Chapter 15

Collateral Consequences and the Principle of Proportional Punishment

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1 Introduction

Rein Gerritsen, nowadays a respectable philosopher of science, specializing in 19th century physics and classical American pragmatism, was convicted of bank robbery, illegal possession of firearms, dealing in stolen goods and car theft about 25 years ago and has spent several years in prison. He wrote a magnificent book (*Knock Out*) on the consequences of this period of his life. In an article for a special issue of an academic journal on desistance from crime[1] he wrote: 'And now, with hindsight, I see that I made two related mistakes. First, thanks to my earlier unwillingness to take the problem of life in prison and what happened afterwards seriously, I overlooked that fact that all ex-convicts are confronted, sooner or later, with the problem of "civil death". For instance, shortly after my arrest, all my possessions, notably my bike, were confiscated by the state without a release of liability for the instalments I still had to pay and without giving me the opportunity to settle these debts, because "dead" men, i.e., prisoners, are disqualified from conducting business affairs. So after my release I had considerable, even huge debts, consisting in court costs, fees, fines, tax deficiencies, the rent on the instalments, paybacks on my study financing, and so on ...' This quote expresses the feeling that many ex-detainees have: they are punished two, three or more times for the same crime because of the impact of the collateral consequences of being formerly convicted on their daily lives.

Up to now, little research has been done in Europe on collateral consequences of convictions.[2] Most research has been carried out in the United States, where the importance of this topic is much more evident.[3] This is most probably because criminal records are not considered to be private information – like in continental Europe – and are therefore freely accessible for everyone who may be interested, consequently having a (negative) impact on ex-offenders'

1 Gerritsen, 2013.
2 Herzog-Evans, 2011, p. 3.
3 Jacobs & Larrauri, 2011, p. 3-4.

position in society.[4] However, Jacobs states with regard to the US, 'Except for the juvenile justice area, criminal justice scholars have treated criminal record policies as unproblematic and inevitable'.[5] The same holds true for the Netherlands, where this topic has mainly attracted attention from politicians with regard to juveniles. This specific age group seems to deserve a second chance after committing 'sins of their youth'.[6] Still, in continental European countries both legal and empirical studies on employers' access to criminal records are absent.[7] In this paper we want to discuss several types of collateral consequences flowing from having criminal records in the Netherlands and to assess them in the light of the notion of punishment, in particular the principle of proportionality.

2 Collateral consequences

2.1 Definition

When a person is suspected of having committed a crime and the police submit the case to the Public Prosecutor's Office, it is registered in the judicial documentation system of the Dutch government (*Justitieel Documentatie Systeem*). When the suspect is convicted, information on this conviction remains stored in this judicial documentation system for at least 20 years, i.e. the offender has a so-called criminal record. Therefore, just being involved in the criminal justice system can already lead to several consequences besides the actual penal decision. In this paper, these measures are referred to as collateral consequences.

Scholars do not – yet – use a single definition of collateral consequences. These are characterized as civil disqualifications, disabilities[8] or restrictions 'frequently leaving former offenders excluded from participation in important aspects of life'.[9] The restrictions are the result of a criminal conviction – or a suspicion of a crime having been committed. They can follow automatically after a conviction, as additional (post-sentence) legal penalties.[10] They can be imposed at the discretion of agencies within or outside the criminal justice system. Moreover, they are considered to operate largely beyond the public view and are, therefore, referred to as 'invisible punishment'.[11] Invisible in the sense that they are not criminal penalties, but are often administrative

4 Jacobs & Larrauri, 2012, p. 4.
5 Jacobs, 2015, p. xi.
6 Kurtovic, 2012, p. 125 and 2014, p. 148.
7 Jacobs, p. xiv.
8 Von Hirsch & Wasik, 1997, p. 599-600.
9 Demleitner, 1999, p. 153.
10 Pinard, 2010, p. 1215-16.
11 Travis, 2002, p. 16.

measures.[12] Therefore, 'despite their impact on individuals who cycle through the criminal justice system, they are not considered part of this system. (...) [They] for the most part are ignored throughout the criminal process. Defense attorneys, prosecutors and judges do not incorporate collateral consequences into their advocacy and sentence practices'.[13]

Next to legal measures, convictions can lead to social consequences as well.[14] Collateral consequences can thus be social or legal in nature and impact individuals, families or communities.[15] The aim of these kinds of measures is mostly preventive, but can also be retributive, or at least they are experienced as such.[16] Exclusion, then, is rather an unwanted by-product of the collateral consequences of a conviction.[17] Summarizing all the above-mentioned descriptions, collateral consequences can be understood as the additional consequences that flow from a criminal conviction which restrict a person in fully participating in society, thereby having a negative impact on his socio-economic position.

