

MARC GROENHUIJSEN\* and RENÉ JANSEN\*\*



## THE REPORTING PROCEDURE FOR POLICE OFFICERS WHO HAVE USED SERIOUS FORCE UNDER DUTCH LAW AND THE PRIVILEGE AGAINST FORCED SELF-INCRIMINATION

**ABSTRACT.** Recently the controversy about the police use of force has increased within The Netherlands. Simultaneously it has become clear that courts have provided divergent judgments in these cases; some have sentenced and others have acquitted police officers. Whereas victims of the police use of force increasingly ask for the prosecution of these officials, others demand to change the reporting procedure in favor of the officer's legal position. This research explains how the reporting procedure for these cases is construed under Dutch law – particularly regarding the serious use of force – seeing that such a contribution currently lacks in (inter)national legal literature. Besides, it examines to what extent the abovementioned procedure violates the officer's right against forced self-incrimination under the ECHR. This research concludes, in absence of a court ruling, that the procedure is incompatible with the ECHR when the evidence that follows from the officers' duty to notify is admissible in criminal procedures.

### I INTRODUCTION

During the last couple of years the controversy about the use of force by Dutch policemen has increased within The Netherlands. Besides the fact that these cases of police use of force have generated more media attention, and civilians have increasingly asked for the prosecution of the police officers involved, it has also become apparent that Dutch courts provide for remarkably different judgments in these

---

\* Doctor Marc Groenhuijsen is Professor of criminal law, criminal procedure and victimology at Tilburg University. He is also the Founding Director of the International Victimology Institute Tilburg (INTERVICT) and part-time judge at the Court of Appeal in Arnhem), E-mail: [m.s.groenhuijsen@tilburguniversity.edu](mailto:m.s.groenhuijsen@tilburguniversity.edu).

\*\* René Jansen LL.M. is a lecturer/researcher at the Private Law Department of Tilburg University, E-mail: [r.jansen@tilburguniversity.edu](mailto:r.jansen@tilburguniversity.edu).

types of cases. This was illustrated most recently in July and August 2015. On 17th July a police officer was convicted by the District Court of Limburg and sentenced to two years of imprisonment. The court ruled that the officer had mistakenly believed that he and his colleagues were in danger when he decided to shoot at the suspect's vehicle. It was believed that this suspect had committed a crime the night before. Besides, this suspect was also required to serve a year of imprisonment and tried to escape at the time the police attempted to arrest him. One of the passengers of the suspect's vehicle was dangerously – but not fatally – injured.<sup>1</sup> On 5th August the District Court of Rotterdam failed to convict two police officers for fatally shooting a person whom the officers mistakenly, but – according to the court – justifiably believed to be a great threat to his neighborhood.<sup>2</sup>

Especially after the first mentioned judgment of the District Court of Limburg, voices were raised to revise the present legislation regarding the police use of force in order to ameliorate the legal position of the police officer involved. First, on several occasions the board of the National Police publically called for special legislation for cases of police use of force, as opposed to cases of civilians who have used force.<sup>3</sup> The board also made clear that in future cases policemen who have used their firearms would be provided with the best lawyers.<sup>4</sup> Secondly, the president of one of the largest Police Unions, ACP, stated that following the judgment of the District Court of Limburg a police officer who has used his firearm should always be treated as a suspect – and not as a witness – because this would provide the police officer with more legal certainty in future court cases. Finally, a Dutch member of parliament belonging to the largest political party – which is currently one of the two ruling parties – posed questions to the Minister of Security and Justice about the clarity and the limits of the present laws for policemen regarding their permissible use of force and the legal position of these

<sup>1</sup> Rb. Limburg 17 juli 2015, ECLI:NL:RBLIM:2015:6059. Both the Public Prosecution Service and the convicted policeman have lodged an appeal against this decision.

<sup>2</sup> Rb. Rotterdam 5 augustus 2015, ECLI:NL:RBROT:2015:6175.

<sup>3</sup> See in this respect also the following contribution that was made 2 years before this judgment, J. Naeyé, 'Een wettelijke strafuitsluitingsgrond voor rechtmatig aanhoudingsgeweld' in: J. W. Fokkens et al. (eds.), *Ad hunc modum. Opstellen over materieel strafrecht (Liber amicorum A.J. Machielse)* (Deventer: Kluwer, 2013), 238. Furthermore, see J. Naeyé, *De organisatie van de Nationale Politie* (Deventer: Kluwer, 2014), 189.

<sup>4</sup> Since the beginning of November 2015 a "group of 19 top lawyers" has been installed at the request of the National Police.

officers in proceedings subsequent to their firearm use.<sup>5</sup> This makes us wonder how the Dutch legislation regarding the police use of force is currently shaped in cases of serious use of force and which legal problems may arise in light of it.

Article 17 (1) of the Dutch 1994 Police Instructions (*Ambtsinstructie voor de politie, de Koninklijke marechaussee en andere opsporingsambtenaren*, Police Instructions)<sup>6</sup> obliges a police officer who has used force to immediately report this to his superior. In view of his oath of office, a police officer will always (have to) do this truthfully.<sup>7</sup> In case of noncompliance with these official directives he risks disciplinary sanctions.<sup>8</sup> His superior then codifies this report on the prescribed notification form.<sup>9</sup> At the same time Articles 152 and 153 Dutch Code of Criminal Procedure (DCCP)<sup>10</sup> compel a police officer to truthfully report about his actions and findings in an official report (*proces-verbaal*). If his official report does not correspond with the truth he can be charged with perjury, a crime that according to Article 207 (1) Dutch Penal Code (DPC)<sup>11</sup> is punished with a maximum of 6 years of imprisonment and a fine of the fourth category.<sup>12</sup> One might wonder how this relates to the right against forced self-incrimination. At least according to the Dutch government no such problem exists under the present procedure.

---

<sup>5</sup> See the document kv-tk-2015Z14386. She also posed questions about the possibilities to reform the present system.

<sup>6</sup> *Stb.* 1994, 275, Directives for office holders in law enforcement.

<sup>7</sup> See for this oath Art. 9 (1) Besluit algemene rechtspositie politie (BARP), *Stb.* 1994, 214: “Ik zweer (beloof) dat ik mij zal gedragen zoals een goed ambtenaar betaamt, dat ik zorgvuldig, onkreukbaar en betrouwbaar zal zijn en dat ik niets zal doen dat het aanzien van het ambt zal schaden.” In English this oath comes down to the following: act as a good civil servant, be careful, unimpeachable, and reliable and do not harm the office.

<sup>8</sup> J. Naeyé, *Nederlands Politierecht. Tekst en commentaar 2009–2010* (Alphen aan den Rijn: Kluwer, 2009), 385. See also *Kamerstukken II 1987/88*, 19535, nr. 5, p. 26. and Art. 76 BARP. Art. 77 BARP mentions the sanctions that are at hand, for instance a reduction of salary, suspension or dismissal.

<sup>9</sup> This form is attached to the *Regeling melding geweldaanwending*, *Stcrt.* 2001, 168. Although the Minister of Security and Justice withdrew this document on 13th December 2012 (*Stcrt.* 2012, 26854) the Ministry of Security and Justice has informed us this notification form is still in use until further notice.

<sup>10</sup> *Stb.* 1921, 14.

<sup>11</sup> *Stb.* 1881, 35.

<sup>12</sup> According to Art. 23 DPC a fine of the fourth category is equal to € 20.250,-.

Following the amendment to the Police Instructions in 2001 a police officer no longer has to fill in the prescribed notification form himself.<sup>13</sup> The Explanatory Memorandum to this amendment makes clear that this change was needed in order to prevent self-incrimination on the part of the officer. From that moment there is no explicitly prescribed way in which police use of force has to be reported. Basically, it can suffice with an oral report from the officer to his superior,<sup>14</sup> although internal guidelines may require him to record it in a different way.<sup>15</sup> As a further consequence of the amendment a police officer is no longer obliged to report why he has chosen to use force. Following the amendment an officer solely needs to report about the facts, the circumstances and the consequences of the force used.

When a police officer's use of force has caused lethal casualties amongst civilians or injuries for which they needed medical treatment,<sup>16</sup> or when the use of force involved a firearm shooting, Article 17 (3) Police Instructions requires the police chief of the regional unit or the national unit<sup>17</sup> (police chief) to refer the notification form to the public prosecutor. Hereafter this research refers to these situations as serious use of force. In reaction to this referral, the public prosecutor will initiate an investigation, which is carried out by the independent National Police Internal Investigations Department (*Rijksrecherche*, NPIID).<sup>18</sup> The NPIID investigates the matter and whilst doing so it does not use the notification form, which is in accordance with its internal policy. The NPIID reports its findings to the public prosecutor. During the (subsequent) investigation the police officer may not be compelled to cooperate.<sup>19</sup> However, the public prosecutor can request to use the notification form and the official police report that was made by the officer as evidence on the basis of Article 105 (1) DCCP. The superior to whom the report was

---

<sup>13</sup> *Stb.* 2001, 387, p. 9.

