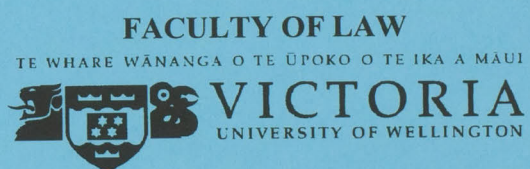


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THE "THREE STRIKES LAW" IN NEW ZEALAND

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Abstract

This paper is about the “Three Strikes Law” in New Zealand. The Paper will explain the social background of its introduction, the present arrangement in New Zealand and will consider whether this arrangement breach the Bill of Rights Act and if it is compatible with the principles of sentencing.

Subjects and Topics

Three Strikes Legislation

Sentencing

Bill of Rights Act 1990

Sentencing and Parole Reform Bill

Sentencing Act 2002

Word length

The text of this paper (excluding abstract, table of contents and bibliography, footnotes) comprises approximately 14991 words.

I Introduction

“Three strikes and you are out”.

This expression comes from baseball where a batter is out after the third strike. But “three strikes and you are out” is also a metaphor for a practice of sentencing in criminal law. It means that a particularly hard punishment follows two previous crimes.

On 1 June 2010, New Zealand established a form of the three strikes in its Sentencing Act 2002 with the Sentencing and Parole Reform Act 2010.

This paper will show the social background of the adoption of the three strikes law, the arrangements of the Act and its development. Furthermore it will show the inconsistency of the Act with the New Zealand Bill of Rights Act 1990 (NZBORA) and with the purpose and principles of sentencing.

II History and Social Background for the Adoption of the “Three Strikes Law” in New Zealand

The basic idea of the “three strikes and you’re out” law is nothing new. It is a form of mandatory sentences which means that the sentencing court has only one option in its sentence.

To impose a longer prison sentence on repeat offenders in comparison to first time offenders who commit the same crime can be traced back to the colonial period in the United States.¹ Furthermore, mandatory sentences existed for a wide range of offences in the eighteenth and early nineteenth century.²

A former regulation of mandatory sentencing can also be found in New Zealand. Indefinite imprisonment of three time convicted felons was included in New Zealand’s Habitual Criminals Act 1906.³

¹Craig Carpenter “Three Strikes and You’re Out in New Zealand: Getting tough on violent crime or get tough political rhetoric?” (2010) Rethinking Crime and Punishment <www.rethinking.org.nz>.

²Neil Morgan “Capturing Crimes Or Capturing Votes? The Aims And Effects Of Mandatories” (1999) 22 UNSW Law Journal 267, at 267.

³Craig Carpenter, above n 1.

The first three strike legislation, as we understand it today, was established in 1993 in the state of Washington. This three strikes law provided no exceptions for the sentencing in the third strike. The initiative to this law was made by the Washington Citizens for Justice, a group of relatives of victims of crime.⁴ The background to the promotion of the idea of a three strikes law was the death of Diana Ballasiotes, who was abducted and stabbed to death by a convicted rapist on work-release from prison.⁵ Finally, the three strikes law was introduced in a statewide ballot in November 1993 by an overwhelming majority.⁶ California was the next state to establish a form of three strikes law. The Bill passed with a majority of 72%. Today 24 jurisdictions in the United States have enacted different versions of the three strikes law, that is, 23 states and the federal government.⁷

A significant factor contributing to the adoption of the three strikes law in New Zealand was the ACT party. The focus of ACT is taxation and crime.⁸ The idea of the adoption of the three strikes legislation was part of its law and order policy for the General Election in 2008.⁹ Following the election, the National Party agreed to support the three strikes Bill through the Select Committee stage.¹⁰

The ACT party got its idea for the three strike law from a group of relatives of victims, the Sensible Sentencing Trust (SST).¹¹ The background to the emergence of the idea of a three strikes law is thus the same as in the 1990s in the United States: a civil group of relatives of victims. Another reason for the idea of the three strikes law is that for a decade a movement to more and more interest in crime policy in the media and the public has emerged.¹² The voices speaking for more punitive sentences and longer penalties have grown steadily.¹³ Interesting in this context was a referendum initiated by the SST in 1999. The question of this referendum was:¹⁴

⁴ Ibid, at 2.

⁵ Ibid.

⁶ Ibid.

⁷ Lyn Hinds "Three Strikes And You're Out In The West: A Study Of Newspaper Coverage Of Crime Control In Western Australia" (2005) 17 *Criminal Justice* 240, at 240.

⁸ Craig Carpenter, above n 1, at 13.

⁹ Sophie Klinger "Three Strikes For New Zealand? Repeat Offenders and The Sentencing And Parole Reform Bill 2009" (2009) 15 *Auckland U L Rev* 248 at 248.

¹⁰ Ibid, at 249.

¹¹ Craig Carpenter, above n 1, at 16.

¹² Sophie Klinger, above n 9, at 248.

¹³ Ibid.

¹⁴ Ibid.

should there be a reform of our justice system, placing greater emphasis on the needs of victims, providing restitution, and compensation for them and imposing minimum sentences and hard labour for all serious violate offences.

This question was answered with 'yes' by a 91.75 per cent vote.¹⁵ At first glance, this result seemed to show that the public would like to have a change in the justice system. But at second glance, this result is not so clear anymore. Rather, the result of the question seemed to be highly influenced concerning the fact how the question was asked, it implied that the justice system does not cover the interest of victims. Furthermore, the question covered a couple of issues and there was no option to agree with just one of them.¹⁶ However, the referendum indicated to some degree the public mood surrounding crimes.

Furthermore SST and ACT often presented the idea of the three strikes law after a crime which had raised high media interest. Then the public was more open for such ideas.¹⁷

The discussion about crimes and raising crime rates is often accompanied by "populist rhetoric and with the language of general deterrence and incapacitation".¹⁸ The discussion around the "fight against crime" especially against violate offenders uses the fear of the public and is accompanied by notions that judges are not doing their job or that they are not being tough enough.¹⁹ There are lots of examples from around the world for such rhetoric. One example outside of New Zealand is a situation in Germany in 2007 when Roland Koch, a well-known politician in Germany, put the fight against violent youth criminality on his agenda for the election in 2008 after two teenagers brutally attacked and nearly killed a 76-year-old man in Munich's underground. This case caused high media interest. In his election campaign, Roland Koch used rhetoric like "zero tolerance against violent offenders".²⁰ A big part of the public liked this kind of rhetoric. They believed that the juvenile criminal law is not tough enough although many experts said that the present arrangement were enough. This example clearly shows how politicians use cases of violent offences and the fear and anger of the public about them to support their career, to get attention especially before elections. Moreover,

¹⁵ Craig Carpenter, above n 1, at 14.

¹⁶ Ibid, at 15.

¹⁷ Ibid, at 16.

¹⁸ Neil Morgan, above n 2, at 269.

¹⁹ Ibid.

²⁰ Spiegel Online „Debatte um Jugendstrafrecht Koch warnt vor kriminellen Ausländer“ (2007) <www.spiegel.de>.

it shows that they use general rhetoric rather than proved facts. This kind of rhetoric is easy to understand by the public and feed its hunger for retribution.

The supporters of the three strikes law frequently used this rhetoric in the media and parliamentary debates.²¹ David Garrett, for example, talked about his experience when he met people in the pub while having a beer after working and talked with them about their thoughts about the current sentencing practice and the three strikes law model. He reported that these people liked the ideas of the three strikes law and harsher punishment. Furthermore, they would go a step further and would ask him why the offenders got a second chance. He reported that in their view, one strike would be enough; they would not give the offenders a second chance.²² But the rhetoric was unmasked by other politicians. Hon Clayton Cosgrove, for example, mentioned in his speech “‘three strikes and you’re out’ is a great slogan, is it not?”²³

However, as seen, topics around harsher punishment and as well the three strikes provisions are not just ways of dealing with crime, rather it is also a political instrument.

III The Arrangement of the “Three Strikes Law” in New Zealand

A Purpose of the Act

The purpose of the Sentencing and Parole Reform Act 2010, as stated in cl 3, is to:

- (a) deny parole to certain repeat offenders and to offenders guilty of the worst murders
- (b) impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences.

B Qualified Offences

The legislation lists over 40 qualifying offences.²⁴ The listed offences are mainly violent and sexual offences. Examples for included sexual offences are s 128B of the Crimes Act 1986 (sexual violation), s 129 (attempted sexual violation and assault with intent to commit sexual violation), s 129A(1) (sexual connection with consent induced by threat)²⁵. Furthermore included are ss 172 to 175 (murder) as well as manslaughter

²¹ (18 February 2009) 652 NZPD 1428-1429.

²² Ibid, at 1424.

²³ Ibid, at 1422.

²⁴ Sentencing Act 2002, s 86A (a).

²⁵ Ibid.

(s 177). Examples for offences assaulting the physical integrity are s 188(1) (wounding with intent to cause grievous bodily harm) or s 189(1) (injuring with intent to cause grievous bodily harm). Moreover included in this category is s 201 (infecting with disease). In addition to that, offences like s 208 (abduction for purposes of marriage or sexual connection) or s 209 (kidnapping) are included in the list of qualified offences. Finally, the robbery offences in ss 234-236(1) are included.

These examples show that the three strikes law in New Zealand applies just in cases of really serious, violent offences. It is not like in some states of the United States that it would apply for a theft²⁶ or other less serious offences.

C First Strike

The first strike is regulated in s 86B of the Sentencing Act 2002. The Act calls it “Stage-1 offence: offender given first warning”. What a “stage-1 offence” is, is defined in s 86A of the Sentencing Act 2002. It:

is a serious violent offence [which] was committed by an offender at a time when the offender did not have a record of first warning ... and was 18 years of age or over.

What “serious violent offence” means can be found in s 86A. This section provides the official definition for “serious violent offence”: it is committing any of the listed 40 qualifying offences unless the context does not require another interpretation. It is clear from the design of the Act that “serious violent offence” as requirement for a stage-1 offence means one of the listed offences. There is no sign in the context of the legislation, neither in the explanatory note or commentary to the Bills that another interpretation would be required. Rather it can be found in the commentary to the 17-2 Bill that “serious violent offence” means one of the listed offences.²⁷ The Act wants to provide a legislation which makes a list of offences applicable to the three strikes law. It does not want to open the door for interpretation by the Court what a “serious violent offence” is in the particular case. Rather, the framework of the three strikes legislation wants to provide a more mechanical situation. Because of that, there is no further requirement or necessity for further interpretation by the Court. If one of the listed

²⁶ So for example in California in *Ewing v California*, 538 US 11 (2003), where the offender Ewing had stolen three golf clubs worth \$399 each.

