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Vol. 3: Punitiveness and Punishment

Helmut Kury & Evelyn Shea
(Eds.)

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Punitivity

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Helmut Kury & Evelyn Shea

(Editors)

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Punitiveness and Punishment

Introduction

Helmut Kury and Evelyn Shea

The articles in this three-volume edition say it clearly: punitiveness is a complex concept that cannot be compressed into a single, comprehensive definition. It manifests itself in different ways, for instance in more punitive popular attitudes regarding punishment, in the voting of more repressive laws, and in increasingly harsher sentences. These aspects have been the object of frequent discussion and research, whereas others facets, such as punitive approaches by the police or the probation and parole services, have received less attention from researchers. This may be changing. Harsh handling of protest movements by police has recently become the focus of criticism, for instance in Germany in connection with the project of an underground train station in Stuttgart or the transport of atomic waste to their final storage deposit. But also in other countries disproportional steps taken by police have led to international protest, for instance in France, Russia, China and Iran.

Results may vary considerably depending on the aspect of punitiveness that is examined, which explains the difficulty in comparing research findings, especially on an international level. Popular attitudes are important because of their influence on political decisions, particularly when they are interpreted as a demand for tougher criminal legislation. Even the judiciary is not always immune to public pressure. With the extension of empirical sociological research to various fields in the first half of the last century opinion polls became more frequent and acquired a growing influence on electoral decisions, to the extent that we speak today of a "media democracy". When fear of crime became a major research topic, was "measured" and the results published, politicians soon discovered its political potential for gaining votes by promising to be tough on crime. Crime in the sense of "governing through crime" became a useful political tool (Simon 2007; Sack 2004).

Polls directed at finding out how the public wants the state to deal with serious offenders indicate that most respondents ask for tougher sentences but are little informed about crime and sanctions. The little they know they have learnt from the media which, for commercial reasons, tend to present a distorted picture of crime by reporting only on those that are "sellable", i.e. mainly violent and sex crimes (Kerner and Feltes, 1980). Given the general ignorance on crime-related matter, the demand for harsher sentences means that people ask for tougher punishment than they believe the courts are meeting out. Several studies have shown that when the

public is better informed about a particular crime and the circumstances that have led to its commission, the demands for sanctions are milder and closer to the actual sentences given by the courts (see Doob and Roberts 1983; Roberts 1992; Roberts and Stalans 1997).

The lack of information on the part of the public is particularly striking in the case of sex offences. Contrary to popular belief, the number of offences against sexual self-determination registered by the police, such as sexual abuse of children, exhibitionism, rape or other forms of sexual coercion are decreasing in Germany. There has been a steady drop in cases of sexual abuse of children from 1997 onward. In 2008/2009 alone, the number of registered sexual offences decreased by 6.1 % to 11,319 cases, which corresponds to 13.8 cases per 100,000 inhabitants. In 2002 the frequency was still 19.4 cases per 100,000. The index for all offences in Germany in 2009 was 7,383 per 100,000 (Bundeskriminalamt 2010).

Even if each offence is "one too many", we have to acknowledge that crime, as every other "evil", is part of the human condition and cannot be eradicated completely – at least not according to the present state of knowledge. Even the Bible contains several accounts of wholesale slaughter (see Buggle 1992). Plays, including classical ones like Shakespeare's *Macbeth* or *Hamlet*, describe gruesome crimes. Crime fiction or films belong to the most popular genre of entertainment. No sooner were the computer and credit cards invented that they were misused for criminal purposes.

The demand for tougher measures against criminals is usually based on the assumption that such measures will reduce the number of offences. Its proponents are often people who are convinced that "in recent times" everything has gotten worse, and that crime is on the rise. It is only in utopian novels that we find innovative methods on how to persuade people to lead law-abiding lives, and these are rarely taken seriously by the readers.

