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Strafrecht en publieke opinie: een onderzoek naar de relatie tussen de strafrechtspleging en het publiek, met bijzondere aandacht voor het Openbaar Ministerie
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Summary

Criminal justice and public opinion

An inquiry into the relationship between the criminal justice system and the public, with special concern for the Public Prosecution Service

This research is about the connection between public opinion and criminal justice. This connection is often described in terms of a strained relation. In an attempt to cool this down, multiple initiatives are deployed to accommodate public opinion within the criminal justice system. In the scientific literature, proposals for other, sometimes far-reaching reforms are made. However, within this literature there appears to be no common understanding about what we mean when using the term 'public opinion'. As a consequence, there is no consensus about what the public actually thinks of the criminal justice, as well as which reforms would please the public. This has led to diverging ideas about how criminal justice actors should relate to the public. Accordingly, the initiatives and proposals for accommodating public opinion within criminal justice, has met widely varying receptions.

The objective of this research was to find answers for the abovementioned questions. To this end, in the *first chapter* the following research questions were formulated: (i) How should public opinion be conceptualized within a criminal justice context? (ii) What are, relying on existing research, the relevant features of public opinion regarding criminal justice matters? (iii) How should the advisability of public opinion targeted acting within or in relation to the criminal justice system be judged? (iv) How should the way in which the Dutch Public Prosecution Service engages in a dialogue with public opinion be judged?

These research questions are answered using different research methods. The *first* research question was answered in two steps. Because an adequate conceptualization of 'public opinion' will always have to be tailored to a specific topic (put differently: universal conceptualizations of public opinion cannot exist), first, the relevant context had to be determined. This has been done by providing an in-depth problem analysis for this research. Conceptual literature on public opinion was then analyzed and viewed in the light of this problem analysis. This resulted in the conceptualization of public opinion used in this study. The *second* research question was answered by means of a narrative literature review. Hereto, existing empirical research into public opinion has been inventoried and analyzed. The conceptualization of public opinion formulated in response to the first research question served as the theoretical groundwork for this analysis. The *third* research question was answered using different methods. As the advisability of public opinion targeted acting cannot be assessed while abstracting from either normative or empirical viewpoints, and since the concept of legitimacy is preeminently suitable for connecting these two viewpoints, at first theoretic-

cal work regarding the notion of legitimacy was analyzed. The findings of this endeavor were confronted with empirical research concerning public opinion. This culminated into an initial framework for judging public opinion targeted acting. Hereafter, two case studies were done at the Public Prosecution Service (PPS). These case studies were done for two reasons. On the one hand, they served to map a part of the public opinion targeted practice. As such, they were of importance for the fourth research question (see more below). On the other hand, they were used to test the initial framework (and as such the case studies were used to finalize the answer to the third research question). This led to some amendments in this initial framework. For answering the *fourth* research question, the findings of the two case studies were of prime importance. Both case studies were conducted at the PPS, as this institution is preeminently required to balance the interests of society with normative considerations. Furthermore, this institution announced in the 00s that it intended to change its orientation towards the public. This was substantiated by announcing two policy shifts: First, the PPS announced it planned to provide more information to the public about pending criminal investigations. Second, the PPS announced it would engage in citizen consultation on sentencing policy. Both policy shifts were objects of a case study in this research. In this fashion, the 'dialogue' between public opinion and the PPS was operationalized.

This book is structured as follows. The *second* chapter, provides an in-depth problem analysis, and as such a context to which a conceptualization of public opinion is tailored. In the *third* chapter, this conceptualization is established (and thus the first research question answered). Here, other essentially contested concepts that are used throughout this book, are conceptualized as well. In the *fourth* and *fifth* chapter, the findings of the narrative literature review are presented. In this way, the second research question is answered. In chapter *six*, different perspectives on legitimacy are discussed. This then leads to an initial framework, that is presented in chapter *seven*. In chapter *eight* and *nine*, the findings of the two case studies are presented. In chapter *ten*, these findings are first put to the test of the initial framework. Subsequently, it is examined if and how this framework should be refined on the basis of the two case studies. In chapter *eleven*, conclusions are drawn. Here, the problem analysis of this research is discussed in the light of the research findings and some recommendations are put forward to improve the dialogue between public opinion and criminal justice.

