

IMPOSED VERSUS UNDERGONE PUNISHMENT IN THE NETHERLANDS

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1 Introduction

A crime often attracts a great deal of attention. So does the following trial and conviction. After the conviction, attention drops down. Most people have no idea how sanctions can be ended. This article deals with the question what happens in the Netherlands to a person after conviction. More specific: what decisions can be made on him regarding the execution of the sanction. This is a very interesting question, for the person undergoing the sanction maybe the most important question. That is why it has always astonished me that lawyers put relatively little attention to it. I will focus on the decisions that can be made on the convicted person during the execution of the sentence, the procedures that have to be taken into account and the legal possibilities to complain about those decisions. I will show that the judge in the Netherlands has very little influence on the decisions that are made during the execution of a sanction what brings uncertainty and a lack of legal protection to the convicted person.

Before starting with the main topic, an overview of the sanctions that can be imposed according to the Dutch sanction system for adults will be given in the second section.

The third section contains an extensive description of the situation in the Netherlands where by emphasis will be put on the sanctions depriving or curtailing a person's liberty. Attention will also be paid to the Green (government) paper 'Sanctions in perspective' which will be the starting point for fundamental legal changes in future. Next, attention shifts to international and doctrinal aspects linked to the subject, as the penal content of sanctions and the role of the judge versus the administration. The last section is reserved for discussion.

2 Headlines of the Dutch sanction system

2.1 *The current Dutch sanction system*

In the Netherlands, penal sanctions can be imposed in two ways. That is why the Dutch sanction system is also called a two-track system or a dualistic sanction system. If the sanction is based on retribution, one calls it a penalty, if protecting society is its fundamental goal, one talks about a measure. The existence of a two track-system can be explained by the fact that the system was influenced by the classical view on punishment on the one hand and the modern movement in penal law on the other. The classical view is based on a portrayal of mankind as fundamentally free. Only abuse of freedom is forbidden. The content of 'abuse of freedom' is decided by the government and laid down in penalty clauses. Especially for the neo-classical thinkers, punishment was not a means to a certain aim, but an aim in itself. The sanction did serve no other aim than to punish, that will say repay the suffer that was caused by the offender. That is why the penal code involved a

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high level of legal protection. Important legal principles as the principle of guilt, the principle of equality and legality (the rule of law) were very important.

Followers of the modern movement in penal law had a totally different portrayal of mankind. In their eyes, human beings were miserable, dangerous and unhappy creatures. They rejected the non-deterministic view of the (neo) classical thinkers and replaced it by a deterministic view. All kinds of factors inevitably lead the delinquent person to evil; personal guilt was negligible. In this view, retribution as an aim of punishment is worthless. The most important aim of punishment according to the modernist thinkers is protecting society by correcting or disarming offenders. These two different visions on the role and function of penal law resulted in a sanction system that reserves penalties for offenders who are held responsible for their deeds and measures for those who are not.⁷

Even apart from the ways sanctions can be ended, the system as it is laid down in the current Penal Code is varied. Compared to many other countries, the judge has a large measure of freedom and a wide range of options in determining the type, degree and mode of penalties. The Dutch sanction system for adults (persons of 18 years or older) distinguishes between penalties and measures and between principal penalties and accessory penalties. In this paper, I will only discuss principal penalties and measures. Accessory penalties are not relevant for the topic.¹

Principal penalties are set out in order of severity in Section 9 of the Penal Code as follows: imprisonment, detention, community sanctions and fines. In a formal sense, detention is still a lighter sentence than imprisonment, but the two hardly differ in the manner of their enforcement. Detention is the only custodial sentence for infractions and can be applied to a maximum of one year. Community sentences were introduced in the penal code in February 2001. Till that time only the community service order had a legal basis, educational sentences were applied as a special condition of a suspended sentence .

There is one general minimum penalty for all offences namely one day for imprisonment and detention and five guilders for the fine. A minimum for community sanctions is lacking. Maximum penalties are laid down for each individual offence. Until 1994 accumulation of penalties was strictly limited, but since that time all combinations of principal penalties are allowed.

