

1 Introduction

1.1 Introduction

When I started analysing the materials of courtroom interaction that I collected in the 1990s (Komter, 1998) I was struck by the ways judges referred to, or read from, the case file. They read sentences from police reports that were supposedly representing the suspect's 'own words' in the police interrogations; sentences that everyone could see would never have been spoken like that. This made me curious to find out what was really said in those interrogations, and to examine how these police reports came to look the way they did. Thus, when the courtroom study was completed, I collected a number of audio-recorded police interrogations and the reports made of these interrogations. The analyses of these materials made me aware of the complexities of the talk, the typing and the texts that emerged in and from the interrogations (Komter, 2001; 2002–3; 2003; 2005; 2006b). Then I realised that I could only understand the 'career' (cf. Cicourel, 1968; Meehan, 1986) of the suspect's statement if I followed cases from the police interrogation through to the trial. Therefore, new materials were collected, consisting of audio-recorded police interrogations, the reports made of these interrogations and video-recorded trials of the same cases. These materials formed the basis for studying how the talk in the police interrogation is transformed into the text of the 'suspect's statement', how this text is incorporated into the police report and becomes recognisable as an official piece of evidence, and how this police report is invoked by the professionals, especially the judges, in the courtroom. My main inspirations and tools for analysing these matters have been found in ethnomethodological and conversation analytic studies.

Although this book draws on my earlier research on trials and police interrogations, the combination and the interplay of the materials result in a synergy that affords the telling of a different, and in a sense more complete story. I shall illuminate the career of the suspect's statement by investigating its construction in the police interrogating room, its written character as part of the police report, and its uses in court by the professionals who deal with

2 Introduction

the case. I shall consider these foci of analysis in their particular settings, that is, the construction of the suspect's statement in the setting of the police interrogation, the character of the suspect's statement in the documentary 'settings' of the police report and the case file, and the invocation and use of the suspect's statement in the courtroom setting. These settings are not only separate entities with their own features and their own dynamics but they are also linked together by the various references to and invocations of the suspect's statement in the course of the process (Smith, 2001: 191).

It has been observed that 'following the career of a document through the various stages through which it goes will highlight the frameworks of organisational action as they are oriented to step by step, phase by phase, by organisational actors' (Harper, 1998: 44). The aim of this book is, by following the career of the suspect's statement from the police interrogation to the trial, to acquire insight into the interactional and documentary foundations of the Dutch criminal law process and, more generally, to understand the effects of the construction, character and use of documents in institutional settings. For medical settings, Heath and Luff (1996: 360) have noticed an absence of studies on 'the practices through which the document is written, read and used' (see also Cicourel, 1992; Raffel, 1979: 43–4. For the study of organisations, Llewellyn and Hindmarsh (2010: 19) have pointed to 'an absence of studies that are attentive to the situated integration of tools, documents, action and interaction'. This book can begin to fill the gap.

1.2 The Dutch Criminal Law Process

The Dutch criminal law process has been described as an 'audit model' of criminal adjudication, where the documented activities at each stage of the criminal law process are checked and reviewed by the legal professionals who use them in subsequent stages (Anderson, 1999: 50). In the Netherlands the criminal law process starts when someone is picked up by the police on the basis of a 'reasonable suspicion of guilt' (Code of Criminal Procedure, section 27.1), or when someone goes to the police station to report a crime or to press charges. Suspects or witnesses are then questioned by police officers, who make reports of these activities. These reports are checked and used by prosecutors as the basis for decisions about prosecution and about the involvement of the investigating judge (in the more serious cases) for the further implementation of the 'preliminary investigations'. The investigating judge is responsible for the means by which these 'preliminary investigations' should be carried out, and takes decisions for example on the suspect's custody and on means of detection, such as house searches and telephone taps.

The Dutch Criminal Law Process

3

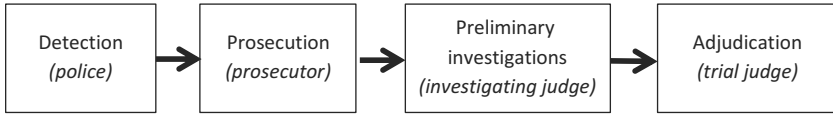


Figure 1 Phases in the criminal law process

During the ‘preliminary investigations’¹ further evidence is collected that is necessary for adjudicating the case in court. When the prosecutor concludes that the case is sufficiently substantiated to obtain a conviction, the case file is considered complete and the case is brought to trial. Figure 1 shows the phases in the criminal law process and the professionals in charge. These phases accumulate, in the sense that police and prosecution remain involved in the preliminary investigations.

