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Gerhardus Antonius van Hamel (1842-1917) and the new horizons of criminal justice under penal positivism

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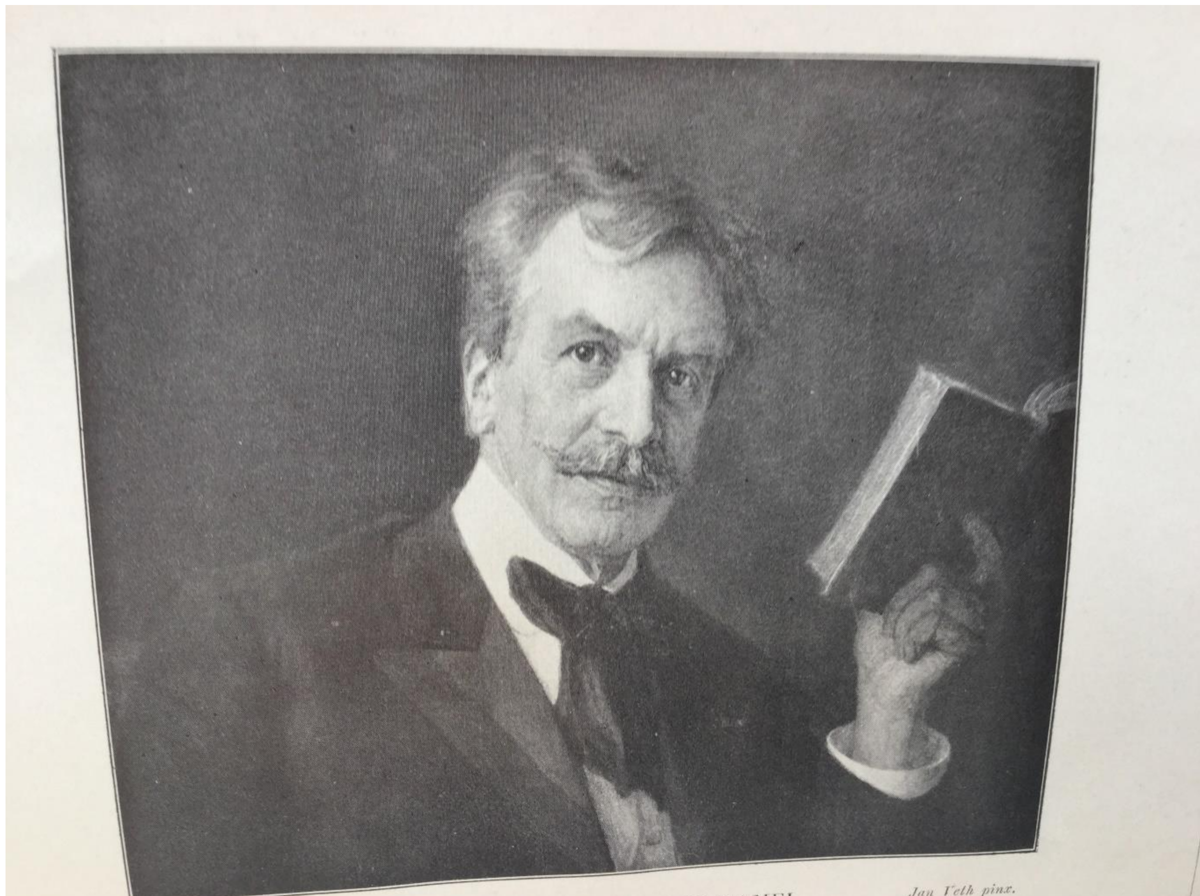
Abstract
The aim of this contribution on G.A. van Hamel, one of the co-founders of the I.K.V. is double. First, what were the international schools of thought that inspired him, as a pupil of the neo-classic school, to become a leading figure of penal positivism and social defence and what was his own impact in this international arena? Second, to which extent was he able to elaborate, in his scholarly and policy work, a proper criminal justice theory of social defence?

Keywords
Criminal justice, criminology, neo-classic school, penal positivism, criminal anthropology, social defence, security measures

Summary: 1. Van Hamel as a lawyer and politician. 2. Van Hamel: a pupil of the neoclassical school. 3. Van Hamel: inspired by the international arena and the construction of the discipline of penal positivism. 4. Van Hamel: in search of his proper criminal justice theory under penal positivism. 4.a. Van Hamel's (international) publications and penal positivism. 4.b. Van Hamel's manual: *Inleiding tot de studie van het Nederlandsche strafrecht*. 5. Conclusions. Bibliographical References



1. Van Hamel as a lawyer and politician

Van Hamel, the son of a protestant minister in Haarlem – whose ancestors were Walloon Huguenots who had migrated to the Netherlands in the 17th century - studied law at Groningen University. After obtaining his PhD in private law at Leiden University, he left the university for a career as a practising lawyer, a public prosecutor and a civil servant at the Ministry of War. At the age of 28 he was already part of the founding fathers of the Nederlandse Juristenvereniging- the *Dutch Society for Lawyers*, established in 1870,[1] which is still very influential today. In 1880, at the age of 38, he was appointed Professor of criminal law, criminal procedure and the philosophy of law at the University of Amsterdam. In the same year he delivered his inaugural lecture entitled "De grenzen der heerschappij van het strafrecht - *The boundaries of the dominion of criminal law*". He was also one of the founding fathers of the very important Journal "Tijdschrift voor Strafrecht (1886)", that was replaced in 1970 by the Journal "Delikt en Delinkwent". His scholarly work on criminal justice is mostly assembled in 2 volumes of "Verspreide Opstellen"[2] from 1912, that were published on the occasion of his 70th birthday. His manual "*Inleiding tot de studie van het Nederlandse strafrecht"* was published in parts between 1889 and 1895. In 1895 it appeared in its entirety[3] and re-edited versions thereof were subsequently published in 1907,[4] 1913 and 1927.[5] This manual deals mainly with the general part of criminal law. He had also intended to publish a second part on the special section (criminal offences) but lost interest therein, as by now his main attention was mostly devoted to the area of punishment. This manual was very influential, as it was published just after the coming into force of the new Dutch Penal Code in 1886. He had been a co-promotor of important doctoral research at Amsterdam University, for example the research carried out by A. Aletrino,[6] J. Van Kan[7] and W.

* This work has been undertaken in the context of the International GERN Seminar (Groupe Européen de Recherches sur les Normativités) organized by Yves Cartuyvels (University of Saint-Louis – Bruxelles, Belgium) and Aniceto Masferrer (University of Valencia, Spain), and of the research project entitled "Las influencias extranjeras en la Codificación penal española: su concreto alcance en la Parte Especial de los Códigos decimonónicos" (ref. DER2016-78388-P), funded by the Spanish 'Ministerio de Economía y Competitividad' (2017-2020) and by the Groupe Européen de Recherches sur les Normativités (GERN) Interlabo (2019-2020).

[1] He participated in the German Juristentag in 1870 and concluded his personal review "Duitse Juristendag", G. A. Van Hamel, Verspreide Opstellen (V.O), I. 64-67 by advocating the establishment of a similar event in the Netherlands.

[2] Van Hamel, G.A., *Verspreide Opstellen (V.O.), part I* , 1870-1891, Leiden: E.J. Brill, 1912, pp. 1-576;
Van Hamel, G.A., *Verspreide Opstellen (V.O.), part II* , 1892- 1912, Leiden: E.J. Brill, 1912, pp. 577-1078.

[3] Van Hamel, G.A.**,** *Inleiding tot de studie van het Nederlandsche strafrecht. Deel I.* (Inleiding. - Eerste Hoofddeel: de algemeene leerstukken), Haarlem: De Erven F. Bonn & The Hague: Gebr. Belinfante, 1889.

[4] Van Hamel, G.A., *Inleiding tot de studie van het Nederlandsche strafrecht*, Haarlem: De Erven F. Bohn & The Hague: Gebr. Belinfante, 1907 (tweede, geheel herziene druk).

[5] Geelhoed, W., 'Inleiding tot de studie van het Nederlandsche strafrecht - 1889: G.A. van Hamel (1842-1917)', *Pro Memorie* 2019, afl. 2, pp. 132-135.

[6] A. Aletrino, a doctor and psychiatrist, defended his PhD entitled "*Eenige beschouwingen over den beroepseed der artsen*" in 1889. He was a pioneer in the field of social medicine and forensic psychiatry. In 1899 he accepted a private chair in criminal anthropology at the University of Amsterdam. At the 5th International Congress on Criminal Anthropology he caused a scandal by reporting on "La situation sociale de l'uraniste" (published in the Les Archives d'Anthropology Criminelle, 1901, http://www.archive.org/stream/congrsinternati19unkngoog/congrsinternati19unkngoog_djvu.txt, p. 26-37) defending the rights of homosexuals as normal persons, which at the time resulted in uproar in the Dutch government and Parliament.