Section 14a a-k Penal Code deals with suspended sentences. All principal and accessory penalties can be applied suspended, meaning that the imposed sanction or a part of it will not be executed under certain conditions. The application of the suspended prison sentence is limited to sentences up to a maximum of one year, prison sentences of one to three years can be partly imposed suspended to a maximum of one third. Until the introduction of the recent Bill on community sanctions, these sanctions did not have a suspended variant. The legislator, however, meant that there should not be a difference on this point with the other principal penalties. Even so, it feels strange, because the conditions belonging to a suspended sentence often have many similarities with community sanctions. Indeed, most community sanctions were applied as a condition of a suspended sentence during the

1. Tak en Van Kalmthout paid attention to accessory penalties in their Sanction-Systems in the member-states of the Council of Europe, 1988, part two, p. 668-670.

experimental stage.

As said before, measures differ from penalties in the way that they can also be imposed on offenders who are not hold responsible for their deeds. Neither the application nor the severity of a measure depends on the guilt of the offender. Financial measures are withdrawal from circulation (Sects. 36b-d PC), the confiscation of the profits of crime (Sect. 36e PC) and compensation to the victim (Sect. 36f PC). Measures depriving a person's liberty are placement in a psychiatric hospital (Sect. 37 PC), the measure of entrustment to a forensic psychiatric hospital (TBS) and the penal centre for addicts. Emphasis will be put on the last category. Interesting for the scope of this paper, is that recently also suspended variants of hospital orders became possible.

The disconnection with guilt, makes it very attractive for the government to present a new sanction as a measure, even though the sanction is actually based on reproach. Suspicions of this kind rise for example with regard to the latest amendments of the bill on the confiscation of profits of crime making it possible to take away also the profits that are (possibly) made with other crimes and the recently introduced bill on the penal centre for drug- addicts which gives the possibility to imprison addicted persons for two years for minor offences, in order to make it possible to treat them.

3 Imposed versus undergone punishment: positive Dutch law

3.1 Financial penalties and measures

Originally fines were only intended for infractions and minor offences. Since the passage of the 1983 Financial Penalties Act all offences may be sentenced with a fine. The minimum fine for all offences is 5 guilders, the maximum can run up to a million guilders depending on which of the six fine categories an offence or infraction is placed in. Following the advice of the Financial Penalties Committee, day fines were rejected on theoretical and practical grounds. Although, the topic has regularly been discussed ever since, day fines were never introduced in the Dutch sanction system, contrary to surrounding countries.² Instead, the judge is ordered to take into account the financial position of the offender when he imposes a fine (Sec. 24 PC). Moreover, the judge has the possibility to impose a fine in instalments, provided that the fine exceeds the amount of 500 guilders. If so, the judge also has to determine the amount of each instalment and the terms in which it has to be paid (Sec. 24a PC).

Section 24a is the only provision for the judge to influence the execution of the fine. In all other aspects, the Prosecution Service is responsible for the way financial penalties and measures are ended (Sec. 562 CCP). Even though this is only a formal responsibility, in practice a Department of the Ministry of Justice (Centraal Justitiele Incassobureau, hereafter CJIB) takes care of the implementation. The little practical interference of the Prosecution Service with the execution of financial and other

2. J. Simonis, *Is ons strafrecht gebaat bij de invoering van een dagboetestelsel?* *DD* 31 (2001), afl. 5, p. 476-494.

sanctions resulted in a change of law in 1999. Section 553 CCP and Section 4 of the Bill on judicial organization still expresses the responsibility of the Prosecution Service for the execution of sanctions, but also the (possible) lack of interference.

The CJIB follows strict procedures, which are applied too rigid sometimes, according to reports of the National Ombudsman.³ As the judge, the CJIB can arrange payment in instalments or postpone payments as long as it is under formal responsibility of the Prosecution Service (subsection 3 of sec. 561 CCP).⁴ Still, the whole amount must be paid in two years and three months from the day that the sentence was due to be enforced (Subsec. 4 of Sec. 561 CCP).

For the scope of this article, financial penalties become really interesting when they are not paid. In that case, the distance between the sanction (primarily) imposed by the judge and the way it is ended, becomes enormous. Whenever a fine is not paid or not fully paid within the set time, a written warning is sent to the convicted person increasing the fine automatically. After the second demand, the bailiff will be called in and the amount will be recovered from the offender's property. However, when recovery from the offender's property is no option or the prosecutor (read CJIB) does not want to consider it, detention for default comes in sight.

