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Shifting Systems: A Comparison of the Role of the Defence Lawyer in England and Wales and the Netherlands

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journals.sagepub.com/home/clj**Ed Johnston**

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Abstract

Over the past four decades, criminal procedural systems in England and Wales and the Netherlands have undergone significant transformations that have reshaped the role of the defence lawyer. In England and Wales, a once staunchly adversarial model—anchored by the Police and Criminal Evidence Act 1984—has seen due process norms gradually subordinated to managerial imperatives of efficiency and economy. Key reforms, including amendments to the right to silence, the introduction of the defence case statement under the Criminal Procedure and Investigations Act 1996, and the establishment of the Criminal Procedure Rules 2003, have imposed new disclosure and case-management duties on defence practitioners, often without a commensurate expansion of their powers or resources. The advent of pre-charge engagement further frontloads defence involvement, yet remains under-utilised amid systemic backlogs.

Conversely, the Dutch inquisitorial framework has incrementally adopted adversarial elements—driven by European human-rights directives and Strasbourg jurisprudence—to bolster suspects' procedural safeguards. From the acceptance of pre-interrogation legal assistance following *Salduz* (*Salduz v Turkey*, App No 36391/02, ECHR 1542, (2009), 49 EHRR) to ongoing reforms in the Code of Criminal Procedure, Dutch defence lawyers now confront greater obligations to articulate investigative requests early, even as judges and prosecutors cede parts of their traditional oversight in favour of streamlined, preliminary inquiries. Simultaneously, managerial pressures in the Netherlands mirror those in England and Wales, with output-oriented funding and rising workloads challenging the effective exercise of enhanced defence rights.

This comparative analysis reveals a convergence: both jurisdictions prioritize efficiency, often at the expense of fair-trial guarantees. While English defence advocacy risks erosion

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under managerialism, Dutch lawyers shoulder expanded adversarial responsibilities without always having adequate infrastructural support. As each system rebalances its checks and balances, the enduring question is whether these 'shifting systems' ultimately advance justice or merely recalibrate the procedural burdens borne by those who defend the accused.

Keywords

Criminal procedure, adversarialism, inquisitorialism, defence lawyer, disclosure, fair trials

Introduction

Over the last 30–40 years, there have been substantial changes in criminal procedure in both the Netherlands and England and Wales that have significantly impacted the role of the defence lawyer in both jurisdictions. In the Netherlands, since the 1970s, more adversarial elements have been introduced to the traditional inquisitorial-based system. At the same time, defence lawyers have started to fulfil their role in a more active manner, taking their client's best interests as a paramount guiding principle.¹ Although these changes have resulted in an enhancement of defence rights, it can be questioned whether they have necessarily improved the fairness of the criminal justice system. It has, for example, been argued that while more obligations have been imposed on the defence, there has not been a similar increase of means and powers.² At the same time these changes have taken place, other traditional inquisitorial safeguards – a thorough criminal investigation by an impartial prosecutor and a judge with an active role – have been diluted. The endeavour to combat crime and improve the efficiency of the criminal process has potentially jeopardised the impartiality of the criminal investigation. Furthermore, high workloads and a more managerial organisation of the judiciary have contributed to judges increasingly leaving it up to the prosecutor and the defence lawyer to decide on the scope and focus of the procedure.³ Although this change can be perceived as welcomed from an adversarial perspective, the question arises whether the necessary conditions to realise a more adversarial style of procedure have been met.

Whilst adversarial norms and values are increasing in the Netherlands, the converse has materialised through a raft of legislative provisions since the mid-1990s in England and Wales. This has led to a distinct dilution of traditional adversarial norms and values. Historically, the criminal procedure in England and Wales has been based on an adversarial system, where prosecution and defence lawyers compete to uncover the 'truth' before a neutral adjudicator. With the enactment of the Police and Criminal Evidence Act 1984, considered the 'high watermark' of the due process approach, adversarial norms and values have been gradually diluted. These have the potential to undermine or dilute the conception of the defence lawyer as a zealous advocate.

The Royal Commission on Criminal Justice (RCCJ), reporting in the early 1990s, suggested that the adversarial system had to rid itself of 'excess' and become more efficient.⁴ The first efficiency driver involved changes to the right to silence through the Criminal Justice and Public Order Act 1994. This was quickly followed by significant changes to the disclosure regime, introducing the Defence Case Statement under s.6A Criminal Procedure and Investigations Act 1996 (CPIA 1996). The former had

1. T.N.B.M. Spronken, *Verdediging. Een onderzoek naar de normering van het optreden van advocaten in strafzaken* (Gouda Quint 2001).

2. A.A. Franken, 'Tegenspraak: belofte of schrikbeeld voor de verdediging?' [2006] *Strafblad* 403.

3. J.M. ten Voorde, "'Het rechtskarakter van het strafrecht". De oratie van A.A.G. Peters (Utrecht, 1972)' [2012] *Strafblad* 441. See also C.H. Brants & S. Field, 'Truth-finding, procedural traditions and cultural trust in the Netherlands and England and Wales: When strengths become weaknesses' (2016) *The International Journal of Evidence & Proof* 20, 266.

4. HMSO, *The Royal Commission on Criminal Justice*, (1993), London. Available here: <https://assets.publishing.service.gov.uk/media/5a7c5c6ce5274a7ee2566f34/2263.pdf> [Last accessed December 2024].

minimal impact on criminal procedure in England and Wales, with evidence suggesting that silence was not an issue that needed addressing.⁵ However, the changes to the disclosure regime arguably transformed the criminal process from its traditional adversarial nature to a more managerial approach, emphasising efficiency, economy, and effectiveness. The introduction of the Criminal Procedure Rules 2003 embodies this push for efficiency, with its overriding objective of 'dealing with cases justly',⁶ the contemporary justice system has pivoted from one emphasising due process rights and norms to one that holds efficiency and economic goals as its priority.

The developments in the Netherlands and in England and Wales are, therefore, partly divergent. At the same time, both systems exhibit a tension between safeguarding fair trial rights and managerial influences. This article aims to illustrate these shifting systems and their impact on the way the defence in criminal processes takes place in the Netherlands and England and Wales. To this end, an overview will first be provided on how the role of the defence lawyer in both jurisdictions has evolved. The following sections will explore in greater detail the developments relevant to the role of the criminal defence lawyer in both jurisdictions. These sections will illustrate how these developments shape the task and responsibilities of the criminal defence lawyer. The final section compares both jurisdictions by examining the consequences of these changes.

The Role of the Defence Lawyer in England and Wales

When evaluating the role of the defence lawyer, there is a danger of oversimplifying the role as solely serving the best interest of the client. Such a narrow view overlooks other obligations that the defence lawyer may need to prioritise or give credence to, which may conflict with the best interest of the client. In a nutshell, the role of the defence operates on three interconnected levels. Firstly, acting as the client's representative; secondly, they serve as an officer of the court; and finally, they hold a duty to the public.⁷

The adversarial criminal process in England and Wales is based on the image of the defence lawyer serving as the accused's shield against the powerful state. This concept has, in turn, fostered the ideal of neutral partisanship, which has become a core tenet of the role of the defence lawyer. This duty of neutral partisanship reflects a dual part of the adversarial ethos; the accused must be adequately protected from the 'oppressive' state, and arguments on both sides of the question best discover the truth.⁸ A further illustration of the defence lawyer is that they are perceived as a 'gladiator of the accused,'⁹ a 'fearless knight,'¹⁰ or the 'hired gun'.¹¹ This imagery conveys the notion that the defence lawyer serves as the accused's fearless protector. The lawyer does not hesitate to shield the client from an overzealous state and is always prepared to advance the client's best interests. In theory, the defence lawyer acts as an 'extension of the client's will'.¹² In essence, the lawyer says, 'all that the client would say for himself (were he able or willing to do so)'.¹³ However, questions persist about whether defence lawyers embody this image in practice or if the 'new regime'¹⁴ and shifting landscape of criminal procedure renders this an unlikely proposition.

