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Sentencing in the Netherlands. Taking risk-related offender characteristics into account

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4 | 'Does he deserve another chance? Or have we had it with him?'

Judges on the role of the risk of recidivism in sentencing¹

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ABSTRACT

In theory, the risk of recidivism is a major factor in sentencing when offenders are sentenced with the purpose of special prevention. In this study we examine the role of the risk of recidivism in actual sentencing practice. Judges say they are more apt to impose special conditions for high-risk offenders and are always open to any indication that offenders want to mend their ways. This bears witness to a sentencing practice characterized by penal welfarism. High-risk offenders are nonetheless sometimes given longer sentences, be it not because of their risk of recidivism but because of their sentencing trend. If offenders do not take advantage of the opportunities they are given at prior convictions to turn their lives around, judges move on to retribution and incapacitation. Sentencing is essentially a mixture of a traditional tendency towards retribution, penal welfarism and new penology.

4.1 INTRODUCTION

The judge's sentencing decision is – barring an appeal – not only the final but perhaps the most important decision of the entire criminal proceedings as well. It is the moment a decision is made about the consequences the crime will have for the offender. What is more, society largely evaluates the functioning of the judiciary on the basis of the sentences enforced (De Roos, 2000). Sentencing is thus not only relevant because of the impact sanctions have on offenders, it is also a cornerstone for the very legitimacy of the criminal justice system. The way a judge arrives at his sentencing decision nonetheless remains very much a black box. In addition to the confidentiality of the judge's chambers,

1 An earlier version of this chapter has been published in Dutch as: "'Krijgt hij nog een kans, of rekenen we af?'. Rechters over de rol van het recidiverisico bij de straftoemeting', *NJB* 2013, 34, p. 2315-2320.

his ample discretionary powers certainly are a contributory aspect as well. Within the limitations of the law, several principal punishment types, accessory sentences and multifarious measures can not only be enforced in combination with each other but also in different modalities: suspended or non-suspended. When the judge selects the penalty to be enforced, he takes various interests into consideration: those of the offender, of the victim, and in a wider sense of all of society. And these are often conflicting interests. Sentences with a view to leading the offender back to a straight and narrow path are a far cry from punishment with a view to reassure society and to do justice to what has been done to the victim.

These conflicting interests are reflected in the various aims of sentencing; though one aim is to safeguard society by keeping the offender off the street (incapacitation), another one is to resocialize him. In concrete cases, the aims of sentencing depend on the severity of the offense (damage to the victim, impact on the legal system), the personal characteristics of the offender and the conditions the offense was committed under or that ensued afterwards. It is quite plausible that the risk of recidivism is also an important factor in determining the sentencing goal and thus in specifying the sentence. After all, if offenders with a high risk of recidivism are involved, the sentencing goal of special prevention will play more of a role than with offenders with a low risk of recidivism. However, if high-risk offenders are given longer sentences because of their risk of future offenses, they are being punished for crimes they have not committed yet, but *might* be guilty of in the future. This is obviously not in keeping with one of the basic principles of the legal system, which is to safeguard one's legal rights: it violates the principle of individual culpability, the legality principle, and the principle of penal law as the *ultimum remedium* (Van der Woude & Van Sliedregt, 2007). Moreover, risk estimates can always be erroneous, with all the ramifications this can imply.

Although a great deal has been written in criminology about the dangers of predictive sentencing (see e.g. Tonry, 1987; Gottfredson, Gottfredson, & Conly, 1989; Netter, 2007; Hannah-Moffat, 2013), we still know very little about the actual role of the risk of recidivism in sentencing. That is why I focus here on the role of the risk of recidivism in sentencing *according to the judges themselves*. Interviews have been conducted with fifteen judges from five different court districts. They have had experience making sentencing decisions in police courts as well as in three-judge criminal courts. A qualitative research method of this kind can tell us more about the factors motivating judges to opt for a specific sanction. It can also reveal the significance judges attribute to specific features and circumstances related to the offense and the offender. It can consequently serve as a valuable supplement to quantitative studies on sentencing.

To get a clear picture of exactly what role the risk of recidivism plays in sentencing according to the judges, I first address the role reserved for the risk of recidivism in theories for the justification of punishment. Thereafter,

I describe what previous research has revealed about the role of the risk of recidivism in sentencing. On the basis of the interviews with judges, I subsequently describe what their view is of the risk of recidivism when they make a sentencing decision.

