I.C.O.P.A. - Montréal - 1987.

PRISON ABOLITION IN A DUTCH PERSPECTIVE.

The strategic value of the struggle against forced labour.

1. About the burden of proof in the case against prisons.

The abolitionists no longer need to argue why prisons are of absolutely no use for the population and serve only for State purposes. During the second international conference on prison abolition Mathiesen has given a short but very clear series of arguments against the building of new prisons(1), an activity that all over the world seems to become more popular with the year. In his view, any given argument for the building of new prisons is irrational, because by far most of the research in this field delivers strong arguments against the building of more of those institutions: "in short, the arguments of individual prevention, general deterrence, the feasibility of a ban, the irreversibility of building, the expansionist character of the prison system, humanitarianism, cultural values and economy, all point away from building of more prisons", Mathiesen said on this occasion.
On abolitionists no longer rests the obligation to put forward, time and again, arguments against goals. The people and agencies who want to maintain the status quo (e.g. the state and its agencies) will have to refute findings stating:
- that confinement is no more effective than fines;
- that recidivism is more likely the longer confinement lasts;
- that the character of prison has almost no effect on recidivism;
- that confinement is no more effective than probation; (2).

The annoying thing however, is that the State almost never takes the trouble to prove the usefullness of its prisons and most of the time uses hypocritical arguments like the one that confinement would meet popular demands for safety and other supposed needs of the voters, argument that tend to be exploited to the bone by shameless politicians.

It doesn't make any sense for abolitionists to put on a rational fight against those very irrational arguments of the state and its politicians. The resulting debate is of the same character as that about the use of nuclear arms. The only difference is that "the Soviet Russian" and "the Red Danger" are exchanged for "the Criminal" and "Criminality". It is not fruitfull trying to counter demagogic argumentations with rational ones. Whenever one, as a critic on the penal system, puts forward that the main function of that system is the deployment of the power of a State against its own citizens, one experiences time and again that the opponent tries to

avoid such a debate, not seldom with the statement that the critic presupposes bad faith on the side of the State and because of that does not need to be taken seriously as a debating partner but must be regarded as an enemy of democracy. A different, a bit less unfriendly method, is to label the critic or abolitionist as a "utopist" and thus try to isolate him this way as a person who needs not to be taken seriously. Another method to corner any abolitionist is to reproach him for not presenting alternatives for the system he critisises. An absurd point of view like if, for instance, a opposant of the death penalty would be obliged to present an equivalent before it can be decided to do away with this barbarous punishment.
The lessons that any abolitionist can learn from this kind of debating experiences is that it is far better to avoid those verbal skirmishes and he can use his time better by concentrating on more effective methods to realize the changes in the criminal system, he wants.

2. The struggle against the prison system in relation to other abolitionist activities.

The International Conference on Prison Abolition (I.C.O.P.A.) has broadened its scope during the 1985 congress in Amsterdam (and rightly so), from prison abolition to abolition of the whole penal system.(3) This broader approach of the penal problems without doubt will stimulate abolitionist thinking and activity. Still, this should not lead to a relative lapse in attention for concern about the phenomenon of detention centres and goals. In developing strategies relating to the question how to put abolitionist theories into practice, without doubt the prison system as an object for abolitionist action offers still the best chances for success. This system has a very clear and literal outline; prisoners form an easily identifiable interest group and their commonly very concrete material oriented problems directly appeal to reformers. In this sense, it is opportunistic for an abolitionist to focus on prisons as objects for action. Isn't it far more complicated to develop strategies for changing legislative procedures or changing the functioning of penal agencies like the police, the state attorney and the judiciary? Of course, the development of abolitionist theory in those fields should continue and it is surely necessary to transform those theories into practice, but in the meantime it may be possible to achieve success in the field of prison abolition, success that may stimulate other abolitionist activities.

During the last ICOPA-congress in Amsterdam, Bergsma put forward the question whether it is realistic to strive after prison abolition in a country like Holland, where these years one can see a rapid expansion of the prison

system. The only sensible thing in his opinion one still can do is raising your voice against it.(4) This seems to be a very defeatist approach of the matter. Against this, one can argue that any abolitionist step forward during times when the penal system is flourishing will yield double crop when circumstances change for the better, e.g. during times when penal repression is diminishing. It seems more feasable not to hide in your ideological pill-box until the times change in your favour. Such an approach results in nothing and who is guaranteeing your safety inside such a pill-box anyway?

