additional substantiation of pre-trial detention decisions might not change practice a lot, as the real issue is not a lack of substantiation but much more a fundamental disagreement on the extent to which pre-trial detention should be applicable (Robroek, 2017: 65).

Our research for the DETOUR project generated empirical data that mainly confirmed the findings of the research already mentioned earlier and furthermore added perspective and depth to the findings that pre-trial detention is used rather extensively in the Netherlands. We found that this extensive use is mainly based on a legal culture that focuses on prevention and that tries to meet an alleged need for preliminary retribution. An important finding is that, indeed, more thorough reasoning and much more attention for alternatives for pre-trial detention are of pivotal importance. Changes are needed regarding the mindset of the authorities deciding on pre-trial detention as well as regarding the possibilities to uncover information that is relevant for the consideration of alternatives (Boone et al., 2017). We will elaborate on these findings in more detail later.

In other comparative research, Jacobs and Lindeman found that the execution of pre-trial detention led to significant obstacles regarding the exercise of defence rights, both in pre-trial detention proceedings and in the proceedings before the trial judge (Jacobs and Lindeman, 2018; Jacobs and Lindeman, 2019; also see Jacobs et al., 2018 and Suremain et al., 2019).[6] This research questioned the regime for pre-trial detainees, because it is of a stricter nature than the regime for convicted prisoners: pre-trial detainees cannot benefit from the reward system (called promotion and degradation), which means that they are always in the "basic" regime, while convicted prisoners, who are in a prison, can upgrade to a "plus" regime after six weeks of good behaviour (Jacobs and Lindeman, 2018: 5). This regime, that applies to more than 40% of the prison population (see earlier), is at odds with the principle

that detainees should not be restricted more than necessary. This principle of minimal restrictions (*minimale beperkingen*) is an important principle in the Dutch Penitentiary Principles Act (*Penitentiaire beginselenwet*), that originally was aimed specifically at pre-trial detainees, but has been made applicable to all detainees in the 1990s (Jacobs and Lindeman, 2019: 8).

A provisional version of a completely modernised Dutch CCP has been published in 2020. Although after a failed attempt for a thorough reform, the system for pre-trial detention will largely remain as it is, the draft of the explanatory memorandum specifically mentions the DETOUR research findings and the recommendations that were made regarding the Dutch situation. The legislator has taken on board some of the DETOUR recommendations and states that

> alternatives to pre-trial detention should be better embedded in both law and policy. The system of suspending pre-trial detention subject to conditions has been improved. In accordance with the recommendations, the judge will be given the legal duty to examine in all cases whether suspension of the pre-trial detention is possible immediately or in due time (Article 2.5.31). Furthermore, also in line with the recommendations, the conditions to be attached to the suspension are laid down by law (Article 2.5.33). Regulation of the conditions for suspension promotes legal certainty and supports the work of the probation service.

In May 2022, the Dutch Council of State advised that, while it endorsed this underlying principle, regulation alone might not be enough: "flanking measures" would be necessary to come to a more restrictive use of pre-trial detention. The definitive legislative proposal is expected to be sent to the parliament in the first half of 2023. Still, we expect that it will take several years before new legislation enters into force.

COVID-19

As stated earlier, we do not have enough data to substantiate the claim that the modest decline in the detention population can be attributed to COVID-19. Especially during the first months of the pandemic, a somewhat more restricted approach to the application of pre-trial detention has been considered possible (Van der Meij, 2020; Rodermond and De Knegt, 2020; De Vocht, 2020), but we have also seen decisions in which fear of COVID-19 was not seen as a reason to decline the request for pre-trial detention or to suspend the order (e.g. Court of Appeal The Hague, 26 March 2020, ECLI:NL:GHDHA:2020:808). Literature suggests that pleas to suspend the pre-trial detention order, that is, because the pandemic would lead to substantial delays in the criminal investigation, had to be thoroughly substantiated to have any chance of success (De Vocht, 2020: 979). All in all, there does not seem to be much evidence for a significant change in decision-making

concerning pre-trial detention. At the same time, the procedural safeguards are hampered by restrictions caused by the pandemic: courts aim to do as much hearings as possible by way of videoconferencing and suspects are actively discouraged to appear in person, limiting the right of access to court. Furthermore, the regime in the detention facilities is more restricted to avoid contamination among the detainees (Van der Meij, 2020: 112).

