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THEODORE A. De ROOS* and JOHANNES F. NIJBOER**

# WRONGFULLY CONVICTED: HOW THE DUTCH DEAL WITH THE REVISION OF THEIR "MISCARRIAGES OF JUSTICE"

ABSTRACT. During most of the twentieth century the very existence of judicial errors was considered an awkward subject in the Dutch legal system. This article considers the change of attitude in recent years. In previous years there was a remarkable self-confidence within the criminal justice system (and in most of the scholarly writings) in doing things the 'right way.' After a few warnings from (only partly legally trained) scholars, who became interested in the functioning of the system, and moreover, after a few clear and undeniable cases of judicial error, there was a *volte-face* in the general feeling amongst both the public and the profession. It is the opinion of the authors that this shift in opinion is historically important. This article therefore intends to draw a picture of the current state of affairs in The Netherlands.

## I INTRODUCTION

During most of the twentieth century the very existence of judicial errors was considered an awkward subject in the Dutch legal system. This article considers the change of attitude in recent years. In previous years there was a remarkable self-confidence within the criminal justice system (and in most of the scholarly writings) in doing things the "right way." After a few warnings from (only partly legally trained) scholars, who became interested in the functioning of the system, and moreover, after a few clear and undeniable cases of judicial error, there was a *volte-face* in the general feeling amongst both the public and the profession. It is the opinion of the authors that this shift in opinion is

* Theodore A. De Roos is Professor of Law at the University of Tilburg. He has a combined background in criminal advocacy and has held positions in a number of universities in The Netherlands (Utrecht, Maastricht, Leiden, and Tilburg).

** Johannes F. Nijboer is Professor of Law at the University of Leiden. He has a scholarly background in the theory of evidence and comparative law.

historically important. This article therefore intends to draw a picture of the current state of affairs in The Netherlands.

The main focus of the article is the actual handling of doubtful cases and wrongful convictions in The Netherlands. The two substantial sections II and III, reflect the general framework of Dutch criminal procedure and the place of the reopening of cases within that system, specifically the work of the Revision Committee (the so-called CEAS). Nevertheless, both sections II and III are directly related to each other and both parts are the product of a joint effort on the part of the authors. The article concludes with an epilogue (section IV). Although the article focuses on the Dutch state of affairs, the content is also relevant for many other jurisdictions. Miscarriages of justice are a universal phenomenon and countries cope with them in a variety of ways, the Innocence project in the USA is well known, but continental countries like France also have to deal with these kinds of cases, e.g. the case of "le meurtre du Pont de Neuilly".[1]

## II MISCARRIAGES OF JUSTICE IN THE NETHERLANDS: FROM A NON-ISSUE TO AN URGENT CONCERN

### 2.1 *Introduction*

Normally, a criminal case in The Netherlands can pass through three judicial instances (courts). If the Public Prosecutor decides to bring the case before the court, which is not mandatory according to the expediency principle (or opportunity principle in criminal matters),[2] it will be tried by the District Court (*Rechtbank*). After the verdict of

[1] See for example, E. Vincent, 'Les Crimes du Pont du Neuilly' *Le Monde* (Paris, 4th April 2008), http://www.lemonde.fr/societe/article/2008/04/04/les-crimes-du-pont-de-neuilly_1030989_3224.html, accessed 2 October 2010. Mr. Marc Machin was convicted in 2001 to an 18 year prison term by the Cour d'Assises for a murder that had taken place on the Pont de Neuilly in Paris. He confessed the act during police interrogation, but withdrew that statement later on (arguing that he had confessed in order to put an end to unbearable psychological pressure). He was nevertheless convicted. In 2008 another man, Mr. David Sagno, confessed to committing the same murder. Machin requested the revision of his case. The revision commission brought the case before the Court of Revision, which has the power to order a new trial or even to nullify the conviction without referring the case to a court. It should be noted that revision in favor of the convicted person is extremely rare in France (as was the case in The Netherlands).

[2] The opportunity principle offers the prosecution discretion to drop a case for reasons of public interest. The opportunity principle is also used in Belgium and France. The contrasting principle is the prosecutorial legality principle (the principle

the District Court both parties, the defence[3] and the prosecution, can appeal to the Court of Appeal (*Gerechtshof*). A victim who joined the case of the prosecution as a (third) civil party is very limited in his or her legal position.[4] In this respect the Dutch system differs considerably from the procedural system in Belgium and France, despite traditional similarities in court structure, legal culture and substantive legislation.[5] In Belgium and France the legal position of the civil party (*partie civile*) is much stronger than it is in The Netherlands where there is no independent right of appeal for the civil party or parties; their cases follow the fate of the case against the accused (also known as defendant or *verdachte*).[6] The Court of Appeal tries the case de novo and is not bound by the decision of the District Court. After the Court of Appeal has given its decision, both parties have the opportunity for an appeal to the Dutch Court of Cassation (*Hoge Raad der Nederlanden*), only on a point of law or an objection as to procedural propriety.

If the Court of Cassation finds a mistake, it will nullify the challenged decision (*vernietiging van de beslissing*). The case will then be sent back to the same Court of Appeal that rendered the earlier verdict or, it will be remitted to one of the other Courts of Appeal. The choice between these options depends on the nature of the

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Footnote 2 continued
of mandatory prosecution) and is prevalent in Germany. Nevertheless, in day-to-day practice both principles are nuanced in their respective applications.

[3] There are a few exceptions. For example, if the defendant was acquitted of all charges against him, he has no right to appeal, whereas the prosecutor can appeal in this case: this would not be considered as double jeopardy. If the defendant was sentenced to the payment of only a small fine, his appeal is subject to the permission of the Court of Appeal.

[4] The procedural position of the victim will be strengthened according to a legislative proposal. See, Article 3 of the EU Framework Decision of 15 March 2001 2001/220/JHA on the position of victims [2001] OJ L82/1 at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_082/l_08220010322en00010004.pdf, accessed 2nd October 2011.

[5] cf D. De Wolf, *De rol van de rechter bij de waarheidsvinding in de correctionele procedure. Een rechtsvergelijkend onderzoek naar Belgisch, Frans en Nederlands recht* (Brussel: Vrije Universiteit, 2009); D. De Wolf, 'De onderzoeksbevoegdheden van de rechter in de correctionele procedure: noodzakelijke instrumenten voor de waarheidsvinding' (2010) 5 *Nullum Crimen* 93 (*Tijdschrift voor straf- en strafprocesrecht*).

