THE NETHERLANDS

PRINCIPLES OF CRIMINAL PROCEDURE AND THEIR APPLICATION IN DISCIPLINARY PROCEEDINGS

Daphne BOITEN *, Nico JÖRG ** & Johannes F. NIJBOER ***

Note: this report is based on the questionnaire, prepared by professor M. Chiavario, as it was published in the Revue Internationale de Droit Pénal, Vol. 72, p.721-728. The concept of the report was discussed during a meeting of the Dutch branche of the Association de Droit Pénal (Gezelschap voor Internationaal Strafrecht), on 17 June 2003 in Amsterdam.

Table of contents
0. Prolegomena - The Netherlands _______________________________ 1042
1. Introduction
   The concepts of disciplinary law and disciplinary procedure ___________ 1043
2. The notion of discipline and the relevant social and societal fields
   and organizations____________________________________________ 1045
3. Central questions ___________________________________________ 1049
4. General part_______________________________________________ 1051
5. Fundamental guarantees and their application to the disciplinary field___ 1057
6. Relationships between disciplinary and criminal proceedings _________ 1062
7. Final remarks ______________________________________________ 1063
8. Bibliography _______________________________________________ 1063

* Junior researcher at the University of Leyden (Correspondence: Seminarium voor Bewijsrecht (Study Center on Evidence), University of Leyden, P.O.Box 9520, NL-2300 RA Leiden (Fax: ++31 71 527 7600; E-mail D.V.Boiten@umail.LeidenUniv.nl

** Advocate-general at the Court of Cassation of The Netherlands, The Hague.

*** Professor of law at the University of Leyden and judge in the Court of Appeal of Amsterdam.
0. Prolegomena - The Netherlands

The Netherlands has been a sovereign state since 1648, as it definitively became independent from the (Spanish) Habsburgs. The independence of the Dutch Republic (Republiek der Zeven Verenigde Nederlanden) was the result of an eighty-year revolt against the Spanish rulers. It also meant a geographical split within the “Netherlands”: the southern provinces remained part of the Habsburg territories. Today, both parts are independent kingdoms (constitutional monarchies). The southern part is Belgium (King Albert II) and the northern part is the Kingdom of The Netherlands (Queen Beatrix).

The Kingdom of The Netherlands consists of the European territory, bordered by the North Sea, Germany, and Belgium, and the so-called Dutch Carribean (Aruba and de Nederlandse Antillen: Bonaire, Curacao, Saba, St. Eustatius, and the Dutch part of St. Maarten). The legal language is Dutch. In the northern province of Friesland exists another permitted legal language: Fries. That this language is permitted is publicly indicated at the doors of the courtrooms in the courthouses of the District Court of Leeuwarden and the Court of Appeal of Leeuwarden. Dutch is also the official language of the former colony Suriname (Dutch Guyana) in South America.

The judicial organization of the Kingdom of the Netherlands has three layers: the District Courts (19), the Courts of Appeal (5) and the Court of Cassation (1). This Court of Cassation (Hoge Raad der Nederlanden) is located in The Hague. It reviews mainly decisions of the five Courts of Appeal and also decisions of the (joint) Court of Appeal of the Nederlandse Antillen & Aruba. The judiciary follows the traditional continental division of territorial jurisdiction, and the Courts of Appeal are trial courts (they try cases “de novo”).

During the era of the Dutch Republic (1648-1795), our own variation of academic law became important: the Roman Dutch law. Traces of it can still be found in the former Cape colonies, now part of the Republic of South Africa. (The present South African language “Afrikaans” is closely related to the Dutch language.) In 1795 the country came under influence of France, ending in the Napoleonic occupation (1810-1813). At that time the former federative republic was transformed into a unitarian state, which became a Kingdom in 1814. The French brought their system of codification, public administration, and administration of justice. Their influence on the organization of state and society can still be found after almost 200 years. During the period 1815-1831 it was unified with Belgium, but this unification turned out to be too artificial: Belgium and The Netherlands were split, apart from the provinces of Dutch and Belgian Limburg, almost following the historical division lines of 1648. Interesting detail:
after the French period the popular jury in criminal cases was abolished, but the Belgians restored it. As a result, Belgium still has the classical 12-person jury, whereas the Dutch only have (panels) of professional judges in criminal cases.

The actual criminal law can be found in the Criminal Code (Wetboek van Strafrecht) of 1886 and the Code of Criminal Procedure (Wetboek van Strafvoering) of 1926. Special legislation covers inter alia Traffic Law (Wegenverkeerwet), Economic Criminal Law (Wet op de Economische Delicten), and the legislation on illegal drugs (Opiumwet). Although there is no official “stare decisis” as to decisions of the Court of Cassation, in fact, the lines set out by this court have an important influence on the other courts. In relation to international law (supranational law), the system is monistic. This means that self-executing elements of international law can be applied directly by the Dutch courts. From this perspective it can be explained that the case law of the European Court of Human Rights in Strasbourg (an organ of the Council of Europe, not of the European Union) has become rather important in Dutch legal practice.

The Dutch legal education is a four-year academic curriculum, followed by special training programs for future barristers (advocaten) and for future members of the magistrature (judges and prosecutors). The choices made here do not definitively influence legal careers: people often switch and cross lines in their lives, partly as a result of the fact that the courts recruit “outsiders,” for instance, former “advocaten” or academics. A special position is the ad hoc-judge (rechterplaatsvervanger). This position is given to legal professionals in other jobs, who once in a while (e.g., one court session per month) become part of a panel of judges in a District Court or a Court of Appeal. They do not receive a salary, but are paid a reimbursement for the days spent in court. The positive explanation of the widespread use of ad hoc-judges by the courts is the compensation of the lack of a lay-element, the negative explanation is an economic one: ad hoc-judges are relatively (compared to professional judges) cheap. All judges are appointed for life and can only be removed involuntarily from office by the Court of Cassation for reasons of incompetence or misbehaviour.

