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SUNNY or CLOUDY?

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by

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THE PENAL CLIMATE IN THE NETHERLANDS:

SUNNY OR CLOUDY?

Introduction

The Dutch prison system - and for that matter the whole of the Dutch penal system - is the object of keen interest abroad. Every year countless visitors come to learn at first hand something of the mild penal climate in the Netherlands. Evidence of such interest is also reflected in the fact that the Netherlands frequently features in what are known as 'cross-national studies',¹⁾ in which the working of penal law in various countries is compared.

At the root of many of the studies relating to the Dutch penal system is the question why it is that in the Netherlands the prisons contain so few people per 100,000 of the population. It is true that the Netherlands is well down in this respect, even in comparison with countries that are by no means known as particularly repressive. In 1978 the number of Dutch prisoners per 100,000 of the population was a mere 22, as against 89 in West Germany, 58 in Denmark, 52 in Sweden and 43 in Norway. There may have been a slight rise in the last few years but in this respect the Netherlands continues to be top - or is it bottom? - of the league.

Such a figure has led people both at home (Hulsman, 1978) and abroad (Johnson, 1979; Cohen, 1973) to ask how such a climate has arisen and how it is maintained. It is generally implicitly

¹ Rutherford, A. Cross-National Study of Correctional Policy and Practice (report as yet unpublished).
Leigh, L.H., J.E. Hall-Williams, The Management of the Prosecution Process in Denmark, Sweden and the Netherlands, 1979.

assumed that the above figure indicates that unconditional prison sentences (hereafter UPS) are seldom handed down in the Netherlands. There are necessarily differences of emphasis in the way the question is answered. Sometimes emphasis is placed on the traditional tolerance of the Dutch (Baring, 1976), at other times the organization of the penal system in particular receives attention; sometimes the answer is sought in the absence of serious large-scale crime - particularly violent crime - in the Netherlands (see comments on Block, 1980); in yet other cases the mild climate is put down to the penal authorities' belief that prison sentences are not helpful (Smith et al., 1978).

In general, the Dutch feel flattered by the great interest shown in their system, particularly as many foreign observers are explicitly interested in introducing certain elements of the system into their own countries (see Doleschal, 1977). We may well ask ourselves, however, whether it is not somewhat premature to conclude on the basis of the low average daily population in their penal establishments that the Dutch are so mild or, to put it more concretely, that they make such little use of custodial sentences. In this article, therefore, we shall first look at the way in which the question as to how mild a penal system is may be formulated most precisely (section I).

Thereafter, by comparing the Netherlands with Sweden and West Germany, we shall show how misleading the use of such a general average figure as the daily prison population can be (section II). This comparison will enable us to establish a characteristic difference in policy between the Netherlands and the other countries referred to. An attempt to explain this difference will then be made in section III. The article ends with several concluding observations (section IV).

I. Comparison of the penal climate: the theoretical aspect

The appreciable differences in the number of prisoners per 100,000 inhabitants between the Netherlands and other countries give pause for thought. The question is, however, whether the figures in question in fact form a good basis for approaching the subject and whether they can indeed serve as a yardstick for comparing the penal climate of various countries. The lack of precision inherent in the daily population figure may cause one to overlook a number of problems which frequently arise in the comparison of statistical data. To begin with, one may ask whether the use of UPS is necessarily the only criterion for measuring the mildness of a particular penal climate. The severity of other sanctions, e.g. fines, could also serve as a yardstick, as could the number of persons placed under supervision under a penal measure. Moreover, it would appear to be reasonable to consider too the regime in the penal establishments, and also to take into consideration the way in which sentences are implemented as well as the less obvious fact that the police apparatus itself could be used as a yardstick (Kaiser, 1980; Grabowski, 1980).

Even if we follow the majority of publications and concentrate on the use of UPS as a criterion, the use of the average daily population rate as a yardstick meets with a number of serious objections:

In the first place, it takes no account of the extent of crime in the countries being compared. It will nevertheless be obvious that more persons per 100,000 of the population will normally receive prison sentences in a country with a relatively large amount of crime than in a country where relatively fewer offences are committed. Comparison of the prison populations in various countries must therefore be made against the background of the crime statistics¹⁾ in those countries. The most suitable measure

¹⁾ For our present purposes we need not take account of crime that does not come to the knowledge of the police, since our article is concerned with the reaction of the 'judicial apparatus' on the population of suspects brought before it.

of this is the number of crimes that come to the knowledge of the police. But that is not all. A large proportion of the crimes recorded by the police are not cleared up, and accordingly there is no criminal who can be punished. In other cases, several offences may be the work of only one criminal, or one crime may be committed by several criminals.

For these reasons, it would appear to be preferable, when making any comparison, to base it on the criminals and not the offences. It would then be possible to use the percentage of known suspects receiving UPS as a basis for the comparison. A necessary condition for such a comparison will then be that the criteria used to determine whether a suspect is included in the statistics are approximately the same, in theory and in practice, in the various countries being compared. We shall return to this point later.