<sup>14</sup> *Ibid.* That this no longer has to be done in writing can be extrapolated from the words of the Explanatory Memorandum. It describes the former procedure as "reporting in writing" (*schriftelijk melden*) as opposed to reporting (*op de hoogte brengen/melden*). See also Naeyé 2014 (n 3 above), 518.

<sup>15</sup> Naeyé 2009 (n 8 above), 386; Naeyé 2014 (n 3 above), 519.

<sup>16</sup> Naeyé 2009 (n 8 above), 387; Naeyé 2014 (n 3 above), 519.

<sup>17</sup> *Stb.* 2012, 458, p. 7; Naeyé 2014 (n 3 above), 76.

<sup>18</sup> Para. 3A (II) and (III) *Stert.* 2010, 20477.

<sup>19</sup> *Stb.* 2001, 387, p. 10.

made can also be summoned to testify during the pre-trial investigation,<sup>20</sup> or he may be required to do so in court later on.

This leads us to the following problem. First it is important to realize that it is the duty of a police officer to react to the unlawful conduct of civilians in order to stop it. This could ultimately mean that the officer has to use severe force, whereas ordinary civilians can choose to flee in such situations.<sup>21</sup> The abovementioned demonstrates that after he has used severe force, a police officer might in actual fact initiate a criminal investigation against himself by reporting his use of force in accordance with Article 17 (1) and (3) Police Instructions. In other words: it might be that the Police Instructions' obligation to report to a certain extent leads to self-incrimination on behalf of the police officer in situations of serious use of force because his statements can be used against him in a subsequent criminal trial. It has been argued before that this is at odds with the privilege against forced self-incrimination<sup>22</sup> as it emerges from the case law of the European Court of Human Rights (ECtHR or Court).<sup>23</sup> Nevertheless, until this moment no extensive study has been conducted on this issue. Legal scholars have made observations regarding the compatibility of such a course of events with the case law of the ECtHR, however, in relation to the reporting procedure for medical doctors who performed euthanasia on their patient. This research therefore analyzes the extent in which this reporting procedure is similar to that of police officers in case of serious use of force and, if so, what this means for the compatibility of the reporting procedure for police officers' serious use of force with the case law of the ECtHR.

The main question in this research is to what extent the Police Instructions' obligation to report in situations of serious use of force is compatible with the European Convention on Human Rights and Fundamental Freedoms (ECHR or Convention). This research solely focuses on the Article 17 (3) Police Instructions cases because then the police chief is compelled to report those cases to the public prosecutor. That way we assure that we solely examine the situation

---

<sup>20</sup> See also para. 5.2 *Stcrt.* 2006, 143.

<sup>21</sup> J. Naeye, *Niet zonder slag of stoot: De geweldsbevoegdheid en doorzettingkracht van de Nederlandse politie* (Zeist: Kerckebosch, 2005), 46–47; Naeyé 2009 (n 8 above), 70.

<sup>22</sup> This prohibition not to incriminate oneself is also known as the principle of *nemo tenetur (nemo tenetur se ipsum accusare)*. This research will use both terms.

<sup>23</sup> J. S. Timmer, J. Naeyé, and M. van der Steeg, *Onder schot. Het vuurwapengebruik van de politie in Nederland (1978–1995)* (Deventer: Gouda Quint, 1996), 71.

in which contact is established with the Public Prosecution Service and, thus, the area of criminal law is reached. Thus Article 17 (3) (a) is kept out of the scope of this research because it involves cases in which the police chief himself finds it appropriate to inform the public prosecutor, and therefore these cases are subjected to his personal appraisal. In other words: this research will only focus on sections (b) about civilian lethal casualties or injuries for which medical treatment was needed and (c) about the officer's shooting of firearms.

First this research explains the legal position of the police officer under the Police Instructions' reporting procedure for the police use of force (Police Instructions' reporting procedure). Next it compares this procedure with the reporting procedure for medical doctors who performed euthanasia on their patient (euthanasia reporting procedure). For both procedures this research discusses their compatibility with the case law of the ECtHR and the comments and criticism they face in relation to the right against forced self-incrimination. It also aims to determine, in relation to the serious use of force by police officers, whether a genuine problem is at stake here. This is partly endeavored on the basis of a questionnaire circulated among lawyers who have represented policemen in court proceedings subsequent to their use of force. Finally, some main findings will be presented in a concluding part.

## II POLICE USE OF FORCE AND THE POLICE INSTRUCTIONS' REPORTING PROCEDURE

### 2.1 *The Legal Basis and Examination of Police Use of Force*

The State has a monopoly on the legitimate use of force within a democratic society that is governed by the rule of law. As regards its internal affairs and security, the police primarily exercises this authority. The police may only use force when it is necessary for the execution of its duties. Since the use of force infringes upon the human and civil rights of the State's residents, e.g. Article 2 (Right to life) and 3 (Prohibition of torture) ECHR, it is a delicate tool that should be used modestly and monitored effectively, adequately and independently.<sup>24</sup>

The Constitution of the Kingdom of The Netherlands does not contain a provision regarding the right to life. It does, however,

---

<sup>24</sup> Judgment in case of *Ramsahai and Others v. The Netherlands*, 15 May 2007, European Court of Human Rights (No. 52391/99).

comprise the following Article 11 upon which the (serious) use of force by the police infringes: “Everyone shall have the right to inviolability of his person, without prejudice to restrictions laid down by or pursuant to Act of Parliament”.<sup>25</sup> Thus the power to limit this right only rests with Parliament. If it wants to use this power, it must adopt a Statutory Act that provides the legal basis for such a limitation. With respect to the use of force by the police it has done so in Article 7 of the Dutch Police Act (*Politiewet 2012*, DPA).<sup>26</sup>

According to Article 7 (1) DPA a police officer is authorized to use force when this is justified in light of the aim pursued (*requirement of proportionality*) and when no other measures are available (*requirement of subsidiarity*).<sup>27</sup> Furthermore, section (5) of this Article requires the use of force to be reasonable (*requirement of proportionality*) and moderate (*requirement of subsidiarity*) in relation to the pursued aim. As a result the requirements of proportionality and subsidiarity are two fold in this provision. The officer must choose the least drastic measure and he must use it as a last resort. This means that in order to stop an unarmed thief a brief headlock is preferred over the extensive use of a gun. Moreover an officer’s use of force must be justified and at the same time reasonable. Likewise there is no need to arrest the thief by force when he hands himself in spontaneously.

On the basis of Article 9 (1) and (3) DPA the Dutch government can adopt further decentralized legislation in order to regulate the police use of force in more detail. In this respect it has issued the Police Instructions. This document contains instructions for police officers regarding the use of different types of violent tools. It also outlines which reporting procedure follows in case of the use of force by the police.

Police use of force is always examined *a posteriori*. On several occasions the Dutch government made it clear that it wants the police use of force to be examined on the basis of the criteria of propor-

---

<sup>25</sup> Government of the Netherlands, *The Constitution of the Government of The Netherlands 2008* (Government of the Netherlands, 18 October 2012), available at <http://www.government.nl/files/documents-and-publications/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf>, (last accessed 13 April 2016).

<sup>26</sup> *Stb.* 2012, 315.

<sup>27</sup> Naeyé 2009 (n 8 above), 68. This is no autonomous competence; the actions have to be authorized and lawful and the use of force has to be necessary and inevitable.



tionality and subsidiarity. In order to restrict this use of force as much as possible it demands the fulfilment of these objective criteria.<sup>28</sup> Although it accepts that these requirements are not self-evident for both the police officer and the civilian, the government believes it is inherent to the police task that the assessment of the police use of force takes place in light of the circumstances of the case and on the basis of these criteria at a later stage.<sup>29</sup>

In case of the police use of force Article 17 (1) Police Instructions obliges the officer who has used force to immediately report the facts, the circumstances and the consequences of his actions to his superior. We have already seen that at that stage it can suffice with an oral statement from the officer. However, his duty to produce an official report in writing about his actions and findings on the basis of Article 152 and 153 DCCP remains intact, though the legislator has left it open for the court to decide how to respond to a violation of Article 152 DCCP.<sup>30</sup> Additionally, a police officer who has used force can be required to register the event in the computer database. This depends on internal instructions, provided that they are not incompatible with Article 17 Police Instructions.<sup>31</sup>

The superior records the officer's notification on a prescribed form together with his judgment on the legality of the officer's actions and the compatibility of these actions with the Police Instructions. He, for instance, notes whether the officer wore a uniform during his use of force. The superior also notes whether the officer acted on his own initiative, whether he provided the civilian with a warning, what kind of force he used, what the purpose was for which the officer used force and what the consequences of the force used were. This form is characterized by the fact that most of the questions it poses have a fixed number of possible answers (besides the answer 'other, namely...'). This does not apply, however, to the question relating to the exact description of the course of events during which the violence was used; here there is an open space in which the answer must be completed. Who this superior is that fills in the form differs depending on the regional police unit.<sup>32</sup> According to Article 1 (2) (a) Police Instructions the superior is the

---

<sup>28</sup> *Kamerstukken II* 1987/88, 19535, nr. 5, p. 44.

<sup>29</sup> *Ibid.*, p. 27.