[6] Any further remedies must be sought in a separate (tort) procedure before a civil court.

mistake, although the Court of Cassation is given quite some leeway for its own discretion.[7]

At some point (possibly after a second or a third appeal in cassation), the decision of the Court of Appeal will become irrevocable. Reopening the case after a final decision which is then ready for execution is, in principle, not possible.[8] Such a reopening of the case is considered to be double jeopardy, a violation of the principle *non [ne] bis in idem*. The Dutch Code of Criminal Procedure nevertheless offers a so-called extraordinary remedy in the form of revision (*herziening*) of criminal verdicts. At present, this cannot result in a disadvantage for the convicted person. Therefore, there is no room for a *reformatio in peius* after a verdict has become irrevocable, but as we will see later (in section III), this might change with future legislation.[9]

Thus revision of formally irrevocable judgements is possible, although until recently this option was rarely used. The revision procedure, as provided by the Dutch Code of Criminal Procedure, is divided into two distinct procedural stages: first, there is a threshold procedure at the Court of Cassation. Then, if the request for revision is granted, a Court of Appeal will retry the case. The request can only be made on one of three grounds: (i) the so-called *novum*—new data which could have led to a different verdict if they had been known to the Court; (ii) inconsistency between two or more verdicts given by different courts, that are not compatible with each other; and (iii) a decision given by the European Court of Human Rights (ECtHR), indicating that there was a violation of human rights in the concrete case. Within the framework of our subject, only the first ground (*novum*) is relevant. Further, it should immediately be noted that a request for revision can only be filed by the defendant, his *advocaat* (defence lawyer), or the *Procurator-General* (Procureur-Generaal) at the Court of Cassation. If someone else wishes to file a motion for revision, the only option is to contact the Procurator-General at the Court of Cassation imploring him to use his power to file a request for revision.

Occasionally a third party (such as an expert who had been involved in the original investigation) has sought rescue with the Procurator-General at the Court of Cassation. So far, granted

[7] Here the Dutch legislative framework seems to be more pragmatic than its French and Belgian counterparts.

[8] This is according to the maxim, '*litis finiri oportet*' – there must be an end to the dispute.

[9] As of October 2011 the relevant Bill is still pending within the legislative process.

requests usually concern cases of mistaken identity: someone else's name and identity was used by the accused. This can happen when a person formally shows up in the records as having served a prison penalty, whereas in fact someone else was recorded under his/her name.[10] Apart from these rather self-evident cases, the revision mechanism was traditionally considered as an *avis rara*. As a consequence, the Dutch legal community used to have confidence in the ordinary safeguards and remedies in the criminal proceedings. As we will see, this has changed quite dramatically.

The extraordinary remedy of revision has a paradoxical foundation for its existence. The legitimacy of the criminal justice system rests on the execution of irrevocable convictions, but the same legitimacy is tainted if it is shown that a wrongful conviction exists as a consequence of which an innocent person is or was undergoing a severe punishment.

### 2.2 *Historical Overview*

The criminal justice system in The Netherlands has a structure that can best be characterized as modified Napoleonic. There are two codes according with the general continental model: a code of criminal procedure (*Wetboek van Strafvordering*) and a (substantive) criminal code (*Wetboek van Strafrecht*). The judicial system is a unitarian hierarchical system. The Public Prosecution Service (*Openbaar Ministerie or Public Ministry*) naturally has a monopoly on criminal prosecutions.

The court structure is built upon hierarchical lines, with the Court of Cassation at the top of the pyramid. It is important to note that although in theory, the decisions of the Court of Cassation have no formal authority (*stare decisis*) for the other, lower courts, they are in fact widely accepted as leading and persuasive authorities. During the nineteenth and twentieth centuries the Napoleonic inheritance was gradually modified and reformed. During the 1890s, after the famous *Hogerhuis* Case[11] the extraordinary remedy of revision was

[10] The growing impact of ICT within the criminal justice system has increased the risk of such mistaken identities. See, W.L. Borst, *Jegens en Wegens* (Nijmegen: Wolf Legal Publishers, 2009).

[11] J. Frieswijk & H. Sleurink, *De Zaak Hogerhuis: "Een Gerechtelijke Misdaad"* (Leeuwarden: Friese Pers Boekerij, 1984) and P.J. van Koppen, *Het Recht van Binnen: Psychologie van het Recht* (Deventer: Kluwer 2002).

introduced in its present form and with the present bases (i) and (ii).[12] The relevant rules were incorporated in the then existing procedural code[13] and they were conserved in the present Code of Criminal Procedure which came into force in 1926. Apart from the already alluded to cases of mistaken identity, the matter was considered as a non-issue in subsequent decades. The internationally renowned *Dreyfus* case, and the less well–known, Dutch case of *Giessen-Nieuwkerk*[14] (false allegations by a police officer) were perceived as 'curious incidents' without serious bearing on the actual criminal justice system.

Around 1988–1990 public attention was drawn to the clear existence of wrongful convictions in the United Kingdom, particularly in relation to a number of IRA-cases from the time of the outbreak of ''the Troubles'' in Northern Ireland. The cases of the Guildford Four, the Birmingham Six, and the Maguire Seven demanded significant attention from the British authorities. A Royal Commission on Criminal Justice investigated the cases above and offered recommendations to parliament.[15] At that time this was not seen as particularly relevant in The Netherlands, except by a few scholars. Nijboer for instance stated in a legal journal (*Delikt en Delinkwent*) that, under equal political and public pressures as in the UK, the same could happen in The Netherlands.[16] He pointed to the fact that mistakes can follow from structural and cultural factors in

[12] Supra, see 21. Base iii was introduced recently after decisions of the Strasbourg court that found a violation of the European Convention on Human Rights in an already irrevocable concrete Dutch criminal case.

[13] From 1811 to 1813 the (old) French *Code d'Instruction Criminelle* was also in force in The Netherlands (by that time a part of the Napoleonic Empire). It remained in force till 1838, with a few changes such as the abolition of the process before the popular jury. In 1838 a new Code of Criminal Procedure (*Wetboek van Strafvordering*) was enacted. This was widely altered in 1886, in line with the new Criminal Code (*Wetboek van Strafrecht*). This revised Code was in force till 1926.