The judge determines the default term when he imposes the original fine. Execution is initiated by the CJIB and effected by the Prosecution Service. The maximum duration is six months, the minimum one day; no more than one day default detention may be put in place of 25 guilders. In practice, however, a day default detention is usually replacing 50 – 100 guilder. The convicted person will be released when he pays the fine during imprisonment. If he pays part of the amount still due, default detention will be shortened proportionately. If he pays after he has undergone part of the subsidiary detention the amount owing is reduced accordingly. All those decisions are made by the CJIB, although formal responsibility lies with the Prosecution Service.

3.2 *Community orders*

Until recently, only the community service order (CSO) had a legal basis in the Penal Code for adults, although juveniles could be sentenced with training orders since 1994. Since the passage of the Bill on Community Sentences in February 2001, training orders can also be imposed on adults. Until that time, they could only be applied as a special condition of a suspended sentence or a conditional suspension of pre-trial detention. Training orders require the offender to learn specific behavioural skills or to be confronted with the consequences of his criminal behaviour for the victim. Also combination orders are a possibility under the new law.

The former Bill stated that the judge stipulated the duration of the CSO as well as the content. However, in practice the judge only determined the number of hours.

3. P.A.M. Mevis, *hoofdlijnen van het strafrechtelijk sanctiestelsel*, W.E.J. Tjeenk Willink, Zwolle, 1997 (second edition) p. 148.

4. Mevis criticizes sec. 28 *Richtlijn Executiebeleid Boetevonnissen* stating undeserved that the CJIB is responsible for payment arrangements, P.A.M. Mevis, *Hoofdlijnen van het strafrechtelijk sanctiestelsel*, W.E.J. Tjeenk Willink, Deventer 1997, p. 149.

Decisions about the kind of project the convicted person had to work on, were left to the probation service. According to the actual Bill, the judge *can* stipulate the nature of labour or the kind of educational sentence. Normally, the probation service will decide about the content of community sentences, although, in case of educational sentences the judge often mentions a specific one. The judge, of course, determines the number of hours with a maximum of 240 hours for CSO and a maximum of 480 hours for educational sentences and combination orders.

Under the former Bill, CSO was also called 'unpaid labour to benefit the community.' The last part of this concept is left out in the actual Bill what makes it possible to attract more commercial projects. Still, most CSO's are carried out at the government or at private organizations involved in health care, environmental protection, and social and cultural work. Except for private projects group projects exist, meant for those who do not fit in a private project, for example addicted persons and persons who committed a sexual offence. The activities developed, for example, are cutting down trees and repairing toys. Together with the 2001 Bill a 'national menu' on training orders is brought out.⁵ The eleven training orders on this list can be imposed as a formal sentence by the judge. Educational sentences that are not on the national menu can still be applied as, for instance, a special condition of a suspended sentence. This has advantages and disadvantages but is, most of all, confusing.

As with financial penalties, the Prosecution Service is responsible for the execution of community sentences. It can gather information about the execution of a community order by asking the probation service (Sec. 22e PC); it can change the content of a community order (Sec. 22f PC) and it can demand detention for default (Sec. 22g PC). Most of the execution-tasks, however, are fulfilled by the probation service. They decide whether a person is going to a private project or a group project; what kind of work he has to perform; if and for what reasons he gets a warning and if the community sentence is carried out satisfactory, or will be sent back to the prosecutor. Complaints about one of those decisions can be lodged at a special complaint board of the probation service (Provision on community sentences, Sec. 22). Although the procedure satisfies the minimum rules of the Council of Europe one can wonder how independent such a board is and if a provision comparable to that prisoners have (see below) should not be preferable. In particular, the procedure excludes complaints about the staff members of the working and training projects while they probably take the most important decisions and, in practice, have a lot of power.⁶

In the case that the convicted person does not show up to the project or does not carry out the order satisfactory, the probation service sends a notification to the prosecutor who will demand for default detention. Under the former law a new meeting of the court was required before the detention could be executed. Nowadays the Prosecution Service can demand for default detention immediately after it gets the notification that the community order failed. Under certain circumstances it is

5. Some training orders that can be found on the national menu are: social skills order, budget order and a special training for offender of sexual crimes.

