



Katrien Mestdagh

A future for prison

On expert-based policy and the influence
of populism

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Katrien Mestdagh, September 2008

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1 A FUTURE FOR PRISON

*I venture to believe that the ways in which we punish,
and the ways in which we represent that action to ourselves,
makes a difference to the way we are.*

David Garland¹

1.1 Introduction

Exactly four years ago, I entered a Belgian prison for the first time. The remand prison of Antwerp had a capacity of 410 beds and housed at that time at about 700 inmates: 500 accused in pre-trial detention, 100 convicted prisoners awaiting a transfer to another prison and 100 medium and high risk mentally ill. Today, the prison holds 650 prisoners with at about the same distribution of different types. This makes Antwerp one of the biggest prisons in Belgium. Another interesting feature of Antwerp's prison is its specific culture, defined by a large number of pre-trial prisoners who stay on average between one to three months. This causes a high fluctuation in the population. A large number of mentally ill, one of every seven inmates, and a rate of 75% prisoners of foreign origin make the remand prison one of the most complex prisons in Belgium. Further the prison culture was characterized by a significant increase of prisoners from East-European countries, frequent violence among prisoners and prisoners and guards, poor prison conditions and continuous officer' strikes, supported by powerful prison officers unions who tend to protest prison overcrowding and policy changes that might in their belief undermine the position and safety of prison officers. The mix of these characteristics made a deep impression on me. It is true; we have no idea what it is like until we enter. The many experiences I have had during my internship in the prison of Antwerp and later on in my job as educational worker in the 16 Flemish prisons, made me reflect on how we *use* and will use prison as

¹ (Garland, 1991: 218)

proscribed in penal legislation and policy documents and how we *should* use it according to academics and field experts. These questions have been in the back of my mind ever since.

1.2 General trends with specific solutions

Belgium is certainly not the only country coping with prison overcrowding and declining prison conditions. In recent Western penal history two striking trends have developed. First, imprisonment in Western countries has been in a deep crisis since the late 1970s. Imprisonment rates in many countries have increased to a level that we have never experienced before: prisons are bursting. This goes together with a growing concern about rising recidivism rates and the high costs that accompany imprisonment. Second, new developments in the field of alternative punishments have emerged. A growing number of Western countries experiment on 'new types' of punishment, such as electric monitoring, restorative justice, community service, and educational sentences. They often go hand in hand like in New Zealand, where we find one of the highest prison rates amongst Western countries and simultaneously a well developed system of restorative justice (Pratt, 2006; Aertsen, Daems & Robert, 2006).

What are we making out of this coincidence and how will it shape the future of imprisonment? Although many countries might experience the same broad tendencies, every country has its own penal and prison characteristics and deals with these in their own particular way. A country's prison policy is rooted in penal policy, which is in its turn historically rooted in broader policies and social, economical, cultural and political changes at many different levels (local, sub-national, national, international, supranational). Internal elements like prison policies, legal reforms and the effectiveness of alternatives, and external elements like socio-economical developments or sudden striking events will determinate how and at what speed these two tendencies will develop within a specific country.

1.3 Focus on penal and prison policy

Andrew Rutherford showed in 1984 (see also rev, ed. 1986) in which ways penal and prison policy influence the use of imprisonment. This idea was further developed by Sonja Snacken who argues that differences in the use of imprisonment can be measured in policy choices:

"National penal policies are particularly important in determining the size and characteristics of prison populations, especially through legislation and the application of custodial and non-custodial sanctions and measures, the length of imprisonment and the possibilities for early release." (Snacken, 2006: 144).

Belgium has a recent record of increased attention to prison policies and the development of formal prison legislation amongst politicians, experts and the public. A decade ago, in 1996 the Belgian government appointed a full time minister of justice for the first time. The execution of sentences and particularly imprisonment became a "hot" topic in policy making. Until the 1990s, imprisonment was given little attention by politicians. Increasing prison overcrowding and a few spectacular escapes in the 1980s and 1990s, followed by several prison officers' strikes and negative reports from the Council of Europe stating Belgian prisoners were denied certain human rights due to an old prison infrastructure, prison overcrowding and bad prison conditions invoked expert and public agitation and media attention. As a consequence prisons became a political issue.