Another objection to basing any comparison on the average daily population is that it obscures the nature of crime as well as its extent. The same objection arises if we simply lump all suspects together. It is important to know whether 90% of offenders are murderers or petty pilferers for we are much more likely to find prison sentences imposed for the one offence than for the other. Accordingly, comparison of the sentence must also be made at least for each type of offence. Even then, however, simple comparison will not be possible. One crime of violence is not the same as another, and even within one type of offence appreciable differences may occur: one instance of theft is more serious than another. Accordingly, the gravity of offences must also be taken into account when making a comparison. Actually, if we were to make a proper comparison, we would have to go even further and also have at our disposal full data relating to the perpetrators. Dutch penal law, for example, is regarded as 'criminal-oriented', i.e. it is concerned with the offender rather than the offence. This is rather unfortunate, since, in practice, the gravity of the offence - the

damage, the injury - is nevertheless the most important factor in determining the severity of the sentence (Zoomer, 1980). In other words, a proper comparison could be accomplished by investigating, for each offence and with due regard to its gravity, the percentage of known perpetrators of that offence who receive a UPS. In the case of the weather it is important to know not just how often it rains, but also for how long. So too in evaluating the climate of the penal law account must be taken not only of the number of prison sentences handed down, but also of their length. This distinction is also lost through the use of the average daily population as a yardstick for comparison. The low average daily population rate in the Netherlands may, by such a reckoning, be interpreted in two ways: the first is that few people ever receive prison sentences; the second is that a relatively large number of short prison sentences are imposed.

To sum up, three objections may be raised to the widely used criterion for measuring the mildness of the penal law climate, i.e. the number of prisoners per 100,000 inhabitants: the figure takes no account of the crime rate; nor of the nature of the offences committed; it also obscures the relationship between the number of unconditional prison sentences and their length. Ideally, comparison of the penal climate in various countries should mean investigating, for each crime and with due regard to the average gravity of such crimes, the percentage of known suspects who receive UPS, and the average length of such sentences. In the following section, we shall attempt to carry out an international comparison on the lines set out above.

II. Comparison of the penal climate: the practical aspect

Anyone who has ever tried to compare statistical data on an international scale is aware of the problems that are generally encountered. In view of this, it is hardly fortuitous that such comparisons are usually based on general data, such as the average daily population rate. Yet it is possible, given the necessary effort, to make a somewhat more precise comparison - at least in the case of countries with well-developed systems for recording statistics and with fairly similar penal systems. In the case of the Netherlands, comparison with Sweden and West Germany would appear to be particularly appropriate. The most important figures from these countries used in this article are given in Table I.

We shall begin our analysis with the average daily population of the penal establishments per 100,000 inhabitants, the general figure used as a starting point in many studies abroad. In this respect, the Federal Republic of Germany clearly tops the league with 89 prisoners per 100,000 of the population, Sweden occupies a middle position with 52, and the Netherlands lags significantly behind with a mere 22. All these figures relate to the year 1978. As we have seen, however, this figure must be looked at against the background of the crime rate, which clearly varies appreciably in the countries concerned. In the same year (1978) some 4,000 crimes per 100,000 inhabitants came to the knowledge of the police in the Netherlands; in West Germany the figure was around 5,500 and in Sweden as high as 9,700.

As we saw in Section I, not every crime coming to the knowledge of the police leads to a suspect who can, where appropriate, be punished. If we reduce the number of crimes coming to the knowledge of the police to agree with the number of known suspects, the absolute figures drop appreciably, as we would expect, but the

Table I. Key crime figures for 1978, including road traffic offences, for West Germany, Sweden and the Netherlands.

	West Germany		Sweden		The Netherlands	
	No.	No. per 100,000 inhab.	No.	No. per 100,000 inhab.	No.	No. per 100,000 inhab.
Crimes coming to the knowledge of the police	3,380,516	5,514	799,293	9,711	561,798	4,042
Crimes cleared up	1,509,120	2,462	275,924	3,353	180,032	1,295
Known suspects in connection with crime	1,172,705	1,913	256,660	3,119	177,763	1,279
No. of unconditional custodial sentences passed	37,617	61	12,884	157	15,566	112
Average daily population in penal establishments	54,452	89	4,278	52	3,011	22
Sentences of over 6 months	70%		17.4%		11.3%	
Percentage of known suspects receiving unconditional custodial sentences	3.2%		5.0%		8.8%	
Percentage of persons sentenced receiving unconditional custodial sentences	6.1%		19%		23%	

comparative rating between the countries remains the same: in Sweden 3,100 suspects per 100,000 inhabitants, in West Germany 1,900 and in the Netherlands 1,300.

