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Voorde, J.M. ten

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THE DUTCH PENAL CODE UNDER REVIEW¹

Jeroen Martijn ten Voorde*

Institute for Criminal Law and Criminology, Leiden University, the Netherlands

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Corresponding author's e-mail : J.M.ten.Voorde@law.leidenuniv.nl

Abstract

The Dutch Penal Code entered into force on September 1, 1886. Since then many parts of the Dutch Penal Code have been discussed. This article does not intend to provide an integral systematic overview of the Dutch Penal Code and the many changes it has been subjected to, but examines (in the first part of this article) it generally, with the aim of showing various arguments for a more thorough review of the Dutch Penal Code. Recognizing the need for revision of the Penal Code, the question arises as to what is meant by a revision. More clarity on what is meant by revising a Penal Code is necessary to prevent failure therein as a result of terminological ambiguity or carelessness. In the second part of this article three manners in which a Penal Code may be revised are described. They are: modification, integral revision, and re-codification.

Keywords – Dutch Penal Code – Modifications General Part – Modifications Special Part – Revision – Modification – Integral Revision – Re-codification

Abstrak

Kitab Undang-undang Hukum Pidana Belanda berlaku pada 1 September 1886. Sejak saat itu, banyak bagian dari KUHP Belanda telah dibahas untuk dilakukan revisi. Tulisan tidak bertujuan untuk memberikan tinjauan secara keseluruhan dan sistematis terhadap KUHP Belanda, beserta berbagai revisi yang telah dilakukan terhadapnya. Meskipun, KUHP Belanda akan dibahas secara umum dalam bagian pertama artikel ini. Tujuan utama tulisan ini yaitu untuk menjelaskan berbagai argumentasi yang mendasari revisi KUHP Belanda yang lebih menyeluruh. Mengingat adanya kebutuhan atas revisi KUHP Belanda, pertanyaan yang timbul adalah apa yang dimaksud dengan revisi itu sendiri. Dengan jelasnya apa yang dimaksud dengan revisi KUHP Belanda, hal ini penting untuk menghindari terjadinya kegagalan dalam melakukan revisi karena adanya ketidakjelasan terminologi atau ketidakhati-hatian. Dalam bagian kedua artikel ini, akan dijelaskan tiga cara revisi KUHP, antara lain, modifikasi, revisi integral, dan rekodifikasi.

Kata kunci: KUHP Belanda, Modifikasi Bagian Umum, Modifikasi Bagian Khusus, Revisi, Modifikasi, Revisi Integral, Rekodifikasi

¹ This article is a revised version of a recently published article: Ten Voorde 2017.

INTRODUCTION

The Dutch Penal Code entered into force on September 1, 1886. In the beginning, the Code was met with some criticism.² Today, however, many agree that the legislator created a sustainable code. This does not mean that no attempts have been made to make profound changes to the existing Code. A first attempt was made at the beginning of the twentieth century when the then Minister of Justice, Cort van der Linden, introduced a bill in parliament which was aimed at amending the existing Code extensively. The most important reason for introducing this bill was that legal practice showed that the Penal Code had several defects and lacunas that needed to be resolved. The bill did not intend to change the foundations of the Penal Code, nor did it seek to reopen the debate about issues that had already been discussed intensively during the creation of the Penal Code (for example the abolition of the death penalty or the distinction between crimes (*misdrifven*) and misdemeanors (*overtredingen*)).

The bill introduced a lot of important changes in all three books of the Dutch Penal Code.³ However, the bill was never discussed in parliament. It was withdrawn by the successor of Cort van der Linden as Minister of Justice, Loeff. The new Minister of Justice, however, agreed with his predecessor that some modifications of the Penal Code were necessary and subsequently introduced a bill of his own, which was meant to change only those parts of the Penal Code that had created uncertainties in legal practice.⁴ Like Cort van der Linden's bill, the new bill still introduced many changes in all parts of the Dutch Penal Code. As was the case with the first bill, the new bill was never discussed in parliament, probably because of a cabinet crisis, which resulted in elections and a new government with yet another Minister of Justice. Until 1965, no Minister proposed integral changes to the Penal Code. In that year, the Minister of Justice reported to the House of Representatives (*Tweede Kamer*) that he was contemplating ordering research with regards to a general revision of the First Book (General Part) of the Code.⁵ Whether any research was ordered (probably not) and if so, what the results of this research were is unknown.

At the end of the 1990s, the then Minister of Justice, Korthals, claimed that, in general, the Dutch Penal Code still formed an adequate catalogue of crimes.⁶ Subsequently, he stated that re-codification was not needed. There are no indications to assume that the present Minister for Security and Justice disagrees with such assumption. However, we can question whether the assumption is correct. To provide an answer to this question, it seems interesting to first summarize the history of the Dutch Penal Code. How often were parts of the Code altered, which parts were amended, and which parts were not? In addition to that, which parts were and are (still) being discussed, particularly by legal scholars? Is the catalogue of crimes still adequate? Are the general concepts of substantive criminal law still well established within the Penal Code? The first part (paragraphs 2 and 3) of this article aims, by means of an overview, to provide an answer to these questions. This will provide an idea on how the Dutch Penal Code has developed and what questions have arisen

² See e.g. Van der Hoeven 1880. Others were more positive, e.g. Pols 1886, who claimed that the introduction of the new Penal Code did not only serve legal practice, but legal science as well.

³ *Kamerstukken II* (Proceedings of the Dutch House of Representatives) 1900/01, 100, 1-3. See Moerman and Mevis 2013.

⁴ *Kamerstukken II* 1904/05, 80,3, p.13.

⁵ *Kamerstukken II* 1965/66, 8300 VI, p.2.

