

Öznur Sevdiren

Alternatives to Imprisonment in England and Wales, Germany and Turkey

A Comparative Study

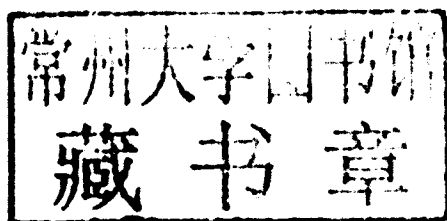


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Chapter 1

Introduction

This study attempts to shed light on the alternatives to imprisonment, as one dimension of arguably one of the central problems of Turkish penal policy: the over-reliance of imprisonment as a sentencing option and a corresponding inexorable increase in the prison population which hitherto has not exclusively, but mainly, been responded to with the enactment of amnesty laws and construction of new prison buildings. So far, this approach has resulted in a gloomy picture of penal justice. Currently, Turkish prisons accommodate one of the largest prison populations in Europe. After a steady increase over the decade, Turkey's prison population reached 116,340 in 2009, nearly four times greater than its level in 1992 (31,582).¹ In the same period, the imprisonment rate per 100,000 population increased dramatically from 54 by nearly 200% to 161. Although there are some puzzling statements on the official capacity of prisons, in the daily press constant reports have appeared indicating that the occupancy level has gone far beyond the actual capacity.² Not forgetting, when assessing the occupancy rate, except for a number of high security prisons, in contrast to many of its European counterparts, the Turkish prison system is still largely based on the dormitory system.³

In view of this state of affairs, a study of this kind is relevant in the greater context of penal reform in Turkey and more specifically for the introduction of a modern prison regime. However, the problem implies a universal phenomenon and, in any case, requires going beyond Turkey's own national boundaries. Remarkably, so far few comparative studies on non-custodial sanctions have been published

¹See for the Turkish figures, the Turkish General Directorate of Penal Execution Institutions and Remand Houses the following web page <http://www.cte.adalet.gov.tr> (Access Date: March 2010), and the figures of the International Prison Studies, King's College London, the following web page: <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpbcountry.php?country=119> (Access Date: March 2010).

²See e.g., *Cumhuriyet*, 25.8.2007, *Hürriyet*, 3.4.2007, *Radikal*, 26.7.2009, *Hürriyet*, 31.8.2009.

³For a critical English account on the theme, see, Green, P. (2002) Turkish Jails, Hunger Strikes and the European Drive for Prison Reform, *Punishment and Society*, vol. 4, no 1, pp. 97–101.

See Neziroglu, I. (2006) 'A Comparison of Law and Practice within the Turkish Prison System with Relevant International Prison Standards with Special Reference to F-Type High Security Prisons', *Turkish Studies*, vol. 7, no 3, pp. 421–450.

and those available studies tend to deal with the subject through isolated country reports that are limited to providing information from an insider's perspective.⁴ This study, in contrast, attempts to place recent (and possible future) developments in Turkish law and practice in a European context by comparing these developments with the experience in two major systems, namely England and Wales,⁵ and Germany.

Somewhat paradoxically, in Turkey, despite the notorious record of high imprisonment rates and reportedly appalling prison conditions,⁶ particularly during times of martial law, little has been systematically written about alternative ways of dealing with offenders. The recent reform of penal law, driven significantly by Turkey's desire to become a fully-fledged member of the European Union, has not changed this state of affairs. Apart from some passing statements that the avoidance of short-term imprisonment should be a goal of Turkish penal policy to the largest extent possible, the theme of prison alternatives has been marginal to the reform debate. Since that debate was preoccupied with such issues as the desirability of the death penalty, the limits of freedom of expression, the definition of sexual offences as well as with fundamental dogmatic issues in the theory of crime (*Verbrechenstheorie*), it was perhaps inevitable that the reform debate was limited to the reiteration of the long-deplored drawbacks of short-term imprisonment without actually examining the merits of the Turkish system in this respect.