[14] Hof Amsterdam 1 October 1929, *NJ* 1929, 1394 (The Netherlands).

[15] C.H. Brants, 'The Royal Commission on Criminal Justice' (1994) 24 *Delikt en Delikwent* 28. See also: C.H. Brants & A. Ringsnalda, *Issues of Convergence: Inquisitorial Prosecution in England and Wales?* (Nijmegen: Wolf Legal Publishers, 2011) publication in a series of the Dutch Division of the International Academy of Comparative Law.

[16] J.F. Nijboer, 'Strafrechtelijk Bewijs van een Andere Kant Bekeken' (1991) 21 *Delikt en Delinkwent* 332.

adjudication. At the same time the psychologists Professors Crombag, Van Koppen, and Wagenaar published their study *Dubieuze Zaken*[17] (*Doubtful Cases*), later published in English as *Anchored Narratives*.[18] The direct impact of these publications was negligible, however. A combination of high self-esteem, bordering on overconfidence amongst judges and prosecutors and a strong public confidence in the justice system prevented a critical view on the elements of procedural justice from emerging. We will later attempt to explain this lack of conscientiousness.

### 2.3 *Complex Cases—Perspectives on the Netherlands Criminal Jusice System (1999)*

During the academic year 1994–1995 an international team of scholars enjoyed a joint period of thorough study at the Netherlands Institute of Advanced Study in Social Sciences and Humanities (NIAS) in Wassenaar.[19] The focus of this ''nucleus'' as the group was christened, was on the comparative study of the Dutch criminal justice system in action. The nucleus used real case files as their primary materials. One of the most important research questions concerned the applicability of Anglo-American evidence theory to the standard fact-finding model of the Dutch judiciary. This Dutch model was coined by Terry Anderson, one of the group members, as ''the audit model''. The results of the work were eventually published in the volume *Complex Cases – Perspectives on the Netherlands Criminal Justice System*.[20]

The comparative conclusions of the book can be summarized as follows: much of today's practice has its roots in an inquisitorial tradition combined with French influence during the Napoleonic era and thereafter. There is a clear contrast between formalities of the system and informal practices 'in the shadow of the law'. The Dutch criminal justice system and the legal system in general can be considered as mature, and this maturity includes giving attention to the

[17] H.F.M. Crombag, P.J. van Koppen & W.A. Wagenaar, *Dubieuze zaken* (Amsterdam, Contact 1992).

[18] H.F.M. Crombag, P.J. van Koppen and W.A. Wagenaar, *Anchored Narratives: The Psychology of Criminal Evidence* (New York: Prentice-Hall, 1993).

[19] The members of the group were: T.J. Anderson, USA, A. Dingley, NL, J. Hielkema, NL, M. Malsch, NL, J.F. Nijboer, NL, W.L. Twining, UK, and B. van der Veer, NL.

[20] M. Malsch & J.F. Nijboer (eds), *Complex Cases – Perspectives on the Netherlands Criminal Justice System* (Amsterdam: Thela Thesis, 1999).

weaknesses of the system. In one of the cases discussed in the book a possible wrongful conviction was examined. Although more nuanced, the conclusion on the Dutch criminal justice system in action appeared to be in line with the earlier observations of Crombag, Van Koppen, and Wagenaar.

A general recommendation was made about the need to be critical at the trial stage and give attention to the function of explaining to the outside world the reasoning behind factual and legal findings.

### 2.4 *The Cases: Putten and Schiedam*

At the beginning of the twenty-first century, in both the legal and political arena, more attention was given to the vulnerability of fact-finding in legal proceedings. An older case, that of *Ina Post* (see below) was the first occasion that professionals in the legal and forensic field expressed serious doubts about the accuracy of the system. This was unusual, as prior to this, the professionalism of prosecutors, judges, experts, and police officers was seldom questioned.

The first case, in which it (eventually) became clear that a wrongful conviction had occurred, was the case of a murder in the town of Putten in the province Gelderland. Two men were convicted and served a relatively long prison sentence for the murder of a female flight attendant (the Court of Appeal in Arnhem had given them severe sentences). After the Court of Cassation (*Hoge Raad der Nederlanden*) accepted the case for revision, the case was tried again at the Court of Appeal of Leeuwarden. The decision of this Court of Appeal was very critical about the earlier work of the judges in Arnhem. The decision evoked an enormous and deeply rooted split of opinion within the Dutch judiciary, the divide arising from the decision itself, and not a fact which can be traced back to any other publications. This was at odds with the traditional Dutch judicial culture where it is the habit of judges not to criticize the decisions of others within the judiciary (one should not express opinions about cases in which one does not render a formal decision).

The *Putten* case continued and in summer 2010 a new suspect emerged who was detected on the basis of DNA profiles in the national database. Unidentified semen was found on the victim's body. In the follow-up of the case at the instance of the Court of Cassation, the *Hoge Raad,* the relevant expert, Professor Eskes,

retracted his earlier explanation of the presence of the semen (earlier sexual intercourse with an unknown person).[21]

The true turning point, however, came with the *Schiedam* case. Professor Van Koppen,[22] at an earlier stage, published a book on this case. His conclusion was that in spite of the fact that the defendant confessed to the murder of a young female and the attempted murder on a boy, he could not have committed the crime. According to Van Koppen this was a clear case of a false confession; however, this analysis was not given much attention by the judiciary. At a later date, another person was proven to be the actual offender. For the Dutch legal community in general this case was a real shock: it showed that wrongful convictions are possible in The Netherlands.

### 2.5 *Report by the Senior Prosecutor Frits Posthumus and Its Aftermath*

Under the auspices of the Board of the Public Prosecution in The Netherlands, a senior prosecutor reported (in depth) about what had gone wrong in the *Schiedam* case.[23] The major conclusions do not differ very much from the conclusions of the British Royal Commission 12 years earlier. The shortcomings, it observed, are structural, rather than incidental. They are related to a lack of control over the police, poorly informed forensic experts, and the urge to obtain confessions. In addition, the report found that the participants in the system have problems understanding that the aforementioned issues pose a problem. However, there is general acceptance that the continental episodic style in proceedings[24] increases the risk of

[21] Another case, still pending, is the *Deventer* case. So far, the Court of Cassation has not accepted requests for revision. We will not give any opinion here: the convicted tax lawyer fully served his sentence.

