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# DEVELOPMENT OF THE PENAL LAW IN THE NETHERLANDS<sup>1</sup>

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W. A. BONGER<sup>2</sup>

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## *Introduction*

The French penal code which was introduced in the Netherlands during the French rule (1810 to 1813) prevailed until 1886, during which time, however, several important changes were made. The most outstanding of these were, the introduction of the cellular prison system (1851), abolishment of corporal punishment and branding (1854), extension of authority to the judges whereby they could acknowledge extenuating circumstances and reduce punishment in those cases (1854), and abolition of capital punishment (1870)—the last execution took place in 1861. The code "d'instruction criminelle", also introduced in 1810, was in force until 1838. It was then replaced by a National Statute Book, which, however, closely followed the French code. With the restoration of independence in 1813 the French penal law was still maintained but the verdict by jury was abolished and since then only official judges can give the verdict in criminal cases. I may state without fear of contradiction that this has proven almost completely satisfactory and there is, therefore, no wish for reënacting lay jurisdiction. The statute book of penal procedure has been replaced by a new one (1926), which, in a technical juridical sense is more coördinant with modern times. The character of inquisition which the preinvestigation has always used remains, but in a milder degree than before.

The discontent with the prevailing penal law grew with the years. This at last led to the new law of 1881, which went into effect in 1886 and is still in force. Smidt and Modderman, Ministers of Justice, are largely responsible for this great national work.

The opinion from a technical juridical standpoint of the Dutch penal law (as it was incorporated about 50 years ago) differs from the criminological. Looked upon from the first point of view one cannot but praise it. The law is clear, concise and well constructed. In practice it has well fulfilled its purposes and very little criticism is

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heard from lawyers. The opinion of the criminologists is different: When the penal law was introduced it was in many ways old-fashioned. It is a tragedy for a man to be born on the border of two periods: likewise with any law or code. The new trend in penal law had penetrated too little in the Netherlands to leave its mark on their code.

As can be expected, philosophically, penal law is based on revenge (Doctrine of Free Will). At the same time it acknowledges the other purposes of punishment. This, however, it bears in moderation; the adage of Professor Modderman, which he so often quoted, being: "The punishment grief, not harm." Corporal and capital punishments do not appear. Life imprisonment is applied only for murder. The maximum temporary imprisonment is 15 years, though in some instances it can be increased to 20 years. *For all offences, including murder, the minimum imprisonment is one day and the minimum fine \$0.20.* In this respect the law was very modern; to my knowledge, up to now, there are very few codes which give the judge such freedom. He may take into consideration all circumstances, whatever their origin, for the determination of the punishment. This is widely practiced. Although, during the exchange of thoughts while formulating this book of law, severe objections were made to these radical provisions, they were quieted during the course of execution: the Dutch judge proved worthy of the great confidence placed in him. From the beginning the law accepted "conditional liberation" but the provisions were so encumbered that practical application was hardly possible. This much for the credit of the Dutch Penal Law.

Now the debits: according to the existing provision of the French penal law, the crime of a lunatic, being completely irresponsible, was not imputed and he was exempt from prosecution. In such cases the judge had authority to place the culprit in an insane asylum for a maximum of one year, after which time further confinement was left to medical authorities. For partial-irresponsibles (Psychopaths) the new code had no provisions, because of the limited scientific knowledge at that time.

Conditional condemnation, which was meant to play such an important role in the practice of penal law, was completely omitted. The regulation of fines was entirely unsatisfactory. Many offenders were not fined as a punishment. In cases where there was a fine the maximum was so low the judge could not reckon with the financial condition of the culprit. Confiscation of property was not possible and there were no arrangements to have fines paid in installments;

consequently many of the poor did not pay fines but endured imprisonment.