Swift (1726; 1993), in his utopian *Gulliver's Travels*, describes the visit of his hero to the Land of Lilliput. Here, things are really different. Informers are punished harder than anybody else while the innocent receive rich compensation from the assets of the actual culprit: "and out of his goods or lands the innocent person is quadruply recompensed for the loss of his time, for the danger he underwent, for the hardship of his imprisonment, and for all the charges he has been at in making his defence; or, if that fund be deficient, it is largely supplied by the crown. The emperor also confers on him some public mark of his favour, and proclamation is made of his innocence through the whole city" (p. 94). This should encourage critics of the present laws on victim compensation in their view that more should be done in this respect (for Germany see *Gesetz über die Entschädigung für Opfer von Gewalttaten*, 11 May 1976).

Swift continues: "Although we usually call reward and punishment the two hinges upon which all government turns, yet I could never observe this maxim to be put in practice by any nation except that of Lilliput. Whoever can there bring sufficient proof, that he has strictly observed the laws of his country for seventy-three moons, has a claim to certain privileges, according to his quality or condition

of life, with a proportionable sum of money out of a fund appropriated for that use: he likewise acquires the title of *snilpall*, or legal, which is added to his name, but does not descend to his posterity. And these people thought it a prodigious defect of policy among us, when I told them that our laws were enforced only by penalties, without any mention of reward. It is upon this account that the image of Justice, in their courts of judicature, is formed with six eyes, two before, as many behind, and on each side one, to signify circumspection; with a bag of gold open in her right hand, and a sword sheathed in her left, to show she is more disposed to reward than to punish" (p.94).

In our society we automatically associate crime with sanctions, and serious crime with harsh sanctions. The offender, especially if guilty of a serious crime, is usually characterised in the eyes of the public by this one single act. The reasons why it happened and the circumstances surrounding it are pushed to the background. The "Boulevard" media tends to portray criminals as the completely "other", so different from us that they represent no threat to our worldview. To give a few examples: in Germany a rapist was recently labelled "Germany's most disgusting sex offender" (*Bild-Zeitung*, 21 October 2010, p. 10; 28 September 2010, p. 3). Concerning the release of offenders from post-sentence preventive detention, the *Bild-Zeitung* wrote: "The scandal of our justice [system] gets worse and worse. Are 300 of the most dangerous criminals to be set free?" (16 August 2010 p. 3). A media campaign against "child abusers" by a private TV channel, run with the collaboration of the wife of a Federal minister, declared: "First sex creep fired." (*Bild-Zeitung*, 16 October 2010, p. 3), and a few days later: "Two new sex creeps unmasked." (*Bild-Zeitung*, 19 October 2010, p. 9). Some critics of the programme, who spoke of a hate campaign against certain offender groups that was more profitable to the owners of the TV channel than in the interest of public safety were made short shrift of without any convincing counterarguments.

Sexual abuse of children is no doubt one of the worst crimes, as it may damage the whole future life of the child. But one-sided campaigns neglect the fact that the perpetrators are often family members, neighbours, or people in charge of the education of the children, and that in many cases they are not reported. Recently discovered cases of sexual abuse in children's homes or in institutions of the (Catholic) Church had remained undisclosed for years. Another reason why the dark area for such offences is extremely high has to do with the fact that the victims, if they "come out" at all, are likely to be stigmatized, not only by the police and the staff of the prosecuting offices but also by the public (see Kury 2003a; Kury & Yoshida 2003; Kury et al. 2002).

What also is often overlooked, because it does not fit in with the image of the criminal as a perfect "monster", is the background information that would explain why the offender would commit such a heinous act. It is not rare that persons who abuse children have themselves been abused or mistreated as a child (Kury, 2008). Such information would call into question the responsibility of the political class and of society – a responsibility which is often shunned (see, for instance, Wacquant 2009). Yet statistical evidence on the great variation in crime rates between different societies points clearly to the social causes of deviant behaviour

(see for instance Thomas and Birkel 2007). Effective crime prevention that goes to the root of the problem must necessarily start by asking why and how a criminal has become what he is. Punishment and secure containment alone do not produce positive results, as the accumulated experience of centuries has taught us.