5. R. Leng, 'Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure', *Crim LR* 704 (1995) at 706.

6. Rule 1(3) *CrimPR* 2005.

7. [1969] 1 A.C. 191.

8. *Ex parte Lloyd* (1822) Montagu's Reports 70n, 72 per Lord Eldon.

9. R. Du Cann, *The Art of the Advocate* (Penguin Publishing, 1964) at p.46.

10. M. Cain and C. Harrington, *Lawyers in the Post-Modern World* (Oxford University Press, 1994) at p.55.

11. F. Zaccarias and B. Green, 'Reconceptualizing Advocacy Ethics', (2005) 74 *Geo.Wash.L.Rev.* 27 at p. 182.

12. W. Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978), *Wis.L.Rev.* 42.

13. D. Pannick, *Advocates* (Oxford University Press, 1992) at p.92.

14. E. Johnston, 'The adversarial defence lawyer: Myths, disclosure and efficiency—A contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020), *The International Journal of Evidence & Proof*, 24(1), 35–58. <https://doi.org/10.1177/1365712719867972>.

In the early 1990s, McConville et al. argued that the culture of criminal defence work was deeply rooted in adversarialism. Their observations revealed that many defence firms operated with a 'production line quality' focused on securing guilty pleas. They also found that some firms viewed criminal clients as dishonest and untrustworthy, and sought to process cases through guilty pleas.¹⁵ Earlier research from the 1970s identified a similar issue regarding the adversarial nature of defence lawyers. Bottoms and McClean observed that access to a defence lawyer was considered a sacred tenet of the Due Process model.¹⁶ But simply having access to a lawyer offers no guarantee that due process values are adhered to. McConville found that lawyers were more concerned with 'the efficient management and processing its clients through the machinery of justice than with justice itself'.¹⁷ They discovered that 'poor quality defence firms do little to uphold the values or principles' of criminal justice in England and Wales'.¹⁸ Johnston's investigation into the working practices of defence lawyers echoed the findings of these studies. Johnston concluded that defence lawyers were not inherently adversarial and were merely cogs in a machine-driven toward a goal of more efficient disposal of cases rather than achieving just outcomes.¹⁹ Newman suggested that defence firms operated like a sausage factory, prioritising profit-making and attempted to conclude cases in the swiftest manner possible.²⁰ He observed that lawyers viewed their clients unfavourably and often presumed their guilt. They often assumed that the client would plead guilty and saw it as their responsibility to facilitate such a plea.²¹ None of the evidence offered here paints the picture of the defence lawyer as an adversarial warrior who prioritises their client's best interests above all other interests.

The Role of the Defence Lawyer in the Netherlands

In contrast to the role of the defence lawyer in England and Wales, the role of counsel in the Netherlands is shaped by the characteristics of the Dutch criminal process. The central objective of Dutch criminal procedural law is to promote the application of criminal law to the truly guilty and to prevent the innocent from being convicted or even prosecuted.²² That objective implies that criminal proceedings are all about the 'material truth', which means establishing what occurred. It further implies that criminal proceedings are fair, that the rights of citizens are respected and that, more specifically, the suspect is protected against disproportionate exercise of power by the State.²³ In the inquisitorial-based Dutch criminal process, it is assumed that these objectives can best be met by an active judge and a fact-finding investigation conducted under the leadership of an impartial public prosecutor. It is the duty of the public prosecutor to collect not only incriminating but also possibly exculpatory information. The accused has traditionally been the object of investigation: they do not have to actively participate in the proceedings and may be assisted by counsel, whose main task is to protect the interests of the client in a partial manner.

15. M. McConville, J. Hodgson, L. Bridges and A. Pavolvic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (1994), Oxford University Press, Oxford at 271.

16. A. Bottoms and J. McClean, *Defendants in the Criminal Process*, (1973) Routledge, Abingdon, at p.229.

17. M. McConville, J. Hodgson, L. Bridges and A. Pavolvic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (1994), Oxford University Press, Oxford at 295.

18. *Ibid* at p.298.

19. See E. Johnston, *The Role of the Defence Lawyer: Conceptions and Perceptions within a Changing System*, (2021), Lexington: Washington D.C. – in particular see Chapter 6.

20. D. Newman, *Legal Aid Lawyers and the Quest for Justice* (2013), Hart: Oxford at p.30.

21. *ibid* at p.112.

22. Explanatory Memorandum to the Code of Criminal Procedure implemented in 1926, Kamerstukken II 1913/14, 286, no. 3, p. 6; see also draft Explanatory Memorandum to the New Code of Criminal Procedure, Kamerstukken II 2022/23, 36327, no. 3, p. 11.

23. J.H. Crijns, 'Een kroniek van de strafrechtelijke waarheidsvinding', in J.H. Crijns, P.P.J. van der Meij & J.M. ten Voorde (red.), *De waarde van waarheid. Opstellen over waarheid en waarheidsvinding in het strafrecht* (Boom Juridische uitgevers 2008), p. 15–55.

In the first decades after the introduction of the Code of Criminal Procedure in 1926, there was great confidence that the prosecution and the criminal courts would ensure proper administration of justice. Until the end of the 1960s, the view prevailed that the counsel's main task was to ensure that confidence in the legal profession was not damaged. This also implied that counsel should not obstruct the finding of the truth and the proper course of the proceedings. Few lawyers were specialising in legal assistance in criminal matters. Most lawyers worked in general law practice and often their assistance during trial was limited to commenting on sentencing.²⁴ From the end of the 1960s onwards, the view on the role of counsel has changed. There has been an increased focus on the right to a fair trial and procedural rights and lawyers have taken on a more active role. Also, there has been a clear trend towards the professionalisation of Dutch criminal defence law practice. At the same time, and partly under the influence of the ECHR, the case law of the ECtHR and EU legislation, the legal position of the defendant has improved. Defendants have been increasingly granted rights and powers enabling them to conduct their defence.²⁵ These include the right to the assistance of counsel prior to and during the police interrogation,²⁶ the right to (early) disclosure of the case file²⁷ and an enhancement of the right to question witnesses.²⁸ As a result, the predominantly inquisitorial Dutch criminal proceedings have taken on an increasingly adversarial character.

These developments have continued in recent years. In the currently ongoing legislative operation to restructure the Code of Criminal Procedure, the Dutch criminal procedure is characterised as a '*contra-dictoir proces op inquisitoire leest geschoeid*',²⁹ which could be translated as an inquisitorial-based adversarial trial. This style of process means that although the judge is still ultimately responsible for a fair, complete and diligent investigation during the trial, the scope and content of that investigation becomes partly dependent on the attitude of the prosecution and the defence.³⁰

These developments do not only affect the defence, but also the prosecution and the judiciary. An important change for the prosecution has been the expansion of special investigation methods, largely in response to the increase in (organised) crime and societal pressure to fight it effectively. Against this background, it has been repeatedly shown that it can be a struggle for the prosecution to reconcile the interests of effectively fighting crime and to maintain a magisterial attitude in criminal investigations.³¹ The development towards a more adversarial way of conducting proceedings is also reflected in the way criminal judges perform their role. Partly because the defence and prosecution have changed the interpretation of their role, judges have – in general – adopted a more passive role.³² Another important factor is the more managerial way in which the judiciary is organised. With a strong focus on productivity and efficiency, an output-oriented funding system has contributed to judges being more preoccupied with quick and efficient adjudication than before.³³ Taken together,

24. T.N.B.M. Spronken, *Verdediging. Een onderzoek naar de normering van het optreden van advocaten in strafzaken* (Gouda Quint 2001), p. 48–56.