1. Introduction - the concepts of disciplinary law and disciplinary procedure

The notion of ‘disciplinary law,’ in itself, contains a broad field of ideas and phenomena, which are so diverse that an exact definition cannot be given by means of one characteristic only. Some examples of the diversity in disciplinary law: military disciplinary law, professional medical disciplinary law, and the law of a hobby-club in philately.

It is possible, however, to point out similarities and differences. These are useful for the determination about what can or should be considered as disciplinary law
in a certain context and the requirements to be set out from a legal perspective. The similarities can be found in social and legal aspects. With respect to the social dimension, disciplinary law is related to "groups" and usually is a means for cohesion and the articulation of norms and values within the group. The legal dimension is related to the enforcement of norms, rules and also decisions given by organs or institutes designed for that task, such as disciplinary boards. Like in classical fields of State law, such as criminal law, the substantive part of the law is combined with an adjective or procedural part. In this report we mainly focus on themes in the latter part, more specific forms of process that are designed and used for disciplinary punishment. The reason is that it is exactly here where the relevance of the actual subject of Section III of the AIDP is clear.

A first distinction can be made regarding the source of disciplinary regulation. Concerning the military, prisoners or civil servants, the State legislature is the institution that makes and confirms the rules. When it comes to medical practitioners and lawyers, the rules are mainly developed within their own profession, but they are imposed on the entire profession by the State. In the case of members of voluntary associations, the members themselves are to make and confirm the rules. As a result of this distinction, it can be said that some activities obviously are considered to be so important that their regulation should not be left just to the concerned parties. Others, the public, and even the State might also have an interest in their enforcement. Illustrative here is the middle group: these concern professional activities with great impact on society, such as the level of medical care in relation to public health issues.

A second distinction can be made with respect to the nature of human activities, which are ruled by disciplinary law: does it concern mandatory activities, professional activities or spare time activities? When put in this order, the State has a diminishing interest. On the other hand, the degree of voluntariness of accepting the disciplinary law increases in this order. Until ten years ago the country knew general conscription (compulsory military service) for males and by then the military disciplinary law was the unique example of mandatory activities. Close to this example lies the disciplinary system of the schools: children between 5 and 16 years old are subject to compulsory education, but the choice of the school is individual. Different schools have different disciplinary regimes.

A third distinction can be made regarding the purpose of the disciplinary arrangements. Usually, two goals can be distinguished. In general: to make it possible for the organization, institution and/or profession to function in a sound way, and more specifically: to perform activities as well as possible. For example, the purpose of military disciplinary law is to enforce the obedience to orders and to prevent behaviour that could interfere with the interests of the organization, and finally the State. Regarding a hobby-club, like gardening, the internal law is meant
to prevent and handle conflicts between members. When it comes to medical and legal practitioners, the goal is to guarantee the decency, level, and quality of the offered services. (Of course many other distinctions can be made regarding disciplinary law, but that would take too long.)

For centuries The Netherlands have been a society of free enterprise and free association. The latter means that the Dutch society is interwoven with literally thousands of associations, active on a huge number of terrains, from associations of employers and of employees (labour unions\(^1\)) to organizations in the field of all imaginable hobbies (hereafter, one example is discussed more in depth, the field of ornamental poultry breeding). What makes the situation even more complex, although here the development of the last decades goes into the direction of mergers through traditional borderlines, is the fact that The Netherlands have developed their own style of pacification in religious matters: next to each other one can find a catholic garden club, a protestant one, and a neutral one. This applies for many autonomous or semi-autonomous fields. In Dutch, this phenomenon is called "verzuiling" (compartmentalization). As was said, the tendency nowadays is different and the explanation therefore is that the traditional borders have lost much of their relevancy (the Christian churches lost the majority of their members and immigrants imported their own ethnological and religious matters).

2. The notion of discipline and the relevant social and societal fields and organizations

Discipline

In many languages this word exists, derived from the Latin noun "disciplina," which means education, learning, knowledge, science, but also: schools or similar institutions; and guidelines, rules of practice, etc. In the Dutch language, "discipline" has two central connotations. The one is related to fields of science, arts and/or professions. The other is related to punishment (and even self-punishment). When discussing disciplinary law and procedure, it is striking that both are relevant here in the sense that both are interrelated here. Disciplinary sanctions are designed to enforce rules, which aim at the re-enforcement of disciplined behaviour. Discussing the distinctions between the various fields, above, we already drew attention to the sources of different rules. When looking at their nature, we can also distinguish various types of rules: in most domains of disciplinary law we may find legal rules, professional rules, and institutional rules. This can be illustrated by the position of a doctor working in a hospital: he/she is subject to legal rules that govern professional

\(^1\) There is even a recognized union for female prostitutes.
behaviour in a broad sense, causing harm that is otherwise criminal. But he/she is also subject to professional norms of good practice, that - by the way - are partly enforced by legal means (here disciplinary law enters in). Finally, the doctor is subject to rules within the hospital itself.

Fields
A brief consultation of various public sources resulted in over two dozen different fields in which the notion of disciplinary law plays a serious role. In order to limit our report, we selected six fields, to which we will relate our discussion of the questionnaire composed by Professor M. Chiavario. These six fields are: societies of people (clubs), active in ornamental poultry farming, organized sports (e.g., soccer), public economic ordering, psychology, public health care, and the military. For each of these we will now give a brief introduction. The basis for our selection is that we assume that our sample of six fields offers a representative picture of the whole.

