

Bewijsmotivering in strafzaken

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SUMMARY

The core topic of this study is the extent to which in criminal cases the existing requirements set for reasoned decisions as to the facts sufficiently meet the functions which such reasoned decisions must perform. These functions are: control, raising the court's awareness and explication. The function of control implies that it must become clear from the statement of reasons given by the court that the rules governing the decision to be taken have been observed and that the parties directly involved are given the opportunity on appeal to raise questions about the decision before a Court of Appeal or the Netherlands Supreme Court. The function of raising the court's awareness is linked to the idea that if a court knows in advance that it must provide the reasons for its decision in writing and so does, it will be faced with specific questions that need to be answered. The function of explication, finally, refers to the court explaining to the parties involved and the public, by way of the included reasons, on what grounds it has arrived at its decision. The functions of control and awareness-raising both relate to guaranteeing the correctness of the decision and, seen from the perspective of these functions, the statement of reasons serves to enforce or supplement the existing rules of evidence. The degree to which the statement of reasons meets these functions is therefore in part dependent on the extent and scope of the law of evidence. The function of explication has a far lesser direct impact in an evidentiary sense and must rather be viewed in the light of guaranteeing an independent, impartial and public administration of justice.

The study commences with an historical exploration of the rules of evidence and the rules governing the express statement of reasons. The exploration shows that, since the coming into effect of the first Code of Criminal Procedure in 1838, there has been a clear link between the rules of evidence and those governing the express statement of reasons. This connection is found most clearly in the debate that raged during the 19th century on maintaining the limited statutory evidentiary system introduced in 1838, in which the Dutch Code of Criminal Procedure contains an exhaustive list of the means of evidence and minimum standards of proof. Opponents to this system pointed out that the application of general rules of evidence must necessarily lead to incorrect results in individual criminal cases. They deem that the correctness of the decision as to the facts is better served if the court is obliged to give the reasons for its decision. When the Code of Criminal Procedure of 1926 was introduced, this criticism was only partly met. A number of unsuitable rules of evidence were abolished and partly replaced by additional duties imposed on the court to state its reasons. This applies to the abolishment of inference as a means of evidence (*het bewijsmiddel der aanwijzingen*) and the use of non-sworn witness statements. In their place came the duty to expressly underpin the relevance of facts – still found in part in Article 359, par. 3, Dutch Code of Criminal

Procedure (DCCP) – and the duty to state additional reasons where use is made of non-sworn witness statements – still found in Article 360 DCCP. In the draft of the Ort Commission (*Staatscommissie Ort*) the minimum standards for establishing proof were abolished and replaced by a duty to provide additional reasons where the court wishes to base the proof on the sole statement of the defendant or a sole witness statement. In the final stage, this proposal was dropped and as a result the statutory (DCCP) evidentiary system – with its exhaustive list of the means of evidence and minimum standards for establishing proof – has been maintained in essence. However, apart from the two requirements as to reasoned decisions referred to above, two additional requirements were laid down in the Code, namely: the requirement that the judgment must contain the content of the means of evidence employed and that the decision as to the facts must be reasoned.

Chapter 3 discusses the way in which subsequently, after 1926, the rules of evidence have been interpreted. Such interpretation can be summed up by a single word: broadly. To all aspects that are characteristic of the rules of evidence laid down in the DCCP, the Netherlands Supreme Court has made exceptions through its case law. For example, for a long time now, the list of the means of evidence has been non-exhaustive, because all forms of evidence may, in effect, be conveyed indirectly, orally or in writing, as a result of the *testimomium-de-auditu* (hearsay testimony) construction approved by the Netherlands Supreme Court. A broad interpretation of the means of evidence of the court's "own observation" has also contributed to the erosion of the limited statutory evidentiary system. The statutory minimum standards for establishing proof are hardly relevant, because they relate to the alleged facts as a whole and therefore do not require that the involvement of the defendant must be evident from more than a single source. And finally, the Netherlands Supreme Court has construed rather broadly the specific requirements set for the means of evidence, for instance the provision that witnesses may only testify about what was observed or experienced personally. Only the Strasbourg Court has imposed further normative requirements in relation to the decision as to the facts. These ensue from the right of the defence to hear witnesses, which is an elaboration of the right to a fair trial laid down in Article 6 ECHR. The Netherlands Supreme Court has subsequently exercised considerable restraint in applying the Strasbourg norms.

Chapters 4 through 6 deal with the specific duties to expressly state the reasons for the court's decision, as incorporated into the DCCP in 1926. In view of the framing history of the Code, the expectation could be that the less strict the statutory rules of evidence are, the more the resulting vacuum in regulating the decision as to the facts would be filled by further reasoning requirements. This expectation is false, however.