If we now relate the figures for the sentencing of these suspects to the numbers for the various countries, allowance has at least been made for the crime rate. (For the moment we shall assume that the statistics for the various countries can be meaningfully compared.) We then arrive at a radically different picture from the one that is generally painted. At a stroke, the Netherlands is seen to have surged into the lead as far as the passing of unconditional prison sentences is concerned. Of the total number of known suspects, 8.8% receive an unconditional prison sentence in the Netherlands, whereas in Sweden the figure is 5% and in West Germany 3.2%. In other words, the roles are completely reversed.

But it is not just the crime rate which is significant. As we have seen, we must also take into consideration the nature of the offences committed. This can be done, in an approximate way, by examining the UPS rate for each type of offence separately. Unfortunately, this is where our comparative analysis begins to break down. Here we encounter for the first time the problem of possible differences in the description of offences, and in addition the statistics are found to contain many large gaps on this point. In the case of Germany, in fact, such figures are totally unavailable, and in the case of the Netherlands and Sweden comparison is only possible for two specific offences, vandalism (skadegörelsebrott) and driving under the influence (rattfylleri).

To take the former offence first: in Sweden, 0.3% of the 11,065 persons suspected of having committed an act of criminal damage receive a UPS; in the Netherlands the figure is 2.2%, out of a total of 8,580 suspects. For driving under the influence the situation is the reverse. Moreover, it is possible, at least in

the case of Sweden and the Netherlands, to compare large groups of suspects from the point of view of the sentence. If we take sexual offences, for instance, the UPS rate is 9.7% for the Netherlands, 9.4% for Sweden; in the case of crime against property, a UPS is imposed on average in 8.3% of all 'instances' in the Netherlands and in 3.5% in Sweden. For crimes against the person Sweden scores higher: 12.1% as against 7.1%. A rather involved picture emerges, therefore, though the end result reveals greater use of UPS in the Netherlands than in Sweden, a finding completely at variance with the one arrived at on the basis of average daily population rates.

There is another way in which this quite startling finding can be corroborated. If, instead of the number of known suspects, we consider that of those sentences, and accordingly of those in whose cases the courts may normally impose a UPS, we see that this happens in 23% of the cases in the Netherlands, in 19% of the cases in Sweden and in 6% of the cases in West Germany.

The third objection to the use of the average daily population per 100,000 inhabitants as a criterion is the fact that this figure greatly obscures the length of the custodial sentences. Yet it is clear that a comparison of the penal climate must consider the duration of the UPS imposed as well as the number. If we compare the three countries in question in this respect, we see first of all that no figures are available for each type of offence separately. If we look at the overall picture, we see that, in the case of the Netherlands, UPS amounts to 6 months or more only in 11.3% of the cases; in Sweden the figure is 17.4%¹⁾ and in West Germany as high as 70.2%. Unlike the case of the number of UPS passed, here there is no question of any intricacy in the picture. Even for the broader categories of offence, sentences in Sweden and, even more so, in Germany are on average considerably

¹⁾ In the case of Sweden, this figure does not include sentences of exactly 6 months.

longer than in the Netherlands. To take a single example: in the case of crime against property 81.6% of those sentenced in West Germany receive a UPS of 6 months or more; in Sweden the figure is 33.0% and in the Netherlands only 27.4%.

To sum up, different 'policies' are followed in the Netherlands and Sweden in the use of UPS (from the frequency point of view) for each type of offence. The overall picture, however, both from the point of view of the number of known suspects and from that of the number of persons sentenced indicates that UPS is more frequently imposed in the Netherlands than in Sweden, and significantly more frequently than in West Germany (for which only general figures are available). The average length of the sentences in the Netherlands is appreciably lower than in the other two countries, however.

This result is significantly at variance with the picture arrived at on the basis of average daily population rates. To put it in a nutshell: in the Netherlands, relatively frequent, but short, UPS; in Sweden and Germany, relatively infrequent but long. Mildness, it appears, has many faces, and the question which will occupy us in the following section is why the short unconditional custodial sentence is comparatively 'popular' in the Netherlands, whereas the reverse situation obtains in West Germany and, to a lesser degree, in Sweden.

Finally, an analysis similar to our approach, but dealing with the Netherlands and Illinois (USA) has been carried out by Block, of whose article we have made use.

III. Factors which may explain the differences between the Netherlands, Sweden and the Federal Republic of Germany

The preceding section shows that comparisons of the use of UPS within Europe are considerably more involved than is generally supposed. In the Netherlands, relatively frequent use is made of it compared to the other two countries, although Dutch sentences are shorter, even much more shorter in some cases.

But this is a long way from explaining the differences. We at any rate feel that it is considerably more difficult to explain why fewer prison sentences, though longer ones, are imposed in West Germany than in the Netherlands, than to explain why such a mild penal climate obtains in the Netherlands in comparison with other countries. To put it another way: the more involved the differences, the more involved the explanation.