²⁷ See also Sentencing and Parole Reform Bill 2009 17-2 (Commentary) at 2.

offences is committed, it will automatically be a "serious violent offence" in the meaning of the three strikes law.

A further requirement of the first strike is that the court warns the offender about the consequence²⁸. The Act does not require a special form of words for that warning, but it is required that the offender gets a written notice "that sets out the consequences".²⁹

D Second and Third Strike

For the second and third strike, the Act differentiates between murder and other offences. Applicable for other offences are s 86C (for the second strike) and s 86D (for the third strike). Applicable in the case of murder is s 86E, which regulates the second and third strike.

(1) Other offences than murder

(a) Second strike

In the legislation, the second strike is designated as "the final warning".³⁰ It follows a second conviction of a qualifying offence. Necessary for such a "stage-2 offence" is:³¹

a serious violent offence ...that was committed by an offender at a time when the offender had a record of first warning (in relation to 1 or more offences).

"Serious violent offence" again means one of the 40 listed offences. There is again no sign that the context leads to another interpretation.

To make it clear, the second strike is named "stage-2 offence" or "final warning". Characteristic for a stage-2 offence is that it is a qualifying offence as stated in s 86A and that there is a former warning. "Stage-2 offence" does not mean that there are special offences which can be stage-2 offences. The offences are all the same listed offences as stated in s 86A. The difference between stage-1 and stage-2 offence is just whether there was a former warning or not.

²⁸ Sentencing Act 2002, s 86B(1)(a).

²⁹ Sentencing Act 2002, s 86B(4).

³⁰ Warren Brokbanks and Richard Ekins "Criminal injustice and the proposed "three strikes" law" (2010) <www.maxim.org.nz>.

³¹ Sentencing Act 2002, s 86A(b).

Further requirements for the “final warning” are that the Court warns the offender of the consequences and gives the offender a written notice of this warning.³² So this is the same requirement as for the first strike.

In addition to that, the second strike provides a special regulation with regard to parole. Therefore, the Act states that:³³

- (4) If the sentence imposed on the offender for any stage-2 offences is a determinate sentence of imprisonment, the court must order that the offender serve the full term of the sentence and, accordingly, that the offender,—
- (a) in the case of a long-term sentence (within the meaning of the Parole Act 2002), serve the sentence without parole; and
 - (b) in the case of a short-term sentence (within the meaning of the Parole Act 2002), not be released before the expiry of the sentence.

This regulation is important because the judge has to impose a determinate jail sentence without parole in cases of long term sentences. In the case of a short term sentence, a release before the expiry date can not be ordered. There is no choice, no discretion by the judge.

The meaning of short-term sentence and long-term sentence in the Sentencing Act and the Parole Act are similar. The definitions of short-term sentence and long-term sentence can be found in s 4 of the Parole Act 2002:

short-term sentence means a sentence of imprisonment that is

- (a) determinate sentence of 24 months or less imposed on or after the commencement date; or
- (b) a notional single sentence of 24 months or less; or
- (c) in the case of a pre-cd sentence, a sentence of 12 months or less

long-term sentence means a sentence of imprisonment that is—

- (a) a determinate sentence of more than 24 months imposed on or after the commencement date; or
 - (b) a notional single sentence of more than 24 months; or
 - (c) an indeterminate sentence imposed before, on, or after the commencement date;
- or
- (d) in the case of a pre-cd sentence, a sentence of more than 12 months

³² Sentencing Act 2002, s 86C.

³³ Ibid.

This means with regard to the three strikes law that in cases of a determinate sentence of imprisonment of more than 24 months or a sentence of more than 12 months in the case of a pre-cd sentence (which means a sentence of imprisonment that is imposed before the commencement date) the judge has no option to order this sentence with parole. Subsection (c) does not apply because s 86C of the Sentencing Act 2002 applies just to determinate but not to indeterminate sentences. The consequence is that the offender who is subject to the sentence is not eligible to be released on parole.

If the sentence is 24 months or less or 12 months or less in cases of pre-cd sentences, a release is not possible before the expiry of the sentence. This means that a release of the offender is not possible before the date on which the offender has served the full term of the sentence and therefore ceases to be subject to the sentence.

To summarize the consequences of the second strike: the offender will be sentenced as normal but any determinate jail sentence will be served in full without the possibility of an early release.

(b) Third strike

Another conviction for a qualifying offence that is not murder finally leads to the third strike. Required for the third strike is:³⁴

a serious violent offence ... [that] was committed by an offender at a time when the offender had a record of final warning (in relation to 1 or more offences).

Furthermore, the Act limits which courts can sentence an offender for a stage-3 offence. These are the High Court or the Court of Appeal or the Supreme Court on appeal.³⁵

Furthermore, it is required (and this is the crucial point of the three strikes law) that:³⁶

(2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.

The second consequence of the third strike affects parole. Therefore the Act

³⁴ Sentencing Act 2002, s 86A(b).

³⁵ Sentencing Act 2002, s 86D(1).

³⁶ Sentencing Act 2002, s 86D(2).

states in s 86D(3):

...the court must order that the offender serve the sentence without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order.

So the third strike has two consequences: firstly, it is mandatory that the court sentences the offender to the maximum for the particular offence and, secondly, parole is not possible unless the court is convinced that it would be manifestly unjust to deny it. The court has no choice with regard to the sentence. It has to give the maximum for the offence. In case of manifest injustice it is only possible to give parole. But it is not possible to differ from the maximum sentence.³⁷ This fact is quite important and the wording and the context of the Act is clear. The exception applies only to subsection (3); not to subsection (2) of s 86D of the Act. Again, in case of manifest injustice there is just a possibility of an exception to give parole but not any possibility to choose another sentence than the maximum. Because of that the statement of ACT that:³⁸

The judge sentencing a Strike Three offender will have no option but to sentence the offender to the maximum sentence. The only exception is if the judge determines it would be 'manifestly unjust' to do so

is not correct.

It is not necessary that all three strikes consist of the same offence. It is rather possible to accumulate strikes for different offences. So it is possible that the first strike is given for a robbery, the second strike for a wounding with intent to cause grievous bodily harm and the third strike for kidnapping.

In this example, the offender would receive a first warning for the robbery and would be sentenced to maybe two years in prison. For the wounding with intent to cause grievous bodily harm he or she would get the second strike and would be sentenced to maybe 3 years in prison without parole (because that would be a long-term sentence according to s 4 of the Parole Act 2002). The conviction for the kidnapping would be the third strike. The court would sentence the offender to the maximum term of imprisonment for that

³⁷ Warren Brookbanks and Richard Ekins, above n 30, at 4.

³⁸ Ibid.

offence, which is 15 years. Furthermore, the sentence would give the order that the offender is ineligible for parole.³⁹

But it is also possible that an offender commits several qualifying offences but still only receives one strike. The crucial aspect of a strike is if there is a warning in the previous court conviction.⁴⁰ When there was no warning, an offence does not count as a strike. Of course, there is no choice to give a warning when a qualified offence is involved. But it might be possible that a serial offender is accused just once for several offences and gets just one strike for them. Multiple offences do not necessarily constitute multiple strikes. So it is possible that a serial offender is on his first or second strike and some "normal" offenders are already on their third strike although the serial offender had in fact committed more crimes than the "normal" offender.⁴¹

A special regulation is made for manslaughter in s 86D(4). The general rule applies: the maximum sentence, which is life imprisonment, has to be served without parole unless this would be manifestly unjust. But in addition to that, the minimum period of imprisonment has to be 20 years unless this would be manifestly unjust with regard to the circumstances of the offence and the offender. In such a case, the court must order a minimum period of imprisonment of not less than 10 years. Thus, the time of imprisonment for manslaughter is at least 10 years even in cases of manifestly injustice.

(2) Murder

As mentioned before, the new legislation makes a special regulation in cases of murder. The ordinary law prescribes that a murder must be punished by a life sentence unless this is manifestly unjust.⁴² Furthermore, the ordinary law prescribes that if the court imposes a life sentence, a minimum non-parole period of at least ten years must be imposed.⁴³ But the ordinary law no longer applies after a first or a final warning.⁴⁴ Rather, the new s 86E of the Sentencing Act becomes relevant. The Act declares in s 86E(1)(a) and (b) that the court must:

³⁹ See another example in Warren Brookbanks and Richard Ekins, above n 30, at 4.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Sentencing Act 2002, s 102.

⁴³ Sentencing Act 2002, s 103.

⁴⁴ Warren Brookbanks and Richard Ekins, above 30, at 4.

sentence the offender to imprisonment for life for that murder; and order that the offender serve that sentence of imprisonment for life without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so.

If it is manifestly unjust, the Act provides under s 86E (4) that:

- (a) if that murder is a stage-3 offence, impose a minimum period of imprisonment of not less than 20 years unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so; and
- (b) if that murder is a stage-2 offence, or if the court is satisfied that a minimum period of imprisonment of not less than 20 years under paragraph (a) would be manifestly unjust, order that the offender serve a minimum period of imprisonment in accordance with section 103.⁴⁵

The consequence of a murder in the three strike legislation is that life imprisonment is mandatory and that the sentence has to be served without parole unless this is manifestly unjust. If manifestly unjust the minimum period of imprisonment is 20 years unless this is again not manifestly unjust.

Moreover s 103 Sentencing Act 2002 needs to be regarded in cases of stage 2 offences. It regulates the imposition of minimum period of imprisonment if life imprisonment is imposed for murder. It is stated that the court must in the case of life imprisonment order a minimum period of imprisonment not less than 10 years and that the court must consider the listed purposes in this section, such as protecting the community from the offender or holding the offender accountable.

Thus, there are possibilities of an early release under parole and the possibility not to order the minimum time of imprisonment in cases of manifestly injustice. In the case of murder the difference of the three strikes law to the ordinary law is small because life imprisonment for murder is always the "normal" punishment.

IV Development of the "Three Strikes Law" in New Zealand

The three strikes law underwent some dramatic changes on its way to become law. In some parts, these changes are highly relevant to the discussion whether the Act is compatible with the Bill of Rights and the principles of sentencing. However, a lot of the

⁴⁵ Section 103 of the Sentencing Act 2002 regulates the imposition of minimum period of imprisonment if life imprisonment imposed for murder.

problems with regard to the consistency with the Bill of Rights were solved during the development of the Act. But nevertheless it is worthwhile to take a close look at the development of the Act. This is necessary for the understanding of the intention of the Act and to get a whole picture of it. In that context, it is furthermore worthwhile to look at the parliamentary debates of the Bill to understand what the intentions of the supporters of the Bill are and which arguments were raised against it by its opponents. Because of that the development of the new legislation will be examined before discussing the consistency of the Sentencing and Parole Reform Act 2010 with the NZBORA and with the principles of Sentencing.

