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1. Complicated Legacies of Justice: The Netherlands and World War II

Chrisje Brants

A. Introduction

After the Second World War, a process of what we now call transitional justice was initiated in the Netherlands to deal with crimes committed during the German occupation. Known as ‘extraordinary justice’ (*bijzondere rechtspleging*), it featured a mixture of criminal, administrative and disciplinary courts and tribunals with special jurisdiction over collaboration, treason and crimes such as murder, torture and pillage. While the deportation and murder of some 75% of the country’s Jewish population in the death camps of Eastern Europe did figure in the extraordinary courts as the background to some of the crimes, it was not the main concern.

Extraordinary justice was always highly politicised, based on the assumption that the good could be clearly separated from the bad, and aimed at ridding the country of all who had made the ‘wrong choice’, i.e. sympathised or colluded with National Socialism and/or the German occupier. Focussed on what was defined as individual political criminality, it left little scope for dealing with the bystander role of the majority of the Dutch population or with such institutions as the police and civic authorities in colluding in crimes of the occupation. Moreover, the necessity of stabilising the political situation and rebuilding a devastated country meant that within ten years of the process being wound up, most Dutch perpetrators had been released and business was back to normal.

At least, so it seemed, but the social division between the right and the wrong, the good and the bad, and between the main group of victims of the war, the Jews, and the rest of society was to last for decades. For those arrested and detained and/or sentenced by the extraordinary courts and tribunals, and for many others whose attitude had simply been politically incorrect, ‘normal’ meant silence. Fear of others finding out and the ostracism that would inevitably follow, precluded their participation in discussions about the war or even talking about it at home; in any event, debate was impossible in terms other than those already firmly established in public discourse. For decades too, the murder of the Dutch Jews and the trauma of the survivors were shrouded in silence. What had happened, in particular in Amsterdam (where only 10% of the Jewish population survived), and what happened

afterwards to the survivors were not issues that either the Jews or the Dutch population in general cared to discuss in public – and again, often not in private either.¹

As this wall of silence was very gradually broken down from the middle of the 1960's, the fate of Dutch Jewry became what De Haan terms a 'national trauma'. In his 1997 book on memory and the persecution of the Jews, he recounts what happened if people asked what he was writing about: 'Simply answering: "the persecution of the Jews", had the same effect as announcing an incurable disease at a birthday party.'² This trauma does not refer specifically to that suffered by Jewish survivors, or even to the Holocaust as such. Rather, it concerns the difficulties of dealing with the impact of the emerging facts of the Holocaust and how it unfolded in the Netherlands.

Van Sas describes the sustaining collective memory of the war as a 'myth of resistance' in which a person could be only hero or blackguard, inherent in which is the image of right and wrong: right = resistance, wrong = collaboration; there are no in-betweens.³ According to Blom, this memory both informed and was reinforced by Dutch historiography, of which the leading perspective was that of oppression, resistance and collaboration, good and bad. He attributes this right-wrong dichotomy to a deep-rooted consensus that can be traced back to the period immediately after the war and the process of extraordinary justice.⁴

In the current transitional justice debate, law, especially criminal law, is seen as well-nigh indispensable in attaining healing for societies torn by traumatic events and for the victims of those events. We only have to look at the discourse surrounding the International Criminal Court (ICC), political, legal and academic, to discover that international criminal law is assumed to help end impunity, promote retribution, reconciliation and conflict

¹ On the lack of public debate: J. Withuis, Jolande, *Erkenning. Van oorlogstrauma naar klaagcultuur* (De Bezige Bij, 2002); A. de Swaan, *De maatschappelijke verwerking van oorlogsverledens*, in: J. Dane (ed.) *Keerzijde van de bevrijding. Opstellen over de maatschappelijke, psycho-sociale en medische aspecten van de problematiek van oorlogsgetroffenen* (Van Loghum Slaterus, 1984), at 54-66; J.H. Schreuder, *Wat niet weet, wat wél deert* (Radboud University Nijmegen, 1999), on the traumatic effects of silence on the second generation. Specifically on Jewish survivors: D. Hondius, *Return. Holocaust Survivors and Dutch Anti-Semitism* (Praeger, 2003), at 118 ff.

² I. de Haan, *Na de ondergang. De herinnering aan de Jodenvervolging in Nederland* (Sdu Uitgevers, 1997), at xiii.

³ N.C.F. van Sas, *De metamorfose van Nederland. Van oude orde naar moderniteit 1750-1900* (Amsterdam University Press, 2004) at 63; see also C. van der Heijden, *Grijs verleden. Nederland en de Tweede Wereldoorlog* (Uitgeverij Contact, 2001).

⁴ Blom, J.C.H. , *In de ban van goed en fout. Geschiedschrijving over de bezettingstijd in Nederland* (Boom, 2007) at 9-12.

solution, and provide recognition of and redress for victims which will then contribute to conflict resolution, reconciliation etc. in a presumed spiral of fortunate effects.⁵

Extraordinary justice in the Netherlands appears to have had much more modest aims, although in its own way it was just as ambitious (and contradictory) as international criminal law, and was in any event seen as an indispensable means of dealing with the past and reinstating social order. However, after the courts had finished, those most affected – the good, the bad and the victims – had very different perceptions of the justice that had been done, indeed of whether justice had been done at all, but their voices were often drowned out in the prevailing good-bad discourse. This contribution asks how, in the social-political context of the time, extraordinary justice coloured perceptions of events, allowing some to flourish and creating a great silence and social division around others. How did those perceptions change, and with them, the nature of public debate? With the benefit of hindsight, the legacy of extraordinary justice may help us understand more about the significance – and limits – of criminal law in processes of transition.⁶

B. Extraordinary Justice

It is impossible to describe in detail here the inception of extraordinary justice, the ins and outs of its procedures and its gradual development into something different from what had been envisaged. Nevertheless, in order to understand both why the latter happened and what the consequences were, we need some idea of the legal framework, the assumptions upon which it rested and how it developed in practice.

1. Assumptions and legal framework

As the war progressed, the Dutch government in exile in London began thinking about what should be done with collaborators.⁷ They (the Government) felt swift, severe and just action was needed to prevent mob-justice, but, dependent on reports from the Dutch resistance, had

⁵ See J. E. Alvarez, Trying Hussein: Between Hubris and Hegemony, *Journal of International Criminal Justice* (2004) 319–29, who calls these goals ‘as ambitious as they are contradictory’.