Legal framework

Stages of pre-trial detention

The police can hold the suspect for questioning for a maximum of 18 hours (Article 56a CCP) and can subsequently order police custody (*inverzekeringstelling*) for three days (Article 57 CCP). After that, that the possibility of pre-trial detention (*voorlopige hechtenis*) will be considered: the order of deprivation of liberty by a judge that precedes the trial in criminal procedures. Public prosecutors are the sole party that can request pre-trial detention and they have a wide margin of appreciation in that respect. The three stages of pre-trial detention are as follows:

1 Remand in custody (*inbewaringstelling*)

  The examining judge (*rechter-commissaris*) decides on the request and can grant the order for a maximum period of 14 days (Article 63 and 64 CCP).

2 Detention in custody (*gevangenhoudin*g or *gevangenneming*)

  After the period of remand in custody, the public prosecutor may request the court in chambers to order the detention in custody for a maximum of 90 days (Article 65 and 66 CCP). Detention can also be ordered if the suspect is at liberty and must be taken into custody to appear before the judge (*gevangenneming*).

3 Detention pending trial (*gevangenneming* or *gevangenhouding*)

  After 104 days (14 days of remand in custody + 90 days detention in custody) the trial will have to start. More complex investigations will not have been finished within 104 days, which leads to so-called *pro forma* hearings, where the trial court will hear the case for no other reason than to decide on the continuation of the pre-trial detention, which it can then extend until the next hearing, that will have to take place within a maximum of three months (Article 66, Section 2 and Article 282 CCP). There is no statutory limit to these extensions, but the so-called anticipation requirement (see next section) can become an important factor.

The time the defendant has spent in pre-trial detention will be deducted from the imposed prison sentence. After an acquittal, defendants may ask for financial compensation for the time spent in pre-trial detention (Article 553 CCP).[7] This provision only applies to time effectively spent in prison. There is no similar legislation (and therefore no financial compensation) regarding alternatives for pre-trial detention, such as electronic monitoring or participation in rehabilitation programmes.

Once the court has come to a verdict, pre-trial detention will automatically continue for another 60 days (Article 66, Section 2, CCP), after which the Court of Appeal is to hear an eventual appeal, again with the possibility of *pro forma* hearings. During an appeal, the pre-trial detention will continue. In most cases, the execution of the detention will be transferred from a remand prison (*huis van bewaring*) to a prison for convicts, which will allow the detainee to participate in the reward system (see the following sections).

Statutory requirements

(1) There must be a "grave suspicion" (*ernstige bezwaren*, Article 67, third section, CCP). This implies that there must be more than the mere suspicion that the suspect has committed the offence.
(2) Following Article 67 CCP, first section, pre-trial detention can only be applied in case of a suspicion of a criminal offence which carries a sentence of imprisonment of four years or more (bar some exceptions). Also, the order can be issued regarding suspects for whom no permanent address or place of residence in the Netherlands can be established and who are suspected of an offence which carries a sentence of imprisonment.
(3) There must be a ground for pre-trial detention (Article 67a CCP):
    (a) The (serious) risk of absconding of the suspect.
    (b) The existence of a serious reason of public safety requiring the immediate deprivation of liberty. This ground has been defined further in Article 67a, Section 2:
        (i) Fear for serious upset to the legal order due to the very serious nature of crimes carrying a sentence of 12 years imprisonment or more (the so-called 12-years/shocked legal order ground).
        (ii) Fear of reoffending.
        (iii) Fear for obstruction of justice.
        (iv) The need to facilitate expedited proceedings against suspects of unsettling crimes in public areas or against public officials (policemen, firemen, and ambulance staff). This last ground is relatively new: it was added in 2015.
(4) The anticipation requirement has to be fulfilled by the judge (Article 67a, third section, CCP).

An order for pre-trial detention should not be issued if it is expected that the pre-trial detention is to exceed the custodial sentence or measure applied by the trial judge.

Basic principles regarding pre-trial detention, derived from the presumption of innocence, and expressed by the ECtHR, are that pre-trial detention should be used restrictively and that suspects should be released whilst awaiting their trial, ECtHR [GC] *Buzadji v. Moldavia* (23755/07, 5 July 2016, §§ 87–89). Dutch legislation aims to reflect these principles and holds several statutory thresholds that are to be met before pre-trial detention can be applied. This shows the *ultima ratio* character of this drastic coercive measure. The grounds for pre-trial detention represent the requirement of proportionality and (to a lesser extent) subsidiarity: detention should be a reasonable means to a reasonable aim and should only be applied when other, less severe measures, are not suitable to fulfil these aims.

From a comparative perspective, the "12-years/shocked legal order ground" may need some more explanation: this ground presupposes that the shock to the legal order that usually goes with grave crimes that carry a maximum sentence of 12 years or more (manslaughter, murder, rape, human trafficking) may constitute the social need for pre-trial detention. The aim of pre-trial detention is, then, to subdue this disturbance of public order (the ECtHR acknowledges that there are circumstances in which the (conditional) release of the suspect could, in itself, cause public disorder (*Geisterfer v. Netherlands*, 15911/08, 9 December 2014; *Hasselbaink v. Netherlands*, 73329/16, 9 February 2021).

