The Aims of Punishment

Theoretical, International and Law Comparative Approaches

Edited by Charis Papacharalambous

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Introductory Remarks

by Charis Papacharalambous (ed.)
Associate Professor of Criminal Law and Jurisprudence, Law Dept., UCY

The book will focus on various of the most recent streams of thought as to the philosophy of punishment, on international and interdisciplinary criminal law issues and the respective role of criminal sanctions as well as on law comparative issues concerning Cyprus and Greece. The theoretical part will more specifically present vistas relative to the relationship of criminal law and politics, whereas the international/interdisciplinary criminal justice discourse touches upon topics like EU and international criminal law, organized crime, sentencing, correctional policy and transitional justice issues. The comparative part deals with very interesting sectors of applied discourse as to punishment like suspension of imprisonment, life term, penology problems and problems of specific sanctions like confiscation.

Lindsay Farmer's Chapter forms a cornerstone of the whole endeavor. His thesis challenges the view that there is an identity between the aims of punishment and the aims of the criminal law. This view holds that the aims of the criminal law are those of the just punishment of individuals; the key question for criminal law theory to answer is thus that of justifying punishment. And once this is done, the justification of norms of criminal law (criminalization) will follow from this. Instead, Farmer argues that the aims of punishment are best understood in terms of the aims and social function of the criminal law as an institution which contributes to the securing of social order. The Chapter begins by setting some key features of an institutional theory of law, before going on to a discussion of the aims of the criminal law and their relationship to the aims of punishment. In the final section the author then returns to the question of the aims of punishment to argue that claims that punishment secures social peace or order are inadequate because they do not have a proper account of the relationship between peace and social order. Farmer argues that this can only be provided by the kind of institutional account of the criminal law he develops in details here.

Felix Herzog stresses, on his part, the need for guaranteeing rule of law even in cases of grave crimes such as the terrorist ones. He chooses the example of the 'ISIS' murderous acts for submitting that for the validity of law, the respect of law and thus for social peace it is better to pass a judgment of a murderer according to the measures of a trial founded on the rule of law, than liquidating him extra-legally. Herzog sees in the latter a violation of fundamental principles of law, the spiraling effect of such measures and the falling of criminal law in disrespect by their implementation. The author concludes that even if we were in a state of war with 'terrorism', targeted killings outside of military

actions can hardly be justified through constructs like 'pre-emptive' self-defence, since such conduct runs contrary to the respect for human rights and the spirit of our moral and law culture. A question then arises: if all aims of punishment are bankrupt in terrorist murders, why should we not resort to extra-legal acts? Herzog submits that the aim here cannot be other than the expressive function of punishment: the expression, that is, of attitudes of resentment and indignation, and of judgments of disapproval and reprobation. In this way we are vindicating the law: punishment reaffirms law emphatically. The question of the kind of sentence to be imposed the author answers with consistency to his theses: punishment conveys blame and should bear a reasonable relation to the degree of blameworthiness; such degrees are to be uncovered even in cases of unthinkable cruelty, as the terrorist ones.

The *editor's* Chapter deals with a rather delicate issue, the imposition of the lay element in criminal law proceedings and the related question of the significance or alleged dangerousness of penal populism. The crucial point according to *Papacharalambous* is the vicious circle of on the one hand recognizing the sterility of formalized procedures, and on the other the impasses arising from the inability to properly incorporate the lay element. The more the latter is institutionalized, the more it loses its refreshing nib. The more one recurs for that reason to the undomesticated lay opinions, the less secure the outcome becomes, the bigger the danger of damaging systematic coherence in law-making or adjudicating through populism grows. The failure of an intermediary position produces then disquietude: even if one promotes limited lay participation at the proceedings, whereby the lay element is qualified on the basis of information and sharing of normative principles, a sharing deemed to enhance avoidance of populist tendency to unjustness, this lay element ceases to be representative any more. The ordeal of 'lay-friendly' applying proportionality displays blatantly the above. But what if one goes deeper into what 'people' mean? What if both institutionalized and roughly populist appearances of the lay element can be shown as the two sides of the same coin? What if 'people' is to be considered as the flipside of the state? The author thinks that this is indeed the case with criminal law as positive law: it draws its (acceptable) legitimacy through people already subjected to the logic of this law's swaying and reigning supreme over society. But there is also another notion of the people. Commenting on thinkers like Foucault, Badiou, Rancière and Žižek, Papacharalambous concludes, in an explicitly Benjaminian manner, that the Hobbesian people is to be counter-distinguished to a violently law-constituent 'folk', a performative collective subject acting disruptively in the mode of 'eventfulness', whereby the Political, the Law and a kind of Arch-Punishment are intertwined. Before and after such events 'people' is always a system-stabilizing factor: a perfectly functioning 'democracy' was, is, and will always be a securely 'policed' one.