⁶ See the introduction by N. Wouters to: N. Wouters (ed.), *Transitional Justice and Memory in Europe (1945-2013)*, (Intersentia, 2014), on the importance of history for understanding processes of justice.

⁷ On the preparations for extraordinary justice i.a.: P. Romijn, Snel, *Streng en rechtvaardig. Politiek beleid in zake de bestraffing en reclassering van ‘foute’ Nederlander 1945-1955* (De Haan, 1989), at 20; A.D. Belinfante, *In plaats van bijltjesdag. De geschiedenis van de bijzondere rechtspleging na de Tweede Wereldoorlog* (Van Gorcum, 1978) at 60-73; and the official Dutch war historian L. de Jong, *Het koninkrijk der Nederlanden in de Tweede Wereldoorlog. IV, Londen, tweede helft* (Staatsuitgeverij, 1979), at 1212-1238.

no clear idea of the numbers involved nor first-hand knowledge of the situation under the occupation. The prevailing notion was that a small, perverse minority had betrayed patriotic Dutch citizens, albeit in three different ways.

There were active collaborators: Dutch fascists in important administrative positions, volunteers in the German armed forces and economic profiteers. Then there were the members of the hated Dutch fascist party *Nationaal Socialistische Beweging* (National Socialist Movement, always known as NSB) or similar organizations, collaborators by definition because of their politics. And finally there were treasonous or unreliable civil servants and government employees. All these people were manifestly ‘on the wrong side’ and there would, so declared Queen Wilhelmina, be no place for them in free Dutch society.⁸ These seriously oversimplified assumptions about the actual situation implied both that ‘right’ and ‘wrong’ were easily distinguishable in practice and that everyone who had not openly made the wrong choice must therefore have made the right one. They were translated into a legal framework corresponding to the three groups presumed to have behaved ‘wrongly’.⁹

The Decree on Extraordinary Criminal Law of 22 December 1943¹⁰ concerned serious, active collaboration, adding to the relevant provisions of the existing Dutch Criminal Code the offences of ‘collaboration with the enemy’ and ‘betrayal’ (essentially subjecting another person to measures by the enemy) with a maximum of five years imprisonment; if a victim had died as a result, the penalty was life imprisonment or death. In 1947, war crimes were added to allow the trial of German citizens. Another decree regulated procedural matters, including new extraordinary trial courts and an extraordinary supreme court staffed by professional judges.¹¹

The Decree on Purging the Administration¹² created a disciplinary regime for civil servants and government employees who had ‘demonstrated a treasonable attitude’, or could

⁸ Speech by Queen Wilhelmina, Free Dutch Radio (*Radio Oranje*), broadcast from London, 10 May 1941. In later years, she spoke several times again of ‘swift, severe and just retribution’ and of isolating and removing all ‘undesirable elements’.

⁹ For details of disciplinary and criminal law: W.M.E.Noach, *De bijzondere rechtspleging. Straf- en tuchtrechtelijk optreden tegen onvaderlandslievend gedrag uit de bezettingsjaren*, (Martinus Nijhoff, 1948); Belinfante, *supra* note 7; L. de Jong, *Het koninkrijk der Nederlanden in de Tweede Wereldoorlog: deel 12 Epiloog, eerste helft*, (Martinus Nijhoff 1988); Administrative cleansing is described by Romijn, *supra* note 7, at 79-162. For an overview in English: C.H. Brants, Dealing with the Holocaust and Collaboration: the Dutch Experience of Criminal Justice and Accountability after World War 2, 33 *Crime, Law and Social Change* 3 (2000) 211-236.

¹⁰ Besluit Buitengewoon Strafrecht 22 December 1943, *Staatsblad* D61.

¹¹ Besluit Buitengewone Rechtspleging 22 December 1943, *Staatsblad* D 63; Besluit Bijzondere Gerechtshoven, 22 December 1943, *Staatsblad* D 62.

¹² Zuiveringsbesluit 13 January 1944, *Staatsblad* E 14.

‘not be relied upon to faithfully co-operate in rebuilding the country’.¹³ Sanctions were suspension (with salary) or dishonourable discharge (with loss of salary and, in some cases, pension rights). This group was dealt with by a ‘Central Organ’, but there were also separate commissions that examined the war record of numerous different professions (journalists, university teachers, artists etc.).

Finally, a Decree on Tribunals¹⁴ dealt with all Dutch citizens ‘who, during the course of hostilities or of the occupation of the Kingdom of the Netherlands, have behaved in a way that is abhorrent to every good patriot.’ This could be anything, from assisting the enemy to displaying a ‘national-socialist attitude’.¹⁵ The lay tribunals, under a professional chairman, could impose one of three penalties: ten years internment, the withdrawal of civil rights or confiscation of property. This disciplinary law was to culminate with extraordinary criminal proceedings, making double jeopardy the norm. Indeed, government employees and other professionals could be subject to all three forms of justice.

These decrees contained vague, multi-interpretable and overlapping provisions and contravened the Dutch Constitution and existing criminal law principles: retro-active criminalisation, the death penalty (abolished in the 19th century), lay judges (forbidden by the Dutch Constitution), the confiscation of a person’s entire assets and denial of civil rights (the outlawed Napoleonic practice of ‘civil death’),¹⁶ no appeal on the facts, while appeal to the extraordinary supreme court on points of law depended on permission by the trial court.¹⁷ The tribunals judged cases brought by members of the public without a public prosecutor on whom the onus of proof rested.

2. *Unforeseen Practicalities and the Solutions*

Almost immediately after liberation it was obvious that far too many people were caught up in a system not yet ready to operate (too few high-ranking and respected judges were available¹⁸ and some prospective chairmen objected to the law they would apply, especially mandatory sentencing). Between 120,000 and 150,000 people, some probably innocent, many

¹³ *Idem* Article 3, para.1

¹⁴ Tribunaalbesluit, 17 September 1944, *Staatsblad* E101.

¹⁵ Noach *supra*, note 9, at 57.

¹⁶ While by today’s standards the culmination of trial by tribunal and criminal court and of the sanctions that both could impose, would be inadmissible, at the time Dutch legal scholars were divided on the matter of double jeopardy.

