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Special issue:

Changing penologies and European crime policy. Theory and practice in the global context. Introduction

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Changing penologies and European crime policy. Theory and practice in the global context. Introduction

Zmieniające się penologie i europejska polityka karna. Teoria i praktyka w kontekście globalnym. Wprowadzenie

Abstract: This Special Issue deals with the significant questions about changing penologies and European crime policy. The discussed topics cover the general picture, trends and aim of today's European penology. The focus is paid on the effectiveness of crime policy, its role in contemporary penology and fundamental values which are closely linked with human rights orientated approach. The issue of punishment and prison standards are also presented in the context of International and European standards. Furthermore, Scandinavian approach to crime policy is widely illustrated, especially based on the Finnish and Norwegian studies.

Keywords: contemporary penology, European crime policy, punishment, international prison standards, Scandinavian crime policies

Abstrakt: W tym numerze specjalnym poruszane są istotne kwestie dotyczące zmieniających się penologii i europejskiej polityki karnej. Tematyka obejmuje ogólny obraz, kierunki i cele współczesnej penologii europejskiej. Nacisk położony jest na skuteczność polityki karnej, jej rolę we współczesnej

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penologii oraz podstawowe wartości, które są ściśle powiązane z podejściem zorientowanym na prawa człowieka. Zagadnienie kar i standardów więziennych ukazane jest także w kontekście standardów międzynarodowych i europejskich. Ponadto, szeroko zilustrowane jest skandynawskie podejście do polityki karnej, zwłaszcza w oparciu o badania fińskie i norweskie.

Słowa kluczowe: współczesna penologia, europejska polityka karna, kara, międzynarodowe standardy więzienne, skandynawskie polityki karne

This Special Issue of Archives of Criminology was inspired by the discussions and presentations during the international conference hosted by the University of Warsaw (21–22 October 2022). The topics it presents deal with the questions about changing penologies and European crime policy. They appear to be of significance, considering the current tendencies observed at the global, European and national levels.

The general framework of contemporary penological debate and its importance is discussed by Tom Daems. We can quote his conclusions from the first article in this Special Issue:

> A penology for today's Europe should have at least two objectives. On the one hand, there is a need to document and describe, to understand and to analyse what is happening (or not happening) with punishment in Europe, with comparative attention for how European developments relate to developments elsewhere in the world. But on the other hand, such a penology should also make its hands dirty; it should engage and intervene in the key debates of today's Europe. After all, … our European institutions are under attack and face important challenges. A penology for today's Europe therefore seems – more than ever – necessary.

Furthermore, the need for a platform to exchange multidisciplinary ideas and research related to crime policy has been clearly highlighted in contemporary 21st-century penology (see e.g. Daems, van Zyl Smit, Snacken 2013). Indeed, the conference which was organised under the auspices of the University Rector on 21–22 October 2022, on the occasions of the 15th anniversary of the European Centre for Penological Studies and the 50th anniversary of the Institute of Social Prevention and Resocialisation of the University of Warsaw, became one such platform for exchanging views. Likewise, the European Centre for Penological Studies at the University of Warsaw was established in 2007–2008 to stimulate interdisciplinary discussions on penological issues and research on the effectiveness of principled policy embodied in the values articulated in European law.

When talking about a penology for Europe, questions naturally arise about the effectiveness of crime policy, fundamental values and the role of crime policy in the legitimation of political order. One may also add that the European dimension of punishment clearly relates to key ideas such as principled human-rights-orientated crime policies and the need to develop an area of justice, security and freedom.

Undoubtedly, the question of values which should offer guidelines for, and set limits to, crime policy emerges in different contexts. The multidimensional aspects of European crime policy standards are analysed by Joanna B. Banach Gutierrez in this issue. In her article, she examines different elements of punishment and crime policy based on EU legislation and the jurisprudence of European courts. She concludes that the effectiveness of punishment should refer to detailed research and should respect the principled human rights approach. The role of modern penology is to reconcile these aspects of punishment in crime policy.

Furthermore, Elżbieta Hryniewicz-Lach uses the example of confiscation to illustrate the importance of clearly defining the limits of crime policy and penology. She demonstrates that certain reactions to harmful behaviours which are not defined as criminal should not be justified as a form of punishment, despite their potential role in crime prevention (confiscation in case of non-conviction). She argues that if these interventions are deemed necessary, they should be justified and rationalised on grounds beyond modern penology. From this perspective, it is especially important to avoid generalisations and to examine interventions which may not be labelled as punishment, but which impact human rights. The limits of criminal law (Husak 2009) and the inflation of criminal law, both in terms of excessive criminalisation and the use of penal law in other branches of social policy (Simon 2007), are a problem for criminology and penology and the interpretation of European law, as Hryniewicz-Lach demonstrates in her contribution.

It is important to understand the historical roots of the development of European standards in crime policy – including the rule of *nullum crimen sine lege poenali anteriori* (no crime without law), which is fundamental to criminal law. This important question is discussed in this issue from a Scandinavian perspective. In his contribution, Raimo Lahti argues that the contemporary Scandinavian approach (especially Finnish) to crime policy is one of the best examples of the "enlightened" tradition of effective and human crime policies, rooted in the Enlightenment – especially in the work of Cesare Beccaria and Jeremy Bentham. Similar themes are explored by Berit Johnsen and colleagues in relation to the new Norwegian security prisons. They examine the interrelationship and potential clashes between rational (in the sense of effective) and humanitarian penitentiary policy. They also suggest that the modern questions and solutions are rooted in earlier discussions between the protagonists of the Panopticon (presented in the work of Jeremy Bentham) and the Philanthropinists (e.g. Elisabeth Fry) in 19th-century England. They demonstrate how questions about balancing efficiency and control with humanitarian prison conditions posed at the end of the 18th-century by Enlightenment reformers are still current, despite the practical challenges evolving because of the ongoing development of societies and technologies.

The question of prison standards is discussed by Dirk van Zyl Smit. He traces the development of contemporary international standards derived from penological reform movements which in turn were inspired by ideas of rational thought and the Enlightenment. The roots of international penitentiary policy and standards lie

in "policy transfer" activities, including visits by practitioners to other countries in search of best practices (starting from the famous report of John Howard on European prisons in 1777), and in international meetings of researchers and prison staff, which started in the mid-19th century (with the first penitentiary conference taking place in Frankfurt am Main in 1846). His focus is on modern mechanisms to promote and reform international prison rules which must apply irrespective of prisoners' sex, race, ethnicity, indigeneity, nationality, sexuality, religion, disability etc. (Mandela Rules 2015). He notes the interrelations between the standards agreed by organisations at different levels and identifies how this influences the process by which international standards are agreed. This is illustrated with the example of how the United Nations' prison standards of 1955 and their later revision (2015 Mandela Rules) inspired the development of and amendments to regional standards, such as the European prison rules (1987/2006). Any revisions or reforms to prison standards, including more detailed recommendations concerning specific groups or policy areas (health, work, disciplinary penalties, monitoring, vulnerable prisoners etc.), should at least maintain current standards. Van Zyl Smit also discusses how international soft law may be effective at influencing practice, and he helps to define minimum standards of human rights based on the provisions of binding treaties. His points are important when considering the need for penology to address the contemporary challenges facing European penal institutions, whilst under attack from political and ideological ideas opposed to Enlightened heritage.

One example of a penal policy which appears to be incompatible with these minimum standards is the confinement of life-sentenced prisoners (lifers) in special security units in Poland, which is examined by Maria Niełaczna. In her contribution, she cogently argues that security concerns cannot justify harsh regimes or non-conformity to the Mandela and European prison rules. However, she argues that improving conditions in these units may be more complicated and difficult than elsewhere because crime policies in Poland (and many other Central European countries) appear harsher than those of Western Europe.

The problem of the relative severity of crime policy in Central Europe is also explored by Krzysztof Krajewski in his article on penal exceptionalism in Central Europe. He demonstrates how the historical heritage of these countries prepared a fertile ground for the development of neo-liberal vulgata and conservative political ideas influencing crime policy. He splits Europe into two regions: east of the river Elbe (a river which delineates eastern and western Germany) and countries which were part of the Ottoman Empire, and the countries of Western Europe. He argues that the eastern region developed much more slowly than Western Europe, including its penal policy, humanitarian reforms and modern criminal law. Punishment reforms did not spread throughout Europe until the end of the 18th and the beginning of the 19th centuries. He also examines the influence of Russian rule, arguing that simplified ideas of Marxism and the political theory of (proletarian) dictatorship strengthened the authoritarian patriarchal attitude of societies, resulting in the development of harsher criminal justice policies.

Krajewski presents the complexity and ambiguities of these historical arguments, discusses important differences within the region and analyses other contemporary factors that could have contributed to the important and lasting differences in the levels of repression and the sophistication of the crime policy in the two regions. He explores the impact of more contemporary events, including the influence that the conservative turn and new punitiveness in Western Europe have had on the new democracies of Central Europe. The value of Krajewski's article is that it demonstrates the interrelationship between general social reform and political ideas on the one hand, and penological concepts and practices on the other. Unfortunately, most historical and cultural specific developments in Central Europe seem to contradict Western European standards, which is particularly salient when they are compared with Scandinavian developments, as discussed by Raimo Lahti and Berit Johnsen et al.

Moreover, the complexity of punishment, as discussed by Daems, reminds us that the role of punishment in criminal justice policy should not be reduced to its instrumental function, i.e. as a means of preventing crime. This perspective is explored in the context of the punitive tendencies of Polish criminal policy in the paper by Jarosław Utrat-Milecki, in which he presents the outline of recent reforms of the Polish penal code, arguing that the changes cannot be explained solely by the results of criminological research or by penal populism. He uses the theoretical framework of "philosophy of punishment" as a tool to analyse changes in crime policy and to evaluate the causes of penal developments which were not predicted 30 or 40 years ago. He argues that this perspective helps in formulating critical arguments about controversial crime policies and criminal law reforms. Crime policy, he states, should be based on evidence and rooted in a principled approach anchored in human rights standards, which may set minimum standards for crime policy but is not enough to explain the way we punish. From this perspective, he analyses the official functions of new forms of punishment and principles of sentencing, especially the changes in the severity of punishment *in abstracto*, which cannot be explained by any criminological arguments or changes in the levels or patterns of crime. He also examines changes in the execution of penalties, especially the principles applied when granting parole.

Both Audrey Teugels and Jarosław Utrat-Milecki approach the question of pain in the sense of Nils Christie's "Limits to Pain" (Christie 1982) in order to understand different aspects of punishment. Teugels' focus is on parole – and specifically recall to prison because of non-compliance. Her article identifies the pains of recall and demonstrates the negative effects and outcomes of recalling prisoners, in terms of reducing the likelihood of successful rehabilitation and reintegration. Questions about the harshness and rationality of punishment (particularly imprisonment) are also addressed by Kathrin Stiebellehner, who provides insights into the history and the use of short-term prison sentences in Austria. Utilising the work of von Liszt and others, she argues that short prison sentences cannot serve the main purposes of prison (i.e. resocialisation and incapacitation) and have negative side

effects, including high rates of recidivism, ineffective crime prevention and a high financial burden. These arguments have been, and still are, used throughout Europe to promote alternatives to prison: community sanctions and measures, including Poland's "mixed penalty" discussed by Utrat-Milecki. However, they are not always successful; for example, Austria does not use community sentences.

In turn, the use of new types of criminal sanctions is explored by Anthea Hucklesby and Paulina Sidor-Borek in their comparative study on the use of electronic monitoring (EM) in criminal justice policy in England and Wales versus Poland. They demonstrate that whilst the Polish approach to EM has evolved away from that of England and Wales to share many of the features of the approaches taken in Western Europe, it is sufficiently distinctive to suggest that a third model or approach exists. Their paper also examines enduring questions about whether the approach to EM by England and Wales or Poland has more effectively managed prison populations. It suggests that EM's impact on prison populations has been marginal at best. Arguably, however, the Polish approach more clearly limits the potential for net-widening because all penalties are described as "deprivation of liberty", i.e. imprisonment. In Poland, deprivation of liberty for up to 18 months may be executed outside of prison under EM. Decisions are taken by the penitentiary court or, since 2023, a penitentiary commission for minor cases attracting sentences of imprisonment of up to four months. Deprivation of liberty can be implemented using different tools, including open, semi-open or closed prisons, and the difference between open prisons and house arrest under EM supervision is much less than between open and closed prisons, especially units for dangerous prisoners. This graduated approach to the implementation of deprivation of liberty in Poland may be one reason why Poland has been an enthusiastic user of EM. This is an important argument when considering the fundamental human right of freedom of movement. Anthea Hucklesby and Paulina Sidor-Borek point to differences in Polish and British approaches, especially concerning the understanding of the "restrictions" and "freedoms" provided by their respective systems. This is part of the discussion on the pains of punishment, also referred to by Teugels and Utrat-Milecki.

The theoretical limit of the study of punishment, and consequently of penology, is raised in this volume by Wojciech Zalewski, who postulates closer links between penology and the study of the methods of social control (which he labels "contrology"). His arguments are similar to those provided by William Tallack (and many other positivist penologists), who argued for closer cooperation between penology and other social policies in his famous book "Penological and Preventive Principles, with Special Reference to Europe and America and to Crime, Pauperism, and Their Prevention; Prisons and Their Substitutes; Habitual Offenders; Conditional liberation; Sentences; Capital Punishment; Intemperance; Prostitution; Neglected Youth; Education; Police" (second enlarged edition, London, Wertheimer, Lea and Co, 1896).

To conclude, if contemporary penology is developing as an important subdiscipline of criminology, as Daems suggests, it raises the question of whether all means of preventing social harms should be part of penological studies. We can ask whether

contrology, proposed by Zalewski, is directing us back to the important debates about the limits of criminology which took place in the 1970s and 1980s (radical, critical criminology) rather than to the "old positivists". The fact that there are different kinds of policies which may influence crime policy does not provide obvious answers about the way in which these issues are analysed, researched and taught. It is important to think about crime as the real social harm, and to remember that not all social harms are, or ought to be, criminalised. In this respect, there is a place for penology as a field of research and teaching, which should at least answer the question of to what extent the threat of criminal punishment can be justified by the prevention of certain harmful behaviours. However, Zalewski seems to go even further, as his proposed contrology blurs the boundaries between different forms of social control.

Without doubt, the changes of crime policy in Europe are complex and divergent. However, ongoing reforms are closely interrelated with some changes in "penal philosophy". "The philosophy of punishment" as a research problem is related both to the diversity of crime policies within and across different jurisdictions and to the kinds of crime (offences) which are dealt with. One of the questions that emerges from the Special Issue is whether there is one European crime policy or different crime policies and different philosophies of punishment or contrology, depending on jurisdiction, types of criminality and reactions to offences. Some questions concerning punishment may be new, but others are enduring (like the discussion about short-term detention, house arrest with the use of electronic monitoring, prison humanitarian reforms, solitary confinement in some supermax prisons or counterterrorism special measures).

As Daems states at the beginning of this volume, changes in the reaction to crime are not necessarily related to progress in research or the understanding of human rights standards. There remains a need to develop consistent minimum values and methods to prevent harms which are defined as crime through limiting the reach of criminalisation and rational reactions to harmful behaviour. Here again we can notice the importance of both the discussion about the limits of criminal law (criminalisation) and the limits of using punishment within the framework of criminal law, especially prison, in response to crime. These are two important questions which penology should help provide answers to, although it is acknowledged that they will always be influenced to different degrees by the political processes and institutionalised practices in a given jurisdiction. However, those processes and practices should be part of the research and debate within penology; indeed, penologists cannot avoid getting their hands dirty.

Guest Editors:
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Tom Daems ■

A penology for Europe[1]

Penologia dla Europy

Abstract: On 22 March 2016 Belgium suffered a severe terrorist attack on its national airport, in Zaventem, close to Brussels, and the Maelbeek metro station. Thirty-two people were killed that day. Another 340 victims, some of whom suffered particularly serious injuries, will carry the scars for the rest of their lives. Such terrorist attacks, in the heart of Europe, pose an enormous challenge, one that goes beyond the role of the police and the judiciary or questions about the design and security of open or semi-open spaces, such as markets, metro stations, concert halls, nightclubs or airports. In addition to prevention and criminal investigation, there is also the question of the appropriate response when the perpetrators or their accomplices are caught. What is an appropriate punishment in such a context, for such awful offences? How long do we need to punish? And for what purpose do we punish? In this article we offer some reflections on these questions. We argue that the question of how to respond to crime – crimes of all kinds – should not be narrowed down to how we can impose "deserved" pain or how we can reach the goals of punishment more effectively; no, we should rather broaden it to the question of how we can strengthen and affirm our values and ideals through our response. "In figuring the equations of punishment … we cannot hold the punisher constant", as James Whitman (2003) wrote in "Harsh Justice". Punishment is not just about the defendants in the dock: it concerns us all, it affects us all.