Furthermore, the limitations of the statistical material enable some of the pitfalls we thought we had avoided a moment ago to confront us once more. In particular the hypothesis that we are dealing with comparable populations of offenders in the countries in question can, in view of the general nature of the comparison, no longer be accepted without qualification..

This takes us close to explaining things on the basis of the sort of figures to which we have just objected. Nevertheless, we do feel it worth making an attempt. There are two reasons for doing so: firstly, despite everything, our approach is based on a more refined picture of the differences than is the case with many other studies. Moreover, we feel that the explanations offered elsewhere are particularly marked by their unstructured and unsystematic approach. General social factors

are treated in the same breath as individual characteristics relating to the sentencing courts; the limited capacity of the Dutch prison system is treated without any consideration of the fact that the Public Prosecutor in the Netherlands is not bound to prosecute in a given offence. Is a more systematic approach not possible here?

In our opinion, if we take the differences already established as our starting point, only three types of causative factor need be distinguished in principle. These are:

- 1) differences in the composition of the population of known suspects or sentenced persons;
- 2) differences in the rules which must be followed in administering criminal justice;
- 3) differences relating to those who apply the rules.

Before we proceed to deal with each of these categories in more detail and, in doing so, launch ourselves into a relatively hazardous guessing-game, three preliminary remarks should be made. First of all, we would point out that it is improbable that any one of the factors described can explain the differences. Anyone who believes that is, in our opinion, unaware of the complexity of the penal system. In practice, the factors will complement, reinforce or cancel each other.

To start with, there is the possibility that the effects of a given factor will manifest themselves indirectly rather than directly. It is known, for instance, that the policy of the Department of Public Prosecutions on decisions not to prosecute not only affects the composition of the population of offenders to be tried but may also affect police policy on criminal investigation and official reporting (Van Dijk and Steinmetz, 1979).

We would also point out that the explanation process may be a very lengthy one. Every factor identified raises new questions. For instance, ^{if} it is found that the population of known suspects varies, the question then arises how this comes about. If the answer is that the police operate a different selection procedure, the next question is why they do so, etc. Finally, it is scarcely feasible to accord a separate exhaustive treatment to every factor in every country. Quite apart from the fact that this would exceed the limits of an introduction, our knowledge of the penal systems of West Germany and Sweden is too restricted for the purpose. So let us return to the three 'premises' given above.

The composition of the population of offenders.

Let us now consider possible differences in the composition of the population of known suspects or sentenced persons. Here - and let it be said most emphatically - it is not a question of the size of the population but of its composition. The size is not relevant here, since we are working with percentages of known offenders who receive prison sentences, and allowance has already been made for the size in the correlations.

How is it possible then - and this begins our series of questions - for differences to arise in the composition of the populations referred to? The most obvious explanation is, of course, that there are differences in actual crime between the countries concerned. If the penal systems were operated in accordance with a completely identical policy, the result would be that more UPS would be imposed in one country than in another. Unfortunately, a crippling lack of comparative material on this point makes us unable to test this hypothesis.¹⁾

1) An attempt has been made to compare the findings of the RDC Victim Survey (Van Dijk and Steinmetz, 1979) with that of Schwind (1978), but this proved to lack foundation in view of the different design and formulation of the questions.

A second explanation may lie in the fact that the selection that the police make out of the total number of crimes actually committed is different in the Netherlands from that made in West Germany or Sweden. This could mean that our basis for comparison - the number of suspected perpetrators of crime known to the police may not be correct with regard to the various countries, e.g. because the average gravity of the crimes that known suspects have committed may be greater in the Netherlands than in West Germany. If the latter hypothesis is true, it will be realistic to expect that the cases which eventually come before the courts in the Netherlands will more often lead to unconditional custodial sentences than in West Germany.

An answer to this question may be obtained by investigating the way in which the selection takes place. There are then two possibilities. Firstly, the police may - for a variety of reasons - operate different criminal investigation procedures in the countries concerned and, in so doing, 'net' a different batch of offences. A second possibility is that the conduct of the public in reporting crime in West Germany and Sweden differs from that in the Netherlands.

Once an offence comes to the knowledge of the police, a new selection then takes place through the attention the police give to clearing up the offence. As far as the criminal investigation work of the police is concerned, there does appear to be prima facie evidence for assuming that the situation in the Netherlands and West Germany may give rise to differences in the composition of the population. For example, the numerical strength of the police force per 100,000 inhabitants in West Germany is over 50% greater than in the Netherlands.¹⁾

1) In 1972, the executive strength of the Dutch police was 148 men per 100,000 inhabitants and in West Germany 231 per 100,000 inhabitants (Perrick, 1973).

As a result, the German police can devote more attention to investigating less serious crimes - which would go uninvestigated in the Netherlands because of lack of manpower - and the composition of the crime base in West Germany may thus be less serious, on average, than in the Netherlands.