We make use of the distinction by Jacobs and Larrauri regarding *de jure* consequences, which are legal, fixed or foreseeable consequences, and *de facto* consequences, which are informal or discretionary.[18] In this contribution we concentrate on the first category, the de jure consequences. In detail we discuss four practices regarding foreseeable, formal consequences: the refusal of a certificate of conduct, the refusal of a residence permit, the alcohol ignition interlock device and financial deprivation. The aim of our contribution is to discuss these practices within the ideas of the Utrecht School on proportional punishment. This should result in answering the following question: How do foreseeable collateral consequences, which are often experienced to be more severe than the criminal punishment itself, relate to the notion of – proportional – punishment?

2.2 Research

In the Netherlands limited attention has been paid to the topic of collateral sentencing, as evidenced by the dearth of publications. Two dissertations have been published on the legal provisions concerning the use of criminal records: one by Mulder in 1955 and one by Singer-Dekker in 1980. In 2012 attention was paid to all kinds of legal aspects of the certificate of conduct in a special issue of the journal *PROCES*.[19] These publications, however, focus only on the

12 Pinard, 2010, p. 1215.
13 Ibid.
14 Damaska, 1968.
15 Pinard, 2010, p. 1215.
16 Boone, 2012, p. 204.
17 Ibid.
18 Jacobs & Larrauri, 2011, p. 1.
19 *PROCES, tijdschrift voor strafrechtspleging* 2012, vol. 2.

legal framework and they lack empirical evidence. Nevertheless, an awareness of the actual consequences of punishment seems to be, and to have been, always relevant. For example, in 1922 in the monthly journal of the probation service, De Jongh voiced his critical opinion on someone being hindered from becoming a tram cleaner in Amsterdam because for this job a declaration of good moral behaviour was required.[20] Obviously, as De Jongh cynically noted, this job requires such an official declaration as there can be no 'blemish' on the behaviour of a cleaner!

On a theoretical level, the Utrecht School has advocated that by undergoing punishment, the offender has already paid his dues to society and should regain society's full trust.[21] Pompe stated that the prison system should avoid cultivating desperadoes.[22] According to Kelk, this means that the offender who has devoted himself to making amends through the punishment imposed on him deserves the forgiveness and mercy of society. In that case, social and human advantages should be promptly offered to him.[23]

In 1961, in his important study on the experiences of detention, Rijksen paid attention to the collateral consequences of imprisonment. He noted the personal views of detainees on the criminal justice system, including its collateral consequences. For example, the story of a 25-year old man who was being supervised by the probation service. He himself arranged a job as a mineworker. Then, the probation officer arranged for supervision at his place of work, which was carried out by a chaplain (an assistant priest). After a while, one of his colleagues said: 'I would not say a word if I were you, you are nothing but a crook.' The assistant priest had told this colleague that the young man had been in prison and was now assigned to his supervision. As a result, it became impossible for the young man to continue working there, as his co-workers all started to comment on his background. [24]

Another important empirical study of the Utrecht School with regard to the position of ex-prisoners in society was carried out by Moerings in 1977. Based on several interviews with ex-detainees and their relatives, he concluded that imprisonment does not instigate a process of stigmatization and social isolation, rather it is an expression of a low or negative socio-economic position. Detention does not constitute an abrupt turnaround with regard to ex-detainees' employment situation, because continuing in work was already a problem before and becomes a bigger problem after detention. Detention, therefore, contributes to the continuation of this situation – but in the wrong direction.[25]

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20 De Jongh, 1922, p. 217-218.
21 Kelk, 2008, p. 7.
22 Pompe, 1957, p. 93
23 Kelk, 2008, p. 8.
24 Rijksen, 1958, p. 289.
25 Moerings, 1977, p. 233.

Taking into account this earlier research, Dirkzwager, Lamet, Nieuwbeerta, Blokland and Van der Laan published a meta-study on the effects of incarceration in the Netherlands in 2009. They concluded that although a fair amount of research has been done on the circumstances of offenders before and after prison, almost no study meets the highest standards for evaluative research and actually determines the relation between imprisonment and life circumstances. They call the lack of knowledge on the negative side-effects of imprisonment at least alarming. This was the start of a longitudinal study – the Prison Project – in which almost 2,000 prisoners are followed for at least three years.[26] Recently, a quantitative study on the relation between employment and crime resulted from this.[27] In a longitudinal study on men's employment prospects Ramakers compared a group of ex-prisoners to a group of future prisoners who experienced regular periods of unemployment.[28] Surprisingly she found that ex-prisoners are more likely to obtain employment – and more quickly – than unemployed future prisoners. Therefore, imprisonment seems to stimulate labour market involvement more than regular unemployment. Yet, longer prison sentences – beyond 6 months – do reduce employment opportunities and, accordingly, can have collateral, i.e. unintended, effects.[29]

