CITIUS, ALTIUS, FORTIUS – FASTER, HIGHER, STRONGER

WHAT WE CAN LEARN FROM ENGLAND AND GERMANY WITH REGARD TO THE MODERNISATION OF CRIMINAL PROCEDURE

SUMMARY

This is a summary of the final report of the project *'Citius, altius, fortius – Sneller, hoger, sterker. Wat we van Engeland en Duitsland kunnen leren in het kader van modernisering strafvordering'* ("Citius, altius, fortius – Faster, higher, stronger. What can we learn from England and Germany with regard to the modernisation of criminal procedure") commissioned by the WODC to the University of Maastricht, in particular to prof. André Klip, dr. Dorris de Vocht and dr. Christina Peristeridou. It concerns a comparative legal research of the practice in German and English criminal procedure. The study was conducted between June 2018 and March 2019 and aims at gaining inspiration for the preparation of the new Dutch Code of Criminal Procedure. Such inspiration can influence the choices made by the Dutch legislator in matters of legislation and policy. Special attention is paid to the following three aspects: the need for speedier justice (acceleration), the adaptation of criminal procedure to digital means (digitalisation) and the simplification of proceedings.

As far as the research methodology goes, a combination of desk and field research (observations and interviews) is used, where the knowledge gained from literature is enriched with lessons from the practice. The researchers have spent time in Germany and England attending trials and interviewing a variety of practitioners. Field research is of great importance in this study for two reasons: first, it is well known that legislation works always in the context of practice and second, mechanisms and solutions to problems are often spontaneously and organically generated from the practice irrespectively of legal frameworks.

The research is an explorative and descriptive inventory of the practice. It is not normative: questions regarding the compatibility of practices with principles and individual rights are not raised. This explorative character also entails that the results and suggestions are presented without assessment of their appropriate fit into the Dutch criminal procedure.

The report is divided into two phases: phase I where a general description of the English and German criminal systems is presented and phase II where we zoom in on the three central themes – acceleration, digitalisation and simplification. The results of phase I are presented in Chapter 2 whereby the results of phase II follow in Chapter 3. Our research concludes with observations found in Chapter 4, regarding good practices in achieving acceleration, digitalisation and simplification that could act as inspiration for the modernisation of Dutch criminal procedure.

Main findings of Phase I show how divergent criminal procedure in England and Germany is. While both systems abide to the usual procedural rights and principles (with some differences), the process unfolds quite differently. In England, prosecution takes place early in the process, where the defendant is charged quite soon after police

custody. Defining moment is that all defendants must enter a plea, of either guilty or non-guilty. If they plead non-guilty, the case will be prepared for trial. If he pleads guilty, the defendant is sentenced immediately. Thus, the English sort their cases – quite early – between those where the defence chooses to contest and those where the defence chooses not to contest. An overwhelming majority of cases end with a guilty plea (depending on the courts, 70% or 90%). The rest enter the English trial, a long and expensive process, where all evidence is given orally and quite extensively. Rules on evidence are a complex matrix and the level of orality is quite high thus several days, weeks or months may be required to finalise a trial. The English legal system is adversarial, meaning that it recognises parties, i.e. the defence and prosecution. Each party present their witnesses cross-examine each other's evidence and at the end the decision is taken by either a jury or professional or lay judges. Laymen participation in the English judiciary is a long-standing tradition and seen as a social duty. Lay judges are active in their role and are voluntaries in addition to their normal occupation (no remuneration). Important feature, next to the orality of evidence during trial, is the collegiality and cooperative culture of jurists. There are no career prosecutors or defence lawyers: most lawyers take up both prosecution and defence of cases, thus constantly altering roles in their daily professional life. This encourages cooperation between the parties, which often facilitates speed. Primary example in this respect is the Rule Committee, a soft law body composed from representatives of different actors (prosecutors, defence attorneys, judges, police officers *et cetera*) who decide on procedural rules of daily practice and solve actual problems that occur on the spot.