Keywords: acts of terror, punishment, penal law, European penal identity, penology

[1] This article is an extended version of a lecture I gave on 21 October 2022 at the conference called "Changing Penologies and European Crime Policy: Theory and Practice in the Global Context", which was organised for the 15th anniversary of the European Centre for Penological Studies and the 50th anniversary of the Institute of Social Prevention and Resocialization, at the University of Warsaw, Poland. I am grateful to Professors Jadwiga Królikowska and Jarosław Utrat-Milecki for their kind invitation and hospitality. The article summarises, revises and elaborates on some ideas I first developed on the occasion of my inaugural lecture at KU Leuven (January 2017) and an online lecture I gave during the COVID-19 pandemic for EmpiriC (Barcelona) (in December 2020). Parts of this article were previously published (in Dutch) in the expanded version of that inaugural lecture (Daems 2017a) and (in Spanish) in a blog post on my website, www.tomdaems.com.

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Abstrakt: 22 marca 2016 roku Belgia doświadczyła poważnego ataku terrorystycznego na swoim krajowym lotnisku w Zaventem, niedaleko Brukseli, oraz na stacji metra Maelbeek. Tego dnia zginęły 32 osoby. 340 inne osoby poszkodowane, z których część odniosła szczególnie poważne obrażenia, noszą w sobie te doświadczenia przez całe życie. Takie ataki terrorystyczne, w sercu Europy, stawiają ogromne wyzwanie – wyzwanie, które wykracza poza kompetencje policji i wymiaru sprawiedliwości. Prowadzą też do pytania o projektowanie i zabezpieczanie otwartych lub półotwartych przestrzeni, takich jak targowiska, stacje metra, sale koncertowe, kluby nocne czy lotniska. Oprócz prewencji i postępowania karnego pojawia się również pytanie o właściwą reakcję, gdy sprawcy lub współsprawcy zostaną zatrzymani. Jaką karę uznać za odpowiednią w takim kontekście, dla tak straszliwych przestępstw? Jak długo musimy karać? I w jakim celu karzemy? W tym artykule przedstawimy refleksje na ten temat. Twierdzimy, że pytanie o to, jak odpowiedzieć na przestępstwo – przestępstwa wszelkiego rodzaju – nie powinno być zawężane do tego, jak możemy zadać „zasłużone" cierpienie lub jak skuteczniej osiągnąć cele kary. Przeciwnie, raczej powinniśmy poszerzyć je o pytanie, jak możemy wzmocnić i potwierdzić nasze wartości i ideały poprzez naszą reakcję. „Przy wymierzaniu kary (...) nie możemy trzymać kary stałej" – napisał Jim Whitman (2003) w „Harsh Justice". Kara nie dotyczy tylko sprawców na ławie oskarżonych – dotyczy nas wszystkich, wpływa na nas wszystkich, jako Europejczyków.

Słowa kluczowe: akty terroru, kara, prawo karne, europejska tożsamość karna, penologia

1. Punishing acts of terror

On 22 March 2016 Belgium suffered a bloody attack on its national airport, in Zaventem, close to Brussels, and on the Maelbeek metro station. Thirty-two people were killed that day. Another 340 victims, some of whom suffered particularly serious injuries, will carry the scars for the rest of their lives. In fact, three of those surviving victims passed away afterwards, which brings the death toll to 35. Such terrorist attacks, in the heart of Europe, pose an enormous challenge that goes beyond the role of the police and the judiciary, and beyond questions about the design and security of open or semi-open spaces, such as markets, metro stations, concert halls, nightclubs or airports. In addition to prevention and criminal investigation, there is also the question of the appropriate response when the perpetrators or their accomplices are caught. What is an appropriate punishment in such a context, for such offences? How do we need to punish? And for what purpose do we punish?

In the wake of such acts of terror, the arsenal of punishment at our disposal seems both powerless and insufficient. As an instrument, punishment is powerless: deterrence does not work for those who are willing to die for their ideals or who are brainwashed by empty promises about willing virgins; incapacitation via deprivation of liberty seems useless when confronted with suicide terrorism, where self-destruction is part of the entire operation, and even the world's most renowned terrorism experts will have to acknowledge that achieving deradicalisation through ready-made programmes is often illusory. So where do we stand with our goals for re-education and reintegration? Jeremy Bentham once suggested

that a punishment that serves no purpose or is unfounded should not be imposed; after all, such a punishment cannot be justified:

> [A]ll punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil. It is plain, therefore, that in the following cases punishment ought not to be inflicted. (1) Where it is groundless: where there is no mischief for it to prevent; the act not being mischievous upon the whole; (2) Where it must be inefficacious: where it cannot act so as to prevent the mischief; (3) Where it is unprofitable, or too expensive: where the mischief it would produce would be greater than what it prevented. (4) Where it is needless: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate. (Bentham 1780: clxvi-clxvii)

Should the utilitarian conclusion in such cases then be that we should not punish at all?

But punishment is not only powerless – it is also insufficient. How many years of imprisonment are enough to rectify the injustice or restore the imbalance? What is "just punishment" in this case? No punishment seems able to compensate for the endless suffering and deep human sorrow. Even the most inventive interpretation of the *talio* principle or the most feverish search for "just deserts" will fall short. Should the retributivists then join the ranks of abolitionists like Louk Hulsman, and support the opinion of the latter that the infliction of suffering cannot and should not be an indicator of "a hierarchy of values within a 'national' society"[2] (Hulsman 2011: 28)?

It is sometimes suggested that anyone who wants to stick to the classic penological goals should colour outside the lines when confronted with such acts. And, indeed, when faced with so much human suffering, the retributive and utilitarian justifications of punishment are often questioned. For example, shortly after the attacks in Zaventem and Maelbeek, a Belgian criminal lawyer argued that we should reintroduce the death penalty. "Anyone who wants to destroy society permanently deserves the death penalty. I don't think that's barbaric", said Pol Vandemeulebroucke in a Flemish newspaper. What is the alternative?, so he wondered. "Do you have to put them underground and in a concrete bunker, where they are aired once a day? Without visitors, until they die at 75?"[3](cited in Bergmans 2016). The criminal lawyer created a false dichotomy, of course, because his so-called "alternative" was no alternative: life imprisonment in an underground bunker is not a sanction in the Belgian criminal code – and the same applies to the death penalty. A year before the start of the trial of the attacks, another lawyer, Walter Damen, argued that we should have the trial behind doors. For him, "the favour" (*de gunst*) of a public trial is a fundamental part of our democratic heritage, but he wondered whether it can be justified in all cases.

> For me, they don't need to get a forum. A process behind closed doors also does justice to our democratic values. I fear that otherwise additional harm will be caused,

[2] Author's translation.

[3] Author's translation.

> in this case the destructive consequences of easily created internet propaganda and unjustified extra pain for the victims.[4] (Damen 2021)

There is a great temptation to react in extraordinary ways to extraordinary events. The death penalty seems the only appropriate response for those who want to destroy us. A heavy and punitive prison regime – in a bunker underground – seems justified for those who consider our civilisation objectionable. A trial behind closed doors seems necessary to eliminate the risks of a public trial becoming abused for propagandistic purposes. According to some, we should therefore develop an "enemy criminal law" (*Feindstrafrecht*) – the term was coined by the German academic criminal lawyer Günther Jakobs (2004) – for the enemies of society: a separate track of criminal justice that can be distinguished from "civilian criminal law" and where a more appropriate response to such exceptional events can be developed (see e.g. Gómez-Jara Díez 2008; Ohana 2014). That is also what the first criminal lawyer quoted above seems to be aiming for. After all, we are dealing here with

> another category of crime … that is at odds with criminal law. Terrorists with one hard drive and one indelible goal to destroy society: you cannot just let them back into society. For that group I have no moral problem with introducing the death penalty.[5] (cited in Bergmans 2016)

2. Towards a richer understanding of punishment

Such pleas to colour outside the lines raise questions, first of all and most obviously because they tend to question some of the achievements of justice and democracy in a European context, e.g. Europe being a death penalty-free zone. But such pleas also raise questions because they are informed by a poor understanding of punishment. In "Punishment and Social Structure", Georg Rusche and Otto Kirchheimer stated that

> punishment is neither a simple consequence of crime, nor the reverse side of crime, nor a mere means which is determined by the end to be achieved. Punishment must be understood as a social phenomenon freed from both its juristic and its social ends. (Rusche, Kirchheimer 1968: 5)

Punishment is not merely a means to an end, or a way to satisfy or channel feelings of revenge. Within penology we have developed a much richer understanding of punishment. In "De la division du travail social", Émile Durkheim noted that punishment is mainly about deep human emotions; it is essentially a passionate reaction. However, this mechanical, passionate reaction fulfils an important function for Durkheim: it strengthens social cohesion. Or as he puts it:

[4] Author's translation.

[5] Author's translation.

> Although it proceeds from an entirely mechanical reaction, from passionate and largely thoughtless movements, it does not fail to play a useful role. Only this role is not where we usually see it. It does not serve, or serves only very secondarily, to correct the culprit or to intimidate his possible imitators; from this double point of view, its effectiveness is justly doubtful and in any case mediocre. Its true function is to maintain intact social cohesion by maintaining all its vitality in the common conscience.[6] (Durkheim 1893: 115–116)

For Durkheim, the goals of punishment (correcting the criminal or deterring potential offenders) should not be confused with the function of punishment (preserving social cohesion). By studying punishment in this way, he paved the way for a sociological understanding of it. And, indeed, over the past few decades, punishment has come to be studied in relation to solidarity, power, political economy, culture, etc. (see e.g. Garland 1990; Daems 2008; Simon, Sparks 2013).

Such a "punishment and society" approach also invites us to explore the extent to which punishment expresses – and helps shape – identity (Daems 2013; Geltner 2014). In "Punishment and Modern Society" David Garland (1990: 276) wrote that "the ways in which we punish, and the ways in which we represent that action to ourselves, makes a difference to the way we are". The late Pieter Spierenburg (2004: 625) formulated it as follows:

> The aim is to explore in what way changes in punishment reflect broader, long-term developments in society; to learn, through the study of punishment, how these developments are interrelated; to find out if all this may enhance our insight into the structure of our own society and ourselves.

Viewed in this way, our own identity, our European identity, seems to be at stake in the terrorism case that we introduced in the previous section. If it is true that the ways in which we punish define ourselves and differentiate us from how others punish, what does punishment then say about us? What do we stand for? The ways in which Europeans punish today may tell us something about European identity.

When we approach punishment from this angle, the question of how to respond to crime should not be narrowed down to how we can inflict "deserved" pain or how can we reach the goals of punishment more effectively; we should rather broaden it to the question of how we can strengthen and affirm our values and ideals through our response. "In figuring the equations of punishment … we cannot hold the punisher constant", as James Whitman (2003: 24) wrote in "Harsh Justice". And indeed, the "punisher" is not a natural given or an "independent variable". He or she does not respond to crime like a salivating Pavlovian dog. Punishment therefore is not just about the defendants in the dock: it affects us all.

[6] Author's translation.

3. Constructing a European penal identity

Acts of terrorism, like other forms of crime, are a feature of all times. But the way we respond to crime is not a constant. We punish differently today than our ancestors did 100 or 1,000 years ago – and our descendants will punish differently in 100 or 1,000 years. We also punish differently depending on the place where we live: for example, prisons in Iceland are very different from prisons in California (Daems 2021a). An important new player that has helped shape punishment since the second half of the twentieth century is "Europe" in its various institutional guises. But just like punishment, Europe is not a constant. Europe, so the Polish-British sociologist Zygmunt Bauman once argued, "is not something you discover; Europe is a mission – something to be made, created, built" (Bauman 2004: 2). He continued: "[W]e, the Europeans, are perhaps the sole people who (as historical subjects and actors of culture) have no identity – fixed identity, or an identity deemed and believed to be fixed" (Bauman 2004: 12). And just like Europe itself, so has European penal identity come to be made, created, built.

The European Court of Human Rights, for example, has played an important role in defining and monitoring what is acceptable in terms of punishment, particularly since its judgment in *Golder v. UK* (1975). In that case the Court rejected the doctrine of inherent limitations: restrictions on the fundamental rights of prisoners have to be legitimised and do not automatically follow from a conviction (Smaers 1994). Over the past four decades, prisoners (and their lawyers) have increasingly found their way to Strasbourg (Van Zyl Smit, Snacken 2009, 2013; Tulkens 2014; Anagnostou, Skleparis 2017). In particular, Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security), 6 (right to a fair trial) and 8 (right to respect for private and family life) of the European Convention of Human Rights have repeatedly – and successfully – been invoked before the Court. Today the Court is dealing with all kinds of issues, from correspondence, prison visits and strip searches to overcrowding, substandard detention infrastructure, inadequate health care and lifelong imprisonment. The Court's judgments are, of course, of direct interest to the parties involved, but they are also important to all other incarcerated persons in Europe's prisons.

From a preventive point of view, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has established itself over the past three decades as a key actor in the monitoring of detention conditions. The CPT has unlimited access to places of detention (prisons, police cells, migration centres, youth institutions, psychiatric hospitals, etc.) in all Member States of the Council of Europe and can freely interact with detainees and staff. Each visit is followed by a report with findings, recommendations and requests for information, which is sent to the authorities of the Member State in question. Article 10 of the European Convention states that each Member State is obliged to ensure its full cooperation with the CPT; if a Member State refuses to cooperate or fails to improve the situation in the light of the CPT's recommenda-

tions, the Committee may proceed to a public statement. When it was established in November 1989, the CPT was a unique institution, but it quickly came to serve as an example and forerunner for other institutions with a similar *modus operandi*, in particular the UN Subcommittee on Prevention of Torture (SPT), which became operational in 2007 after the so-called OPCAT entered into force (Bicknell, Evans 2007), and many national and local monitoring bodies around the globe. As of 13 July 2023, the CPT had carried out 507 visits (292 periodic and 215 *ad hoc* visits) and published 457 reports.

The European Court and the CPT are perhaps the best-known players when it comes to shaping punishment within Europe, but they are not alone. For example, within the Council of Europe, the Committee of Ministers traditionally plays a prominent role (e.g. with recommendations on prison overcrowding and prison population inflation, parole, the European prison rules, etc.). More recently, the European Commissioner for Human Rights has also contributed to the European debate on sentencing, writing letters to government leaders, opinions and visit reports. Moreover, whereas the EU used to be quite reluctant to intervene in EU Member States' criminal justice and penal policies, this has changed significantly, in particular following the judgment (5 April 2016) of the Court of Justice in the joined cases C-404/15 (Aranyosi) and C-659/15 PPU (Căldăraru) (Baker 2013; Daems 2016). The EU's involvement in detention issues seems mainly to be motivated by the fear that substandard prison conditions threaten to undermine the smooth functioning of EU instruments that operate on the basis of mutual recognition. The execution of European arrest warrants or the transfer of detainees presupposes sufficient mutual trust in each other's prison systems, which is not evident given the deplorable detention conditions in various EU Member States (Daems 2013).

The post-war developments in the field of punishment in Europe are impressive. When the renowned French lawyer and former judge in the European Court of Human Rights René Cassin received the Nobel Peace Prize in 1968, he praised the pioneering role that Europe had played in the field of human rights: "[T]here is at least one continent where an impressive array of states has committed itself to heeding the lessons of the Second World War" (Cassin 1968: 7). At first glance, it seems as if Europe has continued to serve as an example in the decades that followed, including in the area of prison monitoring. The European Anti-Torture Convention of 1987 came to be adopted because earlier attempts to create a similar mechanism at the UN level had failed (Daems 2013). It was not until 2002 that the OPCAT saw the light of day. We sometimes tend to forget what a revolutionary idea it was at the time. When one reads "Inhuman States", written by the Italian jurist and first CPT president Antonio Cassese (1996), one can feel the hesitation and taste the improvisation of the early years of the CPT. Unlimited access to prisons – the *sancta sanctorum* of the sovereign nation state – was by no means self-evident, as Cassese recalls at the beginning of his book. The developments outlined in this section should not be taken for granted: indeed, some might feel tempted to argue that this is "cosmopolitan Europe" (Beck, Grande 2007) at its best.