⁶ See also Remmelink 1996, p.57. In contrast: Strijards 1986, p.56, who wrote: "Let's compose a new codex."

over the years. We will see that many parts of the Penal Code have been discussed. For the sake of readability of this article, I had to exercise restraint: in order to be able to show as many subjects that have been debated as possible, most discussions will be touched upon briefly. As a result, the reader may obtain the impression that the Dutch Penal Code is in some chaos. This is not how the first part of this article should be read however. Thus, the article does not intend to provide an integral systematic overview of the Dutch Penal Code, but rather to examine it generally, with the aim of showing various arguments for a more thorough review of the Dutch Penal Code than those which have been raised. In the second part of this article I will describe three manners in which a Penal Code may be revised (paragraph 4). This part is more of a methodical nature. With recognition of the need for revision of the Penal Code, the question arises as to what is meant by a revision. More clarity on what is meant by revising a Penal Code is necessary to prevent failure therein as a result of terminological ambiguity or carelessness.

II. THE GENERAL PART

A. Modifications of the General Part

The First Book of the Dutch Penal Code (DPC) is named General provisions (*Algemene bepalingen*). It forms the General Part of the DPC and is applicable for the entire criminal law (see article 91). The First Book can be divided into four parts: general concepts of substantive criminal law (Titles I, III, IIIa, IV, V, VII and VIII), criminal sanctions (punishments and measures) (Titles II and IIA), juvenile criminal law (Title VIIIA) and a Title (IX) which provides definitions of various terms that occur in the DPC. The numbers of the titles immediately show that three new titles were introduced since the introduction of the DPC (IIA, IIIa and VIIIA). The first provision is numbered 1, the last provision 91. On June 1, 2016, the number of articles in the First Book amounted to 257. Of the original 91 articles, only 19 remained the same, while of the remaining 72 articles seventeen were changed once, and eight articles more than fifteen times (article 4 have changed more than twenty times since 1886). As many as 49 Articles were removed at one time in the history of the First Book (sometimes even more than once). Seven of the original 91 articles are still expired. Various articles which had expired at one time, have been reinstated with a different content (most notably articles 46 and 83).

The number of modifications of the General Part since 1881 (when the General Part became law; the implementation process took more than five years, partly due to the construction of new prisons), amounts to 204 as of June 1, 2016.⁷ The number of modifications was particularly high in the last 25 years: more than 120 modifications were realized since 1990.⁸ The modifications are not spread equally amongst the First Book. Many changes have occurred in Titles II, IIA (both dealing with criminal sanctions) and VIIIA (juvenile criminal law), while other titles (in particular Title III, which mainly contains exceptions) remained relatively unchanged. The number of revisions concerning the general concepts of substantive criminal law is much lower than the number of revisions of Titles II, IIA and VIIIA. Most provisions that contain general concepts, like the exceptions (which can be divided into justifications and excuses), participation, *concursum* and *ne bis in idem*, have not changed substantially.

⁷ I have based my research on data that can be found on www.overheid.nl. This website contains all legislation (communal, provincial, state and international) and all parliamentary proceedings since 1995.

⁸ See also Buruma 2003, 72; De Hullu 2011, p.271.

B. Some comments on the modifications of the General Part

It is too easy to say that the amount of modifications of the General Part is very high. A normative statement can only be made after looking at the modifications in more detail. Upon doing so, we must become aware that on the level of the various titles, much has remained the same. If we compare the present-day First Book of the DPC with the DPC of 30, 60 or 90 years ago, what we see is continuity in various parts of the General Part. However, we also have to agree that many things have changed since the DPC came into force in 1886. This holds true for Title II (articles 9 (increasing the types of punishments, and the introduction of the possibility to combine punishments), 9a (judicial pardon), 14a ff (suspended sentences), 15 ff (probation), Title IIA (articles 36e (confiscation measure), 36f (victim compensation measure), 37a ff (measure of involuntary commitment to a mental hospital), 38m ff (measure concerning habitual offenders) and 38v ff (measures limiting a convicted person's liberties), Title IV (article 46 (preparation) and article 46a (attempt to abet (and possibly also to aid) another person)) and Title VIII (articles 70 and 71 (limiting the statute of limitations), and article 74 (increasing the possibilities to buy off prosecution through a so-called transaction)). Many changes reveal more or less fundamental changes in the criminal law, not only the law of criminal sanctions, but also of substantive criminal law.

1. Criminal sanctions

Many changes have occurred in the titles dealing with criminal sanctions. Not only were new penalties (community service, art. 22b ff), and new modalities of execution of penalties (like probation, article 14a ff) introduced, more importantly, a new type of sanction was developed: the measure.⁹ The measure has become a very important type of criminal sanction under Dutch criminal law. Since its introduction in the early twentieth century, various new measures have been introduced, such as the confiscation measure (article 36e), the measure of involuntary commitment to a mental hospital (article 37a ff), the measure for habitual offenders (article 38m ff), and the measure to limit certain liberties of a convicted person, like a restraining order (article 38z ff). The various changes in the sanctions system reveal changing visions on the justifications of criminal sanctions, agreeing that retribution is not the only justification for criminal punishment. The introduction of measures next to penalties has led to many discussions, which still emerge once in a while.¹⁰ The introduction of measures, more generally the increasing diversity of criminal sanctions, has not benefited the readability of the law and has sometimes led to problems in legal practice, in particular where various sanctions allow for the possibility to apply the same measures as (a part of) different sanctions or sanction modalities. For example, a restraining order can be imposed as a special condition as part of a suspended sentence (article 14c, paragraph 2), a specific condition for probation (article 15a, paragraph 2) or as a specific measure (article 38v ff).¹¹

⁹ The origins of the measure can be traced to the so-called *Moderne Richting* in criminal law, which called for a criminal law that was less oriented on the crime but more orientated on the criminal. Later currents in Dutch criminal law helped in the further shaping of the criminal sanctions in the Dutch Penal Code. These currents all had different ideas on the justification of punishment, which has resulted in a patchwork of sanctions. See on the development of ideas on criminal law and criminal sanctions e.g. Buruma 1999.