The Dutch criminal justice system can be described as mainly inquisitorial, with adversarial elements that come to the fore in the trial stage (Jörg et al., 1995). Features of an inquisitorial process are the emphasis on the pretrial investigations, the central role of the case file for the activities of the legal professionals, and the active involvement of the judge in the truth-finding process. The suspect remains an object of the investigations, and is called ‘suspect’ throughout the criminal law process. Although the prosecutor and the defence lawyer don’t cross-examine suspects or witnesses in the same manner as in some adversarial systems, they do present their vision on the case in their closing statements, with the aim of influencing the outcome of the case (Komter and Malsch, 2012).

Recent developments show a mitigation of some of the more inquisitorial elements in the Dutch criminal law system. Under pressure from the European Court of Human Rights, Dutch courts are advised to depend less on documentary evidence and to question more witnesses in court, to improve the ‘immediacy’ of trials. Other changes in the system have been motivated by a series of miscarriages of justice in the first decade of this century. Between 2002 and 2010 four serious cases of wrongful convictions attracted a lot of media attention. As three of them were based on false confessions to the police (Brants, 2012: 1079), the need arose to achieve greater visibility of and control over the police detectives’ activities in the interrogating room.

This resulted in the introduction in 2006 of mandatory audiovisual registration of police interrogations for the more serious offences (offences that carry a minimal punishment of twelve years in prison), and the introduction in 2016 of

¹ On 1 January 2013 the law concerning the preliminary investigations has been changed. Currently the investigating judge has a supervising function, and the prosecutor is in charge of the further investigations.

4 Introduction

the suspect's right to have a lawyer present at the police interrogation. In contrast with the police reports, the recordings of police interrogations do not constitute official evidence, so they do not obviate the construction of written police reports. As the recordings are not, as a rule, part of the case file, defence lawyers who want to consult them before the trial have to do so at the police station where they were made. They are available to all the professionals who deal with the case, but in practice they are not consulted very often.² As it takes time, the professionals prefer the written police reports (Malsch et al., 2015; see also: Haworth, 2010: 169). Another change in the criminal law process is the digitisation of the criminal law process, which will be legislated in a new Code of Criminal Procedure (Kessler, 2016). This has been set in motion in an experimental phase since 2002–3 and is expected to be completed in 2019.

1.2.1 *The Police Interrogation*

The criminal law process can be seen as a series of events where a possibly criminal event in the real world is transformed into and treated as a legal entity, where a citizen in the civic world is transformed into and treated as a suspect, and where rules are applied that may be different from, or contradictory with, the rules of everyday life. This process starts as a citizen is picked up by the police on the suspicion of having committed an offence. People who are arrested by the police are immediately confronted with the world of the law: they are introduced (if they are first offenders) into a world they don't know, a world with different rules and a different language. They undergo a kind of 'rite of passage' that marks their transformation from being a citizen into being a suspect, during which they appear to have rights that they may not understand and that they may not know they had (Rock, 2007).

This is illustrated by an anecdote told to me by Peter, one of my informants at one of the police stations where I collected my materials. He was an experienced police detective, highly valued by his colleagues, especially for his skills in dealing with suspects. One of his colleagues had arrested a suspect and put him into custody. He informed the suspect of his right to silence and asked him whether he wished to make a statement. This the suspect refused to do. The police officer then consulted Peter and asked him if he perhaps could induce the suspect to talk. So, Peter went to the suspect's cell and said: 'I heard from my colleague that you refused to make a statement, is that so?' The suspect nodded. Then Peter added: 'But then you can perhaps just tell us what

² They may also be consulted by forensic psychologists who work as expert witnesses in the case. There are complaints about the poor quality of the recordings (Horselenberg et al., 2016)

happened?' To this the suspect agreed. So, he was brought to the interrogating room where he 'made a statement'.

A legal requirement for conducting a police interrogation in the Netherlands is that the police must inform suspects at the start of the interrogations that they are not obliged to answer questions.³ The aim of this is not only to protect suspects against unacceptable pressure, but also to ensure the 'truth value' of a confession. A confession only counts as a confession if it is perceivedly voluntarily given (Watson, 1990: 287). The police interrogator must write down the delivery of the caution in the police report (Code of Criminal Procedure, section 29.3).

