

**Issues of Convergence:
Inquisitorial Prosecution
in England and Wales?**

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Preface

This study is part of a larger comparative project in which both authors have been involved for a number of years. Its real origins, however, lie in our fascination with the relationship between different legal cultures and criminal law and procedure. As always when faced with trying to understand foreign law and coming to terms with the intricacies of an alien and often unarticulated legal culture, we would never have managed without the help of native lawyers. We are extremely grateful to the English defence advocates, prosecutors, judges and academics who were prepared to speak to us, let us listen to their lectures and sit in their courtrooms. A special word of thanks to Arwel Jones of the Crown Prosecution Service, head of the Law and Procedure Unit at the CPS Strategy and Policy Directorate, for once again not only receiving us but patiently answering our e-mails and putting us right on a number of points. Any mistakes and misunderstandings are, of course, entirely our own.

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List of Abbreviations

AG	Advocate General
AJA	Access to Justice Act
ASBO	Anti-Social Behaviour Order
CAA	Criminal Appeal Act
CCP	Chief Crown Prosecutor
CJA	Criminal Justice Act
CJPOA	Criminal Justice and Public Order Act
CJU	Criminal Justice Unit
CLA	Criminal Law Act
CPIA	Criminal Procedure and Investigation Act
CPR	Criminal Procedure Rules
CPS	Crown Prosecution Service
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FPN	Fixed Penalty Notices
HMcpis	Her Majesty's Crown Prosecution Service Inspectorate
HMSO	Her Majesty's Stationary Office
HRA	Human Rights Act
MCA	Magistrates' Court Act
NFA	No Further Action
PACE	Police and Criminal Evidence Act
PII	Public Interest Immunity
PND	Penalty Notice for Disorder
POA	Prosecution of Offences Act
RCCJ	Royal Commission on Criminal Justice
RCCP	Royal Commission on Criminal Procedure
RSPCA	Royal Society for the Prevention of Cruelty to Animals
RSPCC	Royal Society for Prevention of Cruelty to Children
SCPO	Serious Crime Prevention Order
SOCA	Serious Organised Crime Agency
SOCPA	Serious Organised Crime and Police Act

Part I

A Comparative Perspective on Prosecution

1. Introduction

Less than thirty years ago there would have been no mistaking the characteristic difference, either superficially or on more serious reflection as a matter of systemic distinction, between criminal process in the Netherlands and in England and Wales.¹ The former, with its definitive pre-trial stage, comprehensive dossier, and a powerful, hierarchically organised prosecution service, judge of instruction² and active trial judge all engaged in a professed search for the substantive truth, was most definitely an inquisitorial system. The latter, without a prosecution service but with autonomous police conducting initial investigations, charging suspects and hiring legal professionals to undertake prosecutions, a passive tribunal of fact judging a direct and oral contest between prosecution and defence with equal rights both pre-trial and in court, was generally agreed to be *the* example of an adversarial system in Europe.³ Much has changed since then.

Two of the most obvious changes have undoubtedly been the emergence of an English Crown Prosecution Service (CPS) and what have been called adversarial elements in Dutch trial procedure.⁴ Such developments in these and other countries have been seen as an indication that the whole distinction between inquisitorial and adversarial systems of criminal justice, if it ever had any real significance, has now in any event been rendered spurious. It has, for example, been pointed out that common, internationally agreed standards of fair trial and the influence of the European Convention on Human Rights and Fundamental Freedoms (ECHR) have introduced a greater adversarial element into European continental procedure, while ever greater professionalism in crime control by public authorities and, more recently, ever greater emphasis on law and order, have brought to countries with predominantly adversarial style procedures a pre-trial phase that has much of the inquisitorial.⁵ It is definitely true that the case law of the European Court of Human Rights (ECtHR) has forced the Dutch legislature to allow more contestation or contradiction in criminal process than was previously the case, and that the pre-trial phase has changed greatly in England and Wales, partly as a result of the development of the CPS. The question, however, is whether this implies that such systems are losing the essential characteristics that derive from their roots in the inquisitorial and adversarial tradition respectively, so that the characterisation of criminal justice systems as such has indeed become a dead end.

A number of terms are used to describe the process whereby legal systems come to resemble each other and take on (some of) each other's characteristics.⁶

¹ While it is correct to refer to England and Wales as separate countries with identical legal systems (within the United Kingdom those of Scotland, and, to a much lesser

² The 'judge of instruction' is also known as investigating judge or investigating magistrate. Given the French influence on Dutch criminal procedure, we shall refer to this figure by the translation of his French title: *juge d'instruction*.

³ It should be noted immediately that we use the terms inquisitorial and adversarial neutrally: there is no implication of one or the other being the 'better' system.

⁴ Knigge & Groenhuijsen (2001), p. 29-36; Knigge & Groenhuijsen (2004), p. 78-86.

⁵ Spencer, in: Delmas-Marty & Spencer (2002), p. 20; Jackson (2005).

⁶ Boele-Woelki (2010).

Most current are harmonisation, approximation, and convergence. These should be distinguished from unification, the goal of which is to render legal rules in different jurisdictions identical. It is invariably reached through the imposition of supranational regulation that by definition does not take account of fundamental differences between domestic systems. Our concern is precisely with such differences and with how legal systems deal with new developments or insights, and adopt or possibly adapt principles and/or rules that are essentially alien.

In any event, there is little scope for the simple imposition of supra-national legislation in the European Union, one of the reasons being the strong relationship between different legal cultures and differences in domestic criminal process.⁷ Here, harmonisation refers to the implementation of EU justice policy, (usually) to alleviate practical problems of trans-national law enforcement. More specifically, harmonisation concerns the end-goal of an active process that, while deliberately set in motion by supranational legislation (framework-decisions/directives),⁸ requires national states to make sure their law does not conflict with previously determined standards. The goal is not to produce identical rules – indeed this is generally considered undesirable, if not impossible – but to bring differing domestic solutions to a common problem into line with each other. Approximation is a similar process and the word is often used synonymously. In both cases we are looking at a conscious policy of co-operation between national states instigated at supranational level and designed to attune systems to each other while respecting their different characteristics. Approximation suggests perhaps a less conscious policy-process than harmonisation, although it is debatable whether there is any real difference.

The issue we want to address is a more long-term and more autonomous process that we shall refer to as convergence and that, while it may be set in motion or otherwise be affected by harmonisation or approximation efforts, may also occur because of fundamental social or political change in any one country. Convergence implies the gradual coming together of legal systems to such an extent that, over time and at the level of essential characteristics, it no longer makes sense to regard them as fundamentally diverse even though (some of) their rules of positive law may differ. While, superficially, systems of criminal justice may be described as inquisitorial or adversarial because of the manner in which procedures are conducted, the procedural design of a system is backed by fundamental notions on what constitutes fair process and how it should produce legitimate outcomes. In the context of criminal procedure, convergence therefore refers to diminishing differences between the ways in which procedural systems define and relate concepts of legitimacy, fairness and truth-finding. While that may result in significant procedural change, systems may also lose defining differences even if their procedural design retains (some of) its characteristically adversarial or inquisitorial features. Convergence is thus something more fundamental than mere changes in procedural arrangements. It implies that these changes are such that they presuppose new and different notions on how truth is to be found legitimately,

⁷ The same applies, for instance, to the unification of family law. See on the importance states attach to sovereignty in criminal justice: Brants (2005), p. 103-104.

⁸ Before December 2009, criminal justice came under the so-called Third Pillar and harmonising regulation was produced in the form of framework-decisions, binding as to the results and only possible by unanimous decision; under the Treaty of Lisbon (2009), the pillar structure has now been dissolved and directives – again binding as to results – can be agreed by majority vote.

notions that do not belong to the inquisitorial or adversarial tradition that has shaped the system.

In the coming pages we propose to examine the question of convergence in this sense between adversarial and inquisitorial systems by taking a closer look at developments in prosecution in England and Wales. The way in which prosecution takes place and is organised forms a persuasive indication of the fundamental nature of procedural style, and a powerful prosecutor is regarded as one of the hallmarks of inquisitorial procedure. The Dutch prosecution service – *Openbaar Ministerie*⁹ – is an essentially inquisitorial institution, part of a criminal justice system that has developed over centuries and is firmly rooted in an inquisitorial tradition and concomitant legal culture.¹⁰

Our question is whether the role of the English prosecutor – equally well-documented as essentially adversarial – has changed or is changing in an inquisitorial direction, whether this affects the adversarial nature of the criminal justice system as a whole and, if so, what the further implications of such changes may be. The question is prompted by recent developments in criminal justice in England and Wales, especially those concerning the Crown Prosecution Service which, since its inception in 1986, has become a much more powerful criminal justice institution than the paucity of literature on its general position would lead one to suppose.

Of course, by definition convergence is not a one-sided matter, for the word implies systems moving towards each other. But, where we are proceeding on the assumption that in issues of prosecution the direction of the movement is towards the inquisitorial, our focus naturally falls on adversarial England and Wales. This means that we are most concerned with pre-trial powers and decision-making, for it is here that the inquisitorial prosecutor exerts the greatest influence, to the extent that, in inquisitorial systems, his pre-trial investigation is the major determinant of truth-finding at trial. However, we shall not be ignoring the trial phase and especially the question of introducing and contesting evidence. Prosecutors play an important part at trial too and one of the more salient aspects of their role is that they can influence the extent to which the defence is actually able to exercise contestation rights through the information they (must) make available or withhold.

While, at first glance, English pre-trial procedure indeed seems to have become more ‘inquisitorial’, that says nothing of the implications of this bland observation. It is our contention that one cannot simply assume that similarities between criminal justice systems, such as the existence of a prosecution service, even a powerful one, and the endowment of seemingly similar (pre-trial) prosecutorial powers to deal with problems that all criminal justice systems face nowadays, automatically imply convergence to the extent that fundamental characteristics are no longer discernible or rendered meaningless. We also believe that the distinction inquisitorial – adversarial remains relevant, though not as an absolute dichotomy that definitively describes criminal justice systems. Rather, it is a tool of analysis that employs ideal-typical definitions of two distinct legal traditions in order to examine the (continuing) influence of legal culture and tradition on how changing circumstances are accommodated in existing systems with all of their historical

⁹ A direct translation of the French Ministère Public.

¹⁰ Brants (2011)

‘baggage’. Our aim is to establish to what extent convergence is occurring, indeed, whether it has occurred at all.

2. A conceptual framework and method

a. Legitimate truth-finding

Convergence occurs if systems lose essential characteristics that place them in the inquisitorial or adversarial tradition. In order to explain what these characteristics are, how they might change, and how they can be examined, we first need to set out a conceptual framework and accompanying method. While we intend to use both concepts and methodology that are derived from comparative theory, this is not a classic comparison of two countries. The English prosecution service is the object of our study, not the Dutch *Openbaar Ministerie*: the Netherlands forms an example of an inquisitorial system, a sounding board or measuring stick against which to test recent developments in an adversarial system. We are, in other words, examining the first part of the assertion that (international) developments and conditions have logically made pre-trial procedure ‘more inquisitorial’ and trial procedure ‘more adversarial’.

We propose to analyse the essential characteristics of criminal process in terms of concepts of *legitimate* truth-finding that underpin systems of criminal procedure. This recognizes that accuracy is pivotal in yielding outcomes that are acceptable, while it also acknowledges that there are other values at stake. Accuracy can never be absolute: if criminal justice systems are to be in any sense effective, something less than absolute accuracy must be held to be acceptable. No criminal procedure is therefore about finding truth *per se*, but about finding a particular type of truth.¹¹ Nor is there any definitive means by which to do so: perceptions of legitimacy, embedded in legal culture, determine the method by which the ‘truth’ is held to be found. This is not merely a matter of producing sufficient accuracy. Legitimacy may also involve other values that have a bearing on the proper method of truth-finding, such as transparency (public trials), participation (an active role for the accused), and independence (separation of powers). Accordingly, the benefit of using the concept of legitimate truth-finding is that it not only clarifies the purpose of a procedural system, but also makes plain that other values (that may even limit truth-finding) may also require a place in the procedural design to make its outcomes, even if less accurate, acceptable. In the final event, legitimacy is determined by culture and tradition.

All participants in a criminal justice system carry their own responsibilities in contributing to legitimate truth-finding, and compliance with them is an essential condition for finding the truth legitimately. Responsibilities differ from roles: whereas the latter consist merely of the attributes of participants (the tasks with which they are burdened, the duties they are under and the powers with which they are vested), responsibilities refer to how these should be used. They consist of normative expectations as to how each participant is to behave. While, in the context of this study, the responsibilities of the prosecutor are our primary concern, the division of responsibilities is always a matter of all participants, related as they are in the particular equilibrium of a procedural system.

¹¹ Weigend (2003); Damaška (1997-1998).

To ensure that legitimate truth-finding can and will take place, a system's procedural design is geared towards ensuring that all necessary conditions for producing legitimate outcomes are met. Certain conditions must be present to allow participants to bear their responsibilities: where tasks and duties are placed on participants we may expect that they are vested with the necessary powers and means to fulfil them. Furthermore, checks and balances are required to ensure that participants comply with their responsibilities so that, ultimately, the truth can be regarded as having been found in a legitimate manner. This requires such things as fostering an occupational culture of compliance, and installing controls. It is clear that the manner in which responsibilities are divided is strongly contingent on legal-cultural perceptions of legitimate truth-finding: values concerning the distribution of power, the proper role of the state and of individuals, their mutual relationship, and what constitutes sufficient and adequate checks and balances all influence the distribution of responsibilities among participants.

b. Legal culture and legal tradition in criminal justice

The values that impinge on concepts of legitimate truth-finding are embedded in legal culture. Approaching the concept of legal culture from a criminal justice angle requires that we recognize the fundamentally socio-political nature of the way in which the criminal justice enterprise reflects and defines how individuals see themselves and their society in relationship to the role of the state in what is perceived as legitimate justice. Considering that, in all modern (democratic) societies, it is the state that enforces the substantive provisions of criminal law according to rules of due process, it follows that procedure plays an important part in that relationship. Indeed, procedure is the primary legitimising factor in the democratic state's monopoly on force in criminal justice: it is what distinguishes *justice* from the brute force of a police state. This is not to say that substantive criminal law requires no legitimacy or does not reflect fundamental social, political and cultural values. However, given the state monopoly on force, questions of legitimacy are as much, if not more, concerned with how the state enforces the law as with the norms that reflect what citizens should and should not do. Criminal process is the symbolic arena where the extent but also the limitations of legitimate state power to intervene in a citizen's fundamental rights and freedoms are played out.

A legal culture of criminal justice is a discursive practice that both reflects and determines the link between the relationship individual-state and the acceptance of procedural arrangements as legitimate. Principles and rules of criminal law and procedure form elements of criminal justice systems that function according to the specific society they serve, the political and constitutional arrangements that shape their organisation and practice, and the law that determines their normative limits. All criminal justice systems share this triangular dialectical relationship that is legal culture. It determines and is determined by perceptions and expectations of law and justice, how authority and procedure should be organised and how to judge whether justice is legitimate (*i.e.* both effective and fair), and decide whether in concrete cases justice has been done.¹² The normative power of a legal culture derives from the relationship between political, social and legal traditions and law, legal institutions, practice and informal experience – inside and outside of the legal community: deeply felt, ingrained attitudes about what law is and should be, and

¹² Brants (2011), p. 2-3. See also: Cotterell (1997), p. 13-32.

how it should translate into a legal system that embodies institutions, institutional roles, procedures and rules.¹³ The resulting internal dynamic generates its own self-evident and self-fulfilling expectations about what acceptable justice is and how it can be achieved, and thus its own legitimacy.

Within the legal culture of a specific jurisdiction, legal tradition – historically conditioned attitudes about the nature of law, about the role of law in society, about the proper organisation and operation of a legal system – plays an important part in determining the concrete shape of procedural and institutional arrangements in the criminal justice system.¹⁴ Legal tradition is a powerful force in maintaining perceptions of how criminal law and procedure should express cultural, social and political values. At the same time it forms the backdrop against which internal adaptations of a system to external influences and issues of convergence between systems must be considered. In the (comparative) theory of criminal procedure, legal traditions to which legal cultures are related, are usually distinguished as being adversarial or inquisitorial. There are, however, two specific risks in basing research on this distinction.¹⁵

The first is to presume that to distinguish between adversarial and inquisitorial is to distinguish between better and worse, a misconception based on misunderstanding of the nature of modern criminal process as an interrelated system of guarantees of truth-finding and fairness, on ignorance of how this operates in practice and has developed over time, and often on historical prejudice. Inquisitorial proceedings are associated with the torture, red robes and pointed hats of an all-powerful Inquisition, while adversarial procedure has much less terrible connotations of medieval folk-gatherings under sacred oaks, solving disputes voluntarily before the elders of the tribe.¹⁶ Neither of these images, although reflecting a certain rather skewed truth about history, says much about criminal process in the past, and nothing about the present. They also reflect the implicit normative preference of the researcher and can lead to serious misreading of the nature of any one system.¹⁷ To give but one concrete example: it is not unusual to find those schooled in the adversarial way of thinking condemning inquisitorial process because ‘the defendant is presumed guilty until proved innocent’. It is a mistake that can usually be traced back to a misunderstanding of the power of the prosecutor in inquisitorial systems, the relatively weak position of the defence, and the role of the trial dossier. The presumption of innocence, however, underlies all modern inquisitorial systems, and the burden of proof lies just as squarely on the inquisitorial prosecutor as on his adversarial counterpart.

The second risk perhaps carries less danger of such fundamental misunderstandings, but nevertheless can result in a failure to move beyond the self-evidence of outward appearances and in misinterpretation of traditional and

¹³ Williams (1979).

¹⁴ Merryman (1985).

¹⁵ It also has a decidedly Western bias, ignoring for example that there are at least two other legal traditions – socialist and Islamic – that form the legal cultural background of tens of millions of people, although obviously that need not worry us here given that we are concerned with two criminal justice systems in western democracies.

¹⁶ Jörg, Field & Brants (1994), p. 42.

¹⁷ See for a misconception of the way in which the analytical distinction adversarial-inquisitorial can be used: Summers (2007), who maintains that adversarial process should be the norm everywhere – also on the continent of Europe – because the inquisitorial was rejected long ago. For a convincing rejection of this reasoning: Field (2009).

cultural influence, and/or the extent of change. It occurs when the distinction adversarial-inquisitorial is regarded as an empirical dichotomy – a system simply is one or the other – that can be discerned by studying procedural rules without taking account of the context in which they function. While to a certain extent it may be true that in a distant past pure adversarial or inquisitorial systems of criminal justice existed, that certainly cannot be said of any modern system. In practice, the adversarial-inquisitorial dichotomy is not a universally applicable descriptive mechanism.¹⁸ Given that almost all modern legal systems combine procedural features of both traditions (a fact often ignored),¹⁹ it is better conceived of as a continuum than a strict division.²⁰ Rather than to speak of inquisitorial or adversarial systems, it is more accurate to see modern jurisdictions as primarily ‘shaped by’ the inquisitorial or adversarial tradition, predominant in the civil law countries of continental Europe and in common law countries such as England and Wales respectively.²¹

c. Using ideal-types to identify change

While the concepts of legal culture and legal tradition are not meant to – and cannot – provide a classification in which characteristics can be exclusively attributed to any one legal system in practice, at an abstract level the distinction between adversarial and inquisitorial ideal-types provides an important analytical tool for determining a system’s essential characteristics. The theoretical advantage of distinguishing between ideal-types of adversarial and inquisitorial procedure with their common and civil law roots is that different systems can be related to legal-cultural perceptions of legitimacy that determine the normative conditions and division of responsibilities under which truth-finding is held to be fair.

By uncovering perceptions of legitimacy and through cognation of conditions for fair truth-finding that underpin a particular system, ideal-types help explain both normative expectations and notions of justice in a given society and the internal equilibrium that makes its criminal justice system coherent – how guarantees of truth-finding and fairness, organisational principles and authority, procedural roles and rights hang together in a legitimising overall structure. We shall employ what can be termed an ‘external’ approach, which involves deducing fundamental legal-cultural concepts of legitimacy from rules of positive law and the attitudes and assumptions of participants in the legal process.²² An ‘internal’ approach seeks to explain the behaviour of those participants in a given jurisdiction or legal culture, and, in order to relate particular behaviour to features of that jurisdiction or cultural group, attempts to understand the law as a native would –

¹⁸ Damaška (1986).

¹⁹ Continental scholars talk about ‘Anglo-American procedure’, while the procedural rules, not to mention the cultural context, differ substantially, not only in England and the United States but also in the other countries where criminal process is based on the adversarial tradition. For their part, scholars from these countries are inclined to talk about the ‘continental inquisitorial system’, without realising that there are real differences in the extent to which a criminal trial in European continental countries could be described as having inquisitorial or adversarial elements.

²⁰ Brants (2011).

²¹ Field (2009), p. 4.

²² Our research is based on a study of academic literature, legislation and case law, and on interviews with English academics and representatives of the major participants in English criminal process.

for which an internal perspective is necessary.²³ The external approach is essentially deductive and aims to describe the normative assumptions and expectations that underlie a system's design, looking at procedural law from an abstract, external perspective. By studying procedural design, including the roles of participants, and looking for similarities with the adversarial and inquisitorial ideal-types, we can identify the conditions on which legitimate truth-finding is predicated and determine its fundamentals as being predominantly adversarial or inquisitorial.²⁴ The point is simply to unearth the normative assumptions on which the system is based. An internal focus would run the risk of obscuring these normative assumptions, as most natives would have the tendency to take them for granted.

Taking this external approach to systems of criminal procedure tells us much about the idiosyncrasies of criminal justice systems, and provides clues about the room there may be for convergence with others and how that might affect the system itself. For, given that law is a dynamic phenomenon that must adapt to (changing) social and political circumstances, legal culture and tradition can only be self-perpetuating to a certain extent. Glenn sees legal traditions as the embodiment of how people think the law should function, noting that exchange of information between jurisdictions and debate about such normative matters is normal and results in overlap and similarity.²⁵ Such a definition of legal tradition, however, fails to address the dialectical relationship between ideas and practice that is essential to the concept of legal culture. That relationship has been described as one of interpretation, a function of the interpreter's historically and culturally conditioned epistemological assumptions; any potential subjectivity is countered by the inter-subjectivity of a legal community's articulated values that have developed over time and sustain the community's cultural identity – a modality of legal experience that is intrinsically that community's. Convergence of legal systems therefore always involves a process whereby concepts from the inter-subjective world of one community take on new meanings in a new context.²⁶

The question is what role legal traditions play in this process. Tradition is often regarded as something left over from the past – 'inert and fixed historically. [An] alternative view stresses the invention and reinvention of tradition.'²⁷ Although their impact on substantive criminal law, criminal procedure and the practice of criminal justice may be 'reshaped by subsequent national and trans-national legal movements', legal traditions 'remain important to an analysis of contemporary (legal) cultures because the past continues to act upon the present'.²⁸ In that sense, legal cultures are conservative in the literal meaning of the word: they ensure continuity and have an influence that goes beyond forms of procedure at any given time, shaping the way in which problems and their solutions are defined and

²³ Öricü & Nelken (2007). Methods can be direct, *i.e.* participating observation, or more indirect, by gathering empirical data and trying to explain these.

²⁴ On the method of using ideal-types, see Jansen (2006).

²⁵ Glenn (2006).

²⁶ Legrand (1997). Legrand uses the cultural significance of language and words to illustrate this point, referring on p. 117 to Walter Benjamin, who wrote in 1923: 'the word *Brot* means something different to a German than the word *pain* to a Frenchman.'

²⁷ Field (2009), p. 370.

²⁸ *Idem*, p. 369.

constituted. '[T]he new is incorporated into the patterns of the old, while often transforming them in more or less subtle ways'.²⁹

Social and political perceptions of what is legitimate in the context of criminal justice change continuously. New interests may come to the fore or the prominence of subservient interests may increase. While giving room to such changes may be necessary to comply with changing cultural expectations of legitimacy, at the same time they may conflict with traditional conditions for legitimate truth-finding. In developing procedural systems, whatever the reason for the development, the roles of participants are unavoidably affected. However, looking at a change of roles alone by mapping the tasks, duties and powers of participants is not sufficient to study convergence as we have defined it. We must look not so much at roles as at responsibilities, for these reveal how participants are expected to behave in order for the process to be considered fair and its outcome acceptable. Ideal-types help explain why responsibilities are divided in a particular way, and by setting out their essential characteristics we can use them to determine whether a more inquisitorial division of responsibilities now prevails in English criminal process.

3. Ideal-typical adversarial and inquisitorial procedure

a. Civil and common law and corresponding procedural traditions

The inquisitorial and adversarial traditions are rooted in the civil and common law respectively. Tracing these roots allows us to flesh out the ideal-types and explain what their essential characteristics in relation to prosecution are. We reiterate that our concern is with two different ideal-typical styles of procedure in the context of legal culture and tradition, that we are not describing existing criminal procedure in any specific country and that we have no position on which system is 'best'. We are searching for the relationship between culture and tradition, and the ideal internal equilibrium of adversarial and inquisitorial criminal process respectively. Nevertheless, despite this quest for difference, it is undertaken on the presumption that the goals of criminal justice in western democracies are the same and that all such criminal justice systems may be described in terms of three related assumptions that derive from a basic tenet of law in a democracy: the state must balance the rights and interests of the individual against those of the collective while at the same time being bound by the law in its efforts.

The first assumption is that the state monopoly on force not only gives public authorities the power in law to deal with (the threat of) crime through law enforcement, but that law also limits and so legitimises that power by preventing unwarranted interference in civil rights and freedoms. The second is that, while effective crime control needs neither law nor fairness, legitimate effectiveness can only be achieved through a criminal process that will produce the truth and do so fairly. The third, that this process requires an intricate and interrelated system of procedural checks and balances that guarantee fairness, and will, as far as is humanly possible, prevent mistakes and produce just verdicts. It is not *what* criminal process seeks to achieve, but *how* it does so that places it in the adversarial or inquisitorial tradition: how the relationship between law, individual and state, and corresponding conceptions of truth, fairness, and rights and freedoms are conceived of.

²⁹ *Idem.*

Where we have defined the end-goal of all criminal process as legitimate truth-finding, an alternative, or rather complementary view put forward by Damaška,³⁰ is that, when seen in relation to the type of state in which that process functions as part of a legal system, end-goals differ. Damaška too uses ideal-types and identifies the reactive, laissez-faire state whose responsibility is no more than to provide a framework within which individuals can assert their own rights in the pursuance of chosen goals. In this ideal-typical minimal and reactive state, the (criminal) law exists and may only be used to maintain the social equilibrium. The promotion of justice is confined to providing the (formal) setting – rules and procedure – for the resolution of the inevitable conflict and potential destabilisation that result from a clash between individual rights and interests.

Whereas for such states it is improper to impose a particular view of what constitutes a ‘good’ society and certainly to use the criminal law to that end, at the opposite end of the spectrum the activist, interventionist state ‘espouses or strives towards a [...] program of material and moral betterment of its citizens’³¹ who are regarded as linked by common interests and goals to which their individual interests are subordinate. The state is not a neutral conflict resolver, but a manager of joint pursuits, to which end it may also engage the criminal law to promote both material and moral welfare. The end-goal of criminal justice is therefore to implement designated policies. Criminal procedure concerns the scope of the means by which the state may do so and is, by definition, officially dominated, *i.e.* an inquiry controlled by state officials rather than a contest between individuals.

We would argue that conflict resolution and policy implementation are not goals of justice *per se* but of the different types of states that Damaška distinguishes, because they are essential to the continued existence of the state. Moreover, such goals can be achieved both with and without recourse to the law and certainly without recourse to criminal justice. At the same time, we must agree that the type of state within which criminal process functions, obviously has a bearing on legal culture and tradition. These, in turn, relate not only to how legitimate truth-finding should take place, but also to what can be accepted as the ‘truth’.

Inquisitorial and adversarial notions of legitimate truth-finding are indeed strongly embedded in reasoning on the relationship between law, individual, and state that is implied in the legal traditions of the civil and common law respectively. Civil law traditions are rooted in the 18th Century ideologies of Enlightenment and Revolution, which reflect a concept of political society in which the state is regarded as fundamental to the rational realisation of the ‘common good’. Because of the immense powers needed to carry out this task, the state is regarded with some suspicion: by their very nature, those powers represent a continuous threat to the liberty of the individual. And yet, precisely because individual liberty is seen as transcending individual interests and as an essential part of the common good itself, only the state can secure and uphold it. In order to resolve this paradox, the exercise of state power is curtailed by the primacy of written rules of law (this is the original meaning of the – continental – concept of *Rechtsstaat*), by entrenched abstract constitutional rights of the individual and by the division of power within the state. From this follow judicial scrutiny of executive action on the basis of written law, and hierarchical monitoring and control within the executive itself. Consequently, only the (written) law can provide executive

³⁰ Damaška (1986), ch. III, IV & V.

³¹ Damaška (1986), p. 80.

state institutions with the power to infringe on individual rights; without legally conferred powers, they can do nothing.

Criminal procedure is an institutional means of serving an essential element of the common good: the powers of law enforcement it confers allow the state to both combat crime and punish criminals, while the limitations it sets on those powers serve to uphold individual rights and freedoms that are also in the wider interest of society in general. The basic assumptions of the civil law tradition then imply: that the state is best entrusted with truth-finding; that the police, subordinate to the public prosecutor and in some cases a judge of instruction must be endowed with sufficient legal powers to undertake the major steps towards that goal; that this entails a thorough criminal investigation and the presentation of evidence to the court; that in this context 'thorough' means not only as complete as possible, but also non-partisan, taking both possible guilt and innocence into account; and that in all stages of the investigation the state is required to guard the interests of society in crime control but also in due process, so that individual interests of the defendant are subsumed under those of society as a whole.

The agenda for the case that is eventually presented to the court is set by the trial 'dossier' compiled during the investigation by the investigating authorities. The defendant must react to that agenda and cannot determine it once the dossier is completed, although during its compilation the defence plays a role in pointing investigators towards avenues of investigation favourable to the defendant, which they have a duty to investigate. Once the case comes to court, however, the defence role is limited to an attempt to undermine what is essentially the prosecution case, among other things by prompting the judge to ask the relevant questions, for it is the judge who plays the primary active role in establishing the 'truth' at trial. In such systems, the central role of the dossier means that there is already one version of the truth on paper. That is debated and verified in court, but the direction of the truth-finding exercise is essentially determined by the prosecution pre-trial. In inquisitorial systems, the emphasis is therefore very much on pre-trial procedure. Defence rights are proportionate to the role of the defence in relation to truth-finding by the other professional participants: making sure that the investigating authorities and the court are able to perform their central role in establishing the truth. It is not a theoretical necessity that all evidence is produced in court; in theory, both incriminating and exculpating evidence is already all contained in the dossier, including transcripts of witness statements.