[7] Van Kan, J., *Les causes économiques de la criminalité: étude historique et critique d'étiologie criminelle*, Paris: A. Storck, 1903.

Bonger.[8] The PhDs by Van Kan and Bonger were a follow-up to Van Hamel's idea to offer a prize for an essay on "*Un aperçu systématique et critique de la littérature concernant l'influence des conditions économiques sur la criminalité*", which was offered by the Law Faculty of the University of Amsterdam in 1899. Van Kan and Bonger, who were Van Hamel's students, thereby submitted papers as a result of his idea. Van Kan received the gold medal; Bonger was honorably mentioned.[9]

Besides his chair, he was also heavily involved in the governance of the University and of the country. From 1890-1891 he was Rector Magnificus of the University of Amsterdam and from 1892-1917 he was member of the Provincial parliament. He left the University in 1910 for the House of Representatives of the Dutch Parliament, to which he had been elected between 1910 and 1917.

In the political spectrum he belonged to the "Liberale Unie" party of which he was even president in 1885. The "Liberale Unie" was a centrist progressive liberal party with a strong secular impetus. Although its members mostly came from the liberal bourgeoisie, in its programme it did include social welfare reforms, the protection of the weakest in society and universal suffrage. The party's Urgence programme (1896)[10] was in fact a social political manifesto for very far-reaching reforms in favour of mandatory social insurance, labour contracts, improving the position of women, compulsory education, etc. This liberal party was now however composed, as many equivalent parties in European countries were at the time, of a more centrist and a more leftist wing. In 1892 the more leftist wing left the party and formed the "Radicale Bond" (the "Radical Union") that promoted universal suffrage and labour and social security law . In 1901 another group left the "Liberale Unie" after a motion for universal suffrage was not adopted by its members. They joined the Radicale Bond and established a new party called the "Vrijzinnig Democratische Bond" (the "Liberal Democratic Union"). However, Van Hamel remained as a Member of Parliament for the more centrist "Liberale Unie" until he died in 1917.

In fact Van Hamel was a perfect combination *in personam* of law & politics,[11] which was quite common at the time. In 1905 he was also offered the opportunity to become the Minister of Justice, but refused because of health issues. In line with his convictions, from his early days he was active in the field of healthcare and juvenile protection in the City of Amsterdam. In 1869 he had already established Pro Juventute, with the aim of providing assistance to juveniles in order to decrease their criminality, and in 1907 he established the Psychiatric-Legal Association.

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[8] Bonger, W., *Criminalité et conditions économiques*, The Hague, Martinus Nijhoff, 1905; *Criminality and Economic Conditions*, Bloomington, Indiana University Press, 1969 (abridged version with an introduction by A. Turk). Bonger belonged to the Social Democratic Workers' Party. In 1922 he became the first Professor of sociology and criminology in the Netherlands at the University of Amsterdam. See Hebberecht, P., "Willem Bonger. The unrecognized European pioneer of the study of white-collar crime", in Van Erp, J., e.a., *Routledge Handbook on White-Collar Crime in Europe*, Routledge, 2015, pp. 125-132.

[9] Van Bemmelen, J.M., "Pioneers in Criminology, VIII. Willem Adriaan Bonger (1876-1940)", in Mannheim, H. (ed.), *Pioneers in criminology,* London, 1960, pp. 297 ff.

[10] See file://soliscom.uu.nl/users/Verva101/My%20Documents/Liberale%20Unie%20-%20Hervormingsprogramma%20en%20Programma%20van%20Urgentie%201897.pdf

[11] X, Karakterschets. Prof. Mr. G. A. van Hamel", *De Hollandsche Revue*, 1896, pp. 782-791; Dahl, F., "G.A. van Hamel", *Tijdschrift voor Strafrecht*, 1918, pp. 60-68.

In 1910 he was the recipient of an honorary doctoral degree from the Université Libre de Bruxelles[12] for his contribution to science and politics.

2. Van Hamel: a pupil of the neoclassical school

In the field of criminal justice Van Hamel had started as a rather conservative lawyer. At the beginning of his career he was certainly an adherent of the moderate neoclassical school under the leadership of Prof. A. Modderman (Universities of Amsterdam & Leiden and the Minister of Justice between 1879-1883), who also belonged to the liberal political family. Modderman was the father of the Dutch Criminal Code, that entered into force in 1886,[13] and it replaced the French *Code Pénal* of 1810.[14] For Van Hamel this penal code was really a key reference in his work, as his manual (see under point 4.b) followed the structure of the code. However, although this penal code was dated 1886, it was still a product of the (neo)classical school. The penal theory of the code was based on the concept that the will of persons is not predetermined (and is thus a reflection of free rational choices) and the principle of personal culpability. Punishment, based on retaliation, consisted mainly of imprisonment, of which the first 5 years had to be spent in solitary confinement. However, there were no minimum sanctions, meaning that there was great faith in the judiciary deciding on an appropriate punishment. The neoclassical school also had a more human approach than the classical school in the Netherlands, as corporal punishment and the death penalty had already been abolished in 1856 and 1870 respectively. However, the code did provide for a life sentence for murder. During the execution of this sentence it could not be regularly assessed by a court, which meant that it consisted of lifelong exclusion from society, unless a royal pardon would be granted. This sentence, that was considered to be a correct form of retaliation for murder and also served to exclude dangerous persons from society, is still in force today, although it is a subject of constant review under the European Convention on Human Rights. Van Hamel was also involved in the Dutch Code of Penal Law for the Dutch Indies, the so-called penal code for Indonesian citizens (1918). The code was very similar to the Dutch Code, but in contrast it retained the death penalty. Although Van Hamel published fairly little on criminal procedure,[15] from 1910 to 1913 he was also a member of the Ort Governmental Commission that prepared the new Code of Criminal Procedure. This code entered into force in 1926, replacing the Dutch Code of Criminal Procedure of 1838 which was rather a translation of the Napoleonic *Code d'instruction criminelle* that had been applied until 1838, but with some modifications.[16]

At the beginning of his career Van Hamel's thoughts on criminal justice were very near to those of A. Modderman (who was only 4 years older). However, from 1880 onwards Van Hamel started to criticize the religious foundations of Modderman's dogmatism. He no

[12] His colleague A. Prins, the co-founder of the IKV/UIDP (see section 3), was Professor of criminal law at the ULB at the time and was also an influential political figure.

[13] Code Pénal Néerlandais, in: Ancel, M. and Marx, Y., *Les Codes Pénaux Européens*, Tome III, Centre Français de droit comparé, Paris 1958, pp. 1375-1466; – Das Niederländische Strafgezetzbuch, translated by D. Schaffmeister, in: Jescheck, H.H. and Kielwein, G., *Sammlung ausserdeutsche Strafgezetzbücher*, Band 18, Berlin, de Gruyter, 1977; – The Dutch Penal Code, translated by L. Rayar and S. Wadsworth, in: *The American Series of Foreign Penal Codes*, no. 30, Colorado, Rothman Littleton, 1997.

[14] Bonger, W., "Development of the Penal Law in the Netherlands", *Journal of Criminal Law and Criminology*, vol. 24, 1933, pp. 260-270.

[15] He had published i.a. a couple of articles on the administration of justice and police reform.

[16] For a more historical insight, see Tak, P.J.P, *The Dutch criminal justice system*, 2008, https://www.wodc.nl/binaries/dutch-cjs-full-text_tcm28-78160.pdf.

longer shared the vision of Modderman on the intrinsic relation between religion and law.[17] Instead of Modderman's metaphysical-religious foundations based on natural law he endorsed a secular ethical approach: "*The law cannot be directed against freedom; what it is protecting against is the compulsion of injustice - Tegen de vrijheid kan het recht niet gericht zijn; waartegen het opkomt is juist de dwang van het onrecht.*" (trad. a.)[18] In his inaugural lecture of 1880 he clearly argued, in the same vein, for the abolition of crimes that were based on the penal protection of religion or moral views.[19] Although the separation of criminal theory and religious foundations is typical of the modern positivist school[20] that opts for scientific foundations, it is also related to the progressive liberal philosophical background of Van Hamel and his engagement in the movement for "libre examen"[21]/ freedom of thought, one of the main dogmas of the progressive liberal movement and the related Free Masonry. From the very beginning Van Hamel was also opposed to the exclusive dogmatic approach in criminal science:

> "So the contrast rose - not realism versus idealism - but realism versus dogmatism (…) the danger that a science of real life would lose its value because of legal futilities and dialectical subtlety" (tr.a.)[22]

In his inaugural lecture of 1880 there was still no sign of the Modern School of penal positivism He explicitly endorsed the general principles of the classical school, being that criminal law intervention is deserved for a predefined legal interest that merits criminal protection and this intervention was further limited by the *ultimum remedium* or *ultima ratio* idea:

> "With regard to the determination of the boundaries (of criminal law), two basic principles apply first and foremost: no criminal law other than for the enforcement of the law, i.e. of the foundations, of the conditions that may be necessary for leading a human life that fulfills its purpose, to the extent that its fulfillment depends on others and can be obtained by coercion. No criminal law insofar as the other means of securing the protection of this legal field, the resilience of the legal consciousness and of the social institutions themselves, discipline within the family or employment context and the coercion of private law are entirely sufficient in view of the scope and the impression of the injustice that can be prevented or remedied"[23] (tr. a.).

