Pecuniary Penalties: A Novel Dutch Approach and Its Implications

Introduction

It is axiomatic to consider law as representing a flexible instrument of social order. This applies *a fortiori* to criminal law; yet the legal conditions governing the right to individual liberty, on which concept Western society is founded, have to be constantly reassessed against a changing social framework. In the light of this premise, the main purpose of the present article is to describe and examine certain official proposals recently advanced in the Netherlands, which have as their object to modify the current system of imposing fines as pecuniary penalties.

To a greater extent than applies under systems that derive from common law, the Dutch sense of justice is based upon the Continental tradition that the function of the judiciary is mainly to expound rules or principles läid down by the legislature. This tendency is reflected in a volume of case-law far less than that which occurs in the administration of systems where the common law is still a dominant feature and in which the machinery of legal precedent, combined with the broad powers of the courts to interpret legal provisions, has led to the concept of "judge-made law".[1]

The course by which penal law has evolved in the Netherlands strikingly demonstrates the remarkable growth of confidence placed by the legislature in the *arbitrium judicis* and also in the administration charged with executing the sanctions imposed by the courts. This trend first became evident in 1886, at the time when the Code Pénal was superseded by the new Wetboek van Strafrecht (Code of General Penal Law) which, unlike its precursor, no longer recognised special penal minima. Abrogation of the special minima gave rise to a need for the judge to apply his discretionary power within the maxima and minima laid down in the Code. So far as minima are concerned, Dutch law draws no distinction based on the nature of the offence involved. Thus in relation to custodial penalties, with one exception, the judge is bound only by the statutory minimum of one day and the maximum provided for the specific offence; and this holds good even for cases of murder, and other forms of homicide.

The Dutch Code of General Penal Law, which contains no fixed penalties, is characterised by the extremely wide powers of free discretion which it has placed at the disposal of the judiciary. Yet in the eighties of the last century the offence was adjudged by its external features rather than by considering the idiosyncrasies of the offender, who was primarily regarded more as an object than as a subject of law.

Since that time, however,—influenced by the behavioural sciences—liberalisation has proceeded apace, with the consequence that the offender is considered no longer to be a person who pre-eminently merits punishment, but rather as a person to whom must be offered a possibility of social readaptation—aided, in many cases, by the services afforded by the various rehabilitation societies. Prominent landmarks in this respect are represented by the introduction of the conditional, or suspended sentence (which is not confined to custodial penalties and can include fines); widened possibilities for the granting of conditional

1. Schmidt, *Die Strafzumessung in rechtsvergleichender Darstellung*, (Berlin, 1961), p. 70.

release and of forfeiture; a broadened scope for fining, with a view to restraint of short-term custodial sentences; and—more recently still—proposals for introducing a modified system of property penalties.

If the tendency to repel custodial punishment is to be further encouraged, it means that the fine will play an even more effective part in the future than has been the case hitherto. This viewpoint is justified on the one hand by the fact that Dutch experience over the past half century has proved custodial punishment to be by no means indispensable as a mode of sanctioning even the graver offences; and, on the other, by the ever-growing intricacy of the many strands that go to make up the fabric of modern society. As instances there may be mentioned the economic situation, the constantly-expanding road traffic problem and the rapidly-rising cost of schemes for social welfare. Such evolutionary developments bring into clearer focus the merits of the pecuniary sanction as a corrective for offences, not only by reason of the circumstances in which they are perpetrated, but also because they are often committed within a body corporate.

The factors that have occasioned growth in the use of the fine as a penalty in the Netherlands can be divided into two categories: first, the possibilities for imposing fines have increased substantially since the last century, resulting from the marked rise in general prosperity and from changes in the nature of crime. During the previous century, large areas of the population lived at minimum subsistence level, and moreover, the forms of conduct combated under criminal law were mainly concentrated among these groups. Since then, criminality has become a more generalised phenomenon, as exemplified by driving under the influence of drink and the multiplicity of socio-economic offences. Thus criminal behaviour can be less readily localised within specific sections of the community.

Secondly, there has arisen greater public awareness of the disadvantages associated with custodial penalties,—an attitude which gained impetus during the years 1940–1945, owing to the large numbers of detainees who were incarcerated on grounds other than those provided in the Code of General Penal Law.