The main topic of Chapter 4 is the court's duty to disclose the content of the means of evidence in the judgment. Although originally, according to the legislator, this requirement was not intended as a rule governing reasoned decisions, for a long time it proved to be the main source of accountability for the decision as to the facts. The inclusion in the judgment of the content of the means of evidence employed by the court allows determination of whether or not the evidence satisfies the statutory requirements; of whether it is relevant for what has been established as proven; and of whether it is sufficient, in view of the minimum standards of proof prescribed by the DCCP. In addition, for a long time the Netherlands Supreme Court stressed the importance of the provision, because it is easy for the defendant to find out about the evidence against him if the content of the means of evidence is included in the judgment.

There are, however, many exceptions to the requirement that the content of the means of evidence must be included in the convicting judgment. The most essential is that, only where an appeal is lodged against the judgment, must all data relevant to the decision as to the facts be added to the judgment. Until such moment or where no appeal is lodged, it is sufficient to write an abridged judgment in which only the conclusion relating to the decision as to the facts is found. Where decisions by single judges (*unus* rule) are concerned, and in the case of a confessing defendant, the full content of the evidence against the defendant need not be included, even after an appeal has been lodged with a Court of Appeal or the Netherlands Supreme Court. A reference by the court as to the provenance of the evidence – the case file – suffices. The requirement of stating the reasons for judicial decisions by including the content of the means of evidence employed neither applies, to a large degree, in the Promis project, a project aimed at improving express reasoning in criminal judgments, which was started in 2004. In addition, it has emerged that some district courts, after an appeal has been lodged, fail to add the data pertaining to the means of evidence employed or a reference to the source of these means of evidence. The courts defend such practice by pointing at the content of the appellate proceedings. In such proceedings, the case is re-tried in full and possible errors in the judgment, such as the failure to include, in the judgment, evidence against the accused, may be corrected without further consequences.

Chapter 5 deals with the requirement that the evidence must be relevant. This requirement was expressed in the Code of Criminal Procedure by the court's duty to indicate which facts and circumstances are relevant. In 2005, this duty was repealed and at present it is sufficient if the content of the means of evidence, as included in the judgment, is relevant. The change is, in effect, a codification of existing practice going back to the introduction, in 1926, of the Code. All the duty entailed, after all, was that the court, in its judgment, included a standard phrase to the effect that: 'the means of evidence listed in the judgment contain the relevant facts and circumstances on which the court has

founded its conviction'. Since this practice was accepted by the Netherlands Supreme Court, the reasoned-judgment rules included in Article 359, par. 3 DCCP, have never accomplished what was intended by the legislator, namely that the court, in its judgment, discloses its logical thought process. This is regrettable, especially if a construction is used whereby proof is inferred from circumstantial evidence. In such cases, the criminal court does not have to express in the judgment *what* it has inferred *from which facts and circumstances*. Listing the evidence without further explanation suffices. The Netherlands Supreme Court will only intervene if the court's decision as to the facts cannot be inferred from the evidence.

In the case of special evidentiary constructions, such as using the fact that the defendant remains silent or lies, or the use of similar past occurrences as evidence (*schakelbewijs*), the court must provide an explanation of the relevance of the evidence, because a mere listing of the content of the evidence does not show its relevance for the court's decision to convict. This also holds true for the refutation of evidence by what is referred to as *Meer en Vaart* defences. At issue here is whether there may be an alternative explanation for the evidence. In those cases, in which the relevance of the evidence is not automatically evident or is disputed, the trier of fact must state additional reasons in its judgment. In many instances, such a statement could consist in the inclusion of a standard phrase, such as 'clearly intended to cover up the truth', 'not supplied a statement which invalidates the relevance of the evidence', or 'what has been adduced by the defence is not persuasive'.

The reliability of evidence is discussed in Chapter 6. Assessment of the reliability of evidence is premised on the court's discretion. This discretion is expressed in the following standard consideration of the Netherlands Supreme Court: 'selection and evaluation of the evidence is reserved for the trier of fact'. The court is not obliged to give account of its selection and evaluation. An exception to this rule is laid down in Article 360 DCCP. Where the court uses non-sworn statements, statements by (partly) anonymous persons, accused turned state witness and shielded witnesses, it must state the reason for such use *ex officio*. The reason for this duty to state reasons lies in the fact that these forms of evidence, by their nature, may be unreliable or that independent review of their reliability by the adjudging court is made more difficult. The duty to state the reasons for its decision purports either to make the court aware of the precarious character of these forms of evidence, or to express, in the judgment, that it has independently examined the reliability of the evidence. This noble purpose is partly undone by the case law of the Netherlands Supreme Court in which the scope of Article 360 DCCP has been limited; the trier of fact, for example, does not have to readily assume that the statement is a non-sworn statement or an anonymous statement within the meaning of Article 360 DCCP. A second exception to the premise of discretionary selection and evaluation is founded in the case law of the Netherlands Supreme Court. Although for a long