It is possible to make out a similar case with regard to the willingness of the public to report incidents. Greater police manpower means, in theory, that more attention can be paid to crimes reported by the public: something that may fall between two stools in the Netherlands may be carefully recorded in Germany. If we then assume that there is no great difference between the detection rates for serious and less serious crime, the difference in composition of the crime base can be attributed to the composition of the population of known suspects.¹⁾ In this way, the lower incarceration rate in West Germany would be explained, at least in part, by a larger number of prosecutions for less serious offences.

The use of the term 'known suspects' also gives rise to problems as far as Sweden is concerned. This is because there the term covers a much more restricted category of offender than in the Netherlands or West Germany. In Sweden, the Department of Public Prosecutions determines when there is a known suspect.²⁾

1) The 1978 detection rate in the Netherlands was 32%; in West Germany the figure hovered around 46% from 1970 to 1977 (Brustén, 1979).

2) For the definition of the term 'known suspect', see: Criminal Statistics, Crimes 1978, Statistiska Meddelanden, no. R 1979: 8.1, Sveriges Officiella Statistik, page 11.

In view of that department's function, it may be assumed that the way in which this is determined from case to case will be a more careful process than where the police make such decisions. For instance, an offence which is not followed by any attempt whatever to arrest the suspect, let alone prosecute him, will not involve the use of the term 'known suspect', as regularly happens in the Netherlands. In other words: the category 'known suspects' probably includes a greater number of serious offenders in the case of Sweden than in the case of the Netherlands. It is therefore all the more remarkable that few custodial sentences are imposed in Sweden, compared to the Netherlands.

In the case of West Germany, then, we are confronted with a relatively speculative explanation of differences in policy, and in the case of Sweden with a difference in the definition of terms, both of which make comparison impossible. Under these circumstances, the way out would appear to be to adopt other, less problematic, terminology. In this connection, the label 'sentenced persons' almost begs to be used.

In the case of West Germany, however, such a comparison leads nowhere, since the populations of sentenced persons cannot be compared because the principle which operates in that country means that all punishable offences referred to the Department of Public Prosecutions must be brought to court. Accordingly, prosecution also takes place in less serious cases which in the Netherlands would be set aside in accordance with the principle that allows the Department of Public Prosecutions to waive prosecution on policy grounds. Even though the principle has been applied less strictly in recent years, it is still probable that the average case brought before the courts in West Germany is less serious than in the Netherlands, and accordingly this label cannot serve as a basis for comparison. Unlike West Germany,

the situation in Sweden can be compared with that in the Netherlands. This is because Sweden observes the same principle on prosecution and there is little reason to suppose that the selection of offenders to be sentenced will differ much from that in the Netherlands. It has been shown that, taking the whole population of persons sentenced, unconditional custodial sentences are imposed in 23% of cases in the Netherlands and in 19% of cases in Sweden.¹⁾

To sum up; although there are indications that the populations of suspects or persons sentenced differ in the three countries looked at, these differences alone cannot account for the difference established between the Netherlands on the one hand and West Germany and Sweden in the other as regards the number and length of unconditional custodial sentences. Perhaps, then, our second group of factors - the rules governing the severity of sentences - will prove more helpful.

Differences in the rules.

Our second main category relates to the rules of criminal law and criminal procedure in the different countries.²⁾

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- 1) The slightly longer duration of sentences in Sweden cannot explain the great difference in the average daily population rates between the Netherlands and Sweden (22 as against 52). The explanation must be sought in the very high input of the Swedish penal system: in Sweden there are some 3,000 known suspects per 100,000 of the population; in the Netherlands the figure is 1,300.
 - 2) In the case of West Germany, we received several valuable suggestions from Professor D. Schaffmeister (Professor of Criminal Law at the State University, Leiden).

Beginning with the prescribed penalties it may be said that there is a large measure of variation in the Netherlands. For every crime - even the most serious - both the Public Prosecutor and the courts can choose a penalty lying between the general minimum (1 day) and the particular maximum penalty attaching to each particular type of offence. The situation in the other two countries is quite different. In Sweden, a prison sentence can only be imposed for a minimum of 1 month while in West Germany, the imposition of a custodial sentence shorter than 6 months is extremely rare. The aim has been to reduce the use of short custodial sentences and to increase the use of fines. Moreover, specific minimum sentences for particular crimes apply in both these countries. In West Germany, for example, a prison sentence for manslaughter must be at least 5 years. Moreover, it has an absolute penalty for murder: any person found guilty of murder must be sentenced to life imprisonment. Obviously, in this type of stipulation we have a very important factor which helps explain both the lower rate of prison sentences meted out and their longer duration. The reason is as follows: since any unconditional prison sentence imposed by a court must always be for a certain minimum period, there arises a certain reserve in the use of this sanction. This leads to a drop in the percentage of cases where unconditional prison sentences are imposed. On the other hand, if as a result this penalty is only applied in more serious cases, it also becomes highly effective and, particularly in the case of West Germany, means fairly long sentences. As far as Sweden is concerned, we believe that this difference in the material penal law can best account for the difference in penal policy compared to the Netherlands. 1)

1) A proposal is now being discussed in Sweden to reduce the minimum length of a prison sentence from 1 month to 1 week. This could lead to a drop in the average length of prison sentences but at the same time the courts may be less reluctant to impose short custodial sentences. If this development goes through, the differences between Sweden and the Netherlands in the average daily population rate for penal establishments per 100,000 inhabitants will decline.