A. Ornamental poultry breeding (sierpluimveeteelt)
Within The Netherlands various local clubs exist in this field. They organize local exhibitions and matches. Even at the local level they usually have statutes and bylaws. One of the regulated subjects is the expulsion of members, for instance as a sanction for not paying membership fees. On a national level there is also an overarching organization, the NDHB, which stands for the Nederlandse Bond van Hoender-, Dwerghoender-, Sier-, en Watervogelhouders. Within the legal framework of the State, the law applicable to this field is private law, in particular, the law on contract and company law (both can be found in the Civil Code). The NDHB makes available to the member organizations models for statutes and bylaws, including provisions on individual membership and sanctions. In the models the enforcement of the (local) club rules and the procedures leading to sanctions are tasks of the general assembly of the members. The board of the local club is assigned some related powers (also according to the models).

B. Royal Dutch Soccer Association (Koninklijke Nederlandse Voetbal Bond)
This national organization has functions in relation to both amateur soccer and professional soccer. One of its main functions is to promote and facilitate soccer in general. The Association is best known as the organizer of the national and regional competitions. It also has a rather well-developed system of disciplinary sanctions and disciplinary procedures. Whenever a soccer club will participate in its official competitions, membership of the Association is mandatory. Sanctions can be imposed on the clubs as such, as well as on individual players, arbiters and board members. Fines, reprimands, and suspensions are frequently imposed sanctions. Expulsion ("royement") is possible, but rarely applied.
C. Public economic ordering (publiek-rechtelijke bedrijfsorganisatie)

After the Second World War, the Dutch economy was built upon a statutory framework, the Act on the economic industrial and commercial organization (Wet op de bedrijfsorganisatie). The primary aim was to prevent the emergence and continuation of black markets by providing a framework of transparency. Enterprises in many branches were obliged to become members of organizations, established for the specific field of economic activity: bedrijfsschappen (sector boards) and productschappen (commodity boards). In different branches, membership with the relevant commodity board (still) is compulsory. There is a hierarchy of sector organizations. Sanctions for non-compliance with the regulations can be punished by reprimand, fine and publication of the disciplinary decision. There are plans to add as a sanction the higher frequency and level of supervision by the organization.

The disciplinary law is laid down in the Act on the disciplinary law within the public economic ordering (as a whole), the Wet tuchtrechtspraak bedrijfsorganisatie (Act on the disciplinary law enforcement for the economic industrial and commercial organization (1954; new text forthcoming). Each branch has its own board of administrators and its own disciplinary board. In this report we focus on one of the branch-organizations, the productschap voor vee en vlees (cattle and meat). The applicable sanctions are the aforementioned ones. They can be imposed by special disciplinary "tribunals," according to the last mentioned Act. Central appeals tribunal is the College van Beroep voor het Bedrijfsleven (Industrial Appeals Court).

D. Psychology

Psychologists who are active in health care are subject to the same legal framework as doctors and nurses. This will be discussed in sub. E. Apart from this, for all psychologists (including researchers and test psychologists) a private organization exists, the Nederlands Instituut voor Psychologie (Dutch Institute for Psychology). Membership is not mandatory, and there exist also other, smaller organizations (e.g., for particular forms of psycho-therapy). The aim is the protection of the profession and the maintenance of professional quality and integrity. This is done by keeping a register of psychologists, which in fact work as a recognition and accreditation system. Disciplinary sanctions include reprimand, suspension, and expulsion. This type of disciplinary involvement is partly motivated by the general interest of mental health care and of the right of outsiders to lodge complaints against professionals. The NIP has a regular disciplinary body and an Appeals organ.
E. Public health care (medicine)
The law concerning public health care and the disciplinary law for medical practitioners is laid down in a public legal framework of legislation and rules of disciplinary procedure (Wet op de Beroepen in de Individuele Gezondheidszorg; Act on the Professions in the individual health care; 1998). Registration with a special organization that keeps the register is mandatory. Supervision is attributed to Governmental inspectors for public health. They can file complaints against doctors but have no monopoly to do so: private persons also can file a complaint. In effect, it appears to be difficult for private persons to get a doctor sanctioned, whereas the vast majority of the complaints by an inspector leads to the application of a sanction. The disciplinary system has a two-level procedure: a regional disciplinary tribunal (medisch tuchtcollege) handles complaints and other disciplinary matters in the first instance. Their decisions are open to appeal by a special central medical appeals tribunal (Centraal Medisch Tuchtcollege; Central Medical Disciplinary Appeals Board), presided over by a detached appeals court judge. The sanctions to be imposed for professional misconduct or professional malpractice include the suspension of the licence to practice or even the definitive removal of the person from the profession (this means the deprivation of necessary facilities to work in health care by means of suspending or deleting the registration²). Furthermore fines, reprimands, and official warnings are available as sanctions.

A private parallel system exists, in fact, as a rudiment of an earlier situation: the Royal Dutch Society for the advancement of the medical sciences (Koninklijke Nederlandse Maatschappij ter bevordering van de geneeskunst). This organisation has its own disciplinary system for the members, next to the public legal system. Sanctions are restricted to the membership (which is not mandatory anymore as it was prior to 1998, when the aforementioned Act came into force). This society can be compared to the NIP, which is mentioned above.

F. The military
Nowadays, the Dutch military employs professionals only. There is no general conscription any more. For the military, special chambers within the ordinary court system are instituted by law (1990). The procedure follows the Code of Criminal Procedure.

² The Act takes as a starting point that everyone is entitled to carry out activities of health care but that certain treatments can only be done by qualified personnel on the basis of a permission (licence) to practice (doctors, nurses, psycho-therapists). This permission is implied in the registration. Registration takes place only on the basis of officially recognized professional exams and credits for effective professional experience. The requirements are different per discipline and subdiscipline. The sanctions that are related to the professional conduct, such as suspension and expulsion from the profession, imply the temporary or permanent withdrawal of the permission to practice.
Procedure in cases that are criminal. When a member of the military is "prosecuted" for a fact that only constitutes a disciplinary offence, a superior can apply disciplinary sanctions, like fines, reprimands, obligation to carry out certain duties, and a prohibition to leave the military base. Appeal is possible in the form of revision by a higher superior. This decision is subject to a right to appeal, which will be adjudicated by the military chamber of the district court. In theory, it is possible to set up an ad hoc or permanent court at places where the military is in action. Actually, for the Dutch situation this could mean that such courts would exist during peace-keeping operations within the framework of the UN or the NATO (Bosnia-Herzegovina; Kosovo; Afghanistan). In fact, the Dutch government prefers criminal trials or disciplinary appeals to be held afterwards in the home country, after the person has finished his/her duty abroad. If the incident(s) has/have been too serious for delay, the person will be taken in custody and/or will immediately be flown back to The Netherlands.