25. T.N.B.M. Spronken, *Verdediging. Een onderzoek naar de normering van het optreden van advocaten in strafzaken* (Gouda Quint 2001), p. 56–125.

26. M. Lochs, 'Geen coulance maar recht: de actieve raadsman bij het politieverhoor', (2021) Boom Strafbld 2.

27. Wet processtukken in strafzaken, Stb. 2011, 601.

28. T.N.B.M. Spronken, *Verdediging. Een onderzoek naar de normering van het optreden van advocaten in strafzaken* (Gouda Quint 2001).

29. Draft Explanatory Memorandum to the New Code of Criminal Procedure, Kamerstukken II 2022/23, 36327, no. 3, p. 13.

30. This development can be traced back to the project *Strafvordering* 2001, see M.S. Groenhuijsen & G. Knigge, 'Kernprofielen deelnemers aan het strafproces', in M.S. Groenhuijsen & G. Knigge, *Afronding en verantwoording, eindrapport onderzoek-sproject Strafvordering 2001*, (Kluwer 2004), p. 77–111.

31. For a detailed account, see P.P.J. van der Meij, *De driehoeksverhouding in het strafrechtelijk vooronderzoek: een onverminderde zoektocht naar evenwicht in de rolverdeling tussen de rechter-commissaris, de officier van justitie en de verdediging* (Kluwer 2010), p. 251–449.

32. W.N. Ferdinandusse, 'De actieve rechter' [2018] Strafbld 2018, 13.

33. For an overview see M. Lochs, *Contempt of court. Een meerwaarde voor de goede strafrechtspleging in Nederland?* (Boom juridisch 2019), p. 37–43.

this has resulted in a different playing field, where more emphasis is being placed on the responsibility of the defence to have its rights effectuated.³⁴

Criminal Justice in Transition: England and Wales

Over the course of the last 30 years, criminal justice in England and Wales has been transitioning from the classic adversarial process to a process driven conveyor belt that seeks to focus on the efficiency and economic performance of the system. A catalyst for this regime change is disclosure of evidence in criminal cases, where defence disclosure obligations were vastly enhanced by the CPIA 1996 and the Criminal Procedure Rules 2003.

The disclosure regime is a relatively recent development. Until the mid-1990s, disclosure was solely an obligation for the prosecution to fulfil. The original rationale for a disclosure regime was to re-balance the equality of arms between the prosecution and the defence. Prosecution had a greater array of resources, and therefore, they should have to disclose facts and aspects of their case to even out the inequality of arms. *R v Bryant and Dickson*³⁵ is commonly regarded as the start of the process in which the courts imposed a duty on the prosecution to disclose material that may lead to the acquittal of the accused.³⁶ This established an obligation on the prosecution to make available to the defence witnesses whom the prosecution knew could give material evidence. Until the 1960s, obligations to disclose information were placed exclusively upon the prosecution. The Criminal Justice Act 1967 was the first exception to this general rule, s.11 which states that in trials on indictment the defendant shall have to give notice of the particulars of an alibi witness.³⁷

In 1986, the Fraud Trials Committee, chaired by Lord Roskill, published their report (referred to as the Roskill Committee). The Committee's findings led to the second major development in defence disclosure. The Committee was established due to concerns that the public no longer believed the legal system was capable of effectively prosecuting perpetrators of serious frauds.³⁸ The Committee found that the legal system was too archaic, cumbersome and unreliable. Every stage of the legal process was an 'open invitation to blatant delay and abuse'.³⁹ Owing to this blatant abuse the Committee stated in its summary that radical reform was necessary. Although the terms of reference for the report related to fraud trials the Committee argued that the changes could 'be of benefit to a wider range of criminal cases'.⁴⁰ The Committee believed that forcing the defence to outline its case in advance of trial would make the trial both 'shorter and more efficient'. Following the Roskill Committee's report, the Government enacted the Criminal Justice Act 1987. The Act provided that in serious fraud cases, persons can be required to give information about and produce documents concerning the investigation. Section 2(3) Criminal Justice Act 1988 allowed the director of the investigation '... to require the person under investigation, or any other person to produce any specified document which appear to the Director to relate to any matter relevant to the investigation ...'.⁴¹ The Crown Court (Advance Notice of Expert

34. P.T.C. van Kampen, 'De strafrechtadvocatuur anno 2011' (2011) *Strafblad* 4, 29; A.A. Franken, 'Tegenspraak: belofte of schrikbeeld voor de verdediging?' (2006) *Strafblad*, 5, 403 and M. Lochs, 'Een publiekrechtelijke verantwoordelijkheid voor de verdediging?', in J. Altena et al (eds.), *In onderlinge samenhang: Liber amicorum Tineke Cleiren* (Boom juridisch 2021), p. 545–556.

35. [1946] 31 Cr App R 146. Prior to *Bryant and Dickson*, in the case *R v Clarke* (1930) 22 Cr App R 58 the court held that where there is a discrepancy between a witness's evidence at trial and his statements made previously to the police, the prosecution should consider if an actual copy of the witness's statement should be disclosed rather than just information given about it.

36. D. Corker and S. Parkinson, (2010) *Disclosure in Criminal Proceedings* (Oxford University Press: Oxford) at p. 3.

37. s.11(1) Criminal Justice Act 1967.

38. The Fraud Trials Committee, Chairman: The Right Honourable Lord Roskill, P.C, (HMSO: 1986) p.1 para 1.

39. *ibid* p.1 para 1.

40. *ibid* p.2 at para 4. The Committee did stop of recommending any proposal to anything other than fraud cases, they would leave that discussion for those with wider concerns than then own.

41. S.2(3) Criminal Justice Act 1988.

Evidence) Rules⁴² provided that any statement in writing of any finding or opinion of an expert upon which a party intended to rely on had to be disclosed as soon as practicable after committal.

The early 1990s saw a succession of successful appeals that were linked to confessions being improperly obtained.⁴³ These cases 'exposed a catalogue of wrongdoing in the process of ... criminal investigation.'⁴⁴ In response, the government established the Royal Commission on Criminal Justice (RCCJ) to examine reforms to the criminal justice process. In light of the findings of the Commission, and despite not being a Term of Reference, the government radically overhauled the regime of defence disclosure. The CPIA 1996 forced the defendant, or his lawyer, to provide the court with a Defence Case Statement.⁴⁵ The content of the defence statement was defined by s.5(6). It is a written statement:

- (a) setting out in general terms the nature of the accused's defence;
- (b) indicating the matters on which he takes issue with the prosecution;
- (c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.

At the time Quirk suggested the disclosure provisions were unworkable as the provisions were flawed due to three fundamental reasons: (1) the lack of understanding of the role and culture of each of the participants, (2) the inadequate allocation of responsibility and (3) the insufficient sanctions for non-compliance with the rules that can be imposed fairly on defendants.⁴⁶ Defence statements often contained minimal information and were typically as vague as possible, often serving merely as a denial of the charge. For instance, in response to a charge of handling a stolen motor vehicle, a defence statement might simply assert: The accused denies that he dishonestly received the vehicle and that he knew or believed it was stolen.⁴⁷ The vagueness of this statement could potentially leave the door open for the defence to spring an ambush defence at trial.⁴⁸ In a study for the RCCJ, Leng suggested that the threat of ambush defences was 'the single most powerful factor in the campaign to abolish the right to silence and to require the early disclosure of the defence case'.⁴⁹ Yet, as Leng's study for the RCCJ suggested, the idea that disclosure was needed to combat 'ambush defences'⁵⁰ was misplaced.⁵¹

Quirk further suggested that the notion of defence disclosure and the idea of rebalancing the system fitted neatly with the philosophy of managerialism⁵² and the early disclosure of the defence case would combat the use of an 'ambush defence'⁵³ which could frustrate the interests of justice. However, in

42. SI 1987/716.

43. The Birmingham Six (*McKenny and Others* [1992] Crim LR 117; Stefan Kiszko (Kiszko 1992); The Cardiff Three (*Paris, Abdullahi and Miller* [1993] 97 Cr App Rep 99; and Judith Ward (*R v Ward* [1993] 1 WLR 619 96 Cr App Rep 1).

