

THE NETHERLANDS

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I. INTRODUCTION

The purpose of this report is to give an overview of the system of Dutch criminal sanctions¹ in the light of the question whether harmonization between the systems of criminal law of the member states of the European Union is possible and desirable. The point of departure is the Dutch Criminal Code (hereinafter : CC), more specifically the First Book of this Code, which contains General Provisions about punishability².

Because of the fact that the main rules of the system of Dutch criminal sanctions are incorporated in the general provisions of this First Book, in principle these provisions apply to all offences, including the offences which constitute (the different kinds of) terrorism, cybercrime and environmental crime, even when the offences are punishable under specific criminal legislation (other than the CC), such as the Economic Offences Act³.

The general rules of the First Book of the CC can be explained by the perspective of the Dutch criminal justice system. Almost all administra-

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¹ See for an extensive overview P. A. M. MEVIS, *Hoofddlijnen van het strafrechtelijk sanctiestelsel*, 2nd ed., W. E. J. Tjeenk Willink, Deventer, 1997. See also P. J. P. TAK, *The Dutch Criminal Justice System*, WODC, The Hague, 1999, pp. 59-96. Sanctions for juveniles won't be worked out in this essay.

² See *The Dutch Penal Code*, translated by L. RAYAR and S. WADSWORTH, in : *The American Series of Foreign penal codes*, Rothman, Littleton, Colorado 80127, 1997.

³ According to article 91 of the (First Book of the) Criminal Code, the (general) provisions under Titles I-VIIIA of the First Book are also applicable to acts that are punishable under other statutes or ordinances, unless determined otherwise in a statute.

tors of the Dutch criminal justice are vested with discretionary powers in the performance of their legal tasks. In particular, discretionary powers may be applied by members of the Public Prosecution service. As exponent of this discretionary power, the Public Prosecution service may decide to waive prosecution of an offence, to settle an offence out of court, or to prosecute a case so that the offence can be tried by a court in a public court trial. In the past thirty years, one of the main objectives of Dutch criminal policy has been the reduction of custodial sentences. This policy could only succeed by vesting the prosecution service and the court with a broad scale of discretionary powers to implement non-custodial sanctions in response to criminal behaviour. There is quite some variety of possibilities the public prosecutor and the trial judge possess to refrain from the imposition of custodial sanctions and to use substitutes instead⁴. For these reasons, the Dutch criminal justice system is often characterized as a "mild penal climate". The following paragraphs intend to show several aspects of this relatively mild penal climate.

Over the last years, the Dutch penal climate has been influenced by European criminal policy and legislation. The Dutch government has expressed the need to develop and implement this European influence⁵. There are no objectives against European initiatives towards harmonization of legislation which is in one line with Dutch criminal law. The following criteria are relevant for the assessment of initiatives which require adaptation of national criminal legislation: the principle of subsidiarity; the relationship between European initiatives and initiatives of other fora (such as the Council of Europe or the United Nations); the safeguards of the European Convention for the Protection of Human Rights and Fundamental Freedoms (including the principle of legality); preservation of discretionary powers of the Public Prosecution Service concerning the prosecution of suspects; judicial review of investigative activities; rejection of special minimum penalties.

II. CHARACTERISTICS OF THE PENALTIES

A. — *Minimum penalties*

The principal penalties⁶ are set out in article 9 CC in order of severity (according to the opinion of the Dutch legislator) as follows: imprisonment; detention; "service penalty"; a fine.

The system of Dutch criminal law incorporates *general minimum* penalties: general provisions in which the minimum penalties for (in

⁴ P. J. P. TAK, *Essays on Dutch Criminal Policy*, Wolf Legal Productions, Nijmegen, 2002, pp. 1-2.

⁵ *Kamerstukken II*, 1998-1999, 26 656, nr. 1.

⁶ Capital punishment for ordinary crimes was abolished in 1870. For military crimes and war crimes capital punishment was abolished in 1983 but in practice has not been used since 1950. See P. J. P. TAK, *The Dutch Criminal Justice System*, *op. cit.*, p. 59. According to article 114 of the Dutch Constitution, capital punishment can not be imposed.

principle all) offences are described. Dutch criminal law doesn't incorporate special minimum penalties ⁷.

The (general) minimum of a custodial sentence (imprisonment or detention), according to article 10 paragraph 2 and article 18 paragraph 1 CC is one day. The minimum of a pecuniary penalty is 2 Euro (article 23 paragraph 2). The third principal penalty in The Netherlands is the "service penalty". According to article 22c CC this penalty can be divided in a work penalty and an educational penalty. The amount of hours of the "service penalty" has a maximum of 480, of which no more than 240 may be work penalty. There's no rule concerning the minimum of a "service penalty"; this is an exception to the rule that minimum penalties are described in general provisions.

