

## Crime and Punishment in the UK

The Criminal Justice Act 2003 reduces deterrence within the UK criminal justice system

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### *Abstract*

*Deterrence under the Criminal Justice Act 2003: A critical appreciation of the effectiveness of its innovative criminal policy and the struggle between the outcome of a controversial political decision and the principle of proportionality.*

### *Summary*

1. **The Criminal Justice Act 2003 reduces deterrence within the UK criminal justice system**
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J.L. Urban, statue of Lady Justice at court building in Olomouc, Czech Republic (1896-1901)

## ***1. The Criminal Justice Act 2003 reduces deterrence within the UK criminal justice system***

The Criminal Justice Act 2003 (hereafter “CJA 2003”) received Royal Assent on 20th November 2003. Its aim was to modernise the criminal justice system from end to end so that it would deliver justice more often and more consistently. So, to sum up, we can say that the main aim of the Act was to reduce crime and re-offending by updating the criminal justice system. It creates for the first time in this country a scheme for comprehensive sentencing guidelines. Now, almost three years after his approval, we can appreciate the effectiveness of this innovative criminal policy.

In one sense the landscape of sentencing has changed utterly over the 50-year period. The biggest single change has been the far greater involvement by Parliament in sentencing, an area of policy which 50 years ago was regarded as quintessentially one of judicial discretion.

In July 2002 the Government published a White Paper outlining its plans for the criminal justice system, from crime prevention through to the punishment and rehabilitation of offenders. This Paper (legally named ‘*Justice for All*’) focused particularly on reforms to court procedure and sentencing, to make trials faster and to deliver clear, consistent and appropriate sentencing. On these issues the White Paper built on the proposals in two consultation documents: *Review of the Criminal Courts of England and Wales* by Sir Robin AULD (2001) and *Making Punishment Work: report of a review of the sentencing framework of England and Wales* (2001) by John HALLIDAY. This Act is intended to introduce reforms in these two areas.

Some two-thirds of the 339 sections in the CJA 2003 concern sentencing, and the changes are yet far-reaching. For the first time the purposes of sentencing have been included in legislation. These are: Punishment (the ‘automatic’ life sentence is abolished by the 2003 Act), Reduction of crime (including deterrence), Reform and rehabilitation, Protection of the public and Making reparation.

The legal system of sentencing must have an effect in the population’s behaviour but, does it necessarily mean to support a legal system of retribution? Many authors do not think so. The broad purpose of any Criminal Justice Act must be to bring about a form of proportionality in sentencing, recognising a hierarchy of penalty levels. A modern system of sentencing should always be able to make differences -when sentencing- between offenders who represent, in fact, a danger of serious harm, and other offenders who do not represent such danger.

With the new way of sentencing introduced by the CJA 2003, the condition that must be fulfilled before a court imposes any hard sentence is a finding that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. Serious harm here means death or serious personal injury, whether physical or psychological. Thus, one of the problems is that the key term ‘significant risk’ is actually

underdefined, and the interpretation of it –be wide or restrict- can be a danger to the proper aim of the term itself.

One of the Acts that preceded the CJA 2003, the Criminal Justice Act from 1991 stated, in relation to the length of prison sentences, only that sentences should be commensurate with the seriousness of the offence. This statement, however, was after redrafted to mean commensurate with the punishment and deterrence which the seriousness of the offence requires. The Government thought, then, that the proper answer to the offences needed to involve both a punishment and deterrence. But let me now come back to the CJA 2003 to underline some of the most important sections according to sentencing. Sections 148, 152 and 153, about the seriousness of the offence, seem to contradict themselves. Part 142 includes the purposes of sentencing and Part 143 gives a definition for persistent offenders –those who, in words of the Act, were convicted six or more times in twelve months, after this had come into force. In 2004, the Government suggested to change this definition of persistent offenders, as they were mostly shoplifters and there was, after all, no way of stopping shoplifters by giving them hard sentences. So, it seems that rising the length of sentences does not have any effect in shoplifters, this method definitely does not work, as it never deters shoplifters from shoplifting. Prison sentences of less than 12 months were imposed frequently on persistent offenders, and it has been known that they provided minimal protection to the public and little help –if any- to offenders in breaking cycles of re-offending. So, in this point, the CJA 2003 does not seem to give any help to solve the matter of deterrence, as this mechanism did not deter offenders from carrying on with their crimes. It should also be known that under the CJA 2003, the most significant change of general principle concerns the effect of previous convictions. Those must be considered by the judge as aggravating circumstances, but cannot be used to determine if the offender is guilty or not guilty. The reference to ‘each conviction’ points towards a cumulative approach, whereby courts may continually ratchet sentences upwards for persistent offenders. Many authors disagree in this point, arguing that the offender should only be judged for his/her present facts. Otherwise, sentencing becomes no more than a mere punishment based in retribution and in an inadequate system of deterrence, as considering each past sentence as an aggravating circumstance could easily be understood and considered as a breach of the principle of proportionality –one of the key principles in retribution since the 1970’s. This level of sentencing for the repetition of relatively minor offences is unfair and out of all proportion, and could lead to such offenders receiving sentences of the length normally reserved for serious offences, such as sexual and violent offences.

Provisions for Early Release reveal that there have always been –since the Criminal Justice Act 1991- purposes and guidelines to reduce the use of imprisonment, but there is little evidence that practices ever changed.