All five ministers of justice appointed over the past twelve years have developed their own view of prison – the reality and what should be done, as well as what might be feasible. Some of them were able to make significant changes in the prison landscape. Prison regimes and the legal position of prisoners were regulated by national law in the Prison Act of January 2005 for the first time in Belgian history. Previously, prison regimes were regulated by internal circulars and unofficial documents. Basically, local prison governors were free to regulate the daily regime of their prison. By means of the Prison Act, prison regimes were formalized for the first time. Community service became an independent penalty by law in April 2002 next to imprisonment and fines. The control over the execution of sentences was transferred from the prison

administration to the judiciary in January 2007. A new Act on the treatment of the mentally ill in prisons was approved in April that same year. These reforms within Belgian penal and prison history have set the legal frame for penal change. The enactment of these laws and regulations through penal and prison policies has become one of today's top priorities. In April 2008 the new minister of justice's *master plan* to improve the prison infrastructure in order to create a more humane detention was approved with regard to its general outlines by the minister's council. The master plan is part of a broader white paper on justice² in which the minister of justice sets the policy goals up to 2012.

A careful and critical analysis of how Belgian policy makers see the use of prisons over the next ten years will shed light on the questions mentioned above: How do and will we use prison? History has taught us that the use of prison can develop relatively fast in an unpredictable way; the Netherlands make a good example. In 1984 Rutherford wrote "there are no indications that the prison system in the Netherlands is likely to depart from its reductionist course" (Rutherford, 1984: 145). Six years later, the well respected Dutch criminologist Herman Franke speculated that in a few decades it might become clear that the 'tough' 1980s in the Netherlands may actually have resulted in a more humane prison system (Franke, 1990). At that time prison capacity had doubled. Franke supposed that the building programme providing more space would eventually lead to over capacity and closure of the oldest and most uncomfortable prisons. But Franke's prediction did not come true. Today, its prison population is still increasing, the prison system has become more conservative and disciplined, and social aid to prisoners has been cut down (Kelk, 2006; Daems, 2007). Constantijn Kelk recently wrote on the "regressive movements" in prison policy and the general deterioration of living conditions in Dutch prisons (Kelk, 2006).

² In his white paper on justice, the current minister of justice describes his policy goals and measures for the justice department for the coming four years. Concerning penal and prison issues, the minister proposes to not only improve and expand the prison infrastructure, but also to focus in prison alternatives and more specifically the further development of electronic monitoring. Further he wants to end impunity and the non-execution of sentences and focus on offenders with specific needs like drug users and the mentally ill in prison. He proposes a minimal effort to implement the prisoner's rights as described in the Prison Act (Vandeurzen, 2008).

The penitentiary is on the move, Belgian policy makers and experts are not only reflecting on, but even more working hard to change the use of prison in the future. This study aims at exploring in which ways these groups wish to shape prisons, their different ideas and perspectives, as well as the different means to achieve their goals.

Notwithstanding that many progressive ideas on restorative justice and many alternatives to imprisonment have been developed, and that these provided important steps over the past fifteen years, prisons remain in a crisis. As in many European countries, Belgian politicians and their policy makers define the use of imprisonment as measure of last resort, and this is advised and supported by experts and professionals. However in practice a significant number of people still end up in prison. Prison conditions are increasingly questioned and disputed in courts (E.g. ECHR 61/1997/845/1051³) and there do not seem to be many results of the reintegration of (ex-)prisoners when recidivism rates are examined. Important questions and remarks concerning the policies on the use of imprisonment remain largely unanswered.

1.4 A future story

For a long time the majority of researchers has been dominantly concerned with the socio-legal history of imprisonment as the most severe type of punishment since the abolishment of the death penalty in Europe. Since the 1970s, a new trend emerged where the focus was on future implications of increasing prison rates, and consequently a more future oriented study of imprisonment developed. Back in 1969 *The Annals of the American Academy of Political and Social Science* devoted a special issue to 'The Future of Corrections'. In the introduction John P. Conrad wrote that "if the state of corrections is any indicator of conditions of civilization, Western man may be in prospering better than he knows." (Conrad, 1969: xii). Conrad was hopeful, American prisons were progressing remarkably and there was no indication that this march forward would soon come to an end (Daems, 2007). Shortly after there was the start of an

³ Case of Arts v. Belgium (1998): applicant held, for seven months of his total detention, in the psychiatric wing of an ordinary prison, rather than in a social protection centre designated by the relevant mental health board.

