5 Compensation for wrongful convictions in the Netherlands[1]

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1 Introduction: origins and development of compensation for wrongful convictions

Ever since the nineteenth century there has been legislative talk about the right to compensation after a wrongful conviction. Although such a right was generally accepted and deemed fair, even by the legislator, it was not until 1926 that the current Code of Criminal Procedure (CCP) came into being in the Netherlands in which such a right was introduced. The academic discussion on this topic had an even broader focus, and also alluded to the issue of compensation for damages incurred after proceedings that did not – generally – end in any sort of conviction that could warrant pretrial detention.[2] In the case of detention on remand, compensation will only be awarded if that is fair, given the circumstances. The legislator was explicit in the opinion that an absolute right to compensation in those cases, which was advocated at the time by some scholars,[3] should be rejected. If the state handled the case correctly and in the public interest, liability was not always just. An actual right to compensation was always deemed just when a person's conviction was overturned after a revision procedure and no sanction was subsequently imposed. In that situation there was more reason to assume that the person involved was innocent. A more imperative right to compensation was therefore appropriate. In the current 'modernisation' of the entire CCP, the stipulations on compensation after a wrongful conviction will change somewhat, but no major alterations are expected. We will address the upcoming changes when and where appropriate.[4]

1 Authors wish to thank Vincent Boer, LLM, for his help on this contribution.

2 *Kamerstukken II* 1913/14, 286(3) (explanatory memorandum) 86–88 and 161. See for the background AJ Blok and LC Besier, *Het Nederlandsche Strafproces* (Haarlem: Tjeenk Willink 1925) I, pp. 276–285 and II pp. 536–538.

3 See the literature in the previous footnote.

4 All Dutch legislation can be found at: https://wetten.overheid.nl/zoeken. The draft of the new CCP is expected to be introduced as a bill to Parliament sometime in 2023. It will presumably take several years and numerous changes before the new CCP will come into effect (which has been predicted for 2026). For more on this legislative project see: https://www.rijksoverheid.nl/onderwerpen/nieuwe-wetboek-van-strafvordering.

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In this chapter on the Dutch regulations on compensation after a wrongful conviction, we will define a wrongful conviction as a conviction for a crime resulting from regular or ordinary criminal proceedings that has subsequently been overturned after the extraordinary procedure of revision on the exclusive legal grounds of: 1) two convictions that cannot coexist, 2) a successful complaint to the European Convention on Human Rights (ECHR) as appropriate redress or 3) a *novum* (see Article 457 Section 1 CCP). Both factual or legal innocence and procedural errors could therefore constitute a wrongful conviction.[5] In the event of a successful revision application, the case will be tried before a 'fresh' *appellate* court which has had no dealings with the case (even if the original conviction came from a regional court). In short, the original verdict(s) can be upheld or quashed (depending on the ground, either by the Supreme Court or the appellate court). If the verdict is quashed, the appellate court gives its own ruling, whereby it cannot give a more severe sentence than the one that was originally given.

We will discuss the legal framework for compensation after a successful revision procedure (Section 2), the calculation of the amount of compensation (Section 3), the recourse claim of the state against persons who caused wrongful convictions (Section 4) and the practice of compensating the wrongfully convicted (Section 5). Subsequently we will evaluate the Dutch mechanism for compensation for wrongful convictions (Section 6). In Sections 2–4 we will focus on the specific entry in Article 539 CCP, because this will normally govern compensation to a large extent. The possibility to claim other damages based on civil law will be briefly mentioned in Section 3.2.

2 Legal framework

2.1 Background of the current legal framework

The Netherlands is party to the International Covenant on Civil and Political Rights (ICCPR). Article 14 Section 6 ICCPR gives the former suspect a right to compensation if their final conviction is reversed.[6] Article 3 of the Seventh Protocol to the ECHR provides a similar right. Since the Netherlands has not ratified that Seventh Protocol (because of the scope of the right to a review of a conviction by a higher tribunal), this provision has no effect and cannot be relied on to claim any compensation.

The most specific stipulations on compensation for a wrongful conviction can be found in the CCP. The mechanism was originally laid down in 1926 in Article

5 Compare Na Jiang, *Wrongful Convictions in China. Comparative and Empirical Perspectives* (1st edn, Springer 2016) Ch. 2.

6 It reads: 'When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.'

481 CCP, regarding compensation for damages incurred because the former suspect underwent penalties, and the measure of placement under a hospital order (in case of insanity) and pretrial detention. The stipulation was later transferred to Article 480 CCP in the Reform of Revision in Favour of Former Suspects Act (2012).[7] In this transfer the scope of the provision was widened to also encompass other measures which led to deprivation of liberty, in addition to placement under a hospital order. The legislator believed the distinction could not be justified and made compensation possible in more cases. The legislator mentioned the measure of placement in a facility for repeat offenders (*inrichting voor stelselmatige daders*, ISD).[8] The Reform of Revision in Favour of Former Suspects Act also introduced Article 482 CCP, which dealt with the damages and legal fees paid by the former suspect to the victim. Those damages and fees could be reimbursed to the former suspect; reimbursement is paid by the state. Articles 480 and 482 CCP were merged in 2020, when several separately placed regulations on compensation were relocated and placed together in Article 539 CCP, without any changes except a technicality.[9]

The topic of compensation for a wrongful conviction is thus currently still regulated in the CCP. There is no stipulation in the constitution, nor is there any other specific regulation. There are the general regulations of civil law, especially undue payment and tort law, which could also be applied to state liability in case of a successful revision application and subsequent positive outcome for the former suspect (see especially Article 6:162 Civil Code).[10] This arrangement might change when the modernisation of the CCP has taken effect, which is expected to be in 2026. As of 2022, it appears that the stipulations in the new CCP will primarily deal exclusively with compensation after a wrongful conviction. In the current draft, it is impossible for the former suspect to start civil proceedings against the state for any claim which falls under the scope of Article 539 CCP and for other claims up to €25,000.[11] The role of civil law will thus be more limited. Compensation (claims) are and will be primarily a matter of public (in this case criminal) law.