6. See chapter 6 of my thesis on community sanctions: M. Boone, *Recht voor gemeen gestraften*, Gouda Quint, Deventer 2000.

even possible that the CJIB automatically executes the default detention, without waiting for the order of the Prosecution Service. The convicted person does have the opportunity to appeal within 14 days (Sec. 22g Subsec. 3) but the appeal does not suspend the execution of the default detention.

3.3 *Sentences depriving a person's liberty*

3.3.1 Execution modalities of the prison sentence

In 1953 the differentiation system was introduced in the Dutch sanction system. From that time on, prisoners were divided up between different institutions regarding their personal characteristics as age, gender and length of prison sentence. This meant a huge change with the latter situation considering the fact that until that time most prison sentences were executed in solitary confinement. A big issue that was raised during the parliamentary debates on the 1953 Act was who had to decide on the place where the sentence had to be executed: the judge or the administration. The minister at that time stated that the severity of the prison sentence depended on the duration of it and therefore had to be decided by the judge. On the contrary, the place where the sanction was executed should be in favour of the rehabilitation of the offender (according to Sec. 26 former Prison Bill) and could better be decided by the administration. As said before, the formal responsibility of the Prosecution Service for all judicial sentences is laid down in Section 4 of the Judicial Organisation Act and Section 553 of the CCP. As with financial penalties, however, the practical influence of the Prosecution Service on the execution of prison sentences is minimal. This situation is recently formalized, as explained above. In fact, the departmental services decide on the placement of prisoners, their transfer, sentence breaks and leaves. In 1999 a new Prison Bill came into force, the Penitentiary Principles Bill (PPB), changing authorities again. In the early days, officers of the departmental services went to the prison to gather information and talk to the prisoner. Then they gave their advice to a selection committee that made the decision. Nowadays, those officers, called selectors, no longer go to the prisons themselves, but take decisions based on the written advice of the prison administration. Also the judge and prosecutor are allowed to give some advice, although they almost never do. The result of recent changes is that prison-administration in certain aspects became more powerful in relation to the Department of Justice. The prisoners, however, became more dependent on the officers working in prison.

Not only procedures, but also selection criteria changed under the new law. Age and duration were abolished. Besides gender, security and special care became the most important selection criteria. There are five levels of security, each connected with a certain type of prison. Under normal circumstances, prisoners will be selected for a normal security prison after pre-trial detention. Prisoners who are not in custody at the time of their conviction and prisoners in the last 18 months of their detention can be selected for a limited security prison where they enjoy a sentence break every four weeks. Prisoners who are sentenced for more than six months can serve their last six weeks to six months in a minimal security prison where they work outside prison during the day and have the weekends off. An even more open

execution modality is the 'penitentiary programme', introduced in the new Penitentiary Principles Act in 1999. Those programs can start a year before the date of early release and aim a smooth transition from prison to free society. Prisoners no longer spend time in prison, but work or follow educational activities during the day and stay home in the evenings and at night. Electronic monitoring is almost ever used to control the prisoner in the first phase of the penitentiary programme; among inmates this programme is therefore less popular than the minimal security prison.

The opposite of the penitentiary programme, is the maximal security prison which is meant for prisoners who are alleged to have attempted to escape or would form a serious danger for society if they did. To the Dutch standard, the regime is unprecedentedly strict and the Commission for the Prevention of Torture from the Council of Europe criticized it in several of her reports.⁷

Besides security, special care is the most important external selection criterion. Some prisons, or departments of prisons, have special centre for vulnerable groups. For example, special regimes exist for detainees who are addicted or suffer from mental diseases, for mothers with children and young adults who are mentally immature. Also the Penitentiary Hospital and Selection Department have regimes based on this criterion. Altogether, the regimes based on security and special care form part of the external differentiation. The Department of Justice decides on external destinations of prisons; selection for one of those regimes follows the procedure described above. Besides external differentiation, internal differentiation exists; inside the prisons or departments of prisons with an external destination, the prison management can reserve certain blocks or programmes for specific groups. At least, every prison has a special care department for mentally disturbed inmates and persons who committed or are accused of sexual offences. In recent research, we also came across 'standard-plus departments' where prisoners have some privileges as study facilities and extra visit; special blocks for inmates who fulfil certain popular jobs and all kinds of internal labour and rehabilitation programmes.⁸ The prison manager instead of officers of the Department of Justice decides about internal placements. Compared to the external procedure, the internal one is less sophisticated; selection criteria are not really worked out or change rapidly and due to failing automation systems, information inside prison flows with difficulty.