The CC acknowledges three additional ⁸ penalties : deprivation of specific rights ; forfeiture ; publication of the judgment ⁹.

Because of the nature of the forfeiture and the publication of the judgment, the Dutch legislator didn't describe a specific or general minimum. According to article 31 CC, where an offender is deprived of specific rights, the judge shall determine the duration of such deprivation ¹⁰. This duration depends on the term of the imposed principal penalty. Where an offender has been sentenced to life imprisonment, such deprivation shall be for life. Where an offender has been sentenced to a determinate period of imprisonment or of detention, such deprivation shall be for a period of time of not less than two years and not more than five years beyond the term of the principal penalty. Where an offender has been sentenced to pay a fine such deprivation shall be for a period of time of not less than two years and not more than five years. Where deprivation is not imposed concurrently, it shall be for a period of not less than two years and not more than five years.

⁷ The law of the European part of the Kingdom of The Netherlands doesn't acknowledge special minimum penalties. The Criminal Code of the Dutch Antils incorporates a few provisions (articles 438a and 438b) with special minimum penalties for second offenders, and so does some other criminal legislation of the Dutch Antils. This won't be worked out here in greater detail. In october 2002, two members of the second Chamber (Lower House) introduced a legislative proposal introducing minimum penalties for grave offences such as murder and rape. However, there seems to be much opposition to this proposal. Therefore, it is not sure whether this proposal will ever become a law.

⁸ The term "additional" is misleading insofar that in cases in which the law allows the imposition of an additional penalty, this penalty may be imposed either *separately* or in conjunction with principal penalties and in conjunction with other additional penalties. See article 9 paragraph 5 CC.

⁹ A specific additional penalty in (article 7 of) the Economic Offences Act is the whole or partial close down of the company of the convicted person. A specific additional penalty in (article 179, 179a and 180 of) the Road Traffic Act 1994 is the disqualification from driving. These additional penalties won't be worked out here in greater detail.

¹⁰ According to article 28 § 1 CC, an offender may be deprived of the following rights : to hold public office or specific offices ; to serve the armed forces ; to elect the members of general representative bodies and to stand for election to these bodies ; to serve as an advisor before the courts or an official administrator ; to practice specific professions.

The Dutch system of criminal sanctions not only incorporates (principal and additional) penalties, but also measures¹¹. Unlike the penalties, the measures do not primarily react to an offence but to an unwanted situation that has been constituted or revealed by the offence. For that reason, the primary aim of measures is not to punish an offender but to finish the unwanted situation. For example, the aim of the measure of withdrawal is to finish the unwanted situation that a dangerous object is in the circulation¹². This measure of withdrawal is the first mentioned measure in (article 36b-36d of) the CC¹³. Because of this nature, the CC does not mention a specific minimum nor a (general or specific) maximum. For this same reason, the Code does not incorporate a general minimum for measures. The measure of confiscation of illegally obtained profits is regulated in article (36e) CC. Its aim is to confiscate specific assets which have been obtained without a valid title¹⁴. Because of its nature, a legal minimum or maximum can't be prescribed. The same goes for the measure of compensation of damage (article 36f)¹⁵. The CC also incorporates three custodial measures: the placement in a psychiatric hospital (article 37), the hospital order (article 37a-38l; also known as entrustment order) and the criminal placement of drug addicts (article 38m-38u). According to article 37, the placement in a psychiatric hospital lasts one year¹⁶. According to article 38d, the hospital order runs for a period of two years¹⁷. The maximum of the criminal placement of drug addicts, pursuant to article 38n, is two years. Extension of this measure is not possible¹⁸.

Because of the fact that unlike the penalties, the measures do not primarily react to an offence and their primary aim is not to punish (retribute), the measures will only be worked out very briefly in the paragraphs below. As mentioned before, the first aim of this report is to give an overview of the system of (retributive) Dutch penalties.

B. — *Maximum penalties*

In 1999, the Dutch Minister of Justice, responding in a letter to a motion of the Second Chamber (Lower House) concerning the legal maxi-

¹¹ See for an extensive overview T. KOIJMANS, *Op maat geregeld?*, Kluwer, Deventer, 2002.

¹² For that reason, it seems plausible that this measure could be imposed in order to withdraw objects that have been used in terrorist actions.

¹³ Not only the CC incorporates measures, but also (article 8 of) the Economic Offences Act — the administration order of the company of the convicted person respectively the order to repair — and (article 58 of) the Railways Act — the order to repair. These measures won't be worked out here except for the observation that they seem specifically applicable with regards to the results of environmental crime.