7 See on the background and effectiveness of this act Joost Nan et al., *Victa vincit veritas?* (1st edn, Boom Juridisch 2018), Joost Nan et al., 'Evaluatie van de Wet hervorming herziening ten voordele' (2019) *Nederlands Juristenblad* 184.

8 *Kamerstukken II* 2008/09 32045 3 (explanatory memorandum) 42.

9 See further *ibid.* [2.2.1].

10 See briefly *ibid.* [3.2].

11 See the draft bill of the new CCP (*ambtelijke versie* July 2020) Article 6.6.1. The relevant provision, Article 6.6.6, will probably read (non-official translation): '1. If after the annulment of the irrevocable final judgment pursuant to Book 5, Title 8.1, no penalty or measure or the measure referred to in Article 37 CC is imposed, a compensation will be awarded in regard to the insurance and pre-trial detention as well as the punishment suffered and custodial measure. The allocation takes place insofar as there are grounds of fairness, taking all circumstances into account. 2. The request for compensation is submitted by the former suspect within five years after he has been able to take cognizance of the termination of the case'.

To the best of our knowledge, there is just one case law on this topic (see Section 5). We did not find any rulings from the Supreme Court.[12] We expect that the case law, if it does cover more than just a couple of cases, is of no real importance in interpreting the regulations. An exception to this may be the *Putten murder case*, which is discussed in more detail in Section 5. There are no statistical data on compensation claims of this sort available.

2.2 Grounds for compensation for wrongful convictions

2.2.1 Possibilities under the CCP

The possibilities covered in the CCP must be seen as the main options to claim compensation, especially Article 539 CCP. To sum up the possibilities included in Article 539 CCP: after a successful revision application has been made by the former suspect (regardless on which of the three exclusive grounds) and the conviction has subsequently been quashed and no sanction adjudicated, the former suspect has a right to compensation for the penalties that led to deprivation of liberty (Section 1) and can also try to claim damages for the pretrial detention that was applied (Section 2). In the proceedings in which the conviction was annulled, the appellate court can order the state to repay the damages the former suspect has paid to the victim (Section 3), as well as the legal fees the former suspect paid to the victim (Section 4). We will elaborate further on these options later in this section.

If, after revision, the original verdict is quashed and no sanction is adjudicated, the former suspect can claim the non-pecuniary damages incurred insofar as they relate to an earlier penalty, as well as measures which resulted in the deprivation of liberty.[13] Usually, the new trial will lead to an acquittal, but it is also possible that the conviction itself is upheld in the new trial, but that no sanction is imposed (see Article 9a Criminal Code (CC), *rechterlijk pardon*). If the text of Article 539 Section 1 CCP is interpreted according to the parliamentary explanation, it can be concluded that compensation is only possible for the undergoing of penalties and measures which led to a deprivation of liberty.[14] The relevant main penalties would then be imprisonment and detention. *Measures*, which are another type of sanction, which lead to a deprivation of liberty are placement under a hospital order (TBS or *terbeschikkingstelling*) and placement in a facility for repeat offenders (*plaatsing in een inrichting voor stelselmatige daders*).[15] If these sanctions are

12 But that is not extraordinary because an appeal to the highest Dutch criminal court is not possible in the specific compensation proceedings.

13 The former suspect's heirs can only claim material damages (see Article 539 Section 1 in conjunction with Article 533 Section 6 CCP).

14 See also AJ Blok and LC Besier, *Het Nederlandsche Strafproces* (Tjeenk Willink 1925) II, 538 and REP de Ranitz, *Herziening van arresten en vonnissen* (Tjeenk Willink 1977) 185.

15 On all criminal sanctions see HS Taekema and JS Nan, 'Principles of Dutch criminal law', in HS Taekema, AJ de Roo and C Elion-Valter (eds), *Understanding Dutch Law* (3rd edn, Boom juridisch 2020) para. 8.5.

not upheld and no other sanction followed due to a successful review of a criminal case, a claim for compensation can be made.[16] Undergoing a different sanction does not lead to a right to compensation. This is because restitution of deprivation of liberty is not possible, whereas a fine can be, which at the time was the only other main penalty.

It has been advocated to interpret Article 539 CCP in a wider manner and to see this stipulation as a possibility to claim compensation for all sanctions the former suspect had to undergo.[17] An appellate court also interpreted the article that way (regarding the penalty of suspension of the former suspect's driver's licence),[18] and this seems to be a more reasonable and practical interpretation. Otherwise, the former suspect has to start separate civil proceedings to claim the damages incurred due to the payment of a fine, executed community service, the confiscation of objects, etc, on the civil law basis of – in general – undue payment or tort law.[19] Certainly a fine would have to be repaid, confiscated items returned or restitution should take place. However, time spent on community service cannot be given back. Perhaps the damages incurred because of sanctions that do not lead to the deprivation of liberty do not legitimise a right to compensation (and there were far fewer sanctions around the turn of the nineteenth century).

This wider interpretation does not seem to be the leading one. This also becomes apparent from the stance taken by our current, 'modern' legislator, who appears to be holding on to the stricter interpretation.[20] In the future, under the new regulations in the CCP, the former suspect will be able to claim damages incurred to the amount of €25,000 because of the execution of those other sanctions in the same proceedings as for the sanctions which led to the deprivation of liberty. That claim is then based on the principle of fairness. However, a right to compensation will still not exist in the new legislation. For the damages exceeding €25,000, the former suspect will have to instigate civil proceedings.

As a consequence of the wording of Article 539 Section 1 CCP and the intention of the legislator, compensation for the sanctions the former suspect underwent and which led to deprivation of liberty is mandatory and damages should be awarded. The state is never exempt from liability. The only remaining question is what the amount of the compensation should be. This question will be answered on the basis of the principle of fairness and could, given the circumstances, result in very moderate damages being awarded, possibly zero. It is

16 In future a claim will also be possible if placement under a hospital order is imposed.

17 GAM Strijards, *Revisie: inbreuken en executiegeschillen betreffende het strafgewijsde* (Gouda Quint 1989) 285–286. See also JWHG Loyson 'De raadkamerprocedures in strafzaken' (2020) 14 *Praktijkwijzer Strafrecht* (3.14), who offers no substantiation of his wider view.