44. H. Quirk, *The Rise and Fall of the Right of Silence*, (2017) Routledge: Oxon) at p.40.

45. S.6A CPIA 1996 outlines the contents of the statement. They are not mandatory in summary-only trials, although section 6(2) does allow the accused to voluntarily provide a defence statement to the prosecution Richard Card and Richard Ward believe the section is unnecessary as it is always open to the accused to disclose facts about his defence. For further discussion please see R. Card and R. Ward, (1996) *The Criminal Procedure and Investigations Act 1996*, (Jordan's Publishing, Bristol) at p. 37.

46. Hannah Quirk discusses these issues at length in 'The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work' 10 Evidence and Proof, (2006), 42.

47. C. Taylor 'Advance Disclosure: Reflections on the Criminal Procedure and Investigations Act 1996' (2001) 40(2) *Howard Journal*, 114, 117.

48. However, in light of the Criminal Procedure Rules and the Overriding Objective, the Court explicitly prohibits ambush defences.

49. R. Leng, 'Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure', Crim LR 704 (1995) at 706.

50. An Ambush defence is one which surprises the prosecution at trial. The prosecution have no idea what evidence the defence will call and is therefore 'ambushed' by their tactics.

51. C. Taylor, Taylor C (2001) Advance Disclosure: Reflections on the Criminal Procedure and Investigations Act 1996. *Howard Journal* 40(2): 114–125 (2001) 114, 117.

52. H. Quirk, 'Disclosure: Significance of Culture in Criminal Procedural Reform' (2006) 10 E&P 42–59 at 56.

53. An Ambush defence is one which surprises the prosecution at trial. The prosecution have no idea what evidence the defence will call and is therefore 'ambushed' by their tactics. Whilst this is a pejorative term from a defence perspective, the prosecution ought to be prepared for any defence to be presented, it is a commonly used term to describe this type of defence.

reality, the defence was not problematic for the courts, Leng's study for the RCCJ found that ambush defences were raised in between 2–5% of trials; all of which ended in the conviction of the defendant.⁵⁴ Leng also cites the work of Block, Corbett and Peay who observed 100 trials and did not find one single use of an ambush defence.⁵⁵ However, Zander and Henderson's study found ambush defences were raised in 7–10% of trials, and half of these ended in convictions.⁵⁶ Ultimately, these encroachments on adversarialism outlined here were part of a broader toxic political atmosphere concerning the due process rights of defendants.

Further Efficiency and the Rise of Managerialism

In his Review of the Criminal Courts of England and Wales (hereafter Auld Review), Auld LJ stated: 'The fairness, efficiency, and effectiveness of the criminal justice system demand that its procedure should be simple, accessible, and, as far as practicable, uniform across all types of criminal jurisdiction'.⁵⁷ He remarked that the 1996 Act was not working as Parliament intended and its operation did not command the confidence of criminal practitioners.⁵⁸ He also argued that there was a high level of non-compliance by the defence in fulfilling its duty to complete an adequate defence statement. In keeping with the recommendation of the Auld Review, the Criminal Procedure Rules Committee was established 'to create a single and simply expressed instrument'.⁵⁹ Rule 1.1 explicitly states that the overriding objective of the new code is that criminal cases should be dealt with justly. Rule 1.1(2) provides a non-exhaustive list of what 'justly' means.

To assist the courts in satisfying the overriding objective, Part III of the Criminal Procedure Rules established case management provisions, obligating all participants in the process to help fulfil this objective. Although case management provisions were not new to the courts, their impact has transformed the role of the judiciary. Before the creation of the CrimPR, judges were generally perceived as passive, neutral umpires.⁶⁰ In light of the CrimPR, the judiciary has become an active participant in proceedings, shedding the shroud of passivity with the dawn of the new millennium. *Jisl*⁶¹ highlighted the importance of having an active and interventionist judge. Talking about the starting point for any criminal case Judge LJ stated:

'The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not, however, a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited ... time itself is a resource.'

To conserve resources, the culture of the criminal trial had to evolve. Cooperation between opposing sides became essential. This shift was primarily driven by the introduction of a Case Management Form,

54. R. Leng, 'Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure', *Crim LR* 704 (1995) at 706.
55. *Ibid*.

56. M. Zander & P. Henderson, *The Crown Court Study*, Royal Commission Research Study No. 19 (1993), pp.14–15.

57. *ibid* at chapter 10 para 271.

58. *Ibid*, Ch 10 para 163 p 463. For an analysis of the regime's failings, please see J. Plotnikoff and R. Woolfson, *A Fair Balance? Evaluation of the Operation of Disclosure Law*, Home Office, RDS Occasional Paper No 76 (2001) and H. Quirk, *The Significance of culture in criminal procedure reform: Why the revised disclosure scheme cannot work*, *The International Journal of Evidence & Proof*, 10(1), 42–59.

59. Lord Justice Auld, *A Review of the Criminal Courts of England and Wales*, (2001), p.472 Para 184. Available here: <https://www.criminal-courts-review.org.uk/auldconts.htm> [Last accessed December 2024].

60. See E. Johnston, (2016) All Rise for the Interventionist: The Judiciary in the 21st Century, *Journal of Criminal Law*, 80(3) 201–213.

61. [2004] EWCA Crim 696 at 114.

which is mandatory in both the magistrates' courts and the Crown Court. The requirements of the form closely mirror the contents of the CPIA defence case statement. While the defence statement aimed to narrow the issues at trial, the Case Management Forms were designed to 'identify the real issues' and streamline the trial process, making it more efficient and expeditious. This fundamentally challenges the concept of adversarialism. Traditionally, a core principle of common law upheld the defendant's right to silence throughout criminal proceedings, placing the burden on the prosecution to prove its case. As Viscount Sankey LC famously stated, 'Throughout the web of English Criminal Law, one golden thread is always to be seen: it is the duty of the prosecution to prove the Prisoners guilt.'⁶² However, the court in *Essa* rejected the idea that the judicial sanctions for failing to comply with disclosure obligations do not infringe on the fair trial rights of the defendant.⁶³ As such, the managerial landscape is here to stay.

The Frontloading of the Defence Role: Pre-Charge Engagement

In December 2020, the revised Attorney General's Guidelines on Disclosure introduced Pre-Charge Engagement (PCE). The idea around PCE is that it represents a voluntary opportunity to engage.⁶⁴ Both the police and the defence lawyer (or an unrepresented suspect) must agree that engaging with the process is in the best interest of advancing the case. Before its implementation, the scheme was not piloted, and there is a lack of research on its operation. The Guidelines emphasize that disclosure obligations must be fulfilled in a 'thinking manner'⁶⁵ which was taken from *R v Olu, Wilson and Brooks*⁶⁶ where the court clarified that disclosure should not be undertaken 'in a mechanical manner ... keeping in mind [and] being alive to the countervailing points of view ... considering the impact of disclosure decisions ... keeping disclosure under review'.⁶⁷ While this thinking manner approach was applied to disclosure, it is evident that both disclosure and PCE are closely interconnected.