3. Classical reform strategies against more direct action oriented strategies.

One can make a rough division between two kinds of reform strategies: those that aim at changes in policy by trying to persuade government agencies and those strategies which aim at the creation of a new reality as a result of which the government and most agencies will be forced to change their policy in penal matters.
A clear example of the first mentioned strategy is the one which F.M. Dunbaugh has put forward during the last I.C.O.P.A.-conference in Amsterdam. His approach represents a classical reform strategy which aims at the reduction of the use of confinement. In contrast to the titel of his contribution "a strategy for abolishing prisons in the United States" (5), his position is not abolitionist at all. "We must reduce the use of involuntary confinement to the bare minimum, and ensure that what little confinement remains is practised in the most human manner possible ...", Dunbaugh says. In his view this aim can be reached by trying to diminish criminality, expand the possibilities for reparation, by trying to influence the policy of the state attorney and by trying to influence the meting out of judicial sanctions. In this way he shows himself to be a reductionist rather than an abolitionist. The question is whether this (without any doubt well-meant) strategy, can produce permanent positive results. Strategies like this aim at changes in policy regarding the use of the penal instruments. In other words strategies like these try to bring about changes in the "software" of the penal system, but leave intact the "hardware" of the same system consisting of the legal framework, the very prison buildings and their staffing.

The history of Dutch criminal policy has learned that changes in policy regarding remand custody were possible (Bergsma, o.c., p. 204/205), but has also proven that such changes in policy can be annihilated within a very short time. Such a negative change is going on in the last decade, wherein

the number of prison cells will be doubled. Changes in policy are laid down in the government paper named "Samenleving en Criminaliteit" (6). Progressive changes in criminal policy can melt away like snow in the sunshine as long as the penal infra-structure is left intact. Even temporarily closed penal instiututions can be re-opened within a very short time whenever the criminal-political tide is coming in.
From this, one can conclude that it makes sense for abolitionists to support reductionist strategies of people like Dunbaugh, but that it is at the same time necessary to act against "the hardware" of the penal system: the prisons.

4. The importance of actions against the prison system.

The importance of actions against the prison system itself lies in the possibility to attack the penal power-play in two of her most vital aspects, the economical exploitation and discipline of detainees by forced labour. Whoever will succeed to attack succesfully the forced labour by prisoners, affects in the same time the very essence of the sanction of confinement (7).

The position of the prisoner as a forced labourer is, since the famous study about this subject by Rusche and Kirchheimer (8) since 1939 a central subject in the debate around prison reform and prison abolition. It is a pity that the relationship between the labour market and the confinement-rate is not as immediate as the authors may have thought (9); still, it is possible that the domain of forced labour may offer good opportunities for abolitionist action.
The fact that prison labour consists not simply of the exploitation of the labour of detainees (even in times wherein unemployment on the free labour market is high, prisoners still are forced to work) has been made clear by Foucault. Even if prison labour does, in certain times, not produce material gains for the government, even if the prisoners do not get any vocational training by it, then still forced labour is very functional for the state agencies: forced labour serves to establish and maintain a power relationship, it offers a scheme for the sub-ordination for the individual and of his adaption to the "capitalistic" production apparatus (10).
Facing these functions of prison labour, one realises that the undertaking of a struggle against forced prison labour and a struggle for minimum wages mean a fight against the central functions of exploitation and disciplining.

The hypothesis here is that whenever one or both of these functions can be

removed or dramatically diminished, the confinement of persons will be no longer as attractive to the State apparatus as a means of power wielding as it is nowadays and possibly wil be given up. Another hypothesis is that when the confinement alternative will become very costly (which it will be whenever normal wages will have to be paid for prison labour), the State and its agencies will resort to less costly extramural management and disciplining techniques. As to the last mentioned hypothesis, the penal practice unfortunately indicates the other way. In Holland, the development of alternatives to confinement still have no noticeable effect on the confinement-rate. So, it seems that alternatives are not really alternatives but supplements to the existing prison system. The development of so-called alternatives does not yet lead automatically to the withering away of the prison system. How easily so-called alternatives are incorporated into the existing criminal system is shown by experiments with the "community service order" (dienstverlening) in Holland. Without knowing too much about the effects on the confinementrate, already a procedure is well under way to incorporate this community service order within the existing penal laws. By that, the disciplining reach of the penal law increases: an alternative becomes a supplement (11).
Not only those penal supplements deserve abolitionist criticism. It is important also to analyse non-penal methods, like the introduction of a duty to work for free for young and old unemployed. This is a non-penal way to discipline a large group of potentially oppositional groups. The sanction of not-obeying to this labour duty is the withdrawal of their social security pay. So, one can see within the penal system a realisation of the penal sanction by forced labour and on the other hand in the so-called free society the realisation of a duty to work by an essentially penal sanction (12), a kind of fine.