For practical purposes, the distinction between public disciplinary and private disciplinary law is made in the rest of the report. This distinction is based on the legal foundation of the disciplinary law and procedure in the particular field and does not refer to the socio-economic distinctions between the government and the private sector. If there is a statutory public legal foundation, then we allocate the field to public disciplinary law, albeit that from a socio-economic perspective the particular field certainly belongs to the private sector (non-governmental health care, public economic ordering).

3. Central questions

In line with the introduction to the questionnaire by the general reporter, this national report is focused on the "reception" of general principles of criminal procedure within disciplinary law. It follows the enumeration of the questionnaire in the part hereafter. With regard to the notion of "fundamental guarantees", it is important to keep in mind that art. 6 of the European Convention on Human Rights and Fundamental Freedoms in relation to the case law of the European

---

3 Art. 6 ECHR: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
Court of Human Rights, entails important minimum guarantees for a "fair" process. The scope is not limited to criminal procedure. For criminal procedure, the ECHR contains additional guarantees. It is not for the Member-States to legislate potential conflicts between state and citizen outside the scope of (the guarantees of) article 6, like the cases of Engel c.s. and Öztürk show (EcHR 8 Juni 1976, A-22; 21 Februari 1984, A-73). A Member-State cannot declare the enforcement of a violation of norms to be disciplinary, if the procedure of enforcement equals a criminal procedure in certain respects, like the essence of the violation and the seriousness of the punishment, being deterrent and punitive. Many civil procedures are covered by art. 6, as well.

It is a consequence of some forms of public disciplinary law (e.g., the military disciplinary law) that art. 6 ECHR is directly applicable to the disciplinary procedure itself, on the one hand, although not in the first instance, providing possibilities for appeal in a court of law. Private disciplinary law, however, is only indirectly applicable: the article guarantees that the determination of a person's civil rights shall be done according to the principles of a "fair" process as they are laid down or implied in that article, but this applies only to the process before the civil courts if a disciplinary decision cannot be enforced without a court decision, or if the person attacks the disciplinary decision as legally not binding because of a lack of good faith. It cannot be said that art. 6 directly applies to disciplinary procedures, if the membership of the organization involved is a free and voluntary act. This legal situation shows in the meantime how interesting and important the subject of this report is.

Within The Netherlands the Convention and the decisions of the ECtHR have direct effect. The Dutch Constitution adopts a monistic view on the relation between international-national law. This means that the Convention (and implications as set out by the ECtHR) can be applied by the national courts and other organs of the State. In general, within the Dutch legal community the

3. Everyone charged with a criminal offence has the following minimum rights:
   1. to be informed promptly in a language which he understands and in detail, of the nature and cause of the accusation against him;
   2. to have adequate time and facilities for the preparation of his defence;
   3. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   4. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   5. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."
decisions of the Strasbourg Court about the implications of art. 6 are perceived as pointing out minimum obligations “erga omnes” (with a margin of appreciation) for the Member-States and that they are not limited in their meaning to the particular State party (parties), unless the limited meaning of a decision is explicit (such as Coeme and others v. Belgium, ECtHR 22 June 2004).

Before we start in answering the questionnaire, it is important to observe that within the Dutch context three issues seem to be implicitly connected, but it is not easy to articulate their interrelations in an unambiguous way. These three are: (i) the scope of the protection of article 6 ECHR (the “fair process” requirement) in disciplinary matters; (ii) the requirement for/the presence of a public legal ordering for the field in question; and (iii) the issue of the (in)voluntariness of access to/membership in certain professional associations. The unravelling of these complex issues might very well be one of the main themes for discussion in the meetings of Section III.

4. General Part

In the following we discuss the questions 1-16 as prepared by the general reporter.

N.B. In the following text ‘defendant’ is used as a concept for the person who is accused in relation to the disciplinary context.

Question 1 Boundaries of the analysis

1.1. Disciplinary law and proceedings are used in a wide sense. Phenomena that can be brought under these headings can be found in enormous variety within legally autonomous or semi-autonomous fields. Many professional or amateur societies, associations and clubs exist, which make their own “disciplinary” provisions and practice. In so far as there is no public legal regulation, the applicable state law is limited to the general provision about companies in Book 2