The Guidelines provide a non-exhaustive list of what PCE might involve, including:

- Giving the suspect the opportunity to comment on any proposed further lines of enquiry
- Ascertaining whether the suspect can identify any other lines of enquiry
- Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation
- Discussing ways to overcome evidential barriers to obtaining potential evidence such as revealing encryption keys
- Agreeing any keyword searches of digital material that the suspect would like carried out
- Obtaining a suspect's consent to access medical records
- The suspect identifying and providing contact details of any potential witnesses
- Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect's representative intends to instruct their own timescales for this.⁶⁸

When examining what PCE entails, it is questionable whether the scheme introduces anything novel to the pre-charge process. PCE closely resembles what Reasonable Lines of Enquiry (RLE) might involve. The Code of Practice accompanying the Criminal Procedure and Investigations Act 1996 (CPIA 1996) advises that an investigator 'should pursue all reasonable lines of enquiry, whether these point towards or

62. *Woolmington v DPP* [1935] AC 462 at 481.

63. [2009] EWCA Crim 43.

64. *The Guidelines* 34.

65. *The Guidelines* p.3 para 4.

66. [2010] EWCA 2975, [2011] 1 Cr. App. R. 33.

67. *Ibid* at 42–44.

68. *Ibid*.

away from the suspect ... it is a matter for the investigator to decide which material ... is reasonable to inquire into'.⁶⁹ At face value, the wording of the guidance is problematic. The term 'engagement' implies a collaborative effort between two parties working towards a common goal. However, the previously mentioned, non-exhaustive list of what PCE might involve indicates a one-way flow of information – from the suspect to the police, with minimal information moving in the opposite direction. Additionally, since PCE occurs before any formal proceedings begin, statutory disclosure rules do not apply. Notwithstanding this, the investigator/prosecutor also should be 'continually alive to the potential need to make further disclosure'⁷⁰ as the suspect continues to provide more information throughout PCE.

Pre-Charge Engagement is not without its merits. The importance of diverting cases from potentially unnecessary trials has never been greater. The criminal court backlog is staggering, with nearly 68,000 cases outstanding in the Crown Court and 387,000 in the magistrates' court as of June 2024.⁷¹ Lubna Shuja, the then-president of the Law Society, remarked that the delays faced by defendants, witnesses, and complainants are unacceptable. Shuja further stated that the 'entire criminal justice system is fracturing... people seeking justice... are left in limbo, waiting longer and longer to see it happen'.⁷² There were attempts to reduce the backlog in the magistrates' court by extending magistrates' sentencing powers. In 2022, the government extended the powers so magistrates could pass a sentence of 12 months for a single offence, replacing the maximum sentence of six months. This extension was thought to free up an extra 1700 days of Crown Court time each year.⁷³ However, this was reversed after 10 months as the magistrates' court works faster than the Crown Court and the increase in sentencing powers 'had led to an increase in the prison population that needed to be addressed, going back to the previous sentencing powers would slow down the increase in the prison population'.⁷⁴ The government's efforts to reduce the backlog by extending the powers of magistrates have proven futile. The criminal justice system is fracturing and desperately needs proper funding. In the meantime, PCE could serve as a viable alternative for resolving cases before trial, but its initial adoption has been low.⁷⁵ Lawyers and police are not engaging with the scheme, leaving it largely unused. Despite this, the advent of PCE is a further example of co-opting the defence lawyer into a more managerialised and less adversarial system. The regime attempts to frontload the construction of guilt or innocence at the earliest possible stage. In part, this could go some way to alleviate the enormous backlog of cases in the court system. However, the price for this efficiency driver is the very tenants that are the cornerstone of the adversarial fair trial: the presumption of innocence and the privilege against prosecution are seemingly ridden roughshod over. The suspect is providing information prior to charge to assist the police and/or the prosecution. The defence lawyer, so often viewed as the zealous shield from the oppressive state is a mere cog in the wheel in the quest for an efficient criminal justice system.

However, by not using the scheme purely because the rates are perceived to be insufficient places their client at a clear disadvantage. As discussed, traditional adversarialism and acting as a 'zealous advocate'

69. Criminal Procedure and Investigations Act 1996, Code of Practice, para 3.5 (available here: Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice (publishing.service.gov.uk) [Last accessed December 2022].

70. *ibid.*

71. The Law Society, 'Clearing record criminal court backlogs must be a priority for next government' June 2024, available here: <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/clearing-record-criminal-court-backlogs-must-be-a-priority-for-next-government> [last accessed December 2024].

72. *Ibid.*

73. Ministry of Justice, Magistrates to help tackle backlog as sentencing powers doubled, 2nd May 2022, available here: <https://www.gov.uk/government/news/magistrates-to-help-tackle-backlog-as-sentencing-powers-doubled> [Last accessed October 2023].

74. HL deb, 16 May 2023, vol 830, col 211 available here: [https://hansard.parliament.uk/lords/2023-05-16/debates/A7694043-1B1D-47A6-BC15-9BD92B07174F/SentencingAct2020\(MagistratesCourtSentencingPowers\)\(Amendment\)Regulations2023#:~:text=The%20instrument%20that%20is%20the,in%20place%20in%20May%202022.](https://hansard.parliament.uk/lords/2023-05-16/debates/A7694043-1B1D-47A6-BC15-9BD92B07174F/SentencingAct2020(MagistratesCourtSentencingPowers)(Amendment)Regulations2023#:~:text=The%20instrument%20that%20is%20the,in%20place%20in%20May%202022.) [Last accessed October 2023].

75. For more on the functioning of PCE, see E. Johnston, The Adversarial Lawyer and the Client's Best Interest: Failures with Pre-Charge Engagement, *Journal of Criminal Law*, (2024), 88(1) 3–16.

is centred on advancing your client's best interest. However, lawyers are not acting in the client's best interest and potentially miss an opportunity to divert a case from prosecution purely because the lawyer does not think engagement is worthwhile from a financial standpoint.

Criminal Justice in Transition: The Netherlands

Enhancing Defence Rights: The Case of Legal Assistance during Police Interrogations

The shift towards a more adversarial procedure, enhancing the rights of the suspect, as outlined in section 3, is evident in the improved right to legal assistance during police custody. The right to access to a lawyer during police custody was long in the making in the Netherlands. Already in the 1980s and 1990s, the right to legal assistance prior to and during police interrogation was the subject of extensive debate.⁷⁶ However, a statutory regulation failed to materialise and it took until the ECtHR judgment in *Salduz* in 2008 that the right to consult a lawyer prior to police interrogation was accepted by the Supreme Court.⁷⁷ This had profound implications for the Dutch legal system and practice. The adjustment of policy, practice and funding of assistance ensured that most arrested suspects could consult a lawyer prior to their police interrogation.⁷⁸ However, a right to assistance during interrogation was not adopted. In subsequent years, it was repeatedly argued that a right to interrogation assistance also followed from ECtHR rulings⁷⁹ and the EU Directive 2013/48/EU on the right of access to a lawyer.⁸⁰ Because a statutory regulation was long overdue, the Supreme Court ruled in late 2015 that a right to assistance during police interrogation should be assumed from then on.⁸¹

