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## **Truth-finding, procedural traditions and cultural trust in the Netherlands and England and Wales: when strengths become weaknesses**

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### **Introduction: wrongful convictions, procedural traditions and cultural trust**

In this article we seek to assess the significance of what we term 'cultural trust' in relation to wrongful convictions in England and Wales and the Netherlands, in the light of the adversarial and inquisitorial procedural traditions which still underpin criminal process in the two countries. International surveys identify many similarities across jurisdictions from both traditions in the direct causes of miscarriages of justice: abuse of power, mistaken eyewitnesses, dubious or misunderstood expert evidence and diverse professional failures by judges, defence lawyers, police and/or prosecutors (Huff and Killias 2008, 2013). More broadly, there is evidence of the effect of the general psychological phenomenon, also well-known from experimental research, confirmation bias or tunnel vision. This suggests that information is filtered through an established lens. Where we have a pre-existing view about the facts (for example a suspect's guilt) we do not deal symmetrically with subsequent information. We tend to seek to confirm our pre-existing hypothesis and have difficulty in 'seeing' – or seeing the significance of – facts pointing to alternative explanations (Brants 2013: 163-6). This has been a key factor in the story behind miscarriages of justice in many jurisdictions.

While there are clearly many similarities in the particular underlying causes of wrongful convictions and in general psychological effects in play, a comparative study focussed on procedural traditions can

nevertheless be fruitful. Jurisdictions from the adversarial and inquisitorial traditions differ significantly in the guarantees that each offers against wrongful conviction in terms of expectations in professional conduct, in ways of assessing and responding to potentially misleading and problematic evidence, and thus also in the definition of the roles and relationships of professional actors. These key differences are linked to different underlying theories as to how facts and truth are to be found. Sometimes these concepts of truth-finding – or at least elements of them – are explicitly stated in policy documents and legislation.<sup>1</sup> But often they are set out, if at all, only in fragmented or incomplete terms and have to be at least partly constructed by identifying the underlying assumptions of the particular procedural tradition.

For jurisdictions primarily influenced by the inquisitorial tradition, the emphasis has been on the active truth-finding judge and the dossier. Thus in the Netherlands, a thorough investigation supervised by an impartial prosecutor<sup>2</sup> with the resulting evidence both for and against guilt recorded in an official file, is assumed to provide an active fact-finding judge with the capacity to find truth at trial. Within the adversarial tradition in England and Wales, autonomous party rights to collect the evidence that suits their case are said to provide a basis for strong defence narrative building and the opportunity to effectively challenge prosecution witnesses at trial through cross-examination. This allows the equality of arms in argument at trial upon which accurate adversarial fact-finding is thought to depend.

But because such underlying assumptions are linked to a particular procedural tradition they have accumulated normative weight over time. As H Patrick Glenn has put it (2010: 17):

‘That which has been captured from the past is inherently normative; it provides present lessons as to how we should act...The

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<sup>11</sup> For example, Art 81, French CCP on the duties of the examining magistrate to seek out both exculpatory and inculpatory evidence.

<sup>2</sup> Originally this would have been an investigating judge comparable to the French *juge d’instruction*.

judgment of many, down through time, confers authority, even legitimacy – at least presumptively – on the lessons of tradition.’

So these are not just assumptions into which individual practitioners have been socialized and by which particular professional lives have been lived. The legitimacy of long established collective practice is rooted in them.

One way of expressing this is in terms of cultural trust: different jurisdictions have their own particular and critical points of trust where fundamental assumptions are made upon which the fact-finding capacity of the system is based. These points of cultural trust are rooted in what are perceived within the jurisdiction to be traditional strengths. However, these may become points of weakness when the assumptions upon which they are built no longer correspond to reality. What if the investigation in the Netherlands is neither thorough nor impartial, the dossier is incomplete and the judge unwilling or unable to fulfil an active role? And what if the defence in England and Wales in fact lack the capacity or will to conduct active independent pre-trial investigations? Here cultural trust can be damaging because it may prevent acknowledging weaknesses where this contradicts established wisdom. Furthermore, the assumptions of a particular procedural tradition, while not excluding change, may also make it difficult to think through or accept new ways of constructing roles and relationships within criminal justice where this runs contrary to what have come to appear as self-evident truths. This may make it more difficult to reform systems coherently even where serious miscarriages of justice have been acknowledged as being based on recurring problems.

It may seem counterintuitive to emphasize trust as potentially dangerous, because it is generally seen as a positive, indeed essential, element in social relations in that it both expresses and reflects stability in mutual expectations. Rasmus Wandall argues (2015: 285-6) that from a functional point of view, trust can be described as a remedy for the inevitable uncertainty of social life – of what to expect from other people, groups, institutions, or from whole systems. But we also talk about

'taking something on trust' to identify a situation where we assume something to be true without (sufficient) evidence. And in criminal matters abusing trust leads to aggravated sentences exactly because it exploits vulnerability, often a vulnerability generated by established expectations of a person or a role (Ashworth 2015: 173).

If the vulnerability created by trust is linked to established expectations, then comparative analysis illustrates how expectations and trust are culturally contingent. David Nelken emphasizes the importance of examining 'decisions to trust, whom to trust, and the consequences of trusting' in comparing the legal, political and cultural relations of different criminal justice systems (1994 cited by Wandall, *op. cit.*: 286). Trust relationships, he argues, are integrated in the design of criminal justice, in 'its purposes and functions, its institutional settings and structures of accountability, the limits of criminalisation and legal authority, as well as the balance between state and non-state social control'. Wandall also urges us to see mechanisms of trust as part of the 'governing structures of criminal justice' (*op. cit.* at 304). Specifically, the way in which functional boundaries of different systems are set up creates (and limits) normative expectations of criminal justice institutions and thus structures the trust relationship between the public and those institutions. So, for Wandall, trust relations are not just about institutional ability to ensure trust but also reflect what criminal justice institutions want to be entrusted to do and not to do. Our argument is that the different procedural traditions of the Netherlands and England and Wales create such strong particular cultural expectations that practitioners find it difficult to recognise where they do not correspond to realities on the ground. Furthermore, these differing assumptions limit the scope of alternative arrangements that may be contemplated.

In what follows, we will set out a general account of the relationship between truth-finding and the adversarial and inquisitorial procedural traditions before examining first England and Wales and then the Netherlands. We will seek to identify points within each jurisdiction where

cultural trust is placed in the capacity of particular roles and relationships to ensure that the innocent are not convicted. But we will also argue that wrongful convictions in both jurisdictions demonstrate that these underlying assumptions may not correspond to realities on the ground. In a final section we will show how even the response to wrongful convictions, both individually and in terms of institutional reform, remains profoundly shaped (and indeed limited) by established procedural traditions.

### **Truth-finding and procedural traditions**

Modern social theory has challenged the notion that there is an objective reality out there waiting to be found, arguing that truth is always socially contingent, constructed in language or discourse, variable between and even within cultures (Lyotard 1984). One could argue that criminal trials cannot and therefore should not aspire to produce truth: 'the truth of what happened is probably unknowable' (Goodpaster 1987: 124). While this might be consonant with the more thorough going scepticism of some modern social theory, it does not seem to be reflected in the way the official and public discourse is constructed in either the Netherlands or England and Wales.

The overriding objective of the Criminal Procedure Rules 2015 in England and Wales (originally adopted in 2005) is to ensure that criminal cases are dealt with justly. Notions of 'justice' within the adversarial context are closely related to the procedural arrangements that ensure a fair trial (i.e. a trial that allows for debate and contestation on an equal footing). Nevertheless, the first named element of this pursuit of justice – placed even before aspirations to fairness of procedure or the recognition of the rights and legitimate interests of individual parties – is exactly

'acquitting the innocent and convicting the guilty'.<sup>3</sup> The Dutch Code of Criminal Procedure (CCP) does not explicitly state that the primary goal of criminal process is to discover the truth. Dutch inquisitorial process is rooted in the civil law tradition of continental Europe, considering the state as fundamental to the realization of the 'common good'. This entails not just preventing and investigating crime and punishing criminals but also protecting individual rights from undue interference by the state (the latter derived from society's interest in due process and therefore seen as transcending that of the individual defendant) (Damaska, 1986; C. Brants, 2010). That the aims of criminal procedure include discovering the *substantive* truth is self-evident in this context – anything less would be to overlook *a priori* the fundamental duality of the role of the state. Consequently, what happens during the trial is commonly referred to (also in the CCP) as *waarheidsvinding* – truth-finding. Where such words are common usage, they denote what people and scholars understand criminal procedure to be about, without it ever being, or having to be, made explicit in law.