The subsidiarity principle requires that the use of fitting alternatives to pre-trial detention should always be considered (Uit Beijerse, 2008, 2009; Boone et al., 2019), but Dutch law doesn't hold an obligation to unequivocally address this in pre-trial detention decisions. We already mentioned earlier that, in the medium-term, new legislation may change that.

Expedited proceedings as a driver for pre-trial detention

Dutch authorities profess a steady belief in a fast-track justice system (also known as "on the spot", *lik op stuk*): an offender-oriented approach in which the authorities provide an "on the spot" reaction to certain crimes (e.g. violence or vandalism in public places and/or against public officials). Criminal policy developed in cooperation with the PPS indicates that certain crimes are preferably dealt by way of expedited proceedings (*snelrecht*). In these proceedings, the trial is to take place while the accused is remanded in custody (so within 14 days). Thus, expedited proceedings preferably go hand in hand with the application of pre-trial detention. Research (Lindeman et al., 2020) has pointed out that, while these expedited proceedings are of course efficient, they are at odds with the presumption of innocence, as implicit assumptions are that the suspect is, indeed, the offender and that society does

not accept a release pending trial. Also, the research showed that matters are hardly ever as clear-cut: a lot of cases are difficult to solve on such short notice and suspects often have behavioural problems and/or suffer from addiction, which means that the straightforward mould of expedited proceedings does not fit at all. Currently, expedited proceedings are mostly used in relatively simple cut-and-dried cases (e.g. repeat offenders for shoplifting), but government policy is still striving for a broader use (Lindeman et al., 2020).

Alternatives to pre-trial detention: conditional suspension of the execution

Strictly speaking there are no alternatives to pre-trial detention in the Dutch system: either the suspect awaits the trial in freedom, or pre-trial detention is ordered. The only possibility to replace pre-trial detention with a non-custodial setting is the conditional suspension (*schorsen onder voorwaarden*) of pre-trial detention (Articles 80–86 CCP), constituting a clear example of the substitution model (see Chapter 1). The judge or court ordering pre-trial detention can, straight after the order or later during the execution of the pre-trial detention, decide to suspend the execution (Article 80, Section 1, CCP).

The CCP distinguishes between general and specific conditions. The general conditions attached to a suspension of the pre-trial detention are that suspects will comply with possible future court orders regarding pre-trial detention and will cooperate with the execution of a possible future prison sentence (Article 80, Section 2, CCP). The only specific requirement mentioned in the law is financial bail to guarantee the fulfilment of the conditions of a suspension (Article 80, Section 1, Subsection 3, CCP). The law does not mention any other specific conditions, leaving room for any condition deemed suitable. In practice, a number of specific conditions is used regularly, as will be explained later.

Decision-making

The actors in the decision-making process

The public prosecutor

It is the prerogative of the public prosecutor to request pre-trial detention. Together with the Department of Justice and Security, the PPS develops and executes criminal policy that significantly impacts the selection, evaluation and processing of criminal cases (Holvast and Lindeman, 2020). Specific policy regarding pre-trial detention is scarce, but as we will illustrate later, the legal culture on pre-trial detention plays an important role in the decision-making by the prosecutor (see Boone et al., 2019; Lindeman et al., 2020). Even when there are no legal duties to request pre-trial detention, public

expectations regarding such requests can be high and in certain cases, a request for pre-trial detention is the rule rather than the exception, as one of the prosecutors in our research pointed out:

> Looking at commune cases – in particular in the somewhat heavier cases – the prosecutor will always request, although I won't say automatically, remand in custody.
>
> (Boone et al., 2017: 19)

We found that prosecutors do not initiate looking into alternatives for pre-trial detention very often and that it is quite common that they expect the defence lawyers to come up with arguments to substantiate a possible suspension of pre-trial detention.

The judiciary

The first decision on pre-trial detention is taken by an examining judge (*Rechter-Commissaris*). The follow-up of pre-trial detention is decided by the court in chambers (*raadkamer*), consisting of three judges. Very little time is allocated for pre-trial detention hearings, which can lead to judges having to decide on dozens of cases per day. Judges have broad discretionary powers in deciding on pre-trial detention, as there is no legal obligation to grant a request for pre-trial detention, even when all statutory requirements have been met. Most applications are granted, though, and we will demonstrate later that we found that – in line with previous research discussed earlier – the judiciary does not always show much scrutiny in its decisions.