4 So far the decision only exists in a French version, Req. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96. The Court (second chamber) found that within a continental legal system art. 6, par.1, ECHR implies that the rules of procedure should be laid down in the written law. Where, like in Belgium, there is a code of criminal procedure, this code should contain the basic rules for the procedure. In the concrete case, Coeme and his co-defendants were tried by the Court of Cassation acting as a trial court (privileged forum for State Officials in relation to alleged crimes committed within the circle of their public duties). The Belgian Code provided in a rule about this specific function of the Court of Cassation without giving any further guidance as to the applicable rules for the trial. This made the procedure unpredictable for the defendants. This constituted a violation of art.6 ECHR.
(legal persons) and Books 3, 6, and 7 (contracts) of the Dutch Civil Code. This implies that in the very end the state courts have a stick in order to influence the acts of the bodies involved. Furthermore, in relation to the determination of a person's civil rights as meant by art. 6 of the ECHR, there - finally - must be an opportunity for a "fair" process. But "finally" means that, in a strict sense, only at the very end a procedure in the state civil court system must be available, in which article 6 is directly applicable. The implementation of fundamental procedural principles and rights within the disciplinary procedure can only be derived from the interpretation that is given to the particular rules (on associations, companies) or on contracts (especially the rule that contracts should be carried out in good faith). Another entrance to a private law protection of such procedural principles and rights would be a civil action against the disciplinary power of the body involved on the basis of tort (the procedure and/or the sanction can under circumstances constitute an illegal act against the individual member). In public disciplinary law, the situation depends on the question of whether or not procedural guarantees form an essential part of the relevant regulation. If this is the case, usually the rules have been drafted more of less with a view of art. 6 and the caselaw of the ECtHR. This is the case with the legislation on the disciplinary law with regards to the professions in the health care (See supra 1 D and E), the military, and in the forthcoming new Act on Disciplinary Economic Organization. Especially where the sanctions that can be imposed meet the criterion "preventive and punitive," the legislature has developed procedural rules that are meant to uphold the principles and rights as required by art. 6 ECHR. This means that otherwise than in the sixties with the decisions in Engel c.s. v. The Netherlands and Öztürk v. Germany, the legislature is well aware of the substantive issues and does not (any more) hold the view that this article would be only applicable to what formally is mentioned as penal or civil law. Furthermore, in private law, an important role is played by good faith in conflict resolution, which may invite seeking relief by a judge if fundamental notions of fair trial have been violated. Generally speaking, one may notice a tendency to more administrative sanctioning by inspectors as an immediate reaction to violations in different fields of (semi)public regulation, with the possibility of appeal in a court of law, which meets the Art. 6 ECHR-requirements.

There are no signs that in statutorily regulated procedures the applying bodies, such as the Central Medical Disciplinary Appeals Tribunal, neglect procedural guarantees that are adopted in the regulation.

1.2. In paragraph 1 of the questionnaire, disciplinary law has been defined as "the body of rules of conduct that govern the members of a particular 'group' of persons for preserving its internal order." In principle, this definition is correct for the Dutch situation, except for the description of the subject: in many cases it is
not only the preservation of the internal order that is covered by the disciplinary law, but the disciplinary law also aims at the maintenance of standards with an external effect. Examples are the rules of good practice that are articulated and enforced in professional conduct (medical doctors, psychologists) and market and quality rules that are enforced in the economic, industrial, and commercial organization.

**Question 2 Sources of law**

2.1. Art. 113, paragraph 2 of the Dutch Constitution requires a regulation by "formal statutes," i.e., an Act approved by parliament, for disciplinary law that is created by the State. This means that the principle of legality is a founding principle here. The autonomous or semi-autonomous fields that have disciplinary law of their own are not subject to this provision. Nevertheless, art. 8 of the Dutch Constitution guarantees the right to free association. This implies that civilians can start associations, societies, clubs, companies, etc., without prior consent of the State. The article forms a part of the first chapter of the Constitution, which is the Dutch "bill of rights." The provision is in line with art. 11 ECHR⁵, which guarantees the same right.

For the public disciplinary law, it is the current view that sanctions and other measures must not infringe upon human rights (ECHR, ICCPR). This means, for example, that such sanctions should not form an unusual or cruel punishment (art. 3 ECHR) and that punitive sanctions applied by bodies set up by the State require a legal fundament (art. 7 ECHR). For private disciplinary law, the situation is more complex in this respect because the so-called horizontal authority of human rights is not self-evident in Dutch law.

In certain respects, States have a positive duty to ensure fundamental rights in private relations: for instance, in Costello v. Roberts the ECHR found that:

“in the present case, which relates to the particular domain of school discipline, the treatment complained of, although it was the act of a headmaster of an independent

---

⁵ Art. 11 ECHR: “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the freedoms of others. This article does not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”
school, is nonetheless such as may engage the responsibility of the United Kingdom under the Convention if it proves to be incompatible with Article 3 or Article 8 or both* (25 March 1993, A 247-C, NJ 1995, 725, m.n.t. EAA).

The provisions of art. 6 ECHR should be taken into account when there is a dispute about the determination of civil rights and obligations. In, among others, the König case (1978), it was stated that the character of the right at issue is decisive; it is not necessary that both parties are private persons. This shows that ‘etikettenschwindel’ is also not a possibility to avoid the ECHR. Art. 6 covers all proceedings, the result of which is decisive for private rights and obligations. The relation employee-employer is, for example, always a civil one, except when it comes to civil servants in cases of careers, employment, or termination. When the proceedings influence the pecuniary rights of someone, it often concerns civil rights, an exception to this are taxes. In disciplinary law, it shows that civil rights are at stake when it comes to suspension or the prohibition to carry out professional activities. When there is a warning or reprimand this probably does not affect civil rights.

2.2. The disciplinary authorities and appeal bodies are certainly in a position to further develop the procedural rules. One element in the statutory, and often also in internal, regulations is that disciplinary boards usually must be and/or are in fact presided over by a lawyer and/or supported by a clerk with a professional legal background. Important case law has been the aforementioned Engel and Öztürk cases, which set the tone for the nowadays widely adopted view that the criminal determination of guilt and the application of preventive and punitive sanctions require a "fair" process in the sense of art. 6 ECHR.

2.3. There are overarching powers in the sense that (public) disciplinary law instituted by the State requires a statutory basis (the previously mentioned art. 113, Constitution). For concrete disciplinary procedures in public disciplinary law the highest judicial instances usually are embedded in the particular field (Central Medical Disciplinary Appeals Board; Regulatory Industrial Organization Appeals Board), with no further remedies in the ordinary court system. In the private disciplinary fields, there finally is access to the civil chambers of the ordinary court system with, as its highest instance, the Dutch Court of Cassation (Hoge Raad der Nederlanden). See supra 1.1.

