

## Special minimum sentences and community service in contemporary Dutch criminal law

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## Special minimum sentences and community service in contemporary Dutch criminal law

### 1. Introduction

For some three decades I have enjoyed a working relationship with Anton van Kalmthout. During this long stretch of time we went through many interesting experiences. When I was a young assistant at Leiden University, Anton introduced me into the art of writing scholarly articles on pending legislation.<sup>1</sup> Later, he supported me as one of my ‘paranymphs’ during the public defense of my doctoral dissertation in 1985. After we became colleagues at the department of criminal law of Tilburg University in 1987, we jointly set out to establish a track record that we could feel comfortable with. To this end, we started to organize international conferences<sup>2</sup> – which at that point in time was quite novel – and we set up joint research projects in which a large number of members of our department participated.<sup>3</sup> Later still, I became involved in his work on a doctoral thesis as one of his supervisors. To be honest: there was very little to supervise, because Anton is one of the most independent researchers that I have ever come across. So he deserves sole credit for all the merits of his monumental work with the intriguing title “*Si non solvit in opere...*”.<sup>4</sup> The publication of this book confirmed Anton’s status as the leading Dutch scholar on community service. One of the other areas where his work has been particularly influential, is the issue of special minimum sentences. On request of the government, he co-authored a book on the topic.<sup>5</sup> Its main findings have been endorsed by the Minister of Justice and have sustained our nations’ policy even when serious international pressure mounted to adopt a different approach.

Against this background, it was relatively easy to select an appropriate topic for my contribution to this volume in honor of Anton van Kalmthout. It is twofold. First I will deal with some recent developments in connection with the position of community service as part of the Dutch sanctions system. Second, a serious threat will be discussed to the traditional principle that our criminal justice system does not make use of mandatory sentences or special minimum sentences. On both counts, I will defend a position which is in line with the standards that have been elaborated by Anton van Kalmthout during his long and fruitful academic career.

### 2. Community service in cases of serious crime<sup>6</sup>

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<sup>1</sup> An example of which is M.S. Groenhuijsen & A.M. van Kalmthout, ‘De wet vermogenssancties en de kwaliteit van de rechtsbedeling’, *Delikt en Delinkwent* 1983, p. 8-31.

<sup>2</sup> In 1988 there was a memorable one on drug policy. See H.J. Albrecht & A.M. van Kalmthout (eds.), *Drugs policies in Western Europe*, Max Planck Institute for foreign and comparative criminal law, Freiburg 1989; and M.S. Groenhuijsen & A.M. van Kalmthout (eds.), *Nederlands drugsbeleid in westeuropese perspectief*, Arnhem: Gouda Quint 1989.

<sup>3</sup> M.S. Groenhuijsen & A.M. van Kalmthout (eds.), *Voordeelsoptneming in het strafrecht. Een commentaar op het rapport van de werkgroep legislatieve projecten vermogenssancties*, Arnhem: Gouda Quint 1989.

<sup>4</sup> Antonius Maria van Kalmthout, “*Si non solvit in opere...*”. *Bijdragen over de geschiedenis en ontwikkeling van onbetaalde arbeid als strafsanctie*, diss. Tilburg, Nijmegen: Wolf Legal Publishers 2001.

<sup>5</sup> Anton M. van Kalmthout & Peter J.P. Tak, *Ups en downs van de minimumstraf. Een verkennende studie naar het voorkomen van minimum-straffen in Frankrijk, België, Duitsland, Engeland en Wales*, Nijmegen: Wolf Legal Publishers 2003.

<sup>6</sup> Also covered in my article ‘Sluipende uitholling van strafrechtelijke uitgangspunten. De bijzondere plaats van de taakstraf’, *Delikt en Delinkwent* 2009, p. 419-427.