In the Middle Ages even minor offences were punished harshly, even cruelly, in the hope of deterring potential offenders (see Schubert 2007; Hinckeldey 1980; Leder 1986, p. 75ff.). Yet this did not lead to a reduction in serious crime. Eisler (2002), for instance, compares the homicide rates from the 13th/14th century until today in five European regions: England, the Netherlands/Belgium, Scandinavia, Germany/Switzerland and Italy. In all five regions the murder rate in the Middle Ages was about 22 times higher than today. Eisler points out that "given the available data there can be no doubt that there has been a slow decrease in the homicide rate in Europe over the centuries." (p.82). The decrease is not linked to the harshness of punishment, since punishment has become milder over this period. Admittedly, the available data is not always precise and medical conditions have improved so that the lives of severely wounded persons are more likely to be saved today. Eisner insists however that "the empirical evidence in all regions is so consistent, the reduction over the centuries so uniform, and the difference in levels so great, that there is little argumentative leeway for the rejection of the thesis that in the process of modernisation there actually has been a secular reduction of the individual use of force." (p.83). This points again to the fact that crime, especially serious crime, is linked to societal factors, and that societal changes or conditions (the progress of "civilisation") may have had a greater influence on crime rates than harsh sanctions (see also Elias 1976). The call for tougher punishment fails thus to acknowledge the responsibility of society.

Recent studies on the effects of punishment in the United States and in Europe confirm the limited effectiveness of harsh measures to prevent deviant behaviour. The majority of US States still have the death penalty as the most severe form of punishment, and some States make frequent use of it, despite little evidence that it effectively deters potential dangerous offenders, not to mention the human rights aspect (see the contributions of Kuhlmann and Winterdyk & King in this volume). The articles of Lappi-Seppälä from Finland (see vol. I) and of Dölling, Entorf, Hermann & Rupp from Germany in this volume equally underline the dubious benefit of harsh sanctions in reducing crime rates.

In a historical retrospective of the evolution of punishment in Germany, Kaiser (1996, p. 985) shows that in 1882 on the territory of the German Empire 76.8 % of all sanctions were prison sentences, all of them unconditionally enforced. By the end of the last century this rate had declined to approximately 5 %. This means that there has been an overall marked reduction of custodial sentences, particularly in favour of fines, with little effect on violent crime rates (see in particular the detailed analysis of Heinz in this volume). Countries with high prison rates do not have necessarily lower crime rates than those that use prison only as a last resort (Harrendorf & Smit 2010; Walmsley 2010; see also Harrendorf in volume I). If rehabilitative measures and aftercare are neglected, and if imprisonment is primarily or exclusively used as a punitive sanction, the negative side effects

increase rather than reduce the risk of recidivism. Collateral damages for the families and communities, and the high costs of keeping offenders in prison should also be taken into account (see Clear 2008; Kury 2003b; Kury & Kern 2003). The sums spent on "crime prevention" could be used more effectively for alternative measures that are more promising (see Shea, Baccaro and Morelli in this volume).

This does not mean, however, that imprisonment has no role to play in crime prevention. A small proportion of very dangerous offenders need to be locked up for the safety of the population, even for long periods, but for other inmates long prison sentences do little for the rehabilitation and may even be counterproductive. The harmful effects of prisonisation, which are known and documented, are more likely to lead to the exclusion of offenders from society than to their reintegration (Clemmer 1940; Sykes 1958; Ortmann 2002). Time in prison should be used to motivate inmates to change by giving them access to treatment programmes and purposeful activities. Early access to parole, when warranted by the active participation and cooperation of the inmates, is equally important to insure a period of supervised and assisted reintegration. The German Prison Law from 1977 (*Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung mit ergänzenden Bestimmungen*) defines in §2 the aim of imprisonment as follows: "During the execution of a prison term the prisoner shall be enabled to lead in future a life without crime. The time in prison also serves to protect the public from further offences." It seems that under the pressure of the media these priorities have recently been reversed: the safety of the public comes first and rehabilitation is a poor second.