A Committee was ultimately set up under the chairmanship of Dr. W.C. van Binsbergen, then Professor of Criminal Law in the State University of Utrecht, by a Decree of the Netherlands' Minister of Justice in 1966. Within its terms of reference, this body was charged with the tasks of investigating whether the current system of legal rules relative to sanctions affecting property requires revision, and advising thereon. The Committee's interim report, published towards the end of 1969, deals almost exclusively with fines[2]; and to this we now turn.

Points of departure adopted by the van Binsbergen Committee

Property sanctions—in particular, the fine—should be tested in accordance with a dual standard: (1) whether they are appropriate; (2) whether the 'justice' of these sanctions can be aligned with the conceptions held in regard to the relationships between the individual and community which prevail in contemporary Dutch society.

The question of appropriateness or suitability resolves itself into two parts: within the framework of criminal justice as administered in the Netherlands, are fines fitted to achieve the aims envisaged, even in the most trivial cases?

2. *'Vermogensstraffen' ('Property Penalties'): Interim report of the Committee instituted by decree of the Dutch Minister of Justice dated* 9 May 1966, Staatsuitgeverij/'s-Gravenhage (1969).

Do fines serve to minimise the sacrifice and effort to be expended in attaining such aims? In the Committee's view, the objectives of penal administration that are relevant in this sphere may be summarised as follows:

i) so to influence human conduct that it conforms to the rule of law, a distinction being drawn between influencing the behaviour of the offender and that of others;
ii) to allay or lessen unrest or discord which may have arisen within the community as a result of an offence; in other words, conciliation or the resolution of conflict.

The van Binsbergen Committee emphatically rejects the view that considerations of 'justice', which, in the immediate context, it defines as the neutralisation of any criminal offence by means of an afflictive complement, should be the sole aim of a penal sanction. Though the Committee does not employ the term 'retribution' directly, it would appear to ally this very closely to the meaning assigned to 'justice'—an aspect which we should regard as inviting criticism, when one considers the scope ascribed to modern theories of punishment.[3]

Influence of the sanction upon the offender

Optimistically assuming a consensus of opinion with respect to the aims of punishment, the appropriateness of various types of penal sanctions becomes predominantly a factual matter. Though insight into the effects of various sanctions is still far from complete, the van Binsbergen Committee seeks to justify the pecuniary penalty by citing a report presented at Strasbourg in 1964 by the sociologist, Roger Hood.[4] So far as pecuniary penalties are concerned, the following conclusions are especially significant:

(a) Pecuniary sanctions appear to be broadly more effective—in the specifically deterrent sense—than are custodial penalties, both with regard to first offenders and recidivists.
(b) Otherwise, the results as between the various sanctions are not markedly disparate.

Research investigations carried out since 1964 confirm, to a large extent, the trend indicated by Hood. Statistically, recent Swedish and American studies tend to show that extra-mural forms of disposal, notably pecuniary sanctions, are more effectively deterrent than are custodial punishments. Indeed, the Home Office, in the second edition of its handbook, *The Sentence of the Court* has not deviated from the view, officially expressed in 1964, that: "Fines, particularly the heavier ones, appear to be among the most 'successful' penalties for almost all types of offender".[5] Again, it has been well stated by Veringa, commenting upon custodial punishment, that: "in the contemporary situation, it is beyond doubt that the negative side-effects still frequently dominate—often to a significant degree—the positive features which can be discerned in this kind of penalty."[6]

The Committee takes its stand upon the following principles:

(1) A sanction (i.e. normally a penalty and/or measure) is permissible only in so far as it is consonant with one or other of the penal aims considered above to be acceptable and whose detrimental side-effects do not exceed the advantages.

3. The literature on this subject is vast. See in particular: Walker, *Sentencing in a Rational Society* (1969), especially Chapter 1; Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (1968); Honderich, *Punishment: The Supposed Justifications* (1969); Moberly, *The Ethics of Punishment* (1968).
4. Hood, *Collected Studies in Criminological Research* (1967) Vol. 1.
5. *The Sentence of the Court* (2nd ed. 1969), p. 73.
6. Veringa, *Het gevangeniswezen in de branding* (Nijmegen – Utrecht, 1964).

(2) The sanction imposed by the court should not be so severe that its effects are experienced by a representative cross-section of those whom it affects (including the offender), as being disproportionate to the offence as it happened *in concreto*, or to the risk that conceivably could arise therefrom.

(3) The sanction should not be more severe than may be necessary to satisfy the penal objectives adopted by the Committee as its starting-point; in short, the optimal sanction should correspond to the minimal.