The Dutch sanctions system has some very plain and simple features.<sup>7</sup> One of its defining elements is the large discretionary power of the judge. The Penal Code provides for generic minimal sentences and for specific maximum sentences for each crime. As a result, the discretionary power of the judge means that in some cases he can impose a custodial sanction in between one day and a life sentence. When it comes to financial penalties, the range can be as wide as from 3 euro's to 760,000 euro's. This is a long standing feature of Dutch law which we have been quite content with.<sup>8</sup> The community service order has been consistently incorporated into this system. The community service order has only been recognized as a separate penalty since 2001. From that time on, the Code holds that in each case of a *crime* where a custodial sanction or a fine can be imposed and in each case of a *misdemeanor* where a custodial sanction can be imposed, the relevant penalty can be replaced by a community service order. That is to say: *in each case*, without any restriction. This was a deliberate choice and it was explicitly justified in the explanatory memorandum. The main reason is that the legislator has sufficient confidence that a judge will not sentence a perpetrator to a community service order unless the circumstances of the case make that an appropriate choice.<sup>9</sup>

Then there was a bizarre incident. In October of 2007 a television documentary was broadcasted with the sensational headline: "Murder, homicide, community service". The main message of the program was the claim that the Dutch judiciary violates the rationale behind the Penal Code by imposing community service orders even in the most serious cases, like murder and rape. Quite understandably, there was a huge uproar. Within days, the Minister of Justice was questioned about this situation in Parliament. The Minister responded in a predictable – and sensible – way. He decided that some proper fact finding was called for before jumping to conclusions. To that end, he commissioned a research project, which led to a report that was published in April of 2008.<sup>10</sup> The main findings were as follows. In 2006, not a single case of murder or homicide ended with a sentence of community service. Even when a broad definition of a 'serious case' is adopted – including instances of attempted homicide, serious assault, sexual crime – a community service order was *virtually without exception* only imposed if the circumstances of the case so dictated (that is: according to the judgment of the researchers, who were supported by independent legal experts in the field). As far as the performance of the prosecutors is concerned, in 5 out of 120 documented cases the prosecutor requested a lesser penalty than might have been expected according to the relevant guidelines. Only *rarely* did the prosecutor request the imposition of a community service order in situations where the offender had been sentenced to that same sanction previously. The independent outside experts who were consulted found just one single case in which they considered the sentence by the court to be too lenient. In general they reported a *high level of satisfaction* about the practice they had reviewed. Hence, the main conclusion following from the research was that there was no reason to limit or reduce the discretionary powers of either the prosecutor or the court in connection with the application of community service orders.

Of course, this should have been the end of the incident. But that was not to be. In the summer of 2008 the Minister of Justice wrote a letter to Parliament in which he stated that it is undesirable if community service orders are imposed "more often than in exceptional situations"

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<sup>7</sup> Anton M. van Kalmthout & Peter. J.P. Tak, *Sanctions-systems in the member-states of the Council of Europe. Deprivation of liberty, community service and other substitutes*, Part II, Deventer/Boston: Kluwer 1992, p. 661 ff.

<sup>8</sup> M.J. Borgers, 'Het wettelijke sanctiestelsel en de straffoetmetingsvrijheid van de rechter', *Delikt en Delinkwent* 2005, p. 111-204.

<sup>9</sup> *Kamerstukken II* (i.e. Parliamentary papers of the Lower House), 1997/98, 26 114, nr. 3, p. 8.

<sup>10</sup> A. Klijn a.o., *Moord, doodslag, taakstraf? Een Zembla-uitzending nader bekeken*, Research Memoranda nr. 1, jaargang 4, 2008.

when it concerns serious crimes.<sup>11</sup> In the abstract, this sounds reasonable. But apparently the Minister is of the opinion that the research I have just summarized has revealed that the currently obtaining practice does not meet this standard. This is evidenced by the fact that the Minister writes that two changes are called for. One is that the guidelines which govern the performance of the prosecution service need to be revised (i.e. tightened) in order to reduce the incidence of requesting community service orders in serious cases or with recidivist offenders. The second is the instruction to the Board of Prosecutors-General to make sure that the revised guidelines are strictly adhered to.<sup>12</sup> Finally, the Minister writes in his letter to the Parliament that he *considers* amending the Penal Code in order to reduce community service orders in serious cases.