<sup>30</sup> HR 19 december 1995, *NJ* 1996, 249.

<sup>31</sup> Naeyé 2009 (n 8 above), 386. See also Naeyé 2014 (n 3 above), 518.

<sup>32</sup> Naeyé 2005 (n 21 above), 66.



official who is actually in charge. If this does not provide immediate clarity, section (b) describes the superior as the official with the highest rank or, in case of equal ranks, the official with the most years of service (seniority).

Later on, yet another official makes the final judgment on the legality of the used force. For the less severe cases it depends on the unit to which this task is assigned.<sup>33</sup> It is usually the police chief who assesses the used force and decides whether or not an internal, disciplinary or criminal investigation is initiated. In the last case scenario he passes the notification form on to the public prosecutor.<sup>34</sup> As regards the serious use of force cases however, the procedure is fixed. The police chief must inform the public prosecutor of the court's district where the violent actions took place of the notification made by the officer who has used force within 48 h.<sup>35</sup> Then the public prosecutor decides whether the police officer must be treated as a witness or as a suspect by the NPIID in the subsequent investigation.<sup>36</sup> In the end, when the investigation is completed, the chief public prosecutor has the authority to decide about the legality of the officer's actions and whether (further) prosecution is warranted.<sup>37</sup> If a firearm was used he must submit his decision to a special advisory committee (*Adviescommissie politieel vuurwapengebruik*),<sup>38</sup> although the advice of this committee is not binding.

For a full understanding of the procedure, it has to be noted that a criminal investigation does not exclude the possibility that simultaneously an internal police investigation is conducted, out of which disciplinary sanctions may follow.<sup>39</sup> This research will not elaborate further on this matter.

Seeing that the notification form and other official reports, as well as the testimony of the superior, can be used as evidence in a criminal

---

<sup>33</sup> G. Drenth et al., *Sturing en toetsing van de politieële geweldsbevoegdheid* (Kracht van meer dan geringe betekenis, Apeldoorn: Politie & Wetenschap, 2008), 73.

<sup>34</sup> De Nationale ombudsman, *Verantwoord politiegeweld* (Den Haag, de Nationale Ombudsman, 2013), 19.

<sup>35</sup> Art. 17 (3) Police Instructions.

<sup>36</sup> Para. 4.6 *Stert*. 2006, 143.

<sup>37</sup> Para. 5.1 *Stert*. 2006, 143; J. S. Timmer, *Politiegeweld. Geweldgebruik van en tegen de politie in Nederland* (Alphen aan den Rijn: Kluwer, 2005), 208. See also Naeyé 2014 (n 3 above), 519.

<sup>38</sup> Para. 5.4 *Stert*. 2006, 143.

<sup>39</sup> Timmer (n 37 above), 188.

investigation or trial, this research will now examine a police officer's legal position under the Police Instructions in case of serious use of force.

## 2.2 *The Legal Position of the Police Officer*

From the beginning of the 1980's until 2000 the officer who had used serious force and thereby shot and injured or killed a civilian, or threatened to use his firearm, was always treated as a suspect in police investigations.<sup>40</sup> This changed shortly before the amendment to the Police Instructions in August 2001.<sup>41</sup> It is clear that when a police officer uses serious force he literally commits a criminal offence out of the DPC.<sup>42</sup> However, following the policy measure of the executive board of the Public Prosecution Service that was issued on 16th May 2000<sup>43</sup> the current general reasoning is that because the officer acted on a statutory basis,<sup>44</sup> or on the basis of his superior's command,<sup>45</sup> he is exempt from criminal liability. This means that his actions are justified and, therefore, he is treated as a witness during the NPIID investigation.<sup>46</sup> But does this mean he can never be seen as a suspect?

First it is important to explain the Police Instructions' reporting procedure in relation to the DCCP and the moment in which the suspect plays a role. A starting point for the application of the provisions of the DCCP is the investigation stage (*opsporing*). From that moment on, the actions that the authorities take must have a statutory basis.<sup>47</sup> According to Article 132a DCCP this phase starts when the investigation, under the supervision of the public prosecutor, regarding criminal actions for the purpose of criminal procedural decision making begins. This means that, for instance, it starts when the authorities have probable cause that someone has performed a criminal action. Here is where the legal position of the suspect comes in.

---

<sup>40</sup> Timmer, Naeyé and Van der Steeg (n 23 above), 69; Timmer (n 37 above), 194.

<sup>41</sup> *Stb.* 2001, 387.

<sup>42</sup> For instance attempted homicide, wrongful death or aggravated assault.

<sup>43</sup> Naeyé 2005 (n 21 above), 48; Timmer (n 37 above), 194–195; J. van Schie and P. Vermaas, 'Niet langer automatisch verdachte na geweldsincident. Instructie positie politiefunctionaris bij geweldsaanwending aangepast', (2000) 15 *Algemeen Politieblad* 6. This policy measure is currently replaced by *Stert.* 2006, 143.

<sup>44</sup> Art. 42 DPC.

<sup>45</sup> Art. 43 DPC.

<sup>46</sup> Para. 4.3 *Stert.* 2006, 143.

<sup>47</sup> Art. 1 DCCP.

According to Article 27 DCCP a suspect is someone against whom, on the basis of facts and circumstances, a reasonable suspicion of a criminal action comes forward. A suspect has the right to remain silent on the basis of Article 29 (1) DCCP and he must be informed of this right before the interrogation by the police officers begins on the basis of Article 29 (2) DCCP. On the one hand, a suspect can invoke several procedural safeguards, such as the right to silence and the right to an attorney. On the other hand, the authorities can use coercive means against a suspect, such as police detention and custody. For a full understanding of the DCCP in relation to the Police Instructions' reporting procedure it is important to note that nowhere in the DCCP is there a specific provision as regards police witness interrogation. This means that any such questioning can only happen on a voluntary basis, even though an unwilling witness can be summoned and compelled to testify on the basis of Article 210 or 260 (1) DCCP in front of a judge during later stages of the procedure.<sup>48</sup>

Police officers generally prefer not to be treated as a suspect during investigations regarding their use of force.<sup>49</sup> Their general mind-set is that they have acted according to the law and in line with the task assigned to them. As a result they do not want to be treated as a suspect. This holds even if and when it means that they cannot invoke the rights a suspect has during a criminal investigation. The fact that their statements as a witness can be used against them in a subsequent criminal trial – because they cannot invoke the procedural safeguards of a suspect at the moment of their witness testimony – has been duly noted above.<sup>50</sup>

The use of police force investigation parts from the assumption of a legitimate use of force by the officer. This means that as long as there are no reasons for doubting the lawfulness of his behavior he will be treated as a witness. The earlier mentioned relevant guidelines of the executive board of the Public Prosecution Service make it clear that at that stage it is not necessary, and certainly not desirable, to treat the officer as a suspect. The same goes for situations where a

---

<sup>48</sup> G. J. M. Corstens and M. J. Borgers, *Het Nederlands strafprocesrecht*, 8th edn (Deventer: Kluwer, 2014), 319.

<sup>49</sup> Nationale ombudsman 2013 (n 34 above), 37; Naeyé 2014 (n 3 above), 186.

<sup>50</sup> Timmer, Naeyé and Van der Steeg (n 23 above), 69; Timmer (n 37 above), 198; J. ten Voorde, 'Politieel vuurwapengeweld in rechte beoordeeld', (2014) 5 *Ars Aequi* 346, 351. Ten Voorde explains the police officer as a witness has no right to a lawyer or the inspection of documents. Though his comments do not go any further than that this policy might be in a need for change.

police officer has not acted in accordance with the Police Instructions, but where he can apply for (other) exemptions from criminal liability.<sup>51</sup> This means that in general the officer is questioned as a witness by the NPIID within 24 h after the event took place. Nonetheless, at the beginning of the hearing the NPIID informs him that he does not have to answer questions that may incriminate him. And the NPIID will treat the officer as a suspect when it is not (or: no longer) beyond reasonable doubt that his actions were legitimate, or when the circumstances surrounding the event are not sufficiently clear at the time of the first hearing.<sup>52</sup>

Prior to the amendment to the Police Instructions in 2001 the police officer himself had to fill in the notification form, in writing, and submit it to his superior. Back then the officer also had to explain the reasons for his actions. Since the amendment, neither a police officer nor his superior<sup>53</sup> has to state the reasons for the necessity and inevitability of his use of force.<sup>54</sup> Following the amendment to Article 17 the superior must record the (oral) report on the prescribed notification form. Consequently, it is the superior who is responsible for its content. That way the police officer is placed at a certain distance from the creation of the document and the establishment of the facts.<sup>55</sup> However, as mentioned earlier it is still possible that a police officer may have the obligation to record his use of force in different ways as well.

The Dutch government believes that the present procedure prevents forced self-incrimination on behalf of the police officer. It claims a balance is created between the need to provide information on the one hand, and preventing self-incrimination on the other, when a police officer merely reports the facts and circumstances of the force used. Furthermore it underlines that a police officer cannot be forced to cooperate in a subsequent criminal investigation, although this might be different during disciplinary investigations,<sup>56</sup> and that the public prosecutor must return the notification form to the superior when he decides to prosecute the police officer.<sup>57</sup> This can only be

---

<sup>51</sup> Para. 4.3 *Stert.* 2006, 143. For instance in the case of self-defense.