4. Revisiting punishment in Europe

However, this is not the whole story. There is a darker side to punishment in Europe. Indeed, notwithstanding decades of work of key European institutions, in 2023 we still see many prison systems in Europe suffering from severe overcrowding, poor living conditions and insufficient care and help for vulnerable detainees. Moreover, some of those key institutions in Europe, like the Court or the CPT, tend to be ignored or face serious challenges. At the end of August 2016, for example, Nils Muižnieks (2016), at that time European Commissioner for Human Rights, sounded the alarm: the implementation of judgments of the European Court of Human Rights left much to be desired and the authority of the Court was increasingly being questioned. On 12 December 2016, Thorbjørn Jagland, the then Secretary General of the Council of Europe, expressed his concerns in a remarkable opinion piece published in "The New York Times" titled "Don't Caricature Europe's Court" (Jagland 2016). The European Convention of Human Rights, Jagland observed, was coming under fire in a growing number of European countries. In his op-ed, Jagland referred to René Cassin's 1968 speech, which we quoted above, in which Cassin praised the European judges as the "true laureates" of the Nobel Prize. In 2016, the situation seemed to be slightly different:

> [T]oday, these same judges are increasingly derided as an impediment to democracy by politicians looking to appeal to nationalist sentiment. The court and the European Convention on Human Rights have come under attack in a growing number of European countries. This is symptomatic of a wider breakdown in the postwar consensus that accepted international law as a fair price for peace and prosperity. These days, the public appetite for international cooperation is waning. Many people are feeling the sharp end of globalization, as their communities face widening inequality and mismanaged diversity. Political programs that promise hard borders and unbridled national sovereignty have become an easier sell. (Jagland 2016)

For its part, the CPT has on various occasions expressed concerns about the poor follow-up of its recommendations (Daems 2017b). Increasingly, as the CPT observes in multiple statements, it has to sing the same tune:

> [A] country's cooperation with the CPT cannot be described as effective in the absence of action to improve the situation in the light of the Committee's recommendations. Over the years, there has been no shortage of 'success stories'. However, it is also the case that the failure of States to implement recommendations repeatedly made by the CPT on certain issues remains a constant refrain of the Committee's reports. Few countries visited over the last twelve months have escaped this criticism. (CPT 2008)

Interestingly, such concerns are not new; on the contrary, they have been voiced for a very long time. For example, in "Prison Secrets" – which was published shortly after the landmark *Golder v. UK* case – Stanley Cohen and Laurie Taylor (1978) reflect on the impact of the European Court's judgment. The title of the relevant section in the book – "All that glitters is not Golder" – immediately betrayed a cer-

tain scepticism about the expected impact of the Strasbourg judgment on British prison practice. Shortly after the judgment, it seemed as if things were about to change. Indeed, a new Circular Instruction was expressly presented in response to the judgment. However, access to a lawyer, which was a key issue in the Golder case, became possible only if complaints were first made via the "normal existing internal procedures". What the Home Office gave with one hand, it took back with the other. The Home Office was well aware that this neutralised the impact of the reform: "By virtue of the arrangements explained … it does not appear that staff should in practice feel at substantially any greater risk of involvement in litigation than now" (cited in Cohen, Taylor 1978: 43). Cohen and Taylor were particularly critical about this. They wrote about "the creation of a system which seems almost totally designed to block the prisoners' intentions at every turn – a system in which double-talk and hypocrisy have almost become elevated into principles" (Cohen, Taylor 1978: 48). Cohen and Taylor hoped that the European Court would continue to condemn such "cynical violations of human rights" in future cases.

5. A penology for Europe

So how to make sense of these mixed messages, Europe being simultaneously a "success" and a "failure" in respect of punishment? It seems obvious that the European developments outlined earlier (section 3) in the field of human rights and the humanisation of punishment cannot be captured in a linear progress story or Whig history. The story of the victories and milestone judgments is important, but this is only part of a bigger story. Why do these institutions at times receive so little attention? Why is the implementation of judgments and recommendations so difficult? Is this a case of implementation failure or rather of theory failure? Just as revisionist historiography in the 1970s and early 1980s rightly cast doubt on the tendency to equate modernisation and humanisation in the history of punishment, contemporary penology may benefit from reviving that earlier "hermeneutics of suspicion" (see e.g. Garland 1986; Daems 2019). There seems to be a need for a penology that charts such ambivalences and places them in a wider context, thereby counteracting an all too facile progress story or a misplaced and simplistic Eurocentric discourse.

How should such a penology for Europe proceed? We make two suggestions. A first avenue might be to study the impact of European institutions – or the lack thereof – from the perspective of denial, as introduced by Stanley Cohen (2001). His disappointing experiences in the human rights movement in Israel made Cohen conclude that the findings and recommendations of human rights bodies (in his case, about the torture of Palestinian prisoners) are often ignored: people close their eyes, they look away, they fail to acknowledge and act. Why is this so? This is not because of a lack of information, but rather because of the ways in which we process and deal

with that information. Facts can be denied ("it never happened"), facts can be given another meaning ("it's not what it seems") or the implications can be denied ("it's not that bad after all") (Cohen 1995, 2001; for a discussion, see Daems 2021b). The study of processes of denial might be particularly interesting for understanding the impact of prison monitoring. Indeed, the raw facts, as observed and recorded by monitoring bodies, are often simple and straightforward, e.g. when people have to sleep on the floor of a prison cell or when they are being locked up in overcrowded institutions with poor ventilation. But that does not mean that states simply accept these raw facts and immediately follow up on recommendations. In order to understand the enduring problems in penal systems in Europe, we need to realise that states may deploy strategies to buy time or divert responsibility, to challenge observations or remain deliberately vague, to repeat what is already known or to indulge in pointless repetition of legal frameworks, etc. (Daems 2017b).

A second source of inspiration is the work of Erving Goffman. To students of crime and punishment Goffman is well known for his books, "Asylums" (Goffman 1961) – where he introduced the notion of the "total institution", which had a major influence on prison sociology – and "Stigma" (Goffman 1963), where he discussed identity formation and the management of tainted identities. However, his broader sociological approach might also be useful in helping us to ask different questions about the role European institutions play. Goffman studied human interactions: people meeting and engaging in conversations. His sociology is very much about the management of information about oneself: what information do we disclose, and what do we hide from others? In particular, how do we manage discrediting or embarrassing information about ourselves? At first sight, such questions may seem far removed from our topic here: Goffman was, after all, very much concerned with face-to-face interactions. He was an observer of everyday life, which seems a long way from the dull, formalistic interactions between European courts, monitoring bodies and state bureaucracies. However, the dramaturgical metaphors he used are useful: his suggestion that the social world is like a play, a piece of drama or performance also seems to apply to how interactions happen on the European stage. Just like people in everyday interactions also states may select "masks" and try to impress their audiences, state authorities may also hide embarrassing facts or try to redefine them so that they look different to the audience. What is going on behind all those words and gestures?

Conclusion

For a long time, penology itself has had to deal with a Goffmanesque "tainted identity". In 1953 Clive S. Lewis famously wrote: "Only the expert 'penologist' (let barbarous things have barbarous names), in the light of previous experiment, can tell us what is likely to deter; only the psychotherapist can tell us what is likely to cure" (Lewis 1953: 226). Lewis criticised penology as a technical pseudoscience

that focussed blindly on questions of effectiveness and thereby ignored what, in his view, should be the essence of punishment: retribution.

Over the past decades, however, penology has undergone a profound process of transformation. The study of the effectiveness of punishment and other interventions became less ambitious, but more sophisticated and evidence-based. The philosophy of punishment came to be challenged by innovative ideas that emerged from the late 1960s onwards, including abolitionist views on criminal law, restorative justice and developments in human rights, as well as penal theories that focus on the communicative dimension of punishment. Finally, the sociology of punishment experienced a real revival. This has happened particularly since the 1970s with Michel Foucault's (1975) influential study of the origins of the prison, but also afterwards, especially under the influence of Norbert Elias' (2000) civilizational theory and David Garland's (1990) multidimensional sociology of punishment.

The penology of today bears little resemblance to the barbaric science of punishment targeted by C.S. Lewis. Contemporary penology has emerged as a thriving sub-discipline of criminology, and it is within the contours of that penology that the European dimension also deserves a more prominent place. A penology for today's Europe should have at least two objectives. On the one hand, there is a need to document and describe, in order to understand and analyse what is happening (or not happening) with punishment in Europe, whilst comparing European developments to those elsewhere in the world. But on the other hand, such a penology should also get its hands dirty; it should engage and intervene in the key debates of today's Europe. After all, as we discussed earlier, our European institutions are under attack and face important challenges. A penology "for" today's Europe therefore seems necessary – more than ever.

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Joanna Beata Banach-Gutierrez ■

In search of the role of punishment from the EU criminal law perspective

W poszukiwaniu roli kary z perspektywy prawa karnego Unii Europejskiej

Abstract: This paper deals with punishment in the context of EU criminal law. Its aim is to search for the role of punishment in the area of European criminal justice, focussing on EU legislation and the case law of the Luxembourg and Strasbourg Courts. The methods used are analysis, synthesis and comparative research. The findings lead to the conclusion that, first of all, the priority behind punishment should be the rehabilitation of an offender, followed by their reintegration into society, and not the severity of imposing a long prison sentence itself. Additionally, a life sentence seems unacceptable without the possibility of conditional release or clemency, as it would be contrary to the European standards of protecting human rights. The role of punishment within the EU is therefore strongly influenced by a human rights-based approach in line with the provisions of the CFR and the ECHR.

Keywords: punishment, EU criminal law, criminal justice, fundamental rights, transnational criminal proceedings

Abstrakt: Niniejszy artykuł omawia kwestię kary w kontekście prawa karnego UE. Jego celem jest poszukiwanie odpowiedzi na temat roli kary w europejskim obszarze wymiaru sprawiedliwości w sprawach karnych, ze szczególnym uwzględnieniem prawodawstwa UE, a także orzecznictwa Trybunałów w Luksemburgu i Strasburgu. Stosowane metody to analiza, synteza i badania porównawcze. W efekcie ustalenia pozwalają na stwierdzenie, że priorytetową rolą kary w prawie karnym UE powinna być przede wszystkim resocjalizacja sprawcy, obok jego reintegracji ze społeczeństwem, a nie sama dotkliwość wymierzenia długoterminowej kary pozbawienia wolności. Dodatkowo kara dożywotniego pozbawienia wolności wydaje się niedopuszczalna bez możliwości warunkowego zwolnienia bądź zastosowania ułaskawienia jako sprzeczna z europejskimi standardami ochrony praw człowieka. Na kształtowanie roli kary w ramach UE duży wpływ ma zatem podejście oparte na prawach człowieka stosownie do postanowień KPP i EKPCz.

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Słowa kluczowe: kara, prawo karne UE, wymiar sprawiedliwości karnej, prawa podstawowe, transnarodowe postępowanie karne

Introduction

Since the early 1990s, there has been a gradual impact of EU criminal law on the national legal orders of the Member States. After the reform introduced by the Treaty of Lisbon, criminal law was naturally restricted to the point that national legislatures and their sovereign powers took on a new character under the EU legal regime. As a result, the adopting of norms of criminal law, both substantive and procedural, has become supranational. In these terms, we may talk about the progressing approximation of criminal law norms within the framework of the EU. This in turn leads to enhancing the area of European criminal justice, in which the respect for fundamental rights of individuals is taking a central place (Baker, Harding 2009: 25–54).

Here, we should stress an important role which is played by the Court of Justice of the European Union (hereinafter: "CJEU"). For it is the case law of the CJEU which has a great impact on the national jurisprudence in criminal matters of the Member States, achieving as unified as possible a legal area throughout the EU (Rosas 2007: 1–16; Arnull 2012; Björnsson, Yuval 2014; Rosas 2022). The essence of the ongoing "judicial dialogue" between the CJEU and national criminal courts lies in the application of the preliminary ruling procedure provided in Article 267 TFEU. We also cannot forget here about the great importance of the European Court of Human Rights (hereinafter: "ECtHR") and the "'semi-vertical' judicial dialogue" which exists between the CJEU and the ECtHR. For this, the CJEU refers *mutatis mutandis* to the case law of the ECtHR (Rosas 2007: 1–16).

In the context of European criminal justice, its key aspect of a human rights-based approach should be highlighted. In light of the case law issued by the Luxembourg and Strasbourg Courts, tendencies appear that prompt a practical functioning of human criminal justice systems in the Member States. This matter fully applies not only to suspects or the accused in pending national criminal trials, but also to those who are sentenced and surrendered to another jurisdiction to serve their custodial sentences (Martufi 2018: 672–688; Montaldo 2018: 223–243; Rodrigues 2019: 17–27).

Importantly, human criminal justice requires some mutual trust, or as it is also called, confidence in the national criminal justice systems. However, this cannot be achieved without a mutual understanding of national legal cultures or traditions, and additionally without the approximation of national legal norms within the EU. Thus, the national judges must still learn to "do justice" in accordance with the rules and values on which European criminal justice is built (Rosas 2007: 1–16; Schroeder 2020: 144–148; Pellonpää 2022: 29–64).

The question of "doing justice" is closely associated with the role of modern punishment itself. Specifically, forms of punishment may vary depending on the legal cultures of and values respected in particular countries. Also, it should be pointed out here that when we think of punishment in the West (or in the European perspective), we typically think of imprisonment imposed on an offender or a criminal (Heiner 2020: 177). This concept of punishment may be described as in a quote by Peter Joyce: "the deliberate use of public power to inflict pain on offenders" (Joyce 2018: 57). But we must remember that he also correctly argues that "inflicted pain on an offender is not universally accepted as a goal of punishment since violence delivered on behalf of the state may serve to legitimise the use of violence by its citizens" (Joyce 2018: 57).

The research studies for this paper lead to some reflections on the role of punishment, which as such is natured by its complexity. First of all, the key question on such a sensitive issue could be what modern punishment is for. In this respect, it seems that the focus should be on the rehabilitation of an offender, as well as their reintegration into a certain community or society. An important objective of this process is said to be the "restoration of reputation" (Joyce 2018: 77). Secondly, more attention should be paid to alternatives to imprisonment (alternative sanctions). Thirdly, life imprisonment appears to be very questionable in regards to the European standards of human rights protection. Last but not least, there is also a noticeable risk of governments following penal populism and adopting a harsh approach in their national criminal policies.

1. Towards human criminal justice in Europe

The humanisation of criminal justice, nurtured by enhancing the protection of fundamental rights which is visible in the current trends of Council of Europe and European Union policies, has a great impact on the attitude towards the role and essence of punishment, as well. This issue also provokes further debate on preventing the impunity of an offender, namely what actions could be taken so that their prosecuting and sentencing are effective and "do justice". Here, a crucial aspect seems to be keeping European citizens safe, but at the same time respecting the rule of law and human rights law are also of great importance.

We may admit that the respect for and protection of fundamental rights is one of the main values for enhancing European criminal justice. Nevertheless, the question that arises is what it means in practice for "European citizens" to secure their legal rights, or in other words, what this value brings individuals – in this case, offenders under the norms of EU criminal law. A starting point could be that there is indeed some extension of humanity towards offenders in criminal justice systems in Europe. Thus, we may come to the general conclusion that the

current human trends in European criminal justice reflect the contemporary general humanisation of the law. Generally, this long-term process of humanisation in law is visible through the actions of international organisations (including NGOs), the laws being adopted and the jurisprudence of the ECtHR and the CJEU. It is obvious nowadays that each individual is a subject of international law, and therefore needs special treatment and protection of their rights, relying on these norms. In this sense, the noticeable humanisation of criminal justice, which is greatly supported by the international protection of human rights, is influencing the national criminal justice systems. Some gradual humanisation of criminal justice, which appears to have become a key factor in shaping the modern function of punishment, provides a further certain impulse to reopen the debate about the essence of preventing the impunity of the offender (Marin, Montaldo 2020).

Since many criminal proceedings across the EU today take on a transnational dimension, it is quite understandable that in national criminal justice systems much attention is paid to a "just and fair" result for the offender, especially through references made to the case law of the CJEU and the ECtHR. This issue, in turn, is closely linked with the years-long discussion in the legal doctrine and sociological or criminological sciences as to the function of criminal penalties and preventing the impunity of the offender. In EU criminal law, the most often discussed question is how to effectively combat crime to maintain the security of the citizens. Its output can be found *inter alia* in the recently adopted EU legal acts and the CJEU case law regarding transnational criminal proceedings. Therefore, the transnational context is taken as a background for the deliberations in this paper.

2. Punishment versus impunity

A starting point for the considerations about punishment and preventing the impunity of the offender could be the following words of Stefano Montaldo:

> the 20th century brought about a significant paradigm shift towards a more individualized approach to prison systems, with a view to minimizing imprisonment and its negative impact on offenders' lives and on crime rates. … The exercise of national *jus puniendi* is not confined to administrating the punishment a wrongdoer deserves any longer. Instead, it pursues the far-reaching objectives of fostering offenders' individual responsibility for their own development and of restoring their participation in social life. As such, individual redemption and collective reintegration become powerful tools for addressing recidivism and providing for citizens' security. (Montaldo 2018: 223–224)

Actually, the above statement finds its reasoning/grounds in the jurisprudence of the CJEU and the ECtHR. To compare, the cases recently decided by the CJEU

may illustrate that there is no legal argumentation in favour of severe punishment. The same concerns the jurisprudence of the ECtHR. Nina Kisic and Sarah King clearly argue that the ECtHR is "shifting away from solely punitive measures to focus on fairness, rehabilitation, and release of incarcerated persons", that is seen on the basis of the Court's interpretation of Articles 3 and 7 ECHR (Kisic, King 2014: 9). They point out that in reference to the rights of convicted persons, the ECtHR tends to follow a policy whereby punishment must be fair and proportional to the crime, as well as crafted in such way that penal systems can aim to rehabilitate the offender (Kisic, King 2014: 11).

The case law of both European courts indicates that there is rather a tendency to apply a more lenient policy towards the offender (Kisic, King 2014: 9–15; Montaldo 2018: 223–243). It seems logical because the severity of the punishment is not always equal to its effectiveness, in the sense of either general or specific prevention. It is maintained that a severe punishment (including even capital punishment) has little deterrent effect. Furthermore, as Barlow notes, "the deterrent effect of punishment may be greater for instrumental crimes" (Barlow 1987: 449), rather than for cases of so-called expressive crimes. The latter ones are usually a result of impulse or the emotional state of the offender (Barlow 1987: 448–449). Also, it is important to point out that the more crucial properties for punishment are argued to be its certainty and swiftness, and not the severity itself (Barlow 1987: 551–552; Akers, Sellers 2004: 18–20).

