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Normering en toezicht in de opsporing: Een onderzoek naar de normering van het strafvorderlijk optreden van opsporingsambtenaren in het voorbereidend onderzoek en het toezicht op de naleving van deze normen

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Summary

REGULATION AND SUPERVISION IN CRIMINAL PROCEDURAL LAW

An inquiry into the rules governing the conduct of police and prosecution in criminal proceedings and supervision of compliance with these rules

The current body of law governing the conduct of police and prosecution during the investigative phase of criminal proceedings encompasses an enormous amount of (procedural) rules. The core of these rules is formed in the Dutch Code of Criminal Procedure ('CCP'), but in recent decades this code has seen many amendments while moreover, many more criminal procedural standards have been introduced at different regulatory levels. These amendments resulted in a complex and ever-changing criminal procedural framework which sets high expectations for the conduct of police and prosecution at the investigative phase of criminal proceedings. Previous research has shown that police and prosecution cannot always meet these legal requirements and have a lack of knowledge on the substance of these rules. This problem has also been acknowledged by the Minister of Justice & Security in the context of current discourse on modernisation of the Code of Criminal Procedure. In this regard, the Minister of Justice & Security has recognised that the many changes that the code has undergone over the past years, have resulted in an ambiguous code which in many ways is not practical and fails to regulate the conduct of investigative authorities in a proper manner. In light of the complexity of the pertinent body of law and concerns attached to it, the question is by whom and how supervision of compliance with all the rules within it, is organised. This question is especially important in light of case law of the Dutch Supreme Court, which in recent years has shifted towards a more restrained approach with regard to the judicial supervisory role of investigative propriety. In the current system, it is unclear whether and to which extent other institutions have a supervisory role in this respect. The proliferation of procedural rules governing the conduct of police and prosecution on the one hand and the lack of clarity surrounding the supervisory system on compliance

with these rules on the other, have led to the following research question central to this study:

What is the legal framework governing the conduct of police and prosecution in the investigative phase of criminal law proceedings, what are the underlying reasons for the existence of these rules, and how should the current system of supervision of compliance with these rules be valued?

The structure of treatment of this research question takes place in three sections corresponding with the three sub-questions, each section with a particular aim. *Section I* focuses on the regulation of conduct in relation to enforcement and supervision. This section maps out what the underlying reasons are for the regulation of the conduct of police and prosecution during the investigative phase of criminal law proceedings and discusses the importance of enforcement of and supervision of compliance with rules. For a better understanding of how the relevant rules should be enforced and how supervision of compliance thereof should be realised, it is essential to gain insight into the reasons why these rules were introduced and how the legal framework has developed in practice. *Section II* focuses on the current system of supervision of the conduct of police and prosecution within the investigative phase of criminal proceedings. This section first provides an overview of the different supervisory authorities who are operative in this regard and explains their respective roles and institutional positions. The perspective is then shifted to the principal supervisory authorities, namely the court and the Public Prosecutor (the individual prosecutors as well as the Public Prosecutor as an entity). While the prosecutor is an investigation officer, he also has supervisory tasks with regards to the lawfulness of the criminal investigations. On the basis of an in-depth analysis of case law as well as empirical research, this section demonstrates how these two key authorities execute their supervisory role. Finally, *section III* connects the two previous sections and provides an answer to the final aspect of the question; namely how the current system of supervision of the conduct of police and prosecution should be valued. By connecting the two issues to each other, this research aims to clarify the relationship between regulation and supervision and aspires to achieve a more comprehensive understanding of the discussion concerning the supervision of police and prosecution.