The very term 'substantive truth' assumes that there is a truth to be found, not different versions of it to be debated and from which to choose. Indeed, Dutch legal scholars regularly contrast the 'substantive truth' that is assumed to be found in the Netherlands with the 'formal' or 'procedural' truth of adversarial procedure, presuming the latter to be simply an agreement on what can be regarded as the truth – and also presuming that, in the adversarial context, it doesn't matter whether it is or not.<sup>4</sup> This is a misconception shaped by entrenched cultural notions of what 'the truth' should be and how it best be found. Both jurisdictions assume that the rules of criminal procedure will lead to the truth being discovered and both have the dictum that any error should be on the side of acquitting the guilty, not convicting the innocent. It is simply that there

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<sup>3</sup> Criminal Procedure Rules 2015, Para 1.1.2

<sup>4</sup> For the use of a similar distinction between substantive and interpretive truth, see Grande (2008: 147-8)

are important differences both in the way truth-finding is conceived and its relationship with other goals such as fairness in procedure.

In the adversarial tradition, the right of autonomous parties to seek out the evidence that suits their case under conditions of something approaching equality of investigative arms and the requirement that evidence be presented orally at trial and subjected to challenge by cross-examination are seen as key elements of Anglo-American due process. This culturally specific notion of fair procedure is also thought to provide the way to the truth, because confrontation between contending arguments is thought to put a passive and impartial decision-maker in the best position to determine guilt or innocence. Whether the underlying theory of truth-finding through partisan contention is valid and whether the practical conditions required can be regularly achieved in modern jurisdictions (Jackson, 1988), is at present not the issue. At this point we merely want to emphasize the difference between this commitment to truth-finding that emerges out of a particular notion of procedural fairness and the inquisitorial tradition, where the primary and original goal of the criminal justice system is determined by entrusting the state with the mission of directly searching for the truth. Here investigations both in the pre-trial and trial phases must be supervised by judicial figures committed to actively seeking out evidence both for and against the accused. The dossier provides continuity between pre-trial and trial phases: the results of the pre-trial investigation that has been actively supervised by the pre-trial investigating or prosecuting magistrate are placed in a dossier that becomes the basis for further judicial questioning at trial.

However, the commitment to truth-finding, be it explicit or simply 'understood' and however encapsulated procedurally, is provisional and restricted: it is not the pursuit of some absolute truth and the commitment is not unconditional. The notion of truth is shaped and limited by the distinct purposes, concepts and procedures of criminal justice in a particular jurisdiction. Furthermore, requirements of finality,



limited investment of means and the distinct normative claims of fair procedure all cut across the primary commitment. Nevertheless, few events are more disturbing to the perceived legitimacy of criminal justice in either the Netherlands or England and Wales than a public acknowledgement that a citizen has been convicted of a serious offence that they did not commit.

So, how are we to assess the strengths and weaknesses of these two very different approaches to truth-finding? If we think of modern scientific practice as the most prestigious and elaborate attempt to ground truth-finding in rational discourse, both approaches seem to have potential strengths and weaknesses. Jackson (*op. cit.*; Brants and Field 1995) points out that 20<sup>th</sup> century accounts of scientific method have rejected the Enlightenment notion of the scientist as an external and objective observer assiduously gathering facts from sense experience and only then forming a hypothesis for testing.<sup>5</sup> It is now acknowledged that scientists do not operate according to this allegedly value-neutral method: observation and classification of even the most basic pieces of evidence implies an already existing theory by which to categorise. Scientists start not with certain fixed data but with a theory which they intuitively sense is promising and which points them to certain questions. If the answers do not fit the theory, they refine the theory to fit the new data. It is dialogue or dialectic between data and theory that validates scientific truth. This scientific dialogue is always ongoing – indeed never-ending – because it is conducted within an academic community in which different researchers continue to advance differing accounts of the relationship between data and theory. But that is exactly why it can only ever produce a provisional truth.

In this light, the strength of the adversarial tradition is its institutionalization of dialogue and challenge to offered accounts of the

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<sup>5</sup> William Twining's work on the 'rationalist tradition' of evidence scholarship has also argued for the need to adapt that tradition in the light of 20th century accounts of the scientific method (Twining 2006).

truth. Its weakness is that modern scientific practices presuppose a continuing dialogue between data collection and the conceptual framework for understanding that data: the latter refined in the light of new data and the refinements requiring further data collection to retest the modified hypothesis. But within the classical adversarial account, autonomous partisan parties seek out evidence which suits their case in the pre-trial phase; the fact-finding magistrate or jury only appears at trial (after the investigation is concluded) and is confined to a passive role. Here, nobody has the role of testing hypotheses about truth by commissioning or conducting further investigations. Thus the most obvious theoretical incompatibility with a modern model of scientific dialogue is the absence of an active pre-trial truth finding figure.

It is classical inquisitorial process that has, at least in theory, this advantage of an active truth-finder both before and during trial, with the power to commission or conduct investigations to test hypotheses about guilt. But the obvious query, relative to the account of scientific fact-finding, is whether there are adequate mechanisms to promote the ongoing dialogue between data and theory upon which it depends. In other words, are doubt and reflective analysis organising principles in the pre-trial investigation? In part this is a question about the culture underpinning judicial supervision: is there a strong, continuing commitment to dialogue and dialectic as a means of verifying truth?

Bostjan Zupancic suggests we should view the lone but active truth-finder, at least in criminal process, with some suspicion. All investigators, prosecutors, examining magistrates or police officers, must of necessity form hypotheses to provide criteria of relevance: the unfocussed assembling of disparate facts could hardly be called an investigation. What Zupanic sees as crucial to truth-finding is not absence of a preconceived hypothesis but flexibility in changing it, or the presence of more than one hypothesis. This suggests the need for institutionalized means of counter-argument and counter-interpretation. Further, Zupancic argues that distinctive features of the structure of criminal investigations

suggest the importance of dialogue between parties. The initial hypothesis to be tested is one of guilt: 'The very fact that this is criminal investigation implies that a certain suspicion of criminal guilt attaches to a certain individual' (1982:69). He adds to this what he terms a practical point: that the line of least resistance and the least possible effort is to stick to one hypothesis and to change the direction of the search for the facts as little as possible: 'the economics of effort do not encourage more effort if the result can be achieved by less' (1982:30). He also argues that the commitment to a culture of truth-finding is much less fundamental in the criminal justice community than that of the scientific, concluding that only a strong counter bias can neutralise the initial perception of guilt and that this can only be provided by dialogue. Similarly, Jackson has argued that the kind of dialogue between the investigator's vision of the evidence as a whole and his or her vision of its constituent parts that derives from modern accounts of science, is most likely to be found where factfinders engage in argument and counterargument with other parties, using doubt and debate as mechanisms of discovery (Jackson, *op. cit.* especially at 522-3).

This suggests that the advantage of an active truth finding judicial figure within the inquisitorial tradition may be undermined where there is no culture of doubt and no effective institutionalized dialogue to suggest alternative hypotheses; it also raises questions about the role of the defence. The defence in the inquisitorial tradition have a limited role, traditionally seen as presenting a particular reading at trial of the evidence already collected in the dossier during the pre-trial process. Given that the defence lawyer is an outsider to the investigation and therefore not party to the original suspicion of guilt, he or she is perhaps best placed to suggest alternative hypotheses and further investigations based on those hypotheses. The traditionally limited defence role would therefore seem to be a point of truth-finding vulnerability.

Potential vulnerabilities in criminal justice systems are not only found within the logic of the account given within a particular procedural

tradition. They can also flow from a distance between the theory of truth-finding and contemporary realities on the ground. The latter may come to be shaped more and more by financial considerations, with the demand to formally process more cases increasing at the same time as state austerity becomes normalized.<sup>6</sup> But if reality takes the form of miscarriages of justice so that the theoretical truth-finding capacities and guarantees of the system are seen to have failed, this can also force reforms and adjustments. In the coming sections we will look at vulnerabilities of, and reforms to criminal justice in England and Wales and the Netherlands, seeking to discover where, how and why such vulnerabilities have revealed themselves and what the scope and shape of reform has been.