<sup>52</sup> Art. 29 (2) DCCP. See also para. 4.4 *Stert.* 2006, 143.

<sup>53</sup> In this respect question 22 of the notification form provides for further explanation.

<sup>54</sup> Naeyé 2009 (n 8 above), 386–387. See also Naeyé 2014 (n 3 above), 518.

<sup>55</sup> *Stb.* 2001, 387, p. 9–10.

<sup>56</sup> *Ibid.*, p. 10.

<sup>57</sup> *Stb.* 1994, 275, Explanatory Memorandum to Art. 17.

understood in the light of the officer's right to silence from the moment he is a suspect.

In their 1996 research Timmer and others conclude that in case of the police use of force neither Article 17 Police Instructions nor Article 152 DCCP violates a police officer's right to silence. They make clear that this right solely belongs to a suspect, and that a police officer who reports about his use of force to his superior does not qualify as a suspect under Article 27 DCCP. They explain that, although an officer is free to do so, a refusal to report his used force is inconsistent with Article 152 DCCP and Article 17 Police Instructions and, therefore, the officer risks disciplinary sanctions. However, these sanctions should not force the officer to report because this would violate his right to a fair trial under Article 6 ECHR.<sup>58</sup> Despite the fact that police officers can refuse to report their used force this rarely happens in practice.<sup>59</sup> Timmer and others determine it is more likely that an officer who refuses to report will produce incomplete or incorrect statements, though in that case the officer risks charges for perjury.<sup>60</sup>

### 2.3 *A Difference Between Theory and Practice*

Normally the police succeeds in performing its duties without the use of force.<sup>61</sup> However, during the last couple of years the use of force by the police has increased due to diverging perceptions between police officers and civilians,<sup>62</sup> as did the notifications of officers about their use of firearms and truncheons.<sup>63</sup> Now the key question is how

---

<sup>58</sup> Timmer, Naeyé and Van der Steeg (n 23 above), 69–71. See the judgment in case of *Funke v France*, 25 February 1993, European Court of Human Rights (No. 10828/84).

<sup>59</sup> Nationale ombudsman 2013 (n 34 above), 48.

<sup>60</sup> J Naeyé, *Heterdaad. Politiebevoegdheden bij ontdekking op heterdaad in theorie en praktijk*, 2nd edn (Arnhem/Lochem: Gouda Quint/Van den Brink, 1990), 255; Timmer, Naeyé and Van der Steeg (n 23 above), 70.

<sup>61</sup> De Nationale ombudsman, *Voorbij het conflict. Verslag van de Nationale ombudsman over 2009* (de Nationale ombudsman 2010), 16; This approach is in line with the notion of *ultimum remedium* under Art. 7 DPA.

<sup>62</sup> G. van den Brink and G. van Os, 'Tweezijdige behoorlijkheid' in: A. F. M. Brenninkmeijer (ed.), *Werken aan behoorlijkheid. De Nationale ombudsman in zijn context* (Den Haag: Boom Juridische Uitgevers, 2007), 148–168.

<sup>63</sup> P. Kruize et al., *Politiële bewapening in perspectief: Over gebruik en effectiviteit van pepperspray & wapenstok* (Amsterdam: Ateno, Bureau voor Criminaliteitsanalyse, 2012), 44.

these reports are made. Are they made in line with the Police Instructions, or has a different method developed in practice?

Naeyé points out that in the year 2000, so one year before the amendment to the Police Instructions, 42.9% of the serious use of force cases (740 out of 1724) were sent to the public prosecutor. This led to 624 traceable assessments by the chief public prosecutor, out of which 66 negative ones followed.<sup>64</sup> So based on this data, 8.9% of the referred notifications were dismissed. Besides, police officers were prosecuted eighteen times, which led to a settlement in eight cases and a guilty verdict and sentence in five cases.<sup>65</sup> As regards the year 2005, Drenth and others' limited research illustrates that in 29.2% (7 out of 24) of the serious police use of force cases the notification form was sent to the public prosecutor.<sup>66</sup> The research of Drenth and others also finds that 64% of the total of 1696 questioned officers admits to never filling in notification forms, which means that one third of them is still to a greater or lesser extent involved in the completion of the forms.<sup>67</sup>

The Dutch National Ombudsman made additional remarkable observations. First, in line with the research of Drenth and others he points out that in practice it still occurs that police officers fill in the form themselves. He makes it clear that officers continue to report about the context of their used force and their emotional feelings. This information is recorded and taken into account when the used force is evaluated. Secondly, he notes that the superior officer sometimes attaches his advice to the notification form.<sup>68</sup> This obviously goes beyond the instructions of the government. In this respect it is striking that the National Ombudsman recommends to describe and take into account the officer's feelings and the situational context when use of police force is assessed.<sup>69</sup> We realize that on some occasions this kind of information can be used in favor of the police officer. However, such a use does not fall under the rules of evidence under the DCCP. When we talk about criminal evidence – which is inherently not in favor of the suspect's legal position – this information can also be used against this officer in order to qualify the used force as an intentional crime, when this is allowed by the DCCP.

---

<sup>64</sup> Naeyé 2005 (n 21 above), 424–427.

<sup>65</sup> *Ibid.*, 426–427.

<sup>66</sup> Drenth et al. (n 33 above), 77.

<sup>67</sup> *Ibid.*, 70.

<sup>68</sup> Nationale ombudsman 2013 (n 34 above), 35–36.

<sup>69</sup> *Ibid.*, 7.

So the core question is: to what extent is the notification form and the testimony of the superior admissible as evidence against the officer, taking into account that they are derived from the police officers' obligation to report under the Police Instructions? And does it make any difference only when this relates to the facts, circumstances and consequences of the severe use of force, or also to the context and the emotional feelings of the officer? The problem is that at present very little is written and no case law exists in relation to this specific issue. In order to obtain arguments that could help to provide an answer to this question, this research examines – by analogy – a reporting procedure in which the notification form and the situational context are always taken into account in the judgment regarding the legality of the performed actions, namely the one that relates to medical doctors who perform euthanasia on their patient in The Netherlands. These medical doctors are most of the time general practitioners (*huisartsen*) who have known their patients for some time already. Subsequently, this research analyzes the compatibility of the Police Instructions' reporting procedure in the case of serious use of force with the case law of the ECtHR.

To be clear, we do not want to position police officers who have used severe force (or medical doctors who have performed euthanasia) above the law, nor do we want to prevent that their unlawful behavior could ever be sanctioned. The argument we make here is that every suspect should be treated equally before the law, irrespective of his profession or other discriminatory grounds. One of the rights a suspect has is the right against forced self-incrimination. As it will be discussed in the following chapters, the notification form and the testimony of superiors are almost never used as evidence in a criminal trial. Though, at the same time, these sources of information are self-incriminating for the police official who has provided this information – following his duty to do so – as a witness and is later confronted with this same evidence during a criminal trial in which he is a suspect. So when it is clear that a public prosecutor can use – and normally does use – other pieces of evidence during the prosecution of a police officer who has unlawfully used severe force (such as witness testimonies of bystanders and security cameras images), why not exclude the notification form and the testimony of the superior as evidence in court? In our opinion the exclusion of the notification form and the testimony of the superior as evidence in court against the reporting officer, will maximize the willingness of police officers to report



truthfully about their use of force (and will thus optimize the way in which the monopoly on violence can be monitored).

Noting that this has not been debated by legal scholars in relation to the police reporting procedure, this research now discusses the legislation and scholarly debate regarding the Dutch euthanasia procedure and the legal position of the medical doctor, in order to determine whether interesting observations can be made that support or contradict the arguments we have made above.

### III EUTHANASIA AND THE REPORTING PROCEDURE FOR MEDICAL DOCTORS

#### 3.1 *The Legal Basis and Examination of Euthanasia*

It is incorrect to think – as many people still do – that unconditional euthanasia is allowed under Dutch law.<sup>70</sup> It still is a crime defined as the termination of life by a medical doctor at the request of a patient which under Article 293 DPC is punished with twelve years of imprisonment and a fine of the fifth category at its maximum.<sup>71</sup> However, between the 1970s and 2002 the Dutch judiciary developed in its case law a standard set of strict conditions under which a medical doctor (euthanasia doctor) can justifiably perform euthanasia on his patient.<sup>72</sup> The Dutch euthanasia legislation, with its key Act being the Termination of Life on Request and Assisted Suicide Act (*Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding*, WTL),<sup>73</sup> is – as the government describes it – the codification of this case law.<sup>74</sup> Central to this Act are the two conflicting values a medical doctor faces when he decides upon the euthanasia request of his patient, namely the protection of human life on the one hand and respecting a severely suffering person's wish to die in a dignified manner on the other. Also, this Act aims to provide more legal certainty for both the medical doctor and the patient and it aims to improve the monitoring of euthanasia cases by placing the area of penal law at a certain distance.<sup>75</sup>

<sup>70</sup> M. S. Groenhuijsen and F. van Laanen, *Euthanasia in international and comparative perspective* (Nijmegen: Wolf Legal Publishers, 2006).