¹⁷ Under normal Dutch criminal procedure, there is a right to full re-trial by a higher court and to appeal to the Supreme Court on points of law.

¹⁸ With some exceptions, the higher Dutch judiciary had not acquitted itself with particular distinction during the occupation; see D. Venema, *Rechters in oorlogstijd* (Boom Juridische uitgevers 2007).

suspected of very minor offences, had been arrested and detained.¹⁹ There was no habeas corpus and a serious backlog of judicial cases. Severe overcrowding, food shortages, ill treatment and even torture plagued some detention camps. Within months, the Government was forced to reduce the numbers by releasing minor cases,²⁰ then, when more releases had to be contemplated, by changing the definition of a ‘minor case’. Once the legal process was underway, procedural rules were held to be unjust and unworkable and this too led to delays and then substantial amendments that changed the nature of the envisaged ‘swift, just and severe retribution’.

The Government, however, was not only moved by practical considerations. Social and political protest by authoritative figures about conditions in the camps and the harshness of the legal rules were gradually picked up by the media. The churches, particularly the Catholic Church, appealed urgently to Christian compassion, irreconcilable with ‘eliminating people from society’.²¹ After the release of 40,000 ‘minor cases’, the churches again called for compassion. Although the intended release of another 60,000 (the definition of ‘minor’ having been extended) led to widespread public protest,²² by May 1947 more than 100,000 people had been set free. Combined with the introduction of habeas corpus for political detainees, this left about 3,000 by 1 October 1948.

The release of ‘political delinquents’ (even if their guilt was not always officially determined),²³ was often conditional on supervision by a new organisation, the STPD (*Stichting Toezicht Politieke Delinquenten* – Foundation for the Supervision of Political Delinquents). A private initiative with government subsidy and staffed mainly by volunteers, it supervised but also supported convicted and non-convicted ‘political delinquents’ with the aim of helping them return to society. It too was vocal in its support of release policies and amendments to the court and tribunal process.²⁴

Tribunals were soon allowed to deviate from mandatory sentencing that was withdrawn altogether in 1946. In 1947, more flexible penalties were introduced and double

¹⁹ In general it is impossible to give exact figures for the process of extraordinary justice. The first weeks were chaotic and not properly documented. The files were not generally available for research until relatively recently. Publications show that some files are missing, double, or contain more than one case. See e.g. S. Faber and G. Donker, *Bijzonder Gewoon. Het Centraal Archief Bijzondere rechtspleging (1944-2000) en de lichte gevallen* (3rd edn., Stichting moderne Rechtsgeschiedenis, 2010).

²⁰ Besluit Politieke Delinquenten 26 October 1945, *Staatsblad* F244.

²¹ De Haan, *supra* note 2, at 90 ff.

²² Noach, *supra* note 9, at 16-17.

²³ Belinfante (*supra* note 7, at 76) thinks it a measure of how well the release policy worked that, of those who later appeared before an extraordinary court, only 1.25% was found to have been wrongfully arrested. The other side of the coin is that many detainees were, therefore, probably innocent.

²⁴ See on the Foundation’s work: J. le Poole, *Verslag der werkzaamheden van de Stichting Toezicht Politieke Delinquenten over de jaren 1945 t/m 1947* (s.e., 1948).

jeopardy abolished, thereby legalising what had already become practice: less serious cases tried by tribunals only, serious criminal offences by extraordinary courts where there was now an automatic right of appeal on points of law i.a. if the death penalty had been imposed.

The purging process also underwent substantive changes, most importantly perhaps because the country would come to a standstill if too many were removed from their jobs. At an early stage, more flexible sanctions and differentiation between categories of seriousness were introduced: ‘mistakes’ during the war could result in a caution (public or non-public) or demotion; less serious cases were punishable by honourable discharge with no loss of pension rights, and minor cases by demotion; the original decree remained applicable to serious cases only.

In total, after release of the minor cases, the courts and tribunals dealt with approximately 65,000 people, 8% of whom were acquitted, with 16% receiving fines, 60% sentences of more than five years, 9% between five and ten years, and 3% between ten and 15 years; 578 people were sentenced to more than fifteen years, 148 to life and 152 to death of whom 40 were executed.²⁵ By 1964, all of the convicted Dutch citizens were free. Most government employees who had been dismissed were rehabilitated by the beginning of the 1950’s, successfully campaigning in 1956 for restoration of their pension rights.

3. *From Collective to Individual Retribution*

The decrees on extraordinary justice and purging the administration were intended as a system of collective retribution, but the simplistic notion on which they were based – that within the three different ‘wrong’ groups, all were equally culpable – bore little resemblance to the variations in war-time behaviour. As the legal process went on, it became clear that more scope for individual differentiation was needed. Procedural amendments helped, but the finer shades of distinction are to be found in the sentencing practices through which collective justice evolved into individual justice. At the same time, the idea that everyone should (let alone could) be tried faded into the background, although the underlying reasons differ between the purge and the process of administrative and criminal justice.

Not all supported the collective purge of the Dutch administration: some thought a public servant should remain at his post in ‘the interests of the country’,²⁶ others objected to

²⁵ These figures are provided by P. Romijn and Eric Schumacher, *Transitional Justice in the Netherlands after World War II*, in: N. Wouters (ed.), *Transitional Justice and Memory in Europe (1945-2013)* (Intersentia 2014), at 133-171.

²⁶ De Haan, *supra* note 2, at 89-94.

what they saw as discrimination of the ‘little man’ while the big shots got off.²⁷ There were indeed large discrepancies in the punishment meted out to civil servants and government employees caught up in the purge (about 10% of the total), among them very high-ranking officials such as mayors and chiefs of police; some were dishonourably discharged and prosecuted, others not.²⁸ Moreover, the idea of a collective purge of the ideologically unsound contradicted the reality of an administration under occupation.

All who remained in government employment by definition co-operated with enemy, but seldom as intentional collaborators or traitors: there were active collaborators; there were also heroes who sabotaged the enemy’s work; the great majority simply got on with the job. Dealing with the highest officials who had remained in office until the very end soon overshadowed the purge of minor employees that gradually ground to a halt. Romijn attributes this to the power struggle between the new and old elite, it being imperative for the latter that purging the administration did not become a divisive political issue.²⁹ But there were also considerations of just retribution, of not blaming the lower ranks for following the example of their superiors and of making sure that individual circumstances were taken into account.

