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## WRONGFUL CONVICTIONS AND INQUISITORIAL PROCESS: THE CASE OF THE NETHERLANDS

*Chrisje Brants\*†*

### I. INTRODUCTION

Dutch criminal justice professionals, legal scholars, the media, and the public alike have always regarded the party-driven adversarial process and lay participation of American criminal justice as inherently unreliable. It has been said, for example, that Dutch inquisitorial justice produces fewer wrongful convictions than the American adversarial process.<sup>1</sup> A variation on this theme is that it would be best to be judged by an American jury if you are guilty, but that a Dutch court would be preferable if you are innocent.<sup>2</sup> Apparently, rational and professional judges, and appointed and impartial prosecutors in control of the police are regarded as better able to discover the truth and less likely to swallow implausible stories or bend the evidence than a bunch of lay people on a jury, (elected) partisan prosecutors, and autonomous police departments. More importantly, such sweeping statements reflect ingrained legal cultural notions of what proper justice should be. However, is there any truth to such assertions, or is it perhaps more likely that there just seems to be proportionately fewer miscarriages of justice in the Netherlands? I shall examine this issue in Part II of this Article.

Whatever the answer, deeply felt ideas about proper justice can be traced to the basic assumptions that underlie different types of criminal processes. This raises questions about the relationship between such

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1. P.J. VAN KOPPEN & T.M. SCHALKEN, *Rechterlijke Denkpatronen als Walkuilen: Over zes Grote Zaken en Derzelver Bewijs*, in HET MAATSCHAPPELIJK OORDEEL VAN DE STRAFRECHTER. DE WISSELWERKING TUSSEN RECHTER EN SAMENLEVING 85–132 (2004); P.J. VAN KOPPEN, *DE SCHIEDAMMER PARKMOORD: EEN RECHTSPSYCHOLOGISCHE RECONSTRUCTIE* (2003); PETER J. VAN KOPPEN & STEVEN D. PENROD, *The John Wayne and Judge Dee Versions of Justice*, in ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE 347–68 (Peter J. van Koppen & Steven D. Penrod eds. 2003).

2. An opinion recently voiced by a classroom of students taking a course in comparative criminal justice at Utrecht University.

theoretical differences and the proneness of one or the other system to produce wrongful convictions in practice. In other words, what, in theory, can typically go wrong in either system, and why? These questions are the subject of Part III. Part IV deals with Dutch criminal process and its specific vulnerabilities, while Part V provides a description of four major wrongful convictions that have occurred recently in the Netherlands and analyzes why wrongful verdicts were delivered by the courts. Such miscarriages of justice led to a public and political outcry that at one point called the very legitimacy of criminal justice into question. Thus, it should come as no surprise that several measures of improvement have been proposed which are the subject of Part VI.

## II. HOW MANY WRONGFUL CONVICTIONS? A SPURIOUS QUESTION

That it should even be a matter of debate whether the adversarial process generates more wrongful convictions than the inquisitorial is somewhat ridiculous, given that there is no means of knowing how many people are wrongfully convicted in any one country, let alone whether the outcomes of one or the other type of system are inherently less accurate. As Samuel Gross has noted, “[B]y definition we do not know when [false convictions] occur. If we did, innocent defendants would not be convicted in the first place.”<sup>3</sup> Even in the United States, where there is a relatively large body of research on the issue (in the Netherlands there is practically none), widely differing estimates circulate and almost all data concern wrongful convictions for serious offences such as murder and rape. Such estimates range between approximately 2.5% and 10%.<sup>4</sup> That is considerably higher than the 0.5% found by C. Ronald Huff et al. in 1996,<sup>5</sup> a discrepancy possibly caused by the fact that this study covered all felonies and not just rape and homicide.<sup>6</sup>

Like Gross,<sup>7</sup> Dutch forensic psychologist Peter van Koppen has remarked that almost all known wrongful convictions concern cases of homicide or very serious sexual crimes. That same pattern is apparent at the legal clinic of the University of Maastricht in the Netherlands where Van Koppen is involved in the innocence project *Gerede Twijfel*

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3. Samuel R. Gross, *Convicting the Innocent*, ANN. REV. L. SOC. SCI. 175 (2008).

4. *Id.* at 177.

5. C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996).

6. It should be noted that it has been considered methodologically flawed in other areas: Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 906 n.71 (2004).

7. Gross, *supra* note 3, at 179.

(Reasonable Doubt),<sup>8</sup> even though the criteria for admittance to the project certainly do not preclude other, less serious cases. Peter van Koppen concludes that it would be wrong to extrapolate percentages based on wrongful convictions for homicide and rape to other types of crime.<sup>9</sup> This conclusion may well be right, but we should not forget that rape and homicide incur severe penalties and draw a great deal of public attention; therefore, we are more likely to know about these crimes, while those wrongfully convicted for a minor offense are neither interesting from the point of view of the media nor are they likely to make the effort to have the verdict overturned. Indeed, the Criminal Cases Review Commission (CCRC), the official English innocence commission that examines possibly unsafe convictions, uses no criteria as to the type of case it will consider. While serious crimes are in the majority, the CCRC also reviews plenty of less serious offenses.<sup>10</sup>

Looking specifically to the Netherlands, it is clear that wrongful convictions occur and that there have been a number of highly publicized exonerations by the courts in the past decade—all involving murder cases.<sup>11</sup> But it is also clear that there are wrongful convictions in other types of cases too. A 1992 study found that the Dutch Supreme Court received 346 requests for cases to be reopened for revision between 1979 and 1991,<sup>12</sup> of which 71 were successful (21%)—mostly concerning fairly minor (traffic) offenses.<sup>13</sup> The same study also examined 35 so-called “dubious cases” that had not been reopened by the courts but were sent in by lawyers. While some of these cases surely represented wrongful convictions, there is no true way of knowing just

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8. The project *Gerede Twijfel* is a legal clinic staffed by law students and supervised by professors, which undertakes investigations into alleged wrongful convictions. The criteria for the project to consider a case are that it has resulted in a prison sentence of four years or more, or a shorter sentence but with indefinite detention at a state psychiatric facility. See *Project Gerede Twijfel*, UNIVERSITEIT MAASTRICHT, [www.geredetwijfel.nl](http://www.geredetwijfel.nl) (last visited May 15, 2012).

9. PETER VAN KOPPEN, *OVERTUIGEND BEWIJS. INDAMMEN VAN RECHTERLIJKE DWALINGEN* 268 (2011).

10. *About the Criminal Cases Review Commission*, CRIM. CASES REV. COMMISSION, [www.ccr.gov.uk](http://www.ccr.gov.uk) (last visited May 15, 2012). Of the 12,696 cases dealt with by the CCRC between its inception in January 1997 and February 2011, 445 (approximately 2.5%) were referred to the Court of Appeal where 314 of the convictions were quashed as being “unsafe.” It should be noted, however, that an “unsafe conviction” is not necessarily the same as a wrongful conviction, although in most cases it will be; neither does this percentage reflect convictions quashed by the Court of Appeal without intervention by the CCRC.

11. I will discuss these cases in detail *infra*.

12. H.F.M. CROMBAG ET AL., *DUBIEUZE ZAKEN. DE PSYCHOLOGIE VAN STRAFRECHTELIJK BEWIJS* 20 (1992). A similar study by the same authors has also appeared in English. WILLEM A. WAGENAAR, PETER J. VAN KOPPEN & HANS F.M. CROMBAG, *ANCHORED NARRATIVES* (1993).

13. Many defendants had been wrongfully convicted because of administrative errors (often by insurance companies), or because the real culprit had used their personal data; such traffic offences do not attract prison sentences but (automatic) fines. A minority of cases concerned more serious crimes, prison sentences, and mistaken verdicts delivered on the basis of flawed or insufficient evidence.

how many. The dearth of research and the fact that there are no systematic studies from which even remotely reliable estimates could be inferred as to the number or type of wrongful convictions by Dutch courts precludes any knowledge of how many wrongful convictions have occurred.<sup>14</sup> Even more importantly, there has been great reluctance in the Netherlands to admit that the Dutch inquisitorial process could somehow be prone to wrongful convictions, despite increasing evidence that it has systemic weaknesses in practice. General awareness of such weaknesses and their potential consequences is a (very) recent phenomenon indeed. It probably explains not only the lack of research but also that very few cases in which defendants have been wrongly sentenced to lengthy prison sentences (or indefinite detainment in a state psychiatric hospital) have come to light. When the research mentioned above was published in 1992, it was more or less dismissed by practically the entire legal community as unscientific and unconvincing.<sup>15</sup>

Until well into the 1990's, only two serious miscarriages of justice—one in 1923 and one in 1984, both wrongful convictions for murder that ended in exonerations—were generally known. However, in the course of the 1990s, a number of cases were taken up by the media and became *causes célèbres*. Additionally, between 2002 and 2010, five of these cases were reopened, resulting in exonerations. At present, there are at least seven other cases “that won't go away,” if only for the simple reason that they have attracted the attention of journalists and moral crusaders. This still may not seem like a lot, but it should be borne in mind that 16 million inhabitants make the Netherlands a very small country compared to the United States, while both the crime rates and the general incarceration rates are also much lower. Add to this that the academic community, the media, and the justice system itself have only recently come to acknowledge that wrongful convictions not only can, but actually do, occur and are more than isolated incidents. Thus, it could well be that the Dutch inquisitorial system merely appears to produce more accurate outcomes as a percentage of all sentences passed.

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14. One could measure the number of cases that are admitted to a revision procedure by the Supreme Court. However, these tell us next to nothing about wrongful convictions, as most such cases are concerned with inequalities in sentencing, while the statistics make no distinction between the types of issue that led to the revision. Peter van Koppen estimates that the project *Gerede Twijfel* has received about 200 requests since its inception in 2004, but many requests are, quite evidently, not cases of wrongful conviction; some cases are civil or administrative cases, in some cases the convicted person does not deny guilt but feels otherwise wrongly done to, and some cases are simply “people who have difficulty understanding the world,” as Van Koppen puts it. He will not hazard a guess as to how many potentially unsafe convictions the project has seen (personal correspondence with the author by email of 12 March 2011).

15. See, e.g., C.J.M. SCHUYT, *Het Juridische en het Sociaal-Wetenschappelijke Bewijs*, DELIKT EN DELINKWENT 655–61 (1992).

This is the more likely since, as we shall see, even though the criminal justice authorities themselves now admit there is a problem, neither the system nor the available legal remedies make it necessarily easy to discover wrongful convictions and have those wrongfully imprisoned exonerated.

### III. INQUISITORIAL AND ADVERSARIAL PROCESS

If we cannot know how many wrongful convictions have taken place in the Netherlands, any talk of the inquisitorial system being inherently stronger than the adversarial is simply spurious. But it is possible to examine that system in theory to discover whether it has systemic weaknesses and, if so, where. A comparison of the two systems is intended to clarify, for readers from adversarial jurisdictions, the basic features—strengths and weaknesses—of both systems. The emphasis, however, is on the inquisitorial system which, to those schooled in the adversarial way of thought, often seems highly peculiar and, in a direct inversion of what Dutch legal scholars think about American justice, incapable of producing fair verdicts. Nevertheless, it is impossible to properly understand how wrongful convictions occur in inquisitorial process without insight into how and why it is, in theory, a coherent procedural system with interrelated safeguards against miscarriages (as is adversarial procedure).

This piece first compares the ideal-types of both systems. To help explain the internal equilibrium in which guarantees of truth finding and fairness, organizational principles, and authority, procedural roles and rights hang together in an overall structure. In practice, there no longer are procedures totally true to type. Given that almost all modern criminal justice systems combine procedural features of both traditions, it is better to consider them not as being totally adversarial or inquisitorial, but as positioned on a continuum.<sup>16</sup> Indeed, rather than speak of inquisitorial or adversarial systems, it is more accurate to see modern jurisdictions as primarily “shaped by” the inquisitorial or adversarial tradition.<sup>17</sup> It should be noted then that the terms inquisitorial and adversarial, neutrally and in their literal sense, clarify the essential difference between how each system seeks to find the truth: an authoritative investigation and a contest between parties respectively.

What do the terms inquisitorial and adversarial imply? Inquisitorial

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16. For a much fuller discussion, see Chrisje Brants & Stijn Franken, *General Report on Fundamental Rights in Criminal Process for World Conference AIDC, Mexico 2008*, *UTRECHT L. REV.*, 7 (Oct. 2009); CHRISJE BRANTS & ALLARD RINGSNALDA, *ISSUES OF CONVERGENCE: INQUISITORIAL PROSECUTION IN ENGLAND AND WALES?* 17–26 (2011).