18 Court of Appeal Arnhem 28 March 1989, ECLI:NL:GHARN:1989:AD0697, *NJ* 1989/776.

19 Civil proceedings are deemed possible, AJA van Dorst, 'Herziening in strafzaken' in MF Attinger et al./PAM Mevis et al. (eds.), *Handboek Strafzaken*, (Wolters Kluwer 2021).

20 Explanatory memorandum new CCP (*ambtelijke versie* July 2020) 1069.

important to point out that the damages incurred because of the sanctions the former suspect underwent are not the same as the losses sustained because of the prosecution itself.

The damages incurred due to pretrial detention are a slightly different story. There is no right to compensation, but compensation could be awarded if that is deemed fair (see Article 539 Section 2 CCP). This will change in the planned new CCP. The former suspect will then also have a right to compensation for damages. It is doubtful whether the distinction between pretrial detention and the executed sanction which led to deprivation of liberty will lead to a very different approach in practice.[21] In this case, the principle of fairness forms the ground for awarding compensation (or leads to exemption of the state of liability) and for the determination of the amount. The regular provisions on compensation for pretrial detention where no conviction follows (or for a crime on which the pretrial detention could be based) are to be applied accordingly. Compensation could, for instance, be denied or lowered if the former suspect acted in such a way that (prolonged) pretrial detention could be said to be their own fault. An example is freely confessing the crime or remaining silent when refuting the reasonable – or even grave – suspicions was possible, and could and would have resulted in earlier release.

Furthermore, the state can also be ordered to repay the damages that were awarded to the victim in the criminal proceedings, and which have already been paid by the former suspect (see Article 539 Section 3 CCP). This is not mandatory but optional. The same goes for the accompanying awarded legal fees that have been paid by the former suspect to the victim (see Article 539 Section 4 CCP). The idea was that the victim should not bear the burden in such matters. An exception was made if the victim was the cause of the wrongful conviction in the first place, for instance by making a false statement to the former suspect's detriment.[22] In such an extraordinary case, the request for reimbursement will be denied and the former suspect will have to address the former victim directly. The reimbursement can be ordered in the criminal proceedings after a successful revision application, in which no sanction is eventually imposed. It cannot and will not be ordered in the subsequent compensation proceedings. If the state is ordered to make these payments, the victim does not have to pay them to either the former suspect or the state. The stipulations are intended to make sure the victim does not end up out of pocket, except when the victim caused the wrongful conviction.[23]

These stipulations make it possible for the financial relationship between the former suspect and the victim to be settled in the verdict after a successful revision application, without the victim being involved and burdened. That is appropriate

21 MJA Duker, 'Niet-imperatieve toekenning bij onterecht ondergane verzekering en voorlopige hechtenis?' (2015) art. 480 Sv Archief Wetboek van Strafvordering AL Melai/MS Groenhuijsen et al. aant. 6.

22 *Kamerstukken II* 2008/09 32045 3 (explanatory memorandum) 25.

23 Ibid.

and efficient. There is one instance where this is not the case, where the victim is mostly to blame for the miscarriage of justice by making a false statement to the former suspect's detriment. When reimbursement by the state is not ordered, it is the former suspect who has to address such a former victim in civil proceedings. This will put a burden on the former suspect so perhaps it would be better if the state still had to compensate the former suspect and turn to the victim for reimbursement, for instance based on the right of recourse.[24] It seems fair to place the burden of redress on the state, under whose tutelage the judicial error occurred, even if the victim was mostly to blame. Currently, this is not possible. In the modernisation project, these stipulations will not be changed, but will be placed with the other stipulations on revision in favour of the former suspect, as it was when they were introduced (see Article 5.8.26 CCP).

The compensation of other costs, such as costs for legal representation (legal fees), other defence costs (for instance a hired expert to make a report) and costs for the attendance of court hearings, do not fall under the scope of Article 539. But the usual stipulations of Articles 529–538 CCP are applicable, so these costs could be reimbursed if they had not already been.[25] An important point is that the majority of these costs will only be reimbursed provided the criminal proceedings did not result in any sanction being adjudicated and the judicial pardon not being extended, and reimbursement is deemed fair. The scope of these provisions therefore more limited than that of Article 539 CCP.

2.2.2 Civil law as a residual category

Besides compensation based on Articles 529–539 CCP (especially in relation to the former suspect having to undergo a certain sanction or pretrial detention and reimbursement of the payments having to be made to the victim ex Article 539 CCP), there is the more general option of a claim for compensation based on undue payment or civil tort law (see Article 6:162 CC). These rules can be seen as complementary, as they allow other damages to be paid because of the state's obligation or liability in light of a revised conviction, *but only if these claims fall outside the scope of the provisions of the CCP.* An important category that can fall under this provision is that of restitution of damages and/or damages awarded in the case of sanctions the former suspect underwent that did not lead to a deprivation of liberty, such as financial penalties and measures. It could also be any illegal action of the state, for instance deprivation of liberty in violation of the

24 See also MJ Borgers and T Kooijmans *Het Nederlands strafprocesrecht* (10th edn, Wolters Kluwer 2021) 1080, footnote 635.