[22] P.J. van Koppen, *De Schiedamer Parkmoord – een Rechtspsychologische Reconstructie* (Nijmegen: Ars Libri Aequi, 2003).

[23] F. Posthumus, *Evaluatieonderzoek in de Schiedammer Parkmoord* (Rapport Posthumus), Openbaar Ministerie (Public Prosecution Service), The Hague 13 September 2005.

[24] See M.R. Damaska, *Evidence Law Adrift* (New Haven: Yale University Press, 1997) and J.F. Nijboer, *Comparative Criminal Law and Procedure* (Deventer: Kluwer, 2005).

confirmation bias (so-called tunnel vision).[25] In section III of this article more attention is given to reactions to this situation.

### 2.6 *Shortcomings of the Actual Revision Procedure*

Over time it has become clear that the present extraordinary remedy of revision, as it is framed within the legislation, is deficient. Firstly, the thresholds for revision are too high, secondly, the number of persons who can apply (the defendant, his lawyer, the defendant's family and the Procurator-General at the Court of Cassation) is too small and finally, the whole procedure is too cumbersome and time consuming.

It is a remarkable achievement that, within the judiciary, the findings of Posthumus and latterly, the work of the CEAS (see further section III) are taken seriously. Nevertheless, they are perceived as serious, unique, or *sui generis* incidents rather than as products of a deficient system.[26] Maybe this is inherent to the lawyers' training, shortened foresight in taking problems on a case-by-case basis rather as a reflection of structural problems. Thus, their perception of legal action is individualized and in this way, it may to be difficult to perceive legal work as being done within the context of a larger complex of entities and to see the different functions as functions of the whole criminal justice *system*.[27]

It is these deficiencies that the Dutch Minister of Justice aims to combat with new legislation. In a nutshell the proposal entails two different elements: an amelioration of the existing revision procedure (widening the threshold, regulating post conviction investigations in cases of 'unsafe convictions') and a possibility of *reformatio in peius* in very serious cases, where cold case investigation gives reason to revise an earlier acquittal. A further description of the proposal is explored in the sections below.

[25] See E. Rassin, *Waarom ik altijd gelijk heb – over tunnelvisie* (Schiedam: Scriptum, 2007).

[26] Cf. G.J.M. Corstens, 'De Wakkere Rechter' (speech at the occasion of the opening of the national register for forensic experts, The Hague, 12 March 2009). See text of article, http://www.rechtspraak.nl/Gerechten/HogeRaad/Actualiteiten/, accessed 2 October 2011.

[27] J.F. Nijboer, *De (straf)rechtspleging als lerend system* (Deventer: Kluwer, 2008).

## III THE NEED FOR LAW REFORM: THE REVISION OF *RES JUDICATA* CASES

### 3.1 *The CEAS: Admission Committee and Task Forces*[28]

From a constitutional perspective, the prosecution can revise its own role in miscarriages of justice, but not the role of the courts. The Admission Committee of the CEAS was appointed by the Board of Procurators-General, the Board of Directors of the Public Prosecution Service. Its chairman (a professor of criminal law at the Radboud University of Nijmegen, Prof. Dr. Ybo Buruma[29]) and one of its members (an advocate) are independent from the Public Ministry; the third member belongs to the (Dutch) Public Ministry.

A case can only be submitted to the Admission Committee of the CEAS if a court has ruled on it and the decision is formally irrevocable. The Board of Procurators-General has committed itself to follow the decision of the Admission Committee if they decide that an application for review is well founded. Upon such a finding, the Board then formulates the research tasks and appoints a research committee consisting of three members of the CEAS. These are usually criminal law professors, retired high police officers, some advocates and experienced members of the Public Ministry. The chairperson of this (sub)committee is always a member of the Public Prosecution Service. Formally, the investigations conducted by the research committee are not investigations in the sense of the Code of Criminal Procedure, rather, all persons and State organs involved participate on a strict voluntary basis.

It is important to stress that the research committees, once they start with their investigations, act completely independent from the Board of Procurators-General, as well as from the Admission Committee. After the research committee presents its findings, the

[28] *Commissie Evaluatie Afgesloten Strafzaken*; it is an interesting point to explore whether or not the British Criminal Cases Review Commission can be considered as comparable.

[29] At the moment Ybo Buruma is still a professor of criminal law at Nijmegen, but he will become a member of the Court of Cassation soon. His proposed appointment led to interesting political discussions within the Dutch Parliament [especially the 'populist' party of Geert Wilders (the PVV) was opposed against the appointment of Buruma in the highest ordinary court of The Netherlands]. This is remarkable, since usually judicial appointments at this level are not subject to political discussion. The background can be found in earlier public remarks by Buruma in which he compared Wilders with the Italian fascist *Duce* Mussolini.

Procurator-General at the Supreme Court (an independent authority which – in The Netherlands,[30] contrary to other countries with Napoleonic systems – is no longer a part of the public prosecutorial system) can undertake any further investigations if he deems them necessary. On the basis of the report of the research committee and/or the results of any further investigations he can decide if he wants to initiate the revision procedure. The most likely basis for this course of action is the discovery of a *novum* (a fact or a complex of facts not considered by the trial courts before, and possibly leading to an acquittal).[31]

### 3.2 *Cases Reported to the CEAS*

By the beginning of 2010, 55 cases had been brought to the CEAS. A large majority of these were found to be manifestly ill-founded, for instance because they had been filed by the convicted person himself and not, as formally required,[32] by a scientist, academic or professional conscientious objector, like a member of the police investigation team who has come to the conclusion that the investigation was characterized by major flaws. The other prevalent reason for inadmissibility is because the case had not yet been decided on irrevocably. Up until January 2011, the research committees (the previously mentioned *driemanschappen*) advised four times in favour of further investigations by the Procurator-General at the Supreme Court.

The Admission Committee proposes research questions, which are generally taken over by the Board of Procurators-General. To this end, research committees have used their instructions rather liberally. However, one major restriction has been respected very strictly: the committees do not have the authority to go into the quality of the court decisions. This is a constitutional limitation which in fact is very difficult to handle. At the start of an investigation a restrictive approach may be justified from a constitutional legal point of view, but in practice it appears far from easy to observe such a rule. Indeed many commentators have considered this restriction as rather artificial. Nonetheless, the reports have not criticized what the courts did in substance, but concentrated on whether the courts had received complete and reliable information from the police and the Public

[30] This is different from other continental countries.