17. S.A. FIELD, *Fair Trial and Procedural Tradition in Europe* (2009).

proceedings are associated with the torture, red robes, and pointed hats of an all-powerful, faceless Inquisition bent on establishing truth by all available means. Adversarial procedure has much less terrible connotations of medieval folk-gatherings under sacred oaks, communal decision making and solving disputes voluntarily before the elders of the tribe.<sup>18</sup> Neither of these images, although reflecting a rather skewed truth about history, says much about criminal process in the past and nothing about the present. But, they do still give rise to stereotypical misinterpretations of unfamiliar procedure and to prejudiced notions about what type of procedure is best. The different procedural rituals that underlie such caricatures of folk memory have indeed left recognizable traces in the legal cultures and criminal justice systems of today.<sup>19</sup>

Thus, it is not unusual to hear Americans describe the inquisitorial process as one in which the defendant is presumed guilty until he proves his innocence, although the presumption of innocence underlies all modern democratic criminal process. The burden of proof lies just as squarely on the inquisitorial prosecutor as on his adversarial counterpart. On the other hand, Dutch legal scholars, as we have seen, are sometimes convinced that the adversarial process, by definition, involves an ignorant jury and biased prosecution and police, and is, therefore, if not incapable of, seriously handicapped in establishing the truth in criminal matters. Yet, adversarial and inquisitorial criminal procedures are both geared to determining the truth and, moreover, to doing so in a fair manner that protects individual rights and interests. While neither system lays claim to the absolute truth, each seeks to establish a version of events that can be regarded as the relevant truth—acceptable and legitimate for all concerned and for society in general. Legitimate truth requires that it be established fairly, while procedural fairness is in itself a guarantee, albeit not an absolute one, that the truth will be found. This relationship between truth-finding and fair trial applies to both traditions. Where they differ fundamentally is in their concepts of truth and of the ideal way to find it. This dictates the type of necessary procedural guarantees and, in turn, is related to the civil and common law roots of the respective procedural models.

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18. NICO JÖRG, STEWART FIELD & CHRISJE BRANTS, *Are Inquisitorial and Adversarial Systems Converging?*, in *CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY* 42 (Phil Fennell, Christopher Harding, Nico Jörg & Bert Swart eds. 1995).

19. Adversarial systems are mostly found in the common law countries where the law has its origins in English common law (therefore: England and Wales, the United States and all of the countries once colonized by the British). Inquisitorial systems are found predominantly in the civil law countries of continental Europe and the countries once colonized by them.

### A. Inquisitorial Process

Modern inquisitorial process shares with its ancient predecessor an emphasis on pre-trial investigation by powerful authorities as a means of truth-finding. However, the modern version is rooted in 18<sup>th</sup> century civil law traditions reflecting a concept of political society in which the state is considered fundamental to the rational realization of the “common good.” Because of the immensely intrusive powers needed for this task, the state is regarded with some suspicion because those powers represent a continuous threat to the liberty of the individual. Yet, it is expected to promote and safeguard individual liberty precisely because liberty is seen as transcending individual interests and as an essential part of the common good itself. In order to resolve this paradox, the exercise of state power is curtailed by written rules of law that also protect individual rights and freedoms (this is the original meaning of the European continental concept of *Rechtstaat*) and by the division of power within the state (*trias politica*). This calls for judicial scrutiny of executive action on the basis of written law and hierarchical monitoring and control within the executive itself.<sup>20</sup> Consequently, only the written law can give the executive the power to infringe individual rights in the course of a criminal investigation; without such legally conferred powers, executive officials can do nothing.

This political ideology is reflected in procedural and organizational arrangements. The assumptions of the civil law tradition imply that the state is best entrusted with truth-finding, but subject to written laws, judicial scrutiny of the executive, and internal hierarchical monitoring and control. These are the basic characteristics of modern inquisitorial procedure. The police, subordinate to the public prosecutor and the prosecutor himself (and sometimes, depending on the jurisdiction, an investigating judge), take the first but determinative steps towards establishing the truth. Logically, the final aim is to discover the substantive truth because anything less would be to overlook *a priori* the fundamental role of the state—guarding and promoting society’s interests in crime control and in individual rights and freedoms (including those of the defendant).<sup>21</sup> In this context, finding the substantive truth implies a

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20. For the classic description of the features of inquisitorial process that distinguish it from the adversarial in relation to the state, see M. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986); and for the specific features of Dutch criminal procedure in relation to its legal cultural tradition: C.H. BRANTS, *Legal Culture and Legal Transplants*, in *NETHERLANDS REPORTS TO THE EIGHTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW*, WASHINGTON 2010, at 1–92 (J.H.M. van Erp & L.P.W. van Vliet, eds. 2010).

21. This double duty imposed on the state is probably why Packer’s dichotomy due process-crime control never seems to work very well when applied to inquisitorial systems: HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

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.

What happens at trial is predominantly determined by the trial “dossier” compiled by the prosecution. During its compilation, the defense may point the prosecutor towards avenues of investigation favorable to the defendant and the prosecutor has a duty to investigate them, but once the case comes to court, the defense role is purely reactive—an attempt to cast doubt on the prosecution’s case, among other things, by prompting the judge to ask the relevant questions. The trial judge has an actively investigative function, although the central role of the dossier means that there is already one version of the truth on paper that guides the investigation by the court. In inquisitorial systems, the emphasis is, therefore, very much on pre-trial procedure. It is not a theoretical necessity that all evidence is produced in court, given that incriminating and exculpatory evidence is already contained in the dossier, including transcripts of witness statements.

Guarantees that the final decision can be accepted as the substantive truth lie in the prosecutor’s, or investigating magistrate’s, non-partisan role of representing and guarding all interests involved and in the prosecutor’s control over the police. Other guarantees also flow from the notion that the truth is best found through investigation by the state: the role of the defense in pointing to factual and legal deficiencies in the prosecution case and the limited, attendant rights necessary for this, the active involvement of the judges in the truth-finding process at trial and their duty to give reasoned decisions, and appeal on the facts—a full re-trial before a higher court—as a form of internal judicial control. In the inquisitorial tradition, the legitimacy of criminal justice and the fate of the defendant depend to a large extent on the integrity of state officials and their visible commitment to non-partisan truth finding. What this system needs to work fairly is a good, i.e. non-partisan, prosecutor and an impartial judge willing to verify, actively and critically, the accuracy of the prosecutor’s case.

### *B. Adversarial Process*

By contrast, the benevolent state that acts in the common good is very much less in evidence in the common law tradition. Indeed, neither the concept of the state nor of the common good exists in the same way. The public interest in criminal justice is primarily defined as an interest in crime control and security with which the authorities are entrusted for so long as they happen to be democratically in power. Next to, and separate from, this shared interest in peace and security, individuals

define their relationship to the state in terms of the rule of law: as a set of concrete rights and freedoms from particular forms of state intrusion, which they themselves can assert. Law is not given by statute, it simply “is”—law of and for the people, containing fundamental freedoms to be invoked against state intrusion that are self-evident, attach to individuals as of right (although they may be embodied in a Bill of Rights), and will be “found” through interpretation by the courts.

These notions of individual autonomy form the basis of adversarial process. They also reflect a fundamental distrust in an all too powerful state, which is further displayed in the separation of investigative powers from those of prosecution. In civil law states, hierarchical monitoring (such as the prosecutor’s control over the police investigation) is premised on the notion of a strong and organic executive arm of the state. Under the common law, executive organs of criminal justice do not monitor each other. Rather, they exist in a state of co-ordinate authority. Adversarial prosecutors do not control the investigation—other than that they can refuse to prosecute a weak case or one where illegalities have occurred—and cannot tell the police what to do.

The emphasis is on crime control and establishing guilt on the one hand (first during the police investigation and then at trial by the prosecution, acting for the people) and on individual participation and the capacity to assert one’s rights directly on the other (the defendant and his lawyer). Consequently, adversarial criminal process is conceived of as a struggle between parties in which the individual defendant fights his own corner. In the clash of opinions between prosecution and defense about “what happened,” the truth, it is assumed, will eventually emerge. That is possible only if each party has equal rights and uses them to try to establish their own version of events through pre-trial investigation and the presentation of evidence supporting that version at trial. An essential feature of adversarial trials is that they do not take place on the basis of a dossier compiled by state officials and reflecting all aspects of the case.

What happens in court is not verification of the prosecutor’s—essentially one-sided—case by the judge but the two-sided presentation of evidence and attempts by each party to falsify the other’s case in the presence of an impartial tribunal of fact. This logically means a tribunal not predisposed to a particular verdict through prior knowledge of the case, as well as not being biased in any other way. In such systems, the emphasis lies in the trial, which is, of necessity, highly oral and “immediate,” given that adversarial debate requires all evidence to be produced in open court. Contrary to inquisitorial procedure, where witnesses and experts are called as the court sees fit and examined by the judge on the basis of what is already on the table in the dossier, in

adversarial trials each party examines the other's witnesses and their own, produces their own experts, and searches for and leads their own evidence in an attempt to establish that theirs is an equally, if not more compelling, version of events. The tribunal of fact is there to listen and to decide, and the judge makes sure the contest takes place according to the rules. Neither the tribunal nor the judge are actively involved in the process of truth-finding: that is the responsibility of the parties.

Here, a formal concept of truth prevails, which also implies that parties may avoid the uncertainty of trial by agreeing it. So long as the tribunal is convinced or parties agree, and so long as the outcome has been reached through following correct procedure, whatever emerges as the "truth" in the course of proceedings can be accepted as such. For this partisan-based system to work, equality of arms between prosecution and defense is a must. The defendant not only needs investigative, confrontation, and presentation rights on an equal footing with the prosecution. The defense also must use the information and resources they have, use their investigative and adversarial presentation skills, and be able to assist the client at every point in the process. The partisan contest that is characteristic of adversarial process provides no safety net. Pre-trial investigation by the police aims to find evidence to support the prosecution case, not to establish facts that would aid the defense.<sup>22</sup> At trial, the judge will not come to the defendant's aid to assert his rights for him or take over the lawyer's role. Also, there is usually no second chance, no appeal on facts that could have been put forward but weren't because the defense investigation failed to unearth them or chose not to lead evidence although it was available. In other words, what the defendant needs more than anything else in adversarial process, is a good lawyer.

### *C. Systemic Weaknesses*

Both of these systems work, and in the overwhelming majority of cases, they produce legitimate and acceptable results. But the features outlined above, which are, in theory, the great respective strengths of the inquisitorial and adversarial traditions, are also their great weaknesses. It is through those weaknesses that criminal justice systems become vulnerable to delivering wrongful convictions. Superficially, errors often seem the same, or, at least, very similar. In a comparative study

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22. Although the adversarial prosecutor is also expected to be impartial, unlike in inquisitorial procedure this notion of impartiality implies no duty to investigate a suspect's innocence, only to ensure and present sufficient evidence of his guilt honestly and without bias.

outlining the situation in many different countries,<sup>23</sup> inadequate defense, wrongful or incorrect interpretations of witness testimony or expert evidence, overambitious police or prosecutors, pressure from the media, investigations that concentrate on one obvious (but wrong) suspect, confirmation bias, group-processes among adjudicators of fact, and false confessions appear as contributing factors in almost every country, regardless of the legal system.

On closer examination, there are great differences in how such mistakes happen, how they enter the system, and the potential guarantees that prevent them from becoming disastrous. In other words, in their interrelated systemic characteristics, systems are vulnerable at different points. In the final event, the vulnerability of both systems can be traced to basic assumptions about the best way to reach accurate verdicts: the integrity of state officials in their non-partisan search for the truth on the one hand, party autonomy, equality, and equality in adversarial debate according to procedural rules on the other. Where these fail at any point in the process, a chain reaction can be set in motion leading inexorably to a wrongful conviction. That is why we must understand both the systemic strengths and weaknesses of a system before we can identify the causes (and potential remedies) of wrongful convictions.

That a defendant is in control of his own situation in the adversarial system, rather than being primarily dependent on the integrity and competence of the police, prosecutor, and judge as in the inquisitorial system, is not only the logical consequence of the individualist political–legal culture in which adversarial trials take place, but is also perhaps more preferable in terms of intrinsic rights of self-determination and even psychologically in terms of feeling less helpless. And certainly, from a scientific point of view, the presentation of and attempt to falsify two versions of events is surely a better way of arriving at the “truth” than verification of the prosecutor’s version by the judge—however many limited opportunities the defense may have had to influence that version in the dossier pre-trial. At the same time, the ability of the defendant to prepare and present his own complete and convincing case depends entirely on equality of arms between defense and prosecution, and on an informed and capable defense lawyer with access to his client at all points in the procedure. While, in theory, this should be the case, the reality is quite different.

The same applies to expert witnesses and witnesses in general. The logic behind placing no restrictions on either party in introducing expert

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23. *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* (C. Ronald Huff & Martin Killias eds. 2008).

testimony (other than those which guarantee that the expert actually knows what he is talking about) is obvious in the adversarial setting, but it is precisely this that can be a factor in a wrongful conviction. Not only are there the actual handicaps under which defense lawyers operate when it comes to finding, and paying for, experts of the stature that the prosecution may present, there is a real risk that the partisan nature of expert testimony will induce experts to identify with the party for whom they are testifying rather than present balanced considerations founded on their own expertise. As for witnesses, the whole idea of partisan contest is one which, however compelling in the theory of truth finding, in practice may all too easily lead the prosecution to ignore the spurious motives and, therefore, the potential unreliability of witnesses in the overpowering desire to win. (The use of jailhouse snitch testimony is a case in point.) Again, though, the almost unlimited right to call and (cross) examine witnesses is a great strength of the adversarial system, at the same time it bears the seeds of its own potential for error.

