

BEYOND THE DEATH PENALTY

BEYOND THE DEATH PENALTY

Reflections on Punishment

Edited by

Hans NELEN
Jacques CLAESSEN



intersentia

Cambridge – Antwerp – Portland

Intersentia Publishing Ltd.
Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
Tel.: +44 1223 393 753 | Email: mail@intersentia.co.uk

Distribution for the UK:
Hart Publishing Ltd.
16C Worcester Place
Oxford OX1 2JW
UK
Tel.: +44 1865 517 530
Email: mail@hartpub.co.uk

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Email: info@isbs.com

Distribution for Austria:
Neuer Wissenschaftlicher Verlag
Argentinierstraße 42/6
1040 Wien
Austria
Tel.: +43 1 535 61 03 24
Email: office@nvwv.at

Distribution for other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

Beyond the Death Penalty. Reflections on Punishment
Hans Nelen and Jacques Claessen (eds.)

© 2012 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

Cover photograph: © iStockphoto/Robert Walsh

ISBN 978-1-78068-060-6
NUR 824

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.

ACKNOWLEDGEMENTS

This book contains a selection of papers that were presented during the multidisciplinary conference ‘Beyond the Death Penalty; Reflections on Punishment’, organised by the Maastricht Centre for Human Rights on 28 and 29 October 2010. The event marked the 150th anniversary of the *de facto* abolition of the death penalty in the Netherlands.

The original idea to organise the conference (and a parallel cultural programme) came from our colleague (and freelance journalist) Paul van der Steen. Due to personal circumstances, he had to withdraw from the organising committee himself. However we managed to enthuse some of our colleagues and succeeded in turning our original ideas into a programme that covered a wide range of topics in relation to punishment. Special references, in this respect, have to be made to David Roef, Gerard de Jonge, Louis Berkvens, Luc Bien and Peter Bal. The latter passed away suddenly on 26 March 2010. This book is dedicated to him. Our dear colleague and friend Peter Bal was really looking forward to a stimulating multidisciplinary conference, and we still feel deep regret that he was not there to attend the conference.

Based on the positive feedback the organisers received from many participants, the conference turned out to be a success. The participants enjoyed the pleasant academic atmosphere, the debates, and the high quality of the presentations. We want to thank all speakers and participants at the conference for their input.

The conference could not have been organised without the financial support of a number of institutions. We are indebted to the Province of Limburg, the Research and Documentation Centre of the Ministry of Safety and Justice (WODC), the Limburg University Fund/SWOL, and the Maastricht Faculty of Law, for their donations. The ancient Maastricht City Hall was kindly placed at our disposal by the local authorities for the re-enactment of the last criminal case in the Netherlands that led to a public execution.

The organisational support of Chantal Kuypers and Yleen Simonis during the conference was invaluable. Yleen was also a great help to us throughout the whole preparation period. We also want to thank Stephan van Uden and, in particular, Evelyn Bell, for their assistance in providing the layout for this book. For a long time, Ben van Wersch belonged to the team of editors of this book. We are very grateful for his input and have good memories of our fruitful and pleasant meetings.

What we hoped to achieve with the conference was a reflection on punishment from a variety of angles, and, additionally, to give some food for thought to the contemporary debate on crime and punishment. Without doubt, the conference served these purposes. We hope this book will have the same impact on its readers.

CONTENTS

<i>Acknowledgements</i>	v
Chapter I. General Introduction	
Hans NELEN and Jacques CLAESSEN	1
1. Historical and Cultural Background	3
2. Punishment in a Populist Context	5
3. Reconciliation and Rehabilitation	6
4. Prison Life	7
5. Efficiency and Effectiveness	8
PART I.	
HISTORICAL AND CULTURAL BACKGROUND	
Chapter II. Whatever Happened to the Death Penalty?	
David GARLAND	13
1. Introduction	13
2. The Character and Capacity of States	15
3. Political Processes of Reform	17
4. Cultural Processes of Reform	19
5. Conclusion	22
Chapter III. The Abolition of the Death Penalty in the Netherlands	
Chrisje BRANTS	25
1. Introduction	25
2. Theories on the Disappearance of Public Punishment	26
3. Legal Culture and the Legitimacy of Criminal Justice	29
4. The Seeds of Dutch Legal Tradition: the Republic of Seven United Provinces	31
5. A Dutch Revolution and the Reception of Ideas of the Enlightenment on Criminal Justice	36
6. The Struggle for Reform	39