[31] In the *Deventer* case (n. 27 above) the final outcome so far was again a conviction.

[32] In itself an interesting condition.

Ministry. In its Annual Report 2007, the Admission Committee acknowledged that it is a physical impossibility to determine conclusions that do not adjudicate on the functioning of the police, public ministry and experts involved.

### 3.3 *Four Cases Admitted for 'Investigation' by a So-Called Driemanschap of the CEAS*

The four cases admitted and researched by the CEAS show differences as well as similarities. The most important similarity seems to be the aforementioned phenomenon of tunnel vision (confirmation bias); i.e. reasoning away information not fitting into the hypothesis on the guilt of the suspect, and neglecting investigation of alternative scenarios. In other respects, however, the cases are sufficiently different that one might not call them complementary. Differences are not necessarily a bad thing when one takes the 'learning effect' into account. The case of the 'murderous nurse' (*Lucia de Berk*) calls our attention to the role of expert evidence and the consequences of a 'battle of experts' in criminal procedure. The 'sexual-abuse-of-children case' (*Enschede*) concerns the vulnerability of evidence given by young children on sexual abuse. The 'nurse-who-confessed' case (*Ina Post*) is interesting because of the problematic character of withdrawn confessions (the same was the case in the '*Schiedam Park murder*' case, which gave rise to the creation of the CEAS).

It is imperative to reiterate that the CEAS is not a body with investigative powers on the basis of the Code of Criminal Procedure. Therefore, its investigations take place on the basis of voluntary cooperation by the people involved; police officers, prosecutors, advocates and experts. In the *Enschede* case and in the fourth case, the 'Dronten Wood murder,'[33] *ad hoc* police investigation teams have been installed, which operate under the responsibility of an experienced Public Prosecutor who herself is instructed by the '*driemanschap*'. In the *ad hoc* teams, several disciplines are combined and adapted to the specific requirements of the case.

### 3.4 *Interim Evaluation*

Here, it should be stressed that during the first decade of the twenty-first century the professional and public attitude towards the functioning of the criminal justice system has changed remarkably,

[33] See H. Arlman, 'Rapport zaak CEAS 2007/31; quis custodiet ipsos custodes?' (2011) *NJB*, pp. 748–749.

notably with regard to two particular aspects; the involvement of non-legal scholars in distinctly legal questions and the recent increased critical analysis of the judicial process.

With respect to the involvement of non-legal scholars this came to particular prominence in the case of Lucia de Berk which involved battles amongst statisticians and between scientists and lawyers. In April 2011, the Lorentz Institute of the University of Leiden together with the Netherlands Institute for Advanced Study in the Social Sciences and Humanities (NIAS) organized an international inter-disciplinary workshop under the title 'Science Meets Justice'. This workshop was organized to frame a scientific agenda on the topic.

The problem of miscarriages of justice has become increasingly recognized as a legal problem with a wider societal impact and the problem is one that pervades the public consciousness in the UK and the USA. A number of other countries formally recognize the possibility of unsafe convictions, but in countries like the Netherlands it has been extremely difficult to get clearly unsafe cases reopened. In a number of high-profile cases, disputed interpretation of scientific, usually statistical, evidence is central to the debate. This has led to the growing interest of the scientific community in forensic science and recognition of the difficulties of communication of technical scientific evidence to lawyers and laypersons alike. With the increasing use of counter-expertise in court cases the criminal justice system has to cope with the problem of reconciling or choosing between the opposing conclusions of different scientific experts. There is then the perception that scientific evidence turns out to be as uncertain and fallible as any other kind of evidence. Statistical science offers itself as a forensic meta-discipline with the ambition to be of help both for the interpretation of the forensic expertise and for the analysis of the evidential complexity of the legal case itself. At this nexus it merges with general methodology, logic and argumentation theory. In some respect scholars who study the overlap between psychology and law take a similar position.[34] These difficulties in the scientific approach are further confounded by issues of communication, hidden assumptions, and the very different ways in which uncertainty and variation is thought about and coped with in different fields. Determining the truth appears to have become harder than ever in the face of the growing complexity of forensic expertise.[35]

[34] P. van Koppen, *Overtuigend bewijs: Indammen van rechterlijke dwalingen* (New Amsterdam, 2011).

[35] See further the work of the Lorentz Center, http://www.lorentzcenter.nl/, accessed 2 October 2011.

The second change worth noting is the fact that within the discussion most legal scholars in criminal law originally took a very defensive position in favour of the current judicial practices. It is only after the years of work of the CEAS and the small number of acquittals in reopened cases that the academic legal sphere became more critical towards actual practices. An ancillary reason might be that most of the professors in criminal law at Dutch universities function as part-time judges (*ad hoc* judges) in the court system as well.[36]

### 3.5 *One Case in Particular (Knobbe)*

One of the two authors of this article, De Roos, participated in the investigation committee on the *Enschede* case (sexual abuse of children). In 1990, many police complaints were filed by the parents of school children against two girls, sisters of 12 and 10 years old, concerning sexual harassment. As the investigation progressed, suspicions were raised about the father and mother of the two sisters, and later, also against an uncle. The allegations substantiated sexual abuse of the sisters and a number of their friends. In the absence of a conviction the suspects were prosecuted and convicted by the District Court and the Court of Appeal. Their appeal to the Court of Cassation was rejected. All of the accused were sentenced to several years imprisonment, but the father was also convicted and placed in a medical asylum, his current place of detention, from where he pleads his innocence to the media.

The case was brought to the attention of the CEAS by Professor Hans Crombag, a psychologist at Maastricht University, who has an established reputation in the field of forensic psychology. During the pre-trial investigations he reported to the investigative judge on the way the witnesses, especially the two daughters of the accused, had been interrogated. His assessment was very critical. Due to the grossly unprofessional way these children had been examined by the police, it was virtually impossible to establish whether their statements were true or false. On top of this devastating report, there were other experts, in particular two police psychologists, who came to more or less the same conclusions. These expert testimonies were heard during the public hearing in the Court of Appeal of Arnhem, which means that the Court was aware of the serious doubts of the experts as to the

[36] See A.P.A. Broeders, 'Een pleidooi voor toepasbaar deskundigenonderzoek' (2010) 4 *EeR* 124.

trustworthiness of the peculiar statements of the young witnesses, which did not confirm each other, were vague as far as time and place of the offences were concerned, and which were hardly supported by technical evidence. Nevertheless, the Courts used the statements of the children as sufficient evidence. The statement of an orthopedagogist (as an expert witness) before the Court of Appeal of Arnhem probably played an important role in this respect and on first reading, she seemed to contradict the expertise of Professor Crombag. In fact, this was not really the case, as her statement concerned the general state of the art in the field of research on traumatized children, and not the trustworthiness of specific witness statements.