These changes reflect a broader trend in European law to strengthen the safeguards for suspects in police custody. In the Netherlands, the enhancement of a suspect's rights during police interrogations has sparked significant resistance and debate. From a strongly inquisitorial perspective, the police interrogation is seen as a crucial method for uncovering the truth, and the presence of a lawyer was initially viewed as an impediment. Consequently, the lawyer was initially only permitted to sit at the back of the interrogation room (instead of next to their client) and was expected to refrain from interfering with the interrogation as much as possible. In fact, the primary task of the lawyer was to prevent undue pressure from being exerted on the suspect.⁸² To this day, the statutory regulation still provides for a rather strict framework, which allows counsel to make comments or ask questions only at certain times during the interrogation and under certain conditions.⁸³ This regulation has been criticised in the literature, as it would not be in line with the principle that assistance during police interrogation also implies that counsel may actively participate in that interrogation.⁸⁴ In practice, it appears that the extent and

76. For an overview P.T.C. van Kampen & P.P.J. van der Meij, 'Verhoorbijstand in een rechtsstaat' [2016] NJB 554.

77. ECtHR 27 November 2008, appl.no. 36391/02 (*Salduz/Turkije*); Supreme Court 30 June 2009, NJ 2009/349, 350 and 351.

78. M. Lochs, 'Geen coullance maar recht: de actieve raadsman bij het politieverhoor' (2021) Boom Strafbld 2, 131.

79. Amongst others ECtHR 24 October 2013, appl.nos. 62880/11, 62892/11 and 62899/11 (*Navone e.a./Monaco*).

80. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. See also Supreme Court 1 April 2014, ECLI:NL:HR:2014:770, NJ 2014/268.

81. Supreme Court 22 December 2015, ECLI:NL:HR:2015:3608, NJ 2016/52 m.nt. Klip. More recently, the Supreme Court has ruled that additional safeguards should apply to vulnerable and/or minor suspects, see Supreme Court 9 April 2024, ECLI:NL:HR:2024:555 and ECLI:NL:HR:2024:556. Further, legislation is being prepared to extend the right to free legal aid in criminal cases, including those involving non-arrested juvenile and vulnerable adult suspects, and suspects on whom the prosecution is seeking to impose a penalty order, see Wetsvoorstel versterking rechtsbijstand in het strafproces.

82. T. Geurts & M.S. Hoekstra, *Advocaat bij politieverhoor 2017–2019* (WODC Cahier 2021–13), p. 25 and 63.

83. S. 28d Code of Criminal Procedure and Decree Organisation and Order Police Interrogation (Besluit inrichting en orde politieverhoor), Stb. 2017, 29.

84. J.H.J. Verbaan & L.E. Hollander, 'De rechtspositie van de raadsman tijdens het politieverhoor' (2020) *Nederlands Tijdschrift voor Strafrecht* 4; M. Lochs, 'Geen coullance maar recht: de actieve raadsman bij het politieverhoor' (2021) Boom Strafbld 2.

mode of intervention by counsel during police interrogation strongly depends on the attitude of the individual police officer and lawyer involved.⁸⁵ In a few cases, disciplinary complaints have been lodged by police officers against lawyers who were alleged to have been too active during police interrogations, thus disrupting the interrogations. The assessment of these complaints shows that the disciplinary courts are reluctant to impose sanctions on lawyers who take a more active approach during police interrogations than is allowed under the legal framework.⁸⁶

Considering that until 2008 suspects could generally only consult a lawyer after their first police interrogation, the right to assistance during police custody in the Netherlands has significantly improved in recent years, largely driven by European standards. From the way this process has unfolded, however, it is easy to see how much reluctance there has been in this regard. That reluctance can be explained by deep-rooted inquisitorial views on the importance of the police interrogation in the investigation, in which the suspect was traditionally seen as an 'object of investigation' rather than a legal subject with autonomous (procedural) rights. To this day, this reluctance is reflected in the (legal) restrictions that still apply to the provision of assistance during police interrogation. The effectiveness of legal assistance during police custody can therefore still be questioned. Defence lawyers' attitude, knowledge and skills are also important factors in this regard. It is conceivable that lawyers need time to adapt to a more assertive role during police interrogations.⁸⁷ For example, training specifically focusing on effectuating suspects' rights at the police detention stage is not yet part of the professional training of criminal defence lawyers.⁸⁸

Efficiency and the Revision of the Code of Criminal Procedure

While the preceding paragraph highlights the strengthening of defence rights in the Dutch criminal process, specifically through the right to legal aid during police custody, it is important to note that there are concurrent developments that could potentially compromise the fairness of a trial. Over the past few decades, the judicial system has increasingly adopted a business-oriented, or managerialist approach, prioritizing the efficient resolution of criminal cases. The implications of these changes are manifold and have been extensively examined in scholarly literature. They encompass aspects such as workload, the quality and values upheld by the judiciary,⁸⁹ and the bureaucratisation and standardisation of the public prosecutor's office. Additionally, these changes have been associated with a notable increase in the use of out-of-court settlements.⁹⁰

In the context of the Netherlands, the emphasis on efficiency, particularly in relation to the revision of the Code of Criminal Procedure, has resulted in an increased focus on preliminary investigations. This is called the *beweging naar voren*, what could be translated as a 'forward shift'. In their attempt to enhance the efficiency, the legislator intends to facilitate a practice in which the investigation of facts is concluded predominantly during this preliminary stage. This practice, which has been the norm for many years,

85. C.M. Klein Haarhuis, *Langetermijnmonitor 'Raadsman bij verhoor': Eerste editie* (WODC Cahier 2018–16), p. 84–85 and 88–90; T. Geurts & M.S. Hoekstra, *Advocaat bij politieverhoor 2017–2019* (WODC Cahier 2021–13), p. 99–103.

86. Disciplinary Appeals Tribunal 's-Hertogenbosch 21 May 2021, ECLI:NL:TAHVD:2021:101; Disciplinary Board. Arnhem-Leeuwarden 30 October 2023, ECLI:TADRARL:2023:286.

87. See on culture A. Pivaty, *Criminal defence at police stations. A comparative and empirical study* (Routledge 2019), p. 174–175.

88. For example the SUPRALAT project, that took place between 2015 and 2017 and resulted in the implementation of such training in several countries, see Report on the SUPRALAT Project, published on www.ecba.org; A. Pivaty et al, 'Contemporary criminal defence practice. Importance of active involvement at the investigative stage and related training requirements' (2020) *International Journal of the Legal Profession* 27, 25.

89. A. Pivaty & M.J. Dubelaar, 'New Public Management and the role of the Dutch trial judge', in E. Johnston & A. Pivaty (eds.), *Efficiency and Bureaucratisation of Criminal Justice. Global Trends* (Routledge 2023), p. 108–127.

90. J.M.W. Lindeman & N.L. Holvast, 'New Public Management in de Dutch criminal justice chain: the effects of stratification and automation in out-of-court proceedings', in E. Johnston & A. Pivaty (eds.), *Efficiency and Bureaucratisation of Criminal Justice. Global Trends* (Routledge 2023), p. 34–54.

dictates that witnesses are heard in public trial hearings only under exceptional circumstances.⁹¹ This principle will now explicitly be reflected in the legal framework. Consequently, the role of the examining magistrates has been expanded, granting them the authority to decide on the investigative requests of the defence and execute these requests up until the start of the trial.⁹²

The explanatory memorandum to the bill revising the Code of Criminal Procedure indicates an intent to provide ‘ample opportunity’ for conducting investigations at an early stage.⁹³ Certain defence powers are indeed expanded to facilitate this, such as the possibility (under specific circumstances) to be present during a police interrogation of a witness.⁹⁴ Contrary to the current regulation, it is now assumed that if a suspect wishes they can attend interrogations conducted during the preliminary investigation.⁹⁵ However, this ‘forward shift’ also implies that the defence is expected to express their investigative requests early on, necessitating a (partial) reveal of their legal strategy. This can be particularly complex and problematic when the investigation has not yet been completed and the defence lawyer therefore lacks a comprehensive understanding of the evidence collected against their client. A contributing factor to this is the often considerable amount of time that is, in practice, needed for the disclosure of (complete) case files. Neither the existing nor the prospective legal framework provides for effective mechanisms to expedite the disclosure of these documents. The delay in disclosure is especially noticeable in cases where the accused have not been subjected to pre-trial detention and often necessitates proactive measures on the part of the defence counsel.⁹⁶