A Sentencing and Parole Reform Bill 2009 (17-1)

(1) Purpose and goals of the Bill

The first version of the three strikes law was introduced by the Sentencing and Parole Reform Bill 2009 on 18 February 2009. In its explanatory are the objectives of the Bill as well as its issues laid down.

The purpose of the Bill is “to create a three stage regime of increasing consequences for the worst repeat violent offenders”.⁴⁶ The new legislation shall be:⁴⁷

specifically targeted at offenders who show contempt for the court system and the safety of others by continuing to offend despite long prison sentences and judicial warnings.

Furthermore, the new legislation shall: “improve public safety by incapacitating these offenders for longer periods”.⁴⁸

The explanatory note also deals with the present situation and why a change is necessary. Therefore, it is stated that there is “a concern that serious and violent offenders go on to commit further serious and violent crimes”.⁴⁹ This fact leads to a loss of confidence in the criminal system and that victims could not be sure when an offender will be released.

⁴⁶ Sentencing and Parole Reform Bill 2009 (17-1) (explanatory note) at. 1.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid, at 5.

For the same reasons, it is necessary to serve life imprisonment for the worst murders without parole.⁵⁰

As “risks and likely impacts” it is mentioned that serious violent offences are not always done by previous offender. So there would be no guarantee to prevent all violent offences.⁵¹

Another stated issue is a potential high impact of the new law on Māori and their loss of confidence in the criminal justice system. Moreover it is mentioned that the result of the most research shows that imprisonment has only little effect on deterrence⁵² and that the proposal may lead to disproportionate outcomes.

But the explanatory note at the same time raises counterarguments and arguments to support the proposal.⁵³ A longer sentence would increase the possibility of rehabilitation and would have “compounding the effect on the whānau of offenders and the intergenerational effects on children separated from parents”.⁵⁴

(2) Parliamentary debate

The Bill was discussed for the first time in parliament at 18th May 2009. Different views about this new regulation were presented. National and ACT party supported the Bill, while Maori, Green, Progressive and Labour party opposed against it.

The points of discussion were mainly the same like in the explanatory note. A frequently mentioned point on behalf of the opponents of the Bill was that other countries had tried the three strikes law and that it had not worked. Upcoming injustice and the high impact on Maori were further topics in the debate.

Jim Anderton, leader of the Progressive party, mentioned that in all countries where the “three strikes” approach was used, the result out of it was “huge anomalies and greater injustice”.⁵⁵

⁵⁰ Ibid.

⁵¹ Ibid, at 9.

⁵² Ibid, at 10.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ (18 February 2009) 652 NZPD 1425.

Metiria Turei of the Green party argued that the legislation would be “dangerous”, “discriminatory” and will “fail to achieve a safer community”.⁵⁶

The supporter of the three strikes law on the other hand found arguments to support their Bill.

The discussion was controversial and raised some legal issues about discrimination and sentencing principles which will be discussed later on.

Finally, the party vote on the question “that the Sentencing and Parole Reform Bill be now read a first time” ended with the result of 64 Ayes and 58 Noes and the decision to refer the Bill to the Law and Order Committee.⁵⁷

(3) Arrangements of the first Bill

The first Bill required the Court to sentence an offender to life imprisonment following a third conviction for a serious violent offence. It was not just the maximum sentence of each offence, but rather life imprisonment regardless of the fulfilled offence.

Another difference relates to the listed offences themselves. The first Bill listed 37 offences that would constitute a “serious violent offence” in the sense of the Bill. In the process of the developing of the Act, other offences were added.

B Sentencing and Parole Reform Bill 2009 (17-2)

Changes of significance were made in the Law and Order Committee.

One and maybe the change from the highest impact was the change of s 86D. The first version of the Bill stated with regard to any third strike that the court is required to:⁵⁸

- (a) impose a sentence of imprisonment for life and
- (b) order that the offender serve a minimum period of imprisonment under that sentence.
- (3) The court must impose a minimum period of imprisonment of 25 years unless the court is satisfied that it would be manifestly unjust to do so.

⁵⁶ Ibid, at 1433.

⁵⁷ Ibid, at 1440.

⁵⁸ Sentencing and Parole Reform Bill 2009 (17-1), cl 86D.

In comparison to that, the wording of this section after it passed the Committee was as follows:

(2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.

(3) When the Court sentences the offender under subsection (2), the Court must order that the offender serve the sentence without parole unless the Court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order.

As mentioned before, there are two big differences. The first is that the court is not required to sentence to life imprisonment; rather it is required to sentence the offender to the maximum penalty of each particular offence. The second difference can be seen in subsection (3). In the first version of the Bill, it was required that the court imposes a minimum period of imprisonment of 25 years while in the second version, the sentence needs to be served without parole. The exception for this requirement in both cases is manifest injustice.

Furthermore the special regulation of minimum imprisonment with regard to manslaughter in s 86D(4) and (5) was implemented. The committee had the view that it is necessary to "recognise the seriousness of taking a human life, while still distinguishing between murder and manslaughter"⁵⁹. With this regulation the legislator shows how serious he takes the killing of a human. Even in cases of manifestly injustice of a life imprisonment a minimum period of imprisonment of at least 10 years is mandatory.

Moreover, the Bill added a few more offences to list in s 86A. Particular sexual conduct with children and young people outside New Zealand; counselling or attempting to procure murder; conspiracy to murder; poisoning with intent to cause grievous bodily harm; infecting with disease. The reason for adding these offences was that they are, in the view of the committee, serious violent offences.⁶⁰ As seen in the commentary of the Bill, the Committee thought about adding burglary and drug crimes to the list of the qualified offences, in particular manufacture and sale of drugs. The reason for not adding burglary was that it is a property offence. Adding such a property offence would be inconsistent with the aim of the Bill to target the worst repeat violent and sexual

⁵⁹ Sentencing and Parole Reform Bill 2009 (17-2) (Commentary), at 7.

⁶⁰ Ibid, at 4.

offenders.⁶¹ The reason for not adding drugs to the list is that the aim of the Bill is not to deal with social problems caused by drugs.⁶²

In addition to that, the requirement of a written notice after a warning was added, too.⁶³ This change is important, because it makes the consequences clearer for the offender. It is more fair and tries to ensure that the offender understands what will happen if he or she commits another crime.

Furthermore, the Bill 17-2 makes changes with regard to the Court's jurisdiction. The changed s 86D(1) gave the High Court the exclusive jurisdiction over cases involving the second and third strike with regard to the trial. Furthermore, only the High Court, the Court of Appeal or the Supreme Court on appeal have jurisdiction over cases involving the third strike with regard to the sentencing.⁶⁴ Reason for that change is that for most severe sanctions and the imposition of mandatory sentences, it is be appropriate that senior judges are responsible in such cases.⁶⁵ This change is also a change for the good. The second and third strikes have drastic consequences to the offender. Because of that it is important that experienced senior judges decide about the case.

The change in the stage-3 offence from shifting away from mandatory life imprisonment to mandatory maximum sentence makes it necessary to as well change the requirements for preventive detention.⁶⁶ The reason for this is that the first Bill provided the possibility of a preventive detention sentence for a 1 and 2-stage offence but not for a stage-3 offence. This was not necessary because the life imprisonment with a minimum non-parole period of 25 years for every stage-3 offence would have almost inevitably been longer than a preventive detention sentence. Section 86D(7) of the Bill declares that the Court would be not precluded to order a sentence of preventive detention. But if the Court orders a preventive detention, it is necessary that this minimum period of imprisonment is not less than the maximum sentence of each offence. An exception for this requirement is made in the case that the Court is satisfied that such a minimum period would be manifestly unjust. This change again shows that changes of the Bill brought a higher flexibility in the sentencing options.

⁶¹ Ibid, at 5.

⁶² Ibid.

⁶³ Sentencing and Parole Reform Bill 2009 (17-2), cl 86C(1)(2).

⁶⁴ Ibid, cl 86(1)(b).

⁶⁵ Sentencing and Parole Reform Bill 2009 (17-2) (Commentary) at 6.

⁶⁶ Ibid, at 8.

Another change was made with regard to the continuing effect of warnings in s 86F. In Bill (17-1), s 86F required the Court of Appeal to cancel a warning if it quashes the strike, meaning the conviction that resulted in the warning. Following a successful appeal, warnings would be disregarded. This regulation was not changed. In the commentary, the Committee makes clear that it is aware that presence of a warning could carry a stigma for the offender, even when there would be no legal effect. Because of that it would be important to cancel such a warning. However, the Committee made some extensions in the case when a qualifying offence was replaced by another qualifying offence in an appeal. The view of the majority of the Committee was that when a conviction was to be replaced with a conviction for another qualified offence the original warning needs to relate to the subsequent conviction.⁶⁷

As a consequence of the non-parole and minimum periods of imprisonment regulation after a third or second strike changes with regard to the possibility of an appeal were made to balance the fairness.⁶⁸

C Sentencing and Parole Reform Bill 2009 (17-3)

The Bill (17-3) does not make any big changes. Rather the changes attempt to clarify the wording in some sections.

The parliamentary debate makes it clear one more time that the creators of the Bill see “parole as a privilege and not as a right” which needs to be earned and that in their view offenders who were warned are not able to earn this privilege anymore.⁶⁹

The opponents of the Bill once more mentioned their arguments against it. They talked about the problem that judicial discretion will be shifted away from judges and in the hands of the police, that the Bill will bring injustice because the most listed offences can vary in their seriousness and that there would be an increase in cost and stress for victims because there would be less guilty pleas and more appeals.⁷⁰ Furthermore, it is mentioned that the regime will make the prisons a more dangerous place because offenders who are convicted for life have nothing to lose and offenders who have no

⁶⁷ Sentencing and Parole Reform Bill 2009 (17-2), cl 86D(4).

⁶⁸ Ibid, cl 86G.

⁶⁹ (25 May 2010) 663 NZPD 11227.

⁷⁰ Ibid, at 11230.

possibility of parole have no motivation to try their best in prison to get an early release.⁷¹

Once again, it becomes clear how controversial the discussion around the legislation is and that legal, practical and social problems are involved in the discussion around the three strikes law.