Before embarking on the interrogation proper, police interrogators often start with expressions of 'hospitality' such as offers of something to drink or, before the ban on smoking in the interrogating room, a cigarette.⁴ Then they may start the 'social interrogation', which consists of talk about the suspect's personal circumstances, such as schooling, work, expectations and friends. This serves to get a general picture of what kind of person the suspect is, but also to make them feel at ease and thereby to increase their willingness to talk; the relatively 'harmless' information elicited at the start of the interrogation sets a more or less friendly tone that may defuse the antagonistic potential of the interrogation (Cicourel, 1968: 116). However, the 'social interrogation' may also contain information that might be of interest to interpret 'the facts', as for example a structural shortage of money may explain a suspect's motives for theft. In one interrogation the fact that the – denying – suspect had two daughters to support and little money, was adduced by the interrogator to express his understanding of people who would steal in such circumstances. The interrogator's insistent appeal to the suspect's personal circumstances eventually made her confess (Komter, 2003).

During the 'fact-related' phase of the interrogation the police must find the truth under the assumption of a non-partisan prosecution; so they must investigate all aspects of the case, not just the incriminating facts (Brants, 2012). As confessions are more easily believed than denials (Goffman, 1970: 111), interrogations with denying suspects involve more investigative or hostile questioning. My materials include three suspects who initially deny the charges and eventually confess; one of them in the course of the interrogation (Komter, 2003), the other two after the police did some additional investigative

³ In the Netherlands this right is laid down in the Code of Criminal Procedure, section 29.1. The right to silence implies that suspects, in contrast to witnesses, are not required to swear an oath that they will speak the truth.

⁴ When I collected my police materials in 1998–9 a standard attribute in interrogating rooms was a packet of tobacco from which suspects could roll their own cigarettes. Because of its value as a social lubricant, police detectives were not happy when smoking was banned from the interrogating room.

6 Introduction

work. In many interrogations there is no clear division between denying and confessing suspects; most of the suspects confess to some degree, or to some of the charges (Komter, 1998; Wartna et al., 1999).

1.2.2 *The Suspect's Statement, the Police Report and the Case File*

In contrast to the general interest in the truth-seeking efforts of police interrogators, relatively little attention has been paid to another significant task: the drawing up of the suspect's statement. This is generally done on the spot by the interrogator or by one of the interrogators when they work as a pair. As a result of the importance of the police detectives' statement taking, the PC on which the police report is written has a prominent place in the interrogation, both visibly as object in the interrogating room and substantively as medium between the talk and the reporting of it. The suspect's statement is the core substance of the police report, and is surrounded by other texts that serve to transform the police report into an official piece of evidence. The evidential value of the reports is highlighted by the fact that they are written down by police functionaries who operate under their oath of office.

How police reports look and what information they contain appear to result largely from bureaucratic and practical considerations, as there are not many legal prerequisites for their format or substance. One of the few legal requirements of police reports is that police interrogators draw up the police report 'as much as possible in the suspect's own words' (Code of Criminal Procedure, section 29.3). At first sight this looks like an instruction to record verbatim what the suspect has said. In practice it appears that judges are satisfied with a police report that contains a 'factual representation' of what the suspect told the police (Franken, 2010: 406).

In the course of the past decade the format of police reports has changed. Until about a decade ago the monologue style was the style most commonly used for reporting police interrogations in the Netherlands (Komter, 2001; 2002–3). Presently, the question–answer (Q–A) style and the 'recontextualised monologue' (RM) style are used more frequently. The 'recontextualised monologue style' is composed of 'recontextualisation phrases'. These are descriptions of the interrogator's speech actions (mostly 'telling' and 'asking') that appear to be produced by the suspect (e.g. 'you tell me ...', 'you ask me ...', Komter, 2006c). Recontextualisation phrases are also used occasionally in monologue or question–answer-style police reports. Whatever the style of the police reports, they are always summaries of the talk in the interrogations.

The police report is only one record among the collection of documents in the case file or dossier. The case file contains statements of suspects and witnesses, reports of the investigative activities of the police, reports of the suspect's custodial situation, reports of procedural matters, the suspect's

The Dutch Criminal Law Process

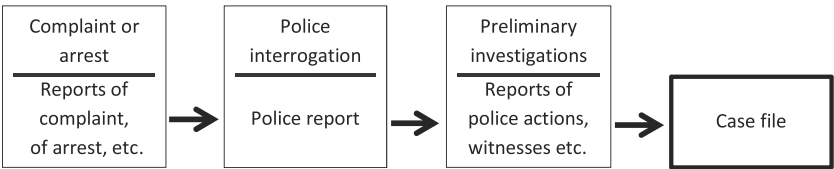


Figure 2 Compilation of the case file

criminal records and other pieces of evidence, such as photographs, audio or video recordings, letters and situation sketches. Documents in the case file may also be drawn up by ‘external’ professionals, such as psychiatrists, medical doctors, probation officers and forensic experts. Every document in the case file can serve as a piece of evidence.