¹⁴ For that reason, it seems plausible that this measure could be imposed in order to confiscate assets that have been obtained by terrorist actions or by environmental crime.

¹⁵ It seems plausible that this measure could be imposed in order to compensate damage that has been caused by terrorist actions, by cybercrime or by environmental crime.

¹⁶ Reduction and extension take place via the Dutch Psychiatric Hospitals Compulsory Admission Act.

¹⁷ Under the conditions, mentioned in article (38e), it can be extended.

¹⁸ However, under the conditions mentioned in article 38m, a new imposition is possible.

maximum penalties, made explicit that the criteria for the Dutch legislator to determine the legal maximum penalties are : the gravity of the offence ; systematic considerations ; considerations concerning the technique of legislation ; international aspects ; procedural considerations ; and instrumental considerations ¹⁹.

In 2000, the Dutch Ministry of Justice published a policy document about the reorientation of the application of custodial sentences and penalties which restrict the liberty ²⁰. In this document, the Ministry enumerates the following purposes of criminal sanctions. The first aim is (retrospective) retribution. Other aims are general and special prevention ²¹. It should be assumed that the maximum of the penalties is also related to these purposes, although it's very hard to measure to which extent each of the purposes is reached by a specific sentence.

The system of Dutch criminal law incorporates *special maximum* penalties : each criminal provision incorporates the maximum (custodial and pecuniary) penalty prescribed for the specific offence. The limits of the maximum penalties are prescribed in general provisions. The system of special maximum penalties is supplemented by general and special aggravating and mitigating circumstances. In determining the maximum of the fines, the legislator was directed by the legal maximum of the custodial sentence ²². For that reason, there is a kind of parallel between the maximum of custodial sentences and the maximum of fines.

As mentioned before, one of the factors that have influence on the maximum of the penalties is the gravity of the offence ²³. For example, manslaughter (article 287 CC) is considered to be more serious than simple theft (article 310 CC), because manslaughter is a crime against human life and theft is a crime against goods. Within each category of offences, for example offences against human life, one can further distinguish between intentionally committed offences (like manslaughter) and non-intentional, culpable offences (like being responsible for the death of another by negligence or carelessness). The maximum penalty of intentional offences is generally significantly higher than the maximum penalty of non-intentional, culpable offences within the same category.

There are two kinds of imprisonment : a determinate period of imprisonment and imprisonment for life. According to article 10 paragraph 4

¹⁹ *Kamerstukken II*, 1998-1999, 26 564, nr. 1, p. 3.

²⁰ *Beleidsnota Sancties in perspectief*, Ministerie van Justitie, 's-Gravenhage, 2000.

²¹ It's not clear whether the Ministry of Justice is regarding the purpose of special prevention in a broad sense (in which aims of protection against the offender and aims of restorative justice also come within the reach of the purpose of special prevention) or in a restrictive sense (in which the penalty only aims to prevent the offender of committing offences again).

²² *Kamerstukken II*, 1998-1999, 26 564, nr. 1, p. 3. See also *Kamerstukken II*, 2001-2002, 28 484, nrs. 1-2.

²³ The maximum penalty reflects the gravity of the worst possible case and is thus high for the most criminal offences. See P. J. P. TAK, *The Dutch Criminal Justice System*, *op. cit.*, p. 59.

CC, a determinate period of imprisonment may in no instance exceed twenty years.

Imprisonment for life is only possible for very special offences, such as murder. The criminal judge has the power to impose life imprisonment²⁴. If, in that case, the judge also imposes the deprivation of specific rights, such deprivation shall be for life as well²⁵. Life imprisonment actually means imprisonment until the end of the convicted person's life. The only way to be released before that moment, is by requesting effectively a pardon. Parole or release arrangements are not applicable in the case of a life sentence. The CC does not prescribe compulsory life imprisonment in any circumstances²⁶.

The penalty of detention may in no instance exceed one year and four months (article 18 paragraph 3).

The fine which may be imposed for an offence shall be not more than the maximum for the category specified for that offence. In Dutch criminal law, there are six categories: the first category, 225 Euro; the second category, 2 250 Euro; the third category, 4 500 Euro; the fourth category, 11 250 Euro; the fifth category, 45 000 Euro; the sixth category, 450 000 Euro. The maximum pecuniary penalty is 450 000 Euro. In the case of conviction of a legal person, a fine may be imposed of not more than the amount of the next highest category, where the category defined for the offence does not allow appropriate punishment²⁷.

Pursuant to article 9 CC, the judge is allowed to combine a custodial sentence or a "service penalty" with a fine. Where a penalty of imprisonment or a penalty of detention, other than detention as a substitute penalty, is imposed of which not more than six months have to be executed, the judge may impose a "service penalty" instead.