Also, the Netherlands Institute for the Study of Crime and Law Enforcement (NSCR) carried out longitudinal quantitative research on this topic. Verbruggen found that only for women – but not for men – there is a negative effect of having a criminal record when it comes to finding employment, when previous unemployment is taken into account.[30] Verbruggen assumes that she found only slight evidence of the labeling effects of previous convictions, because the penal climate in the Netherlands is not as harsh as in the United States, and penal responses are more oriented towards rehabilitation. Both Verbruggen and Ramakers assume that their outcome can be the result of employers in the Netherland having fewer possibilities to obtain criminal record information compared to the United States.

Summarizing the work on collateral consequences flowing from having a criminal record, it can indeed be said that scholars have only recently paid attention to this topic, mainly by carrying out quantitative research. Qualitative research on the experiences of ex-prisoners hardly exists, but from the scarce narratives there are, it at least becomes clear that they often *experience* the collateral consequences of punishment as more demanding than the sentence itself. Gerritsen even speaks of civil death.[31] We argue that collateral consequences did gain a much more systematic and foreseeable nature, since they became

26 Nieuwbeerta, 2010.
27 Ramakers, 2014.
28 Ibid., p. 161.
29 Ibid., p. 162.
30 Verbruggen, 2014.
31 Gerritsen, 2013.

more incorporated into a legal framework. As forms of informal social control have become more institutionalized, they are much more intrusive. Moreover, the development of information technologies has improved the documentation systems of the state, thereby controlling the storage and dissemination of criminal record information. Therefore, the role of state policies becomes more prominent with regard to the use of this information for imposing collateral consequences.

3 Recent developments: four examples from practice

In the Netherlands the collateral consequences flowing from imprisonment as well as other forms of convictions, or even suspicions of having committed a crime, can be manifold. One important foreseeable collateral consequence is not being able to obtain a particular job, as either the law or the employer requires a certain level of integrity, meaning not having been convicted for a certain period of time. Next to work-related integrity, this particular requirement is present in other areas of social life, such as residence permits for immigrants, public housing, or a catering establishment license. Other forms of collateral consequences are the monitoring of sexual offenders by the local authorities, which are informed of their re-entry in a particular municipality. Also, DNA material can be stored in a national register after conviction. Next to all these foreseeable, formal collateral consequences, there are many unforeseen consequences which can be detrimental to the social and economic position of ex-offenders. Examples are the loss of different kinds of relationships, housing, employment and financial resources. An example related to the criminal procedure itself is the publicity of court hearings as well as extensive media coverage.[32] The disclosure of many private details relating to the suspect negatively impacts his personal life. To illustrate our point that collateral consequences can sometimes outweigh the severity of the punishment itself, we describe recent developments in four types of foreseeable consequences.

3.1 Certificate of conduct

Unlike the United States and other parts of Europe like Spain and France, the Netherlands allows no one to acquire extracts from criminal records, apart from an ongoing criminal procedure. The only way for employers to acquire information on the criminal background of potential employees is through an official certificate of conduct, issued by an administrative executive agency of the Ministry of Security and Justice (*Dienst Justis*). The number of requests for certificates of good conduct is substantially increasing each year. In the past decade, applications for this certificate have increased fivefold: from

32 Kristen, 2008, p. 318.

135,000 in 2004 to almost 733,000 in 2013.[33] This means that the amount of such applications that are rejected have also increased: from 400 in 2004 up to 4,000 in 2014. Consequently, since the Netherlands has become more oriented towards risk prevention in the past two decades, more and more background checks are being carried out, for example in work involving contact with children, the taxi business and in voluntary work with sport clubs. Many more employees, trainees and volunteers face collateral consequences when their integrity is called into question, mostly implying the presence of (recent) criminal records.

