IN MEMORY OF LOUK HULSMAN

John Blad [1]

On January 28, 2009 Louk Hulsman, at the age of 85 years, passed away at home in Dordrecht (Netherlands). The message sent out by his family described him as a «gardener of the world, open and connected until his final day, always striving for more humanity». Hulsman was also literally a fine and eager gardener, but apparently the metaphor refers back to the final phrases of the book «Peines Perdues» in its (adapted) Dutch translation: «When I remove from my garden the obstacles that prevent the sun and the water from fertilizing the soil, plants will grow up that I never knew existed. In a comparable manner the disappearance of the states criminal justice system, in a more healthy and dynamic society, will pave the road for a new kind of justice.» [2]

The Dutch legal scholar Kelk also referred to these words in his discussion of the meaning of Hulsmans work for criminal law science in the book of friends that was issued at the occasion of Hulsmans retirement from the Erasmus University (Rotterdam) in 1986. At that time an icy, expansive wind blew through the gardens of criminal policy and Kelk applauded Hulsman as the indispensable gardener «who does not only care for what is growing and flowering but also examines the health of the roots of these developments critically.» [3]

Hulsmans retirement and his «Peine Perdues», translated into Dutch as «Farewell to criminal Justice» did however not imply taking his leave of the national and international debate about criminal justice and the necessity of its abolition, far from that. He kept on being invited from around the world to explain his abolitionist perspective and found a certain degree of resonance everywhere and especially in Latin-American countries, which he came to love more and more. Untill December 2008 he was travelling and lecturing and when he came home he surprised his loved ones by saying he was tired.

[1] John Blad is associate professor in criminal law sciences at Erasmus University of Rotterdam. In 1996 he published his doctorate thesis about the work of Louk Hulsman. J.R. BLAD, *Abolitionisme als strafrechtstheorie*, Gouda Quint, Deventer, 1996 (with an English summary).

[2] Louk HULSMAN, in co-operation with Jacqueline BERNAT DE CELIS and Hans SMITS, *Afscheid van het strafrecht, Een pleidooi voor zelfregulering*, Het Wereldvenster, Unieboek, Houten, 1986, p. 134. (My translation, jrb.)

[3] C. KELK, «Het 'strafrechtelijk discours' of wel, ieder vogeltje zingt zoals het gebekt is», in: *Bezonnen Hoop, Opstellen aangeboden aan L.H.C. Hulsman*, W.E.J. Tjeenk Willink, Zwolle, 1986, p. 10.

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Without a focussed empirical research (f.e. on the basis of a quotation-index) Hulsmans influence on contemporary debates about criminal justice can not be ascertained, but it is clear that this influence has been considerable. This regardless of the fate of the abolitionist proposals themselves, which have not been accepted on a systemic level anywhere. The abolitionist discourse itself, proposing to replace the system of penal law by various alternative interventions, was formulated and strongly advocated by Hulsman and his fellow protagonists Christie, Mathiesen and Bianchi and remains an option to be reflected upon seriously, in view of all the well-known drawbacks and disadvantages of systems driven by the punitive mentality.

Recently the criminal law scholar Groenhuijsen, discussing various theoretical schools in the Netherlands, stipulated that Hulsmans «welfare-orientation» on criminal law still has great importance, especially internationally for the development of restorative justice. And indeed, many of Hulsmans ideas – such as the importance of emancipating the victim and serving the victims needs and the necessity to avoid types of intervention that are non-communicative and degrading and stigmatizing for the offender – have become fundamental tenets in theories of restorative justice. And it must be said, that these notions were brought forward by Hulsman *before* he became an abolitionist: they were part of his reasons for seeing criminal justice as a social problem, in stead of a solution for (other) social problems, inadequately bulked together under the legal concept of crime.

Already in 1971 Hulsman urged for a victim-oriented system of criminal justice with interventions serving the victims needs primarily and not directed «against the offender», making it more difficult for the offender, on the one hand to restore the damages he has done and on the other hand to learn to behave in conformity with the law. The obligations of the offender to redress the damages should be weighed of against the common interest of reintegrating the offender and in this context also imprisonment was discussed as an impediment to both.[4] All very topical today. But Hulsman has never written anything about penal mediation or conferencing, although he must have been aware of the first experiments done in Canada around 1974.