From the very beginning Van Hamel was interested in the goals and legitimacy of punishment. In his exuberant and exhaustive report[24] on his participation in the *German Juristentag* in 1870, we can read that he was in favour of the abolition of the death penalty, but at the same time he demanded additional measures from the legislator in order to avoid "the moral destruction of the life of the criminal"[25] (tr. a.). He pointed in the direction of

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[17] Van Hamel, V.O. I, Ex Cathedris, p. 144.

[18] Idem, p. 164.

[19] Van Hamel, De grenzen der heerschappij van het strafrecht, V.O. I, pp. 170-175.

[20] F. von Liszt underlines that the Modern School "verwehrt jeder metaphysischen Spekulation über den Einfluss auf die empirische Gestaltung der Strafe", in Der Zweckgedanke im Strafrecht, Marburger Universitätsprogramm, 1882, in *Aufsätze und Vorträge van Dr. Franz von Liszt*, Berlin 1905, p. 133.

[21] Van Hamel, De tegenwoordige beweging op het gebied van het strafrecht, Redevoering op den Jaardag der Amsterdamsche Universiteit, V.O. I, p. 549.

[22] Van Hamel, G.A., „Zur Erinnerung und zum Abschied", in: *Mitteilungen der IKV*, vol. 21(1), Festband anlässlich des 25 jährigen Bestehens der Internationale Kriminalistischen Vereinigung, Berlin, J. Guttentag, 1914, p. 442.

[23] Van Hamel, V.O.I, p. 156.

[24] Van Hamel, V.O. I, pp. 1-67.

[25] Van Hamel, V.O. I, p. 40.

reforms to the prison and education systems. Also in his 1880 contribution on prison sentencing[26] he only defended the introduction of custodia simplex (*hechtenis*) in solitary confinement for misdemeanours (contraventions and culpa crimes) when it was the most appropriate form of retaliation as well as general and special prevention.

3. Van Hamel: inspired by the international arena and the construction of the discipline of penal positivism

His political interest in progressive social reform guided Van Hamel towards the societal dimension of (criminal law). Already in 1879 he had translated Rudolf von Jhering's "*Der Kamps ums recht*" (1874) into Dutch. There was a big turnaround, however, in 1884[27] when he discovered the "*Marburger Programm, der Zweckgedanke im Strafrecht*"[28] by Frans von Liszt (9 years younger than Van Hamel).[29] The fact that criminal justice and criminal punishment in particular should not only be based on retaliation but had a criminal policy goal was a real eye-opener for Van Hamel. In 1881 Von Liszt had founded the "Zeitschrift für die gesamte Strafrechtswissenschaft" and throughout his life Van Hamel was very fascinated with this concept[30] as it introduced the necessary social sciences (at the time mostly criminal anthropology and criminal sociology) as scientific foundations for this policy. As a politician from the progressive liberal family, Van Hamel was certainly also fascinated with the link between criminal policy and the "Sozialpolitik" of Bismarck, given the commonalities with the programme of the *Liberale Unie.*[31] Finally, he was also very impressed[32] with a publication by A. Prins in 1886 on "*Criminalité et répression en science pénale et droit positif. Essaie de Science Pénale*"[33] and he was clearly influenced by the Italian anthropological school of Lombroso and the socio-psychological school of Lacassagne and Tarde.[34]

From 1885 onwards Van Hamel actively participated, as a rapporteur, in the existing professional networks, especially in the International Penitentiary Commission and the International Congresses of Criminal Anthropology. The International Penitentiary Commission was founded in 1872 in London and it organized 12 international congresses between 1872 and 1950. In 1951 it was replaced by the International Penal and Penitentiary Foundation (IPPF). This Commission was de facto an intergovernmental body for policy in the area of the treatment of offenders and prisons. Van Hamel participated in several of these international conferences as a rapporteur (see infra), during which he could meet and discuss with high-level officials from the departments of Justice and penitentiary institutions as well

[26] Van Hamel, "Moet nevens de gevangenisstraf een andere vrijheidsstraf - custodia honesta - worden opgenomen? Preadvies Nederlandse Juristenvereniging, 1880", V.O. I, pp. 182-221.

[27] Pompe, W.P.J., "Geschiedenis der Nederlandsche strafrechtswetenschap sinds de codificatie-beweging", in: *Geschiedenis der Nederlandsche rechtswetenschap*, deel II, Amsterdam, 1956, p. 372.

[28] Von Liszt, F., „Der Zweckgedanke im Strafrecht", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1883, pp. 1-47.

[29] Van Hamel, Zur Erinnerung und zum Abschied.

[30] Vervaele, J., "La naissance de L'Etat-Providence et le modèle des sciences pénales intégrées", *Déviance et Société*, 1989, vol. 13, no. 2, p. 14.

[31] Vossler, O., *Bismarcks Sozialpolitik*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1961.

[32] Van Hamel, Zur Erinnerung und zum Abschied.

[33] Brussels-Leipzig: Librairie Européenne C. Muquardt, 1886.

[34] Idem, p. 442. See also, Vervaele, J., "hoofdstuk IX, De penale positivistische school", in: Vervaele, J., *Rechtsstaat en recht tot straffen*, Antwerpen: Kluwer rechtswetenschappen / Arnhem: Gouda Quint, 1990, pp. 271-400.

as colleagues from European Universities. The International Congress of Criminal Anthropology[35] made a start in Rome, at the initiative of Lombroso, in 1885. The participants came from the fields of legal medicine/psychiatry, criminal sociology and to some extent criminal justice. At this congress Lacassagne went into battle against the medical endogenic approach of Lombroso be stating: "The criminal is a microbe that proliferates only in a certain environment. It is probably the environment that produces the criminal, but like a medium that has no microbes, it cannot make crime germinate on its own. [36]

Subsequent congresses were held in Paris (1889), Brussels (1892), Geneva (1892), Amsterdam (1901), Turin (1906), Lombroso's home/university city, and Cologne (1911). The one planned in Budapest for 1914 could not be held for obvious reasons. Van Hamel participated as a rapporteur in several congresses. The Congress organized in Amsterdam was even upon the initiative of Van Hamel. These congresses were a perfect laboratory for the evolution of penal positivism and they very much reflected all the discussions between the different schools, from Lombroso (the born criminal) to Tarde (the social causes of crime), but nevertheless sharing all the ideas on goal-orientated criminal policy, based on scientific results, to achieve social hygiene and an appropriate social defence against criminality. The proceedings of each congress appeared in "*Archives d'Anthropologie Criminelle*",[37] established by Laccasagne in Lyon in 1886 (therefore as a follow-up to the first conference).
In 1889 Van Hamel, together with Franz Von Liszt and Adolphe Prins, founded the *Internationale Kriminalistische Vereinigung* (IKV), also called the *Union Internationale de Droit Pénal* (UIDP), the forerunner of the AIDP, that was established in 1924[38]. They knew each other well from the congresses of the International Penitentiary Commission and the Criminal Anthropology Congresses in which they had actively participated. Moreover, the three of them shared the same political engagement, as they were all active in liberal-progressive parties. Von Liszt and Prins[39] were also members of the Freemasonry,[40] which was also an important social reform actor. They formed a strong trio and they made the IKV/UIDP the leading criminal law organization at the time. The IKV/UIDP included not

[35] Lindsey, Edward, "International Congress of Criminal Anthropology a Review", 1 *J. Am. Inst. Crim. L. & Criminology* 578 (May 1910 to March 1911); Kaluszynski, M. The International Congresses of Criminal Anthropology: Shaping the French and International Criminological Movement, 1886-1914iIn Peter Becker, Richard F. Wetzell. *Criminals and Their Scientists. The History of Criminology in international perspective*, Cambridge University Press, pp.301-316, 2006;acces in pp. 1-23 at https://halshs.archives-ouvertes.fr/halshs-00010544/file/International_congresses_of_criminal_anthropology_Cambridg_.pdf; Kaluszynski, M., "Les congrès internationaux d'anthropologie criminelle (1883-1914)", *Revue d'Histoire intellectuelle* 7 (1989): 59-70. See also. Kaluszynski, M. *La criminologie en mouvement. Naissance et développement d'une science sociale en France à la fin du XIX siècle*, PhD, Paris, 1988, not published.