2.4. There are many areas in which disciplinary powers are wielded by institutions that have autonomous rules and proceedings, compared to the ones established by national (state) law. Amongst our examples (see 1.2.), we refer to the ornamental poultry breeding clubs or associations. The only umbrella that offers
some protection against arbitrary measures is the final access to the courts on the basis of tort law as pointed out earlier.

**Question 3 Links between sanctions and disciplinary proceedings**

3.1. The applicable sanctions are:
- warning
- reprimand
- fine
- obligation to carry out certain duties (military only)
- restriction of liberty (military only)
- suspension of (mandatory) registration/factual prohibition to carry out certain important professional activities
- definitive prohibition to carry out professional activities
- exclusion from the association (temporarily or permanently)
- publication of the disciplinary decision

In fields other than from which we took our examples, different varieties exist (for example within the educational sector there are specific disciplinary measures such as "nablijven op school" (order to remain at school during spare hours; school detention), "strafopstel schrijven" (order to write an essay on a subject related to the misdemeanours)).

3.2. and 3.3. The more serious sanctions do certainly restrict individual freedoms, especially where they limit or prohibit professional activities and/or commercial and industrial activity. Some other sanctions temporarily limit personal liberty (military disciplinary sanctions). More serious sanctions, such as detention or the closing of an enterprise, are reserved for (socio-economic) criminal law and procedure. Administrative law provides (in 15 Statutes) for the power for government agencies to act factually against activities or omissions that are contrary to legal obligations ("bestuursdwang," article 5.21 Algemene wet bestuursrecht).

Cases that qualify for such sanctions belong to the domain of the ordinary courts. This does not mean that misconduct that constitutes a criminal offence and for which a criminal sanction is imposed blocks the way to disciplinary procedures and sanctions. On the contrary: when a medical practitioner is found guilty of negligently causing the death of a patient, the odds are high that a complaint is filed against him/her by an inspector for public health, which will be examined by the professional disciplinary bodies.
3.4. In so far as the reporters are aware, no attempts have been recently made to change criminal offences into disciplinary ones. Besides this, it is worth mentioning that according to the new Dutch legislation (2002) on euthanasia (in which professional medical help to die, which is carried out by a doctor, can be justified\(^6\)), cases in which there is a non-natural cause of death must be scrutinized by a professional council of medical practitioners and specialists on ethics and law before the public prosecutor decides upon a possible prosecution.

3.5. This issue refers to the affirmative answer given to question 2.4. about the non-public authorities that have disciplinary powers. The limits to these powers can be found in the general civil law as pointed out earlier (2.1.).

**Question 4 Status of the bodies of disciplinary justice**

4.1. In itself, sanctions imposed by public and private disciplinary authorities are recognized within the state law. The imposing authorities often can be called “disciplinary judges,” although they carry names such as college (board), commissie (committee), or raad (council). In legal literature, the general phrase is “disciplinary judge.” Sometimes it is not a specific body that holds disciplinary power but the assembly of members or the board (ornamental poultry breeding).

In the military disciplinary law, a court appears only in an appeal stage. Primarily, the superior (commanding officer) decides upon disciplinary sanctions.

4.2. The legislation concerning public disciplinary law in general provides for a special status of the disciplinary authorities. As said earlier, there is a tendency to attribute disciplining power/administrative sanctioning more to inspectors or other (semi) public authorities (like in the military by the commanding officer), with appeal to a court of law. The situation outside that area differs. The disciplinary organs of the NIP (for psychologists) do not have a status as disciplinary judges. They exist partly of lawyers and of members of the NIP. This reflects the interests that are at stake, partly the internal interests of the status of the profession, but the NIP also looks after the (psychological) public health, and also persons who are not members can file complaints. They are ruled by contract law and need national courts to enforce their judgments. Concerning poultry clubs, there is no specialized judge, as decisions are taken by the general assembly of members. A reason for this is that they only have an internal interest. Therefore, the State does not care if they have specialized judges.

4.3. The law certainly does care for independence and impartiality of disciplinary organs. In the public disciplinary law there are guarantees within the legislation

\(^{6}\) Art. 293 and 294 Dutch Criminal Code.
In the private disciplinary sector, the situation varies. Sometimes it is only the safety net provided by the civil law that assists to uphold these values. As far as the activities of the members of the organization have public impact (military; health care and mental health; economic ordering), special attention is paid to guaranteeing independence and impartiality of the (members of the) tribunals, in order to boost confidence by the public in the effectiveness of disciplinary proceedings while assuring the defendant a fair trial at the same time. In this respect, various disciplinary tribunals provide for the possibility or duty for members of a tribunal to excuse themselves from handling the case.

In medical and psychological law, members of disciplinary bodies who have been involved in a pre-trial investigation, are afterwards excluded from deciding the case. Another guarantee for their independence lies in the fact that they act in a panel of both lawyers and specialists.

5. Fundamental guarantees and their application to the disciplinary field

**Question 5 Disciplinary power, fair trial and the presumption of innocence**

5.1. Especially in fields that are regulated by an act of government, the notion of a fair trial is embedded in the regulation, although it is not always mentioned explicitly. For example, one of the reasons the Act on professions in individual healthcare was designed was to bring it in conformity with the demands of the ECHR. In practice, there are, however, still flaws in the system. An example is the influence of the person leading the pre-investigation. He is supposed to be impartial but can decide whether a case is sent to the council chamber with a certain proposition or is submitted directly to a hearing, thus pointing out that he believes a disciplinary measure can be imposed. Another problem is that a specialist from another tribunal can be asked for help if there is no such specialist present in the tribunal. The extern specialist, however, can only be heard during the hearing and cannot take part in the deliberations of the tribunal. The Act on Disciplinary Law Economic Organization, which was designed before the ECHR existed, requires Regulations to guarantee a sound adjudication, which means: effective as to the goals of the organizations and fair towards defendants. In poultry breeding clubs, there are certain provisions for proper proceedings but a fair trial in general is not pursued.