This shift towards the preliminary investigation stage further underscores the ‘verificative’ character of the trial hearing. That character is related to the highly efficient organisation of Dutch criminal proceedings. Trial hearings increasingly revolve around the examination of the case file and the articulation of the respective stances of the prosecution and the defence. Witnesses are seldom heard in court, allowing even larger cases to be concluded within a day or a few days. This phenomenon has been characterised as the mere ‘verification’ of the contents of the case file. The lack of immediacy in court proceedings has been a recurring subject of critique in legal literature, particularly considering its implications for truth-finding and for the publicity of the trial.⁹⁷

The pursuit of efficiency is further evident in the design of the higher appeal procedure in the new Code of Criminal Procedure. Unlike the current regulation, the appellate judge can focus on the objections raised by the parties and disregard points that are not contested.⁹⁸ This approach further distances the judge from being actively responsible for the correctness of the judgment. Concerns have been raised in the literature about the potential development of a passive appellate judge.⁹⁹ The Council of State has also warned that the increased responsibility of the defence to present relevant objections makes the defendant increasingly dependent on the quality of their counsel.¹⁰⁰

Finally,, it is important to note that the Public Prosecution Service has taken on an increasingly significant role in the prosecution of criminal offenses over the past decades, while the judiciary has become

91. See Supreme Court 20 December 1926, NJ 1927, 85, in which judgment so-called hearsay testimony was allowed as evidence.

92. See Book 2, Chapter 10 of the Draft Code of Criminal Procedure, Kamerstukken II 2022/23, 36327, no. 2.

93. Draft Explanatory Memorandum to the New Code of Criminal Procedure, Kamerstukken II 2022/23, 36327, no. 3, p. 35.

94. Art. 2.3.11 Draft Code of Criminal Procedure. However, the text of the bill still raises questions, such as whether the lawyer actually has the right to question the witness and under what circumstances this right can be restricted, see M. Lochs, ‘Achter de feiten aan. De mogelijkheden van de verdediging om bij te dragen aan de feitenvaststelling in strafzaken’ (2024) Platform Modernisering Strafvordering, DOI: 10.5553/PMSv/258950952024002.

95. S. 2.10.29 Draft Code of Criminal Procedure.

96. Van Kampen e.a. 2018, p. 76–79, 186–194, 258–259.

97. L. van Lent, A. Smolders & M. Malsch, “‘We kennen allemaal de stukken...’ Pleidooi voor een debat over een onmiddellijker strafproces in Nederland’ [2020] DD, 528.

98. S. 5.4.29 Draft Code of Criminal Procedure.

99. D. Bektsevici & M. Berndsen, ‘Modern beslissen in hoger beroep en cassatie’ (2019) Platform Modernisering Sv, 59, DOI: 10.5553/PMSV/258950952019002005001.

100. Advisory Body Council of State, ‘Advies over het nieuwe Wetboek van Strafvordering’, 6 April 2022, p. 37–38.

more distant.¹⁰¹ Since 2008, the Public Prosecution Service has had the authority to issue penal orders for less serious offenses.¹⁰² Although this method of out-of-court settlement is efficient and contributes to a reduction in the workload of the judiciary, it raises fundamental questions since the Public Prosecution Service, as the prosecuting authority, is also responsible for the adjudication of (some) criminal offenses. Moreover, research indicates that the rights of suspects are not always properly observed in these proceedings and that legal assistance for suspects is often insufficiently arranged for.¹⁰³ Judicial review only occurs if the suspect objects to the penal order within fourteen days.¹⁰⁴ On a positive note, a bill has recently been submitted to improve legal assistance in penal orders.¹⁰⁵ However, with a new government now in office, it remains uncertain whether this bill will be pursued.

When the aforementioned developments are considered together, it is evident that the role of the judge is shifting towards efficiently ‘orchestrating’ the criminal proceedings. This is a departure from the traditional role where the judge, through active participation, acted as a crucial safeguard for both truth-finding and due process. Consequently, the onus of ensuring a fair trial increasingly falls on the defence, while it is questionable whether the defence is adequately equipped for this task in terms of (legal) possibilities and (financial) resources.

In this context, it is worth noting that not every defendant has access to funded legal aid. There are also significant concerns about the operation of the legal aid system, primarily because the compensation consistently falls short given the volume of work. Moreover, cases are becoming more complex and demanding.¹⁰⁶ Looking at the future, the Council of State, the principal advisory body to the government, has issued warnings about the expected increasing workload for defence lawyers due to the implementation of the new Code of Criminal Procedure. It has stressed the necessity to adjust the legal aid system to accommodate this change. Failure to do so, or inadequate adjustments, will inevitably impact the quality of legal assistance provided in criminal cases.¹⁰⁷ This situation is problematic in itself, but it becomes even more so when considering the increasing responsibility placed on the defence to ensure a fair trial.

A Changing Landscape for the Dutch Defence Lawyer

The developments in Dutch criminal procedure illustrates that there has, in certain aspects, been an enhancement of defence rights in the Netherlands. At the same time, a strong emphasis on efficiency leads to the safeguarding of fair proceedings increasingly being seen as the (exclusive) responsibility of the defence. In the past, the public prosecutor and the proactive judge played a significant role in guaranteeing a fair trial. However, it is now more than ever the duty of the defence to invoke the rights to a fair trial in a timely and appropriate manner, specifically early on in the preliminary investigation. This observation raises important questions, particularly regarding the implications for the role, responsibilities, and possibilities of the defence. For example, it can be questioned whether Dutch criminal defence lawyers are equipped for their role as more adversarial lawyers, in terms of training, skills, funding and (legal) possibilities.¹⁰⁸ In regards to the latter, it remains to be seen whether the defence’s ability to investigate,

101. J.H. Crijns & R.S.B. Kool, ‘Afscheid van de klassieke strafrechtelijke procedure?’ in L.M. Coenraad et al (eds), *Afscheid van de klassieke procedure?* (Wolters Kluwer 2017).

102. Offenses with a maximum prison sentence of six years, see s. 257a of the Code of Criminal Procedure.

103. G. Knigge & E. de Jonge van Ellemeet, *Beschikt en gewogen. Over de naleving van de wet door het openbaar ministerie bij het uitvaardigen van strafbeschikkingen* (Den Haag 2014) and G. Knigge & M. Peters, *Beproefd verzet. Over de naleving van de wet door het openbaar ministerie bij de afhandeling van het verzet tegen een OM-strafbeschikking* (Den Haag 2017).

104. S. 257e Code of Criminal Procedure.

105. Wetsvoorstel Versterking rechtsbijstand in het strafproces.

106. S. van Oers, ‘De sociale advocatuur is onmisbaar’ [2024] *Ars Aequi* 262; see also ‘Commissie Van der Meer opnieuw aan de slag’ *Advocatenblad* 20 december 2023.