Defence lawyers

Pursuant to the Legal Aid Act (*Wet op de rechtsbijstand*), a lawyer will always be appointed to a suspect in pre-trial proceedings. We found that lawyers play a significant role in these proceedings because public prosecutors and judges are not very likely to actively gather information that is necessary to substantiate the (provisional) release of the suspect. Public prosecutors and judges confirm that lawyers that manage to find relevant information to substantiate a request to suspend pre-trial detention can really make a difference for their client (Boone et al., 2017). That said, lawyers claim that they experience difficulties in fulfilling this task: they have very little time to compile all the information and they often do not get all the documents from the casefile until very shortly before the hearing. This can also hamper their possibilities to challenge incriminating facts and circumstances that substantiate a "grave suspicion". Another handicap is that lawyers cannot directly communicate with the probation service if

they wish a report on one of their clients. Lawyers also denounce the often very thin reasoning of the judicial decisions on pre-trial detention: they feel that they can talk until they are blue in the face, but their arguments would be refuted with a fatuous reasoning. Jacobs and Lindeman (2019) found that the financial compensation they receive in many cases is insufficient for the time-consuming work that is needed to really paint a complete picture of the suspect's life. They also found that access to a lawyer for pre-trial detainees can be difficult because of restrictions that go with pre-trial detention (i.e. limited visiting hours, very restricted possibility to use a telephone).

Probation service

The probation service[8] can be ordered to produce a so-called pre-trial assistance report (*vroegrapportage*). As far as the very limited timeframe will allow, it will try and establish whether the release on bail of the suspect would have risks attached to it and, if so, what conditions could be suitable to mitigate that risk. We found that, for a variety of reasons (among others lack of capacity, suspects (allegedly) not cooperating), a pre-trial assistance report is not available for all hearings (see the next section).

The hearing and the decision

First stage: remand in custody

We found that the hearing that precedes the decision-making process of the examining judge usually takes 20–30 minutes. In general (and rather paradoxically), the prosecutor is not present during these hearings, whereas the suspect and the lawyer usually are, but judges told us that they sometimes call the prosecutor during the hearing, should questions arise. The examining judge hears multiple requests in one session and decides on the spot. It is not uncommon that the relevant casefile does not emerge until shortly before the hearing, indicating once more how thin the basis is for this initial decision: after all it has only been a couple of days since the suspect was apprehended so relevant information regarding the charges and information on the personal background is scarce.

Depending on the state of the police enquiries, the fear of obstruction is a relevant ground for pre-trial detention in this stage. As mentioned before, the fear of reoffending is a ground that is used relatively often as is the 12-years/shocked legal order ground (in eligible cases: crimes that carry a maximum of 12 years imprisonment or more). To a lesser extent, fear of absconding is used as a ground for pre-trial detention. Our research confirms that the use of the fear of reoffending and the 12-years/shocked legal order ground go with superficial substantiation. Depending on the nature of the crime and the

background of the suspect, even a first offender that has committed a crime can be considered as a potential recidivist:

> [Y]ou may still feel that it's necessary to find out why a suspect may have done what he did. You want to clarify that, or he might do it again tomorrow.
>
> (Boone et al., 2017: 45)

This is why this ground is considered to be the "mother of all grounds" by certain judges (Janssen et al., 2013: 436). Also, shocked legal order can already be considered as manifest when a judge feels that releasing the suspect of a serious crime would be (in his own words) "*hard to explain to my neighbour*".

Because information is scarcely available, there does not seem to be much room for considerations regarding alternatives (the suspension of the pre-trial detention), but there are exceptions. We will elaborate on this later.

Second stage: detention in custody

The hearing before the court in chambers will be in the presence of the suspect, the defence lawyer and the public prosecutor, and the court decides straight away on an eventual order for detention in custody. The court in chambers can order a 90-day term straight away, but it can also initially order a 30- or 60-day term, which implicates that, on the initiative of the public prosecutor, a new hearing will have to take place after the initial term before the order can be renewed for another 30 or 60 days. After these 90 days (so 104 days after the order for remand in custody), the trial against the – by then – defendant will have to start.[9]

The court in chambers deals with dozens of cases in one session and a hearing usually takes no longer than 10 minutes. The time between the order for remand in custody and the hearing before the court in chambers usually is considerably shorter than 14 days, which means that there still is no significant timeframe in which the probation service and/or the lawyer can gather more information to substantiate a request for suspension of the pre-trial detention.

Third stage: continuation of pre-trial detention during the trial phase

More complex investigations cannot be completed within 104 days, which leads to so-called *pro forma* hearings, that serve no other purpose than to extend the pre-trial detention. There is no limit to the number of suspensions of *pro forma* hearings, but of course the anticipation requirement will have a bearing on the decisions of the court regarding pre-trial detention.