unprecedented, more than six-fold, increase in the American prison population. In 1974, Norvin Morris was one of the first to develop a different and more revolutionary scope on the future for imprisonment in American society. Morris' basic premise was that prisons indeed have a future. Despite assaults by national commissions, criticism of prisoners and scholarly attacks, he believed that prison had a considerable future that merits rational analysis and careful planning (Morris, 1974: 5). His concern was to develop a philosophy of imprisonment which would determine its use with restraint and humanity until it was no longer needed for social control. In his publication, Morris' outlines new ideas on the use of imprisonment, like a basis for the jurisprudence of sentencing with forceful arguments for acceptance of certain principles and for the rejection of notions of dangerousness and treatment as reasons for imprisoning an individual, the rehabilitation of the individual treatment model for the Anglo Saxon world and a specific design outline for a model prison. In a provocative (at that time) chapter he sets out the considerations which, in his view, would justify and restrict the use of imprisonment. He states three principles that should guide the decision as to whether or not to imprison: parsimony meaning the least restrictive sanction necessary, dangerousness predictions as an unjust basis for determining imprisonment and desert meaning that no sanction should be imposed greater than that which is 'deserved' (Morris, 1974: 58-84). Today his forecasts are frequently quoted to support the analysis of the use of imprisonment in recent history and into the near future like the privatisation of prisons (James, Bottomley & Liebling, 1997), or the industrial complex of imprisonment (Christie, 2000). In 2004, Michael Tonry edited a new publication based on Morris' *The future of imprisonment*. A significant number of contemporary experts like Jeffrey Fagan, Alfred Blumstein, Richard S. Frase, Franklin E. Zimring and Gordon Hawkins have contributed to this publication, reflecting on the future of imprisonment starting from Morris's viewpoints in order to confirm or critique supported by the newest data.

This study is based on such future oriented approach. As a "future study", the thesis will focus in three stages: the present and past use of imprisonment, future use as perceived by policy

makers and experts, and the means and roads towards realisation and achievement of future goals.

Studying perspectives on the future of punishment and particularly the use of prison becomes even more interesting when we take the recent policy reforms in Belgium into account. Many legal changes have been made in the past ten years, as listed above, and it is the most urgent present task for policy makers to find ways to operationalize and implement these new laws and reforms.

1.5 Based on views of policy makers and experts

This thesis aims to probe into the views of professionals and politicians who either directly through their own remit and in their own field or indirectly through influencing public opinion, implementation or resistance to the reforms contribute to reforms of penal legislation and policies, and the use of prisons. The thesis will focus on a number of topics and discourses among academics, field experts, politicians and policy makers on how to define penal and prison problems, how to solve them, and what to envision for the future. The views of both sides will be contrasted in order to shed light on the balance respectively imbalance between populism and professionalism in penal and prison policy.

1.6 A brief overview

In the next two chapters, chapter 2 and 3, we present the research framework and methods. Chapter 4 addresses the research results displayed in four current discussions among professionals. These results, completed with secondary Belgian data will be discussed and related to the research framework in chapter 5. To conclude the thesis some finishing we sketch out comments and recommendations in chapter 6.

2 PENAL AND PRISON POLICY

In this chapter we display the development and characteristics of penal and prison policy in Belgium. First, penal and prison policy is situated within the politics of policy making. Second, special attention is given to the increasing influence of *populism* in penal policy making. And third, we address penal policy typologies within the light of these recent developments.

2.1 Penal policy as a limited choice

Are penal changes and changes in the use of imprisonment caused by social forces, as Foucault sees them in changes of power, or as Rusche and Kirchheimer identify the force of the labour market? Or is it a well planned strategy controlled by an elite like the authors Melossi and Pavarini would suggest in their theory on punishment that it is a bourgeois creation? It seems possible to escape both extremes in the degree of control on penal changes if we are willing to ask why some processes did and others did not develop in accordance with the wishes or plans of politicians and experts. Why do Belgian prisons remain overcrowded anno 2008, despite penal legislation and prison policies reforms in the 1990s intended to reduce the prison population? How come countries like France and the Netherlands have undergone many penal changes in the past decade experts and professionals had never been able to predict?

Influential people seldom agree with each other about the desirability of penal changes, Herman Franke says. (Franke, 2007: 10). This seems a trite statement at first sight. It is almost natural to say that politicians, policy makers and experts have different perceptions and ideas on penal subjects because they have different aims and responsibilities. A politician is appointed for a limited amount of years in which he or she has to create positive results before the next elections. An expert has an interest in research and the gathering of knowledge, rather than creating instant results. However, Franke raises an interesting and profound question: in which ways do opinions of experts and policy makers really vary and how does this influence penal and prison policy?

Franke's work illustrates how most penal changes have their own dynamics, and often there is no way back once reforms are set in motion:

"By the end of the nineteenth century the state had invested so much money in the building of new cellular prisons in the Netherlands, and so many prison experts and politicians had aligned themselves with the cellular system through the spoken and the written world, that it was not possible to take account of the growing criticism. Even influential people had to put up with these circumstances and to confine themselves to realizable reform proposals." (Franke, 2007: 11).

This example is particularly interesting as it might illustrate a possible future trend for Belgium, which will be discussed later.