The differences between external and internal differentiation, also result in different complaint procedures. A general complaint procedure exists for complaints about decisions made by the prison manager including internal placements. Every prison has a complaint committee made up of members of the Supervision Board. This Supervision Board includes representatives of different social fields, such as a lawyer, a doctor, a university professor or a housewife. It is preferable that a judge chairs the complaint meetings (Sec. 18 Subsec. 2), but that is not obliged. After a decision is made by the complaint committee, both the prisoner and the prison manager can appeal at the Appeal Committee of the Council for the Enforcement of Criminal Law and Youth Protection which is made up of persons from different disciplines, but chaired by a judge.

7. CPT/inf (98)15 (Nederland); CPT/inf (93)15 (Nederland).

8. M. Boone, *Differentiatie en Selectie onder de Penitentiare Beginselenwet*, in: M. Boone en G. de Jonge (red), *De Penitentiare Beginselenwet in werking*, Gouda Quint Deventer, 2001.

There is also a specific complaint procedure for selection decisions made by the Selector. First, the detainee can object to the decision at the selector himself. If he does not agree with the decision on his objection either, he can appeal at the Appeal Committee of the Council for the Enforcement of Criminal Law and Youth Protection.

3.3.2 Early release or conditional release?

Since 1915 prisoners have been eligible for conditional sentencing after serving two-third of their sentence. In the sixties and seventies, the importance of the conditional release as a rehabilitative instrument decreased. On the one hand, this was due to the fact that less persons than before were eligible for conditional release because of the decrease in long prison sentences. On the other hand, more authoritarian and compulsory methods of helping people became very unpopular during those days among probation officers and other social workers. Conditional release was no longer seen as a bonus for good behaviour in prison or as an instrument of rehabilitation and for that reason it became very difficult for prison authorities to refuse parole.⁹ In 1976 prisoners got the possibility to appeal against a refusal at the special penitentiary division of the Arnhem Court of Appeal. The case law was very critical on the Prison and Probation Administration's release policies and as a result the percentage of parole refusals fell from 11 percent in 1975 to 1 percent by 1986.

So conditional release had evolved from a privilege almost to an automatic right. This situation was formalized in new legislation; on January 1, 1987 a Bill came into force, which introduced automatic release. Prisoners serving a sentence up to one year are released after they served 6 months and one third of their term. Prisoners sentenced to a prison term of more than one year, must be released after they served two third of it. There are some exceptions to the rule of automatic release (Sec 15 a-d PC). First, automatic release can be refused if the prisoner is serving his sentence in a mental hospital because of mental illness and continuation of treatment is necessary. Second, if the prisoner is convicted for a crime for which pre-trial detention would be allowed after the detention started to be carried out; Third, if it became clear that the prisoner seriously misbehaved in an other way during detention; Lastly, if the prisoner escaped or tried to escape. Decisions about refusing or postponing early release are made by the penitentiary division of the Arnhem Court of Appeal, on request of the public prosecutor attached to the court that imposed the prison sentence. However, requests are hardly ever submitted and even more rarely complied with. In a case of 2 May 2001, the prosecutor asked to postpone the early release two years, because the detainee had seriously threatened the mayor of Nunspeet and had backed out of the prison sentence for several months. The judge, however, postponed parole for only a month arguing that since only one other request was submitted in the last two years, policy in this matter was totally unclear to him.¹⁰

In 1995 a proposal was submitted to introduce the conditional release again for

9. P.J. Tak, Sentencing and Punishment in The Netherlands, in: M. Tonry and R.S. Frase, Sentencing and Sanctions in Western Countries, p. 164-165.