Finally, Parliament voted with 63 to 58 that the Bill was read a third time.⁷²

V Inconsistency of the "Three Strikes Law" with the New Zealand Bill of Rights Act 1990

"Three-strike law may breach rights".⁷³ This was a headline of the NZ Herald on Monday, 2 March, 2009. Amnesty International also worried that the new provision is a breach of national and international human rights:⁷⁴

The passing of the controversial "three strikes" bill yesterday is a serious blow to the fairness of New Zealand's criminal justice system as it removes the ability of judges to tailor sentences to the particular circumstances of an offence ...Amnesty International is concerned that provisions outlined in the Sentencing and Parole Reform Bill are a direct breach of both domestic and international human rights laws.

Furthermore, the Attorney-General mentioned in his Interim Report 2009 that the proposal as firstly introduced was inconsistent with the NZBORA.⁷⁵

All these statements were made with regard to the firstly introduced Bill (17-1), the version which provides life imprisonment for every third strike. The changes are changes for the better. But nevertheless, the NZBORA is still breached.

⁷¹ Ibid, at 11237.

⁷² Ibid, at 11247.

⁷³ Patrick Gower "Three-strike law may breach rights" (New Zealand 2 March 2009) New Zealand Herald <www.nzherald.co.nz>.

⁷⁴ Amnesty International "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2009".

⁷⁵ Christopher Finlayson "Interim Report Attorney General under the New Zealand Bill of Rights Act 1990 on Sentencing and Parole Reform Bill 2009".

A Breach of Section 9 of the New Zealand Bill of Rights Act 1990

The new Act is a breach of s 9 of the NZBORA, the right not to be subjected to torture or cruel treatment. It states:

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

1 Section 86D of the Sentencing Act 2002

The new sections 86D fulfils the alternative of “disproportionately severe punishment” and thus breaches s 9 of the NZBORA. This section is regulating the third strike for offences other than murder. As seen above, it is mandatory to serve the maximum sentence of each offence on a third strike. There is no possibility for the Court to serve another sentence. That this is disproportional is the conclusion of an analysis of the applicable case law.

The Supreme Court of New Zealand dealt with the term “disproportionately severe treatment or punishment” in the case *Taunoa v Attorney-General*.⁷⁶ This decision declared principles of other jurisdictions applicable for the interpretation of s 9 of the NZBORA. The majority held that:⁷⁷

“disproportionately severe”... has no counterpart in the overseas instruments ... but must take its colour from the rest of s 9 and therefore from the jurisprudence under those overseas instruments....the words “disproportionately severe” must have been included to fulfil much the same role as “inhuman” treatment or punishment plays in article 7 of the ICCPR⁷⁸, and to perform the same function as the gloss of “gross disproportionality” does for s 12 of the Canadian Charter⁷⁹.

Furthermore the majority found that article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”)⁸⁰ and the United States Constitution, particularly the Eighth Amendment⁸¹ add colour in the interpretation

⁷⁶ *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC).

⁷⁷ *Ibid*, at [172].

⁷⁸ The International Covenant on Civil and Political Rights, signed:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”.

⁷⁹ “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”

⁸⁰ “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

⁸¹ “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”.

of section 9 of the Bill of Rights Act 1990.⁸² “Add the colour in the interpretation” does not mean that the interpretation and understanding is the same, rather it just give some orientation. However, it is necessary to regard the listed jurisdictions and their interpretation of their corresponding regulations to come to an interpretation of s 9 of the NZBORA.

The Supreme Court of Canada dealt with mandatory minimum sentences and disproportional punishment with regard to s 12 of the Canadian Charter the first time in *R v Smith*.⁸³ The background of the case was a mandatory seven-year minimum sentence for importing drugs. The sentence was finally struck down by the court.

The Court held that unusual punishment in s 12 of the Canadian Charter needs to be “grossly disproportionate to what would have been appropriate”.⁸⁴ Therefore, not every disproportional sentence is in breach of s 12 of the Canadian Charter. Rather, it is necessary that it is grossly disproportionate. To answer how to measure proportionality, the Court gives some guidance:⁸⁵

The court in assessing whether a sentence is grossly disproportionate must consider the gravity of the offence, the personal characteristics of the offender, and the particular circumstances of the case to determine what range of sentences would have been appropriate to punish, rehabilitate, deter or protect society from this particular offender.

Therefore, it is important to regard the particular circumstances, the particular offender and the case to find the proportional punishment.

Furthermore, the Court developed the “hypothetical analysis”. This is a theoretical comparison of the present case with hypothetical cases. The Court imagined the case of a young man returning from vacation with a single marihuana cigarette.⁸⁶ It is held that a minimum sentence in this case would be an unusual punishment in accordance with the Canadian law. However, the hypothetical analysis was limited in *R v Goltz*⁸⁷ to imaginable circumstances. This means that the Court has to “examine other reasonably

⁸² (18 May 2010) 663 NZPD 10895.

⁸³ *R v Smith*, [1987] 1 SCR 1045.

⁸⁴ *Ibid* at [54].

⁸⁵ *Ibid*, at [56].

⁸⁶ *Ibid*, at [79].

⁸⁷ *R v Goltz* [1991] 3 SCR 485.

imaginable circumstances in which the challenged law might violate s 12”.⁸⁸ “Imaginable circumstances” would mean circumstances “which could commonly arise in day-to-day life”.⁸⁹ Background of that case was a charge and conviction of the offender to the mandatory minimum sentence of seven days imprisonment, together with a fine of \$300, because he had been driven with a suspended licence. The offender argued that the provision under which he was convicted⁹⁰ violate s 12 of the Canadian Charter.⁹¹

In *R v Morrissey*⁹² the Supreme Court of Canada adopted the analyses from *Smith* and added some additional factors which are relevant for the interpretation. The background of the case was the death of a friend of the offender after a gun accidentally discharged and wounded the victim. According to the criminal code of Canada, a mandatory four-year sentence would be required for this offence. But the trial Judge found that this sentence violated s 12 of the Charter and sentenced the offender to two years.⁹³ The Court of Appeal overturned this ruling. The question for the Supreme Court was, thus, if “a four-year minimum sentence of imprisonment is an unusual punishment for the offence of criminal negligence causing death with a firearm”.⁹⁴ Finally, the Court found that s 12 of the Canadian Charter was not violated. In its analysis, the Court discussed other judgments which are dealing with the section in question of the criminal Code. It becomes clear that other accidents with firearms are included.⁹⁵ The Court furthermore analysed the sentence in his whole context. The gravity of the offence, the particular circumstances of the offender and the case⁹⁶; the actual effect of the punishment on the offender⁹⁷ and penological goals and sentencing principles⁹⁸ were regarded. After this detailed analysis, the Court held that four years imprisonment is not unusual punishment in this case. The Court made clear that such a detailed analysis is necessary to decide whether a punishment is unusual in the sense of s 12 of the Canadian Charter.⁹⁹

⁸⁸ Ibid, at 26.

⁸⁹ Ibid, at 38.

⁹⁰ B C Motor Vehicle Act, s 88.

⁹¹ *R v Goltz*, above, n 87, at 10.

⁹² *R v Morrissey* [2000] 2 SCR 90.

⁹³ Ibid, at [59].

⁹⁴ Ibid, at [1].

⁹⁵ Ibid.

⁹⁶ Ibid, at [37].

⁹⁷ Ibid, at [41].

⁹⁸ Ibid, at [43].

⁹⁹ Ibid, at [34].

The latest decision of the Canadian Supreme Court regarding this matter is *R v Latimer*.¹⁰⁰ In this case, the offender murdered his disabled daughter because he thought that her life was not worth living. He claimed that the length of his prison sentence would be unusual punishment. The Court negates that. This decision refers back to the previous cases and includes again a detailed analyse of the case and with its different factors.

Therefore it is important to regard and analyse the individual circumstances of the case to decide whether a punishment is "grossly disproportional" and thus unusual in the sense of s 12 of the Canadian Charter.

The phrase "cruel and unusual punishment" in the Eight Amendment of the United States was incorporated into the American Constitution in 1791.¹⁰¹ The first time that the American Supreme court dealt with the principle that the punishment should fit the crime was in 1910 in *Weems v United States*.¹⁰² Here, the Court developed the principle of proportionality.¹⁰³ Other decisions followed. In the case of *Rummel v Estelle*¹⁰⁴, the Court had to deal with a life sentence with the possibility of parole for fraud crimes totalling \$230. The statutory provisions in Texas, where the case happened, are equivalent to the three strikes scheme.¹⁰⁵ The Court laid down three objective criteria whether a length of criminal sentence is disproportional which were already announced in *Weems*. These are the nature of the offence, a comparison with sentences imposed in other jurisdictions for commission of the same crime and a comparison with sentences imposed in the same jurisdiction.¹⁰⁶ In *Solem v Helm*,¹⁰⁷ the Supreme Court had to deal with a case of mandatory life imprisonment without parole for the seventh non-violent conviction of the offender. In this decision, the Court referred back to the test in *Weems*. Finally, the Court concluded that the sentence was unusual punishment. Especially the fact of non-parole has lead to this result. In *Harmelin v Michigan*¹⁰⁸ the Court held that a mandatory life without parole sentence for the possession of more than 650 grams (in

¹⁰⁰ *R v Latimer* [2001] 1 SCR 3.

¹⁰¹ David Shichor and Dale K Sechrest *Three Strikes and You're out Vengeance as public Policy* (1st ed, SAGE Publications, Thousand Oaks, 1996) at 5.

¹⁰² *Ibid.*

¹⁰³ Norman J Finkel *Commonsense Justice: Jurors' Notions of the Law* (Harvard University Press Harvard, 2001).

¹⁰⁴ *Rummel v Estelle*, 445 US 263 (1980).

¹⁰⁵ David Shichor and Dale K Sechrest, above n 101, at 295.

¹⁰⁶ *Ibid.*, at 295.

¹⁰⁷ *Solem v Helm*, 463 US 277 (1983).