The more punitive guidelines were subsequently drafted and came into force on January 1, 2009. The content of the new guidelines is explained and clarified in a letter by the deputy-Minister of Justice to Parliament.<sup>13</sup> More importantly, the same letter also reports that the Ministry no longer *ponders* a possible change in the Penal Code, but has already *decided* to aim for that goal and therefore has drafted an amendment, which was sent for consultation to a number of authorities operating the criminal justice system. According to the redrafted article 22b of the Penal Code community service orders are to be excluded as a sentencing option in cases of a crime with a statutory maximum penalty of six years imprisonment, when the crime had a “serious impact on the physical integrity of the victim”. The same applies for crimes of a specific nature, designated by an Order in Council.<sup>14</sup> As far as recidivism is concerned, the revised Code holds that community service is no longer possible if the same sentence had been imposed during the previous five years.

In February of 2009 the Council for the Judiciary commented on the proposed amendment of the Penal Code in a letter to the Ministry. It rejected the proposals in unusually harsh language. I have to admit: quite understandably. The objections raised by the Council can be summarized as follows:

- Current practice shows that in cases of crime the amendment refers to, imposition of a community service order is very rare indeed. And when it happens, there good reasons for taking this decision. All of this has been revealed and confirmed in the research outlined above.<sup>15</sup> Against this background the proposed amendment is completely redundant.
- The Council recommends to evaluate the effects of the new guidelines for prosecutors. An assessment like that could demonstrate that the proposed amendment is superfluous.
- The proposed amendment deprives the court of the opportunity to impose a community service order in a number of cases. This could lead to sentences which are unreasonable, disproportionate and incomprehensible.
- The possibility to reduce sentencing options by excluding certain crimes in an Order in Council is without precedent and violates fundamental principles of the current system of criminal law. Sentencing ranges should be and remain an exclusive competence of the legislator, and can not be delegated to the executive power.

I concur with the critical comments made by the Council of the Judiciary. We are living in an age in which it is recommended from all sides to adopt an interdisciplinary approach to the criminal

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<sup>11</sup> Letter of June 26, 2008, *Kamerstukken II 2007/08*, 31 200, VI, nr. 172.

<sup>12</sup> I notice in passing that literally taken this is absurd. It looks as if the Minister suggests there are two kinds of guidelines: those that are to be followed and those that can be neglected !

<sup>13</sup> Letter of December 16, 2008, *Kamerstukken II 2008/09*, 31 700, VI, nr. 91. Since this article focuses on the discretionary powers of the court (and not of prosecutors) the details of the guidelines need not to be mentioned here.

<sup>14</sup> This concerns crimes against public authorities; sexual crimes; and assault.

<sup>15</sup> I remind the reader that only one single verdict was discovered which was found to be too lenient, given the circumstances of the case.

justice system. The least this calls for, is that we try to take into account empirical evidence about the legal standards and provisions that are under discussion. In this case, the sensationalizing televised documentary has in no way been corroborated by careful research. On the contrary, the project that was carried out proved that hardly any sentence of community service was contestable. In these circumstances the very least that can be expected is to suspend any amendment of the Code until some systematic evaluation has been carried out of the new guidelines in this area.

Some brief observations about the new guidelines in themselves. The guidelines are about the conduct of the prosecutors in the courtroom. They, the prosecutors, are instructed not to request the imposition of a community service order in a number of specified cases. Among these are three types of crime with a statutory maximum penalty of less than six years: resisting a public official resulting in injury, child pornography and instigating prostitution by minors. The reason for mentioning this is that it is very likely that these same types of crime will be prioritized in the Order in Council mentioned above and will in this way affect the discretionary powers of the court in sentencing. Is this categorically justified? I do not think so. It fits the fashion of today to promote a zero-tolerance policy in connection with the three crimes referred to in the guidelines. In itself this policy makes sense. However, we have to remain critical and always keep a keen eye on the specific circumstances of individual cases. Even these kinds of crime can be perpetrated in a way which reduces the level of substantive injustice considerably. When it comes to resisting public officials, for instance, one could easily imagine many instances where this offence obviously does not warrant the imposition of (at least a conditional) term of imprisonment. Situations of football hooliganism and minor incidents in public transportation facilities involving a first offender quickly come to mind. Similar observations can be made in connection to child pornography. Little imagination is required (and I do not mean dirty thoughts, but I am referring to legal creativity) to understand that this felony can be committed in circumstances that are quite mitigating. A clear case could be situations where the perpetrator was convinced of watching an 'ordinary' adult movie and had not been aware of the fact that the movie features actresses who have hidden their true age by means of a forged identity card. Is it really necessary and wise to exclude the possibility of imposing a community service order in this kind of cases?