Chapter IV. The Long and Peculiar History Without the Death Penalty in Finland	
Jukka KEKKONEN	45
1. Introduction	45
2. <i>De Facto</i> Abolition of the Death Penalty: 1826	48
3. Criminal Law Reforms in the 1860s and the New Criminal Code of 1889	50
4. Crisis Episodes: Finnish Civil War	52
4.1. Interwar Period	56
4.2. The Second World War	57
4.3. The Abolition of the Death Penalty	58
4.4. Conclusions	59
Chapter V. Imprisonment as an Alternative to the Death Penalty. Historical Observations Complementary to an Emerging Discussion	
Lydia BERTRAM	63
1. Introduction	63
2. Joint <i>Versus</i> Solitary Confinement	64
3. Debates on the Penal Code: 1827–1828	65
4. Debates on the Penal Code: 1839–1840	66
5. Debates on the Penal Code: 1843–1847	67
6. Legal Introduction of the Pennsylvanian Prison System: 1851–1854	69
7. Debates on the Penal Code: 1859–1860	70
8. The Debate on the Abolition of the Death Penalty	71
9. Conclusion	74
Chapter VI. Towards Abolition of the Death Penalty Based on International Obligations of a State	
Diana MERTEN	77
1. Introduction	77
2. The Hypothesis	78
3. Substantiation	80
3.1. Travaux Préparatoires to Article 6, Paragraph 1 ICCPR	81
3.2. Travaux Préparatoires to Article 6, Paragraph 2 ICCPR	83
3.2.1. Reference to ‘Most Serious Crimes’	83
3.2.2. Reference to ‘the Law in Force at the Time of the Commission of the Crime’	84
3.2.3. Reference to the CPPCG	84
3.2.4. Reference to a Final Judgement Rendered by a Competent Court	86
4. Challenging the Hypothesis	88

5. Consolidating the Hypothesis.	89
6. Conclusion	91

PART 2.

PUNISHMENT IN A POPULIST CONTEXT

Chapter VII. Crime and Punishment in a Populist Context

Hans BOUTELLIER.	95
1. Introduction.	95
2. Security as a Populist Theme.	96
3. Times of Confusion	98
4. Social Ordering	99
5. A Reply to Populism!?	101

Chapter VIII. Too Readily Dismissed? A Victimological Perspective on Penal Populism

Antony PEMBERTON	105
1. Introduction.	105
2. Victimology Versus Penal Populism	107
2.1. Victims Are Not More or Less Punitive than Non-Victims.	107
2.2. Victims Are Not as Much Interested in Retribution and Revenge as They Are in Other Matters	108
2.3. Even if Victims Express an Interest in Punishment It Will Do Them No Good	109
3. Punitiveness in Victims: Questioning the Victimological Consensus. . .	110
4. Addressing Harms and Wrongs, Overlapping but Distinct Aspects of Reacting to Victimisation	112
5. The Importance of Revenge and Retribution	115
6. Conclusion	119

Chapter IX. A ‘Natural Right’ to Revenge?

Bas VAN STOKKOM.	121
1. Introduction.	121
2. A ‘Natural Right’ to be Enraged?	123
3. Penal Populism and Using Victims	126
4. Victim Impact Schemes and Punitive Desires	128
5. Is Revenge Helpful?	131
6. Victim Duties.	133
7. Concluding Thoughts.	137

Chapter X. Lay Participation in the Dutch Criminal Procedure Will Not Result in Higher Public Satisfaction Henk ELFFERS	139
1. Introduction	139
2. Public Satisfaction with the Judiciary	140
3. Dissatisfaction Is Not a Function of Lack of Lay Participation	142
4. Laymen Will Not Decide Differently from Professional Criminal Judges	143
5. Summing Up	143
Chapter XI. Eye to Eye with the Dutch Anti-Social Behaviour Agenda Patrick VAN CALSTER and Marc SCHUILENBURG	145
1. Introduction	145
2. Background of Collective Shop Ban	147
3. Differences with Criminal Law	149
4. Quasi Criminal Law	151
4.1. Public Familiarity with the Measure	152
4.2. Arbitrariness in the Enforcement	154
4.3. Individual Modes of Settlement	156
5. Conclusion	158
Chapter XII. Sex with a Child Robot. Psychological, Ethical and Legal Arguments David BAMPS	161
1. Introduction	161
1.1. Theoretical Framework	162
1.2. Statement of the Problem	164
1.3. Research Questions	164
1.4. Methodology	165
2. <i>Communis Opinio</i>	166
2.1. Poll 2009	166
2.2. Questionnaire 2010	167
2.3. Intuitive Law and Contradictory Moral Beliefs	169
3. Robotics and Underage Sex Workers	170
3.1. Stepping Stone Theory	171
3.2. Canalisation Theory	171
4. Sex Robotics, Children and the Law	172
4.1. Indirect Harm Argument	173
4.2. The Persuasive Argument	173
4.3. The Realistic Argument	174
5. Videogame Industry and Sex Robotics?	175
6. Conclusion and Recommendations	177

PART 3.