As was explored earlier, a research committee does not have the authority to determine questions regarding the quality of the courts' decision. Crombag's request in this case was underpinned with references to publications on 'corroborative storytelling' which could only be rejected in so far it was based on a critique of the quality of the witness statements. But, he also suggested that some 30 statements of children had not been added to the process documents, and if that had been done, there was a significant possibility that they would have come to a different conclusion as to the merits of the case. It was on this subsidiary ground, that the request was admitted. Conversely however, the research committee established that nearly all reports of witnesses had been added to the file. The committee's task could have been fulfilled at this point, but the committee furnished itself with some more room, and discovered a further evidentiary complication during the initial investigations. Amongst other errors, information about the way a crucial interview with the eldest daughter had taken place was not reported in a complete way, telephone taps had not been worked out or reported. In addition, research efforts which had not led to any concrete conclusions were not reported. On the basis of these findings, the committee concluded a very critical report: if the courts had been able to consider this information it is possible that they would have come to determine an acquittal, due to the rather fragile construction of proof. The Board of Procurators-General took on the report, drawing the conclusion that the practice of adding to or withholding information from the file should be scrutinized critically, and ordered its Scientific Bureau to do so. Yet, the Procurator-General at the Court of Cassation refrained from requesting a review procedure, seeing no *novum* and feeling no necessity for further investigations. The Court of Cassation rejected the request for retrial in its decision of 17 March 2009.

### 3.6 *Other Cases*

In the *Hospital Incidents* case (*Lucia de Berk*), the crucial issue concerned the expert statement on the cause of the death of a very young child: was the cause of this death a natural one, or was it caused by poisoning (with dioxin) by the accused? During the trial before the Court of Appeal, the defence called the pharmacologist Professor Freek De Wolff (Leiden University), who had a good reputation and vast experience in forensic pharmacology. Professor De Wolff analyzed the bloody liquid that was found on gauzes, used during the autopsy. He concluded that the percentage of dioxin left no other possible explanation than that this was a case of unnatural death by poisoning. The Court of Appeal used this statement – a claim that was not refuted by the defence – as a crucial piece of evidence from which to construct proof. This, in combination with some other facts such as the presence of Lucia de Berk in the hospital at the time of death of the child, the Court decided that the defendant had committed a premeditated murder and it used the assumed *modus operandi* of the accused as an argument to prove other alleged circumstances in the indictment. This method of reasoning has subject to severe criticism because of its speculative basis, nonetheless, this was tolerated by the Court of Cassation. It should be noted that another expert stated before the District Court that, it was highly improbable that Lucia de Berk, who was present in the hospitals at the times of death of the deceased patients, would have had nothing whatsoever to do with their death. The District Court then used this statement as evidence of the murders. However, the Court of Appeal refrained from using statistics as evidence. Experts on statistics pointed out, and rightly so, that the reasoning by *modus operandi*, at least in the way it was applied by the Court of Appeal, is a flawed statistical argument. Be that as it may, one thing is very clear, as soon as the expert statement of Professor De Wolff had been undermined, the whole logical construction of proof by the Court of Appeal fell into ruin.[37]

Consequently, the Research Committee (*driemanschap*) reported that there now appeared to be a 'relevant difference in scientific opinion', this amounted to a *novum* in the sense of the legal regulation of the review procedure. The Procurator-General at the Court of Cassation came to the same conclusion on the basis of other expert opinions. In

[37] See Y. Buruma, 'Ongemakkelijke lessen van Lucia' (2010) 40 *Delikt en Delinkwent* 689.

the meantime, Lucia de Berk was temporarily released by the Secretary of State, an order that was prolonged by the Court of Cassation on request of its Procurator-General, who requested the revision of the conviction by the Court of Appeal of The Hague. Since then, the Court of Cassation found the request of revision admissible and the Court of Appeal of Arnhem has acquitted the accused of all charges[38].

The case of *Ina Post* was presented to the CEAS by Dr. Han Israels, also a psychologist at Maastricht University. It concerned the presumed murder of an old woman who had been strangled in her house. The police suspected the murder had a financial motive, since some of the woman's cheques had been stolen. In this case, the Research Committee faced unique difficulties because the trial had taken place in 1985. This meant that witnesses were hard to find and that technical evidence was no longer available. The convicted person, a nurse, was originally heard as a witness, she later became a suspect after undergoing a handwriting test. During the interrogations at the Police Station, she confessed twice, but retracted in favour of systematic denial of involvement at a later date.

Dr. Israels was very critical about the way Ina Post had been interrogated by the police. In his view, the detectives had been 'giving away' crime specific information, by asking suggestive closed questions. The case was admitted and referred to a research committee, which presented its report. Again, this assessment was very critical. Although the committee did not establish undue pressure on Ina Post during the police interviews, it indicated serious flaws in the pre-trial police investigation, which had led to an inadequate file. Again, alternative scenarios were totally neglected after the confession at the police station. Moreover, the investigation was based on an incorrect estimation of the time of death of the victim, caused by miscommunication between the technical and the tactical sections of the investigation team. Since that report, this case has been referred to the Procurator-General at the Court of Cassation, who filed a request for revision which was found admissible by the Court of Cassation. The case was tried by the Court of Appeal of 's-Hertogenbosch'. The reopened procedure resalted in an acquittal.

On 31 December 2010 the triumvirate that examined the so called *Drontense bosmoordzaak* for the CEAS-Commission presented their

[38] To that end, the final decision of the Court of Appeal in Arnhem (14 April 2010) was an acquittal on all counts. The case was referred to this Court of Appeal by the Court of Cassation (Hoge Raad der Nederlanden) on 2 February 2010, *Nederlandse Jurisprudentie* 87.

report to the Board of the Public Prosecution Service. By the end of January 2011 the Board endorsed the final conclusions of the report of the triumvirate and put it in the hands of the Dutch Court of Cassation. The triumvirate was chaired by Mr. W.P.A. Korver, Advocate General at the court of Den Bosch. Further members of the triumvirate were also J. Wilzing, Superintendent of Police, former Head of the Region IJsselland, and Theo de Roos (one of the authors of this article).