Obviously, this is a stage in which the length of pre-trial detention can add up substantially, which can have a bearing on the weighing of personal versus public interests – as we will elaborate on later.

Appealing pre-trial detention

The court in chambers' decisions concerning the detention in remand can by appealed at the regional Court of Appeal. Significant restrictions apply as suspects can only appeal once against an order for (extension of) detention in remand. Similarly, they can only appeal once against the rejection of a request for suspension of the execution of pre-trial detention. Suspects cannot lodge an appeal in cassation at the Supreme Court (*Hoge Raad*) – while in some instances, the prosecution can. This is considered to be a closed system of legal remedies (*gesloten stelsel van rechtsmiddelen*), which means that the trial judge has very little room to address faulty pre-trial detention decisions. The information we gathered in our research on this topic was rather scarce, as we did not speak to appeal judges or advocates-general. Most lawyers agreed that the appeal procedure often was rather frustrating, as, again, the hearings would be very brief, the appeal judges would be very formalistic, and the decisions would hardly contain any substantial reasoning.

Bail and alternative solutions

Common situations in which suspension may be considered

The judge can order pre-trial detention and at the same time suspend the pre-trial detention with conditions, but an immediate suspension is not something that happens on a very regular basis. Especially in the early phase of pre-trial detention, the decision-making process does not lean towards a decision in favour of the release.

A fundamental feature of the Dutch system is that the alternatives are created within the framework of the pre-trial detention itself. This means that, in theory, the use is restricted to cases in which one or more grounds for pre-trial detention exist and that the alternative is a sufficient and necessary means to prevent the risk(s) that, given the ground(s) used, the pre-trial detention aims to prevent (subsidiarity principle). In practice, a much more general criterion is often used: whether the interests of the suspect in suspension of the pre-trial detention outweighs the interests of the criminal procedure in continuation of the pre-trial detention (Crijns et al., 2016: 36–37). The judge weighs the personal interests of the suspect against the interests represented in the legal grounds (interests of the criminal investigation and society in general), before deciding on an eventual suspension of the pre-trial detention. Some of the grounds for pre-trial detention (e.g. the 12 years/shocked legal order ground) may become less compelling with the passing of time.

Arguments that initially could not persuade the examining judge or the court in chambers to release the suspect, may be weighed differently in this stage.

Statistics on the number of suspensions are not readily available. Crijns et al. (2016: 36–37) observed in their study that at the initial review, pre-trial detention was suspended in 16% of the cases. At the court in chambers, pre-trial detention was suspended in 13% of the cases. These figures are in line with those mentioned by the Council for the Administration of Criminal Justice and Youth Protection (Raad voor Strafrechtstoepassing en Jeugdbescherming, 2011: 15), that shows that in 2011 14% of pre-trial detentions were suspended at the initial hearing and 12% at the court in chambers. Berghuis et al. (2016: 80) however, found a substantially higher proportion of suspensions by investigation judges since 2011 (2011: 33.8%; 2012: 35.0%; 2014: 36.4%) which they claim to be a result of the changed attitude of the judges towards pre-trial detention. These numbers have been confirmed by the Netherlands Court of Audit in 2017 which, unfortunately, does not provide more recent statistics (Algemene Rekenkamer, 2017: 24).

We found that, regarding the suspension of pre-trial detention, roughly three situations can be distinguished: (1) cases that are not eligible for suspension; (2) cases that are possibly eligible for suspension and (3) cases in which pre-trial-detention is applied to make it possible to suspend it under conditions ("improper remands").

As to situation (1), we found that two grounds for pre-trial detention do not seem to leave much room for conditional release of the suspect: the shocked legal order/12 years-ground and the fear of collusion. Especially the first ground concerns so-called high impact crimes and the general feeling seems to be that it cannot be explained to the victims and/or society that a suspect is released. As one judge put it:

> If you use alternatives in cases in which pre-trial detention is based on one of these grounds, these grounds are actually substantiated insufficiently.
>
> (Boone et al., 2017:54)

It is, indeed, hard to imagine how conditional release would be an alternative that could still subdue disturbance of public order or prevent collusion that is of such a nature that it necessitates pre-trial detention. A well-substantiated application of (one of) these grounds intrinsically leaves very little room for (conditional) release of the suspect.