For now, it is important to see that penal and prison policies are both contextual and in itself influencable.

On the one hand, prison population and the use of imprisonment is a consequence of policy choices and practices. Sonja Snacken refers to this in her publication on determinants of penal policy (2007): actors in the criminal justice system can influence penal changes. Prison officers unions, for example, sometimes have a strong influence on prison conditions and the execution of prison policies. In the year 2006, the officer's unions organised a total of 31 official strikes in the Belgian prisons. Mostly, prisoners were denied visits from family or friends, labour and the evening walk. Another example is the minister's building programme, which is expected to provide more prison capacity (2,500 extra cells) in four years. As Andrew Rutherford states: "The use made of custody, prison population size and other aspects of the prison system are the result of decisions made throughout the criminal justice process and the wider political sphere." (Rutherford, 1986: 48). Other influential criminologists have argued the same (Garland, 2001; Zimring & Hawkins, 2004; Tonry, 2007; Snacken, 2007). David Garland supports Rutherford by stating: "Politics and policy always involve choice and decision-making and the possibility of acting otherwise." (2001: 139) His argument in *The Culture of Control* is that criminal policies are

chosen, but need certain conditions in order to make them possible at all. The presence of these reforms in conditions substantially increases the probability that these policies will occur.

On the other hand, the use of prison is part of a broader context, which can limit or advance penal policy choices. In 1986, Rutherford defines a number of contextual elements that influence penal policy and the prison population. These are the level of crime, treatment of juvenile offenders, functioning of criminal investigation and sentencing, public opinion and political environment, crises, costs, and broader social events. Michael Tonry and Sonja Snacken agree, adding respectively risk, protective factors and non factors (Tonry, 2007) and internal, external and intermediate factors (Snacken, 2007) to the list. In his last publication on *Determinants of Penal Policies* (2007) Tonry describes first the macro- *risk* factors like the general political culture, constitutional structure, mass media, populism, Anglo-Saxon culture and income equality. Second, *protective* factors like professional cadres, a consensus in political cultures and expert-informed policy processes. And third the *non-factors* who affect all countries and will therefore not influence the differences in penal policies between countries, like rising crime rates, harsher public attitude, cynical politicians, ethnic tensions, rapid social and economical change, postmodernist fear and penal populism. Snacken (2007) describes the conditions for Belgian policy making, using Garland's parameters divided into *external* factors which include demography, economy, crime rates; *internal* factors comprising of actors and stages in the criminal justice system, as well as organisational aspects; and *intermediate* factors like politicization, emotionalism, the "return of the victim" by which she means the renewed attention for victims in sentencing policies, and the "human rights vs. punitive sanctions" discourse. Some of these factors need further explanation. Snacken argues a politicization of the crime problem and an increased populism have occurred in Belgium. The political and judicial establishments have been in a crisis of legitimacy over the past twenty years and the extreme right-wing party, Vlaams Belang, has achieved great electoral success since 1991 on themes like immigration, criminality and insecurity. Within these developments, political attention to victims of crime began in the

1980s, with the establishment of several new centres for forensic aid for offenders, in which victims should take due account of possibilities for social reintegration of the offender. In the 1990s we saw the emergence of victim organisations, especially of parents confronted with the murder, disappearance, or fatal traffic accidents of their children. They were influential in the 1993 decision to restrict eligibility for prison leave and parole for drug addicts following the murder of a young couple by two drug addicts (Snacken, 2007: 194). From then on, several political initiatives were taken to improve the position of victims of crime within the criminal justice system: special services for the reception of victims in public prosecution courts (1993), penal mediation at the level of prosecution (1994), and the introduction of compulsory advice and treatment in cases of conditional release of prisoners convicted of sexual abuse of minors (1995). An emphasis on risk monitoring became evident in some legislation and initiatives, such as electric monitoring or the new parole legislation of 1998. The reintroduction of preventive detention for sexual offenders in 1998 is probably the clearest example of the renewed emphasis on protection of the public against offenders (Tubex, 2002: 452-468). But within these developments, there was no decline of the rehabilitative ideal, Sonja Snacken argues. Offenders' rights and victim's rights have remained in balance (E.g. Prison Act 2005 contains a clear overview of prisoner's rights and basic, reductionist imprisonment principles). On top, most penal and prison reforms are still argued on human rights ground, rather than on the demand for punitive sanctions.

Somehow, all authors address the role of the public opinion and a political environment or political culture in penal policy making. Populism, harsher public attitude, the "return of the victim" and increased use of punitive sanctions have become significant factors. The emergence of these elements and their influence on policy making will be discussed more in depth in the next paragraph.