The German legal system is quite different. Prosecution takes place later than the English system which follows the legality principle for prosecution. After the indictment is ready it is admitted to an intermediate procedure to decide whether the case should enter trial (*Zwischenverfahren)*. The overwhelming majority of cases (about 95.5%) pass that test and enter trial. The typical German trial is also long and characterised by a high level of orality. Most witnesses must appear again in court, and the dossier is presented orally at trial. Laymen do exist in combination with professional judges but they remain passive. Defence attorneys play an active role during trial raising objections. Unlike English professional ethics, the German judiciary and lawyers are strictly divided into career-prosecutors, defence attorneys and judges each of them maintaining the same role. German criminal procedure enjoys a high level of orality but also truth-finding principle, i.e. judicial decisions must be based on a thorough examination of evidence which should be presented at trial but also depicted in the reasoning of judgments: judges must explain in detail both orally and in writing the reasoning of their decisions with reference to the evidence and their probative value in the judgment.

Chapter 3 delves deeper into the three main themes of the research, namely acceleration, digitalisation and simplification. The main acceleration mechanism in English law is the plea procedure: all defendants are asked to enter a plea early in the process and thus cases are sorted out early. Problems occur with incentivising defendants not to delay their guilty-plea too much, once resources are spent. If only one opportunity exists, then few will take it, whereas if too many opportunities exist as the case moves further most will choose the latest possible option (when all hope is lost). Hence, the earliest possible guilty-plea chance comes with a sentence discount, which is subsequently not as attractive at later stage. Other interesting mechanisms are the possibility to give a caution instead of prosecution for minor offences and the Single Justice Procedure, a mostly digitalised process where the defendant pleas online and a

single judge arranges a fine without a hearing. The latter is possible for specific offences, e.g. driving violations.

The Germans offer more accelerated mechanisms but these are not used frequently. A quick-trial, the *Beschleunigtes Verfahren*, for less serious offences, offers a quick and compressed trial lasting usually not more than a week from prosecution to verdict. With the *Verständigung*, a form of agreement, the judge (and not the prosecutor) can offer a sentence discount to the defendant should he choose to confess. The procedure takes place once the case has reached trial, all parties must agree, and a variety of formal requirements must be fulfilled. This procedure was altered legislatively with stricter requirements to control practice which was unofficial at that point and arguably quite prolific. However, both these acceleration mechanisms are used infrequently in practice. Especially for the *Verständigung* main reason is the strict requirements which make it unattractive. In this regard, the legislative input has not been successful. More mechanisms exist (e.g. *Strafbefehl*) however the most used one for the purpose of acceleration is one not intended for that purpose: conditional prosecution. Whereas Germany belongs to the systems with obligatory prosecution (legality principle), the exceptions are the Trojan horse with which the system can sort out cases early into the process. Thus, the prosecutor can condition the decision not to prosecute to some requirements, e.g. fine. This allows cases that would otherwise take time (e.g. financial cases) to be settled early; however, the lack of criteria for the decision-making and extensive judicial oversight can foster a culture of unofficial pressure to both sides.

Both legal systems have taken up major reforms recently to align criminal procedures with technological developments. In England the Common Platform is an ambitious project aiming at creating a single digital dossier for each case (with all evidence and motions), to which participants will gain access as the case progresses and enrich it with their documents (e.g. motions). The project is currently in progress, but some parts have been implemented. Other developments relate to virtual courtrooms and use of video links. The latter is already taking place extensively in England, especially in remand hearings. Concerns exist however with the quality of such testimonies as judges find the lack of physical presence influential for the assessment of the evidence. In Germany, a large and impressive project for creating a completely paperless digital workplace for criminal justice is underway. The aim is to create a single digital place for prosecutors, judges and court staff to build and work on case files. The software is truly impressive with all configurations necessary for a digital judicial workplace. This result is due to the decision to create it from scratch by a team of jurists and technicians, instead of purchasing existing software is made initially for non-jurists. While communication of defence attorneys with the court is also to become digital, more problems occur there with regard to the efficiency of the mail system and the increased security measures. Unlike the initial expectation that digitalisation entails less resources, the transition period requires actually more resources, investment and special managerial manoeuvring to persuade participants to support it. The Germans have taken the transition period seriously and are thus focusing on the long-term sustainability of the new situation.