The latest case law of the ECtHR appears to confirm that there is a kind of positive obligation imposed on the national penitentiary systems to make every reasonable effort to minimise the harmful impact of punishment on the offender, focussing specifically on the negative side effects of long-term incarceration (Montaldo 2018: 226). This is because prisoners are regarded as groups at high risk of victimisation whilst serving their sentences. Their victimisation may largely be related to potential biological, psychological, economic and social abuses in the institutions where they are detained (Barlow 1987: 454–456).

Furthermore, as we noted above, there are two main priorities related to the presupposed role of punishment. First of all, the punishment should be aimed at rehabilitating the offender, and also at socially reintegrating them. Here, the important factors so as to achieve these effects, as Stefano Montaldo argues, should be "clear rules regarding the duration of the deprivation of liberty, adequate detention conditions, and the avoidance of too harsh prison regimes" (Montaldo 2018: 226). Also, when modelling their criminal policies and prison regimes the Member States should focus on the purpose of reintegrating the offender into society (Montaldo 2018: 227). In fact, we may agree with the opinion that "offenders' rehabilitation lies on a thin line between (limited) EU criminal competences and national responsibilities, under the common umbrella of the obligations elaborated by European Court of Human Rights" (Montaldo 2018: 230). At this point, we should also mention Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing

custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. Its Preamble directly states that "[e] nforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person" (OJ 5.12.2008, L 327: para 9).

It seems very important in the discourse of punishment to emphasise the close link between rehabilitation and human dignity (Montaldo 2018: 227–228). Actually, it is true that human dignity is the highest value in the hierarchy of fundamental rights. This particular issue is connected with the prohibition of inhuman or degrading treatment or punishment, as provided for in Article 3 of the ECHR and Article 4 of the Charter of Fundamental Rights of the European Union (hereinafter "CFR"). Accordingly, it is obvious that in light of European law, "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". EU legal acts, such as Council Framework Decision 2002/584/JHA on the European arrest warrant also directly refers to the observance of fundamental rights. The Recitals of its Preamble state:

> This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. [...] No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. (OJ 18.07.2002, L 190: Recitals 12 and 13)

Thus, the well-reasoned risk of any inhuman or degrading treatment of the offender should constitute absolute grounds for refusing to execute a European arrest warrant and refusing extradition to third countries because of the questionable conditions at the site of detention. Such findings appear to be derived from the CJEU case law, e.g. *Aranyosi and Căldăraru, ML, Dorobantu, Petruhin, Pisciotti, Raugevicius*, *Ruska Federacija*.

Again, we can assert that a key role of punishment under the EU criminal law regime should be not only rehabilitating the offender, but also reintegrating them into society. This approach seems to be evident in light of EU legislation and the case law of the CJEU. However, this approach can only be positively viewed in the cases where it appears truly possible, that is, depending on many particular circumstances, including the type of crime committed and the mental state of the offender. We should also note that the CJEU indicated the significance of reintegration into society in a few cases. Taking as an example the case of João Pedro Lopes Da Silva Jorge, the CJEU directly pointed out that

> the Court has held that ground for optional non-execution [of the EAW] has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires. (C 42/11 2012: para 32)

Interestingly, regarding the comparison of ECtHR and CJEU case law, as Adriano Martufi concludes, the ECtHR's case law seems to take a theoretical approach as it "values offender's responsibility and self-determination as essential components of a rehabilitative treatment", whereas "the case law of CJEU is on the contrary illustrative of a utilitarian approach concerned with security and crime-prevention" (Martufi 2018: 687). He also stresses the risks of possible incoherence between ECtHR and EU law with regard to rehabilitation. Such incoherence may result in national criminal justice systems receiving opposing normative inputs as to the way of dealing with offenders. On the other hand, a possible "rapprochement" between those two European courts might not be ruled out completely. In this event, the CJEU appears to be required to interpret rehabilitation as an individual right, so that the full potential of the CRF may be deployed in matters of crime and punishment (Martufi 2018: 687).

As to preventing the impunity of the offender, it is worth focussing on the case of *criminal proceedings against X*. The CJEU argued here that

> the *ne bis in idem* principle set out in both Article 4(5) of the Framework Decision and Article 3(2) thereof and in Article 54 of the CISA is intended not only to prevent, in the area of freedom, security and justice, the impunity of persons definitively convicted and sentenced; it also seeks to ensure legal certainty through respect for decisions of public bodies which have become final. (C-665/20 PPU 2021: para 99)

Furthermore, the Court also highlighted that

> [i]n particular, when exercising the discretion it enjoys, the executing judicial authority must strike a balance between, on the one hand, preventing impunity and combating crime and, on the other, ensuring legal certainty for the person concerned, in order to attain the European Union's objective of becoming an area of freedom, security and justice, in accordance with Article 67(1) and (3) TFEU. (C-665/20 PPU 2021: para 103)

In this case, the CJEU came into important conclusion indicating that

> [i]t is for the executing judicial authority, when exercising the discretion it enjoys, to strike a balance between, on the one hand, preventing impunity and combating crime and, on the other, ensuring legal certainty for the person concerned. (C-665/20 PPU 2021: para 104)

Discussing the impunity of the offender, the focus also should be on its linkage with the principles of proportionality and certainty of law. In this respect, we should recall Article 49 of the CFR, which deals with the principles of legality and proportionality of criminal offences and penalties. Point 3 reads that "the severity of penalties must not be disproportionate to the criminal offence." Also, in the case *JZ v. Prokuratura Rejonowa Łódź – Śródmieście*, the CJEU made a direct reference to "the practical effect of the principle of proportionality in the application of penalties, as provided for in Article 49(3) of the Charter" (Case C-294/16 PPU 2016: para 42).

Another question in our discussion of punishment could be whether life imprisonment is still desirable in national criminal justice systems. Generally, we may still observe a predominance of imprisonment in national criminal policies of the EU Member States. In this way, a repressive approach is taken to prevent the impunity of the offender, especially to fight against the most serious forms of crime. This trend is in a sense compliant with EU criminal law, as there is no legal prohibition against imposing even life imprisonment. However, as we read in Article 5 (2) of Council Framework Decision (2002/584/JHA) on the European arrest warrant,

> if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure. (OJ 18.07.2002, L 190)

Therefore, it seems that along with undertaking a repressive approach under the EU legal regime, there must be also some room for human rights protection. Finally, we may assume that long-term imprisonment should be regarded as a kind of *ultima ratio* in EU criminal law, restricted to certain, very specific cases.

3. Criteria on criminal sanctions under the EU legal regime

At this point, we should point out that as a rule the EU Member States are obliged to be in compliance with Union law. This also applies to sanctions in national criminal justice systems. As far as sanctions are concerned, the requirements expressed directly in the landmark case 68/88 *Commission v. Greece* must be fulfilled. In other words, sanctions have to be compatible with Greek maize criteria which are articulated in the CJEU judgment: "For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive" (68/88 1989: para 24).

Also, we should add that the above criteria of effective, proportionate and dissuasive sanctions relate both to legislation and practical enforcement in criminal matters. However, it is not an easy task for a national legislature to define their meaning and scope (Klip 2016: 351–370). We may thus admit that the punitive

system of the EU relies on the general idea that sanctions should be effective, proportionate and dissuasive (Nuotio 2020: 20–39), but that on the other hand it appears impossible or at least problematic and not clear enough how to identify the criteria used by the EU legislature "when choosing the *type* of sanctions that EU Member States must provide for in their legal system" (Rodrigues 2019: 21).

In order to better understand the intentions of the EU legislature as regards criminal penalties, it may be helpful to recall the two cases of *Kolev and others (Kolev I) and criminal proceedings against A. P.* In its judgment concerning *Kolev and others*, the CJEU noted that

> while the Member States have … a freedom to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two, they must nonetheless ensure that cases of serious fraud or any other serious illegal activity affecting the financial interests of the Union in customs matters are punishable by criminal penalties that are effective and that act as a deterrent. (C-612/15 2018: para 54)

Furthermore, the CJEU refers to such significant questions as lack of punishment and protection of fundamental rights of the accused in criminal proceedings. Regarding these issues, the Court maintains that

> it is therefore for the national legislature, where required, to amend the legislation and to ensure that the procedural rules applicable to the prosecutions of offences affecting the financial interests of the European Union are not designed in such a way that there arises, for reasons inherent in those rules, a systemic risk that acts that may be categorized, as such offences may go unpunished, and also to ensure that the fundamental rights of accused persons are protected. (C-612/15 2018: para 65)

The case of *Kolev and others (Kolev I)* illustrates that it is necessary to ensure respect for the right to a defence, as guaranteed by Article 48(2) CFR, which reads that "[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed". Also, the right of accused persons to have their case heard within a reasonable time should be protected, as provided for in Article 6 (1) ECHR: "[i] n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." What is also particularly important to highlight with regard to *Kolev and others* is the CJEU's view that the national courts and prosecutors are required to act in a way that ensures a fair balance between the right to a defence and the need to guarantee the effectiveness of the prosecution and punishment (C-612/15 2018: para 98).

In turn, *criminal proceedings against A. P.* pertains to the interpretation of Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. The

request was made in proceedings relating to the recognition in Estonia of a judgment of the Rīgas pilsētas Latgales priekšpilsētas tiesa (Riga City Court, Latgale District, Latvia), by which A. P. was sentenced to a suspended term of three years' imprisonment. In its judgment the CJEU argued for

> Article 1(1) and recitals 8 and 24 that the framework decision pursues three complementary objectives, namely facilitating the social rehabilitation of sentenced persons, improving the protection of victims and of the general public by preventing recidivism, and facilitating the application of suitable probation measures and alternative sanctions, in the case of offenders who do not live in the Member State of conviction. (C-2/19 2020: para.52)

In addition, the Court places obligations on the national authorities to consider in their decisions that

> [i]n particular, the authorities of the Member State in which the sentenced person resides are, as a general rule, more able to supervise compliance with that obligation and to act upon any breach thereof, since they are, in principle, better placed to assess the nature of the breach, the situation of the person committing it and his or her prospects of rehabilitation. (C-2/19 2020: para 53)

A crucial notice is also the statement referring to the protection of victims and the general public:

> the link created between suspension of the execution of the sentence and the obligation not to commit a new criminal offence is intended to deter reoffending. Thus, to permit the competent authority of the Member State of residence to act upon any breach of that obligation is liable to contribute to attainment of the objective of protecting victims and the general public. (C-2/19 2020: para 54)

Conclusions

To conclude, we can assume that judicial national authorities, when taking their decisions on punishments, should be focussed much more on the rehabilitation and reintegration of the offender into society than the long-term severity of imprisonment, as such. Even if there is still a repressive approach in EU criminal law and policy – especially through the possibility of imposing a long-term imprisonment – certain requirements must be fulfilled to be compatible with human rights protection under the CFR and the ECHR.

Considering the role of punishment from the EU criminal law perspective, the focus should be placed on the proper implementation of the Union's laws in the national legal orders, and on following the rules which derive from the jurisprudence of both European courts, namely the CJEU and the ECtHR. The

"judicial dialogue" between the CJEU and the national courts, as well as between the CJEU and the ECtHR, appears to have a very positive impact on the role of punishment in European criminal justice. Importantly, as Nina Kisic and Sarah King note, the jurisprudence of the ECtHR indicates that "the Court is moving toward a model that favors not simply punishment but incentivizing desired behavior" (Kisic, King 2014: 11).

This suggests that current trends in jurisprudence of both European courts involve more lenient penal policy towards offenders, in terms of possibly limiting long-term imprisonment to specific cases and being rather in favour of some probation measures and alternative sanctions – for example, using electronic monitoring in cases where it is certainly possible. In this sense, the priority of punishment from the EU criminal law perspective is to rehabilitate the offender and reintegrate them into society, and not imposing a severe long-term punishment in and of itself.

It is also worth quoting the conclusion of Nina Kisic and Sarah King that

> [i]n its pattern of emphasizing the importance of rehabilitation of offenders and societies while routinely applying the more lenient law, the ECtHR has repeatedly rejected the arguments from several governments that the gravity of the crime should be the primary determining factor in the punishment. (Kisic, King 2014: 13)

However, the responsibility for ensuring compliance with the rules set at the Union level lies with the national criminal courts of the EU Member States and the good will of governing politicians. Last but not least, there is still a need to train criminal judges and defence lawyers taking part in criminal proceedings – and to educate society as a whole.

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Confiscation of assets in the EU: Legal or (just) effective?

Konfiskata mienia w Unii Europejskiej – prawnie uzasadnione czy (tylko) skuteczne?

Abstract: The European Union is empowered to legislate in criminal matters; the European Parliament and the Council may establish minimum rules, in certain areas, concerning the definitions of criminal offences and sanctions or facilitating cross-border cooperation. However, in the field of asset confiscation, the EU authorities seem to go beyond these competences in their legislative activity. In this paper the author refers to this and other problems of EU legislation in criminal matters: covering up the insufficient competence to legislate with the argument of needing harmonisation, the lack of reliable data that would justify EU legislative activity and the problematic concept of effectiveness in EU legislation.

Keywords: asset confiscation, extended confiscation, EU criminal law, harmonisation, the effectiveness-based approach, asset recovery, asset forfeiture

Abstrakt: Organy Unii Europejskiej są uprawnione do tworzenia regulacji karnych; Parlament Europejski i Rada UE mogą w niektórych obszarach, ustanowić normy minimalne dotyczące definicji przestępstw i sankcji lub inne mające ułatwić współpracę transgraniczną. Wydaje się jednak, że w obszarze konfiskaty mienia władze unijne wykraczają w swojej działalności legislacyjnej poza przyznane im kompetencje. W niniejszym artykule autorka odnosi się do tego i innych problemów stanowienia przez UE prawa w sprawach karnych: ukrywania niewystarczających kompetencji w tym zakresie za argumentem koniecznej harmonizacji, braku rzetelnych danych uzasadniających działalność legislacyjną UE oraz problematycznego pojęcia efektywności w prawodawstwie unijnym.

Słowa kluczowe: konfiskata mienia, konfiskata rozszerzona, prawo karne UE, harmonizacja, podejście oparte na efektywności, odzyskiwanie mienia, przepadek korzyści

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The legislative power of the European Union in criminal law has been a controversial topic for a long time. The judgements of the European Court of Justice in the"Environmental Crime" case (EJC judgment of 13 September 2005, C-176/03, *Commission v. Council*) and the subsequent "Ship-Source Pollution" case (EJC judgment of 23 October 2007, C-440/05, *Commission v. Council*) made it clear that if the EU authorities see the need to adopt criminal sanctions in order to enforce EU policies by the legal instruments at their disposal, and they wish to avoid repeated actions for annulment, they shall benefit from a clear competence (conferral of power) in this field. Eventually, the Lisbon Treaty included in Art. 83 of the Treaty on European Union (TFEU) the explicit grounds (but also limitation) for the European Parliament and the Council to create substantive criminal law provisions, and included in Art. 82 TFEU the EU's competence to create rules for judicial cooperation in criminal matters. However, not all controversial issues of criminal law legislation at the EU level have been definitively solved. Some of the remaining problematic ones discussed in this paper are the EU authorities' competence to create instruments for asset confiscation, the existence of reliable evidence-based grounds for expanding those instruments and the meaning of "effectiveness" in EU legislation.

This article is divided into four sections. In the first one, the legal basis for the competence of the EU authorities to legislate within the field of criminal law is presented, with a special focus on different language versions of relevant provisions. In the second section, the author refers to the concept of "sanction" under EU law in order to answer whether asset confiscation can be perceived as an instrument under the scope of the competence for Union harmonisation (Art. 83 TFEU) or whether the relevant legal basis should be sought elsewhere (in particular in Art. 82(2) TFEU). In the third section, further problems of EU legislation in this field are indicated, with special attention being paid to the potential problem of insufficient competence being rationalised with the need to create a harmonised regime for EU confiscation (3.1) and the effectiveness requirement being emphasised even when it cannot be substantiated adequately with data (3.2). The fourth section presents some final reflections.

This work presents the partial results of the research project called "Extended confiscation and its justification in light of fundamental rights and general principles of EU law", which is financed by the National Science Centre, Poland (*Narodowe Centrum Nauki*) for the period 2021–2024 (project number: 2020/39/D/HS5/01114). More information on the project, including 16 national reports, is available on https://konfiskata.web.amu.edu.pl/en/.