¹⁰ See Van der Landen 1992.

¹¹ The legislator endorsed the criticism and has proposed a new bill with the purpose of streamlin-

Besides this, the legislator has changed its view on what qualifies as a proportionate sanction. In 1886 the legislator thought it to be disproportionate to combine penalties; nowadays article 9 makes various sorts of combinations of penalties possible. Further, we have seen an increase in the temporary maximum penalties in article 10, paragraphs 2 and 3, increasing from 15 to 18 years (nowadays only applied in cases of human trafficking (article 273f)) and from 20 to 30 years in case of *concursum*, recidivism and crimes for which a life sentence may also be imposed.¹² The introduction of anti-terrorist offences in the DPC in 2005 also brought with it a rise in offences which can be punished with a life sentence. Recently, the legislator has decided that community orders are not allowed for various crimes and in various cases (article 22b). This caused much distress among judges and scholars who viewed this new legislation as a fundamental breach of Dutch criminal law, in particular in the sense that it is at odds with the broad discretionary powers of the courts when it comes to sanctioning.¹³ Such distress can partly be explained by the fact that over the years, the courts have lost much of their monopoly on imposing sanctions,¹⁴ for example with the introduction of the *strafbeschikking* which give public prosecutors, and in some cases even police officers, the competence to impose various types of sanctions, with the exception of imprisonment (articles 257a ff Dutch Code of Criminal Procedure), for crimes that can be punished (by a court) with imprisonment with a maximum of six years. When we realize that many crimes fall within the scope of the *strafbeschikking* (including theft, embezzlement, money laundering, discrimination, the possession of child pornography, assault, etc.), the possible consequences of its introduction become rather obvious.

2. General concepts of substantive criminal law

a. Some legislative alterations

Taking into account the small amount of changes in the titles which deal with the general concepts of substantive criminal law, one could argue that this part of the Dutch Penal Code has survived well over the years. The legislator of 1886 should be credited for this, for apparently being able to create a code that has survived many important societal and legal changes. However, if we take a closer look at the general concepts, we see that many things have changed (even without the text of law being changed).

A first example is the introduction (in 1994) of preparation in Title V of the First Book. Any person who obtains goods or money with the intention to commit a very serious crime (with a maximum penalty of more than eight years), can be held accountable for preparing such crime (article 46).¹⁵ The introduction of article 46 was a breach with the past, as preparation is not a concept of substantive criminal law with which the laws of European countries are familiar. The DPC included, right from the beginning, a few special preparatory offences such as abetment (article 131), but

ing the rules on sanctions, transferring these rules to the Code of Criminal Procedure (*Kamerstukken II* 2014/15, 34 086, 2).

¹² See on the development of the life sentence in Dutch criminal law and practice: Claessen 2016, Ten Voorde 2003.

¹³ See Schuyt 2009, Groenhuijsen 2009, Schoep 2009.

¹⁴ Balkema and Corstens 1986, p.306.

¹⁵ At the same time, the description of attempt was changed by removing voluntary retreat as an element of attempt. Voluntary retreat has become a specific kind of exception (article 46b).

these were exceptions in a system which did not want to create criminal responsibility too easily. When article 46 was introduced, no attempts were made to rethink, let alone rewrite, the existing preparatory offences in the DPC. With the introduction of numerous new preparatory offences in the DPC since 1994 (especially concerning the prevention of terrorist offences), the relationship with article 46 has become even more unclear.¹⁶

A second example is the introduction of criminal liability of legal persons (corporations) (article 51) and actually directing (*feitelijk leidinggeven*) by a manager of a legal person. For a long time, the criminal liability of the legal person (corporation) was seen as an unacceptable expansion of the criminal law (*societas delinquere non potest*), which was not in accordance with its foundations, in particular the idea that only a guilty person can be held criminally liable. However, when article 51 was introduced in 1976 many Dutch scholars thought that the criminalization of the legal person was not very problematic. Nonetheless, practical and theoretical issues remain as to under what circumstances a legal person can be held criminally liable. In legal practice, this sometimes proves to be a difficult legal question to answer.¹⁷ These questions are rarely addressed in courts, because many criminal cases against corporations are settled with the Public Prosecution Office (*Openbaar Ministerie*).

A third example regards the alterations in the law of limitations (article 70 ff). The DPC makes a distinction between the limitation of the prosecution of crimes and misdemeanors (articles 70-72) and the limitation of punishments (article 76). The limitation of the prosecution of crimes and misdemeanors was introduced in the DPC for at least two reasons. First, the legislator claimed that evidence becomes less reliable the older a case becomes. Second, the older a case is, the less justifiable (in terms of retribution and prevention) punishment becomes. According to the present-day legislator, these arguments are no longer valid: modern investigative techniques have made proof increasingly possible in older cases, while from the viewpoint of victims of crimes punishment is justifiable no matter how old a case is. Such change in viewpoint has led to changes in the statute of limitations.¹⁸ For example, no limitation exists in prosecuting crimes which can be punished with a life sentence (it used to be eighteen years).