### **Adversarial truth-finding in England and Wales**

Although Criminal Procedure Rules declare the acquitting of the innocent and conviction of the guilty to be an explicit aim of criminal process, it is difficult to set out clearly the underpinning model for adversarial fact-finding in England and Wales. In the last 30 years there have been three major reviews of criminal process (two Royal Commissions in 1981 and 1993 and the Auld Report in 2001). All explicitly endorsed the adversarial tradition as the underlying basis of the system but said almost nothing about theories of adversarial fact-finding. Thus we have no officially endorsed, specific account of how truth is to be found.

In part this may be because the requirements of procedural fairness and truth-finding are not clearly distinguished within the tradition. The Anglo-American adversarial concept of fair procedure (due process) is also thought to provide the basis for truth-finding and legitimate decision-making. Thus, the legitimacy of fact-finding seems to flow indirectly from the presumed legitimacy of the process rather than being a distinct direct

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<sup>6</sup> For more on economics and incentives in relation to evidence, see Posner (1999, 2001).

aim necessitating distinct means to directly accomplish it. One apparent consequence is the implicit assumption of recent Royal Commissions and the Auld Report that explaining how truth is to be found would not be helpful. But the danger is that this may allow uncertainties to continue about the roles of key parties in fact-finding: procedural assumptions about the pre-trial roles and relations of police, prosecutor and defence lawyers may not be clearly set out in law or in practice on the ground.

Despite this lack of explicit theory, it is possible to (re)construct what one might describe as the classical account of the logic of adversarial truth-finding that hinges on a truth-finding dialogue. Autonomous parties seek out and present evidence at trial supporting their case: under conditions of equality of arms the ensuing *choc des opinions* allows an impartial truth-finder to adjudicate on facts. This theory depends on effective construction of alternative narratives at trial, suggesting that one point of adversarial 'trust' is in the existence of active, autonomous investigation by defence lawyers who are expected to seek out and interview witnesses, to commission forensic and expert evidence and not simply to leave the accumulation of exonerating evidence to the state.

Yet the admittedly limited empirical evidence we have of general defence practice suggests that not only is there usually no equality of investigative arms but that there are not even two full independent investigations before the initial trial. In reality, a single police investigation is followed by a review by the defence of disclosed prosecution materials and very little active defence search for new exonerating materials. The only substantial empirical study of defence lawyers in England and Wales to have specifically considered the search for exculpatory evidence remains that conducted by a team led by Mike McConville in the late 1980s and early 1990s (1994).<sup>7</sup> They concluded

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<sup>7</sup> The book is based on 198 researcher weeks of observation, on a limited series of formal interviews with qualified solicitors and a more comprehensive set of interviews with articled clerks (i.e. trainee solicitors).

that defence lawyers' 'favourite strategy' consisted of waiting until the prosecution papers arrive and then putting that case to the client for comment. With a few isolated exceptions, little independent investigative work was undertaken by defence advisers beyond interviewing any potential witnesses that the client cared to produce. In 198 weeks of fieldwork, the researchers observed only eighteen such interviews of possible defence witnesses and little other evidence of proactive defence investigative strategies. Often investigative work (such as getting evidence of injuries or finding witnesses) was delegated to the defendants themselves.

Might this absence of proactive autonomous defence investigation simply reflect the banal reality of most criminal cases? Perhaps the issues were simple and did not need defence investigation? Would the picture be different in more serious cases such as homicide and rape (the ones likely to become famous as miscarriages of justice)? In fact, if one considers the evidence of acknowledged or alleged miscarriages of justice in England and Wales, similar themes emerge of lack of proactive defence investigation even in these most serious cases. In recent publications (Robins ed. 2012, 2013), a range of experienced lawyers and investigative journalists have argued that inadequate preparation by first instance defence lawyers is a key causal influence in many miscarriages of justice. The problems identified have been various (Malone and Platt 2013). A full account of the client's version of events is sometimes not taken early enough or thoroughly enough, complex work sometimes delegated to inexperienced or underqualified staff. Potential witnesses are not always interviewed, appropriate experts not instructed, relevant tests not ordered and relevant sites not visited. Finally, unused material may not be requested from the prosecution or disclosed materials not scrutinised in enough depth. From a number of examples cited of miscarriages related to these issues one can pick out the following: the defence failure to seek out alibi witnesses in Dougherty (1974) and Fergus (1991), to examine the photos on the mobile phone of Sam

Hallam (2012), to seek out school records in Anver Daud Sheikh (2004), to commission psychiatric reports on the reliability of Ian Lawless' confession (2009), to make necessary site visits in Pountley (1996).<sup>8</sup>

Various explanations have been offered for this absence of proactive autonomous defence investigation which range from the scandalous to the understandable. Some authors have identified a certain cultural contempt held by defence lawyers for the clients and presumptions of their guilt (Newman 2012, 2013, McConville and others 1994). Others argue that dealing with large criminal investigations such as those undertaken in relating to homicides and rapes involves particular and unusually complex demands and there is a lack of this kind of experience in many criminal law firms (Malone and Platt 2013). Many cite the material pressures on lawyers working on legal aid as a disincentive to invest time in individual cases and in particular the impact of graduated fixed fees (Nurse 2013: 77). Finally, there are always the inherent structural disadvantages that defence lawyers have in relation to a state police: their limited powers to secure witnesses and materials and the intrinsic limitations of forensic reports on materials already examined (and thus altered) by earlier prosecution examinations (McBarnet 1981: 85-101).

### ***Shifting points of trust? The truth-finding police investigation in an adversarial context***

The logic of adversarial fact-finding depends on some rough equality of investigative arms: otherwise the relative strength of the competing versions of reality presented at trial will reflect the inequality of investigative arms rather than the intrinsic merit of the potential evidence out there. Before the arrival of a professional police force in England and Wales in the 1830s, when most prosecutions were conducted by victims rather than the state, this may have been a less manifest structural

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<sup>8</sup> For the cases of Lawless and Sheikh see Newby (2013: 65-66), on Dougherty and Pountley see Green (2013)

problem. But it is hard to see that there could ever be equality of arms in the 20th and 21<sup>st</sup> century contest between legal aided solicitors and teams of state investigative police with their inherently superior access to witnesses, surveillance materials, forensic science support and data bases.

One response has been to suggest that the 'cultural trust' of the system in terms of fact-finding is no longer constructed along traditional adversarial lines. We now expect the primary state actors, police and prosecutors, to behave in a quasi-judicial manner. Thus the Runciman Commission, a Royal Commission set up on the day of the release of the Birmingham 6, argued that it was the 'duty of the police to investigate fairly and thoroughly all the relevant evidence, including that which exonerates the suspect' (Runciman 1993: 9). The difficulty is that this assertion – with its implication of shifting points of cultural trust – has never been coherently set out in detailed legal duties, the Commission specifying neither the nature of the duty nor its legal source.

However there has been some judicial endorsement of principle that the police have a legal duty to seek out exculpatory evidence. In *Fergus*, where the police failed, despite many requests from the prosecution, to interview alibi witnesses cited by the defendant in interview, Lord Justice Steyn, giving the decision of the Court of Appeal, referred to the police's 'lamentable failure to investigate. If they had carried out their duty, it is unlikely that Ivan [Fergus] would have been convicted.'<sup>9</sup> Yet the Court does not indicate the legal origins or scope of that duty and the comment itself is *obiter dictum*. That means that the legal principle enunciated – that the police had a duty to investigate exonerating evidence – was not necessary to the decision. Under the English doctrine of precedent, the case does not therefore establish a legal principle that binds future courts.

The police's duty to seek out exculpatory evidence has also been evoked in 'soft law' in the form of administrative Codes of Practice and

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<sup>9</sup> R v Fergus [1994] 98 Cr. App. R. 313 at 322



Guidance which are not sources of law – they do not constitute secondary legislation – and thus strictly speaking do not establish legal duties. Section 23 Criminal Procedure and Investigations Act 1996 states that the Home Secretary shall issue a Code of Practice (on disclosure of evidence) to ensure *inter alia* that ‘where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued.’ Now that clearly does establish a legal duty, but upon the Home Secretary to issue the Code of Practice not on the police to obey. Paragraph 3.5 of the Code of Practice on Disclosure issued by the Home Office, states that the ‘...investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable will depend on the particular circumstances.’<sup>10</sup> But the Code of Practice itself does not establish legally binding duties though it is certainly admissible in evidence and its breach may be taken into account in determining legal proceedings. Similar views are expressed in the latest version of the Director of Public Prosecutions Guidance On Charging (2013) and joint (police and prosecutor) operational instructions for the disclosure of unused material.<sup>11</sup> But these are not authoritative sources of law either.