The individualisation of sanctions was even more apparent in extraordinary criminal and administrative justice,³⁰ where sentences gradually became less harsh, most noticeably at the extraordinary courts. The maximum penalty for joining enemy forces, for example, was death, and some death sentences were passed and executed. Over time, courts came to distinguish between the Waffen SS (regarded as most reprehensible) and other branches of the German forces, took into account the youthful age of most volunteers who, after 1947, were no longer prosecuted, and brought the sentence for Waffen-SS’ers down to between eight and 15 years. While it is less easy to discover clear sentencing patterns for the other capital offences, betrayal and collaboration, here too sentences for even very serious crimes became more lenient as the courts discovered that, however immoral a person’s behaviour and horrific the consequences, there was always some case that was worse. Eventually, the notion of collective justice was entirely abandoned as courts sought to ensure that the punishment fitted the individual crime.

Although the consequences of many acts of betrayal were the same (the victims died), there were obviously different circumstances, motives and degrees of blame. In 1945, one

²⁷ Romijn, *supra* note 7, at 20.

²⁸ De Haan, *supra* note 7, at 88-89; Romijn, *supra* note 7, at 143 ff.

²⁹ Romijn, *supra* note 7, at 95-109

³⁰ The following is based on Belinfante, *supra* note 7, ch. IX-XII.

incident and the death of one person could lead to a death sentence. Later, the death penalty was rare. In 1949, for example, a Dutch ‘businessman’ who conned several Jews into paying to be ‘smuggled to England’ then handed them over to the Germans, was sentenced to 15 years in prison.³¹ Public officials who had merely done their job did not appear before the extraordinary courts. Only those who had been more than enthusiastic in assisting the occupying forces were prosecuted, with police officers who had hunted down Jews in hiding or betrayed resistance workers receiving harsh sentences until the very end.

It was also clear that severe penalties for low-ranking employees or policemen were problematic considering the bad example often given by superiors.³² However, even when the perpetrators were mayors, individualisation and mitigation in sentencing became the norm over the years, although the courts continued to regard NSB-membership as an aggravating factor. In 1945, for example, the NSB-mayor of Wassenaar was sentenced to life (later commuted to 20 years, although his actions had not had any dire results. Three years later, the mayor of Amsterdam, not a member of the NSB, received three years; his NSB-colleague in The Hague, 12; the mayor of Rotterdam, a considerably more active collaborator than either of the others, got ten years. The great majority of Dutch Jews had been deported under their leadership. Most difficult were the cases of the ‘good’ mayors, who had been appointed before the war and had never sympathized with national-socialism. They too had sometimes delivered Jews into the hands of the Germans. After consideration of the circumstances, they got off sometimes very lightly.

4. *A Policy of Pardons*

In 1950, the process of extraordinary justice gradually came to an end. A 1949 parliamentary inquiry commission examined the role of government under the occupation but decided the part played by high-ranking civil servants who had ‘looked after the country’s affairs’ after the government fled to London, did not really come under its mandate; it did no more than state that ‘some civil servants were insufficiently aware of where to draw the line’.³³ Then, while the extraordinary courts were still sitting, the Government embarked on a policy of pardons. Partly a response to public opinion where vengeful feelings had somewhat subsided (though not towards the Germans), and to pleas for clemency by the churches and

³¹ Belinfante, *supra* note 7, at 372.

³² ‘[I]n many branches of the police force, we find the most serious offences ... committed by the highest ranking officers...and what is worse, by shifting the burden of their responsibility as superiors onto their subordinates to whom fell the actual dirty work... We also find poignant discrepancies in the sentencing of such cases (Extraordinary Supreme Court, 8 November 1948).

³³ De Haan, *supra* note 2, at 91.

authoritative legal scholars, above all the policy of pardons was driven by socio-political and economic considerations. The country was devastated, the population split by memories of the war; rebuilding a stable society and viable economy was impossible without reconciliation and thus reintegration of political delinquents. Enough was enough.

In 1947, discrepancies in sentencing that came to light on appeal to the Extraordinary Supreme Court were resolved by commuting harsh sentences imposed immediately after the war. 1948, Queen Wilhelmina's jubilee year, saw the first of several mass pardons. The first youthful volunteers were pardoned in 1949, soon followed by the older ones. In 1950, pardons were issued for all those with ten years still to serve, later followed by a commission to look into cases with 15 years remaining. Then in 1951, lifers began to be pardoned. In the following years, increasing numbers of prisoners were pardoned and freed, among them 67 who had originally received death sentences.³⁴

C. Perceptions of Justice and Legacies of Silence

Already while extraordinary justice was ongoing, and certainly afterwards, there was a festering pool of dissatisfaction that was to flare up in public debate in the years to come.³⁵ But the specific groups concerned – ex-resistance fighters, Jewish survivors and collaborators – were different, and so too the reasons for their disillusionment. It was partly the legal process itself that led to perceptions that justice had not been done, but this cannot be separated from its socio-political context. These different perceptions, deriving from very different experiences of the war, were not equally represented in public discourse; some were silenced for many years, only to emerge as the respective groups found a voice and the nature of public debate gradually changed.

1. The Resistance

Those directly and professionally involved or interested (government ministers, judges, legal scholars and practitioners, academics), in short the old elite, felt that extraordinary justice had been a success once the practical problems were solved. But a substantial part of public opinion as represented in the now legal war-time underground press, the new political parties

³⁴ Because there had been public unease about executing the death penalty given that it could not be appealed, by March 1946 death sentences were not carried out anyway unless the Crown had considered a pardon. Those remaining were eventually all commuted to life.