10. Hof Arnhem 2 mei 2001, Nieuwsbrief Strafrecht nr. 7, p. 247.

certain groups of detainees after they served half of their sentence. However, this proposal has been withdrawn by the Minister of Justice arguing that the same objections could be reached by the than initiated penitentiary program. In the latest green paper on penal sanctions, *Sanctions in Perspective*, the conditional release reappears. This time the suggestion is made to introduce the conditional release next to the penitentiary programme.

3.3.3 Execution modalities of measures depriving a person's liberty

According to the Dutch law, criminal liability can be either wholly or partially excluded when offenders are suffering from a defective development of or diseased disorder of mental faculties while committing the crime. But, if the crime is threatened with a prison term of four years or more, or if mentioned in Section 37a PC the judge can impose compulsory treatment. In that case, he needs advice from the special observation hospital of the Ministry of Justice (*Pieter Baan Centrum*) or from at least two behavioural experts, one of whom must be a psychiatrist. In the case of diminished responsibility, the judge can impose both a custodial sentence and compulsory treatment. Then, the Penal Code demands that the prison sentence is executed before the compulsory treatment (in a forensic psychiatric hospital, TBS). Due to a shortage of cells in the forensic psychiatric hospitals in recent years, offenders had to stay in prison even after the right to keep them there had been expired. As a result, Dutch government had to pay huge compensations.

Incidentally, TBS does not have to be implemented in a custodial setting; the judge can also impose TBS with conditions. Although the law gives some examples of possible conditions (Sec. 38a PC), the judge is free to determine specific conditions as long as there is a relation with the behaviour of the offender.¹¹ Formally, the Prosecution Service is responsible for the implementation of conditions, but as with community orders and penitentiary programmes the Probation Service sees on the fulfilment of these conditions in practice. Theoretically, the conditions can even be very similar to the kind of projects that are implemented as community orders and penitentiary programmes.

Contrary to the prison sentence, the term of compulsory treatment is not fixed. Only in cases where no violence was involved, the measure of compulsory treatment can be imposed to a maximum of two years with a possibility of prolongation for two years on request of the Prosecution Officer. If violence was involved, the length of the measure is indeterminate. At first, the judge imposes the measure for two years, but the Prosecution Officer can ask for a prolongation every two years. If the safety of others or the general safety of persons or goods demands so, the judge can extend the measure one or two years (Sec 38e lid 2 PC). For that, he needs a recommendation from the head of the hospital and, if the measure exceeds a period of six years, the reports from two independent mental health experts.¹² The compulsory treatment can also be ended conditionally (Sec. 38g PC), but only if the TBS is extended with one year and has a maximum of three years. The same rules

11. Cleiren/Nijboer 2000(T&C Sr), art 38b Sr, note 3 and 4.

12. Peter Bal and Frans Koenraadt, Criminal law and mentally ill offenders in comparative perspective, *Psychology, Crime & Law*, Vol. 6, p 239.

are applicable as for the TBS with conditions (Sec. 38 and 38a PC).

The Netherlands has eight TBS hospitals. Four of them are runned by the state while the others are particularly owned. There have always been slight differences in population and treatment techniques between the hospitals. Those differences were taken into account by the Meijers Institute that was responsible for the selection of the patients for the diverse hospitals. As a result of the shortage of bed space, the selection procedure recently changed. Yet, the patients are divided between the different institutes without selection, while the Meijers Institute became a regular TBS-hospital.

4 International standards

There are many international instruments regarding the imposition and implementation of punishments. Not only do the human right conventions dedicate specific sections to sentencing, both the United Nations and the Council of Europe formulated standard minimum rules for the implementation of both custodial and non-custodial sentences. However, none of those rules give clear guidance on the central questions of this paper: How should responsibilities between the judge and the administration be divided if decisions on the (further) implementation of sanctions are taken and what other procedural safeguards have to be taken into account?

