

PŘEDNÁŠKY
ZAHRA NIČNÍCH
PROFESORŮ

*Alternatives for detention
and punishment*

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1.1
Introduction

The term alternatives for detention covers a wide range of possibilities to avoid detention. It is often forgotten that in cases of an offence there are two parties: the suspect /offender/ and the victim /the injured party/. Especially in penal cases the state takes the responsibility to handle the case. The state, not the victim, is responsible for identifying, prosecuting and punishing the offender. The principal parties are the offender and the state, each represented by others who speak for them. What about the victim, the injured party? He stays behind, hurt, with feelings of frustration and powerlessness.

But society has to cope with all the partners in the process, the public, the victim and the offender. The harm has to be restored as soon as possible. By restoring the harm, justice can be done. The question is how? By imprisonment or in another way, an alternative way?

Opinions about the victim's position are slowly changing. Victim Aid Organizations are founded and Compensation funds are subsidized. In this lecture the victim is placed in the spotlights, by doing so I have the idea that in the meantime this can also mean finding alternatives for detention.

1.2
Alternative sanctions

Alternative sanctions as substitute for imprisonment have been developed for the first time in countries plagued by a prison crises, e.g. the United States and the United Kingdom. Nowadays most western countries are actually struggling with serious prison overcrowding and, as a consequence the use of alternative sanctions has spread all over the western world.

During the last decade, alternative sanctions in the Netherlands have been developed in an increasing variety of forms. The only one with a formal legal status is the Dutch equivalent of community service. Other types, such as mediation, compensation, attendance-centres and boot-camps, are still considered to be in an experimental stage.

1.3
Goals of punishment

Over the years different punishment goals are used as a legitimation ground, for example: revenge (a past-oriented goal); safeguarding society (a present-oriented goal) and prevention (a future-oriented goal). Special prevention punishment can aim at two goals. The negative deterrent goal and the positive goal of rehabilitation.

However, criminological research taught us that the idea of improving the individual through deprivation of liberty is an illusion, it is currently accepted that such punishment leads to poor rehabilitation and high recidivism in addition to the fact that it has a destructive effect on the personality¹.

Depending on the general public opinion in a certain period of time, the penal sanction policy is focused on one of the mentioned punishment goals. In fact the history of penal law is the history of its reforms.

In the seventies the idea of rehabilitation was strongly emphasized in the Netherlands. Equality and solidarity were important items in Dutch society. Everybody was responsible for everything that happened in society. Those thoughts were reflected in ideas about the goals of penal sanctions.

This changed in the eighties when on one hand emphasizes was put on being pragmatic/business like and individualistic and on the other hand, partly due to economic pressure, on the obviously unsuccessful rehabilitation ideal.

Nowadays the item is time-out, temporary removal from and protection of society. A double track policy can be noticed. Firstly, there are thoughts about other alternative sanctions according the searching for extension of community service. Main item, is to restore the bond with society. Training and schooling programs were started and the government appealed to the citizens to increase social control: the soft approach.

¹Th. Mathiesen: „The arguments against building more prisons“, in Norman Bishop (Ed.), Scandinavian Criminal Policy and Criminology 1980-85.

Secondly, there is an opposite development with a call for more and severe sanctions and cutbacks in the expenditures for youth and community-board programs. In this track the revenge goal under the denominator of „society protection“ becomes clearer and clearer. The deviant is no longer a member of society but an outcast (Fremdkörper).

That non-custodial alternatives are to be preferred because they cost less than imprisonment, undoubtedly appears to be an attractive reason for their use. However, when we take a look at the budget of the Ministry of Justice for the year 1994 the following figures show up: one hundred million Dutch guilders estimated for the extension of prison capacity and two and a half million guilders for the development of alternative sanctions.

1.4

The influence of public opinion

Thinking about penal sanctions and nowadays about alternative sanctions is a reflection of thinking about criminals and criminal behaviour in society. It could be possible that the public considers those offenders who „benefit“ from the imposition of a non-custodial alternative are easily seen as being the more favourable cases. For example, in terms of the offence committed, the previous criminal history, personal characteristics and social situation. The demand for retribution cannot be ignored. After all, what the public is prepared to accept, sets the limit for the use of alternatives for detention.

An investigation into the public support of assignment penalties², alternative sanctions, was recently carried out in the Netherlands.

The reason for this research was a report of the Consultation and Advice Committee Alternative Sanctions³, discussed by the members of the State committee of Justice who kept aloof regarding the extension of duty punishments. Repeatedly the credibility of the suggested alternative methods was questioned. Doubts arose about the public support for further extension, even by some members of the judiciary⁴.

