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Forensic psychiatry and psychology: The expert's position in Dutch criminal justice

Abstract

This contribution identifies the specific position of the Dutch forensic mental health expert and explains how forensic mental health expertise has been integrated into the Dutch criminal justice system.

It outlines the characteristics of the Dutch forensic mental health system in order to provide a frame of reference for international comparison. More specifically, the chapter sketches the procedure for and recent changes in criminal procedure. The chapter begins with a brief discussion of the historical roots of forensic psychiatry.

1. Historical perspectives

One of the first known psychiatric reports used as evidence in a Dutch trial is the one on Maria Meybeek. In 1780 she was put in the Pest House for a year, at the request of her husband, because she was out of her mind. In 1783 she killed her child, out of love as she said, as she had heard that 'wijl dat kindje stom was, men het soude swavelen of iets doen, dat sy gev. daarom dagt, dat het beter was, dat sy gev. het maar dood maakte' (as the child was dumb, it would be sulphured or have something done to it, and that she – the accused – therefore thought that it was better for her – the accused – to kill it). At the trial, medical reports about her that had been made in 1780 were produced. On that occasion a surgeon had declared that she was not in full possession of her mental faculties, and 'daarenboven mat zwaarmoedige gedagten behept, weshalve dezelve bewaring nodig heeft' (in addition she was prey to depressive thoughts, so that she must be detained). Thanks to this report she was sentenced, on December 9, 1783, not to death but to 50 years in the Spin House (Faber & Krikke, 1977).

In the course of the nineteenth century, interest in forensic medicine began to grow. The appearance of forensic reports in trials in the Netherlands was not fortuitous, but rather a sign that judicial medical science was gaining ground, be it ever slowly.

At the turn of the century there was a great deal of controversy in the Netherlands about the responsibility of the insane. The short periods – sometimes too short – that lunatic prisoners spent in lunatic asylums made felt the need for more adequate internment of criminal lunatics and lunatic criminals.

At the beginning of this century, optimism about the contribution psychiatry might make, also influenced the criminal justice system. The expectations culminated in a particular case, the Papendrecht case:

In 1907 Garsthagen complained in a newspaper about the brutal police behaviour of which he was the victim when he was accused of having broken a window pane of a police officer's house. Garsthagen was accused of libel. All the witnesses wanted to testify that maltreatment by the police was common practice in the town of Papendrecht. The result was a judicial proceeding in several stages. Three distinguished psychiatrists (G. Jelgersma, professor of psychiatry, J. van Deventer, Inspector of the Lunatic Asylums, and M.J. van Erp Taalman Kip, medical superintendent of a lunatic asylum in Arnhem) assessed not only the accused Garsthagen, but also 33 witnesses. In their report the experts describe the results of their assessment of the accused and of 10 of the witnesses. The experts considered all the subjects to suffer from a mental disorder.

The public prosecutor was pleased with this result and hoped that psychological and psychiatric assessment would gain more influence in the criminal justice system in the near future.

Garsthagen's lawyer (J.A. van Hamel) was enraged, analyzed the report in detail and tore it in pieces at the court session.

As a result of this case, which attracted public attention in newspapers, professional journals and even in Parliament van Hamel was able to prevent the increasing psychiatrization of the criminal justice system (Janse de Jonge, 1982). Thereafter, a distinction in forensic expertise became clear: the criminalistic approach as opposed to the (forensic) mental health approach, or in other words, offence-oriented expertise as opposed to the offender-oriented expertise. A brief look at some aspects of the Dutch system will help the reader to understand the distinction better (see Zeegers & Krul-Steketee, 1987 for a more detailed account of the Dutch forensic mental health system).

2. Characteristics of forensic mental health in the Netherlands

Relatively mild climate of criminal justice

'Prisons in the United Provinces are so quiet and most of them are so clean, that a visitor can hardly believe he is in a gaol.' (John Howard, The State of Prisons, 1777, when he visited the Netherlands and its penitentiaries.)

Dutch criminal justice is internationally renowned for its relatively mild penal climate (Hulsman, 1978; Kelk, 1983). A comparison between the detention ratios of a number of countries reflects this mildness. The average number of detainees per 100,000 inhabitants differs remarkably. The USA has the highest score with 440 and the Netherlands ranks last with 42. In recent years, however, the score for the Netherlands has increased drastically.

The participation of social workers, probation officers and forensic mental health experts, along with a long-standing tradition facilitate a humane approach and relative tolerance (Koenraadt, 1991). Relatively short prison sentences and the use of conditional sentences have also contributed to the low prison population.