Substantively, *section I* of this study deals with the regulation of the conduct of police and prosecution during the investigative phase of criminal proceedings; more specifically, it is concerned with the underlying reasons for the existence of these rules, the evolution of the current legal framework and the implications of that framework and its underlying rationale for the supervision of the pertinent procedural rules. After all, legal norms are created with a specific purpose, while distinct objectives may have implications for the enforcement and subsequently the supervision of those norms. *Chapter 2*

provides a global account of the functions which can be attributed to legal norms. Legal norms create order in society by defining concepts, stipulating the rights and duties of individuals (and the government alike) and determining procedures; they thereby ensure a certain stability in society. Legal norms also function as a justification for governmental authority; on the one hand they facilitate the use of interventions by the government, while on the other they also impose restrictions on these interventions, thereby protecting the individual. The introduction of legal norms is goal oriented, by introducing rules the government expresses preferences with respect to the manner in which legal relations are determined and defined. This legal order is however dynamic and is subject to societal changes and developments. The legislator can respond to certain societal needs and problems by formulating legal norms, but to achieve objectives must also ensure compliance with these rules. This chapter thus argues that regulation entails a certain obligation to ensure rule-compliance; meaning a duty to enforce rules which are formulated and to provide for a system for the supervision of compliance with them. The question then is what should be understood under a system of supervision and how this can be defined.

Building upon public administration theory, this chapter comes to the following definition of supervision: an activity that is aimed at gathering information about whether an action or case meets the requirements set for it, subsequently forming an opinion thereon and if necessary, intervening as a result thereof. This broad definition of supervision is then broken down into three components – namely: (1) the collection of information; (2) evaluation of the conduct in light of the relevant norms; and (3) intervention – and potential further operationalisation for the criminal procedural context. In a legal sense, supervision refers to a certain formalised, legal and professional form of monitoring upon which certain requirements can be imposed. In that light, the following *institutional requirements* for adequate supervision are formulated and substantiated in this chapter: adequate supervision must be formal, transparent, independent and unbiased. With regard to the scope of the supervision, it is argued that it must have a certain degree of thoroughness. This means that it must concern the entire underlying legal framework. The creation of legal norms in a rule of law setting is as such not without obligation, bringing with it a requirement on the part of the government to also ensure compliance with the standards it sets itself.

Chapter 3 focuses on the reasons underlying regulation in the context of criminal proceedings. After discussing the main objective of criminal proceedings, namely the correct application of substantive criminal law, the chapter considers how this main objective has influenced the construction of the current legal framework of criminal procedure. It is argued that while this main objective has been directional in this regard, not all legal norms can be traced back to this rather broad and vague notion. On the basis of this main objective, a set of values are distinguished that form the basis of criminal procedural

law; in particular those such as reliability, lawfulness, integrity and expediency. While some of these values can be deduced from the main objective of criminal proceedings, there are underlying values that are less directly linked to the fundamental objectives of criminal procedural law. These are values underlying more pragmatic procedural rules. Indeed, sometimes the underlying reasons for creating legal norms can be very pragmatic and thus less fundamental. Societal changes for instance may require the implementation of new legal norms, because new situations and phenomena arise that cannot simply be incorporated into existing legislation. In addition, societal developments can also contribute to a certain redefinition of the fundamental principles and objectives that underlie the current legal framework. This brings with it that not all rules can be traced back to the most fundamental objectives and values of criminal procedural law, but are of a more pragmatic nature. Moreover, these fundamental objectives and underlying values of procedural rules are to a certain extent versatile and can be interpreted in various ways. A strict categorization of rules according to the underlying values is thus not feasible considering the ever-changing character of the latter. Nevertheless, insight into these underlying values is necessary for a proper understanding of the current legal framework governing the conduct of police and prosecution, given that they form the rationale for the creation of rules contained therein.

After the discussion of the legal values which (can) underlie procedural rules relating to the investigative phase, *Chapter 4* outlines the legal framework of procedural rules and the more pragmatic reasons that have been formative for this. The purpose of this discussion is to illustrate the complexity of the current system and describe the political and societal developments which gave rise to it. This discussion takes as its starting point the introduction of the current Dutch Code of Criminal Procedure in 1926. The contemporary body of law governing criminal procedural investigations is considerably altered as compared to the original system as regulated in 1926. Many new rules have been introduced both within and outside the Code. Some of these norms have been implemented at the highest level of national legislation while others can be found in international treaties, lower national regulations and even case law. As a whole, the legal framework governing the investigative phase has become increasingly complex, extensive and much more varied in terms of differences in types of rules it contains. This development can partly be attributed to (international) political and legal influences. Human rights conventions, for example, have focused more attention on the protection of the individual, as a result of which some new rights and values have been introduced in the context of criminal proceedings. Technological developments or developments in the field of crime (prevention) have also had an effect on the regulation of criminal proceedings. The so-called battle on organized crime in the 80's and 90's and the ensuing crisis in the police force resulted in one of the biggest legislative operations within the Dutch Code of Criminal Procedural Code since the promulgation of the Code. In its inquiry into this affair,