[4] L.H.C. HULSMAN, «De benadeelden door strafbaar gedrag en hun schadeloosstelling», in: *Slachtoffers van Delicten*, Baarn, Anthos, 1971, 30-45.

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Hulsman started his professional carreer in 1949 at the ministry of Defense and, being recognized as an excellent legislative jurist he was soon commissioned to represent the Dutch interests in European organisations, trying to promote a European Defense Community and later, having moved to the Ministry of Justice working for (the committee of experts on penal matters of) the Council of Europe. One could say that the legislative approach to problems has always remained Hulsmans fundamental point of departure when addressing whatever issue at hand. Legislation and policy were his foci, and these activities should be adequate and effective in the way they were designated to be and this meant stressing the importance of adequate feedback and policy changes when necessary in view of the real, manifest *and* latent (often counterproductive) effects.

Criminal policy he defined as «the complex of decisions about the usage of the criminal justice system» and in his inaugural lecture (1965) with the title «The maintenance of Law» he discussed criteria for the selection and allocation of societal problems to be addressed, to the various available systems of law : civil law, administrative law and criminal law. These allocation criteria were stressed as fundamental, because the systematic capacities to maintain any law adequately depend on the validity of these criteria. [5]

The inaugural lecture and his essay about (absolute and relative) negative criteria for penalisation (1974) [6] are two of the most consulted and appreciated contributions of Hulsman in the Dutch legal literature to this day.

As chairman of the state committee installed to design an adequate drug-policy (1968) Hulsman was the intellectual father of the internationally renowned Dutch drug-policy, based on a certain amount of tolerance and a sharp distinction between the (legal) regimes for soft and hard drugs. Criminal law interventions were discussed as more likely to enhance the (personal and social) problems related to the use of substances than to decrease them and health care was considered to be of great importance. [7] This policy is one of the causes of the Netherlands being the country with the lowest number of drug-deaths of the world.

As already mentioned, the position and interests of victims had his attention early and in this regard he was advocating an important role

[5] L.H.C. HULSMAN, (1965) *Handhaving van Recht*, Kluwer, Deventer/Antwerpen.

[6] L.H.C. HULSMAN, «Kriteria voor strafbaarstelling», in : E. ANDRÈ DE LA PORTE (Ed.), *Strafrecht te-recht?,* In den Toorn, Baarn, 1972, pp. 80-93.

[7] THE COMMITTEE HULSMAN reported in 1971 : *Ruimte in het drugbeleid*, Boom, Meppel.

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for social security systems and for an easily accessible and generous Victim Compensation Fund.[8]

Hulsman was very involved in teaching probation officers and in developing their functions in criminal justice, which he considered of great importance. On the other hand, he was interested in the theoretical and practical issues of the determination of criminal sanctions in concrete cases adjudicated by the courts, instructing judges to decide in a rational and systematic way in view of the types of offences and the goals that were to be reached by the sanction in concreto. The course he developed in this field was unique and also taught in the Erasmus University in the 1970's and 1980's.

In 1983 important legislative innovations in the system of (available) criminal sanctions were implemented, deeply influenced by Hulsman stress on the need to avoid imprisonment, making the monetary sanction and the «transaction» between the public prosecutor and the defendant available for all types of offences.

Integrated criminal law science

When Louk Hulsman was appointed in 1963 to the newly founded law school of Erasmus University he had high hopes of developing a criminal law science with a much higher degree of scientific rationality, especially in terms of influencing the conduct of individual delinquents and the population at large in the direction of conformity with legitimate behavioural expectations (norms). In 1965 he stipulated that criminal law was a «briljant instrument to maintain the law» but directly identified many shortcomings in the criminal law system and in the administration of criminal justice. In particular, he claimed, that the system was not adequately equipped with suitable means and resources and that the level of legal professionalism was too low. But much more importantly, any realistic insights and social scientific – psychological and sociological – knowledge about how behaviour can adequately be influenced were lacking completely.[9] For this reason the criminal justice system risks to be more counterproductive than productive in terms of maintaining laws.

For the first ten years of the intellectual journey that began, one can say that the search was for a «functional theory of criminal law», trying to find out what works adequately and what not. Colleagues were

[8] L.H.C. Hulsman, «De benadeelden door strafbaar gedrag en hun schadeloosstelling», in : *Slachtoffers van delicten*, Anthos, Baarn, 1971. Het schadefonds werd uiteindelijk veel beperkter van strekking dan Hulsman bepleitte.