In the *second* chapter, the problem analysis of this research has been explored in depth and thus the context to which the conceptualization of public opinion has to relate has been determined. For this purpose, seven perspectives on the subject of this research have been discussed. The first two perspectives highlight how the relationship between criminal law and public opinion was and is thought about in the Dutch and international literature respectively. In the Dutch criminal law literature public opinion is traditionally seen as something that – for example through interest groups – influences criminal (procedural) law and in addition influences the (man-

ner of) proceedings, in which connection a link is typically made with public access to justice. In recent decades, public opinion – partly due to the advent of polling – is more often understood in quantitative terms; and it has become common to speak of a ‘gap’ between what the public would like and what the criminal justice system can (be able to) deliver. Partly against this background, much thought is taking place about how the criminal justice system should relate to the public (more transparency, simpler language, etc.) or even make room for lay decision-making (by introducing lay panels or even jury trials). Similar problem analyses and schools of thought can be found in the international literature. However, the literature offers no unanimity on what exactly should be left to the public, on what exactly we mean by the term ‘public opinion’ and what exactly it is that the public thinks.

What *can* be found in the various proposals for a stronger orientation towards the public, are concerns about the current relationship between public opinion and criminal law. These concerns are grouped in chapter two into three subsequent perspectives on the subject matter of this study. These are the heating up of public discourse, the changing of how (public) institutions can establish and perpetuate authority, and the subversive influence of criminal justice politics on criminal justice. For each of these perspectives, however, where the problem is often more or less clear, it is less evident whether – and in what way – a different public orientation of actors in the criminal justice system could provide an adequate remedy for it. The last two perspectives on the subject matter of this study further problematized aspirations to reconnect public opinion and criminal justice. First, by arguing that proposals for more citizen and less professional are not infrequently based on a one-sided view of the concept of ‘democracy’: as if it were an ideal aimed only at development and not also at protection. Then by problematizing how the classical role conceptions of actors in criminal justice relate to (proposals for) a new public orientation.

In the *third chapter*, first of all, a conceptualization of public opinion was established. For this purpose, conceptual literature on this concept was related to the problem definition established in Chapter 2 (for a synthesis, see Figure 2.1). This first led to a definition of opinion, as a not necessarily disclosed, non-universal opinion on a subject that by its nature lends itself to subjective judgment. The focus in this chapter, however, was on how to determine when an opinion becomes ‘public’. In this respect – in view of the conceptual literature – two perspectives appeared possible, namely a first in which the number of people with a more or less similar opinion is central and a second in which one speaks of a public opinion if that opinion develops a certain force in the social discourse. Because both meanings are important for the problem analysis of this research, they have been conceptualized as two dimensions of public opinion. For the dimension of numbers (N), the researcher must sum the opinions within a given society. To determine the force (F) of a public opinion, one must look, on the one hand, at the reactions a public opinion elicits from actors relevant to criminal justice and, on the other hand, at its prominence within the social discourse. The latter can be

evident, for example, from the extent to which a public opinion suppresses dissenting opinions. Finally, a third dimension has been added, that of durability (*D*). With this, relative fresh opinions can be distinguished from more enduring ones. All this resulted in a three-dimensional conceptualization of public opinion. Consequently, public opinion can be thought of as a concept comprised of eight octants (figure 3.2). The question in which of these octants a public opinion can be situated depends on three mechanisms: the degree to which social groups that wish to bring a certain opinion into the limelight are equipped to do so, the willingness of broader segments of the public to become involved, and the dynamics of the public arena.

In the remainder of the third chapter, definitions of the concepts of 'punitive populism', 'legitimacy' ('rightfulness of power'), 'trust' and a number of related concepts were determined. 'Trust' is defined as the acceptance of dependence in uncertainty. From this conceptualization it is derived that for trust it is always important how much knowledge someone lacks about a certain situation or factual complex. After all, this 'uncertainty gap' determines how much uncertainty someone has to accept. In addition, it is important how strong someone's willingness is to take that uncertainty for granted: the 'leap of faith'. From this conceptualization of trust, it is deduced that there are also other ways of coping with uncertainty. 'Constructive distrust' is one of them. Exercising constructive distrust increases the amount of knowledge about a particular subject (and this therefore reduces the size of the uncertainty gap), which in turn reduces the distance someone must be able to bridge to accept a particular situation. Constructive distrust can thus be another means to the same end: accepting dependency. From these distinctions, an ideal-type distinction can also be derived for how (criminal) authorities can relate to the public. They can promote acceptance, for example by using decorum or otherwise to persuade the public to accept (wide) uncertainty. In addition, they can facilitate constructive mistrust, for example, by practicing transparency.