It is therefore not paradoxical that the result of the long-standing neglect of this topic has created some form of 'short-sightedness' or failure to recognise the fact that Turkish legislation does provide for a number of alternative modalities to imprisonment comparable to its European counterparts even though these alternatives play only a minor role in practice. Turkish commentators, relying heavily on German literature, seemed to take for granted the assumption that an extension of non-custodial sanctions was essential.⁷

Originally, this study started from the assumption that Turkey does not have a sufficient number of viable alternatives to imprisonment; it set out to discover new

⁴Jescheck, H.-H. (ed.) (1983–1984) *Die Freiheitsstrafe und ihre Surrogate im deutschen und ausländischen Recht*, vol. 1–3, Nomos, Baden Baden, Albrecht, H.-J. and Kalmthout, A., M. (eds.) (2002) *Community Sanctions and Measures in Europe and North America*, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, see also, Dünkler, F. and Spiess, G. (1983) *Alternativen zur Freiheitsstrafe: Strafaussetzung zur Bewährung und Bewährungshilfe im internationalen Vergleich*, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, van Kalmthout, A., M. (1989) *Sanction Systems in the Member-States of the Council of Europe*, Kluwer, Deventer, Zvekic, U. (1994) *Alternatives to Imprisonment* (United Nations Interregional Crime and Justice Research Institute), Nelson-Hall Publishers, Chicago, Tas-Junger, J. (1994) *Alternatives to Prison Sentences: Experiences and Developments*, Kugler Publications, Amsterdam.

⁵Hereinafter this study will refer to the jurisdiction of England and Wales as 'England'.

⁶See Neziroglu, *op. cit.*, pp. 421–450. For indication of relevant supranational case law concerning prison conditions in Turkey, see van Zyl Smit, D. and Snacken, S. (2009) *Principles of European Prison Law and Policy*, Oxford University Press, Oxford, pp. 126–175.

⁷See chapter 4.

ways to reduce the abundant use of imprisonment in Turkey. Yet, a close look at the theory and practice of prison alternatives made it possible to discover the shadowy existence of alternative measures to imprisonment in Turkey. The central theme of this study thus became the question whether and to what extent it is advisable to enrich the Turkish system by transplanting or importing ideas from other systems. In this context, particular attention is devoted to the question as to what extent non-custodial alternatives can be regarded as genuine substitutes for custody. Two jurisdictions have been chosen for closer study: Germany and England and Wales.

Germany is the one of the most influential countries with respect to its contribution to both Turkish public and private law in that the view can be shared that it is truly primarily Germanic legal traditions and culture that have influenced Turkish law up to the present.⁸ As early as 1876, the first Ottoman Constitution was modelled closely after the Prussian Constitution of 1851.⁹ In 1916, the German Civil Code was translated into Turkish, and consequently a discussion developed on whether the Ottoman Civil Code (*Mecelle*) met the standards of a modern civil code. After the proclamation of the republic, a commercial code was adopted based on significant influence from the Italian and German codes. The Turkish Criminal Procedure Code was adopted in 1929 from the German Code of Criminal Procedure.¹⁰ More importantly, the German Penal Code and German doctrine had a substantial impact on the enactment of the new Turkish Criminal Procedure Code and Penal Code. The new Turkish Penal Code borrowed many concepts and institutions from the German law, among others are the formal distinction between penalties and measures, the day-fine system and the reformulation of the provisions on the suspended sentence.¹¹ Alongside, the contribution of German law to Turkish law, the choice of Germany has also been prompted by the fact that in this country although the sanction system based on a dualist system of imprisonment and fines, the use of prison sentences has been significantly reduced over more than a century.

In comparison to the influence of German law over Turkish law, English law has been less known in Turkish academic and legal circles. Since the beginning of the nineteenth century, Turkish law developed along the civil-law tradition.¹² Whereas

⁸Hoegen, E. and Brienens, M (2000) *Victims of Crime in 22 European Criminal Justice Systems*, Wolf Legal Production in cooperation with the Global Law Association, Nijmegen, pp. 960, Chapter 24.

⁹Bozkurt, G. (1996) 'Alman Arşiv Belgelerine Göre Alman Hukuku'nun Türk Hukuku'na Etkisi', *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, vol. 45, no 4, pp. 29–40, p. 29.