The mass-media support this relative mild climate. In the newspapers, no offender's name, but only his or her initials are published. He or she remains anonymous in the press.

Dense network of forensic mental health facilities

In-patient and out-patient facilities are available for treatment of mentally ill offenders. Nevertheless, general mental hospitals are reluctant to admit or commit forensic mental patients or patients with a background to the criminal justice system.

Probation, aftercare, treatment for addicts, social welfare, district forensic psychiatric service, work rehabilitation, and specialized hospitals for mentally ill offenders create a differentiated network of facilities for assessment, counselling, crisis intervention and treatment of forensic mental patients or mentally ill offenders.

Independent and impartial forensic mental health experts

In the Netherlands, pre-trial assessment in contrast to the situation in several other countries presupposes, that the behavioral experts should act impartially and independently and not work directly for either prosecution or defence. This means a battle of experts seldom takes place in the courtroom, whereas such conflict is commonplace in the adversarial system. Disagreement between the experts remains possible of course, especially when a second or third expert presents an opinion (Kelk, 1990).

In the assessment area we are seldom – in comparison with the US forensic mental health system - confronted with the problem of subjects malingering. Malingering is

relatively scarce in the Dutch system because substantive law seldom conflicts with psychiatric learning.

No incompetency to stand trial

In the Netherlands we do not, as a practical matter, consider defendants incompetent to stand trial. There is a provision in the law recognizing possible incompetency that is rarely used. Every defendant has the right to stand trial.

Sliding scale of responsibility

In the course of this century, criminal law has changed to reflect a standard of degrees of responsibility in conformity with psychiatric and psychological knowledge. In the Netherlands, we do not merely assume a dichotomy between irresponsibility and responsibility, but instead consider a large number of gradations between the extremes.

Small scale forensic mental hospitals

The average number of patients in a Dutch forensic mental hospital is 85. Although this number is increasing it remains rather low, especially when you compare it with the huge institutions in e.g. the USA. The total TBS population is 450 patients. (The TBS is a penal sanction for those mentally ill offenders who have committed a serious offence. The TBS is imposed for two years and can selectively and permanently be extended with one or two years (Dellen & van der Veer, 1992)). This small population per institution is a necessary condition for use of a sociotherapeutic approach, instead of the merely custodial approach found in many other mental health systems.

Dutch forensic mental hospitals typically house only one patient in a cell, as in the prison system. Dormitories are not used anymore (Downes, 1988).

Theoretical background in Utrecht School

After World War II three distinguished professors in the Law Department of Utrecht State University undertook an intense joint effort, both scientifically and as practitioners to reform Dutch criminal law. W.P.J. Pompe, specialized in criminal law, P.A.H. Baan, specialized in forensic psychiatry, and G.Th. Kempe, specialized in criminology integrated theory and practice on the one hand and law and social sciences on the other, in their efforts to humanize Dutch criminal law (Léauté, 1959). They sought to promote special attention to and guarantees for, the defendant as an individual. They wished to affect both the defendant's subjective experience of criminal justice and his status as a subject with his individual rights.

Intensive pre trial assessment

The Psychiatric Observation Hospital of the Ministry of Justice was established in Utrecht in 1949. It is an institution where defendants who are suspected of serious crimes can be observed and psychiatrically and psychologically assessed for seven weeks in multimethodical and multidisciplinary approach (Beyaert, 1991).

A categorical diagnosis such as classification as through DSM-III-R is not sufficient for a valid forensic psychiatric diagnosis (Mooij et al, 1991). Instead a real individualisation of specifically an explanation of the link between the possible mental disorder and the commission of the crime is necessary.

Other than residential observation and assessment, the majority of expert examinations of subjects take place on an out-patient basis.

The forensic mental health system separates pre-trial assessment and imposed treatment

As a consequence of the Montesquieu's 'separation des pouvoirs' the assessment and treatment of mentally ill offenders are strictly separated and take place in different institutions.

Attention for the legal position of inmates

In the course of this century a remarkable change took place. At the beginning of this century the psychiatrist was introduced into the criminal justice system to protect the defendant against the power of the judge. In the seventies and eighties, however the legal professionals were more and more called upon to support and protect the patient or defendant in his contacts with psychiatrists.

In recent years, the juridification of the mental health system and the improvement of the legal position of inmates have been particularly limited.

Academic chairs of forensic psychiatry are located in the law schools

The location of the chairs in law schools enables forensic mental health experts to inform the students of law in an early stage of their study of the importance of forensic psychiatric and psychological issues in criminal law (Koenraadt, 1990; Jaffé et al, 1993).

