

Criminalisation of Corpse Desecration

October 2022

SUMMARY

dr. Bas de Wilde (De strafzaak)
prof. dr. Britta van Beers (VU Amsterdam)
dr. Sanne Buisman (VU Amsterdam)
Daniel Bökenkamp, LL.M (VU Amsterdam)

De strafzaak

Strafrechtelijk onderzoek en
onderwijs



Chapter 1: Introduction

This report describes a study commissioned by the Research and Documentation Centre of the Dutch Ministry of Justice and Security. There were several reasons to conduct this study. First, in a case in which necrophilia could be proven, prosecution was not possible because there was no question of a criminal offence. Second, there is no independent criminal provision for the violation of a dead body. Third, a court was of the opinion that the penalty carried by an offence in respect of disposing of a corpse with the intention of concealing the cause of death (article 151 of the Dutch Criminal Code) is too low. Fourth, a body broker is active in the Netherlands, which is a company that makes donated bodies available to commercial companies in return for payment, and the question has arisen as to whether there is cause to criminalise certain activities of body brokers.

The central research question is:

Is it necessary to criminalise forms of corpse desecration that are not punishable yet or to amend existing criminal provisions relating to forms of corpse desecration?

The research leading to the answer to this question was conducted on the basis of the following subquestions:

1. *How is the integrity of the dead body legally protected outside the context of criminal law, such as in fundamental rights (article 11 of the Dutch Constitution and articles 3 and 8 ECHR), private law and health law? What legal principles and legal interests are relevant here?*
2. *Which forms of corpse desecration are punishable or not punishable under current law in the Netherlands, how are they dealt with under criminal law and what is their prevalence?*
3. *Is there any support in the Netherlands for the criminalisation of forms of corpse desecration that are not punishable yet or for amendment of existing criminal provisions regarding forms of corpse desecration?*
4. *What arguments for or against criminalisation can be drawn from foreign law?*
 - 4.1 *What forms of corpse desecration are or are not punishable in selected other countries?*
 - 4.2 *Is there any debate in these countries about whether or not corpse desecration should be punishable?*
 - 4.3 *How is criminalisation implemented in the countries that have criminalised forms of corpse desecration?*
 - 4.4 *In what way are cases of corpse desecration dealt with in the countries that have criminalisation?*

Research Methods

Ten forms of corpse desecration have been distinguished. Criminalisation was examined for each of these forms. The term 'necessary' in the central research question is taken from

instruction 2.2 of the Dutch Drafting Instructions for Legislation. The question of whether legislation is necessary within the meaning of this instruction in fact comes down to the question whether such legislation is recommendable. Therefore, the conclusions of this study are equal to its recommendations. The necessity of legislation was examined using the criteria for criminalisation developed by Buisman, building on earlier work by De Roos and others. These authoritative criteria provide concrete guidance for assessing the necessity of criminalisation.

The subquestions were examined using classical legal research methods to determine the meaning of legal principles (research in literature, legislation, parliamentary history and case-law), combined with empirical research (quantitative case-law research and interviews) in order to identify prevalence, sentencing and opinions. Interviews were conducted with police employees (5), public prosecutors (2), judges (2), surviving dependants who have faced a form of corpse desecration (3), funeral directors (2), the director of RISE-labs and scientists (5). A comprehensive legal comparison was also conducted. The laws of Germany, France, England & Wales, the United States, Scotland, Belgium and Sweden were mapped in country reports and then analysed from a comparative perspective. The first four countries mentioned were examined comprehensively with respect to all ten forms of corpse desecration distinguished in this study. With respect to the last three countries, only discussions and recent developments have been identified.

Chapter 2: Criteria for Criminalisation

The criteria for criminalisation are based on three main questions:

1. *Is government action legitimate?*
Relevant here is whether conduct causes harm, whether such conduct should be considered unlawful, and to what extent interests worthy of protection are affected.
2. *Is criminalisation justifiable?*
This involves assessing whether criminalisation is prospectively proportional (is the use of criminal law proportionate to the undesirable behaviour?), whether other, less drastic means, such as the application of administrative law or civil law, can offer adequate protection against unlawful and harmful behaviour (*ultima ratio*), and whether criminalisation is expected to be sufficiently effective.
3. *How could a criminalisation provision be phrased?*
This takes into account internal subsidiarity (can the conduct be brought under an existing criminal provision and does that result in an appropriate qualification of the conduct?), the principle of *lex certa* inherent in the principle of legality (does the criminal provision provide sufficient legal certainty?) and the practical manageability of the criminal provision. Retrospective proportionality is relevant in determining the penalty carried by an offence: how does the proposed statutory penalty relate to the seriousness of the offence and to statutory penalties for similar conduct?