¹⁰Law no 1412, date 4/4/1929, Official Gazette 20/4/1929, See Önder, A. (1974) *Der Einfluss des deutschen Rechts auf das türkische Strafprozessrecht*, *Annales de la Faculté de Droit d'Istanbul*, vol. 38, pp. 367–385 and (1981) *Die türkische Strafprozessordnung*, *Annales de la Faculté de Droit d'Istanbul*, vol. 44, pp. 178–196.

¹¹See, Sözüer, A. (2007) *Die Reform des türkischen Strafrechts*, *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 119, no 3, pp. 712–749.

¹²Alacaptan, U. (1958) *İngiliz Ceza Hukukunda Suc ve Cezaların Kanuniligi Prensibi*, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara.

the penal institutions, for which England was famous worldwide,¹³ attracted attention in Turkey, much less consideration was given to English substantive criminal law. The concepts and traditions of the common law may have been regarded as too far removed from Turkish legal culture as to serve as an example for reform.¹⁴

For the study of alternatives to imprisonment the system of England and Wales has been chosen because this jurisdiction is internationally well known for its conception and innovative practice of various non-custodial alternatives.¹⁵ Non-custodial sanctions such as the probation order and the community service order have a relatively long history in England and Wales. In contrast to some other countries, in England these penalties can be imposed as independent sanctions. Not surprisingly, English legal rules and practice in this regard have become a model for numerous European countries.¹⁶ Even in a global context, the fact that in England a wide range of non-custodial sanctions are available has instigated academic curiosity. Notably, the establishment of a probation service in Turkey was informed substantially by experience gained in England. As will be touched on below, intergovernmental agreements exist between Turkey and England, the latter providing expertise in the establishment and development of a probation service. Such cooperation made the knowledge of the English experience even more valuable. In contrast to some of its counterparts, for example Germany, these penalties are established in their own right, i.e. the latter category of sanctions could be imposed as an independent sanction. Somewhat paradoxically though, the strategy of extending and strengthening non-custodial sanctions have some well-publicised disappointing results. A close look at the English system of sanctions therefore appeared indispensable for the present study.

As this brief overview reveals, the contrast between Germany and England in the context of this study cannot be merely reduced to their hitherto influence over Turkish law. What is even more interesting for this study is the distinct ways of managing offenders within the criminal justice system that these countries opted for. Indeed, at the risk of oversimplification, whilst the German system is characterised by an above mentioned system based on fines and imprisonment, the

¹³An English prison administrator and reformer, Ruggles-Brise, famously noted that "It is a remarkable fact, at least so far as my observation and experience goes that foreign countries look to England with anxiety and curiosity for the *practical* solution of the penal problem". Cited in Radzinowicz, L. (1991) 'Penal Regressions', *Cambridge Law Journal*, vol. 50, pp. 422–444, p. 439.

¹⁴On the penal establishments in England and Wales, see e.g., Gölcüklü, F. (1962a) 'İngiltere ve Gal Eyaleti'nde Hürriyeti Bağlayıcı Cezalar ve Cezaevi Sistemleri', *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, vol. 17, no 1, pp. 159–202. From the same author on the English Judicial Mechanism, see (1955) 'İngiliz Adli Teskilatı', *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, vol. 10, no 1, pp. 160–185.

¹⁵Bottoms, A., E. (1987) 'Limiting Prison Use: Experiences in England and Wales', *Howard Journal*, vol. 26, no 3, pp. 177–202, p. 177.

¹⁶For an early account, see Tak, P.J.P. (1986) Community Service Orders in Western Europe – A Comparative Survey – in Albrecht, H.-J. and Schädler, W. (eds.) *Community Service*, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg.