The Council of the Judiciary refers to the sentence as a part of the verdict that needs to be 'tailor made'. I fully agree. This requires that the judge is enabled to take each and every specific ingredient of the case into account. Whenever he is limited in taking relevant circumstances into account, this could lead to unreasonable, incomprehensible and capricious sentences. Why eliminate the possibility of a community service order and leave the opportunity to impose a fine intact? It is still established knowledge that the legislator considers the community service order less severe than imprisonment, but more severe than a fine.<sup>16</sup>

The conclusion of this section must be that the actions of the Dutch Minister of Justice in connection with the community service order cannot be endorsed. It is just not wise to start considering to reduce the discretionary power of the judge in sentencing for each individual type of crime. In this problem area it probably makes more sense to look at the approach that has been adopted by the European Union. As early as 2002 the European Council has faced the fact that the legal traditions of the various jurisdictions of the member states vary tremendously when it comes to sentencing powers of the courts. The Council respects these traditions and at the same time aims to increase some elements of unity by promoting different legal instruments.<sup>17</sup> Most prominent among these is the concept of a so-called minimum maximum penalty. This

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<sup>16</sup> *Handelingen I* 1999/00, 26 114, nr. 36, p. 1726.

<sup>17</sup> Council of the European Union 27 May 2002, (06.06) 9141/02.

technique has subsequently been applied in a number of Framework Decisions and Directives.<sup>18</sup> The advantage of this approach lies in the fact that it offers the legislator the opportunity to send a signal about the seriousness of a certain type of crime while at the same time it avoids to compel a judge to take a decision in an individual case which he himself would feel uncomfortable with.

### 3. *Mandatory minimum sentences – recent developments*

The present contribution is about discretion in sentencing. It is only a small step from excluding the community service order in certain kinds of cases and from the concept of minimum-maximum-penalties to the topic of mandatory minimum sentences.

As stated in the previous section, it is a feature of the currently existing Dutch criminal justice system not to have specific crime related minimum sentences. I think it is fair to say that this is widely considered to be part of our cultural heritage. It also constitutes one of the more significant attributes of our penal system which is generally supported by the government on the one hand and by the doctrinal academic writers on the other hand.

All of this is now at stake because of an initiative taken by a representative of the *Partij voor de Vrijheid* (PVV, the Freedom Party), a populist political movement which has over the past couple of years attracted a substantial part of the electorate.<sup>19</sup> This representative, named De Roon (a former Attorney-General at the Court of Appeals in Amsterdam), has introduced a draft bill to change the Penal Code in a number of important ways.<sup>20</sup> One of these concerns reform of the sanctions system. Two major changes are proposed: the first is to increase the length of maximum sentences, the other is to introduce an extensive set of minimum penalties.

I can be brief about maximum sentences. According to the draft bill, the maximum temporary custodial sanction (that is: apart from life imprisonment) should be increased from 30 years to 70 years. Apart from that, the idea is to raise the maximum period of incarceration for most of the crimes contained in the Penal Code by an average of some 250%.

Astonishing as this in and of itself may look, the proposals on the introduction of special minimum sentences are even more revolutionary. According to the draft bill, three additional articles should be included in our Penal Code, articles 10a-10c.