<sup>71</sup> According to Art. 23 DPC a fine of the fifth category is equal to € 81.000.

<sup>72</sup> E. Pans, *De normatieve grondslagen van het Nederlandse euthanasierecht* (Nijmegen: Wolf Legal Publishers, 2006), 28.

<sup>73</sup> *Stb.* 2001, 194. See also Art. 9 (1) and (2).

<sup>74</sup> *Kamerstukken II* 2000/01, 26691, nr. 9, p. 16.

<sup>75</sup> *Ibid.*, p. 18.

Before the creation of the WTL the Dutch judiciary had developed a set of criteria under which a doctor could invoke the exemption from criminal liability on the basis of Article 40 DPC (duress). At present, Article 293 (2) DPC contains a special ground for the exemption from criminal liability which can only be invoked by the euthanasia doctor. In order to do so this doctor must have acted in accordance with the statutory due care criteria specified in Article 2 WTL and the duty to report on the basis of Article 7 (2) Burial and Cremation Act (*Wet op de lijkbezorging*, WLB).<sup>76</sup> As a result this involves a cumulative provision: both requirements have to be fulfilled by the euthanasia doctor. We will now explain what the reporting procedure under the WTL exactly entails.

When a medical doctor euthanizes a patient he must report this without delay to the municipal coroner on the basis of Article 293 (2) DPC and Article 7 (2) WLB. At that moment the euthanasia doctor provides the municipal coroner with a completed notification form and a well-reasoned report about the course of events and the non-natural death of the patient.<sup>77</sup> In this report he replies to open questions, regarding the means he has used and the assessments he has made during the process, for example. In this respect it differs from the notification form that is used in the police reporting procedure, where the possible answers are to some extent fixed. Simultaneously the municipal coroner informs the public prosecutor in writing about this euthanasia death<sup>78</sup> without expressing his judgment on the carefulness of the doctor's actions, although the public prosecutor can request him to do so. Then the public prosecutor decides whether the body is free to be buried or cremated. Finally, the municipal coroner also sends the notification form and the report to the competent regional euthanasia review committee (*Regionale toetsingscommissie*, RRC).<sup>79</sup>

As a next step, it is usually the RRC that examines the case. This committee is composed of three members: a legal member (chairman), a medical member and an ethical member.<sup>80</sup> This committee decides whether the actions of the medical doctor were in line with the statutory due care criteria out of Article 2 (1)

---

<sup>76</sup> *Stb.* 1991, 130.

<sup>77</sup> Art. 7 (2) WLB. *Stb.* 2002, 140: in the appendix the model form can be found.

<sup>78</sup> Art. 10 WLB.

<sup>79</sup> *Stcrt.* 2012, 26899.

<sup>80</sup> Art. 3 (2) WTL.

WTL. The committee decides in one of the three following manners. First, it can find that the actions of the doctor were consistent with the statutory due care criteria and thus legitimate. In that case it informs the Public Prosecution Service of its judgment and the case ends here. This means no further investigations are conducted by the Public Prosecution Service, apart from in the case that new facts arise or a civilian reports a crime. Secondly, the RRC can rule it is not competent to decide on the matter when (it is believed that) no request for euthanasia was made by the patient. In that case it refers the case back to the municipal coroner and it requests him to inform the public prosecutor. Thirdly, the RRC can hold that the doctor's actions were not in accordance with the due care criteria.<sup>81</sup> Then it sends its judgment together with a copy of the case file to the Assembly of General Procurators. On the basis of Article 10 WTL, the RRC is obliged to provide the public prosecutor at his request the information he needs to assess the doctor's actions.

This procedure has various implications on the chances of criminal investigation by the Public Prosecution Service. Article 2 (1) WTL is a codification of the case law as regards the substantive and procedural requirements the euthanasia doctors must fulfil in order to successfully invoke the exemption from criminal liability under Article 40 DPC. This means that if the RRC rules that the actions of the medical doctor were in line with Article 2 (1) WTL, there is no reason for the Public Prosecution Service to assume the doctor's actions are illegal.<sup>82</sup> Although the government states the RRC is not a penal authority and it does not infringe upon the Public Prosecution Service's right to prosecute, it has an important (indirect) saying in the actions of the latter.<sup>83</sup> In other words, when the RRC provides its approval, the Public Prosecution Service does not investigate the matter. In case of incompetence of the RRC or incompatibility of the doctor's actions with the statutory due care criteria, the Public Prosecution Service can decide to initiate criminal investigations. It can also do so when at the moment the doctor notifies the municipal coroner it is not clear or doubtful that the euthanasia doctor can invoke the exemption from criminal liability out of Article 293 (2) or Article 40 DPC, when the euthanasia was reported incorrectly or not

---

<sup>81</sup> *Stert.* 2012, 26899.

<sup>82</sup> *Kamerstukken I* 2000/01, 26691, nr. 137b, p. 27.

<sup>83</sup> *Stert.* 2012, 26899.

performed by a medical doctor.<sup>84</sup> Finally, Article 14 WTL does not prevent members of the RRC from testifying during the criminal investigation or in court about the written and oral statements the doctor has made.

### 3.2 *The Legal Position of the Medical Doctor*

Similar to the police use of force investigations, the actions of the euthanasia doctor are examined *a posteriori*. If a doctor falsely reports, he faces 1 month of imprisonment and a fine of the second category at its maximum according to Article 81 (1) WLB. Generally within 6 weeks the RRC decides whether the actions of the doctor were in line with the statutory due care criteria of Article 2 WTL.<sup>85</sup> In order to do so, it can request a medical doctor to clarify his initial report with additional written or oral statements.<sup>86</sup> Whilst doing this, the euthanasia doctor cannot be forced to cooperate.

So why do we discuss the reporting procedure for euthanasia doctors in this research regarding the reporting procedure for police officers who have used force? While, similar to the police officer, the euthanasia doctor makes his report at the moment when he is still not a suspect under Article 27 DCCP. This means he submits this notification in the pre-investigation phase (*controlefase*).<sup>87</sup> In the past the Advocate-General Fokkens of the Supreme Court of the Netherlands (*Hoge Raad*) observed in this respect that the principle of *nemo tenetur* plays no role at that particular moment.<sup>88</sup> This is an obvious observation of course, because in the pre-investigation phase there is no suspect involved. Thus, the euthanasia doctor must fulfil his obligation to report and no right to silence is awarded to him. Moreover, similar to the police officer he will be punished for making false statements; a notification of a natural death means he risks three years of imprisonment and a fine of the fourth category on the basis of Article 228 DPC. At the same time he loses his opportunity to

---

<sup>84</sup> *Ibid.* Or it can do so when prosecution is requested on the basis of Art. 12 DCCP.

<sup>85</sup> Art. 9 (1) WTL.

<sup>86</sup> Art. 8 (2) WTL.

<sup>87</sup> W. L. J. M. Duijst, *Gezondheidsstrafrecht* (Deventer: Kluwer, 2009), 97.

<sup>88</sup> HR 30 november 1999, ECLI:NL:PHR:1999:AA3796, *NJ* 2000, 216. In this case the euthanasia doctor had made false statements regarding an unnatural death. Therefore the Dutch Supreme Court did not have to determine to what extent the euthanasia reporting procedure violated the *nemo tenetur* principle, because the euthanasia doctor could be punished for making false statements.

invoke the exemption from criminal liability of Article 293 (2) and is exposed to a prosecution on the basis of Article 293 (1) DPC. Comparable to the police use of force investigation procedure, the euthanasia doctor becomes a suspect from the moment the investigation under the supervision of the public prosecutor regarding the doctor's suspected criminal actions begins.

Similar to the reporting procedure for police officials, the number of euthanasia doctors that are annually criminally prosecuted is slim.<sup>89</sup> However, contrary to the debate regarding the question whether the Police Instructions' obligation to report violates the *nemo tenetur* principle,<sup>90</sup> scholars disagree with each other where it comes to the reporting procedure for euthanasia doctors and the admissibility of documents produced in the pre-investigation phase as evidence in a subsequent criminal investigation.<sup>91</sup> Pans, for instance, is critical about the procedure under the WTL and thinks it harms the legal certainty for the euthanasia doctor. She calls to prohibit the Public Prosecution Service from using documents that are the product of the obligation to report of the euthanasia doctor. Pans argues to treat a positive judgment of the RRC as a warrant that the Public Prosecution Service will not further investigate the case (besides when new facts arise).<sup>92</sup> However, it is doubtful whether such an argument can hold taking into account that the family of the victim can appeal a decision not to prosecute the doctor before the Court of Appeal on the basis of Article 12 DCCP. Duijst and Veerman concur that the use of the doctor's report in a criminal trial is contrary to the prin-

---

<sup>89</sup> See Leo Enthoven, 'Toetsingspraktijk euthanasie voor sommige artsen onrechtvaardig', (2016) 2 *NJB* 117, 121: this author points out that out of 3506 reports the RRC received in 2014, only four reports (so less than 0.1%) have led to a judgment of the RRC that the actions of the doctor were inconsistent with the statutory due care criteria and thus illegitimate. Furthermore, Enthoven points out that euthanasia doctors do not have the possibility to appeal a decision of the RRC. Knowing that it only involves a couple of doctors per year who are confronted with a negative decision of the RRC, he states, does not alter the fact that these doctors suffer a legal inequality compared to ordinary civilians in this respect.