The present volume is the third in a three-volume edition on *Punitiveness – International Developments* and deals with punitiveness and punishment. The first volume examines to what extent punitiveness can be called a worldwide phenomenon. Part one deals primarily with theoretical and methodological questions, part two looks at punitive trends in different societies, and part three asks how changed attitudes toward punishment and changes in legislation and sentencing affect the juvenile system. The second volume brings together international contributions on *Insecurity and Punitiveness*, in particular on *Insecurity, Politics and Media, Measuring Feelings of Insecurity and Punitive Attitudes*, and *Has Criminal Legislation Become More Punitive?*

The present volume on *Punitiveness and Punishment* is divided into three parts: *The Impact of Punitiveness on Imprisonment, Its Consequences on the Use of Alternatives*, and *The Effectiveness of Punishment*. The ten articles on various aspects of punishment have been written by 19 authors from six different countries.

The four texts of the first chapter (chapter III.1) study punitiveness in relation to imprisonment.

Dessecker examines the sentencing practices of the German criminal courts to measure changes in punitiveness. He looks in particular at the number of life sentences handed out each year, life being the most severe sanction in Germany. In his overview of the historical development of life sentences in Germany, he points out that although a life sentence is the standard legal punishment for murder under

specific aggravating circumstances it has never been applied in an overwhelming majority of murder cases. However, there are indications that since the 1970ies judges have become less lenient. Whereas the number of murders registered by the police has steadily decreased (except for a short period following the German unification), the number of life sentences have increased from the mid-60ies until the beginning of the 21st century, with a corresponding increase in the number life prisoners. Still, these numbers are well within the European mean. An empirical study by the author shows that as far as life sentences are concerned there is no evidence of increased punitiveness in the German criminal justice system, as the period lifers actually serve inside prison has hardly changed during the last decade.

Gunnlaugsson presents data on trends in criminal sanctions in Iceland, a relatively small country, isolated from its neighbours by the sea. The population density is low, and the whole island counts some 300,000 inhabitants. "Iceland is a small and relatively homogenous nation in the North Atlantic and has for a long time been perceived as a low crime country." Even here there is fear that crime is increasing, in particular drug offences, despite efforts made to reduce drug use by the young. The country has undergone considerable change during the last years: the population is growing and the number of immigrants is increasing. After a period of strong economic growth the country was hit by financial disaster in connection with the bank crash, and there are signs of increased punitiveness. Opinion polls indicate that the population is asking for tougher sentences, in particular for violent and sexual offenders. The number of fines and of conditional and unconditional prison sentences has increased during the last decade. This also applies to the length of sentences pronounced by the courts, and there is now a considerable shortage of prison places. But not all measures tend at greater severity. Alternatives to imprisonment have been introduced such as community work and treatment centres for alcohol and drug dependent offenders. "These alternatives to prison demonstrate a tendency in Iceland to replace punishment with rehabilitation as a means of crime control." Iceland will have to invest more money in the construction of new prisons despite the financial crisis. In 2010 the first new prison was opened for 20 inmates in an open setting. At the same time greater efforts will be made to extend alternative measures to imprisonment.

Kuhlmann provides a nuanced overview of the manifestations of punitiveness in the American criminal justice system. Among criminologists, the United States are usually cited for maintaining capital punishment in over half of the federal States and for having the highest prison rate among Western industrialized nations with all that this entails. In the 1960ies and well into the 1970ies the country was a model for the treatment and the rehabilitation of offenders but this is no longer the case. "The management of correctional institutions increasingly abandoned goals of rehabilitation and, instead, focused on managing the new 'warehouse' population." Overcrowded prisons and inhumane conditions do not prepare prisoners for leading a responsible life outside. Prisons are populated mainly by the poor, members of minority groups and increasingly by women (see e.g. Wacquant, 2009). Because of structural changes in society feelings of insecurity have increased among the population. "Under these circumstances a punitive ideology was promoted that held the individual person responsible for his/her poverty or criminal behaviour while

ignoring the structural contexts." Levels of punitiveness are rising in most Western states but nowhere as much as in the United States. An expert on the American prison system, Annette Kuhlmann concentrates on topics such as overcrowding, guards, women in prison, the supermax, juveniles, and the death penalty. The politics of punitiveness are also visible in the language of politicians who, when speaking about crime and its control, increasingly use the image of war: "war on crime", "war on drugs", "war on gangs", and now "war on terrorism". If there are changes in crime policy, such as the reduction of inmate numbers, they are linked to economic problems rather than to a change in penal philosophies.