It is obvious that the civil law tradition and its inquisitorial process are best suited to the goals of the active, interventionist state promoting a common good. By contrast, the common law tradition from which adversarial process originates and the reactive state are logically interrelated. Here, a state that is presumed to act in the common good is very much less in evidence – indeed neither the concept of the state or that of the common good exists in the same way. Moreover, in a common law context the concepts of law and rights and correspondingly the role of the judge in finding law are very different. In the civil law tradition of *trias politica*, the division of powers and the primacy of written law imply that all law must emanate from the legislature, be enforced by the executive, and applied by the courts and interpreted only in so far as interpretation does not deviate from legislative intentions.³² Fundamental rights (of fair trial) also require legislation,

³² The original civil law notion that, according to the doctrine of *trias politica*, the judge should simply be (in Montesquieu's words) *bouche de la loi* has long since been abandoned. The great disadvantage of statutory law – that it is inflexible, cannot take all

not only to establish them and their individual applicability in law, but especially to secure them against the state (not only is all executive action limited by the written rules, the organs of state criminal justice are required to see that individual interests are taken into account and individual rights upheld).

The common law, however, built up of custom and its judicial interpretation over (hundreds of) years, simply 'is'; it is law of and for the people, within which fundamental freedoms, to be invoked against state intrusion, attach to individuals as of right. There is no need to provide them in the abstract through codification, as they already exist and will be 'found' naturally through interpretation by the courts. This is not to say that modern common law countries do not have statutes that govern (parts of) criminal process. However, the notion of intrinsic individual rights, and an individual's right but also responsibility to assert them, is deeply entrenched in legal culture. The relationship between the individual and the state is defined in terms of the rule of law: as a set of concrete rights and freedoms, which citizens themselves can invoke against particular forms of state intrusion. Far from requiring hierarchical monitoring between different branches of the executive – which, in civil law states, is premised on the notion of a strong and organic executive arm of the state – under the common law (executive) organs of criminal justice do not monitor each other. Rather, they exist in a state of co-ordinate authority and all their tasks are governed by the rule of law. Within these parameters, the executive needs no statutory conferment of powers, but may do anything that is not expressly forbidden in law.

Against this common law background, adversarial criminal process is conceived of as a struggle between parties in which the individual defendant fights his own corner. In the clash of opinions between prosecution and defence about 'what happened', the truth, it is assumed, will eventually emerge. Such truth-finding is only possible if each party has equal rights and uses them to try to establish their own version of events by seeking their own evidence to underpin it and presenting it to a tribunal of fact. In most common law jurisdictions, the tribunal of fact, at least in serious cases, is a jury. Although in England and Wales serious crime is tried by jury, it would be a misapprehension to suppose that the jury is a necessary and exclusive feature of an adversarial trial.³³ The majority of cases that make it to court are tried before a judge (lay or professional) sitting without a jury, while lay participation in the form of a jury or, more usually, lay assessors, is a feature of most European civil law jurisdictions with more or less inquisitorial procedures.

Whether the tribunal of fact is a judge or a jury, an essential feature of adversarial trials is that they do not take place on the basis of a dossier compiled by state officials and reflecting all aspects of the case. What happens in court therefore is not verification of the state's case by the judge, but falsification of that case by the other party, the individual accused of an offence, in the presence of an impartial tribunal. 'Impartial' in the context of an adversarial trial logically means that the tribunal of fact is not predisposed to a particular verdict through prior knowledge

circumstances into account and is unable to adapt to sometimes rapidly changing situations – is eliminated by the courts' powers of interpretation, though the degree to which this may be exercised to extend the scope of legal provisions beyond what the legislature intended, differs considerably between jurisdictions.

³³ A jury is characteristic of the common law tradition, but its essential role is a democratic one. The jury is the final link in a system of checks and balances that protect the people against abuse of power, not only with regard to the executive, but also the legislature and the judiciary.

of the facts of the case, as well as not being biased in any other way. Contrary to inquisitorial procedure where witnesses and experts are called and examined by the judge on the basis of what is already on the table in the dossier, in adversarial trials each party examines the other's witnesses and their own, produces their own experts, searches for and leads their own evidence in an attempt to establish that theirs is an equally if not more compelling version of events than that put forward by the other side. Such trials are of necessity highly oral and 'immediate' in nature, for their aim is to convince a tribunal of fact with no prior knowledge of the case, of the accuracy of one party's account; adversarial debate therefore requires that all evidence be produced in open court. The judge is there to make sure that the contest takes place according to the rules, not to become involved in the actual process of truth-finding that is the responsibility of parties. In such systems, the emphasis lies on the two-sided presentation of evidence at trial, rather than on its pre-trial collection in a dossier to form a comprehensive – but essentially one-sided – version of events.

So, there are different ways of finding the truth that in essence are related to different legal traditions and cultures, to concepts of the relationship individual-state and to different types of states that foster and are fostered by such concepts. But there are also different concepts of 'truth' itself and these too are logically implied in the ideal-types of states and cultural legal traditions. For the state that actively intervenes as a 'party' in criminal proceedings (although the word is inappropriate) by empowering its officials to conduct as thorough an investigation as is necessary in order to unearth *all* aspects of the case, the legitimacy of that investigation and its outcome will depend on what type of truth is the goal of the truth-finding enterprise. In this case, that can only be substantive truth. To aim at anything less would be to overlook *a priori* some of the very interests that come together in the fundamental role of the state, namely to guard and promote society's interests that are understood as including those of the individuals concerned: the defendant, but also, *e.g.*, the victim. The reactive state, on the other hand, has done no more than provide the forum and the (legal) framework within which equal parties are to settle a conflict. Whatever emerges as the 'truth' in the course of debate – even if it is about determining what crime took place, when it was committed, by whom and under what circumstances – can be accepted as the truth, as long as the tribunal is convinced or parties agree *and* as long as the outcome has been reached according to the procedural rules. Here a formal concept of truth prevails. In both cases the concept of truth is related to the way in which it is regarded as best found.

b. The responsibilities of participants in relation to prosecution

In present-day procedural systems, the prosecutor has many responsibilities and not all relate to the concept of legitimate truth-finding in court as it is traditionally understood in the adversarial and inquisitorial traditions. While the ideal-types are premised on a crime being investigated, a prosecution brought and the case decided at trial, most cases are now disposed of by other means in the pre-trial phase. Depending on the system, the prosecutor may have significant responsibilities with regard to the decision whether to prosecute (or not) and to possible alternatives to prosecution. While these responsibilities do not relate directly to inquisitorial and adversarial concepts of legitimate truth-finding, they are indirectly related in that particular allocations of responsibilities allow particular types of decision-making on what should happen if the truth is not to be found within a trial context. For

this reason we shall deal first with the prosecutor's truth-finding responsibilities both in the pre-trial and trial phase, and with the interrelated responsibilities of other parties.

The prosecutor and truth-finding

Truth-finding in the adversarial system is predicated on partisanship and the ability of both parties to prepare, fight and win, in direct confrontation, a more convincing case than the other party. Prosecutors are regarded, and perform, as advocates of the prosecution case and their basic training – no different from that of a defence lawyer – is geared towards this role. This means that equality between prosecution and defence is a must, for on this depends whether the tribunal of fact will actually hear both versions of the case in all its aspects – and only then will it be able to decide the 'truth'. The defence must therefore not only have investigative, confrontation and presentation rights on an equal footing with the prosecution but also both investigative and adversarial presentation skills, and be able to assist the client at every point in the process. This is a necessary condition for legitimate truth-finding, for the partisan contest at trial that is characteristic of adversarial process provides no safety net: pre-trial process is directed towards finding evidence to support the prosecution case, not towards establishing facts that would aid the defence, while at trial the judge will not come to defendant's aid to assert his rights for him or take over the lawyer's role. There is also no second chance, no appeal on facts that could have been put forward but weren't because the defence investigation did not unearth them when that would have been theoretically possible, or chose not to lead evidence although it was available.³⁴ In any event, the prosecutor will be dependent on what the police – in their search for proof of the suspect's guilt – have unearthed in their investigation; he is not expected, nor will he normally be able, to direct police investigative activities or to order an inquiry into matters of possible innocence.³⁵

Conversely, conditions for truth-finding in an inquisitorial system lie firstly in the prosecutor's or judge of instruction's role of representing and guarding all interests involved and in the prosecutor's control over the police investigation. Prosecutors are expected not only to seek to prove the state's case in court, but also to take decisions and perform in a manner that takes all interests into account, including those of the accused, throughout the process and especially pre-trial. Their training must therefore be such as to make this possible. Where adversarial prosecutors are advocates, the demands on the inquisitorial prosecutor require that he take quasi-judicial decisions, and training in continental inquisitorial systems takes place in the context of a career judiciary: indeed, in many countries prosecutors form part of the judiciary. Other guarantees flow equally from the

³⁴ In part, this is also the consequence of the democratic significance of the jury as the final link in the checks and balances that ensure that, in the final event, the law 'belongs' to the people, so that no court should overturn a jury verdict that has been rendered according to the law. Consequently, normal appeals in an adversarial system are allowed on points of law only.

³⁵ In this sense it could be said that the defence is at an advantage. The division of labour implied in the double task of investigation and presentation means that defence work requires more than one person and, if necessary, the hiring of independent investigators. Although the defence team will not have the coercive powers of the prosecution investigators – the police – they will be able to direct and control the investigation to produce the results most relevant to the defence case.

notion that the truth is best found through investigation by the state: the role of the defence in pointing to factual and legal deficiencies in the prosecution case and the attendant rights necessary for this; the fact that appeal on the facts – a full re-trial before a higher court – is a normal feature of judicial control in inquisitorial criminal process; and the requirement that judges actively involve themselves in the truth-finding process in court. In the theory of the inquisitorial tradition, the legitimacy of criminal justice depends to a large extent on the integrity of state officials and their visible commitment to non-partisan truth-finding. The relative paucity of the scope of rights available to the defence (at least in comparison to adversarial process) stands in direct relation to the presumed proportionality that is needed in order to make sure that the other participants actually attend to all of the interests involved – including those of the defendant.

The relationship between prosecution and defence is a significant feature of the distinction between adversarial and inquisitorial concepts of fairness regarding truth-finding. In the adversarial concept, the defence should be able to operate autonomously from the prosecution. On the one hand, this is inherent in the common law tradition that defines the relationship between state and citizens in terms of inherent liberties to be invoked autonomously against state power. On the other, it logically determines and is determined by the adversarial concept of legitimate truth-finding through the presentation of contesting versions and explanations of events. In the adversarial system the defence has an autonomous role in truth-finding so that the prosecutor need not be tasked with ensuring an impartial and objective investigation in the sense that both sides of the case are investigated in full and presented to the court. By contrast, the inquisitorial concept of legitimate truth-finding is dependent on state officials, the prosecutor and the judge, with no autonomous role for the defence. In the civil law tradition, the state is the protector of the common good, and its officials can therefore be trusted with guarding the interests of the defence in an impartial manner. While the prosecutor is expected to be impartial in the adversarial system too, this notion of impartiality is perhaps better described as a lack of bias towards a suspect; the adversarial prosecutor is not expected to investigate a suspect's innocence but to ensure and present sufficient evidence of his guilt.

The responsibilities of the prosecutor in deciding to prosecute (or not)

Although the prosecutor's role and responsibilities at trial are often put forward as definitive of an inquisitorial or adversarial system, we have already indicated that these are preceded by the decision on whether to prosecute at all. Should non-prosecution be the outcome of that decision, the question then arises as to what should happen to the suspect and why. Depending on the reasons for deciding not to go to trial, there are many different ways of resolving that question. These too are rooted in legal-cultural perceptions of legitimate criminal process and as such are indicative of the inquisitorial and adversarial tradition respectively. It is not a common feature of all criminal justice systems that the decision to prosecute is the prosecutor's responsibility. Nor are the criteria that apply to such a decision universal, although all systems do require at least that the prosecutor is satisfied there is sufficient *prima facie* evidence to sustain the prosecution case. While evidentiary considerations point to some sort of quasi-judicial decision since they require an objective appraisal of the available evidence, the scope of responsibility may differ. In adversarial systems, the prosecutor is more likely to have an adjudicative responsibility, deciding merely whether the evidence before him is

enough to justify a prosecution. In inquisitorial systems, it is the prosecutor's responsibility to ensure that all relevant lines of inquiry have been explored and that the dossier is complete and contains relevant and accurate information.³⁶

If a decision has been taken not to prosecute a case before a court even though the prosecutor is of the opinion that there is sufficient evidence to do so, that is not necessarily the end of the matter, nor does it mean that the suspect will escape sanctions. Although the equilibrium implied in the ideal-typical conditions for legitimate truth-finding and thus the concomitant responsibilities of the prosecutor concern the situation in which the matter of guilt or innocence is decided in court, only a minimal number of cases are actually dealt with in this way in systems of either type.³⁷ A full trial, with all of the labour, time and costs involved, is therefore the exception as both systems strive to alleviate pressure on the courts through either not prosecuting at all, or settling out of court. Not only is the way in which this takes place influenced by fundamental systemic characteristics, at the same time these are reflected in the definition of the second consideration in decisions on whether or not to prosecute: the public interest.

As Damaska has pointed out, '[I]t stands to reason that where the administration of justice is a vehicle for policy implementation [therefore in the active, interventionist state *cb/ar*], the state must retain the choice over whether to activate proceedings.'³⁸ Consequently, the ideal-typical inquisitorial prosecutor (or possibly a hierarchically superior judge in pre-trial proceedings) has a monopoly on the prosecution decision within the limits imposed by the law. At the same time, the aim of state policy is the protection and promotion of the interests of society and *thus* also of the individual, so that costs and pressure on the system can never be the only considerations of public interest. Others include the use of the criminal law as a steering mechanism in implementing social policies designed to promote the common interest, which could equally imply that in some (categories of) cases prosecution may do more harm than good so that no recourse to the criminal courts should be had. Whatever the case, an inquisitorial prosecutor will need to (be trained to) be able to weigh all of the interests involved, but this is subject to checks and balances within the system such as instructions (guidelines) from hierarchical superiors that point the way to the desired course of action, and judicial review of decisions.

On the other hand, the adversarial system is not geared to policy implementation but to the (reactive) state's providing the means for conflict-solving, and a criminal case is perceived as a dispute between prosecution and defence that should be resolved within the legal framework provided. The public interest here is a much more one-sided affair, defined in terms of law and order (or even the interests of government) and to be distinguished from the interests of individual citizens that can be protected and promoted by asserting individual rights. Prosecution is the norm, but not necessarily by a state official. Where there is no requirement that the state prosecutor implement any policy, there is also little need for guidelines or specific checks and balances. Moreover, while it may be in a narrowly defined public interest to alleviate pressure on the system and count the pennies, the way in which this takes place is guided by neither statutory

³⁶ Jackson (2005).

³⁷ See Jehle & Wade (2006) for an overview.

³⁸ Damaška (1986), p. 154.

requirements nor specifically designed public policy but by the parties to the dispute themselves and as they see fit.

In the adversarial procedural tradition, the rights and duties of parties with regard to truth-finding and their theoretical equality, imply that both are responsible for the outcome. That applies not only if an impartial tribunal finally settles the issue, but also if they wish at any point to stop the process because they are in agreement, for example if the defendant pleads guilty, thereby accepting the prosecutor's version of the truth. In such systems, settlement out of court and thus the avoidance of a costly and traumatic procedure of which the results are often uncertain, takes the form of negotiation between equal parties: the outcome is usually a compromise in which the prosecutor accepts the plea in exchange for a lesser charge (and therefore lesser sentence). No trial need take place as truth-finding is no longer necessary (the formal truth having been established according to the rules) and the case proceeds at once to the sentencing stage, which is the prerogative of the judge.

Such a plea in the setting of an adversarial system differs essentially from a confession in the inquisitorial tradition, which simply means that prosecutor and judge need be less extensive in proving and deciding the case. In the framework of the inquisitorial system and its related prosecutorial and judicial responsibility for finding the substantive 'truth', the outcome of the case cannot be open to negotiation with the accused. No confession is needed for settlement out of court, only the prosecutor's conviction that, on the basis of available evidence, the substantive truth is that the suspect is guilty. Such settlements usually involve the inquisitorial prosecutor offering to drop the prosecution in return for the fulfilment of certain conditions, including payment of a certain sum. There is no trial, for there is no longer a sentence to be imposed – indeed, such conditional settlements are often not even regarded as sanctions (although that is what they are in a material sense and they will certainly be experienced as such by the suspect) but as agreements to waive the right to prosecution and the right to a court hearing respectively.

A step further is a situation in which the prosecutor is invested with powers that allow him to take on a quasi-judicial role in actually imposing a financial penalty, although this could also be regarded as a step back towards the historical situation in which one state official combined the functions of both inquisitorial prosecutor and judge. Now the prosecutor's responsibilities entail weighing evidence and balancing interests in determining the appropriate penalty. This responsibility rests squarely on him, as there are no other parties effectively involved; there are no proceedings by which the defence can contest the charges, and in any event the prosecutor is both the prosecuting and the adjudicative instance. The responsibility of the prosecutor in sanctioning presumes that he is positioned to ensure that all relevant evidence is gathered and evaluated in an impartial manner. The only check is the possibility of the accused appealing the sanction and thus of the case entering the ordinary procedural system.

Fundamental characteristics of the ideal-types with regard to prosecution

Damaška maintains that there are three ways in which procedural characteristics can be said to follow from ideal-types.³⁹ Characteristics can be understood to express fundamental tenets of the political doctrine in which the ideal-type is

³⁹ Damaška (1986), p 94–96.

rooted; they can be conceptually implied as they are logically necessary in one type and not in the other; or they may be conceptually compatible with both types. The latter distinction would seem unnecessary for our purpose, as any change in such characteristics will not be indicative of fundamental change. The ideal-types of adversarial and inquisitorial criminal justice systems elaborated in the previous sections, however, do make it possible to identify procedural and organisational characteristics and their logical implications for the interrelated responsibilities of the prosecutor and other participants. Together, we have argued, these reflect different legal-cultural perceptions of legitimate truth-finding in the common and civil law, while the balance between them determines the coherency of criminal process. As Damaška has argued persuasively, their wider political context is formed by the ideal-typical conflict-solving and policy-implementing ideologies of the reactive and interventionist state respectively.

Fundamental to common law adversarial systems is the concept of party autonomy, in which the citizen-defendant is responsible for the defence case on the basis of inherent rights and freedoms that are to be used in a contest with the prosecution to establish a formal concept of truth on the basis of adversarial argument between parties. The rules according to which this takes place and the powers invested in the prosecutor may be contained in written statutes, but that is not necessarily the case. In so far as the defendant's opposite number is a state prosecutor, this figure is embedded in an organisation of co-ordinate authority without responsibilities of policy implementation or investigation, only those narrowly related to prosecution. Logical implications are party independence, of each other and of interference 'from above', and party equality. These in their turn imply that defence and prosecution have equal rights to introduce their own (selection of) evidence, that all selected evidence must be adduced at trial in verbal argument before a passive judge, that there is no duty for the prosecutor to investigate, or to provide evidence in support of, the defence case, and that defendants/defence counsel must have not only the rights but also the means and ability to do so themselves. The implications for the organisation and responsibilities of the prosecution are a lack of policy guidelines, training as advocates and professional ethics that stress partisan advocacy; should prosecutors also have the power to decide whether or not to prosecute, this decision will be unsupervised by any (judicial) superior authority. Out-of-court settlement is governed by the same principles of autonomy, independence and a formal concept of truth, and takes the form of plea-bargaining.

The fundamental tenets of inquisitorial procedure are that state functionaries determine and are responsible for an investigation into the substantive truth, the results of which – *à charge* and *à décharge* – are collected as evidence in an officially compiled dossier and verified at trial. Procedural rules, including the powers of state investigators and judges, are determined by the legislature. State prosecutors have a monopoly of prosecution and are embedded in a hierarchical organisation. Consequently, the prosecutor is *dominus litis* throughout the process with the defendant/defence counsel in a subservient position. He is responsible for placing all relevant evidence in the dossier that is at the disposal of an active, truth-finding judge. (Verbal) contestation by the defence is a possible but not necessary feature of (pre) trial procedure.⁴⁰ The dominant role of the prosecutor and his organisational

⁴⁰ This is an example of Damaška's third type of characteristic in that it is compatible with both adversarial and inquisitorial procedure. However, it is essential to the concept of

position imply control over practical investigators (normally the police), hierarchical and judicial monitoring and control of decisions to investigate and prosecute, compliance with guidelines from superior authorities with a view to policy implementation, training as part of a career judiciary and professional ethics of quasi-judicial impartiality. Out of court settlement takes either the form of an agreement to fulfil certain conditions or a prosecutor's fine; both are based on presupposed prosecutorial impartiality and as such are legitimate as a punitive reaction to guilt (the substantive truth).

These fundamental tenets of both systems and their logical implications for the organisational characteristics and responsibilities of prosecution in relation to the goal of criminal process – legitimate truth-finding – form our starting point for an investigation into whether specific changes have occurred in the responsibilities of the adversarial English prosecutor that may denote transition in the direction of the inquisitorial ideal-type. To determine what the real consequence of such changes may be, we must also know whether, in practice, they have been accommodated within traditional legal-cultural perceptions of legitimacy, thus unaccompanied by changes in the responsibilities of other participants or a shift in the concept of legitimate truth-finding. For if that is the case it points to possible lack of coherence, as what is logically implied in the fundamental tenets of the system may no longer be (fully) in place.

Ideal-types are theoretical constructs that can assist in assessing real systems and possible change, precisely because they allow the type of analysis that is not clouded by the self-evidence of the system of which the researcher happens to be part. While the ideologies that underpin both inquisitorial and adversarial criminal justice are sometimes dismissed for their mythical quality, like all myths they have a basis in reality and a moral and ethical impact on the way we design, think about and experience law. Such historically conditioned, legal-political concepts of the state in relation to its citizens and of the role that law plays in maintaining that relationship, translate into criminal procedures in particular ways. These can be examined in theory, as we have just done, but also in practice, and we now turn to criminal procedure in England and Wales and the role and responsibilities of the prosecution as they currently obtain.

legitimate truth-finding that obtains in the former, and merely helpful to the latter where it is not logically implied.

Part II

Prosecution in England and Wales

1. Introduction

Every system of criminal procedure is unique in the sense that it reflects the specific political and social needs of the society in which it functions, but that of England and Wales has a special uniqueness in Europe that makes it, when seen through continental eyes, exceedingly complicated and in many ways illogical. This is partly due to the lack of a comprehensive code of criminal procedure and the common law reliance on historical precedent, but paradoxically, also partly the result of an excessive amount of legislation – most of it (very) recent – that regulates bits of the criminal process and is constantly being amended and updated.⁴¹ Indeed, reforming the criminal justice system has become something of an obsession with successive British governments. Some regulation was made necessary by the incorporation of the European Convention on Human Rights and Fundamental Freedoms in the Human Rights Act 1998 (HRA) that came into force in 2000, and by international phenomena such as organised crime and terrorism. Other legislation, however, before and after the HRA, has been a reaction to perceived national crises in legitimacy and prompted by a desire for fairer process or greater efficiency, usually both. There has never been total reform, which is what makes it all so confusing. Nevertheless, although many fairly fundamental changes have taken place and the details of the system are perpetually subject to amendment, there are some features that have remained reasonably constant over the years, and of these the reader should be aware in order to be able to make sense of all that follows.

First, there is the common law basis and the essentially adversary nature of trial procedure, which can be avoided by pleading guilty. Guilty pleas are important in reducing the caseload of the courts and can be entered at any point in the process, thereby ending the need for adversarial proof taking. The case then proceeds directly to the sentencing stage. Only a very small percentage of cases make it to court,⁴² where trials are structured as an oral contest between defence and prosecution before a passive tribunal of fact. All evidence on which either party wishes to rely must, in principle, be produced at trial by parties themselves, who (cross-) examine their own and each other's witnesses and experts. There is, in principle, no appeal on the facts from a verdict by a jury.

⁴¹ The *Criminal Procedure Rules* (CPR) are a case in point. Although it refers to itself as a 'code' (s. 1.1), this statute in no way resembles a continental code of criminal procedure. It confers no powers on police or prosecution though some on the courts, nor does it regulate their relationship to each other, and, in placing some new duties on the prosecutor towards the courts, obliquely provides the defendant with some corresponding rights. It deals only with the different procedures and requirements for instigating a criminal trial, referring all the while to other pieces of legislation and to earlier versions of itself or its predecessors. It will be clear that this makes such acts and statutes difficult to read because they involve constant cross-referencing. Moreover, their most recently published versions are not always easy to find on Internet. Nevertheless, they are there, under different links at *i.a.*: <www.opsi.gov.uk/stat.htm>; <eur-lex.europa.eu/n-lex/info/info_uk>; <www.justis.com/data-coverage/uk-statutory-instruments>; <www.ials.sas.ac.uk/library/.../justis_UK_statutory_instruments>.

⁴² See Tables 5 and 10, Annex II.

Second, although the definition of the different types of offences has changed over the centuries,⁴³ as has the structure and organisation of the courts, the latter are still divided according to the distinction between minor and serious cases and in both types some form of lay participation is envisaged. Trials take place before a (panel of) judge(s) or a jury, either in a magistrates' court or a Crown Court respectively. The jurisdiction of these courts and thus the trial venue, are determined by the category into which the offence falls, of which there are three. In the magistrates' courts a panel of two or three (lay) judges, or a professional district judge sitting alone, deals with less serious, so-called *summary offences*, both as to the facts and the law (the court is assisted by professional court clerks who take care of legal matters for the lay judges). The most serious of crimes (murder, kidnapping, rape, arson, etc.) are *cases heard on indictment only* and are brought in the Crown Courts. These are presided over by a professional judge, but decisions on the facts are the prerogative of a jury of twelve. The third category of offences is known as *triable either way*; these are among the most frequently committed (e.g. theft burglary, receiving stolen goods, sexual assault) and, as the name implies, can be heard in either the magistrates' court or the Crown Court.

Indictable-only and either-way offences also come before a magistrates' court in so-called committal proceedings, in order to refer them to the court with final jurisdiction. At present indictable-only offences are heard briefly in the magistrates' court (in connection with bail or remand in custody), followed immediately by 'sending' to the Crown Court (where different forms of pre-trial hearings are possible, during which a guilty plea can also be entered). Either-way offences are heard first by the magistrates in mode-of-trial proceedings. The decision for a summary or jury trial is determined by the seriousness of the offence and by whether the magistrates consider their sanctioning powers sufficient.⁴⁴ If the case is referred to the Crown Court this is irrevocable and followed by committal proceedings and a jury trial. If, however, the decision is for summary trial, the defendant can insist that his case be heard by a jury. Should he wish to plead guilty at this stage, a procedure known as plea before venue is applicable: after a guilty plea, magistrates must deal with the case themselves, however serious, although if their own sanctioning powers are insufficient they may refer a convicted defendant to the Crown Court for sanctioning. A guilty plea therefore has the immediate effect of removing even the most serious of cases from the jurisdiction of the Crown Court.

And finally, in England the term 'prosecution' has a variety of meanings. A prosecutor may be a private individual or any of a number of publically appointed officials such as police officers – though theoretically there is no difference. There are, furthermore, a number of different tasks and functions that fall under the header of prosecution but – contrary to inquisitorial systems – may, and often are, carried out by different agents. All cases start with an *investigation*, during which a decision to initiate a prosecution must be taken: the suspect should be *charged* (i.e. told on what accusation he is to be tried). The case then proceeds to the preparatory stage, where a *decision on continuation* is made. If that decision is affirmative, the prosecution case needs to be *prepared*: the arguments should be developed, points of law anticipated, and evidence and witnesses prepared for trial. The final step is the actual *conduct* of the prosecution in court which involves

⁴³ Latterly in the *Criminal Law Act (CLA)* 1977, pt. II.

⁴⁴ S. 19 *Magistrates' Courts Act (MCA)* 1980.

presenting the case and deciding on what evidence to offer, which witnesses to call, points of law to argue, and whether to accept a plea.

The police usually conduct criminal investigations. Traditionally, there are two other sorts of (legal) professionals who play a part in criminal cases: solicitors and barristers. While prosecutors are lawyer-advocates at trial, the lawyer who appears for the prosecution (Crown) in court is not necessarily a Crown Prosecutor. Solicitors require a law degree and further Law Society qualifications and practical training; barristers need to obtain a good law degree, and to complete the Bar Vocational Course at one of the Inns of Court in London and practical training as a pupil to a qualified barrister. When acting for the defence, solicitors provide legal assistance to suspects, if necessary from the moment of arrest or police interrogation, prepare defence cases and act as advocates in the magistrates' courts. While they also prepare cases that end in the Crown Court, they usually have to instruct a barrister to represent the defendant at trial, for solicitors have no rights of audience in the higher courts unless they have the extra qualification of solicitor-advocate. On the prosecution side, the same division of tasks applies, but it should be noted that the prosecution may be served by either a solicitor or barrister in private practice hired by the Crown Prosecution Service or the police, or by a Crown Prosecutor in CPS-employment. The latter still need solicitor or barrister qualifications.⁴⁵ They too prepare cases (on the basis of the police investigation), and senior Crown Prosecutors act as advocates in the magistrates' courts. CPS-lawyers qualified for the bar have rights of audience in the Crown Court (Crown Advocates).⁴⁶ It should further be noted that the judiciary in England, certainly in the higher courts, is also recruited from the Bar.⁴⁷

2. The history of public prosecution and a Crown Prosecution Service in England and Wales⁴⁸

a. The English tradition of private prosecutions

One of the unique features of criminal procedure in England and Wales is that, ideologically, prosecution has never really been regarded as a function of the state, rather the opposite, and a true public prosecution service only came into being in 1986. Until well into the 19th Century, English prosecutions were private: anyone could bring a prosecution against another citizen on whatever charge he preferred. The whole process – from investigating and gathering evidence to presenting the case at trial – was seen as the victim's responsibility.⁴⁹ It has been conjectured that in the later 18th Century, some 80 per cent of prosecutions in rural England were brought by the victim or a solicitor on his behalf. The balance was made up by cases

⁴⁵ See <www.cps.gov.uk/careers/legal_professional_careers> (last viewed 20.10.2010).

⁴⁶ S. 36 *Access to Justice Act 1999*.

⁴⁷ Criticism of the judiciary in England and Wales was always that it formed part of the elite old boys network and that this was reflected in appointments by the Crown at the instigation of the then Lord Chancellor, both head of the judiciary and a member of government. The position of Lord Chancellor has been amalgamated with that of Secretary for Justice at the newly created Ministry for Justice in 2006 and judges are now appointed by the independent Judicial Appointments Commission. See www.judiciary.gov.uk/about-the-judiciary (last viewed 21.10.2010).

⁴⁸ The CPS has been the object of many studies, reports and reforms. An overview is provided in the appendices of Glidewell (1998).

⁴⁹ Hay & Snyder (1989), p. 21.

prosecuted by government officials, but almost always if a government agency or official was the victim.⁵⁰ Only in exceptional, serious cases would an official sometimes investigate and prosecute.