<sup>90</sup> In fact it can barely be called a debate because only a few scholars discuss this topic and they all agree that it is inherent to the task of the police officer that he must provide information out of which a criminal investigation can follow.

<sup>91</sup> E. Delbeke, *Juridische aspecten van zorgverlening aan het levenseinde* (Antwerpen: Intersentia, 2012).

<sup>92</sup> Pans (n 72 above), 127–128.

ciple of *nemo tenetur* and, thus, to Article 6 ECHR.<sup>93</sup> Others warn this might be construed as illegally obtained evidence or openly question the compatibility of the WTL reporting procedure with the ECHR.<sup>94</sup>

This research did not find a court ruling on the compatibility of the WTL obligation to report with the principle of *nemo tenetur*. As a result we cannot make a comparison about the legal validity of the Police Instructions' reporting procedure with that of the WTL on the basis of judicial precedents. However, it is worth noting that scholars in the debate regarding the euthanasia reporting procedure have uniformly raised questions about it and doubted its compatibility with the *nemo tenetur* principle. Until now such a scholarly debate has not taken place with respect to the Police Instructions' reporting procedure in case of a police officer's serious use of force. This is even more remarkable when we take the following into account.

It is clear that the task of the police officer and the medical doctor who performs euthanasia differs. In principle a police officer must respond to the unlawful conduct of civilians, which could ultimately mean that he has to use severe force in order to stop it. A euthanasia doctor can decide for himself whether he is willing to perform euthanasia on his patient – and thereby wants to encroach upon the right to life of a civilian – as long as he acts in compliance with the law. So in other words, a police officer has a *duty* to act and a medical doctor can *choose* to act. A doctor may for instance refuse to perform euthanasia at the request of his patient, when this conflicts with his personal (religious) belief.

Though in our opinion this 'freedom of choice' for the medical doctor can also sometimes be a matter of perception. According to the law he can make his own decision, that is obvious. However, it has been illustrated by a number of cases that euthanasia doctors performed euthanasia on their patients when this was not in compliance with the law, but at the same time their patients begged these doctors to do so in order to stop their suffering. Then a medical doctor has freedom of choice, but the patient puts a heavy moral burden on his shoulders. What the police officer and the euthanasia doctor do share is that, in the end, both of them are individually criminally responsible when their actions turn out to be illegitimate

---

<sup>93</sup> W. L. J. M. Duijst and G. Veerman, 'Niemand behalve de arts?' in: A. den Exter (ed.), *De euthanasiewet: grondrechten onder druk?* (Budel: Damon, 2006), 130–149.

<sup>94</sup> B. D. Onwuteaka-Philipsen et al., *Evaluatie Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding* (Den Haag: ZonMw, 2007).

and in that case they can invoke an exemption from criminal liability. This is something they share with every civilian.

Thus, euthanasia doctors have the liberty to choose to perform euthanasia, whereas police officers in general have the duty to act (which could ultimately mean: to use severe force). So would one not expect that the legal debate becomes more intense, when the freedom of choice is more limited (and thus the extent in which one is compelled to act is greater)? In our opinion both the police officer and the euthanasia doctor perform a task assigned to them by the Dutch legislator for the public good, however, the euthanasia doctor can refuse to perform this task when he deems this is appropriate. Therefore, we believe that in relation to the debate on *nemo tenetur*, the Police Instructions' reporting procedure at least deserves the same level of scholarly attention as the debate regarding the euthanasia reporting procedure.

In the end, it becomes clear that both procedures are confronted with the same problem: information that is obtained by a legal duty to testify in the pre-investigation phase, can later on be used against this same person in a criminal investigation. Scholars agree that, in relation to the euthanasia reporting procedure, this violates the *nemo tenetur* principle. However, due to the absence of case law this reasoning cannot be supported by judicial precedents. Then the question is, to what extent is the use of this kind of information allowed under the ECHR? In order to test the compatibility of the police reporting procedure with the ECHR, this research will now discuss the ECtHR's case law regarding the admissibility of evidence established in the pre-investigation phase in a subsequent criminal investigation. By nature the following overview of the Court's case law is a casuistic one. This is compounded by the fact that it involves a Court, which is famous for deciding a case in light of the circumstances of the case. Nevertheless, it contains significant elements that the Court will presumably take into account when – one day – it has to rule on the Police Instructions' reporting procedure. A discussion of these elements in relation to the police reporting procedure follows in the fifth chapter of this research.

#### IV THE LEGAL POSITION OF A WITNESS AND THE RIGHT AGAINST SELF-INCRIMINATION

The principle of *nemo tenetur* is not codified in Article 6 ECHR as such. Nevertheless, the Strasbourg court has ruled in the case of *John*



*Murray v. the United Kingdom* that the principle, taken together with the right to silence, is fundamental for the right to a fair trial as codified in Article 6 (1) ECHR.<sup>95</sup> It is important to keep in mind that Article 6 ECHR and the right to silence can only be invoked by a suspect, meaning an individual facing a criminal charge.<sup>96</sup> According to the case law of the Court, the moment a criminal charge begins is when there is an “official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”.<sup>97</sup> Against this background it is normally not illegal to compel a non-suspect – such as a witness – to testify. However, the ECtHR has ruled in several cases that sometimes statements that are made during the pre-investigation phase by a witness cannot be used as evidence in a criminal trial.

Let us start with the case of *Saunders v. the United Kingdom*.<sup>98</sup> In this case the applicant was forced on the basis of domestic law to cooperate in an administrative investigation. During this investigation he was prosecuted for the same matter. In court the statements he had made during the administrative investigation, and which were incriminating to him, were used to disprove his plea of innocence. The ECtHR stated that “the Court’s sole concern in the present case is with the use made of the relevant statements at the applicant’s criminal trial”. It held that:

[T]he right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. (...) In sum, the evidence available to the Court sup-

---

<sup>95</sup> Judgment in case of *John Murray v. the United Kingdom*, 8 February 1996, European Court of Human Rights (No. 18731/91), para. 45.

<sup>96</sup> E. J. Koops, *Het decryptiebevel en het nemo-teneturbeginsel. Nopen ontwikkelingen sinds 2000 tot invoering van een ontsleutelplicht voor verdachten?* (Onderzoek en beleid, nr. 305, Den Haag/Meppel: Wetenschappelijk Onderzoek- en Documentatiecentrum/Boom Lemma uitgevers, 2012), 48. See also the judgment in case *Allan v. the United Kingdom*, 5 November 2002, European Court of Human Rights (No. 48539/99), para. 50.

<sup>97</sup> Judgment in case of *Eckle v. Germany*, 15 July 1982, European Court of Human Rights (No. 8130/78), para. 73.

<sup>98</sup> Judgment in case of *Saunders v. the United Kingdom*, 17 December 1996, European Court of Human Rights (No. 19187/91).

ports the claim that the transcripts of the applicant's answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant.<sup>99</sup>

Here we have identified the first important elements the ECtHR takes into account in order to assess the extent to which the *nemo tenetur* principle is violated. It is also an important argument to convince those who claim – such as the Dutch government and several lawyers and civil servants we have spoken to – that the notification form of the Police Instructions does not violate the *nemo tenetur* principle because it merely entails factual information. The judgment in the case of *Saunders* clearly illustrates that this kind of information may not be used to disprove the statements of innocence of the suspect that provided this same information. So this also applies in relation to a police officer who has used force.

The Court in *Saunders* also made clear that the applicant was obliged to make the statements, because he could not invoke a right to silence and his refusal to respond would be punished with two years of imprisonment. Here we can see clear parallels with the reporting procedure for police officers that have used force, who are obliged to report and cannot use the right to silence, because they are not a suspect at the moment they notify their superior. At the same time they face disciplinary and criminal sanctions for not (truthfully) reporting about the course of events. The Court in *Saunders* also stated that the public interest of the fight against fraud could not serve as a justification for this course of events. So does this mean that this also contradicts the argument of those who claim that the use of force is inherent to the position of authority of the police, and that the public interest in properly investigating such a use of force justifies the fact that a police officer should provide this information while risking that it may be used against him as criminal evidence at a later stage? We believe it does. In the end, the ECtHR in *Saunders* ruled the principle of *nemo tenetur* was violated,<sup>100</sup> which is an important indication that the same can be observed regarding the police reporting procedure.

Besides *Saunders* we mention other cases in this respect. In *Zaichenko v. Russia*<sup>101</sup> the Court held that:

---

<sup>99</sup> *Ibid*, paras. 71–72.

<sup>100</sup> *Ibid*, paras. 67–76, in particular para. 74.

<sup>101</sup> Judgment in case of *Zaichenko v. Russia*, 18 February 2010, European Court of Human Rights (No. 39660/02).