1. EU legal basis to legislate in criminal law

Article 82(1) TFUE gives the EU authorities – the European Parliament and the Council – the competence to create rules on facilitating mutual cooperation in criminal matters, which includes the approximation of the laws and regulations of the Member States in areas referred to in Art. 82(2) TFUE (mutual admissibility of evidence between Member States, the rights of individuals in criminal proceedings, the rights of victims of crime and other specific aspects of criminal procedure, which the Council has identified in advance via decision) and in Art. 83 TFUE. Article 83(1) TFUE addresses the EU competence to establish minimum rules concerning the definition of criminal offences and sanctions for particularly serious crimes with a cross-border dimension, known as "eurocrimes". These areas are listed, but "on the basis of developments in crime" the Council may adopt a decision identifying other areas of crime which meet the criteria (as is currently happening in reference to the violation of EU restrictive measures; Ballegooij 2022: 146–151; Proposal 2022a; Council Decision 2022; Proposal 2022c). Article 83(2) TFEU expands the EU legislative competence in criminal law to "effet-utile crimes", existing in areas which have been subject to harmonisation measures if the approximation of criminal laws and regulations of the Member States proves essential in order to ensure the effective implementation of a Union policy. However, in the latter case, the EU directives may also establish only minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

Other provisions of the Treaties which may serve as a basis for criminal law legislation are Art. 79 TFEU on trafficking in human beings, Art. 86(2) TFEU on the European Public Prosecutor Office, Art. 114 TFUE on national legislation regulating the market, Art. 325(4) TFUE on the protection of the financial interests of the EU and Art. 352 TFUE on adopting specific measures necessary to achieve one of the objectives of the Treaties, even in the absence of explicit competence. However, these other potential legal bases do not include a clear reference to criminal law or restrictions similar to those explicitly formulated in Articles 82 and 83 TFEU, including the "emergency brake" procedure regulated in their third paragraphs. Therefore, although other legal grounds sometimes appear in the Commission's proposals as complementary bases, the Council – by legislating in the field of criminal law – consistently adheres to Articles 82 and 83 TFEU (Franssen 2017: 88–92; Wieczorek 2020: 109–113). However, as none of these provisions explicitly refer to the harmonisation of asset confiscation schemes, it becomes necessary to consider whether asset confiscation can be understood as a "sanction" in terms of Art. 83 TFEU or whether the legal basis for harmonising confiscation regimes at the EU level should instead be Art. 82(2) TFEU.

When investigating the meaning of sanction in Art. 83 TFEU, it should be borne in mind that this term appears only in some language versions of the Treaty, e.g. in English (sanctions), French (*sanctions*) or Italian (*sanzioni*), whereas in the other language versions a term equivalent to "penalties" is used. This latter

term can be found, e.g. in the German (*Strafen*) and Polish (*kary*) versions of Art. 83 TFEU. Its meaning in the context of national criminal law may lead to problematic conclusions. In German criminal law a clear distinction is made between sanctions and penalties; within a three-track system of sanctions, penalties (first-track instruments) are conceived as instruments of repression, preventive instruments (second-track instruments) have a protective nature and restoring measures (third-track instruments) aim to deprive an individual of the proceeds of crime (Hochmayr 2012: 65–68). Similarly, the use of the term "penalties" (*kary*) in the Polish-language version of Art. 83 TFEU may indicate a desire to create minimum rules only in reference to the instruments of a punitive nature, which excludes confiscation – in particular, in view of the amendment of the Polish Penal Code carried out in 2015, which regulated confiscation (forfeiture) in one chapter, along with compensatory measures, and clearly separated them from criminal measures (Płońska 2015: 91–93; Raglewski 2015: 171–172).

The observation that "no two texts in different languages will ever have exactly the same meaning" and the fact that even significant differences between language versions of a text cannot fully be avoided, especially due to inadequate translations and political meddling, are nothing new (Schilling 2010: 50). The problem of discrepancies between various language versions of the same provision has already been confronted by the CJEU, which assumed that in such a case a uniform interpretation of a provision of EU law requires a teleological interpretation with reference to the context and purpose of the rules of which it forms part (CJEU judgments of 26 April 2012, C510/10, *DR and TV2 Danmark*, para. 45; of 25 April 2013 C89/12, *Bark*, para. 40; and of 17 September 2015 C-257/14, *Van der Lans*, para. 25). This approach effectively forms the law and leads to solutions that fit better with the EU legal order "in the light of its broader set of rules and principles and of its context of application" (Maduro 2008: 141; in reference to asset recovery, cf. CJEU judgements of 14 January 2021, C-393/19, paras. 46–58; and of 12 October 2021 in joint cases C-845 and C-863, paras. 32–34). Such an interpretation of multilingual texts may not correspond to what was previously sought by the legislature, but it is in accordance with the concept of dynamic and principle-based development of the EU integration and its legal order: "universal principles maintain the legal text updated" and minimise the risk of an interpretative manipulation of the legislation (Maduro 2008: 141–145; Helios 2014: 184–197 with reference to R. Dworkin). This approach may also result in the creation of a standardised EU legislative language (an official version, which should not be confused with the technical "Euro-speak"; Kużelewska 2014: 159–161; cf. Ringe 2022: 140–159), consisting of concepts and connotations autonomously construed at the EU level as a common frame of reference for interpreting Union legal acts. Such "terminologisation" has already been observed in the CJEU case law (Schilling 2010: 51, 55–56; Helios, Jedlecka 2018: 134–137, 182–186). This attitude could even contribute to solving the problem of defining the scope of power that has been conferred by the Member States to the European Union.

In reference to the different terms used for the instruments of reaction to crime which can be harmonised under Art. 83 TFEU, German authors indicate that where the EU legislature used the term "penalties" in the German version of the relevant provisions, it was meant broadly as "sanctions" (cf. Hochmayr 2017, para. 43; Böse 2019, para. 20). In accordance with the teleological interpretation of Art. 83 TFEU, a "sanction" can be understood as an autonomous concept of EU criminal law: an instrument aimed at smoothing cross-border cooperation of national authorities working towards freedom, security and justice; in such a case it encompasses not only instruments of repression ("penalties"), but a wide scope of reactions to criminal offences, which evolve over time. This interpretation may be inconsistent with the German-language version of Art. 83 TFEU, but it meets the common superior aims when interpreting EU law: it maintains external consistency in the understanding of "sanctions" in the Union and enables a more effective (homogeneous) reaction to criminal offence once it is expected at the EU level, particularly for serious crimes with a cross-border dimension.

Further verification of whether the EU authorities have the power to harmonise confiscation regimes will be based on the English version of Art. 83 TFEU. In recent years English has become the main language of the European Commission's internal communication and drafting, most often used to create a "reference version" of EU legal documents from which they are translated into the other official languages (Robinson 2005: 4–5, 9–10; Robinson 2010: 131–132, 147; Schilling 2011: 1483–1484), whereas the language of deliberation of the CJEU is, by custom, French (https://curia.europa.eu/jcms/jcms/Jo2_10739/en/). The English version of a relevant provision can then be perceived as an output for interpretation and as binding until there are convincing arguments in favour of a different (i.e. inconsistent with the English version) interpretation of certain legal terms. In this case the English version of Art. 83 TFEU includes the term "sanction", understood more broadly than "penalty", which prima facie increases the chance to find an interpretative solution according to which the EU authorities are competent to harmonise compensation regimes.

2. Confiscation as a sanction under EU law?

As pointed out in the literature, confiscation measures were introduced even before the Lisbon Treaty, in special instruments such as Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime or Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property. However, they were not considered sanctions and, under the Lisbon Treaty, they still do not fit very well into the framework of Art. 83 TFEU (Asp 2012: 100).

Confiscation of assets at the EU level is currently regulated by Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, which includes three generations of confiscation regimes: regular confiscation, extended confiscation and non-conviction-based confiscation (Boucht 2019: 529–534). "Confiscation" in terms of the Directive should be understood as "a final deprivation of property ordered by a court in relation to a criminal offence" (Art. 2(4) Directive). Article 5.1. of the Directive obliges Member States to enable confiscation of property belonging to a person who is convicted of a criminal offence that may bring economic benefit, extending such confiscation to every situation where a court, based on the circumstances of the case (e.g. the disproportionality between the value of property and the lawful income of the convicted person), "is satisfied" that the property in question is derived from criminal conduct. This kind of confiscation – going beyond the scope of property acquired through crime as (positively) proven by evidence – can be defined as "classic extended confiscation". Another possible extension of the scope of confiscation is "confiscation from a third party", where forfeiture goes beyond the property of the suspected (accused) person to property transferred to or acquired by third parties from the suspected (accused) person (Art. 6 Directive). Confiscation may also go beyond the time limits set by the moments of committing a crime and of issuing a court sentence; this kind of "retrospective confiscation" is not directly mentioned in Directive 2014/42/EU, but falls within the limits of its Art. 5. Moreover, the Directive points out that confiscation need not be adjudicated on the basis of a final conviction; even if conviction is not possible, it should still be legally feasible to confiscate instrumentalities and proceeds, at least where such impossibility is a result of the suspected (accused) person's illness or abscondence and the initiated criminal proceedings could have led to a criminal conviction if the suspected (accused) person had been able to stand trial. This "non-conviction-based confiscation" (NCBC) is regulated in Art. 4 of the Directive. On 25 May 2022 the European Commission, within the EU Strategy to tackle Organised Crime 2021–2025, presented a proposal for a new Directive of the European Parliament and of the Council on asset recovery and confiscation (Proposal 2022b). The understanding of "confiscation" in the proposal is similar to the one in the 2014 Confiscation Directive, but the scope of regulation is broader: it covers additional criminal offences and includes a new (fourth) generation of confiscation regimes: confiscation of unexplained wealth linked to criminal activities.

The understanding of asset confiscation in the 2014 Confiscation Directive in the 2022 Proposal is quite broad, going beyond the direct connection of eligible property to a criminal offence and to the final conviction of the perpetrator. Deprivation of property ordered in relation to a criminal offence can be perceived by a perpetrator as a severe ailment, in particular by extended confiscation, when a convict effectively loses more than they had acquired by committing a trigger offence, or by other types of confiscation, if they are applied in accordance with "the gross principle" covering the whole income resulting from an offence, without the

chance to deduct any invested (licit) funds or expenses. In such cases, confiscation of assets which goes beyond pure profit from a proven offence may imply a repressive character, which may justify this kind of reaction to criminal offence being perceived as a sanction in the "narrow sense" (equated with a penalty). However, the unwanted loss of assets, even of legal origin, does not automatically constitute a sanction, just like an obligation to repair the damage caused or to pay taxes is not qualified as such. Moreover, the general preventive function of economic evil, which is inflicted on the perpetrator when applying the gross principle to asset confiscation, also exists in civil law in the event of violations of the law or good morals (§ 817 of the German Civil Code) and is therefore assumed to follow from the overall legal system (Rönnau, Begemeier 2017: 7–8).

In the context of Art. 83 TFUE, a sanction can be (and often is) understood according to the criteria developed in the judgment of the European Court of Human Rights (ECtHR) of 8 June 1976 in the case *Engel & Others v. Netherlands* (appl. no. 5100/71 et al.) as an instrument of criminal nature, being a synonym of "penalty", having a repressive character, marked by ethical blame, which opens the door for applying guarantees of fundamental rights (European Parliament 2013: 22; Rui, Sieber 2015: 261, 286). If the Engel criteria shall be decisive, it should be kept in mind that one of the main arguments for considering an instrument a criminal sanction is its legal classification under national law (Rui, Sieber 2015: 256). Closer examination of this issue shows that confiscation (forfeiture) in national legal orders is often qualified as an instrument of criminal law, also where it is deprived of a punitive aim and nature (regarding extended confiscation, cf. de la Cuesta 2022: 10–12; Maugeri 2022: 6–9; Kilchling 2023: 23–24; and other national reports available on https://konfiskata.web.amu.edu.pl/en/). Even the ECtHR has observed that the imposition of a confiscation order may amount to a penalty for the purposes of the European Convention of Human Rights (e.g. the judgment of 26 February 1996, *Welch v. the United Kingdom*, appl. no. 17440/90).

Still, in many cases confiscation differs significantly from the concept of a penalty. The relevant instruments can, as in Italian law, be preventive in nature (although, in practice, there is much evidence for the principally restorative function of Italian preventive confiscation: Mazzacuva 2017: 103–110; Trinchera 2020: 65–71). Confiscation measures can also, as in Germany or Scandinavian countries, be aimed mainly at re-establishing the situation prior to an unlawful act (Rui, Sieber 2015: 285–286). In a more systemic approach it was indicated that confiscation measures may fall within the scope of different disciplines, which determine their function and the legal constructions under which property can be confiscated: criminal law perceives confiscation as a category of sanction (in a narrow sense), police law applies confiscation in order to prevent future damage caused by or with this property, civil law enables property to be seized in order to re-establish the situation before an offence took place and tax law – if income from an undisclosed source or even criminal gain is taxable according to the law – enables (at least) a certain percentage of the perpetrator's gain to be taken by the state (Rui, Sieber 2015: 249).

Just as the term "confiscation" can be understood in various ways, the meaning of *sanction* can differ under the circumstances. The established rules of legal methodology permit the same term to be interpreted differently, depending on the context. A "sanction" in a competence norm (of Art. 83 TFEU) need not be identical with a *sanction* in a norm guaranteeing human rights. Whereas the latter term ("sanction in a narrow sense") must be interpreted strictly (e.g. by the Engel criteria), the former ("sanction in a broad sense") can relate to almost any negative legal consequences of committing a criminal offence (Rui, Sieber 2015: 285–286). Nevertheless, in order to classify such a consequence as a "sanction", it is still necessary to identify some distinguishing features of it.

An important aspect of a criminal sanction "in a narrow sense" is the sanction-specific ailment, which exceeds the simple inconvenience of depriving beneficiaries of the proceeds of crime (Rui, Sieber 2015: 250–251, 255). This inconvenience is usually perceived as something that goes beyond affecting honour, and results in an 'objectively perceptible' fine or imprisonment. However, the ethical blame, strongly linked to the area of criminal law, which results in a "subjectively perceptible" influence of a criminal law instrument on the "good name" of an affected individual should not be underestimated. Even if an instrument regulated by criminal law is formally qualified as a purely compensatory consequence of committing an offence which is aimed at simply depriving someone of the proceeds of crime in a way that is free from repressive factors (the so-called "third-track instrument"; cf. Hochmayr 2012: 65–68), its placement within criminal law cannot be declared irrelevant. This aspect also appears with a criminal sanction "in a broad sense". There are no "neutral" instruments of criminal law: placing a legal solution in the context of criminal law has a significant effect on its perception as a part of the reaction to crime. The systemic placement of an instrument in a legal system influences the contextual interpretation of relevant provisions (Padjen 2020: 192) and their perception by the society. A person against whom such instrument is applied in a criminal proceeding becomes involved in some kind of "illicit activity", which itself creates an important aspect of criminal repression. Being forced to prove the lawful origin of one's assets in order to combat the legal presumption that they were obtained through some previous, unspecified criminal activity is potentially very stigmatising for the affected person, who may be perceived as a persistent offender, and it may significantly affect their individual privacy and professional career (Stanton-Ife 2007: 156–158; Boucht 2017: 136–138, 189, 198–199). Such an effect of a "shade of involvement in suspicious business" was observed even in *in rem* proceedings, where the proceeds of crime, rather than the owner of the property, are the target (Naylor 1999: 41).

However, perceiving every instrument of reaction to crime as a specific sanction in terms of Art. 83 TFEU, due to its link with the law of repression, can be seen as a way to circumvent the Member States' conferral to the Union powers in criminal law, which should be interpreted – in accordance with Art. 5(2) TEU – strictly, as a kind of exceptional legislative competence. With this approach, achieving

compatibility between the wording of Art. 83 TFUE and the EU competence to legislate matters of confiscation relies on understanding "sanction" in a narrow sense, in terms of a penalty: an instrument inflicting objective hardship on the offender. In such a case confiscation is not a sanction, but may still fall within the scope of Art. 83 TFUE in accordance with the rules of legal interpretation. One of these rules is *argumentum a maiori ad minus* (from greater to lesser): the assumption that if a legal norm allows one to do more, it also allows one to do less, particularly if it is perceived as being enough to achieve the same aim (Ziembiński 2007: 251–253). Therefore, if the EU has the explicit competence to harmonise (minimum definitions of criminal) sanctions, which are instruments of repression, it should – especially with respect to the principle of proportionality – also be entitled, in similar circumstances, to harmonise non-repressive instruments intended to deprive an offender of the benefits of crime, i.e. asset confiscation schemes. However, it should be borne in mind that the result of interpretation still depends on the concept behind the conferral of powers (e.g. as a general or exceptional competence). This concept may change with time and political aims, in which case the slightly modified concept of a sanction proposed in first section of this paper – a reaction to an (already committed) offence, provided by criminal laws of EU member states – seems to be the most convenient one.

However, even if such a concept is found convincing, still some reservation can be made with regard to the NCBC schemes. It has been pointed out that non-conviction-based confiscation is not imposed following a particular criminal conviction, but, like freezing orders, is rather a preventive measure to ensure that illicit assets are not to be left at the offender's disposal (Forsaith et al. 2012: 188–196). Consequently, NCBC – especially when it targets property instead of a person – should not be considered a sanction in any possible understanding of the term within Art. 83 TFEU, but an instrument of civil law, which can be harmonised under Art. 81(1) TFEU referring to judicial cooperation in civil matters (Forsaith et al. 2012: 189–190; Rui, Sieber 2015: 284–288; Simonato 2015: 213, 221; Boucht 2017: 67–93; Thunberg Schunke 2017: 304–308, 316).