Article 10a provides for cases in which at least one third of the applicable maximum sentence of unconditional imprisonment is to be imposed. This should be done when there is a conviction for a serious sexual crime or violent crime, and in case of a number of violations of the laws on illegal narcotic drugs and on illegal firearms and ammunition. In case of recidivism within five years this minimum penalty shall be raised to two thirds of the maximum prison term. If the recidivist perpetrator commits the new crime within fifteen years of the previous one and the new crime is punishable by life imprisonment, than this life sentence is to be imposed on a mandatory basis.

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<sup>18</sup> Some examples: the Framework Decision on Terrorism (2002/475/JBZ); the Framework Decision on Human Trafficking (2002/629/JBZ); the Framework Decision on Racism and Xenophobia (2008/913/JBZ); and the Directive on penal measures to protect intellectual property (2005/0127/COD).

<sup>19</sup> The topic is also discussed in my paper 'Wijziging van het sanctiestelsel, wijziging van de leeftijdsgrenzen in het strafrecht en aanscherping van de bepalingen inzake voorlopige hechtenis', *Delikt en Delinkwent* 2010, p. 105-118.

<sup>20</sup> In The Netherlands, draft bills are usually initiated by the government. However, members of parliament also have the right to submit draft pieces of legislation for consideration and decision making by the parliament. The document under consideration is printed as *Kamerstukken II* 2008/09, 31 938, nrs. 1-3.

Article 10b deals with the less serious crimes. It also introduces specific minimum sentences. For first offenders it calls for a minimum of:

- 12 months for committing violence in a public area
- 2 months for uttering a threat to commit a serious crime against another person (or 4 months if the act was committed in public)
- 3 months for simple assault/battery (or 6 months when the act took place in public)

A second crime from this list within a period of eight years leads to double the level of the minimum sentence. In case of a third conviction, the maximum term of imprisonment will be the mandatory sentence.

Article 10c contains a generic provision for all other crimes. In case of a conviction for 'any crime' a conditional custodial sentence of at least three months shall be mandatory. Recidivism within a period of 8 years shall automatically lead to unconditional imprisonment. Should a third crime of this category occur within another period of 8 years, this minimum penalty is to be doubled in length. In the event of a fourth conviction (again: another period of 8 years) mandatory imposition of the maximum prison sentence will follow.

This begs the question on which view on human nature these proposals are founded? Which are the underlying attitudes toward society and the role and function of the criminal justice system? On what assumptions concerning the origin of criminal behavior do these ideas rest? Can any vision be discerned on the mechanisms that could be employed to reduce the incidence of anti-social conduct?

The explanatory memorandum accompanying the draft bill offers a hint of insight into the ideas of De Roon. For present purposes it is most important that the document stresses with regret that up until now the Dutch government has rather robustly declined any invitation to introduce special minimum penalties. The reason for this firm stand is that the government has fully accepted and endorsed the observations and conclusions from the authoritative study undertaken by Anton van Kalmthout and Peter Tak.<sup>21</sup> These authors have convincingly explained why one simply cannot force a court to impose a sentence which the court itself would consider to be unreasonable or capricious. They have carefully explained how and why courts will find loopholes to avoid unsatisfactory outcomes. Courts will attain their goal – a verdict which is fair and does justice to the case – by guile if necessary. One of the means employed to this effect is the so-called 'spurious acquittal'.<sup>22</sup> The explanatory memorandum comments on the use of these practices as follows: "All of these methods can be reduced to one single factor: the desire to mitigate the harshness of the law in individual cases."<sup>23</sup> I would rather say: not to mitigate harshness, but to mitigate *unreasonable* and *evidently disproportionate* harshness. The draft bill is intended to put an end to this kind of practices:

"The desire to tailor the sentence to the specific circumstances of the case, however, is not the only standard to apply in considering the appropriate penalty. There are also the interests of the victim (and his next of kin) and of society at large that ought to play a role in deciding criminal cases. It is exactly this kind of factors which demand that certain crimes will no longer be punished mildly. Precisely these factors require minimum sentences."<sup>24</sup>

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<sup>21</sup> A.M. van Kalmthout & P.J.P. Tak, *Ups and downs van de minimumstraf*, Nijmegen: Wolf Legal Publishers 2003.