The most important part of the code of 1886 is the regulation of imprisonment. It is very simple. Professor Modderman considered this one of the greatest assets of the new penal law! How far our ideas differ now-a-days from theirs, for we ask the greatest differentiation! The first five years or less are spent in solitary confinement, after which they are grouped. The great majority of prisoners is confined in solitude—the average at any given moment of the total number of prisoners, serving more than five years is about 140 (not a great number for a country of over 8 million inhabitants.) The solitude is absolute. The prisoners do not get in touch with each other at work or even Divine services. Labor is compulsory but is done only in the cells. During the open air recreational period, also, the prisoners are not allowed to communicate with each other. In the corridors, etc. the prisoners wear a mask. Instruction is given individually to those who need it. A restricted library is available. From a hygienic standpoint the prisons are satisfactory as is the food which is simple, without much variety. Educational exercises are completely lacking. Very few prisoners when they leave their confinement are better than when they entered. They are less equipped to face life than before.

Since the eighties criminological science has made great advances and has shown her blessed influence in Holland. The criticism of the penal law of 1886 has brought about a closer coordination with the new views of later years. In this article a short revue of these changes will be given.

#### *Law for Juveniles*

The first important change was the *Penal law for children and youths*. The regulation as it was in the law of 1886, principally imitating the French law, was absolutely inadequate. The greater criminality of youths—a consequence of an increasing industrialization of the Netherlands—made new laws imperative. According to the old regulations a child under ten years of age could not be prosecuted; a child between the ages of ten to sixteen was investigated to see if he had acted with discrimination. If in the opinion of the judge this was the case, the child was punished according to normal rules, the maximum of the punishment to be lowered by one third. If the child had not acted with discrimination, no punishment was applied and he could be sent to a state educational institute until his eighteenth year. This latter also applied to children below ten years of age. The state

educational institute at those times was more of a prison than an educational institute.

The so-called "Child Laws" (1905, introduced in 1901) also made complete changes in civil-judicial relations of children who threatened to become criminal: (i. e. removal of parental authority, regulation of guardianship, etc.). The most important is that the judge—who, since 1921, is a special "child" judge, and is also in charge of the civil-judicial child-jurisprudence—can put aside the question of guilt and responsibility and has only to look for the best precaution for the child and society. This also may consist in a punishment. If the child is not yet sixteen years of age, the judge can return it to the parents without punishment—through which rule the principle of the code that every culprit must be punished is broken. In the nature of things this provision is not often applied, because the home often lacks much and proves a very bad environment for the child. The most applied measure is that the child (under 18 years) is not punished, but "is put at the disposal of the government", which means in practice that the child will be educated at the expense of the government in a governmental or private institute till, at most, its majority (21st year). If the judge does not take this measure, he is also authorized to indict a short prison term (maximum one year, minimum one month) which is endured in a special institute (house of correction). It must still be mentioned that since 1921 the judge has also the authority to put the criminal child "under supervision", an absolute civil-judicial measure, where the child is put under the supervision of a specially appointed guardian.

The procedure for penalizing children and youths deviates from the ordinary one very much. The whole case is in the hands of one judge (the children's judge), whereas in the normal procedure the duty of the judge-police officer (judge in preinvestigation) and of the judge in the final investigation (trial) are strictly separated. The discussion of the case is not public but is only in the presence of the defendant, the parents, and eventually the guardians. The trial by the children's judge does not resemble that of the regular judge—it is not so much a judicial procedure as a deliberation between judge, public prosecutor, and defendant to see what is best for the child and for society.

The child laws have in general been satisfactory. Their shortcomings are not so much in the regulations, as in that the funds—certainly in these times of depression—are not adequate for the best application. The results of the laws are conciliatory. In rough figures

it can be said that two thirds of the cases are successful. The younger the children when they are taken from a bad environment, the better the results. Of those that came to the hands of justice before their 14th year, 7% failed totally, of those 18-21 years of age 29%, of the first group 67% succeeded completely, of the latter 53%.<sup>3</sup>