C. — *Consequences*

The general, very low, minimum principal penalties are characteristic of the Dutch system of criminal sanctions. Therefore, a big difference arises between the (general) minimum and the (specific) maximum penalty that can be imposed for an offence. Because of the general minimum penalties, this difference becomes bigger in grave offences of which the seriousness is expressed in a higher maximum penalty²⁸.

In each case, the criminal judge has the power to impose a sentence of which the ultimate limits are drawn between the special maximum and the general minimum. As mentioned before, in the Dutch system of

²⁴ In all cases in which the judge has the power to impose life imprisonment, he also has the power to impose a determinate term of imprisonment. In the latter case, imprisonment shall be imposed for twenty years at most. Compare article 10 § 3 CC.

²⁵ See article 31 § 1 CC. According to article 59, where life imprisonment has been imposed, no penalties other than deprivation of specific rights, forfeiture of objects seized and publication of the judgment may be imposed in conjunction therewith.

²⁶ See also P. J. P. TAK, *The Dutch Criminal Justice System*, *op. cit.*, pp. 59-60.

²⁷ See article 23 CC.

²⁸ P. A. M. MEVIS, *op. cit.*, p. 39.

criminal law the judge has a great margin of discretion to determine the appropriate sanction, considering the gravity of the offence and the person of the suspect. An example of this last circumstance is the fact that, pursuant to article 24 CC, the judge shall, in his discretion, take the accused's means into consideration in determining the amount of the fine, in order to arrive at an appropriate punishment without disproportionality affecting the income and the capital of the accused. This general remark should be noted when reading the paragraphs below.

The absence of mandatory rules for imposing a penalty may contribute to a mild penal climate but may also result in great disparity in sentencing. Disparity has been called one of the most serious problems in sentencing in the Netherlands. The Courts of Appeal or the Supreme Court can undo extreme unjust sentences. But neither appellate courts nor the Supreme Court can ever realize full equality in sentencing by lower courts. Various proposals have been discussed to improve the equality in sentencing without restricting too much the judges' power to individualize the sentence. Those proposals ranged from the establishment of a special Sentencing Court, or a data bank on sentences, to sentencing checklists or drawing up sentencing guidelines for courts but none of those proposals led to a viable solution to the problem of disparity in imposing penalties. For certain groups of offences — like drunken driving, social security fraud, tax fraud and drug crimes — there is less disparity in sentencing. This has to do with the fact that for these offences the prosecution service has issued directives on what sentence is to be requested at trial in the closing speech. Those directives have a harmonizing effect. It appears in practice that the court considers the penalty requested by the prosecutor in his closing speech as a guideline for sentencing²⁹.

D. — *Penalties for legal persons*

It follows from article 51 of the CC that (not only natural persons but also) juristic persons — also known as legal persons or corporations — are a category of criminal offenders in The Netherlands. However, the CC doesn't incorporate specific penalties for legal persons³⁰. Where an offence is committed by a juristic person (corporation), criminal proceedings may be instituted and such penalties and measures as are prescribed by law, where applicable, may be imposed against the juristic person and/or against those who have ordered the commission of the offence and against those in control of such unlawful behaviour. The proof of the offendership of the corporation requires — according to the jurisprudence of the Dutch Supreme Court — that the corporation initiates the forbidden actions and that the corporation is aware of, and accepts, those

²⁹ P. J. P. TAK, *The Dutch Criminal Justice System*, *op. cit.*, p. 77.

³⁰ In case of an economic offence, (art. 7 sub c of) the Economic Offences Act enables the judge to impose the penalty of closing down the business of the convicted person.

actions³¹. As far as the criminal liability of the natural person (who ordered the commission of the offence or who was in control of the unlawful behaviour) is concerned, it has only to be established that the corporation committed the offence and the accused natural person was aware of the forbidden action (or similar actions) and that he failed to interfere where he was obliged to do so³².

III. MODES OF EXECUTION OF (CUSTODIAL) PENALTIES

A. — *Introduction*

Pursuant to article 553 of the Dutch Code of Criminal Procedure, the execution of judicial decisions is carried out by the Public Prosecution or the Minister of Justice on the recommendation of the Public Prosecution. According to the jurisprudence of the Dutch Supreme Court, this is a very important rule : the promise of the Public Prosecution to a crown witness that, if the crown witness would meet his commitments, the Public Prosecution would not execute an imposed custodial sentence, led to a bar from the prosecution of the (own) criminal case of this crown witness because this was in conflict with article 553 and a denial of the legal system concerning the decision to prosecute, the imposition of sentences and the execution of sentences³³. In this verdict, the Supreme Court made clear that the criminal judge is responsible for the imposition of sentences and the Public Prosecution is responsible for the execution, without having the possibility of modifying the judicial decision without the consent of a judge. This legal relationship between judge and Public Prosecution underlies the subjects of the following subparagraphs.