A fourth example is the introduction of recklessness (*roekeloosheid*) as part of negligence in several crimes within and outside the scope of the Dutch Penal Code. Recklessness is the severest form of negligence (*culpa*) and can potentially lead to a doubling of the maximum prison sentence (see for example article 307, paragraph 2).¹⁹

b The importance of case law

When recklessness was introduced, the legislator underlined the importance of the development of general concepts, and stated that legal scholars and the courts should play a major role in such development. Indeed, not only recklessness but also other general concepts of substantive criminal have changed steadily over time. The Supreme Court (*Hoge Raad*) played and plays a crucial role in the development of these concepts. In recent years, the influence of the development of general concepts

¹⁶ See Keulen 2009, Keulen 2014.

¹⁷ Hornman 2016.

¹⁸ See Van de Lagemaat 2012.

¹⁹ See Ten Voorde 2016.

of substantive law of both the European Court of Justice of the European Union and the European Court of Human Rights has steadily increased.²⁰

First, the Supreme Court has expanded the scope of the justification of self defense (article 41). In a 1965 verdict, the Supreme Court decided that a reaction to an imminent danger of an attack can also qualify as self defense.²¹ In recent decades we have witnessed the Supreme Court taking a much more lenient position when it comes to the principles of proportionality and subsidiarity. In deciding whether the defense was proportionate, the position of the attacked person has been placed more on the forefront, which means that self defense should not be decided solely from an objective point of view.²² Politicians claim that this is not enough and people should have more liberty in defending their own body and goods or those of others.²³

Second, the Supreme Court has made certain endeavors to expand the scope of co-perpetration (*medeplegen*) (article 47), to the detriment of various other forms of participation, for instance abetting (article 47, paragraph 2) and aiding (article 48).²⁴ The Supreme Court has accepted co-perpetration in cases where the perpetrator was not present at the scene of the crime, but had a great influence during the preparation phase. The Supreme Court also accepts conviction for co-perpetration where the perpetrator was present at the scene of the crime, but was passive during the commission of the crime, on the basis that he had acted in accordance with a role pre-determined before the crime was committed. Even in cases where no proof of a prior agreement was available, there can be co-preparation if during the crime the perpetrators played mutually exchangeable roles. In a recent verdict, the Supreme Court recognized that co-perpetration should be distinguished from aiding, but even now the distinction between the two forms of participation is not easily made.²⁵

Third, the Supreme Court introduced a new kind of criminal responsibility: functional perpetration.²⁶ A person can be held responsible for a crime, as if he had committed the crime himself, if he had power over the acts of the actual perpetrator and accepted the commission of crimes by the psychical perpetrator. This type of perpetration is particularly used in cases of economic crime, but can also be used in other cases. Functional perpetration can be seen as one of the reasons why indirect perpetration (*doen plegen*) (article 47) has become more or less an obsolete form of participation under Dutch penal law. Various scholars have argued that indirect perpetration could be revoked from the DPC.²⁷

Fourth, while the text of the law of *concursum* (articles 55-63) has not changed fundamentally since 1886, the Supreme Court has dramatically changed the relationship between *concursum idealis* (*eendaadse samenloop*) and *concursum realis* (*meerdadse samenloop*). The central term in Title VI is the term 'fact' (*feit*). According to the legislator, the meaning of the term fact depended on the factual circumstances of the case. The Supreme Court, however, decided in a landmark case in 1932 that courts should take a more normative point of view.²⁸ Facts are the same (and therefore

²⁰ See, solely referring to intent, Ten Voorde 2015b.

²¹ HR February 2, 1965, *NJ* 1965, 262; HR 21 December 2004, *NJ* 2007, p.469.

²² Cleiren, Crijns and Verpalen 2016, pp.504-506.

²³ See Ten Voorde 2011.

²⁴ De Hullu 2015, pp.434-453.

²⁵ HR December 2, 2014, *NJ* 2015, 390; HR 5 July 2016, *NJ* 2016, p.418.

²⁶ HR February 23, 1954, *NJ* 1954, p.78.

²⁷ See Keulen *et al.* 2010.

²⁸ HR February 15, 1932, *NJ* 1932, p.289 (*Oude Kijk in 't Jatstraat*).

result in *concursum idealis*) when they have the same normative character or purpose. From a normative standpoint, the case law shows that facts are rarely the same.²⁹ As a result, *concursum idealis* is applied less frequently as opposed to *concursum realis*. This seems to be changing in case law, leading to a more important role for *concursum idealis*.³⁰ Another issue concerning *concursum* is the rule that can be found in article 63. In cases where a person is convicted for a crime (or misdemeanor) which he committed before an earlier conviction for another crime, courts must take into account the punishment in that earlier conviction and therefore apply the rules of *concursum (realis)* as if the cases were tried at the same time. In legal practice this can result in very low sentences. In a multiple rape case, the District Court of Amsterdam had to apply article 63, but disagreed with the outcome. Because the court had to take into account various earlier convictions, it was only able to sentence the defendant to four years of imprisonment. The Court set aside article 63 and convicted the defendant to ten years imprisonment. The verdict caused some distress among scholars, but the Minister of Security and Justice agreed with the Amsterdam Court that the rules are too strict.³¹ A bill has been introduced to change article 63 in such a way that it will apply to fewer cases. Besides this, articles 57 ff will be changed as well. Under current law, in convictions for multiple facts, the maximum sentence can only be one-third above the highest maximum of the crimes for which the defendant is convicted. The bill proposes to raise the maximum to one half above the highest maximum sentence.³²

III. THE SPECIAL PART

A. Modifications of the special part

At the time the Dutch Penal Code came into force, the special part consisted of two Books. The Second Book was divided into 31 titles, the Third Book into nine. The Second Book comprised 331 articles (92-423), the Third Book had 51 articles (424-474).³³ The present-day special part still consists of two Books. The division in titles also still exists. Only Titles VI and XXXI became defunct. Title XXXI was reintroduced (with a different content) in 2013. The names of several titles (III, X, XII, XXVII and XXIX) have changed. Two new titles were introduced (Titles XIXA and XXXA). No titles were removed from or introduced into the Third Book; the names of the titles have not changed since 1886.