### *Conditional Condemnation*

The second important change in the penal law of 1886 was the introduction of conditional condemnation (1915), especially to avoid the fatal short prison terms. A system was chosen combining some elements of the French and others of the English system. The judge delivers judgment—not above one year—but at the same time stipulates that the punishment will be suspended. The general condition for every case is that the condemned does not commit another crime in the probationary period—maximum three years. Moreover, the judge is authorized to inflict “special conditions” which are not allowed to restrict religious or political liberty. The most frequent special conditions are, in practice, restoration of damages inflicted through the indictable fact, prohibition as to living in a certain place, and abstinence from alcohol. If the condemned violates one or more conditions the judge will judge anew if the punishment will be executed, or not. The supervision for the fulfilment of the conditions is in hands of the Public Prosecutor, but the judge can appoint a special functionary or a society or institute dedicated to such purposes which will supervise closely and will extend help and aid to the condemned. The judge often falls back upon this authority. We revert to this later. Besides the conditional condemnation, the judge can inflict a fine, a conditional fine, or he can make the inflicted punishment partially conditional and partially unconditional. The latter is made possible since 1929. The institution of the conditional condemnation has become, already, very well known, although it ought to be applied more often in order to have a better chance of success. The number of cases per year is 1600 to 1700, or about 8% of all condemnations. The success of this institution is unmistakable, 80-90% of the cases having favorable results.

With the same law introducing conditional condemnation changes in the regulation of conditional liberation were made, so that since 1915 a report of every convict who had been in jail for at least 9 months and who had undergone two-thirds of his term was made by the authorities concerned to the Secretary of Justice, about his chances

<sup>3</sup>See explanation in my “Introduction to Criminology” (1932), pp. 126-8.

for probation, eventually accompanied by a proposition for conditional liberation. For this, conduct in jail is of no great importance—the greatest criminals behave quite well—but the chance for a good conduct in society. The Secretary of Justice invokes expert assistance and gives his decision. To the general condition—that the conditionally liberated convict does not commit another crime and does not misbehave in any other way during his period of probation which is one year longer than the remainder of the condemnation—the Secretary of Justice can still impose special conditions, in the same manner as mentioned above for conditional condemnation. Also a special supervision can be established to give aid and help in the same manner as with conditional condemnation. In cases where one of the conditions is violated by the conditionally liberated convict, the Secretary of Justice has the power, but is not obliged, to withdraw the conditional liberation.

The percentage of those who can be liberated, according to law, is about 20%. The results can be said to be satisfactory. In round figures about 80% of those liberated pass their probation period successfully.

For a very long time there has existed, in the Netherlands, private institutes (one being more than a hundred years old) whose object it is to look after ex-convicts, to organize cell visits, etc. These institutes have adjusted themselves more and more to modern ideas of penal law and are the channels for probation. They are organized by well-meaning, scientific laymen, and are assisted by probation officers; the costs are partly paid out of its own resources, but mostly by the Department of Justice. In the Netherlands probation has been incorporated in the law and is primarily charged to these institutes. The religious discord in the Netherlands is, unhappily enough, very great.<sup>4</sup> Every important church organization (Calvinists, Roman Catholics, etc.) has its own institutes. There is also a very large neutral organization. The drawbacks of this splitting up is partially neutralized since these institutes are organized into a "probation counsel" for each district, where they discuss together the different cases and divide the work.

The work, discussed above, involved with the conditional condemnation and the conditional liberation (supervision, aid and help)

<sup>4</sup>In 1920 there were—the last known figures—over 300 church affiliations in the Netherlands. Happily enough not all are concerned with probation. The number not belonging to a church organization (primarily unbelievers) is also very large; in 1920 being about 8%. Their criminality, however, is very small (see my book "Introduction Into Criminology," p. 179 v. v.); they do not form their own society.

is generally left to these institutes. They have still another very important task to fulfil, the so-called reporting, i.e. the advice to the judge about the person of the accused, his antecedents, his mode and conditions of living, etc. The modern judge needs more and more knowledge of the person he has to judge, in order to fulfil his task properly and justly. Above mentioned institutes see that the judge, in case he wishes, receives a report on the accused. Special societies exist to report youthful criminals.