Frank Saliger's text touches upon a central issue concerning the aims of punishment. What is the role of 'communication' in penal law discourse? What does the notion mean

indeed? Saliger meticulously analyses the adventures within German theory on these topics, remarking the following: (a) there is no 'communication' proper whenever functionalism uses the word but means otherwise, i.e. when personal interaction is substituted by the normative task of reassuring the validity of the criminal law norm; (b) there is a danger inherent in 'real' communication: it might overestimate the 'symbolic' function of criminal law by stressing the expressivity of the penalty in order for the crude normativism to be avoided; (c) there is no possibility of compromising the facticity of interacting subjects and their normativized simulacrum; real individuals (especially the victims) arise always as the main actors in penal matters. Saliger's position is crystal-clear: there is no way to let 'expressivism' as to the aims of punishment redeem 'symbolic' criminal law insofar the latter had traditionally been exposed to critique. Despite the unavoidability of a symbolic function of criminal law provisions, there are always trends to an 'auto-communication' of the law-maker with him(her)self (the author refers back to the criminalization of participation to suicide), whereby the symbolical element appears in an odd manner: bypassing any demanding communication, it purports to strengthen traditional moral sense by brushing academic critique and emerging new moral values under the carpet. In his study, the author always corresponds the turns and twists in the theoretical debate about communication and expressive punishment to respective repercussions and shifts as to the classic aims of punishment.

The Chapter of *Anastasia Chamberlen* and *Henrique Carvalho* offers a critical engagement with the question: what does punishment aim to achieve? Through a dialogue with sociological, psychological and criminological literature on the links between punishment, criminal justice and emotions, the authors argue that the main role of punishment in society is emotional. That is, it is desired and driven by a set of feelings, anxieties and insecurities. They discuss how this affective nature of punishment carries significant implications for scholarship on punishment; namely they show (1) that the primary subjects of punishment are the punisher and those in whose name they punish, *rather than the punished*; (2) that the aim of punishment is predominantly *ideological*, rather than deontological or consequentialist; and (3) that punishment has a symbiotic relationship with *violence*, so that one feeds into the other. The latter part of the Chapter explores these implications, and then concludes by proposing that a criminal justice system that sincerely aims to guard society against violence must be one geared at making punishment increasingly unnecessary.

John Gkountis' Chapter deals with the crucial phenomenon of using penal law symbolically in an epoch of crisis. The use of criminal law and the imposition of penal sanctions represent the harshest instruments at the state's disposal for the regulation of social coexistence and the protection of the rights of its citizens from their unlawful infringement. Such measures signify the immediate restriction of personal freedom and bring about decisive and often irrevocable changes in the lives of their addressees. Due to their severe effects, criminal provisions must therefore strictly adhere to a series of con-

stitutionally guaranteed principles which have been established in order to protect the individual from any form of state arbitrariness in the process of formulating and enforcing these measures. Nevertheless, the emergence of a multitude of serious issues over the past decades on a global scale, such as the rise of terrorism and the widespread humanitarian crisis, has often forced the legislature to react rashly, by formulating and imposing ill-conceived criminal provisions in an ineffective attempt to both placate the general public and manage the problems at hand. It is the author's critical stance now, that these legislative attempts – which only *symbolically* claim to resolve the issues they address – often disregard the fundamental principles to which every criminal provision must adhere, thus contradicting the established doctrine of criminal law and ultimately endangering the citizens by curtailing their constitutional rights and exposing them to unwarranted sanctions.

Artemis Savvidou's Chapter deals with the principle of proportionality. The author analyzes the principle in its meaning, historical development and mode of operation. The international law provisions for the principle are a stable point of reference. Special attention is paid to the ways its constituent parts work, how i.e. necessity, appropriateness and proportionality in the narrow sense approach the analogical relationship between crime and sanction. The specific fields of operation of the principle are then considered, i.e. how proportionality affects the work of the legislator, of the judge and of the system of sentence serving. Throughout the Chapter the respective jurisdiction is duly presented. The author seems in her conclusion to be skeptical though. Proportionality and 'balancing' as the mode of its operation cannot cover up their ultimate dependence upon criminal policy and its aims; proportionality features thus as a form of legal ideology.

Proportionality is a vast field of interest. *Christos Naintos* in his Chapter deepens into the principle under the specific scope of how setting a hierarchy within the aims of punishment may influence conformity to this principle. The author submits that the choice between utilitarianism and retribution does indeed affect the result of the proportionality control of a penalty. Three are the cornerstones of his reasoning. *First,* that, since the scientific discussion on the aims of punishment is ongoing, there cannot exist a single proportionate punishment for every crime. Only disproportionate punishments can be displayed, that should be avoided as unconstitutional. *Secondly*, that the legislator in criminal law should define the sanctions framework according to the proportionality principle and refrain from threatening one single sentence without possibility of reduction or increase in accordance to the elements of each different case. *Thirdly,* that supporters of different major theories on the aims of punishment have to take into consideration the fact that the implementation of the principle of proportionality might lead them to substantially different results. Supporting thus a theory promoting negative general prevention as the main aim of punishment is contradictory to implementing retributive aims in the framework of the proportionality control.