¹⁰⁸ *Harmelin v Michigan*, 501 US 957 (1991).

the case 672 grams) of cocaine was not cruel and unusual punishment and thus not unconstitutional. This decision narrowed the proportionality doctrine from “proportional” to “grossly disproportional”.¹⁰⁹

The most important decision of the Supreme Court of the United States for the interpretation of the Eighth Amendment with regard to the three strikes law is *Ewing v California*¹¹⁰. In this case, the offender was sentenced to 25 years under California’s three strikes provision for stealing three golf clubs worth \$399 each from a pro shop. The offender was a recidivist with previous convictions for theft, burglary and robbery offences. A majority of 5-4 held that the three strikes law of California does not breach the Eighth Amendment. The majority found that just in extreme cases “grossly disproportional” is fulfilled and can strike down a sentence. Furthermore, the majority found that it is enough that the state of California decided that a three strikes law can fulfil the goal of its criminal justice system. The three strikes law is a trend in criminal sentencing which targets career offenders. It is a policy decision whether repeat offenders will be punished more harshly or not. Furthermore, they stated that they did not sit as a “superlegislature to second-guess”.¹¹¹ Thus the Supreme Court adjudges the legislator a scope of assessment for how to deal with crime. However, the minority of the Court found that judges need to be able determine the length of a prison sentence. The reason for this is that the Court has to prove the proportionality of fines, bails and death sentences but in cases of the three strikes law not the length of a prison sentence. In the view of the minority, there is no reason to make a difference between these sentences.¹¹² Furthermore, they expressed the view that the Eighth Amendment includes the obligation to take into account all goals of punishment to find a proportional punishment.¹¹³ In their view the:¹¹⁴

Eighth Amendment prohibition of cruel and unusual punishments expresses a broad and basic proportionality principle that takes into account all of the justifications for penal sanctions.

The minority mentioned that it needs to be regarded that the offender did not commit a violent offence in the present case even when he is a recidivist.

¹⁰⁹ Ibid, at 15.

¹¹⁰ *Ewing v California* [2003] 538 US 11.

¹¹¹ Ibid, at II B, per O'Connor J.

¹¹² Ibid, per Stevens J.

¹¹³ Ibid.

¹¹⁴ Ibid.

The commentary and court decisions on Article 3 of the ECHR include mainly the manner of the punishment (for example corporal punishment). The main focus is the protection from inhuman treatment of offenders and cruel.¹¹⁵ Furthermore, it is stated in a commentary that imprisonment is capable of breaching this article, especially when there is no possibility of early release from prison.¹¹⁶ The ECHR mentioned that therefore a minimum of seriousness of the disproportional between the offence and the punishment, i.e. the length of imprisonment is necessary.¹¹⁷ This application is close to the "grossly disproportional" approach of Canada and the United States.

As seen, the test for unusual punishment in the United States and Canada is similar. Both adopted the test of "grossly disproportionate". In both interpretations, a comparison with other punishments is necessary. Nevertheless, the approach to regard the particular case with all its factors in Canada is a lot more pronounced than in the United States. In addition to that, the United States Supreme Court dealt with three strikes provisions in comparison to the Canadian Supreme Court which only dealt with mandatory minimum sentences. In these decisions the majority of the United States Supreme Court found that the Californian three strikes legislation is not a disproportional punishment. And the California version of the three strikes law is much harsher than the one in New Zealand. It provides life imprisonment for every third strike. However, it is not necessary to conclude that this interpretation is applicable to New Zealand. Rather, the interpretations just give colour to the interpretation of New Zealand's s 9 of the NZBORA. This colour delivers interpretation principles; not the interpretation itself. Therefore, a punishment needs to be grossly disproportionate regarding the individual factors of the case to breach s 9 of the NZBORA. Furthermore, there are strong arguments raised by the minority of the US Supreme Court who argued for a breach of the Eight Amendment. It is convincing that Judges have to prove proportionality closely and need to be able to prove and determine the length of a prison sentence, which is not possible under the three strikes law.

The Canadian Supreme Court did not deal with a three strikes provision, but rather with minimum sentences in its decisions. In its view, it is important to regard the particular circumstances, the particular offender and the case to find the proportional punishment when to decide whether minimum mandatory sentence is disproportional or not. In the

¹¹⁵ Jens Meyer-Ladewig *Kommentar zur Europäischen Menschenrechtskonvention* (2nd ed, NOMOS, Baden-Baden 2006).at Rn 1 c.

¹¹⁶ *Ibid.*

¹¹⁷ ECHR 18 January 1978, NJW 1979.

mentioned decisions some mandatory minimum sentences were found to be grossly disproportionate.

In the judgement of *R v Goeltz* is stated:¹¹⁸

Many of the mandatory sentences ... may not be cruel and unusual. But if, to borrow the language of Lamer J. in *Smith*, it is "inevitable that, in some cases, a verdict of guilty will lead to the imposition of a term which will be grossly disproportionate" (p. 1078), the entire subsection must be struck down.

Thus a simple mandatory minimum sentence can violate the Canadian Charter. In case of a mandatory minimum sentence the Court has still a scale (as long as the minimum is not life imprisonment) to play with. In comparison to that a third strike in 86D Sentencing Act 2002 leaves no room to deal with the length of the prison sentence at all. It is impossible to regard the particular circumstances of the case. Because of that it need to be concluded that when a provision which leaves room to deal with the particular circumstances of the case can breach the right against unusual punishment, a provision without such a room can breaches the right too. Even regarding that two previous convictions are preceding the third strike, the result is the same. This fact is used as a justification for the third strike. But this is not the question. Still: it is even more impossible to regard the circumstances of each case on a third strike than in a mandatory minimum sentence. And such a situation can lead to injustice and thus the violation of s 9 NZBORA.

One example for an injustice outcome of the three strikes law was mentioned by Clayton Cosgrove in the parliament debate on 18 May 2010.¹¹⁹ He referred to a case of manslaughter.¹²⁰ He argued that it would be unjust that an offender with two former strikes 40 years ago would receive the maximum sentence (which is life imprisonment¹²¹) for a tragic hunting accident. And indeed, such an outcome is disproportional. As seen above, the special regulation for manslaughter in s 86D (4) prescribe that even in cases of manifestly injustice a minimum imprisonment of at least 10 years is mandatory. 10 Years for a tragic hunting accident seemed to be way to long. This result can be proved by *Morrisey*. As mentioned above, the trial judge saw even 4 years of a mandatory sentence as to long. The Supreme Court saw 4 years of

¹¹⁸ *R v Goltz*, above n 87, at [53].

¹¹⁹ (18 May 2010) 663 NZPD, at 10913.

¹²⁰ *Ibid.*

¹²¹ Crimes Act 1968, s 177.

imprisonment as proportional, but just because of a comparison with other hunting accidents which got the same punishment. But between 4 and 10 years is a big difference. No hunting accident outside of the three strikes law will be punished with 10 years of imprisonment. Such a long time can not be seen as proportional anymore. Moreover it is not sure in under the New Zealand three strikes law that the time of imprisonment will be 10 years. Rather a new decision about an early release on parole by the parole board is necessary. It is easily possible that a person who lived the last 40 years in accordance with the law will go for a long time into prison because of a hunting accident.

Similar examples can be found for other offences. Especially the fact that there is now time limit for the previous strikes can lead to such unjust outcomes.

Of course, it is not a question that the sentence for an offender after several offences can be and may need to be tougher. This is a normal sentencing practice and a common aggravating factor. Furthermore, not every case will be disproportional under the new legislation. There will be cases in which the sentence fits the crime. However, the example above shows that there is a high potential of disproportionality. In the most cases, the maximum penalty will not fit the crime. It is rare that the maximum penalty needs to be given. Most of the times, there are mitigating factors which need to be regarded. Furthermore, it is rare that cases reach the highest scale of the offence. To prevent disproportionality, it would be necessary to give an exception in the third strike with regard to the length of the sentence itself and not just to the parole.

Also the fact that parole might be possible in cases of manifest injustice does not change the result. In fact, parole might lead to an early release and a shorter time in prison so that the maximum sentence will be not served. However, there are differences between to give a possibility of parole or to give a possibility to differ from the mandatory maximum sentence itself. The practical difference is the way of the decision. Parole just applies for long term sentences.¹²² In cases of long term sentences the parole board has to decide whether the offender get parole or not. This process includes different steps with hearings and the analysis of the case. And after all, it is not clear if the offender will get parole. Beside that an early release under parole usually includes conditions of release.¹²³ So it is not clear whether the offender will be released early and if he will be

¹²² Parole Act 2002, s 6(4).

¹²³ Parole Act 2002, s 109.

released, he will have to fulfil the conditions. This does not happen when the sentence is from the beginning less than the maximum penalty. Notwithstanding practical differences, a different message will be served to offenders and, in general, if a law provides the possibility of regarding individual circumstances or just gives the possibility of a release on parole as an exception. Again: in order to give the possibility to regard the particular circumstances, it would rather be necessary to give an exception to the mandatory maximum sentence itself. It would be necessary to give the court the possibility to differ from the maximum in cases of manifest injustice.

Regarding the development of the Bill the result is still the same: s 9 of the NZBORA is violated. The change in the legislation reduces the chance of disproportion results because the maximum sentence is more individual for each case than a mandatory life imprisonment for every qualified offence. This provision at least regards what kind of offence was committed. However, as already mentioned the provision does still not regard the facts of the case and includes the high risk of disproportional results.

To summarise the analysis of the different jurisprudences: s 9 of the NZBORA is violated because after a detailed case analysis in the most of the cases the maximum penalty for the offence will be disproportional.

The rights in the NZBORA are generally limited by s 5 NZBORA. However, the right to be free from torture is an absolute right and its breach can never be justified under s 5 NZBORA.¹²⁴ But this does not apply to disproportional punishment. If such a punishment violates s 9 of the NZBORA, a justification under s 5 NZBORA is possible.¹²⁵ Because of that an analysis whether the breach can be justified under s 5 NZBORA or not becomes necessary.

Section 5 of the NZBORA states:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This means that if a right is breached it is necessary to examine whether this breach can be “demonstrably justified in a free and democratic society”. It is necessary to consider

¹²⁴Brookers “Commentary Human Rights Law” Brookers online, <www.brookersonline.co.nz>.

¹²⁵Andrew Buttler and Petra Buttler *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis, Wellington, 2005), at 242.

factors like the objectives of the proposal, the interest addressed in the breached right or the extent to which the proposal breaches the right¹²⁶.

In general there are two possible approaches how a right can be limited. These are “definitional balancing”, which narrows the scope of the rights, and “ad hoc balancing”, which consider limitations or restrictions under on a case by case basis.¹²⁷ In the early days of NZBORA jurisprudence, the courts favoured the first approach, now they mainly use the second one.¹²⁸

However, the test whether limitations on rights are “demonstrably justified in a free and democratic society” is one of proportionality.¹²⁹

The leading case in New Zealand for the interpretation of the methodological s 5 of the NZBORA is *R v Hansen*.¹³⁰

The test whether a breach is demonstrably justified is highly influenced by the Canadian Jurisprudence and the leading decision *R v Oakes*.¹³¹ The Court refers particularly to the Canadian case law.¹³²

In *R v Oakes*, the Canadian Supreme Court established a five step test to identify whether a limit on a right is “demonstrably justified” under s 1 of the Canadian Charter, which is similar to s 5 of the NZBORA.