4.2 THE ROLE OF THE RISK OF RECIDIVISM IN SENTENCING IN THEORY

If the state punishes a citizen, it infringes upon a number of the citizen's fundamental rights. For example, a prison sentence in principle infringes upon the right to privacy, family life and physical integrity.² This is why a state can solely sanction a citizen if and when it is authorized to do so: the punishment not only needs to be lawful, it needs to be justified as well. Theories on the justification of punishment can be divided into two types, retributivist and utilitarian perspectives.

In the retributive approach, punishment is justified by the proportional retribution of the offense *committed*. So it is about the severity of the offense and the culpability of the offender (Von Hirsch & Ashworth, 2005). Retribution is purely retrospective. There is no place in this theory for the risk of *future* criminal conduct. However, the best predictor of future behavior is past behavior; there is a strong link between a person's criminal record and his risk of recidivism.³ Although according to the retributivist perspective, a punishment is essentially given for the *present* offense and not for offenses the offender has already been punished for, there is nonetheless a certain amount of space in retributivism to take recidivism into account in the sentence. According to some retributivists, the repeat offender ought to be given a *recidivist premium*. The offender's culpability is considered greater because he has not mended his ways since the previous conviction (Lee, 2009). Other retributivists such as Ashworth and Von Hirsch feel that repeat offenders should not get a longer sentence, but instead first offenders should get a shorter one. The underlying idea is that everyone makes a mistake sometimes. So judges should be tolerant the first time someone commits an offense. Every time the offender repeats the offense, he should have less subtracted from his sentence so there is a *progressive loss of mitigation* (Roberts, 2008; Von Hirsch, Ashworth, & Roberts, 2009; Roberts & Von Hirsch, 2010). In short, in retri-

2 Sections 10, 11 and 15 of the Constitution and Sections 5 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3 That a person's criminal record is a major predictor of recidivism is clear for example from a study by Wartna (2009).

butivism there is a role for the offender's criminal record,⁴ but not for the risk of reoffending.

A very different approach is the utilitarian one. From a utilitarian perspective, a punishment is justified if it furthers the interests of society as a whole (De Keijser, 2001). So it is a matter of costs and benefits. What are the advantages for society in terms of safety and a reduced risk of recidivism? And what does enforcing the punishment cost? It is not just a matter of the financial costs society has to pay for the execution of the punishment, the suffering of the offender being punished is also an important debit item. As a result of this focus on benefiting society, which is basically its own justification, the utilitarian view is completely oriented towards the future. It is not important what crime someone has committed, nor does it matter what else he did in the past, the only important thing is what is going to be best for society as a whole in the future. In this utilitarian perspective the sentencing goals are, in addition to norm confirmation and enforcement, general and special prevention. There are any number of ways to achieve special prevention: via special deterrence, via incapacitation or via resocialization. Since sentences are justified from this utilitarian perspective when the positive aspects for society compensate for the negative aspects of the sanction, the risk of recidivism definitely plays a role: more drastic sanctions will be justified for high-risk than for low risk-offenders.

In the Netherlands, the retributive and utilitarian approaches are combined into a mixed theory, with retribution constituting both the ground and the borders for punishment but with space within these borders for utilitarian goals (Jörg, Kelk, & Klip, 2012). In a theoretical sense the risk of recidivism is thus embedded in the Dutch sentencing practice. Judges are however free to decide which goals they are striving for with the sanctions they impose. De Keijser has demonstrated that the punishment goals judges say they are striving for can differ widely, and are not necessarily reflected in the punishments they impose in concrete cases (De Keijser, 2001; 2002). What is more, one and the same sentence can serve various aims. This is why it is so hard to determine whether certain sentences are enforced with a certain aim.

There is nonetheless the widespread notion that the protection of society has become more significant as a sentencing goal. This is evident for example in the new penological accounts propagated by American legal scholars Simon and Feeley (1992, 1994). They note that the legal system, previously oriented towards *helping* offenders (penal welfarism with resocialization as the main

4 On the basis of recidivism as an aggravating circumstance, see also the farewell lecture of De Hullu (2003), who notes that recidivism 'undeniably influences how the offender is evaluated as a person' and is thus 'an aggravating aspect of the sentencing factor on good grounds (p. 23) but also advocates a certain amount of reticence vis a vis the legislative recidivism regulation because the aspect of double punishment is hard to reconcile with the proportional retribution as maximizing principle.

sentencing goal) has developed into *actuarial justice*: crime is viewed as a risk that can be managed like any other risk. To minimize the risk as much and as efficiently as possible, every effort is made to prevent high-risk offenders from committing future crimes via long-term incarceration or the monitoring and controlling of their long-term behavior in some other way, i.e. imposing certain behavioral interventions. Since the tendency the new penology is referring to are also assumed to be in evidence in the Netherlands (Van der Woude, 2010; Van Swaaningen, 1996), we expect the risk of recidivism to play a prominent role in sentencing here as well. In fact, theoretically speaking, the risk of recidivism is an essential element in sentencing. Here I examine the extent to which this role of the risk of recidivism manifests itself in actual practice.