<sup>22</sup> A spurious acquittal takes place when the court acquits the defendant from a charge which is threatened with a severe minimum penalty with the sole objective to avoid the imposition of that penalty if it is considered to be disproportionate to the charge.

<sup>23</sup> *Kamerstukken II* 2008/09, 31 938, nr. 3, p. 3.

<sup>24</sup> *Ibidem*.

According to the explanatory memorandum, we should learn from foreign experiences. If and when it is demonstrated that elsewhere the system of specific minimum sentences is sabotaged by using loopholes, we should take steps in order to exclude that possibility. One of the concrete measures proposed by De Rooy in this respect is to introduce *an obligation to prosecute* every crime which is by law threatened with a minimum sentence.<sup>25</sup>

Is this really the right way to go? I invite the reader to take a close look at the range of crimes referred to in the proposed articles 10a to 10c and to briefly reflect on the very limited seriousness in which these crimes can present themselves in actual cases. The first offender from the list of article 10a will receive at least one third of the maximum penalty. This means that the perpetrator of a forced French kiss – which in The Netherlands comes under the statutory definition of rape – will be sentenced to at least ten years imprisonment! A fistfight in the pub which qualifies as simple assault could no longer be dismissed by the prosecutor and will end in a sentence of at least three months, regardless of the circumstances of the case. If I read the proposal correctly, even a first time conviction for shoplifting will force the court to impose a sentence of three months unconditional incarceration (article 10c). In case of recidivism the length of the prison term will multiply. In my humble opinion, all of this comes dangerously close to the horror-stories we have heard from the American legislation on the basis of a ‘three-strikes-out-principle’.<sup>26</sup>

Can this be considered as a responsible way of meeting out sentences? In no way it can. The biggest problem with these proposals is that they amount to a prohibition for the court to really think about the best way to resolve a case. Sentencing ought to be the result of legal reasoning. Instead, in these proposals it would be replaced by the instruction to follow simple battle orders issued in legislation. The proposed provisions would deprive the court from any opportunity to attempt to balance all the interests which are at stake in a given case. The notion of a balancing act would be replaced by sanctifying an abstract concept of ‘the interests of the victim and society at large’. And this concept is then in turn accepted as a justification for an extremely high level of punishment.

The implicit assumption must be that this kind of penalization will have a strong deterrent effect. However, has this assumption ever been supported by empirical evidence? Most scholars in Europe will probably argue: quite the contrary! The presumption of the deterrent effect of severe minimum sentences is without exception used as an expectation that can not be refuted. It is an axiom, a postulate which has been immunized against any form of criticism on the basis of empirical evidence. The view on human nature that belies these proposals in effect constitutes a leap back to the early nineteenth century, when the so-called ‘classical school’ of Von Feuerbach *cum suis* coined the image of a *homo economicus*. This vision of a ‘rational man’, who chooses his course of action on the basis of balancing potential benefits and possible drawbacks, has long since been abandoned in connection with major parts of the criminal law. Why has this view been abandoned? Because more recent schools of thought have demonstrated that crime quite often just is not a matter of

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<sup>25</sup> This is yet another huge deviation from basic principles of Dutch criminal procedure, which is based on the ‘expediency principle’, allowing the prosecutor wide discretionary powers in deciding whether or not to pursue a case.