In this case the accused Henk H., was sentenced to 20 years in prison and remains incarcerated. Experts called upon included the author Jacob Fish (*Realm of the Goat*, 2007), the philosopher of science Ton Derksen (The Prosecution in Error, 2008) and the legal psychologist Peter van Koppen (*The Sleeping Judge*, 2008, written with W.A. Wagenaar and H. Israel). In a rather bizarre case, the offender was accused of deluding the victim, Pim D., under the guise that he was working for a dating service, that he had a blind date with a woman who Pim knew, not knowing that the girl actually happened to be the ex-girlfriend of Henk H.

The prosecution successfully alleged that Henk H. killed Pim D. and buried him in a forest in Dronten. Pim D. had been missing since 5 December 2001 yet his body was only discovered and exhumed on 27 March 2002, after a missing persons broadcast on Dutch TV. Henk H. was already detained in January 2002, and was prosecuted and convicted of murder and hiding the corpse of the victim. In the police interviews and during the hearings in the District Court and the Court of Appeal Henk H. made quite variable, but always customized statements, without ever confessing. During the proceedings the Courts reviewed anonymous letters that each outlined a different scenario, in which Pim D would have died a natural death in a gay meeting place near the spot where later on, in 2002, his body was found.

The investigation of the triumvirate included the anonymous letters in its reports, but also anonymous letters which were received after the judgment the Court of Appeal by various parties being involved in his case (including the CEAS) or were sent to the press, among which were letters purporting to be from whistleblowers who had been part of the police investigation team. The CEAS-triumvirate investigated, assisted by an *ad hoc* police team, a number of issues on which doubts were raised. Except for the anonymous letters the investigation included the aspects of; recognition of the potential offender by a witness near the spot where the victim would later be

found, to tracing the tracks on a shovel which was found in the backyard of the offender and the possibly falsely prepared minutes of the policeman relating to objects found (including a mobile phone) which later turned out to belong to the victim. The final conclusion of the triumvirate was that its findings at no point led to the conclusion that there has been flaws in the investigation, prosecution and presentation of evidence at the hearing that could have stood in the way of a balanced assessment of the facts, while no facts or circumstances revealed an acceptable *novum*. This distinguishes the CEAS report from the first three reports, which in tone, were more critical.

### 3.7 *Assessment of the Performance of the CEAS*

In 2008 the performance of the CEAS was evaluated in an external review by a research group. Thus, a body that was introduced to evaluate the quality of pre-trial investigation in criminal cases was itself subject to evaluation. The report of this evaluation ('The CEAS at Work')[39] was made public later that year. The assessment of the researchers was that the research committees and the Admission Committee had operated in an independent way and in an impartial manner. Furthermore, taking into account the thoroughness of the reports and the degree of care with which they were drawn up, the reports were comprehensible to the broader public and contained clear explanations and recommendations. Finally, the 'conclusiveness' was found to be satisfactory in the sense that all investigations had been thorough, extensive and that conclusions regarding the refutation or confirmation of identified shortcomings had been adequately substantiated. On the other hand, none of the three research committees was fully conclusive with regard to the question of whether a particular case should be considered for a retrial procedure (with the possible exception of the Lucia de Berk committee which indicated a *novum* in relation to the dioxin poisoning of a baby under the care of the convicted nurse). The researchers also reviewed the constitutional restriction that the investigation was not to include the role of the courts. They established that all three research committees were of the opinion that this restriction formed an artificial limitation that was very difficult to observe. This meant that a number of potential shortcomings could not be fully investigated. In a letter to

[39] J. de Ridder, C.M. Klein Haarhuis & W.M. de Jongste, *De CEAS aan het werk. Bevindingen over het functioneren van de Commissie Evaluatie Afgesloten Strafzaken 2006–2008*, Rijksuniversiteit Groningen/Ministerie van Justitie (WODC), Onderzoek en beleid 274 (The Hague: Boom Legal Publishers, 2008).

the CEAS of 1 October 2008, the Minister of Justice expressed his appreciation for the efforts of the CEAS, and requested the CEAS to continue until new legislation relating to the review procedure in criminal cases was enacted. The CEAS accepted this request.

Does the CEAS have any added value, when compared with the already existing procedure of revision, mentioned before? In our view the answer should be *yes, without any hesitation*. Because of the existence of the CEAS, convictions can be investigated on the (sole) basis of doubts regarding the information as presented to the court. Thus it is not necessary to present a *novum*, which is a strict condition in the revision procedure laid down in Article 457 of the Dutch Code of Criminal Procedure.

The Admission Committee pointed out in its 2007 Annual Report that a solid legal basis should be given to the kind of research (or rather investigation) that is being carried out by the CEAS. The restriction that the performance of the courts should not be taken into account should be removed. Furthermore, the rule that the convicted himself (or his counsel) is not entitled to request the reopening of the case should be repealed. The Admission Committee also suggested that the restriction to very serious crimes (maximum prison sentence of at least 12 years) should be reconsidered. In a letter to the Dutch parliament (*Tweede Kamer*) in April 2008, the Minister of Justice endorsed these points. A Bill for an extended review procedure, in which these elements will be integrated, has been accepted by the government and will be sent to parliament soon.

### 3.8 *Future Legislation*

In the course of 2008, the Dutch Minister of Justice presented a proposal for new legislation regarding the revision procedure. This Bill preserves some elements of the existing CEAS, but also introduces several new aspects. The most important change is that the CEAS will have the competence to investigate and comment on judicial decisions. Secondly, the revision procedure is altered in such a way that faults in the preliminary investigations can be considered a *novum*.