These premises appear to reflect both contemporary criminological thought[7] and also the standards admissible in a modern civilised society.

Economy of the sanction

A subsidiary, though nonetheless important aspect underlying the philosophy adopted by the van Binsbergen Committee relative to pecuniary sanctions concerns minimisation of the sacrifices and efforts involved in achieving the desired objective. From the standpoint of the offender and his family it is proper to demand no greater sacrifice, to impose upon them no heavier burden than is necessary for attaining the ends of criminal justice. *Ceteris paribus,* this implies that the most lenient, though at the same time effective sanction must be selected for the individual offender. Yet where the economy of the sanction is concerned, not only the citizen in the role of delinquent, but also the law-abiding citizen has his rights. Available financial resources are limited: so far as they are utilised in executing sanctions, such means cannot be directed to other, possibly more deserving social purposes. A powerful argument for restricting custodial punishment as much as possible is adduced by the Committee in drawing attention to the approximate costs now involved in its execution in the Netherlands. Besides personal and material costs (estimated at about f. 50 per day, inclusive of buildings), there must also be taken into account possible social disbursements (which could increase the maintenance costs to f. 70 per day.) According to these estimates, it may be assumed that incarceration for one month will cost an average of f.1800. It is considered, moreover, that through loss of productive days, both during detention and in the course of the unemployment that probably ensues—taken together with unemployment benefits—this amount is but a fraction of the total cost to the community.

The fine (geldboete) ranks as the third principal penalty in the Netherlands (art. 9 Sr.),[8] the others being imprisonment (gevangenisstraf) and detention (hechtenis). Frequently a choice of principal penalty is available to the court as between imprisonment and fine, while in the law of overtredingen (cf. non-indictable offences), the fine often occurs as sole penalty or as an alternative to detention. The legislature has extended the applicability of fines with a view to repressing short-term imprisonment.

Defects of the current legal rules

The van Binsbergen Committee points out that by contrast with the systematic approach in regard to fines which characterised the legislation of 1881/1886, repeated amendments to the Code, occasioned by increased recognition of a need for individualised penalties, have led to the appearance of lack of principle and of a certain capriciousness in the rules. The most diverse maxima are laid down in the separate legal provisions without its being possible conscientiously to maintain that such variety reflects either the gravity or frequency of offences

7. See, for example, Beutel, *Some Potentialities of Jurisprudence as a New Branch of Social Science* (1957); Walker, *op. cit.*
8. Sr. = het Wetboek van Strafrecht = the Code of General Penal Law.

perpetrated. In practice, the Dutch courts rarely award penal maxima, and apart from those areas of criminal law which relate respectively to fiscal and socio-economic offences the maxima which can be imposed under art. 24 of the Code (f.10,000 or f.20,000, as the case may be) are levied most infrequently. Again, art. 24(3) is difficult to reconcile with the penal philosophy adopted by the Committee since, an offence which attracts more than 6 years' imprisonment cannot be satisfied with a fine as sole principal penalty. The Committee considers this to be a rather arbitrary restriction of judicial discretion attributable to the dogmatic view according to which certain 'misdrijven' (cf. indictable offences), if committed by a normal offender, always occasion a custodial sentence—if need be, only symbolically, e.g. one day's suspended imprisonment. Moreover, the reason for the wide divergencies between the maxima provided in art. 14a Sr. (f.2,000 and f.4,000) and those carried by art. 24 is not clear.

Logically enough, the van Binsbergen Committee argues that it is comprehensible for higher maximum fines to have been laid down in the 'Wet op de economische delicten' (Economic Offences Act) than in the Code of General Penal Law and in most special Acts. However, it is not so obvious why, in the field of socio-economic legislation, a system of allocating penal maxima has been adopted which differs from that followed elsewhere. No *specific* maxima, separately determined for each kind of crime, occur in the Economic Offences Act. Instead, one finds only *generic* maxima, collectively assigned to broad categories. "It is clear", the Committee states, "that where the fine is concerned, it ought to be feasible to introduce such a system into criminal law as a whole. A broad classification would certainly be preferable to a differentiation which has now become indistinct."

Another basis for criticism consists in the fact that, within the current system of Dutch penal sanctions, the fine is placed secondary to custodial punishment. Even the majority of 'overtredingen' carry the possibility of a custodial sentence as a sanction; yet according to modern conceptions the legal rules should be framed quite differently, since for all 'overtredingen' and for many—if not the majority—of 'misdrijven' defined in the law, a custodial sentence ranks as exceptional in court practice.