RECONCILIATION AND REHABILITATION

Chapter XIII. Crime and Punishment: Reflections on (Capital) Punishment from a Religious Perspective

Jacques CLAESSEN	183
1. Introduction	183
2. Religion as a Neglected Interest in Criminology	184
3. Religion and Religion	185
4. Religion in the Public Sphere	186
5. Religious Views on Crime and Punishment	188
5.1. Religious Fundamentalism and Conservatism	188
5.1.1. American Criminological Research	189
5.1.2. God is Love. Still, He Punishes.	191
5.2. Mysticism	193
5.2.1. A Mystical Theory of (Criminal) Justice	194
5.2.2. No Room for the Death Sentence.	196
6. The Mystical Roots of Restorative Justice	198
6.1. Crime as a Relational Conflict and Law Governing Wrongful Conduct to Restore Relations	198
6.2. Man as a ‘Junction of Relations’	199
6.3. Restorative Justice Means Attention to the Needs of all Parties . . .	200
6.4. Restorative Justice as a Mystical-Legal Perspective in Action	201
7. Epilogue	201

Chapter XIV. The South African Model of Transitional Justice: Revenge or Reconciliation?

Georgi VERBEECK	203
1. Introduction	203
2. Dealing with the Past in Post-Conflict Societies	204
2.1. Amnesia	205
2.2. Trials and Justice	206
2.3. Lustration	207
2.4. Restitution and Compensation	207
2.5. Political Re-Education	208
2.6. Truth and Reconciliation Commissions	208
3. Truth and Reconciliation in South Africa	209
4. Towards a ‘Culture of Apology’	213
5. South Africa: Model or Miracle?	216

Chapter XV. Criminal Records and Judicial Rehabilitation in the Netherlands

Miranda BOONE	219
1. Introduction	219
2. Re-Socialisation and Rehabilitation in the Netherlands	220
3. Criminal Records	222
3.1. Content	222
3.2. Access to Criminal Records	223
4. Conduct Certificate	225
4.1. Admissibility	226
4.2. Judicial Data in the Decision to Assign a Conduct Certificate	227
4.3. Practical Implications	228
5. Expunging Techniques/Rehabilitation Opportunities	229
5.1. Automatic Measures	229
5.2. Measures Requiring Some Form of Merit	230
6. Issuing a Conduct Certificate	231
6.1. Objective Criterion	232
6.2. Subjective Criterion	233
7. Retrospective Period	234
8. Rehabilitation Rituals	234
9. Conclusion	235

PART 4.

PRISON LIFE

Chapter XVI. Life Without Parole

Hans NELEN	241
1. Introduction	241
2. Deprivation of Liberty and Autonomy	243
3. Deprivation of Security	244
4. Resistance	245
5. Playing the Opposites	246
6. Interaction with Other Prisoners	247
7. Social Cleansing	249
8. Epilogue	250

Chapter XVII. Working as a Prison Officer: To Be Human is To Be Emotional

Hanne TOURNEL	253
1. Introduction	253
2. What is Meant by ‘Emotions’?	254
3. Prisons as Emotional Arenas: The Importance of Context	256

4.	Working as a Prison Officer: A View on the Emotional Impact	257
4.1.	Prison Officers and Emotional Labour	257
4.2.	Dynamic Security: A Complex Task	258
4.3.	Emotions and the Professional and Organisational Culture	260
4.4.	The Stigma of Prison Officers As a Considerable Stressor	262
5.	Emotion Management by a Prison Officer	263
6.	The Costs Associated with the Emotional Impact and the Required Emotion Management	265
7.	Conclusion	266

Chapter XVIII. Health care in Detention in the Netherlands: Dilemmas
and Decisions

	Wilma DUIJST, Tatjana NAUJOCKS and Jan VOSTERS	269
1.	Introduction.	269
2.	The Right to Health Care.	270
3.	Obligations for the State.	271
4.	Medical Care in Detention in the Netherlands	273
4.1.	Just Doctoring?	274
4.2.	Refusal of Medical Care in a Police Station	274
4.3.	Medical Care and Safety	275
4.4.	Communication Between the Police Station and Prison	275
4.5.	Medical Care in Prison.	276
4.6.	Drugs.	276
4.7.	Refusal of Medical Care in Prison	276
4.8.	End of Life Decisions	277
4.9.	Choosing Means Being Responsible	277
5.	Death in Detention	278
6.	Death in a Dutch Prison or Police Station	279
7.	Conclusion	281

PART 5.
EFFICIENCY AND EFFECTIVENESS

Chapter XIX. The Efficiency of Solving Criminal Conflict through
Negotiation

	Stephanie VERHELST.	285
1.	Introduction.	285
2.	Law, Economics and Efficiency.	286
2.1.	Law and Economics	286
2.2.	Efficiency and Criminal Law.	286

3.	Different Methods for Reaching a Negotiated Solution in Criminal Conflict	287
3.1.	Settlement	288
3.2.	Mediation in Criminal Law	290
3.3.	Restorative Mediation	291
4.	A Comparison with ‘Efficiency’ as Starting Point	293
4.1.	Arguments Pro	293
4.2.	Arguments Contra	297
5.	Conclusion	300

Chapter XX. Recidivism in the Netherlands: Dutch Research on the Effectiveness of Penal Interventions

	Bouke WARTNA, Daphne ALBERDA and Suzan VERWEIJ	305
1.	Introduction	305
2.	Method	309
3.	Results	312
4.	Conclusion and Discussion	317
	<i>About the Authors</i>	319