the parliamentary committee led by MP Van Traa concluded that the lack of clear rules governing the conduct of investigations officers had contributed to a further lack of clarity with respect to investigative powers of the police and prosecution, both in terms of the availability there as well as the manner in which they were to be deployed. With the codification of the Special Investigative Powers Act, the legislator provided some clarifications. At the same time, this resolved only a part of the problem; the crisis was partly due to inadequate legislation, but was also caused by deficiencies in the supervision of the police and prosecution (and specifically the supervision of the police *by* the prosecution). The creation of new rules can therefore never be a final solution; for a rule to be effective, it is necessary that compliance with the rule is also ensured. The conclusion of this chapter is that the current system of criminal procedural law is to a large extent the result of an organic development in which legal, societal, political and economic developments have all played an important role. Not only are the underlying (theoretical and legal) values important to the understanding of the current framework, but other more pragmatic considerations can further clarify the reasons for the existence of the rules contained therein.

After illustrating the complexity of the current legal framework as well as the complexity of reasons underlying its norms, this first section concludes with a few observations on legislative process. It concludes that legislation is often introduced in response to societal developments; in some respects, this has led to an abundance of rules in criminal procedural law. However, creating new rules can never be a final solution. For a rule to be effective, it is also necessary to supervise compliance with the norm. The increasing regulation of the conduct of police and prosecution and the complexity of the current system of rules therefore give rise to the question as to how supervision of these rules is organized in the current system. Before illustrating the manner in which the supervision of the compliance is organized however, this concluding chapter of *section I* sketches the framework for adequate supervision in the specific context of criminal procedure. Firstly, the institutional requirements which may be imposed as a requirement of adequate supervision are further substantiated: for adequate supervision in the context of criminal procedural law, supervision must be formal, transparent, independent and unbiased. Furthermore, with regard to the scope of supervision, a certain degree of thoroughness is necessary. Finally, it is argued that the specific characteristics of the legal framework that is the subject of supervision brings two substantive requirements with it: in view of the complexity of the legal framework, adequate supervision should be able to take underlying values and norm rationales into account, as these reasons are paramount for a correct interpretation and understanding of the rule. Moreover, it is important that the different values that are deemed important in criminal proceedings are 'covered'. After all, these procedural rules were created to effectuate these underlying values in criminal proceedings. Second, adequate supervision should contribute to

the clarification of the legal framework. The complexity of the current legal framework entails that supervision should provide some clarification as to the meaning and functioning of these different rules: if a norm is unclear, it is not impossible to evaluate to what extent the conduct of police and prosecution is in conformity with the rule. This causes a problem for the supervisory authority as well as the police and prosecution whose conduct has to meet these standards.

Section II of the study focuses on the supervision of the conduct of police and prosecution within the context of criminal investigations. *Chapter 5* provides an overview of the institutional and constitutional roles and positions of the various entities who have a supervisory duty with regard to the police and prosecution. The role of various supervisory entities is discussed, such as the National Ombudsman, the Inspection for the Ministry of Justice and Security (Inspectie Justitie & Veiligheid), the Court of Audit (Algemene Rekenkamer), the Authority on the protection of personal data (Autoriteit persoonsgegevens), the Attorney-General at the Supreme Court and finally the police organization itself. The discussion of these authorities illustrates that their supervisory role is to a large extent aimed at the organizational level and is not necessarily concerned with ensuring police and prosecutorial compliance with procedural rules. In light of this, the chapter focuses on the two key supervisory authorities in this regard, namely the judiciary and the public prosecution itself and provides an assessment of their institutional and legal positions in relation to their supervisory roles. The chapter starts with a description of the development of the supervisory role of the judiciary with regard to criminal pre-trial investigations. The supervision of the compliance of police and prosecutorial conduct with criminal procedural rules has not always been an explicit and unambiguous responsibility assigned to the courts. Judicial involvement in the supervision of the conduct of the police and prosecutorial authorities in the preliminary investigation originated and developed in case law, starting in the 1960's. While courts designated a supervisory role for themselves and expanded this role in the years following, it would take the legislator decades to provide a legal basis for this judicial task. Even when it did elect to do so however, the legislator did not comment on the scope of the judicial supervisory task or its objectives. With the introduction of Article 359a CCP, the legislator explicitly chose to provide the courts with a broad discretionary power to structure their own supervisory role. In order to ensure a consistent execution thereof, the Supreme Court provided further structure for the application of this provision in its case law. Gradually, this case law has evolved into a very detailed scheme for judicial supervision of police and prosecutorial conduct in criminal investigations. The extent to which this case law is followed by lower courts is the focus of Chapter 7.