In the first step, it has to be examined if the objective of the limiting provision is so important that the overriding of the particular right can be warranted.¹³³ The second step is to determine whether the objective is reasonable.¹³⁴ This second step again includes three different steps. The first question is if there is a rational connection between the provision and the purpose of the limitation. Secondly, it is necessary that the provision affects the right as little as possible. The question is if there are alternative ways which

¹²⁶ Ministry of Justice *The Handbook of the NZBORA* (Wellington 2004).

¹²⁷ Andrew Buttler and Petra Buttler, above n 125, at 120.

¹²⁸ Brookers “Commentary- Human Rights Law”, above, n 124, at 5.02.

¹²⁹ *Ibid.*

¹³⁰ *Hansen v R* [2007] 3 NZLR 1.

¹³¹ *R v Oakes* [1986] 1 SCR 103 (SC).

¹³² See, eg, Blanchard J *Hansen*, above n 130, at [103],[104], [120]; Elias CJ *Hansen*, above n 130, [64],[65].

¹³³ *Hansen*, above n 130, at [121].

¹³⁴ *Ibid.*

still achieve the provision's objective. The third and last step is a final analysis of proportionality.¹³⁵ The more serious the breach of the right is, the more important the objective of the breach must be in order to justify it.¹³⁶

In the first step, it needs to be regarded that the objectives stated by the parliament need to be seen as sufficiently important most of the time.¹³⁷ It is rare that the goals of the parliament are without legitimacy.¹³⁸

The objective of the three strikes law is, as was mentioned before, to "deny parole to repeat offenders" and to "impose maximum terms of imprisonment" on them.¹³⁹ Its aim is to bring the "worst of the worst" offenders into prison. The goal is to protect the public and to deter other potential offenders and the offender himself. The protection of the public and concepts of prevention in criminal justice can generally be seen as important enough to warrant a limitation to override a right or freedom because this purpose is important for society and the coexistence of the people. A mandatory minimum sentence can be justified because of general deterrence or the seriousness of the type of the offending.¹⁴⁰ It is possible to reach the goals of the provision. To put violent offenders in prison seems to be a possibility to protect the public from them. Furthermore, it seemed to be possible to deter offenders or potential offenders with harsh punishments.¹⁴¹

However, the new provisions are not able to stand the test on the second step. Here the parliament has to choose the option which limits the right as little as reasonably possible.¹⁴² With regard to the three strikes law, there are less intrusive possibilities to reach its purpose. It is not necessary to introduce a three strikes law to achieve harsher punishments. The instruments of the Sentencing Act 2002 are enough. It is possible to give a maximum sentence if the judge thinks this is reasonable in the particular case. Furthermore, s 8 of the Sentencing Act 2002 already provides a regulation which declares that the maximum must be served whenever it is suitable. It is a provision for judges to order the maximum when a case crosses the boarder and reaches the highest

¹³⁵ Ibid.

¹³⁶ Brookers "Commentary- Human Rights Law", above n 124.

¹³⁷ Ibid.

¹³⁸ Hansen, above n 130, at [207].

¹³⁹ Sentencing Act 2002, s 3.

¹⁴⁰ Andrew Buttler and Petra Buttler, above n 125, at 238.

¹⁴¹ If the three strike law is able to deter will discussed later.

¹⁴² Hansen, above n 130, at [113]-[119].

level of the offence. So there are alternatives in the existing law to reach the purpose without unjust results and while regarding the particular case. If the legislation would like to “target [...] offenders who show contempt for the court system and the safety of others of continuing the offend”¹⁴³ and to “improve public safety by incapacitating these offenders for longer periods”¹⁴⁴ they could reach this purpose with guidelines and policies of sentencing. They could give orientation and rules how to sentence. With this it is possible to declare goals in sentencing but guarantee at the same time that an individual sentence is possible.

Furthermore, the provision cannot stand the last step of the test, the proportionality inquiry. It is the will of the legislature that violent and sex offences are worse than others and that offenders who commit such crimes for a third time are not worth to get another chance. The legislator has scope for assessment how to deal with crime and how to punish.¹⁴⁵ This was also an argument used by majority of the United States Supreme Court in *Ewig*. But it is not free in that assessment. Rather rights of freedom like s 9 of the NZBORA limiting such an assessment. This is the function of such rights. Because of that, the fact of potential unjust outcomes weight heavier than the scope for assessment of the legislator.

The danger of an unjust punishment is too high. As mentioned above, such unjust punishment is possible in several cases. In the most cases the maximum penalty does not fit the case. There are still too many opportunities how to commit a crime and to many factors which can play a role in order that such a mechanic sentencing could be proportional. This cannot be justified by the purpose of the Act.

Section 9 of the NZBORA is violated by s 86D and this breach cannot be justified under s 5 of the NZBORA.

2 Section 86E Sentencing Act 2010

Another result brings the analysis of s 86E which regulates the second and third strike for murder. It does not breach the NZBORA. Life imprisonment for murder is not grossly disproportional. Rather a comparison with other jurisdictions and real or hypothetical cases and punishments (like developed by the American and Canadian

¹⁴³ Sentencing and Parole Reform Bill (17-1) (explanatory note), at 1.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Hansen*, above n 130, at [207] and [105].

Courts to measure proportionality) leads to this result. Life imprisonment is also mandatory in the ordinary law.¹⁴⁶ Every murder will be punished to life imprisonment; this is a common penalty in a lot of jurisdictions.¹⁴⁷ Moreover it needs to be regarded that murder is the worst of all offences. That life protection is one of the highest goods and offences against it are highly unaccepted can be seen for example in the life protection in the Bill of Rights and similar documents all over the world. Additionally s 86E parole is possible when given circumstances of the offence and the offender would lead to a manifestly unjust result. This is in the case of murder proportional, especially in comparison to manslaughter. Manslaughter can be a tragic hunting accident while murder is a willing act of killing a person. This is a difference. And to punish taking a life with this attitude is not disproportional.

In summary: Murder is the worst offence. Every murder will be sentenced to life imprisonment, constantly under the three strikes or the ordinary law, in New Zealand and in a lot of other countries. Finally parole is also possible under the three strikes provision and can prevent unjust outcomes.

3 Conclusion

Section 86D violates s 9 of the NZBORA because it does not stand the proportionality test and does not leave room to regard the particular circumstances of the case.

Section 86D on the contrary does not breach s 9 of the NZBORA. Life imprisonment for murder is proportional and it is still possible to regard the circumstances of the case because of the possibility of parole in cases of injustice.

B Discriminatory Impact of the Three Strikes Law

Many people worry about a discriminatory impact of the three strikes law on Māori.

Tariana Turia, the Co-Leader of the Māori Party, for example, referred to research from the United States which indicates a higher impact of the three strikes law on African Americans than white Americans.¹⁴⁸ She expressed the fear that the same will happen in New Zealand with regard to Māori.

¹⁴⁶ Crimes Act 1961, s 172.

¹⁴⁷ So for example as well in Germany in §211 StGB.

¹⁴⁸ (18 February 2009) 652 NZPD 1432.

Hone Harawira, member of the Māori Party, talked about prison statistics where 50 per cent of the inmates were Māori although they represent just 14 per cent of the population of New Zealand.¹⁴⁹ He argued that the three strikes regime will not change anything, because the offenders will not learn anything out of the first and second strike because they just react to problems the only way they know of. Furthermore, he mentioned the fact that Māori are more likely to be convicted, sentenced to jail and be given longer sentences.¹⁵⁰

And indeed, the 2007 sentencing and conviction statistics shows that 5680 Māori were convicted and sentenced for violent offences, as compared with 4 630 Pākehā. This number needs to be seen with regard to the population basis.¹⁵¹ Bearing that in mind, the representation of Māori is three times higher than the representation of Pākehā in this category of offences.

This critique was not just raised in New Zealand. Rather, it exists in all countries which adopted a three strikes law. A higher impact to black Americans¹⁵² in the United States and to Aborigines in Australia is mentioned.¹⁵³

That a three strikes regime, namely the regime of the Northern Territory of Australia, might be able to have a discriminatory impact on indigenous people was found by the Committee on the Elimination of Racial Discrimination (CERD) of the UN. The Committee proclaimed that the three strikes law would have a discriminatory impact on the Aboriginal people. It stated:¹⁵⁴

The mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially in the case of juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends the State party to review all laws and practices in this field.

¹⁴⁹ (25 May 2010) 639 NZPD 11238.

¹⁵⁰ Ibid, at 11238.

¹⁵¹ Ibid.

¹⁵² Neil Morgan, above n 2.

¹⁵³ Luke Neal and Mirko Bagaric "After Three Strikes- The Continued Discriminatory Impact of Sentencing System Against Indigenous Australians: Suggested Reform" (2002) 26 Criminal Law Journal 279.

¹⁵⁴ "Concluding observation by the Committee on the Elimination of Racial Discrimination; Australia" CERD/C/56/Misc.42/rev.3 (2000), at [16], <www.faira.org.au>.

One explanation for a discriminatory impact of the three strikes law is that it involves a selection of offences.¹⁵⁵ It pays attention to special activities which are incorporated in the list of qualified offences. One example comes from the United States. There, the Federal Sentencing Guidelines state that a transaction involving five grams of 'crack' cocaine can attract the same mandatory penalty as 500 grams of powder cocaine. Interesting thereby is that crack is the drug of the poor black Americans, while powder cocaine is the drug of choice in an "upper class" of the society.¹⁵⁶ But this is not the case in New Zealand. Drug offences are not included in the Act and also the other offences are not "typical" for Māori. Rather there are violent and sex offences.

However, a close look to the meaning of "discrimination" is necessary to answer the question whether the three strikes law will have a discriminatory impact on Māori or not.

The NZBORA provides protection against discrimination in s 19:

Freedom from discrimination

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

What forbidden grounds of discrimination are, is then provided for in s 21 of the Human Rights Act 1993 (HRA). These are sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability age, political options, employment status, family status and sexual orientation.

New Zealand has until now no definitive judgment on what constitutes discrimination.¹⁵⁷ However, s 19 might be infringement if there is a¹⁵⁸

(1) different treatment (2) between the complainant and someone in comparable circumstances (3) "on the ground" of one of the prohibited grounds of discrimination listed in s 21 HRA; (4) that disadvantages the complainant; and (5) Cannot be justified under s 5 NZBoRA.

¹⁵⁵ Neil Morgan, above n 2.

¹⁵⁶ Ibid.

¹⁵⁷ Brookers *Commentary on Human Rights*, above n 124.

¹⁵⁸ Ibid.