25 See for a rare example, Court of Appeal Leeuwarden 4 October 2002, ECLI:NL:GHLEE:2002:AE8349 and ECLI:NL:GHLEE:2002:AE8353. See for more on the topic of compensation after a criminal trial, NJ Kwakman, 'Schadecompensatie in het strafproces' (DPhil thesis, University of Groningen 2003) and NM Dane, 'Overheidsaansprakelijkheid voor schade bij legitiem strafvorderlijk handelen' (DPhil thesis, University of Leiden, 2009).

stipulations of the CCP of Article 5 ECHR.[26] Another category is non-pecuniary damages caused by the earlier prosecution and/or conviction itself, such as the burden of the conviction, damage to the reputation of the former suspect, missed business opportunities, etc.[27] They have to be damages beyond the hardship of the pretrial detention. For liability based on tort law, either the former suspect has to prove that the state acted illegally during the regular proceedings or the former suspect's innocence has to be evident from the verdict or case file.[28] An acquittal is not enough, as a verdict of not guilty does not always mean someone is innocent. In the case of a revised conviction, the chances that the subsequent verdict or documents prove innocence will be better than in normal proceedings. In the case of civil proceedings against the state for damages outside the scope of Articles 529–539 CCP, the usual provisions of civil procedural code are applicable.[29] In the new CCP, instigating such a civil proceeding will only be possible if the claim exceeds €25,000, according to Article 6.6.1 CCP. This means that the simpler claims can be handled by the criminal courts – which are more accessible – and the more complex cases by the civil courts.[30]

2.3 Procedure for claiming compensation under the CCP

Former suspects, or their heirs, are eligible to claim compensation (see Article 539 Section 1 CCP). If the amount claimed is at least €500, legal aid could be granted by the Legal Aid Board (*Raad voor Rechtsbijstand*). That is, if the former suspect's financial position is modest. Normally, a request for compensation would also contain a request for reimbursement of the legal fees in relation to the request. The standard amount that is awarded is €340 where no oral hearing is needed, and the compensation for the legal fees is doubled if such a hearing does take place. No court fee is levied on the former suspect for the request, even if the submission is altogether inadmissible or (largely) rejected.

Given the reference in Article 539 Section 1 CCP to Articles 533–536 CCP, the following procedural conditions and formalities apply. The request for compensation has to be filed within three months of the conclusion of the case (so after the reviewed verdict was given).[31] The competent court is the appellate court

26 Article 5 Section 5 ECHR gives a right to compensation in those cases.

27 See on Dutch civil law generally HN Schelhaas and HS Taekema, 'The outlines of Dutch private law', in HS Taekema, AJ de Roo and C Elion-Valter (eds), *Understanding Dutch Law* (3rd edn, Boom juridisch 2020). A useful website is http://dutchcivillaw.com.

28 See, among other authorities, Supreme Court 13 October 2006, ECLI:NL:HR:2006:AV6956, *NJ* 2007/432.

29 See further, M van Hooijdonk and P Eijsvoogel, *Litigation in the Netherlands: Civil Procedure, Arbitration and Administrative Litigation* (2nd edn, Wolters Kluwer 2009). The following websites could also be useful: http://dutchcivillaw.com and https://dutch-law.com/proceedings-netherlands.html.

30 Explanatory memorandum new CCP (*ambtelijke versie* July 2020) 1045.

31 In the new CCP this will be prolonged to five years, in alignment with civil law. See the draft bill of the new CCP (*ambtelijke versie* July 2020), Article 6.6.6 Section 2.

(criminal division) that has handled the case after revision, and that has given the latest verdict. If possible, the same panel of three judges should give a ruling on the request. The request has to be submitted on paper and signed by the former suspect, but no other formal conditions apply. If an oral hearing takes place (when it is deemed necessary by the court), it is held in public (not in camera). An oral hearing is not needed if the request and the (positive) outcome are clear. Also, the general regulations on Council chamber proceedings apply (*raadkamer*, see Articles 21–25 CCP). That is all proceedings other than the usual trial proceedings (in open court). During the 1990s, this type of proceeding was aligned with the requirements of Article 6 ECHR, which is sometimes applicable. Since a final determination of the civil rights of the former suspect takes place in the compensation proceedings, it seems safe to say the civil limb of the right to a fair trial is applicable.[32] The district attorney's office is the counterparty in the proceedings. The district attorney's office and the former suspect are both summoned in the case of an oral hearing. Attendance is not obligatory for the former suspect, who can be assisted or represented by legal counsel during the hearing and can also bring an interpreter, if necessary, but they are not provided by the court. The district attorney's office has to submit the relevant case file to the court and make it available to the former suspect and the attorney. Both the representative of the district attorney's office and the former suspect and/or the attorney are given a hearing and can thus make a statement. In contrast to normal criminal proceedings, the former suspect does not have the right to the last word (*laatste woord*).[33] Minutes of the hearing are made and signed by the clerk and then signed by the president of the chamber of judges or one of the other judges. The ruling itself has to be reasoned, dated and signed by the president of the chamber or one of the other judges and by the clerk; there is no time limit for the court to give a ruling. In the case of compensation proceedings, a ruling is generally given after six weeks. It is not possible to appeal against this type of ruling as the law does not provide for one (see Article 445 CCP).

The court has the general authority to give the necessary orders (see Article 23 Section 1 CCP). Witnesses and experts can be ordered to testify under oath, documents to be submitted by either party, etc. There is no formal process for the former suspect or the representative of the district attorney's office to call on expert witnesses, but both parties can ask the court to make use of its authority. The law does not provide for a burden of proof or any standard of proof. Since the request for compensation is submitted by the former suspect, it is up to this person to supply enough facts and circumstances and substantiate them with documents to stake the claim, at least concerning the outcome of the case ex Article 539 Section 1 CCP and the amount of compensation requested. The district attorney's office can rebut but also support the claim of the former suspect.

32 Compare *Kamerstukken II* 1991/92 22584 3 [1–11].

33 See, for instance, Supreme Court 28 May 1985, ECLI:NL:PHR:1985:AC8907, *NJ* 1985/909.

As previously stated, the claim is judged on the principle of fairness. The court is therefore not bound by the views of either party, even if they agree. Given all these characteristics, the proceedings could be said to be more inquisitorial in nature than adversarial.

3 The amount of compensation

The law only specifies that the calculation of the amount of compensation has to be done on the principle of fairness (again, see Article 539 Section 1 CCP). The law also stipulates that the living conditions of the former suspect are to be considered (Article 534 Section 2 CCP). Nothing further is stipulated. Furthermore, no practical guide is provided by the courts on this specific matter. There is, however, a general agreement drafted by the Dutch criminal judges which, among many other things (such as standard sanctions for the most common crimes), governs compensation for pretrial detention (*Oriëntatiepunten voor straftoemeting en LOVS-afspraken*). This agreement was drafted in order to have more uniformity in the outcome of the most common criminal cases and situations, but it does not have the status of a law. Judges can deviate from the given standards if the circumstances call for it. It makes sense that the claim of compensation is related to a successful revision, even though technically this type of request is not explicitly mentioned. The general compensation is currently €130 for any day spent in custody at a police station and €100 in jail on remand. Given the fact that compensation after a wrongful conviction is something quite different from being awarded compensation for pretrial detention when the normal criminal proceedings do not end with a conviction for which this detention was ordered, it is conceivable that different amounts will be requested and awarded. It is expected that the damages awarded will be (much) higher, depending on the circumstances of the case. However, the damages awarded could also be fairly moderate if the former suspect is to blame for the wrongful conviction.