The main question, concerning assignment penalties is that of the credibility. It seems to be a credible kind of punishment when it is an equivalent to imprisonment.

The equivalence is estimated on basis of punishment goals: do the assignment penalties have the same target as the short detention? There is no doubt about the special and general prevention or protection of society goals. In view of those goals,

²Recently in the Netherlands the concept alternative sanctions (alternatieve sancties) is changed into assignment penalties (taakstraffen). This includes community service, learning projects etc. At present there is a multicoloured palette of alternatives like courses, projects and training programmes while still new alternatives are developed like vocational projects.

³The official name is: De Overleg- en Adviescommissie Alternatieve Sancties, (OCAS). The name of the report is: „Alternatieve sancties; sancties met het oog op de toekomst“.

⁴Especially the procurator general of the Leeuwarden Court, Steenhuis, thought that the present community service was a weak infusion from the original idea.

the assignment penalty even seems to be better. The issue here is the inflicted harm. One supposes that the public needs some kind of revenge.

The investigation made clear that, in contrary to what was expressed by the politicians and the judiciary, there seems to be a widespread support for other than traditional penal sanctions. The survey among over 1000 Dutch men and women shows that many see community service, training programmes, vocational training, compensation and reconciliation as appropriate sentences. Support for alternative measures increases if some extra information is given on the offence, the offender and the circumstances under which the offence was committed. By no means alternative dispositions seem to have reached the limits of public acceptance.

About the question whether the use of custodial sanction appears to be decisive for the general level of crime control in society, the investigation made clear that 93 % of the interviewees thought that the government does too little concerning fighting criminality. Obviously the interviewees did not think that a more and heavier imprisonment policy is the solution for reducing criminality⁵.

1.5

Possibilities of alternative measures

The expression „alternatives to detention“ or „alternatives to imprisonment“⁶ as it has come to be generally used today covers a wide range of sharply differing measures. In literature on this subject, and especially in United Nations documents, the term is used to refer to:

- a) pre-trial measure(s) the object of which is to avoid bringing the offender to trial;
- b) particular sanctions or measures of non-custodial character imposed by the courts and
- c) certain steps taking during the enforcement of a prison sentence which are intended to alleviate the negative effects of imprisonment.

Steps that are taken during the enforcement of a prison sentence and which have as their objective the alleviation of the negative effects of imprisonment and the providing of possibilities for the improvement of the prisoner or his/her personal situation can encompass, home leaves e.g. when the end of the imprisonment is near, permission to leave prison, e.g. in a therapeutic community or an experiment „day detention“. Such measures occur within the framework of a prison sentence. Imprisonment has not been avoided, only alleviated. For this reason it seems inaccurate to describe those modes of enforcement as alternatives to imprisonment. They are really alternatives to institutionalization.

⁵See P.H. van der Laan: „Het publiek en de taakstraf“ (the public and the assignment penalty), Justitiële Verkenningen, no 9-93, pag. 83 e.v.

⁶In my opinion the usage of the term „alternatives to imprisonment“ can be criticized for its imprecision and its inaccuracy.

But those are not the alternatives I want to discuss in this lecture.

In my point of view it is much more important to find alternatives for detention. And that had to happen in an early stage of the penal process.

Pre-trial measures are frequently decided on by the public prosecutor and not infrequently brought into play because the offence itself is not a grave one, it concerns a first offender or it does not appear for some other reason to be in the public interest to prosecute. In brief, in cases where the prosecutor thinks that imprisonment is not essential as a sanction.

This can be exemplified with the Dutch „transaction“. An offender can avoid being brought before court by paying, on the proposition of a prosecutor, a certain sum to the state or recompensing for the damage. The prosecutor may propose a transaction even for offences which can be punished under the Penal Code with up to six years imprisonment. No detention means only benefit for both state and offender. To solve a case by paying a transaction, is a right one, I suppose, when no victims are involved e.g. in cases of traffic infractions. The question remains: will the transaction satisfy the victim when he/she is involved?

1.6

The victim and alternatives

On one hand there is a growing interest for the position of the victim on the other hand the effect of the alternative sanctions on the criminal is subject of the discourse.

Increasing concern for the victim has arisen partly from humanitarian reasons such as having regard for the victim's loss or suffering, partly from the view that it is just and equitable that the state owes an obligation to the victim beyond that to citizens in general.

The term „victim“ does not occur in the Dutch Code of Criminal Procedure nor in any other criminal law statute. The victim has a procedural role only in the capacity of witness, informer or injured party.