<sup>26</sup> One of the most tragic examples is the US Supreme Court decision in *Rummel vs Estille* in 1980. Perpetrator Rummel was first convicted for buying goods with a combined value of \$ 80.00 with an invalid credit card. This earned him three years of imprisonment. After his release he used a forged check in the amount of \$ 28.36. He ended up in jail for four years. Finally he accepted an upfront payment of \$ 120.75 for services to render, and he failed to keep that contract. For this, under the ‘State habitual offender act’, he was sentenced to lifetime imprisonment (mandatory). The Supreme Court held that this sentence was not ‘grossly disproportionate’ in a way as to render it ‘cruel and unusual punishment’ as meant in the Eighth Amendment to the Constitution. See for more details: Laurence H. Tribe, *God save this honorable court*, New York: Mentor: 1985, p. 87-88.

rational choice. However, politicians like De Roon are not persuaded by this argument. They will counter with the assertion that any crime committed is clear enough evidence that the punishment threatened in the Penal Code apparently was insufficient. Hence they call for more severe penalties in legislation, including substantial minimum sentences if need be. Deterrence works, because it is supposed to work. Deterrence works, because it is an axiom, a postulate, a starting point in their line of reasoning. Deterrence works, because it has got to work. Deterrence has got to work, no matter what empirical evidence to the contrary is available.

The view on human nature underlying these proposals betrays an overrated expectation of the possibility to change society by a mere act of legislation. The proposals mirror the ambition to have a one-on-one causal effect on the behavior of ordinary citizens and of the judiciary. That is at least one step too far. As a direct consequence of this unwarranted optimism, the proposals also radiate an unfounded confidence in the paramount importance of the criminal justice system for the way society functions and can be influenced. As experience has shown over a large number of years, criminal law is only one of the social institutions which – in interaction with many others – shapes and molds the daily routines within a larger community. On the other hand I do not hesitate to label the proposals as naïve when it comes to the objective of limiting or reducing the discretionary powers of the prosecutor and the judiciary. The PVV-delegate De Roon claims to have learned from comparative research and thus to avoid the pitfalls that other countries have been faced with in this respect. He feels confident that his ideas will effectively abort any attempts to sabotage or sidestep the strict rules on special minimum sentences. Here again I am convinced he is wrong. He seriously underestimates the resilience and the sense of determination of the professionals who run the criminal justice system. This system is extremely creative when the objective is to avoid verdicts which truly run counter to our sense of justice. In cases where the law calls for an undeserved or disproportionate penalty to be imposed, the prosecutors and the judiciary will find new ways to avoid unacceptable consequences of special minimum sentences.

#### *4. Conclusion*

The features of Dutch criminal justice are not carved in stone. The upshot of the present contribution is not that every fundamental reform of our system ought to be resisted. Quite the opposite. Criminal law and criminal procedure are in constant motion. The dynamics of the surrounding environment call for flexibility. The interests of the individual (perpetrator and victim) and of society at large need to be re-assessed on a permanent basis. This balancing act is literally without end.

Even the two basic principles which have been discussed in the previous sections can be subject to change. Both principles concern the discretionary power of the judiciary in sentencing.<sup>27</sup>

The first principle holds that the full range of sentencing options should be available, regardless of the kind of crime involved. It has been explained that the government intends to exclude the possibility of imposing a community service order when certain types of infractions are involved. It is not the very act of limiting sentencing options that has been criticized, but it is the complete absence of empirical justification for such a step which was rejected. A modern approach to our field of study requires that we include findings from social sciences in our deliberations. Applying this mantra to the question that was raised on community service orders,

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<sup>27</sup> In both instances, some derivative comments were made on the discretionary powers of the prosecution service.

there can be no doubt that recent practice has been fully satisfactory. Reform should only be contemplated when there are clear advantages to be gained. The logical conclusion is that the suggested reduction of sentencing options can not be supported.

According to the second principle, the Dutch criminal justice system does not include any mandatory or special minimum-sentences in the Penal Code. The proposals of the PVV-delegate De Roon fundamentally challenge this principle. The problem that was outlined in the previous section is that these proposals have been argued very poorly. This is surprising, given the scope and the nature of the reform they represent and given the empirical evidence which clearly suggests to prefer a completely different direction.

On both counts, I find a wealth of well referenced reasoning in the academic publications of Anton van Kalmthout. When discussing these items in the future, I am positive that we will quite often rely on his work in order to prevent reforms which are well received by the populist vote, but which in true reality constitute dangerous perversions of the structure of our criminal justice system.