The limited case law that has been published reveals substantial differences in the calculation of the damages awarded. The circumstances that influence the damages awarded that are mentioned by the courts are: the type of detention regime in which the former suspect served their detention (on average the regime after a conviction is deemed to be lighter than pretrial); the strong defamation effect after a final conviction (particularly in cases that received a lot of attention from the media); the duration of the detention (the longer the detention, the more impact is has on the lives of the former suspect); the life stage at which the former suspect was incarcerated; their family bonds.[34]

These circumstances can result in an amount of compensation which is close to the usual compensation for pretrial detention[35] or to a much higher amount. In

34 See more on this in Section 5, where the *Van Mechelen case*, the *Putten murder case* and the *Spelonk case* are discussed.

35 Court of Appeal's-Gravenhage 5 June 2003, ECLI:NL:GHSGR:2003:AF9801.

the infamous *Putten murder case*,[36] which received a lot of media attention, five times the usual amount of compensation for pretrial detention was awarded. In this case, two men were wrongfully convicted of manslaughter and rape.[37] In various other infamous wrongful conviction cases compensation was awarded to the former suspects not through a court case, but through a settlement with the state/prosecution office on the basis of civil state liability. the process for reaching such a settlement is not governed by any (procedural) rules. If both the former suspect and the state are in agreement on the liability of the state and the damages that are to be awarded, no court proceedings are necessary (which could be advantageous to both parties). If the media reports are to be believed, the amount of compensation awarded in those cases was related to that of the *Putten murder case*. However, since the details of the settlements were not made public, we are very much in the dark about the real numbers, as well as the circumstances that played a role in determining the amount of compensation.

4 The recourse claim of the state against persons who caused a wrongful conviction

The question arises whether the government as a party can claim for compensation against persons who caused a wrongful conviction. Can the government demand the costs of investigation and prosecution from the person who deliberately made a false statement? The legislator's point of departure is that the costs of preventive and repressive enforcement of criminal law may, as a matter of principle, not be charged to citizens and companies. The government does not consider the enforcement of law individually attributable. In addition, preventive and repressive enforcement should be equally applicable to everyone and should not be dependent on private contributions with regard to the costs. Enforcement should therefore, as a matter of principle, be financed by general state resources.[38] This starting point, which can be deduced from the current legal system, has however been questioned by the legislator itself. For example, in 2014 the legislator prepared a bill that provided for the payment of a contribution by convicted persons towards the costs of investigation, prosecution and trial.[39] The contribution concerned a fixed lump sum. However, this bill was withdrawn after criticism from, among others, the Council of State.[40] The Supreme Court has also ruled in its case law that costs for investigation cannot, as a matter of principle, be refunded

36 Court of Appeal Leeuwarden 4 October 2002, ECLI:NL:GHLEE:2002:AE8347; ECLI:NL:GHLEE:2002:AE8348; ECLI:NL:GHLEE:2002:AE8349; ECLI:NL:GHLEE:2002:AE8350; ECLI:NL:GHLEE:2002:AE8351 and ECLI:NL:GHLEE:2002:AE8352.

37 In a case in the Caribbean part of the Netherlands, *the Spelonk case*, amounts close to five times the usual compensation for detention were also awarded plus US$25,500 of compensation for loss of income.

38 See *Kamerstukken II* 2005/06, 30 526 3, pp. 5, 9. Furthermore, Supreme Court 22 April 2008, ECLI:NL:HR:2008:BB7077, *NJ* 2008, 468 m.nt. MJ Borgers.

39 See *Kamerstukken II* 2014/15 34067 3, pp. 1–2.

40 See *Kamerstukken II* 2017/18 34067 17.

through private law.[41] After all, these are costs incurred by the police in carrying out their public duty, which is to detect criminal offences. A recourse claim through private law would suggest an unacceptable interference with public law regulations, the same applies to costs as a result of a false declaration. However, the Supreme Court has formulated one exception to the rule. This is in the event that: 1) the person who made the report not only knew that the offence was not committed; but 2) also made the report for no other purpose than to harm the police; and 3) knew or should have understood at the time of the report that it would prompt or cause the police to take unnecessary investigative actions.[42] Under those circumstances, the government can still claim damages on the basis of tort law.

From this ruling of the Supreme Court it can be derived that an expert witness who makes a grave mistake will as a matter of principle also not be liable. We expect that a recourse claim for the damages which the state paid to the former suspect will accordingly suffer the same fate as the costs of the police investigation.

Although the state in general has no right to claim compensation against persons who caused a wrongful conviction, the filing of a false report does, of course, constitute a criminal offence. It is prohibited under Article 188 CC as a crime against public authority.[43] Consequently, the state is 'protected' against such behaviour.[44] The same goes for expert witnesses who deliberately make a false statement under oath and thus commit perjury (Article 207 Criminal Code), or for an expert witness deliberately filing a false report resulting in a falsehood (Article 225 Criminal Code).

The former suspect can claim damages incurred because of the false report from the person who thus caused the wrongful conviction, if the damages have not already been paid by the state. This is based on tort law. As the CCP offers the former suspect various more accessible routes, we do not expect the former suspect to claim damages from the person who caused the wrongful conviction.

5 The practice of compensating the wrongfully convicted

While the Dutch state regularly awards compensation for unlawful pretrial detention (in 2020 4,584 compensations were awarded totalling €5,681,219),[45] the cases in which compensation is awarded after a wrongful conviction appear to be

41 Supreme Court 14 February 2017, ECLI:NL:HR:2017:221, *NJ* 2017/140 m.nt. SD Lindenbergh and see also Supreme Court 15 May 2020, ECLI:NL:HR:2020:890, *NJ* 2020/269 m.nt. JW Zwemmer.