A similar legal ambiguity is manifest in the supervisory task of the prosecutor. While there is no legal basis stipulating his supervisory role, the prosecutor is considered a magistrate and the head of criminal investigations. Therefore,

a certain supervisory role is implied. This task is implicitly derived from various legal powers of the prosecutor and his institutional position as a magistrate within the constitutional division of powers. The origin of this supervisory task is often sought in the authority of the prosecutor as head of investigations and his relation vis-à-vis the other investigating officers (the police). In brief, this 'authority' means that he is responsible for the legality and reliability of the investigation. The general provision regarding his 'authority' and relationship with police officers however provides little guidance as to what exactly this supervision entails, what its scope is and how it should be implemented in practice. It is therefore, in particular, practice which has been crucial to shaping this supervisory task. Various developments – both with regard to criminal policy and other political developments – have contributed to constant changes in this supervisory task. As a result of these developments, it is not only attributed to individual prosecutors, but is also considered as a task of the Public Prosecutor Service (as an entity). In recent years, the Public Prosecutor Service has taken on many activities relating to this supervisory task, such as creating various review committees, internal supervisory bodies and special positions for prosecutors who are (mostly) concerned with the quality and lawfulness of criminal investigations. In short, although it is generally assumed that the prosecutor has a supervisory task in relation to ensuring compliance of investigative authorities in criminal investigations, it is by no means clear what the scope and purpose of this task is.

While both the courts and the prosecutor have a certain responsibility for the enforcement of criminal procedural rules, it is not immediately clear what this supervisory role exactly entails. *Chapters 6, 7 and 8* therefore focus on the question of how this supervision materializes in practice. *Chapter 6* focuses on judicial supervision as set out in the case law of the Supreme Court. This chapter outlines the general framework of judicial oversight and focuses in particular on those aspects of the framework that have raised questions in either literature or other case law. With the introduction of Article 359a CCP the Dutch legislator explicitly provided a legal basis for the supervisory role of the courts. Therewith, he explicitly provided the court with a broad discretionary power to further utilize this judicial power. The Supreme Court however has clearly structured and narrowed down the scope of this discretionary power. The picture which emerges from the analysis of the case law of the Supreme Court is that lower courts must exercise great restraint in their supervision of the police and prosecution, in particular when responding to irregularities committed in the preliminary investigation. The Supreme Court seems to limit the supervisory task of courts to safeguarding the subjective rights of defendants, in particular the right to a fair trial. The threshold set out in the Supreme Court's case law for attaching legal consequences to unlawful conduct – in particular the exclusion of evidence and a stay of proceedings – are very high. Moreover, when courts decide to 'intervene' (i.e. attach

a legal consequence to unlawful conduct), case law requires very extensive reasoning. These strict requirements set out by the Supreme Court are on the one hand aimed at restraining the courts in the exercise of the supervisory task and on the other hand at ensuring the uniformity of judicial supervision. The main conclusion of this chapter is that the case law of the Supreme Court provides a detailed framework for the supervisory task of the court. While it in this sense forms a useful tool for lower courts to respond to unlawful conduct during the investigative phase, at times the details of this framework can also cause uncertainty as to the application of the judicial supervisory task. Moreover, the high thresholds imposed in case law with respect to its, restricts its effectuation greatly. For a clear view on the functioning of the supervisory task of the courts, it is however necessary to examine the response of lower courts respond to Supreme Court case law.