[9] L.H.C. Hulsman, «Strafrecht en gerechtigheid», *Te Elfder Ure*, 1965, 12, 2, pp. 60-65.

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appointed who were thinking along the same lines, such as the criminologist Hoefnagels and the jurist and psychologist Ter Heide. Hulsman agreed explicitly with the philosopher of law Van Haersolte stating: «Man is not a magician whose good will naturally brings about the desired results, but a technician who will have to find the adequate means to serve his goals. He (...) commands nature by obeying it.»[10]

Both Hulsman and Ter Heide were heavily influenced by the school of «Defense Sociale Nouvelle» as initiated by Marc Ancel in 1954.[11] In this new articulation of the ideas of social defense resocializing the delinquent was one of the main techniques of serving society and this was thought to be best facilitated in a context of fundamental solidarity with the offender. Committing criminal offences was seen by both as a disorder, not per se intra-personal, but of the person in relation to his or her social behavioural field. Learning to act differently would have to be the main purpose and meaning of the sanction as Ter Heide stipulated.[12] In order to create room for adequate behavioural interventions a certain degree of de-juridification was considered necessary, loosening up the strictly punitive interpretation of the criminal sanction (punishment), which became defined by Hulsman – not as the imposition of a pain but – as censuring the delinquent and «calling him back to the normative order.»[13]

From 1965 onwards Hulsman was a member of the «Société internationale de défense sociale (pour une politique criminelle humaniste)» and of the advisory board of its journal Cahiers de Défense sociale. At the occasion of his 80th birthday there was a special issue of this journal in honour of Hulsman with as central theme: criminal justice between abolitionism and zero tolerance.[14]

Hulsman passionately worked on his ideas for an integrated criminal law science, combining law and criminology in his teaching and writing and building up an integrated law curriculum in the Erasmus Law School, launched in 1970, that contained so many social scientific elements that some professors in law began to doubt whether such a curriculum could really deliver good lawyers.

In Hulsmans view, the social sciences should have the function of offering jurists broader frames of reference for the prediction of the

[10] *Op. cit.*, footnote 9. (My translation, jrb.)

[11] Marc ANCEL, *La defense sociale nouvelle*, Editions Cujas, Paris, 2d edition 1966 (first edition 1954).

[12] J. TER HEIDE, *Vrijheid. Over de zin van de straf*, Bakker/ Daamen, Den Haag, 1965.

[13] This conception of punishment was already present in the famous Utrecht School, represented in Rotterdam by Hoefnagels, although this school also hang on to retribution, something which Hulsman refused to accept as a justification for punishment.

[14] See www.defensesociale.org./revista2003/00.pdf.

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effects of legal interventions and thereby for the selection of legal instruments to serve the legal and social order adequately.

While developing a radically new kind of curriculum for legal education, Hulsman went on playing his part in many national and international committees, editorial boards, conferences and research programmes. His energy and commitment seemed to be endless.

The integrated approach to legal education gained an international component for the students after the start in 1984 of a comprehensive international «Erasmus» programme, subsidized by Brussels, called «Criminal Justice and Critical Criminology» which still exists today although the label «critical» has disappeared from the title.

The development of the abolitionist paradigm

Between 1974 and 1977 Hulsman gradually developed the intuition, that efficaciousness and control of penal interventions could only be possible when the structural and cultural organisation of the criminal justice system were radically changed. In his inaugural lecture and later, designing negative criteria for penalisation (1972), he hoped that the usage of criminal law interventions could be rationally steered and limited. In the beginning of the 1970s articles appeared on issues as «feedback» in the system and the «costs and benefits» and «cost-effectiveness». He began to work with two opposite understandings of criminal justice : one interpreting it as a solution to social problems, the other interpreting it as a major social problem itself. He gradually became convinced that the second was the more plausible interpretation.

