Generale preventie

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SUMMARY

In PART I of this study a survey has been given of what Dutch authors have written since 1870, when capital punishment was abolished, on subjects concerning the general preventive effect of punishment. This historical survey ends where, during the years 1940-1945, under the stress of the occupation all literature on the subject ceased.

In PART II an attempt has been made to arrange the historical matter so as to obtain a picture of what had been brought forward in the Netherlands in connection with the general preventive effect of punishment. This led to the introduction of some new distinctions.

I arrived at the following conclusions.

1. General and special prevention form a dual conception from which the whole of criminal law can be surveyed. General and special prevention are not aims of punishment, which can or cannot be pursued along with retribution, protection of the community, reformation of the criminal or rendering him harmless (by detention), but they are the two aspects common to all these aims, such as retribution etc.

2. I define general prevention as the effect which punishment exercises on persons other than the convicted. This effect always makes itself felt, whether desired or not. If no attention is paid to the effect of the punishment on the community one runs the risk of giving rise to indignation at the administration of justice, disregard of the authorities, or contempt for law and order without noticing that the administration of justice itself is the cause of it.

3. Therefore one cannot on adequate grounds be pro or contra the infliction of punishment for general preventive purposes. The punishment must of necessity be tested as to its effect on others than the convicted person. There can only be a difference of opinion as to how far one may go for the sake of the effect of the punishment on the community, when other interests may be injured, e.g. those of the accused or those regarding legal security or the after-care of criminals. Moreover, the requirements of punishment as an effective general preventive may come into conflict with the boundaries which the public sense of justice sets to the statutory maximum punishments, the punishment imposed by the judge or the execution of the punishment.

CHAPTER I, § 1.

In proportion as the gap between rulers and ruled became less wide, the merely deterrent function of criminal law passed into that of upholding authority. This function is the most essential of the general preventive side of punishment. In the middle of the last century it was more and more realized that deterrent alone was not sufficient. It is essential to strengthen the sense of a moral standard in the community itself, so as to increase its resistance against committing crime. By the side of the upholding of authority, punishment has therefore another function, viz. that of upholding the norm. Not before the 20th century does it become evident that it is sometimes the task of the authorities to create new law which is not yet felt as just by the people, and thus to create new delicts. The third general preventive function of punishment is that of creating new norms.

In order to make a proper use of this norm-creating function authority must be strongly established. For the punishable nature of new delicts, such as those resulting from laws regulating economic conditions, lies at first merely in disobedience
to the law. It is only gradually that the committing of such a delict is inwardly felt as an act of injustice. Thus, general prevention in its function of upholding authority gives support to its function of creating new standards. It is further unthinkable that its function of upholding existing standards can remain unimpaired if that of upholding authority is neglected, and vice versa.

CHAPTER I, § 2.

The function of upholding authority is the most important in cases where the authority of the government is directly attacked—sedition, political delicts. Here, determent stands first and, above all, the enforcement of obedience is aimed at. In addition to the detering effect there is, however, a second side to the authority-upholding function, viz. the desire to keep unimpaired or to strengthen the habit of obedience to the authorities among the majority of the members of the community.

From this function of general prevention it becomes understandable why, in practice, there should always have been objections against limiting the possibilities of remanding a delinquent immediately after his apprehension. From this motive also springs the desire to extend the legal possibility, as well as the practice, of immediately seizing any goods found on the suspected person, and bringing him at once before a judge. It is of great importance for this authority-upholding function that the prisoner should be tried with the shortest possible delay.

It even depends on the strength of the authority of the government and of law and order what shall be the demands to be made upon the evidence in criminal cases.

The judge, too, must keep in view the upholding of authority. For this purpose he must at the same time both inspire confidence in the people and establish a distance between himself and them. Amongst other things, the significance of judicial robes for the upholding of authority is pointed out and attention is drawn to the drawbacks of a system whereby the public prosecutor, without intervention of the judge, is entitled to come to an arrangement with the accused, enabling him to pay a certain fine without a public trial. Attention is also drawn to the danger run by the authority of the judge when he is called upon to try insignificant cases of what in principle is a serious crime, or when he is overburdened with the trying of petty cases.

For the sake of the confidence which the people must have in the administration of justice it is advisable to keep the wording of the sentence as simple as possible and the punishment as striking as possible. The judge should reside in the district where the accused reside, so that he may understand the mentality of the people.

CHAPTER I, § 3.