Chapter 3: The Legal Status of the Corpse

The dead body is considered a special “property item” in private law, taking into consideration the connection between the human body and the human person. Human dignity must be respected even after death. This is reflected, among other things, in the fact that certain personality rights, in particular the right to respect for private life and the right to protection of physical integrity, remain in force after death. Surviving dependants also have rights to be respected with regard to a dead body. They have certain control but do not become owners of the dead body.

The post-mortem effect of personality rights is also recognised with respect to article 11 of the Dutch Constitution, which guarantees the right to the inviolability of the human body. Among other things, a deceased person’s wishes expressed during life regarding the destination of his dead body must be respected. The principle of non-commerciality, also expressed in the EU Charter of Fundamental Rights, is important with regard to the donation of bodies. It is prohibited under this principle to use the human body and its components *as such* as a source of financial gain.

Chapter 4: Criminalisation, Settlement and Prevalence of Corpse Desecration in the Netherlands

1. Removal of a Corpse

The exhumation or removal of a dead body is punishable under article 150 of the Dutch Criminal Code. This crime is punishable by imprisonment up to one year or a third-category fine. Case-law research covering the period 2002-2021 shows that there was only one conviction for this offence (N=1).

2. Disposing of a Corpse with Intent to Conceal Death or Cause of Death

Disposing of a corpse or concealing it with the intent to conceal the death or cause of death is punishable under article 151 of the Dutch Criminal Code. In the nineteenth century, the legislature considered it important that civil status records remain up to date. Contemporary grounds for punishment show that respect for the victim and the interests of surviving dependants are considered compelling interests that are infringed by this offence. The penalty under article 151 of the Dutch Criminal Code is a prison sentence up to two years or a fourth-category fine. Case-law research over the period 2002-2021 shows that it is relatively rare to prosecute under article 151 of the Dutch Criminal Code (N=165). Where this has happened, this often also involved prosecution for homicide. An action based on article 151 of the Dutch Criminal Code alone is rare (N=35). This can be the case, for example, when homicide or the capacity of the offender cannot be proven due to mutilation of the corpse.

3. Physical Injury to a Corpse (destruction, dismemberment, removal of organs, causing bone fracture, damage)

Physical injury to a corpse is not independently punishable. However, it may be punishable under other criminal provisions. It has been allowed by the Supreme Court of the Netherlands to prosecute under article 350 of the Dutch Criminal Code (destruction or damage to property). In special cases, it is possible to prosecute under article 141 of the Dutch Criminal Code (public acts of violence). Prosecution under these criminal provisions is extremely rare. Usually, in cases of physical corpse desecration, the choice is made to prosecute under section 151 of the Dutch Criminal Code.

4. *Sexual Conduct with a Dead Body*

Necrophilia is not an independent offence in the Netherlands. In the case of sexual conduct with a dead body, prosecution may be possible on the basis of other offences that the perpetrator is also suspected to have committed, such as injury to the deceased body (article 350 of the Dutch Criminal Code), moving a removed dead body (article 150 of the Dutch Criminal Code) or breach of peace (article 138 of the Criminal Dutch Code). However, it is possible that none of these facts can be proven. This happened in a case of necrophilia that received media attention. Few Dutch cases of necrophilia are known. It can nevertheless not be inferred from this that necrophilia is rare.

5. *Purchase and Sale of (parts of) the Body of a Deceased Person*

It is not an offence to trade in human dead bodies or parts thereof, even when done for profit. There are no known cases of bodies or parts thereof being sold as such. However, a “body broker”, as it is called, is active in the Netherlands. This is a company that makes donated bodies available to other companies for the purpose of scientific research or education, which companies pay a fee for the costs involved.

6. *Exhibition of (prepared) Dead Bodies*

Exhibiting dead bodies does not constitute a criminal offence. It does occur in the Netherlands, including by commercially operating companies. Exhibitions such as Body Worlds attract large audiences. The bodies exhibited have been prepared abroad.