For one aspect of the first issue, some answer can be found in Section 5 of the European Convention on Human Rights. According to Subsection 1a, (only) the decision on criminal incarceration has to be taken by a court. In the Netherlands, neither the decision on default detention in the case of unpaid fines or community orders that were carried in an unacceptable way nor the decision to put a person back in jail because he did not carry out his penitentiary programme satisfactory is taken by a judge. An interesting question is therefore whether these decisions should be seen as 'incarceration after a conviction by a competent court' (Section 5 Subsection 1a) or as 'the lawful arrest or detention of a person for non-compliance with the lawful order of a court in order to secure the fulfilment of any obligation described by law' (Section 5, Subsection 1b). In the Benham-case, the European Court made clear that the decision on default detention for unpaid fines, can be classified under Subsection b.¹³ In my opinion however, this situation differs from the other two. Since, if a community order or penitentiary programmes is not carried out satisfactory, detention is not applied to secure the fulfilment of an obligation in the future. Then, the European Court decided in the Engel-case, the measure is situated in a punitive context and falls under the scope of Subsection a.¹⁴

5 Doctrinal issues

Some important doctrinal issues are related to the situation described above. In this section I will deal with three of them: First, the role the judge has in the execution of sanctions; Second, closely related to the first, the question what one considers to be

13. EHRM 10 juni 1996, Reports J&D, 1996-III no 10 (Benham).

14. EHRM 8 juni 1967, NJ 1978, 223, Series A, vol. 22 (Engel), note 69.

the penal content of a sanction; Thirdly, the weakening connection between the judicial modality of a sanction and its content.

With the introduction of the former Penitentiary Bill, the *Beginselenwet Gevangeniswezen*, in 1953 a debate was going on between the Minister of Justice and the Members of Parliament about the question who was going to decide on the institute where a prisoner had to carry out his prison sentence: the judge or the administration. This Bill initiated the Differentiation Principle meaning that prisoners would be distributed over different kinds of prisons depending on different criteria, for example, gender, age and duration of the prison sentence. The original enactment stated that the judge would decide on the length of the prison sentence while the administration would decide in which prison the sentence had to be carried out based on an investigation of the offender. Members of Parliament did not agree with this proposal. Although Section 553 PPC stated that the Prosecution Service was responsible for the execution of sanctions, it did not state that the decision on the institute where the prison sentence had to be served belonged to their task. On the contrary, the place where the prison sentence had to be served could contribute as much to the severity of it as the length of the prison sentence, the reason why the judge should decide on it.¹⁵ The Minister of Justice responded that the Differentiation System was not meant to create differences in severity of sentences, but to make it possible to carry out the prison sentence in groups by placing people together who had similar characteristics.¹⁶ In the end, the parties agreed on a possibility of appeal against the selection decision by the Prison Administration at the Appeal Committee of the Central Council for the Enforcement of Criminal Law.

The issue of the division of powers is closely related to that of the penal content of penalties. To solve the first issue, one has to know what one considers the penal content of a sentence. Again, the former Minister of Justice was very clear on this topic. During the parliamentary debate on the 1953 Bill, the Members of Parliament were wondering if a far reaching differentiation system would not weaken the punitive character of prison sentences. The Minister did not agree: 'The essence of the prison sentence', he said, 'is the loss of freedom, the freedom to go where ever one wants and to participate in the community like one chooses. This essence cannot be lost by a more human and social way of carrying out the prison sentence.'¹⁷

History repeats in the case of community orders. As said before, according to the former Bill the judge had to decide on both the number of hours and the nature of the CSO. The Supreme Court, however, agreed on leaving the last decision to the probation service.¹⁸ According to the actual Bill, the judge *can* stipulate the nature of labour or the kind of educational sentence. In my opinion, this means that the nature of the work or educational sentence cannot be regarded as a part of the penal content of a community order. Consequently, the number of hours imposed by the judge should be implemented by the probation officer according to rehabilitative aims. Thinking along the same lines, Ashworth argues that, as with imprisonment,

15. Kamerstukken II 1949/50, 1189, nr. 4, p. 16.

16. Kamerstukken II 1950/51, 1189, nr. 5, p. 22.

17. Kamerstukken II 1950/51, 1189, nr. 5, p. 22.

18. Hoge Raad 20 oktober 1992, NJ 1993, 154.

‘community service orders are made as punishment not for punishment.’¹⁹

However, there are different opinions on this matter in actual Dutch literature. Balkema, for example, states that the nature of labour should also be seen as a punitive element of a CSO.²⁰ Others mentioned the confrontation of the offender with the consequences of his deeds,²¹ shame²² and stigmatisation, due to the greater visibility compared to custodial sentences. These opinions do not seem to be based on a clear concept of punishment. For example, no difference is made between desired and undesired effects of penalties, a distinction that has always been made for prison sentences. Moreover, if all these characteristics belong to the penal content of community sentences, does not the rule of law force us to lay them down in legislation, or, at least, let the judge decide about the precise content of the sentence?