A final example is the instrument of plea-bargaining, which is in widespread use in all adversarial systems. A logical consequence of adversarial procedure is the acceptance of a version of events as the "truth," or at least the relevant outcome of a trial, because it has been agreed between parties. There is much to be said for avoiding a distressing and costly contest where none is necessary. But despite the guarantees that adversarial procedures have in place to protect the defendant and ensure informed consent, all of the literature on plea-bargaining points to the very real danger of the innocent defendant pleading guilty. This risk is exacerbated in states that have the death penalty or mandatory life sentences.

In the inquisitorial system, partisanship when applied to anyone else but the defense lawyer is a dirty word. There are, in theory, no parties and, thus, no witnesses or experts for the prosecution or the defense. Instead, there are merely witnesses, and experts are not regarded as witnesses but are simply experts appointed by the court, often from state laboratories or forensic institutions. Appointment by the court has the great advantage of releasing an expert from any unconscious obligation they may feel towards the party they are assisting. The main danger here is not that they are inherently partisan, although that is always possible, but that precisely because they are regarded (and regard themselves) as non-partisan professionals, a court may place too great a reliance on their findings without there being an automatic response from an expert from the other side to contradict them.

While there are differences in different inquisitorial jurisdictions, they all share the need to trust the integrity of the representatives of state institutions and, logically, a great and almost unquestioning faith that the

legal guarantees of the system at each stage in the process will prevent the state, in whatever guise, from going off the rails. Without such faith, the very basis of the system would be called into question. Paradoxically, this is precisely one of the strengths of inquisitorial justice: one can feel secure in the hands of a prosecutor, expert, or judge, from a legal culture where integrity and non-partisanship are expected and continually reinforced by training and experience.<sup>24</sup> That may be preferable to being forced to place one's fate in the hands of a lawyer who may or may not do a good job, depending, among other things, on how much he is paid. But again, in strength there is weakness.

The relative paucity of the scope of rights available to the defense is directly proportionate to the defense role of "looking over the prosecutor's shoulder"—making sure the prosecution does not lose sight of the defendant's interests. But the proportion is derived from the theoretical understanding of the ideal role of other participants in the procedure, not from what may actually happen in practice. If the faith in the ability of those participants to contribute to fair truth-finding is, for any reason, misplaced, the defense lawyer may be empty handed in terms of defense rights to challenge the prosecution case on issues, or at a point in the procedure, where it could make a difference.

#### IV. DUTCH CRIMINAL PROCESS

While no system fits its ideal type entirely, it is nevertheless fair to say that Dutch criminal process is decidedly at the inquisitorial end of the continuum compared to most other European criminal justice systems. (Just as American process lies at the adversarial end, more so than, for example English process.) The Netherlands is, moreover, one of the very few continental European countries without any involvement of the lay public. Where most other jurisdictions have some form of jury or mixed panel, the Dutch consider criminal justice a matter primarily requiring the considered and distanced judgment of state-employed legal professionals and, therefore, place considerable faith in their ability to bring a criminal investigation and trial to a truthful conclusion. While it is impossible to describe Dutch criminal process in detail, the following is a short summary of its most salient features.<sup>25</sup>

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24. Where adversarial prosecutors are partisan advocates and trained as such, the demands on the inquisitorial prosecutor require that he take quasi-judicial decisions, and training in inquisitorial systems takes place in the context of a career judiciary, of which, in many countries, prosecutors form part.

25. For a much more detailed account though still a summary, (on which this Part is based), see CHRISJE BRANTS, *The Vulnerability of Dutch Criminal Procedure to Wrongful Conviction*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 157–82 (C. Ronald Huff & Martin Killias eds. 2008).

*A. The Professionals*

Pre-trial investigation in the Netherlands is conducted almost exclusively by the police who may use only the powers granted by the Police Act and Code of Criminal Procedure. The police may arrest and interrogate persons against whom there exists a reasonable suspicion that they committed an offense and may hold suspects for a maximum of 15 hours before involving the prosecutor. Detention can last for 3 days and, in cases of urgent necessity, up to 6 days. After the original 15 hours has elapsed, custody must be ordered by the prosecutor, after which the judge of instruction (10 days), and then the court (90 days) may order further detention.<sup>26</sup> During all this time, the suspect may be questioned by the police in the context of the prosecutor's investigation. The police also have a number of intrusive investigative powers, the use of almost all of which requires the prosecutor's permission. In general, the police are answerable to the Prosecution Service (and internally, to their superior officers) and it is the prosecutor who, is responsible for the investigation and may, therefore, also issue instructions to the police. That the police investigate all aspects of the case impartially is not literally required by law, but is a professional criterion deriving from the relationship between police and prosecutor—thus from an assumption of non-partisan prosecution.

The Public Prosecution Service is a hierarchical organization, headed by a council of five so-called procurators-general (PG's). The council can issue binding instructions to both the police and the prosecutors at the 19 district courts and five appeal courts (where they are called advocates-general—AG's) and at the national prosecution department that deals with such matters as organized crime and terrorism. The minister of justice is accountable to Parliament for the actions of the prosecution service. Dutch public prosecutors are civil servants, trained after law school in the same way as judges: a five year theoretical and practical training course where, half way through, trainees opt either for the judiciary or the prosecution service. Constitutionally, the Public Prosecution Service is both part of the civil service and of the judiciary. Prosecutors are expected to adopt a quasi-judicial stance in their most important tasks, which are controlling and monitoring pre-trial investigation by the police; compiling a trial dossier of all relevant steps in the investigation and all relevant evidence, against and for the

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26. Thus, the court case must begin, even if only formally, after 100 days. If the prosecutor is not ready, he must nevertheless make sure he subpoenas the defendant to appear and grants the defense full access to the dossier, at the latest 10 days before the first court appearance. He may then ask the court to set another date for continuing the trial to give more time to complete the investigation. There is a possibility of bail, but it is never used. As a consequence, suspects may spend considerable time in pre-trial detention before their case is heard in full by the court.

defendant; and presenting the case at trial. This non-partisan role is safeguarded not only by training, but also by a hierarchical system of monitoring and control—both of the police and within the prosecution service. Disclosure ensures that the defense can play a role in shaping the dossier that is eventually presented to the court. The final safeguard is active scrutiny of the pre-trial investigation and the evidence by the judge, if necessary prompted by the defense.

Originally, a non-partisan investigation was thought to be best safeguarded at the pre-trial stage by an investigating magistrate, of whom each court has several appointed on a rote basis. However, the magistrates' investigative role has been reduced over the years, and now their main task is authorizing telephone taps and bugs, and interviewing, under oath, witnesses the defense wants to challenge but who will not be called in court. Dutch trial judges sit alone in minor cases, sit in panels of three in more serious cases, and in panels of five in the appellate courts. There is no jury in any case, criminal or otherwise. The defense and prosecution have the right to appeal to one of the five appellate courts, which will conduct a full retrial. The judiciary is a state institution where appointment for life, a (very) good salary, and the absence of government involvement in day-to-day matters serve to guarantee independence. Impartiality is part of the professional ethic: judges are fully acquainted with the dossier before trial, but are expected (and trained) to keep an open mind as to guilt or innocence.

Every defendant in a criminal case has the right to be represented by a lawyer. If he cannot afford one, the defendant will be assigned an attorney. However, adults have no right to have the lawyer present during interrogations by the police.<sup>27</sup> Most criminal defense lawyers take assigned cases, which pay substantially less, as a matter of course. Criminal defense lawyers' role in criminal procedure is to represent the interests of the defendant and, pre-trial, they monitor the compilation of the dossier (not only as to the nature of the evidence but also the legality of police methods used to obtain it) pointing the prosecutor towards certain avenues of investigation. In court, defense attorneys attempt to weaken the prosecution case and direct the judge towards evidence favorable to the defense. Dutch lawyers have no powers of investigation (to approach and interview potential witnesses is regarded as tampering with the evidence) and cannot call witnesses or experts themselves. The lawyers are dependent on the prosecutor's willingness to grant a request that a witness be heard and, in the final instance, on the court that can overrule or uphold the prosecution's refusal to accede to a defense

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27. This is currently a hot issue following recent rulings by the European Court of Human Rights. *See infra*, Part VI.C (describing the changes that are taking place as a result).

request.<sup>28</sup> Experts are appointed by the court and do not appear as partisan witnesses.

### *B. The Limited Role of Debate at Trial*

Dutch trials are exceedingly short compared to adversarial procedures because they are document-based and debate in court is very limited. With only professional participants, there is little need to elaborate legal details that are understood by all, while the evidence will have been systematically added to the dossier beforehand—including most witness statements. The role of the judge as investigator of fact precludes the necessity of cross-examination. Although the Dutch Code of Criminal Procedure seems to place trial in open court at the center of proceedings and requires that all witnesses appear, pre-trial investigation is the focus of truth-finding, and the use of hearsay testimony is widespread. Threatened or vulnerable witnesses (e.g. children, rape victims, police informers) are not often called at trial and are more usually heard under oath by the investigating magistrate in chambers. Also, threatened witnesses have their identity kept from both court and defense with only limited opportunities for the lawyer—though not the defendant—to be present or submit (written) questions. The investigating magistrate then provides a written report to the court, and evidence given to him is regarded as evidence given to the trial court.

These procedures were introduced after the European Court of Human Rights gave a number of judgments against the Netherlands in which convictions had been based on unchallenged or anonymous testimony.<sup>29</sup> While a poor substitute for hearing witnesses at trial, such procedures are consistent with the ideology upon which Dutch procedure in general is based. More important than the “principle of immediacy” that requires evidence to be presented at trial is that of “internal transparency.” All participants must be acquainted with the facts of the case as represented in the dossier on an equal footing so that there can be no conviction on evidence not known to the defense. However, the right of the defense to examine the complete dossier becomes absolute only ten days before trial and can be curtailed before that “in the interests of the investigation.” The assumption is, thus, that the prosecutor will, in his non-partisan role, have included everything that is relevant and will have looked into all aspects of the case before

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28. The lawyer can also physically bring witnesses to court, by-passing the necessity to have them subpoenaed by the prosecutor. Even so, the defense must still convince the trial judge why it is relevant that they should testify.

29. Eur. Ct. H.R. 1997, App. No. 21363/93, Eur. Ct. H.R. (Van Mechelen v. The Netherlands) (Neth.); Eur. Ct. H.R. 1989, App. No. 11454/85 (Kostovski v. The Netherlands) (Neth.).

the trial starts. Internal transparency is also a guarantee that the court will not base its decision on incomplete evidence. That is, the prosecutor and defense counsel cannot agree to leave some things unsaid, effectively ruling out charge bargaining. In the final event, the court must arrive at the substantive truth so that a full trial must always take place, even if the defendant has pled guilty.

The defense may challenge the accuracy of the prosecution case and request additions to the dossier or the hearing of new witnesses at trial. Such requests must be addressed to the prosecutor first. However, the active role of the court means that, within the criteria of the law, it has the final decision on which witnesses are to be heard; on whether the dossier is complete and relevant, or whether documents should be added to it or may be left out; and on whether expert opinion may be challenged by the introduction of other experts. In short, the court decides whether it considers itself to be in possession of all relevant facts. It is also the court that conducts the first and fullest questioning of witnesses. The defendant (never considered a witness in his own case and therefore never under oath) may speak in his own defense and always has the last word, but only if he so wishes. Dutch trials are essentially a debate on the relative weight to be given to the several pieces of evidence that the state has gathered in its non-partisan search for the truth.

### *C. Guarantees Against Miscarriages of Justice*

In essence, Dutch criminal process relies almost exclusively on the non-partisan gathering of evidence by the prosecutor; his control of the police and their professionalism in conducting a non-partisan investigation without illegalities; the ability of the defense lawyer to “assist” in the compilation of the dossier, which is in turn dependent on the non-partisan professional attitude of the prosecutor; and on the impartiality and professional truth-finding activities of the court at trial. In short, the integrity of the system and its ability to police itself are the guarantees for fair procedures and accurate outcomes.<sup>30</sup> This is bolstered by professional ethics internalized during training, and by hierarchical and judicial monitoring and control, that reinforce written rules of law geared towards ensuring fair and substantive truth-finding both pre-trial and at trial.

Such pre-trial rules are primarily concerned with granting (and limiting) police, prosecutorial, and judicial powers to employ certain investigative methods and to arrest, detain, and interrogate suspects. The

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30. JÖRG, FIELD & BRANTS, *supra* note 18.