Article 553 also makes clear that the actual interference of the members of the Public Prosecution with the actual execution can be small. The Public Prosecution can leave the execution to the Minister of Justice. This happens mainly in two categories of sanctions : custodial sanctions and pecuniary sanctions³⁴. As a result, the administration has got some far-reaching powers concerning, among others, the decision of participation of a convicted person in a so-called penitentiary program ; the transfer of a prisoner to another penitentiary institution and the temporary release. This should be kept in mind when reading the following subparagraphs.

Furthermore, article 553 of the Dutch Code of Criminal Procedure points out that the execution of sanctions is in the hands of the Public Prosecution (and the Minister of Justice). This state of affairs raises questions about the possibilities of the judge to interfere. In principle, the legislator didn't give the judge the power to interfere in the way the

³¹ HR 1 July 1981, *NJ* 1982, 80 (codfish-case). Also HR 23 February 1954, *NJ* 1954, 378 (iron wire-case) and HR 14 January 1992, *NJ* 1992, 413 (discriminating disco-case).

³² HR 16 December 1986, *NJ* 1987, 321 (Slavenburg II-case).

³³ HR 1 June 1999, *NJ* 1999, 567 (Karman-case).

³⁴ P. A. M. MEVIS, *op. cit.*, p. 147.

imposed sanctions are executed. For this reason, article 553 marks a dichotomy in law between the imposition and the execution of sanctions³⁵. However, there are exceptions to this principle. Occasionally, Dutch law incorporates provisions concerning judicial interference in the execution. From the perspective of the application of sanctions, the aspects which are considered to be part of the modality of sanctions — distinct from the judicial decision about the sort and extent of sanctions — are aspects in which the judge has the power to interfere. One can think of the conditional sentence ; the payment by instalment of a pecuniary sanction ; in case of imposition of a “service penalty”, the judge can state the kind of service or education that has to be worked out by the offender³⁶ ; where the judge orders publication of the judgment, he shall also determine how such publication is to be made³⁷ ; and in case of imposition of a hospital order, the judge has to choose between ordering that the concerned person shall be treated in the name of the Government or attaching stipulations as to the conduct of the concerned person³⁸.

Pursuant to article 27 CC, in those cases in which the offender has spent time either in police custody, judicial custody, in a psychiatric hospital or an institution intended for clinical observation pursuant to an observation order in detention in a foreign country as a result of an extradition request from The Netherlands, the judge when imposing a term of imprisonment or of detention or a “service penalty”, shall order that the term of the sentence be reduced by the time already served prior to the implementation of the judgment. Where the order applies to a “service penalty”, the judge, in his judgment, shall determine the criteria on which the reduction shall be based.

B. — *Conditional sentence*

The Dutch system of criminal law acknowledges the (general) possibility of a conviction under conditions. According to article 14a CC, where a penalty of not more than one year’s imprisonment or a penalty of detention, other than detention as a substitute penalty, a “service penalty” or a fine is imposed, the judge may order that these penalties shall not be executed in whole or in part. Where a penalty of not less than one year’s and not more than three year’s imprisonment is imposed, the judge may order that part of the penalty, being not more than one third, shall not be executed. The judge may in addition order that additional penalties imposed shall not be executed in whole or in part. According to article 14b, the judge who orders that the sentence imposed by him shall not be executed in whole or in part shall at the same time determine a period of probation. The legal maximum of this probation period varies between two and three years³⁹.

³⁵ P. A. M. MEVIS, *op. cit.*, pp. 150-151.

³⁶ See art. 22c § 1 CC.

³⁷ See article 36 § 1 CC.

³⁸ See article 37b § 1 and article 38 § 1 CC.

³⁹ See article 14b § 2 jo. article 14c § 1 and 2, section 3 and 4 CC.

According to article 14c, for the application of article 14a a general condition shall be that the convicted person shall not commit an offence during the probation period⁴⁰. This condition doesn't create new obligations for the convicted person, but it imposes an extra sanction for violation of criminal norms. It sharpens the threat of a penalty on violating criminal norms and makes this threat concrete. This general condition applies *ipso iure*. For that reason, the judge can not omit this condition, nor modify or terminate it. The general condition even applies if the verdict doesn't say anything about it⁴¹. The general condition is related to all offences, including accessory, attempt and preparation, and minor offences. Even offences that have been committed abroad don't seem excluded⁴².

