

The Dutch Situation and Some Problems

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The Law and Psychiatry congress in Oxford in 1979 convinced me that there are not only as many laws as there are countries, but also that there are even more discrepant interpretations, procedures and interactions between law and psychiatry in these various countries. As it happened, we were talking about quite different things in Oxford, only to discover this after long discussion.

Therefore, I would like to first present some actual juridical and penal situations in Holland, in order to be able to discuss some problems. Fundamental problems, I think, arise in the confrontation between psychiatry and law, since the behavioral sciences have become aware of the laws of interactions, family systems, networks, etc.

The Present Situation in Holland

First of all I should indicate that the socio-juridical situation in Holland changed drastically after the Second World War. Some of us like to think that the reason for this was that a lot of judges, well-known authors and university professors were kept in prison during the German occupation. After the war, these ex-prisoners, who normally would never have experienced how it feels to be incarcerated, were the most honorable and esteemed citizens. Some of them became pioneers in changing the legal system in Holland.

Whatever the reason, Holland now has the reputation of giving very short sentences. Even the official publications of the Ministry of Justice indicate that a sentence of 6 months or longer is considered *long*.

Holland appears to be an island of tolerance between neighboring countries, with about 3,000 detainees (on any given day), of which 2,000 are awaiting trial. About 15,000 people receive prison sentences each year, out of a total population of 13 million inhabitants.** Nevertheless, the officially registered criminality rate seems to be lower than those of neighboring countries.

The second point I wish to mention is that since 1928 criminal courts in Holland have been able to call upon psychiatric expertise to rule on the lack of, or the degree of diminished responsibility of an offender. In Dutch law, the offender's degree of diminished responsibility at the moment of the crime, has nothing to do with his legal culpability, nor does it affect the question as to whether or not he is "fit for trial." The opinion of the expert witness (psychiatrist) concerning the responsibility of the defendant is judged by the

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**In Nord Rhein Westphalen, a neighboring province of the Federal Republic of Germany, there are four times as many people detained (on any given day) for the same total population of 13 million inhabitants.

criminal courts after they have reached a judgment concerning the defendant's culpability. A psychiatric opinion of diminished responsibility may consequently affect the sentence received, and can shorten the term of imprisonment.

On the other hand, diminished responsibility is *not* held to be sufficient reason for admission to a psychiatric institution. It is one of two reasons for "detention at the government's pleasure" (T.B.R.), the other being a court's ruling, again based on psychiatric advice, concerning the danger which the offender represents for society. The psychiatrist is asked to predict the probability of recidivism, and the court decides whether or not the predicted behavior is considered a danger to society. For example, indecent exposure is in most cases no longer prosecuted in The Netherlands, whereas more than twenty years ago it was considered a reason for detention at the government's pleasure.

The Law of 1928 accepted, very realistically, not only the concept of a sliding scale of responsibility between *not* responsible and *fully* responsible, but at the same time changed the concept of mental illness in Dutch law. Formerly, gross intellectual impairment was considered the only reason for non-responsibility. The Dutch Law of 1928 speaks of "defective development or impairment of mental faculties," which includes all psychiatric (biologically, psychologically and/or sociologically conditioned) diseases and defective developments. The same law made it possible to "detain an offender at the government's pleasure" but only after judgment by the court concerning his/her guilt. This T.B.R. (detention at the government's pleasure) is a court sanction with a maximum duration of two years, but the detainment can be extended by the court for another one or two years, on regular review at the end of each period. Psychiatric opinion concerning the detainee is taken into account at these reviews, every time a court has to rule whether there are sufficient and legitimate reasons to impose or prolong the T.B.R. ruling. It is here where judgments about human responsibility and danger are made, that the disciplines of psychiatry and law have their differences, and the arguments over these are by no means finished in The Netherlands. Although the law was officially changed in 1928, in reality the change did not come until after World War II.

To give an idea about the frequency of use of psychiatric expertise and the use of the T.B.R. sanction, in addition to the figures above concerning sentences, the following figures may help. In 1960 there were 200 persons detained at the government's pleasure. This number has decreased gradually each year since. In the last years no more than about 100 offenders were detained at the government's pleasure. Consequently the total number of persons detained by this measure has decreased from about 800 in 1960 to about 500 today.

Of the defendants called to appear before a criminal court, about 11% (7000 in a year) are accompanied by a psychiatric report, and of the remaining cases, 50% are presented with a report made by a social worker (probation officer). Furthermore, in about 100 cases each year a so-called multidisciplinary report is made, on the basis of clinical observation during a 6- to 8-week period. Most of these multidisciplinary reports are made at the Psychiatric Observation Clinic, the Pieter Baan Centre.