[B]eing in a rather stressful situation and given the relatively quick sequence of the events, it was unlikely that the applicant could reasonably appreciate without a proper notice the consequences of his being questioned in proceedings which then formed the basis for his prosecution for a criminal offence.

Since the judgment was primarily based on these statements and the consequences thereof were not remedied in court, the Court held there was a violation of Article 6 ECHR.<sup>102</sup> This is something that normally does not apply to cases of police use of force. As mentioned before there are often more pieces of evidence available than solely the notification form and the testimony of the superior. It will only be a problem in the police use of force investigations when these sources of information constitute the only evidence that is available and on which the charges are based in a subsequent criminal trial. The latter scenario is centralized in this research.

As in *Zaichenko*, the ECtHR used a similar reasoning in *Shabelnik v. Ukraine*. In this case the applicant had made statements as a witness that soon turned out to be self-incriminating. The Court held that the right to legal aid in the pre-prosecution stage was violated because a confusing situation was created in which the applicant was told he had the right not to incriminate himself and at the same time his obligation to respond was recalled. Seeing that he was not able to speak to a lawyer and that his conviction was mainly based on these statements, the Court ruled that Article 6 of the Convention was violated.<sup>103</sup> We believe that this aspect has already been taken into account in the present course of events under the police reporting procedure. In the introduction of this research it has been pointed out that the police has installed a group of top lawyers, and it is likely (as we have heard from some other lawyers that have dealt with cases of police use of force) that these lawyers are immediately notified when an officer has used violence. That way the police officer can be briefed about his legal position and his rights as a suspect or a witness, preferably before he has reported this to his superior. However, we have received this information from a lawyer operating in one police region only, and it is not clear (we would say unlikely) that this is also the case in other police regions. So in that sense the problem has not yet been entirely resolved.

Furthermore, in *Heaney and McGuinness v. Ireland*, in which the applicant's refusal to make statements was punished by law with

---

<sup>102</sup> *Ibid*, paras. 55 and 58–60.

<sup>103</sup> Judgment in case of *Shabelnik v. Ukraine*, 19 February 2009, European Court of Human Rights (No. 16404/03), paras. 57–60.

6 months of imprisonment, the Court ruled that the public interest could never justify a provision that violates the core of the principle of *nemo tenetur*, which has at its core the right to silence.<sup>104</sup> Here we can make similar observations regarding the police reporting procedure as we have done in relation to *Saunders*: the public interest in a proper investigation of the police use of force cannot justify a violation of the *nemo tenetur* principle. As an extension in *Shannon v. the United Kingdom*, it was held this could be permissible in the case of a non-suspect and when there were no intentions to prosecute that person.<sup>105</sup> However, this – in our opinion – is a rather artificial distinction the Court makes in its judgment, because this intention to prosecute a police officer can also arise later on, being the result of a successful complaint of an injured person on the basis of Article 12 DCCP. Likewise, the Court's judgment in *O'Halloran and Francis v. the United Kingdom* made clear that there was no violation of Article 6 ECHR when a refusal to make statements is punished with a small punishment (for instance a fine) and the statement itself is only part of the broader body of evidence for which the accused can provide counterevidence.<sup>106</sup> Regarding the latter observation we have already pointed out that the problem of *nemo tenetur* indeed plays a smaller role in cases where there are also other pieces of evidence available. However, our research focuses on those cases to which this does not apply.

In sum, according to the ECtHR the use of the notification form and the testimony of the superior as evidence is most problematic in cases where the conviction mainly rests on this information, or where this information is used to disprove the statements of innocence made by the police officer who has used violence and has provided this information. Besides, the public interest of proper investigation into the police use of force cannot justify a violation of an officer's right against forced self-incrimination. When we, therefore, take into account that the disciplinary and criminal sanctions for a police officer – who does not (truthfully) report about his used force – are not to be seen as small punishments, we cannot but conclude that the police reporting procedure does not hold in light of the requirements the ECtHR has formulated in relation to the principle of *nemo*

---

<sup>104</sup> Judgment in case of *Heaney and McGuinness v. Ireland*, 21 December 2000, European Court of Human Rights (No. 34720/97), paras. 57–58.

<sup>105</sup> Judgment in case of *Shannon v. the United Kingdom*, 4 October 2005, European Court of Human Rights (No. 6563/03), para. 38.

<sup>106</sup> Judgment in case of *O'Halloran and Francis v. the United Kingdom*, 29 June 2007, European Court of Human Rights (Nos. 15809/02 and 25624/02), paras. 56–62.

tenetur. In our opinion a police officer must always have the right to consult a lawyer before he reports about the force he has used to his superior. Furthermore, we ask ourselves what is the reason for not excluding the notification form and corresponding documents the officer has made – as well as the testimony of the superior – as evidence in court, when we have been told that this information is normally not used as criminal evidence on which the charges and a later conviction are based. Why not exclude the possibility of using something one never uses?

We conclude this overview by comparing the line of reasoning of the abovementioned case of *O'Halloran and Francis*, in which the obligation to respond was discussed with respect to traffic laws, with a statement of Timmer and others in 1996. In *O'Halloran and Francis* the Court ruled that because of the specific nature and the enforceability of traffic laws, as well as the limited role of the obligation to respond, certain obligations could be imposed upon car owners. It held that:

Those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom these responsibilities include the obligation, in the event of suspected commission of road-traffic offences, to inform the authorities of the identity of the driver on that occasion.<sup>107</sup>

Timmer and others came to a similar conclusion in their report in 1996. They consider the fact that an officer must truthfully make an official report about his use of force not as something in defense of his innocence but rather as a logical consequence of the monopoly on violence of the public authorities and, therefore, the officer just has to accept this obligation.<sup>108</sup> We have already pointed out that this 'public interest argument' does not hold in light of the case law of the ECtHR.

## V THE COMPATIBILITY OF ARTICLE 17 POLICE INSTRUCTIONS WITH ARTICLE 6 ECHR

We have seen that according to the ECtHR the use of evidence obtained from a non-suspect who has a legal obligation to respond in a subsequent criminal investigation can lead to a violation of the principle of *nemo tenetur* under Article 6 ECHR. This does not only relate

---

<sup>107</sup> *Ibid*, para. 57.

<sup>108</sup> Timmer, Naeyé and Van der Steeg (n 23 above), 70.

to directly incriminating statements but to explanatory factual statements as well. As in each decision of the ECtHR the specific circumstances of the case play a role. In the light of this research important aspects in the Court's reasoning are the extent of coercion under which the evidence is obtained, the sanction in case of non-compliance with the obligation to respond, whether there is a confusing situation for the applicant, the applicant's possibilities of contacting a lawyer and the degree to which the conviction is based on the evidence obtained in a compulsive manner during the pre-investigation phase. The Court stipulated that the public interest cannot be used to justify procedures that infringe upon the core aspects of the right to silence which is the core of the principle of *nemo tenetur*. Finally, the Court has made it clear that an obligation to respond can be acceptable where there is no intention to prosecute a non-suspect.

So what does this mean for the Police Instructions' reporting procedure in the case of serious use of force by police officers? First we have seen that in practice some officers fill in the notification form themselves. On top of that, sometimes the police officer's emotional and situational aspects are reported and taken into account during the reporting procedure. One can say this is the responsibility of the police officer himself because he has no legal obligation to fill in this form or to speak about more than just the bare facts and circumstances of the event. However, as the National Ombudsman indicates in his report, some police officers do arrive in an emotional state at the bureau after they have used force. When officers at that particular point in time have to inform their superior, they will not always be conscious of the implications self-incriminating statements can have for them in a subsequent criminal investigation. Without a clear warning for the officer as regards the self-incriminating effects of his complete story, a violation of the privilege against self-incrimination seems to be at stake here.

On the other hand, we do understand the pivotal importance of the police use of force being reported properly and duly. We agree that at the moment the officer reports to his superior one must start from the assumption that the officer acted in line with the Police Instructions. We also understand how important it is for the officer from a psychological point of view to share his story as a non-suspect with his superior. It must be avoided that an officer reports unreliably about the force he has used, in the light of the officer's as well as society's interests. Even though we have pointed out that according to its internal rules the NPIID does not take the notification form into account whilst carrying out its investigation, the fact remains

that at this time the public prosecutor can obtain a variety of evidence that is based on the officer's report. Therefore, we have come up with the following solution.