Regarding this test already the first requirement needs to be negated. There is no different treatment between Māori and pākehā. The three strikes law applies to all in the same way. Every single offender who commits two previous qualified offences will get a third strike. This is not discrimination because of race or ethnic origin. The fact that Māori are more likely to be convicted and more in the focus of the prosecution authorities is a social problem but not a question of discrimination. The new legislation itself treats all offenders equally.

But the protection from discrimination in s 19 NZBORA is not limited to direct discrimination, rather it includes indirect discrimination.¹⁵⁹ Indirect discrimination means that a neutral law, rule or practice has in fact a disproportional impact to a specific group.¹⁶⁰ There is conciseness that the impact of the three strikes law on Maori will be higher. So, in fact, the neutral Act will have a disproportional impact on one group, the Māori.

However, an indirect discrimination does not automatically violate the NZBORA. Rather, such discrimination can be justified by s 5.¹⁶¹ What is "demonstrably justified" needs to be examined again with the test out of *R v Hansen*.

As already mentioned, the objective of the limiting provision, the three strikes law, is to impose a maximum imprisonment and deny parole for repeat offenders. Protection of the public and deterrence are the aims of the legislation. These aims and purposes are important reason to override the protection from discrimination. Therefore, the first step of the test is passed.

Furthermore, the provision passes the second step of the test. The objective of the three strikes law is reasonable with regard to discrimination. The three strikes law gives a relevant basis for the distinction. Justifications for the Act, and especially the third strike with its mandatory sentence, are the previous offences. Previous offences are a generally known aggravating factor. It is appropriate to punish repeat offenders harsher than others. The question is just if there is a justification for an unequal treatment and not if the treatment itself is disproportional. The question if the treatment itself is

¹⁵⁹ *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 at 236 and 238.

¹⁶⁰ Andrew Buttler and Petra Buttler, above n 125, at 502.

¹⁶¹ Selene Mize "Indirect Discrimination Reconsidered" (2007) 1 NZLRev 27, at 58.

disproportional is a question of s 9 not of s 19 NZBORA. . The protection from indirect discrimination aims to avoid reasonable unequal treatment, not to protect from disproportional punishment itself. But such an unreasonableness treatment is not given. Rather, as mentioned before, the previous offences can justify the unequal outcome. That one group is more affected than another while committing more crimes is a normal outcome of criminal justice provisions. As mentioned before, Māori are generally more effected by the Crimes Act because they are committing more crimes. But this fact leads not to an indirect discrimination of the Crimes Act itself. Moreover the situation in New Zealand is different than in the mentioned cases of the United States and Australia. The three strikes law applies to all violent and sex offence. It is not like in the mentioned example from the United States that one drug offend committed by black Americans is included meanwhile a drug offence committed by mainly white Americans is not included. Rather there is no differentiation between the offences.

The protection of the public and its interest in punishing violent and sex offenders, thus really serious offences, weight higher than the interest of the Māori not to be subject of indirect discrimination. Because of that proportionality is given. It is proportional to punish a group of offenders who are more likely to committee crimes than other ethnical groups. This is in the interest of the public.

The indirect discrimination is justified under s 5 of the NZBORA.

The three strikes law is not discriminatory and does not violate the NZBORA.

C Breach of Other Rights

Other rights of the NZBORA are not violated by the three strikes law.

There are two rights there are worthwhile to briefly look at: s 23(5) and s 26(2) of the NZBORA.

Section 23(5) of the NZBORA requires that:

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

This section has its counterpart in article 10 ICCPR.¹⁶² If s 23 (5) is applicable s 9 might be too because there is some overlap.¹⁶³ However, s 23(5) is not breached by the new regulation. Section 23(5) applies in cases where the person is already in prison, a police cell or a similar institution.¹⁶⁴ It deals with the treatment of the prisoners. This is not the area of the three strikes law. It just deals with the sentencing but not what happens to the offender in prison. The fact that the offender may unjustly be in prison is not enough to breach s 23(5).

Section 23(5) deals with the prohibition of double jeopardy:

No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

The three strikes law leads to a continuing effect of the previous offence in the second and third strike. However, this seems to be not enough to see this as another punishment for the same offence. Furthermore every previous offence gives effect to the sentence. It is a basic rule of sentencing that a previous offence may be an aggravating factor. Section 26(2) is not violated.

(4) Conclusion

Section 86D of the New Act violates the NZBORA. It is a breach of s 9 because it disregards the circumstances of the particular case. However, the new Act does not breach s 23(5) and neither the prohibition of double jeopardy. Furthermore, the discriminatory impact on Maori can be justified under s 5.

VI Reconcilability with Rules of Sentencing

Sentencing underlies some basic principles. They can be found in s 7 of the Sentencing Act 2002, which describes the purpose of sentencing in New Zealand. These principles are deterrence, incapacitation, just deserts, retribution, rehabilitation and restitution. These basic principles are mostly incompatible with the three strikes law. Just the principle of incapacitation can justify the legislation.

¹⁶² Amnesty International, above n 74.

¹⁶³ *Taunoa v Attorney-General*, above n 76, at [79-80].

¹⁶⁴ The Ministry of Justice *The Handbook of the NZBORA* (Wellington, 2004), at Part III Section 23.

A Deterrence

Deterrence as a purpose of sentencing is stated in s 7(f) of the Sentencing Act 2002 and is used in a large number of cases to justify the sentence selected.¹⁶⁵ Deterrence is the attempt to restrain persons from offending by the threat of punishment.¹⁶⁶

Deterrence can be divided into two categories: specific deterrence and general deterrence. General deterrence focuses on general prevention of crime by making examples of specific deviants.¹⁶⁷ It will deter other persons who think about offending in the same way as a punished offender.¹⁶⁸ Specific deterrence is focused on the individual offender. It will deter the offender from re-offending.¹⁶⁹

Whether the three strikes law has a deterring effect or not was a big point of discussion in all of the parliamentary debates about the Sentencing and Parole Reform Bill. The supporters of the Bill were sure about it that it would. David Garret from the ACT party mentioned for example in the debate of the 15th May 2010:

Criminals know about this legislation now..., criminals are not stupid. They may not have university degrees or even have finished high school, but they know about cause and effect as it affects them. All the criminals will know in 5, 6, or 7 years, when the first third-striker goes away for 14 years if their conviction was for aggravated robbery, or 20 years if it was for sexual violation. The criminals will know about it, just as they know today when a child sex offender has been convicted and which prison that offender will turn up in. They know. They are not stupid.

On the other hand, the opponents of the Bill doubted any deterrence effect. They mainly refer to research results from the United States. Additionally the explanatory note also mentioned that research has shown that the three strikes law just has a little deterrence effect.¹⁷⁰

On the first sight the three strikes law seem to deter in both ways, individually and in general. The warning in the first and second strike associated with the indication of the consequences of re-offending can deter offenders. The fact of a harsh punishment in the

¹⁶⁵ Bruce Robertson (ed) *Adams on Criminal Law* Brookers Online <www.brookersonline.co.nz>.

¹⁶⁶ Geoff Hall *Sentencing Law and Practice* (Lexis Nexis, Wellington, 2004).

¹⁶⁷ Andrew Ashworth *Sentencing and Criminal Justice* (4th edition, Cambridge University Press, Cambridge, 2005) at 75.

¹⁶⁸ Geoff Hall, above n 166, at 51.

¹⁶⁹ *Ibid.*

¹⁷⁰ Sentencing and Parole Reform Bill 2009 (17-1) (explanatory Note), at 10.

third strike might also be able to deter in general. And also the arguments of David Garret seemed to be plausible and underline the deterrence effect of the three strikes law. Potential offenders are aware of the three strikes law.

However, at second sight the deterrence effect of the three strikes legislation is not that clear anymore.

One problem of deterring potential offenders with harsher punishments is that the fear of a potential sentence is only an issue when the potential offender believes that there might be the chance to get caught.¹⁷¹ Many studies have shown that the deterrence effect is much higher after changes in levels of enforcement and prosecution rather than in the sentencing practice.¹⁷² Deterrence depends on the determination of the offender if it is worthwhile to commit the crime.¹⁷³ It is a balancing of the costs and the benefits. The life circumstances and what the individual offender has to lose from being caught become important.

Another point of importance whether sentencing can deter or not is how well-known the consequences of a crime are. This is influenced by facts like media interest and communication. This problem might be relatively small with regard to the three strikes law in New Zealand because of two reasons. The first reason is that the introduction of the three strikes law got a high media interest. The second reason is provided by the Act itself: the offender of a stage-1 offence must to get a written notice which warns him about the consequences of further crimes.¹⁷⁴

However, another problem of deterrence is that some crimes are committed on impulse.¹⁷⁵ Offenders take chances rather than planning the offence in advance.¹⁷⁶ This leads to another point. The effect of deterrence depends on the crime. Violent offences like the qualified offences in the Act are mainly not planned. Rather, they are committed out of a situation. Because of that, this factor influences the deterrence success of the three strikes law. Furthermore, individual experience or experience of friends with offending may influence the deterrence effect.

¹⁷¹Ministry of Justice *Sentencing Policy and Guidance A Discussion Paper* (Wellington 1997), at 46.

¹⁷² *Ibid.*, at 48.

¹⁷³ Andrew Ashworth, above n 167, at 75.

¹⁷⁴ Sentencing Act 2002, s86B(1)(a).

¹⁷⁵ Bruce Robertson, above n 165.

¹⁷⁶ Andrew Ahworth, above n 167, at 76.

All this shows that deterrence is influenced by a lot of factors. To deter potential offenders from offending or re-offending is much more complicated than just deliver harsher punishments or establish a regime like the three strikes law. Moreover there are still the research results which say that harsher punishment instead of the probability of detection has an impact on deterrence.

This result can be proved by a look at the experience with the three strikes law in California. The crime statistic shows a declining crime rate since the introduction of the three strikes regime.¹⁷⁷ But whenever crime rates are analysed, it needs to be kept in mind that such statistics are highly influenced by the behaviour of prosecution authorities, their equipment and personnel situation.¹⁷⁸ Another point that needs to be regarded are the undetected cases.¹⁷⁹ Many crimes are not accounted for in the statistics at all.¹⁸⁰ Because of that, the crime rate in California needs to be analysed carefully. On the first view, the crime rate declined after the introduction of the three strikes law. It fell by 43 percent statewide between 1994 and 1999 (the three strikes regime was introduced in 1994). However, the rate had already declined by 10 per cent between 1991 and 1994. Furthermore, it rose again after 1999.¹⁸¹ In addition to that, other reasons for the declining can be identified. These are in particular a strong economy, demographic changes, more effective law enforcement and a decline in handgun use.¹⁸² All this shows that the analyses of crime rates is much more complicated than just thinking that the introduction of a new legislation is the only reason for the declining of a crime rate. It might be one reason but never the pure and only one.