Due to the changing attitude towards the weak legal position of the victim in line with paragraphs 4 and 6 of the United Nations Declaration on Basic Principles of Justice for Victims of Crime and the Abuse of Power (1985) a number of guidelines have been issued by the Dutch Public Prosecution service on how to treat victims.

The guidelines oblige the Dutch police and prosecutors to inform the victim whether the prosecution of the offender will take place and also about the possibility of financial compensation from the offender.

The provision of more information to victims, in itself, can significantly reduce the sense of bewilderment and confusion that many victims experience in their contact with the system.

The information victims require is of two kinds: first, information on the criminal justice system and how it operates; second, information on the progress of the case in which they are involved. They need to know why their stolen property may not

be promptly returned to them; why a charge is reduced; why the offender was not ordered to make restitution.

In the Netherlands two experimental projects are set up as a result of the interest for the position of the victim: the compensation measure and the penal settlement. Both models⁷ have one thing in common, they provide for a set of rights and procedures which the victim may use in order to try and get satisfaction from the offender, with the support of the state.

1.7

The compensation measure

The injured person in the Netherlands has the right to present a claim for the payment of compensation in connection with criminal proceedings, but the claim is rather restricted by statute⁸. Problems by presenting the claim in penal cases were the restrictions of the amount and the collection of the claim.

To solve the problem of cashing in, recently⁹ a new measure is introduced, in the Penal Code. If the offender and the victim have not settled a compensation before the court session, the judge, together with the imposed sanction¹⁰, obliges the offender to pay the claim. Since the introduction of article 36f in the Penal Code the state takes responsibility for the collection of the claim. The Public Prosecution Service is responsible for cashing in the claim. The measure can be imposed when the offender is responsible for the damage according to the civil law. If the offender does not pay the claim the public prosecutor can order an executorial distress and even impose an alternative imprisonment. The alternative imprisonment does not nullify the claim.

In the meantime the victim is no longer obliged to decide whether to submit a civil or a penal claim. The claim can be split up. The victim is entitled to bring the part of the claim which can be proved easily before the penal court and the other part before the civil court.

1.8.1 The penal settlement¹¹.

In 1989 a penal settlement¹² experiment was started in Amsterdam. The experiment aimed at finding out: „in which kind of cases settlements between suspects

⁷Both discussed models concern especially financial losses or damages. There is a special fund for bodily harmed Victims. Anyone who has been the victim of a violent criminal act which caused serious bodily injuries can claim compensation of up to DFL. 25,000 for material damages and DFL. 10,000 from the Criminal Injuries Compensation Fund.

⁸For infractions, DFL. 600.-, art. 44 RO and DFL. 1500.- for crimes, art. 56 RO.

⁹The Act of 23 december 1992, Stb. 1993, no. 29. In force since 1 April 1993 as an experiment for two years in two district courts.

¹⁰This can be a (suspended) sentence or a fine.

¹¹With words of thanks to mr G. van Leijen and the national consultant of the „Dading“ project Mrs. M. Emmen.

¹²Dading (Settlement) is a civil law alternative to a Dutch criminal law reaction. According to

and victims regarding the caused, or eventually in the future to be avoided harm, can be used instead of penal prosecution¹³. Although the Civil Code does not forbid prosecution after a successful settlement¹⁴, this kind of experiments where prosecution is drawn ahead by a civil act are possible in the Netherlands, because the public prosecutor has a right to dismiss cases for reasons of public interest.

1.8.2 The selection

The experiment was carried out by a project-office, assisted by a team working in the criminal justice field. Each week, a few cases, decided to be prosecuted and ready to be submitted to the „police-judge“¹⁵ were taken to the project-office. The cases were selected at random; about 65 % of the cases concerned property-crimes and vandalism¹⁶ and some 32 % concerned acts of violence against persons¹⁷.

1.8.3 The procedure

It will be obvious that the interests of victim¹⁸ and offender are not the same. The offender's main interest is to avoid penal prosecution, while the victim wants compensation or restitution. This conflict of interests can only be solved by negotiation on a voluntary and equal base.

The negotiation started with a letter from the prosecutor to the suspect, telling that the prosecutor had decided to prosecute him, unless he was able to reach a compromise with the victim regarding reparation of damage and redress. Thereafter a letter from the project was sent, in which it offered organisational and juridical assistance. If the suspect agreed with this procedure the victim was approached with the same question¹⁹. In principle both parties got legal aid. If one of the parties did not yet have a lawyer, one of the members of the assisting lawyer-pool was assigned to him. Sometimes the office mediated in simple cases where parties were not interested in having a lawyer.