The conclusion of this all can be that not only the battle against the disciplining models within the prison system must be fought, but also that the extramural models of disciplining by forced labour need the attention of the abolitionists.

5. How to approach the problem of prison labour in Holland.

If we now suppose that the struggle against the prison system and, more definite, against the obligation to work for prisoners is an essential abolitionist activity, the question arises on which points one can try to affect the duty to work, in which way that could be realised and whether the conditions for success are existent.

In Holland, actions should concentrate upon four objects: [1] upon the abolition of the legal duty for prisoners to work; [2] upon the introduction of at least a legal minimum wage for detainees who want to work on a voluntary basis; [3] on a boycot of prison products and of enterprises, profiting from prison labour and [4] on the applicability of the normal social security laws on detainees.
Schumann (see note 7, p. 18-19) has clearly indicated that whenever action is undertaken against forced labour by prisoners, one should choose the right objects. He reports about an initiative from 1975 at Bielefeld (West-Germany). The mistake made then was, as Schumann says, that one did not oppose the duty to work principially and only undertook efforts to obtain higher tariffs for the work done. His conclusion is that this type of action, aiming at an isolated change within the prison system added more rationality to it and offered it a new means of disciplining: viz. the distribution of different kinds of work with different kinds of tariffs between the prisoners, depending on the (bad or good) behaviour of those persons.

In Holland, the obligation for prisoners to work is embodied in the Criminal Code (articles 14, 20 and 22) and specified in the Code for the Prison System (Beginselenwet Gevangeniswezen), articles 32 - 38. Further details are laid down in rules of a lesser formal status, like the "Gevangenismaatregel" (articles 49 - 62). Most of the rules are elaborated in written instructions from the Minister of Justice to the prison administrations (circulaires). Abolitionist activity will have to result in the final withdrawal of the before mentioned legal framework for prison labour.

The counter part of the abolition of the obligation for prisoners to work during their confinement is the claim for normal pay for work they wish to do voluntarily. The rational for this claim is that the State, by confining a certain group of people, cuts off their possibility to sell their labour force on the "free" labour market. At the same time, a right to normal social security payments m,ust be established in those cases where the prison administration cannot offer normally paid work to those who want to work. Actions in these fields should result in a corresponding accomodation of the Dutch law on minimum wages and of the laws concerning compensation for involuntary unemployment. So, for one one should attempt to deregulate in the penal field and attempt to obtain a more extensive legislation of the administrative laws concerning payment and social security.

The next question is which means the abolitionists have to attain those targets. Two, complementary, roads seem to be open. First of all, there is

the juridical way. In Holland, there still are a lot of not yet explored procedural possibilities in the field of labour law for prisoners. It seems to be fruitfull to examine the possibility of initiating "normal" civil law suits in different places against different prison managements and/or the Ministry of Justice by which one can try to make existing law applicable to the situation of detainees. It seems to be worthwhile to transform penal law problems into civil law procedures. One could try to take private enterprises into civil courts qualifying them as eluders of legal obligations to pay minimum wages to workers and putting them down as tax-evadors by indirectly using the forced labour of prisoners.

But one should not build his abolitionist hope solely on juridical procedures, knowing that workers in the end never profit much from procedures against "the other side". It seems realistic not to have to build too high hopes upon juridical procedures as regards the position of prisoners/workers. The chance that the judiciary will qualify prisoners as forced labourers is very slim, regarding the jurisprudence of the European Commission on the fourth article of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which forbids "forced or compulsory labour" (13). One should however also realise that this European Convention needs not be interpreted in a minimalistic way and that it may be possible to drive the national jurisprudence beyond the minimum exigencies of this convention.