The question is whether this is adequate to the task of effectively establishing a practice which seems to run contrary to the adversarial tradition of autonomous partisan parties. The most obvious difficulty is the lack of clarity in definition: what are ‘reasonable lines of inquiry’ and who determines what they are? If there is no effective means for the defence to challenge police decisions to not pursue a line of inquiry the answer is effectively a matter of police discretion. Historically the English courts have been reluctant to use either the public law remedies available

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<sup>10</sup> Criminal Procedure and Investigations Act 1996, Code of Practice on Disclosure, Para. 3.4

<sup>11</sup> The Director's Guidance On Charging 2013 - fifth edition, May 2013 (revised arrangements) see para 3. Guidance to Police Officers and Crown Prosecutors Issued by the Director of Public Prosecution under S37A of the Police and Criminal Evidence Act 1984, para. 2.5

under judicial review or to allow private suits for negligence in relation to police investigations. Only where the individual affected can establish a clear violation of internal norms set out in guidance, regulations or Codes of Practice is that likely to succeed (Field and Roberts 2002: 502-508). In the absence of clear definitions of 'reasonable lines of inquiry' in the circumstances of the particular case that is not likely.

In recent times, Codes of Practice have sometimes influenced police behaviour (for example in relation to interrogation practice and recording of confessions) because breach has led to exclusion of prosecution evidence at trial. But it is hard to see what to exclude because the police have not pursued particular investigations. Finally, neither the Criminal Cases Review Commission nor the Court of Appeal see evidence of flawed police investigations as in itself grounds for overturning convictions: usually the defence has to produce new evidence which undermines a significant element of the prosecution case against the suspect. So only by following the unexplored lead and discovering something new does this bring redress. And here it will be the 'newness' and significance of the exculpatory evidence that counts, not the failure of the police to explore it.

So there is a certain paradox here. The adversarial tradition is said to be based on distrust of the state, preferring to invest trust in the initiative of autonomous parties and the impartiality of community representatives rather than an active truth-finding magistrate. Yet here trust is placed on the state police to find the truth even in the absence of a supervising magistrate with legal powers to direct them to pursue particular lines of inquiry. Furthermore, we have a number of empirical reasons for being cautious about trusting police to pursue exculpatory evidence. There is the widespread experimental and other evidence of confirmation bias or tunnel vision as a general psychological phenomenon. More specifically, recent empirical studies of homicide investigations emphasize how the prospect of an adversarial contested trial 'permeates and foreshadows all aspects of detective decision-making

in murder cases' (Brookman and Innes 2013a: 285). Police investigative strategy is built on anticipating and shutting down lines of defence (Brookman and Innes 2013b: 297). In particular, the moment there is a 'prime suspect' he or she becomes the dominant focus and priority for investigation. Furthermore, Innes emphasizes that SIOs are under pressure to be aware of costs of investigations: 'once the suspect was identified, there was immense pressure to discontinue previous lines of enquiry which were now seen as unproductive and costly. This is a risky strategy over the long term, as to some extent it precludes alternative hypotheses about the crime being considered' (261-2). This focus on existing hypotheses is particularly strong where officers feel under pressure to deliver (256).

This tendency to focus on a suspect and to search for incriminating evidence against him or her was evident in the famous miscarriages of justice that came to light in the 1980s. In these cases, once detectives were clear that a suspect was guilty, they felt themselves under no obligation to pursue exculpatory lines of inquiry (Sanders 1987: 230-234, Field 1994: 119). This suggested the operation of adversarial assumptions in relation to the police role: it was for the defence to pursue such material. These assumptions are still evident in more recent cases. For example, in the Fergus case, in the six months between arrest and trial, the police made no attempt to trace any of the four alibi witnesses that Fergus cited in his first police interview despite seven different requests by the Crown Prosecution Service and Prosecution counsel. Convinced by an earlier (false) identification that the suspect was guilty, no doubt they took the view that these witnesses (who were his friends) would not help the case for the prosecution. And why should the officers help the case for the defence if they considered Fergus guilty? And why would they have charged him if they did not think he was guilty? Similar police failures to pursue alternative lines of inquiry which point away from the prime suspect are evident in the still unresolved case of Susan May. These include a failure to follow up evidence pointing to an alternative suspect

and a red Ford Fiesta, unoccupied but with the engine running, outside the victim's house at midnight on the night she was killed. There is also evidence that the police may have persuaded witnesses to give accounts pointing away from alternative theories of the case so as to concentrate on building a case against their prime suspect (Allison 2013, Green 2013)).

***Redressing an imbalance of investigative arms? The limitations to prosecution disclosure of exculpatory evidence***

It is sometimes argued that certain procedural 'advantages' compensate the defence for inequalities in investigative resources and thus re-balance the contest to present convincing narrative at trial. For example, we have asymmetrical obligations of disclosure, a high standard of proof with its burden (generally) on the prosecution, the right to silence and the exclusion of various kinds of evidence thought to be unduly prejudicial or obtained in unacceptable ways. These mechanisms may well prevent the conviction of at least some defendants where the incriminating evidence is not strong (and thus protect some innocent suspects). But it is hard to see most of them as effectively compensating the defence for their structural investigative fact-finding weaknesses because that would involve comparing the incommensurable: how do you measure the impact of these very different kinds of advantages and disadvantages? And the paradox is that over the last 20 years many of these structural defence advantages have been eroded or qualified exactly because they are said to obstruct accurate truth-finding.

The only possible exception is the development of duties of prosecution disclosure. If there is no political will to finance two full autonomous investigations of the same incident, one plausible claim for a procedural advantage that might assist defence construction of alternative narratives is access to prosecution materials. This might suggest that we should begin to see the role of the defence in criminal investigations in England and Wales more in terms of making new and alternative

connections between facts established by the police investigation. But the massive amount of information and the complexity of possible interrelations between elements of unused materials in complex investigations raise questions about the capacity of solicitors to process the material effectively. There are material disincentives for defence lawyers: under the graduated fixed fee system now used to fund legal aid, solicitors get a sum based on the number of pages disclosed, not the time taken to read them (Nurse 2013:77, Garland and McEwan 2012: 245). Defence solicitors do not have access to the HOLMES computer technology used by the police to organise complex investigations and only the more specialist use Case Map (the equivalent for defence lawyers). Unused schedules are at best organised according to the categories and assumptions of the prosecution narrative and at worst the nature and form of prosecution disclosure of investigative materials conceals as much as it reveals. Given that unused material can run to thousands of pages, misfiling or odd filing makes it difficult to use the files to both follow the development of the police investigation and appreciate the significance of potentially exculpatory material (Evans 2012). As a result, it is common in the process of revealing miscarriages for connections to be made by the defence between facts that might in theory have been 'known' to them for some time. Often, these connections will be made after conviction or even after initial appeals have failed.

We only have room here to point to a few examples of defence failure to exploit disclosed materials. In relation to Miller, one of the Cardiff 3 originally convicted of the murder of Lynette White, witness statements placing Miller in a pool hall 20 minutes after her death, were amongst the unused materials but their significance was not appreciated (Sekar 2013: 28). In Adams (2007) there were clear failures on a late returned brief to properly examine unused material and HOLMES computer base material to inform cross-examination. In the Susan May case (2012), the defence failed to appreciate the significance of

photographs illustrating chemical enhancement of her prints on a wall (Green 2013).

### ***Correcting mistakes: appeals and the adversarial tradition***

There are thus certain systemic truth-finding vulnerabilities within the criminal process in England and Wales linked to weaknesses in the truth-finding capacities of the adversarial tradition or in the capacity to put into practice the assumptions on which it is based: the systemic imbalance in investigative arms as between prosecution and defence, the rhetorical but not properly operationalized expectation of a police search for exculpatory evidence and the inadequacy of prosecution disclosure as a mechanism for remedying structural defence disadvantage in constructing alternative narratives. This suggests that truth-finding mistakes are to be expected from first instance decision-making. How adequate is the criminal process in England and Wales to the identifying and remedying of these first instance mistakes?