³⁵ Romijn and Schumacher, *supra* note 25, at 151.

striving for power and especially ex-members of the resistance saw the policy of releasing so many from detention, the extension of the definition of ‘minor cases’ in 1945-1946, the increasingly lenient sentences and the pardons as unwarranted leniency. ‘...The law must have its course...Those who dispense justice should know that they are subjecting our people to a new crime if they hesitate to punish the guilty...we do not ask for the hangman, but for justice according to honour and conscience.’³⁶

It is unknown who wrote this, but it neatly sums up feelings of many resistance members, part of the new elite, who were highly critical of the policies of the old governing parties, including the way extraordinary justice was handled and the (political) compassion that guided its course. Twenty five years later, after the publication of what is still the classic study on extraordinary justice,³⁷ ex-resistance fighter (and criminologist) Willem Nagel was unable to hide the anger he had felt at the time. Writing under his pen name, J.B. Charles, he exclaimed: ‘Has it taken until 1978 for us to be shocked by the compassion that poisoned the so-called justice of 1945?’³⁸ This concept of ‘compassion’ has been explained as the expression of a predominantly catholic moral, exceedingly useful for the powerful catholic party that formed part of the first post-war coalition governments and also provided the prime-minister. A number of authors see extraordinary justice in this framework.³⁹

Compassion was a way of depoliticizing the issue – an appeal to fundamental Christian values not easily opposed politically – and, with it, the Resistance whose members became the war heroes of yesterday, not the political heroes of today. Resistance in the Netherlands did not really come into its own until halfway through the war. However, those who resisted the Germans from the outset were almost all politically motivated and organized accordingly. The largest group arose from the communist party, while others organized around socialist and/or pacifist leaders. The other significant group came from the Dutch reformed church. Their common ground was a desire for a new order after liberation, though they differed on what should constitute that order. This was a politically destabilizing factor in post-war society and the governing elite were keen to prevent the Resistance as such becoming a political group. Being silenced as a political force, however, is not the same as silence about the role of the Resistance.

³⁶ Anonymous pamphlet, Archives NIOD *Doc II 249, no. 0127C-49*.

³⁷ Namely Belinfante, *supra* note 7.

³⁸ J.B. Charles, *Van het kleine koude front* (7th edn., Amsterdam 1984).

³⁹ Romijn, *supra* note 7, De Haan, *supra* note 2.

Immediately after the war, there was much public interest in the resistance and several ex-members published widely-read memoirs.⁴⁰ These set the tone for a discourse of patriotic heroism,⁴¹ reinforced in 1947 by the award of pensions for members of the former Resistance and their families. Hondius refers to a ‘new social hierarchy’ formed in the reaction after the war: resistance fighters at the top, collaborators at the bottom ... a hierarchy [that] was widely accepted and has remained in place and essentially unchanged since 1945’.⁴² But while this informed the myth of resistance, one group was excluded: the communist ex-resistance, whom the cold war pushed down the social hierarchy and deprived of the authority their war record conferred. Paradoxically, while the Resistance was depoliticised, discussions about the war were conducted in the distinctly politicised, ideological frame of democracy versus totalitarianism. What was not needed in that context, were personal stories of injustice, precisely what Jewish survivors needed to tell.⁴³

2. *Jewish Survivors*

The voice of Jewish survivors recently returned from the camps or re-emerging from hiding was barely heard after the war. In so far as they were directly concerned with extraordinary justice, they, or their now dead family members, were simply individual victims. The process had not done justice to the experience of genocide, but this was something they could not articulate. In the prevailing discourse, Jews were no different from anyone else who survived the war, a reflection of a strict government policy of neutrality: no single category of war victims was to be favoured above others. ‘Collective victimisation’,⁴⁴ however, hid the fact that a tragedy had befallen the Jews that was of a different order to what had happened to the Dutch as a nation, even during the horrendous final year of starvation, lack of fuel and an increasingly brutal occupation, during which thousands died. This ‘hunger winter’ also fed the population’s perception of collective victimisation: granted, the Jews were in camps but we ate tulip bulbs or starved.

⁴⁰ J.C.H. Blom, I. Schöffer and A.C. 't Hart, *De affaire-Menten, 1945-1976: eindrapport van de Commissie van Onderzoek betreffende het opsporingsbeleid inzake Menten vanaf de bevrijding tot de zomer van 1976 en de invloeden waaraan dat beleid al dan niet heeft blootgestaan* (Staatsuitgeverij, 1979) at 191-192.

⁴¹ J. Bank, *Oorlogsverleden in Nederland* (Ambo, 1983) at 8-9.

⁴² Hondius, *supra* note 1, at 160/161.

⁴³ Ismee Tames & Jolande Withuis, *Stilte na de oorlog?*, 9 *Historisch Nieuwsblad* (2010), 68-75.

⁴⁴ Romijn and Schumacher, *supra* note 25, at 149. There was also no distinction in support for victims, which was temporary and scarce, the exception being pensions for ex-resistance members.

Jewish survivors felt betrayed – yet again – on returning to the Netherlands,⁴⁵ where they met indifference and sometimes hostility at the borders and in the cities where their own community no longer existed, and struggled to recover confiscated or (mis)appropriated property. In some cases, non-Jewish neighbours refused to return goods entrusted to them for safe-keeping, even expressing open displeasure that the rightful owner had returned alive.⁴⁶ More than anything, there was lack of understanding: the Jews should stop whining, be grateful for what they had and get on with their life. In the midst of what was at best indifference to the particular nature of their experience, traumatised Jewish survivors were unwilling and afraid to manifest themselves as such.

This silence was finally broken after 20 years. More important in the Dutch context than the trial of Adolf Eichmann (although that led to shock and disbelief), was the television series *De Bezetting* (The Occupation), a prequel to official historian L. de Jong's *magnus opum* on the Netherlands during World War II. On May 3 1962, the episode on the persecution, deportation and murder of the Dutch Jews stunned the audience and the media. De Jong encouraged another Jewish historian, J. Presser, to write a specific history of the Jews during the occupation.⁴⁷ *Ondergang* (Downfall) appeared in 1965, a harrowing tale of exclusion and destruction. Then, at the beginning of the 1970's, reports began to appear on 'concentration camp syndrome' and in 1972, a television documentary about a psychiatrist and his Jewish patients (*Begrijp je nu waarom ik huil? – Now do you understand why I weep?*), drove home the reality of living with memories of the Holocaust.