Certainly until the mid 1800s, there was no organised, professional corps of investigators and prosecutors vested with the necessary powers and responsible for enforcing criminal law. The burden on citizens was significant. A private prosecutor was responsible for apprehending suspects (if necessary by applying for arrest warrants), investigating the case, ensuring that witnesses were available for trial, and conducting the actual prosecution in court.⁵¹ He could, of course, instruct a solicitor to do the work for him, but that was a costly affair. Consequently, there were two major drawbacks to this prosecution system. Law enforcement depended mainly on private initiative, which for various reasons (costs, trouble, fear), was not always forthcoming. And the system could easily be abused by bringing malicious prosecutions with a view to blackmailing the prosecuted person or obtaining rewards.

Even if prosecutions were private, there were various methods and institutions of policing in the 18th and early 19th Century. To appreciate these, one must be aware of some of the main tenets of English law and government at the time, and of two constitutional themes in particular: the decentralisation of power and the notion of community-involved policing. Their effects were clearest in the structure of local government. The main administrative areas in England, counties, were governed by the magistracy: unpaid laymen elected from the local gentry, who had executive as well as judicial tasks and powers.⁵² In the area of criminal law they directed local constables in keeping peace and order, committed suspects to gaol for trial and dispensed justice as justices of the peace in less serious cases (misdemeanours) in the so-called quarter sessions. Almost all serious cases against life or property – felonies, all punishable by death – were the prerogative of the royal courts where high court judges presided over jury trials. In London, they sat regularly at the Old Bailey. Other counties were served by assizes that went on circuit once or twice a year.⁵³

Counties were policed by constables under direction of the magistrates. But these parish constables were not a police force as we would define it today. They kept the peace but were not initially involved in the investigation or prosecution of crime. They lacked many specific powers, though unlike citizens they could arrest and imprison people – often their only involvement in the prosecution process.⁵⁴ They also differed from modern police in that they were neither organised nor professional. Although in name they were officers of the Crown, parish constables were directed by local magistrates and were not part of any wider organisation or structure of authority. Furthermore, they epitomised the idea of community-involved policing: they were unpaid, inexperienced civilians who took up the part-time office as a civic duty. They had no force of men at their disposal, though they could hire deputies to assist them (or take over their tasks altogether) at their own expense. For the most part they relied on members of the local community who

⁵⁰ Hay (1983), p. 167.

⁵¹ Hay & Snyder (1989), p. 18–26. What is said here applies to the prosecution of felony; the possibilities of dealing with crime summarily were very limited; *idem*, p. 26.

⁵² Hay & Snyder (1989), p. 10; Gleason (1969).

⁵³ Beattie (2001), p. 15; Bentley (1998), p. 8–9.

⁵⁴ Beattie (2001), p. 121 and 131; Hay & Snyder (1989), p. 16.

could be called upon for assistance, for instance to break up a riot or apprehend a suspected criminal.⁵⁵

The same principles of decentralisation and community-involved policing applied to London, but due to the rapid urbanisation of the area – coupled with a perceived increase of crime and loss of morality – the tasks of local authorities and constables developed earlier than elsewhere. In an administrative sense, most of the city on the north bank of the Thames fell under the authority of the county of Middlesex, with its various boroughs and the City of Westminster. The City of London, a square mile in the middle of the urbanised area, was governed autonomously by the Corporation, which provided magistrates and constables. In both areas, policing increasingly involved detecting crime and bringing offenders to justice.⁵⁶ The City authorities successfully tried to increase control over the constables. There were also permanent magistrates' court sessions so that crimes could be reported and instructions for arrests made forthwith.⁵⁷ And the magistrates themselves took on a more active role in forwarding prosecutions through their committal proceedings.

The situation was similar in Middlesex County, but the county magistrates were less in control of the local constables and lacked any real means of crime detection. In a famous initiative, the magistrates of Bow Street, justices of the peace Thomas de Veil and John and Henry Fielding, developed a scheme that had some novel features. They published information about crimes and suspects in order to receive information.⁵⁸ They further believed that a hierarchically controlled bureaucracy was needed to facilitate the detection, investigation and prosecution of crime. Rather than relying on the existing parish constables or other officers of the Crown, they engaged with thief takers, privately organised men who sought and prosecuted suspects for reward (issued by either the government, or by victims or their relatives). These Bow Street Runners, as they came to be known, could assist law enforcement under the supervision of the magistrates.⁵⁹ Magistrates would also examine suspects and hear witnesses to establish whether the accusation was founded and should go to trial.⁶⁰

Traditionally, magistrates were unpaid, a situation that was regarded as a guarantee of independence: he who was paid by government might all too easily develop an interest in implementing oppressive policies. The downside was that magistrates were not always available, which did not favour effective law enforcement. The Bow Street magistrates were paid secretly, but already by 1792 stipendiary magistrates at Metropolitan police courts were appointed who could

⁵⁵ The notion of community-involved policing as a civic duty, both of taking up rotating offices and of assisting in law enforcement, goes back to the old system of apprehending suspects through the hue and cry, which required that all able-bodied men engage in the pursuit of suspected criminals. That duty was laid down, for instance, in the Statute of Winchester of 1285. See Beattie (2001), p. 114.

⁵⁶ Beattie (2001), p. 82; Hay & Snyder (1989), p. 16 and 21.

⁵⁷ It should be noted that the modern adversarial trial did not develop until the 19th century through the gradual introduction of counsel for the defence: Langbein (2003); Duff et al. (2007), p. 40–46. Defence counsel were allowed to represent defendants as a matter of law by the *Prisoner's Counsel Act 1836*.

⁵⁸ Styles (1989).

⁵⁹ Rawlings (1999); Emsley (1996).

⁶⁰ Beattie (2001), p. 111–112.

dispose of their own (small) force of police constables. The practice later spread to other urban areas.⁶¹

These various initiatives show that the link between effective law enforcement, prosecuting crime and reducing crime rates had already been made in the 18th Century. But effective law enforcement remained difficult in the traditional English prosecution system. In early 19th Century England, a public prosecution service with career officials responsible for gathering evidence and preparing and conducting prosecutions, was simply unheard of. Efforts were merely directed at facilitating the apprehension of suspects and so improving the existing system of private prosecutions. Throughout the country, the Government tried to encourage prosecutions through rewards and immunities for suspects who were willing to testify. In urban areas, surveillance by constables aimed at reinforcing prevention and detection.⁶² Other initiatives were of a more civic nature, such as the Associations for the Prosecution of Felons that provided insurance for their members against the costs of prosecution.⁶³ Preventing malicious prosecutions, one of the other main drawbacks of private prosecutions (particularly if rewards are available), was traditionally the task of the Grand Jury, which established whether there was sufficient *prima facie* evidence to pass a bill of indictment to trial.

Private prosecutors were also assisted by magistrates through the process of committal proceedings that ensured that all witnesses *à charge* and the prosecutor were to be bound over to appear at the actual trial.⁶⁴ Magistrates have sometimes been identified as the first public prosecutors in England,⁶⁵ but they were not public prosecutors as they already existed on the Continent. They played no role in ensuring that all relevant incriminating and exculpating evidence was gathered. They made no prosecution decisions, nor had they any control over the actual conduct of the prosecution at trial. They merely ensured that prosecutions and trials could actually take place. And, finally, they lacked any organisational structure and central authority. Private prosecutors, even if assisted by magistrates, continued to carry the responsibility, burden and costs of apprehension, investigation, and trial prosecution.⁶⁶

b. Early proposals for a public prosecution system

Between 1750 and 1850, English criminal justice went through a transition. The system of private prosecution had ideological, constitutional roots but was also closely related to punishment being regarded as serving exemplary and deterrent ends only (the public scaffold), for which it is neither necessary to investigate and

⁶¹ Philips (1980).

⁶² Beattie (2001), ch. 1.

⁶³ Philips (1989)

⁶⁴ One problem was that prosecutors might settle their case before trial, or refuse to continue the prosecution (perhaps under pressure from the community or relatives of the suspect). Private settlement was only allowed for misdemeanour; it was itself a crime in cases of felony. See also Duff et al. (2007), p. 34. On the function of the committal proceedings more generally, see Langbein (1973).

⁶⁵ Langbein (1973); Langbein (1974). This is questioned by Bellamy (1984). See also Hay & Snyder (1989), p. 18.

⁶⁶ Hay & Snyder (1989), p. 17-18. However, at trial it was often the judge who 'conducted the prosecution' by interviewing the witnesses *à charge* and establishing the prosecution evidence: Bentley (1998), p. 71. Prosecuting counsel was generally retained in the course of the 19th Century; *idem*, p. 72-74.

prosecute all crimes nor to have a state police force and public prosecutor.⁶⁷ By the end of the 18th Century (in London) and during the 19th in the rest of the country, thinking about punishment began to change as the ideas of such Enlightenment thinkers as Jeremy Bentham (and through his work, Cesare Beccaria) took hold. The middle classes especially came to believe that 'effective law enforcement' required the investigation and prosecution of as many crimes as possible and that this would also have a deterrent effect. Public order was also a problem: traditionally a task for the military, the English had a vested dislike of a 'standing army'. Changing attitudes to crime led to successful initiatives to create official police forces (Bow Street in London and, later, elsewhere) but also to various attempts to set up a public prosecution service. Even if these were unsuccessful, they warrant brief attention, for they are informative of the arguments against public prosecution and of the English aversion to extending executive power in particular.

In the course of the 19th Century, discontent with the system of private prosecutions grew. Problems of crime increased, malicious prosecutions occurred with some regularity and unjust convictions were discovered. Serious crime was seen to go unpunished because of unwillingness, inability or poverty on the part of the victim.⁶⁸ Given these issues, it seems surprising that the English did not establish an official corpus of career prosecutors to ensure a more effective and reliable enforcement of the criminal law. It was not for want of examples in other common law jurisdictions. For instance, there had been public prosecutions by the Lord Advocate and procurators fiscal in his name in Scotland since the 16th Century,⁶⁹ and the right to bring private prosecutions was also much more curtailed. The Scottish model frequently served as an example for suggested reforms of the English system, and a number of bills were introduced in Parliament in the 19th Century.⁷⁰ In general terms, they sought to resolve two problems: prosecutions were not always brought or continued, and they failed too often because of inadequate investigations. Proponents argued that a system of public prosecutions would prevent the guilty from escaping punishment and avoid conviction of the innocent. It would also ensure that cases were better prepared and investigated. The danger of arbitrary use of prosecution powers would be sufficiently balanced, they said, by the Grand Jury and the retained right to bring private prosecutions.⁷¹

However, there was a strong constitutional argument against granting the power to prosecute to the executive. In Parliament, the public prosecutor was called 'an office of odious appellation'.⁷² It was something horribly French, and to the English all things French were synonymous with the arbitrary use of executive powers to limit civil liberties. Some even argued that increasing democracy made it more important than ever to ensure that the powers available to government were limited. Such sentiments about public prosecutions were shared throughout the

⁶⁷ Hay (1975); Philips (1980).

⁶⁸ Hay & Snyder (1989), p. 36-37.

⁶⁹ See Irvine Smith (1958); Normand (1983). For a cursory description of the inquisitorial roots of Scottish criminal procedure and their continuing relevance today, see Ringnalda (2010). For other jurisdictions, see Hay & Snyder (1989).

⁷⁰ Hay & Snyder (1989), p. 29-32.

⁷¹ Kurland & Waters (1959). P. 520,

⁷² Quoted in Hay & Snyder (1989), p. 33. The quote is taken from a report of 1818 from the parliamentary committee on the police of the metropolis.

political spectrum: 'the consequences of prosecutions were too important for the political liberties to be entrusted to the executive'.⁷³ The English had also not forgotten their own bad experience with executive control over prosecutions in the 17th Century.⁷⁴ Even the rarely applied power of the Attorney General (AG), a law officer of the Crown,⁷⁵ to initiate prosecutions *ex officio* without the scrutiny of the Grand Jury or to stay prosecutions by entering a *nolle prosequi*, remained highly contested and was criticized by some as unconstitutional.⁷⁶ Thus, while worries about the inadequacy of private prosecutions were very much alive in the English parliament, it was committed to improving the existing system.⁷⁷ Prosecution remained a matter for private citizens acting with an interest in upholding the law.

c. The new police as prosecutors

Between 1829 and 1856, organised and professional police forces were established throughout England to replace the old parish constables, and they were to play an important part in prosecution. The principles that played a role in the early days of English criminal process with its private prosecutions also had a strong bearing on the development of the police and their prosecutorial role. The first of these is that any power is to be placed at arm's length from the executive. The second, that the protection of liberties requires community involvement and self-government. However, writing about the history of the English police, including their role as prosecutors, is fraught with difficulty. Traditional police historians consider the creation of organised police forces a radical breach with tradition, relying on contemporary arguments to determine why it was necessary: industrialisation and urbanisation increased the prevalence of evil in society, old institutions were too corrupt and inefficient to deal with the new situation, and, while there may have been some irrational opposition, people eventually came to realise that the new police forces were a benefit for all. Later historians have offered a more revisionist account that qualifies some of the orthodoxies and takes account of English class society. They argue that there was not a radical breach, for the tasks of old and new police forces were similar; it was simply that the ruling elite needed an instrument of suppression, and thus an authoritatively organised police force.⁷⁸

Whatever be of the deeper social processes at work, it seems clear that increasing crime rates and inefficient magistrates and constables were used as arguments in favour of an organised, professional police force. In 1829, just such a force was established for the London area, the Metropolitan Police (also known as

⁷³ Hay & Snyder (1989), p. 43. It should be noted that the elite in Parliament did not feel the disadvantages of the system of private prosecutions in the first half of the 19th Century: Hay (1983), p. 170.

⁷⁴ Various State prosecutions under the Stuart dynasty, most notably the treason trials, exemplified the dangers of abuse: see Langbein (2003), p. 68–86 for a discussion of these oppressive trials.

⁷⁵ On the history of the office of the Attorney-General, see Edwards (1964); Edwards (1984).

⁷⁶ Hay & Snyder (1989), p. 34. The procedure of *ex officio* informations was abolished by the *Criminal Law Act 1967*, s. 6. However, see *infra* on the current powers of the Attorney-General.

⁷⁷ Hay & Snyder (1989), p. 34.

⁷⁸ See Reiner (2000) and Emsley (1996) for a description and analysis of various police histories.

Scotland Yard).⁷⁹ Police forces in counties as well as in boroughs were made mandatory in 1856. Consequently, there were three parallel systems. This remained the situation until 1964 when two types of forces, the Metropolitan Police and the local (area) forces, were created.⁸⁰ Although it is subject to debate whether the new police forces were a radical breach with the past, they did have some features that broke with tradition. It was the first time since the tyrannical days of the 17th Century that an executive force had been set up.⁸¹ Like suggestions for a public prosecution service, the proposals for police forces initially met with a lot of resistance. The English also equated the idea of police 'with things French'.⁸² In France there were military-style police, the *gendarmerie*, a powerful tool at the disposal of the government and 'thus' a threat to civil liberty, but there were also plain-clothes detectives, which to the English was tantamount to government espionage.⁸³ While the end might be legitimate, many thought the means anything but.

'It is no doubt true, that to prevent crime is better than to punish it; but the difficulty is not in the end but in the means, and though [one] could imagine a system of police that might arrive at the object sought for; yet in a free country, or even in one where any unrestrained intercourse of society is admitted, such a system would of necessity be odious and repulsive, one which no government could be able to carry into execution. [...] [A]mong free people, the very proposal would be rejected with abhorrence; it would be a plan which would make every servant of every house a spy on the actions of his master, and all classes of society spies on each other'.⁸⁴

Although by the early years of the 19th Century the drawbacks of private prosecution were increasingly felt, prosecutions only became a truly public affair after the 1850s, when the newly established police forces gradually took over the tasks of investigation and prosecution.⁸⁵ The then Home Secretary Sir Robert Peel, who was probably the most adamant proponent of establishing police forces, reluctantly conceded that there should be no public prosecution system concomitant with the creation of the police:

'If we were legislating *de novo*, without reference to previous customs and formed habits, I for one should not hesitate to relieve private individuals from the charge in the case of criminal offences justly called by writers upon law – public wrongs. I would have a public prosecutor working in each case on principal, and not on the heated and vindictive feelings of the individual sufferer, on which we mainly rely at present for the due execution of justice

⁷⁹ The Metropolitan Police had no, and still has no, responsibility for the City of London, which is policed by the City of London Police.

⁸⁰ Emsley (1996), p. 85.

⁸¹ Hay (1983), p. 173.

⁸² Emsley (1996), p. 21.

⁸³ Emsley (1996), p. 25.

⁸⁴ 3rd Report of the Committee on Police, 5 June 1818, p. 32.

⁸⁵ Hay (1983), p. 174–175; Hancock & Jackson (2006), p. 81. The police had been given the statutory responsibility to prosecute public order offences (misdemeanours) under the *Police Act 1839*, but felonies (crimes against property and life) continued to be prosecuted privately; Davis (1989), p. 399. See also Hay & Snyder (1989), p. 15.

[...] [A]nd I would by the appointment of a public prosecutor guard against malicious or frivolous prosecutions on the one hand, and on the other, I would ensure prosecution in cases in which justice might require it.’⁸⁶

The reference to ‘previous customs and formed habits’ is significant. It shows that the principle of private prosecutions still carried great weight in the first half of the 19th Century. However, though the right to bring private prosecutions was retained, the police became involved in various ways. They could pressure victims to initiate prosecutions by bringing them before the magistrates and having them bound over to prosecute, with the police officer acting as the main prosecution witness. Constables could also bring a prosecution, as could any citizen, either by instructing a solicitor, or by actually presenting the case in court.⁸⁷ Because of the sensitive nature of the police in light of English constitutional history, police forces were set up as autonomous, non-governmental keepers of order and peace. For the police to take on a role as semi-official prosecutors was therefore very much an anomaly,⁸⁸ understandable only if we take into account the unique image of the English police that is contained in the concept of ‘policing by consent’.

The police were not construed as a top-down force whose powers derived legitimacy from the government. Rather, constables were seen as civilians in uniform, who took upon themselves the ancient civic duties of community-involved policing. They were unarmed and were to use as little force as possible. With a few exceptions such as the power of arrest, their legal powers were no different from those of ordinary citizens. They could do anything that was not forbidden. A famous example, one that continued until almost the end of the 20th Century and the advent of the Police and Criminal Evidence Act 1984 (PACE), was that detaining suspects for questioning was not based on any legal power; suspects were simply said to attend the police station voluntarily to ‘assist the police with their inquiries’.⁸⁹ Another important feature of policing by consent is that the police are there for the people, not as instruments of a particular government policy. Police forces were therefore insulated from direct political influence, each force enjoying a large measure of autonomy in a co-ordinate rather than hierarchical structure of authority.

With the police seen as an extension of the people rather than of government, they could be accepted much more readily as *de facto* public prosecutors. As citizen-police officers, they were, to all intents and purposes, private prosecutors acting as civilians with an interest in upholding the law. There were regional differences as to what police involvement in prosecution entailed. In most areas, the Chief Constable would be the general prosecutor, who instructed lawyers to conduct cases in court. This introduced some sort of independent and objective legal check on the police’s decision to prosecute. But in the London area, it was common for police officers to conduct prosecutions themselves, thus without any independent control. Police prosecution practices, particularly those in London, were abhorred by the middle and upper classes, and the police were criticized in Parliament for being over-zealous and bringing malicious prosecutions to obtain rewards, for having little interest in forwarding cases where there was no reward, and for being

⁸⁶ Quoted in: May (2003), p. 194. The quote is from a speech by Peel in Parliament in 1827.

⁸⁷ Hay & Snyder (1989), p. 38-39.

⁸⁸ Hay & Snyder (1989), p. 35.

⁸⁹ Spencer (2002), p. 24.

engaged in work that had become the realm of lawyers.⁹⁰ The sub-text in this class-ridden society being that they were operating above their station.

A public prosecution service was suggested that could independently and objectively decide on initiating prosecutions and could supply lawyers to conduct cases. Phillimore MP, opined that, because there was no public prosecution service,

‘[...] we gave to policemen, to a class amongst whom were to be found some of the most hardened and profligate of mankind, and over whom the most incessant vigilance was requisite to prevent flagrant and cruel abuses of authority, we gave to these men an unlimited power of pardon and connivance; and we entrusted them with an authority which in every country but England was regulated with as much anxiety as the functions of the Judge himself.’⁹¹

Phillimore proposed taking the prosecutorial role away from the police. But amongst the various reasons why his Bill failed, the constitutional argument featured prominently.⁹² At least the police were acting in their capacity as private citizens, independent from government and without central executive policy or control. It was perhaps the lesser of two evils: the system of prosecutions brought by the victim generally being regarded as flawed and outdated, the next best thing was to have the police take over.

By the 1880s, with the Victorian middle classes worried that political and social order was dangerously threatened by high crime rates and a growing urban proletariat, policing came to be accepted as a matter of public interest. Police forces had professionalised, there were more elaborate pre-trial checks and balances, and the police increasingly used lawyers to conduct prosecutions. This suggested independent, objective review of prosecution decisions, not by government officials but by lawyers in private practice.⁹³ Furthermore, under the doctrine of constabulary independence, the police were autonomous and independent from government, and not bound by executive policy on prosecutions. Thus was the constitutional principle against government control over prosecutions preserved:⁹⁴

‘No Minister of the Crown can tell [a Chief Constable] that he [...] must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.’⁹⁵

The lack of public prosecution meant that there was no independent government institution that could review police decisions and intervene in the preparation and initiation of prosecutions. But in 1879, with the creation of the office of the Director of Public Prosecutions (DPP), the first, albeit small, step towards such

⁹⁰ Hay & Snyder (1989), p. 39-43.

⁹¹ 136 *Parliamentary Debates*, House of Commons (3rd series), col 1651 (1855); quoted in Hay (1983), p. 175.

⁹² Hay & Snyder (1989), p. 43-44; Hancock & Jackson (2006), p. 81.

⁹³ Hay & Snyder (1989), p. 45-46; Sieghart (1988), p. 95.

⁹⁴ White (2006), p. 148.

⁹⁵ *R. v Commissioner of the Police of the Metropolis Ex p. Blackburn (No.1)* [1968] 2 Q.B. 118, at 136 (per Denning MR). On constabulary independence, see Sanders & Young (2007), p. 324.

public prosecution was taken.⁹⁶ The role of the DPP, though until 1908 limited to advising, was to decide whether prosecutions of sensitive cases already initiated by the police or others, should be continued. In that case, the DPP and his staff would act as solicitors by preparing the prosecution and instructing counsel.⁹⁷ A small department of lawyers was established to assist the DPP in his work, but his role remained limited: he took over in only 8 per cent of prosecutions for indictable offences.⁹⁸ The establishment of the DPP was not intended to breach constitutional principles: appointed by the Home Secretary, he was responsible only to the Attorney General, who in turn was independent from government,⁹⁹ which restricted executive control. His office was to be a non-governmental, independent institution, uninvolved with or affected by the policies of central government. Moreover, the DPP had no control over the police and no investigative role or independent investigative powers. The fact that his powers were much more limited than was envisaged by earlier proponents of a public prosecution service, suggests that the police had become the legitimate prosecutors.

d. The decline of the police as prosecutors and the creation of the CPS

The police were to remain the most important prosecutors throughout the 20th Century. Prosecutions for summary offences were often conducted by police officers, as no special qualifications are required to appear in a magistrates' court. In prosecutions for indictable offences the police would instruct a solicitor, who in turn instructed a barrister to present the case in the Crown Court.¹⁰⁰ The prosecutors in court were thus either police officers or hired lawyers in private practice. The police, however, did not have a monopoly on bringing prosecutions and their prosecutorial role had no specific statutory basis.¹⁰¹ Other citizens or organizations could also bring prosecutions. Furthermore, a number of so-called regulatory agencies were created with a view to enforcing regulatory law, including the prosecution of crime, mostly in the economic sphere.¹⁰²

Conspicuous by its absence was any independent review of the evidence or of decisions to prosecute. Since prosecutors were either police officers or lawyers hired by the police to conduct prosecutions, the police were in full control of decision-making in the prosecution process. This means that no impartial agent was involved, *i.e.* someone who was not intimately involved in the investigation. Solicitors employed by the police were bound by their client's instructions. In Crown Court cases, prosecuting barristers could refuse to prosecute a weak case

⁹⁶ *Prosecution of Offences Act 1879*.

⁹⁷ Devlin (1960), p. 18–19,

⁹⁸ Hancock & Jackson (2006), p. 83.

⁹⁹ Hancock & Jackson (2006), p. 81.

¹⁰⁰ Sanders (2004), p. 100. On the system of solicitors and barristers, see *idem*, p. 121–122 and p. XX *supra*. See also Windlesham (2001), p. 106.

¹⁰¹ White (2006).

¹⁰² Ashworth & Redmayne (2010), p. 194–195. Police powers of prosecution were not entirely unchecked. Not only could the DPP take over the preparation and initiation of any prosecution, whether brought privately or by the police, the Attorney General could also issue writs of *nolle prosequi* to grant immunity from prosecutions. Some categories of offences required consent for prosecution by the Attorney General or DPP. See Wood (1988), p. 19; Hancock & Jackson (2006), p. 83. The powers of the DPP were consolidated in the *Prosecution of Offences Act (POA) 1979*.

and return the brief to the solicitor, the only form of 'independent' review.¹⁰³ Although they were not really in the position to form an independent opinion, being entirely dependent on the police and their solicitors for information (and probably reluctant to return briefs for fear of losing their prospects of prosecution work), counsel for the prosecution have always been regarded as 'independent' in the sense that they are seen as 'ministers of justice'.¹⁰⁴

A famous quote by senior prosecuting counsel Christmas Humphreys has it that 'Crown counsel is concerned with justice first, justice second, and a conviction a very bad third,' adding that prosecuting counsel should always consider how to help their colleagues for the defence.¹⁰⁵ However, the concept of 'minister of justice' is disconcertingly vague. An important clue to what it means can be found in older case law in which it was first suggested and in which the courts contrast the distanced attitude of the professional prosecuting barrister with that of the vengeful private prosecuting victim. According to one legal scholar

['...I]t must indeed be admitted that revenge ought not to become the motive of their actions, or occasion any unnecessary harshness in their proceedings [...]. The object of criminal provisions is not vengeance for the past, but safety for the future; and to the furtherance of this design every man is bound to contribute.'¹⁰⁶

It was certainly not the intention that prosecuting counsel should assist the defence with preparing and presenting the case. Rather, they should engage in 'fair' and professional debate. Requiring that prosecuting counsel acts fairly and assists the defence therefore has a quite different meaning from similar claims in inquisitorial systems. His fairness applies only to the manner of presenting the accusation at trial (not bending the facts or browbeating the accused in an effort to obtain a conviction at any cost) and has nothing to do with the fairness of an independent decision to bring a prosecution in the first place.

This notion of 'minister of justice' is logical in the system of private prosecutions of the early 1800s to which, far into the 20th Century, the peculiar role of the police can be traced and in which the investigator was naturally the same person as the prosecutor. Any form of independent review by a prosecuting agency would impinge on the right to bring private prosecutions and would therefore violate constitutional principles. It was also unnecessary; the Grand Jury, later replaced by committal proceedings in the magistrates' court, filtered out unfounded cases, and the truth of the remainder was to be established at trial. It was therefore perfectly acceptable that the investigator – traditionally the victim, later the police – and not a lawyer was in charge of the prosecution process and that he would either act as prosecutor in person, or have the prosecution done by lawyers who were instructed by him and bound to obey his instructions.¹⁰⁷ By implication, prosecuting lawyers had no investigative powers of their own: their task was only to present the incriminating evidence gathered by their client.

¹⁰³ Devlin (1960), p. 21.

¹⁰⁴ *R v Puddick* [1865] 4 F & F 497; *R v Rutland* [1865] 4 F & F 495; *R v Banks* [1916] 2 KB 621; Niblett (1997); Plater (2006).

¹⁰⁵ Humphreys (1955), p. 746.

¹⁰⁶ Chitty (1816), p. 3.

¹⁰⁷ White (2006), p. 148.

The problems of the police combining investigative and prosecutorial functions were not insignificant. There were regular complaints about the police prosecuting evidentially weak cases. Royal Commissions in 1929 and 1962 suggested taking prosecutorial tasks away from the police.¹⁰⁸ Upon recommendation by the 1962 Royal Commission on the Police, most police forces set up prosecuting solicitors' departments, introducing a form of independent, lawyerly review.¹⁰⁹ However, police solicitors were in the employment of the police force and continued to act on their instructions; their degree of independence and objectivity varied.¹¹⁰ In many cases where the prosecuting solicitor advised against continuing the case, the police nonetheless pressed for prosecution.¹¹¹

During the 1970s, although policing by consent remained the dominant ideology, the police came to take on a less neutral role with political undertones, in the sense that, increasingly, they were used as an instrument of central government to promote law and order politics. While this was already apparent in the policing of anti-nuclear marches and anti-Vietnam demonstrations, the apotheosis would be their much maligned part in breaking the miners' strike (and the power of the trade unions) under the Thatcher-Government at the beginning of the 1980s. Their (mis)handling of prosecutions, presumed miscarriages of justice and various cases of police misconduct also provoked criticism and eventually led to a revision of the English system.¹¹² First, the British department of the International Commission of Jurists, JUSTICE, published a report in 1970, which provided an influential argument against the existing system of police prosecutions.¹¹³ Its gist was that it was wrong in principle for the police, involved as they were in the investigation, to take decisions concerning prosecution; these required impartiality and independence, and, like in Scotland, were better entrusted to lawyers who had not been involved in the investigation and who could review the case independently.¹¹⁴ Another concern at this time was the high number judge-directed acquittals: in 43 to 47 per cent of cases tried in the Crown Court, the judge found the evidence so weak that he refused to let the case start or directed the jury to acquit the defendant.¹¹⁵

The immediate impetus for change, however, was a miscarriage of justice,¹¹⁶ the Confait-case, in which three men were convicted of murder on what turned out to be false confessions. The subsequent inquiry found various important shortcomings in the role of the police,¹¹⁷ mainly concerning the problem of false confessions and lack of regulation of questioning at the police station.¹¹⁸ However, the inquiry also referred to blinkered decision-making: once the police had charged a suspect, there was little incentive to question the evidence or explore alternative lines of inquiry, suggesting that they were too involved in the investigations for

¹⁰⁸ Windlesham (2001), p. 108.

¹⁰⁹ Hancock & Jackson (2006), p. 83.

¹¹⁰ Sigler (1974), arguing that some solicitors did act nearly as independently as public prosecutors in reviewing police prosecutions.

¹¹¹ Hancock & Jackson (2006), p. 84.

¹¹² Windlesham (2001), p. 108.

¹¹³ JUSTICE (1970).

¹¹⁴ Ashworth (2000), p. 258; Hancock & Jackson (2006), p. 83.

¹¹⁵ Hancock & Jackson (2006), p. 83, referring to Rozenberg (1987).