There was no personal contact. Originally the counsellors of both parties²⁰ dealt with the Dutch Civil Code the settlement is a special kind of agreement made by conflicting parties in order to avoid or to cancel litigation. It is only valid if concluded in writing. (Book 7a art. 1888 Civil Code).

¹³The report: „Dading in plaats van strafrecht“ (Settlement instead of prosecution), edited by Humanitas; 1991; p.7.

¹⁴Civil Code Book 7a, article 1890 paragraph 2.

¹⁵The police-judge may impose a fine, a maximum sentence of 6 months imprisonment or a combination of the two. (Criminal procedure Code art. 376).

¹⁶Like theft, burglary, shop-lifting and breaking-windows.

¹⁷Like harassment, assault and battery.

¹⁸The report speaks of the injured party.

¹⁹In relation-cases first the victim was approached and afterwards the suspect, this to avoid unequal pressure from the suspect upon the injured.

²⁰During the first experiment period the counselor's help was free. Later on the injured party

with the negotiation. Nowadays different legal aid services negotiate either on behalf of the victim or on behalf of the suspect. Mostly the probation officer on behalf of the suspect and the Victim Aid Organization on behalf of the victim.

The subject of the negotiation is the damage caused by the offender. The victim and offender are absolutely free to come up with any form of restitution they can agree upon.

Restitution is not per definition limited to financial compensation, although in most cases financial compensation was the result of the negotiation. Examples of non-financial restitutions are: writing an apology²¹, repairing the damage by working for the victims²², abstaining from a particular behaviour²³ – like wife-battery – or not entering a shop for a certain period. Such non-financial agreements were often accompanied with a monetary guarantee that if the offender would act in breach of the agreement he would owe the victim a certain amount of money.

The public prosecutor dismissed the case having received a copy of the agreement of the concluded settlement.

1.8.4 The results

During the first experimental phase 208 cases were selected. In half of the cases the parties were interested. One third of the cases²⁴ agreed with the settlement.

The first experiment was a very small one. It concerned cases from one unit of one public prosecutors office in Amsterdam. But the experiment has got a follow-up. Nowadays, still in an experimental phase, the penal settlement is carried out in different court districts. The main problems are to find sources of funding, providing sufficient legal assistance is expensive, to get the cooperation of the authorities and adjusted procedures, e.g. cases of wife-battery need to be worked out.

1.9 Victim Support Schemes

The National Victim Support Organization, funded by the Ministry of Justice covers two-third of the country. The program is worked out by local victim support schemes. Yearly over 1.000 professionals and volunteers provide help to 25.000 victims. The schemes are intended to meet the needs of victims in regard to practical help, emotional support and counselling, and advice regarding future preventive measures, help to overcome the effects of victimization.

has to pay for the help if, on basis of a low income, no lawyer was appointed. Most of the offenders had an appointed lawyer.

²¹In two of the settled cases.

²²In four of the settled cases.

²³In eight of the settled cases.

²⁴Fifty one percent of the settlements concerns corporate bodies the other forty nine percent was settled mostly between individuals.

1.10 Synopsis

- I start with the statement that the criminal justice system has relegated the victim to a very minor role and left the victims with the conviction that they are being used, as a means to punish the offender, that their losses and needs count for little against the government's focus on the public interest and the focus on the offender.
- Know that extending prison capacity does not reduce crime.
- Although the politicians thought so, the results of the investigation show us that the ideas about alternatives of politicians are not parallel with the opinions of the public.
- We have noticed that it is the view of victims of crime that they need more assistance to deal with their losses and suffering. In addition they believe that they should be compensated adequately for any loss or suffering which they have endured. Many of them also feel that they need to be more active participants in the justice process.
- We have discussed a legal compensation possibility, the compensation measure. Regarding to an alternative for detention it has to be mentioned that an agreement if arranged by the public prosecutor can lead to a dismissal of the charge or in case of an court session to lower the punishment.
- By arguing the penal settlement we could see that instead of being penalized by an abstract system, the offender has the opportunity to make right what he has done wrong. Victim as well as offender were able to deal with the consequences of the crime by themselves and search for a solution.
- Looking to the position of the offender, beside the points already mentioned, it can be concluded that alternatives for punishment offer him a better possibility for rehabilitation.
- In both models the role of the government has changed. It is no longer the almighty party which decides over the heads of the involved parties but the government gets the role of an intermediate- or an executive organ.