Most defendants in The Netherlands are extremely nervous when the question of T.B.R. arises. A great deal of fear circulates in the prisons about the in-

stitutions where T.B.R. detainees are treated, and concerning psychiatrists, expert reports, etc. Offenders seldom ask for treatment by T.B.R. themselves, although many of them acknowledge that they need "treatment." They are afraid of the undetermined period of detention, by which the sanction can be extended every year or two years, and which constitutes a real possibility of lifelong detention. They are afraid of "psychiatry" and psychiatrists. Not only world-wide irrational fears about this modern "witchcraft" lie at the base of this, but also the more realistic fear that they may be asked or "forced" to change. In fact, those who are detained at the government's pleasure are told that they will have to change their (dangerous) behavior, and that they will not be released without such personality change or growth to guarantee non-dangerous behavior. The third reason why all offenders are afraid of T.B.R. is the pejorative label of psychiatric illness. This is a very reasonable fear since saying you are an ex-convict is one thing, reporting you are an ex-T.B.R. patient is quite another.

The second remark I have to make is that the Dutch institutes in which people sanctioned to a T.B.R. are treated are of high quality; the treatment available in the institutes is often of higher quality than that in the psychiatric institutes available for non-offenders. In most of the (seven) existing T.B.R. institutes the ideas of the therapeutic community originated by Maxwell Jones and developed by several others are used, although certainly there are differences. Some of the institutions are "high security" and others less so. Most of them are oriented towards psychoanalysis, family therapy or behavior therapy; pharmacotherapy is neither popular nor greatly used.

As to the method of choice in the treatment of those who are more or less forced into therapy by the courts with the sanction of the T.B.R., the discussion still continues. Comparing the T.B.R. population (about 500) with the number of people who treat them, there is a proportion of 3 (treating) to 1 (treated). Another figure might also be interesting. In the Van Mesdag Clinic (Groningen), the Dutch maximum security institute, 50% of the inmates are in regular psychoanalysis (4 to 5 times a week for sessions of 45 minutes). In the Van Mesdag Clinic the average duration of T.B.R. detainment is 4½ years. For some of the 70 inmates this could mean more or less lifelong detainment; for others, a couple of years' treatment.

The third remark I should like to make concerns the effectiveness of treatment in the Dutch T.B.R. clinics. A research project is under way, but is meeting the same problems we see elsewhere in the field of research on the results of psychotherapy.

It is, after all, extremely difficult to define a measurable goal for this kind of treatment. It is neither "happiness," if that were measurable, nor "adaptation," if there were norms or quantifications for that.

It is even possible that the current way of thinking of the Dutch state about criminality and criminals, and the large amount of money the government spends for both assessment of defendants and treatment of criminals, are at the base of everything. I think that the present-day degree of tolerance and belief in Holland that people can change for the better has as much to do with the successful treatment of criminals as the relatively low criminal figures and the mild or moderate punishment (sentences).

Some Problems Concerning the Confrontation Between Psychiatric Assessment of the Degrees of Responsibility and the Juridical System

The concept of the freedom of man is closely connected with that of individual responsibility. I cannot and do not wish to enter into a philosophical debate, but you cannot avoid practical questions. Let us take as an example an "economic" crime such as pollution. The way in which a factory or mining industry unloads some of its chemical waste products can have fatal effects on a national or even international level. Everyone is convinced that this is a form of dangerous criminality, but there is seldom a way in which to incriminate an individual. It is neither the director of the factory, nor the truckdriver who threw the toxic material away, nor the trade unions, nor the shareholders, nor is it the government with arrears in legislation about pollution which is to blame. However, all together, as part of a system, as a mutual interactional knot, they may be held responsible. The question arises as to why ideas and the kind of reactions change so radically in the field of common criminality. Why according to criminal law do we continue to search for Mister X and try to prove that he is the one to blame and to punish? Often it is easy to demonstrate that the crime could not have happened without interactions with others and that the criminal was only part of the system, just as with the abovementioned economic crime.

A well-known example is the married couple, in which the husband is an alcoholic, and the wife in a manner of speaking is pushing her husband towards the pub, while at the same time proclaiming that she is very much concerned about the life he leads. A small crime, such as the breaking up of a cigarette machine, can stimulate the development of a negative and vicious spiral: the wife becoming more and more concerned (an understandable response), and the husband increasingly in revolt against his wife who (perhaps unconsciously) is increasingly treating him as his dominating mother did. In his revolt a visit to the bar becomes a daily routine and the consumption of alcohol increases as does the need for money. To the others in the bar he boasts about his being a "free man," and he disapproves of his own and all other wives, "being all the same." Such a spiral could very easily end with the man in prison for the first time, and then for a second or more: the recidivist is born. Is this exclusively his fault? Why don't we also blame the other customers in the bar, the barman, his wife, the social and economic situation?