3.2 Alcohol ignition interlock device (the 'alcohol lock')

The alcohol lock was introduced in the Netherlands on 1 December 2011. Drunken drivers who were found to have a certain blood/alcohol level, approximately amounting to having consumed between five and nine alcoholic drinks, are compelled to participate in the alcohol lock procedure which takes about two years, otherwise their driving licence will get suspended for five years. This measure will cost the participant about € 4,500 and he/she is only allowed to drive a car with a built-in alcohol ignition interlock device, therefore he/she receives a special – restricted – driving licence. In 2012 and 2013 this measure was imposed about 4,000 times a year.[34] About three years after its introduction this measure was contested, first by lawyers, scholars and politicians, and eventually by public prosecutors and judges. The most important issue raised concerns the mandatory character of this preventive measure, leaving no room to take individual circumstances into account. Therefore, the case law on the alcohol lock shows a strong development towards considering this preventive measure as a punitive response (see section 5).

3.3 Financial deprivation

A very dominant and partly foreseeable collateral consequence is the loss of income and mounting debts as a result of a criminal conviction, in particular when this conviction results in imprisonment. Many people lose their job when they are sentenced to a (longer) custodial sentence, although detention as such is not a direct ground for dismissal (HR (Supreme Court) 17 December 2010, ECLI:NL:HR:2010:BO1821). The employer is no longer obliged to pay the salary of such a detainee, however. Already in 2000, a Bill was enacted that excluded detainees from almost all forms of social security payments from the first day of (pre-trial) detention. In prison, prisoners can earn a maximum of € 15 per week, an amount that most of them will need for cigarettes, telephone calls and renting necessary equipment, such as a television and a

33 http://jaarverslag.justis.nl/factsheet_vog.html.
34 http://cbr.nl/downloadbrochure.pp?id=31.

fridge. Because certain costs, for example rent for housing and maintenance payments, do not stop at the prison's front door, this means that prisoners often start to incur mounting debts from the moment they enter prison. The proposal to oblige prisoners to contribute to their stay in prison could make this situation dramatically worse if it is accepted by Parliament. According to this proposal, prisoners will have to pay € 115 per week, whereas the total contribution can run to € 11,680.[35] This proposal also introduces a personal contribution to the investigation, prosecution and trial stage, which will amount to € 1,380 (trial by a single judge) or € 2,760 (trial by a full court).[36]

3.4 Immigrants' residence permits

For immigrants, the collateral consequences of a criminal conviction can be even worse. A criminal conviction can have implications for their lawful residence in the Netherlands. To determine what consequences a criminal conviction should have, the 'sliding scale' principle is applied. This means that the longer immigrants have lawfully resided in the Netherlands, the more severe the punishment should be in order to terminate their regular stay. One can have serious doubts about the legitimacy of such a measure in general. These doubts become even stronger because the sliding scale has been tightened several times in recent years. To give an example, before 2012 immigrants with a regular stay of less than one year had to have been sentenced to at least an irrevocable one year in prison in order to be deported. Since the tightening of the scale in 2012, an irrevocable prison sentence of one day is enough to deport every immigrant with a regular stay of less than three years. These tightening rounds have resulted in a significant increase in the number of immigrants whose regular stay has been terminated, although this effect is partly compensated by European regulation that protects immigrants who have a residence permit for an indefinite period. Compared to 2002, in 2013 the relative share of irrevocably convicted immigrants whose regular stay was terminated had increased five-fold.[37]

4 The Utrecht School and the notion of proportional punishment

Normally, two main approaches are distinguished in sentencing theory, the retributive and utilitarian approach. The main difference between them is that in the retributive approach the offence committed in the past is the focal point for sentencing, while in the utilitarian approach the sentence is based upon the effects it can have in the years to come. Focusing on the past sets limits on the severity of the sentence according to the retributive approach. Because

35 Council for Sentencing Implementation and Youth Protection (RSJ) 2013, p. 5.
36 *Kamerstukken II* (Parliamentary Papers) 2014/15, 34 067, no. 7.
37 Berdowski & Vennekens, 2014.

the sentence is based on the responsibility of the perpetrator for his/her past behaviour, the severity of the sentence may not exceed a reasonable censure of the perpetrator for that behavior and the consequences thereof. Compared to the retributive approach, the utilitarian approach sets much less clear limits on the penalty. According to the utilitarian approach, a sentence is justified because of its assumed effects in the future. The future utility for society in general justifies the hardship that is imposed on the perpetrator. That utility can consist of different aspects, but with regard to criminal sentencing the benefits are usually divided into three categories: special prevention, general prevention and reparation. All three sentencing aims can lead to indefinite and disproportional sentences being imposed, often based on uncertain predictions about the future. Classical thinkers therefore often accuse more utilitarian-oriented thinkers of promoting an instrumentalist use of sentencing, thereby having no regard for the individual rights of offenders.[38]