A further change considered by this legislation is responsibility for the retrial. Earlier it was mentioned that if the Court of Cassation judges a request for revision admissible, the case is retried before a Court of Appeal. Under the current rules, this procedure before the Court of Appeal takes place under the responsibility of the Public Ministry. The new proposal is to engage the responsibility of the Attorney General at the Court of Cassation. This magistrate

(supported by Deputy Attorneys General) is not a member of the Public Ministry and is independent in a sense that, unlike the Public Ministry, he is not subordinate to the Minister of Justice or any political body. In our opinion, the exercise of authority from this independent position is a big advantage. The question is, however, whether this is perceived as such by the many vociferous critics of the judiciary in criminal cases, especially psychologists and statisticians. In their view,[40] the judiciary is a closed shop, not inclined to accept objections from outside of their profession, however well founded these may be. There seems to be some political support for that point of view by now, but is not clear whether this support is sufficient to prevent the Bill from becoming law in the near future.

In fact, it is very likely that the Bill will be accepted and enacted, because the government combined its proposal of an improved extraordinary revision procedure with a revision procedure that includes those previously accused but definitively acquitted persons. The latter will probably be welcomed by the electorate in the societal climate of today, characterized by its call for public security ('tough on crime'). Introducing the possibility of a revision procedure to the disadvantage of a previously accused, amounts to an infringement upon the principle of *ne bis in idem*, which up to now was nearly sacrosanct in Dutch legal culture. Be that is it may, the aforementioned improvement of the original revision procedure is without any doubt an advancement. For some critics, the changes do not go far enough in that they do not guarantee a satisfying solution and that the revision procedure should be taken out of the hands of the closed shop of the judiciary. They highlight the success of an institution like the Criminal Cases Review Commission that was set up some years ago in England and Wales and in Scotland.

The four reports of the CEAS committees, considered above, are all very critical. Although they did not establish any intent on behalf of the police and the public ministry to mislead the court and the defence, they exposed major shortcomings in the investigative methods and in the way the courts deal with non-legal expertise. In the *Enschede* case, the courts simply neglected the massive critique formulated by a range of experts, some of them belonging to the police apparatus themselves, without much more than a superficial motivation. The *Ina Post* case showed a disturbing lack of self-criticism from the police during the

[40] See W.A. Wagenaar, H. Israels & P.J. van Koppen, *De slapende rechter. Waarom het veroordelen van burgers niet alleen aan de rechter kan worden overgelaten* (Amsterdam: Bert Bakker, 2009). In English, *The Sleeping Judge. Why the Conviction of Citizens Cannot be Entrusted Solely to Professional Judges*.

pre-trial investigations. The *Lucia de Berk case* is one of the toughest to deal with for legal professionals, because in cases like this the legal professionals are completely dependent on experts who speak a 'different language'. Moreover, the courts are increasingly being confronted with the nasty phenomenon of the 'battle of experts'. To counteract this, a Bill has been implemented which, introduces a register of recognized experts who have to meet certain minimum standards, based on the state of the art in their specific discipline. A court that calls on the services of an expert appearing on this list will be relying on a trusted expert in their own field, and will improve the judiciary's confidence in such experts. This provision will not solve all the problems in this respect, but it may be considered an improvement.

## IV EPILOGUE

### 4.1 *Explanations for the Growing Awareness of the Vulnerability of the Criminal Justice System*

It is not easy to give a full explanation for the growing awareness of the criminal justice system's vulnerability, but it is possible to point to some explanatory developments. During the twentieth century the mainstream of legal scholarship in the field of criminal law was never very critical towards legal practice. Of course, there were scholars like Louk Hulsman, who criticized the criminal justice system as such, but they were perceived as outsiders. The Dutch criminal justice system could be characterized as very lenient in practice – at least until the 1990s. It relied on a paradoxical combination of tolerance in practice and formalism in the paperwork of the case files (*dossiers*). The whole enterprise of fact-finding and evidence was left to the police, the investigative judge, and if necessary, to experts. Judges, prosecutors and advocates took the outcome of the investigations that were embodied in these dossiers for granted, in a spirit of wilfully blind confidence that might be considered very naïve today. As we have seen, during the last decade of the twentieth century the criminal justice climate has changed. The rise of organized crime and the reactions to this development put far more emphasis on the investigation of crimes. The unregulated use of undercover agents and hidden techniques (systematic observation, wiretapping, etc.) led to a parliamentary inquiry.[41] As a result, the investigation was more often

[41] Enquêtecommissie opsporingsmethoden, *Inzake opsporing*, Report delivered 1st February 1996 (Commissie-Van Traa).

controlled by the lawyers, especially since the inquiry also had led to more and better regulation of investigative methods. At the same time the penal climate became far more rigid, due to other political insights, and particularly due to the internationalization of the Dutch society.

Around 1989 the ECtHR issued several decisions concerning the Dutch use of anonymous testimony for convictions.[42] This led to a shift in the trial practice, from relying on the written statements in the *dossiers* to reliance on the examination of witnesses during trial. The Bar and the Prosecution (and as a consequence also the courts generally) became more professional in their assessment of the evidence. The work of the police, the investigative judge, and experts was no longer accepted without question.

Finally, the influence of comparative socio-legal studies and the scholarship of psychologists, focussing on the criminal law in action, may very well have triggered a far more critical awareness of the weaknesses of the traditional way of handling criminal cases. The already mentioned American Innocence Project (that showed that wrongful convictions are not simple accidents), as well as the British miscarriages of justice briefly discussed above, all may have contributed to this climate precipitating change.

### 4.2 *The Criminal Justice System as a Learning System*

Today, the revision cases are still viewed as significantly unique and rare incidents. When we look at the criminal justice system as a whole within the perspective of systems theory, this raises the question whether the criminal justice system in The Netherlands is able to learn from past experiences. We hesitate to give an affirmative answer to this question.[43] There are a few factors in the structure and culture within the system that favour a closed setting. The secrecy of court deliberations and the absence of dissenting opinions, the formal style of justification of decisions, the habit of not criticizing decisions, the defensive reflexes not only in the judiciary or the legal profession, but

[42] EHRM 22 April 1997, [1997] *NJ* 635 (*Van Mechelen case*). See http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=29443773&skin=hudoc-en&action=request and http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=29443773&skin=hudoc-en&action=request for the *Kostovski case*, both accessed 2nd October 2011.

[43] See J.F. Nijboer, *De (straf)rechtspleging als lerend systeem* (Deventer: Kluwer, 2008).

also in legal scholarship, the absence of a lay element in the trial, all of these contribute to a situation in which it is very difficult to learn through the system itself. There is, however, one rule above all that is abundantly clear, miscarriages of justice exist.