Jewish survivors now had a voice, raised that same year in public protest against granting pardons to the last remaining – German – prisoners serving life sentences (the so-called Three of Breda). Many academics and clergy supported release – and for the same reason: life imprisonment is inhumane. But anti-release groups were vociferous and shared a different sentiment: to release these Germans is to inflict yet more suffering on their victims. Such was the public outcry that, after an emotional parliamentary debate, the pardons were refused. A year later, when Jewish victim-survivors were specifically compensated (*Wet Uitkering Vervolgingslachtoffers – Law on Support of Victims of Persecution*), this was

⁴⁵ D. Hondius, *The persistence of uneasiness: Dutch Jews and non-Jews since 1945* (unpublished manuscript held by National Institute for Holocaust Studies - NIOD, Amsterdam, 1998); Hondius, *supra* note 1. See also M. Citroen, *U wordt door niemand verwacht. Nederlandse Joden na kampen en onderduik* (Het Spectrum, 1999).

⁴⁶ The title of Citroen's book (note 45 *supra*) in English is: *Nobody is expecting you. Dutch Jews emerging from the camps and hiding.*

⁴⁷ J. Presser, *Ondergang. De vervolging en verdelging van het Nederlandse Jodendom, 1940-1945* (Nijhoff, 1965).

justified as an act of special solidarity on the part of the Dutch population.⁴⁸ The Germans (now two, one died in prison) were not released until 1989; both died shortly afterwards in Germany.

3. Collaborators

Despite the releases and pardons, the efforts of the STPD that latterly had functioned as a reintegration service for political delinquents, and the political stress on rebuilding the country, the reconciliatory ideas of political and social elites were not shared by the population in general.⁴⁹ This was partly due to dissatisfaction with extraordinary justice, but there was also anger at the support and housing collaborators received while victims struggled to make ends meet amid a general housing shortage. The STPD noted that many ex-political delinquents found it impossible to find jobs, were shunned by neighbours and that their children were discriminated against by friends and even teachers.⁵⁰ In later years, the group was no longer categorically rejected, but their position was difficult enough for them to shroud their past in protective silence. At the same time, many were also angry about the treatment meted out in the first months after liberation and their children grew up in an atmosphere of silent bitterness.

Early attempts to break the silence were met with hostility and disbelief. In 1949, a Dutch fascist published a report on the detention camps, detailing the ill-treatment, starvation rations, torture and even murder of detainees.⁵¹ Although some were shocked, the more so since the facts were corroborated by less suspect sources,⁵² the Government took steps to improve the situation and the fuss died away. Only recently has there been serious and detailed research into what happened in this ‘forgotten past’ (the subtitle of one such publication).⁵³ As to the fact of collaboration, in 1967 the first attempt to throw some light on who the collaborators were and what their motives,⁵⁴ met with a storm of criticism especially

⁴⁸ At the end of the century, when the details emerged of how the Jews had been looted by official Dutch institutions, government, stock-market, banks and insurance companies donated a combined 764 million guilders (Romijn and Schumacher, *supra* note 25, at 164).

⁴⁹ Romijn and Schumacher, *supra* note 25, at 159.

⁵⁰ Le Poole, *supra* note 24, at 11-12.

⁵¹ H.W. van der Vaart Smit, *Kamptoestanden 1944/45-1948 – rapport* (Keizerskroon, 1949).

⁵² A. van Liempt, *Na de bevrijding. De loodzware jaren 1945-1950* (Uitgeverij Balans, 2014), at 47

⁵³ G. Abuys, and Bas Kortholt, *Interneringenkamp Westerbork: verhalen van een vergeten verleden (1945-1948)* (Just Publishers, 2010); see also R. Hoving, *Het foute kamp. De geschiedenis van het Amersfoortse interneringskamp Laan 1914 (1945-1946)* (Donker, 2011).

⁵⁴ Armando en H. Sleutelaar, *De SS'ers. Nederlandse vrijwilligers in de Tweede Wereldoorlog*, (De Bezige Bij, 1967).

from papers that were a continuation of the underground press. Even in the 1980's studies of collaborators received little general attention.⁵⁵

Collaborators had always been reluctant to seek a public platform. In 1947, a number of leading ex-NSB members had apologized publicly, but this admission of guilt was not taken seriously and there were no more large scale attempts.⁵⁶ According to Tames, while reintegration was certainly not easy and there was no real reconciliation, things were not as bad in practice as the right-wrong discourse would suggest; collaborators were 'allowed' back, but only in so far as they were prepared to admit their fundamental guilt, making them ever dependent on the conditional good will of others.⁵⁷ Their children formed a particularly difficult and vulnerable group, who, for obvious reasons, were both traumatized by the silence and/or the knowledge of who their parents were, and yet could not speak out of loyalty or fear, or both. During the 1980's, they were grudgingly but not widely recognised as one of the groups for whom the war had brought specific traumas.⁵⁸ It is, however, only in the past ten years that their individual stories have started to be told.⁵⁹

D. The bystander role of the Dutch population

If the three specifically dissatisfied groups were eventually able to articulate their feelings, until the end of the millennium neither they nor anyone else managed to put the one subject enduringly smothered by the myth of resistance on the agenda of public debate: the bystander role of the great majority of Dutch citizens. Writing on protests against 'lenient' justice, the director of the STDP noted: 'So many compatriots bear some moral guilt, because ... they refused to help those in need. The more they proclaim they were "anti", though in reality "neutral", during the occupation, the louder they are after liberation!'⁶⁰ Years later and after the Three of Breda affair, a legal scholar noted: '...the settling of accounts for what happened to the Jews ... should include the culpable negligence of the Dutch. If solidarity with victims

⁵⁵ E.g. J. Hofman, *De collaborateur. Een sociaal-psychologisch onderzoek naar misdadig gedrag in dienst van de Duitse bezetter* (Boom, 1981), and H. Stouten, *Naar verkeerd spoor. Achtergronden van Nederlandse politieke delinquenten, 1940-1945* (Stubeg 1986); the latter, a prison director had waited 40 years to publish his experiences because he felt his ideas did not fit the prevailing consensus on the war.

⁵⁶ Romijn & Schumacher, *supra* note 25, at 167/168.

⁵⁷ I. Tames, *Doorn in het vlees. Foute Nederlanders in de jaren vijftig en zestig* (Balans, 2013).

⁵⁸ H.J. Scheffel-Baars, *Kind van foute ouders* (Werkgroep Herkenning, 1984).