As of June 1, 2016, the Second Book consisted of 438 articles, the Third Book was comprised of 64 articles. Since 1886, 165 articles have been added to the Second Book, while 60 were revoked (more than once). The Third Book saw 34 articles added, while 25 articles were revoked. Over a period of 130 years (1886-2016), the Second Book of the Dutch Penal Code was amended 221 times, the Third Book 122 times. The amount of changes of the Second Book since 1990 is almost one half of this total (115). The number of times the Third Book was changed is lower compared to the

²⁹ Franken 1995. Franken explains that the meaning of the term 'fact' in articles 55 and 57 differs from its meaning in article 68 (*ne bis in idem*). Whether facts are the same under article 68 does not only depend on normative (e.g. maximum penalties, legal interests), but also on factual arguments.

³⁰ See De Graaf 2016; HR June 20, 2017, ECLI:NL:HR:2017:1111.

³¹ District Court Amsterdam October 14, 2011, NJ 2011, 468; *Kamerstukken II* 2011/12, 29 297, 129, p. 5. See on *concursum realis* Ten Voorde, Cleiren and Schuyt 2013.

³² *Kamerstukken II* 2014/15, 34 126, p.2.

³³ When the Penal Code finally came into force on September 1, 1886, more than five years after it was first published in the Dutch *Staatsblad*, five new articles were added, while fifteen of the original articles that were published in 1881 had been changed (Act of January 15, 1886, *Staatsblad* 1886, 6).

period before 1990. It seems that the Third Book has become less important over the years, which can be explained by the expansion (before and particularly after 1990) of administrative penalties and offences outside the Penal Code.³⁴ Another explanation could be that the offences mentioned in the Third Book have themselves become less important. This probably the case with articles such as article 439 (accepting a uniform as a gift by a soldier) and article 459 (letting cattle loose in gardens, woods, or land where crops are sown).

If we take a closer look into the development of the Second and Third Book, we notice that the number of acts which amended ten or more articles in the Second Book is limited (Second Book seventeen; Third Book three). The number of acts which amended five or more articles is much higher (Second Book 56; Third Book eight). Various acts which amended many articles of both books deal with penalties, especially fines.³⁵ What is also clear is that some titles have been amended much more frequently than others. Title V (crimes against the public order (*Misdrijven tegen de openbare orde*)) has seen the most amendments, followed by Titles VIII and XIV (Crimes against public authority (*Misdrijven tegen het openbaar gezag*) and Crimes against public morals (*Misdrijven tegen de zeden*) respectively). The title of the Third Book that has seen the most amendments is Title II (Misdemeanors against the public order (*Overtredingen tegen de openbare orde*)). The least amended titles are Titles XV and XXI of the Second Book (Abandoning persons in need (*Verlaten van hulpverboevenden*) and Causing of death or serious injury by negligence (*Veroorzaken van de dood of van lichamelijk letsel door schuld*)) and Title V of the Third Book (Misdemeanors concerning persons in need (*Overtredingen betreffende hulpbehoevenden*)). These titles are comprised of only a few offenses, Title V is formed by only one article (article 450)). Amendments are held to mean changes in one or more articles within a title. Amendments also refer to the introduction or revocation of articles. No title has been amended integrally. In various cases, amendments deal with more than one title. The Terrorist Offences Act 2005 brought with it amendments in various titles, as did both the Acts on Cybercrime (1993 and 2006) and the Act on Financial and Economic crimes (2014).

The adaptations of the Second and Third Book have very different backgrounds: implementation or amendment of other laws, implementation of international agreements (including European Union directives), technological, economic and societal changes, and so forth. Such changes led to the expansion or limitation of existing offences, the introduction of new offences or the revocation of offences and changes in penalties. As the DPC has been amended so many times, it is impossible to go into detail much further. I can only offer an impression of some recent changes. Since January 1, 2011, eleven offences have been added to the Penal Code (all of them crimes), while eight have been revoked (crimes and misdemeanors). The description of about forty offences has been altered. The maximum penalty of thirteen offences has been raised. Changes in the DPC concerned offences in the form of fraud and corruption, cybercrime, forging travel and other official documents, and the abolishment of blasphemy as a specific crime.

B. Some comments on the modifications of the special part

³⁴ See e.g. the long list of offences in articles 1 and 1a of the Economic Offences Act (*Wet op de Economische Delicten*).

³⁵ Act of May 4, 1954, *Staatsblad* 1954, 169; Act of March 10, 1984, *Staatsblad* 1984, 91. The latter introduced categories of fines (see article 23).

As mentioned above, despite the numerous changes of the DPC, several Ministers of Justice have maintained that the DPC forms an adequate catalogue of offences. It is not easy to endorse or object to such conclusion. The many amendments to the special part can be read in two ways. On the one hand, due to the fact that the DPC has been amended so many times (and much more frequently over the past 25 years than in the one hundred years before), one could question this claim.³⁶ On the other hand, one could also say that the DPC appears to have been so flexible that it allowed for the inclusion of new offences without apparent difficulty. Furthermore, it is important to underline that many of the most important offences such as theft, extortion, intentionally inflicting heavily bodily harm, manslaughter, murder, etc. have not changed significantly since 1886. Legal practice does not seem to have any difficulties in working with these crimes which are (in most cases) more than 130 years old.³⁷

However, it does not mean that the special part does not give rise to any discussion. Scholars have debated various aspects of the special part, from the distinction between crimes and misdemeanors to individual crimes. I will discuss several issues below, without going into too much detail.