Winterdyk & King offer an interesting comparison of punitiveness between the United States and Canada, two neighbouring countries, yet with different crime policies. The authors focus on sanction patterns in adult criminal courts as this area has received more public criticism than others, partly because of the way court decisions are portrayed by the media. Their overview of Canadian crime statistics show that the number of registered offences rose steadily until the turn of this century but has since shown a consistent downward trend. There has been no increase in violent crime during this period. The same pattern can also be observed in the United States, but the crime rate is considerably higher. As far as property crime is concerned, there is little difference between the two countries. Whereas there has been a dramatic increase in the prison population in the United States during the last decades, this has not been the case in Canada, where the percentage of prison sentences handed down by the courts has hardly changed between 1996-1997 and 2006-2007. The authors give a lucid analysis of the different factors and motivations influencing the crime policies of the two countries. One chapter is dedicated to the treatment of the aboriginal population by the courts. The very high suicide rates of young aboriginal inmates are of particular concern. The authors conclude with a discussion of essential aspects that have to be taken into consideration when comparing the punitiveness of different countries.

The three articles of chapter III.2 examine the possible impact of increased punitiveness on sanctioning practices in Germany, Italy and the Czech Republic, with a particular focus on the use of alternatives to imprisonment.

Heinz gives a detailed overview on the development of sanctioning practices in Germany and examines, in the light of empirical evidence, if there are indications of greater punitiveness as is sometimes claimed. He focuses on judicial punitiveness and points out that this aspect cannot be treated globally but that we need to differentiate between punitiveness of public prosecutors, the courts and the probation and parole services. We also need to ask if increases in punitiveness concern all offence categories or only particular groups. Heinz begins with a short summary of the German sanction system in order to make it more accessible to foreign readers. After analysing various aspects, for instance juvenile delinquency and specific crimes such as a murder, manslaughter, aggravated assault and burglary, he concludes that the "punitiveness thesis" repeatedly defended by some German criminologists has to be reconsidered. "No evidence exists to show that relatively more individuals have been convicted or sanctioned."

Shea, Baccaro & Morelli discuss crime prevention and the treatment of offenders in Italy. They show that since the re-election of Silvio Berlusconi as Prime Minister in 2008 there are some indications of increased punitiveness against offenders. As in the United States or in other countries, fear of crime and the political use made thereof plays an important part. Within a period of roughly 18 months there have been over 90 changes of a punitive nature in criminal law, prison law and on the administrative level. The reintegration of offenders and their rehabilitation has faded into the background, and earlier steps in this direction have even been reversed. The first part of the article deals with the content of the new legislations, the second part with their impact on the rehabilitation of offenders. The new security policies have led to a rapid increase of the inmate population and to the second highest figures of prison overcrowding in Europe, exceeded only by Bulgaria. At the same time the use of alternatives to imprisonment, such as probation, parole or home detention, have been drastically curtailed. The government sees the solution to overcrowding in the construction of new prisons, but plans in this direction are hampered by budgetary problems. The authors consider other possibilities that would enhance the rehabilitation of inmates without endangering security, in particular the extension of alternative measures, more constructive ways in dealing with inmates with addiction problems or reducing the excessive use of preventive detention.

Rozun, Kotulan and Tomasek analyse the changes in crime policy in the Czech Republic after the "Velvet Revolution" of 1989. Their article focuses on new alternative measures to imprisonment, in particular on supervised early release (parole). In order to assess the new parole system, the authors set up two research projects: one to assess the success rate of early supervised conditional release and the other to test how probation officers and social workers evaluate the new Probation and Mediation Service. The success rate of parole was tested on a sample of 672 conditionally released prisoners three years after release based on their file in the official crime register. Failure was defined by two criteria: lack of compliance with parole conditions and conviction for a new offence. The detailed and careful analysis provides information not only about the outcome of the parole period but also on the background of the parolees. The results of the questionnaire-based survey of probation officers and social workers furnish interesting insights into the weak spots of the parole system. The positive results of a close cooperation between the social services and the parole offices are also stressed. Though success or failure of reintegration depends lastly on the will of the parolee to lead a law-abiding life, society has to do its share to make this step as easy as possible. More needs to be done in this respect concerning re-socialisation programmes, housing and employment.