There are no chairs of forensic psychiatry in the medical schools.

Interdisciplinary exchange

Professional exchange has existed since the beginning of this century. In several organizations, state committees and professional journals psychiatrists, psychologists and lawyers work together. The Psychiatric Juridical Society originated in 1907 and is still a well attended forum for the exchange of multidisciplinary information.

Modest position of forensic psychology

Unlike the situation in, e.g., Germany, the incidence of forensic psychological experts testifying in Dutch courts is rather small (Kury, 1987). The frequency of such testimony is changing rapidly, especially because the psychological expertise recently became one of the preconditions for imposing a TBS-measure.

TBS-hospitals mainly treat patients with personality disorders

When I visit forensic mental hospitals abroad, the large number of schizophrenics in those hospitals often surprises me. On the other hand, in Dutch TBS-hospitals you mostly meet psychopaths or patients with personality disorders. The percentage of TBS-patients in the Netherlands suffering from psychosis is, however, increasing.

Solid historical and socio-cultural roots

The division of society into blocks (Catholics, Protestants, socialists, liberals) is known in the Netherlands by the term 'pillarization' (verzuiling). It refers to the division of society into several so-called pillars, i.e. vertical blocks, each encompassing an integrated complex of social institutions based on religious or secular principles, although the degree to which religion or ideology imply differences among institutions is not uniform (Moerings, 1983).

Pillarization has not been limited to politics and religion, but has permeated the whole of society: political parties, educational institutions, radio and television, employers' organizations, trade unions, sport and leisure associations, health organizations.

Pillarization was no barrier to cooperation: on the contrary, coalition and co-operation are essential precisely because no single pillar can claim an absolute majority in Parliament (Moerings, 1983).

The fifteen factors mentioned above provide a more specific picture of assessment and treatment in Dutch forensic mental health and offer a frame of reference for international comparison.

3. Two kinds of forensic sciences

In his historical study of the significance of early 19th century psychiatrist J.C.A. Heinroth in forensic psychiatry, Otto Marx

(1968) says of forensic expertise: 'A Gutachten, or appraisal, includes a very detailed and concise life history and personality assessment, as well as a thorough analysis of the committed act. This evaluating method has been much more developed in Germany and countries which adopted Roman law. For there, criminals are judged by their motivation and personality, rather than by the crime committed, as is the case in Common Law countries.' In the Netherlands the importance of the accused's personality is reflected in the forensic mental health approach. In this respect an important distinction governs forensic experts: the criminalistic approach is employed for gathering evidence, for finding and identifying the offender, whereas the forensic mental health approach seeks to describe the accused as a person (Mooij et al, 1991). The former is the offence-oriented forensic discipline, the latter the offender-oriented. In order to maintain a clear independent and impartial position, the forensic expert must be aware of this distinction. Both kinds of experts have to fulfil the conditions of criminal law and procedure as well as those of professional ethics.

The offence oriented approach is best represented by the Forensic Laboratory (see the chapter by E.R. Groeneveld; Nijboer, 1991), the offender oriented approach is represented by the observation and assessment in the Pieter Baan Centre.

4. Residential observation and assessment

The Pieter Baan Centre conducts mental health evaluation of detainees who are thought to have committed a serious crime. The Pieter Baan Centre is equipped for forensic behavioral evaluation, but has very few facilities for treatment. The total capacity of the Centre is 28 detainees. The intensive observation and assessment of a detainee take seven weeks. In this period a multidisciplinary team compiles an extensive report for the court using multiple methods

Scheme

	Criminalistics	**Forensic Mental Health**
Applied science	Physical and/or medical sciences	Social and/or medical sciences
Objects or subjects	Things or persons as objects of investigation	Persons as subjects of investigation
Position concerning evidence	Investigation is meant for the purpose of evidence	The investigation should remain outside of the evidence area
Design of investigation	$n \geq 1$	$n = 1$
Method	Objectifying Random sampling	Individualizing Anthropological
Centres d' excellence	Forensic Laboratory for Forensic Pathology	Pieter Baan Centre
Approach	Hermeneutic	Non-hermeneutic
Focus on	Identification	Personality/ Persona
Mode of conclusion forensic report	Probabilistic In quantitative terms	Gradual In qualitative terms
	Offence-oriented	**Offender-oriented**

(Mooij et al, 1991; Koenraadt, 1992). Such a report, approximately 50 type-written pages in length, contains the following parts:
- a report of the detainee's social environment, proposed by a social worker;

- a report of the detainee's actual behaviour, proposed by one of the socio-therapists of the ward;
- a report of his/her psychological assessment, including interviews and psychological testing;
- a report of the detainee's physical condition by a general practitioner and a neurologist;
- a report of a psychiatric assessment.