In fact, adversarial procedural assumptions also restrict the scope and effectiveness of the review and appeal process in England and Wales. Primarily, there is the view that fact-finding is best conducted through the oral examination of witnesses – especially their cross-examination – at public trial before a jury. Because criminal appeals from jury decisions will be heard by professional judges based largely on case papers and legal argument, the Court of Appeal defines its role in practice in quite restricted terms. The policing of jury decisions in relation to arguments and evidence presented at trial is not only regarded as unnecessary but unacceptable. Thus the Court of Appeal does not see itself as a '*double degré de juridiction*' within the terms of the inquisitorial Continental tradition and acts more like a court of review rather than of appeal. It generally requires some fresh evidence that has not been considered by the first instance fact-finder before a conviction is quashed. Only very exceptionally may convictions be quashed on the basis of a 'lurking doubt'

where little or no new evidence is presented that was unavailable at trial.<sup>12</sup>

Thus the assumption is that any credible defence narratives that may exist can be (and therefore should be) presented at first instance. In practice, only defence evidence or argument that could not have been made at first instance can be the basis for appeal. This seems to reflect culturally informed but false institutional assumptions about the way the investigative process works: that advance prosecution disclosure, supported by independent active investigation by the defence, routinely provides the basis for strong defence narrative building and thus something like equality of arms. But if in many serious cases the defence in fact lack the capacity or will either to conduct active independent pre-trial investigations or to make sense of the 'unused materials' disclosed by the prosecution, the cultural assumptions of the system become points of weakness rather than points of strength.

### **Inquisitorial truth-finding in the Netherlands**

The Dutch Code of Criminal Procedure opens with the admonishment that investigation and trial shall take place only according to rules laid down in legislation. These include the Code itself, the Criminal Code, other laws governing the judiciary, the prosecution service and the police, and laws providing for procedural exceptions. This principle of legality is assumed to ensure that the state (the criminal justice authorities and courts) not only has adequate powers to investigate and punish, but is also subject to sufficient monitoring and control to prevent abuse. The latter are already present in the concept of *trias politica*, which gives the judiciary powers of scrutiny of executive decisions in matters of law. They are also provided by hierarchical monitoring and controls within the criminal justice system itself: the police are subordinate to the public prosecutor and the

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<sup>12</sup> *R v Pope* [2012] EWCA Crim 2241

prosecutor to the court (and in some instances to an investigating judge), while the hierarchical organisation of police force and prosecution service allows control by, and accountability to, superiors. Decisions as to the facts by the court of first instance are subject to scrutiny by the (higher) court of appeal (in the form of a re-trial); points of law can be raised before the Supreme Court. And finally, just in case this whole system should somehow produce an untruth, there is revision before the Supreme Court: a case may be reopened if new evidence casts doubt on the original decision, a procedure designed to prevent the Supreme Court from becoming a court of third (factual) instance. It must first establish the existence of new evidence (*novum*) and then that such evidence, had it been known at the time, would have led the final fact-finding court to acquit. If so, the case will be referred for retrial to an appeal court.

Thus the written law provides safeguards and gives power to the executive to infringe individual rights in the course of a criminal investigation. However, it does not set out specifically two key premises that are simply self-evident given the state's dual role as guardian of both social and individual interests. First, that the basic objective is truth-finding. Secondly, that finding the substantive truth implies a criminal investigation and presentation of evidence at trial that are not only as complete as possible, but also non-partisan, taking into account the possibility that a person may be guilty or innocent. Strictly speaking, inquisitorial procedure knows no parties (in the sense of adversaries), only participants. The key to the legitimacy of substantive truth-finding is thus not debate in court based on two independent, partisan investigations, but *inquisition*, inquiry, by non-partisan state officials, acting according to the law and subject to internal control. The rules of criminal procedure reflect this basic tenet .

The trial dossier compiled by the prosecutor on the basis of the police file allows scrutiny of both pre-trial investigation and evidence . It should contain a full account of investigative steps and all relevant documents and warrants, and is available to the trial court. This enables



the court to take an active role in investigating the case at trial. The defence are neither required, nor expected or even allowed, to present an independent case. Rather, their role is to 'look over the prosecutor's shoulder' during the investigation and compilation of the dossier and to point to any indications of innocence that may have remained unexplored, at which point the prosecutor should explore them. Should he consider this unnecessary or simply not do it, the defence may request that either an investigating judge or the trial court order further investigations to be conducted; whether they do so, depends on whether they deem it necessary for truth-finding purposes. Once the trial begins, the primary role of the defence is to cast doubt on the prosecution case, among other things, by prompting the judge to ask the relevant questions.

Although the trial court has an actively investigative function, the central role of the dossier means that there is only one version of the truth on paper to guide its investigation. This agenda-setting function of the dossier, assumed to contain all incriminating and exculpatory evidence, places the emphasis very much on pre-trial procedure and pre-empts the necessity of producing all of the evidence and every witness in court. It should also be noted that the defence must ask the prosecutor to call witnesses who the prosecution have not called themselves (or ask the court to order the prosecutor to call them), and that there is no automatic right to produce one's own 'expert for the defence'. The very terms 'defence witness' and 'expert for the defence' are anomalies, for they imply partisanship. Where there are no 'parties', only 'participants', inquisitorial procedure knows only witnesses whose testimony may or may not be favourable to the defence, and experts accredited to the court, all in the service of the substantive truth.

With substantive truth the primary goal, and investigation by state officials according to law the means of achieving it, the critical point of trust hinges on the principle of legality and the professional integrity of those officials to actually behave as the law and its underlying assumptions prescribe. This is particularly important now that pre-trial

investigation by the police and prosecution sets the agenda for the trial process. The lack of external controls and the often truncated nature of debate in open court hinder a truly transparent process. Even the requirement that the court give reasoned decisions, although contributing to external transparency, has its roots in scrutiny through appeal to a higher court, allowing it to examine the validity of the first decision. Trust is therefore vested in an institution that has to be assumed to police itself, if its decisions on guilt or innocence are to be regarded as 'truthful' and therefore legitimate (Jörg *et al.*, 1996).

Trust in all political and public institutions in the Netherlands is traditionally high (K. Brants 2013). That applies perhaps less to the police, but is particularly the case for the judiciary; the prosecution service is probably somewhere in the middle (De Keijser *et al.* 2004). Indeed, there is no small degree of (self)-satisfaction as to the workings of criminal justice with its professional judges and quasi-judicial prosecutors. The Dutch are pleased to be among the few continental systems without lay participation (an inquisitorial system by no means precludes a jury) and the public at large and even legal scholars sometimes seem convinced that an adversarial system by definition involves an ignorant jury, biased prosecution and police, and is, therefore, to be regarded as seriously handicapped in establishing the truth in criminal matters (De Roos 2000; Groenhuijsen & Knigge 2004, 107-109). While a deal of this prejudice is based on media reporting of sensational cases such as O.J. Simpson and, further in the past, the Birmingham Six and other miscarriages in England and Wales, it has also helped confirm the self-fulfilling belief that the Dutch system, because it could be trusted, did not produce such wrongful convictions and therefore could be trusted.

Research in 1992 (Crombag *et al.*, Wagenaar *et al.* 1993) suggested that possibly scores of miscarriages had gone unnoticed (until then only two – in 1923 and 1984 – had been officially acknowledged) and that this was, at least in part, due to the way the system itself worked. This was dismissed by practically the entire legal community as

unscientific and unconvincing (e.g. Schuyt, 1992). Such reluctance to countenance that Dutch inquisitorial process could somehow produce wrongful convictions persisted even after it became apparent that the researchers had a point. The potential strength of the system – non-partisan pre-trial investigation, the professional integrity of those conducting it, the active investigative role of the court, elaborate rules of evidence, internal monitoring and control and the possibilities of appeal and revision (in short, its ability to police itself) – was also a potential weakness.

### ***Vulnerabilities***

The Dutch criminal justice system works, and gets it right – most of the time. Retrial by a higher appeal court probably catches a number of potential miscarriages, although there is little research to confirm this or say how many. However, the reliance on one single version of events, the result of one investigation by the police and collected by the prosecution (albeit possibly prompted by the defence) into the dossier to be verified at trial, makes the system singularly vulnerable to confirmation bias. Paradoxically, although internal control all along the process, with each following authority checking the previous one's decisions, would seem a logical way to catch mistakes at an early stage, the same mechanism also allows those mistakes to move through the system with almost inexorable logic towards a wrongful conviction. In the miscarriages of justice that have come to light since 2002, tunnel vision and confirmation bias have been a major common factor. False confessions to the police and incorrect or misunderstood expert evidence come a close second (see i.a.: Van Koppen 2003; Van Koppen and Schalken, 2004; Israels, 2004; Derksen, 2006; De Ridder *et al.*, 2008, ch. 6; 20 Van Koppen 2011; Brants, 2012).