It was Willem Pompe who introduced the concept of the Joint Approach into Dutch sentencing theory. This concept can solve the intrinsic tension between the two philosophies of sentencing introduced above. It states that punishment should never exceed the boundaries of proportionality, but within these upper limits, it should contribute as much as possible to the utilitarian objectives of punishment, in particular special prevention and rehabilitation. Despite the fact that the highest court in the Netherlands regularly distanced itself from this starting point in serious cases in which proportional punishment could not result in a satisfactory level of protection for society, the joint approach is still considered to be the dominant approach in the Dutch criminal justice system.[39]

The Utrecht thinkers have always emphasized the limiting function of the retributive approach in criminal policy.[40] For that reason they resisted the idea of retribution as an aim of sentencing. Considering retribution as an aim resulted in the conception that one could pursue either more or less retribution, an idea that is often stressed in policy papers regarding the sanctioning system, such as in *Werkzame detentie*[41] (Working Detention 1990) or *Sancties in perspectief*[42] (Sanctions in Perspective 2000). 'Sentencing *is* retribution' has always been the credo of the Utrecht School and it should be within the boundaries of retribution that societal and individual objectives are pursued.

This credo does not yet answer the question of what this punishment should or could consist of. According to Jonkers (criminal) punishment consists of an objective evil that will normally be considered as suffering.[43] In this context an important and interesting discussion was ongoing between the Minister of

38 Focqué & 't Hart, 1990.
39 Kelk & De Jong, 2013, p. 26.
40 Kelk, 1994, p. 194-195.
41 *Kamerstukken II* 1994/95, 24 263, no. 3.
42 *Kamerstukken II* 2000/01, 27 419, no. 1.
43 Jonkers, 1991, p. III-1.

Justice and Members of Parliament when the Penal System Framework Act (*Beginselenwet gevangeniswezen*), was introduced in 1953. This Act initiated the Differentiation Principle meaning that prisoners would be dispersed in different kinds of prisons depending on different criteria, for example, gender, age and the duration of the prison sentence. During the parliamentary debate, the Members of Parliament were wondering if a far-reaching differentiation system would not weaken the punitive nature of prison sentences. The Minister did not agree: 'The essence of the prison sentence', he said, 'is the loss of freedom, the freedom to go wherever one wants and to participate in the community as one chooses. This essence cannot be lost by a more humane and social way of carrying out the prison sentence.'[44]

The idea of the loss of freedom as the essence of the prison sentence is closely connected with the rejection of additional punishment and the principle of minimal restrictions. 'The deprivation of liberty is considered *as* punishment not *for* punishment' is a widely accepted slogan among penologists, meaning that the prison sentence should not be used to impose additional punishment. These principles are also widely advocated by Utrecht scholars. The principle of minimal restrictions was originally regarded as a consequence of the principle of innocence and was only applied with regard to unconvicted detainees. In their PhD theses both Geurts (1962) and Kelk (1978) defended an extension of the significance of the principle to convicted prisoners. This extension was only realised in the current Penitentiary Bill (*Penitentiaire beginselenwet*) 1999, under pressure from the intensified human rights debate.[45] More importantly, they gave meaning to the principle by formulating strict conditions under which restrictions on liberties could be legitimized. Kelk introduced his well-known concept of the *rechtsburgerschap* (legal citizenship) of all prisoners as an expression of the idea that prisoners have the right to participate in legal procedures and claim that legal principles and values must be applied to them in a discursive process where belief in the rationality of the arguments prevails.[46]

Neither the idea of proportional punishment nor the principle of minimal restrictions or the prohibition of additional suffering has set clear limits on the content or gravity of the sentence, however. The increased sanction differentiation and the gradual complete abolition of the prohibition on combinations of sentences have made it very unclear what should be considered as proportional punishment, although this development is partly compensated by the construction of prosecution and sentencing guidelines.[47] Many infringements during the implementation of (prison) sentences can easily be recognised as unnecessary additional punishment, although they are mostly accepted as being

44 *Kamerstukken II* 1950/51, 1189, no. 5, p. 22.
45 *Kamerstukken II* 1994/95, 24 263, no. 3, p. 13.
46 Kelk, 1978, p. 7 and 140.
47 Borgers, 2005.