In applying article 14a, also special conditions may be imposed, such as full or partial compensation for the damage resulting from the offence ; committal of the convicted person to an institution for treatment for a period of time specified in the order, the length of which may not exceed the period of probation ; the deposit of a sum of money as a security⁴³ ; the deposit of a sum of money, the amount to be set by the judge, in the criminal injuries compensation ; and other special conditions with regard to the conduct of the convicted person. These special conditions may not abridge the freedom of the convicted person to profess his religion or his personal beliefs or curtail his constitutional freedom. Furthermore, a special condition has to imply a smaller restriction of freedom than the unconditionally imposed sentence⁴⁴. The aims of the special conditions is closely related to the aim of the conditional sentence. The special conditions are imposed in order to improve the convicted person with regards to avoiding repeated crime. They have a strong relationship with the committed offence. For that reason, the special condition has a reflecting character. They should contribute to the effort of preventing that similar offences (as the offence for which the offender has been convicted) are committed. This often happens by putting pressure on to the convict to avoid specific risky situations. The primary aim of the special conditions is the compliance with the general condition, that the convicted person doesn't commit an offence again. Therefore, the justification of the special conditions is not the retribution of culpability but the combating of repeated crime⁴⁵.

Pursuant to article 14g CC, where any condition imposed is not met, the judge who imposed the sentence, upon receipt of an application by

⁴⁰ In 2000, the government of The Netherlands proposed to abolish this general condition. However, from both the parliament and the science of law, this idea was heavily criticised. For that reason, the minister of justice is going to reconsider this proposal.

⁴¹ HR 8 June 1993, *NJ* 1993, 746. See also F. W. BLEICHRODT, *Onder voorwaarde*, Gouda Quint, Deventer, 1996, p. 65.

⁴² F. W. BLEICHRODT, *op. cit.*, p. 65.

⁴³ Pursuant to article 14k CC, where a sum of money has been deposited as a security, this sum shall be paid back to the convicted person, insofar as it has not, by virtue of a judicial decision specified in article 14g paragraph 4, been forfeited to the state.

⁴⁴ F. W. BLEICHRODT, *op. cit.*, p. 97.

⁴⁵ F. W. BLEICHRODT, *op. cit.*, pp. 69-70.

the Public Prosecutor's Office and without prejudice to the provisions of article 14f CC ⁴⁶, may, where he finds grounds so to do, order that the suspended sentence be carried out or order that the part of the suspended sentence be carried out, the conditions either remaining as imposed or being modified. Instead of ordering that a custodial sentence be carried out, the judge can impose a "service penalty". Where a sum of money has been deposited to the state as a security, the judge may in addition determine that this sum, in whole or in part, is forfeit to the state.

C. — *Early release*

Another characteristic of the system of Dutch criminal sanctions is the system of early release which has been incorporated in article 15 and 15a of the CC. A convicted person sentenced to a custodial sentence for a determinate period of which more than one year is to be executed shall be released when two thirds of that sentence have been served. A convicted person sentenced to a custodial sentence of which not more than one year is to be executed may be released when he has been deprived of his liberty for not less than six months and when one third of the remaining term has been served. This instrument of early release is a right for the convicted person. His early release does not depend on certain conditions ⁴⁷.

Nowadays, in The Netherlands there is quite some opposition against this system. For that reason the Dutch legislator is preparing a concept of a legislative proposal to change the system of early release into a system of conditional release ⁴⁸.

⁴⁶ According to article 14f, the judge who imposed the conditions may, either upon receipt of an application by the Public Prosecutor's Office, or at the request of the convicted person, reduce the period of probation, or extend it on one occasion. The extension shall be for not more than one year. Similarly, during the probation period or during the period in which probation is suspended, the judge may modify the special conditions imposed or change the term within the probation period during which they are operative, revoke these conditions, impose special conditions and make, modify or revoke an appointment as specified in article 14d. This latter decision implies an appointment to an institution for the rehabilitation of offenders assigned by virtue of General Administrative Order, or a special rehabilitation officer, to aid and assist the convicted person in complying with the conditions.

⁴⁷ Early release, according to article 15a, may be postponed where a. the convicted person on the grounds of mental defect or mental disease, has been committed to an institution for the treatment of persons on an Entrustment Order and where continuation of treatment is required ; b. the convicted person has been convicted in a final judgment for a criminal offence for which, pursuant to article 67, section 1, of the Code of Criminal Procedure, judicial custody is allowed and where the offence was committed after the execution of his sentence commenced ; c. there is evidence that the convicted person has otherwise grossly misbehaved after the execution of his sentence commenced ; d. the convicted person removes himself or attempts to remove himself from execution after the execution of his sentence commenced.

⁴⁸ See also *Voorwaarden voor een veilige terugkeer*, Rapport van de Commissie Herziening vervroegde invrijheidstelling, Sdu, 's-Gravenhage, 2002.