Moreover, in the case of West Germany, the rules relating to criminal procedure also affect the difference with the Netherlands. Firstly, the preferment of charges; in West Germany, the summons contains a lengthy and detailed description of the nature of the offence. This is followed by specification of the section or sections of the law which related to the case. Unlike the situation in the Netherlands, however, the courts are not bound by any such description of the offence; they may interpret the facts differently from the Public Prosecutor. It may be, for example, that they consider additional, or more serious, offences to be involved than the Public Prosecutor (and accordingly sentence the suspect for them). A guilty verdict for several different types of offence may have a markedly cumulative effect on the severity of the sentence received.

Another important characteristic of the way court proceedings are conducted in the Federal Republic of Germany is that they are a repetition of the preliminary hearing by the police and the Department of Public Prosecutions. All the case documents used in the preliminary hearing are read out and discussed. Witnesses are called who repeat the statements they have already made. As a result, the entire proceedings take up a great deal of time. The presence of the witnesses and the inclusion of their statements in particular may cause emotions to run high. Since a court hearing is a less remote and less arid affair than in the Netherlands, this can affect the severity of the sentence, particularly in cases where the gravity of the charge makes a custodial sentence inevitable. Moreover, a great deal of attention is paid to the crime and little time is left for the offender's personal circumstances; significantly fewer probation, after-care and psychiatric background reports are produced than in the Netherlands.

Finally, the rules governing the use of remand in custody are more flexible in West Germany: the offences for which remand in custody is available are not limited, nor are limits set to the length of this measure.

In our view, the nature of court proceedings in West Germany constitutes a factor which goes some way towards explaining why custodial sentences there are so long by Dutch standards. It should be noted in passing that this greatly affects the level of the average daily population in West Germany.

Moreover, there are other rules which influence the average daily population rate. Firstly, the prisoner in West Germany has less opportunity to apply for release on licence than in the Netherlands, where it is hardly ever refused and therefore has a symbolic function; in West Germany the rules are applied more stringently and release on licence is less frequently granted. Something similar happens with suspended sentences, which in the Netherlands are seldom implemented where the conditions are violated, whereas in comparable cases in West Germany the courts are obliged to implement the sentences.

Thirdly, remission of ^{sentence} is granted less frequently and at a later stage than in the Netherlands (N.B. in the Netherlands persons who have already served 5 years of their sentence and are not yet eligible for release on licence are generally granted remission). Finally, there is the important consideration that there has been a desire to reduce the number of short custodial sentences (of less than 6 months) by substituting stiff fines in appropriate cases. However, many people (particularly the unemployed) find such fines so large that they are forced to serve the alternative custodial sentence. As a result, the reduction in the number of short custodial sentences has been lower than was envisaged.

The sentencing courts

The third main group of possible explanations consists of the differences relating to the persons who have to apply the rules. We conceive of this group in broad terms to cover not just the way the officials themselves discharge their duties, but also the influences that the environment - society - exerts on them. This group has particular application to the differences between the Netherlands and West Germany. We are unaware of any factors which are characteristic of Sweden in this connection.

In West Germany, the administration of justice is in the hands of laymen as well as salaried judges. In the criminal courts where cases are heard at first and second instance, one or more lay-assessors sit with one or more salaried judges; in the Grosse Strafkammer (first instance) two laymen sit with three salaried judges; and in the Schwurgericht (first instance: mainly for crimes against the person) there are two laymen on the bench. There are indications that the lay-assessors do not have a great deal of influence on the question of guilt (generally a purely legal matter), but that they do influence the severity of the sentences. The laymen appear to display a slightly more flexible attitude (Roos, 1978), particularly where more serious offences are concerned. The inclusion of detailed witness statements makes court proceedings in West Germany a more emotional affair than in the Netherlands. The very reason that laymen do not have a framework of legal interpretation at their command and consequently judge more by the emotional rather than the factual aspects of the case (Bauer, 1978) may well encourage stiffer sentencing.