Code of Criminal Procedure<sup>31</sup> also gives certain pre-trial rights to the suspect. Under its provisions, a suspect has the right to access the prosecution evidence and to the assistance of a lawyer of the suspect's choosing or provided by the state. The Code provides for lawyer-client contact and confidentiality for suspects in detention. If a pre-trial judicial investigation has been opened by the judge of instruction, the lawyer may be present when the suspect is interrogated by the judge. As there is no mention of any such right with regard to the police, this has always been interpreted to mean that, *a contrario*, the suspect has no right to have a lawyer present during police interrogations. This is accepted as established legal doctrine.<sup>32</sup> Furthermore, undue pressure against the suspect is forbidden and a caution by the interrogator that he has the right to remain silent is prescribed. But, given the emphasis on substantive truth-finding by the state and the fact that pre-trial-rights could be used to hinder the investigation, the provisions granting these rights also have a second paragraph: "[U]nless in the opinion of the judge of instruction (or prosecutor, as the case may be) the interests of the investigation make the exercise of right X undesirable" (or some such formulation).<sup>33</sup>

At trial, the defense's role is secondary to the prosecution, while both are subordinate to the authority and truth-finding activities of the court. That, in its turn, is bound by elaborate rules of evidence. Dutch courts are not free in the evidence they may consider. There are rules on how courts may use evidence to construe guilt. Further, courts are constrained in regards to the weight they may attach to different sorts of evidence and in regards to the relationship between the evidence and the court's decision that the defendant is guilty. The Code of Criminal Procedure contains a limitative list of what may be legally regarded as evidence: the court's own observations during trial; statements by the defendant (including confessions); witness statements; other statements

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31. The 1926 Code replaced Napoleonic legislation introduced during the French occupation of the Netherlands between 1810 and 1813, although any revolutionary "foreign" ideas such as legal assistance and jury trial were abolished as soon as the occupying armies left. On the lasting influence of Napoleon, see C.H. BRANTS, *Legal Culture and Legal Transplants*, in NETHERLANDS REPORTS TO THE EIGHTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, WASHINGTON 2010, at 1-92 (J.H.M. van Erp & L.P.W. van Vliet, eds. 2010). On the situation in the 19th and early 20th Century, see TARU SPRONKEN, VERDEDIGING: EEN ONDERZOEK NAAR DE NORMERING VAN HAT OPTREDEN VAN ADVOCATEN IN STRAFZAKEN [DEFENSE: A STUDY ON THE STANDARDIZATION OF THE ACTIONS OF ATTORNEYS IN CRIMINAL CASES] 9-18 (2001).

32. See, e.g., HR 21 May 1985, NJ 1986, 26.

33. The only exception is the suspect who is to be further detained (by the prosecutor) and who has the right to have a lawyer present at the detention hearing. The Dutch Bar has a system of duty lawyers to assist such suspects. However, even suspects detained by the judge of instruction or the court until the trial begins can be subject to denial or restriction of access to their lawyer "in the interests of the investigation."

or written documents, such as reports by experts); and official written statements by investigating officers.<sup>34</sup> With the exception of the latter (in so far as they do not in fact amount to the hearsay testimony of a single witness or the defendant), evidence requires other evidence as corroboration. A conviction may not rest on the statement of a defendant alone, on that of a single witness, or on anonymous testimony.

Moreover, even if the court has sufficient evidence of the proper sort, it may not convict unless that evidence has convinced the court of guilt “beyond reasonable doubt.”<sup>35</sup> If this causal requirement is not met, *in dubio pro reo* prevails. An extra safeguard requires the court to give a reasoned decision setting out the (legal) evidence by which it has been convinced. Both the defendant and the prosecutor have the right to appeal following the decision in first instance. The appeal court’s decision on the facts is final, although another avenue of appeal on points of law to the Supreme Court may be open (known as “cassation”).

Given that even the most secure of evidentiary rules and the most professional of courts in two instances may still leave room for mistakes, there is also a revision procedure. The Supreme Court may order a case reopened (and, if necessary, retried) if new evidence casts doubt on the original decision. Either a convicted person or the prosecutor at the Supreme Court (also called advocate-general) can request revision. The procedure is designed to prevent the Supreme Court from becoming a court of third (factual) instance, by requiring that the Supreme Court establish, first, the existence of new evidence not known at the time to the original court (a so-called *novum*). If established, the court must find that such evidence, had it been known at the time, would have led the court that gave the final verdict on the facts to acquit. If the Supreme Court so finds, the case is referred to one of the appeal courts for a full retrial (but never to the court that originally gave the final verdict on the facts). Obviously, if another person has been convicted by another court for the same offense, this constitutes a typical *novum*, and this scenario is specifically provided for in the Code of Criminal Procedure. In many other cases, however, “new evidence” is strictly interpreted so that the requirement that the Supreme Court in effect second guess the original decision—and, therefore, also the decision that the referral court will reach on retrial—may prevent a case

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34. Such reports may contain first hand evidence based on the officer’s own experience—for example that he found drugs in the defendant’s possession—but also may be the transcript (not verbatim) of an interrogation of a witness, i.e. hearsay.

35. This is known as a negative system of proof: the court may not convict without sufficient legal evidence even if it is convinced of guilt, but may also not convict if there is sufficient evidence but it is not convinced.

from reaching review.

### *B. Vulnerabilities*

Although Dutch criminal justice lacks the safeguards found in adversarial process (and, indeed, in a number of inquisitorial jurisdictions that lie further towards the adversarial on our theoretical continuum), it is nevertheless an entirely coherent procedural system. Its safeguards are the integrity of the state institutions concerned, the cumulative monitoring and scrutiny that take place throughout the process, and the capacity of law and legal–ethical culture to ensure that each professional participant functions as required. If these guarantees work as intended, the system needs no external safeguards such as autonomous defense rights. However, just as adversarial process is based on the myth that adversarial debate between equal autonomous parties will produce the “truth,” so long as procedural rules are followed, so too is Dutch inquisitorial process based on a myth of justified confidence in a system of state-controlled state investigation and the small professional elite through which it operates. The problem is that, in real life, parties in a criminal trial are seldom equal in a material sense and procedural rules do not always produce the truth. Likewise, the supreme confidence the Dutch place in their self-controlling system of criminal justice is no longer justified, if indeed, it ever was.

That confidence has historical and socio-political roots,<sup>36</sup> and it may be that the system originally functioned very well. In any event, there were few signs of public or legal–professional dissatisfaction (or of wrongful convictions) until about the 1980’s. The last two decades of the 20th century brought increasing public criticism of the criminal justice authorities, fear of crime, and general feelings of insecurity. This led to demands for more and better crime control. It was said that criminals were treated too leniently, that due process rights were abused in criminal procedure, that the police and prosecution service were making too many mistakes, that the courts were too slow, and that the process was too bureaucratic. Although Dutch legal culture traditionally regards public opinion as irrational and emotional and, therefore, as unwarranted interference in the due process of rational justice, these developments have rendered the whole criminal justice system highly sensitive to critical media coverage and demands for results that are perceived as assaults on its legitimacy.

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36. See C.H. BRANTS, *Legal Culture and Legal Transplants*, in NETHERLANDS REPORTS TO THE EIGHTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, WASHINGTON 2010, at 1–92 (J.H.M. van Erp & L.P.W. van Vliet, eds. 2010).

The response has been new legislation to increase both the efficiency of pre-trial investigation and court procedure and the number of trials that end in convictions. The result has been an erosion of the traditional safeguards against wrongful convictions that the inquisitorial system relies. This has affected the practical commitment of the police and the prosecution service to non-partisanship and the legal requirements that ensure that courts convict only on the basis of reliable and corroborated evidence and commit their reasoning for the conviction to paper. The powers of the prosecutor have increased dramatically. On the other hand, the powers of the investigative magistrate (intended as an extra and impartial safeguard in criminal investigation) have been reduced. Similarly, defense rights have been curtailed, most especially concerning disclosure of the dossier before the 10 day limit, the right to have witnesses called, and the right to full retrial. For instance, in the interests of efficiency, appeal courts may, and under certain circumstances do, rely on evidence and witnesses originally produced without re-examining them.

Consequently, what always was a process of verification of an essentially one-sided investigation has become even more one-sided. Changes to the procedural rules on how the court goes about its verification of the case make it more difficult for the defense to suggest alternative interpretations of the evidence. Case law increasingly requires the defense to show substantial reasons why the court should doubt the accuracy of the dossier or the legality or reliability of the evidence it contains. The defense in an inquisitorial system, however, does not have the defense rights or adversarial means and skills. Most importantly, the defense in an inquisitorial system does not conduct its own pre-trial investigation. Therefore, it is difficult to challenge the prosecutor's version of events, especially if rights to access the dossier are restricted. This is exacerbated by the nature of inquisitorial investigation. It places a search for the substantive truth above all other considerations, especially in pre-trial process. Thus, when the most important steps in the compilation of the dossier—and the prosecutor's version of the truth—take place, the defense has fewest opportunities to intervene.

All through the investigative process, there are stages at which the prosecutor, investigating judge, trial court, and appeal court, are expected to scrutinize the conduct and results of the previous phase. The goal is to ensure that all avenues of investigation have been explored, including alternative scenarios that could point to innocence rather than guilt. The great theoretical strength of this system is that the cumulative nature of such hierarchical and judicial controls, combined with the rules of evidence and the possibilities of retrial and review, make it

possible to catch and correct mistakes. At the same time, the cumulative nature of both investigation and hierarchical and judicial supervision are also great weaknesses. In practice, these weaknesses can allow errors to accumulate so that even the final safeguards, appeal and review, fail in a chain reaction of misguided actions and decisions. Mistakes at the level of the police investigation may, therefore, run all the way through the system until the appeal court adds its own wrongful verdict to the process, the Supreme Court refuses to admit a request for review, or the referral court finds the innocent defendant guilty once again.

#### V. CASES OF SYSTEMIC FAILURE: FOUR MAJOR WRONGFUL CONVICTIONS

This Part now looks at the four most serious miscarriages of justice that have occurred in the Netherlands in recent memory. These cases, three of which came after the defendants made false confessions to the police, shook the legal establishment to the core, although not immediately; the first was dismissed as an unfortunate “incident.”

##### *A. Murder in Putten*<sup>37</sup>

Putten is a village in the east of the Netherlands with a predominantly protestant-religious population. In January 1994, a grandmother came home and found the body of her granddaughter who had been raped and strangled. A month later, four men were arrested on the basis of eyewitness testimony that their car had been seen in the vicinity of the house. The men gave conflicting statements on their whereabouts on the afternoon of the murder. During the interrogations that followed, two of the men stated that they had seen the others go to the house, and had seen them, through the window, sexually assault and strangle the victim. After lengthy interrogation, the other two then confessed to the crimes. Although the confessions (and one of the incriminating statements) were retracted at trial, the suspects were convicted in first instance and on appeal. The courts heard conflicting eyewitness testimony. Some witnesses put the men or their car at the scene of the crime. Others stated that they had seen nothing and no one in the vicinity of the house, while yet others said that the men—and the car—had been at home. The court also received rather uncertain expert reports.

The forensic laboratory found DNA in semen left on the girl’s thigh and in hair found on the girl’s body. However, neither sample matched the DNA of the defendants. The same was originally said of a pubic hair

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37. Based on the final exonerating decision by App. Ct. Leeuwarden, Apr. 24 2002, LJN: AE1877 [www.rechtspraak.nl].

found at the scene, although a month later, after a second test, the expert changed his mind and reported that it “could not be ruled out” that the hair belonged to one of the suspects. Fibers were found on one of the defendant’s trousers which were said to “probably match” a rug at the scene of the crime. The evidence on which the convictions were based was the eyewitness statements placing the men near the scene of the crime, the partially retracted statements by two men that they had seen the defendants murder the victim, and the (retracted) confessions. The courts also took most of the forensic evidence into consideration. An expert testified at trial that the semen was most likely the result of intercourse with someone else prior to the murder, but that it could well have been “dragged out” by one of the defendants during the rape. The expert testimony on the pubic hair and the rug was taken as corroborating. The two defendants went to prison, continuing to protest their innocence.

In the years that followed, the case was taken up by a well-known television journalist who devoted no fewer than 40 broadcasts to it. With the help of a respected, retired chief of police, the journalist reconstructed the case, concluding that the crime could not have taken place within the time-frame claimed by the prosecution and accepted by the courts. Additionally, the journalist and retired police chief concluded that the two witnesses (one of whom was of decidedly minimal intelligence) who said they saw the murder committed had lied (to which they admitted on camera) and that, in any event, it could not have been committed in that way. The journalist and retired police chief also found that the police had used undue pressure and tricks during the interrogations. It was also discovered that the police had fed the suspects information about the crime and told them they had irrefutable forensic evidence, and that this had led to the suspects giving false statements. The team of innocence crusaders also interviewed the forensic expert of the “dragged-out-semen-theory.” It was discovered that crucial information had been withheld when the expert was asked to report. Now, given that information, the expert declared that his original findings were spurious. The journalist and retired police chief also commissioned new DNA tests, not possible at the time of the trial, which showed that the semen and both hairs came from the same person. Despite these new findings, the Supreme Court refused to admit them as “new evidence” that would have led to a different verdict and several requests to have the case reopened were denied. Finally, the expert wrote a new report retracting his original findings about the semen. This, the Supreme Court accepted (redefining “new evidence” to include, “under exceptional circumstances, revised expert opinion”), and the case was referred to be retried.