### *Fines*

In 1925 a far reaching change took place in the provisions about fines. The drawbacks of the existing regulations which were mentioned before have been practically wiped out by the new regulations. For almost all crimes the judge is at liberty to inflict a fine instead of a jail sentence. Only very great crimes (i.e. where more than 6 years in jail is set as maximum) are exempt. The maximum for small crimes is fl. 5000.- (\$2000.-) for greater ones fl. 10.000.- (\$4.000.-) and can eventually be paid in installments. The fine is based on the wealth or income of the condemned and only in case of obstinacy or total inability is it replaced by a jail term of, at the most, six months. This regulation has proven very satisfactory and the judge often uses this means, i.e. to impose a fine instead of a jail term. Twenty years ago 50 to 60 of all 100 condemnations were jail terms. At present they do not run much over 30, whereas the cases of fines have risen from 40 to well over 65. Fines are collected very thoroughly; consequently arrests as substitutes are used very little. Much unnecessary grief has been obviated in this way, the unsatisfactory influence of a short jail term prevented, and last, but not least, money has been saved.

After conquering many obstacles, a changed law for the insane criminals was made in 1925, namely the "psychopaths law" (introduced in 1928). A real passion was incited during the origination of this law, and the law itself does not satisfy completely. In the Netherlands the reforms of the penal law were, in general, viewed from a practical standpoint and theoretical foundations were left aside: all parties worked together. In Parliament the Calvinists voted only against the Conditional Condemnation, as their principle was revenge. With the introduction of the "psychopathic law" the Secretary of Justice, who was a Calvinist, was able to put over his idea that a partially-responsible person (psychopath in a stricter sense) always had to be punished first, before a medical examination could be started.

The rule is, in principle as follows: Complete irresponsibles (lunatics) will, of course, not be punished, but can be condemned to an insane asylum. The judge can at the same time stipulate, but only if the public order thus requires, that the patient is to be placed "at the disposal of the government" which means in practice that he cannot leave the asylum without the consent of the Secretary of Justice. The disposal period is two years, but can be prolonged by the judge each time for another two years. A dangerous insane criminal can thus be confined for the rest of his life.

Partial irresponsibles (psychopaths) may be punished normally or may be put at the disposal of the government. In the latter case, however, they must be condemned first, as mentioned above. There are judges who disapprove of this provision, and they circumvent it by giving a conditional condemnation, thus making the "revenge punishment" illusory! The term is two years also, at the maximum; the Secretary of Justice can end it sooner be it conditional or unconditional, and the patient can be put at liberty. After termination of the first two years the judge can always prolong it another two years. Here too, life long internment is possible.

About the practice nothing much can yet be said, because the laws have been in operation such a short time. One thing, however, has been already shown; the number of criminal psychopaths is much larger than was estimated, and the law, in its execution, is quite expensive (building asylums, etc.). Consequently there has been adopted a law (December, 1932) which, in order to curtail expenses, greatly restricts the working sphere of the "psychopathic law" of 1925. As happens so often, here to, economy will receive wisdom, as psychopaths are very harmful to society.

A second experience is that, among the psychiatrists, there must be specialists in this field, who besides their psychiatric knowledge must have a thorough sociological understanding; so-called "social psychiatrists."

Finally there are still two important laws to be mentioned which were incorporated in 1929 but which, sadly enough, are, for financial reasons, not yet put into operation. The State economizes, but Society must bear the burden. The first law introduces the "young men's prison," of which the State of New York gives a first example in its Elmira Prison, which later, in a changed form, was followed by England in her Borstal Institutions. The Dutch law gives the judge the authority to send young men between 18 to 25 years of age, who have committed a severe crime, to the young men's prison for at

least one and not exceeding three years. The prison will, of course, be pronouncedly educational. The cell system goes completely into the background, and a selected and limited system of relationship into the foreground. From the favorable results obtained elsewhere with such a prison, only good is to be expected of it in Holland.

The second law (1924), bearing upon professional and habitual criminals in the "preventive detention law." In the Netherlands it was shown very clearly that the existing penal law was absolutely inadequate to deal with this dangerous class. Aside from the somewhat complicated details, the regulation is based upon the fact that the criminals who have already three condemnations, totaling at least eight years imprisonment (convictions up to six months do not count) may with their next condemnation (at least one year) be taken into consideration for preventive detention which starts after termination of sentence. The judge must find this measure necessary to prevent other crimes and just in relation to prevailing circumstances. The length of preventive detention is at least five years, at most ten years: conditional liberation by the Secretary of Justice is possible at all times. The "detention" has to be in a special institute to be erected for this purpose. It does not bear the character of a punishment.