Such is the institutional trust in the integrity of the system and its officials that higher authorities are inclined to rely on the findings of previous decision makers and take them at face value. Case law itself instructs the court to proceed on the assumption that the dossier contains

all relevant information and that the prosecutor's decision as to what is relevant is correct, unless the opposite is either glaringly obvious or can be shown by the defence.<sup>13</sup> However, more often than not the defence is unable to show what is missing, lacking as it does the possibility of conducting its own pre-trial investigations. In general, the lack of external controls, in particular a defence that can produce an alternative reading of the 'truth' backed up by 'alternative' evidence, compounds the problem of tunnel vision.

Although the defendant and the defence have rights such as privileged communication and access to the dossier, the emphasis on substantive truth-finding by the state and the realisation that pre-trial rights could hinder the investigation, means that the provisions granting these rights also have a proviso: '...unless in the opinion of the investigating judge (or prosecutor, as the case may be) the interests of the investigation make the exercise of right X undesirable' (or some such formulation). Access to the full dossier is only guaranteed unconditionally from ten days before the onset of the trial; before that, the defence must try to persuade the prosecutor to allow access. This need not be a problem, but when it is, it undermines the assumption that the defence lawyer can act as a prompt to the prosecutor in matters of possible evidence favourable to the defendant. The most important steps in the development of the dossier – and the prosecutor's version of the truth – take place from the very beginning of the investigation, but this is a time when the defence has fewest opportunities to intervene.

Precisely because of this, the system is surrounded by guarantees that should compensate for the lack of autonomous defence participation and contribution, but these safeguards date from the enactment of the Code of Criminal Procedure in 1926, and have been systematically eroded over the course of decades, in particular since the end of the 20th Century. A range of factors – fear of crime, general feelings of insecurity,

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<sup>13</sup> HR 7 mei 1996, NJ 1996, 687

political and media demands for more and better crime control, assertions that defence rights are abused in criminal procedure as well as financial constraints – have all led to new legislation aimed at more efficient pre-trial investigation and court procedure and at more convictions. The powers of the prosecutor have been substantially increased, those of the investigative magistrate (an extra and impartial safeguard in criminal investigation) reduced.<sup>14</sup> Defence rights have been curtailed, as has retrial: in the interests of efficiency, appeal courts may, and under certain circumstances do, rely on evidence and witnesses originally produced without re-examining them.

Such changes have resulted, perhaps unconsciously, in the desired aim of the trial being defined as a conviction rather than as the substantive truth, thereby undermining the commitment to impartiality and increasing the likelihood of tunnel vision and confirmation bias. Concomitantly, a number of prosecutors came to prefer the role of crime fighter to the traditionally favoured magisterial, non-partisan prosecutor (Van de Bunt, 1985; C. Brants and K. Brants, 2002: 8). Few Dutch police officers would wilfully ignore indications of innocence and there is no evidence they resort to violence during interrogations. However, in the confirmed cases of wrongful conviction, substantial media pressure to find the perpetrator, combined with officers seeking confirmation of existing suspicions, produced coercive investigations and in some cases false confessions. And rather than check whether all avenues had been explored, prosecutors sought to verify the *prima facie* police case and present it through the dossier to the court.

The court is the final and most important monitor of police and prosecution activities pre-trial, but judges are strongly influenced by how the prosecution presents the case (De Keijser *et al.* 2004), and the fact that they have prior knowledge of it through the dossier promotes

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<sup>14</sup> Partly as a result of several miscarriages of justice (see *infra*), as of 1 January 2013 the position of the investigating judge has been somewhat reinstated in the sense that his role as the hierarchical monitor of the prosecution has been reinforced. Wet Versterking positieve rechter-commissaris (Staatsblad. 2012, 408).

confirmation bias. Some have said that truth finding in a Dutch court is not focused on active investigation of whether the evidence points beyond reasonable doubt to the guilt of the defendant, but on confirmation that it does not contradict the prosecutor's assertion that the defendant is guilty (Van Koppen and Schalken, 2004). Elaborate rules of evidence should prevent this: there must be a specified amount of corroborated, not merely circumstantial evidence and even then the court may only convict, after deliberations in chamber, if it is convinced by that evidence. There are, however, indications that judges, basing their deliberations on the dossier, look for corroborating evidence to confirm what they already think. In its written reasoning, the court need not discuss all available evidence and any residual doubt it may have had, even though judges must give a reasoned response to specific defences. Unanimity is not required, and although a career judiciary is assumed to bring the guarantee of impartiality and the rationality of the legally trained mind to the process, the fact that career judges take decisions as a matter of routine makes it all too possible that a process of group-think governs deliberations, brooking no contradiction (De Keijser *et al.* 2004, 36-38).

A final point of both potential strength and weakness concerns the position of experts, who in Dutch procedure are not witnesses but simply experts to the court with no other obligation than to explain, according to professional standards of ethical conduct, what their scientific conclusions mean. This emphatically non-partisan role would seem better suited to truth-finding than experts testifying for one or other party (however much they may, in theory, be beholden to the same professional, scientific standards). However, an inquisitorial court may be just as likely as an adversarial jury to give too much weight to expert testimony and forensic evidence or to misunderstand it. In either system, neither judges nor defence lawyers are knowledgeable enough to ask the relevant scientific questions, but the absence of an expert for the defence means that the Dutch court is exclusively dependent upon its own amateur evaluation. Moreover, it is not unknown for Dutch experts to identify, consciously or

unconsciously with the prosecution case, as happened in more than one wrongful conviction.

***Cases in point: Schiedam park murder<sup>15</sup> and Lucia de Berk***

While all of the miscarriages demonstrate the risks of institutional trust in the infallibility of the Dutch system, two are particularly good examples. The first, the Schiedam Park Murder, concerns two children, respectively killed and injured after a sexual assault. The police focussed on a passer-by, a known paedophile, who confessed under protracted interrogation although he did not fit the survivor's description of the attacker and other witness statements were contradictory (though they agreed there was a bicycle). The suspect soon retracted the confession, his DNA was not found and an alibi gave him practically no time to commit the crime, yet he was convicted at first instance and then on appeal, primarily on the retracted confession and circumstantial evidence (he was in the park with a bicycle). The child's evidence was dismissed as not credible, the prosecution's (unlikely) reconstruction of the time frame and (equally unlikely) explanation of unidentified DNA on the body were accepted.

Journalists then discovered that someone else, whose DNA matched and who had a record of violent sexual offenses against children and no alibi, had confessed spontaneously to the murder in the park, a month before the Supreme Court dismissed a request for revision, there being no 'new evidence'. The convicted man was released and exonerated. And the prosecution service set up a commission of inquiry.

It found that the police had pressured the suspect to confess, disregarded evidence in his favour and, backed up by a child psychologist, vainly exerted 'inadmissible' pressure on a young and traumatized witness to make him admit to fabricating his attacker's description.

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15 The facts are taken from the official report commissioned in January 2005 by the Prosecution available at [www.rijksoverheid.nl/documenten/rapporten/2005/09/13/evaluatieonderzoek-in-de-schiedammer-parkmoord-rapport-posthumus](http://www.rijksoverheid.nl/documenten/rapporten/2005/09/13/evaluatieonderzoek-in-de-schiedammer-parkmoord-rapport-posthumus) (last visited 4 May 2016), and from Van Koppen, 2003.

Scientists at the state forensic laboratory twice expressed serious doubts about the defendant's guilt to the prosecutors because the only DNA found on both body and weapon was unidentified. They left this out of their report, nor did the prosecution tell the court or the defence. As a result, the experts were never questioned about doubts. A journalist also revealed that forensic institute scientists had been using the case during a course attended by some 200 police officers and prosecutors, to demonstrate how DNA-evidence had led to a wrongful conviction. One attendee blew the whistle and was subsequently fired for his pains. This led to Parliament demanding answers from the Minister of Justice. They accepted his version of events – 'unintentional but serious mistakes' – and his promise for a 'programme of improvement'.



Immediately, a temporary commission – *Commissie evaluatie afgesloten strafzaken* or *Commission for the Evaluation of Concluded Criminal Cases* (CEAS) – was installed to examine possible other miscarriages; it referred several cases to the Supreme Court, of which two were eventually overturned. The second of these, Lucia de Berk,<sup>16</sup> concerned a nurse accused of murdering children in hospital. There was no direct evidence and she never confessed, but was convicted and sentenced to life. Interestingly and unlike Schiedam, in this case no-one did anything wrong. Expert (statistical) evidence used to convict in first instance was later repudiated and rejected by the appeal court; and on appeal the expert requested by the defence testified he ‘was now of the opinion’ that one of the children had been deliberately killed. The court found corroboration in Lucia’s diary where she had written of having to ‘stop this compulsive behaviour’ (her explanation was that she was addicted to laying the tarot in the presence of dying patients). The final verdict rested on these two pieces of evidence and what was termed ‘repeating proof’: the deaths of six children seemed inexplicable, expert evidence showed Lucia had murdered one child, so she must have murdered the others too.