Simmelink has questioned the distinction between crimes and misdemeanors. This distinction was already discussed in parliament during the introduction of the Penal Code.³⁸ It can be discussed from a substantive point of view, but also from a procedural point of view. From a substantive point of view, the distinction between crimes and misdemeanors was deemed necessary because of the difference between various offences. Some offences in the DPC can be viewed as *mala in se*. They are punishable because society does not accept such acts. In addition to *mala in se*, the DPC also criminalises *mala prohibita*. These are acts which are punishable because the legislator found it necessary to make them punishable. The difference between *mala in se* and *mala prohibita* has consequences for the application of some general concepts of substantive criminal law such as attempt and preparation (articles 45 and 46) and aiding (article 48). The distinction also makes it visible that various offences are primarily punished for reasons of retribution (*mala in se*), others for primarily preventive reasons (*mala prohibita*). For these and other reasons, Remmelink concluded that the distinction between crimes and misdemeanors is highly important.³⁹

Simmelink, however, questions the distinction, albeit from a procedural perspective. He calls the distinction 'artificial', not due to substantive reasons, but from a procedural perspective. Simmelink holds that he could understand why the distinction is maintained if it were to be still visible in the manner in which offences are dealt with in criminal procedure. However, in practice, the manner in which offences are dealt with is not determined through distinction between crimes and misdemeanors. For such procedural reason, Simmelink argues that the distinction should be abolished. Various modern codes lack a distinction between offences, which could also be an argument for its abolition.

³⁶ See also Van Veen 1994, 6.

³⁷ Dutch courts have quite some interpretative freedom, which makes the adaptation of existing offences to new crimes possible. See e.g. the famous *Electriciteits-arrest* (HR 23 May 1921, *NJ* 1921, p. 564) in which the Dutch Supreme Court decided that taking away a good (article 310) can also imply theft of electricity.

³⁸ Simmelink 2003, pp.519-522.

³⁹ Remmelink 1996, pp.105-107.

As noted above, the Second and Third Books are divided into titles. This system was met with some criticism during the introduction of the Penal Code,⁴⁰ but no serious attempt was made to change this arrangement of offences in the DPC. After the DPC came into force, there seems to have been no discussion concerning the ordering of the special part, even when the legislator introduced new offences, such as those regarding cybercrime and terrorism. Both types of offences were given a place within the existing Penal Code, albeit dispersed over several titles. One can ask why the legislator did not decide to place these topically related offences under one title. At the time of the introduction of the Penal Code the legislator warned that changing the proposed titles (i.e. by introducing new titles and moving articles to these new titles) would not automatically result in a better Penal Code.⁴¹ Today, the DPC consists of titles with a highly differentiated content. For instance, Title V of the Second Book contains crimes that relate to terrorism, racism, organized crime, group violence, cybercrime, and crimes concerning the burial of persons. This has not led to a better understanding of this title which deals with public order (*openbare orde*). This being the case, the legislator has never contemplated changing the structure of the Second and Third Books of the DPC.

Technological, economic, demographic, social and other developments have had a great influence on the DPC. This is quite obvious in Title VII of the Second Book (Crimes which endanger the general safety of persons and goods (*Misdrijven waardoor de algemene veiligheid van personen of goederen wordt in gevaar gebracht*)).⁴² At the same time, some parts of the DPC seem to have become somewhat obsolete. Why is theft of cattle grazing in a field a separate offence (article 311 par. 1), while the theft of a car is not explicitly criminalized in a separate provision? Breaching telegraph secret (article 273c) also seems somewhat of an obsolete offence in the internet era. The same holds true for the various crimes concerning slavery (articles 274-276), as these crimes seem to be also punishable as a form of human trafficking (article 273f). If we review the Third Book of the Penal Code, we can also place question marks next to several offences contained therein.⁴³ Recently, several members of Parliament have called on the Minister of Security and Justice to revoke obsolete offences from the Penal Code. Their motion to do so did not pass, yet the Minister of Security and Justice seemed not unwilling to investigate whether or not some offences are indeed obsolete and as such should be revoked.⁴⁴ Several authors agree that the DPC should not develop into a patchwork of offences.⁴⁵

Groups of offences may also be brought under scrutiny. Sexual offences in Title XIV of the Second Book are one example. This title has seen many changes since its introduction in 1886, notably in 1911, 1991 and 1999. These changes were the result of changing moral attitudes toward sex. In 2016, a report was published in which it was argued that Title XIV should be revised again, particularly because the various

⁴⁰ Smidt and Smidt 1891, pp.4,5.

⁴¹ Smidt and Smidt 1891, pp.2-3.

⁴² See Stamhuis 2006.

⁴³ E.g. article 447 (illegally damaging or removing an official announcement), which seems to be of less value in the internet era. This act can be punishable as damaging (article 350) or removing or damaging computer files (article 350a). Other obsolete articles include, for various reasons, 435 (in particular the liability for carrying foreign orders of chivalry), 408 (damaging on a ship), 414 and 474 (omitting to give aid to a person on a ship). The latter offences are also punishable under other offences (articles 350 and 255-257 respectively).

⁴⁴ *Kamerstukken II* 2012/13, 33 605 VI, 10; *Kamerstukken II* 2013/14, 29 279,173, p.20.