Chapter 7 revolves around the question as to the manner in which lower courts are guided by the case law of the Supreme Court and how the judicial supervisory role is effectuated by them. The analysis of lower courts' case law is achieved through an empirical approach; a total of 259 judgments from three reference years (2010, 2012 and 2015) being selected as a basis of study. The selection of these years is based on the rendering of authoritative Supreme Court judgments in or before those reference years with respect to the application of article 359a CCP and the substance of the judicial supervisory role. Drawing upon this case law, this chapter illustrates how lower courts execute their supervisory task with regard to the supervision of police and prosecutorial conduct. The picture that emerges from this analysis is that while lower courts generally comply with the framework set out by the Supreme Court, they nevertheless also seem to allow themselves certain leeway to operate outside this strict framework. This leeway often appears through a more thorough and extensive supervisory role with regard to unlawful conduct that is not immediately linked to fair trial rights of the defendant, such as violations of rules which safeguard the integrity of the proceedings and violations of rules which safeguard the privacy of the defendant (in particular the inviolability of the home). This case law also shows that with regard to certain conduct, lower courts are more inclined to make use of their supervisory role in order to clarify the use of certain 'new' investigative methods by the police and prosecution, or to clarify the limits of the law; examples are investigative methods relating to the search and seizure of smartphones and other electronic devices. At the same time, there are many discrepancies in the case law of lower courts. Courts do not always specify the reasons for the legal consequences they attach to specific unlawful conduct, while the case law of the Supreme Court emphasizes the importance of explicit reasoning with respect to the relationship between the attached legal consequences and the unlawful conduct. As a result, it is often not clear how and why a consequence attached to unlawful conduct is supposed to remedy the unlawfulness: for instance, a mitigation of the sentence cannot remedy an unlawfulness whereby violation

of procedural rules in the collection of evidence resulted in unreliability of the latter. Moreover, there are great differences in how lower courts deal with different types of violations. Despite the detailed framework provided by the Supreme Court, there are thus many discrepancies in the manner in which lower courts execute their supervisory task. The question is how these differences can be explained. Considering that lower courts do not always provide substantial reasoning, it is not easy to answer this question. Given the more extensive use of the judicial supervisory role by lower courts, it could be argued that some discrepancies are related to a different (broader) interpretation by lower courts of their responsibility in relation to their supervisory role. However, other discrepancies, such as those relating to the legal consequences attached to different types of violations, are more difficult to explain. It is plausible that such deviations from the Supreme Court case law are the result of uncertainty or lack of clarity with respect to the details of this framework. In order to fully explain these differences, it is thus necessary that courts provide more extensive reasoning. Furthermore, while the case law of the Supreme Court seems to require thorough reasoning in relation to the supervisory role of lower courts, the Supreme Court is itself also very ambiguous in this respect, therewith failing to encourage lower courts to provide detailed reasons.

The last chapter of section II deals with the supervisory role of the prosecutor. As little is known about how this supervisory role materializes in practice, the aim of this chapter is to provide more insight into how prosecutors execute their supervisory task. To this end, a series of twenty semi-structured interviews were conducted with prosecutors of various specializations and ranks. *Chapter 8* reports on this empirical study. In general, the respondents claim to see a clear supervisory task for the prosecutor, but they are less unanimous about what this task entails. Some prosecutors consider themselves as possessing an extensive supervisory role; they consider it of great importance that police comply with criminal procedural rules in the context of investigations and therefore closely monitor and scrutinize the conduct of police in this context. In addition, they see a clear educational role for prosecutors and are therefore more inclined to communicate irregularities (either minor errors or greater unlawful conduct), to police officers. Other prosecutors, on the other hand, indicate that many criminal investigations take place under great time pressure, which means that it is not always possible to closely monitor the conduct of police at this stage of criminal proceedings. When procedural rules are violated, these violations are often discovered during the trial phase, making it more difficult for the prosecutor to adequately address these violations. In between these two extremes, many other perspectives are put forward by the respondents. The interviews make clear that there are many differences in the manner in which prosecutors execute their supervisory role; there are divergent perspectives on the underlying norms that prosecutors are supposed to supervise (some for instance do not consider procedural norms relating to