42 Supreme Court 14 February 2017, ECLI:NL:HR:2017:221, *NJ* 2017/140 m.nt. SD Lindenbergh [3.4.2–3.4.3].

43 Non-official translation: 'Section 188: Any person who reports or files a complaint of a criminal offence, knowing that such offence has not been committed, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category.'

44 Compare HJ Smidt, *Geschiedenis van het Wetboek van Strafrecht (1881–1886): Deel II* (Tjeenk Willink 1881) 188.

45 Answers to Parliamentary questions 22 February 2021 3220575.

much rarer. This is because the total number of cases in which an application for revision is declared well-founded by the Dutch Supreme Court is quite limited. In the period October 2012 to December 2019, 55 cases were declared well-founded. In the five years before that, the numbers were somewhat higher with 114 well-founded cases.[46] Of those cases, a substantial proportion concerned relatively minor offences for which the former suspect did not serve any detention, such as mistaken identity in minor cases or not having car insurance. Therefore, it is unlikely that there were major damages to claim in these cases.[47] This means that the number of cases whereit has been possible to request substantial compensation is quite limited in recent years,. The courts do not keep records of these types of cases, so we are not able to provide the precise numbers. Not only does the number of cases appear to be limited and uncertain, the way in which the amount of compensation were calculated and the circumstances that were decisive are also indeterminate.

To provide some additional information on how compensation for wrongful conviction functions in practice, we conducted some research. First, we searched for all relevant verdicts which are publicly available via the website of the judiciary. A selection of all judgments is published on this website.[48] It publishes judgments in all the cases of the highest Dutch courts. If a case from a lower court has received media attention or is considered relevant case law, it is also published.[49] Additionally, we searched in the relevant legal literature databases, which include journals that publish relevant case law. This search only provided an output of four published verdicts (we will describe these verdicts below). We also conducted a media analysis where we searched for news articles about the compensation that was awarded in some renowned wrongful convictions. This was primarily conducted because we were familiar with the fact that in several cases compensation was awarded not via a court case, but through a settlement with the prosecution office. However, our search for published verdicts has not been comprehensive, it has only provided a selection. Nonetheless, these verdicts still provide an indication of how courts deal with compensation for wrongful conviction.

A case from 1989 provides some insight into how courts deal with the compensation for damages due to sanctions that did not result in deprivation of liberty. As mentioned, the legislator appears to interpret the criminal legislation in a manner that would not include compensation for other sanctions, such as community service or driving disqualifications (see Section 2.2.1). However, in this case[50] a former suspect was granted 2,000 guilders (which converts to €907) compensation for driving disqualifications based on Article 481 CCP. This case

46 For the numbers see NL Holvast, JS Nan and SMA Lestrade, 'Between legal certainty and doubt' (2020) 13(4) *Erasmus Law Review* 1, 8.

47 No precise numbers are available on the type of cases that were revised.

48 This is the website: www.rechtspraak.nl.

49 For the selection criteria see 'Besluit selectiecriteria uitsprakendatabank' at www.rechtspraak.nl.

50 Court of Appeal Arnhem 28 March 1989, ECLI:NL:GHARN:1989:AD0697, *NJ* 1989/776.

currently appears to be the only published case on these other sanctions and was, until recently, mentioned in legal commentaries on the legislation.[51]

Furthermore, in 2003 a case dealing with damages due to a violation of the European Convention on Human Rights, the *Van Mechelen case*[52], the Appellate Court of The Hague ruled that the court is not bound by the amount of compensation that the ECHR decided to be fair.[53] The court awarded substantially higher compensation than ruled by the ECHR. Compensation for legal fees was awarded in all published cases.

From the available case law, it remains rather unclear how the courts decide on the compensation and what circumstances play a decisive role in their decision. In the *Van Mechelen* case three men were each sentenced to 14 years' imprisonment for armed robbery and attempted murder. This case concerned the use of anonymous witnesses, which led to a violation of Article 6 ECHR. The civil appellate court subsequently judged that Van Mechelen would be acquitted if this evidence were to be disregarded in the criminal case.[54] In this case, the court awarded the former suspects compensation for the pretrial detention based on the general rules on pretrial compensation (then 150 guilders/€68 a day). For the post-trial detention, the court also referred to the pretrial detention rules as a guideline for deciding on the damages awarded for wrongful detention, but stated that these are not automatically applicable. On the one hand, the court saw reasons to moderate the amount of compensation; the detention regime after a conviction is usually lighter and there is no longer uncertainty about the duration of the detention. On the other hand, the defamation is stronger after a final conviction. The court also considered the fact that the main suspect spent 12 months in a penitentiary selection centre due to psychological problems.[55] Considering all the circumstances, the court awarded the main suspect a lump sum of €140,000 for the post-trial imprisonment. The court did not provide a calculation per day in the verdict, but this translates to 132 guilders (€60) per day, which is slightly less than the usual amount awarded for pretrial detention (being 150 guilders per day at the time).[56] However, a year earlier, in 2002, in the *Putten murder case* in which two men were wrongfully convicted for manslaughter and rape and spent six years and

51 MJA Duker, 'Schadevergoeding wegens andere onterecht ten uitvoer gelegde sancties?' (2007) Article 481 Sv Archief Wetboek van Strafvordering A.L. Melai/M.S. Groenhuijsen et al. aant. 6.

52 *Van Mechelen and others v. the Netherlands* App No. 21363/93 21364/93 21427/93 22056/93
(ECHR, 30 oktober 1997).

53 Court of Appeal's-Gravenhage 5 June 2003, ECLI:NL:GHSGR:2003:AF9801.

54 This was a civil law case because, at the time, it was not possible to have a case revised after a verdict by the ECHR. See Supreme Court 6 July 1999, ECLI:NL:HR:1999:ZD1603, *NJ* 1999/800. The CCP procedure was therefore not applicable.