time the second requirement, laid down in paragraph 2 of Article 359 DCCP, that the decision as to the facts must be reasoned, lacked significance, from the eighties onwards, the Netherlands Supreme Court began to alter this. In a number of specific cases, it demanded that the criminal court, in its judgment, give its reasons for its selection and evaluation of the evidence, provided that the defence has conducted an unambiguous and well-founded defence in relation to this issue. Regarding the reliability of evidence, the Netherlands Supreme Court has assumed such a duty of reply in relation to statements by anonymous witnesses, accused turned state witness, and expert witnesses whose expertise is disputed, or where the reliability of the method employed by them is contested. The first two instances are now listed in Article 360 DCCP and with regard to these there is a duty to state reasons *ex officio*. Statutory rules have also been created where the other instances are concerned. From January 2005 onwards, the rule is that each express and reasoned assertion put forward by the defence or the Public Prosecutor's Office may only be rejected by the court by stating the grounds for such rejection (Article 359, par. 2, second full sentence DCCP). The statutory rules do not only depart from previous case law as to the extent of the court's duty to state reasons for its decision, but the underlying reason for the duty to state reasons differs as well. In those cases, in which the Netherlands Supreme Court accepted a duty to state additional reasons, this was intended, among other things, to have expressed, in the judgment, that the criminal court, rather than the examining magistrate or the expert witness, bears the ultimate responsibility for uncovering the truth. The duty to reply as laid down in the second full sentence of Article 359, par. 2 DCCP is much more intended to give structure to the uncovering of the truth, in which increasingly the emphasis is placed on the parties' position in the matter. In criminal proceedings and the outcome of these – the judgment –, the focus must be on matters that divide the parties. Increasing emphasis on what the parties submit will push the court's responsibility for establishing the relevant facts and circumstances to the background.

From Chapters 3 through 6 it may be concluded therefore that in the Netherlands the rules of evidence are interpreted far less narrowly than is to be expected on the grounds of the content and background of the statutory rules. Moreover, judicial discretion in establishing and evaluating the facts is not compensated by a more narrow interpretation of the rules on stating reasons. Only the general duty to reply, effective from 1 January 2005, and its predecessors in case law could be evidence of a renewed interest in further regulation of the decision as to the facts, because additional requirements relating to the stating of reasons are set. However, the requirements set for obtaining a reply from the court to the assertions submitted by the defence or the prosecution, the playing down of the sanction of nullity formulated by the Netherlands Supreme Court and the absence of a substantive evaluation of the reply given are an indication that further regulation of the decision as to the facts is clearly not envisaged. The aim

is to have a tailored statement of reasons, in the sense that the court must only explain its judgment if this is expressly requested by a party to the proceedings and where such a request is accompanied by all relevant arguments.

How different the situation in Germany, as discussed in Chapter 7. In contradistinction to the Netherlands, Germany does not have a limited statutory evidentiary system. All forms of evidence are allowed, in principle, providing they are presented to the court according to the relevant requirements. This means that the rules regarding the presentation of evidence in court, both as to form and content, must have been met. If these have been complied with, it is at the court's discretion to evaluate the evidence. This has been expressly laid down in § 261 *Strafprozessordnung* (StPO). In Germany, the emphasis is therefore on regulation of the presentation of the evidence in court and far less on the court's evaluation of the evidence. Nevertheless, the Bundesgerichtshof has held that it does not suffice for the decision as to the facts that the court is persuaded by the evidence. Such persuasion must have its foundation in the objective establishment of facts and must be in accordance with rules of general experience and scientific insights. In this respect, control is exercised in last instance and, to enable such control, the German criminal court must include in its judgment all facts and circumstances relevant to the decision as to the facts and must effectively weigh these. If it fails to do so, this may mean that it has not complied with its duty to investigate *ex officio*, or that it has not been thorough in evaluating the evidence. In specific cases – as in the case of conflicting statements (*Aussage gegen Aussage*) or the accused's silence – the Bundesgerichtshof has in effect dictated which aspects the court must involve in evaluating the evidence and include in the judgment.

There is a remarkable difference between the Netherlands and Germany regarding the inclusion of the reasons for the court's decision, since in Germany, in spite of an express provision (§ 261 StPO), the court's discretion in respect of the evaluation of the evidence has been curtailed by the imposition of rules on stating reasons, whereas in the Netherlands there are specific statutory provisions governing the duty to state reasons, which from the very beginning have been robbed of their significance. A second remarkable difference is that in Germany the initiative to state the reasons for the decision lies exclusively with the criminal court, and therefore the rule followed in the Netherlands that stating reasons is only prescribed if the parties, by conducting a defence, indicate that they wish to discuss the decision as to the facts does not apply. A third difference is the extent of last-instance review of the decision as to the facts. Compared to Germany, in the Netherlands such review is very limited.