¹¹⁶ There were others: Sieghart (1988).

¹¹⁷ Confait Inquiry (1977).

¹¹⁸ Ashworth & Redmayne (2010), p. 10.

objective decision-making. Once again the Scottish model was presented as an example of how a public prosecutor could contribute to an impartial and objective decision-making process.¹¹⁹

The Confaft-inquiry led to a wide-ranging review of the criminal justice process by the Royal Commission on Criminal Procedure, also called the Philips Commission after its chair, which reported in 1981.¹²⁰ The first part of the report concerned regulation and rationalisation of police powers in the pre-trial phase, including questioning suspects and strengthening their position by giving them a right to legal assistance while in custody. These recommendations resulted in the Police and Criminal Evidence Act 1984. The second part dealt with the English prosecution system, which the Philips Commission evaluated in terms of fairness, accountability and efficiency. Regarding fairness, miscarriages of justice and high acquittal rates highlighted that the system could not guarantee that the right people, and only the right people, were prosecuted. This also implied a lack of efficiency, with resources spent on unsuccessful cases that should have been weeded out at an early stage.¹²¹ Since accountability to the executive and Parliament applied only to the DPP and not to the police, there was neither uniformity nor conformity in prosecution policies and practices.¹²²

The Commission sought to remedy these defects by the creation of a public prosecution service so that, importantly, the functions of investigation and prosecution would be strictly separate. Investigation would remain in the hands of the police, including the decision to initiate a prosecution or an out-of-court settlement.¹²³ However, once a decision to prosecute had been made, a legally qualified Crown Prosecutor would take over. Not having been involved in the investigation, he could decide independently whether prosecution should be continued, and if so, on what charge. The prosecutor would conduct prosecutions in the magistrates' court and brief counsel for cases in the Crown Court.¹²⁴ This separation between investigation and prosecution was intended to put the prosecution on equal, co-ordinate footing with the police and was subsequently termed the 'Philips principle'.¹²⁵ The Philips Commission implied that a public prosecution service should conduct all prosecutions once the police had taken the decision to prosecute, but its proposed role was limited. Strict separation between investigation and prosecution entailed that the prosecutor would have no investigative powers or control over the police to direct investigations. Prosecutors could informally request the police to supply particular evidence or conduct additional inquiries, but their formal role would not start until the police file was complete so that they were reliant on police information.

The government of the day accepted the proposals and created the Crown Prosecution Service with the Prosecution of Offences Act (POA) 1985. The CPS became operative in the whole of England and Wales in 1986. It was organized in a more centralised fashion than the Philips Commission had proposed, with a central headquarters headed by the DPP in charge of all local Crown Prosecutors, though

¹¹⁹ Hancock & Jackson (2006), p. 83.

¹²⁰ RCCP (1981a). The report is reviewed in Munday (1981). On the report, see White (2006); Ashworth (2000), p. 259.

¹²¹ White (2006), p. 152.

¹²² Hancock & Jackson (2006), p. 84.

¹²³ RCCP (1981a), § 7.7.

¹²⁴ RCCP (1981a), § 7.6; White (2006), p. 154–155.

¹²⁵ White (2006), p. 154.

also with maximum delegation: cases were to be dealt with at a local level, and few would have to pass through the DPP's office.¹²⁶ The Government chose this option because it would be more cost-efficient, ensure more consistent policy and enhance the appearance of independence from local police forces.¹²⁷ A centralised institution would also have the benefit of offering a unified career structure.¹²⁸

Crown Prosecutors had to be qualified lawyers and were recruited from the ranks of solicitors and barristers.¹²⁹ The CPS originally had little standing in the criminal justice system, and struggled to prove its worth. This resulted in difficulties in recruiting competent lawyers, and staffing was a significant problem for a number of years.¹³⁰ One of the main issues affecting the CPS was its structurally weak position.¹³¹ On the one hand its role was limited to deciding whether prosecutions initiated by the police should be continued, possibly on a different charge. On the other hand, Crown Prosecutors had no rights of audience in the higher courts (which made it difficult to attract qualified lawyers who would lose theirs) and could only prosecute in person in the magistrates' courts. The CPS was therefore still dependent on private counsel in the Crown Court, who under the so-called Farquharson guidelines that regulated the conduct of prosecution counsel, carried sole responsibility for the prosecution at trial.¹³²

The service was divided into areas largely coinciding with the police areas, to allow liaison between prosecutors and police, each area under the control of a Chief Crown Prosecutor (CCP). Crown Prosecutors were headed by the DPP and CPS headquarters.¹³³ The DPP was involved in a limited number of cases only. Most work was done at local level by Crown Prosecutors assisted by legally unqualified staff.¹³⁴ Crown Prosecutors were given the same powers as the DPP, the most significant of these being the power and duty to take over any prosecution initiated by the police.¹³⁵ When the police made a decision to prosecute a suspect on a particular charge, the case was sent to the CPS, where Crown Prosecutors decided whether or not the prosecution should be continued. But they remained dependent on the information supplied to them by the police. They had no powers of investigation, while the police were not bound to follow up on any of the CPS's inquiries or requests for further evidence.¹³⁶

The purpose of the discretionary power to discontinue prosecutions and amend charges was twofold: evidentially weak cases would be filtered out at an early stage and the CPS would act as a filter against police misconduct by filtering out cases where evidence had been obtained illegally. Guidance on how that power should be used was given in a Code for Crown Prosecutors issued by the DPP and revised

¹²⁶ Gandy (1988), p. 7-8.

¹²⁷ Windlesham (2001), p. 110-111. The Government's plans were set out in a White Paper *An Independent Prosecution Service for England and Wales*, cmd. 9074, London: HMSO 1983.

¹²⁸ Hancock & Jackson (2006), p. 85.

¹²⁹ Hancock & Jackson (2006), p. 89.

¹³⁰ Windlesham (2001), p. 115.

¹³¹ Hancock & Jackson (2006), p. 87; MacDonald (2004), p. 68.

¹³² Hancock & Jackson (2006), p. 98.

¹³³ Gandy (1988).

¹³⁴ Caseworkers were introduced later as part of the Glidewell reforms: Ashworth (2000), p. 261-262.

¹³⁵ SS. 1(6) and 3 *Prosecution of Offences Act 1985*.

¹³⁶ Sanders (1987)

regularly.¹³⁷ The Code set forth the two tests that prosecutors should apply. A prosecution should be continued if it was in the public interest, and if sufficient admissible evidence was available. The evidentiary threshold was increased. The police would traditionally anticipate committal proceedings at the magistrates' court, where the test was whether there was a *prima facie* case against the defendant. It focused exclusively on incriminating evidence, and did not require possible defences to be taken into account. The CPS Code required a 'realistic prospect of conviction', which implies that all evidence and arguments, both incriminatory and exculpatory, should be considered in anticipating whether a reasonable and objective jury could convict.¹³⁸

One of the most sensitive features of the new prosecution system was the structure of authority in which it would function. For the first time, government would have at its disposal a hierarchic, bureaucratic organisation with prosecutorial powers. But it was placed at a significant distance from the executive. The Prosecution of Offences Act 1985 provided that the DPP be appointed by the Attorney General. The DPP and the CPS as a whole were placed under his 'superintendence'. What superintendence entails remained undefined; the concept attempted to strike a balance between the need for independence and the need for accountability,¹³⁹ suggesting general oversight rather than day-to-day supervision.¹⁴⁰ And regarding the powers of the Attorney General over the DPP, it should be recalled that the Attorney General himself is constitutionally independent, answerable to Parliament for CPS policy only, not for individual decisions whether or not to prosecute. From the start, the AG, DPP and CPS therefore enjoyed a large degree of independence from government and Parliament.¹⁴¹ Neither was there any judicial control envisaged, although a decision not to prosecute, whether by the police or by the CPS, was subject to judicial review.¹⁴² As a final check on the prosecutorial powers of the CPS, the right to bring private prosecutions remained as unfettered as it was before 1986.¹⁴³

¹³⁷ The Code is required by s. 10 of the *Prosecution of Offences Act 1985*. It is a public document and available on <www.cps.gov.uk/publications/code_for_crown_prosecutors>.

¹³⁸ Ashworth & Redmayne (2010), p. 200-201.

¹³⁹ Perrodet (2002), p. 420.

¹⁴⁰ Gandy (1988), p. 9.

¹⁴¹ Ashworth (2000), p. 262.

¹⁴² Ashworth & Redmayne (2010), p. 222. Contrary to what continental lawyers are inclined to think, judicial review is not a review of a (criminal) case, but an appeal under what on the Continent would be administrative law.

¹⁴³ S. 6(1) *Prosecution of Offences Act 1985*. Though it is often claimed that private prosecutions are very rare, there are some organisations that bring private prosecutions regularly. The RSPCA (Royal Society for the Prevention of Cruelty to Animals), for instance, brings many private prosecutions. In 2009, it secured 2579 convictions on the basis of private prosecutions brought in the magistrates' court.

3. The development of the Crown Prosecution Service

a. The Royal Commission: a quest for greater accuracy¹⁴⁴

Public confidence in the English criminal justice system was badly shaken by a number of grave miscarriages of justice that came to light in the late 1980s and early 1990s. Many concerned suspected IRA terrorists. Infamous cases like the Birmingham Six, the Guildford Four and the Maguire Seven all involved false confessions that had been obtained under undue pressure during police questioning. Biased forensic experts, fabrication of evidence, and suppressing exculpatory information by the police and forensic experts, also featured significantly. The remit of the Royal Commission on Criminal Justice (RCCJ), chaired by Viscount Runciman, was to review the problem of miscarriages and to recommend improvements to help avoid conviction of the innocent. The decisive role of confessions, regulation of police questioning and disclosure of evidence were prominent issues. As was the appeals system, for it had proved singularly difficult to reopen cases of possibly unsafe convictions.

Many of the problems the Runciman Commission set out to repair had been known for a long time and the Philips Commission had already reviewed them. Most though not all of the cases that triggered the RCCJ pre-dated the implementation of the Philips recommendations and the establishment of the CPS. However, the occurrence of miscarriages was closely related to the adversarial system itself and showed the dangers of over-zealousness and bias on the part of police and prosecution. Theoretically, these should have been balanced by the role of the defence in adversarial truth-finding. In practice, the Runciman Commission reported, the defence were hardly able to conduct their own investigations and compensate for prosecution bias. Moreover, in convicting, juries had apparently relied heavily on (withdrawn) confessions. Though the Commission drew the line at requiring corroboration, it did suggest that judges should warn juries about confession evidence.¹⁴⁵ Finally, it advised that an independent authority be set up with powers to investigate potential miscarriages of justice and put them forward for appeal. This resulted in the Criminal Cases Review Commission that started work in 1997.¹⁴⁶

Generally speaking, the RCCJ recommendations relating to miscarriages of justice were informed by the idea of inequality between prosecution and defence. In this context, the Commission stressed professional standards – improved training and supervision, guidelines and codes of practice – to ensure that police and prosecution complied with their duties and that an equal contest could take place at trial. It also discussed an important compensatory mechanism, namely a duty on the police to investigate all incriminating as well as exculpating lines of inquiry. The Commission recommended that the duty to investigate all lines of inquiry (though not to follow CPS instructions) be given a statutory basis, which duly

¹⁴⁴ This section is based largely on Field & Thomas (1994).

¹⁴⁵ There is no minimum of evidence required to convict in England and Wales. Juries may use any of the evidence they choose to come to a conviction: the standard is 'beyond reasonable doubt'.

¹⁴⁶ *Criminal Appeal Act (CAA) 1995*, pt. 2.

occurred in the Criminal Procedure and Investigations Act (CPIA) 1996.¹⁴⁷ The fruits of this impartial investigation were to be made available to the defence through a new disclosure system. Disclosure of both incriminating and exculpatory material was already a legal obligation at the time of the RCCJ, but its precise principles were unclear and regularly reformulated.¹⁴⁸ The Commission proposed that the disclosure regime be put on a statutory footing, a recommendation again followed by the Government in the CPIA 1996.¹⁴⁹

The Commission assumed that the police had always been under such a duty. But that assumption can be questioned. Historically, there is nothing in the traditionally adversarial English procedure that suggests it: finding exculpatory material was a task for the defence. As Devlin once wrote: 'if [investigating all incriminating and exculpatory evidence impartially] is part of the duty of the police, it would help them a lot, I think, if they were told so plainly'.¹⁵⁰ Prosecutors were only required to disclose exculpatory information they happened to have found, but there was no duty actively to look for it.¹⁵¹ The latter was accepted only as late as 1993 by the Court of Appeal. In the case of *Ivan Fergus* all participants at trial – prosecution, defence and judge – had been at fault, but it was also clear that the police had failed to investigate properly:

'[...] had the police carried out *their duty* [our. it. *cb/ar*] to follow the instructions of the Crown Prosecution Service to take statements from alibi witnesses it was unlikely that the appellant would have been convicted.'¹⁵²

The statutory disclosure scheme of the CPIA was based on the idea that the police should be made available as a resource to the defence. Disclosure was intended to ensure that all relevant incriminating and exculpatory evidence would be disclosed to the defence and meant an important change to CPS duties. Rather than granting the defence full access to police material (as had been the rule under case law), a police officer would draft a schedule with all information gathered during the investigations and submit it to the Crown Prosecutor, who would select and disclose the evidence that might be adduced in support of the prosecution case. On the basis of this 'primary disclosure', the defendant would set out his case in a defence statement and submit it to the prosecutor who would then determine evidence that tended to exculpate the accused or undermine the prosecution case and thus was relevant for the defence. Disclosure of this material formed the second stage. Crown Prosecutors were given the important duty of selecting relevant information for the defence and the power to withhold disclosable material

¹⁴⁷ *Criminal Procedure and Investigation Act* 1996 s. 23 provides that a Code of Practice shall be drawn up to ensure an impartial police investigation, and in particular that all exculpatory lines of inquiry are followed up.

¹⁴⁸ For a long time, disclosure was regulated by guidelines issued by the Attorney General in 1982. However, these were held not to reflect the common law on disclosure in two landmark cases: *R v Ward* [1993] 96 Cr App R 1; *R v Keane* (1994) 99 Cr App R 1. See generally Niblett (1997), p. 67.

¹⁴⁹ *Criminal Procedure and Investigation Act* 1996 s. 3 ff.

¹⁵⁰ Devlin (1979).

¹⁵¹ *Dallison v Caffery*, [1965] 1 QB 348, at 375.

¹⁵² *R v Ivan Fergus*, Court of Appeal, 28 June 1993, [1994] 98 Cr. App. R. 313, per Steyn L.J.

if disclosure would be against the public interest. Judicial authorisation was required, but the hearings could be *ex parte*.

b. Narey and Glidewell: the quest for efficiency

The Runciman Commission's agenda also shifted somewhat to matters of efficiency. It suggested several changes unrelated to the problem of miscarriages of justice. Most notably, it emphasised the need for pre-trial hearings for better preparation of complex cases. The Government did not implement these recommendations in full, eclectically using some while disregarding others, but it did institute the recommended pre-trial proceedings as well as some other efficiency-enhancing measures.¹⁵³ It also took the opportunity to centralise the CPS in 1993 to ensure more consistent policy and efficient use of scarce resources and staff. Nevertheless, with the Conservatives in government for much of the 1990s, the perceived wrongs of the criminal justice system (conviction rates too low compared to crime rates, cautioning rates too high, and charges too often significantly downgraded) were a permanent target of law and order policies, and much of the blame for what was termed the 'Justice Gap' was laid at the door of the CPS. Not surprisingly, the main theme of the Tory reforms was efficiency.

The Narey Review, published in 1997, dealt with the issue of delay and made recommendations of a predominantly managerial nature to ensure that cases were disposed of more expeditiously. As far as the CPS was concerned, the significance of some of Narey's recommendations extended beyond the scope of managerialism. Crown Prosecutors were to become members of police administrative support units (ASUs). Closer co-operation with the police at an early stage would allow a swifter disposal of cases where a guilty plea was anticipated. The role of lay staff was extended so that CPS case workers, not Crown Prosecutors, could review incoming files and deal with uncontested cases in the magistrates' court.

When Labour came to power in 1997, it too set out to bridge the Justice Gap, its attitude towards the criminal justice system reflected in its electoral slogan: 'Tough on Crime, Tough on the Causes of Crime'. It considered the Narey Review and commissioned a new review to look specifically into the structure and organisation of the CPS. In 1998, the Glidewell Report endorsed many of Narey's recommendations regarding the use of lay case workers to deal with straightforward, uncontested cases in the magistrates' court.¹⁵⁴ Furthermore, it elaborated on the theme of earlier and closer co-operation between the CPS and the

¹⁵³ Preparatory hearings are regulated in parts 3 of the *Criminal Procedure and Investigation Act* 1996, in part 4 of the same act (dealing with other pre-trial hearings where binding rulings can be made for the further conduct of the case), and in s. 50 and 51 of the *Crime and Disorder Act* 1998 (these are the so-called preliminary hearings which take place in the Crown Court on instigation of the magistrates). Other recommendations that were taken over were the possibility to draw adverse inferences from an accused's relying on his right to silence (s. 34-39 *Criminal Justice and Public Order Act (CJPOA)* 1994); the possibility of sentence reduction for early guilty pleas (s. 48 *Criminal Justice and Public Order Act* 1994); and the possibility of plea before venue, where tendering a guilty plea before the mode of trial has been determined implies a choice for the magistrates' court, so that suspects of more serious crime are encouraged to plead as early as possible (s. 17A-C Magistrates' Court Act 1980, as amended by s. 49 *Criminal Procedure and Investigation Act* 1996). The recommendation to abolish the right to elect trial by jury was not taken over.

¹⁵⁴ Glidewell (1998).

police. The CPS was to be decentralised to make its areas coincide with the existing police areas. Glidewell also found that prosecutors were still reluctant to get involved in the investigative process and co-operate with police officers for fear of losing the ability to take objective prosecution decisions. He recommended that the position of CPS prosecutors be strengthened through the creation of Criminal Justice Units (CJUs). These had the same purpose as the ASUs, but were to be permanently under the power and control of a prosecutor. As a consequence, prosecutors gained some practical, if still not formal, authority to direct the police in the preparatory phase, and became less dependent on them for information about cases.¹⁵⁵

Some other trends of reform came to the fore in the late 1990s. Institutional police racism and cases of death in custody that were not properly followed up resulted in non-prosecution or unfounded acquittals and required revision of the traditionally limited accountability of the police and the CPS.¹⁵⁶ An independent inspectorate for the CPS (HMcpis) was established to enhance accountability. The CPS was also burdened with various duties to support victims and witnesses and communicate with them adequately, *i.e.* by informing them of CPS decisions. Another important change, though not one that was inspired by either Narey or Glidewell, was CPS advocacy. Rights of audience in the higher courts were extended to solicitors with special qualifications (solicitor-advocates) as early as 1990. However, solicitors and barristers who were employed by the CPS remained exempt until in 1999, when they too obtained rights of audience.¹⁵⁷

c. The new millennium: a quest for a new CPS?

Two important occurrences shaped the development of the English criminal justice system in the 21st Century. In 1998, the Human Rights Act incorporated the European Convention on Human Rights into the English domestic legal system. This had significant implications for the regulation of intrusive investigative powers and procedural standards. It did not, however, have a very immediate impact on the role of the CPS. The most significant changes were the result of the 2001 Auld Review of the English criminal courts system and the subsequent Government white paper *Justice for All*,¹⁵⁸ detailing a wider plan to modernize the criminal justice system.

A major concern was to speed up the disposal of cases and relieve the burden on the court system by encouraging guilty pleas at the earliest possible moment. At the time, the police engaged widely in plea-bargaining and Auld noted that they often over-charged, *i.e.* charged with a more serious offence than was warranted on the evidence in an effort to pressure the suspect to agree to plead to a lesser charge. The CPS were often unable to correct such over-charging, as it depended too much on investigating and charging decisions already made by the police. Over-charging did provide the prosecution with bargaining chips in negotiations with the defence, but delayed the tendering of guilty pleas. At the same time, the peculiarities of the English system meant that bargaining depended on the lawyer's adroitness and

¹⁵⁵ White (2006), p. 172-173.

¹⁵⁶ MacPherson Report (1999); Butler Report (1999).

¹⁵⁷ *Access to Justice Act (AJA) 1999*, s.36.

¹⁵⁸ Full text of Auld (2001) at <www.criminal-courts-review.org.uk>, and of Justice for All (2002) at <www.archive2.official-documents.co.uk>.

was more like a shady deal than a means of streamlining criminal process and reducing the burden on the courts.¹⁵⁹

A guilty suspect is more likely to plead guilty, and sooner in the process, if some form of inducement is offered that will result in a lesser sentence than the defendant would risk if the case went to trial. A successful plea-bargain needs not only an agreement that the defendant will plead guilty in exchange for fewer or lesser charges, but also knowledge of what sentence reduction the judge will be willing to give. If a plea had not been entered sooner in the process, all of this took place in back rooms, corridors and judge's chambers, where prosecution and defence barristers would attempt to find out from the judge what sort of sentence reduction was available and then bargain accordingly. However, advance indications of sentence by the judge had been forbidden for decades,¹⁶⁰ and the defence could increase the pressure by waiting as long as possible – even to the point of entering a plea as the hearing was about to begin, resulting in a 'cracked trial'. The financial and organisational pressure of an increasing number of cracked trials made definitive regulation more than ever necessary.

Although legislation after Runciman and a great deal of case law attempted to regulate what everyone recognised was an established way of producing guilty pleas (for example by asking, though not obliging, the judge to take account of the moment in time and the circumstances of the plea),¹⁶¹ the problem remained that the judge was forbidden to indicate what reduction he would give. A practice, however, was developing of a one-third reduction for the earliest possible plea, and Auld proposed that this be consolidated in legislation.¹⁶² To solve the problem of over-charging by the police, Auld proposed to transfer the power to initiate prosecutions and decide on the charge from the police to the CPS for all but minor summary offences. According to Auld, the Philips principle had had its day, and as they were already responsible for reviewing charges and evidence, it made sense to grant the CPS control over the prosecution process from the start.¹⁶³

Auld also recommended streamlining the two-stage disclosure scheme, placing responsibility for identifying disclosable material more firmly with the prosecutor rather than the police.¹⁶⁴ The old regime was complex, given that initial disclosure concerned the prosecution case while secondary disclosure of information helpful to the defence was made only after a defence statement had been received. It was also thought that full disclosure at the earliest possible occasion would encourage early guilty pleas because the defence would be better able to judge the strength of the prosecution case immediately. The duty to disclose should be reformulated as one that comes alive when the prosecution is initiated and should be kept under continuous review. Further recommendations included Criminal Procedure Rules to provide a clear and concise consolidation of important legislation and codify uncontroversial common law rules.¹⁶⁵

¹⁵⁹ Brants & Stapert, p. 69.

¹⁶⁰ *R. v. Turner* [1970] 2 Q.B. 321.

¹⁶¹ *Criminal Justice and Public Order Act 1994*, s. 48, now s. 144, *Criminal Justice Act (CJA) 2003*.

¹⁶² Auld (2001), ch. 10, recommendations 186–193.

¹⁶³ Brownlee (2004), p. 897–898.

¹⁶⁴ Auld (2001), ch. 2, § 14.

¹⁶⁵ Auld (2001), ch. 2, §228. Auld made this suggestion in conjunction with the creation of a unified criminal court, which was not followed by the Government. The Criminal Procedure Rules materialised in 2005.

Although many of Auld's suggestions and plans, and those of the Government, were inspired by managerial concerns, they were to have quite profound consequences for the CPS and its position in the criminal justice system. Together, they resulted in the Criminal Justice Act 2003 and this piece of legislation, with the amendments to previous regulation and Codes of practice it made necessary, is what has shaped the CPS into what it is today. Although its main task remains the review and prosecution of cases brought by the police, the CPS has changed significantly and is still in transition.

4. The Crown Prosecution Service Today

a. Organisation and Structure

The CPS is a hierarchically organised, bureaucratic organisation. The highest authority is the Director of Public Prosecutions. He is based at CPS headquarters, which has divisions that are responsible for resources, training, policy, etc. The CPS has the duty to take over all prosecutions from the police, and the right to take over any other prosecution; these powers are exercised by Crown Prosecutors. They are based in CPS areas coinciding with the police areas, to allow smooth co-operation between police forces and the CPS. Each area is headed by a Chief Crown Prosecutor. The DPP issues guidance on how Crown Prosecutors should exercise their powers. A Code and a set of Quality Standards detail the general obligations and duties of prosecutors.¹⁶⁶ There is further guidance on specific areas of the prosecutorial role, and guidelines pertaining to the prosecution of specific offences. The DPP may always intervene in cases he deems sensitive, and for some categories of offences his consent to (non) prosecution is required.¹⁶⁷

Crown Prosecutors must be qualified solicitors or barristers.¹⁶⁸ The CPS offers fully qualified barristers or solicitors a five-day in-house training programme. Further training is offered on an as-needs basis.¹⁶⁹ Legal trainees who have completed the law society or bar exams (post-graduate degrees obtained from selected law schools), can take the practical part of their training in-house at the CPS and follow courses at the Prosecution College.¹⁷⁰ Unqualified law graduates receive support from the CPS to take the law or bar exam. Subject to obtaining the necessary bar or solicitor-advocate qualifications, Crown Prosecutors can eventually progress to the rank of Crown Advocates (with rights of audience), with further promotion to Senior and Principle Crown Advocate available.¹⁷¹ The aim is to develop a service of career prosecutors. However, although the number of Crown Advocates with rights of audience in the higher courts is increasing, it is

¹⁶⁶ *Code for Crown Prosecutors (2010)* (issued under s. 10 *Prosecution of Offences Act 1985*); Core Quality Standards, <www.cps.gov.uk/publications/core_quality_standards/index.html> (last viewed 30 October 2010).

¹⁶⁷ See the legal guidance of 21 July 2010 at <www.cps.gov.uk/legal/a_to_c/consent_to_prosecute>.

¹⁶⁸ See <www.cps.gov.uk/careers/legal_professional_careers> (last viewed 20.10.2010).

¹⁶⁹ Hancock & Jackson (2006), p. 89-91. On training, see the *Personnel Management Manual*, volume 1, chapter 6 (available from <www.cps.gov.uk/publications/humanresources/pmm/index.html> (last viewed 28 October 2010).

¹⁷⁰ See <prosecutioncollege.cps.gov.uk>.

¹⁷¹ *Access to Justice Act 1999*, s.36.

still usual for the CPS to instruct a barrister in private practice. Its website refers to the aim of 'bringing 25% of all Crown Court prosecution work in-house'.¹⁷²

Staff without barrister or solicitor qualification, are known as associate prosecutors. Increasingly, they have been given autonomous tasks by statute, and their role is further elaborated in guidance issued by the DPP.¹⁷³ Training is provided by the CPS in the form of short courses and learning modules.¹⁷⁴ Associate prosecutors have limited rights of audience in the magistrates' courts.¹⁷⁵ An associate prosecutor usually acts on the instruction of the Crown Prosecutor who reviewed the case, though in straightforward cases he can review the case himself.¹⁷⁶ However, the decision to institute or continue a prosecution must always be taken by a Crown Prosecutor.¹⁷⁷

b. Prosecutorial role

The precise role of the CPS in the prosecution process depends on the type of offence that determines the procedure. It is also important to note two things: first, that the term 'prosecutor' includes private and public prosecutors – the latter including members of the CPS and the police;¹⁷⁸ second, the difference between preparing the prosecution by investigation, taking the decision to prosecute and charge, and conducting a prosecution in court.¹⁷⁹ The essence of the task of the CPS remains taking over prosecutions from the police. All cases brought by the police are prosecuted by the CPS, except for some minor offences which the police may prosecute themselves in the magistrates' court.¹⁸⁰ It also takes over prosecutions from a number of other investigative agencies, including the Serious Organised Crime Agency, which has special expertise and enhanced investigative

¹⁷² See

<www.cps.gov.uk/careers/benefits_of_working_with_the_cps/career_progression/index.html> for a description of the various functions within the CPS. Job descriptions for Crown Advocates are available from <www.cps.gov.uk/careers/legal_professional_careers/crown_advocate> (last viewed 28 October 2010).

¹⁷³ S. 7A *Prosecution of Offences Act 1985* (as amended by the *Criminal Justice Act 2003*). See the *Director's Instructions to CPS Associate Prosecutors* of February 2009, available at <www.cps.gov.uk/publications/directors_guidance/dpp_instructions.html>.

¹⁷⁴ *CPS Annual Report 2009-2010*, Annex E (available from <www.cps.gov.uk>).

¹⁷⁵ S. 7A *Prosecution of Offences Act 1985* and S. 7A(2)(a)(ii) *Prosecution of Offences Act 1985* as amended by s. 55(2)(a) of the *Criminal Justice and Immigration Act 2008*. Associate prosecutors are allowed to conduct trials of summary non-imprisonable offences. The Attorney General may issue an order determining that they may conduct prosecution of all summary offences, regardless of their sanction.

¹⁷⁶ § 3.4 and 3.5 *Director's Instructions to CPS Associate Prosecutors*.

¹⁷⁷ § 2.2 *Director's Instructions to CPS Associate Prosecutors*.

¹⁷⁸ The term 'public prosecutor' is defined in s. 29(5) *Criminal Justice Act 2003*. It includes the police forces; the DPP; the directors of the Serious Fraud Office, of the Revenue and Customs Prosecutions, and of the Serious Organised Crime Agency; the Secretary of State; and the Commissioners of Inland Revenue and of Customs.

¹⁷⁹ See *supra* p. XXX

¹⁸⁰ S. 3(2)(a) *Prosecution of Offences Act 1985*; this exception applies to so-called specified offences, which are mentioned in the Attorney General's *Prosecution of Offences Act 1985 (Special Proceedings) Order 1999*.

powers.¹⁸¹ The CPS has been merged with the Revenue and Customs Prosecutions Office (responsible for prosecuting tax offences), making it an increasingly broad-based prosecution service. However, other agencies, such as the Serious Fraud Office, have retained their prosecutorial powers. Moreover, private prosecutions remain competent, although the CPS has the power to take over.¹⁸²

The rules are spread out over different regulatory instruments, including the Criminal Procedure Rules¹⁸³ and the DPP's charging guidelines.¹⁸⁴ The flow chart in Annex I may serve as an illustration of how complicated things still are. In the (very) near future, the usual, traditional way of instigating criminal proceedings against a suspect who is at large will be available to private prosecutors only: they can 'lay an information' (containing a charge) before magistrates requesting them to issue a summons for the suspect to appear in court, or a warrant for his arrest.¹⁸⁵ Public prosecutors have to proceed by way of a written charge, accompanied, by a requisition that requires the suspect to appear before a magistrates' court.¹⁸⁶

While the police remain responsible for preparing a prosecution by investigating, gathering evidence and arresting suspects, charging the suspect and initiating the prosecution are now the CPS's responsibility in principle and are governed by the Director's Guidance on Charging. Although the legislation seems to suggest otherwise, this Guidance is not dependent on an arrest to trigger its application – its principles and guidelines concerning the respective responsibilities of the police and the CPS apply howsoever the proceedings are instituted. Accordingly, the police do not have the capacity to circumvent the requirement for CPS authority to charge.¹⁸⁷ The suspect can be charged at the police station (*e.g.* if he is detained in custody or when he returns to answer bail), or by means of a written charge (*i.e.* by post).¹⁸⁸ A decision to charge a detained suspect must be made within 96 hours.¹⁸⁹

While in principle only the CPS has the power to charge, the first steps are still taken by the police without mandatory CPS-involvement. A police custody officer determines if there is sufficient evidence to charge, applying the so-called threshold test: there must be a reasonable suspicion of guilt, while bringing a prosecution

¹⁸¹ S. 38 *Serious Organised Crime and Police Act 2005*, establishing SOCA. The DPP also has investigative powers with a view to investigating and prosecuting organised crime. See www.soca.gov.uk

¹⁸² S. 6 *Prosecution of Offences Act 1985*. See the CPS legal guidance of 23 June 2009 on (taking over) private prosecutions at www.cps.gov.uk/legal/p_to_r/private_prosecutions.