Simplification of procedure relies on many parameters. We focused on certain elements that in our view encouraged (or discouraged) simplified procedures. The level of orality that is traditionally embedded for different reasons in both systems plays a significant role in spreading out trial sessions. In Germany, the interpretation of procedural

principles and rights has given extensive room to the defence in requesting new evidence and other motions during trial, to which the court must always take time to respond, thus delaying procedures. In England, on the other hand, the concept of casemanagement, i.e. how the progress of cases from investigation until completion is managed and by whom, has contributed to more oversight regarding efficiency that transcends stages and actors. The focus is not on what the prosecutor or the court staff should do, but the question 'what makes a case efficiently managed'. At the same time, the use of soft law collaborative bodies such as the Rule Committee in England, can facilitate communication and cooperation between participants, greater awareness of practical issues and their quick resolution.

Finally, Chapter 4 concludes this research with our main observations, i.e. a collection of reflective comments that could, in our opinion, facilitate efficiency in criminal proceedings. Implementing those in the context of Dutch procedure requires more research and falls outside the scope of our study. Furthermore, it must be born in mind that our research is merely explorative and thus we refrained from matters of principles and rights. Our observations are practical, but also theoretical. The most important observations are:

<u>Alternatives for a full trial:</u>

- **The possibility of alternatives to the mainstream procedure for settlement of cases and exits at different time points:** there should be a possibility sought for all cases to be settled in an alternative manner at the pre-trial stage. More opportunities for exiting the mainstream procedure should be built along the process.

<u>{Preparation of) the trial:</u>

- **Digital dossier (case file):** a single digital dossier (and not parallel systems) should be made that can be enriched as the case progresses and to which participants can have access.
- **Digital workplace:** a software allowing participants not only to view the case file but also to build motions and judgments should be created to enable a paperless workplace.
- **Software developed for and by jurists:** software developed by and for jurists ensures a user-friendly experience. The German software should be an example.
- **Attention to safety, sustainability and reliability of digital systems:** Digitalisation costs resources to safeguard safety from attacks, storage of data and long-term reliability (loss of data).
- **Transition management:** Transition to new ways of work is a stressful experience for participants of the system. Transition management is necessary to help people move along and not against the change.
- **Replacing paper procedure and thinking out of the box:** when digitalizing procedures replacing paper procedures should not be done automatically; some procedures are only required at the paper world. Thus an out of the box way of thinking is required to challenge the use of certain traditional procedures e.g. authenticity stamps.

- **Virtual hearings and video links use with care:** digitalizing court hearings is encouraged but with simultaneous attention to the impact on truth-finding process; more research is required there.

Concluding remarks:

- **Introducing flexible collaborative body such as Rule Committee:** such body can increase flexible problem solving of practical matters and foster an atmosphere of cooperation amongst different actors of the judicial system.
- **Introducing concept of casemanagement:** bring attention to how cases should be managed instead of how efficient the work of individual actors should be is suggested.
- **Efficiency as principles and defining efficiency:** efficiency should become a principle of the criminal justice system and thus be weighted with other principles and rights. Such internalisation shall facilitate also the definition of this concept which for now remains vague: what is efficiency, and for whom? What makes a trial or a procedure efficient? These are questions worth addressing.
- **Modernization, a joint enterprise:** change cannot be successfully superimposed on the participants of the judicial system. People should be heard, encouraged to assist and persuaded to support modernisation plans.