Main proposals of the van Binsbergen Committee

The perspectives outlined above make it abundantly clear that the Committee expects financial penalties to play an increasingly important part in the future. With regard to fines, the present chaotic state of the rules has provoked an impressively-worded conclusion that it amounts to "patchwork made up from literally hundreds of pieces, over large parts of which other patches have been sewn. It is high time for this to be jettisoned because no reasonable purpose is served by such a situation."[9]

As a first step in rationalising the system of pecuniary penalties, the Committee —inspired mainly by the plan adopted in the Economic Offences Act—proposes that the Code of General Penal Law should contain a new comprehensive provision based upon five categories of fine. For the first category, the maximum amounts to f.200; for the second, f.1000; for the third, f.10,000; for the fourth, f.25,000; and for the fifth, f.100,000.

An important argument in favour of such a five-tier system is that, when the need arises, e.g. owing to inflationary pressures upon the value of currency,

9. Interim report, chapter 7.2, p. 70.

an appropriate adjustment can be made by amending one statutory article only.

It is for the legislature to determine into which category of fines a given offence should fall. So far as no special regulation is postulated, the Committee proposes a general rule worded as follows: "If it is not specified which fine-category is applicable to an offence, then the first or third category shall respectively be deemed to apply, depending upon whether the offence counts as 'overtreding' or as 'misdrijf'."[10]

This general prescription is intended to cover not merely cases where the legislature is silent with regard to the maximum fine to be imposed, but also where a specific amount has been stated without declaring a fine-category applicable to the offence in question.

A transitional provision is proposed in order to accommodate rules laid down before the new law comes into operation: no period has been specified in the relevant draft prescription during which the present maxima can be temporarily enforced, but the Committee envisages an interval of 5 years.

While realising that in practice this possibility will be used infrequently, the van Binsbergen Committee nevertheless proposes to enable the fine to be inflicted as a penalty for *all* offences, including those that carry more than six years' imprisonment. The Committee emphasises that even the gravest crimes *in abstracto* can—*in concreto*—occur in a form for which, in its view, a penalty more severe than a fine would be disproportionate or unnecessary.

The sanction to be imposed must reflect all the circumstances of each individual case. If, for instance (and exceptionally), the court were to deem a fine advisable as the penalty for a specific case of homicide, this need not necessarily be particularly heavy.

Although—with some reservations—the Committee has taken as its basis the current dual division of offences into 'misdrijven' and 'overtredingen', it is assumed that whether an offence belongs to one group or to the other is not vital *per se* in determining the fine-category which should be applicable to that offence. Hence it is quite conceivable that a 'misdrijf' may be classed in the second tier of offences and an 'overtreding' in the third tier. What criteria should determine the appropriate category?

The upper limit assigned to each class is, in the opinion of the Committee, dependent upon the significance to society of the offence in question, in the sense that a fine can never be imposed for an offence which would be exceedingly disproportionate in relation thereto. On the other hand, the maximum should provide sufficient scope to allow for the attainment of the penal objectives adopted by the Committee; namely, to influence the offender's conduct and also that of others, as well as to promote conciliation. Yet another circumstance is decisive in order that a certain offence may fall within the first category, viz:- whether it is a proper case for police disposal. This mode of settlement, which would not be superseded, consists essentially in a fixed-tariff system (see below). Hence in general, category (1) comprises trivial 'overtredingen', e.g. forms of trespass and certain minor road traffic offences.

Next, there arises the need for a grouping under which not only the majority of the remaining 'overtredingen' may be classed, but also a number of 'misdrijven', i.e. those for which a heavier fine would be regarded as disproportionate to the social significance of the offence, or deemed unnecessary from the standpoint either of influencing behaviour or of resolving conflict. As examples

10. *Ibid.*, p. 71.

of this second category there may be cited the 'overtredingen' of failure to concede right of way in traffic and causing a breach of the peace. Among 'misdrijven' for which fines in this same category can be regarded as appropriate are simple cases of maltreatment and offences related to poaching and the like.

The third category is normally and in the main reserved for 'misdrijven'; but—as will be clear from what is said above—it is indicated also for 'overtredingen' if, from the viewpoint of the penal principles accepted by the van Binsbergen Committee, a fine higher than is prescribed in category (2) appears necessary. Yet here, too, the rule applies that such fine must not be disparate in relation to the social consequence of the offence. Examples of 'overtredingen' in this class are furnished by certain infractions of the Safety Act (Veiligheidswet) and the Employment Act (Arbeidswet).