The essential nature of the norm-upholding function lies in restoring the public sense of justice which has suffered by the committing of a delict, or in confirming the feeling of having been right in the minds of all those who have behaved lawfully. It is sometimes suggested that it should be found in the symbolic ostracism of the criminal, which is practically brought about by imprisonment, or merely in the encouraging and deepening of the indignation of the members of the community.

The norm-upholding function requires the fulfilment of two conditions: There
must be both consistency and continuity in the measure of the punishments inflicted, and there must be continuity in the administration of justice itself.

The norm-upholding function demands the restoring of law and order, that is more than retribution for wrong-doing or expiation of guilt by equal suffering. For the upholding of norms requires forethought and is, amongst other things, influenced by the condition of law and order at the moment of the trial.

If the punishment is to serve the norm-upholding function adequately, the seriousness of the delict should find expression in the measure of the punishment. For this reason there are objections to an indeterminate sentence as far as this second function of general prevention is concerned.

CHAPTER I, § 4.

The central problem in the creation of norms is the question how far the authorities may anticipate the sense of justice of the members of the community. In general it may be said that the authorities may never go so far that the punishment imposed is no longer felt as just, but is felt to be unjust. For then they lose contact with the people and are no longer in a position to carry out any reformation of norms. In giving guidance for the creation of norms the degree of punishment should be kept within the limits of the sense of justice of the people. In the Netherlands this question was amply discussed in the thirties.

CHAPTER II, § 1.

The means by which the punishment is given a general preventive effect are determent, repeated punishment, and the inspiring of fear. According as one of these three effects preponderates, the system of punishment must be different.

Deterrent — the oldest form of general prevention — was originally thought to be always effective through the conscious reflection of the members of the community. The upholding and the creation of norms, however, are, above all, based on repeated imposition and execution of punishment. Thus an unconscious barrier is erected against committing delicts. The inculcation of traffic regulations took place in this way.

In addition to determent and repetition of punishment it is, however, of importance to keep alive a vague fear of imprisonment, of being mixed up with anything connected with the criminal judge; to this, for instance, the decorum of the court should contribute, and also the height of the prison walls. This is what is meant by „fear-inspiring“ as distinguished from determent.

CHAPTER II, § 2.

The function of criminal law is of an authority-upholding and, along with it, of an undifferentiated norm-upholding nature. The deterrent effect brought about through the potential criminals conscious deliberation was greatly over-estimated in the first half of the 19th century. Of far greater importance is its fear-inspiring effect. In order to uphold the authority of the law the making of criminal laws which cannot be maintained or the infringement of which cannot be traced should be avoided.

For the more differentiated upholding of norms the measure of punishment imposed by the judge is of much greater importance than the maximum punishment fixed by law.
CHAPTER II, § 3.

The general preventive significance of the administration of criminal law lies, as was said above, in the consistency of the punishments imposed in equally serious cases and in the continuity of the administration of justice. In order to attain adequate regularity in the administration of justice, intensive prosecution is required. Moreover, from this point of view of general prevention, prosecution of anything that has come to the knowledge of the public prosecutor is desirable. Unsuccessful prosecution and that of trifling cases, on the other hand, are injurious to the norm-upholding function of the punishment. Also the suspended sentence, the difference between the demand made by the prosecutor and the sentence pronounced at the same session, and also the judge taking into account the social consequences already suffered by the convicted person, without the public understanding the reason for the abnormal leniency of the punishment, may injure this function.

The creation of norms does not require consistency of punishment but, on the contrary, demands that this consistency should be discontinued. This may be done abruptly, but also gradually. Both methods have their advantages and disadvantages.

CHAPTER II, § 4.

For general prevention the trial in open court and with all possible publicity concerning the judicial procedure is of the greatest importance. The 19th century saw in the public trials nothing but a means by which the members of the community could check the judge. The promulgation of sentences was only admitted in cases of delicts which made it desirable that the community should be warned against the delinquent; it obtained the character of an additional punishment. In our century the drawbacks of the trial in open court are beginning to be felt. "A school for crime" it is called. For this reason it is argued that a selection should be made of the cases that shall be tried in public and also of the audience admitted to the trial; in some cases, for instance, only the press should be present, of which a sensible report is expected.

Many disadvantages to which a public trial is subject are not attached to the promulgation of the sentence. It must, however, be said that from the point of view of general prevention there are some objections to the activity of the press. Too much attention is repeatedly paid to the crime and too little to the trial. It is precisely through the press that it should be inculcated upon the people that crimes are regularly prosecuted and tried, at least if this is really the case.