The final doctrinal issue I want to raise is that of the fading connection between the judicial modality of a sanction and its content. Since it is possible that the same activities have to be carried out in both the context of a community order and the last stage of a custodial sentence (penitentiary programme), one can wonder what is still the difference between imprisonment and sanctions curtailing a person’s liberty. In a *formal* opinion one reduces this distinction to a merely procedural difference: imprisonment is what is defined as such in the law. Bleichrodt tries to give a *material* definition of imprisonment. In his opinion, imprisonment distinguishes from other sanctions because it makes it impossible for a person to live his regular life.²³ In my thesis, I defend a *gradual* opinion: there is no need to create a clear doctrinal distinction between custodial sanctions and non-custodial sanctions, besides the rather clear judicial borders that are given by the jurisprudence of the European Court of Human Rights.²⁴ In the light of the legal protection of convicted persons, it is more important that the judge is involved when the penal content of a sanction dramatically changes. In Dutch literature there is much consensus on this matter according to penitentiary programs. The judge should decide about both the application and the discontinuation of a penitentiary program. In my opinion, penitentiary programs could be integrated with the minimal security prison. Then, two other grades of curtailing a person’s liberty are left: community sentences and the normal security prison. In my opinion, it should always be the judge who decides on alterations to these modalities.

19. A.Ashworth, *Sentencing and Criminal Justice* (1992), p. 268.

20. J.P. Balkema, *Alternatieve Sancties in plaats van en tijdens de detentie*, *Justitiële Verkenningen*, 1993, nr. 9 p. 84..

21. G.J. Ploeg en A. P.G. de Beer, *De inpassing van de taakstraf*, *Justitiële Verkenningen*, 1993, nr. 9. p. 17 e.v.

22. C. Kelk, *De zeer grote wenselijkheid van een gespecialiseerde sanctierechter*, *Sancties*, 1994, afl. 4, p. 230.

23. F.W. Bleichrodt, *Onder Voorwaarde, Een onderzoek naar de voorwaardelijke veroordeling en andere voorwaardelijke modaliteiten*, Deventer, Gouda Quint, 1996, p. 241.

24. HRM 10 March 1972, Series A, vol. 12 (De Wilde, Ooms en Veryp) EHRM 8 June 1976, Series A, vol. 22 (Engel); EHRM 6 November 1980, Series A vol. 39 (Guzzardi); EHRM 28 mei 1985, Series A, vol 93 (Ashingdane); EHRM 28 November 1988, Series A, vol. 144 (Nielsen).

6 Discussion

As in other countries, the number of execution modalities of sanctions increased dramatically in the Netherlands during the last two decades. Although research does not always clearly demonstrate, we have to suppose that this development is in favour of the rehabilitation possibilities of offenders and, at least, of a more human way of carrying out sanctions. However, more variation in execution modalities did not go hand in hand with a higher level of legal protection for convicted offenders. More variation also leads to more uncertainty and less equality and legality. The decision to apply or end more open variants of sanctions curtailing a person's liberty is most often left to an administrative authority instead of a judiciary one. One of the consequences is that only those persons are selected for special programmes and sanction modalities who have good opportunities to succeed. Rehabilitative goals and the urge for legal protection could become more balanced again by appointing a special judge to take or supervise all decisions on the implementation of sanctions. 'Execution judges' are established in, for example, Germany and France.²⁵ For the Netherlands one could think about specialized judges appointed to the district courts with the possibility of appeal at the penitentiary division of the Arnhem Court of Appeal.²⁶

25. Deutekom, F. van, De franse executierechter, *Sancties*, 1993, p. 288-289; F. van Deutekom, Der Vollzugsrichter in den Niederlanden und Deutschland in rechtsvergleichender Sicht, *Zeitschrift für Strafvollzug und Straffälligenhilfe*, 1992, p. 217-223.

26. C. Kelk, De zeer grote wenselijkheid van een gespecialiseerde sanctierechter, *Sancties*, 1994, afl. 4, p. 230.