D. — *Phasing of detention*

Furthermore, the system of Dutch custodial sentences incorporates the so-called phasing of detention. This means that prisoners serving a long sentence will be placed in a more “open” institution by the time that moment of the end of their sentence is coming closer. Nowadays, in The Netherlands there is an experiment with an electronic tagging system. Required are an acceptable accommodation of the concerned person, a telephone connection and the approval of housemates. The concerned person gets a belt around the ankle which functions as a transmitter that is connected to a receiver, a small desk that transmits information to a central computer. If the concerned person moves away more than 50 meters from the receiver, the central computer is being alarmed. The concerned person gets a daily program with activities outdoors. The central computer is adjusted to that.

E. — *Penitentiary program*

Another characteristic of Dutch custodial sentences is the so-called penitentiary program (which takes place in the phase before the electronic tagging system that was mentioned above). According to article 4 of the Dutch Act of Penitentiary Principles, a penitentiary program is a system of activities — outside the penitentiary institution — in which is participated by persons in order to have the rest of their custodial sentence executed in connection with their stay in the penal institution. A prisoner is only eligible for participation in a penitentiary program when he has irrevocably been sentenced to a custodial sentence of which the non-suspended part lasts at least one year ; if he has served at least the half of the imposed custodial sentence ; and the part of the custodial sentence that still has to be served, lasts at least six weeks and at most one year.⁴⁹ Article 5 of the Penitentiary Enactment prescribes that a penitentiary program contains a minimum of 26 hours per week in which activities of the participant are taken upon. These activities are aimed at learning specific social skills ; at improving the chance of a job after the custodial sentence ; at offering education ; at offering special care and treatment to the participants who are addicted to drugs and mental health care ; or at other ways of social rehabilitation.

The Public Prosecution and the institution for the rehabilitation of offenders give the director of the penitentiary institution an advise concerning the convicted person. The director then makes a recommendation for the “selection-officer” (a person appointed by the minister of justice). This officer decides whether the convicted person will be allowed to participate in a penitentiary program.

⁴⁹ Pursuant to article 4 § 6 of the Dutch Act of Penitentiary Principles, a person who has been placed a criminal placement of drug addicts is not eligible for a penitentiary program.

F. — *Pay by instalment*

According to article 24a CC, where in a judgment a sentence of one or more fines amounting to not less than 225 euro has been imposed, the judge may determine in the judgment that the convicted person pay by instalment. Each instalment shall be not less than 45 euro. Pursuant to article 24b CC, the Public Prosecutor's Office shall send a written reminder for payment when the amount of a fine imposed in a final judgment has not been paid in full within the set time limit. The amount is then increased by operation of law by 10 euro.

Pursuant to article 36f paragraph 4 CC, the provisions of payment by instalment also apply to the measure of compensation of damage.

G. — *Detention as a substitute penalty*

According to article 24c CC, where a fine has been imposed in a judgment and where neither full payment nor full recovery of the amount due ensues, the judge shall order detention as a substitute penalty, of which the term shall be not less than one day and not more than one year. It shall not exceed one day for each full 25 euro of the fine.

Detention as a substitute penalty is also ordered in the judgment in which a "service penalty" is imposed. This follows from article 22d CC. The term of such detention shall be not less than one day and not more than eight months. It shall not exceed one day for each two hours of the "service penalty". According to article 22g, when the convicted person doesn't commence the "service penalty" or the Public Prosecutor's Office is of the opinion that the convicted person doesn't properly complete the penalty imposed, or doesn't have properly completed the penalty imposed, the Public Prosecutor's Office may order the execution of the detention as a substitute penalty. The convicted person may submit a declaration of objection to this with the judge who imposed the sentence. The judge may change the decision of the Public Prosecutor's Office.

According to regulations to be laid down by General Administrative Order, the Public Prosecutor's office may make inquiries of entities and persons whose work involves the rehabilitation of offenders as to the way the service penalty is or has been performed⁵⁰. This state of affairs points out that in the Dutch system of "service penalties", the rehabilitation service is a rather important organ in advising (both the judge and) the Public Prosecution and, by doing so, it has a relatively big power concerning the continuation of the "service penalty".

H. — *Pardon*

According to article 122 of the Dutch Constitution, under certain conditions, imposed by law, pardon and amnesty can be granted.

⁵⁰ See article (22e) CC.