The above differences are caused by a deviating law of evidence and criminal procedure. In both countries, an attempt was made to incorporate into the law a system which could guarantee the correctness of the decision as to the facts. In Germany, a choice was made for a system in which the emphasis lies on

presentation of the evidence before the court, so that the court is able independently to evaluate the available evidence. In the Netherlands, on the other hand, the emphasis has been placed on regulating, by means of statutory rules of evidence, the phase in which the evidence is evaluated. Within the limited statutory evidentiary system, the stating of reasons is of a predominantly procedural character, the emphasis shifting to control of statutory requirements with much less emphasis placed on the content of the evidence.

The original emphasis on presentation of the evidence in court and therefore less on evidence evaluation has resulted in Germany as well in a far-reaching duty for the criminal court to investigate *ex officio*, which duty may be reviewed in last-instance proceedings. The reason behind such a duty is that, where the court is not bound by rules governing evidence evaluation, there must be a guarantee, in any case, that it has at its disposal all relevant facts and circumstances in order to take the decision. The fact that the Bundesgerichtshof deemed it necessary to curtail the court's discretion in relation to evaluation of the evidence, has not negatively affected the importance of the court's duty to investigate. On the contrary, it is evident that such a duty to investigate gains in significance, if a court is also obliged to involve and weigh the facts and circumstances that have emerged as a result of its investigation.

The final difference between Germany and the Netherlands relates to review of the decision as to the facts by the last-instance court. Whereas in the Netherlands the Netherlands Supreme Court will exercise much more restraint in reviewing the decision as to the facts and conducts a marginal test as to the reasonableness of the decision, its German counterpart conducts a much more intensive review. Judgments by German courts must show that the court has examined all relevant facts and has involved these in its decision, while observing rules of general experience and scientific insights. This evaluation goes much further and may be explained in part by the absence of a means of appeal in serious criminal cases. Review of the evaluation of the evidence enables the Bundesgerichtshof to check the correctness and completeness of the investigation into the facts. Where defects are discovered, the judgment will be quashed in last-instance proceedings before the Netherlands Supreme Court and the case will be referred back. Thus, the guarantee that the facts will be evaluated by two courts is preserved, be it by detour.

The final chapter is dedicated to the importance of the inclusion of the reasons for the court's decision and the concomitant functions. Stating reasons is important, because it legitimises the decision ultimately taken by the court. The statement of reasons must show that the court has arrived at the correct decision. Arriving at a correct decision is safeguarded by the fact that the court is subject to the law; by the quality of the decision maker (independent, impartial and knowledgeable); and by the possibility to dispute the evidence. The question as to whether in a specific case these safeguards have been observed only becomes evident from the judgment and the statement of reasons included in it. In that

respect, the statement of reasons is therefore an essential condition for guaranteeing a proper search for the truth. The statement must show that the statutory limits applying to the decision as to the facts have been observed; it must demonstrate that the court has arrived at its decision in an independent, impartial and knowledgeable way and show that the court has examined and assessed the weight of the parties' assertions. Here, the functions of control and awareness raising are invoked. The function of explication contributes to a lesser extent to guaranteeing a proper search for the truth. Its main goal is to maximise communication between the court and those involved – the parties to the proceedings and the public. By providing an explanation, the court's judgment and the administration of justice in general gain in authority.

In the Netherlands, the reasoned statement as to proof has traditionally been dominated by the functions of control and awareness raising. However, it has lost much of its value, because the Netherlands Supreme Court has narrowly construed the rules governing evidence and the duty to state the reasons for the decision. As a result, there is little control to be exercised in the area of the law of evidence and there is not always a legal necessity to show, in the judgment, that the court has examined all relevant facts and circumstances. The only exception to this is the duty to reply to the assertions of the parties as included in the DCCP per 1 January 2005. Although the Netherlands Supreme Court has also construed this duty narrowly, it could nevertheless serve to regulate the decision as to the facts. This, however, would require that the decision as to the facts be more intensively reviewed in last-instance appellate proceedings. Thus far, the Netherlands Supreme Court does not seem to wish to follow the example set by its German counterpart in this respect. And so the duty to reply seems to be aimed predominantly at providing an explanation to the parties involved and to the public, without there being a possibility of subjecting the explanation itself to judicial review. Moreover, such an explanation is only required where the parties expressly so request. If they fail to do so, or if they fail to meet the applicable procedural requirements, this could be an indication for the court that there is no need for an additional statement of reasons.

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