7. *Making Images or Taking Fingerprints of Dead Bodies*

Making images of deceased persons is not a criminal offence, even if, for example, exposed genitals are depicted. However, there is a legislative bill under consultation which proposes to criminalise the making of images of fatal victims of (traffic) accidents. Taking a fingerprint from a dead body is not punishable.

8. *Removal of Additions to the Body that are Attached to It (e.g. piercings or gold teeth)*

Taking away items attached to the dead body constitutes theft (article 310 of the Dutch Criminal Code) and possibly theft preceded by forcible entry or breaking of locks (article 311

of the Dutch Criminal Code). When the body is physically affected by the removal, this may constitute damage (article 350 of the Dutch Criminal Code). There are no known cases of this from case-law.

9. *Fouling of a Corpse (e.g. spitting or urinating on a corpse)*
10. *Unauthorised Modification of the Corpse (e.g. hair or clothing), the Position of a Corpse or the Mere Touching of a Corpse*

The behaviours under 9. and 10. do not constitute an offence.

Chapter 5: Views on the Criminalisation of Corpse Desecration in the Netherlands

There is agreement among the interviewees on the following aspects:

- The statutory penalty of two years' imprisonment in respect of article 151 of the Dutch Criminal Code (disposing of a corpse with the intent to conceal death or cause of death) is too low in the most serious cases.
- Designating a deceased body as a "property item" and deeming applicable the provisions relating to destruction/damage (article 350 of the Dutch Criminal Code) and public acts of violence (article 141 of the Dutch Criminal Code) does not do justice to the special status of the deceased body. The penalty carried by the offence under article 350 of the Dutch Criminal Code of two years is too low in the case of physical corpse desecration. There is a need for an independent criminal provision for physical corpse desecration.
- All types of necrophilia should be punishable, even where no sexual penetration is involved.
- The depiction of naked body parts with sexual intent should be criminalised.
- It is not necessary to consider the fact that a stolen object was attached to a dead body as an aggravating circumstance under article 311 of the Dutch Criminal Code.
- Spitting or urinating on a dead body and changing the deceased person's position, hairstyle or clothing, although indecent, is not considered to deserve punishment.

Views differ as to whether the activities of body brokers should be prohibited.

Chapter 6: Law Comparison

The following table summarises criminalisation by country. In the left-hand column, the types of corpse desecration that have been examined are listed in an abbreviated form.

	NL	GM	FR	BE	SW	E&W	SC	US
moving	x	x	x	NI	x	x	NI	x (48 states)
disposal	x	x	x	NI	x	x	NI	x (48 states)
physical injury	x	x	x	sometimes	x	x	sometimes	x (34 states)
sexual conduct	sometimes	x	x	sometimes	x	x	sometimes	x (47 states)
sale/purchase		possibly	x	NI	NI	possibly	NI	sometimes (12 states)
exhibition		sometimes	possibly	NI	NI	sometimes	NI	sometimes (1 state)
images		possibly	sometimes	sometimes	NI		NI	sometimes (1 state)
removal of additions	x	x	x	NI	NI	x	NI	x
fouling		x	x	NI	NI		NI	
unauthorised modification				NI	NI		NI	

Explanation of abbreviations:

x	punishable
sometimes	only punishable if specific conditions are met
possibly	uncertain whether punishable
NI	not investigated (not all behaviours have been investigated for Belgium, Sweden and Scotland)

While physical injury and sexual necrophilia are punishable in most of the foreign countries studied, a specific penal provision is often lacking in these countries too, although these behaviours are considered objectionable and legislative initiatives have been taken to achieve independent criminalisation.

Chapter 7: Application of Criminalisation Criteria to Corpse Desecration

The necessity of introducing new legislation or amending existing legislation was assessed by applying the criteria for criminalisation to the types of corpse desecration distinguished in this study. In doing so, the argumentation following from the answers to the subquestions has been taken into consideration. If introduction or amendment of legislation is deemed necessary within the meaning of instruction 2.2 of the Dutch Drafting Instructions for Legislation, this means in actual practice that such introduction or amendment is recommended. The researchers make the following recommendations to the legislature:

Exhumation or removal of a Corpse

- The offence description of the current article 150 of the Dutch Criminal Code is maintained.

- The penalty carried by the offence under this provision is increased from one to two years' imprisonment. This is a more proportionate punishment, as the offence involves a violation of human dignity and the interest of the surviving dependants and the government to know where a dead body is.