There might be some potential for a deterrence effect in the three strikes regime. But there are too many other factors, which play an important role with regard to the question of deterrence. As mentioned above, the research results are that harsher punishment has no deterrence effect. Rather other factors like the chance to get caught are relevant for the success of deterrence. Because of that the three strikes law alone might not be able to deter offenders. Rather it would deter offenders of the qualified offences in a higher grade when they would know that the chance to get caught is high.

¹⁷⁷US Department of Justice "Criminal Victimization 2000: Changes 1999-2000 with Trends 1993-2000" (2001) <www.ojp.usdoj.gov>.

¹⁷⁸Hans Göppinger *Kriminologie* (C H Beck, Munich 2008) at 357.

¹⁷⁹Ibid, at 348 and 351.

¹⁸⁰Bernd Dieter Meier *Kriminologie* (C H Beck, München 2010) at 139.

¹⁸¹Brian Brown and Greg Jolivet „A Primer: Three Strikes - The Impact After More Than a Decade" (2005) Legislativ Analyst Office <www.lao.ca.gov>.

¹⁸²Ibid.

B Incapacitation

Incapacitation aims to "protect the community from the offender".¹⁸³ Today this goal is mainly achieved through prison sentences. Death penalties or banishment serve the same purpose. And also the three strikes law is a classic example of incapacitation.¹⁸⁴

Incapacitation has some parallels to deterrence. Both principles aim to protecting future victims.¹⁸⁵

That incapacitation and with it the protection of the public is one of New Zealand's sentencing goals was confirmed by the Court of Appeal in *R v Ward*.¹⁸⁶ The Court says that the protection of the public is a legitimate factor in sentencing but nevertheless any reason of incapacitation should not take the sentence beyond what is proportionate to the offence.

The main point of critique on incapacitation as sentencing purpose is that the offender is punished for something that it is believed he might do in the future and not for what he has done in the past.¹⁸⁷

However, as mentioned before, the three strikes law is a classic example for incapacitation¹⁸⁸ and can be justified with this purpose of sentencing.

C Just Desert

Just Desert means "to hold the offender accountable for harm done to the victim and the community by the offending".¹⁸⁹ It will punish the offender for a wrongdoing.¹⁹⁰ Background of this theory is that as long as every member of the society accepts the law, everyone at the same time receives the benefit from a law-abiding society.¹⁹¹ Punishment is seen as a tool to reinforce the society's inhibitions against offending by reaffirming with the rules of the society and the law itself. Because of that the process of sentencing may vary from one society to another and the understanding what is

¹⁸³ Sentencing Act 2002, s 7(g).

¹⁸⁴ Andrew Ashworth, above at 167, at 81.

¹⁸⁵ Ibid.

¹⁸⁶ *R v Ward* [1976] NZLR 588.

¹⁸⁷ David Shichor and Dale K Sechrest above n 101, at 286.

¹⁸⁸ Neil Morgan, above n 2.

¹⁸⁹ Sentencing Act 2002, s 7(a).

¹⁹⁰ Ministry of Justice Sentencing Policy and Guidance A Discussion Paper (Wellington 1997).

¹⁹¹ Andrew Ashworth, above n 167, at 82.

appropriate may also vary from one person's to another's.¹⁹² This theory wants to balance wrongdoing with punishment, thus proportionality in punishment becomes necessary.¹⁹³ The person of the offender and the particular offence become the determining factors in the sentencing decision.¹⁹⁴ Other factors like the harm done or the culpability of the offender, the motives of the offender and circumstances of the offence needs to be taken into account.¹⁹⁵ An expression of every society what kind of offences it sees as more serious and what offences it sees less serious are their penalty scales. Different countries have different anchoring points for their penalty scales.¹⁹⁶

The three strikes law could be seen as the view of the society that for each of the qualified offences, the maximum penalty is the appropriate penalty for a third offending. It was a decision of the public to elect the parties which included the three strikes law in their election program. However, it is in question if the three strikes law is really an expression of the will of the society or rather more a political instrument. As seen above the introduction of the three strikes law was guided by rhetoric of „big slogans“. It is in question if the public really wants a law disregarding the individual case or if it just believed that this kind of law will “fight the crime”.

However, a desert based sentencing is designed to promote proportionality and consistency in sentencing.¹⁹⁷ Just desert requires proportionality. This is one of its basic principles. This means that it is necessary to find the right punishment for every offence. And therefore it is necessary to regard the particular offence, the person of the offender and the particular circumstances. The three strikes law does not fulfil these requirements. It rather disregards them. Especially the third strike is a general punishment, which disregards any individual circumstances. Because of that the three strikes law is inconsistent with the just desert theory.

D Rehabilitation

Another purpose of sentencing is “to assist in the offender's rehabilitation and reintegration”.¹⁹⁸ The aim of rehabilitation is to transform the offender into a valuable member of society. It will reduce future crimes by changing the behaviour and the skills

¹⁹² Ibid, at 85.

¹⁹³ Bruce Robert, above n 165.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Andrew Ashworth, above n 164, at 85.

¹⁹⁷ Neil Morgan, above n 2, at 276.

¹⁹⁸ Sentencing Act 2002, s 7(h).

of the offender.¹⁹⁹ Also, imprisonment can be used as a form of rehabilitation. Here, the offender might be “re-educated”. This goal of sentencing was the aim with the most support in two polls in 1994 and 1985 in New Zealand.²⁰⁰ Helpful for rehabilitation is also the possibility of parole. So it is possible to give the offender a motivation to change his behaviour and work with the people in prison.. If offenders cooperate and try to change themselves, an early release becomes possible. Furthermore conditions of release can support rehabilitation. Moreover, it is a motivation for an offender on parole to not commit any crimes because otherwise the parole will be revoked.

The three strikes regime does not have the aim of rehabilitation. It will deter and protect the public by shutting offenders away. But it will not change the offender. Even the first and the second strike do not have the aim to rehabilitate, they will rather deter.

But in some cases rehabilitation is the best way to protect the public.²⁰¹ Sometimes, it is necessary to weight rehabilitation higher than deterrence or incapacitation.²⁰² This is unregarded by the legislator.

The three strikes law has the goal to protect the public. But it disregards the opportunity to protect the public by good rehabilitation work.

E Restitution

Restitution is a victim-oriented theory of punishment. It will “provide for the interests of the victim of the offence [and] provide reparation for harm done by the offending”.²⁰³ It is based on the premise that “the offender should put right the wrong done by his or her conduct”.²⁰⁴ Restitution might be a reparation or compensation order by the court or an apology. Also possible is that the offender performs a service for the victim or a charitable body. This aim of sentencing differs from the others because its focus lies on the victim and not on the offender or the society as a whole.²⁰⁵ Its aim is not to prevent future crime; it rather focuses on the immediate past offence. Restitution is well established in New Zealand, it is manifested with the sentence of reparation, which was

¹⁹⁹ Ministry of Justice, above n 190, at 63.

²⁰⁰ Ministry of Justice, above n 190, at 65.

²⁰¹ Bruce Robertson, above n 165, at 7

²⁰² See for example *Excell v Police* High Court Palmerston North CRI-2009-454-49, 17 February 2010, at 27.

²⁰³ Sections 7(b)(c) of the Sentencing Act 2002.

²⁰⁴ Ministry of Justice, above n 190, at 70.

²⁰⁵ Bruce Robertson, above n 165.

established in 1985 in the Criminal Justice Act 1985.²⁰⁶ Quite often, retribution is imposed along with another sentence.

The critique on restitution is sometimes that it has another intention than the other sentencing purposes and that it is more comparable and closer to tort law.

However, the three strikes law has nothing to do with retribution. It does not aim at being a compensation for the harm. Rather it can have the opposite effect. So it was mentioned by Lianne Dalziel and Carmen Sepuloni, both from the Labour Party, in the parliament debate that Bill does not protect victims, but rather that it would make the situation for them worse because the offenders and especially such who are convicted because of murder would not plead guilty anymore because of the mandatory sentence.²⁰⁷ Because of that the risk that the decision process takes longer. Then the victims are longer confronted with the case. Furthermore the possibilities of appeals against the orders relating to imprisonment in s 86H Sentencing Act 2002 enlarges the possibility of longer confrontation of the victim with the case.

Thus the three strikes law is not compatible with restitution.

VII Conclusion

The three strikes law breaches s 9 of the NZBORA. Section 86D Sentencing Act 2002 is a disproportional punishment in the sense of the NZBORA. Furthermore, it is not compatible with most of the sentencing goals and purposes. Its deterrence effect seems to be questionable; it is not compatible with the just desert theories and it does not have the goal of rehabilitation or restitution.

The three strikes law has changed immensely from the first introduced Bill to the final Act. A lot of things were changed for the good. However, the three strikes law is still unjust. It is a more of a step back than of a step forward. It is a political way to ease public concerns and the loud voices that cry for harder punishments.

The classic instruments of sentencing are enough to fight crime. It is already possible to give hard sentences to worst offenders. Every judge is free to give the maximum penalty

²⁰⁶ Ministry of Justice, above n 190, at 72.

²⁰⁷ (25 May 2010) 663 NZPD 10903.

if he or she thinks that it fits the case or if he or she thinks it is necessary to protect the public against this particular offender or to deter him or others. Furthermore, the will of the legislator for harder penalties is already laid down in s 8 of the Sentencing Act, which states that if the court thinks that this case is one of the worst of this offence, they must give the maximum penalty.

An instrument like the three strikes law is absolutely not necessary to bring "the worst of the worst offenders" to justice. The only thing which it does is bringing injustice.

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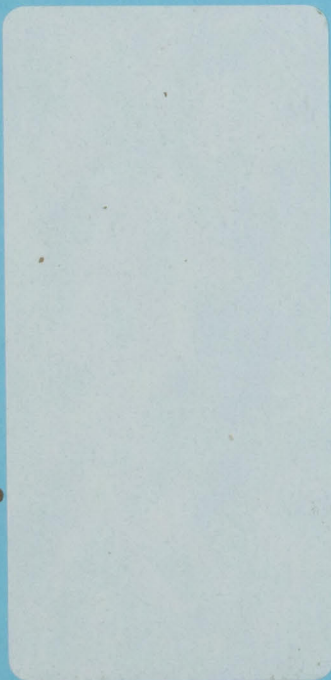
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