¹⁸³ Statutory Instrument (S.I.) 2010/60 (L.2).

¹⁸⁴ *Director's Guidance on Charging*, currently in its 3rd edition of February 2007. The guidance is complemented by the *Director's Guidance on the Streamlined Process*, 2nd edition, October 2008.

¹⁸⁵ S. 1(1) *Magistrates' Court Act 1980*. It remains competent for public prosecutors to request the magistrates' court to issue an arrest warrant: s. 30(4) *Criminal Justice Act 2003*.

¹⁸⁶ S. 29(1), (2) *Criminal Justice Act 2003* and *Criminal Procedure Rules (as in force from 4 October 2010)*, s. 7.2..

¹⁸⁷ S. 37A *Police and Criminal Evidence Act 1984* and *Director's Guidance*. Links to the text of *Police and Criminal Evidence Act 1984* and the guidelines at: www.homeoffice.gov.uk/police/powers (last viewed 19.10.2010).

¹⁸⁸ S. 37B(8) *Police and Criminal Evidence Act 1984*.

¹⁸⁹ S. 41-44 *Police and Criminal Evidence Act 1984*. The period has been extended to 28 days for terrorism offences: s. 23 *Terrorism Act 2006*.

would be in the public interest (as far as can be judged on the material available).¹⁹⁰ CPS charging as introduced by the Criminal Justice Act 2003 becomes operative if the custody officer is of the opinion that the threshold test has been met.¹⁹¹ He then submits the case to the CPS for review and a Crown Prosecutor decides whether a prosecution should be initiated, and if so, on which charge or charges. Given the strict time limits for charging if the suspect is detained, fast decision-making is often required. Duty prosecutors are stationed at major police stations to advise custody officers and take charging decisions if necessary.¹⁹² These can also be made by a Crown Prosecutor by phone.¹⁹³ Custody officers have also been given the power to remand suspects on bail for the purpose of enabling the CPS to take a charging decision.¹⁹⁴ The DPP has the power to specify offences that may be charged by the police without reference to the CPS. This currently applies to a limited number of minor, mainly road traffic offences.¹⁹⁵ As these are summary offences whose prosecution may also be conducted by the police, the CPS are not involved in any way. In all other cases, the police are not authorized to issue a charge in whatever form.

In deciding whether to institute criminal proceedings and on what charge, Crown Prosecutors are bound by the Code for Crown Prosecutors to apply a more stringent test than the police. This so-called 'full code test' has two prongs.¹⁹⁶ First, there must be a realistic prospect of conviction: an objective, impartial and reasonable jury or judge would be more likely than not to convict. The test requires prosecutors to consider the possible defence case, as well as the admissibility and reliability of the prosecution evidence.¹⁹⁷ In their dependence on the police, prosecutors were hardly able to come to an independent assessment of the evidence;¹⁹⁸ moreover, it was regarded as unethical for them to speak to prosecution witnesses (to prevent coaching).¹⁹⁹ Some notable cases resulted in judge-directed acquittals after key prosecution witnesses were found to be unreliable,²⁰⁰ and prosecutors are now allowed to conduct pre-trial interviews with witnesses to assess their reliability and credibility.²⁰¹

¹⁹⁰ S. 37(1) *Police and Criminal Evidence Act 1984* and § 3.1 *Director's Guidance on Charging*. A police custody officer is a specially designated police officer responsible for making detention decisions. See s. 36 *Police and Criminal Evidence Act 1984*.

¹⁹¹ Ashworth & Redmayne (2010), p. 197. The rules are laid down in ss. 28 and 29 and schedule 2 of the *Criminal Justice Act 2003*. If the test is not met, the suspect should be released (with or without bail), though the investigations may continue: s. 37(2) *Police and Criminal Evidence Act 1984*.

¹⁹² § 5 *Director's Guidance on Charging*.

¹⁹³ A special team of Crown Prosecutors called CPS Direct has been set up for this task. See <www.cps.gov.uk/direct>.

¹⁹⁴ S. 37(7)(a) *Police and Criminal Evidence Act 1984*.

¹⁹⁵ § 3.3 *Director's Guidance on Charging*.

¹⁹⁶ § 3.8 *Director's Guidance on Charging*. The Guidance provides that if insufficient evidence is available to apply the full code test, while it would be inappropriate to release the suspect on bail, the threshold test may be employed initially: § 3.9.

¹⁹⁷ § 4.6, 4.7 *Code for Crown Prosecutors (2010)*.

¹⁹⁸ Gandy (1988), p. 13; Ashworth (2000), p. 269; Hancock & Jackson (2006), p. 110.

¹⁹⁹ Ashworth & Redmayne (2010), p. 202-203.

²⁰⁰ The murder of Damilola Taylor, where the trial judge ordered that the defendants be acquitted because one of the important prosecution witnesses lacked credibility, was the direct cause for considering the possibility of holding pre-trial witness interviews. See

Under the second prong of the test, prosecutors must determine whether a prosecution is in the public interest, considering such factors as the severity of the expected sentence, the appropriateness of an out-of-court settlement, the role of the suspect in the offence and his motives, the relationship between suspect and victim, and any compensation made by the suspect. The wording of the Code suggests that in principle a prosecution should be brought, unless it would not be in the public interest to do so.²⁰² However, it also stresses that each case be judged on its own facts and merits, and all relevant factors carefully weighed rather than simply added up.²⁰³

It is of note that the case should be reviewed continuously as it progresses and more information becomes available.²⁰⁴ To facilitate review by the CPS, the police prepare a report of the evidence; a fairly summary affair in simpler cases, a full evidential report is required for contested cases in the Crown Court, setting out the main incriminating evidence as well as evidence that undermines the prosecution case and/or is otherwise helpful to the defence.²⁰⁵ After charging, the case proceeds to the magistrates' court. The traditional check on prosecutorial decision-making in the form of committal proceedings has been replaced for indictable-only offences by automatic sending to the Crown Court where preliminary issues are evaluated in plea and case management hearings.²⁰⁶

c. The role of the CPS in criminal investigation

Relationship between police and CPS

While the CPS can instruct the police in the context of charging, it has no powers of control or supervision over the initiation or conduct of police investigations.²⁰⁷ The police are under a statutory duty to investigate all reasonable lines of inquiry, but there are no mechanisms of hierarchical supervision to ensure that they do. This limitation can be traced to the Philips principle of strict separation between investigation and prosecution. With the exception of a limited range of investigative powers in some cases of serious or organised crime that the DPP can exercise independently from the police (and may delegate),²⁰⁸ Crown Prosecutors

CPS, *Pre-Trial Witness Interviews by Prosecutors – A Consultation Paper*, 2003 (available at <www.cps.gov.uk/publications/docs/pre-trial-wit-consult.pdf>).

²⁰¹ See generally Roberts & Saunders (2008).

²⁰² § 4.12 *Code for Crown Prosecutors* (2010); § 4.2 refers to cases where the public interest precludes a prosecution even if the evidence is strong as 'rare instances'.

²⁰³ § 4.13 *Code for Crown Prosecutors* (2010).

²⁰⁴ § 3.6 *Code for Crown Prosecutors* (2010).

²⁰⁵ § 7 *Director's Guidance on Charging*.

²⁰⁶ Archbold §1-14; s. 51 *Crime and Disorder Act 1998*. See also the CPS legal guidance on Sending Indictable Only Cases to the Crown Court and Committal Proceedings, on <www.cps.gov.uk/legal/s_to_u/sending_indictable_only_cases_to_the_crown_court> (last viewed 28 October 2010). Committal proceedings are also to be abolished for triable either way offences that are tried in the Crown Court (*Criminal Justice Act 2003*, schedule 3).

²⁰⁷ § 1.5 and 3.2 *Code for Crown Prosecutors* (2010), stress that prosecutors cannot direct the police or other investigators because of fundamental constitutional principles.

²⁰⁸ *Serious Organised Crime and Police Act 2005*, ss. 60-67; these powers include issuing disclosure notices that require a person to answer questions, disclose documents, or provide information by other means. Failure to comply with such a notice or answer truthfully is an offence. These provisions give the CPS some true, if limited investigative

lack investigative authority and depend on the police investigation. Despite this principled approach, there are various, mostly informal ways in which Crown Prosecutors can exert some influence. Though they cannot formally instruct the police on the deployment of their investigative powers, police and CPS work together in the Criminal Justice Units as the investigation progresses, and duty prosecutors at the police station may request or suggest a particular course of action (under the statutory charging scheme they are expected to provide early advice on lines of inquiry and evidence).²⁰⁹

Investigations and Disclosure of Evidence to the Defence

With no powers of supervision or direction, the CPS cannot carry responsibility in ensuring full and impartial police investigations, but prosecutors do have a duty to ensure that all relevant material gathered by the police is disclosed to the defence as soon as a suspect is charged with a summary offence, or committed for or sent to trial in the Crown Court. 'Relevant' refers not only to the prosecution case, but especially to anything that might reasonably be considered capable of undermining it or of assisting the case for the accused. The defence may also request that the judge order disclosure if they have reason to believe that disclosable material has been withheld.²¹⁰

If disclosable material is so sensitive that disclosure would conflict with the public interest (for instance, if disclosure would reveal sensitive information about ongoing investigations or (covert) investigation tactics), the prosecutor should seek leave from the court to withhold it.²¹¹ These procedures are known as public interest immunity hearings (PII-hearings). Normally the defence is notified and able to attend the PII-hearing to discuss the need for disclosure. Alternatively, the defence may be notified of a PII-application but that they cannot attend. However, notification gives them some idea of the material in issue, and they can make representations to the court. A third option is that the defence is not even notified of the fact that information is being withheld.²¹² The test to be applied by the court is whether non-disclosure would preclude a fair trial. If so, the information cannot be withheld for public interest reasons.²¹³ The prosecutor must then choose between disclosure and abandoning proceedings.

Disclosure by the defence requires submission of the details of the defence case to the prosecution if the case is to be tried in the Crown Court.²¹⁴ A defence statement should explain any legal defence and the facts on which there is disagreement with the prosecution, and why, and identify and explain any point of

powers; it is also of note that the information obtained cannot be used in criminal proceedings against the person from whom they were obtained.

²⁰⁹ § 5.2 and 8.1 *Director's Guidance on Charging*.

²¹⁰ S. 1, 3, 7A and 8 *Criminal Procedure and Investigations Act 1996* (as amended by the *Criminal Justice Act 2003*)

²¹¹ S. 3(6), 7A(8) and 8(5) *Criminal Procedure and Investigations Act 1996*.

²¹² Chapter 13 of the CPS *Disclosure Manual* at <www.cps.gov.uk/legal/d_to_g/disclosure_manual> (last viewed 7 November 2010). In these cases, some courts appoint special counsel to represent the interests of the defendant and obtain knowledge of the sensitive material while not being allowed to report back to the defence: Ashworth & Redmayne (2010), p. 269.

²¹³ *R v H and C* [2004] 2 WLR 335.

²¹⁴ Sending a so-called defence statement is voluntary for cases dealt with by magistrates' courts: S. 5 and 6 *Criminal Procedure and Investigations Act 1996*.

law with which the accused wishes to take issue. The prosecutor must also be notified of changes that occur as the case progresses.²¹⁵ If a defendant deviates at trial from the defence as set out in the statement or fails to submit a statement where required, the court or a party may make any comment they deem appropriate, and the judge or jury may draw the inferences they think proper.²¹⁶ According to the CPS Disclosure Manual, the purpose of defence statements is threefold: to identify issues in dispute, to facilitate the selection of material that is relevant and therefore falls to be disclosed, and to indicate new or alternative reasonable lines of inquiry. Defence statements therefore also serve to ensure that the police investigate all reasonable lines of inquiry. To that end, the prosecutor should submit them to the investigating officers.²¹⁷ The police are further assisted in assuring the impartiality of their investigations by the requirement that the defence give notice of the witnesses it intends to call.²¹⁸

d. Prosecution ethics and prosecution advocates

The trial remains the centrepiece of English criminal process. Though various pre-trial hearings may be held, truth-finding takes place at trial, where in principle all evidence is examined and all witnesses testify, subject to cross examination.²¹⁹ In cases heard in the magistrates' court, Crown Prosecutors generally conduct the prosecution. In the majority of Crown Court cases the CPS instructs a barrister in private practice. As many relevant decisions are made during trial proceedings, this raises the question of how responsibilities are divided between the CPS and external prosecuting advocates. Any barrister acting for the CPS is bound by CPS policy, including the Code for Crown Prosecutors.²²⁰ The CPS now has greater control over the conduct of prosecutions by private barristers. Where it originally lost responsibility for a case once it reached court and was fully in the hands of counsel, amended guidelines now provide that prosecution counsel must discuss all

²¹⁵ S. 6A *Criminal Procedure and Investigations Act 1996* ss. 6A and 6B.

²¹⁶ S. 11 *Criminal Procedure and Investigations Act 1996*; s. 6E(4) provides that the judge can decide to make the defence statement available to the jury.

²¹⁷ §15.5/17 *CPS Disclosure Manual*.

²¹⁸ S. 6C *Criminal Procedure and Investigations Act 1996*. Such notices are submitted to the police, and an investigator may decide to interview defence witnesses. S. 21A *Criminal Procedure and Investigations Act 1996*. The appropriate procedure is described in a code of practice at www.legislation.gov.uk/ukpga/1996/25/pdfs/ukpgacop_19960025_en.pdf. There is a special requirement to mention the details of an alibi witness, if any, if a defence of alibi is set out in the defence statement: s. 6A(2) *Criminal Procedure and Investigations Act 1996*.

²¹⁹ There are various exceptions to the rule that witnesses should give their evidence orally at trial. Part 11, Ch. 2 of the *Criminal Justice Act 2003* codifies a number of exceptions to the prohibition on hearsay evidence. Furthermore, under the *Coroners and Justice Act 2009*, there are various ways in which witness anonymity can be maintained and cross-examination limited. See Ormerod, Choo & Easter (2010).

²²⁰ The duties of prosecuting counsel are set forth in the CPS National Standards of Advocacy of September 2008, available at www.cps.gov.uk/publications/prosecution/nsa.html. These standards are further elaborated in the *CPS Instructions for Prosecuting Advocates*, which are incorporated into every prosecution brief (available at www.cps.gov.uk/legal/p_to_r/prosecuting_advocates_instructions) (last viewed 25 October 2010).

non-evidential decisions with Crown Prosecutors and refer unresolved issues to the Chief Crown Prosecutor.²²¹ Though the guidelines still state that prosecution counsel may make the necessary decisions,²²² the proper course of action in case of disagreement is for the barrister to return the brief.²²³

All prosecutors, be they Crown Prosecutors or barristers instructed by the CPS, are bound by a number of (ethical) obligations. Obviously, they must be fair, independent and objective throughout the process (both in pre-trial and trial decision-making).²²⁴ All participants in the criminal process are also bound by the Criminal Procedure Rules.²²⁵ These rules identify the overriding objective of the criminal process as ensuring that criminal cases are dealt with justly. This includes that the innocent be acquitted and the guilty be convicted.²²⁶

e. Out-of-court settlement

The vast majority of cases never reach the courts and are dealt with either through out-of-court disposal within the criminal justice system, also known as diversion,²²⁷ or outside the realm of criminal law.²²⁸ The CPS has tasks in both, generally sharing the responsibility with other authorities such as the police. Plea-bargaining is a hybrid form of out-of-court disposal: the trial is avoided, but the judge imposes sentence, with all of the usual consequences. The Government followed recommendations in the Auld Review in the Criminal Justice Act 2003,²²⁹ bringing the practice into the open and setting sentence-reduction tariffs on early guilty-pleas. The Court of Appeal has also overturned the old ban on judges giving an advance indication of sentence (reduction) at the request of the defendant.²³⁰ In any bargaining situation, the prosecutor is bound by the CPS Code for Crown Prosecutors, section 10, that sets out the conditions; over-charging is expressly forbidden.²³¹

The law also provides for a number of means of statutory diversion for minor offences if there is sufficient evidence of guilt such as fixed penalty notices (FNP's) for traffic offences or penalty notices for disorder (PND's). These are issued by the police and require no admission of guilt. The police also have at their disposal a number of non-statutory powers of diversion. They may always decide to take no further action (NFA), as there is no duty on the police to register reported crimes.

²²¹ CPS, *The Farquharson Guidelines: The Role and Responsibilities of the Prosecution Advocate*, 2002, available at <www.cps.gov.uk/publications/docs/farqbooklet.pdf>.

²²² *Farquharson Guidelines* §4 – e.

²²³ Hancock & Jackson (2006), p. 99.

²²⁴ *Code for Crown Prosecutors* (2010), §2.4.

²²⁵ The CPS *National Standards of Advocacy* expressly mention that prosecutors are bound by the overriding objective.

²²⁶ *Criminal Procedure Rules* 2010, 1.1(2)(a).

²²⁷ This entails the disposition of cases by the police or CPS within the context of criminal process, but without going to trial.

²²⁸ *Criminal Statistics: England and Wales 2009 Statistics bulletin*, London: Ministry of Justice, October 2010, p. 6.

²²⁹ *Criminal Justice Act* 2003, s. 144 (replacing the *Criminal Justice and Public Order Act*); sentencing guidelines that elaborate on this provision can be found at <www.sentencingcouncil.org.uk/sentencing-guidelines.htm> (last viewed 21.10.2010).

²³⁰ *R. v. Goodyear* [2005] EWCA Crim 888

²³¹ See <www.cps.gov.uk/publications/code_for_crown_prosecutors/guiltypleas.html> (last viewed 21.10.2010).

Alternatively, they may issue an informal, unregistered warning, or more formally, a simple caution. This too is a warning, but one that is registered and may be cited at future court appearances in an antecedents-statement. The cautioned person must admit the offence, and should sign a statement accordingly. There is Home Office guidance on the issue, which states that cautions should only be used for low level offending and sets forth some additional criteria and conditions.²³² However, due to the principle of constabulary independence, police forces do not consider this guidance to be binding and although police cautions are meant for first offenders of minor offences, they are also used widely in more serious cases.²³³

Apart from plea-bargaining, the CPS itself has few diversionary powers, although since the Criminal Justice Act 2003 it has exclusive authority to impose conditional cautions:²³⁴ no prosecution will be brought against a suspect, provided he admits to the offence and is willing to comply with certain rehabilitative, reparative or punitive conditions.²³⁵ The CPS can also instruct the police who, under guidance by the DPP and a code of practice issued by the Secretary of State,²³⁶ make an initial assessment of whether a case is suitable for a conditional caution. They should then refer these cases to a Crown Prosecutor (in principle by telephone), who has the final say and can authorise the custody officer to impose a conditional caution. However, the CPS is not bound by the police assessments. Conversely, should a Crown Prosecutor, upon review of a case that the police have referred for charging, find that a simple or conditional caution would be more appropriate, the police are bound to follow his decision.²³⁷ The autonomous police power to take No Further Action has also been somewhat curtailed for indictable-only offences. If the threshold test is met, these cases must be referred to the CPS for a final decision.²³⁸ The CPS's power to instruct the police does not apply to PNDs and FPNs, though the use of these dispositive instruments is strictly regulated by statute.²³⁹

Diversion remains within the criminal law, but prevents prosecution. There are also various civil orders that either replace the need for criminal proceedings, or are imposed in addition to a criminal sentence for purposes of deterrence. These so-called behaviour orders are widely used and can have far-reaching consequences for

²³² Home Office *Circular on Simple Cautioning of Adult Offenders*, 016/2008, available from <www.homeoffice.gov.uk>.

²³³ See for details of police diversionary powers: Ashworth & Redmayne (2010), p. 160-176.

²³⁴ The CPS *Code of Practice Criminal Justice Act 2003*, s. 22-27 makes clear that *conditional* cautioning is not a police but a prosecutorial power.

²³⁵ S. 23A(3) *Criminal Justice Act 2003*. A punitive condition, competent for offences specified by the Secretary of State only (s. 23A(1)) may consist of a penalty of at most £250, and should not exceed one quarter of the maximum penalty for the offence in issue. See the *Director's Guidance on Adult Conditional Cautions* of January 2010 and *Code for Crown Prosecutors* (2010), § 7 for details; meanwhile, punitive conditions are only available in pilot areas.

²³⁶ The Secretary of State is required to issue a code of practice under s. 25 *Criminal Justice Act 2003*. This is currently the *Revised Code of Practice for Conditional Cautions – Adults 2010*. Its contents are largely the same as those of the *Director's Guidance on Adult Conditional Cautions*.

²³⁷ § 3.4 *Director's Guidance on Adult Conditional Cautions*, § 3 and 8; s. 37B(6) PACE 1984, and §9.4 *Director's Guidance on Charging*. This power to instruct the police also applies to reprimands and warnings for young offenders..

²³⁸ § 8.3 *Director's Guidance on Charging*.

²³⁹ § 7.6 *Code for Crown Prosecutors* (2010).

the recipient. They are generally imposed by the magistrates' court sitting in civil capacity, and require a person to behave or not to behave in a particular manner. Breach of the order is a criminal offence. Civil behaviour orders may be requested by a variety of authorities, including local councils, the police and the CPS.²⁴⁰ At the same time, criminal courts have the power to impose a wide variety of civil behaviour orders *ex proprio motu*.²⁴¹ Though prosecutors do not request or offer advice on a sentence, they can request the court to impose a limited number of civil behaviour orders in the context of a prosecution, as an ancillary order upon verdict or finding by a criminal court.²⁴² It is then for the prosecutor to present the facts and evidence to the court and to specify the desired conditions of the order.²⁴³

f. Accountability

The CPS is headed by the DPP, who carries ultimate responsibility for the conduct of all CPS prosecutors.²⁴⁴ He has wide powers to issue guidance and policies to Crown Prosecutors on how their powers should be used, is appointed by the Attorney General, and is placed under the latter's superintendence.²⁴⁵ The Attorney General is a government minister, but as he does not sit in Cabinet he has a significant degree of independence, with ministerial responsibility to Parliament for the CPS, but only for the general policies it pursues; there is no responsibility to Parliament for decisions in individual cases.²⁴⁶ The CPS annual reports on the CPS's performance in relation to government targets are laid before Parliament, but they do not discuss qualitative aspects of the prosecution service.²⁴⁷ The CPS Inspectorate (HMCpsi) also publishes annual reports, but these too focus predominantly on quantitative benchmarks and managerial issues. The task of the inspectorate is described as to 'promote the effectiveness, efficiency and value for money [...] and in doing so, enhance the quality of justice'.²⁴⁸ However, some of its thematic reports offer a critical assessment of qualitative aspects of the work of the CPS.²⁴⁹

While there is accountability for general policy and performance, there is little for individual decision-making. Parliament and the government cannot intervene in individual cases, nor is there any official complaints mechanism. Anyone who is not satisfied with a decision to prosecute or not to prosecute can write a letter to the DPP's office, but these need not be answered. Members of Parliament regularly refer complaints from their constituents to the DPP and although the CPS is not

²⁴⁰ See for football banning orders s. 14B *Football Spectators Act 1989*, for Anti Social behaviour Orders (ASBO's) S. 1C *Crime and Disorder Act 1998* and for Serious Crime Prevention Orders (SCPO's) S. 8 *Serious Crime Act 2007*, Part 50 *Criminal Procedure Rules 2010*, rule 50.3(1).

²⁴¹ See *Criminal Procedure Rules 2010*, rule 50.1, for a list of possible orders and their legal bases.

²⁴² Such as an Anti-Social Behaviour Order (ASBO, s. 1C *Crime and Disorder Act 1998*) or a Serious Crime Prevention Order (SCPO, S. 8 *Serious Crime Act 2007*, Part 50 *Criminal Procedure Rules 2010*, rule 50.3(1)).

²⁴³ *Criminal Procedure Rules 2010*, rule 50.3(3).

²⁴⁴ S. 3(2) *Prosecution of Offences Act 1985* vests all the powers of the CPS in the DPP.

²⁴⁵ S. 3(1) *Prosecution of Offences Act 1985*.

²⁴⁶ Ashworth & Redmayne (2010), p. 220; Hancock & Jackson (2006), p. 134–135.

²⁴⁷ S. 9 *Prosecution of Offences Act 1985*; Ashworth & Redmayne (2010), p. 220.

²⁴⁸ <www.hmcpsi.gov.uk/index.php?id=2> (last viewed 30 October 2010).

²⁴⁹ The HMCPSI reports may be found at their website <www.hmcpsi.gov.uk>.

required to give reasoned decisions,²⁵⁰ it will explain its course of action in sensitive or highly publicised cases.²⁵¹ In cases involving an identifiable victim, guidelines prescribe that prosecutors should consult with that victim, inform him or her of the decisions that have been made, and explain their reasons.²⁵²

Prosecution decisions by the CPS may be judicially reviewed.²⁵³ A distinction should be made between decisions *to* prosecute and decisions *not to* prosecute. The possibilities of judicial review are widest in the latter event. The courts had already suggested that judicial review of a decision not to prosecute was competent before the creation of the CPS (*i.e.* when most prosecution decisions were made by the police).²⁵⁴ This has received much judicial support, and the DPP has now issued guidance on the subject, stressing that prosecutors should record the reasons for their decision in the event judicial review is requested.²⁵⁵ Judicial review of decisions to initiate a prosecution is more difficult to achieve and granted only in exceptional circumstances, such as demonstrable fraud or corruption. Review is also possible if, in deciding to prosecute, the CPS has not followed settled policy. It should be noted that in any event judicial review is usually successful only if the decision under review is such that no reasonable authority could ever have come to it.²⁵⁶

5. Summary: the Crown Prosecution Service, past and present

Our brief overview of the history of the English prosecution system identifies four broad phases of development. In the first, lasting until the 19th Century, prosecutions were private. It was the responsibility of the victim (or other citizens) to gather evidence and prepare and conduct a prosecution. Though private prosecutors were granted assistance by magistrates and constables, they were in sole control of the prosecution process. The government had no official structure to provide for prosecutions and government officials would only prosecute – in the same way as any private citizen – on an *ad hoc* basis.

During the second phase, the police were the dominant prosecutors. This lasted from about the second half of the 19th Century until 1986. As law enforcement increasingly demanded that offenders be prosecuted and the disadvantages of relying on private prosecutors became clear, the police took over the victim's role as prosecutor. They did so without affecting the theoretically private basis of the English prosecution system. The police were autonomous and independent from

²⁵⁰ Ashworth & Redmayne (2010), p. 220/221.

²⁵¹ An overview can be found at the CPS-website (<www.cps.gov.uk>), under press releases.

²⁵² See the Prosecutors' Pledge at <www.cps.gov.uk/publications/prosecution/prosecutor_pledge.html> (last viewed 30 October 2010).

²⁵³ See the information on the CPS website at <www.cps.gov.uk/legal/a_to_c/appeals_judicial_review_of_prosecution_decisions> (last viewed 7 November 2010).

²⁵⁴ *R. v Commissioner of the Police of the Metropolis Ex p. Blackburn (No.1)* [1968] 2 Q.B. 118, at 136 (per Denning MR); the remark was made *obiter* and is therefore not binding.

²⁵⁵ *Appeals: Judicial Review of Prosecutorial Decisions*, version of 21 May 2009, available at <www.cps.gov.uk/legal/a_to_c/appeals_judicial_review_of_prosecution_decisions>.

²⁵⁶ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, HL.

government, and there was no executive control over their prosecuting activities. Police officers were regarded as uniformed citizen prosecutors. These days also saw the creation of the Director of Public Prosecutions. While this was a true public prosecutor's office, its role was largely limited to operating as a check on the prevailing system of police prosecutions, and it had no investigative role whatsoever.

The third phase starts with the creation of the CPS as a national prosecution service in 1986, responsible for taking over all prosecutions initiated by the police. The functions of investigating and prosecuting were strictly separated to enable Crown Prosecutors to take independent, objective and legally informed decisions about the continuation of prosecution. The original role of the CPS was to review prosecution decisions made by the police, testing these on evidentiary sufficiency and public interest. Its only power was to discontinue prosecutions if the test was not met. In reviewing cases, Crown Prosecutors were entirely dependent on the police. They had no means of forcing the police to reveal information about investigations, nor could they investigate independently. Once a decision to continue a prosecution was made, Crown Prosecutors would present cases in the magistrates' courts, where committal proceedings were the only check. Since they lacked rights of audience in the Crown Court, they instructed barristers in private practice to conduct the actual trials. That also implied that the control of the CPS over the conduct of Crown Court prosecutions was limited.

The English criminal justice system is currently in a fourth, transitional phase and there have been many recent changes, especially after the introduction of the Criminal Justice Act 2003. The CPS now has firmer prosecutorial powers that also allow it more scope to implement prosecution policy through diversion, where it can impose conditional cautions and instruct the police how to act in serious cases. It initiates prosecutions and determines the charge for all but minor offences. Prosecutors still do not have their own investigative powers or formal control over the police. But they can be closely involved during investigations, particularly in more serious cases and have some (informal) ways of directing the police, since they lead the Criminal Justice Units (CJUs) in which police and CPS co-operate. The DPP can also issue guidance to instruct the police on charging.

This changing relationship means that the information position of the CPS has improved. Disclosure rules further enhance the information that is available to Crown Prosecutors, where the police have a statutory duty to investigate impartially and divulge the results to the prosecutor. Disclosure has also given the CPS an important new duty that ensures that prosecution and defence are sufficiently equal for the purposes of an adversarial trial. And finally Crown Prosecutors can now obtain rights of audience in the Crown Court. This strengthens the career structure of the CPS and facilitates the creation of a corps of career prosecutors. The CPS also exerts greater control over the actual conduct of prosecutions in the Crown Court.

It has been said that the Crown Prosecution Service is on its way to becoming a broadly-based, unified prosecution agency. While there have been no grand reforms of the CPS as such, the changes over the years may well add up to something more fundamental. The question now is whether these developments are an indication that the English common law, adversarial system is moving in an inquisitorial direction and therefore converging with the civil law systems of continental Europe. And, if that can be shown to be the case, what are the consequences and what the limits of such convergence?