The exonerating judgment by the referral court lists a catalogue of errors on the part of the police and, thus, by definition, on the part of the prosecution. There had been a highly stressful (though not illegal) interrogation situation that lasted two months, during which the suspects had no contact with the outside world or with their lawyers; the police had focused exclusively on the two suspects and had subsequently attempted to find evidence to “fit” existing suspicions, failing to follow up on eyewitness testimony that seemed to contradict such suspicions or to check whether events could have taken place as alleged. There was a perhaps deliberately incomplete dossier and evidence had been destroyed. Expert reports and witnesses were presented as definitive evidence but were either ambiguous or had not been given crucial information. The court that gave the original verdict on appeal was also shown to have accepted unquestioningly controversial evidence and a dubious reconstruction of the crime. In effect, the court relied on two retracted confessions, convenient eyewitness statements, and ambiguous expert reports, thereby ignoring any evidence that pointed to an alternative crime scenario.

Finally, the advocate-general who represented the prosecution during the retrial came in for some severe, though subtly-worded, criticism. In putting forward the prosecution’s case, he had ignored or misrepresented the following. Most of the witness statements pointed towards innocence, not guilt. The pathologist had confirmed that the victim could not have been strangled in the way the prosecution alleged, which was how the crime was described in the false confessions. New forensic evidence had shown that the mitochondrial DNA in the hairs found on the victim’s body could possibly match that of the defendants, but that this could be said of anyone with any relationship to them whatsoever through the maternal line—a substantial part of the population of the socially isolated region where the crime took place. And finally, while the original, visual examination of the fibers of the rug suggested a match, forensic testing had now shown that, while there could possibly be a match, the fibers were present in fabric that could be bought in the village and could have come from anywhere, including the defendant’s own carpet. The exonerating judgment concluded that reasonable doubt as to the defendants’ guilt was underlined by the advocate-general’s failure, even during the retrial, to acknowledge this exculpatory evidence. The exonerees later received € 900,000 (\$1,200,000) in compensation. Also, in October 2009, a man who claimed to be the victim’s secret lover but knew nothing about her was convicted for her rape and murder. That case has now gone to appeal.<sup>38</sup>

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38. The same defendant is also suspected of other murders.

*B. The Schiedam Park Murder*<sup>39</sup>

In June 2000, an 11 year old boy and a 10 year old girl were sexually assaulted by a man in the bushes of a park in Schiedam, near Rotterdam. The girl was strangled, and the boy seriously injured. A passer-by called the police. The boy then described his attacker to police. Although the boy's description of the attacker did not match the passerby's appearance, and although other witness statements were contradictory (though all said they had seen a bicycle standing near the bushes), the police soon focused on the passerby as the suspect. The man had been in the park at the time of the attack and, significantly, was a known pedophile. Under protracted police interrogation, the suspect confessed. However, the confession was retracted just two days later. DNA found on the girl's body and on the murder weapon did not match the suspect's. Instead, the DNA had come from a third unknown person. In addition, an alibi gave the suspect practically no time to commit the crime. Yet he was convicted in May 2001 and again on appeal in March 2002. The convictions were based primarily on the retracted confession, circumstantial evidence that the defendant had a bicycle, and evidence that the suspect was in the park at the time. The court backed this up through the prosecution's reconstruction of the time frame, dismissed the boy-victim's description of the attacker as not credible, and accepted the prosecutor's explanation of unidentified DNA on the girl's body. The prosecution claimed that anyone who had been in contact with the victim could have left the DNA, and the fact that the defendant's DNA was not found was proof of guilt rather than innocence. The prosecutor declared that the defendant "had been careful not to leave evidence behind." In 2003, the Supreme Court refused the defendant's petition for cassation. But while he was in prison, rumors started to circulate that he was innocent.

A leading academic from the Dutch innocence project, *Gerede Twijfel* in Maastricht, published a book outlining the case and casting serious doubt on the conviction.<sup>40</sup> It later emerged that, after the innocence project finished its investigations, it sent its report to the head of the prosecution service in 2002, but he never answered. Again, the case was taken up by the media and caused some public consternation. In September 2004, the Supreme Court dismissed a request for revision, because nothing pointed to there being "new evidence." The public

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39. The facts are taken from the official report commissioned in January 2005 by the Prosecution Service (see *infra*) after it became apparent that someone else was most probably the perpetrator. The case was investigated by one of the advocates general at the Amsterdam appeal court, seconded by a law professor and an ex-police chief. The full report is available at RIJKSOVERHEID, [www.rijksoverheid.nl](http://www.rijksoverheid.nl) (last visited May 15, 2012).

40. PETER J. VAN KOPPEN, *DE SCHIEDAMMER PARKMOORD* (2003).

clamor that something was wrong grew ever louder when journalists discovered that someone had been arrested for another crime and had confessed spontaneously to the murder in the Schiedam Park in August 2004. Suspicions grew that the prosecution had deliberately kept this information secret. It would have certainly constituted new evidence at the revision hearing a month later. Gradually, it emerged that there was a match with the new suspect's DNA, that he had no alibi, and that he had committed several other violent sexual offenses against children. Despite this, the prosecution service continued to deny mistakes had been made. By November, the media were talking about a prosecution disaster. In December, the convicted man was released and then exonerated after the Supreme Court had referred the case for retrial in January 2005. He received approximately € 600,000 in compensation, and the prosecution service set up an official inquiry into what had gone wrong. The chairman was one of the advocates-general at the Amsterdam appeal court, seconded by a law professor and an ex-police chief. What they found shocked the country.

Believing they had their man, the police had pressured the suspect to confess and disregarded any evidence in his favor. Backed up by a child psychologist, the police had also exerted what was described as inadmissible and intolerable pressure on a young and traumatized witness to make him admit the description of his attacker was a fabrication. The child stuck to his statement, but neither the prosecutor nor the courts took him seriously. Indeed, the prosecutor in the first instance ignored anything that pointed to the suspect's innocence. Before the original trial, and again before the appeal was heard, a number of scientists at the state forensic laboratory expressed serious doubts about the defendant's guilt. The scientists also took the unprecedented step of twice speaking to both district prosecutor and to the advocate-general before compiling their report. None of this was included in the final version of the report and was not communicated by either experts or the prosecution to the court or to the defense team. Although the court and the defense knew that unidentified DNA had been found on the body, they were not told the DNA had also been on the murder weapon.

The advocate-general at the appeal court did have doubts, but ignored them and said nothing about them in court. The forensic scientists identified sufficiently with the prosecution to leave their doubts out of the report. What was said to persuade the scientists during their two meetings with the prosecution is not known, except that the district prosecutor did tell them it was important to make sure that "the defense can't run away with this DNA-business." The defense lawyer, ignorant of the fact that only unknown DNA had been found on the murder

weapon, had no right to be shown the full results of the forensic institute's tests, only what was in the final report. Nor did the defense have the right of cross-examination so that they could do little more than argue the case on the face of what was known. Forensic experts who testified were never asked about doubts because neither the court nor the defense was aware that doubts existed.

In August 2005, the public effect of the inquiry's report was greatly reinforced by another television broadcast. While the convicted man was in prison, his case had been used by forensic institute scientists during a course for police and prosecutors about DNA evidence. This case, scientists said, demonstrated how an innocent man could be convicted. Despite the fact that at least 200 police officers and prosecutors attended this course, only one chose to speak out. Finding no response from his superiors, this police officer approached the media and set in motion a lengthy and detailed journalistic investigation. The officer was subsequently fired. The program provoked a furious public debate about the state of Dutch justice in general and about the prosecution service in particular. Parliament demanded answers from the Minister but eventually accepted his version of events: no one had acted intentionally but "serious mistakes" had been made. The government did, however, promise a "program of improvement," including a temporary innocence commission.<sup>41</sup> Its investigations resulted in the reopening of the following two cases and the eventual exoneration of the convicted defendants.

### *C. Lucia de Berk*<sup>42</sup>

Lucia de Berk, a nurse at a children's hospital, was the subject of rumors between 2000 and 2010, which claimed that she was suspiciously often present when a child died. The hospital director first consulted a medical expert, who declared it unlikely that these deaths were all due to natural courses. The director then engaged in some amateur statistics. He ultimately concluded that it couldn't be coincidence that Lucia had either always been the one responsible for the child's medication or had been the last person present before they died. He then held a press conference about the deaths, naming the nurse

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41. Commissie Evaluatie afgesloten strafzaken or CEAS—Commission Evaluation Closed Criminal Cases.

42. Based on positive review judgment, HR 7 Oct. 2008, LJN: BD4153, and exonerating judgment Hof Arnhem 14 Apr. 2010, LJN: BM0876 (both at [www.rechtspraak.nl](http://www.rechtspraak.nl)); J. DE RIDDER, C.M. HAARHUIS & W.M. DE JONGSTE, *DE CEAS AAN HET WERK: BEVINDINGEN OVER HET FUNCTIONEREN VAN DE COMMISSIE EVALUATIE AFGESLOTEN STRAFZAKEN 2006–2008* (2008). Chapter 6, and the report by the CEAS-commission on the case are available at OPENBAAR MINISTERIE, [www.om.nl](http://www.om.nl) (last visited May 15, 2012).

as a possible suspect. The police gathered information about the hospital unit where the nurse worked and about sudden, inexplicable deaths at other hospitals where she had worked previously. They also tapped Ms. de Berk's telephone and consulted a statistician whose findings they took as proof that the suspicions were well-founded. Lucia de Berk was then arrested. Although she never confessed, and despite a lack of direct evidence against her (no one, for example, had seen her do anything wrong) she was convicted in 2003 for four murders and three attempted murders. De Berk was sentenced to life imprisonment. In 2004, the sentence was upheld on appeal, but this time for seven murders and three attempts. The appeal court also imposed an order for indefinite detainment at a psychiatric institution.

The court of first instance convicted on the basis of statistical probability in combination with corroborating evidence of unnatural death after the statistician testified that the chance that a nurse could be present at so many suspicious deaths or incidents was 1 in 340 million. Some medical experts, though not all, testified that at least four of the children had been poisoned with an overdose of medication. On appeal, the court rejected the statistical evidence (that had come in for a great deal of criticism in the media). However, one of the medical experts, unfortunately the one suggested by the defense, testified that he "was now of the opinion" that the first child had been killed with a non-therapeutic overdose. This, the court took, as proof of murder. The court found corroboration in Lucia's diary where, on the day of the death of a patient she was attending, she had written of "her secret" and having to "stop this compulsive behavior." (Her own explanation was that she had become addicted to laying tarot cards in the presence of dying patients and felt she must stop; she had kept this secret because she felt it inappropriate behavior for a nurse. The court did not believe her.) The final verdict rested on these two pieces of evidence and what became known as "repeating proof." That is, given that there was proof she had murdered the first child and that the deaths of the other six were inexplicable, there could be no other explanation than that Lucia had murdered them too. Lucia de Berk suffered a stroke almost immediately after the decision. The Supreme Court admitted the case in cassation, but only on the point that a life sentence could not be combined with indefinite detainment at a psychiatric institution.<sup>43</sup> With that, any chance of overturning the verdict was eliminated by March 2006.

To some, including her lawyer, it was obvious from the start that Lucia de Berk had been wrongfully convicted. A few worried citizens

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43. TON DERKSEN, *LUCIA DE B. RECONSTRUCTIE VAN EEN GERECHTELIJKE DWALING* (2006); METTA DE NOO, *ER WERD MIJ VERTELD, OVER LUCIA DE B.* (2010).

developed into crusaders in her case, starting a website and blog to help get the case reopened.<sup>44</sup> The problem then became finding the necessary new evidence. Statisticians and doctors appeared on television disputing the findings of the experts heard at trial. These statisticians and doctors claimed that the deaths were almost certainly due to natural causes and that the probability statistics were, quite simply, incorrect. One concerned individual, a professor in philosophy of science, published a book outlining the mistakes that had been made in the case citing a world renowned expert in this type of death in sick children. He approached the CEAS, asking them to reinvestigate and, once the case was admitted, the CEAS advised the prosecution service to push for revision.

It was discovered that the police had concentrated from the very start on just the one suspect. It was also discovered that the statistician had not included in his investigation a comparison with the other deaths in other hospital units where Lucia de Berk had not been present. Further, new calculations showed nothing suspicious about De Berk's presence at so many deaths. In fact, given her position as staff nurse, it would have been unusual if she had not been there. It also became clear that the report by forensic psychiatrists on the content of her diary had been ignored by the prosecution and the court, and most importantly, that the findings of the one medical expert who had stated that the first child had been deliberately overdosed were categorically repudiated by the world's leading expert in such cases. The prosecution at the Supreme Court feared that none of this could be regarded as "new evidence" because it had been known to the appeal court at the time even if it had not realized its significance. Nevertheless, the advocate-general at the Supreme Court again reinvestigated the case and requested revision because, in his opinion, the children had died of natural causes, and therefore, no crime had been committed. The advocate-general thought it difficult to construe his findings as "new evidence," but the Supreme Court admitted the case on the basis of "progressive scientific insight," and referred it to the appeal court in Amsterdam. Lucia de Berk was released awaiting the decision, and she was exonerated in April 2010. She received compensation of unknown, but reportedly "gigantic" proportions.

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44. See, for example, the website started by Metta de Noo, *Licht voor Lucia*, LUCIA DE B., [www.luciadeb.nl](http://www.luciadeb.nl) (last visited May 15, 2012). See also the blog started by Piet Groeneboom, PIET GROENEBOOM'S BLOG, <http://pietg.wordpress.com> (last visited May 15, 2012).