[36] Lacassagne, A., Congrès international d'anthropologie criminelle, 1885, https://gallica.bnf.fr/ark:/12148/bpt6k9690221m.texteImage, p. 166.

[37] They were published from 1886 onwards as « *Les Archives de l'anthropologie criminelle et des sciences pénales Médecine légale, judiciaire — Statistique criminelle — Législation et Droit* ». Lombroso had already founded, together with Ferri and Garofalo, *L'Archivio di psichiatria e scienza penali* in 1880.

[38] *Cf* Chérif Bassiouni, M., "Un siècle de service consacrée à la justice criminelle et aux droits de l'homme", *Revue Internationale de Droit Pénal (Le Centenaire de l'UIDP/AIDP)*, 1990, vol. 61,1-2, p. 31. ; Jescheck, H.H., "Der Einflusss der IKV und der AIDP auf die Internationale Entwicklung der Modernen Kriminalpolitik. Festvortrag auf dem XII Internationalen Strafrechtskongress im Hamburg am 17 September 1979", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 92 (1980), pp. 997-1020; and Berdugo, I., *El movimiento de política criminal tendente a la unificación legislativa. Su desarrollo hasta 1940*, non-published doctoral thesis, Universidad Complutense de Madrid, 1976, full text available at: www.cienciaspenales.net.

[39] It is not excluded that Van Hamel was also a member, but I could not find any formal confirmation of this.

[40] For the interaction between the Freemasonry movement and the modern positivist school, see Vervaele, Rechtsstaat en recht tot straffen, 1991, p. 538.

only university professors, but also Members of Parliament (such as Von Liszt and Van Hamel), civil servants from Ministries of Justice, magistrates and governors of penitentiary institutions (like Prins). The main aim of the IKV/UIDP was to have a strong impact on legislative and justice reforms in the last decade of the 19th and the first decades of the 20th centuries. The founding fathers endorsed the criminal policy views of the modern positivist school. In its 1898 founding statutes the mission of the IKV/ UIDP was laid out in nine points in Article II:[41]

"1. The mission of criminal law is the fight against crime as a social phenomenon.
2. Criminal science and criminal law must therefore take into account the results of anthropological and sociological studies.
3. Punishment is one of the most effective means available to the state against crime. It is not the [only] way. It should therefore not be isolated from other social remedies and in particular not forget about preventive measures.
4. The distinction between accidental and habitual offenders is essential in practice as well as in theory: it must be the basis of the provisions of the criminal law.
5. Since the criminal courts and the prison administration work together for the same purpose and since the conviction is only valid by its mode of execution, the separation enshrined in our modern law between the repressive function and the prison function is irrational and harmful.
6. The deprivation of liberty rightly occupies, rightly so, the first place in our system of punishments, the Union pays special attention to everything related to the improvement of prisons and related institutions.
7. With regard, however, to short-term imprisonment, the Union considers that the substitution of imprisonment by measures of equivalent effectiveness is possible and desirable
8. With regard to long-term imprisonment, the Union considers that the duration of imprisonment should not depend only on the material and moral gravity of the offense committed, but also on the results obtained by the prison regime.
9. With regard to habitual irredeemable criminals the Union considers that, regardless of the gravity of the offense, and certainly in case of repetition of petty crimes, the penal system must above all have as a goal to keep these offenders in custody, as long as possible, to avoid further harm" (tr. a.).

In the programme of the first Congress in Brussels (1889) social defence and punishment formed the hard core and the following topics were on the agenda for the rapporteurs and the discussions:

(1) Is a suspended sentence desirable? (2) What penal measures are possible as a substitute for undesirable short prison sentences? (3) What are the defects of most modern legislations with regard to the treatment of recidivists? (4) The treatment of juvenile offenders, including the determination of the age under which no criminal proceedings should be taken, and an extension of reform school treatment.

This agenda would remain dominant until 1924. In fact the IKV/UIDP mainly discussed the following:

a. The function and types of sanctioning (conditional release,[42] alternative sanctioning, fines, special prevention, solitary confinement)
b. The treatment of juvenile offenders (criminal justice vs. rehabilitation in special institutions for re-education).[43]

[41] Bulletin de L'Union Internationale de Droit Pénal, 1889: 1-6. Reprinted in *Revue Internationale de Droit Pénal* (*Le Centenaire de l' UIDP/AIDP)*, 1990, vol. 61, 1-2, p. 83.

[42] This had already been introduced by Minister LeJeune in Belgium in 1888.

[43] Van Hamel, "De misdadige jeugd en de Nederlandse wet", V.O. II, pp. 796-883.

c. Special measures for dangerous criminals/recidivists (indeterminate sentences, lifelong sentences)

J.A. Van Hamel, the son of G.A. Van Hamel, who in 1910 was his successor to the chair of criminal law at the University of Amsterdam and also replaced him in 1917 as a Member of Parliament, underlined in 1911, looking back at the career of his father and the importance of the IKV/UIDP as the driving force of the new school of thought against the classical school which his father had aimed at:

> "We wanted to profess a new creed in penal science. We want, they said in their articles of association, to have recognized in jurisprudence and in legislation, the idea that crime and punishment should be looked at from a sociological point of view as much as from a judicial one. They opposed what is called the "classical" or "legal" school of penal science and reproached its partisans because they attached too little importance to the social and realistic side of criminality. Codes and definitions dogmas and technicalities, abstract notions and philosophical deductions, formed the principal points of interest in the creed of the latter school. Punishment was regarded by them as a formal matter only, to be arithmetically and judiciously measured out, but administered without testing its real power to reduce or prevent crime".[44]

There is no doubt that the IKV/UIDP was an active and influential factor in reforming the penal systems of European countries, certainly in the area of the goals, types and legitimacy of punishment. It was an important driving force in the reform movement with a strong proactive impetus on the legislative side (especially codification) and judicial practice, also based on comparative research.

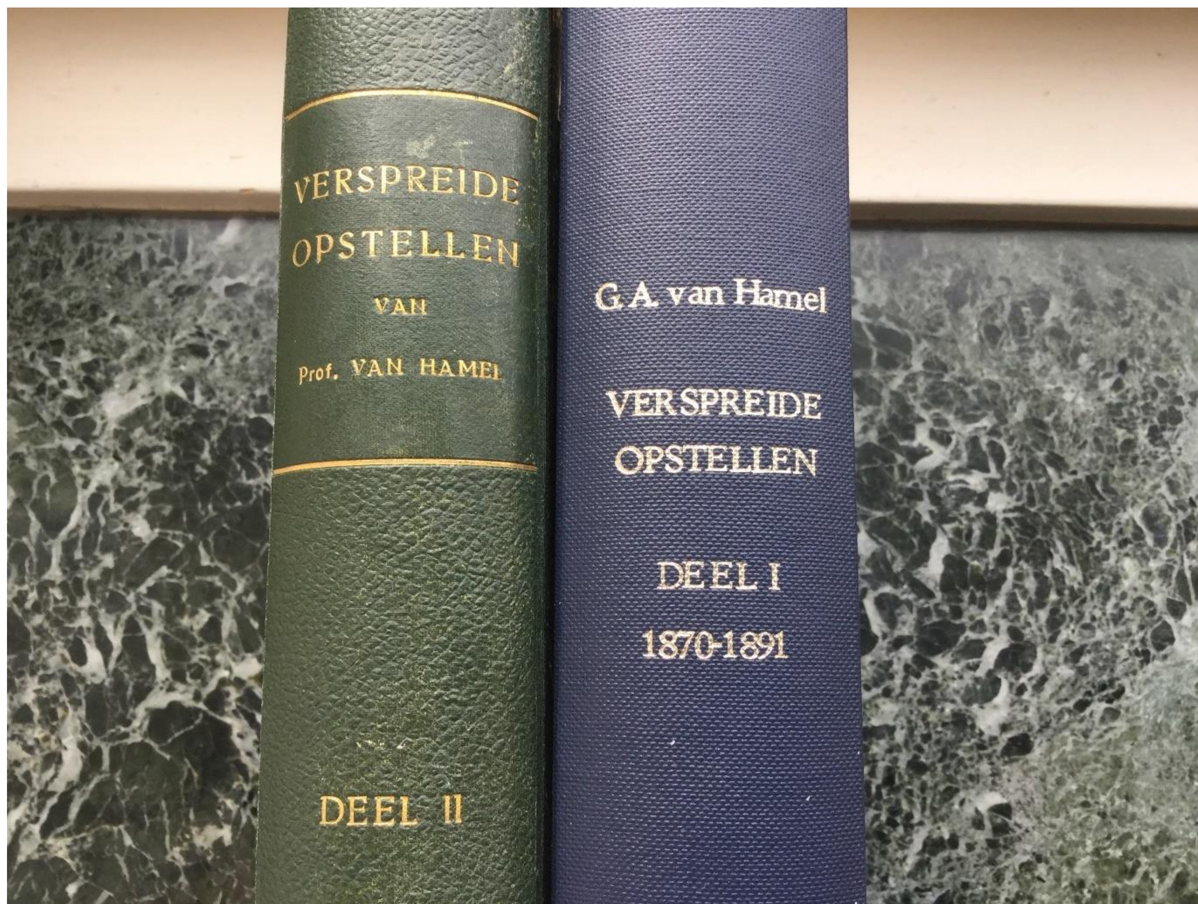
Van Hamel, as the co-founder, not only had an important governance role, but also contributed substantially to the scientific activities and was in constant interaction with the different schools of thought concerning penal positivism at the time. It is therefore not surprising that, in 1894, he wrote an article on Dutch criminal law in the impressive comparative study on German and foreign criminal law, which was in preparation for the reform of German criminal law.[45]