In the juridical sense it is he, and he alone, who is culpable of the burglary or the fight. From the viewpoint of the behavioral sciences it is easy to demonstrate a vast network of interactions, a system without which the negative spiraling could not have existed. It is easy to find other examples.

Five adolescents, each of them in search of an identity, find themselves united together in order to find mutual support. They are South Molukkans, a social (racial) minority in Holland which feels and thinks itself discriminated against (and indeed sometimes has been). Being unemployed they meet each other every day in the loft of a derelict and uninhabited building, to drink some alcohol and smoke some "grass." A group of adolescents — nothing very special, until they discover that each day a money case is delivered to the bank

on the other side of the street. One day, someone proposes they snatch the case and they thus become a group for action. However badly organized, they nevertheless make a plan for armed robbery. The firearms are meant to deter the messenger. They had not foreseen that the messenger would defend himself, but he does. Unfortunately he is killed. A very serious and shocking crime has occurred in which an innocent victim is killed. The five adolescents were guilty, and they pleaded so. There was no problem in that, but the group as a group pleaded guilty and they felt themselves equally responsible, although only one of them fired the gun. And so, the problem of individual responsibility versus collective responsibility comes again to the fore.

This crime could not have happened without the obvious group dynamics. Group dynamics play a part in each group but especially when the group is composed of individuals who are uncertain of their identities and their places in society.

Is the one who fired the gun more guilty and/or more responsible than the others? From the juridical point of view the case is clear; the shot has been fired by one man. From the point of view of the behavioral sciences, the experts could demonstrate that group dynamics resulted in a loss of individuality, especially while the members of a group are immature. For the psychiatrist working and advising in the forensic field, the question arises repeatedly of the importance of individual responsibility or group responsibility. Is responsibility an interactional network as is so often the case in economic crimes?

A third example will demonstrate another aspect of this problem. The proprietor of a bar was killed, evidently with total premeditation; for a couple of months the murderers had conspired to kill the head of the family. During these months the question of whether he should be killed was never raised, but only how. In the beginning there were five conspirators, but one of them did not dare to go through with it. He could find no other way out than simulated appendicitis and was subsequently operated upon. This fifth man was later a witness at the trial. The other four conspirators were the proprietor's wife and her lover, a son and a regular customer of the bar. The last of these, once a member of the French Foreign Legion, had lost his wife six months before, and had returned to alcoholism thereafter. He was the one who fired the fatal bullet. There was yet another son who initially pleaded guilty, but the police found out that he had an alibi and could not have been involved. This was a family tragedy with a number of psychodynamic elements on an Oedipal theme, and I do not wish to go into unnecessary details.

We had all four conspirators in observation and we had several joint interviews. During our observations it became very clear that the mother of the family had the three men as "puppets on a string." She was without doubt the one who instigated the whole tragedy. However, she was not the murderer in the legal sense. Reporting the results of our individual observations to the court, but especially reporting our observations concerning the interpersonal interactions, we expert witnesses found ourselves suddenly in a difficult position. Quite by accident the experts became witnesses for the prosecution of the mother. What happened in court was that the mother was declared guilty (as were the others) and she received a much longer sentence than the man who fired the gun.

The difficulty for the expert witness in this case is that he is supposed (in The Netherlands at least) *neither* to be witness for the prosecution *nor* for the defense. But while reporting the interactions he has observed in cases such the abovementioned, he seems to lose this impartiality.

With these three cases I hope to have illustrated the problems which can occur and with which the forensic psychiatrist is confronted, when he postulates that every person is part of an interacting network – group or family.

The impact of communication theory, of group dynamics and of family therapy on forensic psychiatry is rather great. Besides all medical and psychiatric illnesses and the psychodynamically understandable malformations of the personality, there is at present a third field, the field of interactions, in which the defendant can also be ensnared, and by which their “free will to determine their actions” can be impaired with the consequence of diminished responsibility for a certain crime. But decreasing responsibility for an individual in this way means an increasing responsibility for the social network to which the individual belongs.

If penal laws and penal law procedures have been constructed for the defense of the individual against the power of governments, as I believe is the case, there is very good reason to restrict the governments’ power over the individual to those (and only those) who have been proven guilty of a specific crime. Furthermore, restriction by law of the kind and the duration of power that can be executed by governments over individuals is also necessary. On the other hand, the impact of a social network on the conduct of an individual is an undeniable reality.

The forensic psychiatrist has not only to deal with this problem when he is advising on the degree of responsibility, but also when he recommends some form of therapy. For instance, if he advises family therapy as a special condition associated with a suspended sentence, who is to blame when the therapy fails or does not even start. Should the sentence be executed because of this failure? I do not think so, but neither can I find an alternative solution.

Although we recognize that most intellectuals become enraged if a certain line or passage of their work is taken out of context, we currently accept in penal law (and in forensic psychiatry) that an individual can be taken out of his/her context or social network.