The contribution of *Athanasia Dionysopoulou* focuses on the question how much room has been left to national criminal policy given the extensive competences of EU in the area of substantive criminal law. To approach this issue the range of the competences of EU in substantive criminal law shall be presented and analyzed together with the conditions under which they are exercised. As a result the aims of EU criminal law will be defined and the role of legal diversity will be assessed. Subsequently, the institutional options of member states in exercising national criminal policy shall be highlighted.

The transition from dangerousness to risk as undergirding the intensification of the preventive rationale in European criminal justice policies is the subject of inquiry of *Athanasios Chouliaras* and *Marinos Skandamis*. The Italian Positivist School devised the concept of dangerousness at the beginnings of the 19th century as a means to enhance the defense of the society against individuals showing an alleged propensity to crime. The concept has evolved since then and nowadays is linked to probabilistic calculations and statistical distributions to measure risk factors applied to populations. Seen through this prism, it is posited that dangerousness serves as a means for the intensification of the preventive rationale over the retributive one in criminal policy, echoing the increasing demand for preventive justice. To substantiate such an allegation the chapter analyses how the presumed dangerousness of certain categories of situations or persons is used in European Union's and Council of Europe's legal instruments. As far as the former is concerned, there is an emerging trend to impose full criminal liability on specific preparatory acts and attempts of crime equating them with consummated offences. In the framework of the latter, there is a notable re-emergence of the vague concept of dangerousness used to delimit the treatment of a specific category of offenders, although with the declared purpose to delimit its scope so as to avoid abuses. The observed shift from law enforcement to prevention policies entails the subordination of the principle of legality to police functional necessities, resulting in the emergence of a phenomenon that could be described as "police-ization of justice".

Demetra Sorvatzioti's Chapter is addressing the question why in the continental criminal law systems a separate sentencing trial is needed. Criminal sentencing is relatively similar in the common law and continental systems in that both occur post-conviction. They are dissimilar, however, in that the common law system has a separate trial for sentencing purposes while the continental system has neither a method nor a separate procedure for sentencing examination. In the common law system evidence and arguments regarding all mitigating and aggravating factors occur in the sentencing trial where the Court issues a separate decision. In the continental system, any mitigating and aggravating factors are examined within the substantive trial. Sentencing is a crucial part of the criminal trial. It is linked to punishment, rehabilitation and recidivism. However, in the continental system it lacks the necessary procedural frame and hearing details. The author therefore argues that the common law system is not only properly structured but also more focused on

the criminological and legal aspects of sentencing which ensure fairness through the justification and reasoning of the sentence imposed by the court.

The Chapter of *George Chloupis* examines whether the purposes of punishment are served and to what extent individual rights and freedoms are offended in the context of attempting to tackle modern forms of criminal action such as organized crime, even before the occurrence of such action, referring to the upgrading of the significance of the risk before damage to legal goods, as well as to what extent and by what criteria the boundaries of the various rights offended are framed and whether there can be complete protection of individual freedoms while meeting the objectives of the punishment.

The chapter written by *Gorazd Meško*, *Bojan Tičar*, and *Rok Hacin* presents the main legal perspectives and changes in criminal legislation in Slovenia regarding the aims of punishment. The prisons system of the Republic of Slovenia and the crime and punishment statistics are presented and discussed. Also, a discussion takes place on the changes in the purposes of punishment from the ideologically set goals in the socialist system before the Slovenian independence in 1991 to the times of a young democracy. The authors conclude that the new polity has been since its establishment characterized by the abandonment of the explicit aims of punishment in the criminal legislation, whereby the year 2017 marks a turn.

The problem of punishing those responsible for traffic accidents in Cyprus is the subject of inquiry of Prof. *Andreas Kapardis*. Traffic collisions in general and fatal ones in particular have been a cause for concern worldwide for a number of years now, including in Cyprus where, while the proportion of accidents per 1,000 of the population and the number of fatal accidents has been declining since 1982, the proportion of dead among serious road accident victims has been increasing. The author deepens into the current public debate in Cyprus on the road death toll; this debate focuses on whether part of the answer lies in deterrent penalties, and a number of bills (pending in Parliament at the time of writing) emphasize prevention and increase the available penalties for traffic offenders. The chapter also discusses causes of traffic accidents in Cyprus, reviews the existing empirical literature on traffic accidents both internationally as well as in Cyprus, considers police traffic accidents statistics, compares sanctions for traffic offenders in Cyprus, Greece and England, examines relevant case law and, finally, drawing on the experience of countries in the EU with low traffic accident rates, it concludes about traffic penalties in Cyprus – monetary, demerit points, and sentences by the courts.