⁵⁹ See e.g. B. Kromhout, *Fout geboren: het verhaal van kinderen van foute ouders* (Contact, 2004);

C. van der Heijden, *Kinderen van foute ouders: hun verhaal*, (Uitgeverij Atlas Contact, 2014).

⁶⁰ Le Poole, *supra* note 24, at 23.

is enforced through punishing the Three of Breda, extraordinary justice becomes an alibi for all those only too keen to pass their own failings and blame to the Germans.⁶¹ Then, as before, there was little room for such soul searching. Right versus wrong defined the war years from the beginning, continually reinforced in the writings of historians such as de Jong and Presser,⁶² and by sporadic revelations that public figures had been ‘wrong’ during the war. After one such incident, the then Dutch Prime Minister Lubbers wrote in a private letter: ‘The image this society...has of the war is totally out of focus. “You were right or you were wrong”. The reality of grey is completely ignored.’⁶³

That grey reality is now the subject of much new research, following a call by Blom to move forward from the right-wrong dichotomy. Why the persecution of the Jews was so catastrophic in the Netherlands has become a pressing question for historians: the Dutch paradox, for were not the Jews always received with great tolerance?⁶⁴ Yet, of all Western European countries, the Netherlands lost the greatest percentage of its Jewish population (75%, as opposed to 25% in France, for example, and 40% in Belgium). There have many explanations as to why the Dutch Jews fared so badly. Obviously, the Netherlands has no wild countryside (as in France) and bordered no neutral country to which to escape (as did Denmark). More importantly, deportations in the Netherlands were uninterrupted and less violent than elsewhere, while the Jewish Council continued to cooperate till the end. The Jews of the Netherlands were highly assimilated and ‘clung to the legal options which then proved to be part of the deportation system’.⁶⁵

This is with the benefit of hindsight, and so too are explanations as to why the majority and the Dutch administration were so compliant. According to Romijn, protecting the population at large, not its most vulnerable group, was the authorities’ priority. In the mixture of force and deceit that the Germans employed, tolerating discrimination of the Jews seemed wiser than protest. But this was a slippery slope and these ‘politics of lesser evil’ became bankrupt by 1943 when the Germans turned their attention to the Dutch population itself, and evading forced labour in Germany became the acceptable reaction (although many did go).

⁶¹ C.H.F. Rüter, *Enkele aspecten van de strafrechtelijke reactie op oorlogsmisdrijven en misdrijven tegen de menselijkheid* (University Press Amsterdam, 1973), at 147.

⁶² Blom, *supra* note 4; Van der Heijden, *supra* note 3, at 410.

⁶³ Quoted in R. Bouwman, *De val van een bergredenaar* (Boom, 2000), at 319.

⁶⁴ Blom, *supra* note 4, at 75; this book combines i.a. two inaugural speeches. It is in the first (at 9-30), given in 1983, that he makes his appeal for recognising shades of grey.

⁶⁵ P. Griffioen and R. Zeller, Comparing the persecution of the Jews in the Netherlands, France and Belgium, 1940-1945: similarities, differences, causes, in: *The Persecution of the Jews in the Netherlands, 1940-1945. New Perspectives* (Vossiuspers UvA, 2012), at 77-78.

This attitude on the part of the (highest) authorities partly explains why, when public servants were required to sign the ‘declaration of Aryan descent’, only seven non-Jews in the whole country refused, or why the gradual exclusion of Jews from public life went ahead so smoothly.⁶⁶ When the razzias started in February 1941, there was brief and violent public protest in Amsterdam led by communist dockers (the ‘February Strike’); it was put down harshly, but made the Germans more circumspect in rounding up Jews for deportation. Van der Heijden points out that there was comparatively little resistance until 1943 and that armed resistance was also less than in other countries. He puts the compliance of the population down to an inclination to compromise, obedience to authority and trust in the administration.⁶⁷

But hindsight now begs the question of what people knew then. Private diaries from the period show that many were distressed by what was happening to the Jews (if also mildly anti-Semitic) but that they did not understand its significance, despite the stories about destruction and extermination in ‘the East’ as broadcast via the BBC and underground press.⁶⁸ While Van der Heijden also doubts how much people knew, the main gist of his study is that the ‘grey, middle-of-the-road position of the bystander’ made it easier to avoid trouble and adapt to an increasingly difficult reality. Historians are coming to see this as a continuation of pre-war social and political relations: the capacity of both administration and population to adapt derives from a political culture of accommodation that made contact and cooperation with the Germans possible without its necessarily being (perceived as) collaboration.⁶⁹

Part of the Dutch paradox, this also goes some way to explaining the myth of resistance and the great silence that shrouded first the fate of the Jews and later, when the facts were known, the role the Dutch themselves had played in it. Withuis stresses that, because the experience and significance of the war and post-war situation differed for different groups, it was impossible to find a collective narrative for the future. The failure to protect the Jews is hardly a candidate, especially not in a country that regards itself as extremely tolerant. And so the narrative evolved towards oppression and heroic resistance. The more this is emphasised, however, the more the decidedly unheroic attitude towards the deportations must be denied, notions of ‘right’ and ‘wrong’ dominate the debate and, where

⁶⁶ P. Romijn, ‘The ‘Lesser Evil’ – the case of the Dutch local authorities and the Holocaust’, in: *The Persecution of the Jews in the Netherlands, 1940-1945. New Perspectives* (Vossiuspers UvA, 2012) 13-28 at 17-19.

⁶⁷ Van der Heijden, *supra* note 3, at 287.

⁶⁸ B. van der Boom, ‘*Wij weten niets van hun lot*’. *Gewone Nederlanders en de Holocaust* (Boom, 2012). (The title, a quote from a diary, is worth translating: ‘We know nothing of their fate’).