Figure 2 gives an overview of the compilation of the case file through the successive stages of the criminal law process.⁵

The case file or dossier is meant to contain all the information gathered during the pretrial activities in the criminal process relevant for the adjudication of the case.

1.2.3 The Criminal Trial

The time spent on the pretrial investigations is one reason why Dutch trials last a relatively short period of time. Because most of the investigative work has already been done trials rarely take more than one day to be concluded; routine cases usually take no more than an hour. Another reason for the speedy dispatch of criminal cases is that most of the suspects confess to at least some of the charges, among other things because denying suspects may be filtered out of the system when there is not enough other evidence to build a case against them.

The documents in the case file form the basis for the legal professionals’ management of their professional tasks in court (Komter, 1998; Malsch and Nijboer, 1999). Judges and defence lawyers receive the completed case file from the prosecutor’s office around two weeks before the trial to give them the time to prepare it. Judges prepare the trial with the help of the clerks’ summaries of and annotations to the important parts of the case file; they then check the clerks’ work, mark what they consider to be the legally relevant passages and scribble notes on the documents (Van Oorschot, 2014a).

⁵ ‘Complaint’ refers to the event that someone reports a crime to the police, files a complaint or presses charges.

8 Introduction

The importance of the case file for the trial is highlighted by the fact that most cases are adjudicated by hearing no witnesses but only the suspects, because the written statements of witnesses as reported by the police can be used as evidence.⁶ This potential lack of transparency of the criminal law process might undermine the suspect's right to a fair and public hearing. Therefore, the 'immediacy principle' of court proceedings requires that evidence should be presented in court in its most original form. When the judges rely on written evidence, they must read aloud or summarise this evidence if they want to use it for their verdict (Code of Criminal Procedure, section 301.4). Thus, in the course of their questioning the suspect, judges read aloud or summarise those passages from the case file that they consider pertinent for ratification as 'usable' evidence.⁷ Moreover, judges review the evidence by mobilising the suspects' expressions of commitment to their earlier statements as reported by the police and by comparing their statements with the other evidence contained in the case file (Komter, 1998; 2002). Although this 'documentary method of interrogation' (Lynch and Bogen, 1996: 214) is by no means restricted to inquisitorial systems, it is one of the notable features of Dutch trials.

In contrast to the relatively passive role of judges in adversarial criminal justice systems, judges play a more active role in Dutch courtrooms.⁸ Their main tasks are to preside over the court session, to decide on procedural correctness, to examine the suspect's involvement in the criminal offence of which he or she is accused and, if the suspect is found guilty, to decide on the appropriate kind and amount of punishment. A session in court consists of the following activities. The (presiding) judge opens the trial, verifies the suspect's personal details and informs them of their right to silence. Then the prosecutor presents the indictment, after which the (presiding) judge starts the 'main examinations'. These consist of questioning the suspect (and witnesses if any), first about 'the facts' in order to find out whether the suspects are guilty of the offences of which they are accused, and then about 'the person' in order to help judges decide on the appropriate measure of punishment. After that the prosecutor takes the floor for the closing arguments (the requisitory), which contain a summary of 'the facts' and of the measure of guilt of the suspect, and a demand for the kind and amount of punishment that the suspect should

⁶ Even the presence of suspects in court is not required by law. Most suspects, however, do appear, as their defence lawyers cannot act on their behalf when they are absent.

⁷ In studies of adversarial criminal law systems it has also been found that those passages are selected for quoting in court that are important for the evidence in the case (Ehrlich, 2012: 61–2; Philips, 1986: 154).

⁸ Serious crimes (that carry a prison sentence of more than a year) are tried by a panel of three judges, of which one acts as presiding judge; simple cases are handled by a single judge (the 'police magistrate').

receive. Then the defence lawyer presents his or her arguments on behalf of the suspect. The two parties get the opportunity to respond to each other's closing arguments, after which the suspect gets the floor for his or her 'last word'. In the simple cases tried by the police magistrate the verdict is pronounced at the end of the trial; in the more serious cases the court generally passes judgment two weeks after the trial.