So, if legal procedures seem not to be too successfull beforehand, they can anyway lead (and certainly so when they are initiated on a large scale and when they are subject to controlled tactics) to a situation in which the State and its judicial agencies feel themselves compelled to express themselves fundamentally on the subject of forced labour in the prisons. A side effect will also be that the "bad conscience" of the authorities will remain intact (14) and will prevent them from allowing the situation of the prisoners to detoriate too much.

As a necessary supplement to juridical procedures, use should be made of a second road to abolition, which is the labour-strike. In this respect it is not so much a problem to induce strikes within the various prisons in Holland (reasons enough for those and the prisoners are always ready for it), but a very important condition for a successfull political use of strikes is their adequate organisation. The prisoners cannot be expected to do much on this point. Although the Dutch prisoner is not denied his right to freedom of peacefull assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his

interests, the Dutch constitution makes it possible to infringe upon the exercising of these rights whenever the detention situation makes this opportune. What is denied to a prisoner is the right to strike. Claims in this direction are systematically refuted by the Court of Appeal that decides in prisoners-rights cases. (Beroepscommissie 1.12.1983 - SGA 103/83, P.I. 84/25 and Beroepscommissie 15.7.1983 - SGA, 82/83, P.I. 84/7). It is however very much the question whether abolitionist action should aim at securing a "right" to strike for prisoners. Whenever "the other side" formulates a (legal) right to strike, it always will be bound to certain conditions. One can argue that any worker has per se an unconditional "natural" right to strike and whereever this right is denied to him he just takes it.

On the issue of actions against products of prison labour and against private employers who let prisoners work for them, one could orientate oneself on successfull actions (at least in Holland) against products of the South-African apartheid system (Boycot Outspan) and companies who keep this system intact (Shell helps). No enterprise will like it to be labelled openly as an exploiter of cheap prison labour. It should also be tried to allow the employers act themselves against cheap prison labour by pointing at the unfair competition that is allowed for in the use of cheap prison labour. In such a way the employers organisations could be of use to abolitionist efforts.

Not only employers organisations should be activated however. It seems more important to try to let the labour unions take interest in the position of the prisoner/labourer. The big difficulty one will encounter is that the consciousness of the (organised) labourer is not per se very much enlightened on the issue of "criminality" and the handling of "criminals" (16). Perhaps at least on the side of one union (the union of civil servants, ABVA) there is a tendency to care for the implications of criminal policy, because this union organises the bulk of the prison personnel (17). Positive concern on the side of the acknowledged unions through actions for the abolition of forced prison labour and the introduction of normal wages for prisoners is only possible if the pursued changes are not only in the favour of the prisoners, but also favour the situation of the prison personnel itself. So, one should find points of common interest between the prisoners and their warders. Perhaps such a common interest is the tranquility in the field of labour and wages so there is no need to fight out conflicts between individual or organised detainees and the lower personnel. A relatively good position or prisoners with regard to labour and payment can be used by the warders as a good basis for their own demands in this field. To

both parties it must be made clear that in the last instance, as workers, they are on the same side.

The final question here is whether the conditions for successfull actions exist. In the Dutch situation there are reasons to be relatively optimistic. Not withstanding a sharp increase in the number of prison cells (from about 3500 in 1980 up till about 7000 in 1990), the climate and the conditions do not seem too unfavourable to initiate activities against forced prison labour and for a normal wage for voluntarily undertaken prison labour. In the first place, the Ministry of Justice and the present administration have never denied as a matter of principle that the payment of working prisioners is far too low. The only argument against paying normal salaries has always been shortage of money. Even the jidiciary confirms that a prisoner cannot live on prison-wages (President of the Arnhem Court, 3.5.1985 - K.G. 1985, nr. 148). Secondly, practice has proven that prisoners individually, but also as a group, have been very well prepared to take part in actions in this field. That became clear during a struggle for the effectuation of the right to freedom of peacefull assembly and to freedom of association with others, which took place at the beginning of the eighties (19). The experience has learned that such actions need very concrete and clear cut targets and may not last too long, because of the great mobility of prisoners (by frequent transfers and release). It is very important to pick the right institutions, because circumstances vary enormously regarding their placement. The presence of a local supporting unit outside the walls must be decisive by selecting the places for action.