*D. Ina Post*<sup>45</sup>

This last case is the oldest in this series, but it is the most recent exoneration, which became possible only because of the existence of the CEAS. In August 1986, an 89 year old woman was strangled in an apartment block for the elderly. Several checks were stolen and later cashed—presumably by the murderer. The police used these checks to conduct a graphology test of the handwriting of the victim’s caregivers, one of whom was Ina Post. She became a chief suspect because her signature resembled that of the presumed murderer and because the police found her “nervous” when she complied with their request that she produce a sample of her handwriting and signature. Ms. Post was thereafter detained for questioning. During police questioning, she twice confessed to committing the murder. However, she later retracted the confessions. Ms. Post was subsequently found guilty in first instance and again on appeal on the basis of her retracted confessions, and “nervous behavior,” the expert’s opinion that the signature on the checks was not the victim’s, and the expert’s inability to rule out that the signature could have been the defendant’s. The Supreme Court refused a petition for cassation. Four requests for revision were also refused. The requests were based on new graphology tests, on expert testimony that Ina Post was highly suggestible, on information contained in interviews with a number of the police officers who participated in the investigation, on expert reports on new developments in graphology, and on reports questioning the authenticity of Post’s confessions.<sup>46</sup> As far as the Supreme Court was concerned, none of this was new evidence.<sup>47</sup>

From the very beginning, the conviction of Ina Post attracted a great deal of media attention. Several people took up her case, including Post’s aunt, a private detective, and a probation officer. In later years (the conviction took place long before the general population had access to the Internet), blogs and websites were created on her behalf. Also, the case was examined by the Maastricht innocence project, which found the conviction to be flawed and later referred the case to the CEAS-commission. The latter came to a number of devastating conclusions. First, the CEAS-commission concluded that the police had acted on unsubstantiated assumptions that had strongly determined the direction

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45. Based on the exonerating judgment of June 6 2010, LJN BN94444 and the reconstruction by the CEAS Commission (CEAS 2006/0018), on OPENBAAR MINISTERIE, [www.om.nl](http://www.om.nl) (last visited May 15, 2012).

46. See, e.g., HAN ISRAËLS, *DE BEKENTENISSEN VAN INA POST* (2004).

47. After the Putten case, the Supreme Court returned to its previous strict definition of new evidence, which was one of the reasons why it took so long to exonerate Ina Post.

of the investigation. Specifically, these assumptions included the time of death being around 7 p.m., that the victim must have known her killer well, and later, that Ina Post had committed both the theft and the murder. As a result, the investigation became focused on finding proof of her guilt, not on establishing facts. Post's alibi was not verified, and police did not follow up on information that the murder could be linked to another death in the same apartment block with roughly the same modus operandi—in which Post could not possibly have been involved. Police ignored other indications that they had the wrong suspect, such as the failure to find any identification or other corroborating evidence. Additionally, the police failed to investigate the defendant's knowledge of details of the crime, which could have been obtained from the media and, indeed, in many cases were provided by the police themselves. Also, the police used suggestive, forceful questioning had twice led Post to confess, falsely, to both theft and murder. The CEAS recommended that the case be reopened and, in 2009, the Supreme Court granted Post's request for revision, referring the case to the Appeal Court, which finally acquitted Post in October 2010. At the time of writing, it is unknown whether she received compensation.

## VI. PROPOSED REMEDIES

The cases outlined above are classic demonstrations, though in slightly different ways, of how self-repeating errors and confirmation bias can occur in the Dutch criminal justice system. These errors have a number of factors in common: flawed or biased police investigations,<sup>48</sup> tunnel vision, and the dubious role of forensic experts. While the police and prosecution seem to have been singularly inept in handling the case against Ina Post, the defendants in both the Putten and Schiedam Park cases were unfortunate enough to come up against prosecutors and experts actively conniving with the police to ignore indications of innocence. More importantly, these persons kept exculpatory evidence away from the defense and the courts. Such aspects represent drastic failures of the guarantees typical of inquisitorial systems, but the most remarkable feature of all four cases is that the guarantees on which the Dutch system could be said to rely most in the final event—the active judge at trial and appeal, and the revision procedure—also failed to operate properly. The courts in all instances convicted or upheld convictions on evidence that was so flawed as to arouse serious doubts among academics and other (professional) outsiders. The judges

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48. It should also be noted that three of the cases involve false confessions while the fact that Lucia de Berk never confessed was not for want of trying on the part of the police.

disregarded indications of possible innocence and failed to investigate further (although to be fair, in the Schiedam case the court was not totally informed about the scope of exculpatory evidence).

Although a confession is not enough under Dutch law to convict, false confessions, even if retracted, weigh heavily against the defendants. These cases show that the court can also reason away discrepancies between the prosecutor's version of events and the defendant's, alibi testimony, or forensic evidence, and that judges sometimes accept flawed forensics without question. Lucia de Berk is of a slightly different order. There was no confession and no apparent reason for the court to doubt the police and prosecution case or the expert evidence. However, De Berk's case shows the dangers of rules of evidence. These rules, although designed to do the opposite, actually allow courts to scrape together a conviction without really questioning the prosecution case. Perhaps most importantly, the rules of evidence allow courts to confirm what they believe in the first place. The construction of "repeating proof" is particularly alarming. Indeed, the courts (and experts) seem to have been carried away on the vicious preconception of guilt that informed public opinion in the case of Lucia de Berk.<sup>49</sup> The appellate court, for example, went out of its way—as De Berk's lawyer later bitterly complained—to put the worst possible interpretation on the evidence.

These cases, each in their own way, occasioned much public and political unease and also led to changes in the Dutch justice system. Some changes were self-imposed by the judiciary, though possibly unconsciously. Peter van Koppen has noted, for example, that courts are significantly more inclined to acquit in cases of homicide since the Schiedam Park murder case.<sup>50</sup> The manner in which the district court of Rotterdam had all too readily accepted the improbable prosecution case especially shocked the courts. This led the Rotterdam judges to conduct their own internal inquiry. The same case, which was particularly upsetting because it demonstrated lack of integrity on the part of the prosecution,<sup>51</sup> also led to the "program of improvements" and the creation of the CEAS. The case also prompted a legislative proposal to amend the review procedure. Meanwhile, the European Court of Human Rights has handed down a number of judgments that appear to make the presence of a lawyer during police interrogations mandatory—

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49. She was the subject of a sustained whispering campaign of gossip by her colleagues and regularly depicted as a witch—sometimes literally in cartoons—by the media.

50. PETER VAN KOPPEN, *OVERTUIGEND BEWIJS: INDAMMEN VAN RECHTERLIKE DWALINGEN* 289 (2011).

51. Although the same could be said of the murder in Putten, that case was originally dismissed as a one-off, while many in the judiciary continued to insist that the exonerees were guilty.

specifically mentioning the prevention of miscarriages of justice in its reasoning. This has also resulted in changes to the position and rights of the defense pre-trial. In this part, I briefly outline the most important of these proposed remedies.

#### *A. Program of Improvements*

The official inquiry committee, which was set up following the denouement of the Schiedam Park murder case, made a number of recommendations. All of these were accepted by the minister of justice, after which the police, the prosecution service, and the national forensic institute (NFI) produced plans showing how these recommendations were to be implemented.<sup>52</sup> These plans are highly detailed and, in some cases, seem to be no more than a combination of professional investigation requirements and common sense. For example, the requirements mandate that police and prosecutors be properly trained to investigate high profile, serious cases; that during and after an investigation all material should be correctly collected and kept; and that the NFI should produce reports that are clear and can be understood by police, prosecutors, courts, and defense lawyers.<sup>53</sup> Other measures are clearly reactions to specific details of the Schiedam Park murder case. These measures include new rules that apply if scientists at the NFI have doubts as to whether police and prosecutor are taking the right decisions or are focusing on the right suspect. Due to these new protective measures, scientists must commit their doubts to paper and discuss these doubts with the NFI director. If the NFI director agrees, he must discuss the doubts with the prosecutor and the judge of instruction, who also decides whether the defense will be present at this discussion. The NFI report of doubts must be included in the dossier so that the court, and also the defense, will always be informed before trial that doubts exist. There are also improvements that are much more general and are specifically aimed at improving the quality of policing and prosecution and, thus, preventing erroneous convictions.

Throughout, the report is based on the notion of the impartial, quasi-judicial prosecutor. An important aspect of the prosecutor's work is evaluating the police case, which must not mean simply asking whether

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52. *Versterking Opsporing en Vervolging: Naar Aanleiding van het Evaluatierapport van de Schiedammer Parkmoord* [Strengthen Investigation and Prosecution: Following the Evaluation of the Schiedam Park Murder], OPENBAAR MINISTERIE, POLITIE NFI (Nov. 4, 2005), <http://www.how2ask.nl/wp-content/uploads/2010/11/Rapport-versterking-opsporing-en-vervolging.pdf>.

53. *Id.* at 26, 37, 46–50. These are not, however, superfluous exhortations, given that in the Putten case (but there have been many others too) forensic material was found to be contaminated through incorrect procedures and that all of these cases involve some measure of misunderstanding about the implications of forensic evidence.

there is sufficient evidence to convict. Rather, the prosecution must make sure that, before the case comes to court, it has been examined from all angles and that the right value has been placed on any possibly exculpatory evidence. Organized evaluation of all aspects of the case, first internally by the police and then by the prosecution is, therefore, now mandatory. If there is any doubt, prosecutors should seek review by a third party, such as an academic.<sup>54</sup>

### *B. Audiovisual Registration of Police Questioning*

While measures such as organized evaluation and third-party review are intended to prevent tunnel vision and confirmation bias from setting in from the police investigation onwards, others measures are aimed specifically at preventing false confessions. As long as some sort of due process awareness has colored Dutch legal thinking about the position of the suspect,<sup>55</sup> there have been discussions about what due process actually means. Inquisitorial ideology regards the suspect as an object of investigation and the most important source of information. How is this to be reconciled with pre-trial rights?

The most contested provision of the new Code in 1926 forbade undue pressure against the suspect and prescribed a caution that he had the right to remain silent. Many thought this quite mad, for it contradicted the principle that the state must search for the truth by all appropriate means: “[S]urely criminal procedure is about revealing the truth and eliciting the facts from the suspect who knows best what happened.”<sup>56</sup> The caution was nevertheless included, but soon abolished in 1937 and not reinstated until 1974. This was regarded as sufficient protection against undue pressure, self-incrimination, and false confessions. Defense lawyers regularly advocated some form of external monitoring of police questioning. However, it was not until 1995, amidst public doubts about the guilt of the men convicted of the murders in Putten that the government bowed to demands for the video taping of interrogations. But, the government dragged its heels until the wrongful conviction in the Schiedam Park murder case of 2005. This, followed by the cases of Lucia de Berk and Ina Post, forced the minister of justice’s hand.

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54. *Id.* at 18–22.

55. From the introduction of the Code of Criminal Procedure in the 1920’s onwards.

56. For these and many more examples, see J.J.H. DRENTH, *DE HISTORISCHE ONTWIKKELING VAN HET INQUISITOIRE STRAFPROCES* 224–28 (1939); JAN HENDRIK DRENTH, *BIJDRAGE TOT DE KENNIS DER HISTORISCHE ONTWIKKELING VAN HET ACCUSATOIRE TOT HET INQUISITOIRE STRAFPROCES* [CONTRIBUTION TO THE KNOWLEDGE OF THE HISTORICAL DEVELOPMENT OF THE ADVERSARIAL TO THE INQUISITORIAL TRIAL] 224–28 (1939).

The police have now introduced a new manual, have improved training on interrogation techniques, and have made officers aware of the danger of false confessions. The prosecution service has produced binding guidelines on the audiovisual registration of police questioning of suspects, witnesses, or those reporting a crime.<sup>57</sup> These guidelines are highly detailed, ranging from the situations in which registration is obligatory to exactly how it should take place, how data should be stored, and whether the defense should receive copies. At present, the guidelines' scope is somewhat restricted, given that the police districts of Amsterdam and surrounding area, Rotterdam, and The Hague are exempted.<sup>58</sup> (In short, video or audio tape-recording is now mandatory for all suspected crimes if the victim has died, the possible prison sentence is 12 years or more, the possible prison sentence is less but the victim has sustained serious injury, or the case concerns a serious sexual offense. Audiovisual registration is obligatory if experts assist the police during questioning, the person questioned is vulnerable (younger than 16 or mentally impaired), and the case falls under one of the above categories, or a witness is questioned by a behavioral expert. In all other cases, the prosecution or the judge of instruction may decide that audiovisual registration is necessary, depending on the person concerned, the nature of the case, or how questioning is proceeding. Visual registration of questioning must be such that all concerned are visible, and children must be questioned in a non-threatening environment.