⁴⁵ De Hullu 2015, 562 ff; Van Bemmelen 1934, 241; Simons 1928.

amendments made earlier have led to a text that is almost incomprehensible.⁴⁶ In his reaction to this report, the Minister for Security and Justice announced a bill which should result in an integral revision of Title XIV. The announcement was joined by a statement that the new law should also deal with new types of (digital) sexual offences, like sextortion, revenge porn, sexting and sexchatting.⁴⁷ Another example are crimes which limit the freedom of speech, such as the crimes of blasphemy (abolished in 2014),⁴⁸ racism, and insult (of the King and foreign heads of state). Several politicians and scholars have argued that the present-day law limits the freedom of speech too much. They want to redefine the boundaries of the criminal law, sometimes by abolishing crimes.⁴⁹ Others argue that the freedom of speech should be more limited, and have proposed the criminalization of both denying the holocaust and glorifying terrorist attacks.⁵⁰ The issue shows that no unity exists, making it less easy for the courts to render satisfactory decisions.

IV. FRAMING THE DEBATE

Discussions concerning the DPC greatly vary in nature and depth. The need to keep the DPC up to date by eliminating criminal offences which are (almost) never used or are obsolete has a different meaning than reconsidering the difference between crimes and misdemeanors or between punishments and measures. Redeveloping the Fifth Title of the First Book (*Participation*)⁵¹ could introduce several minor changes in the law, while a redevelopment of the crimes which limit the freedom of speech could lead to major changes. The differences between changes which have been and are going to be made in the near future such as the revision of Title XIV of the Second Book are too substantial to lead to one conclusion. First of all, it would be too easy to say that the fact that the DPC has been amended so many times should automatically lead to the conclusion that the Code should be changed integrally. At the same time, it would also be too easy to say that no further substantial reform of the DPC is necessary within the next decade. It we want to think about the future of the DPC - and why not - it would seem wise to come to some form of general understanding on how revision of the penal code is possible. Dutch scholars have made a distinction between various ways in which a penal code could be subject to revision. Each of these ways start with an analysis of the existing penal code. The analysis leads to a list of subjects which need to be reconsidered. From this follows a description of how these subjects should be addressed. The way in which they should be addressed depends on the nature and content of the subjects which need to be reconsidered and the reasons why a reconsideration of these subjects is deemed necessary. Depending on the outcome of the analysis, there are three possible strategies for the revision of the penal code, each with its own rationale and character, namely: modernization, integral revision, and re-codification.

⁴⁶ Lindenberg and Van Dijk 2016.

⁴⁷ *Kamerstukken II* 2015/16, 29 279, 300; Ten Voorde 2016.

⁴⁸ Act of January 23, 2014, *Staatsblad* 2014, p.39.

⁴⁹ *Kamerstukken II* 2014/15, 34 051, 1-2 (abolition of hate speech); *Kamerstukken II* 2015/16, 34 456, 1-2 (abolition of insulting the King and of foreign heads of state).

⁵⁰ See *Kamerstukken II* 2005/06, 30 579, 1-2; *Kamerstukken II* 2015/16, 34 466, 1-2 respectively.

⁵¹ The sequence of articles of the Fifth Title does not seem to be logical. For example, not article 47 but article 51, par. 1 ("Offences can be committed by natural persons and corporations") is the opening article of this title. See also Knigge 1992, pp.152-154.

A. Modernization

Modernization of the penal code could take inventory of the differences between the text of the law and the interpretation of the law by the courts (especially the highest courts) as a point of departure. For example, the Dutch Supreme Court has decided that the division between the two types of aiding in article 48 (aiding during the crime and aiding before the crime) is of relative importance. The Supreme Court places emphasis on the more general description of aiding in article 49, paragraph 4 (in this article aiding is described as intentionally fostering a crime).⁵² This raises the question as to whether the legislator should decide to abolish article 48 altogether. Focusing on the Second Book, it is clear that due to case law of the Supreme Court, the description of several offences has become more narrow (or more accurate) as compared to the text of the law. This could lead to the question whether, taking the principle of legality into account, it is necessary to revise (parts of) the DPC in a way that brings it in line with legal practice.⁵³ We could call this process the modernization of the penal code. For modernization, no fundamental debate about the offences and general principles of substantive criminal law is necessary. It only means updating existing law and making it coherent in relation to legal practice, particularly the case law of the highest court. Modernization of the law is only possible for those parts of the code where there is full agreement on the changes that were introduced in legal practice.⁵⁴ It also means that only offences concerning which there is consensus that they should be de-penalized can be revoked, for example because they have not been prosecuted for several decades and are not considered a crime any more (because, from present-day standards, they do not constitute a harm or are not considered legally immoral anymore). From this perspective, we can no longer speak of modernization where changes lead to a debate with regards to the justification of offences. Modernization of the code concerns only parts of a code concerning which there is agreement that it would be of practical use.

B. Integral revision

Integral revision departs from the idea that the existing penal code does not give an up to date and adequate picture of the most important general principles of substantive criminal law.⁵⁵ Such may be the case if a code is misleading when it comes to understanding its general principles. In the DPC, the rather vague (or lack of) description of general principles has been of great value. It has made the development of substantive criminal law possible without having to change the code once every few decades. The fact that the Supreme Court has always enjoyed a great deal of credibility (from the perspective of scholars, legal practitioners and the legislator) has helped a stable development of substantive criminal law through the Court's case law. However, the question could arise as to whether it is time to legalize certain developments in order to make the code more up to date. In terms of general principles, it sometimes means making choices, which would lead to the conclusion that it is a process which constitutes more than just modernizing the DPC. Shifting our attention to the Second and Third Books, it was remarked above that the structure of parts of these books is not always entirely clear. Title V of the Second Book is a prime example: one cannot speak of a *collection* of offences which are all concerned with the public order. The

⁵² HR 22 maart 2011, *NJ* 2011, 870 m.nt. T.M. Schalken.