Residual 'misdrijven' are set aside for the fourth category, i.e. those offences which, on the basis of the *points d'appui* previously mentioned—including the proviso that such heavier fine may not be regarded as incompatible with the social import of the offence committed—justify a fine greater than the maximum specified under group (3). Examples are falsification of merchandise; bribery of persons other than officials; adulteration of foodstuffs and other types of fraud.

What of the fifth category? The Committee holds the opinion that for one group of cases the legislature should allow courts an opportunity to impose a fine heavier than that which the offence would attract under the usual regulations. This conversion to a superior category is possible where a body corporate is fined and, owing to the extent of the business it transacts, no adequate penalty could ordinarily be imposed. In view of the increasing part played by such organisations within society, e.g. in food supply; banking and credit facilities; transportation—and the merger of firms in trade and industry—the Committee considered that a provision was advisable to empower the courts, in the instance now mentioned, to impose a fine not exceeding the maximum of the next higher category. Besides the four categories already described, this obviously entailed the necessity of including a fifth within the legal framework proposed. Hence the fifth tier may come into operation when the penalty is imposed upon a body corporate.

Offences perpetrated by officials; plural offences; recidivism

According to the law now in force, the penal maxima—including the fine—placed upon an offence can be raised by one-third in cases where the delict is committed by an official who violates a duty pertaining to his office or who abuses a position of trust. So far as the fine is concerned, the view expressed by the Committee is that no real necessity to exceed the normal maximum would exist in such cases, should a change be made to the proposed division into five broad categories with fairly high maxima.

In concurrence of a plurality of offences which must be regarded as separate incidents, the van Binsbergen Committee sees no adequate reason for limiting the possibility of cumulating penalties to four-thirds of the highest maximum. Hence on that basis the specified maximal fine could be imposed upon an offender for each of the crimes proved to have been committed by him.

As to whether a higher maximum fine should be prescribed in the case of recidivism, the Committee considers that no general rule ought to be provided; and it should be left to the legislature, in so far as such a course may be deemed desirable, to determine when recidivism should have as its consequence augmentation of the penalty threatened (i.e. a higher category). The Committee

has been guided by the consideration that, on the one hand, little occasion arises in practice to apply the current Dutch provisions relating to recidivism, while, on the other, the maxima now proposed for the separate categories of fines offer sufficient discretionary margin—even in the event of recidivism—within which to fix an appropriate sanction.

Maximum fine coupled with a suspended custodial sentence

It is believed by the Committee that the current system may constitute for the judge an undesirable obstacle in arriving at a suitable penalty. If, for example, the maximum fine which a certain 'misdrijf' attracts amounts to f.25,000, and by virtue of the significance of the offence relative to society the Dutch judge would not deem a heavy fine to be adequate in itself and may therefore wish to combine his penal sanction with a suspended custodial sentence, then—under the system now in force—the fine imposed should be rated considerably below the statutory maximum. A reduced fine, however, might well fail to satisfy his opinion that, *in concreto*, a heavy fine is indicated; hence he will be inclined to seek a solution through augmentation of the custodial sanction. Consequently, in cases where a fine is combined with a suspended custodial sentence the Committee proposes to place the fine maxima on the same footing as those that apply when the fine is imposed exclusively as the principal penalty.

Increase of fine minimum

The general minimum of half a guilder, which has remained in the Code since 1886, is regarded by the Committee as being no longer in harmony with modern social conditions. Taking into account the current rate for trivial 'overtredingen', hence the sum payable by pedestrians and pedal cyclists by way of police disposal (f.5), it proposes to introduce the same amount into the law as a general minimum. So far as the penal law for delinquent minors is concerned, a lower amount is postulated, namely half that figure.

Fines by instalments

The van Binsbergen Committee draws attention to the fact that when a fine is paid by instalments there is no objection in principle to the total amount levied being considerably higher than in the case where this penal sanction is satisfied by a single payment. Moreover, by introducing the time-factor, increased opportunities are provided for influencing conduct favourably by means of the fine. No necessity for terms shorter than one month is thought to arise; but a possibility of varying the range of term between one and three months is considered desirable. The Committee, with good reason, urges that this power should be utilised only when the number of instalments is of some magnitude, since otherwise the advantages of the system would not offset its drawbacks, such as greater administrative inconvenience. A minimum of five instalments is advocated, while a maximum period of a 2 years is regarded as advisable for full settlement. In the proposal, the minimum amount per instalment is fixed at 10 guilders.