Disposing of/Concealing a Corpse with Intent to Conceal Death or Cause of Death

The terms "destroys" and "burns" are removed from the offence description in article 151 of the Dutch Criminal Code. These acts will be covered by a new criminal provision on physical corpse desecration.

- The penalty carried by the offence under this provision is increased from two to four years' imprisonment. There is a serious impairment of the post-mortem right to inviolability of the human body, there is a major infringement of the interests of surviving dependants and the offender may escape conviction for homicide. These circumstances justify a significant increase in the penalty.
- A second paragraph is added to article 151 of the Dutch Criminal Code, stipulating that the maximum of the main sentences of the first paragraph will be reduced by one-third if the corpse is found on the instructions of the guilty party. This provision may encourage a suspect to disclose the place where he left a dead body. This is particularly important for surviving dependants.

Physical Corpse Desecration

- Following the current article 151 of the Dutch Criminal Code, a provision must be inserted in which the deliberate and unlawful destruction or damage of a corpse and the use of violence against a corpse are punishable. An independent criminal provision is necessary, because the designation of a corpse as a property item within the meaning of articles 141 (public acts of violence) and 350 (destruction/damage) of the Dutch Criminal Code does not do justice to the special status of the dead body, while the penalty under article 350 of the Dutch Criminal Code of two years' imprisonment is not proportionate to the seriousness of the offence.
- An appropriate penalty for the offence in respect of this new provision is six years' imprisonment or a fourth-category fine. This punishment is appropriate because the offence involves a potentially very far-reaching impairment of the post-mortem effects of the right to bodily integrity (e.g. when a body is cut into pieces), while surviving dependants are seriously affected in their memory of the deceased and their mourning.
- This new provision includes an aggravating option: where physical corpse desecration is committed before a corpse is disposed of (article 151 of the Dutch Criminal Code), imprisonment of up to eight years or a fourth-category fine can be imposed.

Necrophilia

- A new provision criminalising the performance of sexual acts with a corpse is included in the title relating to sex crimes. Necrophilia with dead bodies seriously violates the post-mortem effect of the right to bodily integrity, while surviving dependants are affected in the memory of the deceased.
- It makes sense to include this provision after article 254a of the Dutch Criminal Code.

- An appropriate penalty for this offence is 4 years' imprisonment or a fourth-category fine.

For-Profit Body Donation

- A new criminal provision is added to the same title containing sections 150 and 151 of the Dutch Criminal Code, which criminalises the making of a gift or promise or the provision of a service when their purpose is to induce someone to donate a body, either his own or that of another person. The acceptance of such a gift, promise or service is also criminalised when the person accepting it knows or could reasonably suspect that its purpose is to induce body donation. This penal provision arises from the prohibition imposed by the non-commerciality principle on deriving financial benefit from making (parts of) bodies available *as such*. It must be stressed here that this principle does not prevent a commercial company from paying a fee for the use of a donated body made available by a hospital for scientific research.
- The Dutch Burial and Cremation Act introduces a licensing requirement for companies that receive donated bodies immediately after death and possibly subsequently make them available to other companies, in order to prevent excesses. Violation of licence conditions will become an economic offence.

Exhibition of Corpses

- The Dutch Burial and Cremation Act introduces a permit requirement for organising an exhibition of prepared corpses. This aims to ensure non-commerciality and prevent excesses from occurring, for example by exhibiting bodies of executed persons. Criminalisation of acting in violation of the permit obligation or the permit conditions need not be criminalised, as an exhibition can be closed down in that case.

Images

- It becomes punishable to intentionally and unlawfully manufacture or possess an image of a sexual nature of a corpse. This is necessary because such images violate the post-mortem effect of the right to respect private life and the memory of the deceased.
- It makes sense to align the criminalisation with article 139h paragraph 1 of the Dutch Criminal Code. This provision can be extended in such a way that it covers not only persons but also corpses.
- The penalty carried by the offence under article 139h of the Dutch Criminal Code – a maximum of one year's imprisonment or a fourth-category fine – is also appropriate with regard to images of corpses.

There is no need to introduce criminal provisions in respect of physically harming a body through carelessness, fingerprinting a deceased body, fouling a deceased body or unauthorised modifications to a corpse, nor is it necessary to add an aggravating circumstance to article 311 of the Dutch Criminal Code for the case of stealing items attached to the deceased.