If the suspect wishes to hear or see, together with his lawyer, the recording of his interrogation or that of a witness, or if the lawyer wishes to do so alone, a request must be filed with the public prosecutor. The prosecutor will then inform the police officer leading the investigation. The same guidelines go on to say where this may take place but do not specify if, or when, such a request may be denied. The rules expressly prohibit the defense receiving copies of the registration. Appendix 3 to the guidelines, however, specifically deals with this issue. According to standing case law of the Supreme Court, the defense has no right to receive a copy of the registration but does have a right to know that it has taken place and to request that (parts of) it be filed as evidence in the dossier. This disclosure right may be limited pre-trial if the interests of the investigation or of vulnerable witnesses should take

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57. AANWIJZING AUDITIEF EN AUDIOVISUEEL REGISTREREN VAN VERHOREN VAN AANGEVERS, GETUIGEN EN VERDACHTEN (2010A018), 6 Apr. 2009 (in force 1 Sep. 2010–31 Aug. 2014), STC. 2010, no. 11885, available at [http://wetten.overheid.nl/BWBR0027982/geldigheidsdatum\\_21-05-2011](http://wetten.overheid.nl/BWBR0027982/geldigheidsdatum_21-05-2011).

58. These are the three metropolitan areas where most of the crimes to which the guidelines refer are committed.

precedence over those of the defendant.<sup>59</sup> After registered interrogations have become part of the dossier,<sup>60</sup> the defense may still be refused a copy because of the privacy rights of third persons.

### *C. The Presence of Lawyers During Police Questioning*

Despite the evidence that false confessions were a real danger, the presence of a lawyer during police questioning remained absolutely prohibited, both for the criminal justice authorities and for many legal scholars.<sup>61</sup> Calls by the European Committee for the Prevention of Torture (the last one, in 2008, referring explicitly to the prevention of miscarriages of justice) to review the legal aid situation,<sup>62</sup> were ignored. However, the European Court of Human Rights has upset this stubborn Dutch doctrine. The European Convention has direct effect in the Netherlands and is of higher status than national law. The courts can and must apply the European Convention's provisions—and their interpretation by the European Court—directly.<sup>63</sup> The impact of *Salduz v. Turkey* and the string of decisions that followed<sup>64</sup> became even more significant since they coincided with the revelation of the miscarriages of justice described in this Article. In what is known as the *Salduz* case law, the European Court appears to require the presence of a lawyer during police questioning. The wording of the judgments, however, is ambiguous, a fact which the Dutch courts and criminal justice authorities use to minimize the effect of these European judgments.

On June 20, 2009, the Dutch Supreme Court ruled on a case resembling the *Salduz* case in so far as it involved a minor in police custody whose statements, which were made without the assistance of a lawyer and were later retracted, were used as evidence.<sup>65</sup> The European

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59. The prosecution refers to another decision by the Supreme Court: HR 7 May 1996, NJ 1996, 687.

60. (and are, therefore, open to inspection by the defense at the latest 10 days before trial).

61. AFRONDING EN VERANTWOORDING: EINDRAPPORT ONDERZOEKSPROJECT STRAFVORDERING 2001 78–79 (M S GROENHUIJSEN & G KNIGGE eds. 2004).

62. *See, e.g.*, EUROPEAN COMM. FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, REPORT TO THE AUTHORITIES OF THE KINGDOM OF THE NETHERLANDS ON THE VISITS CARRIED OUT TO THE KINGDOM IN EUROPE, ARUBA, AND THE NETHERLANDS ANTILLES BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT) IN JUNE 2007, 2 CPT/Inf (2008), available at <http://www.cpt.coe.int/en/states/nld.htm> (concerning a visit to the Netherlands in 2007).

63. The Dutch Constitution is not directly applicable; this makes the European Convention effectively the only Bill of Rights in the Netherlands.

64. *Salduz v. Turkey*, App. No. 36391/02, Eur. Ct. H.R. (2008); *Dayanan v. Turkey*, App. No. 7377/03, Eur. Ct. H.R. (2010); *Pishchalnikov v. Russia*, App. No. 7025/04, Eur. Ct. H.R. (2009); *Brusco v. France*, App. No. 1466/07, Eur. Ct. H.R. (2010).

65. HR 30 June 2009, LJN BH3084.

Court's decisions were not entirely clear and could be read restrictively or expansively—what does “from the first interrogation” mean, is “access to a lawyer” the same as “assistance of a lawyer” and does this imply physical presence *during* police interrogation? The Supreme Court took all this to mean that any suspect has the right to consult a lawyer prior to the first police interrogation (i.e., formal questioning after arrest), to be informed of that right, and except in cases of an unequivocal waiver or if there are other urgent reasons, to be able within reasonable limits to exercise that right. But the Dutch Court found there was no general right to have a lawyer present during an interrogation. Minors form an exception, though, as they do have the right to have a lawyer or other “person of trust” with them in the interrogation room. Statements made by the suspect without his having enjoyed the (relevant) right, and any other evidence found as a direct result of such statements if raised as a defense should, in principle, be excluded.

The prosecution service followed with a set of binding instructions<sup>66</sup> based on the idea that no more than a right to prior consultation is required for adults. These instructions qualify such consultation rights, of which every suspect must be informed on arrest, according to the seriousness of the offense. In the most serious cases, suspects must also be informed that this legal assistance is free and that the right to consultation cannot be waived. In the most minor cases, the suspect must be informed of his right to counsel and that, should he wish to exercise that right, he will have to pay for a lawyer himself. The police must always inform the pool of duty lawyers<sup>67</sup> or an attorney of the suspect's choice, and wait for a maximum of two hours for the lawyer to arrive before starting the interrogation. After 30 minutes of consultation, the interrogation may begin. Should a “life-threatening” situation arise that requires immediate police action, the prosecutor may authorize the police to start the interrogation immediately without the lawyer. Suspects who make spontaneous statements before being cautioned must still be informed of their consultation rights. The police may not ask further questions until the lawyer has arrived or the right has been waived. If new suspicions arise during the interrogation, there is no need to inform the suspect again of his consultation rights.

Given that there has not yet been a case against the Netherlands in Strasbourg, it is a moot question as to whether the new rules meet the European standard. This is especially so since the European Court has clarified the *Salduz* decision in *Brusco v France*.<sup>68</sup> There now seems to

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66. *Aanwijzing Rechtsbijstand Politieverhoor* (2010A007) STC 2010 4003, available at <http://www.om.nl/organisatie/beleidsregels/overzicht/jeugd/@155139/aanwijzing-0/>.

67. See *supra* note 33 (describing the system of duty lawyers).

68. *Brusco v. France*, App. No. 1466/07, Eur. Ct. H.R. (2010). This case involved an adult who

be little room for doubt that the rights of a fair trial include the right to have a lawyer present—although the European Court has still not used the magic words: “physical presence.” In response to parliamentary questions, the Dutch minister of justice and security again interpreted the words of the European Court as restrictively as possible: “the suspect must have the opportunity to consult with a lawyer before and during the investigation . . . which does not lead directly to the conclusion that the lawyer must be present at the interrogation.”<sup>69</sup> However, in what might have been a last ditch interpretative stand, in his comments on the *Brusco* decision, even the minister of justice and security has reluctantly conceded, “[I]t can by no means be ruled out that in future” there will be a right to have a lawyer present during police interrogations.<sup>70</sup>

#### *D. Innocence Commission CEAS and New Rules on Revision*

The CEAS commission installed immediately after the Schiedam Park murder to look into possible other cases of wrongful conviction officially came under the authority of the prosecution service, although it had a number of independent members. At the same time, Parliament asked the minister of justice to investigate the possibility of an independent innocence commission along the lines of the Criminal Cases Review Commission of England and Wales. The report the minister commissioned suggested that the great strength of the English commission was its complete independence from the police and prosecution service, and its ability to conduct its own investigations. This had greatly contributed to shoring up the legitimacy of criminal justice and had removed a great deal of (media) focus on possible wrongful convictions. In turn, this also relieved political pressure on the government. The English commission’s weaknesses were its inability to deal with cases quickly enough to prevent a large backlog and, inevitably, the delay in bringing possible miscarriages to the Court of Appeal.<sup>71</sup>

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was originally a witness, but was then questioned by the police as a suspect. No lawyer was present. The words of the European Court (“in any event the suspect has the right to consult with a lawyer before and during the investigation”) strongly imply that the presence of a lawyer during police questioning is a general right.

69. LETTER TO THE SECOND CHAMBER OF PARLIAMENT FROM THE MINISTER OF SECURITY AND JUSTICE, 16 Nov. 2010 (DDS5673300), <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2010/11/16/brief-tweede-kamer-raadsman-bij-het-politieverhoor/brief-raadsman.pdf> (last visited Feb. 15, 2011).

70. *Id.*

71. C.H. BRANTS, THE CRIMINAL CASES REVIEW COMMISSION (CCRC). RAPPORT TEN BEHOEVE VAN DE MINISTER VAN JUSTITIE (2006).

Focusing on the weaknesses rather than the strengths, the minister decided not to introduce an independent innocence commission. Instead, he installed the CEAS commission that reviewed two of the miscarriages outlined above and recommended revision. A number of problems attached to the rules under which the CEAS operated: it was not independent of the prosecution service (although it never suffered from interference from that quarter), defendants and lawyers could not put their own case forward to be reviewed but had to work through the prosecution or “external experts” (usually academics interested in the case), and importantly, the CEAS was not allowed to examine the role of the courts. This latter restriction was logical in view of the civil law doctrine of *trias politica* and the fact that the commission was under the authority of the prosecution service. The administration (in this case, the prosecution) cannot examine the actions of the judiciary, but CEAS regarded this restriction as highly unsatisfactory given that most miscarriages also involve judicial errors.

CEAS was never meant to be a permanent solution. The government has finally produced a bill of law which is intended to provide a structural opportunity for reviewing possible miscarriages by extending the rules of the existing revision procedure with an eye towards protecting the wrongfully convicted.<sup>72</sup> In short, the new procedure redefines the ground for revision, “new evidence,” to include new forensic insights. The Supreme Court will still have the final word, but the convicted person may file a request with the Procurator-General at the Supreme Court for further investigation.<sup>73</sup> Before deciding, the PG may—or must, if the defendant has been sentenced to 10 years or more—forward the request to a commission (comparable to the CEAS) that will advise on the necessity of further investigation. In conducting that investigation, the PG can call in the assistance of an investigation team consisting of police officers, prosecutors and, if necessary, external experts. Alternatively, he may have the judge of instruction open an investigation. Because it is feared that this more generous regulation of revision will lead to a large number of requests, the convicted person must be represented by a lawyer.

These new rules are certainly an improvement although they have been criticized for not going far enough. Much of this criticism is highly detailed and concerns intricacies of the rules of evidence. However, the

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72. WIJZIGING VAN HET WETBOEK VAN STRAFVORDERING IN VERBAND MET EEN HERVORMING VAN DE REGELING BETREFFENDE HERZIENING TEN VOORDELE VAN DE GEWEZEN VERDACHTE (WET HERVORMING HERZIENING TEN VOORDELE, TK 2010/2011, 32 045. See also the Explanatory Memorandum to this bill of law at TK 2010/2011, 32 045, no. 3.

73. The PG at the Supreme Court is not a member of the prosecution service and is regarded as 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.

major bone of contention is the fact that the new rules do not provide for an independent innocence commission and that they restrict mandatory new investigation into the facts to those sentenced to ten years or more. Some authors are convinced that the Supreme Court should not be the organ of revision at all because it is unlikely to regard decisions by fellow judges independently and critically. These critics call for a totally independent, administrative innocence commission that will both investigate and decide on possible miscarriages of justice.<sup>74</sup> Others are more enamored of a solution comparable to the English Criminal Cases Review Commission. That would still allow the Court of Appeal to have the final word on whether a conviction is safe or not, but the commission itself would be totally independent in its investigations.<sup>75</sup> One problem, which has also come up in the discussions in Parliament, is that the text of the new regulation is unclear about whether errors by the courts constitute grounds for revision. In reply to parliamentary questions, however, the minister has said that the definition of “new evidence” may also include the situation in which the tribunal of fact was acquainted with the evidence at the time of trial, but failed to recognize its significance, i.e. the Lucia de Berk scenario.

## VII. CONCLUSIONS

While there is no way of knowing how often wrongful convictions occur in the Netherlands, during the past twenty years it has become clear that the criminal justice system is by no means as accurate as the Dutch have always thought. What is surprising is not that there have been miscarriages of justice that must be regarded as consequences of the system. Rather, what is astonishing is that the criminal justice authorities and most legal scholars believed, until very recently, that any wrongful conviction would be an extremely rare and isolated incident. Theoretical consideration of the strengths and weaknesses of inquisitorial process reveals that Dutch criminal justice has systemic features that make it vulnerable to miscarriages. Whether or not it is just as vulnerable as an adversarial system like the American one is a moot question.

The fundamental assumption that state officials can be trusted to conduct an independent and non-partisan investigation to find the truth that will allow the court to arrive at a reliable and therefore legitimate

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74. H.F.M. CROMBAG, ET AL., *HERZIENING: KANTTEKENINGEN BIJ HET W* [REVIEW: COMMENTS ON THE BILL] (2009), available at <http://njblog.nl/2009/03/05/herziening-kanttekeningen-bij-het-wetsontwerp/>.