'necessary for the execution of the sentence or the maintenance of order within prisons' in the scarce jurisprudence on this topic.[48]

Back to collateral consequences. How are these limited by the notion of proportionality? Very little, is our conclusion. They are not considered to be part of the sentence that should be assessed within the limits of the proportionality principle. Although nobody will deny that they can be considered as an objective evil that will normally be regarded as suffering (see the definition by Jonkers above), it is generally accepted that suffering can only be considered as punishment if it is *intended* as such.[49] Characteristic for collateral consequences is precisely that they are (assumed) not to be intended and are only a consequence of the original sentence imposed. Some of the consequences we described above are, however, perfectly foreseeability and predictable. What, then, is still the intrinsic value of the principle of proportionality if such consequences are deliberately left out of any consideration of proportionality? Another argument that can be derived from the definition of punishment reflected above is that even if collateral consequences would be intended, they do not have any retributive function (or foundation) and cannot therefore be regarded as part of the sentence. From a normative and theoretical point of view we agree with this proposition. Disqualifications should only be invoked if there are strong arguments for this in terms of risk prevention. According to Wasik and Von Hirsch this requirement is fulfilled when a very vulnerable occupation or position is at stake or if the offence committed forms a real danger to the position involved.[50] Some of the disqualifications described above, however, can hardly be legitimized from a preventive perspective. And as far as they do have a preventive nature, they are hardly used in accordance with this objective, since a serious screening of risks preceding the implementation of collateral measures is almost always lacking.[51] Besides, authors disagree on this assumption and it is acknowledged in the literature that collateral consequences can have retributive functions.[52] Some authors even argue that collateral consequences cannot be accepted as part of the sentence *because* these consequences are often disproportionate and are therefore not in accordance with the theory of retribution.[53] This line of circular reasoning should be avoided, however, since it can make the principle of proportionality completely hollow.

Although scholars at the Utrecht school have always been aware of the destructive effects that collateral consequences could have on the lives of convicted persons and have drawn attention to these in their more sociological work (see above Moerings, Rijksen), they have not really criticized them from a

48 Van den Hurk & Molleman, 2012.
49 Jonkers, 1991, p. III-1.
50 Wasik & Von Hirsch, 1997.
51 Boone 2011, 2012.
52 Ibid.
53 La Folette, 2005; Demleitner, 1999.

more legal perspective. We argue, however, that it should be carefully scrutinized which consequences should and should not be considered as part of the sentence and be included in the considerations regarding proportionality. Consequences that are foreseeable and can clearly be considered as an 'objective evil' should be regarded as being part of the sentence. Even if they are only preventive and not retributive in nature, they should at least be roughly proportional to the expected danger to society as Boone already agreed with Von Hirsch and Wasik in an earlier article.[54] This proposition means that the sentencing body (which can be the judge or the prosecutor in the Dutch situation) has to involve these consequences in his/her considerations and thus be informed about them. We are aware of the fact that sometimes this already happens, see for example the illustrations in the next section, but only occasionally and at the discretion of the person who is sentencing.

5 The role of the criminal court judge

5.1 Certificate of conduct

The first time that the criminal courts explicitly reflected upon the consequence of not receiving a certificate of conduct was in a verdict by the Court of Appeal in The Hague on June 21, 2011.[55] This case involved a 14-year old boy who had sexually abused a 4-year old girl. The court characterized this offence as wrongful experimental sexual behaviour at the onset of puberty. Professionals claimed that there was no risk of reoffending as the boy had demonstrated that he was truly aware of the harm he had caused to the young girl. Taking all this into account, the court stated that it believed that its verdict should not be a reason for refusing to issue a certificate of conduct, as the boy was very young, at the beginning of his teenage years, when he committed this non-severe form of sexual assault. Moreover, according to the court, the boy had voluntarily applied for counselling and professionals found the risk of reoffending to be negligible. Thus, the court concluded, refusing to issue a certificate of conduct, solely because of this criminal conviction, would infringe upon the private life of the suspect to such extent that it would violate Article 8 of the European Convention on Human Rights and Article 3 of the Convention on the Rights of the Child. Therefore, the court advised the boy – in case of any collateral consequences – to send a copy of its verdict to the administrative agency when applying for a certificate of conduct. By doing so, this agency, when deciding upon his application, could consider information about the severity of the offence, the circumstances under which the offence had been committed, the individual behind the person convicted as well as his personal circumstances.

54 Boone, 2012.
55 ECLI:NL:GHSGR:2011:BQ8697.

After this specific consideration with regard to the collateral consequence of not obtaining a certificate of conduct, the courts started to refer to this more regularly. The district court of The Hague repeated this consideration in a verdict of December 14, 2014 in a more or less similar case concerning a 12-year old boy who had sexually harassed his 6-year old half-sister.[56] This sexual behaviour could be partly attributed to his impulsive behaviour and to the fact that he was easily influenced – in this case his elder brother had told him to commit the acts with which he was accused and the young suspect did this without thought. He was now receiving medication for this impulsive behaviour (diagnosed as ADHD). Also his mother had arranged for him to have treatment, so that his sexual development no longer showed any discrepancies. The court stated that, based on this single conviction, refusing to grant him a certificate of conduct would violate his right to respect for his private life (Article 8 ECHR) and his right that the best interests of the child should be a primary consideration (Article 3 CRC).