55 At the time, penitentiary selection centres were special penitentiary centres specifically designed to observe suspects or convicts in order to provide psychological advice necessary for the (further) execution of a sentence.

56 The suspects were convicted on 4 February 1991 and set free on 25 April 1997; this is 2,272 days. 300,000/2,272 = 132.

eight months in prison, the criminal Appellate Court of Leeuwarden made rather different considerations in awarding compensation. Both wrongfully convicted persons in this notorious *case* received an amount of about €900,000 for the time of pre- and post-trial detention that they had wrongfully served.[57] The compensation amounted to five times the usual amount that is awarded as compensation for pretrial detention. The court also multiplied the usual amount of compensation by five for the pre- *and* the post-conviction phase. The court justified this decision by stating that the former suspects served detention for very serious and defaming crimes (rape and manslaughter) for which they may never be relieved of the stigma clinging to them. Furthermore, the fact that the former suspects were relatively young and were unable to spend time with their family and children or were unable to start a family was mentioned. In addition to compensation for detention that was served, the court also compensated the travel costs of family members.[58] In a more recent case (2014) in the Caribbean part of the Netherlands, the *Spelonk case*,[59] a rather similar calculation was made by the Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Saint Eustatius and Saba (based on the amounts of compensation common in the Dutch Caribbean). In that case, the court additionally awarded a suspect US$25,500 for loss of income. The former suspects in the *Spelonk case* had served seven years and ten months of wrongful detention. In addition to several reasons that are quite similar to those in the *Putten murder case*, the court also took into account the fact that the state had not shown any willingness to negotiate the granting of compensation, despite it being obvious that the former suspects were entitled to it given the way that the Netherlands had dealt with other wrongful conviction cases. This was considered an extra burden on the former suspect. Thus, while the crimes for which the former suspects were wrongfully committed were rather similar in seriousness in the *Van Mechelen*, the *Putten murder* and the *Spelonk* cases – although rape could be considered more defaming – and the time that they actually served also not vary much, the compensation that was awarded was very different. From the motivation provided in the verdicts, it is not clear what justified these differences. A possible difference, apart from the especially defaming effect of a rape conviction, which may have played a role in the *Putten murder case*, is the fact that the crimes in the *Van Mechelen case* were committed within a criminal environment, whereas those in the *Putten murder case* and the *Spelonk case* were not. Another possible and relevant difference is that the grounds for the errors in law differed. In the *Putten murder case* and the *Spelonk case* there was a 'novum' and the former suspects were deemed most likely innocent. In the *Van Mechelen case*, the ECHR had convicted the Netherlands of a violation of Article 6 ECHR. As a

57 Court of Appeal Leeuwarden 4 October 2002, ECLI:NL:GHLEE:2002:AE8347; ECLI:NL:GHLEE:2002:AE8348; ECLI:NL:GHLEE:2002:AE8349; ECLI:NL:GHLEE:2002:AE8350; ECLI:NL:GHLEE:2002:AE8351; ECLI:NL:GHLEE:2002:AE8352.

58 It also awarded certain legal fees.

59 Joint Court of Justice of Aruba, Curaçao, Sint Maarten, and of Bonaire, Sint Eustatius and Saba 11 October 2014, ECLI:NL:OGHACMB:2014:8, m.nt. T.M. Schalken (*Spelonk*).

result, the Dutch court 'only' judged that the suspect would have been acquitted if the evidence of the anonymous witnesses was disregarded.

The *Putten murder case* and the *Spelonk case* (referring to the Caribbean part of the Netherlands) appear to be the only revised murder cases in which compensation was awarded by the court. In several other infamous wrongful conviction cases (*the murder in Schiedam, Ina Post, Lucia de Berk* and the *Showbiz murder case*), the media also reported that substantial amounts of compensation were awarded to the former suspects. These compensations were not awarded by courts but through a settlement with the prosecution office, often accompanied by apologies for the course of events.[60] In the *Spelonk case,* the Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Saint Eustatius and Saba reasoned that a settlement would also have been an obvious way for the state to deal with the case, but since this had not happened the court ruled on the compensation. If the media are correct, the amounts of compensation awarded in the settled compensation cases are more or less in line with the *Putten murder case*, and all cases involved considerable amounts of money were.[61] However, as in Section 3, it is not known for what types of damages these compensations were awarded nor the reasons for and calculation of the compensation.

6 Conclusions

No real academic or professional discussion has taken place recently on the topic of compensation after a wrongful conviction.[62] It is just assume that such an option is available to the former suspect. Several important criminal cases have been revised over the years and some claims for compensation were made, but compensation for those errors is not a hot topic in the Netherlands – at least not legally; the media do report on them. The CCP has provided a route for the former suspect to claim compensation after a wrongful conviction since 1926. Currently this is codified in Article 539 CCP. The former suspect has a right to compensation for the penalties and measures undergone before the final conviction was overturned. Compensation for the pretrial detention will not be automatically awarded, only if and insofar as that would be fair. In upcoming legislation, a right to compensation will be extended to pretrial detention which the former suspect underwent. The claim is adjudicated by the same court – and preferably the same panel of judges – that eventually quashed the conviction and did not impose any sanction. The level of compensation has to be determined on the principle of fairness, given the circumstances of each case. Compensating a

60 We have contacted the lawyers involved, but due to confidentiality no further information could be given.

61 We have contacted several lawyers involved in these high-profile cases. One of the lawyers involved informed us that the settlement in question was indeed very considerable.

62 In contrast to the mechanism of revision itself, which is still under discussion, see NL Holvast, JS Nan and SMA Lestrade, 'Between legal certainty and doubt' (2020) *Erasmus Law Review* 13(4).

wrongfully convicted suspect has, and will continue to have, deep roots in the Dutch legal system.