3. Even if confiscation is a sanction, the problem is not resolved

3.1. Rationalization before competence

Article 83 (1) TFEU limits the legislative competence of the Union in substantive criminal law to specific, listed types of crime. For this reason, it cannot serve as a basis for the general harmonisation of confiscation measures (Rui, Sieber 2015: 287). Article 83(2) TFEU, which also creates a basis for harmonising substantive criminal laws, does not include any list of criminal offences; it is applied based

on the existence of a "Union policy in an area which has been subject to harmonisation measures". Consequently, confiscation rules under Art. 83(2) TFEU can only be adopted once a Union policy has first been harmonised – and, as yet, no such policy can be identified in the context of confiscation (Rui, Sieber 2015: 288); in particular, asset recovery and confiscation do not autonomously create an EU policy area under Art. 83(2) TFEU (Sakellaraki 2022: 485).

An alternative legal basis for harmonising criminal laws is Art. 82(2) TFEU. However, being aimed at developing procedural rules on the mutual recognition of judicial decisions (including confiscation matters, also NCBC) it does not include the explicit competence to harmonise confiscation regimes as well. Relevant rules could be based on a general reference to "the rights of victims of crime" but this would cover only a very limited part of the subject matter. Therefore, the Council should first – acting unanimously and with the consent of the European Parliament – clearly expand the EU competence to legislate matters related to confiscation (Forsaith et al. 2012: 59–62, 188–190; Rui, Sieber 2015: 290). This could, however, still cover only procedural issues.

Thus, EU authorities currently swim in the murky waters of their declared competences in terms of confiscation. The solution reached in the adoption of Directive 2014/42/EU was to use the dual legal basis of Articles 82(2) and 83(1) TFEU, which evades the question of whether confiscation is a sanction or a judicial cooperation mechanism (Mitsilegas 2016: 59–60). In the proposal for this Directive, the European Commission emphasised the "functional rationale" of creating harmonised rules on confiscation, indicating that the Union is better placed than individual Member States to regulate confiscation of assets, because its prime target – organised crime – is often transnational in nature and therefore needs to be tackled jointly (Proposal 2012: 8). This "functional rationale" is then mainly about the presumed higher "effectiveness" of legislative activity expected at the EU level than at the national one. However, as it was clearly expressed in the literature,

> to the extent that the effectiveness rationale for EU action in the field of criminal law holds legitimating power, it cannot justify encroachments upon the constitutional principles (conferral and subsidiarity) regulating the relationship between the EU and the Member States. On the contrary, in such circumstances, it opens the floor to a questioning of the legitimacy of European integration in this very sensitive field. (Öberg 2021: 414)

In other words, the effectiveness rationale cannot compensate for the deficiencies in the conferral of powers (or other EU principles).

Nevertheless, the "functional rationale" appears as the main justification for legislating at the EU level. Choosing, on the basis of Art. 82(1) TFEU, the legal measure of Regulation No. 2018/1805 on the mutual recognition of freezing orders and confiscation orders, the Commission indicated that in

> cross-border procedures, where uniform rules are required, there is no need to leave a margin to Member States to transpose such rules. A regulation is directly applicable,

> provides clarity and greater legal certainty, and avoids the transposition problems that the Framework Decisions on mutual recognition of freezing and confiscation orders were subject to. (Proposal 2016: 7)

From a formal perspective, Art. 82(1) TFEU accepts (any) measures (in the meaning of those listed in Art. 288 TFEU) to lay down rules and procedures for ensuring and facilitating judicial cooperation in criminal matters in the European Union – and from this perspective a regulation is an acceptable choice. However, such a regulation may also create a hidden requirement for harmonisation of confiscation measures in Member States, and thus substantive criminal law, for which Articles 83 and 82(2) TFEU provide the instrument of a directive. This hidden requirement follows from the expectancy of a certain proximity of European legal systems in terms of similar instruments of law (including criminal law), which is necessary for effective judicial cooperation. In other words, the concept of mutual trust needs a solid formal basis of similar legal solutions (Willems 2020: 52, 130–131).

The proximity of legal solutions in the EU Member States either exists naturally or must be achieved by progressive and enforced harmonisation, which can be obtained directly by a requirement in a directive to implement a certain legal solution, or indirectly, as a result of the positive knock-on effect of mutual recognition on substantive matters (Oliveira de Silva 2022: 202). In the field of asset confiscation, efforts to establish common minimum rules on freezing and confiscating assets were made even before the Lisbon Treaty entered into force, on the basis of joint action and framework decisions requiring their implementation into national legal orders. However, this resulted in regulatory dissonance reaching an alarming level (Oliveira de Silva 2022: 200–201). Even the provisions of the 2014 Confiscation Directive were perceived as offering little guidance on the interpretation of its requirements and therefore as being insufficient to achieve satisfactory approximation of relevant legal solutions, resulting in the observation that many aspects covered by the Directive remain to be explored and discussed (Ligeti, Simonato 2017: 5–8).

Due to the above-mentioned problems and in order to ensure the effective mutual recognition of freezing and confiscation orders, the EU legislative authorities decided to establish the mentioned Regulation 2018/1805. This legally binding and directly applicable EU act was perceived as a remedy for the pitfalls of previous failed harmonisation: it should have allowed the enforcement of even fully unknown instruments (in criminal matters) from one legal system in another one without the need to approximate confiscation mechanisms (Oliveira e Silva 2022: 202). Still, properly executing a freezing or confiscation order is much easier if an equivalent instrument can be found in the legal order of the executing state. Otherwise, due to significant differences in terminology and legal concepts in the field of asset confiscation, as well as the fact that national provisions are not designed to respond to specific and difficult problems of transnational cases, a foreign confiscation order referring to an unknown measure may not be applied effectively by the executing state (Ligeti, Simonato 2017: 5; Thunberg Schunke 2017: 306; Meyer 2020:

143–144, 166–167; Brandão 2022: 36–37). Such an understanding of conditions for effective judicial cooperation within the European Union led, for example, to the Polish Ministry of Justice's 2019 conclusion that in order to adjust Polish law to the requirements of Regulation 2018/1805 on the mutual recognition of freezing and confiscation orders, it is necessary to create a new instrument of *in rem* confiscation in Polish law (Warchoł 2021).

This example from Poland shows how the problem of an insufficient legislative basis to harmonise confiscation schemes on substantive criminal law (Art. 82(2) and 83 TFEU) can be overcome by an indirect harmonisation measure of judicial cooperation (Art. 82(1) TFEU): EU Member States, based on their previous experience, may find the approximation of legal solutions for asset confiscation indispensable to effective interstate cooperation. If the decision in this regard belongs to the Member States, it cannot be said that such harmonisation was explicitly required by the Union's legislative authorities. Nevertheless, if the scope of an EU regulation in criminal matters clearly goes beyond the mutual recognition of judicial decisions and creates minimum rules of interstate cooperation in order to overcome insufficient harmonisation in a relevant field, the allegation of hidden, forced harmonisation (the so-called side-door solution) cannot be avoided (Ochnio 2018: 442–445). It was noted by the EU legislative authorities, who stipulated in Rec. 53 of the Preamble to Regulation 2018/105 that "the legal form of this act should not constitute a precedent for future legal acts of the Union in the field of mutual recognition of judgments and judicial decisions in criminal matters". In fact, the most recent legislative activity in this area is the Commission's Proposal from 25 May 2022 for a new directive on asset recovery and confiscation.

In accordance with the Commission's documents accompanying the 2022 Proposal, the new Confiscation Directive should be based on Articles 82(2), 83(1), 83(2) and 87(2) TFEU. In the Explanatory memorandum to the Proposal, the understanding of confiscation as a sanction in the meaning of Art. 83(1) TFEU is taken for granted and the focus is again placed on the functional rationale. In reference to Art. 83(2) TFEU, the memorandum invokes the essentiality of a broad perspective on confiscation to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. Article 83(1) TFEU is mentioned in the context of preventing and combating organised crime and other "eurocrimes". Articles 82(2) and 87(2) TFEU are cited in terms of procedural safeguards, compensation for victims and facilitating prevention and detection of offences, even – in the case of Art. 87 TFEU – going beyond those covered by Art. 82 and 83 TFEU (Explanatory memorandum 2022: 4; Commission 2022: 29–30). In accordance with the Commission's impact assessment report,

> [t]he combination of these legal bases (Art. 82, 83 and 87 TFEU) allows for harmonising measures on freezing, confiscation and management of illicit assets, measures that directly facilitate cross-border cooperation as well as other measures that govern Member States' internal procedures to the extent necessary to ensure the effective

> implementation of asset recovery and confiscation measures while also contributing to cross-border cooperation. (Commission 2022: 29)

Invoking multiple legal bases, however, resembles an attempt to create the impression that many EU competence provisions for confiscation legislation exist, where there is not even a single substantive one. The Commission's emphasis on the reasonableness and practical character of EU legislative activity should convince the audience that any concern about the existence of a legal basis for legislation on confiscation is not to take precedence over practical harmonisation needs. Arguments such as "let's not fuss over formalities when important aims are ahead", however, are difficult to accept from a legal point of view, which requires a clear, explicit competence norm in such a delicate filed as criminal law.

3.2. Effectiveness without data

The effectiveness-based approach played an important role in creating the single market within the EU (Melander 2014: 284; Öberg 2014: 374). Also, effectiveness is currently a driving force underlying EU legislative activity, one of the principles of EU law and a precondition for the success of the EU legal system (Melander 2014: 278). At the same time, its meaning – particularly in criminal law – seems to be unclear, making assessment of it a difficult task.

In the context of criminal matters within the EU, effectiveness is mainly understood as swift cooperation based on mutual recognition, free from significant legal or practical hurdles. Its meaning in EU substantive criminal law, where the harmonisation of confiscation schemes takes place, is more enigmatic. In terms of Art. 83(1) TFEU, "effectiveness" is understood as the effective harmonisation of national sanctioning systems in order to develop a coherent sanctioning regime at the EU level (Satzger 2019: 116). In terms of Art. 83(2) TFEU, it means that criminal laws should in some way contribute positively to the implementation of EU policies, whereas "the essentiality test" examines whether criminal laws are more effective than non-criminal laws in enforcing the EU policy at issue (Öberg: 2014: 379–380).

In any case, the lack of empirical studies gives the concept of effectiveness a rather symbolic character (Suominen 2014: 402–413). There is little hard evidence available about the actual effects of asset confiscation on criminal conduct, whether as a disincentive or achieving the restorative aim. Although the latter can be assessed, e.g. by measuring the amount of confiscated assets to the amount of alleged total criminal wealth (Boucht 2019: 537), when the amount of criminal wealth is unknown, the estimated percentage of this unknown number cannot lead researchers and policymakers much further. This has an important impact on justifying the creation of new instruments in this field, especially at the EU level. The argument that "although existing statistics are limited, the amounts recovered from proceeds of crime in the Union seem insufficient compared to the estimated proceeds" (Rec. 4 of the 2014 Confiscation Directive) was answered

by indicating that the Union legislature should not justify a new instrument with stronger confiscation powers using such a poor statistical basis (Thunberg Schunke 2017: 189–193; de Bondt 2014), as it violates the subsidiarity principle (*Verstoß gegen das Subsidiaritätsprinzip*; German 2012: 2–3). In such a case, the belief remains that once criminal law provisions are adopted at the EU level and transposed to national legal orders, they will automatically work effectively, a belief that the literature calls the "over-reliance on the magic of criminal law" (Forsaith et al. 2012: 59–62; Herlin-Karnell 2014a: 272; Suominen 2014: 396–397, 402–413; Franssen 2017: 106). This concept may work in theory, where rational offenders decide to conduct their criminal activity after calculating the probability of detection and successful prosecution and the celerity and severity of potential sanction (Öberg 2014: 375). However, life seems to be more complex than a rational choice (or any other) theory.

Empirical research on legal compliance has shown that individuals obey the law when they perceive that they have a moral obligation to comply (where criminal law corresponds to the internalised social norms) or when criminal sanction correlates with the individual's subjective perceptions of the risk and threat of punishment (Öberg 2014: 378); both factors can hardly be influenced by legislation, not only at the EU level (Franssen 2017: 101–103), but also at the national one. Potential offenders are commonly unaware of the legal provisions which have been formulated to produce a behavioural effect, or they tend to discount their practical meaning, perceiving the likelihood of punishment as small and distant (Robinson, Darley 2004; Schoepfer 2007: 152). The same refers to asset confiscation regimes. Therefore, it cannot be said with confidence that criminals understand them and take them into account in their decisions regarding criminal activity (Ulph 2010: 278), particularly when the possible assets are distant and uncertain (e.g. the concept of forfeiting royalties received from monetising the knowledge and experience of committing a crime through book sales or revenue earned from YouTube videos: Mamak et al. 2022: 305–320). Additionally, the capacity of members of a criminal group to let consequences guide their actions might be weakened by group pressure (Robinson, Darley 2004: 180–181). Offenders who have lost their proceeds may trigger new criminal activities in order to recover their losses or may develop new counter-strategies to prevent the seizure of assets, especially since they may have problems finding legitimate work thanks to their conviction (Ulph 2010: 278). Their new criminal activities will also, consequently, lead to more restrictive follow-the-money strategies (Nelen 2004: 524–526), going round the vicious legal spiral and eventually resulting in the observation that it is much easier to legislate than to effectively apply the law in practice (Keiler, Klip 2022: 6).

The existing confiscation regimes may not be sufficiently efficient at deterring potential offenders from engaging in acquisitive crime (by removing the economic incentive to commit an offence), preventing future offences or restoring the *status quo ante*. Speculative estimates of illicit assets based on methodologically weak, more or less plausible assumptions (due to a lack of reliable data) cannot serve as a firm basis of a convincing *plaidoyer* for legislation of confiscation. Effectiveness

can, however, be achieved another way, as a result of correctly determining the cause of identified deficiencies in criminal justice: possible shortcomings in existing legal provisions or in their application. If the problem is finding and tracing the assets in question or sharing information between different public bodies, creating more severe confiscation schemes or conferring more power to the courts in this regard is unlikely to solve the problem (Boucht 2019: 534–536).

An example of good practice may be the audit of the Polish system of asset recovery carried out in 2019 by the Polish Supreme Audit Office (*Najwyższa Izba Kontroli*). The controlling body analysed statistics prepared for the period 2016–2018 by authorities engaged in asset recovery, and it observed significant methodological discrepancies in the provided data, which prevented a consistent picture of the scope of asset recovery conducted by Polish law enforcement authorities. In the period under review, the Polish Ministry of Justice collected statistical data on the number of convicted persons against whom confiscation was ordered, but not on the value of effectively enforced confiscation orders. In the period covered by the audit, the Polish National Prosecutor's Office (*Prokurator Krajowy*) did not have a system that would reliably analyse the effectiveness of asset security carried out by prosecutors, in particular because there was no consistent information on the value of the assets secured. The statistical data collected by the police for the purpose of assessing the effectiveness of its officers in detecting and recovering assets was recognised by the controlling body as unreliable because it was based on fragmentary use of data from various IT systems with different functions. In the period covered by the audit, the state authorities had no knowledge about the amount of losses incurred by the state budget as a result of various types of crime and the Polish Ministry of Justice could not provide data from 2014 to 2018 which would indicate the value of effectively enforced asset confiscation orders in relation to global indicators (NIK 2019: 31–38). In this situation, although the Polish entities involved in the recovery of criminal assets worked within their competences, the Polish Supreme Audit Office found that the lack of coordination and monitoring of the efficiency of the process precluded them from describing the existing Polish system of asset recovery as efficient. In particular, the lack of reliable data on the level of acquisitive crime and on the amount of property losses caused thereby made it impossible to assess whether and to what extent the slight increase in secured assets observed in the period 2014–2018 in Poland resulted from legal amendments covering extended confiscation schemes (NIK 2019: 10).

The audit of (the efficiency of) the asset recovery system in Poland shows that before introducing new solutions in the area of asset confiscation, in particular creating at the EU level instruments in the "new generation of confiscation regimes" (currently represented by the unexplained wealth mechanism in the 2022 Proposal), it is first necessary to examine how the existing asset recovery schemes work in Member States. Otherwise, the Union will act like a poor doctor, who increases the dosage of a drug without investigating why the previous dosage did not help or whether the wrong type of drug was chosen.