safeguarding the right to privacy as relevant for the supervisory role), as well as the manner in which this supervision is executed (some prosecutors are heavily involved with the criminal investigation and the conduct of the police in that context while others adopt a more distant and independent role). In addition, the supervisory role of the prosecutor is different depending on the type of investigation at issue. In investigations concerning serious or organized crime for instance, there is intensive involvement in the investigation, both of the prosecutor leading the case, as well as that of the Public prosecutor Services (on a regional or even national level). The same level of involvement and collaboration between police and prosecution exists with regard to frequently occurring crimes (in the context of the so-called 'ZSM approach'), which are dealt with according to set protocols. A wholly different picture is true for the 'regular' case load. Investigations for this category are to a great extent conducted by police officers, while prosecutorial involvement only occurs at a later stage; often just before these cases go to trial. In such cases, the supervisory role of the prosecutor is very limited and police often receive no feedback if rules have been violated. In addition, the prosecutor is not often inclined to attach legal consequences to violations of criminal procedural norms by the police in this context. Prosecutors explain this by referring to the framework set out by the Supreme Court and argue that as courts often sanction violations, there is no need for them to attach any legal consequences to them. It suffices to be transparent about potential unlawful conduct by police and explain the context of such actions. Although respondents argue that their constitutional role as magistrates implies that they have an own independent duty to monitor and supervise the police and that this supervisory role exists independently of the courts' supervisory role, they nevertheless remain influenced and guided by the case law of the Supreme Court in this regard. This means that the restraint exercised in the judicial supervisory task has a clear effect on the supervision exercised by the prosecutor. In addition to differences in the interpretation and exercise of the prosecutorial supervisory task, the interviews also illustrate discrepancies in perception, in particular with regard to the extent in which unlawful conduct during investigations constitutes a problem and how to prevent violations from occurring. These divergent perspectives not only illustrate the fragmentation of supervision exercised by the prosecutor, but also show that there are no clear-cut solutions to this problem.

The third and final section of this study merges the findings of the previous two sections and answers the remaining question. Namely, how should the current system of supervision of police and prosecution be valued. Before evaluating the current system of supervision of compliance with criminal procedural rules by police and prosecution, *Chapter 9* demonstrates the (importance of the) relationship between regulation and supervision. It does so by discussing a few irregularities and unclarity in case law concerning the supervisory role of courts and argues the significance of explicitly taking into

account the underlying legal framework (and its underlying values) in the context of the supervision of compliance with rules. In this sense, the manner in which judicial supervision deals with the consequences of unlawful conduct is illustrative. In the previous chapters, it was demonstrated how judicial supervision (in accordance with the case law of the Supreme Court), has as its focus the final component of supervision, the intervention. This intervention is narrowed down to attaching a legal consequence to unlawful conduct. In their 'interventions', courts moreover place emphasis on safeguarding the subjective rights of defendants, in particular those rights that relate to the fairness of the proceedings. The practical implication of this judicial focus is that courts often will not address violations of procedural norms which do not affect defendants' subjective rights. In such cases, lower courts often merely refer to the case law of the Supreme Court stating that an (alleged) violation should not result in any legal consequences, therewith failing to exercise any kind of supervision of the lawfulness of the conduct. This is partly caused by the focus on the consequences of violations of procedural rules; when courts decline to connect any legal consequences to unlawful conduct – perhaps due to the lack of relevance of the consequences of the unlawfulness for the specific case, or the absence of sufficient gravity of the violation – they also often refrain from exercising their judicial supervisory role altogether. The focus on the fairness of the proceedings – more specifically the subjective rights of the defendant in this regard – only exacerbates this problem, as these two phenomena together lead to ambiguities in case law. Although the concept of fairness is not explicitly defined in legislation or case law, it is assumed that fair proceedings are defined by a number of fair trial rights that are mentioned in article 6 ECHR and the case law of the ECtHR. However, in chapter 3, it is argued that fairness is an open value and an ever-changing notion, so that the concept of fairness cannot be reduced to these limitative rights. This chapter moreover illustrates how this restrained judicial supervision influences the supervisory role of the Public Prosecutor, as in lieu of a general understanding of his own supervisory role, the prosecutor refers to the framework set out by the Supreme Court for judicial supervision. As a result, many obstacles occurring in the exercise of judicial supervision can also be identified in the supervision conducted by the prosecutor. This is all the more problematic when one considers that the restraint in judicial supervision is justified partially by referring to the primary supervisory role that the prosecution has with respect to the police.