In general, this system appears to be functioning adequately in compensating the most important aspects of wrongful conviction, although there is hardly any published case law. We believe that the system could be improved by stipulating in the law unequivocally that compensation is possible for damages incurred due to all sanctions that the former suspect had to undergo (and not just for the sanctions that led to a deprivation of liberty), without putting limits on the amount requested. This would give the former suspect a broader right to compensation and would make civil proceedings for the remainder of the damages unnecessary in all instances. That subsequent civil proceedings will be necessary in practice is doubtful. The *Putten murder case* in particular evidences that the courts are inclined to compensate the former suspect royally, even beyond the scope of Article 539 CCP, although the court was much more reticent in the *Van Mechelen case*. Furthermore, several high-profile cases have been settled out of court. We are critical of this, as this course of events is not transparent and frustrates the development of a uniform legal manner of dealing with compensation in serious wrongful conviction cases.

In circumstances where the alleged victim is to blame for the miscarriage of justice, we believe that the CCP should provide the option that the state reimburses the former suspect for damages and legal fees paid to the victim based on the later quashed conviction and addresses the victim for recourse. The current rules state that the former suspect has to do this by themself, but it would seem that the state should take on this responsibility. The criminal justice system did, after all, not filter out the falsities. This is irrelevant however asthere are no known cases where this was actually an issue. The state has only limited options against persons who caused a wrongful conviction.

Bibliography

Blok AJ and Besier LC, *Het Nederlandsche Strafproces* (Tjeenk Willink 1925).

Borgers MJ and Kooijmans T, *Het Nederlands strafprocesrecht* (10th edn, Wolters Kluwer 2021).

Dane NM, 'Overheidsaansprakelijkheid voor schade bij legitiem strafvorderlijk handelen', DPhil thesis, University of Leiden, 2009.

Duker MJA, 'Niet-imperatieve toekenning bij onterecht ondergane verzekering en voorlopige hechtenis?' in AL Melai and MS Groenhuijsen et al. (eds), *Wetboek van Strafvordering* (Kluwer 2015).

Duker MJA, 'Schadevergoeding wegens andere onterecht ten uitvoer gelegde sancties?' in AL Melai and MS Groenhuijsen et al. (eds), *Wetboek van Strafvordering* (Kluwer 2007).

Holvast NL, Nan JS and Lestrade SMA, 'Between legal certainty and doubt' (2020) *Erasmus Law Review* 13.

Jiang Na, *Wrongful Convictions in China. Comparative and Empirical Perspectives* (1st edn, Springer 2016).

Kwakman NJM, 'Schadecompensatie in het strafproces', DPhil thesis, University of Groningen, 2003).

Loyson JWHG, 'De raadkamerprocedures in strafzaken' (2020) *Praktijkwijzer Strafrecht* 14.
Nan JS et al., *Victa vincit veritas?* (1st edn, Boom Juridisch 2018).
Nan JS and others, 'Evaluatie van de Wet hervorming herziening ten voordele' (2019) *Nederlands Juristenblad* 184.
de Ranitz REP, *Herziening van arresten en vonnissen* (Tjeenk Willink 1977).
Schelhaas HN and Taekema HS, 'The outlines of Dutch private law' in HS Taekema, A de Roo and C Elion-Valter (eds), *Understanding Dutch law* (3rd edn, Boom juridisch 2020).
Smidt HJ, *Geschiedenis van het Wetboek van Strafrecht (1881–1886): Deel II* (Tjeenk Willink 1881).
Strijards GAM, *Revisie: inbreuken en executiegeschillen betreffende het strafgewijsde* (Gouda Quint 1989).
Taekema HS and Nan JS, 'Principles of Dutch criminal law' in HS Taekema, AJ de Roo and C Elion-Valter (eds), *Understanding Dutch Law* (3rd edn, Boom juridisch 2020).
van Dorst AJA, 'Herziening in strafzaken' in MF Attinger et al./PAM Mevis et al. (eds), *Handboek Strafzaken* (Wolters Kluwer 2021).
van Hooijdonk M and Eijsvoogel P, *Litigation in the Netherlands: Civil Procedure, Arbitration and Administrative Litigation* (2nd edn, Wolters Kluwer 2009).

Table of cases

Van Mechelen and others v. the Netherlands App no 21363/93 21364/93 21427/93 22056/93 (ECtHR, 30 October 1997).
Supreme Court 28 May 1985, ECLI:NL:PHR:1985:AC8907, *NJ* 1985/909.
Supreme Court 13 October 2006, ECLI:NL:HR:2006:AV6956, *NJ* 2007/432.
Supreme Court 6 July 1999, ECLI:NL:HR:1999:ZD1603, *NJ* 1999/800.
Supreme Court 22 April 2008, ECLI:NL:HR:2008:BB7077, *NJ* 2008, 468 m.nt. M.J. Borgers.
Supreme Court 14 February 2017, ECLI:NL:HR:2017:221, *NJ* 2017/140 m.nt. S.D. Lindenbergh.
Supreme Court 14 February 2017, ECLI:NL:HR:2017:221, *NJ* 2017/140 m.nt. SD Lindenbergh.
Supreme Court 15 May 2020, ECLI:NL:HR:2020:890, *NJ* 2020/269 m.nt. J.W. Zwemmer.
Court of Appeal Arnhem 28 March 1989, ECLI:NL:GHARN:1989:AD0697, *NJ* 1989/776.
Court of Appeal Leeuwarden 4 October 2002, ECLI:NL:GHLEE:2002:AE8347.
Court of Appeal Leeuwarden 4 October 2002, ECLI:NL:GHLEE:2002:AE8348.
Court of Appeal Leeuwarden 4 October 2002, ECLI:NL:GHLEE:2002:AE8349.
Court of Appeal Leeuwarden 4 October 2002, ECLI:NL:GHLEE:2002:AE8350.
Court of Appeal Leeuwarden 4 October 2002, ECLI:NL:GHLEE:2002:AE8351.
Court of Appeal Leeuwarden 4 October 2002, ECLI:NL:GHLEE:2002:AE8352.
Court of Appeal Leeuwarden 4 October 2002, ECLI:NL:GHLEE:2002:AE8353.
Court of Appeal's-Gravenhage 5 June 2003, ECLI:NL:GHSGR:2003:AF9801.
Joint Court of Justice of Aruba, Curaçao, Sint Maarten, and of Bonaire, Sint Eustatius and Saba 11 October 2014, ECLI:NL:OGHACMB:2014:8, m.nt. T.M. Schalken (*Spelonk*).