In other cases (situation 2), suspension of pre-trial detention can be a viable option. These are often cases where the fear of reoffending plays an important role, as, to a somewhat lesser extent, does the fear of absconding. Despite these grounds, our research showed that prosecutors and judges also still seem to weigh the gravity of the crime and the potential shock of the legal order against the personal circumstances when considering this ground and the options for provisional release. Personal circumstances are of pivotal

importance. For example, our research showed that suspects who can substantiate that they have a "wholesome" life (a job, a house, a family, responsibilities as breadwinner) may be eligible for provisional release, which can also partly explain the overrepresentation of foreign nationals in pre-trial detention (more extensively in Chapter 13). The same is less true for repeat offenders, especially when they have a background of addiction and/or mental disorders. They are seen as particularly at risk of reoffending. Still, conditions (such as participating in an addiction programme) may be beneficial to these people, as these conditions can be a start of a treatment process. So, in well-substantiated cases, in which it is clear what kind of treatment would be best *and* that such treatment is readily available, a suspension of pre-trial detention is a possibility. Finally, we found that some of the respondents (especially some of the prosecutors) thought that the residence status of the suspect could be a possible obstacle for suspension of the pre-trial detention. They put forward the view that it seems counterintuitive to use scarce resources available for rehabilitation programmes or probation trajectories if it concerns people who hardly speak Dutch and/or who are irregular migrants that are likely to be deported in due time. These considerations can probably contribute to the overrepresentation of foreign nationals in pre-trial detention as mentioned in the introduction.

The foregoing demonstrates that in a lot of cases, the suspension of pre-trial detention is used as a driver for the rehabilitation of the suspect. Following on a judge we spoke to, we call these "improper remands" (*oneigenlijke bevelen*), because pre-trial detention is applied first and foremost to create a legal framework for (probation) supervision, help or treatment. We learnt that sometimes the assessment of prosecutors and/or judges was that detention of suspects was not in order (for example because of the anticipation requirement as mentioned earlier), but that their release would preferably be conditional. Examples were given regarding repeat offenders (shoplifting, burglaries) or suspects of domestic violence. The strategy that usually requires that both the prosecution and the judiciary agree, is to start probation supervision and/or treatment as early as possible by setting conditions to the suspension of the pre-trial detention. The trial judge can then follow up on the conditional release of the suspect by passing on a conditional sentence with the same conditions. A problem that could arise in this regard is the so-called net-widening effect of alternatives: prosecutors and judges may risk using the framework of pre-trial detention because they want to use the alternatives. Of course, this raises questions in light of the presumption of innocence (hence the judge's use of the word "improper"), but we didn't come across respondents that significantly problematised this practice.

Apart from the "improper" use of the framework for pre-trial detention, another dilemma arises regarding this approach. Most Dutch judges are not very keen on sending defendants to prison who seem to be successfully abiding to the conditions set to the suspension of pre-trial detention. A prosecutor

that wants the suspect to serve an unconditional prison sentence is therefore not likely to agree to a framework of conditions for suspension. When an unconditional sentence seems imminent, even defence lawyers seem to agree that "doing time" straight away may be the better option for their clients.

Types of alternatives and the subsidiarity principle

In practice, the following list of conditions are used most often:

- Reporting to the police
- Contact ban
- Electronic monitoring
- Financial guarantee
- Hand in identity papers
- Location order (house arrest)
- Location ban
- Probation supervision (eventually including training orders)
- Treatment (clinical or ambulant)

The lack of regulation and the wide variety of conditions used in practice raise questions regarding the subsidiarity principle: Do the conditions that are attached to the suspension of pre-trial detention contribute to a less intrusive way to the underlying goals of pre-trial detention (Uit Beijerse, 2009: 316)? It follows from this principle that conditions attached to the suspension should contribute to the realisation of the objective on which pre-trial detention it is based. However, regarding these grounds, the fundamental problem is that they are so widely interpreted (and scarcely substantiated) that it is difficult to judge if an alternative for detention really meets the subsidiarity principle or not. To really answer the question if a condition is in accordance with the subsidiarity principle, it would be necessary that judges clarify in every individual case which exact aims they want to serve with the pre-trial detention and, when these aims are compatible with the legal grounds for pre-trial detention, whether the conditions attached to a suspension are suitable to serve those particular aims.

The (lack of) use of alternatives in practice

Several practical issues stand in the way of a broad use of alternatives. We found that judges only consider alternatives if they have concrete information on the availability of valid options as well as guarantees that the conditions attached to the release provide a solid alternative related to the ground of the pre-trial detention (such as preventing recidivism). This information, however, is often difficult to get in an early stage of the investigation. A sufficiently conclusive (preliminary) probation report is not always available at

the hearing before the investigation judge (Lindeman, 2018). Consequently, information that is much needed for a well-informed judicial decision in the early stage of pre-trial detention is not or hardly available. Defence lawyers often try to fill this gap. Due to time constraints and insufficient renumeration, however, their resources are limited (Jacobs and Lindeman, 2018, 2019). Furthermore, they cannot directly contact the probation office and ask them to gather certain information. The public prosecutor is in the lead in this regard, and we found that not all prosecutors are equally willing to pass on requests by the defence lawyer to the probation office.