107. Advisory Body Council of State, ‘Advies over het nieuwe Wetboek van Strafvordering’, 6 April 2022, p. 49.

108. A. Pivaty et al, ‘Contemporary criminal defence practice. Importance of active involvement at the investigative stage and related training requirements’ (2020) *International Journal of the Legal Profession* 27, 25–44.

substantiate and present its own version of events is always effective and sufficient. One notable example pertains to the compilation of the case file, which is the responsibility of the public prosecutor. Over time, the defence's ability to influence the composition of these case documents has seen a moderate expansion, yet a substantial reliance on judicial authorities persists. This is particularly evident when the defence seeks to introduce its own documents into the proceedings. In such instances, the decision to admit this information primarily rests with the prosecutor and ultimately with the judge. From an inquisitorial perspective, it is comprehensible that judicial authorities maintain control over the addition of relevant documents to the file. However, when viewed through the lens of effective adversarial proceedings, it is noteworthy that the defence faces restrictions in introducing information that it considers relevant. A more logical approach might be to allow the defence the freedom to present documents, with the understanding that the judge retains the final say on the relevance of this information and its inclusion in the decision-making process.¹⁰⁹

At the same time, there is debate on the duties and responsibilities of defence lawyers. Various incidents involving lawyers' improper or potentially criminal behaviour have sparked controversy and raised concerns about their professional conduct. This has led to the ongoing restructuring of disciplinary supervision in the legal profession.¹¹⁰ Efforts are also underway to enhance supervision of interactions between lawyers and clients in high-security detention facilities.¹¹¹ In this context, the question arises whether lawyers should have a public responsibility. This implies that they should more often weigh their clients' interests against the broader interests of justice. Consequently, their role as zealous advocates may be somewhat contested.¹¹²

A final point that should be mentioned relates to the enduring prevalence of 'inquisitorial mindsets and attitudes' within substantial segments of the criminal justice system. As illustrated by the development of the right to legal assistance during police custody, European influences have been necessary for instigating adversarial reforms. These changes are unfolding gradually, and their interpretation and practical application often encounter resistance. The shift towards a more adversarial practice, characterised by enhanced defence rights, is therefore a gradual and occasionally inconsistent process. This is exemplified by the ongoing comprehensive legislative operation aimed at revising the Code of Criminal Procedure. While certain aspects of this operation are enhancing defence rights, most decisions made do not significantly reinforce the adversarial nature of the criminal process. Furthermore, the entire operation is heavily geared towards enhancing efficiency. With its strong focus on the preliminary investigation, the Dutch criminal process is distancing itself even more from the traditional adversarial courtroom setting than it already has.

Conclusion

The adversarial criminal justice process in England and Wales has undergone substantial change over the last four decades. From the high watermark of PACE 1984, which reaffirmed due process values in the wake of several miscarriages of justice, to the gradual dilution of these powers through various legislative provisions, the system has moved from an adversarial obstacle course to a cooperative, managerialised process focusing on efficiently moving the defendant through the system. Despite all these procedural changes, the role of the lawyer ought to be unaltered throughout. Their role is to advance the best interests

109. P.T.C. van Kampen et al, *Mind the Gap. Modernisering Wetboek van Strafvordering: consequenties voor de verdediging* (WODC 2018); also M. Lochs, 'Achter de feiten aan. De mogelijkheden van de verdediging om bij te dragen aan de feitenvaststelling in strafzaken' [2024] Platform Modernisering Strafvordering, doi: 10.5553/PMSv/258950952024002.

110. 'Toezicht advocatuur: Kroniek van het voortschrijdend inzicht' *Advocatenblad* 29 juni 2023.

111. Concept Wetsvoorstel Wijziging van de Penitentiaire beginselenwet in verband met aanvullende maatregelen tegen georganiseerde criminaliteit tijdens detentie, Kamerstukken II 2023/24, 36372, no. 22.

112. See M. Lochs, 'Een publiekrechtelijke verantwoordelijkheid voor de verdediging?', in J. Altena et al (eds.), *In onderlinge samenhang. Liber amicorum Tineke Cleiren* (Boom juridisch 2021), p. 545–556.

of the client, having a duty to the administration of justice and a duty to the public. Yet, it is arguable if defence lawyers truly prioritised their first duty – to the client. A raft of evidence from the 1970s–1990s suggests that lawyers viewed their clients with disdain, often pre-judging them. Empirical work from the turn of the century indicates that little has changed in this approach, but what has changed is the system itself; the defence lawyer has several obligations to ensure ‘cases are dealt with justly’, including obligations around disclosure and the management of criminal cases. The quest for efficiency blunts the adversarial arsenal of the defence lawyer. When they are afforded further armaments that might assist the client’s best interest, such as PCE, they often go unused. The role of the defence lawyer is paramount to a fair and just system, yet their impact is gradually diluting. The modern-day lawyer in England and Wales has a primary duty to ensure cases are dealt with justly and in the most efficient method possible.

In the Netherlands, adversarial elements are increasingly being incorporated into the traditionally inquisitorial criminal process. This shift is accompanied by an enhancement of the defendant’s legal position. Simultaneously, there is a significant emphasis on resolving cases as efficiently as possible within the criminal process. This places a greater responsibility on the defence to present all points that may be relevant to the client. Meanwhile, the public prosecutor and the judge appear less active in fulfilling their duties to ensure truth-finding and due process. These dynamics can be particularly challenging because defence lawyers do not always have the necessary authority or skills to conduct the defence in a truly adversarial manner. Additionally, suspects, especially in minor cases, often lack any legal assistance.

When comparing developments in both jurisdictions, it becomes evident that managerial influences significantly impact the criminal procedural systems in England and Wales as well as the Netherlands. A common observation is that this emphasis on efficient case handling often comes at the expense of effectively exercising defence rights. At the same time, this article illustrates an opposite movement in both jurisdictions: while the adversarial nature of the English criminal process is diminishing due to managerial influences, the Dutch criminal process – largely influenced by European standards – is incorporating more adversarial elements, which also affects how the criminal defence lawyer is expected to fulfill their role. While the English lawyer is becoming more of a cog in the system, more and more is expected of the Dutch lawyer, although the structure of the Dutch criminal process does not yet sufficiently facilitate a truly ‘adversarial’ interpretation of his role.

From a fair trial perspective, it can be stated that adversarialism has always been seen as essential to ensuring due process. In this context, the developments in England and Wales are particularly concerning. The increasing adversarial influences in the Dutch criminal process are undoubtedly positive in this context. However, this observation does not capture the full picture. This is due to the fact that the structure of a criminal procedural system is founded on fundamental principles, where the division of tasks and roles among various actors is crucial for the system’s proper functioning. When the roles of participants change, whether due to efficiency motives or other factors, it impacts the system’s coherence and raises questions about whether the underlying goals and principles of the criminal process can still be achieved. In other words, it is a delicate system of checks and balances where imbalances can quickly arise. For instance, the withdrawal of the active, protective role of the Dutch judge can be seen as problematic if it is not accompanied by a significantly stronger position for the defence. In the English system, a weakening of the defence lawyer’s position negatively affects the fairness of the process, given its structure. This is even more critical when the role and stance of the judge in such a system change, especially if the judge actively interferes with or imposes requirements on the way the defence is conducted, without this more active role being accompanied by the full responsibility for ensuring a complete and fair process as is expected of the inquisitorial judge.

In England and Wales, the adversarial nature has been misplaced amongst a swathe of provisions that focus the justice system on becoming more efficient to preserve economic resources. Lost amongst this seismic shift is the notion of fair trial rights, and in turn, the defendants have lost their zealous advocate. A mere cog in the wheel of efficiency has replaced this adversarial warrior. On the surface, the Netherlands appears to be embracing more adversarial norms, yet the growing workload faced by

Dutch defence lawyers is straining a system ill-equipped to support them. In both jurisdictions, as systemic transformations unfold, it is the defence lawyer who emerges as the unintended casualty.

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