4.3 PRIOR RESEARCH

Virtually all the quantitative studies on sentencing in the Netherlands and abroad demonstrate the role of the risk of recidivism in sentencing outcomes. In addition to the severity of the offense, the offender's criminal record is one of the most important factors in sentencing: the longer the list of previous convictions, the longer the prison sentence (Blumstein, Cohen, Martin, & Tonry, 1983; Timmerman & Breembroek, 1985; Kannegieter, 1994). Although the offenders' criminal records are taken into consideration in almost all the recent studies on sentencing, the opposite is true as regards the risk of their recidivism. In the Netherlands and abroad, up to now the risk of recidivism has not been a topic of investigation in quantitative studies on sentencing.

One exception is the study we conducted for the Council for the Judiciary (Van Wingerden, Moerings, & Van Wilsem, 2011). We examined the extent to which the risk of recidivism, as it is estimated using the risk assessment tool RISC, affects sentencing. The results show that the role of the risk of recidivism in sentencing is diffuse and limited. Offenders with a high risk of recidivism according to the RISC do not have a greater chance of being sentenced to prison than those with a low risk of recidivism. There is no significant difference in the duration of their sentences. Many risk-related offender characteristics that are unchangeable or *static* such as sex, age and country of birth do bear a relation to the sentence. Women for example have less of a chance of being sentenced to prison and the duration of their sentences is shorter. Offenders in the 31-50 age group are less likely to be sentenced to prison than those in the 18-30 age group, although the duration of sentences for offenders above the age of 30 is longer. The chance of a prison sentence is greater for offenders from an Eastern European or non-Western country, but their sentence length does not differ from those of offenders born in the Netherlands. A criminal record also increases the chance of a prison sentence. The role of *dynamic* risk factors in sentencing is similarly diffuse. Unlike static risk factors,

these risk factors are changeable. Some factors such as a criminogenic housing situation (at a shelter or on the streets) or work situation (irregular jobs or unemployed) increase the chance of a prison sentence but decrease the length of the sentence. Drug use is also linked to a shorter prison sentence. Many risk factors are thus not necessarily linked to a greater chance of a prison sentence or a longer one. So on the basis of this quantitative study, the role of the risk of recidivism in sentencing is not unequivocal.

Other research methods might perhaps provide greater insight into the role of the risk of recidivism in sentencing. In this same study, a case is presented to fifteen judges. Despite the wide variety in the sanctions the judges state they would impose, all of them accord a prominent position to the risk of recidivism when asked to arrange cards with the facts and circumstances of the case in a sequence rating their importance. Only physical harm to the victim and the offender's prior convictions for crimes of violence committed under the influence of alcohol are considered more important by the judges (Van Wingerden et al., 2011). On the basis of interviews with judges, in the following section I address the exact significance judges attribute to the risk of recidivism in sentencing.

4.4 THE ROLE OF THE RISK OF RECIDIVISM ACCORDING TO THE JUDGES

4.4.1 Estimates of the role of the risk of recidivism

According to all fifteen judges who were interviewed, the risk of recidivism plays an important role in sentencing. However, they do not attribute any importance to the risk of recidivism as such as it is described by the Probation Service in the pre-sentence report. Even though they indicate that they do read the conclusions of the Probation Service about the risk of recidivism, they are more interested in the underlying reasons for this risk. The risk of recidivism cited in the pre-sentence report should follow from the entire story of the personal background and circumstances of the offender. 'I don't just blindly accept the risk of recidivism referred to in the pre-sentence report,' says one judge (Interview F). The judges who were interviewed state they always make their risk assessment. The criminal record of the offender plays an important role in this connection. As one judge says,

'I myself mainly estimate the risk of recidivism based on the criminal record and the impression the suspect makes on me in the file and in court. As far as what the Probation Service has to say about the risk [...] that is not really so useful to me. And sometimes I have a totally different idea about that risk of recidivism. I read the report, I accept it, but can't do much with it' (Interview E).