In short: lack of time, capacity and information are three interrelated obstacles to the realisation of alternatives for pre-trial detention. These obstacles affect foreign nationals even harder, in particular because of a (perceived) lack of residence in the Netherlands (Boone et al., 2017: 54; Wermink et al., 2022, see also chapter 13). Many practical issues are mentioned: unwillingness of suspects to reveal information to lawyers they hardly know; privacy issues preventing social workers or therapists from sharing information, inability to cover costs that come with them advising, or capacity issues in case of more intensive behavioural intervention or treatment (waiting lists were often mentioned as an impediment, Boone et al., 2017).

This leads to rather scarce use of some relevant options. Electronic monitoring (EM) is only used in the context of pre-trial detention in exceptional cases. We found that lack of knowledge and initiative at the Prosecution Service, limited capacity and time-consuming feasibility assessments are reasons for the limited use of EM, especially in the first two stages of pre-trial detention. Financial bail is another example of an alternative that is almost never used, for a variety of reasons – such as lack of knowledge and initiative, a fear for class justice or fear of laundering of criminal assets (Boone et al., 2017: 63–64; Polman, 2015; Crijns et al., 2016: 37).

In those cases where alternatives are being used, the impression that we got from our research was that conditions were not always monitored very intensively. Violations happen and can result in a termination of the suspension order, so much is clear. But respondents also gave examples of cases in which a violation of the conditions resulted in an alteration of the suspension order (Article 81 CCP) or simply a continuation of the suspension order.

European aspects

ECtHR case law and EU directives on procedural rights

After a long period in which the Dutch practice did not seem to raise eyebrows in Strasbourg, the ECtHR has recently found violations against the Netherlands in relation to pre-trial detention. The first of these recent violations was found in 2014, in *Geisterfer v. The Netherlands* (15911/08, 9 December 2014). The Court found that the "shocked legal order/12

years-ground", while generally acceptable, was insufficiently substantiated, because the Dutch judges had not given a reasoning capable of showing that the accused's release would actually disturb the legal order. The details of that case were very specific, because pre-trial detention had already been conditionally suspended and the accompanying release of the accused had not led to any unrest. Therefore, it was indeed implausible that the ground was still relevant. Even when the judgment contained important general principles (especially in § 39), it did not lead to the sentiment that important changes in the assessment of pre-trial detention were necessary.

On 9 February 2021, the ECtHR delivered three more judgments on Dutch pre-trial detention cases and in all three judgments the court unanimously held violations of Article 5 (*Hasselbaink v. Netherlands* 73329/16; *Zohlandt v. Netherlands* 69491/16, and *Maassen v. Netherlands*, 10982/15). Again, the superficial substantiation of grounds for pre-trial detention (not only the shocked legal order, but also fear of absconding and fear of collusion) was denounced. The Court not only referred to its own case-law, but also to the earlier mentioned third-party intervention by the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*), that had already identified the lack of (sound) argumentation in pre-trial decisions in 2016. At the moment of the writing of this chapter, it is too early to measure the impact of the judgments.

The EU-directives on procedural rights (Asselineau, 2018; Costa Ramos et al., 2020) also hold relevant provisions that relate to some of the shortcomings in Dutch practice. In this chapter, we specifically address Article 7 of Directive 2013/12/EU on the right to information in criminal proceedings, that aims to secure the right of access of the material of the case, also specifically in the pre-trial detention stage, in order to effectively challenge the lawfulness of the arrest or detention and to allow the effective exercise of the rights of the defence (Pivaty and Soo, 2019). We found that access to relevant information in the pre-trial detention phase is very limited and that lawyers often are empty-handed when it comes to substantiating requests for (provisional) release. In other comparative research, Jacobs and Lindeman (2019) found that the execution of pre-trial detention led to significant obstacles regarding the exercise of defence rights.

European Supervision Order (ESO)

The European Supervision Order (ESO; see Chapter 14) has been implemented in Article 5.7.1 et seq. of the Dutch CCP). The Public Prosecution Service has been appointed as the competent authority (Article 6 framework decision: Article 5.7.4 CCP). Within the Public Prosecution Service, the Centre for International Legal Assistance in Criminal Matters – Noord Holland (CILA, *Internationaal Rechthulp Centrum (IRC) Noord-Holland, department WETS-ETM*) has been appointed as the central authority concerning

the ESO.[10] The CILA processes all incoming and outgoing requests based on this mechanism and it decides independently on the incoming requests. Our DETOUR research showed that, while the PPS has made considerable effort to facilitate the ESO, it is not being used much. A lack of knowledge, the bureaucracy involved, and the length of the proceedings seem to stand in the way of a widespread use of the ESO (Lindeman et al., 2018).