Public execution was abolished in the Netherlands as early as the middle of the 19th century. Especially in cases of capital and corporal punishment the urge of the spectators to follow suit was repeatedly the cause of new crimes, as has recently become evident.

New methods of publication are employed, e.g. the publication of the number of punishments imposed in a certain period for a certain delict, the placing along the road of placards containing such warnings etc.

CHAPTER II, § 5.

The execution of punishment, too, has a general preventive effect; in the first place that of inspiring fear, especially in cases of long imprisonment. In the second place the execution of punishment guarantees the effect aimed at by the
imposition. This is, above all, the general preventive significance of shorter imprisonment and of fines.

For the sake of general prevention the punishment should appeal to the imagination of the public — for this purpose need not even be very severe — and it should be in an immediately understandable connection with the nature and seriousness of the delict. Thus it is advisable that, in addition to the payment of a fine, the delinquent should be compelled to indemnify his victim to such an extent that the advantages derived from the delict are at least completely nullified. It is thought desirable that young persons should be punished by „school punishments“ (being kept in by order of the judge), automobilists by a notice on their car stating the punishment for an offence against the road regulations.

Along with the desire for a more striking punishment, the stiffening of the prison-regime in cases of short sentence was urged in order to impart a more deterrent character to the punishment. This, however, has on those who undergo it a crime-inciting effect which is opposed to the possible advantages of its general preventive effect.

CHAPTER III, § 1.

Some types of men are more, others less susceptible than normal to the general preventive effect of the punishment. Those who have never come into contact with the criminal judge are especially sensitive to this effect. Less sensitive than is normally the case are recidivists, political delinquents, all those who are prepared to commit a delict with malice prepense, those who commit a crime out of passion (crime passionnel) and abnormal persons who are not or in some less degree responsible. This last group presents special difficulties for the general preventive punishment. The indeterminate sentence in case of grave recidivists has in its very indefiniteness perhaps such a fear-inspiring effect that it neutralizes the disadvantages which are attached to the sentence not containing a definite punishment.

The effect of the general preventive character of the punishment should reach those whose norms are disturbed by the committing of a delict, those who must be impressed with the culpability of the behaviour of a delinquent, and those whose respect for the authority of the government has suffered. Attention should be paid to the effect of the punishment both on existing social groups and on a casual multitude.

As separate groups that are of importance as being influenced by the threat of punishment were considered the following: beggars, the unemployed during the economic crisis of 1929, the country youth, and the farmers under the laws made after 1929 in connection with this crisis.

According as the cohesion in a certain group is greater, the punishment imposed upon one of its members for a delict repeatedly perpetrated in, and typical of that group, has a greater general preventive effect.

CHAPTER III, § 2.

Some delicts are capable of being suppressed by general prevention, others scarcely at all. For the general preventive punishment to be effective it is necessary that the delict should be of frequent occurrence and that it should not be committed from economic necessity. The kind of criminality said to be most sensitive to general preventive measures is elastic and epidemic in its nature.
Under abnormal conditions a general preventive punishment is called to aid in order to maintain law and order and the authority of the government. In the long run criminal law is in a position to cope with such a situation only if the causes are attacked by means of other measures e.g. against unemployment.

CHAPTER IV.

The general preventive punishment must not go beyond the bounds set by the public sense of justice. These bounds are not realised before they are exceeded. There comes a moment that the punishment is thought to be unjustly severe, and a moment that it is thought to be unjustly light. Between these two extremes there is a margin.

In addition to the desire to let the punishment correspond with the wrong committed by the delinquent and the extent of his guilt, the sense of justice consists of the desire to take into account the social conditions and circumstances at the moment the delict is committed, as well as the social conditions and circumstances at the time of the trial.

This means that the sense of justice itself demands that the punishment shall take into account the requirements of both: general and special prevention. It is indivisible and it determinates in its entirety what place must be given to the element: general prevention.

In cases of light offences the desire to make the punishment correspond with the guilt and the offence, leaves a broad margin. Consequently general prevention has in such cases, all the more significance for the measure of the punishment to be imposed within the two limits of the margin mentioned above. This is the domain — suppression of hooliganism, of offences against road regulations, of those against the regulations concerning economic conditions, etc. — where, in our more and more thickly populated country, general prevention, as it should be aimed at by the administration of justice, has to fulfil a most important task in the coming years.