The CJA 2003 also restates in new language (Community Orders) the criteria for the imposition of Community Sentences –Part 11, Chapter 2. Where under certain provisions there is a minimum sentence fixed by law, no Community Sentence must be imposed. In addition to this, the CJA 2003 introduces the possibility of a Community Sentence where the ‘serious enough’ threshold

has not been passed –if the offender has had three convictions for which he has been fined since the age of 16. A Community Order can be imposed for up to 3 years and will include one or more of 12 requirements, such as ‘supervision’ or ‘unpaid work’, between others. Punishment, reparation and rehabilitation are the purposes resting beneath these requirements –remember the ‘supervision’ and ‘mental health’ combined requirement given to the 10 years old murderers John Venables and Robert Thompson in 1994, almost 12 years ago, in a famous murder case that shocked and amazed the whole population in England.

The question now is: is the mission of the CJA 2003 accomplished? Has the Government put the sense back into sentencing as promised in the White Paper? Nicholas MOSS JP, Chairman, North Herts Bench/ Chair, Hertfordshire Probation Board, thinks it is mission partly accomplished. Re-offending, he says, has been reduced under the CJA 2003.

The role of sentencing, in words of Andrew ASHWORTH, was to ensure the safety of the community, help rehabilitate offenders to prevent them re-offending and reserve imprisonment for a limited range of serious, dangerous and persistent offenders. But, why should we have a system that recognizes prevention and deterrence?

The retribution based on the principle of proportionality must be the departure of a criminal system, but it is also crucial to have a system of deterrence. However, yet the CJA 2003 restricts the power of the courts to imprison offenders who do not represent a risk of serious harm to the public. Anyway, do increasing sentences have any effect in deterrence? In other words, does an increase in sentence severity simply reflect an upward shift in the seriousness of offending? Evidence for this is difficult to find: research by HOUGH *et al.* in 2003 examined such claims, but concluded that there was no statistical evidence to support them. The purpose of the Act in this point is to focus on public protection through increasing levels of sentence severity but, from my humble point of view, this is an absolutely inappropriate decision, as it does not give any proper solution to the matter of those who need to commit a crime. The absolute maximum for dangerous offenders under the CJA 2003 is life sentencing, and it is always difficult for the judge to decide the exact length of the sentence, for how long will the defendants be a danger for the society, etc. In addition to this, we can also confirm that the CJA 2003 offers a system of appeals that deters offenders from appealing, as the system gives The Crown Court the full power of The Magistrates when an offender appeals to The Crown Court against a sentence of The Magistrates. We can never forget that deterrence is based on people’s knowledge: if we are rising sentences in order to deter people from committing crimes, we must be sure that people know it. Otherwise, deterrence does not work at all.

According to the Guideline Machinery, the 2003 Act now changes the structure of the last act in major ways, and both the ‘Halliday Report’ and ‘Justice for all’ promoted the objective of creating comprehensive sentencing guidelines. The advantages of this would lie in the values of consistency and coherence: the starting points and key factors would be known and the whole system would be more transparent. But let’s now talk about the Community Sentence. Section

148 of the CJA 2003 states that a Court must not pass a Community Sentence unless satisfied that the seriousness of the offence is sufficient to warrant such a sentence.

At last, we must admit that there is no evidence on the results of this system: we do not know if raising sentences helps deterrence, as correlation is not causation –between statistics.

To sum up, I truly believe that I am not far from the truth if I state that, in a wide range of matters, such as the ones exposed and argued before, the CJA 2003 is trying to increase sentences with the main aim of deterrence. This decision can become a dangerous weapon against the principle of proportionality and can also painfully wound the eventual rehabilitation of the offender, as he/she will be given a sentence out of proportion that will never offer him/her the chance to come back to a normal life in society. In addition to this, we must admit that the CJA 2003 forgets about those offenders who are not sensitive to the increasing of sentences, as their crimes are nothing but an answer to their needs (drug dealers, shoplifters...). So, is it a sensible decision to increase the sentences of those who need to commit crimes to live? What kind of message are we sending to these people? Are we really deterring them from committing more crimes? Honestly, I do not think so. They will just find themselves trapped in the machinery of a system of no second chances, and the CJA 2003 will have failed in its purpose of deterring criminals from violating the law. It is a fact, Edward LAIJAS says, that if people are thinking of committing a crime and are aware that they will be released because of early parole, then it will not effectively deter any future crime from happening, but it does not mean that deterrence must be reduced to retribution. Otherwise, we should be considering capital punishment as an effective and fair retributive justice –nothing farther from our purpose. This is why the principle of proportionality raises as one of the key principles that inform the interpretation of the law. Deterrence, if I am not wrong, can be defined as the prevention from action by fear of the consequences, a state of mind brought about by the existence of a credible threat of unacceptable counteraction. So, deterrence is a means of controlling a person's behaviour through negative motivational influences, namely fear of punishment. But fear and punishment out of proportion and with no sense does not link to the meaning of a democratic society. Human being, I believe, should be conceived as a 'social animal', so that any punishment given for his/her eventual antisocial behaviours should always suggest his/her rehabilitation, his/her reintegration into society. This is -I sincerely believe- what the CJA 2003 rejected among its principles when the decision of increasing sentences was made. Perhaps we will have to think over this for the next Act.

## 2. References

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