The views which the officials concerned with the administration of justice hold as to the usefulness of custodial sentences are also relevant. We have a strong feeling that the judiciary in the Netherlands is convinced that prison sentences do not benefit the

accused; the fact that such sentences are nevertheless imposed has to do, on the one hand, with the fact that society and the suspect must be clearly shown that he has overstepped the mark and that the suspect must be made fully conscious of the fact; on the other hand, it has to do with the fact that alternatives to custodial sentences are lacking. As we see it, fines - and certainly stiff fines - are rarely regarded in the Netherlands as a good alternative. Dutch courts feel that many suspects will simply be unable to find the money to meet the fine; it is also doubtful whether suspects will scrape the necessary money together by proper means; lastly, some suspects will not regard a fine as a punishment.¹⁾

Under these circumstances, short custodial sentences are the preferred means of making it clear to suspects that their conduct is not acceptable. The fact that, generally speaking, short sentences are given will have to do with the belief that the longer the sentence, the smaller the prisoner's chances of rehabilitation. (On the alternatives and the usefulness of short custodial sentences, see the comments on an article by Heijder included in the present publication). In our view, prison sentences are imposed primarily for purely punitive reasons in West Germany, though it is widely argued that they can also be used for rehabilitation purposes. This may perhaps be evidenced by the fact that the number of short custodial sentences (i.e. of less than 6 months) has declined sharply in favour of fines owing to the belief that custodial sentences must be of longer duration in order to achieve any rehabilitation effect.

1) Perhaps all this has to do with the fact that the Netherlands, unlike West Germany and Sweden, does not operate a 'daily fine system', under which courts have an explicit duty to take into consideration the financial position of suspects, and, for that reason, will be more inclined to impose stiff fines.

Finally, the effects of the environment on those engaged in the administration of justice. We have the impression that in the Netherlands, on the one hand, the opportunities the public has to influence the administration of justice are very limited, witness the absence of lay assessors from the benches, and that, on the other hand, pressure from society for stiffer sentences is less marked than in West Germany. The fact that public pressure can lead to a demand for stiffer sentences is evident from the results of an investigation carried out several years ago into the perception of the gravity of various crimes (Buikhuisen and Van Dijk, 1975). The investigation revealed that Department of Public Prosecutions personnel on average rated the various crimes 2 points lower, on a scale from 1 to 10, than the public and 1 point lower than the police. (Nevertheless, there was approximate agreement between the 3 groups as to the scale of gravity of the crimes.)

The obvious conclusion from this is that the penalties which the courts are prepared to impose will be milder than those which the public envisages. If, therefore, as in other countries, the public were to exert direct influence on the administration of justice - we have already referred to the presence of lay assessors in West German criminal courts - this could easily lead to pressure for stiffer sentences.

As already stated, we feel it is still an open question whether Dutch society would wish to have more influence on the administration of justice. Compared to the United States, for example, the demand for tougher action by the courts in West Germany is, we feel, undoubtedly greater than in the Netherlands. We would not go so far as to maintain - as many foreign writers do - that the Dutch are traditionally a tolerant people (Block, 1979; Johnson, 1979). But the press, which even according to the members

of the judiciary, is a structured stream of communication nevertheless pays a different sort of attention to crime in the Netherlands than is the case in West Germany. We shall explain. If we assume that every country gets the press it deserves, it is likely that the feelings of the public as to what is desirable in the field of sentencing by the courts will find expression in the press as a whole. The Netherlands differs from West Germany in not having a 'real' right-wing press. Compared to the 'Bildzeitung', for example, the 'Telegraaf' is a tame affair. Furthermore, unlike Sweden and West Germany, the Netherlands has a fairly well developed left-wing press. To the best of our knowledge, West Germany has no daily newspaper that corresponds to the 'Volkskrant', and 'Elsevier' (centre) is matched by a great many left-of-centre weeklies. The left-wing press pays a relatively large amount of critical attention to what goes on in court and judicial circles in a way which may undoubtedly help to keep sentences short. On television we see, compared to West Germany, the same (or is it a different?) picture. There the programme 'Aktenselchen XY Ungelöst' (Case No. XY; Unsolved) is still running and enjoys a wide audience, whereas a similar programme was a flop in the Netherlands. These differences may well mean that the picture which the West German public receives of crime from the media is further from reality than in the Netherlands. In the case of those offences which do not affect the picture - by far the majority - the judiciary has a free hand and experiences no pressure from below; on the other hand, the pressure is there in the case of the offences that do shape the picture of crime; it is also brought to bear through the pages of the popular press and so limits the room for manoeuvre. In those cases where a prison sentence is indicated, such pressure gives rise to long - even very long - sentences.

We have come to the end of our relatively speculative explanation of the differences that exist between the Federal Republic of Germany, Sweden and the Netherlands so far as policy regarding

the use and duration of unconditional custodial sentences is concerned. We are aware that the number of possible explanations is larger than we have been able to deal with here. It has not been possible to treat all the possible influences on the differences in question. What we do hope to have made clear is that it is no simple matter to compare different countries, far less so to account for the differences. The question arises: Where is all this leading? We should like to deal briefly with this question in the last part of our article.