Motivational requirements proposed in sentencing policy

Where the judge does not believe that a form of penalty less severe than a custodial sentence will suffice, it is now proposed by the Committee that he be expressly obliged to motivate his opinion. By this means, the aim of regarding custodial punishment as the 'ultimum remedium' is brought into greater relief. Additionally, if the fine amounts to more than f.200, a special motivational obligation is required. At the same time it follows that should the court be of the

opinion that it must transfer to a higher category of fines than the one threatened, it must observe the special motivational requirement, since the fine will then exceed the maximum for the lower category. If the judge wishes to motivate in greater detail, then he ought to have all necessary particulars at his disposal and base his decision thereon. Hence there should be a statutory obligation incumbent upon the public prosecutor to ensure that the requisite data for assessing the defendant's means are available to the court in the documentary evidence, whenever there is a likelihood that a fine in excess of f.200 may be imposed.

Commentary

We consider that the proposals recently advanced by the so-called van Binsbergen Committee with respect to amending the current Dutch general law relating to fines reveal a theoretical elegance of concept characterised by thoroughness, perspicacity and systemisation.

Nevertheless, the penal philosophy as expressed by the Committee may appear to some to suggest an oversimplification of the issues involved which is, perhaps, a trifle casuistic. Thus, if we regard the matter in a practical spirit, rather than from the light of idealism, there can be little doubt that the first of the dual aims adopted by the Committee, namely: "so to influence human conduct that it conforms to the rule of law, a distinction being drawn between influencing the behaviour of the offender and that of others" virtually amounts to a tacit admission that specific and general deterrence must be regarded as legitimate aims or purposes of the fine. This is surely incontrovertible.

From the context, it seems clear that although the Committee, in its report, does not allude directly to the term "retribution" (vergelding) and prefers to use the word "justice" (rechtvaardigheid), one is led somewhat oddly but inevitably to assume that the Committee intends to equate the term "justice" with that form of retribution which contains an element of unofficial retaliation, universally discredited today. Inasmuch as the court, when assessing the amount of a fine, must consider the relative seriousness of the offence committed, it follows, however, that the retributive concept of proportion cannot be entirely excluded.

It will be observed that the principles which govern the van Binsbergen proposals for reform of the law relating to pecuniary penalties centre upon what Nigel Walker has styled "economic reductivism".[11] To cite Dr. Walker:

> . . . No society can afford to have a policeman at everyone's elbow. The number of people willing or suitable to be psychiatrists, probation officers or custodial staff, under present or foreseeable conditions of service, is already insufficient for our *present* penal system. Solutions are conceivable, however, where there is a genuine choice between policies neither of which is too expensive to be contemplated.[12]

Such an approach is commendable; yet the problem poses itself: where must the line be drawn and what are the determinative factors?

In attempting to evaluate the van Binsbergen proposals, it may be worth recalling Walker's comments relative to an investigation carried out by Dr. W.H. Hammond of the Home Office Research Unit (1960 and 1966). His samples consisted of the careers of some 4,000 offenders of all ages from the

11. Walker, *op. cit.*, p. 4.
12. *Ibid.*

London Metropolitan Police District and from Scotland. Eliminating female offenders from his samples and allowing for other variables, he found that:
(a) in general, *fines* are followed by fewer reconvictions than other measures;
(b) *heavy fines* are followed by fewer reconvictions than light fines.

Walker is no doubt correct when he says:

> It is possible to interpret these results in two ways. They can be taken at their face-value and used as the basis for a fairly simple sentencing policy on the following lines. If a man's circumstances make it reasonable to fine him, this is the choice most likely to be successful. If a fine is ruled out by his means, discharge him. Reserve prison for those whom you feel you cannot deal with in either of these ways—for example, because the offence itself was of the kind against which people need protection. Use probation only where you have a strong positive reason for doing so—for example, for a house-breaker who cannot pay a fine.[13]

This statement, represents in many though not all respects the situation envisaged in the van Binsbergen proposals set forth above.

