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Hundred years of penal law in The Netherlands 1900-2000

Summaries

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The administration of justice as an enterprise; a metaphor adrift?
R. Foqué

The metaphor of an enterprise refers to the increasing need for more efficiency and for more efficacity in the administration of justice. Metaphors can play an important role as semantic innovators in our legal and political discourse. They can make explicit what hitherto has been secret or latent. It is important however that they do not deteriorate into mere cliché's (Zijderveld). Then, their innovative meaning will become overgrown with mere functionality. Metaphors are always ironic by nature: they can characterize a situation or a phenomenon in a *as if*-modus. The administration of justice *as if* it was an enterprise. At the same time the simultaneous message of the metaphor is that public administration *is not* an enterprise. Under the influence of recent management-theories in the field of public administration, such as David Osborne and Ted Gaebler's famous theory on *Reinventing Government (How the Entrepreneurial Spirit is Transforming the Public Sector)*, the metaphor of a public enterprise looses its metaphorical character and becomes more and more a totalitarian cliché (Lefort). The so-called *entrepreneurial spirit* claims explicitly to cover the totality of the proces of public administration. The withdrawal of the metaphor (Derrida) leads to the entrance of a restless instrumentalism and to the end of law and democracy. This deterioration is criticized with reference to the theory of democracy and of the rule of law (from Montesquieu to Radbruch and Lefort). The author pleas for the protection of our society as a *decent society* and for the protection of our political and social order as a *legal order*, under the rule of law and not under the rule of a new class of managers and entrepreneurs.

From danger to risk; cultural and judicial developments in modern society
R. Pieterman

As an integral part of the thought of the Enlightenment the concept of risk has had an important and distinguishable effect on the development of the modern world and thus on law. Law used to be focused mainly on the moral quality of those brought before civil or penal courts. The introduction, however, of legal thinking in terms of risk had the effect of diminishing moral questions and introducing economic rationality instead. In civil law damage became to be considered a side effect of social and economic activities. Apart from preventive actions rationalised systems of damage compensation were developed in the form of public or private insurance schemes. In penal law the major effect was the enhancement of preventive regulation. Where classic crimes are involved risk has had much less impact on the verdicts of the courts. Recent developments go beyond civil and penal law. Modern doubts about the certainty of scientific knowledge along with the growing influence of the environmental movement have contributed to the development of the precautionary principle in international law. The more national law will be developed in line with this principle, the more modern society runs the risk of its social and economic developments coming to a halt.

Farewell to criminal law? Law enforcement and governmentality
R. van Swaaningen

This article examines the development of criminal law's monopoly with respect to law enforcement over the last century. From an empirical viewpoint, criminal law never has played any central role in the fight against crime. Its monopoly only concerns the further prosecution and punishment of crimes that have come to the knowledge of the police. The political use of criminal law has changed alongside changing ideas of government. When ideas of sovereignty changed to governance on distance, the central position attributed to criminal law as the state instrument par excellence was waning. The following 'responsibilisation' of the 'sub-political field' in the fight against crime, and the new vision of crime as a risk to be managed rather an evil to be repressed, is particularly visible in crime prevention. The author points at a number of dangers of this development, and at some potentials. He argues that a judgement of it depends less of the new 'governmentality' as such, and more of the socio-economic policy in which it is embedded: is safety a commodity or a public good?

The emancipation of victims of crime within the Dutch criminal justice system
R.S.B. Kool

At the end of the twentieth century victims of crime have been acknowledged as legal subjects. Due to a continuous strive for emancipation, victims have obtained a certain position within the criminal justice system. In historical perspective these changes mark a major change in Dutch criminal policy, in so far that the right to prosecute remains solely to the state. As a result of the emphasis on human rights, that took place in the last two decades, victims of crime claim procedural rights as well as active legal protection of the private sphere. The service-oriented victim-policy, set out by the Dutch government in the 1980's, does not longer provide an adequate answer to victims actual need. On short term a further elaboration of the criminal paradigm towards victims of crime is to be expected. These developments will encompass the whole range of criminal justice. Next to a consolidation of procedural rights, the range of criminal law will be broadened by introducing penal provisions (e.g. stalking) and by using a victim-oriented point of view within judicial interpretation.

The penal judge; developments in the last hundres years
J.F. Nijboer

The professional attitude of the judiciary in Holland has changed during the last century. The courts decide more and more on the basis of a wider spectrum than just codes and other statutes. At the same time elements out of the traditional French professional culture still exist. The Dutch courts moreover have become increasingly aware of international and constitutional issues.

The dynamics of criminal proceedings; why preliminary investigations became decisive in so many criminal cases
K. Rozemond

According to the Dutch Code of Criminal Procedure, which came into force in 1926, a criminal trial judge can use as evidence written statements as well as statements made at trial. As a consequence, preliminary investigations in Dutch criminal cases became more important. Written reports of investigating officers and expert witnesses and records of pre-trial statements made by suspects and witnesses are important sources of evidence. The course of Dutch criminal proceedings is determined by the quality of the pre-trial evidence and by the wish of the defence, the prosecution and the judiciary to hear witnesses at trial. The result is a dynamic system of gathering evidence in which every relevant source of information can be incorporated.

The settlement of criminal cases out side the courts
J. Boek

In The Netherlands there is no obligation to investigate or prosecute every discovered crime. Cases can be settled outside the courts by the police and by the public prosecutor by simply dropping the case; most cases can be settled by proposing to the suspect to pay a fine. In the last hundred years the settlement of criminal cases out side the courts has become the most common way to deal with them. This is not contradictory to the penal principles that justify criminal punishment. Problems may arise when criminal cases are settled out side the courts by automatically proposing a fine. This can be contradictory to the rationality that should at least in part justify the criminal punishment.

The sanctions-system in het last century

F.W. Bleichrodt

In the beginning of the twentieth century the Dutch sanctions-system was based on the Penal Code, which was introduced in 1886. In this simple and sober system imprisonment was the central punishment. The execution of this sentence was based on the cellular system.
During the twentieth century the sanctions-system has become more differentiated. Imprisonment lost its central position in the sanctions-system. The application of financial sanctions rose. The suspended sentence was introduced in 1915. Later in the century community service was introduced. The way of execution of custodial sentences changed drastically. The primacy of execution by isolation was abolished and there became more opportunities for substituting (parts of) detention by non-custodial alternatives. Besides penalties, the Dutch penal code contains measures. These measures are not primarily based on retribution of culpability, but on prevention of new offences or reparation. The sanctions-system has become more complex. In the next century we need a new regulation of the different sanctions and execution modalities.