Although some thought this conviction obviously wrongful, legally speaking there was enough proof. The courts (and experts) seem to have been carried away on the preconception of guilt that informed public opinion,<sup>17</sup> the appeal court going out of its way to put the worst possible interpretation on the evidence. But the latter is a question of fact not usually within reach of the Supreme Court. Where was ‘new evidence’ to come from? One academic who studied the case (Derksen 2006) asked the new commission to reinvestigate, citing a ‘world renowned expert’ in the same type of *natural* death in sick children. Subsequently, the prosecution requested revision on the grounds that there had been no

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<sup>16</sup>Based on positive revision decision, HR 7 Oct. 2008, LJN: BD4153, and exonerating decision Hof Arnhem 14 April 2010, LJN: BM0876 (both at [www.rechtspraak.nl](http://www.rechtspraak.nl)).

<sup>17</sup> De Berk was the subject of a sustained whispering campaign by her colleagues and regularly depicted as a witch—sometimes literally in cartoons—by the media.

murders. Revision was granted on the basis of 'new scientific insights', although this was hardly the case, given the prior existence of the book by the 'world renowned expert'. De Berk was subsequently acquitted by the referral court.

### ***Remedies and Reforms***

In both of the above cases, tunnel vision and confirmation bias spread throughout the system. This had happened before, in the first wrongful conviction to come to light which was dismissed as an unfortunate incident.<sup>18</sup> But the public outcry about Schiedam and later Lucia de Berk prompted action: the police, prosecution service and state forensic institute (NFI) developed a combined 'Programme of improvements' (*Versterking opsporing en vervolging* (2005)). Partly it mixes the professional with common sense, requiring police and prosecutor training, proper collection and storing of evidence and clear and comprehensible forensic reports (*Versterking opsporing en vervolging*, 2005, 26, 37, 46–50). Other measures are reactions to specific features of the Schiedam murder: NFI scientists must discuss doubts about the prosecution case with the NFI director and, with the latter's permission, with prosecution and investigating judge (who may or may not decide to allow the defence to be present); an NFI report of doubts must be included in the dossier. Organized evaluation of all aspects of the case (exculpating and inculpating), internally by the police and then by the prosecution, is now mandatory. Prosecutors may seek review by a third party, such as an academic, although it is unclear what status such a reviewer would have.

Defence lawyers have long argued for audio-visual recording, but the prosecution service did not produce binding guidelines, now prolonged, until 2009.<sup>19</sup> The real stumbling block has been the presence of lawyers during police questioning (Brants 2011), always fiercely resisted by the

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<sup>18</sup> *Putten Murder*, Exonerating decision App. Ct. Leeuwarden, 24 April 2002, LJN: AE1877 [www.rechtspraak.nl]

<sup>19</sup> *Aanwijzing auditief en visueel registreren van verhoren van aangevers, getuigen en verdachten*, in force from 1.1.2013, *Staatscourant* 2012, 26 900.

criminal justice authorities and by many academics even after the European Court of Human Rights' judgement in *Salduz v. Turkey*, the string of decisions that followed and then the European Directive of 2013.<sup>20</sup> In the beginning, Dutch courts and criminal justice authorities latched onto the ambiguous wording of the European Court's judgements to minimize their effect, allowing the presence of a lawyer for underage suspects only and a right of consultation with, but not the presence of, a lawyer for adults, all regulated through prosecution service guidelines.<sup>21</sup> With the deadline for implementation of the Directive looming in November 2016, the Supreme Court has finally and unequivocally ruled that lawyers have the right to be present in all cases as of 1 March 2016.<sup>22</sup> However, legislation has still not materialised, there being no organisation of or funding for the necessary legal assistance. In any event, it is highly restrictive of what lawyers will actually be allowed to do: be present, yes, but actively participate, let alone influence what their client may say, certainly not (Nan, 2015, 988-991).

As of 2012, the system of revision has also been reformed. New legislation has redefined 'new evidence.' Originally limited to facts that, had they been known at the time of the trial, would have led the court to acquit, it now includes forensic insights and evidence known at the time of trial but not recognised as significant by the tribunal of fact. Moreover, anyone considering themselves wrongfully convicted of a crime carrying a penalty of more than 12 years, may now file a request with the Procurator-General at the Supreme Court (PG) for further investigation.<sup>23</sup> Before deciding, the PG may forward the request to the permanent

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<sup>20</sup> *Salduz v. Turkey*, App. No. 36391/02, Eur. Ct. H.R. (2008); Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, *OJ* L 294.

<sup>21</sup> See e.g. HR 30 June 2009, *LJN* BH3084; 'Aanwijzing rechtsbijstand politieverhoor (2010A007)', *Staatscourant* 2010, 4003.

<sup>22</sup> HR: 2015:3608, *NJ* 2016/52, annotated A.H. Klip.

<sup>23</sup> The PG at the Supreme Court is not a member of the prosecution service. He is independent: his appointment is for life and his main function is to advise the Supreme Court as to the applicable law and the interests of justice in the specific cases that come before it.

*Adviescommissie afgesloten strafzaken* [Advisory Commission on Concluded Criminal Cases] – ACAS.<sup>24</sup> This Commission (which replaces the temporary CEAS commission) has five members and a secretary nominated by the PG and appointed by the Minister, with members drawn from the Bar, academia, or others with knowledge of criminal cases such as ex-police officers; only one (not the chairman) is a member of the prosecution service. ACAS must advise 'independently and impartially', to which end it has limited powers.

## **Reforms and cultural trust**

### ***England and Wales***

There is strong evidence that in England and Wales defence lawyers often struggle, even in very serious cases, to conduct the autonomous proactive search for exculpatory evidence upon which a traditional concept of adversarial fact-finding depends. Even a minimal attempt to reassert the need for proactive independent defence investigation seems unlikely under current conditions of state austerity. The state has never properly financed two investigations of the same incident and seems unlikely to do so in the foreseeable future.

Rather than re-asserting traditional notions of adversarial truth-finding the tendency has been to talk in terms which seem to overlay the English adversarial tradition with assumptions more consonant with that of the inquisitorial tradition: assertions of the duty of the police to seek out exculpatory evidence and of the Crown Prosecution Service to act quasi-judicially. Yet there has been a failure to understand what an examination of comparative research on the inquisitorial tradition might have revealed: that the credibility of an active truth-finding state investigation rests on clearly defined legal duties placed on the police and effective judicial powers of monitoring and supervision of the carrying out

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<sup>24</sup> Wet Hervorming Herziening ten Voordele, *Staatsblad* 2012, nr. 275 and Besluit adviescommissie afgesloten strafzaken(BAAS) *Staatsblad* 2012, nr. 405.

of those duties. Given that the relevant police duty to seek out exculpatory evidence is set out only in the most general terms in soft law and there is no power vested in the CPS to require investigative acts of the police, we seem to be awkwardly perched between adversarial assumptions that do not reflect law in action and inquisitorial assumptions that have not even fully made their way into the law in books.

This makes the Court of Appeal's traditional deference to first instance jury decision-making highly problematic. The adversarial tradition of limited review of first-instance decision-making rather than re-hearing means that if there is not a balanced presentation of relevant contending evidence before the jury because of the absence of proactive defence investigation or thorough state pursuit of exculpatory evidence, then this cannot necessarily be rectified later. The emphasis on lay-decision making within the English criminal justice process (and in particular the jury in serious cases) is rooted in a long political tradition of distrust of the state (Thompson 1980). The political argument that citizens should be protected at first instance trial from state coercion by interposing fellow citizens between them and conviction and punishment does not obviously entail a subsequent refusal on appeal to re-examine fully the evidential basis of any convictions and the weaknesses of the original process as an exercise in truth-finding. But the institutional imprimatur of the adversarial tradition exerts key influence: there has been a huge historic investment of resources in oral first-instance jury trials but there is what is in Continental terms only a small professional judiciary and a tiny cohort of appeal court judges.