IV. Summary and Discussion

There was once a tourist who decided to visit Moscow. He didn't like warm climates and had therefore decided to go during the winter. The average daily temperature in Moscow, measured over the whole year, was not much different from that of Amsterdam and he had found he could quite happily stand the winter there. His holiday proved a great disappointment, however, since our friend had just as great a dislike of real cold and, in January, when he visited the city, the temperature in Moscow never rose above -5°.

The comparison is, we feel, obvious. Just as the meteorological climate in one city cannot be compared with that of another city on the basis of one general average, so too any comparison of the penal climate in different countries made on the basis of general figures is way off beam. Just as, in the case of the weather, some information is at least required as to how the average temperature over a year was arrived at, and as to precipitation and wind, so too more refined data are necessary in order to evaluate the penal climate. At the very least, there is a need for some information on the crime rate and its nature, on the selection processes within the penal system, and on the number and length of prison sentences.

If all that our tourist deserves is a compassionate glance for his failure to glean the necessary information, the researcher into the penal climate who bases his work on data that are too general does deserve some sympathy. Firstly, because in the case of theory, it is much more difficult than in the case of the weather to establish when precisely we are faced with a mild climate. Quite apart from the fact that the amount of UPS imposed is by no means the only possible yardstick, such a yardstick raises problems of its own. After all, which climate is

milder; one in which UPS is relatively rarely imposed, but when imposed, is of long duration, or one in which fairly frequent use is made of the sanction, but always using short or even extremely short sentences?

The fact that this is not a purely theoretical problem can be seen from the fact that, of the countries on which this article has concentrated, West Germany and Sweden fall into the former category, and the Netherlands into the latter. In practice, too, the researcher encounters considerably more difficulties than our tourist. Whereas the latter can simply telephone the Automobile Association or consult a guidebook to obtain the information he requires, the researcher has to make do with inadequate statistical data whose comparability, moreover, leaves much to be desired. In the Netherlands, for instance, when dealing with the concept 'known suspects' the starting-point is police statistics, whereas in Sweden it is the data available from the Department of Public Prosecutions. Again, in West Germany, certain offences are bracketed to form a single statistical category in a slightly different way from that used in the Netherlands, while at the same time - and here lies the root of the problem - the legal definitions of the various offences differ from one country to another.

This lack of reliable statistical data, together with the theoretical problems, leads one to seek refuge once more in what in our opinion are too general figures. The researcher may be having a rough time, but that does not excuse him from doing the best he can under the circumstances. He must at least be aware of the fact - we wish to emphasize this - that comparisons which take no account of the crime rate and the nature of the offences committed nor of the frequency and length of prison sentences are quite wrong. As we have seen, there has too often been a failure to meet these requirements.

One of the results has been that the explanations offered to account for the assumed differences are barely adequate and, more particularly, do little to clarify the intricacy of the penal system. Nevertheless, the explanation must lie ultimately in the interaction of the various components of that system. It will never be a complete explanation. The reason for this is that the final explanation will depend on complete understanding of the factors involved and the way in which they affect each other (Vlek and Michon, 1980).

We are still far from achieving such a goal and it is doubtful whether we shall ever achieve it. Nevertheless, it is worthwhile to keep on trying. Not because we, as natives of Amsterdam, should be so interested in explaining the differences between our climate and that of Moscow. That is primarily their affair. The real reason is that further research may increase our understanding of the workings of our own penal system. The prime importance of that would lie in bringing the workings of the various subsystems more into line. It frequently happens that - all in good faith - one part of the system undoes the work of another, or one authority pursues a policy at variance with that of another. It would be interesting, for example, to examine more closely the sort of relationship that exists between the prosecution policy of the Department of Public Prosecutions and a possible official-reporting threshold operated by the police. More information is also required in order to gain a full picture of the effect which measures in one particular field or within one particular sub-system have on the system as a whole. For example, enlargement of the prison capacity could indirectly affect the penalties policy of the Department of Public Prosecutions and, as a result, sentencing by the courts. Enlargement of the police apparatus could affect the composition of the population of offenders and accordingly might also affect prosecution and penalties policies, etc. etc. If we are to maintain our climate, account must be

taken of this sort of chain reaction. Finally, further research into the working of the penal system may serve to stress further the need for better statistical data. After all, how is it possible to gain any understanding of how a system works if there is a crippling lack of quite basic data on the subject and little, if anything, is known of the duration of processes within the system. In short, this is good reason for continuing research in this field. At present, the penal system is still largely a closed book. The elements for improved understanding of it will have to be put together piece by piece. We should then be in a position to tell Muscovites what the weather in Amsterdam is really like. Perhaps this will mean that we will prefer to stay at home.

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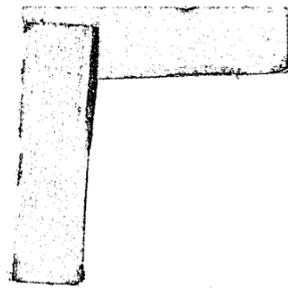
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