Charalambos Charalambous presents us the Cypriot law on the suspension of prison sentences, an institution very crucial to the materialization of punishment's aims. The Chapter refers initially briefly to the background of the introduction of the initial law on the suspension of imprisonment sentence, its amendment in 1997, its restitution to some extent by the more recent Law 186(I)/03 as well as the case law of the Supreme Court of Cyprus before and after 2003. Basic aim of the study is to explore to some extent the

nature of the measure of suspension and in particular whether it could become from now on a separate kind of sentence, since in reality that is what it results in practice. The view expressed and developed in the study is that suspended imprisonment is but should also be recognized and enacted as a distinct and separate kind of sentence, something which accords perfectly with what it actually is and would greatly enhance the judicial task. This view is particularly strengthened also by some recent references in the case law that the suspended sentence is 'milder', 'more lenient', 'a first step of treatment' and 'a second chance' to the accused. Such development would also enhance a lot the relevant writing and reasoning of judicial decisions. To achieve this it would be necessary, the author submits, to amend accordingly the Criminal Code and add suspended imprisonment in the kinds of sentences. Since the Chapter is based on the author's respective presentation at the international conference held at the UCY in 2016 on Aims of Punishment, statistical data in the Chapter do not reach beyond 2014.

Nestor Courakis' contribution seeks to highlight the problems arising through the interpretation of Art. 79 of the Greek Penal Code, which concerns the assessment of factors indicating the imposition of the in concreto appropriate punishment at the sentencing stage. These problems are connected with four specific issues: (a) the wording and the way of interpretation of the provision in question; (b) the penalties to be imposed; (c) the procedure which is followed when the courts apply the abovementioned provision; and (d) the juridical reasons which explain and justify a decision taken according to Art. 79 grPC. Furthermore, the contribution puts forward some ideas on how to deal with the problems concerning the application of the said provision. Noteworthy is that recently (in June 2019) a new Penal Code and a new Code of Penal Procedure were voted by the Greek Parliament and came into force after a couple of days. Since it has been announced that these Codes are to be soon revised, their text is by no means final.

The Chapter of *Tonia Tzannetaki* is about the perverse effects that can be produced when particular penal sanctions and measures are collectively used by the legislature primarily or exclusively as tools for curbing prison overcrowding. It aims first at showing how the legislative exploitation of 'penal' measures for alleviating 'systemic' problems of criminal justice can produce disastrous effects for the normative and functional cohesiveness as well as for the legitimacy of the system of punishment. It draws to this end from the Greek example of the excessive, decade-long use of 'front- and back-door penal measures' for addressing the chronically acute overcrowding of the country's prisons. The study tries specifically to establish a causal link between this particular practice and a number of severe pathological characteristics of the Greek system of punishment. It attempts, secondly, to explain the dominance of the use of front- and back-door measures in the overall policy adopted towards overcrowding and in the Greek penal policy in general. Further, it points to the inadequate and/or much delayed development of structural – legislative and administrative – solutions to overcrowding and to the greater compatibility of the heavily used front- and back-door measures with the characteristics and the capacities

of the Greek 'penal state'. The Chapter concludes by briefly discussing the preconditions of a principled legislative use of front- and back- door measures for tackling overcrowding as well as the distinct dangers involved in an extensive use of these measures for promoting moderation in punishment 'by stealth'.

Elisavet Symeonidou-Kastanidou and *Yannis Naziris* present the book's topic in the framework of the new Greek Criminal Code, entered into force on the 1st of July, 2019 and marking a change in Greek criminal law after almost seventy years. The new legal framework has brought about significant changes particularly in the area of penal sanctions, with a view to a simpler and more coherent set of rules balancing the repressive force of criminal law against fundamental rights and principles. The Chapter aims at providing an overview as well as a critical appraisal of the Greek system of penal sanctions (and security measures). Its goal is partly to inform about what has been (or, rather, was) with a view to what will be (or, in fact, already is). Accordingly, the Chapter begins by discussing the system of penal sanctions under the former Criminal Code, describing both its initial "configuration" and subsequent "distortions" engendered by fragmentary legislative amendments. Subsequently, the focus shifts to the core changes introduced by the new Criminal Code, along with a brief explanation of their underlying rationale. To facilitate the appraisal of the new as opposed to the preexisting legal regime, all sections of the Chapter assess penal sanctions as threatened, imposed, and executed.

I thank wholeheartedly all contributors as well as the publishers for their hospitality and the splendid outcome of their precious work. Special thanks go to my old friend *Jürgen Heckel*, editor and typographer in Hamburg, for his amazing work in proofreading the initial texts. I owe him the excellent outcome of the whole.