5.2. It is estimated that the presumption of innocence is safeguarded as well because other guarantees of fair trial are also accepted. With the exception of military disciplinary law, it is nowhere mentioned explicitly. Probably there is in some fields of practice an obligation for the person involved to give information. For instance, when someone has acted in a certain way, he might want or have to explain his actions to others of his profession.
5.3. A reasonable time is promoted in most cases of disciplinary law, and usually maximum periods are prescribed for the trial and the verdict. Mostly it is self-evident when there are aspects of the case that require a speedy trial. This can be, for example, economic aspects. When there are less interests involved, like in the ornamental poultry breeding, the speediness of the trial is less emphasized. Contrary to this, the Act on Professions in Individual Healthcare even states that the Central Medical Disciplinary Appeals Tribunal assures that there is no unnecessary delay. In practice, this not happening.

Question 6 Disciplinary justice and the power to start proceedings
6.1. The competence of the disciplinary authorities to initiate proceedings is very diverse. In some fields, proceedings are only started after a complaint of a party concerned or of the prosecutor (in military cases with a criminal aspect) or of the inspector who is in charge of supervizing the specific field. This is the case in medical disciplinary law, law of the economic organization, psychology and professional soccer. There are also fields where no distinction is made between the bodies holding the power to start proceedings and the ones who have disciplinary power. Examples here are amateur soccer, and also in military disciplinary law it is the same officer who can instigate proceedings and who takes the final decision on guilt and punishment. However, the majority of disciplinary tribunals is not allowed to initiate investigations or start proceedings on their own.

6.2. In the fields where the power to start proceedings and the disciplinary authority do not rest with the same bodies (public economic ordering, psychologists, soccer, and the medical field), the members of the tribunal are excluded from being members of the ruling body or its employees.

6.3. Examples of bodies holding both powers are the commanding officer in the military and the disciplinary committee in amateur soccer.

Question 7 Auditur et altera pars, awareness of charges and defensive facilities
7.1. In all six studied fields of disciplinary law the defendant has the opportunity to defend himself. This can be in writing or he can be heard at the hearing. In some cases he is even obliged to appear at the hearing. Usually he can question witnesses and experts, introduce documents, and evidence, etc.

7.2. The indictment is always sent to the defendant some time before the hearing. This period varies from at least 24 hours in military disciplinary law to at least 14 days in disciplinary law on the economic organization. There is also always an opportunity for the defendant to see the documents in the case in advance, so he
can prepare his defence. A problem arises, for example, in the medical field, where an expert is not obliged to make a report in advance of the hearing, since, as a result of this, no defence can be prepared and the defendant can be taken by surprise and might not be able to react adequately.

A change of charges is not standardly communicated to the defendant. In the soccer association this is assured, but when the disciplinary organ in psychological proceedings amplifies a complaint this is not always communicated (in time).

**Question 8 Right to counsel**

8.1. In the six fields we looked at, the defendant has a right to counsel.

8.2. Usually this counsel can be anyone. Of course, a lawyer is often chosen as counsel, but it can also be someone from the same profession or in another way experienced. Sometimes the tribunal can refuse a counsel on special grounds. There are no special requirements as to legal or professional skills. The defendant is totally free in the choice of counsel; only when it is likely that the procedure will be delayed because of the chosen counsel can the tribunal refuse him. Within the fields we looked at, this is only so in medical and military disciplinary law.

8.3. Defendant is free in his choice of counsel.

**Question 9 Evidence**

9.1. Outside the criminal law, no such rule is to be found, but the impression is that as disciplinary proceedings are more punitive and deterrent, the burden of proof is higher (military, health care) than in disciplinary law, which functions as part of private company law (preponderance of evidence).

9.2. The defence can request the tribunal to call witnesses or experts to be questioned during the hearing. Sometimes they can even be summoned by the public prosecutor, who can give an order to bring them along if they do not appear after the first summoning. If the defendant only defends himself in writing, he can add written declarations of witnesses to his defence.

9.3. In most fields, the defendant can see the documents in the case, unless confidentiality is required. There are no provisions concerning the right of defendants to request other information from the agency holding the disciplinary power or the power to begin disciplinary proceedings.
9.4. The defendant can question witnesses. It seems to be common that the questions are asked through a member of the tribunal. So the tribunal can control the questions.

**Question 10** Publicity and secrecy of proceedings

10.1. There is no general rule as to the secrecy of proceedings. In military, psychological and soccer disciplinary law the proceedings are in principle *in camera*, unless the tribunal decides otherwise (ex officio or on request). In medical and economic disciplinary law the standard is a public hearing, but there can be special reasons to decide otherwise. Some people state that, especially in the medical field, the doctor’s reputation is already damaged by a public hearing, no matter what the outcome is. Keep in mind that sometimes publication of the decision can be a sanction in itself, see infra 11.3.

10.2. The defence usually can waive its right to a public hearing. The tribunal has to agree with a hearing *in camera*, of course. When the standard for a hearing is *in camera*, the defendant can also ask for a public hearing. It is always the tribunal that decides in the end what form is chosen.

**Question 11** Disciplinary judgments: statement of reasons, notification, publicity

11.1. A statement of reasons is not always required, but in most fields it is.

11.2. The decision is sent to the defendant as soon as possible. In military disciplinary law the procedure is started from the assumption that the defendant is present, so he can take immediate notice of the decision.

11.3. Whether the judgment is published depends on the field of disciplinary law. In military law, the sanction is never made public, occasionally it is published in the military law review. In many disciplines, a selection of judgments is published anonymously in specialist journals to keep people informed on the application of disciplinary law.