The *fourth chapter* inventoried and analyzed research into the dimension of numbers of public opinion. The existing research was first grouped into five domains of research: (i) Survey research on perceived performance. This is research in which respondents are asked, for example, whether the judiciary can be trusted or whether people think that punishment is generally too harsh or too lenient. (ii) Survey research on what people think is important in criminal justice. In this research people are asked, for example, what they believe are important qualities for a judge or what they think are important characteristics for a good criminal justice system. (iii) Survey research on background characteristics. This section contained research on group characteristics of people who complete surveys in the same way, on knowledge levels about crime and punishment, and on the influence of the media on those knowledge levels. (iv) Research that has used methods other than the traditional survey. Among these are ordinal proportionality research and more deliberative methods. (iv) Research using open-ended questions. This includes, for example, research in which respondents are asked what they

think are manifest 'problems', and the answers given are then coded afterwards.

For determining the content of the dimension of numbers of public opinion, it is concluded that only survey research offers a proper method, although results of this type of research should be interpreted with restraint. Other methods discussed in this chapter can be used to assess the elasticity of public opinion, or to institutionalize public input in criminal justice, but are inadequate to assess public opinion as it *is*. Based on a substantive analysis of the survey research, it was then determined that public opinion relevant to criminal justice has limited depth and consists mainly of three non-concrete opinions: Firstly, the Dutch public does trust criminal justice professionals. Secondly, the public is dissatisfied with the general punitive performance of criminal justice. Sentences are widely perceived to be too lenient and large majority segments of the public endorse a wide range of punitive propositions. Thirdly, the public supports rehabilitation of most offenders. Next to these three majority opinions, there is a significant minority, of around thirty percent of the Dutch population, that does not bestow trust on criminal justice actors, and is dissatisfied with perceived levels of sentencing. This group is characterized, among other things, by general uneasiness. Apart from the abovementioned lasting and stable public opinions, it is likely that frequently more specific, but less durable public opinions come and go. These opinions can hardly be grasped reliably by survey research. It does, however, seem probable that the three durable and non-concrete opinions will then serve as a generative basis: opinions which find resonance within them, are more likely to proliferate among members of the public.

The *fifth chapter* discussed research on the dimension of force of public opinion. As there is no existing body of research into this dimension yet, the literature review presented in this chapter has a more circumstantial approach. First, the force of survey research has been analyzed. Then, other research has been discussed, which, while not named 'research on public opinion', is informative for this purpose. With regard to the first – the power of surveys themselves – it has been concluded that survey research develops a force in many ways. It is prominent in social discourse, partly because media make extensive use of surveys in their reporting. Moreover, people who take note of it are more likely to support the majority view: thus, survey research suppresses other opinions. Next to this, survey research affects criminal justice politics, as politicians tend to belief that the results of these surveys are a valid representation for electorally viable stances. Other research that proved useful for exploring the dimension of force of public opinion was research that was either labelled as 'punitive scandal' research or 'moral panic' research. Taken together, studies in these fields demonstrate that public opinions resulting from criminal or penal incidents can easily surge in intensity and consequently lack subtlety. Based on this, some overarching conclusions have been drawn regarding the interaction between the dimension of numbers and that of force of public opinion. What is clear is

that the 'generative bases' identified in chapter 4 are also important for the question of which opinions can develop force. Because the bases sometimes point in different directions – for example, a proposal for minimum sentences can appeal to the punitiveness opinion but clash with the opinion that judges can be trusted – processes such as framing and claim making play a major role in the establishment of concrete, powerful and widely supported opinions. Depending on what is emphasized in a concrete frame, an opinion has the potential to develop more force and proliferate among the public.