The three contributions in Chapter III.3 deal with the central question of the effectiveness of (harsh) sanctions from a psycho-physiological, a psychological and a criminological perspective.

Peper & Chavanon, in their article on the *Neuropsychology of Punishment*, provide an overview of a topic that has received so far little attention in

criminological research. Yet neuropsychology has contributed in recent years new insights into the effects of punishment in relation to brain functions, and the question in how far neuropsychological processes have to be taken into account when dealing with deviant behaviour may come increasingly to the fore with progress made in this field. After a historical review of the neuropsychological influence on criminology, the authors describe the general neuropsychological mechanisms to deal with sanctions, and give a detailed explanation of individual differences of sanction related processes. In presenting their own research results they conclude that "neuropsychology provides objective clues for the expected sensitivity differences pertaining to sanctions or reward depletion and suggests intervention methods to be considered in the rehabilitation process." In their final paragraph they make suggestions for further research and for practical applications, for instance for the rehabilitation of offenders. Despite many reservations, the two authors come to the conclusion that "neuropsychology and psychological neuroscience [...] provide important additional knowledge concerning the neural architecture of the emotion processing systems, which complements and informs current criminological theory."

Kunst describes the psychological conditions that can influence the effects of penal sanctions from the perspective of a prison psychologist with practical experience in the rehabilitation of offenders. Punishment is seen by state institutions, and also by the public, as serving a preventive function in the sense of both general and individual prevention: it is meant to deter potential offenders and to rehabilitate actual offenders. The author describes the mechanisms of operant conditioning and gives details about crime therapy in prison. This is followed by remarks on classical conditioning with particular reference to "psychopaths". *Kunst* then discusses the significance of model learning, learning from insight and self management. She underlines that punishment alone has only a limited effect on behaviour. If criminal sanctions are, however, supported by systematic rehabilitative measure and therapy, they can make a substantial contribution to the reintegration of offenders into society.

In the last article of this volume, *Dölling, Entorf, Hermann & Rupp* query to what extent punishment has a general deterrent effect – a question that has been repeatedly raised over the years and, depending on the inquiry, has received very different answers. Those in charge of crime policies claim that (harsh) punishment has a deterrent effect on potential offenders. Consequently, laws tend to become harsher and sanctions are increased, as this is seen as the only remedy when milder measures do not succeed in reducing crime rates. The authors question this theory and provide ample proof for its refutation in their meta-analysis based on 700 empirical studies. These were chosen from a literature research of over 9,000 studies based on their relevance, their geographical spread and the variety of their methodology. Their own methodological approach allows for taking into account different factors that may have influenced the results, such as the methodology used in the different studies or how long ago the research was made. Their detailed findings lead to the conclusion "that not all actions can be equally influenced by threat of sanctions." In confirmation of earlier studies and psychological considerations on the effectiveness of punishment their research shows that the

perceived likeliness of punishment has a greater deterrent effect than the severity of sanctions. But even if the deterrence hypothesis is partly invalidated, this does not mean that sanctions have no effect. "There are cases where deterrence can influence behaviour – the death penalty, however, does not seem to belong to these measures."

This third volume presents a comprehensive overview of a central aspect of punitiveness: the effectiveness of severe sanctions. Criminal laws and sentencing practices have become more severe on the assumption that greater harshness will effectively reduce crime. The ten articles show clearly that this assumption is only partly justified. Punishment alone is not only expensive; it also does little to solve the underlying problem.

Editing the present volume would have been impossible without a close and longstanding collaboration with international experts from different fields of criminology. The editors wish thus to express their gratitude, first and foremost, to the authors of the articles. Without their fruitful cooperation this publication on a topic of global dimension would not have been possible. The processing of the contributions in this volume involved a considerable amount of work in which Marianne Schwill has been a tremendous help, and we are deeply grateful to her. We also wish to thank the *Universitätsverlag* and Dr. Brockmeyer, Bochum/Germany most warmly for their invaluable cooperation in publishing these volumes in their book series "Crime and Crime Policy – Kriminalität und Kriminalpolitik".

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