In the second place, it must be possible to have free access to prisoners who want to join the actions. In Holland, free access is not granted to non-professionals. The only independent persons who have free access to the prisoners are lawyers and people working in Law Centres, who serve as independent consultants to prisoners within the various prison institutions. The formal position of the people working in Law Centres is rather dependent upon the approval of the Minister of Justice, so it seems not to be wise to try to involve them in direct abolitionist action. However, they are very usefull in keeping contact between prisoners and outside supporting units and are always willing to provide detailed information about the situation within the prison buildings. A favourable circumstance is that these Law Centres maintain a specialised secretariat, where data regarding the position of prisoners are compiled. The more activist (and perhaps the more risky) work will be for the so-called social lawyers consisting of professional barristors/sollicitors who, on ideological grounds are specialised in cases regarding the rights of workers, tenants, people entitled to

social security, aliens and prisoners. This group of social lawyers is relatively extensive and relatively well organised in Holland and has a central, professional staffed, secretariat and a monthly magazine. A certain number of them is specialised in prisoners rights. The Dutch free legal aid system guarantees that the services of social lawyers to prisoners who want legal advice are paid by the very government who keeps the prisoners inside. So, the opposition can be financed by the State itself.

In the third place, in Holland there are interest groups like the Union of Law-breakers (Bond van Wetsovertreders) and Relations of Prisoners (Relaties van Gedetineerden) and a few others who, on a strictly voluntary basis have proven to be able to support actions on behalf of the prisoners.

As far as the media play a role in the game, in Holland there are enough qualified and sympathising press and radio people available who are willing to give information to the public about eventual actions on behalf of prisoners. It seems a happy circumstance that in Holland the phenomenon of the government broadcasting system does not exist. Experience with the support by private broadcasting unions has been obtained at the beginning of the eighties, when the broadcasting company, called VPRO, provided weekly information by radio about the activities of the before mentioned Bond van Wetsovertreders with the aim to give information to the prisoners about their right to make formal complaints to the prison administrations and to stimulate them to create prisoners unions (19).

So, given these rather favourable circumstances, the question arises what holds the abolitionists back? First of all their relatively small number, and secondly the circumstance that social lawyers are engaged in that many battles of a different kind that it requires additional energy to focus a significant part of them on the problem of forced prison labour. It seems first of all a matter of finding and organizing a good mixture of abolitionist thinkers, social lawyers and convicts and their pressure groups. Initiatives in this field should be realistic. The average prisoner must not be placed on a ideological pedestal. He must not be depicted as "a not yet conscious proto-revolutionary", nor as a vanguard in some kind of general revolutionary struggle. Any illusion about possibilities of integrating prisoners and free labourers or/and intellectuals is doomed to lead to disappointment. In practice, very often the direct immediate interests of prisoners prevail above the long term targets of abolitionists. The average prisoner will demand direct material results, an attitude which can easily collide with the more abstract abolitionist thinking. One shall have to accept that prisoners will try to use abolitionist actions only for their

own private interest. Only a few former prisoners will be ready to invest energy in abolitionist movements after their release.

Before starting any activities in this field, one should realise that the penal institutions will counter react (K. Engelhardt, o.c., p. 359). Those counters will certainly be directed towards the elimination of the professionals involved. Such was the aim of the Secretary of State of the Ministry of Justice when she lodged a complaint against the author of this paper during the time in which he, as a lawyer, adviced some prisoners about their rights to assemble and about their possibilities to found a prisoners union. The first thing she tried to do was (while illegally opening his letters to prisoners) to claim that his activities went beyond professional legal advising of clients and led to an improper use of the right of free communication between lawyer and detained client. Happily this complaint was dismissed by the Dutch Bar Association, but it made clear that the Ministry of Justice will do anything to disrupt attempts really to change something in the prison system. In another case things went wrong for a so-called law-shop that was allowed to councel prisoners inside one Dutch prison. From the moment this law-shop got really critical, when it critisized the circumstances under which a prisoner committed suicide, they were kicked out by the prison administration. The highest administrative court in Holland agreed with this decision (20) and this law-shop, not disposing of the backing of a strong professional organisation, stayed out.
So, when planning abolitionist actions against the State and its agencies, one should be prepared for very formal and harsh counter actions and always have plenty replacements in reserve.

Speaking with Tucholsky and Mathiesen, one can say that reforms, let alone abolitionist ones, never come from above and changes cannot take place from the writing desk alone. So, something has to be done.

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Notes.

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