At the end a report of a committee of the Council Of Europe has to be mentioned. The results of an investigation by the „European Committee on Crime Problems“ are laid down in the report „Draft recommendation on the position of the victim in the framework of criminal law and procedure an explanatory report“ (1985).

In this report the following advantages of mediation between victim and offender are mentioned:

- avoiding stigmatization, less publicity around the offence which can be harmful for the offender as well as for the victim;
- a reduction of the penal cases, and
- reconciliation between the victim and the offender.

1.11 Conclusions

Thinking about alternatives is thinking about a new system. And like a building, the system can be constructed of all kinds of „alternative“ materials. The mentioned models are new „materials“ besides the conventional approach of punishment. I am aware that they cannot solve all problems. The positive aspects however are: the problem is brought back to where it belongs, the involved parties.

Victims get back their identity. The system does not take over their case completely but victims get involved, they are consulted, informed and helped with their difficulties.

Offenders are confronted with the harm they caused. In the meantime they are able to do something to the caused harm by themselves.

From the point of the state, solutions like the above mentioned can give a reduction of penal cases and lower costs for the whole system.

With regard to society one can conclude that individualizing the offender and clarifying the motives behind the offence creates more understanding and trust in alternatives for punishment.

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Alternatives for detention and punishment

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S U M M A R Y

Alternativy detence a trestu

Článek se zabývá problematikou alternativních sankcí, a to zejména z pohledu postavení oběti trestného činu. Jak uvádí autorka v úvodu, často se zapomíná, že v případech spáchání trestného činu existují dvě strany: podezřelý (pachatel) a oběť (poškozená strana). A právě oběť je tím, kdo stojí v pozadí, zraněn, s pocity frustrace a bezmocnosti. Škoda by proto měla být co nejdříve napravena. Otázka zní jak? Uvězněním pachatele nebo jinou cestou, alternativní cestou?

Úvodní částí článku jsou věnovány úvahám o cíli trestu, o vlivu veřejného mínění na aplikaci jeho alternativ a obsahují rovněž vymezení pojmu alternativy detence

(alternatives to detention) či alternativy uvěznění (alternatives to imprisonment). Definice zahrnuje tři oblasti:

- a) předprocesní opatření, při jejichž uplatnění se pachatel vyhne trestnímu procesu,
- b) zvláštní sankce či opatření nevazebního charakteru ukládané soudem,
- c) určité kroky podniknuté během výkonu trestu odnětí svobody, které umožňují zmírnění negativních účinků uvěznění.

Po tomto úvodním vstupu do problematiky následuje část nazvaná „Oběť a alternativy“, která charakterizuje postavení oběti v trestním řízení. V této souvislosti je zmíněn § 4 a § 6 Deklarace OSN z r. 1985, která směřuje ke změně postoju k slabé zákonné pozici oběti trestného činu (Declaration on Basic Principles of Justice for Victims of Crime and the Abuse of Power). Na tuto část pak navazují další, v nichž autorka věnuje pozornost dvěma nizozemským projektům, jež jsou projevem zájmu o postavení oběti, a to **kompenzačním opatření** (compensation measure) a **vyrovnání** (penal settlement). Oběma modelům je společné to, že poskytují soubor práv a postupů, jež může oběť použít k dosažení satisfakce, a to za podpory státu. Autorka objasňuje podstatu těchto dvou projektů a popisuje postup při jejich aplikaci. Zmiňuje se rovněž o „National Victim Support Organization“ (Národní organizace na podporu oběti) financované ministerstvem spravedlnosti a uvádí základní myšlenky, z nichž činnost této organizace vychází a dále o zprávě výboru Rady Evropy (European Committee on Crime Problems) z r. 1985 týkající se také oběti trestného činu. V této zprávě jsou uvedeny přednosti dohody mezi obětí a pachatelem:

- yloučení stigmatizace, méně publicity kolem činu, která může být škodlivá jak pro pachatele, tak i pro oběť
- edukce trestních věcí a
- mír mezi obětí a pachatelem.

Poslední část (Conclusions, tedy Závěry) představuje shrnutí sledované problematiky. Autorka hodnotí oba zmíněné projekty pozitivně jako nové nekonvenční přístupy k trestání, které sice nemohou vyřešit všechny problémy, nicméně obětem trestného činu je vrácena jejich identita, tento systém jim poskytuje informovanost a pomoc. Pachatelé jsou konfrontováni se škodami, které svým činem způsobili a mohou udělat něco pro jejich nápravu. Z pohledu státu pak výše uvedená řešení mohou přispět k redukci trestních věcí a k zlevnění celého trestního systému.