The *sixth chapter* began to answer the third research question by examining and analyzing different perspectives on legitimacy. First, an overview of the social science and criminal justice approaches to legitimacy was provided. The essence of the difference between the two is that the social sciences typically look to society for the answer to the question of how legitimacy should be determined – and this typically leads to the question what people perceive as legitimate – while the criminal law scholars seek the answer to this question primarily in the law. As a result, the social science concept of legitimacy mainly overlaps with notions of acceptance (to what extent is a given power relationship currently accepted by subordinates?) and with deeper social values (does the power relationship aligns with the socially, culturally and historically determined values of a legal community?), while criminal law thinking overlaps with notions of legality and – above all – justice. After this general overview, four dividing lines in thinking about legitimacy were examined: (i) the dividing line between 'empirical' and 'normative' legitimacy; (ii) that between legitimacy as a measure of the quality of a power relationship or as a key to obedience; (iii) that between the object and subject approach to legitimacy; and (iv) the dividing line between substantive and procedural approaches to legitimacy. For each of these divisions, it was examined to what extent they actually split the concept of legitimacy (which would then leave two or more distinguishable concepts), or whether they do merely reflect perspectives on one underlying concept. The conclusion for each of these divisions was that they do not cut across the concept of legitimacy entirely, that therefore one underlying concept remains intact and that an integrated approach to legitimacy must therefore always pay attention to all of these perspectives. These perspectives therefore recur in the framework established in chapter 7.

The *seventh chapter* contains the initial framework for judging the advisability of public opinion targeted acting in criminal justice (initial, because the framework will be refined after application on two case studies, in chapter 10). The framework is comprised of five levels. (i) The *first level* requires a normative test. For this, the values of a given society need to be mapped. In principle, this can be done by means of classical legal scholarship. Restraint needs to be exercised: For this test, only values that cannot be subject to reasonable disagreement matter. (ii) Then, it should be first determined whether consequentialist motives play a role in the public opinion targeted acting. If so, the likelihood of the desired effects should be assessed. (iii) Subsequently, the likelihood of unintended side effects is the matter of inquiry. Particular

attention should be devoted to diverging effects on the multiple audiences that criminal justice serves. (iv) Thereafter, the question is whether the acting at hand is primarily aimed to foster trust, or – on the contrary – to facilitate constructive distrust. The latter is normally preferable. (v) Finally, dynamic effects have to be analyzed. Here, the metaphor of a ‘dialogue’ is of use. Relevant questions are whether or not the public opinion targeted acting contributes to a fair and clear dialogue, and whether or not it is aimed at curbing emotional escalation. After this last step, the balance can be drawn up. Here it is important that going through the various steps in the assessment framework leads to disparate information. This applies both to the nature of the information (it can be normative or empirical), the weight (of the facts or norms at issue) and the definiteness (clear or surrounded by uncertainties). Given the resulting problem of incommensurability, it cannot be said in advance how this disparate information should ultimately be weighed against each other. This requires subjective (because non-argumentative) weighing, which may vary from case to case.

The *eighth chapter* presents the findings of the first case study. For this case study, several research techniques were combined: participant observation, qualitative document analysis, interviews and focus groups. On this basis, a thick description of the information practice of the Dutch PPS was provided. For example, the functions of the various internal actors and external actors were discussed and a typology of the journalists with whom the OM has to deal was given. It also described, using a chronological perspective on information, at which stages of a criminal investigation media coverage can arise, in what way this happens, and how the prosecution typically responds. The main conclusion here is that there is no uniformity: when and what information is shared with the public differs from case to case. Next, on the basis of an analysis of the content, it was determined what reasons the Public Prosecution Service had for seeking or avoiding publicity. Here too, the picture varied from case to case, although a number of repeating motives were identified that always played a role in whether or not media attention was sought.

The thick description of the information practice allowed to highlight seven characteristics. (i) To begin with, media attention is, even for trained professionals, very hard to anticipate. This finding – although not surprising in itself – turned out to be of great importance for understanding the choices made by the PPS in the information process. (iii) Partly to prevent the PPS from being caught off guard by news coverage, press officers maintain a relationship of mutual trust with journalists. This enables them to see news coverage coming. Several *quid pro quo* dynamics help sustaining these relationships. As a result, the press officers can often intervene in impending news coverage, especially when this is considered to be at odds with the interests of victims, pending investigations, or considered to be overtly biased. (iii) A third feature is the highly unregulated character of information services. Prosecutors and press officials are, to a large extent, free to decide for their selves in which cases, when how and if they share information

with the public. (iv) A next characteristic is related to the previous two and implies that the OM has internalized the journalistic logic to a certain extent. Press officials respect the interest of journalists, and are generally prepared to adjust their own activities accordingly (e.g. by temporarily suspending a press release). (v) The fifth feature is a prevailing interest in the reputation of the Public Prosecution Service. This colors the activities of the press officials: They use several techniques to be sure that their institution looks well in the eyes of the public. (vi) A next characteristic is the complicated relationship between OM information and the (information departments of) local authorities and the police, actors with their own logic and agenda. (vii) A final feature has been referred to as the 'limited limitations resulting from the viewpoint of personal data'. This viewpoint offers a relatively narrow criterion. Broader perspectives, among which are a more holistic conception of privacy and the presumption of innocence, would lead to a more stringent approach.