Towards the Inquisitorial?

Having described the practice of prosecution in England and Wales and its place in the adversarial criminal justice system in some detail, it is now time to examine the changes that have taken place over the years against the background of both the adversarial ideal-type and an existing inquisitorial system, that of the Netherlands. These form the touchstones, as it were, for determining whether, as far as prosecution and pre-trial process are concerned, the English system is still firmly rooted in the adversarial tradition or whether changes have been such that it now has fundamental characteristics associated with the inquisitorial tradition, characteristics that presuppose new and different procedural conditions of legitimate truth-finding. Should the latter be the case, we must also discover whether those conditions have changed accordingly. In other words, does the system still form a coherent whole in the sense that the necessary balance of responsibilities between participants – the police, the prosecution, the defence and the judge – obtains?

1. Two touchstones: the adversarial ideal-type and the Dutch inquisitorial system

In Part I we identified procedural and organisational characteristics and their logical implications for the interrelated responsibilities of the prosecutor and other participants. These ultimately derive from the fundamental tenets of the common and civil law ideologies of the adversarial and inquisitorial systems respectively. A very brief summary is indicated. Adversarial systems, with their formal concept of truth, are based on party autonomy, party independence and party equality: prosecution and defence are equally responsible for finding (pre-trial) and adducing (at trial) the evidence they see fit to support their case. The judge presides passively over trial proceedings – *i.e.* plays no part in the selection of evidence or adversarial debate that is the decisive truth-finding moment, other than to ensure that both occur according to procedural rules that govern partisan advocacy between equals. Out-of-court settlement is, again, a matter of party autonomy and a formal concept of truth, reached through bargaining between equals. Pre-trial, prosecutors are dependent on the police for the results of criminal investigations and have no investigative powers of their own, but, given that the organisations in which police and prosecution function exist in a state of co-ordinate authority, they also have no means of directing or supervising police investigations. Adversarial prosecutors are not responsible for finding evidence *à décharge* or for using the criminal law and their powers of (non-) prosecution to implement wider social state policy.

Inquisitorial procedure is premised on a quest for the substantive truth by the state. The inquisitorial prosecutor has a major role to play pre-trial in making sure that all evidence *à charge* and *à décharge* is collected in a trial dossier. The defence has no investigative powers and is dependent on the prosecutor, but can request that avenues of investigation favourable to the defendant be explored. Out-of-court settlement takes either the form of a conditional waiver of prosecution or a prosecutor's fine. At trial, the judge both oversees adherence to procedural rules and actively conducts his own investigation into the truth on the basis of the

dossier. The prosecutor, whose training and professional ethics are directed towards quasi-judicial impartiality, is *dominus litis* of the whole process, controls and directs police investigators, is subject to hierarchical and judicial monitoring and control, and must comply with instructions from superiors with a view to implementing state policies.

The position and responsibilities of the Dutch prosecutor form our second touchstone, chosen not only because of our familiarity with them, but also because, on the practical continuum of adversarial to inquisitorial, Dutch criminal justice is decidedly at the inquisitorial end, more so perhaps than is the case for many other European civil-law countries. We shall be returning repeatedly to different aspects of Dutch prosecution in the course of this analysis as we contrast the situation in England and Wales with it. Here, a short and abstract overview serves as an introduction.

Dutch public prosecutors are employed by the state as civil servants and are members of the Public Prosecution Service (*Openbaar Ministerie – OM*), a hierarchical career organisation headed by the Minister of Justice who is answerable to Parliament for its actions and policies. Policy decisions on the use of (non-) prosecution for different (categories of) crimes emanate from the council of five procurators general that forms the head of the service and are communicated via binding guidelines (which may also bind the police in their relationship with prosecutors in the field). Prosecutors receive the same (lengthy) basic training as judges (and can and sometimes do switch career). Indeed, they are regarded as part of the judiciary, known as the ‘standing judiciary’ because the prosecutor stands during his performance in court. The notion that the prosecutor is ‘really’ some sort of judicial figure, is reflected in the fact that prosecutors are expected to adopt a quasi-judicial stance in the execution of one of their most important roles: controlling and monitoring pre-trial investigation by the police and the compilation of a trial dossier containing records of all relevant steps in the investigation and all relevant evidence – against *and* for the defendant. The decision whether or not to prosecute is taken on the basis of the results of the investigation pre-trial and is the sole responsibility of the prosecutor (the so-called monopoly principle).

Guarantees that prosecutors will actually fulfil this non-partisan role are to be found in the hierarchical system of monitoring and control that governs both their relationship with the police and relations within the prosecution service, in judicial control by the trial judge and especially in the professional ethics they internalise during training. As an extra safeguard, however, pre-trial access to the dossier allows the defence to play a part in determining the information and evidence that is eventually presented to the court. That has the power to actively scrutinise the way the pre-trial investigation was conducted and the evidence it produced, and must actively conduct an investigation of the prosecutor’s charges at trial. It is expected to use that power both *ex officio* and at the prompting of the defence lawyer.

Professional judges sit alone in minor cases and in panels of three in more serious cases. There is no jury in any criminal case (or any other court case for that matter). Subject to certain limitations, there is a right to appeal on conviction to one of the five appeals courts that will result in a full retrial. Each court has judges of instruction who are appointed on a rote basis. Originally, the modern judge of instruction was a figure who was called to investigate serious cases at a stage in the investigation where suspicions were accumulating and further prosecution looked

likely; he was regarded as a more impartial and thus better safeguard for the defendant's interests than the prosecutor – a real judicial rather than a quasi-judicial figure.²⁵⁷ This role has been reduced over the years, and his main task now is to authorise intrusive methods of surveillance and investigation, and to take depositions, under oath, from witnesses who the defence may want to challenge but who for any one of a number of reasons cannot be called to testify in open court.²⁵⁸

Every defendant in a criminal case has the right to a lawyer. The role of the defence is to assist the defendant and represent his interests: monitoring the compilation of the dossier, not only as to the nature of the evidence but also as to the legality of the police methods used to obtain it, pointing the prosecutor towards certain avenues of investigation (witnesses to be heard, alibis to be checked, etc.), and in court attempting to undermine the strength of the prosecution case and directing the judge towards evidence favourable to the defence. Pre-trial, the lawyer's responsibilities are limited. In keeping with inquisitorial principles, the suspect is seen as a source of information and object of investigation rather than an autonomous subject at law. Combined with confidence in the integrity and impartiality of prosecuting authorities, this has always meant that there is no right to the assistance of a lawyer during police investigations.²⁵⁹ Neither are defence lawyers in the Netherlands expected to undertake their own investigation and they will certainly not approach and interview potential witnesses. They also have no authority to call witnesses or experts themselves.

The prosecutor may, if he wishes, call witnesses, but there is no notion of cross-examination as a means of establishing the reliability and salience of evidence and neither defence lawyers nor prosecutor is likely to be trained in adversarial debate. Technically, there are no witnesses or experts for the prosecution or defence – merely witnesses and experts whose testimony will help the court find the substantive truth. Indeed, not all witnesses are heard in court, as statements made to police, prosecutor or judge of instruction will be in the dossier and may be used as evidence. It is essentially the prosecution that decides the content of the dossier, and the court that has the final word on when it considers it has sufficient information to come to a verdict. The right of the defence to call and question witnesses (or more accurately have them questioned) or to invoke expert opinion is therefore dependent first on either having the witness physically present in court or the prosecutor's granting a request that the witness be called, and, in the final instance, on the court's allowing the witness to testify or overruling or upholding the prosecution's refusal to accede to a defence request. Finally, a recent

²⁵⁷ Commissie Moons (1990), p. 9.

²⁵⁸ In recent years there has been dissatisfaction with the rather hybrid figure that the judge of instruction has become as a result of often *ad hoc* legislation, and debate on how he should be positioned in criminal process in relationship to prosecution and defence. At present, the Government is working on draft legislation that could bring significant change in the future and redistribute responsibilities in pre-trial investigation amongst the participants. See for an overview: Van der Meij (2010a) and Van der Meij (2010b).

²⁵⁹ Recently the European Court of Human Rights has given decisions that appear to require the presence of a lawyer during police interrogations as a fundamental part of the right to a fair trial under article 6: ECtHR Gr.Ch. 27 November 2008 *Salduz v Turkey*, application number 36391/02; ECtHR 24 September 2009, *Pishchalnikov v Russia*, application number 7025/04. The Dutch Government is still resisting full implementation of these decisions, arguing on the basis of an interpretative decision by the Dutch Supreme Court that they simply require that the suspect be allowed to consult with a lawyer before interrogation. See HR 30 June 2009, *NJ* 2009, 349.

development has afforded victims some status as participants in court although this is limited and effectuated through the prosecution service.

At its core, Dutch criminal process is dependent on the integrity and ability of the professional participants to adhere to the professional ethics that govern the roles the law has assigned to them, and on the effectiveness of hierarchical and judicial monitoring and control: the non-partisan gathering of evidence by the prosecutor, his control of the police and their integrity in conducting a non-partisan investigation, the ability of the defence lawyer to make sure that the dossier contains all relevant evidence, which is in turn dependent on the non-partisan professional attitude of the prosecutor; the impartiality and professional truth-finding activities of the court at trial – in short the integrity of the system and its ability to police itself.²⁶⁰ These characteristics reflect the fundamental assumption that state officials will indeed conduct an independent and non-partisan investigation into the truth and that the court will be able, on the basis of this, to arrive at a reliable and therefore legitimate verdict.²⁶¹

2. The early history of prosecution

We have stressed the importance of legal culture and tradition in determining the concrete shape of current procedural and institutional arrangements in the criminal justice system, even if subsequent developments have apparently brought considerable change. Before we measure English prosecution against its ideal-type and prosecution in the Netherlands, it therefore makes sense to contrast the early histories of both English and Dutch prosecution and distil the legal-cultural elements that have shaped how they developed over time. This will help us later to judge how and to what extent ‘the new [has been] incorporated into patterns of the old’ and how this has contributed to the way in which solutions to perceived problems in criminal justice are defined and constituted.²⁶²

Uninformed by any ‘grand design’, criminal justice in England and Wales developed piecemeal under the common law.²⁶³ There are three interrelated implications of the common law tradition for the early history of investigation and prosecution in English criminal procedure, of which the dominant feature was the primacy of private prosecution. First, that executive power should rest with autonomous local authorities, not central government. Second, that the power to uphold the law should be exercised through community involvement – not by bureaucratic officials, but by lay people: magistrates, juries, part-time rotating constables, and the community at large.²⁶⁴ And third, that it should be for individual, autonomous citizens to decide to bring a prosecution.

²⁶⁰ Jörg *et al.* (1995).

²⁶¹ It would go beyond the scope of this analysis to examine the roots of the supreme confidence that the Dutch appear to place in their criminal justice system and its officials. Suffice it to say that, for a number of historical and legal, political and cultural reasons, that confidence has always existed, again perhaps more so than in other inquisitorial systems. See further: Brants & Field (2000); Brants (2010).

²⁶² *Idem.*

²⁶³ On the ‘grand design’ of the French *Code d’Instruction Criminelle* of 1808, and its influence in other European countries: Esmein (1913), p. 462 ff. and 570 ff.. On England and the common law: Langbein (2003)

²⁶⁴ On lay participation: Damaška (1986), p. 24 and 135–140.

When, in the latter half of the 19th Century, the police became *de facto* public prosecutors, this did not breach any of these three principles. Police powers were decentralised and fragmented and local forces largely autonomous from central or local government. Police accountability took effect in 'policing by consent', the legitimacy of which derives not from the state and its laws, but from a tacit contract between the police and the people. This is very much a common law notion (if the state may not be vested with powers, they must come from the people directly): the police are regarded as an organised form of self-policing with uniformed citizens maintaining law and order in the interest of the community itself. Police prosecutions were thus not construed as public prosecutions. Rather, the prosecuting police constable was merely seen to act in his capacity as an autonomous citizen with an interest in upholding the law.

The system of private prosecutions was therefore much more than a historical contingency. It was shaped by the implications of its own constitutional principle.²⁶⁵ A citizen should always be able to bring a private prosecution as a check against corruption or government inactivity. More importantly, the executive should not be granted any control over the prosecution process, either by restricting the right to bring prosecutions, or by allowing it to establish an office of public career prosecutors who could prosecute *ex proprio motu*. This feature of 19th Century English legal culture, coinciding with Damaška's ideal-type of the reactive, *laissez-faire* state, not only explains the resistance against a public prosecutor, but also forms the background of the adversarial structure of trial proceedings. If there cannot be a role for government or any state representative in the criminal process, the criminal trial can only be conceptualized as a contest or dispute between private actors.²⁶⁶

The prosecutor is then nothing more than a partisan participant whose proper task is to present the court with the incriminating evidence, while the role of the court (trial judge or jury) is logically limited to determining which side has the strongest case, without actively looking for the substantive truth.²⁶⁷ Indeed, debate on the English prosecution system in the 19th Century was mainly between proponents of a public prosecution service who suggested it as a remedy to the known defects of private prosecutions (uncertain enforcement, malicious prosecutions), and opponents who relied on constitutional arguments of legitimacy to argue against it. Concepts of inquiry and truth-finding played no role here. Investigation was a matter for parties – the police, who initiated prosecutions, and the defendant and his counsel; the lawyer who appeared in court on behalf of the prosecution had no role in the investigative process. For a long time, the separation between investigation and prosecution was to embody an important aspect of fair process.

Contrast the English situation with the development of public prosecution in the Netherlands.²⁶⁸ Already by the early 16th Century, the territory was part of the centralised Hapsburg Empire. Increasingly, public authorities administered criminal justice, of which the leading principles were becoming apparent: investigation by a public official, obtaining evidence to discover the substantive truth, and presenting it at trial. During the independent Republic of Seven United Provinces (17th and 18th Century), the contours of a national cultural tradition of

²⁶⁵ Hay & Snyder (1989); Hay (1983).

²⁶⁶ E.g. Hay & Snyder (1989), p. 35; Langbein (2003).

²⁶⁷ Sieghart (1988), p. 100.

²⁶⁸ See more fully: Brants (2010).

criminal justice were already in evidence: the maintenance of law and social order by an elite regent-government, confidence in and legitimacy of that administration, and rudimentary social-criminal policy. The *Schout* – both inquisitorial prosecutor and judge – was the most powerful representative in this system, responsible for both investigation and prosecution before the courts and assisted by a burgeoning judicial police force (*substituut schouten* or *rakkers*), although an organised militia of burghers maintained public order (at night). The *Schout* also had the power of ‘composition’ and could exact payment from suspects in return for a decision not to prosecute.

Despite the so-called Batavian Revolution at the end of the 18th Century that heralded the end of the old Republic, there was no revolutionary change in criminal process. Indeed, within legal practice there was strong resistance to any change that was seen as detrimental to substantive truth-finding by the executive and an established judiciary. Neither was there any perceived need for self-representation of the people as a corrective to such powerful state forces. After the imposition of Napoleonic criminal procedure during the French occupation at the beginning of the 19th Century, many French innovations were discarded as soon as the occupation ended and William of Orange was established as king;²⁶⁹ although a professional, rationalised, hierarchical and bureaucratic prosecution service and police force were easily absorbed into Dutch procedural arrangements.

While the judge of instruction was originally the most important figure in pre-trial investigation, eventually it was the *Ministère Publique*, still known by the literal translation from the French: *Openbaar Ministerie* (Public Ministry), that was to become a pivotal organisation, not only as the primary institution of law and order but also as the guardian of social order through the discretionary use of prosecution policy according to the principle of expediency. This was already apparent in 1838 when a new (Dutch) code of criminal procedure was enacted. Although it was almost a translation of the old Napoleonic code, extended the powers of the prosecution at the expense of the judge of instruction. The latter, however, remained involved in pre-trial investigations, while the court had the power to refuse permission to prosecute should it consider the evidence insufficient. This left the activities of the prosecution, especially in more serious cases, still under judicial scrutiny, where they remained until 1886.

However, part of the civil law tradition that formed the basis of the French codification of criminal process, was slow to permeate through Dutch criminal justice, while throughout the 19th Century (secret) inquisitorial criminal procedure remained much the same as it had been under the old Dutch republic (trials did become public, though not until a Constitution had finally been agreed in 1848). The notion of *trias politica*, which required adherence to the letter of the law and judicial scrutiny of all executive action, was also contested. This had direct consequences for (the debate on) the position of the prosecutor. From the beginning of the 19th Century, that debate centred on a question of principle: was the public ministry part of the judiciary or of the executive: should it be free from all political influence and bound only by the law (*gens de la loi*), or by the decisions of higher executive authority, at that time the King (*gens du roi*)?

The Government maintained it had the right to give orders to prosecutors, and left no doubt as to what ‘*gens du roi*’ entailed: ‘a nation or civil community cannot

²⁶⁹ Juries, public trials and legal representation, for example, all disappeared. See Van Lent (2008).

be regarded as active in itself in the promotion of its interests, for it has entrusted them through the Constitution to higher authority.²⁷⁰ (This aspect of the civil law tradition fitted Dutch legal culture very well: there always had been reliance on, and confidence in, government elites to look after the interests of society, in which the office of *Schout* – Public Ministry *avant la lettre* – was a powerful force.) A compromise was finally reached in 1873: the prosecutor, now under political responsibility of the Minister of Justice, was nevertheless ‘somehow’ to be regarded as part of the judiciary; he was bound by the law and at trial answerable to the court, but also to Parliament through the Minister of Justice to whom he was subordinate and whose orders he was bound to obey. The latter paved the way for the prosecution service as an important executive force of not only criminal justice but also wider social policy. In essence this was to underpin the position of the prosecution service and the use of the principle of expediency of prosecution to this day.

Finally, it should be noted that a truly Dutch Code of Criminal Procedure to replace French legislation was not enacted until 1926. Presented at the time as moderately adversarial (a characterisation sometimes still heard today), it brought legal assistance pre-trial and access to evidence being gathered by the prosecution and the judge of instruction. This would allow the defence, in theory, to be sufficiently prepared to contest all the evidence orally, thus bringing pre-trial investigation under the scrutiny of the judge and, in open court, of the public and the press. Writers at the time were rightly sceptical about how adversarial this new procedure actually was, preferring to speak of ‘moderately’ or ‘modified’ inquisitorial proceedings.²⁷¹ Undeniably the procedure had all the hallmarks of the inquisitorial: an investigation into the truth by the State, not entirely secret but certainly also not open pre-trial investigations determining the scope of investigation by an active judge at trial, a strong prosecution service and a decidedly secondary role for the defence.

One of the most contested provisions forbade undue pressure against the suspect and prescribed a caution by the interrogator. Many thought this quite mad, because it contradicted the principle that the state must search for the truth by all appropriate means (and what better way than hearing it from the suspect himself?). When, during the parliamentary debate, someone muttered something about ‘fair play’, a fellow member shot back: ‘this is not a game of dice so that we have to worry whether the one party has more chance than the other – no, we must guarantee that the truth is found’.²⁷² The Code considerably reinforced the position of the prosecutor in pre-trial procedure, although it did introduce a procedure before the Court of Appeal in which third parties could complain about prosecutorial decisions not to prosecute. It also introduced important rights for the defence, which were seen by the legislature as an extra guarantee for legitimate truth-finding, as was the judge of instruction who was to enter the picture if serious suspicions warranted greater investigative powers. And it legalised the principle of expediency.²⁷³ The 1926 Code, though with many amendments, is still in force today.

²⁷⁰ Original in Dutch quoted in Pieterman (1990), p. 43.

²⁷¹ Van Heijnsbergen (1929); Van Guns (1935), p. 335; Drenth (1939), p.243

²⁷² See Drenth (1939) p.224–228 for many more examples.

²⁷³ The power, sharply reminiscent of composition, of what is known in Dutch as *transactie* – literally: transaction – whereby the suspect could ‘buy off’ the prosecution by paying a

3. Themes of transition

It is obvious that, from a (very) early date, prosecution in England and the Netherlands respectively was shaped by sharply contrasting ideologies with regard to the relationship between citizen and state that dictated the role and responsibilities of the prosecutor in criminal process. The Dutch situation is one of steady development of an inquisitorial system of prosecution geared towards the establishment of substantive truth-finding that was consolidated in the 1926 Code. Over the years, it has seen many substantial changes that have softened the sharper inquisitorial edges and brought it into line with the ECHR, most importantly improved defence (and contestation) rights.²⁷⁴ However, it cannot be said that these are comparable to the rights of a defendant in an adversarial trial: Dutch defendants may contest the evidence against them though not necessarily at trial (what the French call '*le contradictoire*'), but this has not essentially changed the role and responsibilities of participants. Notably, the position of the public prosecutor has remained intact. If anything he is now a stronger figure vis à vis both the police and the judge of instruction, forming the axis around which criminal process is centred.

While the Dutch system as a whole has not lost its fundamental inquisitorial characteristics, in particular with regard to prosecution, on the face of it the situation in England and Wales is very different. The establishment of the Crown Prosecution Service in 1986 would appear to be, if not a clean break, then certainly the harbinger of essential change within the common law tradition and the related constitutional principle of private prosecution, with all that this entails for both the organisation of prosecution, the autonomy, equality and independence of parties and thus for their (adversarial) responsibilities in criminal process, and the reliance on procedural rules in formal truth-finding. If that is the case, and if that change is towards organisation and responsibilities of the CPS that are more in keeping with the inquisitorial tradition, then, drawing on our ideal-types, the following themes of transition emerge: the relationship between prosecutor and police; prosecutorial duties towards the defence pre-trial; the role of the prosecutor at trial; training and ethics; out-of-court settlement; and the responsibilities of the prosecution service with regard to policy implementation. All of these touch directly on the hallmarks of common-law adversarial process.

a. Relationship between police and prosecution

The principle of private prosecution is one of those ideologically informed common law myths that was abandoned *de facto* in the course of the 19th Century when policing moved from being an *ad hoc* matter for lay amateurs to the task of an organised, professional police force. Nevertheless, the forces of tradition allowed

sum of money had already been introduced in 1922; it was for the prosecutor to decide, after impartially weighing the interests involved.

²⁷⁴ It should be noted that the 1926 Code appears to establish the principle that evidence should be produced (and contested) at trial (principle of immediacy), although this is still a matter for debate among legal scholars. In any event, that debate was rendered academic immediately after the Code came into force by a decision by the Dutch Supreme Court that made widespread use of hearsay evidence possible: HR 20 December 1926, *NJ* 1927,85 (*De auditu*). This decision essentially undid the principle of immediacy and pushed the balance further towards the inquisitorial.

this to be construed as policing by consent, and prosecution by the police as no more than ‘uniformed’ private prosecution. When the Philips Commission argued for radical reform of the criminal justice system, resulting in the CPS – the first public prosecution service in England and Wales – the same forces were still clearly at work.

The powers of the new organisation were limited so as to prevent abuse by the executive. Importantly, it could not initiate prosecutions, which remained the remit of a still fully autonomous police service, free from (policy) control by the executive or the new prosecution service. The right to bring private prosecutions was also retained. Philips recommended the CPS be a locally-based service, independent yet accountable to local authorities, thus decentralizing and fragmentizing power.²⁷⁵ The service was eventually more centrally organised than proposed, ostensibly for efficiency reasons. However, given that implementing law and order policies would certainly have benefited from a centralised prosecution structure where policy could be more easily controlled, the reason was probably also the Conservative Party profile throughout the 1980s as the party of ‘Law and Order’.²⁷⁶

Nevertheless, the principle of private prosecutions was respected despite the advent of a real public prosecution service, both in the sense that the government still had no control over the prosecution process, and that citizens could initiate prosecutions if the police refused to do so.²⁷⁷ The responsibility of the CPS was no more than to take over prosecutions after the police had investigated and charged, in order to prevent evidentially weak cases from reaching court: it could continue or could stop prosecutions, not start them. The ‘Philips principle’ required strict separation between investigation and prosecution so that the prosecutor could evaluate the case *for the prosecution* impartially and independently. The defence case remained beyond his horizon. As the public prosecutor was not in control of the police, he also could not be responsible for conducting an overall inquiry into incriminating and exculpating evidence. It was standard opinion at the time that neither police nor prosecution were there to do the defence’s job.

Despite the fact that police malpractice and the resulting miscarriages of justice formed the backdrop to the 1993 Royal Commission on Criminal Justice, the RCCJ too made no recommendations that would have fundamentally altered the relationship between the police and the prosecution, who still played no formal role in the investigative process. It considered mechanisms of pre-trial supervision such as prosecutorial or judicial monitoring and control of police investigations but rejected them as ineffective.²⁷⁸ Runciman merely recommended closer co-operation between the CPS and the police, and also ignored the suggestion that prosecutors should take the initial decision whether to prosecute for the same reasons as the

²⁷⁵ Windlesham (2001), p. 109.

²⁷⁶ Ashworth & Redmayne (2010), p. 11. The years before were marked by bipartisan consensus; see e.g. Downes & Morgan (2007).

²⁷⁷ The right of the DPP to take over private prosecutions was retained by the *Prosecution of Offences Act 1985*, s. 6. It is also of note that the Philips Commission recommended some changes to the right to private prosecutions. A citizen would first have to apply to a Crown Prosecutor to ask him to initiate proceedings. In case of refusal, the citizen could apply to the magistrates’ court for leave to commence proceedings. The idea was to make the right to private prosecutions more effective: if a citizen had obtained leave from the magistrates’ court, he would receive reasonable compensation for his expenses. However, the Government declined this suggestion, arguing that the right to private prosecutions should be unfettered. See Windlesham (2001), p. 109.

²⁷⁸ Critically: Field (1994).

Philips Commission: it would be impracticable to involve prosecutors at such an early stage. The RCCJ's recommendations did, however, lead to a (rather complex) statutory disclosure scheme that forced the police into closer co-operation with the prosecution.

In line with recommendations by the Auld Review and following the Criminal Justice Act 2003, the Philips principle of strict separation between investigative and prosecutorial functions, which informed the relationship between police and CPS in its early years, was modified. Much of the resulting change was motivated by efficiency considerations, although the effect has also been to strengthen the position of the CPS *vis-à-vis* the police. Crown Prosecutors now control the prosecution process in the sense that they decide who to prosecute and on what charge, which is a significant limitation of constabulary autonomy.²⁷⁹ Yet, the legacy of separation between investigation and prosecution lingers on. Although Crown Prosecutors have gained more control over the police, can become quite involved in investigations and have the authority to interview witnesses pre-trial, they still cannot formally tell the police when, how or what to investigate. At the same time, co-operation in CJU's (Criminal Justice Units), co-location (duty prosecutors at the police station) and CPS Direct can achieve much by way of informal suggestion and coercion.

It should be noted that it is essentially the limited time allotted the police to investigate before a suspect must be charged, that involves the prosecutor at an early stage, not any power to control investigations, while pre-trial interviewing was mainly intended to allow prosecutors to assess the credibility of witnesses whom they intended to call at trial, not to legalise any interference in the police investigation.²⁸⁰ However, the CPS Code of Practice states that the purpose of such interviews may also be to understand complex evidence, explore new evidence, or probe the witness's account,²⁸¹ and research has shown that pre-trial witness interviews are also triggered by various evidentiary factors, such as suspected missing information (*e.g.* compensating inadequacies in the police investigations), inherent implausibility between statements and other evidence, and conflicting or otherwise problematic evidence.²⁸² Prosecutors indicate that the power to interview witnesses makes them less reliant on the police.²⁸³

The aims of the statutory charging scheme were to eliminate weak cases as early as possible, to ensure a better and more robust preparation of prosecution cases, and to encourage and allow early guilty pleas.²⁸⁴ While this has the effect of involving the prosecutor at an earlier stage and increasing his informal control over the police,²⁸⁵ there is still nothing the prosecution can do if the police decide to use their authority to take No Further Action or fail to provide the evidence that

²⁷⁹ White (2006), p. 160-161.

²⁸⁰ CPS, *Pre-Trial Witness Interviews by Prosecutors – A Consultation Paper*, 2003.

²⁸¹ *Pre-trial witness interviews: Code of practice* of February 2008 (available from <www.cps.gov.uk/victims_witnesses/resources/interviews.html>). Further guidance is provided in the *Pre-Trial Witness Interviews – Guidance for Prosecutors*, available from <www.cps.gov.uk/legal/p_to_r/pre-trial_witness_interviews/pre_trial_witness_interviews_\guidance_for_prosecutors> (last viewed 7 November 2010).

²⁸² Roberts & Saunders (2010), p. 114-120,

²⁸³ *Idem*, p. 130.

²⁸⁴ Brownlee (2004), p. 897.

²⁸⁵ Hancock & Jackson (2006), p. 109.

would support a certain charge, other than refuse to instigate a prosecution. The police still also control the charging process in the sense that they and not the prosecutor apply the first threshold test that guides the initial decision whether or not to charge, so that they are in effect the gatekeepers to the statutory charging scheme.²⁸⁶

While British authors are inclined to say that the CPS is in control of the prosecution process,²⁸⁷ to the inquisitorial eye that seems a strange statement when it is compared to a continental prosecution service. On the basis of the Code of Criminal Procedure, the Dutch public prosecutor is not only an investigative official with more coercive powers of investigation and detention than police officers; he also controls and directs criminal investigations. The police must report to him in full and as soon as possible on the steps they take and the results they obtain, need his authority for many of the more intrusive methods of investigation, follow his instructions if more or other investigations are needed, and are not and never have been in any way formally involved in the decision to charge and prosecute.²⁸⁸ In matters of criminal justice, the police are hierarchically subordinate to the prosecution service, which carries full responsibility for the investigation.

That is not to say that it always works like this in practice and in reality prosecutors are certainly not always involved in the day-to-day conducting of police investigations. Moreover, as an organisation of some power, the police have always attempted both to extend it and to achieve some form of autonomy of action. Control over the police, especially in serious cases, has been a constant source of concern for government and the prosecution service for decades in the Netherlands. Indeed, there was a period in the 1990s when the police seemed to be decidedly out of control in investigations concerning organised crime. Following a parliamentary inquiry,²⁸⁹ that has now been rectified through stringent statutory provisions that have put the prosecutor even more firmly back in the saddle – at least in theory. It is also true that the Dutch police have the right to take no further action (and use it extensively).²⁹⁰ In that sense, like their English counterparts, they too are the gatekeepers to prosecution.

b. Duties regarding the defence pre-trial

Although truth-finding through adversarial debate of necessity presupposes equality of arms both pre-trial and at trial, and is indeed a feature of English criminal procedure, it has always been recognised in the days of modern organised policing that, however equal their procedural rights in theory, parties are simply not equal when it comes to investigative powers and resources. The duty to

²⁸⁶ Brownlee (2004), p. 900. Note also that, in 2009, a pilot was initiated to allow the police to make the charging decision in all summary offences. If this regime were to be implemented nationally, the focus of the CPS would be shifted to more serious offences that are triable either way or on indictment only (Ashworth & Redmayne (2010), p. 198–199).