The most important findings of this book are presented in the final chapter of this study. *Chapter 10* provides an overall evaluation of the current system of supervision of compliance with procedural norms by police and prosecution. The main conclusion of this study is that the current system of supervision cannot be considered as being adequate and contains shortcomings on many levels. On the basis of the three components of the definition of supervision and the requirements imposed thereupon (as discussed in the conclusion to

section I of this study) a balance is drawn up and the most significant flaws of the current system are discussed. With regard to the first component of supervision – the collection of information as to the conduct of the police and prosecution – it should be noted that, due to the nature of criminal proceedings, courts have an inherently incomplete oversight on police and prosecutorial conduct. Only those investigations that lead to trial are brought to the attention of the courts, while these constitute only a small portion of the total investigative conduct of the police and prosecution. This lack of oversight is only partially remedied by the supervision exercised by the prosecutor. Although the prosecutor in theory possesses complete oversight with respect to all police conduct relating to criminal investigations, in practice he is largely dependent on police officers for information in this regard. In addition, the high work load of the individual prosecutor as well as the Public Prosecutor Service as an entity brings with it that prosecutors simply do not always have the possibility to exercise necessary supervision. With regard to the second component of the definition of supervision – evaluation of the conduct in light of pertinent norms – the flaws are of a more fundamental nature. The focus of judicial supervision on procedural rules pertaining to the subjective rights of defendants also leads to incomplete oversight on the conduct of police and prosecution. Courts moreover do not always clarify whether and to what extent they have exercised their supervisory task. The restrained judicial supervision has a clear effect on the supervision exercised by the prosecutor. Consequently, it can be assumed that the supervision exercised by the courts and the prosecutor only relates to a part of the legal framework of procedural rules. Finally, shortcomings can also be established with regard to the third component of supervision – the intervention. Courts are very reserved in attaching legal consequences to unlawful conduct by the police and prosecution. The thresholds set by the Supreme Court are high and when courts do not see any reason to attach a legal consequence to unlawful conduct, they refrain from evaluating the lawfulness of the conduct altogether. Moreover, if courts do respond to unlawful conduct, the question is whether the judicial response can be regarded as a meaningful intervention, as the court is generally dependent on the prosecutor to communicate this judicial response to police officers. Although the prosecutor in theory has many means of communication with the police, there is no general and shared understanding of how this communication should take place and whether there is an effective way of communicating these responses. Consequently, the communication of judicial responses and feedback from the prosecution to the police is, to a great extent, dependent on the individual prosecutor; meaning that there are many different approaches. As a result, there is little clarity, both with regard to feedback on judicial responses as well as unlawful conduct which is detected by the public prosecutor himself. In addition, it is assumed that when prosecutors do communicate with the police, this feedback is often misunderstood. The final overarching problem is the high degree of diversity and inconsistencies

in the interpretation of various supervisory roles, which pertains to all three components of the definition set out in section I. The current system of supervision can thus be characterized as fragmented and incomplete. The next question is whether and to what extent other existing supervisory authorities can fill the flaws that have been identified in the supervision practices of courts and the prosecutor. Based on the assessment of the current role these alternate supervisory authorities have, the chapter concludes that this type of supervision is inadequately systematic in nature and is not sufficiently concerned with compliance with criminal procedural rules in order to be able to compensate for the flaws identified in the supervision exercised by courts and the prosecutor.

The study concludes with a number of recommendations to improve the current system. In particular, this chapter argues for a differentiated model, whereby supervision as it is currently exercised by courts and the prosecutor is further strengthened and systematically supplemented with supervision by other authorities. A system of adequate supervision as put forward in this study requires a significant effort in this regard from both the courts and the prosecutor. It however also requires restraint on the part of the legislator; an important message in this context is that if there is no capacity or willingness to enforce procedural rules, these rules should not be introduced in the first place.