1.3 Research Approaches

The study of the 'career' of a suspect's statement from the police interrogation through to the trial involves the examination of different types of materials (audio and video recordings, police reports) in different settings (police interrogations and trials). These materials comprise a complex and interrelated collection of texts (suspects' statements), documents (police reports) and activities (e.g. talking, listening, typing, reading, truth finding, accusing and defending). As these materials cover a lot of ground, the research approaches must do justice to their variety and scope; on the other hand, in order to avoid losing sight of the focus of the project I had to confine myself to the essentials. As mentioned before, the main inspirations for analysing these materials derive from ethnomethodology and conversation analysis (CA). Although these approaches are related, each of them offers specific concepts and tools relevant for the analyses of my materials.

1.3.1 *Ethnomethodology and Conversation Analysis*

Ethnomethodologists and conversation analysts study what actors are actually doing in face-to-face interaction, and address how the actors themselves produce and make sense of the occasions they are involved in. An important contribution of ethnomethodology is the insights it offers into the ways in which people depend on taken-for-granted and shared knowledge for making sense of the world, into the practical circumstances that constrain and enable action, into the methods of practical reasoning that people employ for getting things done, and into the use of documents in organisations (Garfinkel, 1967c; Moore et al., 2010; Pollner 1987; Smith, 1974; 2001). These insights are particularly relevant for the study of legal practices, where the business of finding out 'what really happened' or 'who is to blame' is an overriding concern for those involved (Atkinson 1981; Dupret et al., 2015b; Garfinkel, 1967d; Manzo, 1997). The participants' reliance on the 'documentary method of interpretation' (Garfinkel, 1967c) for their truth-finding efforts is based on common-sense knowledge about the typical manner in which offences are committed, about the social characteristics of the persons who commit them, and about the features of the settings in which they occur (Sudnow, 1965: 259;

see also: Ericson, 1981; Sanders, 1977). Thus, police detectives gather information, physical evidence and witnesses' statements that are pieced together by reference to an imputed underlying pattern, which can lend coherence to the emerging 'discovery' of 'what happened'. The same methods are employed by the professionals in the courtroom – judges, prosecutors and defence lawyers – who monitor the suspects' and witnesses' narratives for coherence and consistency in order to decide on their truthfulness (Sacks, 1995 part I: 113–25).

A feature characteristic of institutional life is the production and use of documents. As a rule, these documents are considered as objective and factual accounts of prior events (Jönsson and Linell, 1991; Smith, 1974: 260; Zimmerman, 1969). Garfinkel's work on clinic records (1967e) drew attention to the fact that documents do not merely describe and represent an outside reality, but that they can be understood as objects in their own right and with their own dynamics, the purpose of which is to make available displays of justifiable work or 'correct procedures' (Benson and Drew, 1978; Harper, 1998; Smith, 1974; 1990a; 1990b; 2001; Watson, 2009; Zimmerman, 1969). Thus, police reports that are drawn up as representations of what suspects told the police in the interrogation room, are also constructed in anticipation of their prospective uses by professionals who deal with the case (Komter, 2001; 2002–3; 2006a; Linell and Jönsson 1995). This orientation to prospective uses anticipates the 'career' of the documents in an organisation as they are consulted or referred to on later occasions (Komter, 2012; Lynch, 2015; Meehan, 1986).

Conversation analysis focuses the attention on the sequential organisation of talk (Sacks et al., 1974). Each turn at talk displays the speaker's understanding of the previous turn and projects the range of activities available to the next speaker (Heritage, 1984a). This understanding is contingent on the sequential order of the talk. The smallest unit is the adjacency pair, where the first pair part anticipates a specific second pair part (for example a question projects an answer), so that if this second pair part is not forthcoming, it can be considered to be 'noticeably absent' (Sacks and Schegloff, 1973). It is not the analyst's interpretations or intuitions that count, but the interpretation of the participants themselves as shown in the sequential organisation of their talk, which can then be an important resource for the analyst.

Recent developments in CA have shown a growing interest in the role of the distribution of knowledge in the organisation of interaction (Heritage, 2012a; 2012b; Heritage and Raymond, 2005; Raymond and Heritage, 2006; Stivers et al., 2011; see also: Goodwin, 1981; Komter, 1995; Labov and Fanshel, 1977; Sacks, 1995). These studies have shown that the distribution of knowledge informs how participants in interaction produce and interpret their utterances, and on how they make their utterances recognisable as the actions they are. Especially in legal settings where the focus of the activities is on