However, Dr. Walker continues:[14] "We have only to suppose that the sort of man whom courts think they can correct by means of a fine is in the nature of things more likely to go straight whatever is done to him. This is not at all unlikely. The man who is regarded by sensible courts as worth fining is the man with a steady job, good wages and a fixed address: a better prospect than the intermittently employed man with 'no fixed abode'."

At the very least, it can be said to be anachronistic to settle a term of imprisonment to be served on default at the same time as the fine is fixed, for there no longer exists any clear relationship between the pay that the sentenced person might otherwise ordinarily be expected to have received during the period spent in prison and the amount of the fine imposed.

It is to be observed that the limits of the present contribution do not permit detailed analysis of the principles upon which application of the fine in English sentencing policy is based. Indeed, comprehensive studies have been published on these aspects, notably by David Thomas,[15] and, more recently, by Alec Samuels.[16] No clear philosophy is spelled out in the relationship between fining and imprisonment as applied by the English courts.

The need for greater uniformity of penalty in like cases has led to a movement towards a "tariff" approach to repetitive infractions such as motoring offences—a tendency which is given impetus by the clear injustice of markedly different amounts of fine in similar cases.[17] The Netherlands currently recognises three such rates. The arrangement certainly would save time, expense and pressure upon the courts by facilitating disposal of simple cases. In addition, a transaction of this nature could well be made optional to the subject; if he preferred to be dealt with according to the rules of court procedure, then, that alternative could remain open to him.

The concept of a general minimum fine, which the van Binsbergen Committee proposes to retain, may appear somewhat surprising to common law jurists,—

13. *Op. cit.*, pp. 94–95.
14. *Op. cit.*, p. 95.
15. Thomas, "Sentencing: The Basic Principles, Part II" [1967] Crim. L.R. 503, especially at pp. 520–522.
16. Samuels, "The Fine: The Principles" [1970] Crim. L.R. 201; 268. See also the several valuable additional references documented by that author.
17. Willett, *Criminal on the Road*, (1964), especially at p. 128.

the more so since the undeniable fact is that the increased general minimum suggested for adult delinquents, namely f.5,—must still be deemed derisory when viewed against contemporary standards of affluence. On the other hand, a token penalty of this order may serve to divert the court from taking the maximum as the level for the most serious offence and hence assist in the process of individualising the sentence. Clearly, it cannot be regarded as constituting any realistic fetter upon the judicial discretion.

Social attitudes with regard to crime are apt to differ from one country to another. The proposition advanced by the Committee, that even the gravest offences, considered in the abstract, can arise *in concreto* in a form which merits a penalty of no greater severity than a fine[18] undoubtedly invites controversy. Where crimes such as homicide, blackmail, wounding with intent to do grievous bodily harm and robbery are concerned, we submit that legislature must take into account not only the views of behavioural scientists but also the voice of public opinion, especially in the present climate of feeling. The ordinary citizen has a right to see the moral code respected; and whatever mitigating factors may be present, there exists a deep-seated belief that the moral wickedness of an offence, as well as its actual or potential harmfulness, should be reflected in an appropriate sentence. For this reason, then, it seems unlikely that any legislative proposal to justify the fine—even in exceptional cases—as a sole penalty for grave offences which, by their very nature attract some degree of ignominy, would commend itself in general since, were it to be otherwise, the moral code would be put at risk and respect for the law weakened. Apart from these implications, there remains the probability that such crimes are symptomatic at least of a seriously disturbed, if not actually deranged personality; hence their perpetrators stand in need of treatment, rather than of an economic sanction.

There exists a further ground of debate: The van Binsbergen Committee,[19] actuated by a humanitarian desire to play down the role of custodial sentences, accepts the view that in many cases the deterrent factor of a sanction consists in the likelihood of arrest and trial, rather than in the severity of the sanction anticipated. Though this theory is supported by a considerable body of criminological and other opinion,[20] in the absence of firm evidence that it enshrines an unchallengeable principle and does not amount to a mere half-truth, one is led to adopt a sceptical attitude to the assumption. What end would be served by puristically insisting on its universal validity?