75. C.H. BRANTS & A.A. FRANKEN, *OVER DE CRIMINAL CASES REVIEW COMMISSION EN DE COMMISSIE EVALUATIE AFGESLOTEN STRAFZAKEN 734–54* (2006).

verdict forms the major legal-cultural reason why so many in the legal world have been unable even to conceive of the system being flawed in any way. Under these conditions, the guarantees of due process that American legal scholars take as given are seen as unnecessary. The Dutch defendant has no right to have a lawyer present during police investigations. It is essentially the prosecution that decides the content of the dossier and, therefore, the case that is heard by the court. The court also has the final word on when it considers it has sufficient information to come to a verdict. The court may also refuse a defendant's request to hear more evidence. And finally, debate at trial based on autonomous defense rights is not regarded as essential for truth finding.

This state-driven system is surrounded by guarantees that should compensate for the lack of autonomous defense participation and contribution, namely hierarchical control and monitoring in and between the different state participants, of which a full retrial by a higher court forms part. The latter should, and perhaps does, mean that such inquisitorial systems make less irredeemable mistakes than adversarial systems where the defendant has only one chance. However, that is not to say that the court of first instance does not often get it wrong,<sup>76</sup> while such errors usually mean that any wrongfully convicted person will spend a considerable time in prison while the appeals system runs its course.<sup>77</sup> However, the very existence of these guarantees that are meant to catch and eradicate mistakes also means that these are only too easily passed further up the chain of decision making. This tendency has been exacerbated by recent changes to the system in the name of cost-effectiveness and efficiency (in the sense of better crime control). As the police and prosecution service struggle to get the desired result, a conviction, the relationship between these changes and intensified media pressure has had the effect of undermining the commitment to impartiality and of increasing the likelihood of tunnel vision and confirmation bias.

There are no indications that the Dutch police employ violence during interrogations—although they are not averse to psychologically coercive interrogation techniques. Further, few officers willfully ignore findings for the suspect. However, many officers do narrow their focus, seeking confirmation of existing suspicions. This undermines the first

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76. If we were to include all the cases of wrongful conviction in first instance, therefore in which the court of appeal has acquitted (or the Supreme Court has returned a case for acquittal because of fundamental mistakes on points of law made by either of the tribunals of fact), the wrongful conviction rate in the Netherlands would be very much higher.

77. This problem besets all inquisitorial systems that, because of their reliance on monitoring and control and written evidence, generate huge amounts of paper and are very bureaucratic; this in its turn leads to fast trials but exceedingly slow procedures as a whole.

assumption of their inquisitorial role: an open mind and non-partisanship. Where traditionally the magisterial, non-partisan prosecutor, able and willing to take “judicial” decisions in the name of the common good, was the predominant role model,<sup>78</sup> this has been replaced among a substantial number of prosecutors by the model of the crime fighter.<sup>79</sup> While non-partisanship would lead the prosecution to attempt to falsify police findings, the prosecutor then becomes much more likely to seek to verify the police case and to base upon it the evidence he will present through the dossier and in court. With, until very recently, no external monitoring at all of the pre-trial investigation, this is all too easy.

Moreover, although the courts are traditionally regarded as the most important monitors of police and prosecution activities pre-trial, recent research indicates that judges are greatly influenced by the way prosecutors build and present their cases.<sup>80</sup> That renders the courts subject to confirmation bias on the basis of their prior knowledge of the prosecution’s case. This means that defense allegations that exculpatory evidence exists but has not been investigated or disclosed must be very strong in order to be admitted to judicial decision making.

Indeed, it has been said that truth finding in Dutch courts is not geared towards discovering whether the evidence points beyond reasonable doubt to the guilt of the defendant. Rather, truth finding in Dutch courts focuses on whether the available evidence does not contradict the prosecutor’s assertion that the defendant is indeed guilty.<sup>81</sup> It is the same mechanism that undermines the assumption of non-partisan gathering of evidence during pre-trial investigation. Dutch rules of evidence and the requirement that judges decide in collaboration on issues of guilt and innocence should mean that doubts about the prosecution case are debated in chambers on the basis of reliable direct and corroborative evidence and that possible other scenarios are considered. But here too there are inherent weaknesses.

The problems of expert testimony are, in some ways, no different from problems that may occur in other systems of criminal procedure.

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78. H.G. VAN DE BUNT, OFFICIEREN VAN JUSTITIE, VERSLAG VAN EEN PARTICIPEREND OBSERVATIEONDERZOEK (1985).

79. C.H. Brants & K. Brants, *Vertrouwen en Achterdocht: De Driehoeksrelatie Justitie, Media, Publiek* [*Trust and Suspicion: The Three Cornered Relationship between the Justice System, Media, and Citizens*], JUSTITIËLE VERKENNINGEN [JUDICIAL EXPLORATIONS], July–Aug. 2002, at 8.

80. J.W. KEIJSER ET AL., *Strafrechters over Maatschappelijke Druk, Responsiviteit en de Kloof Tussen Rechter en Samenleving* [*Judges on Social Pressure, Responsivity, and the Gap Between the Courts and Society*], in HET MAATSCHAPPELIJK OORDEEL VAN DE STRAFRECHTER. DE WISSELWERKING TUSSEN RECHTER EN SAMENLEVING 21 (J.W. de Keijser & H. Elffers eds. 2004).

81. P.J. van Koppen & T.M. Schalken, *Rechterlijke Denkpatronen als Valkuilen: Over zes Grote Zaken en Derzelve Bewijs*, in Het Maatschappelijk Oordeel van de Strafrechter. De Wisselwerking Tussen Rechter en Samenleving 85-132 (J.W. de Keijser & H. Elffers, eds. 2004).

Judges may be inclined to give too much weight to expert testimony and forensic evidence (especially true of DNA). However, it is perhaps more problematic that judges will generally have at their disposal the evidence of only one expert. While neither judges nor the defense lawyers are usually knowledgeable enough to ask the relevant scientific questions at trial, the routine absence of an expert for the defense means that the court is dependent upon its own, often amateur, evaluation of the evidence.

The negative system of evidence<sup>82</sup> and legal requirements as to sorts and amount of evidence necessary to convict imply that (possibly false) confessions, the statement of a single (possibly biased or untruthful) witness, or of a single expert, may never lead to a conviction unless there is corroboration of guilt from an independent source. The defendant must also have had the opportunity to challenge the evidence brought against him. In reality, however, it is possible to convict on two sources of evidence—admittedly independent—while the conviction nevertheless rests on one witness, one expert, or a confession. The conviction of Ina Post is a case in point.<sup>83</sup> Moreover, while judges should look first at the evidence and then decide whether they find it convincing, if their mind is already made up by the information they themselves consider sufficient during trial—itsself based on mainly the prosecution dossier—the judges will then simply look for the legally permissible forms of confirmation of what they already think. This psychological process is compounded by the fact that, in its written reasoning, the court need not discuss all available evidence and any residual doubt there may have been, but is merely required to enumerate the legally permissible sorts of evidence upon which the decision is based. This is true even though judges must give a reasoned response to specific defenses. Unanimity among the panel members is not necessary.<sup>84</sup>

This reality of judicial process is all the more problematic because, ultimately, the Dutch place the greatest faith in the career judiciary with its “impartial and open-minded” judges. The rationality of the legally trained mind and the experience of highly qualified practitioners is presumed to guide judicial decision making, not the irrational prejudice that may color the verdict of the inexperienced layman, who is probably also ignorant of the finer points of law. One of the more troubling aspects of a career judiciary, however, is that experience can degenerate

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82. *See supra* note 35.

83. Van Koppen & Schalken, *supra* note 81.

84. Nevertheless, the judiciary is assumed to speak with one voice: dissenting opinions are unknown and what goes on in chambers is secret, making research very difficult and dependent on experimental situations with panel-groups.

into routine, so that panels of judges feel no need to explain to each other what the strength or weakness of the case are as all will understand them, and that in general a process of group-think governs deliberations. This is especially true of younger judges, who are quickly socialized into such a process and may well find out that too independent a frame of mind is not appreciated.<sup>85</sup>

The systemic problems outlined above are all evident in one way or the other in the wrongful convictions that have occurred in recent years. At last, measures have been designed to deal with them, albeit reluctantly, in the face of much public pressure. The question is whether the proposed solutions will actually have the desired effect.

As in any criminal justice system, the first point of risk of a wrongful verdict eventually being handed down occurs during police questioning. In the Netherlands, there has never been any way of knowing what exactly was said during an interrogation, whether a statement was skewed to produce confirmation of a suspicion or if a confession was tainted by coercion. Written police reports, on which a court may place great reliance as corroborating evidence, are not verbatim and do not contain the questions asked. Rather, reports of police findings are written in the form of a continuous statement made by the suspect. It is of course up to the prosecutor to recognize and correct police bias, but he is rarely present during the interrogation of a suspect—or a witness for that matter—and is usually quite content to rely on police findings. Besides making sure that the police are aware of the dangers of the type of interrogation techniques they employ (through education and training), there are other ways of countering the risk of coercive questioning, false confessions or tunnel vision—or at least being able to detect whether they have occurred. Ensuring that a suspect is informed of his rights is a *sine qua non*, while there is also audiovisual registration of interrogations or the physical presence of a lawyer in the interrogation room.

All of the above have now, finally, found their way into the Dutch version of inquisitorial justice. However, from the grudging introduction of the caution in 1926 to the greatly reluctant acceptance of the probability that the European Court's definition of essential fair trial rights includes the presence of a lawyer during police questioning, their reception has been half-hearted. Attempts to undermine these measures by the creation of legal exceptions are probably only to be expected. Audiovisual registration of interrogations is very important in the Netherlands, given the lack of verbatim transcripts, yet still, the position of the defense is weak and decisions as to what information is to be

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85. KEIJSER ET AL., *supra* note 80, at 36–38.

disclosed are still in the hands of the prosecution and courts with the same exceptions as apply to withholding information about or obtained from witnesses. We may expect that, eventually, there will be a right in the Netherlands to have a lawyer present during questioning, but as yet this has not materialized other than for underage suspects.

There is a fundamental tension between the notion of the suspect as an object of investigation and source of information, and the idea of an autonomous subject at law with inalienable fair trial rights. This was explicitly argued in 1926 when the question was asked why would a policeman want to encourage a suspect to remain silent when the suspect is the one who knows most about the crime. In this sense, there is something to the American assertion that inquisitorial process is based on a presumption of guilt. In essence, the same argument has been used to deny suspects the right to a lawyer during questioning because lawyers will most likely tell their clients not to say anything and will, therefore, hinder the investigation. It does not seem to occur to these opponents of legal assistance, who would all regard themselves as proponents of fair trial rights, that there is something contradictory about accepting the right to remain silent as a fundamental aspect of due process and yet wanting to ensure that it is not exercised.

Moreover, in the specific Dutch situation, where there has always been a decided hint of smugness to the faith attached to the ability and integrity of the criminal justice authorities and judiciary, it has proved exceedingly difficult to introduce any form of external monitoring. Among those who oppose such a notion are not only the professionals of the criminal justice system, but many, if not most, of the leading legal academics. This applies in particular to the judiciary. It is telling that there is only one, very small, innocence project in the Netherlands that is regarded as renegade. The project's findings have often been literally, laughed out of court. Distrust of external monitoring is also probably the main reason why the new rules on revision do not instigate a true innocence commission but, instead, place decisions on whether or not a case should be reinvestigated first with the procurator-general at the Supreme Court and then with the Court itself. Although the PG functions independently, and the position has the same guarantees for independence as that of a judge, the PG is nevertheless "part of the system." He is not an outsider but a member of the judiciary, albeit one with idiosyncratic powers. The official argument for opting for this specific solution is twofold: constitutional arrangements (i.e. the *trias politica*) preclude any judgment or criticism of the judiciary by any institution but itself, and it is preferable to have in place a ruling that is coherent within the Dutch system rather than looking for solutions elsewhere (i.e. installing a commission akin to the Criminal Cases

Review Commission).

It is neither surprising, nor unwise, that the government has not opted to “borrow” from the essentially different adversarial system. Damaska has shown convincingly that allowing American trial judges to cross-examine witnesses would require a complete overhaul of institutional and procedural arrangements in the U.S.<sup>86</sup> The same applies vice versa. There is, moreover, a very real danger that such legal transplants will have the same result as sawing down a leg in the assumption that the table will stop wobbling, while with hindsight, it turns out that the floor is uneven. By then, the chance of restoring the table’s equilibrium is almost certainly gone forever.

Nevertheless, while the proposed “measures of improvement” that have come in the wake of the public scandals about wrongful convictions are—rightly so—designed to fit into the inquisitorial scheme that governs Dutch criminal process, these measures still presume the ability of the system to ensure its own coherence and integrity, i.e. to police itself. The measures allow for no real defense participation or “outside interference” although it would be perfectly possible to design forms of both that are essentially compatible with inquisitorial process. What has now been put in place may perhaps be viewed as “state strategic selection mechanisms,” designed to take the sting out of public criticism and unrest and to prevent even further reaching demands for reform.<sup>87</sup> Whatever the case, the very fact that the government has been forced by the revelations of wrongful convictions to do anything at all is a new and welcome development. For the first time, the Dutch criminal justice system now contains features that imply a healthy distrust of, rather than blind confidence in, the law and judicial authority. That is something that both the criminal justice authorities and the mainstream legal community in the Netherlands have never countenanced easily.

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86. Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L., 839, 849–50 (1997).

87. Cf. Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289 (2005).