Also in cases dealing with other than sexual or juvenile offences, the criminal courts have recently started to make independent considerations as to whether the offence poses a risk to performing a certain job. For example, in a case involving a 26-year old man who had dealt in cocaine and wanted a job as a taxi driver, the court stated the following: 'paying attention to the fact that the suspect is a first offender and has shown himself to be aware of the evil nature of his actions, this verdict should not lead to a refusal of his certificate of conduct, as there is no relation between the drug offence and his professional activities as a taxi driver'.[57] Also in the case of a 48-year old taxi driver who had been convicted of money laundering, the court considered the following: the suspect had not committed these acts for the sake of profit, but in order to do someone a favour. The court stated that the acts he committed were not at all related to his professional activities, given the possible consequences of this sentence for the suspect's work in the taxi branch.[58]

5.2 Alcohol lock

Since its introduction on December 1st, 2011 the alcohol lock is increasingly considered to be a penal response. After two years, awareness started to grow of how 'punishing' this measure is experienced by those against whom it has been imposed. Consequently, this measure was increasingly considered to have a punitive character, based on its severity. Therefore, it should at least be proportionate for the individual on whom it is imposed. As of the end of 2013 the criminal courts started to bar prosecutions on a regular basis.[59] Subsequently,

56 ECLI:NL:RBDHA:2014:15974.
57 Rb. Rotterdam 26 January 2015, parketnr. 10/680463-13.
58 Hof Arnhem 4 February 2013, ECLI:NL:GHARL:2013:CA0478.
59 Conclusie A-G Harteveld, 20 January 2015, ECLI:NL:PHR:2015:8, para. 5.1 &5.5.

the Public Prosecutor suspended prosecutions in 'alcohol lock cases' in order to await a final judgement on this matter by the Supreme Court.[60]

At the end of 2014 the Court of Appeal established that by this measure drivers will suffer severe financial consequences; the costs are very high and they do not have a choice (except for not participating or losing one's driving license for 60 months).[61] The personal consequences, however, can be very drastic. Moreover, personal circumstances and the circumstances of the offence play no role in the decision making. Professionals in the criminal justice system have argued that it should no longer be an administrative agency that executes this imperative measure; rather it should be part of the punishment imposed by the criminal justice system.[62] However, at the time the administrative courts and the Council of State did not share this conclusion.

On March 3rd, 2015 the Supreme Court decided that prosecutions for drunken driving should be barred when the measure of the alcohol lock is already being imposed by an administrative procedure.[63] Both procedures are based on the same facts and the consequences are alike, leading to limitations on one's driving licence and substantial financial obligations. Between these two procedures there is a sufficiently close connection, yet the legislator did not arrange how to deal with this. However, the rationale of the *ne bis in idem* principle and the *una via* principle implies that someone cannot be tried twice for the same facts. Therefore, prosecution has been declared to be contrary to the principles of due process and, consequently, barred when the alcohol lock is already being imposed.

One day later, on March 4th, 2015 also the highest administrative court, the Council of State, made a final ruling on the alcohol lock provisions and declared these to be non-binding.[64] The costs are extremely high and persons who are dependent of their driving licence (taxi drivers, car mechanics, salesmen driving commercial cars, disabled persons, etcetera) are placed in a disadvantageous position. Their interest cannot, however, be balanced, because of the mandatory nature of this measure. The Council of State stated that these cases are not isolated incidents, as objections to the severe consequences of the alcohol lock are very frequently brought on appeal. The disproportionality of the measure was therefore given a structural character. As its proportionality has not been sufficiently guaranteed, it has been declared to be non-binding. Now it is up to the legislator to create a provision that can balance the interests of those persons for whom the alcohol lock has much more adverse consequences.

60 Ibid., para. 5.7.
61 Ibid.
62 Kurtovic & Van Spanje, 2013. De Vries, Van Spanje & Kabel, 2014.
63 HR 3 March 2015, ECLI:NL:HR:2015:434.
64 Raad van State 4 March 2015, 201400944/1/A1.