In 1977 the first lecture was given, in French, in which Hulsman tried out an abolitionist perspective on criminal justice, focussing on what he had come to see as the most problematic and misleading concept : crime. In summary : crime has no ontological reality and the only thing the very different problematic behaviours or situations have in common is that they have been labelled as crime. If we want to do good research into the causation of these very different phenomena, looking for interventions that could really remediate their causes and/or address the harmful consequences, does it help us to know that these phenomena are called crime? It only distracts or blinds us and leads us to think that punishment is the necessary reaction. All the connotations of the concept of crime Hulsman began to see as misleading and counterproductive in our endeavour to gain reliable knowledge of the phenomena at hand.[15]

[15] Later these views were the subject of the famous article : Louk Hulsman, «Critical criminology and the concept of crime», *Contemporary Crisis*, 10, 1986, 63-80.

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The French lecture on «an abolitionist perspective on criminal justice» appeared in the Dutch language in 1979, as an appendix in a book resulting from a series of meetings between prominent professors and practitioners of criminal law.[16] It was an appendix because Hulsman had not succeeded to convince his conversation partners of the correctness of his perspective, although most of them were also quite critical of criminal justice and particularly of imprisonment. Meanwhile in the Netherlands the incarceration-rates were on the rise and Hulsman feared that this would escalate further soon.

On European level Hulsman had been preparing an extensive report on decriminalisation, that was issued in 1980 by the Council of Europe. The report not only offers a very detailed analysis of the nature and processes of decriminalisation, but also insights into the strategic uses of it. Hulsman was very proud and happy with the report because, as he said, it had been possible to develop another kind of language, e.g. a language that was not colonized by the linquistics of criminal justice, between the members of the committee, allowing them to see the problems of criminal justice in a new light and thus finding different and new exits and options for adequately dealing with them.

One could say that from then on Hulsmans primary *method* in thinking about any problem became to deconstruct and debunk informal and formal language in order to create room for alternative action. In his own words he shifted from a «catascopic» to an «anascopic» perspective. Did it also imply a radical good-bye to any type of instrumental ambition *with* the use of law, the type of ambition he started out with? Yes and no: paradoxically, abolitionism was the ultimate attempt to (gain control over and) improve the system.

In a letter to his good friend Wim Duk – an eminent Dutch scholar in administrative law – Hulsman wrote in 1984, he said that he had come to the conclusion that criminal policy could merely be influenced deeply by choosing an abolitionist perspective: «A reformist vision, that does not fundamentally question the system (that does not develop a different set of images and concomitant fundamental concepts) can exert only little influence on the ondulatory motion between 'reduction' and 'expansion'.»[17]

At the funeral service Duk said that he was convinced by Hulsmans views, but they found no resonance with the majority of criminal law

[16] L.H.C. Hulsman, «Een abolitionistisch (afschaffend) perspectief op het strafrechtelijk systeem», in: *Problematiek van de strafrechtspraak*, Bosch en Keuning, Baarn, 1979, pp. 50-74.

[17] L.H.C. Hulsman, «Een brief aan Wim over capaciteitstekorten, het niet-tenuitvoerleggen van strafrechtelijke beslissingen en expansieve strafrechtspolitiek», in: *Recht op scherp*, Tjeenk Willink, Zwolle, 215–227, p. 215.

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scholars and policymakers in The Netherlands and the criminal justice system started to expand from 1985 onwards and became more punitive than it has ever been in this country.

One of the few colleagues who explicitly supported Hulsman, A.A.G. Peters, appreciated his viewpoints confirming that «l'abolition du système penal ... serait pour le tissue social le signal d'une renaissance» and criticized criminal law scientists in general for not putting up any resistance against the formation of a repressive ideology within the criminal justice system. [18]

A COURAGEOUS AND CONSISTENT SCHOLAR

In view of what has been discussed above, it would be wrong to put the meaning of Hulsmans work only in the key of penal abolitionism : so much of what he has contributed to criminal law theory then remains unseen. When one considers his abolitionist discourse as most characteristic, it should however be noted that this is only the surface of a discourse that on a deeper level remained oriented at or looking for adequate responses to problematic situations that we are used to call «crime».