At that time all of these professional networks functioned in a common language, which was French, and all of them also had a strong governmental, diplomatic character. Nevertheless, the drive for reforming existing laws and practices was very strong, as most of the participants believed that the new sciences would be able to explain the roots of criminality and based on rationalism and positivism would also be able to guide the criminal justice system towards a more appropriate goal-orientated policy, based on rehabilitation and exclusion. Although within these networks and organisations there were many struggles between different schools of thought and interests, they reflected a reform movement that was based on new concepts of social order and social control, steered by a new body of knowledge and new policy instruments under the umbrella of penal positivism and social defence.

[44] Van Hamel, J.A., "International Union of Criminal Law", 2 *J. Am. Inst. Crim. L. & Criminology* 22 , May 1911 to March 1912, pp. 22-23.

[45] *Vergleichende Darstellung des Deutschen und Ausländischen Strafrecht*, published in 15 massive volumes between 1905 and 1908, Berlin, Verlag Otto Liebermann.

4. Van Hamel: in search of his proper criminal justice theory under penal positivism



After the contextual setting it is now high time to delve into the contents of his penal thoughts. The only way to do this is to take a look, in a chronological setting, at his main contributions, as he never elaborated a comprehensive theoretical framework in his publications. We can then compare this with his Manual on Dutch Criminal Law of 1907.

4.a. Van Hamel's (international) publications and penal positivism

In his report for the 2nd International Penitentiary Congress in Rome (1885),[46] Van Hamel defended a limited use of the **indeterminate sentence**, referring explicitly to the work of the German psychiatrist M. Kraepelin,[47] the publications by C. Lombroso,[48] E. Ferri[49] and R. Garofalo[50] and the publications in *L'Archivio di psichiatria criminale* (founded in 1880)

[46] Van Hamel, "Quelle latitude la loi doit-elle laisser au juge quant à la détermination de la peine", 1885, included in Van Hamel, V.O.l II, , pp. 308-333; also published in *Bulletin de la Commission Pénitentiaire Internationale*, April 1884.

[47] Die Abschaffung des Strafmasses. Ein Vorschlag zur Reform der heutigen Strafrechtspflege, Stuttgart, 1880.

[48] His book, L'uomo delinquente, published in 1876 in Milan, met with great success.

[49] Ferri, E., *La teoria dell'imputabilità e la negazione del libero arbitrio*, Bologna 1878; Ferri, E., *I nuovi orizzonti del diritto e della procedure penale*, Bologna, 1881 and Ferri, E., *Sociologia criminale*, Bologna, 1885.

[50] Garofalo, R., *Criminologia*, Naples, 1885.

and obviously the Marburger Programme of F. von Liszt (Zweckgedanke). He proposed a fundamental **three-degree classification of criminals: occasional, habitual corrigible and habitual incorrigible**. For habitual incorrigible criminals (*malfaiteurs d'habitude incorrigibles*), he provided for a system of lifelong imprisonment, for which some conditions should be laid down in the law, but to be decided by a judge after a period of examination. For habitual corrigible criminals (*malfaiteurs d'habitude corrigibles*) he provided for a prison sentence based on retaliation plus indeterminate detention. For serious cases some conditions should be laid down in the law. For both serious and non-serious cases the judge should take decisions based on a period of examination and observation. The judge had to be consulted from time to time on a prolongation of the sentence. For occasional criminals (*malfaiteurs d'occasion*) there should be a maximum sentence laid down in the law, but no minimum sentence and thus there would be full discretion for the judge when deciding on the punishment or alternative sanctions.[51] At this conference he also meet personally with Lombroso and Ferri. In his writings he was fairly critical of Lombroso and he certainly had more proximity with Ferri, with whom he did try to find a compromise between the medical-psychiatric approach and the legal-sociological approach in penal positivism. That he was very much impressed by this experience in Rome is also reflected in his writing entitled "Eene stem uit Italië – A Voice from Italy"[52] in 1878 (tr. a.). in which he reflected on the reforms of criminal law in Italy and the Netherlands and in which he underlined, inter alia, that the abolition of the death penalty had made it necessary to introduce life imprisonment, referring to the new Dutch Criminal Code.[53]

In his contribution to the 2nd Congress of Criminal Anthropology in Paris (1889) he elaborated on this three-fold distinction in the same vein, but in relation to the functionality of **solitary confinement** under the telling title: "*L'emprisonnement cellulaire, du point de vue de la biologie et de la sociologie criminelles*".[54] He was convinced that a period of solitary confinement did correspond with the aim of retaliation (as did the classic school), but also that solitary confinement could lead to a moral insight of guilt and repentance, that could be helpful for rehabilitation of occacional offenders. . In 1889 he certainly belonged to a minority of lawyers who attended the Congress, as it was fairly dominated by medicine and psychiatry in the first two Congresses. It was only from the Congress of 1901 onwards that lawyers were well represented in the Congress[55] and, yes, this Congress was organized by Van Hamel at his own University of Amsterdam.

In his contribution[56] to the first Congress of the IKV/UIDP in 1889 he addressed the deficiencies of criminal legislations in dealing with the problem of **recidivism**. He underlined the fact that most criminal codes qualified recidivism as an aggravating factor and completely neglected the concept of habitual criminals. His contribution clearly advocated **absolute, perpetual and indeterminate punishment for the incorrigible and relatively indeterminate for the habitual corrigible**. In *concreto* the dividing line between those who can be corrected and rehabilitated and those who cannot had to be decided on a case by case

[51] Van Hamel, "Quelle latitude la loi doit-elle laisser au juge quant à la détermination de la peine", V.O. I, pp. 883-884.

[52] Van Hamel, V.O. I, p. 84.

[53] Idem.

[54] Van Hamel, V.O. I, pp. 503-510.

[55] M. Kaluszynski, o.c., https://halshs.archives-ouvertes.fr/halshs-00010544/file/International_congresses_of_criminal_anthropology_Cambridg_.pdf p. 15.

[56] Van Hamel, "Quelles sont les défectuosités du système suivi aujourd'hui par la plupart des législations pour combattre la récidive? ", V.O. I, pp. 511-522.

basis and could not be laid down a priori in the law. He defended retaining the classical approach to crime and punishment for the occasional criminal and to defer the punishment to the sentencing execution authorities for the habitual corrigible and incorrigible, as they are the only ones that are capable of individualizing and assessing the real situation and providing for appropriate sentencing and eventual treatment. Van Hamel did in fact advocate a **supplementary security measure of social defence** instead of classic punishment for the habitual criminals. Van Hamel's report still reflected a minority view at the Rome Congress and was strongly rejected by the neo-classical dominant school of thought, based on the legality principle for crimes and punishment. But even colleagues from the social defence movement, such as A. Prins from Belgium, were very reticent in agreeing to his proposals for an indeterminate sentence.