⁵³ Compare Van Bemmelen 1966, pp.274-275.

⁵⁴ Ten Voorde 2015a.

⁵⁵ De Hullu 2015, p.568.

same holds true for Title XIV of the Second Book, where research has shown that the offences in this title give rise to much confusion in legal practice. This is in particular due to the lack of a clear description of many of the offences in Title XIV.

The subjects which are part of an integral revision of the penal code do not deal with issues concerning which there is full agreement that changes in the law are necessary. They deal with issues which are subject of (at least) political, practical and scientific dispute. Of course, part of an integral revision is the modernization of the code, but because (tough) choices have to be made, the term modernization does not suffice. De Hullu and Groenhuijsen (Supreme Court judge and professor of criminal law respectively), have introduced the term integral revision.⁵⁶ Integral revision means a general reconsideration of the DPC, one where the system of the present code is taken as a point of departure. According to Groenhuijsen, an integral revision means the adaptation of a code on the basis of recognizable systematic assumptions, which can be the same as those of the existing penal code, but may also differ (slightly). In terms of the DPC, systematic assumptions refer to the conditions under which a person may be punished, the system of criminal sanctions, and so forth. Integral revision takes into account social, cultural, economic, and technological developments, in addition to developments in legal thinking, international legislation and national and international case law.⁵⁷ It makes the difference between integral revision and modernization more visible. Integral revision is an in depth revision of (large parts of) the penal code, while modernization only attempts to bring a code (or parts of it) up to date.

An integral revision should not necessarily lead to a new penal code, but should lead to various major changes, while retaining those elements in the existing code which do not require alteration. It is important to note that integral revision of a code could mean updating the foundations of the penal code concerned. An integral revision however may not result in a complete alteration of such foundations, as that would mean the creation of a new penal code. Updating the foundations of the penal code is, however, not the primary objective of an integral revision of a penal code. Questions on the distinction between penalties and measures or crimes and misdemeanors, as well as such questions as to whether or not *dolus eventualis* is an acceptable form of intent, need not be dealt with. The revision of the code takes place within the existing parameters.

C. Re-codification

If one starts questioning these parameters (the legal and even philosophical foundations of the existing penal code), integral revision will no longer suffice. Consequently, re-codification seems to be the only option. Re-codification takes as its starting point that the foundations of the existing penal code are no longer clear, up to date or even acceptable and should be rewritten (i.e. rephrasing the text without the purpose of changing its content) or even revised (i.e. rephrasing and intentionally changing the content of the text). Questions concerning the distinction between penalties and measures not only touch upon the distinction as such, but also on the premises on which such division is based, namely the principle of guilt. Questioning the distinction between crimes and misdemeanors touches upon the principle of criminal law as *ultimum remedium*. Several other issues also target the foundations of

⁵⁶ De Hullu 2015, 563; De Hullu 2007, pp.157-159, 162-164; Groenhuijsen 1992, pp.35-36.

⁵⁷ Compare Van Bemmelen 1966, pp.274-175; De Hullu 2015, p.563.

the penal code, such as questions of strict liability and the introduction of minimum sentences.⁵⁸ Subjects which affect the core of the existing penal code, i.e. the political philosophical and legal philosophical foundations of the present-day criminal law, should not be discussed without taking these foundations into account. Where a legislator wants to change the foundations of the penal law (or, in the process of modernizing or integrally changing a code, reaches the point where its foundations need to be discussed), and the penal code in particular, it no longer opts for an integral revision of the penal code, but for a re-codification, that is, for an entirely new penal code.

Modernization, integral revision and re-codification are ways in which a penal code can be revised. It is clear that re-codification leads to the most far reaching revision of a code, namely the introduction of a new penal code. Modernization is the least radical way in which a penal code can be revised. Generally, re-codification and integral revision will also lead to a modernized penal code. However, modernization of the penal code is not the prime reason for re-codification and integral revision. The principal reason for re-codification is re-formulation of the principles on which the penal code should be based and the creation of a new code on such basis. Integral revision has as its principle objective re-ordering the penal code on the basis of existing foundations. Each of the manners in which the penal code can be revised has its own rules. A legislator should be aware of this. Modernization of the penal code while in fact (unconsciously) actually also changing its foundations may prove to be a rather difficult task, as any democratically elected legislator should be frank and open as to what it plans to do with what is still one of the most difficult parts of the law.

V. CONCLUSION

The Dutch constitution demands that a penal code be created (article 107). It does not mean that the legislator has the obligation to re-codify a penal code from time to time. The creation of a penal code is a very difficult task, not only when it comes to the introduction of new offences,⁵⁹ but also where a system of criminal sanctions and a description of general principles have to be developed. Further challenging tasks would lie in establishing a (good) relationship between the general principles on the one hand and the offences on the other and deciding what sanctions should apply to (which) offences (whether all sanctions should apply to all offences, whether combinations of sanctions should be possible, and so forth). All of such tasks demonstrate how complex the revision of a Penal Code may be, involving difficulties which can only be overcome if it is clear from the start what the objectives of the revision are, namely: modernization, integral revision or re-codification.

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⁵⁸ *Kamerstukken II 2011/12*, 33 234, 2; *Kamerstukken II 2008/09*, 31 938, p.2.

⁵⁹ The most difficult question concerning the criminalization of acts is not how a crime should be described (legislators have so much experience in describing crimes that they are called "offence factories" (Husak 2008, p.34), but which acts are so serious that they should be criminalized (and on what grounds). Whatever the objectives of the revision of a code, the principles of criminalization remain the same.

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