Hulsman was one of the founders of the Coornhert League in 1971, a society for humanistic reform of the criminal justice system that had real influence on policies in the 1970s but has faded away now. Many of Hulsmans functionalist and humanistic ideas about criminal justice were widely shared in the Dutch professional society. To quote the famous professor of law, W.P.J. Pompe (Utrecht School), reporting on Crime and Punishment in 1976 : «(...) Guilt does not need to be only and not even in the first place to be amended by punishment. It would be commendable, to begin a dialogue with the offender to find out how reconciliation could be brought about, be it by making amends, be it by forgiveness, be it by punishment. All under the condition that the offender appreciates the wrongfulness of his conduct.» [19]

Hulsman claimed that this type of dialogue was perverted and made impossible by the threat of punishment and the way the criminal procedures work and one could say that he was more stubborn, consistent

[18] Antonie A.G. PETERS, «Strafrecht en beleid : de constitutionele dimensie», in C. FIJNAUT and P. SPIERENBURG (Ed.), *Scherp toezicht*, Gouda Quint, Arnhem, 1990, 211-225, 218.

[19] As quoted by Hans Smits in a recent study of the demise of the Coornhert League, *Strafrechthervormers en hemelbestormers. Opkomst en teloorgang van de Coornhert-Liga*, Amsterdam : Aksant, 2008, 13.

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and insistent than many of his colleagues in arguments with policymakers.

It should also be mentioned, that for Hulsman a retributionist justification of punishment was unacceptable, since for him this would imply absolute norms and a denial of the separation of law and ethics, which seemed to him fundamental to modern society, characterized by personal liberty. Retribution would in his view only increase the suffering by adding the suffering of punishment – not only for the offender but for his social network too – to the suffering caused by the problematic and damaging conduct of the culprit. [20]

It is unfortunate that Hulsmans abolitionist strategy – for that is what it was : a strategy – seems to have had the opposite effect in the sense that from the middle of the 1980's his influence on the debate waned. The functionalist approach to criminal justice has been replaced by penal populism and instrumentalism and the notion that the punitive system could be part of the problem has become suppressed.

Since his departure from Erasmus University in 1986 Hulsman did not publish a lot in Dutch anymore, but numerous articles were published in many other languages and so was his book «Peines Perdues». [21] Hulsman kept on travelling to contribute to countless conferences and to acquaint himself with the cultures of other countries, regions and cities. And he always found confirmation of his intuition, that «things are not necessarily so» and that we should be open to many different solutions and experiments.

Hulsman kept the courage to be dissident and to suggest what he knew was extra-oridinary and to many people even shocking or frightening. But he brought his messages kindly and with great personal interest in the views of others, hoping that they would find reasons in their own experiences in life that «the menu is not the meal» and that the reality of experiences is always so deeply different from the stories that are told about them.

After his death Hulsman was awarded the W.A. Bonger prize for his complete criminological work by the Dutch Society for Criminology and in connection to this a collection of selected essays will be published in 2010 (in the Dutch language).

The laudation applaudes Louk Hulsmans work as «scientifically original, trail-blazing and of decisive societal importance for the liberal

[20] L.H.C. HULSMAN, «De strafrechtelijke sanctie en zijn maat», *Wijsgerig Perspectief*, 1968, Meulenhof Educatief, pp. 207-232.

[21] There is a Dutch, French, Spanish and Korean translation but some friends claim there are more. Hulsmans daughter is trying to find out if that is so. See www.loukhulsman.org.

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Dutch drug-policies, the position of victims in the criminal justice system and the development of alternatives for penal interventions such as mediation and restorative justice.»

Louk Hulsman never took leave from the debate about criminal justice systems and, although those who knew him well will miss his warm personal presence, he will remain part of it through his work.

Résumé

Louk Hulsman est mort le 28 janvier 2009. Ce texte est un hommage à un grand pénaliste, à un talentueux avocat d'une science criminelle intégrée, à un initiateur célèbre du paradigme abolitionniste en justice criminelle, à un savant courageux et cohérent, et à une personnalité attachante.

Resumen

Louk Hulsman falleció el 28 de enero de 2009. Este texto constituye un homenaje a un gran penalista, a un talentoso defensor de una ciencia penal integrada, a un célebre iniciador del paradigma abolicionista en la justicia penal, a un científico valiente y coherente y a una personalidad atrayente.

Summary

Louk Hulsman died on the 28th of January 2009. This text is a hommage to a great criminal lawyer, a talented exponent of an integrated criminal science, a famous instigator of the abolitionist paradigm in criminal justice, a courageous and coherent scholar and a charming individual.

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