The report, in which jargon must be avoided, ends with a conclusion concerning the detainee's degree of responsibility and with a recommendation with respect to the possible need for mental health intervention or treatment in order to prevent recidivism.

5. New legislation and the position of the forensic mental health experts

In September 1988 the new Act governing the TBS came into operation.

One of the new conditions for imposing TBS is the availability of a recent forensic mental health report written by both a psychiatrist and another behavioral expert, who in most cases is a psychologist. When the authorities believe that TBS should be extended, the staff of the Pieter Baan Centre often act as the reporting expert.

When the extension results in a detention that exceeds a total duration of six years, or a multiple of six years, the new law requires as a pre-condition a recent, specific, dated and signed report by a psychiatrist and a psychologist, (either a joint report or one by each of them separately). The psychiatrist and psychologist must not be affiliated with the institution where the patient is in treatment at the time they compile such an assessment and report.

The most important changes in the law regarding the forensic experts' role in the mental health system are the requirements for:

a) a recent (not older than 6 months) multidisciplinary report as a prerequisite for imposing or for selectively extending TBS;

b) a second opinion by external experts not affiliated to the treatment institution in cases where the authorities seek to extend the TBS;

c) the co-ordinated assessment of detainees, rather than the previous hierarchical roles of the forensic experts, with the psychiatrist being the chief expert. In the Pieter Baan Centre the actual forensic reports are signed by both a psychiatrist and a psychologist.

The expert plays no part in the decision-making process itself. In the Netherlands, however, there is one exception to this rule. In the Arnhem *penitentiary* court of appeal a few psychiatrists and psychologists entered a new role by becoming members of the court itself (De Smit, 1983; Van de Loo, 1993). These experts, sitting as aides to the judges, are considered qualified for this task by their forensic mental health training and their professional experience. This court, that is only involved in matters concerning imprisonment (after the verdict and after the beginning of the detention) consists of five judges and two councils, which are either psychiatrists or psychologists. Since 1975 this court has adjudicated appeals in cases of conditional discharge. (After two-thirds of the sentence has expired the Ministry of Justice, depending on, e.g., positive adjustment to the prison system and favourable personality characteristics, can conditionally discharge detainees). Recently conditional discharge became a right for the detainee and, as a result, appeals before this court are now rare. In 1988 a new task was added: appeals of extensions of the TBS. This additional assignment changed the task of this special court but the change made outsiders into insiders. The expert's knowledge and skills of psychiatry and psychology became part of the court itself (De Smit, 1983).

6. Some final remarks

In conclusion I want to stress a few points:

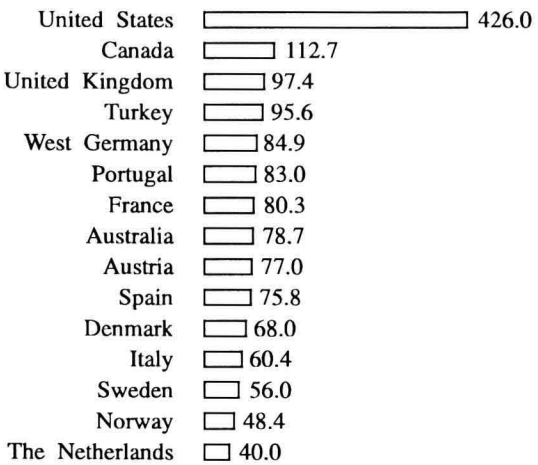
Internationally we might come to the conclusion that in one country they bake potatoes in oil and in an other they bake them in butter and they nevertheless both taste marvellous. The question remains how we can learn from other jurisdictions. International exchange is especially fruitful for the training of forensic experts, so that they may learn the pros and cons of their national system (Jaffé et al, 1993).

Because we are inevitably dealing with deep rooted traditions comparative history of forensic psychiatry and psychology might offer both a thorough understanding and practical insight (Smith, 1989).

Appendix

A comparison of rates of imprisonment in different countries

(Rate per 100,000 total population)



Based on The Sentencing Project, Januari 1991, and the Bureau of Justice Statistics; the Adult Correctional Services in Canada, Canadian centre for Justice Statistics, 1989-1990; Council of Europe, september 1989.

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