English system is marked by the availability of a broad array of non-custodial sanctions. From this perspective, it is fair to suggest that the meaning and implications of such a 'contrast' is not only illuminating for the Turkish system (a system which has considerable similarities with the German system). Beyond this, overall such an "exercise in difference" may likely call on the somewhat axiomatic assumption that is still largely held that the extension of alternative sentences will necessarily bring a reduction in the use of imprisonment into question.¹⁷

1.1 The Scope

A major terminological question arose when trying to define the subject matter of this study and delineate its boundaries. At first glance, the term 'community sanctions and measures',¹⁸ as used in documents of the Council of Europe as well as in comparative studies,¹⁹ appeared to be particularly well suited. In one of the guiding documents of the Council of Europe, for example, that term is used to cover the following types of sanctions²⁰:

1. Suspension of the enforcement of a sentence to imprisonment with imposed conditions
2. Probation as an independent sanction, imposed without the pronouncement of a sentence of imprisonment

¹⁷Frankenberg views comparative learning process as involving two stages: 'distancing' and 'differencing': He defines 'distancing' as "an attempt to break away from firmly held beliefs and settled knowledge and as an attempt to resist the power of prejudice and ignorance". And goes on to state that "from a distance old knowledge can be reviewed and new knowledge can be distinguished as it is in its own right. ... Mere distance, however, neither opens our eyes nor makes us see clearly. As long as foreign places only look like or unlike home, as long as foreign legal cultures only appear to be un-common or un-civil, and as long as they are treated as same or other, they do not speak for themselves. In order to break the unconscious spell that holds us to see others by the measure of ourselves without abandoning the benefits of criticism, travelling as well as comparison has to be an exercise in difference". Frankenberg, G. (1985) *Critical Comparisons: Rethinking Comparative Law*, *Harvard International Law Journal*, vol. 26, no 2, pp. 411–455.

¹⁸Other alternatives are 'community based penal measures', 'community-based penal measures', 'community-based dispositions', 'community care programmes', 'community corrections', 'community correctional programmes', 'supervision in the community', 'punishment in the community'. Vass, A. (1990) *Alternatives to Prison: Punishment, Custody and the Community*, Sage, London, p. xv.

¹⁹See e.g., most recently, Dünkler, F. and Pruin, I. (2009) 'Community Sanctions and the Sanctioning Practice in Juvenile Justice Systems in Europe' in Junger-Tas, J. and Dünkler, F. (eds.) *Reforming Juvenile Justice*, Springer, Dordrecht.

²⁰*Recommendation No(2000)22 of the Ministers to Member States on Improving the Implementation of the European Rules on Community Sanctions and Measures (adopted by the Committee of Ministers on 29 November 2000 at the 731st meeting of the Ministers' Deputies)* <http://www.justizia.net/Docutecal/Ficheros.asp?intcodigo=1204&IdDoc=SP&Idio.ma=sp> (Access Date: December 2009).

3. High intensity supervision
4. Community service (i.e. unpaid work on behalf of the community)
5. Treatment orders/contract treatment for specific categories of offenders
6. Victim-offender mediation/victim compensation
7. Restriction of liberty of movement by means of, for example, curfew orders or electronic monitoring

The term 'community' in this document refers to the venue of execution of the sanction, emphasising that such sanctions are executed outside prison establishments. The implications of the term go beyond that, however. Inspired by recent theoretical and philosophical approaches in Anglo-Saxon literature,²¹ the term 'community' is loaded to encompass various forms of voluntary involvement and assistance of 'community' members in the 'reintegration' of offenders into society. This perspective is clearly discernible in another guiding document including the rules on community sanctions and measures.²² The following citation should elucidate the meaning given to this concept.

(Rule 44) Justice cannot be effectively administered in isolation from the community it seeks to serve: this requires both the acceptance and the respect of the public. This level of confidence and commitment is most likely to be achieved if members of the public are encouraged and enabled to participate in the administration of justice. ...

(Rule 45).The involvement of members of the local community greatly facilitates access to an extensive range of human and material resources and social support systems. Offenders are able to establish links with voluntary agencies, trade unions and staff associations, social and recreational clubs, religious groups, charitable bodies and other organisations and individuals with the capacity to provide them with assistance and support. The maintenance of links with the wider society is likely to enhance the prospects of an offender's social reintegration.

As emphasised by various commentators, such a community approach emphasising alternatives to the provision of services by the state, collective voluntarism as a source of resources, localism, and the involvement of non-criminal justice professionals, is deeply embedded in the cultural and political context of England.²³

²¹E.g., Braithwaite, J. (1989) *Crime, Shame and Reintegration*, Cambridge University Press, Cambridge.