### *Conclusion*

Looking over the whole development of the Dutch penal law, we may have reason for satisfaction. Through partial changes we have succeeded in accomplishing some necessities urged by criminology, and, although the technical juridical aspect of our penal law has suffered, this is only a *schoenheitsfehler* (beauty fault) as our neighbors on the East would call it. One has to submit to this, for there is not a particle of a chance that a new General Part will be made soon. The main factor is that we have in Holland a group of regulations which are generally in accordance with our times and with which satisfactory results can be obtained in practice. Much is still lacking in the execution of the laws. We have too few people who can guarantee it. Our prison help has too little schooling, the ranks of our probation officers are too small, and incompetent. Most of all is the *nervus rerum* lacking,—the money—a lack which accounts for the non-execution of two of our most important laws, and the insufficient administration of another.

The most feeble point in the Dutch system is the regulation of ordinary imprisonment. Five years of cell confinement as severely carried through as in our country is much too long; the maximum

ought not to be longer—according to my opinion—than six months. Instead of long solitude we ought to have a system of selected and restricted relationships, with isolation during the night, combined with modern factory work or work in the fields. In such a system a certain amount of educational work can enter the picture.

It is to be feared that such a change will not be effected very soon. Thoughts of revenge and financial difficulties cause much opposition. Yet some few little steps have been taken in that direction. In the first place: the prison direction has the power to allow some deviation from the strict system to prisoners in the form of a favor (decorating a wall, keeping a bird, growing a beard or hair, etc.). In the second and most important place: the Secretary of Justice has—according to the law of 1929—the power to determine that prisoners can be brought together for certain purposes (work, instruction, gymnastics, etc.). The execution of this power affords in most cases expenses of alteration, etc. Some prisons were completely inadequate and had to be replaced by new ones. In short, in these difficult times, there is little chance for early realization.

The fear that modern criminological ideas would increase crime, has proven utterly unjustified because the new trend is not “sentimental” as some of its opponents state but is thoroughly based on the knowledge of mankind and society. Since 1896 (beginning of criminologic statistics) crime has met with a constant decline. Since that year up to 1915 crime diminished about 35%, from 1915 to 1919 (war period) it rose about 80%<sup>5</sup> only to decline again to the pre-war level. Sexual crime has remained very high. This favorable decline is partially due to our modern penal law policies, but primarily because the great majority live under better social conditions than formerly. The material level has risen considerably; housing conditions are better, working hours shorter, education improved, civilization increased, alcoholism very much declined. This decline, occurring in full freedom, is enormous. A hundred years ago the consumption per capita was about 11 liters (approx. three gallons); fifty years ago the consumption of 50% alcohol was about nine liters; today, a little over two liters! Aggressive crime, caused largely through alcoholism, has diminished very much in the last 30 years, ill treatment, 28%, refractoriness, 40%, and qualified ill treatment, 58%! The momentary crisis causes again a rise of crime due to economic motives; but up to now much less than could have been expected in comparison with

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<sup>5</sup>For details see my “Criminality of the Netherlands” in the periodical “Men and Society,” VI 1930.

former experiences.<sup>6</sup> Unemployment insurance and other extended care of the unemployed is the reason for this increase.

Criminality in the Netherlands is, in comparison with other countries very favorable: only one figure suffices: *about once every two years is somebody sentenced to life imprisonment*. This also agrees with the economic and social level that has been reached. I conclude with expressing the wish that the present crisis with its terrible consequences will soon come to an end, and that we can go ahead to fight crime with full force, first by prevention of crime, and secondly by efficient treatment of criminals. May that which has been achieved be a spur to go on in the future—Forward!

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<sup>6</sup>See my "Criminality and Economic Conditions," Little, Brown & Co. Boston, 1915, p. 566 v. v.