²⁸⁷ Jackson (2006), p. 40.

²⁸⁸ The word ‘charge’ is not exactly appropriate, as it does not mean the same in the Dutch system as it does in the English. What is meant here is that the prosecutor decides not only for what offences a suspect will stand trial but also, prior to that, what should be investigated.

²⁸⁹ See Commissie Van Traa (1996).

²⁹⁰ This is not regulated by law, but is a mandate deriving from the prosecutor’s legal right to decide not to prosecute for reasons of public interest.

disclose the results of the police investigation to the defence that is a means of closing this equality gap, developed gradually during the 20th Century. Originally, disclosure simply served to better equip the defence in preparing for trial by allowing them to see the case against the defendant. Revealing exculpatory facts, should the police happen upon them, was a matter of fair play. Later, the police were required to disclose all material gathered. The defence would then have to wade through all of the police evidence. Although by that time the police were regarded as having a duty to investigate evidence *à décharge* should they be aware of its possible existence, it was in the partisan adversarial way of things that they gathered – and thus disclosed – evidence that supported the prosecution case, thus against, not for the defendant.

Recognition of a fundamental inequality between prosecution and defence in the pre-trial stage and consequently of the defence's inability to actually act on an equal footing with the prosecution at trial, is one of the more far-reaching of the Runciman Commission's conclusions. The solutions proposed also have important consequences. The now statutory duty of the police to investigate 'all reasonable lines of inquiry' (implying both incriminating and exculpatory evidence) in effect means they are supposed to take over much of the investigative work of the defence, although the latter are by no means precluded from conducting their own investigations. Secondly, under the statutory disclosure scheme (first in the CPIA 1996 and latterly in the CJA 2003), Crown Prosecutors must determine which material gathered by the police is relevant and requires early disclosure, not only because it supports the prosecution case but also because it could undermine it, or otherwise assists the defence. And, finally, there is possibility of holding Public Interest Hearings in order for a judge to authorise the prosecution's withholding sensitive material, an increasingly important figure in these days of organised crime and terrorism.

On paper the powers of the Dutch prosecutor appear to be much greater, given his status as director of, and his responsibility for, police investigations, and the fact that he determines the trial dossier and controls – pre-trial – the inquisitorial equivalent of disclosure: defence access to its contents. But significantly, the Dutch police have no statutory duty to investigate impartially: that they are expected to do so simply follows from their subordination to the prosecutor in matters of criminal process and his duty to take all interests into account when deciding whether or not to prosecute and on what charge. Although the police need the prosecutor's permission to use certain coercive investigation methods (and in some cases the prosecutor needs that of the judge of instruction)²⁹¹ so that he should at least be aware of what is happening, this does not guarantee that the police investigation will be either complete or impartial.

And finally there is the matter of the prosecution withholding information. If normal procedures apply and the defence is of the opinion that (in England) disclosable material has been withheld or (in the Netherlands) that relevant information is missing from the dossier, this is an issue that can be raised with the court in both countries. And in both the defence faces the same dilemma: they will need to show the relevance of the material without knowing what it is, and may therefore find it impossible to convince the court of the necessity of disclosure or inclusion in the dossier. If it is a matter of sensitive information that is to be

²⁹¹ In some instances it will suffice to inform the prosecutor afterwards if circumstances require immediate police action.

withheld for reasons of public interest, however, very different rules apply in England and in the Netherlands although in both countries the judge, and not the prosecutor, has the final word.

The English prosecutor always needs prior authorisation by a judge. If that is refused because non-disclosure would render a trial unfair, the prosecution have but two options: disclose or abandon the case. In the related issue of witness anonymity, only the identity of the witness will be unknown, but he must appear in court so that the defence can still exercise contestation rights.²⁹² Fearful witnesses may be spared the ordeal of testifying and their testimony admitted as hearsay (one of the exceptions to the ban on hearsay evidence introduced by the CJA 2003), but only if their identity is known and only with leave of the court.²⁹³ Moreover, here too, but now under PACE 1984, s. 78, the judge can rule this evidence inadmissible if it were to render the trial unfair.²⁹⁴

The Dutch prosecutor has different options if he wishes to withhold information. The use of special investigative methods (such as undercover agents, observation, etc.) must be accounted for in a separate dossier, but only the fact that these methods have been used, not the specifics that might endanger people or ongoing or future operations. It is up to the defence to persuade the court that missing information is essential for truth-finding and that the prosecutor should be ordered to furnish it. Other solutions to the problem of sensitive information – *e.g.* the identity of witnesses or information from the security services – rely on separate (*ex parte*) closed proceedings before the judge of instruction: witnesses are removed from the courtroom to the judge of instruction's chambers where he acts as a surrogate for the court. He examines the witness under oath *in camera* and *ex parte* and reports to the court on all aspects, including the credibility of the reasons for anonymity and the reliability and credibility of the testimony. The defence may furnish a list of questions to be put, although the judge will ignore any that would endanger anonymity. The testimony contained in the judge of instruction's report has the same standing as if it had been given in court and may be used in evidence (although a conviction may not rely on anonymous testimony alone). Such procedures build on a feature of Dutch trials ever since the Supreme Court's '*De-auditu* decision' of 1926: hearsay testimony (depositions by suspects or witnesses contained in a police officers report) are regularly used in evidence.

c. The prosecution at trial

The idiosyncrasies of the English criminal justice system, with its residual notion of private prosecution and therefore charging in the hands of the police and the monopoly on representation before the higher courts in those of the autonomous barrister, left the CPS from its inception 'sandwiched' between the police and the bar.²⁹⁵ Where Crown Prosecutors could only prosecute in person in the magistrates' court, the CPS was dependent on private counsel to conduct prosecutions for serious offences, the evidence for which was determined by the

²⁹² Although some maintain that this is no longer fully possible. See Ormerod, Choo & Easter (2010).

²⁹³ *Criminal Justice Act 2003*, s. 116.

²⁹⁴ S.126(2) *Criminal Justice Act 2003* specifically provides that nothing in the new hearsay provisions prejudices the power of the court to exclude evidence under s. 78; see Birch (2005), p. 7.

²⁹⁵ Hancock & Jackson (2006), p. 87; MacDonald (2004), p. 68.

police. Crown Prosecutors were ‘decision reversers’ rather than decision makers,²⁹⁶ and were described as ‘handmaidens’ to the police.²⁹⁷ Once a barrister had been briefed, all responsibility for the conduct of the case was transferred from the CPS to the barrister.²⁹⁸

This state of affairs officially came to an end when Crown Prosecutors with full Bar qualifications obtained rights of audience in the higher courts, the responsibility for charging was transferred from the police to the CPS, and the guidelines governing the relationship between Crown Prosecutors and counsel in private practice were amended. These developments have led some English lawyers to regard the Crown Prosecutor as, finally, *dominus litis*. However, although the CPS now has a greater degree of control over the trial process, problems remain and some new ones have been created. Despite the measures to increase the influence and involvement of the CPS in pre-trial investigations at an early stage, these do not provide formal rules that would allow the prosecutor to actually take control. The police continue to have an agenda-setting role in charging through their collection and first review of available evidence.

CPS advocacy serves the dual purpose of allowing Crown Prosecutors to exert greater influence over the conduct of cases at trial and creating a more attractive career structure. But, as yet, the majority of Crown Court cases are still conducted by barristers in private practice. Apparently it is still difficult to attract fully qualified barristers into the prosecution service. While this may be a matter of time, it is undoubtedly also partly because CPS salaries cannot compete with what counsel in private practice can earn. Among the judiciary there are still worries about the quality of CPS staff. They too point to the fact that CPS pay is insufficiently competitive to attract the most talented lawyers.²⁹⁹ If they receive their practical training in-house, their experience is with prosecuting cases for the CPS alone, whereas private barristers or solicitor-advocates have experience with both prosecution and defence work. Other participants to the trial, and especially judges, also complain that CPS advocacy and the greater influence of the CPS over the trial process change the independent role of prosecuting counsel at trial to one of implementing policies and decisions that are made elsewhere. This often requires prosecutors – be they employed by the Crown or in private practice – to consult with CPS decision-makers and distracts from adversarial debate in court.

It has, however, become easier to prepare for trial, both as a result of defence disclosure – which precludes so-called ambush defences – and pre-trial hearings where issues to be raised at trial and witnesses to be called are declared. Where the intention is to make it easier for the courts and participants to plan and prepare, such hearings also detract from true adversarial debate in court to a certain extent. Nevertheless, all evidence must still be produced and, if the defence so wishes, contested at trial. If CPS advocacy has affected the independence and autonomy of the prosecutor, it has not changed either as far as the defence is concerned.

And finally, until recently the English prosecutor played no role in sentencing, neither proposing a particular sentence nor indicating to the judge what sentence the prosecution thinks appropriate (which was considered not done). That is still the case, but things are changing. Prosecutors now have a duty to assist the court

²⁹⁶ Sanders (2004), p. 103.

²⁹⁷ Zedner (2004), p. 149.

²⁹⁸ Hancock & Jackson (2006), p. 98.

²⁹⁹ There is a saying that judges like to quote: ‘if you give peanuts, you get monkeys’.

in reaching a sentencing decision,³⁰⁰ informing it of relevant facts and reminding it of applicable law and guidance. It is also for the prosecutor to represent the views of the victim (contained in a victim impact statement) and an assessment of the community impact, if applicable.³⁰¹

The Dutch prosecutor has never had to contend with losing control over the trial process or with sharing prosecutorial responsibilities with other participants. He and he alone can bring a prosecution and conduct it at trial.³⁰² He, in principle, determines the evidence that the court will see and the witnesses who will testify. While the defence may try to have certain avenues of inquiry explored and the results recorded in the dossier, or to introduce other evidence or witnesses at trial, they have no absolute autonomous right to do so independently and are in the final event dependent on the judge's decision to grant their request. With these prosecutorial powers, his monopoly of prosecution and agenda-setting role through the trial dossier, the law makes the Dutch prosecutor truly *dominus litis*. Moreover, while it is the court that decides the sanction, the prosecutor has a duty to request that it pass a certain sentence. Although the court need not follow him and, indeed, is usually more lenient, this nevertheless has the effect of giving the prosecution a major task in setting the contours of sentencing policy.

d. Training and ethics

Although the aim is that the Crown Prosecution Service is, or will become, a true career prosecution service, the CPS does not train its own staff from the beginning. Given that there are no formal requirements other than that Crown Prosecutors must be qualified solicitors or barristers, professional training standards are set by the Law Society and the Bar.³⁰³ Courses at the Prosecution College are (short) modules followed by prosecutors already on the job; many are offered in the form of e-learning. They form part of the induction process into the service rather than basic training. That is, of course, less true of in-house practical training or pupillage. Nevertheless, at a criminal trial, both defence and prosecution will be represented by advocates with more or less exactly the same basic training, in which the emphasis is on partisan advocacy skills and the ethics of independence, autonomy and identification with the interests of one's client.

While the stress on adversarial advocacy in training is logical in English criminal process where the defining moment is still the trial, the professional ethics to which a Crown Prosecutor must adhere emphasise impartiality and are a mixture of those that also obtain in private practice, the Code for Crown Prosecutors³⁰⁴ and other guidance from the DPP such as that which governs the

³⁰⁰ § 11.1 CPS Code

³⁰¹ See the CPS legal guidance 'Sentencing – General Principles' of August 2010, available at <www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles>. See also §B4 of the Attorney General's guidelines on the acceptance of pleas (revised 2009) (the AG's guidelines apply to guilty pleas, but also to sentencing in general: § 11.6 CPS code).

³⁰² Even if the Court of Appeal orders him to prosecute under the complaints procedure of art. 12 CCP, still only a member of the prosecution service can bring that prosecution. While the Court of Appeal can also determine what the charge should then be, it is debatable whether it can dictate how the prosecution is conducted.

³⁰³ See <www.cps.gov.uk/careers/legal_professional_careers> (last viewed 20.10.2010).

³⁰⁴ <www.cps.gov.uk/publications/code_for_crown_prosecutors>

relationship between Crown Prosecutors and counsel in private practice, and the Statement of Ethical Principles for the Public Prosecutor of November 2009.³⁰⁵

The Code for Crown Prosecutors is meant to inform the public about how the prosecution service works, but is, from a continental perspective, something of a mixture between brochure, ethical standards, and code of criminal procedure. It contains, for example the statement that 'Prosecutors [...] must not let any personal views about the ethnic or national origin, gender, disability, age, religion or belief, political views, sexual orientation, or gender identity of the suspect, victim or any witness influence their decisions. Neither must prosecutors be affected by improper or undue pressure from any source.' But it also contains a definition of the threshold and full code tests that must be applied in determining whether or not to prosecute.

The Statement of Ethical Principles sets out a number of general rules of behaviour that apply to all other public prosecutors as defined by the law. In its general section, it stresses personal integrity but also impartiality: 'Prosecutors must perform their duties without fear, favour or prejudice.' They must: take decisions based upon an impartial and professional assessment of the available evidence, independently and with objectivity within the framework laid down by the law, the Code, all departmental policies currently in force and all guidance issued by or on behalf of the Attorney General; and take into account all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the defendant. The Code for Crown Prosecutors also states that 'Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.' The same exhortation is implied in the Criminal Procedure Rules, which stress in their opening sections that criminal process is about ensuring that justice is done and the right persons convicted (or acquitted). Where these rules apply to all participants, they suggest that neither prosecution nor defence should primarily be interested in winning their case, but have a duty to contribute to one of the overriding goals: ensuring that the truth is found.³⁰⁶

The Dutch Public Prosecution Service is, in true continental fashion, part of a career judiciary. Training lasts six years in all and offers places to graduates from a university law school after a lengthy and rigorous selection process that includes intelligence and psychological tests and assessments as to a person's suitability to work as a judge or prosecutor. The basic training is the same for both jobs and is a mixture of theory and practice at the courts and prosecution service. Trainees do not make their final choice as to branch of the judiciary – sitting or standing – until halfway through. In the final year all trainees complete an internship in the criminal justice system but not within the judiciary (often with a law firm).³⁰⁷ These six years, during which trainees are in (temporary) paid employment with the judiciary, are not only training about all aspects of criminal process, but also form a powerful induction and socialisation into the professional and ethical norms of the organisation.

In the prosecution service, these norms are codified in a Code of Professional Behaviour issued by the Council of Procurators General.³⁰⁸ Not surprisingly, while it too stresses personal integrity and impartiality (in the sense of lack of prejudice),

³⁰⁵ <www.cps.gov.uk/legal/s_to_u/statment_of_ethical_principles_for_the_public_prosecutor>

³⁰⁶ Ashworth & Redmayne (2010) p. 264 ff.

³⁰⁷ <www.werkenbijderechtspraak.nl/LoopbaanmogelijkhedenRAIO>.

³⁰⁸ Handleiding gedragscode OM (2006H002), at <www.om.nl>.

it contains a much more robust definition of impartial prosecution: 'The public prosecutor's investigation is directed towards discovering the objective truth [...] He must consider all circumstances, both incriminating and exculpating.' And, unlike the rules to which English prosecutors are bound, it also lays much emphasis on the requirements of obedience to superior authority that derive from the vertical hierarchical structure of the organisation and the horizontal hierarchical relationships that obtain between the different organs of the criminal justice system.

Members of the prosecution service must, for example, follow the formal instructions that are issued through the Procurators-General by the Minister of Justice, defend them loyally in court and never lose sight of the consequences of their actions for the Minister's political accountability to Parliament, and need permission from their direct superior to ask the court to consider a legal point of view that differs from standing case law or doctrine. They are accountable to the court for all actions pre-trial and at trial and must make sure that the defence has timely access to the trial dossier. Prosecutors 'ensure that the police act duly and lawfully' and that they 'deliver official reports that are truthful and complete'. Prosecutors must also make sure that they know the details of pre-trial investigation by the police and are able to justify those activities to the court. Finally it should be noted that the responsibility for the well-being of victims but also of all witnesses rests with the prosecutor, again not surprising given his powers with regard to selecting those witnesses who should be called and bringing them before the court.

e. Out-of-court settlement

As in most other jurisdictions, certainly the Netherlands, Crown Prosecutors have also become case disposers,³⁰⁹ where previously that was also predominantly a police responsibility (or, in the case of plea-bargaining, that of the prosecuting solicitor-advocate or barrister). The opportunities for the police to engage in plea-bargaining have diminished since it has become a regulated and regular part of criminal process, but it is difficult to know whether the combined strategies of early disclosure, CPS charging and CPS advocacy, the new Farquahrson guidelines, and the judge's advance indication of sentence (reduction), have had the desired effects of eliminating over-charging and encouraging early guilty pleas. The fact that cracked trials are still a significant problem in England and Wales indicates that defendants still wait to plead guilty.

This should not really come as a surprise in the light of both the organisation of the courts and the nature of the trial process. Charging must, by law, take place after 96 hours (until not so very long ago, 24 hours), thus at an early stage in the investigation. While in some cases the evidence of guilt may be obvious and even overwhelming, in many others a defendant, even if guilty, would be well advised to wait and see. That is especially important in jury trials, as juries appear much more likely to acquit than magistrates, while a professional culture of bargaining between counsel at the Crown Court has existed for over a century.³¹⁰ Now that over three quarters of Crown Court trials are still conducted by counsel in private practice, it is a moot question whether that culture has really been upturned by the Farquahrson guidelines that require all counsel for the prosecution to consult with

³⁰⁹ See for an overview Jehle & Wade (2006).

³¹⁰ See Tables 5 and 11 in Annex II.

the Crown Prosecutor before offering or accepting a charge bargain. Even if advance sentence indications are now possible, agreement still has to be reached first on the charge.

This complication is compounded by the existence of either-way offences and the attendant right to opt for jury trial. Almost two thirds of defendants who do so still go on to plead guilty, often at the last minute as they hold out to see whether, for example, witnesses will turn up. The newly appointed Government Victims' Commissioner has called this a 'publicly funded waiting game'.³¹¹ Again there are calls to scrap the right to jury trial for either-way offences, but again the Government seems reluctant to do so: 'We are considering how best to encourage guilty pleas at an earlier stage, while preserving a person's long-standing right to have their case heard before a jury'.³¹²

Charge-bargaining is the typical adversarial way of relieving the burden on the courts and leaves the notion of formal truth-finding intact, but has its obvious disadvantages in the above. For decades, however, England has had other means of diversion for which the police had wide and largely unchecked discretionary power. Even after the advent of the CPS, when various Home Office circulars attempted to set out diversion policy (particularly regarding police cautioning), these were not formally binding under the doctrine of constabulary independence.³¹³ This remained more or less the case until the 2003 reforms, although previously prosecutors had gained some informal say in diversion through co-operation with police officers in ASUs and CJUs. The Criminal Justice Act 2003, however, gave the CPS its own power of diversion in conditional cautions.

A true form of prosecutorial diversion involving conditional non-prosecution decisions by the prosecutor, this is new in England. Although the conditional caution is in a sense a way of consensual truth-finding because acceptance by the suspect is required, there is a significant responsibility on the prosecutor to determine whether a conditional caution is in the public interest and justified by the evidence, and, if so, what the condition should be. This requires the prosecutor to be informed of the case and to take quasi-judicial decisions; his now stronger position in relation to the police could be of great assistance. The police, however, still operate as gatekeepers to the prosecution system where they have their own diversionary powers and can divert quite serious offences without formal control of or supervision by the CPS.³¹⁴ Only in cases of indictable-only offences need the police consult with the CPS before issuing a police caution.³¹⁵

In the Netherlands, the use of discretionary prosecutorial power according to the principle of expediency was already around in the 19th Century. Since 1873 there had been consensus that the prosecution service formed part of the executive and at the same time of the judiciary, bound by the law and at trial answerable to the court, but also to Parliament through the Minister of Justice to whom it was subordinate and whose orders it was bound to obey. It was also agreed that the principle of expediency meant that prosecution should not be instigated if the public interest required otherwise.

During the 20th Century, two related developments led to a massive growth in the use of the expediency principle that includes both decisions not to prosecute at

³¹¹ *The Guardian*, Wednesday 3 November 2010.

³¹² *Idem*.

³¹³ Ashworth & Redmayne (2010), p. 170.

³¹⁴ § 9.1 *Director's Guidance on Charging*.

³¹⁵ Ashworth & Redmayne (2010), p. 170.

all and diversionary measures such as conditional waivers of prosecution: these can be compared to conditional cautions in England, although Dutch prosecutors can impose many more types of conditions than their English counterparts.³¹⁶ On the one hand there was a growing consensus that the criminal law is not always the best way to tackle criminality: it is a costly affair both financially, socially and emotionally; it is rarely really effective in terms of preventing (re)offending; the courts are ill-equipped to deal with all the offences that could be prosecuted; and it should therefore only be used as a last resort (the principle of *ultimum remedium*). The other development was using the (threat) of criminal law but not actual prosecution to effectuate much wider social and economic policies than can be strictly defined as pertaining to criminal justice. We shall deal with this latter, though related, issue in the following paragraph.

Changing discourse in the second half of the 20th Century on the idea that the criminal law should always be *ultimum remedium* was reflected in a change in the interpretation of the principle of expediency: from 'prosecution, unless the interests of society require otherwise', it became 'no prosecution, unless the interests of society so require'. The number of cases dropped by the prosecution or dealt with out of court increased each year. Transaction was originally only allowed for misdemeanours under the Criminal Code, but can be imposed for any offence that carries a penalty of less than 6 years imprisonment since 1983.³¹⁷ Many, especially foreigners, see the wide use of non-prosecution as the epitome of the consensus and compromise that make for mild and tolerant criminal justice policies. But in the particular framework of Dutch inquisitorial justice it is neither consensual nor a compromise. The powerful position of the prosecutor and the fact that suspects always have much more to lose make it in practice simply a matter of 'take it or leave it'. Transaction is a pragmatic instrument of social control in the hands of the executive; that it takes place without public or judicial scrutiny is justified by the judicial role of the prosecutor, its legitimacy resting on public confidence in his ability to fulfil that role in the interests of society. That it is consensual is more than something of a euphemism. And although there is evidence that powerful suspects such as white collar and corporate criminals can do deals to keep their case out of court,³¹⁸ in no way is it intended to put the suspect in an autonomous position to negotiate the truth.³¹⁹

By the new millennium the traditional means of relieving the burden on the courts (non-prosecution and transaction) were no longer considered a real option, indeed, seen rather as one of the causes of declining public confidence in criminal justice – invisible and not the 'real punishment' that 'real crime' warrants. And yet the strain on the court system was in urgent need of a solution. The Minister of Justice commissioned research into plea-bargaining,³²⁰ following which he informed Parliament that little was to be expected from the introduction of such a *corpus alienum* into Dutch procedure. Not only did it not fit a procedural tradition of active judicial truth-finding, capacity gains would be negligible; neither would plea-bargaining put an end to the 'undesirable' practice of negotiation between the prosecution and (powerful) defendants.

³¹⁶ The police have a mandate in law to impose conditional cautions too for a number of delineated offences.

³¹⁷ *Wet Vermogenssancties*, 31 March 1983, *Stb.* 1983, 153.

³¹⁸ Brants (1988) and Brants & Brants (1991), ch. IX.

³¹⁹ Brants & Field (1995); Brants (2007)

³²⁰ Brants & Stapert (2004).

Instead, the minister proposed allowing the public prosecutor to impose fines in the form of penal orders. This proposal, now law,³²¹ aims to catch a number of birds with one stone: unburden the courts and yet provide 'real' and visible punishment, and solve the problem of those who agree to transaction and yet do not pay (approximately 25 per cent). The imposition of a prosecutorial fine is an act of prosecution, and the fine formally a criminal sanction; the prosecutor can enforce it directly.³²² The law is being phased in, while transaction is phased out. This penal sanction fits Dutch inquisitorial tradition perfectly. Justified with an appeal to the prosecutor's judicial role, it has brought us full circle: an official who is both prosecutor and judge, as he was in the Republic of Seven United Provinces.

f. The policy responsibilities and accountability of the prosecution service

Discretionary prosecutorial authority regarding the question whether or not to prosecute, make of a public prosecution service in principle a powerful policy instrument in the hands of the state. However, there are different ways of using that instrument, different ends to which it can be used and different means of holding the prosecution service and individual prosecutors accountable for how they make use of discretionary powers. In any event, without conceding Damaška's rather drastic dichotomy between the active, policy-making state and the reactive, *laissez-faire* state where the criminal law as a policy-instrument is anathema, it is important to recognise his point that the prosecution service must be in full control of the prosecution decision in order to effectively prevent other agencies, public or private, from undermining what has been conceived as a coherent policy of (non-) prosecution.

Taking the English situation first: what sorts of policies involve the prosecution service and why, and to what extent is it responsible and accountable for their effectuation? It is important to realise that the Crown Prosecution Service came into existence at a point in time when the legitimacy of the criminal justice system in England was highly contested after a number of dramatic miscarriages of justice were exposed, but also during a period in which, increasingly, law and order policies were being expounded by the Government in response to what was defined as a growing crime problem. The CPS was therefore to act as some form of control on the police, but also to ensure effective implementation of criminal policy and, in its wake, to decide whether prosecutions were in the public interest. The head of the prosecution agency, the DPP, was given wide powers to issue guidance on how the public interest should be interpreted, and such guidance is subject to parliamentary scrutiny. The growing emphasis on policy is also emphasised by the recent creation of a Ministry of Justice, which carries a certain responsibility for the criminal justice system and for drafting new laws and guidance.³²³

A second consideration has been an increasing desire for more efficiency. As criminal law enforcement demands more resources, and as resources become scarcer, so the need to control them increases. A centrally organised, government-

³²¹ *Wet OM-afdoening*, 7 July 2006, *Stb.* 2006, 330.

³²² Letter from the Minister of Justice concerning plea-bargaining, 23 October 2003, *Kamerstukken II* 2003/04, 29200 VI, nr. 31.

³²³ <www.justice.gov.uk/about.htm> (last viewed 30 October 2010). It should be noted that this is not a ministry of justice in the continental sense. It has no responsibility for the prosecution service.

controlled CPS is an effective instrument for ensuring that resources are used more efficiently by directing them as policy goals demand, setting priorities and focussing on particularly problematic types of crime. By gathering experience and developing best practices, such an organisation can also be used to ensure that cases are dealt with efficiently and speedily. And, finally, a prosecution agency brings the use of out-of-court settlements, formerly relatively autonomous police-decisions, under central control. There is, in short, a need for managerial prosecutors, epitomized by the existence of policy and business development departments at the CPS and the emphasis on goals assessments in the CPS and CPS Inspectorate annual reports.³²⁴

While the CPS does not control prosecutions fully, given the fairly extensive residue of autonomous gate-keeping that still resides with the police, in matters of relatively serious 'ordinary' crime it has a monopoly on prosecution. Even if private prosecutions are still possible, the DPP is empowered to take them over and stop them if they are inopportune. The institution of private prosecutions also acts as a mechanism of control on CPS decisions not to prosecute where the victim or another party has a vested interest in prosecution. However, several other government agencies in England and Wales have prosecutorial powers, the most salient example being the Serious Fraud Office. Moreover, some private organisations with a (semi) public function, such as the Royal Societies for the Protection of Animals and Children (RSPCA and RSPCC respectively) and the child-welfare charity Dr. Barnado's, regularly bring private prosecutions without interference by the DPP.

This points to the CPS being an instrument of crime-control and law and order but (as yet) not in specialised fields. It implements general criminal justice policy at the individual level, *i.e.* policies of non-prosecution setting out criteria regarding the public interest in justice that allow a prosecutor to weigh each case on its merits. There is no sense of using prosecutorial discretion to implement wider social policies or to allow discretionary use of the criminal law to meet changing social demands. Special policy guidelines have been issued for categories of (socially and politically) sensitive offences, such as assisted suicide, domestic violence, rape, and hate crime.³²⁵ In cases of assisted suicide, for instance, a prosecution is less likely if the victim had reached a voluntary, clear, settled and informed decision, and if the suspect was motivated by compassion.³²⁶ However, it is made perfectly clear that such policies are in no way intended to decriminalise certain offences. Prosecutorial discretion remains therefore a policy instrument geared towards better, more efficient (value for money) and just use of the criminal justice system in individual cases. As a government agency, albeit a reasonably independent one given the relatively independent political position of the Attorney General, the CPS is subject to the same form of judicial review as any other government organisation.

³²⁴ See <www.cps.gov.uk/your_cps/our_organisation/headquarters.html> for an overview of the organisation of CPS headquarters (last viewed 30 October 2010).

³²⁵ The House of Lords required the DPP to clarify his position as to the factors for and against prosecution in cases of encouraging or assisting suicide (*R (on the application of Purdey) v DPP*, [2009] UKHL 45). This resulted in the Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide of February 2010.

³²⁶ § 45 the Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide of February 2010 (available at <www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html>).

In the Netherlands, the Public Prosecution Service is specifically both a prosecution agency and a policy-making and implementing institution. That has been the case for at least a century.³²⁷ The early 1900s saw the beginnings of what was to become a large body of socio-economic law with penal sanctions for which the prosecution service was responsible. As prosecutors began to use their discretionary authority not to prosecute more frequently in this field, the question arose whether the principle of expediency could set aside not only prosecution in specific individual cases, but the general enforcement of specific laws as a matter of policy. At the time, leading members of the prosecution service thought not,³²⁸ but first economic crisis in the interwar years and then (the aftermath of) the Second World War firmly established discretionary prosecution policies and a powerful role for the prosecution service in the socio-economic field.

As a result, and in combination with the new interpretation of the principle of expediency explained in the previous paragraph, by the 1970s there was no doubt that the prosecution service could, on grounds of public interest, set aside the law in both individual cases and in general as a matter of policy. Prosecutorial discretion in individual cases had always been the norm and new, broader powers of out-of-court settlement appeared to make tailor-made decisions easier and were certainly used with increasing frequency. Secularisation and the disappearance of shared moral attitudes to existential questions threw doubt on whether crimes of 'morality' that took no account of changing ideas on autonomy and self-determination (pornography, prostitution, drugs, abortion, euthanasia) were matters for the criminal law at all. The answer, regardless of the law in the books, was increasingly decided by the prosecution service (and in extreme or borderline cases, by the courts).³²⁹ Dutch prosecutors came to regard their judicial role as the role of preference, seeing themselves as independent and impartial magistrates whose further contribution to society was to promote a stable social order with the least possible resort to the strong arm of the law.³³⁰

Although the 'soft' policies of the 1970s no longer apply in these days of what politicians (though not necessarily prosecutors) like to refer to as no-nonsense, zero-tolerance crime control, the gradual development of the prosecution service as a policy-implementing agency *par excellence* has had a number of consequences. The service has been centralised, control by the Minister of Justice through the Council of Procurators-General increased, and prosecutorial control over the police tightened. Targets are set for the amount of crime that must be prosecuted and the amount that can be dealt with by taking no further action or any one of the means of out-of-court settlement. Policies are laid down by the Minister of Justice through the council of Procurators-General in what were originally called

³²⁷ And actually for much longer. Already in the 17th Century Dutch Republic, the criminal justice authorities of the cities were inclined not to prosecute vice (prostitution, gambling, drunken and disorderly behaviour), recognising that it was inevitable in cities that depended on mercantile trade and needed to (temporarily) accommodate many foreigners among the population, and that other, gentler methods of persuasion to maintain public order were more effective and less costly. This partly established the Dutch reputation for 'tolerance' in such matters – not entirely deserved as the ulterior motive was one of not endangering economic prosperity. See e.g. Van de Pol (1996).