⁶⁹ Blom, *supra* note 4).

silence reigns in the absence of a narrative that all can share, post-war traumas are medicalised rather than treated as social problems.⁷⁰

The new historiography has created a narrative something akin to collective guilt for what happened to the Jews, both during and after the war; there is more understanding of the role of so-called collaborators⁷¹ and certainly of the difficulties their children faced (although to have been the child of ‘wrong’ parents is a stigma most would prefer to avoid, even today). Interestingly, as this new truth, ‘the guilty Dutch’, took hold, studies of the resistance celebrating its heroes began to appear as if to ward off the risk that their memory would succumb to the weight of collective responsibility.⁷²

E. Conclusion

With the exception of what happened in the detention camps, the unofficial reaction to collaborators was fairly mild in the Netherlands, certainly in comparison with, say, France. In that, extraordinary justice was certainly successful. But it was also inevitably flawed, procedurally, but perhaps more importantly, as a social process. The courts struggled with the realization that the stark categories of right and wrong had only some link with reality and that collective justice was therefore no justice at all, and did their best to provide fair trial and punishment in the individual circumstances. That this was viewed as too lenient was exacerbated by the release and pardon policies. Yet, leniency and ‘compassion’ cannot simply be dismissed as part of the political struggle of the time. A measure of due process, establishing individual guilt, proportional sentencing, some degree of equality through mitigation of the harsh sentences of the early years, releasing minor cases and attempting to prevent the perpetual exclusion from society of those found wanting, were not merely pragmatic-political issues but justifiable concerns of judges, legal scholars and government wrestling with the question: what is just retribution in such extraordinary circumstances?

Knowing what we know now, it seems extraordinary indeed that the whole process was premised on the ideological-political distinction of right and wrong, so that the offences specifically designed to accommodate the circumstances of the war reflect the notion that all

⁷⁰ Withuis, *supra* note 1, at 109.

⁷¹ The term ‘wartime mayor’ became a Dutch expression for a Catch 22 situation: by remaining at his post, he gets his hands dirty; by leaving, he abandons his people.

⁷² See e.g. J. Cohen and H. Piersma (eds.), *Moedige mensen: helden in oorlogstijd* (Boom, 2014); see also the website of NIOD, on which, since 2007, staff members could name their ‘hero of the month’. More recently the site gives access to blogs about heroism and the ‘production’ of heroes (www.niod.knaw.nl/heldvandemaand).

politically unsound individuals – and they alone – were perpetrators. The process therefore aimed at denying the politically unsound a place in society; the sanctions – life sentences, the death penalty, the ‘civil death’ of total confiscation of assets and denial of civil rights, lustration – were all intended to achieve just that. But in the absence of any connection to wartime realities, this concept could not, by definition, make good on its promises; neither could it do justice to the realities of the crimes and criminals of the occupation. Thus it was preconditioned to leave a legacy of divisiveness.

Extraordinary justice has been criticised for this failure to promote a society conducive to an inclusive debate that could lead to reconciliation.⁷³ Given that it was founded on notions of exclusion that is hardly surprising. To expect the legal process to lead to reconciliation in such post-conflict situations, probably always asks too much of the criminal law, for it would be to ignore that every legal process is a function of the social and political context in which it operates⁷⁴ and, moreover, to conflate law and its application with justice. A court’s verdict is definite and authoritative; closure, not continued debate about what it establishes as legal truth, is its purpose.⁷⁵ Justice, like history with which it is closely intertwined, is an open-ended quest for historical truth and understanding.⁷⁶ In the context of conflict and transition, justice is a permanent struggle in different theatres of memory, confronting different truths of very complex, traumatic social and political events. It is a collective process and can only be achieved if all can recognise a collective version of the past, or at least the validity of different, contested memories.

If the legal process of extraordinary justice failed, it is because it could not produce even the beginnings of a collective version of the past. That it did produce a divisive right-wrong dichotomy should not surprise: establishing ‘wrong’ as opposed to right is what criminal trials are about. But there was another inherent mechanism at work that is specific to the underlying ideology of Dutch post-war justice. The truth about the destruction of the Jewish people that emerged from the trials was a patchwork of collaboration and betrayal by individual perpetrators. To betray a Jew was a politically unpatriotic act that usually led to the death of the victim so that the maximum penalty was death (and indeed, death sentences were

⁷³ Romijn, *supra*, note 7, at 20.

⁷⁴ Which is, perhaps, a persuasive reason for not embarking on criminal trials immediately after the end of hostilities, and certainly not while they are still ongoing.

⁷⁵ C.H. Brants and K. Klep, *Transitional Justice, History Telling, Collective Memory and the Victim-Witness*, 7 *International Journal for Conflict and Violence* (2013) 36-49, at 46.

⁷⁶ J.C.H. Blom, *Historische en strafrechtelijke ordening van de chaos*, in: M. Spiering et al. (eds), *De weerspanning van de feiten. Opstellen over geschiedenis, politiek, recht en literatuur aangeboden aan W.H. Robool* (Verloren, 2000) 23-32, at 24-25.

imposed and carried out), but it was no more nor less than any other act of betrayal that had cost lives. Parallel to the prevailing political and social discourse, victimhood was, literally, ‘neutralised’, so that the Holocaust as a phenomenon and the particular collective victimhood of the Jews (as opposed to the collective victimhood of the Dutch population as a whole) were not, and could not be, addressed as specific issues.

Similarly, the identification of perpetrators as unpatriotic and politically unsound individuals buried the difficult moral question of the co-operation of almost the whole administration and the passive attitude of practically the whole population. That releases, pardons and reintegration schemes failed to bring reconciliation any closer despite the rhetoric of rebuilding the nation, is also logical. They were top-down policies that left the past behind and closed off divisions, while reconciliation is an ongoing social dialogue about precisely what it is that divides.

That the path of justice in the Netherlands proved so rough is not simply a result of how its legal component operated. Criminal trials are but are small part of the process of justice itself and few now remember the contribution of extraordinary criminal justice at all. That criminal courts and tribunals sentenced tens of thousands in a series of trials lasting more than 6 years – no mean feat – is specialized, not general knowledge. Its contribution to a legacy of dichotomous public discourse, however, has proved lasting. The prevailing image of the reckoning, seen on television year after year around liberation day, is of men in old-fashioned raincoats and hats, hands in the air and a placard reading ‘traitor’ round their necks, manhandled through the streets by a couple of armed resistance men and a jeering mob; or of girls – *moffenmeiden*⁷⁷ – having their head roughly shaved amid the sunny festival-like atmosphere of newly liberated towns. It is the enduring imagery of right and wrong. Likewise, a lecture-series at the Resistance Museum in Amsterdam marking the 70th anniversary of the end of the war bears the title ‘Heroes and Villains’. No Dutch person needs to be told what that means in the context of the war.

⁷⁷ Saving the alliteration, best translated as ‘Boche-bitches’.