Pursuant to article 558 of the Dutch Code of Criminal Procedure, pardon can be requested and granted for all principal and additional penalties which have been irrevocably imposed by the Dutch criminal judge, with the exception of unconditional fines with a maximum of 225 Euro.⁵¹ There are two grounds for a pardon. According to article 2 of the Dutch Pardon Act, a pardon can be given a. if there is any circumstance, that the judge couldn't take into consideration at the time of his judgment and which, if he would have been familiar with this circumstance, would have lead to the imposition of a different penalty or measure, or to the decision not to impose a sanction or b. if it has become likely that the (further) execution of the judgment doesn't reasonably serve a purpose of criminal law⁵².

In current Dutch law, there's no Statutory Act concerning amnesty.

IV. THE CRIMINAL RECORD OF THE OFFENDER

Title XXXI of the Second Book of the CC contains provisions on repeated criminal offences commonly applicable to various titles of that book⁵³. For example, according to article 421, the penalty of imprisonment prescribed in several criminal provisions⁵⁴ may be increased by one third where, at the time the criminal offence is committed, less than five years have passed since the offender fully or partially served a sentence of imprisonment imposed upon him for any of the criminal offences defined in the above articles, or since he fully or partially served a sentence imposed upon him under Military Law, for theft, embezzlement, handling stolen property, intentionally deriving advantage from the proceeds of property obtained by means of a criminal offence, or deception, or since he was pardoned from serving such sentence ; or where the right to implement the sentence has not yet lapsed at the time the criminal offence is committed. It should be noted that several forms of terrorism can be qualified as the criminal offences to which the provisions on repeated criminal offences could be applicable.

Furthermore, the Dutch criminal judge is allowed to take into consideration, when he determines the penalty (the limit of which is bound by the concrete criminal provision), the criminal record of the suspect, including the crimes committed abroad, and other personal circumstances concerning the suspect. This criminal record may convince the judge that another "service penalty" is not going to keep the suspect from committing another crime and, for that reason, a custodial sentence is appropriate. Dutch law does not contain a provision which prescribes that a previous

⁵¹ Pardon can also be requested and granted for penalties that have been imposed by a judgment in a foreign state, which are executed in The Netherlands.

⁵² The Dutch legislator has recently made a legislative proposal for some changes in the procedure for obtaining pardon : *Kamerstukken II*, 2000-2001, 27 798, nrs. 1-2.

⁵³ The CC doesn't incorporate such provisions for minor offences.

⁵⁴ See article 105, 174, 208-212, 216-222bis, 225-229, 310-312, 315, 317, 318, 321-323, 326-332, 341, 343, 344, 359, 361, 366, 373, last section, 402, 416 and 417 CC.

foreign conviction should be an aggravating circumstance for determining the penalty.

Since January 1st 1988, the possibilities for transferring the execution of criminal judgments have increased considerably for The Netherlands. On that date, the Dutch Act on the Transfer of Enforcement of Criminal Judgments came into force, and since then the number of international agreements in this field has also increased⁵⁵. Pursuant to article 2 of this Act, enforcement of foreign criminal judgments can take place in The Netherlands if there's a treaty (for example the Convention on the transfer of sentenced persons) which enables the transfer of the enforcement. In general, the Act acknowledged two procedures to get the foreign judgment enforced in The Netherlands : the so-called "exequaturprocedure" and the procedure of "direct enforcement". For the latter, the consent of the convicted person is required.

V. CONCLUSION

In the paragraphs above, the Dutch system of criminal sanctions has been described. This report aims to contribute to the discussion whether harmonization between the systems of criminal law of the member states of the European Union is possible and desirable.

In this perspective, three obstacles of the current Dutch system have to be mentioned. The first, and most important obstacle, is the circumstance that Dutch criminal law doesn't recognize special minimum penalties. As a matter of fact, until now the Dutch government rejects the idea of special minimum penalties as a consequence of harmonization. It remains to be seen whether (and when) the Dutch legislator will change this point of view.

The second obstacle, which is of less importance, is the fact that Dutch law doesn't incorporate a system of conditional release of custodial sentences. The Dutch Criminal Code incorporates a system of early release. However, the Dutch legislator is preparing a concept of a legislative proposal to change the system of early release into a system of conditional release.

The last possible obstacle that should be mentioned is the principle of discretionary powers concerning the prosecution of suspects. This principle — contrary to the principle of legality — doesn't oblige the Public Prosecution to prosecute every offence. If the "general interest" doesn't demand the prosecution of an offence, the Public Prosecution may decide not to prosecute. However, in recent decades more and more directives have been made which oblige the Public Prosecution to prosecute several categories of offences. The question remains, how strong the European influence on the Dutch Public Prosecution and on the Dutch legislator concerning this matter will be.

⁵⁵ D. J. M. W. PARIDAENS, *De overdracht van de tenuitvoerlegging van strafvonnis- sen*, Casparie, IJsselstein/Nieuwegein, 1994, p. 445.

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