4.4.2 Influence of the risk of recidivism on sentencing

Although all judges say the risk of recidivism plays a role in their sentencing decision, it is not so clear exactly how they take the risk of recidivism into consideration when making a decision. Are offenders with a high risk of recidivism more apt to be sentenced to prison or to a longer prison sentence, or are they more apt to be sentenced to sanctions involving behavioral interventions? It is clear from the interviews that the risk of recidivism plays more of a role in the selection of the modality and type of sanction than in the duration of the sentence. 'It mainly plays a role in determining the type of sentence I impose, suspended or not, and possibly the conditions themselves' (Interview D). 'Suspects with a high risk of recidivism are more apt to be given a suspended sentence and special conditions' (Interview J). 'This is because of the need to *work on* the offenders with a high risk of recidivism. 'If there is a high risk of recidivism, you have to do something about it.' Another judge clarifies this, 'If the risk of recidivism is high, you have to put special prevention in place' (Interview F). 'You impose more custom-made sanctions if the risk of recidivism is high' (Interview J). Offenders with a low risk of recidivism are less in need of behavioral interventions.

'If the risk of recidivism is low, it doesn't really play a role at all. Because then you only punish the offender for what has already happened, he gets his sentence and that is it. You don't add any kind of suspended sentence. There would be no point to it' (Interview G).

So a lower risk of recidivism does not necessarily mean a shorter sentence, but a high risk of recidivism means more custom-made sanctions and a greater likelihood of a suspended sentence with special conditions being imposed. At any rate a high risk of recidivism does not seem to be a reason to be more apt to impose a prison sentence or make the sentence longer.

4.4.3 In pursuit of hope for the offender

It is clear from what is noted above that judges do take the risk of recidivism into consideration from a penal welfarism perspective. Offenders with a high risk of recidivism are not simply written off. Judges are constantly on the lookout for indications that the offender has made – or wants to make – positive changes in his lifestyle. Judges are well aware that the risk of recidivism is not fixed, that it is subject to change because the circumstances in the offender's life can change. 'It is often just a matter of meeting a really nice woman and suddenly something clicks ... that is the kind of thing it can take to turn someone's life all the way around' (Interview J). Another judge says:

'We never stop hoping they are going to see the light. I sometimes ask about that in court. "When are you finally going to turn the corner? Because if I look at your record ..." I really do mention that sometimes. In practice, it does happen that at a certain moment they turn a corner. When people reach a certain age or start having a certain kind of relationship or when they have children. It can happen' (Interview B, cf. Interviews A, G and J).

Most of the judges who were interviewed indicate that sentences are lower for offenders who want to mend their ways. In one interview, a judge explains how important he feels it is whether an offender is willing to turn over a new leaf.

'I always ask, "What do you want to do with your life? What kind of ideas do you have about the future?" It really matters to me what they say. If they say, "I realize I have messed up the last couple of years and it is not really what I want at all. I am thinking about going back to school, that is what I would like to do," that is what I want to hear, then you can see the kind of picture they have in mind. If they say, "I don't have the slightest idea" or someone says "things are going fine in this suspect's life" or "I do have ADHD or I am a drinker but that does not lead to any problems" then I think that is a pity and I think he is not ready for help or support yet, maybe he will have to get into trouble one more time before he shapes up' (Interview F).

It is clear from the judges' avid interest in whether offenders want to mend their ways how much significance the judges attribute to the idea of resocialization. This is more indicative of a sentencing practice characterized by penal welfarism than by the risk management of the new penology. Wherever possible, judges seem to opt for special prevention via resocialization. They do not lose sight however of the interests of society. Judges also note that offenders might be at a point in their criminal career where they are no longer eligible for suspended sentences. Offenders with a high risk of recidivism then do receive longer sentences, because the judges have simply had it with them and want to punish them. It is clear however from the judges' responses that this consideration is not based as much on the risk of recidivism as it is on the offenders' criminal record and sanctioning history.

4.4.4 Continuing the sentencing trend

Judges not only base their estimate of the risk of recidivism on the information from the pre-sentence report, to an important extent they also base it on the offender's criminal record. And they not only consult the criminal record to see what crimes the offender has been convicted of in the past, they also want to see what sanctions have been imposed. This enables the judges to take the sanctioning trend into account. One judge formulates this as follows, 'A prior prison sentence means he is already on the ladder there' (Interview L). So there

is no point to sentencing an offender to community service if he has repeatedly failed in the past to meet with the community service conditions and has already served a number of prison sentences. Another judge puts it as follows, 'I am not going to go against the sanctioning trend in an individual case by reverting back to community service unless there are very special circumstances' (Interview F).