We prefer not to alter the moment the investigation phase begins under the Police Instructions. A small amendment suffices to avoid an incompatibility of the Police Instructions' reporting procedure with Article 6 ECHR. Whether or not the superior of the police officer is seen as the author of the notification form, the fact remains that this form contains information that has been obtained from the officer who used force and has a legal obligation to report about this used force to his superior. Especially in those cases in which this information is used to disprove the officer's claim of being innocent. The government can adopt a provision under the Police Instructions that excludes the notification form, as well as any documents that are drafted following the officer's report, and the testimony of the superior as evidence in a subsequent criminal investigation against this officer. Such an approach would be in line with the already existing Kingdom Act concerning Safety Investigation Board (*Rijkswet Onderzoeksraad voor veiligheid*).<sup>109</sup> Following Article 52 (1) of this Act the Dutch Safety Board can question witnesses under oath, which means these witnesses can be compelled to provide self-incriminating information. In order to prevent a violation of the right against forced self-incrimination, this Act excludes the Dutch Safety Board's documents (Article 69 (1)(f)) and the testimony of the Board's investigators (Article 69 (4)) as evidence in court, notwithstanding the fact that the Board's documents only contain factual information that has been documented by the Board itself. See in this respect also the Articles 30–32 of the Parliamentary Inquiry Act (*Wet op de parlementaire enquête 2008*).<sup>110</sup> Obviously, this does not mean that the notification form and the documents that are drafted on the basis of the officer's report cannot be used in favor of the police officer, because – as pointed out before – the rules regarding evidence under the DCCP only relate to those pieces of evidence that incriminate the suspect.<sup>111</sup> In theory the government could repeat its

---

<sup>109</sup> *Stb.* 2004, 677.

<sup>110</sup> *Stb.* 2008, 148.

<sup>111</sup> T. Kooijmans and J. B. H. M. Simmelink, *De verhouding tussen het strafrechtelijk onderzoek en het onderzoek door de Onderzoeksraad voor Veiligheid* (Tilburg: Universiteit van Tilburg, 2007), 15; T. Kooijmans et al., *Het gebruik van onderzoeksinformatie en rapporten van de Onderzoeksraad voor veiligheid in juridische procedures* (Tilburg: Tilburg University, 2014), 20.



demand that a police officer only speaks about the facts and circumstances of the force he has used. However, in the light of the National Ombudsman's report this does not seem a fruitful solution.

The Ministry of Security and Justice has informed us that at this very moment the Police Instructions, including its reporting procedure, is under review. Changes to the Police Instructions are expected to enter into force in 2016. When the government refrains to reform the present system in the way as is proposed in this research, we fear it is not the question *if* but *when* a Dutch court or the ECtHR itself will rule the Police Instructions' reporting procedure violates Article 6 ECHR. Then just one question remains: how serious is this problem in actual practice? Especially if we take into account the possibility for the Public Prosecution Service to reach a settlement with the police officer before an actual court case takes place, we need to examine to what extent the notification form and other relevant documents, as well as the superior's testimony, are admitted in court as evidence and to what extent a subsequent conviction is based on these pieces of evidence.

Following a brief survey amongst eight lawyers who – to a greater or lesser extent – have dealt with police use of force cases in the past, the following indications come forward. Per year the number of criminal cases against police officers who have used force is limited. Most of the cases that are actually brought before a court result from a complaint of a citizen to a Court of Appeal on the basis of Article 12 DCCP for the initial non-prosecution of a police officer by the Public Prosecution Service. In some cases it still happens that the police officer himself – or together with his superior – fills in the prescribed notification form. The documents that are produced out of the officer's report only relate to the facts, the circumstances and the consequences of the incident, and these documents do not normally contain any contextual or emotional information provided by the officer. However, in one case a superior was asked by the Public Prosecution Service to pose some additional questions to the police officer, after which the answers to these questions were recorded in an official report under oath. This then became part of the criminal file. That way an extension of the reporting procedure had taken place. Two lawyers confirmed that the notification form is part of the file in a criminal investigation against the police officer who has used force. It appears this mainly happens in non-severe police use of force cases, because as mentioned earlier the NPIID – in light of the tension between the officer's obligation to report and his right to remain

silent as a suspect – tries to avoid that the notification form becomes a part of the criminal file. Finally, according to the eight lawyers it never occurred that a police officer was convicted on the basis of the notification form, nor did it occur that a superior was summoned to testify against the reporting police officer. However, since this brief survey does not equal an extensive empirical study more research is needed in order to make solid statements in this respect.

And even when one claims that there is no genuine problem at stake here because criminal investigations against police officers who have used serious force rarely take place – for instance there are approximately 60.000 police officers in The Netherlands<sup>112</sup> who arrest about 300.000–400.000 suspects per year out of almost 17 million inhabitants,<sup>113</sup> and the number of cases in which the NPIID investigated firearm shooting by police officers remained low during the last years: 23 (2009), 25 (2010), 30 (2011), 24 (2012), 33 (2013) and 33 (2014)<sup>114</sup> – does this then mean that the existing law on the police use of force investigations should not be improved for the rare cases in which the identified problem in this research can play a role in the future? The solution that we propose to this problem is to make an easy and, at least in our opinion, politically non-sensitive amendment. Thus what reason can there be to oppose a statutory provision which explicitly excludes the notification form, the witness testimony of the superior and the reports that the police officer has made following his use of force being used as evidence in subsequent court

---

<sup>112</sup> Nationale Politie, *Jaarverslag Nationale Politie 2014* (Nationale Politie, 20 May 2015) available at <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/jaarverslagen/2015/05/20/nationale-politie/06-venj-vi-nationale-politie-jaarverslag-2014-en-financiele-verantwoording.pdf> (last accessed 12 April 2016).

<sup>113</sup> See for instance an overview of the years 2009–2013: Centraal Bureau voor de Statistiek, ‘Registraties en aanhoudingen van verdachten; nationaliteit’ (Centraal Bureau voor de Statistiek, 19 October 2015) <http://statline.cbs.nl/Statweb/publication/?DM=SLNL&PA=82315NED&D1=0-1,12,18,22,25-26&D2=0&D3=0-1,6,9,24,26&D4=1-2&D5=10-14&HDR=G4,G1,G3&STB=T,G2&VW=T> (last accessed 13 April 2016). The number of arrested suspects per year: 423.420 (2009), 386.210 (2010), 376.470 (2011), 350.080 (2012), 317.740 (2013) and 309.280 (2014). See also the number of inhabitants in The Netherlands: Centraal Bureau voor de Statistiek, ‘Bevolkingsteller’ (Centraal Bureau voor de Statistiek, 20 October 2015) <http://www.cbs.nl/nl-NL/menu/themas/bevolking/cijfers/extra/bevolkingsteller.htm> (last accessed 12 April 2016).

<sup>114</sup> Rijksrecherche, ‘Rijksrecherche onderzocht totaal 33 schietincidenten in 2014’ (Rijksrecherche, 13 February 2015) available at <http://www.rijksrecherche.nl/algemene-onderdelen/uitgebreid-zoeken/@163147/rijksrecherche/> (last accessed 12 April 2016).

proceedings? Whereas in some professions people are judged and remembered on their best moments and their biggest achievements, for instance scientists and artists. Others, such as truck drivers and policemen, are judged on their weakest moments and the potential mistake they have made once in their long-lasting career. At those vulnerable moments it is important to have a legal system in place that at least provides them – when needed – with the same rights that every suspect is entitled to during a criminal investigation. We therefore call upon the Dutch Ministry of Security and Justice, and finally the Dutch legislator, to take note of our proposition and to incorporate it into the revised Police Instructions that are expected to enter into force in 2016.

## VI CONCLUSION

This study has examined the compatibility of the Police Instructions' obligation to report in the severe police use of force cases with the principle of *nemo tenetur* under Article 6 ECHR. This research has pointed out that the Dutch government was aware of a possible inconsistency in the reporting procedure with Article 6 ECHR at the time this procedure was incorporated. In its regulation the government has made clear that a balance had to be struck between the notions of 'providing information' and 'self-incrimination'. Where the government assumes this balance is maintained under the present legal system, this research has uncovered an imbalance in disfavor of police officers. A police official has the obligation to notify his superior about the force he has used, and under the present system the resulting notification form and other related documents, as well as the witness testimony of the superior to whom the report was made, can be used as evidence during the subsequent criminal trial against this officer. The factual information directly derives from the police officer and it sometimes occurs that police officers themselves fill in the notification form or that they report about the emotional and situational aspects of the event.

This research has also discussed the reporting procedure for medical doctors who performed euthanasia on their patient. It found out that scholars in the euthanasia debate claim that such a procedure violates the *nemo tenetur* principle when the doctor's report is used in a criminal trial. By analogy, these arguments could also apply to the Police Instructions' reporting procedure in the case of a police officer's serious use of force. Furthermore, due to the absence of Dutch

court rulings on the compatibility of the euthanasia and the Police Instructions' reporting procedure with the principle of *nemo tenetur*, this research has examined the case law of the ECtHR. It concludes that several elements of the Police Instructions' reporting procedure in case of serious use of force go against the case law of the ECtHR.

As a result, the present reporting procedure of the Police Instructions is likely to violate the principle of *nemo tenetur* under Article 6 ECHR when the notification form and related documents or the testimony of the superior are used to disprove the officer's claim of innocence or when the criminal charges and a subsequent conviction is solely based on these pieces of evidence. A small amendment to the Police Instructions in order to eliminate the possibility for the public prosecutor to use the aforementioned means of evidence can solve this problem, especially when we realize that in most cases the public prosecutor never needs to use these pieces of information as evidence.

#### OPEN ACCESS

This article is distributed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted use, distribution, and reproduction in any medium, provided you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license, and indicate if changes were made.