²²*Recommendation (1992) 16 of The Committee of Ministers to Member States on the European Rules (adopted by the Committee of Ministers on 19 October 1982 at the 482nd meeting of the Ministers' Deputies)* <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=574882&SecMode=1&DocId=605174&Usage=2> (Access Date: December 2009).

²³See, Crawford, A. (1997) *The Local Governance of Crime: Appeals to Community and Partnerships*, Clarendon Press, Oxford, chapter 5, Brownlee, I. (1998) *Community Punishment: A Critical Introduction*, Harlow, Wesley Longman, pp. 56–59, Cavadino, M., Crow, I. and Dignan, J. (1999) *Criminal Justice 2000: Strategies for a New Century*, Waterside Press, Winchester, pp. 97–98, Worall, A. and Hoy, C. (2005) *Punishment in the Community: Managing Offenders and Making Choices*, Sage, London, pp. 57–70.

In stark contrast to England²⁴ where “the appeals to community connect with, and are nourished by anti-statism”²⁵ both Germany²⁶ and Turkey are countries in which the overall reliance on the state is strong, and an approach emphasising the role of ‘the community’ in the enforcement of non-custodial sanctions²⁷ has so far been largely absent. Noticeably, the term ‘community’ as an attribute of sanctions does not even translate easily into German²⁸ and Turkish. It is therefore fair to conclude that the term ‘community sanctions and measures’ does not denote the same meaning in all three countries featured in this study.

It is interesting to note that over time, the term ‘community sanctions’, may have lost some of its original meaning even on its native soil. As will be discussed, recent changes in English law have blurred the distinction between community and non-community sanctions.²⁹ Even, one of the authoritative definitions of ‘community penalties’ may thus no longer be accurate. In 2001, Bottoms *et al.* had defined ‘community penalties’ as:

“Court ordered punishments structurally located between custody, on the one hand, and financial or nominal penalties (fines, compensation, and discharge) on the other. What distinguishes community penalties from fines and compensation is that they are personally restrictive, involving some active contact with a penal agent; but, unlike custodial sanctions, this contact takes place in a community-based setting”.³⁰

If one abandons the specific ‘communal’ element of ‘community penalties’ and simply defines them as ‘intermediate punishments’³¹ the question arises whether the term still extends to financial penalties. There is no doubt that fines must be included in any attempt to analyse the relationship between the use of non-custodial

²⁴See, Raynor, P. (2001) Community Penalties and Social Integration: ‘Community’ as Solution and as Problem in Bottom *et al.* (eds.), pp.183–199, Crawford, A. (2000) Contrasts in Victim Offender Mediation and Appeals to Community in France and England, in Nelken, D. (ed.) *Contrasting Criminal Justice*, Ashgate, Aldershot, pp. 205–229, p. 220.

²⁵Crawford (2000), *op. cit.*, p. 220.

²⁶Jung, H. (1999) Die “European Rules on Community Sanctions and Measures” in Feuerhelm, W., Schwind, H.-D. und Bock, M. (eds.) *Festschrift für Alexander Böhm zum 70. Geburtstag am 14. Juni 1999*, de Gruyter, Berlin, pp.69–79, Albrecht, H.-J. (2002) ‘Community Sanctions in the Federal Republic of Germany’, in Albrecht and Kalmthout *op. cit.*, pp.243–270, p. 244, see also Lacey, N. and Zedner, L. (1995) Discourses of Community on Criminal Justice, *Journal of Law and Society*, vol. 22, pp. 301–325.

²⁷In this context, see also Crawford (2000), *op. cit.*, p. 205.

²⁸Jung, *op. cit.*, p. 72 ‘gemeinwesenorientiert’.

²⁹Bottoms *et al.* (2004) *op. cit.*, p.13. In this context, see also, Roberts, J., V. (2004) *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, Cambridge University Press, Cambridge.

³⁰Bottoms, A., E., Gelsthorpe, L. and Rex, S. (eds.) (2001) *Community Penalties: Change and Challenges*, Willan Publishing, Cullompton, p. 1, see also Nellis, M. (2001) Community Penalties in Historical Perspective in Bottoms *et al.* (2001), pp. 16–40.