In his formal speech as Rector of the University of Amsterdam in 1890 on '*De tegenwoordige beweging op het gebied van het strafrecht*'[57] he provided not only an overview of the drivers of penal positivism in Europe, but he definitely contradicted one of the main representatives of the classical school, F. Carrara, by accusing him of dogmatism:

"But the great mistake it (dogmatism) has made is that, for the sake of the legal significance of crime, it has ignored its anthropological and social significance. It finds its most powerful expression in this statement by Francesco Carrara, the now deceased leader of the criminal justice school in Italy, the sacramental formula in which all the truths of the criminal justice of civilized peoples are expressed: *il delitto è un ente giuridico*, the crime is something legal. No, maestro, crime is above all human; an expression of life; expression of a weak life, a sick life, a corrupt life, a horrible life; but of a life; it is above all not a breach of law but a breach of peace (...) Criminal law has a vocation in the fight against crime. It does not have to struggle alone. But it cannot carry on that struggle without knowing the cause of the crime in the criminal and in the society" (tr. a.).[58]

In the same speech, Van Hamel stated that the distance between the Italian anthropological school and the French sociological school (Laccasagne) was not that great and that a predisposition to crime and thus causes of crime are mostly a mix of anthropological and sociological factors, although the former are predominant. With this position Van Hamel combined both schools, as did E. Ferri. But on this point he was not so much aligned with F. von Liszt who was not really interested in the endogenic approach of Lombroso. He also dedicated a substantial part of his formal speech to the "new movement", also called the "*Nieuwe Richting*- New Direction" in criminal justice that had to find solutions for "the criminal treatment of habitual criminals, in particular of the **army of recidivists**. That army represents the biggest danger of criminality, as it threatens social peace and social development" (tr.a.).[59] The character image of the incorrigibles[60] consists, in his view, of two types of persons, those who are morally and physically weak and those who have a violent nature and temperament, and both categories commit different types of crimes. In other words he elaborated a typology of perpetrators, based on "scientific criteria", relating it back to types of offences and therefrom he deduced the most appropriate system of punishment.

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[57] Van Hamel, "De tegenwoordige beweging op het gebied van het strafrecht, Redevoering op den Jaardag der Amsterdamsche Universiteit", V.O. I, pp. 523-551.

[58] Idem, p. 531.

[59] Idem, p. 547.

[60] Van Hamel, V.O., idem, 3^{e} Vergadering IKV, 1892, p. 602.

In 1892 he submitted a report[61] to the 3rd Congress of Criminal Anthropology (Brussels), in which he related the **typology of habitual incorrigible criminals** to the concept of **social dangerousness**. For the first time he not only mentioned usual suspects, such as thieves, paedophiles and blackmailers, but also white-collar criminals in the economic and financial sector[62] as part of this typology. The key questions are: when can they be released and who takes the decision on which procedure? There cannot be a time limit to an indeterminate sentence as by its very nature it is a security measure. However, he also advocated a system in which the decision is taken by the judiciary with rights and remedies for the persons concerned in order to avoid the arbitrariness of administrative decisions (as it was in the Ancient Regime).[63]

The discussions on social dangerousness in relation to recidivism and habitual incorrigible criminals would remain a point of strong debate in the IKV/UIDP. The French School of Lacassagne and Tarde and also the Russians were afraid of arbitrary confinement and were in favour of the legal rights of individuals, while Van Hamel belonged to the German and Italian stream that was in favour of indeterminate und even preventive confinement in the case of social dangerousness. However, F.V. Liszt was also arguing that social defence should be based on legal limitations and guarantees:

> "*Nullum crimen sine lege, nulla poena sine lege*. Dies beiden Sätze sind das Bollwerk des Staatsbürges gegenüber der staatlichen Allgewalt; sie schützen den einzelnen gegen die rücksichtlose Macht der Mehrheit (…)."[64]

At the 4th Congress of Criminal Anthropology in Geneva (1896) Van Hamel presented a remarkable report on "*Anarchism and the combat against anarchism from the point of view of criminal anthropology*"[65] (tr a.). This report – surprisingly - was not included in his "Verspreide Opstellen". Europe at that time was the scene of serious violent attacks by anarchist movements and some states enacted emergency criminal legislation. Van Hamel started by defending the liberty of thought, including from anarchists, but vigorously rejected all violence that he qualified as **anarchist terrorism** that endangers the "pacific evolution of social institutions". In his view the solution was quite simple, as penal positivism, based on criminology, anthropology and criminal sociology, has a clear answer: 1/ the right to punish (*ius puniendi*) and the punishment has to be founded on social defence; 2/ anti-social behaviour turns its author into a dangerous person; and 3/ prevention and repression has to be based on the causes of the criminality (etiology). By copy-pasting the etiology of Lombroso[66], he distinguished between a/ common criminals that use anarchism as a pretext; b/ pathologic anarchists and c/ fanatic anarchists. If they commit violent crimes, like murder, he considered them as **enemies** and they all merit harsh punishment:

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[61] Van Hamel, "Des mesures applicable aux incorrigibles et de l'autorité apte à en fixer le choix", V.O. II, pp. 577- 590.

[62] Van Hamel, idem, 3e Vergadering IKV, 1892, p. 581.

[63] This is also a topic that is elaborated in his writing on "Het vraagstuk van de 'onbepaalde vonnissen'", V.O. II, p. 920-941 that was published in Tijdschrift voor Strafrecht at the time.

[64] Von Liszt, F., *Strafrechtliche Aufsätze und Vorträge*, II, Berlin, Guttentag, 1905, p. 60.

[65] Van Hamel, "L'anarchisme et le combat contre l'anarchisme au point de vue de l'anthropologie criminelle", included in the full text of « Congres international d'anthropologie criminelle : compte rendu des travaux de la quatrième session tenue à Genève du 24 au 29 août 1896 », https://archive.org/stream/congrsinternat1897cong/congrsinternat1897cong_djvu.txt

[66] Lombroso published his book *Gli anarchici* in 1894.

"No cowardice, no weakness, no hesitation on this point. It's only before a united and resolute army that the enemy retreats"[67] (tr. a.).

In principle common offences and penalties should apply. In countries where the death penalty is foreseen for murder it should also apply to them;[68] in other countries the indeterminate sentence with psychiatric treatment could be applied for pathologic anarchists and life imprisonment for fanatic anarchists. Harsh punishment should also apply to all preparatory acts and to direct and indirect incitement.

"Verspreide Opstellen" still contained a piece by Van Hamel to the 5th International Congress of Criminal Anthropology in Amsterdam in 1901, but that is rather limited to the announcement of the event. In his opening speech as president of the Congress Van Hamel took stock of the impact of criminal anthropology on the reform agenda:

"From a practical point of view, criminal anthropology with its motto's of "crime fighting" and "social defense" has already succeeded in breaking the magic force of punishment as a unique talisman to ward off the scourge of crime. Conditional sentence, agricultural colonies, institutions of reform or education in establishments or in families, indeterminate sentences, ancillary building for the abnormal, anthropological expertise in the procedure, have already been introduced and are increasingly introduced, under the influence, perhaps overlooked but no less real, of the new doctrines(tr.a.).[69]

At the explicit request of Van Hamel the Congress decided to include a special session on the "*Social causes of Crime*". In this session special attention was given to the position of socialism vis-à-vis questions of criminality.[70]

4.b. Van Hamel's manual: *Inleiding tot de studie van het Nederlandsche strafrecht*[71]

For the sake of our analysis the 2nd edition is the most appropriate one to verify to which extent Van Hamel integrated penal positivism in his conceptual approach to criminal justice. First, it is the most elaborate version of his manual and it did not substantially change thereafter. Second, 1907 is a good moment to verify it, as by then he was in the mature period of his professional career and penal positivism was very much established and influential in criminal policy.

Although this second edition of 1907 is dedicated to his friends A. Prins and F. Von Liszt, the manual is mainly an overview of the general doctrine of criminal law, in the light of the structure of the Dutch Code of Criminal Law of 1886. In his first part on "Inleidende beschouwingen" he elaborated in chapter I on the essence of criminal law as a legal science

[67] Van Hamel, "L'anarchisme et le combat contre l'anarchisme au point de vue de l'anthropologie criminelle", p. 118.

[68] Also Von Liszt underlines the very prudent approach of Van Hamel on the abolition of the death penalty, see Von Liszt, F., "G.A. Van Hamel, Ein Nachruf". *Zeitschrift f. d. ges. Strafrechtswissenschaft*, 38, 1917, p. 568.