Or perhaps the concept of effectiveness is what needs to be re-examined? Effectiveness may eventually be understood "symbolically", as a collective manifestation of a common understanding of justice and of respect for the same fundamental values in the EU (Elholm, Colson 2016: 48–64; Öberg 2021: 412). A current example of such an approach is the Proposal for a Directive of the Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures (2022c). In another case of the above-mentioned 2022 Proposal for further harmonisation in the field of confiscation, however, the Commission sticks to the more traditional concept of effectiveness: the ability to achieve a desired goal (Commission 2011: 9). The proposed draft was described as being based on choosing from different options of criminal policies the one which was expected to give "the qualitative leap in the confiscation rate" and, at the same time, be "proportionate in relation to the administrative burden and interference with Member States' organisational set-ups as well as be balanced against safeguards and the policy objective sought, given the scale of the problem" (Commission 2022: 7–65, 151–154; Explanatory memorandum 2022: 1–15). Nevertheless, in view of the conditions for effective legislation discussed above, the Commission's choice seems to be based more on hopes and expectations than on solid, evidence-based grounds. In that case, one must hope that even if there is no evidence of the expected effectiveness (however it is understood) of the new confiscation law, it will at least result in consistent EU standards for protection of affected individuals (cf. CJEU judgements of 14 January 2021, Case C-393/19, paras. 46–58; and of 12 October 2021 in joint cases C-845 and C-863, paras. 32–34; Mirandola 2020: 417–419).

4. Final reflections

One of the main principles of criminal law legislation is the principle of legality, perceived as a conjunction of intertwining rules going beyond the non-retroactivity of criminal law and including a verification of whether the relevant authority (legislative as well as judiciary) operates on the basis of and within the limits of the conferred powers (cf. Herlin-Karnell 2014b: 1119–1121).

Currently, neither Art. 83 TFEU nor Art. 82 TFUE nor any other provision establishes a clear and explicit legal basis for harmonising confiscation laws at the EU level. The legislative competence of the Union in asset confiscation is taken for granted, and it can be assumed that the new EU directive on asset confiscation will be adopted under one of the given (not expanded) provisions, including even minimum rules on additional confiscation regimes. However, it should be remembered that the burden of proof that the EU authorities are acting within their competences when legislating in the field of confiscation lies with the legis-

lative body. Therefore, they are the ones who take the risk that a member of the Council may at some point pull the "emergency brake", pointing out – pursuant to Art. 83(3) TFEU – that the EU authorities legislating beyond the conferral of powers affects a fundamental aspect of the criminal justice system of (one of) the Member States.

The easiest way to resolve the competence problem would be to establish a clear legal basis. In particular that both mentioned articles provide for the possibility to expand the EU legislative competences and, as stated in the literature, "[s]ince confiscation is an area where third-pillar legislation already exists, there should be more readiness on the part of the EU institutions to include it in Art. 82(2) TFEU" (Forsaith et al. 2012: 188–190). This solution is nonetheless not optimal: the Council decision taken in accordance with Art. 82(2) TFEU is limited to specific aspects of criminal procedure; the alternative provided by Art. 83(1) TFEU may cover only particularly serious crimes with a cross-border dimension (and the subsidiarity clause from Art. 5(3) TEU seems not to allow for further legislative extensions). Article 83(2) TFEU may also provide a solution worth considering, but first a relevant Union policy should be identified in an area which has been subject to harmonisation measures.

On the other hand, establishing a clear legal basis for EU legislative competence over asset confiscation might put into question the existence of a sufficient basis for previous legal acts issued in this area. The competence basis problem could then be (at least partly) removed by creating an autonomous concept of a "sanction" (or "penalty" in some language versions of Art. 83 TFEU) in EU law, understood as any reaction to criminal offences regulated by criminal laws of the EU Member States (further extension would be inconsistent with the framework of Art. 83 TFEU; cf. CJEU judgement of 28 October 2021, C-319/19, paras. 32–41), the harmonisation of which may contribute to smooth cross-border cooperation of national authorities within the area of freedom, security and justice. Whether it is still consistent with the scope of powers conferred by the Member States to the EU authorities in the Lisbon Treaty remains an open question. Another option applied by the EU authorities based on Art. 82(1) TFEU is a side-door solution, where the harmonisation of confiscation regimes is a result of the need to adapt national legal systems to effectively apply the EU cooperative regulation (2018/1085) in the same field. This choice, however, was perceived as an exceptional one-time solution even by the EU authorities themselves.

Nevertheless, finding a proper basis for competence would not solve all the problems with the EU legislation on confiscation. Another relevant aspect is the "effectiveness" of a chosen solution at combating serious acquisitive crime with a cross-border dimension, for which neither a clear, solid concept of how the harmonised confiscation law should discourage offenders from committing crimes nor reliable data to justify EU legislation on the matter can be established. It may even be problematic to clarify whether the reason for alleged deficiencies in criminal justice are the shortcomings of existing legal provisions on confiscation or

problems with their practical application, which seems to be a basic step before any legislative activity is to be undertaken, particularly at the EU level. This problem could be solved by modifying the concept of "effectiveness" in the framework of EU legislation and perceiving it as a "symbolic effectiveness" expressed through a smooth approximation of the criminal law regimes of the EU Member States, where a joint response to certain problem is expected (here, cross-border crime). However, any modification of the EU legal terms should be made carefully, so as not to make a verbal manipulation for the sole sake of justifying another harmonisation at the EU level, where solid evidence is lacking.

The main concept underlying this paper is not to criticise EU activity on asset confiscation, but to emphasise that if the EU expects the Member States to act in accordance with the best legislative practices, it should give them a good example of how to proceed. Several questionable bases for competency over EU confiscation legislation are not better than one solid, substantive one. The need to support asset recovery is understandable, but it should not become a justification for circumventing the conferral of powers in the Treaties or other legislative principles. Even the best concepts of effective instruments of asset recovery and management must still be subject to the common rules of good legislation. Otherwise, exceptions will be created, which in the long run can supersede or replace legal principles guaranteeing respect for fundamental freedoms and can transform the system of legal protection into a tool of oppression.

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Criminal policy and sanctions in the 2020s and onwards: Determinants of penal culture in Finland during the last 150 years

Polityka karna i sankcje karne od lat 20. XXI wieku. Determinanty kultury penalnej w Finlandii w ostatnich 150 latach

Abstract: This article provides a fragmentary overview of the developments of criminal law and criminal policy in Finland during the last 150 years. It reflects the author's experiences as a criminal scientist and an expert in drafting criminal legislation over 50 years. This review uses the conclusions from Cesare Beccaria's classic, centuries-old book as its starting point: a punishment may not be an act of violence, but should be public, immediate, necessary, as minimal as the case allows, proportional to the crime, and determined by law.

The Finnish Penal Code of 1889 was originally thoroughly permeated by both the principles and the spirit of the classical school of penal law, wherein punishment was primarily regarded as retribution for an offence and the penal system was therefore tolerably harmonious with the demands of general deterrence. More weight was given to individual prevention when the Code was first drafted. Later on, the influence of the sociological school of penal law, which focused on the offender and individualized criminal sanctions, led to partial reforms of the penal system, such as the enactment of the Conditional Sentences Act of 1918, the Dangerous Recidivists Act of 1932, and the Young Offenders Act of 1940. The day fine system of 1921 and the fluctuations in the ideology regarding indeterminate penal sanctions are analyzed.

The total reform of the Penal Code between 1972 and 2003 aimed to create a more rational penal system – one designed for efficient, just, and humane criminal justice. An ambitious attempt was made in as uniform and systematic a way as possible to assess the goals, interests, and values that the new Criminal Code should promote and protect. The existence of the criminal justice system was justified on utilitarian grounds. The structure and operation of a penal system, however, cannot be founded solely on the basis of utility; the criteria of justice and humaneness must also be applied. The penal system must be rational in regard to both its goals (utility) and its values (justice and humaneness).

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The developments since the 1990s have been characterized by the influence of human rights and basic rights on both criminal and procedural law, as well as by the effects of internationalizing and Europeanizing the criminal justice system. The latter tendencies have resulted in the diversification of criminal law.

Keywords: criminal policy, criminal sanctions, criminal sciences, penal culture, comparative law, the ideology of punishment, Finnish criminal law, European criminal law and policy

Abstrakt: Artykuł ten stanowi fragmentaryczny przegląd rozwoju polityki karnej i prawa karnego w Finlandii w ostatnich 150 latach. Odzwierciedla on doświadczenia Autora jako kryminologa i eksperta w tworzeniu prawa karnego przez ponad 50 lat. Punktem wyjścia tego przeglądu są wnioski z klasycznej, mającej już wielowiekową tradycję, książki Cesare Beccarii: kara nie może być aktem przemocy, powinna być publiczna, natychmiastowa, niezbędna, tak niska, jak tylko pozwala na to dana sprawa, proporcjonalna względem popełnionego czynu i określona w prawie.

Fiński Kodeks karny z 1889 roku pierwotnie przesiąknięty był zarówno zasadami, jak i duchem klasycznej szkoły prawa karnego, w której kara była postrzegana tylko jako odpłata za przestępstwo, a tym samym system karny co do zasady wypełniał oczekiwania w zakresie ogólnego odstraszania. W pierwszej wersji Kodeksu więcej uwagi poświęcono prewencji indywidualnej. Później, pod wpływem socjologicznej szkoły prawa karnego, która skupiała się na sprawcy i na zindywidualizowanych sankcjach karnych, doszło do częściowej zmiany systemu karnego, m.in. przez uchwalenie Prawa o karach warunkowych w 1918 roku, Prawa o niebezpiecznych recydywistach w 1932 roku i Prawa o młodocianych sprawcach przestępstw w 1940 roku. W szczególności przedmiotem analizy są system kar dziennych z 1921 roku i zmiany w ideologii dotyczącej nieokreślonych sankcji karnych.

Generalna reforma Kodeksu karnego przeprowadzona w latach 1972–2003 miała na celu stworzenie bardziej racjonalnego system karania – takiego, który będzie służył skutecznemu, właściwemu i humanitarnemu wymiarowi sprawiedliwości. W artykule dokonano ambitnej próby podsumowania, w sposób możliwie jednolity i systematyczny, celów, interesów i wartości, które nowy Kodeks karny ma promować i których ma chronić. Funkcjonowanie wymiaru sprawiedliwości w sprawach karnych jest uzasadniane na gruncie utylitarnym. Struktura i działanie systemu karnego nie może jednak opierać się wyłącznie na użyteczności; kryteria sprawiedliwości i humanitaryzmu muszą być również stosowane. System karny musi być racjonalny w odniesieniu zarówno do jego celów (użyteczności), jak i jego wartości (sprawiedliwość i człowieczeństwo).

Zmiany od lat 90. XX wieku charakteryzują się wpływem praw człowieka i praw podstawowych na prawo zarówno karne, jak i proceduralne, jak również skutkami umiędzynarodowienia i europeizacji systemu sprawiedliwości w sprawach karnych. Te ostatnie zmiany przyczyniły się do dywersyfikacji prawa karnego.

Słowa kluczowe: polityka karna, sankcje karne, nauki o przestępczości, kultura penalna, prawo porównawcze, ideologia karania, fińskie prawo karne, europejskie prawo karne, europejska polityka karna

Introduction

In this article, I present an overview of the development of criminal policy and sanctions in Finland by tracing the legal ideological orientations that have influenced them during the last 150 years. I highlight my review above all with my own experiences as a researcher in criminal science and an expert who has participated in law drafting (Lahti 2019; Lahti 2021c). Although attention is mainly paid to the

development of Finnish criminal law, there is reason to point out that the ideologies in the background of tradition have followed international trends. I posit that the attachment of Finnish criminal law to international, and especially European, developments has become stronger in recent decades. At the beginning of this overview, I assess the significance of Cesare Beccaria's classic work, "Dei delitti e delle pene" (Beccaria 1977; 1995; 1998), from over 250 years ago. I conclude my presentation with a prognosis of the criminal justice system in the 2020s and onwards.

The person who most influenced my criminal justice thinking is my teacher, Inkeri Anttila, who passed away in 2013 (Anttila 2001a; Lahti 2013). The stimuli for research work she produced can be expressed with the key concepts of multi-disciplinarity, internationalism, and the reciprocity between theory and practice. Of these concepts, multi-disciplinarity for me has meant encompassing a broad understanding of criminal justice or criminology, whereby legal research should be combined with elements and viewpoints from empirical social science and political research. Consequently, criminal law teaching and research should also be connected to other criminal sciences, i.e., criminology and criminal policy. Multi-disciplinarity can also emerge by crossing boundaries between legal areas. For myself, medical law and biolaw – for which I was responsible as a part-time teacher between 1997 and 2011 – has meant an enriching perspective on the legal system.

For me, internationalism has meant participating in congresses of scientific organizations and other events within my own scientific fields, cross-border contact with other researchers, and research collaboration. It has also meant that the legal sources and influences that are taken into account in the research have been internationalized as well as participating in creating norms and standards that are significant for international criminal policy in various arrangements of the United Nations.

For me, the interplay between theory and practice has been realized through my participation as an expert in law drafting from 1967 onwards, most notably in the management group for a criminal law project that completely revised criminal law, under the Ministry of Justice during its entire period of operation (1980–1999). As criminal law is rarely revised completely – perhaps once a century – it was a unique vantage point for a scholar of criminal law to participate in it.

1. About Cesare Beccaria's "On Crime and Punishments" (1764) and the influence of the work

Cesare Beccaria's book "On Crime and Punishments" has been considered one of the most significant works of the Enlightenment, which is rooted in utilitarian philosophy, as it was written in the spirit of equality, freedom, and tolerance. Beccaria opposed the death penalty and other cruel punishments. The work was quickly translated into the major European languages and many of Europe's rulers began to reform their countries' criminal law systems under its influence.

The Swedish translation (1770) was among the first translations of Beccaria's work (Finland was a part of Sweden until 1809). It inspired Sweden's regent, Gustav III, to introduce his measures to soften the penal system and abolish torture. Beccaria's contemporary, Matthias Calonius – characterized as the father of Finnish criminal sciences – recommended the work, although he noted that it went too far in its humane philosophy (Wahlberg 2003: 48).

Enlightenment philosophy (Strömholm 1979: 661; Anttila 2001b; Ferrajoli 2014) influenced criminal justice thinking, particularly in terms of the rationalism that the Enlightenment emphasized, with the humanization of the criminal justice system becoming secondary in comparison. It is interesting to compare the concepts of rationalism and humanism, which are characteristic of the Enlightenment, with the demands for a rational and humane criminal policy that were highlighted in our country two centuries later. I return to the demands of recent decades below. Here I quote a statement from the conclusions of Beccaria's work, because it still has a message that is very viable: "In order that punishment should not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime and determined by the law" (Beccaria 1995: 113).

2. The ideology of punishment in the 1889 Penal Code and its later amendments

During the Lantdag of 1863–1864, the foundations of the new penal code were approved for subsequent preparation, which lasted for a quarter of a century. The Imperial bill on these grounds included a detailed proposal for penalties to be introduced and discontinued by the new law. From today's perspective, the most important result of the bill was thus a progressive statement of the program for a comprehensive audit of the criminal penal system. This bill, the main features of which received the approval of the Estates, contained proposals for the abolition of the death penalty as well as the abandonment of the use of both corporal and shameful punishment and exile. The basic structure of the penal system would consist of "penitentiary" imprisonment (with hard labor), confinement to special short-term custody ("arrest"), and fines. The enforcement of custodial sentences would follow the principle of treating prisoners progressively, with parole being part of such a progressive system (Lahti 1977: 122–127).

In the report of the Legal Affairs Committee of the Assembly of the Representatives of the Estates from the year 1867, there is a statement of principle that is still worth considering "The history of criminal law teaches that the means of punishment in an advancing civilization seek a milder form and that the progress of general culture is accompanied by a uniform progression in the perception of the means for the realization of those demands" (Lagutskottets betänkande 1867: 508–509).

It is interesting to compare this statement with, for example, Tapio Lappi-Seppälä's recent research: fundamentally, the Nordic criminal policy and thus its relatively low level of repression (and, for example, the fairly low number of prisoners) are explained by the social and cultural characteristics typical of the welfare state, which create the conditions for citizens' trust and perceived legitimacy toward the activities of the authorities and the judiciary (Lappi-Seppälä 2012).

When one assesses the goals that were subsequently set for the penal system in the 1889 Penal Code, one notices that the penal system was not only supposed to fulfill the requirements of justice in line with the idea of retribution, that the punishment should be proportionate to the deed, but that the system should also entail a quest for deterrence, implying a general preventive action, and for improvement characteristic of a special preventive action. They also wanted to make the penal system more humane than before.

In the 1889 Penal Code, driven by the father of the law, Jaakko Forsman, the idea of retribution in the so-called classical school of criminal law was retained as the primary basis of assessment for the penal system. However, the goal of improving the offender was also expressed, above all in the way of enforcing custodial sentences. The death penalty and loss of civic trust were retained in the penal system, contrary to the program declaration of the 1863–1864 Lantdag; they were finally abolished as forms of punishment in the late 1960s and early 1970s. Admittedly, the last peacetime death penalty was carried out in 1825.

In the decades that followed the entry into force of the 1889 penal legislation, criminal law thinking changed under the influence of the so-called sociological (modern) school. Allan Serlachius, who on behalf of the Ministry of Justice wrote the Criminal Code bill in 1920, was a firm supporter of the school. From the beginning of the 1910s, changes were made to the penal system, according to which the character of the convicted person and special preventive purposes (being reintegrated into society or rendered harmless, i.e., isolating dangerous offenders) were to be taken into account more than before when choosing the type of punishment (Lahti 1977: 127–143).