³¹Tonry, M. and Lynch, M. (1996) Intermediate Sanctions, *Crime and Justice*, vol. 20, pp. 99–144.

sentencing options,³² since financial penalties have played a crucial role in reducing the use of imprisonment. It has been observed, for example, that in countries applying the unit or day-fine system, such as Austria, Switzerland, certain Scandinavian countries and France, short-term imprisonment has, to a considerable extent, been replaced by fines.³³ Accordingly, to disregard fines in this study would mean to neglect an indispensable element of the relationship between custody and its alternatives.

In the face of such conceptual difficulties, to use the term 'community penalties' for all non-custodial sanctions would be misleading. In lieu of this term, therefore, the terms 'alternatives to imprisonment' or, interchangeably, 'prison alternatives' and non-custodial sentences will be employed. A note of caution is in order, however. Although 'alternatives to imprisonment' is a convenient short-hand term that can be used with respect to all three jurisdictions treated here, it refers to a variety of diverse practices, ranging from programmes prior to court proceedings to early release arrangements.³⁴ For the sake of clarity and coherence, this study is primarily concerned with court ordered alternatives to imprisonment. Yet, pre-trial diversionary mechanisms will also be discussed at some point. This is because there is considerable evidence that, at least in England³⁵ and Germany,³⁶ such diversionary measures have significantly contributed to reducing the size of

³²Harding, J. (2003) 'Which Way Probation? A Correctional or Community Justice Service?', *Probation Journal*, vol. 54, no. 4, pp. 369–373. Bottoms *et al.* (2004), p. 9, Hughes, G. (2001) 'The Competing Logics of Community Sanctions: Welfare, Rehabilitation and Restorative Justice', McLaughlin, E. and Muncie, J. (eds.) *Controlling Crime*, Sage, London, pp. 249–297, p. 291.

³³Albrecht, A. and Kalmthout, A., M. (2002) 'Intermediate Penalties: European Developments in Conceptions and Use of Non-Custodial Criminal Sanctions' in Albrecht and Kalmthout *op. cit.*, pp. 1–11, p. 4.

³⁴Vass, *op. cit.*, p. xv.

³⁵See, for example, with regard to England, Gelsthorpe, L. and Morris, A. (1994) *Juvenile Justice 1945–1992* in Maguire, M., Morgan, R. and Reiner, R. (eds.) *the Oxford Handbook of Criminology*, Clarendon Press, Oxford, Young, J. and Matthews, R. (2003) *The New Politics of Crime and Punishment*, Cullompton, Willan, p. 82, Mair, G. (2004) Diversionary and Non-Supervisory Approaches to Dealing with Offenders in Bottoms *et al.* (2004) pp. 135–161, see also Allen, R. (1991) Out of Jail : The Reduction in the Use of Penal Custody for Male Juveniles 1981–1988, *Howard Journal*, vol. 30, no 1, pp. 30–52, pp. 33–36.

With regard to Germany, see Graham, J. (1987) *The Declining Prison Population in the Federal Republic of Germany*, Home Office Research Bulletin, no 24, London pp. 47–52 and (1990) Decarceration in the Federal Republic of Germany: How Practitioners are Succeeding Where Policy Makers Have Failed?, *British Journal of Criminology*, vol. 30, no 2., pp. 47–52.

See also, Mayerhofer-Ludwig, W. (1995) Sentence without Conviction Notes on Diversion from the Juvenile Court in the Federal Republic of Germany, pp. 108–109 in Albrecht, G. and Ludwig-Mayerhofer, W. (eds.) *Diversion and Informal Social Control*, de Gruyter, Berlin, Muncie, J. and Sparks, R. (1991) Expansion and Contraction in European Penal Systems in Muncie and Sparks (eds) *Imprisonment European Perspectives*, Prentice Hall, New York, pp. 89–108, p. 101.

³⁶See for example, Jeschek, H.-H. (1979) Die Krise der Kriminalpolitik, *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 91, pp. 1060–1061, Feltes, T. (1982) Alternativen zur Jugendstrafe in Sievering, U., O. (ed.) *Alternativen zur Freiheitsstrafe*, Haag Herchen, Frankfurt, pp. 79–87, p. 83.