5.3 Immigration law

Sometimes, the criminal courts also seem to take into account the effects of their verdicts on immigrants' residence permits. However, there is no legal obligation to be reticent when imposing sentences in criminal cases, especially when, for example, it leads to an order declaring that a person is an undesirable alien (*ongewenstverklaring*). In practice, the attitude of judges varies from – in the one extreme – being sensitive to the personal interests and suffering of a suspect, for example when he/she will no longer fulfil the conditions for staying or residing in the Netherlands and therefore can no longer remain on Dutch territory.[65] In the other extreme, judges can be completely non-sensitive to this, arguing that the suspect was aware of the consequences of his/her criminal behaviour and, by committing the offence, took these for granted.[66]

With regard to the extent to which criminal court judges need to consider the effects of punishment for immigrants, the case law and the literature point towards the criminal law provision of the obligation to respond to a defence (*responsieplicht*, Article 359(2) 2 Code of Criminal Procedure).[67] This means that when the defence argues in detail and expressly on how a certain punishment will affect the legal status of the immigrant, the court should respond to this defence if it decides otherwise.[68] However, when the humanitarian aspects of the case are serious, the Supreme Court seems to be more inclined to make special demands on this obligation to respond, according to Schalken.[69] This was the case when an appellant, who had already remained in the Netherlands for 13 years and was married to a Dutch woman, with whom he had a six-year old child, had been declared undesirable because of one offence. The punishment, therefore, had a direct, severely hindering effect on his – future – eligibility for family reunification.

In a recent Supreme Court case[70] counsel for the appellant pleaded for a prison sentence of 27 instead of 30 days, so that the appellant would not be declared undesirable.[71] The Court of Appeal had ruled that it is not up to the criminal court judge to decide on such a declaration, therefore these immigration law consequences could not be taken into account. It held that the mere possibility that the results of the criminal case would be of importance when an administrative measure would be imposed could not constitute a sufficient

65 Informal conversation with Hugo Loth, a lawyer in Amsterdam, specializing in both criminal and immigration cases, on 27 March 2015.

66 See for example HR 28 September 2010, ECLI:NL:HR:2010:BM9857.

67 Jonge van Ellemeet, 2014.

68 See a.o. HR 26 April 2011, *NJ* 2011/360 m.nt. Schalken; HR 15 May 2012, ECLI:NL:HR:2012:BW5162; HR 18 September 2012, ECLI:NL:HR:2012:BX4744; HR 25 September 2012, ECLI:NL:HR:2012:BX4987.

69 HR 26 April 2011, *NJ* 2011/360 m.nt. Schalken.

70 HR 26 March 2013, ECLI:NL:HR:2013:BZ5383.

71 According to par, 5.10.2 onder c Vreemdelingencirculaire A 2000.

ground to lessen the sentence. The Supreme Court ruled that this judgement is not incomprehensible. According to a case note by Boeles, this does not mean that the Supreme Court has lowered its demands with regard to the obligation to respond to a defence, rather it means that the defence lawyer should do more than simply referring to a 'mere possibility' and should indicate the probability that collateral consequences will be inflicted.[72] This, Boeles argues, requires expert knowledge of immigration law, which is lacking both on the side of the defence lawyer and the criminal court judge, who, therefore, cannot assess a probability statement concerning these consequences.

6 Discussion

In continental Europe relatively little research has been carried out on the collateral consequences of convictions, broadly defined as additional consequences flowing from a criminal conviction which restrict a convicted offender in fully participating in society. In this contribution we have discussed four foreseeable consequences of criminal convictions and stressed why these should be involved in considerations regarding the proportionality of sentencing, much more than occurs today. The fact that the consequences are not intended is an insufficient reason to omit them from these considerations, in particular since the role of state policies in imposing these consequences has become much more prominent, resulting from the tightening of information technologies and the use of documentation systems. Consequently, the collateral consequences of sentencing sometimes outweigh the effect of the sentence itself. Neglecting these in the legal argumentation regarding the sentence therefore hollows the sentencing principles which has so often been stressed by thinkers of the Utrecht school: the limiting function of the retributive approach, the principle of minimal restrictions and the prohibition of additional punishment. Considering the developments regarding the collateral consequences of punishment, as described above, we argue that it is no longer sufficient to look at the criminal justice system only. Examining the collateral consequences of convictions requires that the borders of criminal justice are crossed, which is also called the 'post sentenciam' phase of the penal process.[73] In conclusion, we argue that consequences which are legal and foreseeable and have a structural nature should be taken into account by the judge (or prosecutor) in his or her considerations regarding the proportionality of the sentence. If the disqualifications clearly have a preventive function that justifies the limits of proportional punishment to be exceeded, they should at least be broadly proportional to the danger assessed.

72 HR 26 maart 2013, *JV* 2013/195 m nt. Boeles.
73 Herzog-Evans, 2011, p. 2.

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