But in its motivational proposals, the Dutch Committee goes further and recommends that the legislature should lay down a rule to the effect that when the fine imposed exceeds a certain amount (f.200), a court should state the special reasons which have determined the penalty and, in particular, the manner in which the offender's ability to pay the fine so levied has been taken into account. While it would be absurd to attempt to draw any significant parallels between the various maxima of the fine-categories now proposed in the Netherlands and the corresponding Australian provisions, since sentencing policy as applied in the respective territories differs considerably, nonetheless, if we disregard small fines for the purpose, a statutory obligation of this sort is

18. Interim report, chapter 7.9.3.
19. *Ibid.*, para. 2.4., p. 13.
20. See – *inter alia* – Sutherland, *Principles of Criminology* (3rd ed.) chapter IX, pp. 355 ff.; Rusche and Kirchheimer, *Punishment and Social Structure* (1939); Fry, *Arms of the Law* (1951), pp. 73ff.

by no means valueless, provided that such motivated decisions are not allowed to degenerate into mere 'clauses de style'. Relative to the desirability of reasoned decisions in passing sentence, it has been well-stated by Dr. Hermann Mannheim[21] that:

> . . . courts owe it to themselves and to the community which they serve to state in writing their reasons for imposing a given sentence. Justice must not only be done; in a democracy it must be explained to the people to whom it is no longer simple and self-explanatory. While I am under no illusion that such written reasons will always be very illuminating, no one will dispute that judgements are more thoroughly considered and less liable to error and emotional bias if their reasoning is set forth in writing. The process of articulation may even lead to the discovery that some of those 'intangible' factors which were thought so decisive are in fact unable to stand the test of reason.

It is clear that, as a penalty, the fine suffers from two serious disadvantages. First, because at present there is nothing in the law to prevent a third party from discharging a fine, the offender may sometimes be personally unaffected, or insufficiently so. In this connexion, it would seem on principle that a suggestion mooted by Samuels might usefully be elaborated.[22] He tentatively takes the view that a likely third party payer could be prohibited by injunction from paying, subject to his right to be heard by the court.

A somewhat more difficult question arises with regard to the problems presented by enforcement procedures. As Bradbury remarks:[23] "Any sanction which can be evaded to the extent that the fine system can, must be improved in order that maximum efficacy can be obtained." The natural inference is that by avoiding payment, a person sets at naught the machinery of administration of justice and renders his trial nugatory.

Conclusion

Bearing in mind the fact that the English Law Commission has already embarked upon codification of the criminal law, it may be of some interest to consider a small, but nonetheless highly significant area of a Western European code and the proposals recently advanced for amelioration of its framework.

Two factors are outstanding: First, it is clear that, in the novel concept of fining described above—based upon a broad categorisation of offences,—the kinds of offences and the fine—categories to which they are allotted do not necessarily stand in any direct relationship as between common law territories and the Netherlands. Secondly, a similar comment applies to the magnitudes of the various penal maxima specified. However, if the legal system of fining currently in force in the Netherlands can be said to exhibit capriciousness and whimsicality, similar charges can undoubtedly be levelled at common law systems relating to fines, which are manifestly lacking in logical and consistent principles.

The philosophy advocated by the van Binsbergen Committee for extending the use of the fine as a sole penalty, on occasion, for even the gravest offences, could not be expected to meet with universal approval since the nexus would be loosened between reprobation of the crime and a generally-accepted need to reaffirm the moral code. Yet it is considered that the proposals we have outlined ought to receive serious attention in countries based upon the common law,

21. Mannheim, "Some Aspects of Judicial Sentencing Policy", (1958) 67 Yale L.J. 961.
22. Samuels, *loc. cit.*, p. 209.
23. Bradbury, "Fines – Are They a Deterrent?", (1969) New L.J., 466.

by reason of the fact that they reflect so well the outlook of what Dr. Nigel Walker has aptly described as that of the economic reductivist.

Another aspect which deserves due consideration is the framework proposed by the van Binsbergen Committee for payment of fines by instalments. Where this mode of payment is authorised, the Committee recommends a normal *maximum* time-limit of 3 months, which may—in necessitous cases—be extended to an absolute maximum period of 2 years. Though it is frequently argued that periodical payments serve to remind the offender of the crime he has committed and, by so doing, may enhance the specifically deterrent effects of the fine, long periods of time to pay inevitably cause administrative inconvenience. The Committee's view that a fine when satisfied by instalments may justify in the aggregate a pecuniary penalty heavier than one settled by payment of a lump sum is at least debatable, though not without some merit. Again, where heavier penalties are involved, the motivated fine can be justified in principle: the magistrates should have adequate information relating to the financial circumstances of the accused, since nowadays their public accountability for the task of dispensing justice is becoming increasingly apparent. This is no bad thing, as it may assist in resolving certain misconceptions with regard to "inconsistency" in sentencing.

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