[69] http://www.archive.org/stream/congrsinternati19unkngoog/congrsinternati19unkngoog_djvu.txt, p. 400.

[70] http://www.archive.org/stream/congrsinternati19unkngoog/congrsinternati19unkngoog_djvu.txt, p. 502.

[71] Van Hamel, *Inleiding tot de studie van het Nederlandsche strafrecht*.

and as a social-anthropological science.[72] As a legal science criminal law has to systemize and decide on abstract notions and general principles. This legal science is based on theoretical and philosophical foundations and has the task of elaborating a closed system of dogmatism that enables one to assess the existing law in a critical way. As a social science criminal law has to take into account that crime is not only a legal construct based on *actus reus* and *mens rea* (guilt), but a natural fact committed by a human being and that punishment cannot be limited to retaliation, but has a social function. This social science approach, based on an analysis of the causes of crime (criminal etiology) and the study of the methods to combat crime (criminal policy), is the area of criminology. Criminal policy for Van Hamel is the equivalent of social defence that has to be a part of a broader social policy.

In the second part on General Principles he elaborated in chapter 2 on the offence (*strafbaar feit*) which is for him a formal concept of a general character based on a violation or endangerment of legal values.[73] The notion of criminal fault has a legal and psychological side. Legally it is fault based on responsibility for the commission or omission in violation of a legal prescription. The moral element can be intent (dolus) or eventual intent (*dolus eventualis*). The psychological side is the correlation between the psyche of the perpetrator and the execution of the offence. Van Hamel was thus clearly not charmed by the French doctrine of the material fact.[74]

Chapter III[75] deals with punishment and forms of punishment. Van Hamel qualified the death penalty as an "ultimate act of social defence" that could only be applied in very exceptional circumstances, although he added that, because of ethical considerations, it would be better to abolish it. Only in a very limited par. 49[76] did Van Hamel deal with "other penalties and forms to combat criminality" as part of criminal policy and social defence. In this paragraph he referred to mandatory treatment for certain types of criminals (juvenile delinquency, psychiatric delinquency) and elaborated on the types of punishment for each category (occasional criminals, habitual correctible and habitual uncorrectable). This is in fact the only part where he directly dealt with social defence law in relation to the psychological diversity of criminals. The concept of social defence, based on the social dangerousness of categories of offenders, is clearly related to the type of punishment (from parole and conditional probation to an indeterminate sentence). There is a clear shift from punishment as retaliation ("*Vergeltungsstrafe*") towards punishment, based on the social function, as a tool of criminal policy ("*Schutzstrafe*"), in line with the vision of F. van Liszt: "*The penalty as a special purpose penalty (depends) in type and level on the nature of the criminal - Strafe als Zweckstrafe (richtet) sich in Art und Mass nach der Eigenart des Verbrechers*" (tr. a.).[77]

To conclude, although Van Hamel, in line with social defence, insisted that punishments should receive more attention than the general doctrines, about half of his Introduction is devoted to the general doctrines and only a very minimal part to punishment and social defence. How social defence has to be related to the general principles of criminal law, especially in relation to the legality principle and magna carta defence rights, remains in

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[72] P. 1-32.

[73] P. 186-487.

[74] Van Hamel was convinced that this could lead to objective responsibility or strict liability. For his rejection see NJV 1884, I, 268, par. 33 (6).

[75] Van Hamel, V.O. I, pp. 488-643.

[76] Van Hamel, V.O. II, pp. 521- 524.

[77] Von Liszt, F., *Lehrbuch des Deutschen Strafrechts*, 2nd edition, Berlin, 1884, p. 62.

the dark. This, as such, comes as no surprise as the whole I.K.V./ U.I.D.P struggled with the tensions between the general legal concepts of the neo-classical school and social defence.[78] Nevertheless, it is striking that there is quite some distance between his contributions to the International Conferences on penal positivism and his manual for the home market.

5. Conclusions

Van Hamel was, unlike many other criminal law lawyers at the end of the 19th century, open-minded when it came to the new horizons of penal modernism and penal positivism. In the period 1885-1900 he was one of the few criminal law lawyers who did participate and contribute to the Congresses of the Criminal Anthropology, where medicine and psychiatry were omnipresent. He was convinced that criminality was "a knowable positive entity that, with the aid of scientific investigation and appropriate practical techniques, could be removed from the social body."[79] The goal of criminal justice was to "cure the socially spoiled, if possible, and isolate, if necessary" (tr.a), by which the principles of culpability and imputability of the neo-classical school were to a large extent replaced by the principles of treatment and/or exclusion in the phase of punishment.[80] His references to society as a (sick) body, infected by degenerated individuals clearly referred to the thoughts of C. Darwin[81] and H. Spencer[82] on biological and social evolution, although he did not quote them in his oeuvre.

In his opening speech as President of the 5th Congress of Criminal Anthropology in Amsterdam (1901), Van Hamel clearly underlined why it is important to study the minority of degenerate criminals as part of sociological normativity:

> "There are certainly some among those who are foreign to these studies, who reproach them for their interest in this small minority, very often degenerated; and who fear that it will lose sight of the far greater importance of healthy, more numerous and more worthy social forces. To those I would like to answer this. You are right. Relatively the delinquent army forms a small minority. That goes without saying. A society in which it forms the majority cannot exist. However, this harmful or dangerous minority is there. We must take care of it; otherwise they will take care of you. And since we have to deal with it, we must do it with open eyes, knowing what we are doing. But above all: the very study of individual and social abnormalities undoubtedly contributes to a deeper knowledge of the sources of healthy and normal life, both of individuals and of societies" (tr. a.).[83]

From this point of departure he elaborated on criminal policy that aims at social defence against degenerate and dangerous persons that are a threat to the legal and social order. This social defence is based on resocialization where possible and exclusion, even lifelong, if necessary. So we see a clear shift from classic retribution to resocialization/

[78] Groenhuijsen, M.S. & Van der Landen, D., "De I.K.V. in het spanningsveld tussen klassieke rechtsbeginselen en moderne rechtsopvattingen", in Groenhuijsen, M.S. & Van der Landen, D. (eds.), *De Moderne richting in het strafrecht. Theorie, praktijk, latere ontwikkelingen en actuele betekenis*, Arnhem, Gouda Quint, 1990, pp. 7-96.

[79] Garland, D., "The Criminal and His Science. A Critical Account of the Formation of Criminology at the End of the Nineteenth Century", *British Journal of Criminology*, 1985, 25 (2), p. 133.

[80] Van Hamel, V.O. II, p. 957.

[81] *The Origin of Species*, London, 1859.

[82] *The Principles of Sociology*, 3 volumes, New York, 1876-1896.

[83] http://www.archive.org/stream/congrsinternati19unkngoog/congrsinternati19unkngoog_djvu.txt, pp. 401-402.

rehabilitation and incapacitation/exclusion from the social body. This shift is based on an individualized approach to the human being (not the person *in abstracto*), combined with far-reaching discretion for judges and prison administration instead of rigid degrees of punishment provided by substantive criminal law on the basis of the legality principle. The social defence solution thus consists of a dual track, being positive reformation through punishment and/or treatment or negative neutralization through lifelong exclusion from society based on punishment and/or measures of security.

As a result, the emphasis shifts from criminal normativity and dogmatism (the classical school) to criminal law enforcement and the doctrine of sanctions. The sanction is no longer determined by the legal-causal relationship between guilt and conduct effect, but also by external criteria of a scientific nature, based on the social danger of the perpetrator.[84] The new sciences - criminal anthropology and criminal sociology - were in his view the tools to study criminality as a social phenomenon, but also to reshape the ius puniendi and the purpose and legitimacy of punishment[85] through individualized execution and/or treatment. So criminology is turned into a « savoir bio-politique », a modern rationality at the service of criminal law and criminal policy[86]. Or to put it in the words of M. Foucault:

> "Psychiatric expertise, but more generally criminal anthropology and the rehashing discourse of criminology find there one of their precise functions: by solemnly registering offenses in the field of objects susceptible of scientific knowledge, giving the mechanisms of legal punishment a justifiable grip not only on offenses, but on individuals; not what they did, but what they are, will be, maybe" (tr.a.).[87]

His slogan was undoubtedly "striving for truth"[88] and truth here stands for rational, scientific truth based on criminal anthropology and criminal sociology. V. Liszt was of the opinion that Van Hamel had integrated both in his concept of special prevention at the service of guaranteeing the legal order.[89] Although this mission reflects a clear interest in criminality as a social phenomenon, it does not tackle the fundamental discussion about the "*gesamte Strafrechtwissenschaft*". He never did elaborate a vision thereon[90] and considered criminology to be primarily an auxiliary science and found that criminal law dogmatics, although reoriented towards criminal politics on punishment, had the leading function.[91] This was also completely confirmed by F. v. Liszt in his obituary for Van Hamel, which praised him for his vision on criminal policy and dogmatism.[92] Although he did not share the conclusion of C. Fijnaut that Van Hamel was not a real believer in the modern thoughts of penal positivism[93], it is true that he was a rather conservative reformer, certainly compared to

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[84] Peters, T. and Vervaele, J., "Aperçu historique et importance actuelle de l'Union internationale de droit pénal. Notions sur le système de sanctions pénales", *Revue Internationale de droit pénal*, 1990, Vol. 61, 1-2, p. 239.