³²⁸ Pieterman (1990) p. 184.

³²⁹ All of these issues were first (part) decriminalised *de facto*; only then did legislation follow. See, for example, on prostitution Brants (1998).

³³⁰ Van de Bunt (1985).

Guidelines but now go under the name of Instructions. These concern both the way in which individual cases should be decided and wider policy issues and are binding on prosecutors.

Consequently, Dutch Prosecutors have at least three interrelated but increasingly contradictory roles and responsibilities. As quasi-judicial figures, they must weigh all relevant factors and decide in individual cases, a responsibility in which, given the primacy of the Instructions, the autonomy of individual prosecutors has been increasingly curtailed. As government servants they must obey the orders and follow the policy instructions of hierarchical superiors, including the Minister of Justice, that can concern how categories of crime are to be prosecuted (or not), but also individual cases. And as case-disposers they must meet centrally established targets and make sure that the caseload of the courts does not become unbearable. Both the prosecution service and individual prosecutors are accountable in different ways for how they discharge these responsibilities.

Individual prosecutors are accountable to hierarchical superiors for discretionary policy decisions, but also to the courts. Decisions by criminal justice authorities are exempt from normal procedures of judicial review. However, defendants can challenge the prosecution by invoking policy instructions that have quasi-legislative status in the sense that they can be used to argue that a prosecution violates the principle of equality before the law; there are also limited possibilities to challenge a charge and summons to appear before a court. Discretionary decisions not to prosecute are subject to complaint by interested third parties, in particular victims. And, finally, prosecutors are also accountable to the court for the way in which a prosecution is conducted, both pre-trial (including police investigation) and in court. All of these means of accountability concern individual cases. Policy as such is subject to neither complaint or review by the court; the Minister of Justice is politically accountable to Parliament for both the policies and actions of what has become a powerful government agency of law and order and wider social and economic policy.

4. Towards the inquisitorial

The underlying purpose of the previous paragraphs is to help us understand developments in the criminal justice system of England and Wales in terms of change in the basic characteristics that place it squarely in the adversarial tradition. Our discussion has focussed on English prosecutors, or rather all those involved in pre-trial investigation and/or prosecution: the police, citizens, CPS prosecutors and other lawyers conducting the prosecution in court. Their responsibilities, and their relationship to each other and to the other participants in criminal process traditionally formed an accurate reflection of fundamental adversarial characteristics, in theory and in practice. Prosecutors operated within a co-ordinate structure of authority free from policy-implementing goals, with no duty to investigate or present the case impartially or otherwise assist the defence, and their activities culminated in formal truth-finding through either adversarial debate in court or out-of-court agreement with the suspect.

English criminal process has undergone some apparently radical changes since the Crown Prosecution Service started in 1986, and these have been greatest in the pre-trial stage. So much is obvious from the previous pages. Equally obvious is that the English prosecutor now has tasks, powers and duties that are common to the

inquisitorial ideal-type. The question is whether these transitions have led to the sort of responsibilities that are rooted in an inquisitorial concept of legitimate truth-finding with very different fundamental characteristics, so that convergence with systems of the continental inquisitorial tradition has occurred or is occurring. Mere similarities between procedural features and the role of the prosecutor do not necessarily imply convergence. The issue is whether legitimate truth-finding in English criminal process has become *dependent on the prosecutor* discharging his tasks and duties and wielding his powers in a particular manner – as it would be in inquisitorial process. If that is the case, or partly the case, prosecutorial responsibilities in the pre-trial stage have indeed moved or are moving towards the inquisitorial.

What, then, can be said now of the procedural, organisational and inter-relational characteristics that are fundamental to the coherence and legitimacy of criminal process in the common-law adversarial legal tradition and culture? To what extent is it possible to accommodate changes in one set of responsibilities without affecting others or without fundamentally adapting the relationship between the criminal justice authorities and the way pre-trial and trial procedure hang together? These questions are prompted by the observation that, at the trial stage, English criminal process has retained the adversarial features that make debate between equal, independent and autonomous parties the centrepiece of legitimate truth-finding.

One of the main organisational characteristics of criminal justice in England and Wales was always the co-ordinate structure of authority that curtailed and balanced state powers and put the various organs and institutions on an equal footing. Historically, this was reflected in the autonomous position of local police forces and the absence of a public prosecution service. While the creation of the CPS implied a breach with the latter, its position has remained largely in line with this co-ordinate structure. It was set up at some distance from the Government, was intended to be (and calls itself) an independent service and has no formal hierarchical relationship with the police. In comparison with the Dutch *Openbaar Ministerie*, the CPS remains a rather inadequate tool for either implementing policy or controlling police activity in pre-trial investigation.

We have argued that policy implementation is not in itself a goal of justice. Rather, the concept relates to fundamental principles of state and the scope for individualism they allow. The only thing that can really be said about modern democratic states is that hierarchical authority structures and inquisitorial responsibilities make it easier to draw wider social policy issues both into the sphere of criminal justice and the remit of the prosecutor. Nevertheless, where structures of authority are obliquely reflected in criminal process, they do impinge on legitimate concepts of truth-finding. The relationship between the English prosecution service and police pre-trial forms a good example.

In England, the principle of constabulary independence still prevails, at least in the sense that the CPS cannot tell the police who, what, when or how to investigate. That not only means that whether a case transgresses beyond the investigation stage to prosecution can be settled decisively by autonomous decisions taken by the police, but also that what the police investigate determines the prosecution case. While this is, of course, also true for the Netherlands, the relationship between the Dutch police and the prosecution service is so constructed as to allow the prosecution maximum supervision and control; if that does not

always materialise in practice this is the result of informal mechanisms and tactics. In England, rather the opposite is true. This influences not only the degree to which the prosecutor can direct pre-trial process, but also his relationship with and duties towards the defence that have, nowadays, culminated in an important responsibility with regard to truth-finding.

In relationship to legitimate truth-finding, the most important fundamental characteristic of the adversarial, common law tradition is constituted by the interrelated principles of party independence, autonomy and equality. Traditionally, the defence in England are not dependent on police and prosecution for receiving information, are fully responsible for finding and adducing exculpatory evidence on an equal footing with the prosecutor and autonomous in the construction and presentation of the defence case. These defence responsibilities require party-equality if they are to serve their purpose: full adversarial debate at trial. Inequality not only endangers independence but also autonomy. Legitimate adversarial truth-finding depends on the interrelated guarantees that all three principles provide.

This basic legal-cultural premise of common law has always shaped the way in which problems of legitimacy were defined and solutions to them conceived. It is, for instance, no coincidence that the rise of professional policing coincided with the introduction of defence lawyers at trial in the 1830s to compensate for the resulting inequality: parties to criminal process had not been equal since, in the same period, organised police forces took over prosecutions, however much the police were construed as private prosecutors and thus as equal to the citizen-suspect. A defence lawyer restores the balance. Although the main changes to criminal process in the past decades have often been driven by a desire for more (cost) efficiency, major problems of legitimacy, such as the occurrence of miscarriages of justice, have still been defined as the result of inequality between parties. And solutions, also those meant to address problems of ineffectiveness and inefficiency, have always been so constructed as to reinstate or sustain party equality as a cornerstone of the adversarial trial.

Increasingly unequal opportunities for gathering information and other investigative activities in these days of modern policing, have led to the police and prosecution in combination being burdened with the duty to investigate all reasonable lines of inquiry – incriminating and exculpatory – and to divulge the results to the defence. Pre-trial hearings and defence disclosure are efficiency measures that have the added benefit of helping investigators and prosecutors to know what reasonable lines of inquiry remain to be investigated and what to disclose, so that equality may be enhanced.

How such procedural arrangements reveal ingrained attitudes towards legitimate truth-finding may be illustrated by differences between the English disclosure regime and the responsibilities of the Dutch prosecutor with regard to access to the dossier. In England, disclosure pertains to making available all evidence – used and unused material, incriminating and exculpatory – at the earliest possible moment. An important aim is to improve the quality of adversarial debate by ironing out inequalities between defence and prosecution. If refusing disclosure for reasons of public interest would jeopardise a fair trial, the consequence in England is disclose or abandon. Given that the case will be decided at trial, all of this derives logically from legitimate truth-finding being defined as dependent on debate between equals at trial.

In the Netherlands, the whole dossier must in principle be available ten days before trial so that the defence can prepare, but access may be restricted pre-trial ‘in the interests of the investigation’. Here the aim is to improve the quality of pre-trial substantive truth-finding by state investigators through *non*-disclosure. Dutch prosecutors and judges can also rely on information that is not contested in court. Again, logical if legitimate truth-finding is predicated on confidence in prosecution and judiciary to conduct a comprehensive, impartial investigation into the substantive truth; contestation by the defence is only one means of ensuring this and is not necessarily required at trial.

While the statutory duties of impartial investigation and disclosure promote equality in England, at the same time they have the propensity to undermine those other adversarial mainstays: party independence and party autonomy. Increasingly, the defence is dependent on police and prosecutor for information that is crucial to the defence case. But English prosecutors do not have the authority of the inquisitorial prosecutor that would allow them to control the information flow. There is no formal power to instruct the police to conduct an impartial investigation, nor to force them to divulge (all of the) evidence they may have unearthed.³³¹ The defence must therefore simply assume that the police investigation has been impartial and has exhausted all reasonable lines of inquiry, and that all relevant information has been disclosed. Even if we consider that the defence have their own power to investigate and still actually do so, disclosure was introduced for the very reason that their investigative powers are not equal to those of their adversary.

So, whereas truth-finding at trial still requires party equality, that equality itself has become dependent on the impartiality of police investigations and disclosure by the CPS. The principle of autonomy still applies at trial and means that the defence are both free but also obliged to lead (or omit) any evidence they choose to sustain their own and undermine the prosecutor’s case. If they are dependent on disclosure for information, one could question whether the autonomy principle can still support a defence responsibility to present the defence case and contest that of the prosecution, and has not become simply a procedural attribute of little material substance.

One argument against this conclusion is the professional culture of adversarial partisan advocacy in which English lawyers are schooled – defence, prosecutor and judge. The legislature and the authorities hierarchically superior to and within the CPS, have produced a surfeit of not always binding regulations to ensure that prosecutors, whether or not in private practice, behave in a way that is befitting of an impartial, quasi-judicial figure. They must argue the prosecution case in court, but their main task is to impartially assist the tribunal of fact to come to a just

³³¹ The co-ordinate organisation of investigation and disclosure also means that compliance with disclosure obligations may be difficult in practice. The police investigate, the CPS is responsible for disclosing all relevant information. Furthermore, relevance may change as the case develops and can only be definitely assessed at trial. The person conducting the prosecution must therefore continue to review and disclose where required. If that is a private barrister not involved in preparing the case, he will not necessarily be aware of all available evidence. The *Farquharson Guidelines* specify that an advocate should review CPS disclosure-decisions and satisfy himself that he is in possession of all relevant documentation, but the advocate’s view on the case is limited to the information included in his brief.

verdict; efficiency reasons dictate that preferably the case should not get so far, but be dealt with, again justly and impartially, out of court. Where the defence formally retain the independent and autonomous role of partisan adversarial advocate, and the majority of prosecution advocates are still in private practice, the more inquisitorial and judicial role of the prosecutor that the regulation seems to be promoting, is not necessarily or even logically the role of choice. That it has proved impossible, as yet, to bring down the number of cracked trials – despite all the statutory rules and incentives – is perhaps also not surprising given that plea and charge-bargaining take place on the cusp of two competing professional cultures and ideologies.

So, what should we make of these developments and their sometimes contradictory consequences in terms of convergence? The conclusion must be that English criminal justice has indeed moved along the continuum in the direction of the inquisitorial, at least pre-trial and as far as prosecution is concerned. However neither the organisation of authority nor trial procedure have changed in anything like the same way, so that, as yet, this shift has not had particularly coherent consequences. That may be a matter of time, as many changes are fairly recent and we should perhaps not underestimate the power of external developments to influence even the most deeply entrenched of legal-cultural beliefs.

At present, we see the emphasis of truth-finding shifting to the pre-trial phase, even if the truth is only definitely found through adversarial debate at trial. That debate, however, is no longer between parties who independently and autonomously investigate and present their own evidence. Defence and prosecution are not equal in terms of investigative resources, and in compensation the state itself has taken on the responsibility of ensuring that incriminating and exculpating evidence is gathered by investigating ‘all reasonable lines of inquiry’. This is defined in terms of the purpose of the investigation which still has an adversarial ring to it: to ascertain who is responsible for the crime in question, not to exonerate individual suspects. But ‘reasonable’ also means that there must be some reason or circumstance for the police to investigate further, and from whom better to acquire that knowledge than the suspect?

While redressing inequality pre-trial allows parties to participate in adversarial debate at trial on an equal footing, at the same time (and in combination with efficiency concerns) the duty of impartial investigation and the statutory disclosure regime have also given pre-trial procedure some decidedly inquisitorial characteristics. Defence disclosure, further disclosure of prosecution evidence and pre-trial hearings require active co-operation between prosecution and defence, and limit and determine truth-finding pre-trial. While as yet that co-operation has not resulted in evidence-agreements that are committed to paper (as it has in Scotland), this nevertheless is a move towards one version of the truth setting the agenda for debate at trial.

It could be said that the common law principle of private prosecution, itself the expression of a deep-seated belief in the intrinsic freedoms and rights upon which an individual can rely under the common law understanding of the rule of law, originally dictated the adversarial nature of the trial. It is now the adversarial trial that dictates solutions to problems in pre-trial process and yet are pushing it in an inquisitorial direction. And so, paradoxically, some of the most inquisitorial characteristics of pre-trial procedure in England – impartial investigation for and against the suspect, defence dependence on and co-operation with the prosecution

pre-trial – are the result of attempts to uphold one of its most fundamental adversarial features: equality between defence and prosecution. Perhaps this is confirmation of the fact that if you mess with the rule of law, you're left with the law of unintended consequences.³³²

³³² Unfortunately, this wonderful maxim is not entirely of our making, but is a variation on Nick Cohen in the Observer newspaper (10-12-2002).

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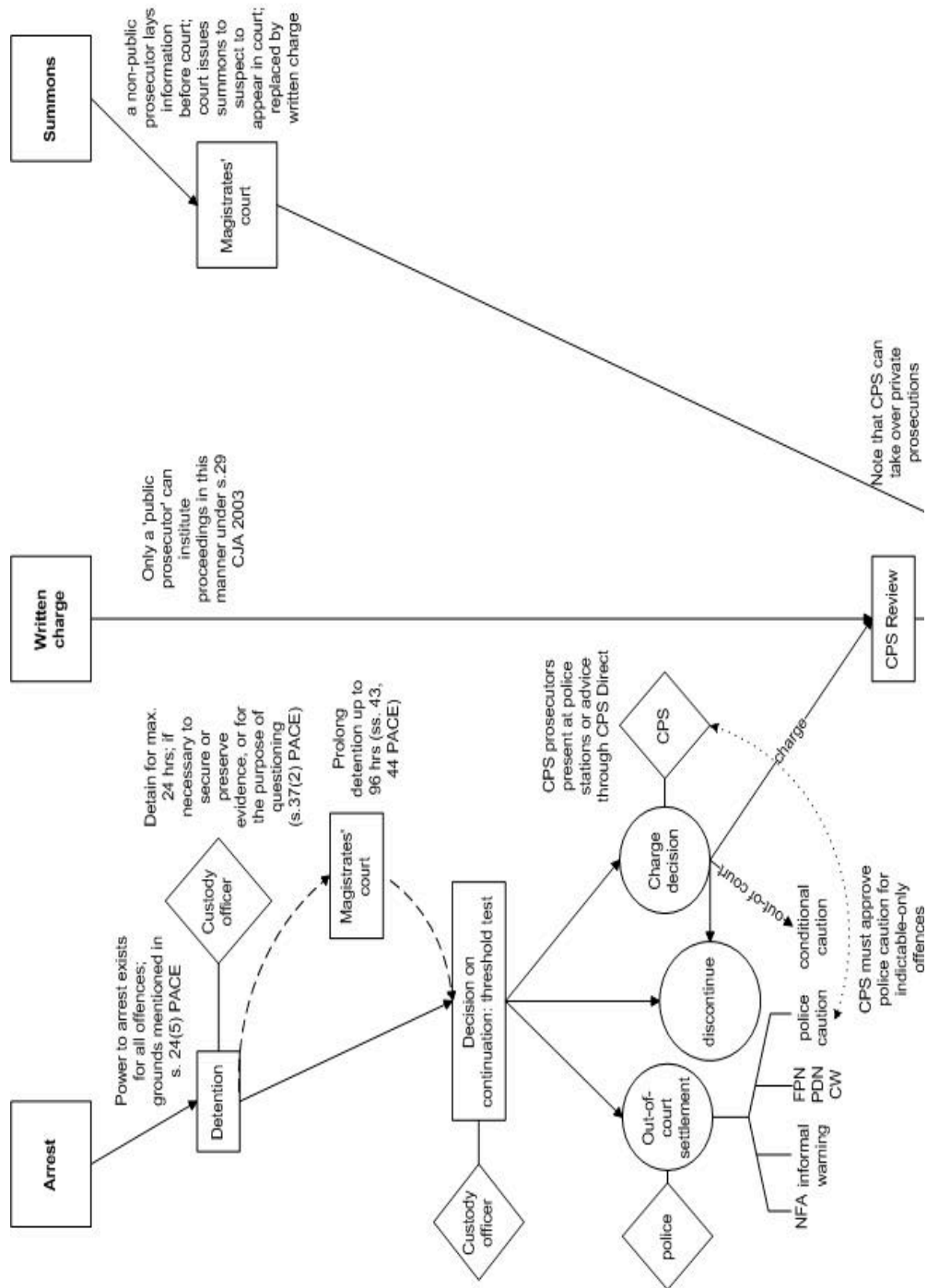
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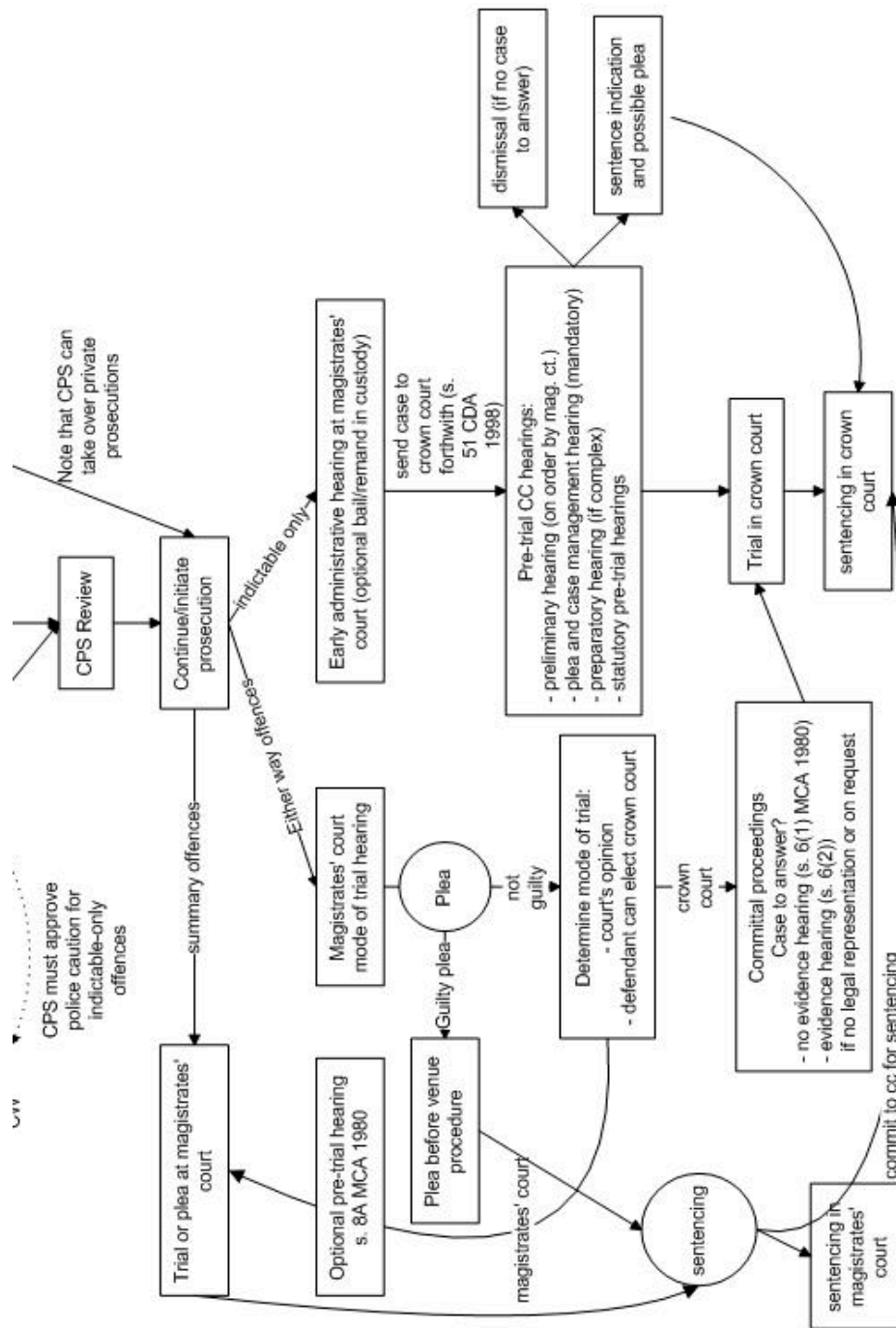
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Annex I Flow Chart





Annex II Tables

These statistics are intended to give a brief overview of the workings of the English criminal justice system, as far as is relevant for our discussion of the role of the prosecutor. They are divided into three sections: the first giving general figures on the criminal process, the second on the magistrates' courts, and the third on the Crown Court. The figures are based on two sources:

- The *Judicial and court statistics 2009*, published by the Ministry of Justice (<http://www.justice.gov.uk/publications/judicialandcourtstatistics.htm>) (referred to as Judicial Statistics).
- The *Criminal Statistics, England and Wales 2009*, published by the Ministry of Justice (<http://www.justice.gov.uk/criminalannual.htm>) (referred to as Criminal Statistics).

All figures are for 2009, unless indicated otherwise.

1. Overall statistics of the English criminal justice system

Table 1: Findings of guilt by type of court (*source: Criminal Statistics*)

	Number of defendants (<i>x 1000</i>)
Defendants found guilty at magistrates' courts	1.330
<i>Of which indictable offences</i>	256
Defendants found guilty at the Crown Court	77
Total offenders found guilty at both courts	1.407

Table 2: Cautioning (simple and conditional), by type of offence
(*source: Criminal Statistics*)

Offence type / group	Offenders (<i>x1000</i>)	Percentage
Indictable offences (excluding motoring offences)	159,5	33%
<i>Violence against the person</i>	27,3	39%
<i>Sexual offences</i>	1,5	22%
<i>Burglary</i>	4,4	16%
<i>Robbery</i>	0,2	2%
<i>Theft and handling stolen goods</i>	60,7	35%
<i>Fraud and forgery</i>	7,2	26%
<i>Criminal damage</i>	6,4	45%
<i>Drug offences</i>	43,8	44%
<i>Other (excluding motoring offences)</i>	8,0	14%
Summary offences (excluding motoring offences)	131,1	20%
All offences (excluding motoring offences)	290,6	26%

Table 3: Overall conviction rate in all courts (*source: Criminal Statistics*)

Offence	Percentage of offenders found guilty
Indictable offences	79%
<i>Violence against the person</i>	66%
<i>Sexual offences</i>	55%
<i>Burglary</i>	74%
<i>Robbery</i>	63%
<i>Theft and handling stolen goods</i>	89%
<i>Fraud and forgery</i>	80%
<i>Criminal damage</i>	79%
<i>Drug offences</i>	92%
<i>Other (excluding motoring offences)</i>	69%
<i>Motoring offences</i>	86%
<u>Summary offences</u>	84%
<i>Offences (excluding motoring offences)</i>	83%
<i>Motoring offences</i>	86%
All offences	83%

2. Statistics concerning procedures in the magistrates' courts

Table 4: Defendants proceeded against in the magistrates' court (*source: Criminal Statistics*)

Type of offence	Number of defendants (x 1000)
Indictable	415,3
Summary non-motoring	618,8
Summary motoring	659,2
All offences	1.693,2

Table 5: Cases completed by the CPS in the magistrates' court
(source: *Criminal Statistics*)

Outcome	Number of defendants (<i>x 1000</i>)	Percentage
Discontinued	79,1	9%
Administrative finalisations	13,0	1%
Discharged at committal proceedings	2,3	0%
Heard in court, of which:	794,4	89%
<i>Guilty pleas</i>	604,1	68%
<i>Proof in absence</i>	135,5	15%
<i>Convicted after trial</i>	33,3	4%
<i>Dismissed</i>	21,5	2%
Total Unsuccessful Outcomes	115,8	13%
Total convicted	772,9	87%
Total completed in magistrates' courts	888,7	100%

Table 6: Persons aged 18 and over, committed for trial at the Crown Court for offences triable either way (source: *Criminal Statistics*)

Offence group	All defendants (<i>x 1000</i>)	Committed for trial at Crown Court	
		Defendants (<i>x 1000</i>)	Percentage
Violence against the person	47,9	19,6	41%
Sexual offences	4,7	3,1	67%
Burglary	22,4	9	40%
Robbery	0	0	0%
Theft and handling stolen goods	108,4	8,3	8%
Fraud and forgery	22	5,1	23%
Criminal damage	6,8	0,8	12%
Drug offences	54,7	12,2	22%
Other (ex. motoring offences)	57,6	8,5	15%
Indictable motoring offences	3,9	1,8	47%
Total	328,4	68,5	21%

Table 7: Number and proportion of magistrates' court trials that were cracked, by cause (*source: Judicial Statistics*)

Total trials	179.858	100%
Total cracked trials	68.080	38%
<u>Main reasons for cracked trials</u>		
Late guilty plea accepted	38.272	21%
Guilty plea to alternative new charge	5.086	3%
Defendant bound over	1.482	1%
Prosecution end case	23.198	13%

Table 8: Number and proportion of magistrates' court trials that were ineffective, by cause (*source: Judicial Statistics*)

Total trials	179.858	100%
Total ineffective trials	33.609	19%
<u>Main reasons for ineffective trial</u>		
Prosecution not ready	3.595	2%
Prosecution witness absent	6.243	3%
Defendant absent	6.903	4%
Defence not ready	5.372	3%
Defence witness absent	1.394	1%
Other	10.102	6%

3. Statistics concerning procedures in the Crown Court

Table 9: Receipts, disposals, and outstanding cases in the Crown Court (*source: Judicial Statistics*)

Number of cases		
Committed for trial	Receipts	62.838
	Disposal	59.840
	Cases outstanding	23.655
Sent for trial	Receipts	34.869
	Disposals	34.471
	Cases outstanding	16.243

Table 10: Defendants dealt with in cases committed or sent for trial at the Crown Court, by plea (*source: Judicial Statistics*) (*Nr = Number(s)*)

Year	Total number of defendants dealt with	Plea entered				No plea entered				Guilty pleas as % cases with plea
		Guilty (to all counts)		Not guilty		Bench warrant		Other		
		Nr	%	Nr	%	Nr	%	Nr	%	
2005	80.772	49.261	61	29.323	36	229	0,3%	1.959	2%	63%
2006	83.730	52.817	63	28.709	34	239	0,3%	1.965	2%	65%
2007	90.720	59.997	66	28.299	31	303	0,3%	2.121	2%	68%
2008	96.027	65.571	68	27.923	29	444	0,5%	2.089	2%	70%
2009	104.418	71.442	68	29.835	29	514	0,5%	2.627	3%	71%

Table 11: Defendants dealt with in cases committed or sent to the Crown Court, showing results according to plea (*source: Judicial Statistics*)

Showing results according to plea (Source: National Statistics)						
Year	Total number of defendants entering plea	Guilty to all counts	Plea entered			
			Not guilty			Percentage acquitted
		Total	Total	Acquitted	Convicted	
2005	78.584	49.261	29.323	15.587	13.736	53%
2006	81.526	52.817	28.709	17.031	11.678	59%
2007	88.296	59.997	28.299	17.226	11.073	61%
2008	93.494	65.571	27.923	16.786	11.137	60%
2009	101.277	71.442	29.835	18.583	11.252	62%

Table 12: Defendants acquitted in the Crown Court after a not guilty plea, by manner of acquittal (*source: Judicial Statistics*)

Year	Manner of acquittal					% of acquittals by jury verdict
	Discharged by judge	Acquittal directed by judge	Jury verdict	Other acquittal	Total	
2005	8.598	1.638	4.577	774	15.587	29%
2006	9.919	1.698	5.165	249	17.031	30%
2007	10.360	1.660	5.024	182	17.226	29%
2008	10.245	1.497	4.844	200	16.786	29%
2009	11.146	1.669	5.535	233	18.583	30%

Table 13: Cracked trials in the Crown Court(source: *Judicial Statistics*) (Nr = Number(s))

Year	Total listings for trial	Reason for cracked trial					
		Total cracked trials		Defendant enters late guilty plea		Defendant pleads guilty to alternative charge, accepted by prosecution	
		Nr	%	Nr	%	Nr	%
2005	38.244	14.575	38,1%	9.105	62,5%	2.648	18,2%
2006	36.659	14.398	39,3%	9.157	63,6%	2.550	17,7%
2007	37.285	15.507	41,6%	9.707	62,6%	2.754	17,8%
2008	35.985	14.772	41,1%	9.223	62,4%	2.805	19,0%
2009	39.262	16.437	41,9%	10.451	63,6%	2.831	17,2%

Table 14: Ineffective trials in the Crown Court(source: *Judicial Statistics*)

Year	Total listings for trial	Total ineffective trials	Ineffective trial rate
		Number	Percentage
2005	38.244	5.216	13,6%
2006	36.659	4.571	12,5%
2007	37.285	4.511	12,1%
2008	35.985	4.169	11,6%
2009	39.262	4.926	12,5%

Table 15: Reasons for ineffective trials in the Crown Court(source: *Judicial Statistics*)

	Number	Percentage
Prosecution not ready	851	17,3%
Prosecution witness absent	1.040	21,1%
Defence not ready	867	17,6%
Defence witness absent	78	1,6%
Defendant absent/unfit	1.168	23,7%
Court administrative	922	18,7%