Concluding remarks and suggestions for reform

In this chapter, we have demonstrated that decision-making in pre-trial detention cases in the Netherlands is driven by a couple of important factors: legal culture, time constraints, case load, limited safeguarding of procedural rights, lack of effective remedies and a reluctance to use alternatives.

Legal culture and criminal policy have culminated in certain conventions towards pre-trial detention. A preventive approach is leading, based on assumptions about the societal impact of the release of the suspect. Government policy is aimed at an "on-the-spot" approach and the mantra is being "tough on crime". This causes a climate in which the provisional release of suspects of so-called high impact crimes or repeat offenders is an exception. This legal culture, that is manifest in the policy on the expedited proceedings as well, seems to be deeply institutionalised and has led to a very extensive interpretation of the statutory grounds for pre-trial detention.

Time constraints lead to very little information being available in the first stage of pre-trial detention: the police have very little time to compile a comprehensive casefile and the probation office has very little time to provide relevant information on the personal circumstances of the suspect. The lawyer therefore has very limited opportunities to thoroughly substantiate a plea for alternatives.

The caseload for examining judges and courts in chambers is very high, which stands in the way of thorough deliberation. In more recent years, the introduction of so-called professional standards does not seem to have had a significant impact (Boone et al., 2019: 177).

Furthermore, procedural safeguards are far from ideal. As said, lawyers have little time to prepare the case and with a fixed (and not very generous) remuneration only limited resources are available. Access to the casefile is often problematic, as the file is often provided on very short notice and contains ample relevant information. Access to the suspect can also be problematic. This is all the more cogent when we bear in mind that in most cases it is only after considerable efforts by the lawyer that a suspect may face suspension of pre-trial detention.

Legal remedies for the suspect are limited and not very effective. Appeal in cassation at the Supreme Court is not possible, whereas the hearing before the trial court also leaves no room to address earlier faulty pre-trial detention decisions. Consequently, faulty or ill-substantiated decisions often remain

without consequence. No significant legal development exists, even when the ECtHR has repeatedly found a violation of Article 5 ECHR in Dutch cases in recent years. All in all, there is little incentive for the judiciary to change its attitude towards pre-trial detention.

Earlier we mentioned the current proposal for a new CCP, that also addresses pre-trial detention and aims for a legal duty for judges to examine the possibility of alternatives. This proposal explicitly follows some of the recommendations that were given in our DETOUR-report on the Netherlands. However, we feel that that it is not necessary to wait for a change in legislation. To reduce the use of remand detention, the question that should be considered in the pre-trial stage is not if detention should be applied or not, but what restrictions of liberty are necessary to fulfil the aims that are at stake in this stage of the criminal justice process.

Notes

1 Compared to most northern, western and southern European countries with more than one million inhabitants (Aebi et al., 2022, table B). For an elaboration on the reasons for this low prison rate, see Boone et al. (2022).
2 These numbers are based on an annual count in September of each year. It includes not only adult prisoners who are detained within a penitentiary institution, but also prisoners who are placed in special healthcare institutions used for those who are particularly vulnerable and persons who follow a penitentiary programme outside prison.
3 Quote taken from a press release in English, at https://english.rekenkamer.nl/publications/reports/2017/11/14/pre-trial-detention-suspects-in-the-cells (accessed 10 January 2023).
4 Answers to Parliamentary questions by the member Van Nispen (SP) to the Minister of Justice and Security, *Aanhangsel Handelingen II* 2016/17, 1848.
5 www.rechtspraak.nl/SiteCollectionDocuments/professionele-standaarden-strafrecht.pdf (accessed 10 January 2023).
6 This research was carried out for the EUPRETRIALRIGHTS project. See www.prisonlitigation.org/eupretrialrights/?lang=en (accessed 10 January 2023).
7 Until 1 January 2020, this was Article 89 CCP.
8 There are three Dutch probation organisations ("3 Reclasseringsorganisaties (3RO)"), of which the Dutch probation service (Reclassering Nederland) is the largest.
9 An important exception in this regard is made for cases in which there is a suspicion for terrorist crimes: after the first 90 days, the court in chambers can extend the pre-trial detention during two years, with a maximum of 90 days at a time.
10 In addition to mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty (Framework Decision 2008/909/JHA).

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