In the *ninth chapter*, attention shifted to the results of the second case study, which focused on the dialogue on sentencing. The findings of this case study rely mainly on document analysis, observations and interviews. It was concluded, first, that there was never a clear idea or purpose behind the citizen consultations of the PPS. Rather, it was a coincidental convergence of various circumstances. One of these circumstances was that within the PPS, there was the feeling that they had lost contact with 'the citizen'. Another conclusion is that the citizen consultations can be typified as ongoing improvisation. Pilot studies were carried out before the start, which also resulted in concrete recommendations, but these recommendations ultimately played no role once the PPS started the consultations. The outcome of the citizens' forums varied widely: there was a great deal of variety in the number of citizens participating, the way the evening was organized and the method of consultation (see Table 9.5 for an overview). The actual influence of citizens' consultations on the sentencing policy guidelines of the PPS can be considered very small. Systematic influence can be excluded in any case. It is possible, however, that the PPS sometimes gained inspiration by listening to what citizens had to say, which could then theoretically lead to non-systematic influence. From an analysis of claims made by the OM itself and from what was said in the interviews, however, it was concluded that even such a non-systematic form of influence could only have been rather limited. It has also been concluded that enthusiasm within the Public Prosecution Service for citizen consultations seems to have waned. The most likely explanation for this is that it was gradually discovered that 'the citizen' is not as different as was initially feared.

The *tenth chapter* tested the findings of both case studies against the framework developed in chapter 7 and – conversely – examined what this framework could learn from the case studies. The *information service* departments did, at a general level, pass the test. However, there are some features of this practice that were harder to justify. This applies, among other things, to the amusing tone that can be found in some of the information, certain

activities of the PPS on social media, that are inspired by advertising logic, and the sometimes very strong dependence of regionally operating journalists on the PPS. Also objectionable is the often not anonymized digital way of providing information to the press – something that is also done by the courts. The assessment of the sentencing dialogue culminated in a negative judgement. Because the introduction of these consultations must be seen as a deterioration from a normative point of view, no consequentialist gains are plausible, only low levels of constructive distrust are facilitated and lots of undesirable dynamic effects are likely to occur, it seems best to put a hold to the citizen consultations (at least as long as they are organized as they are now and were in the past). In the final section of this chapter, the reconsideration of the test led to some amendments. Most important is that it seemed advisable to already assess the ‘multiple audiences’ of criminal justice at the second level and to bring in the standpoint of other criminal justice actors in assessing the fifth step.

The *eleventh chapter* contains the conclusion of this study. First, the answers to the research questions are summarized. Next, the findings of this study are placed in a broader context by reflecting on the problem analysis. This reflection first calls attention to the fact that public opinion targeted acting, that is initially intended to cool down the social discourse, can easily backfire if this is done with a desire to charm the public in mind. It was then argued that it can be deduced from this research that a political or corporate logic of authority does not fit well within the criminal justice system. For this reason, actors in the criminal justice system should work on their own logic of authority, which includes a sharper distinction between actions that consist of promoting transparency – which should be recommended – and actions that are primarily focused on reputation – which should be rejected. The conclusion then addressed the influence of criminal justice polics. This influence is particularly problematic because politicians tend to oversimplify the questions at stake in criminal law towards the public, while on the other hand, in response to public dissatisfaction, they often further complicate criminal (procedural) law with ongoing new legal amendments. This state of affairs ultimately undermines a fruitful dialogue between the public, criminal justice policy and criminal justice. Next, attention is focused on the blurring of boundaries between the political and legal sphere. Finally, it has been argued that the findings of this research support the idea of criminal justice professionals that lead – instead of are being led by – public opinion. While public opinion targeted acting in criminal justice often seems to be motivated by a lack of self-confidence – perceived public dissatisfaction with one’s own functioning is then internalized – this research actually provides arguments to believe in a more opinion-making role conception for actors in criminal justice. Actors in the criminal justice system should dare and want to guide public opinion. In the final section of chapter 11, some recommendations were made.