The Court of Appeal has explicitly stressed the importance in dealing with its caseload of the restricted nature of appeals within the adversarial tradition (Ashworth and Redmayne 2010: 373, citing *R v Fortean* [2009] EWCA Crim 437. Not surprisingly, a Court of Appeal struggling to deal with its current workload, finds the prospect of routine rights of appeal that involve re-hearings difficult to countenance. The Justice Select Committee recently recommended that the Law

Commission should review the statutory grounds on which the Court of Appeal may allow appeals and consider legislative reform encouraging the quashing of a conviction where the Court has a serious doubt about the verdict even without fresh evidence or legal argument (Zander 2015).<sup>25</sup> This followed evidence, *inter alia* from leaders of several Innocence Projects, suggesting that all too often the Court of Appeal seemed unable or reluctant to overturn convictions in cases which raised doubts about the fact-finding reliability of first instance jury decisions but where it was difficult to point to new arguments or evidence.<sup>26</sup> The Minister of Justice, Michael Gove rejected this, citing comments made to the Select Committee on the proposals by a former Lord Chief Justice, Lord Judge.<sup>27</sup> That intervention, supported by the current Lord Chief Justice, argued against the proposed changes, not, on this occasion, on the basis of the constitutional primacy of the jury, but because the jury had the 'major advantage' over the Court of Appeal of seeing and hearing the witness and observing the body language.<sup>28</sup> Leaving aside psychological evidence suggesting that this provides little or no advantage in accurate truth-finding (Roberts and Zuckerman 2010: 299-300, Dennis 2013: 682), what is striking is that it is the traditional adversarial reluctance to countenance appeals as re-hearings that seems to limit options for reform.

What also emerges clearly from Lord Judge's intervention is his reluctance to allow the Criminal Cases Review Commission with its more

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<sup>25</sup> The Justice Select Committee report is available online:

<http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/publications/>. Last consulted April 28 2016

<sup>26</sup> The written evidence submitted is available online:

<http://www.parliament.uk/justicecttee>. Last consulted April 28 2016

<sup>27</sup> Letter from Rt Hon Michael Gove MP, Lord Chancellor and Secretary of State for Justice, 30 September 2015, on freedom of information; the Criminal cases Review Commission; and joint enterprise . Available online at

<http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/publications/>

<sup>28</sup> Justice Select Committee Enquiry into Criminal Cases Review Commission, Written Evidence, available online at

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Criminal%20Cases%20Review%20Commission/written/18446.html>

inquisitorial investigative processes to share responsibility for final decision-making on guilt and innocence with the Court of Appeal. An institution that receives 'evidence' outside the traditional context of oral adversarial trial simply cannot be a legitimate fact-finder. All this leaves the system with the fundamental vulnerability with which we started: if first instance decision-making is not based on a balanced contest between contending views – and we have suggested reasons for thinking that this can be a problem even in serious cases – then the system does not have the means to put that right at a later stage. In a system built on the one-shot trial you have only one shot.

### ***The Netherlands***

The title (in English) of the 'programme of improvements' that followed the Schiedam park murder case, 'Reinforcing investigation and prosecution' is telling: with the legislation to improve the revision procedure, refinement and reinforcement of the existing system are exactly what the measures have done. Throughout, the programme embraces the notion of the impartial, quasi-judicial prosecutor (Versterking opsporing en vervolging, 2005, 18–22), emphasizing that the prosecutor must evaluate the police case, not simply ask if there is sufficient evidence to convict. Overall, there is extreme reluctance to contemplate any form of external influence or control. Faith in Dutch criminal justice has been dealt a serious blow, but the system and its professional actors still rely on its most important critical point of trust: it polices itself, internally and hierarchically. This is again apparent in the law reinforcing the position of the investigating judge, making him/her a more efficient internal monitor of the pre-trial investigation.<sup>29</sup> The very idea of external influence in the form of monitoring what actually happens during police interrogations through audio-visual registration and especially through the presence of that pesky outsider, the defence

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<sup>29</sup> See note 14 *infra*.

lawyer, has met with resistance and procrastination. Even after the right of the defence to physically attend police interrogations has been forced on the Netherlands by the European Court, the resulting legislation will restrict what they can do.

The new advisory commission ACAS is an improvement on the original temporary commission, which worked explicitly under the authority of, and through the prosecution service. However, despite calls for a totally independent investigatory commission, or even for an administrative innocence commission that would both investigate and decide on possible miscarriages of justice (Brants and Franken, 2006; Crombag et al, 2009), the Minister has continued to reject the model of the CCRC for England and Wales as being unsuitable for an inquisitorial system. Precisely why is unclear; it is as if a totally independent commission would somehow undermine the authority of the prosecution service and the courts. The Dutch commission, despite the membership of outsiders, is effectively controlled by the PG: he decides its remit by the specificities of his request, has the new investigation opened and decides whether or not to put the case forward to the Supreme Court for revision. However independent he may be, and whatever his professional integrity, he is still part of the system in the same way that the courts are.

It is perhaps what happens at trial that poses the greatest problem, for the courts are constitutionally outside of any external control. Their crucial role as the final evaluator of the gathering of evidence pretrial and of its probative value, is governed by the law and by professional ethics. However, while the miscarriages demonstrate that the rules of evidence cannot prevent tunnel vision and despite enhanced training programmes, courts can still scrape together – and interpret – evidence in order to achieve a conviction. Indeed, the most recent revision case, that of the Breda Six<sup>30</sup> in which the referral court has reconvicted, has all of the hallmarks of this and in that sense closely resembles the case of Lucia de

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<sup>30</sup> Based on the revision decision by the Supreme Court, HR:2012:BW7190 at [www.rechtspraak.nl](http://www.rechtspraak.nl)



Berk (Deug and Stevens, 2015).

Rules of evidence can be changed by the legislature, but that is a lengthy business. At present a project 'Modernising the Code of Criminal Procedure' is ongoing. Critics have pointed to its overwhelming concern with efficiency and with further reinforcing the primacy of pre-trial investigation above the trial. This will reduce the cost, but also the necessity of producing evidence in court and at the same time require more of the defence in the way of prompting the court to investigate (Nan, 2016, 992-993). The latter is already an issue, as the Supreme Court has given numerous decisions which essentially force the defence into a more adversarial role without there being the corresponding party-equality and autonomy that would allow them to fulfil it properly.

## **Conclusion**

Despite the evidence of vulnerabilities in the procedural logic of both the adversarial and inquisitorial traditions, the underlying assumptions remain fundamental to the thinking of the key professional actors. Thus, the default reaction is to reinforce, not reform. In itself, such an approach to addressing what can go wrong may seem coherent in leaving intact the essential nature of the traditional process. But in the Dutch case, that leaves largely untouched the lack of transparency and external control of the established ways of doing things. The system of internal controls, however reinforced, remains vulnerable because it promotes tunnel vision and confirmation bias where it is not accompanied by institutionalized opportunities for dialogue – preferably including an outsider who can bring fresh insights and alternative hypotheses to bear. The obvious choice here is the defence lawyer, but not only does that seem almost impossible for the 'insiders' to contemplate, as yet Dutch lawyers lack the adversarial training that would make their presence effective. In the case of England and Wales, one can also point – in the recent blunt political

and judicial rejection of any significant change to the function of appeals - to a continuing inability to see the one-shot trial as a vulnerability as opposed to a cultural strength. There is also a continuing failure to fully recognise the implications of the structurally inscribed implausibility of anything like equality of investigative arms and the evident defence difficulties in fulfilling the proactive investigative role that classical adversarial truth-finding assumes. So there is evidence in both jurisdictions of culturally conditioned reactions which limit the capacity to think in alternative terms.

But traditional ways of doing things are not immutable: modern criminal justice cultures are shifting things full of borrowings from elsewhere (Colson and Field 2016). Indeed, in both traditions, we see some readjustments that imply applying ideas more normally associated with the other tradition: defence prompting of the court in the inquisitorial tradition and judicial and police truth-finding duties in the adversarial. The analysis above suggests that there are arguments for 'borrowing' from the strengths of the other tradition. But that requires an examination of tensions created within mixed procedural practices by combining elements of both active state truth-finding and dialogue and debate between opposing parties. Otherwise there is a danger that a particular system might be caught between two competing logics without quite operationalizing either or reconciling the tensions between them. If, elements are to be introduced from the other tradition, such as an adversarial role for Dutch lawyers or an inquisitorial role for the English police, this must be done with an informed understanding of what those guarantees require to function properly. That requires comparative understanding not only of procedural rules but the institutions, traditions and formal and informal ways of thinking that shape the way they are applied in practice. This is one bilateral attempt to contribute to that understanding of different legal cultures.

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