In law on public economic ordering, publication of the decision is one of the sanctions. The disciplinary boards of the NIP can decide that all members of the NIP will be informed in writing of a judgment in an individual case. In medical law, the decision is always pronounced in public. It can also be published in certain magazines, without the names of the persons involved, but this is an exception. It usually happens when certain guidelines can be distinguished. The sanctions are, however, always noted in the Big-register, where medics have to be registered to be allowed to work in their profession. In the soccer association, all decisions are published in the special announcements.
Question 12 Appeals

12.1. An appeal is always possible. Usually, there are special appeals tribunals for the specific disciplinary field. The appeal tribunals consist partly of lawyers, but these do not always form the majority of the tribunal. In military law, the defendant has the right to have his case reviewed by the designated superior of the commanding officer. The review decision is subject to appeal before the district court. In medical disciplinary law, the central medical disciplinary appeals tribunal is the highest judge, no cassation is possible at the Court of Cassation.

12.2. There is generally an appeal possible at an independent judicial authority. Only in clubs, like in the poultry breeding field, no appeal is possible, but a case can be brought before the civil court, when civil law is violated by a decision. The appeals board of the NIP is not entirely independent, as it consists of a majority of members of the NIP. To execute a private law sanction without the co-operation of the ‘convicted’ or ‘sanctioned person’ an order of a court of law may be needed.

Question 13 Provisional measures, coercive measures, seizures

13.1. In most cases provisional matters are allowed when this seems necessary because of urgent circumstances. This can happen when there is a serious complaint, which appears legitimate and there is a danger to aggrieved third parties. This usually consists of suspension from duties. Only the psychologists do not have provisional measures.

13.2. These provisional matters are applied by the disciplinary authorities. In economic organization law, the Economic Crimes Act may be applicable when the offences are too serious. It allows for inspections, seizures and judicial orders for pre-trial detention and the cessation of the illegal activities.

13.3. As to coercive powers, in medical law the disciplinary authorities are allowed to enter facilities. If necessary, they can ask the police for assistance. In military law the commanding officer has the power to seize papers and objects, but in special cases certain other functionaries may act. If the offence has criminal aspects, the public prosecutor will be involved and criminal procedure will apply.

6. Relationships between disciplinary and criminal proceedings

Question 14 Ne bis in idem (double jeopardy)

14.1. Whether the opening of criminal proceedings requires a suspension of the disciplinary proceedings varies among the various fields of disciplinary law. In general, a criminal procedure is possible next to a disciplinary procedure, unless a special act prohibits this. The reason for this is that the standard and function of both kinds of procedures are different. Disciplinary law is meant to guarantee to
the public a reasonable level of professional activities and also to maintain the standard of professional ethics. Criminal law, on the other hand, tries to maintain the legal order and protect society as a whole. In military and economic organization law, the public prosecutor decides which path is followed when a case has both disciplinary and criminal aspects. In other fields, like the medical profession, it is also customary for the public prosecutor and an inspection service to discuss which road should be followed. The disciplinary procedure usually prevails. It can also be useful to fill a deficiency in the criminal system. A criminal procedure is chosen in cases where the legal system is severely damaged. In medical disciplinary law, it is impossible to start another procedure when the disciplinary decision has become final. The NIP does not allow parallel proceedings.

14.2. There are no limits given. Of course, disciplinary and criminal sanctions are often very different and serve a different purpose.

14.3. The criminal judge or disciplinary tribunal usually takes into consideration the sanctions that have been imposed in another trial. In military disciplinary law this is also happening, but there is no real *ne bis in idem* barrier, although the disciplinary offences are formulated in a way that does not collide with the criminal law. However, no sanction can be imposed for the same offence, which has already been sanctioned in another procedure.

14.4. Coming to acquittal, the disciplinary practice also differs. According to the NIP, after a criminal acquittal, disciplinary proceedings might well be possible, as the underlying reasons might be totally irrelevant for the standards of the NIP. In military proceedings no disciplinary action will succeed after a criminal acquittal regarding the same offence, but room may be left for the enforcement of a disciplinary offence, adjacent to the criminal offence.

Question 15 Relationships of the evidence

15.1. and 15.2. When proceedings are secret it will require a court order to seize the materials and to use them in a criminal trial. In economic law no consecutive trials are foreseen, so this problem will not arise. In military law, it is permissible to use disciplinary materials for a criminal process and vice versa.

15.3. The defendant usually has the right to remain silent. This is often explicitly provided for in the applicable rules, for example in the Act on military disciplinary law and the Act on public economic ordering. However, the defendant can often be obliged to hand over information.\(^7\)

---

\(^7\)An exception to this right beyond the six fields we looked at is the civil servants law, for example, concerning police officers.
7. Final remarks

Question 16  For/against a wider implementation of the fundamental principles

16.1 In so far as disciplinary law is related to involuntary relations, there seems no doubt that the procedures and sanctions should meet the standards of “fairness” as laid down in the relevant articles of the supra-national treaties regarding human rights (such as art. 6 ECHR). Within the Dutch legal system two frameworks can be distinguished: the areas where a public regulation exists and the autonomous or semi-autonomous fields where only in a basic way the private law offers indirect guarantees for the maintenance of these standards. If we keep in mind that these latter fields include an enormous variation, it is not easy to stick to one clear opinion relevant to all areas. It rather is a matter of weighing values: the autonomy of associations, etc., against the protection of individual rights. The outcome of this weighing process will differ from situation to situation. The emphasis will be put on the protection of general principles of a fair procedure, where the situation becomes less free and voluntary for the persons involved. It appears that such principles gain relevancy as soon as people find themselves in less voluntary circumstances, such as practicing within certain professions.

Where, in the Dutch situation, actual (public) legislation exists, the situation seems to be satisfying. This might be the lesson The Netherlands learned from the Engel case, back in 1976.

16.2 Within the autonomous or semi-autonomous fields, the State should not be too intrusive into the internal order of associations, etc., as long as it is clear and certain that the persons involved find themselves in a situation of their own free choice.

8. Bibliography