If judges impose a longer sentence for offenders with a high risk of recidivism, their reasons for doing so thus seem less related to the risk of re-offending than to the sanctions imposed in the past. If despite all the efforts made in the past, the offender is still incorrigible, judges do reach a point where they have had it with him and just settle for out and out punishment. There is no longer any trace of penal welfarism in this case, just retribution and incapacitation.

4.5 CONCLUSION

Although in theory, the risk of recidivism plays an important role within the mixed theory for the justification of punishment, particularly when sentences are imposed with a view to safeguarding society and resocializing the offender, its role in the practice of sentencing has barely received any attention in sentencing studies. That is why this study focuses on the role of the risk of recidivism in actual sentencing practice. To this end, we have conducted interviews with judges. Although there are several disadvantages to interviewing judges about how they arrive at their sentencing decisions, such as the reprimand expressed by Gommer (2007) that it only generates rationalizations in retrospect, which might deviate sharply from what the judges' motivations really were, there is the great advantage above quantitative research on sentencing that it does more than reflect a coherence in a model constructed by the researcher. The interviews provide valuable insight into how judges themselves see the sentencing process as regards precisely the factors that are so hard to measure in quantitative sentencing studies, e.g. a judge's belief that the offender really does want to mend his ways. What is more, the interaction processes between the various sentencing factors can be revealed on the basis of these interviews because they grant insight into the judges' reasons for opting for certain sanctions.

The results of our study show that judges never blindly make decisions on the sole basis of the risk of recidivism as it is estimated in the Probation Services' pre-sentence report. They prefer to make their own risk assessments. This finding is in keeping with the results of quantitative research on the role of the risk of recidivism in sentencing (Van Wingerden et al. 2011). In addition, the judges all indicate that the risk of recidivism is an important factor in their sentencing decision, particularly as regards the type of sanction to impose. Offenders with a high risk of recidivism are not necessarily more likely to be

sentenced to prison, but they do have a greater chance of suspended sentences with behavioral interventions as special conditions. After all, there is *work to be done* on these offenders. This also means that in principle, offenders with a low risk of recidivism are not apt to be given suspended sentences with special conditions, since even without interventions, they will probably stay out of trouble.

Striking about the interviews is that judges never write off high-risk offenders beforehand. They are always on the lookout for indications that the offender has mended his ways or wants to. This is indicative of a sentencing practice more characterized by the resocialization idea of penal welfarism than the risk management idea of the new penology. However, once an offender has had enough chances and has not taken advantage of them, as is evident from prior convictions, the judges reach a point where they have had it with him. They are no longer apt to even consider suspended sentences with special conditions. In these cases, resocialization is no longer a sentencing aim and retribution and special prevention through incapacitation are what it is about. This practice is in keeping with the observation by Hannah-Moffat (2005) that the new penology has not replaced the old sentencing practice based on penal welfarism. Instead the strategies geared toward reducing risk are hybrid and flexible so various sentencing practices can simultaneously support each other.

In short, when assessing the interests of an offender to be kept out of trouble, and the interests of a victim and of society to be safeguarded against the future criminal conduct of the offender, resocialization is an important sentencing goal for judges. However, once an offender has had enough opportunities to mend his ways, the sentencing aim of safeguarding society and of retribution come to play a main role. For the time being, there seem to be no grounds for a fear of predictive sentencing whereby sentencing with a view to preventing future behavior violates the offender's fundamental human rights. Offenders are not given longer sentences because of their high risk of recidivism in itself, but because they have not mended their ways after all kinds of other previous sanctions. Every time he is convicted, the offender moves a little bit higher on the sentencing trend. And the judge is solely apt to deviate from the sentencing trend if he is firmly convinced the offender has turned a corner and is headed for the straight and narrow path.

This seems to be a sentencing practice with a lot to say for it. The sentencing goal is geared toward the individual case. Utilitarian considerations shaped by the risk of recidivism play an important role in this connection. In this line of thinking, judges continue to address the offender's interests in the sense of resocialization but are not unaware of society's interest in its own safety and in retribution. Which side the scale will tip towards depends on the severity of the crime and on the offender being willing and able to change. This hybrid sentencing practice does justice to the interests of the offenders as well as to those of society.

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