[85] Pifferi, M., *Reinventing Punishment. A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries*, Oxford: Oxford University Press, 2016.

[86] Kaluszynski, M., *La criminologie en mouvement. Naissance et développement d'une science sociale en France à la fin du XIX siècle*, PhD, Paris. 1988, not published.

[87] Foucault, M., *Surveiller et Punir*, Paris, Gallimard, 1975, p. 24.

[88] Von Liszt, "G.A. Van Hamel, Ein Nachruf", p. 555.

[89] Idem, p. 565.

[90] See also in this sense - Fijnaut, C., "G.A. van Hamel: een behoudend strafrechtshervormer", *Delikt en Delinkwent* 1984, pp. 8-24.

[91] Van Hamel, "Aanvaarding der Aula van de Amsterdamsche Universiteit", V.O. I, p. 554.

[92] Idem, pp. 563-564.

[93] Idem, p. 17.

A. Prins, and that he did not integrate criminal law as a legal science and as a social science into a concept of '*Gesamte Strafrechtswissenschaft*".

The social defence vision of Van Hamel was certainly not shared by all members of the penal positivism moment. Prof. D. Simons, a professor of criminal law at Utrecht University and an active member of the I.K.V./U.I.D.P, certainly did, although, averse to the retaliatory thinking of the classical school, he distanced himself[94] from the views of Van Hamel on indeterminate sentencing and great judicial freedom. Simons attached strong importance to the individualization, socialization and humanization of criminal law, which were also intrinsically linked to legal guarantees and the rule of law. Also for that reason he advocated guaranteeing the rule of law and criminal justice dogmatics as a boundary to judicial freedom and criminal justice policy and introducing a system of accusatory preliminary investigation in order to enhance the rights of suspects and the accused (also defended by A. Prins).

How Van Hamel related to penal positivism was concisely expressed by W. Pompe, who took over the chair of criminal law from D. Simons at Utrecht University and vigorously criticized the penal positivist approach in his PhD of 1921 "*Beveiligingmaatregelen naast straffen* - Security measures beside punishment"[95] (tr.a) and insisted on a more humanistic approach towards the suspect in his inaugural lecture[96]. In his historical overview of Dutch criminal science, written in 1956, he wrote that penal positivism " has undergone remarkable fluctuations in van Hamel's thought" (tr.a.)[97]. Van Hamel was, in the view of Pompe, initially charmed by the scientific, deterministic character based on the natural-scientific method and also saw punishment as an empirical rather than an ethical answer to exceeding a norm. But Van Hamel was, in Pompe's view, also strongly inspired by the objective of social justice and he always felt the need to embed the new doctrine in the dogmatics of legal-ethical standardization. This is maybe the reason why Van Hamel's work, although important for his contribution to penal positivism, also has a strong eclectic character in which we cannot find an overall, coherent, theoretical and conceptual approach.

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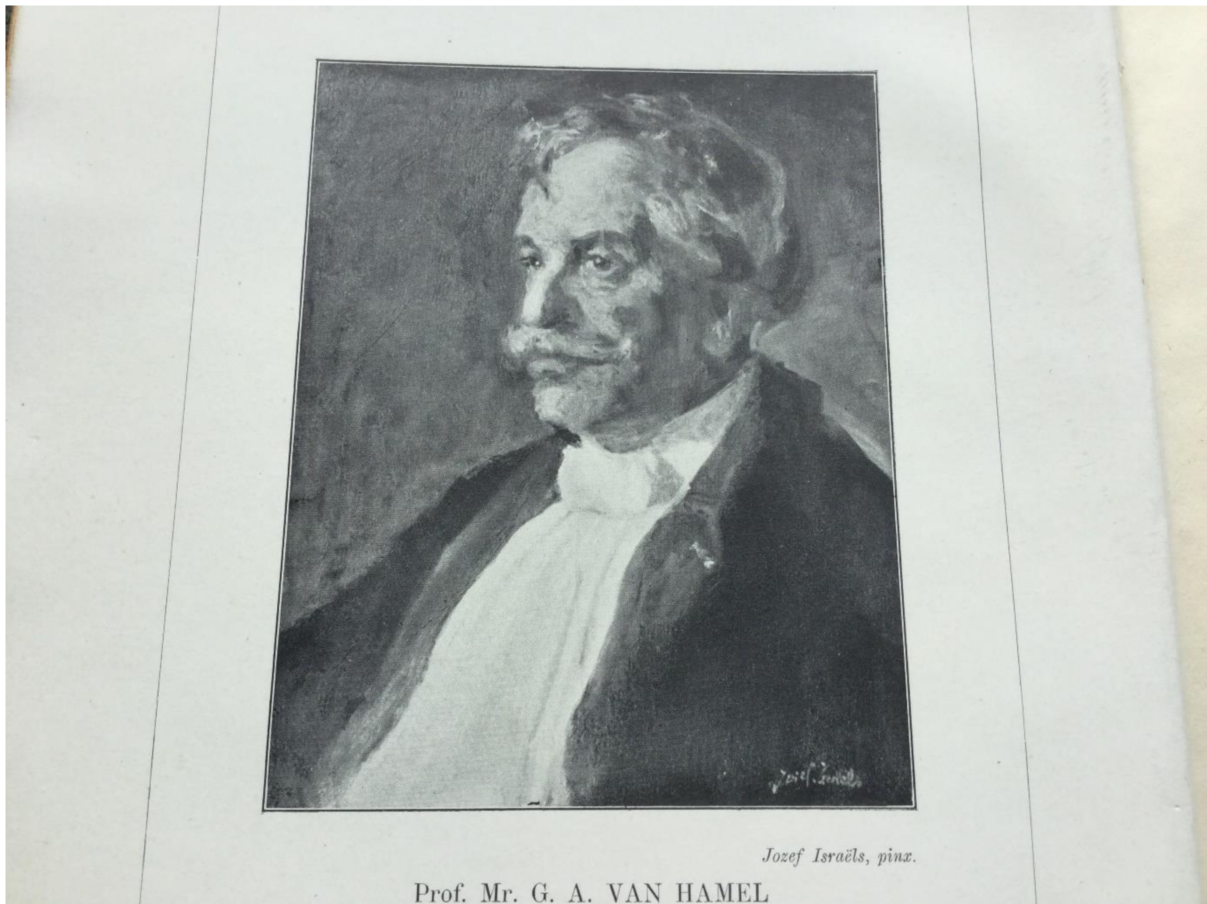
[94] Simons, D., *De verdediging in het strafrecht*, Haarlem, 1897; Simons, D., *Leerboek van het Nederlandse Strafrecht*, Groningen, 1917; Simons, D., "De strafrechtstheorie van Von Liszt", *Tijdschrift voor Strafrecht*, 1897, p. 22. Zie ook Janse de Jonge, H., "David Simons (1860-1930)", *Delikt en Delinkwent*, 1985, p. 306.

[95] The Dutch Penal Code of 1886 already provided for psychiatric confinement and treatment for those offenders who could not be considered to be imputable. In the Netherlands in 1928 the so-called "psychopath laws" were enacted, by which it was possible to impose custodial sentences, supplemented with social defence confinement (called tbr ("ter beschikkingstelling van de regering - at disposal of the government")) for those psychopathic offenders were considered to be only partially imputable. The judge could impose the measure for one to two years but could extend it to lifelong. Only in the 1950s were rights and remedies provided for the persons concerned.

[96] Pompe, W.P.J., *De persoon des daders in het strafrecht*, Utrecht / Nijmegen: Dekker & van de Vegt / J.W. van Leeuwen, 1928.

[97] Pompe, W.P.J., "Geschiedenis der Nederlandsche strafrechtswetenschap sinds de codificatie-beweging", *Geschiedenis der Nederlandsche rechtswetenschap*, deel II, Amsterdam, 1956, pp. 372, 377.



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