Typical examples of how this way of thinking is reflected are the law revisions regarding suspended sentences (1918), preventive detention in penal institutions (1932, 1953) (Lahti 2021b), recidivism (1939), and young offenders (1940). An internationally noted reform propelled by the demand for justice was the introduction of the day fine system in 1921, which takes into account the financial status of those to be punished (Lahti 2021a).

3. The idea behind the total revision of the penal legislation between 1972 and 2003: Toward a rational and humane criminal policy

In the late 1960s, Professor Inkeri Anttila published in Swedish a seminal lecture on a conservative and radical criminal policy in the Nordic region. She analyzed trends in criminal policy, highlighted criminology's latest research findings and developed a future criminal policy based on them (Anttila 1971). The text reflected the general intellectual atmosphere of the 1960s, where the prevailing criminal and more comprehensive control policy became subject to re-evaluation; the need for change in criminal policy and criminal law derived from changes in society and criminological research. As a result of the new way of thinking, the different subfields of research in criminal law and crime are perceived to be in an important interaction with each other. Legal and social science research should be extensively used in rational criminal policy decision-making and the results of other scientific fields (medicine, humanities, and the natural sciences) are having a growing impact on legal decision-making.

In Finland, starting in the 1960s, planning systems for the economy and public administration began to be created as well as for using research in social policy decision-making in general. This was evidenced by the fact that a cost-benefit-conscious way of thinking and a diverse selection of means were included in several criminal policy preparatory documents, such as the revision of the regulations on drunk driving in 1975. The legal changes that were implemented concerned improving the conditions for traffic monitoring, expanding and clarifying the area of criminality, and making conditional sentences and fines more useful alternatives to unconditional prison sentences. In addition, the regulations regarding drunk driving were unified and placed in the penal code with the aim of increasing the reprehensibility of the behavior (Lahti 1977: 143–155).

By making corresponding use of criminology, the Criminal Law Committee, which operated in the period 1972–1976, closely linked criminal policy with other social policies and argued for a narrow criminal justice system in comparison with other means of prevention and control. The committee continued to emphasize the general preventive effect of the penal system (promoting general law-abiding behavior), but rejected its one-sided connection with the severity of punishment (Komiteanmietintö 1976: 72). With similar justifications, the Government's bill for the first stage of the total revision of the Penal Code recommended that prison sentences be used in only the most necessary cases and argued that in light of criminological research it was not justified to expect a small, gradual reduction in punishment to weaken the general preventive effect of the punishment (Hallituksen esitys 1988: 17–19, 23).

From all the different mechanisms through which the general preventive effect of punishment should be reached, deterrence is not the most important; it is socio-ethical disapproval which affects the sense of morality and justice – general prevention instead of general deterrence – without the need for a severe penal system. The legitimacy of the whole criminal justice system is an important

aim, and therefore such principles of justice as equality and proportionality are central. The emphasis on the non-utilitarian goals of the criminal justice system – fairness and humaneness – must be reconciled with the lessening of its repressive features (punitiveness), for example, through the introduction of alternatives to imprisonment. The significance of individual prevention or incapacitation in the neo-classical penal thinking is regarded as very limited (Lahti 2017).

The impact of criminology and other research data on the making of laws must be assessed differently. Such an impact can be easily demonstrated when the legislative documents are directly based on the results of empirical criminological research. A more indirect influence on the preparation of criminal legislation is more common, whereby research data changes thinking on criminal policy. In that case, the important factors are how much up-to-date research data is available, to what extent researchers participate in the legislative process, and whether the use of research data is secured in this process in some other way. In the total revision of the criminal legislation that was done between 1990 and 2003, the conditions for utilizing research were generally good, apart from the domestic basic research regarding the theoretical foundations of criminal law being strengthened too late for the revision.

All in all, since the end of the 1960s there has been a major break in criminal policy thinking, as a result of which the value-based objectives pursued by criminal policy and the decision-making criteria set for it have been redefined, albeit with concepts that were already familiar from Enlightenment philosophy: toward a rational and humane criminal policy. According to one contemporary interpretation, rationality implies an awareness of impact, value, and alternatives (Anttila, Törnudd 1973; 2001). Reducing crime is not the only objective; the aim is rather to reduce the damage caused by crime and its control and to distribute it fairly between different parties (such as the public authority and individuals). With the criminal justice system, utility (efficiency), justice, and humanity are pursued, whereby the demands for justice and humanity are concretized by fundamental and human rights (Lahti 2021c: 3, 35).

Differentiation of the values and objectives that define criminal policy and diversification of the principles and interests that must be taken into account when choosing means have also affected the expectations placed on research that must be used in legislative work. It is understandable that under the current financial situation of the state, it is assumed that costs and other consequences are taken into account more seriously and systematically than before.[1] When criminal policy measures are evaluated, even more weight than before should be placed on alternative approaches in which preventive measures and other types of punishment take precedence over criminal law. For the prevention of crime in business activities, various models are increasingly sought that emphasize corporate self-regulation.

[1] See, e.g., the official positions on crime policy and the criminal justice system in the Ministry of Justice's Outlook 2014. *Oikeudenmukainen, avoin ja luottamukselle rakentuva yhteiskunta* [A fair, open and trusting society]. Ministry of Justice publications.

4. Research data and choice of values: Recent legislative examples

Expanding research data and exploiting the models these data offer so as to exercise criminal policy and criminal law on rational grounds does not exclude basing the final choices of values on an examination that is compatible with democratic political decision-making. In addition to empirical research results, research at best highlights legal and moral-based criteria for evaluations that influence decision-making and yardsticks to combine or balance such criteria. It can also be used to analyze various trade-off options to achieve the values and objectives that have been set and to make impact assessments.

Two recent examples of reforming the criminal punishment system can be mentioned, in which the use of empirical research data has been central, but where the justification has ultimately been a result of legal ideological or social political choices of values: The importance of assessments of danger when executing long-term prisoners' sentences has increased (most recently through legislative amendments in the 2010s) and there are still plans to expand them (Lahti 2021b: 210–215). The assessment of whether these changes to the law are justified is significantly influenced by how reliable such assessments of the danger posed by prisoners are in light of research data (Kampen, Young 2014). But even more important is how such individualization of criminal penalties that strive for "de-harming" society is emphasized, as the legal principles of equality, proportionality, and predictability that are applied in the prisoner's favor act as a counterweight.

My second example concerns the amendment to the law on the supervised freedom of prisoners on probation (Statutes Nos. 629–630/2013). In the law, it was established as a possible condition for supervised freedom on probation and the conditional release of life prisoners that they consent to drug treatment that suppresses sex drive. When I was heard in the Parliament about the Government bill (Hallituksen esitys 2012), I considered that its justification presupposes that the consent is based on the prisoner's firm belief that such drug treatment is estimated on good grounds to prevent the prisoner from committing a new serious sexual crime and that this objective is not possible to achieve with care or support measures that interfere less with the prisoner's integrity. By way of comparison, I had the experience of working on the abolition of forced castration for sex offenders (1970) as the secretary of the committee (Komiteanmietintö 1968), the rationale being – apart from the inhumanity of such a coercive measure – that, according to research, forced castration did not have the effects that were sought for it.

The importance of the choice of values was particularly accentuated during the total revision of the penal legislation (1972–2003). After all, it emphasized the re-evaluation of criminalization (the values and interests that are protected by penal provisions) and the threats of punishment that would be made. The content of the criminal law was to be adjusted in accordance with the current legal consciousness and this issue was considered to be part of a social justice problem. Even the Parliament's committees had to take a position on these questions about

the choice of values in their reports and statements. In its report from 1990, the Legal Affairs Committee pointed out that regulatory needs that societal changes provoke from time to time must be considered, and that only a comprehensive reform provides the opportunity for a sufficiently comprehensive and consistent reassessment. On the other hand, the Legal Affairs Committee set the goal that the penal code should be able to fulfill its task for even decades with a reasonable number of minor changes. Particularly with regard to provisions on economic crime, this objective has not been possible to achieve (Lakivaliokunnan mietintö 1990).

In the aforementioned report of the Legal Affairs Committee, I draw attention to two points. Firstly, the Committee confirmed the Government's idea that the sentences imposed for crimes against property are on average unjustifiably severe compared to some sentences imposed for crimes against life and health. Secondly, it was important to the Legal Affairs Committee that in the last stage of the total revision of the penal legislation in the entire new penal code, the changes that are possibly needed – due to both the penalty scales established in the different stages of the revision and the final solutions regarding the general part of the penal code – are made.

The Government has not prepared such a bill, although this would be required to complete the total revision of the Criminal Code. Such a bill would also be necessary to correct the fact that our penal code, which has been 99 percent renewed since its establishment, would no longer be known as the Code of 1889, but that the Statute Book of Finland would list it as the Criminal Code from this century.[2] Accordingly, we should have a formally new Criminal Code in our Statute Book by the 2030s at the latest (Matikkala 2007).

5. Criminal law's constitutionalization, Europeanization, and internationalization

The changes that have taken place in the development of law since the 1990s – the constitutionalization of criminal law, Europeanization, and internationalization – have placed new demands on criminal policy legislation, on the application of the law and on research that supports it. The basis for the constitutionalization and Europeanization of criminal law is Finland joining the Council of Europe and signing its human rights convention (1990), Finland's fundamental rights reform (1995), and Finland joining the European Union (1995). The strengthening of the EU's Charter of Fundamental Rights and the expansion of the EU's criminal justice competence with the Treaty of Lisbon (2009) have created further challenges for Finnish legal culture.

[2] According to my calculations in 2014, only Article 4 of the Criminal Code, which now consists of 53 chapters, approximately 650 sections, is in force in their original form (PC 2: 6, 18; PC 18: 2–3) – and the first two of them entail provisions of a technical nature.

In terms of the internationalization of criminal law, it has been significant that criminalization based on international treaties (that is, so-called transnational crimes) has increased and that international criminal courts dealing with the core crimes of international criminal law have been founded. In the latter respect, the ad hoc tribunals established by the UN Security Council in the early 1990s to deal with the serious violations of humanitarian law committed in former Yugoslavia and Rwanda are among the most important, as well as the Rome Statute of the International Criminal Court, which was approved in 1998 and entered into force in 2002.

The aforementioned developments have also changed the scope of criminal law in such a way that substantive criminal law and criminal procedural law have a closer mutual relationship than before. In its own way, it is also a question of the scope of expanding criminal law, as punitive administrative sanctions must be assessed by the same principles of fair trial as actual criminal sanctions (Lahti 2022). Furthermore, the importance of comparing criminal law increases because European and international criminal law both interact with national legal systems. In addition, it is important to understand the characteristic features of foreign legal systems in order to realize international forms of cooperation in criminal cases and to assess the need to approximate criminal legislation.

This development has meant that the field of legal sources has been significantly expanded and the methods of interpreting and balancing used in the application of law have become more versatile than before. At the same time, the general doctrines of criminal law and the uniformity of the system which the doctrines form have been put to the test by this diversity (pluralism) of the law. The previous internal consistency (coherence) in the criminal justice system cannot be achieved; instead, criminal law is differentiated (fragmented) and when it is applied, the observance of the business environment (contextuality) is emphasized (Lahti 2012: 376).

In practice, the constitutionalization of criminal law means, for example, that the constitutional limitations on criminalization are assessed based on principles designed by the Constitutional Committee of the Parliament, such as the requirement of the principle of legality that criminal provisions must be clearly defined and determined (Melander 2008).

In practice, the Europeanization of criminal law means, among other things, that the direct applicability, direct effect, and interpretation effect of EU laws, as well as the importance of the principle of proportionality, are considered in criminal cases connected to EU law (Lahti 2020). It is possible that the Parliament may consider the application of the so-called emergency braking procedure on the grounds that a proposed directive would affect fundamental aspects of Finland's legal system (OJ C 115: Art. 82 § 3).

Problems caused by the internationalization of criminal law in practice include how to insert a regulatory obligation that according to international law must be enforced nationally into the Finnish Criminal Code without violating its internal rationality. Examples of this are the criminalization obligations set out in conventions on the prevention of terrorism (Lohse 2012), as a result of which Finland

decided to uniformly assess the scope and limits of such "proactive criminal law"[3]. There is also a growing debate on the trends toward transnational criminal law (Bolster, Gless, Jessberger 2021) and toward law and globalization (Husa 2018) and on the content of these increasingly used concepts. Transnational criminal law in the broader sense covers international criminal law *in stricto sensu*, and so the crimes under international law (core crimes) are topical since the establishment of the International Criminal Court (ICC) and the aggressive war of Russia against Ukraine. Jaakko Husa writes that "[b]ecause of globalisation, the need for a non-nation-state-bound understanding of overlapping legal sources is constantly growing and the necessity for knowledge of how to deal with polycentrism and pluralism of laws has grown intensely" (Husa 2018). A move from transnational criminal law to global criminal law is desirable according to Kimmo Nuotio, because such a trend could lead to a broader setting of law and development studies and of sustainable development (Nuotio 2023: 474).

6. Criminal policy and criminal sciences in the 2020s and onwards

It has traditionally been considered that criminal law, as a morally charged area of law, changes at a slower pace than other areas of law. In accordance with the Parliament's Legal Affairs Committee report described above, "[criminal law] should reflect the views prevailing in society about acceptable and reprehensible behavior" (Lakivaliokunnan mietintö 1990). This statement seems to express conflicting objectives: on the one hand, a certain continuity is recognized in assessing the harmfulness and reprehensibility of the acts; on the other hand, there is an awareness that criminal legislation should be able to express changes in the reprehensibility of acts harmful to society or individuals more quickly than before. In the future, it can be assumed that the international and European regulatory obligations will continue to grow and increase proportionally to the changes in the criminal legislation.

It is desirable that as much as possible of the system's thinking and the internal rationality that the carefully selected wording of the Criminal Code includes should be maintained when the impending total revision of the Finnish Penal Code is completed – and in case of later changes. Criminal legislation should be developed as part of a systematic criminal policy and in the long term. The basis for the final selection of values should consist of careful analysis of legal grounds, impact analyses, and other research data. Unjustified tightening of the criminal justice system should be countered with arguments presented by research, which concern, among other things, the relative ineffectiveness of prison sentences, the importance of societal and circumstantial factors as background factors to crime,

[3] By Statute No. 435/2013, new criminalizations, in which preparatory acts were defined punishable, were introduced into the Penal Code (Crominal Code 21: 6a, 25: 4a, 31: 2a).

and the highly selective nature of the criminal justice system – as Inkeri Anttila highlighted in the text that became her last (Anttila 2011).

That the criminal justice system, which is in a fixed relationship with state sovereignty, has been partially moved and continues to be moved beyond the reach of the nation-states' direct decision-making is a challenge for transnational criminal law and criminal policy research and discussion, as well as for the deliberation on fundamental and human rights. The continuous task of criminal justice research is to strengthen the theoretical basis in order to be able to take into account the rational and humane criminal policy characteristics of Finland and other Nordic countries, human and fundamental rights, and the Europeanization and internationalization of law. This presupposes that legal principles and interests, which are partly contradictory or in a tense relationship with each other, are weighed and balanced (Lahti 2012: 375–377; Lahti 2020: 10–13).

The need for research becomes greater because the planning of the EU's criminal policy is strengthened, and along with it grows the need to create grounds for approximating the general part of criminal law in EU Member States through legal comparative research. The importance of the studies on comparative criminology and criminal justice should not be forgotten. For instance, empirical studies should increasingly be planned in research groups so that they can be repeated in various countries in order to strengthen their verification value and applicability in decision-making. We need more evidence-based criminological research to be utilized in criminal-policy planning and as a foundation for rational criminal policy. This is particularly true in relation to the decision-making and actors within the EU, where criminal policy has not so far been based on coherent conceptions or by utilizing relevant criminological research. In Europe, such works as the "Corpus Juris" proposal and its implementation (Delmas-Marty 1997; Delmas-Marty, Vervaele 2000–2001), "Economic Criminal Law in the European Union" (Tiedemann 2002), "A Programme for European Criminal Justice" (Schünemann 2006), and "A Manifesto on European Criminal Policy" (Asp et al. 2009) are significant.

International criminal law is a particularly significant subfield in research on the diversity and differentiation of law, as it combines different areas of law (international law, humanitarian law, human rights jurisprudence, and national criminal and criminal procedural law) as well as different enforcement models (supranational, national, and mixed criminal law systems) (van den Herik, Stahn 2012).

The criminal law researchers in Finland and in other Nordic countries should strive to actively influence the international discussion and decision-making (the creation of norms and standards) based on the value premises of our country and other like-minded people. These include – in addition to the values of democracy, human rights, and the rule of law – the demands for legitimacy and relatively low repression and humanity. Examples of such activities are the work of the European Criminal Policy Institute (HEUNI), which works in affiliation with the United Nations (Redo 2012).

Such values that Finnish – and more generally, Nordic – criminal policy represents and their successes have received positive attention in the international discourse (Pratt, Eriksson 2012; Christensen, Lohne, Hörnqvist 2022) and have therefore been an innovative export product. From my own area of influence, I also refer to the International Criminal Law Association (AIDP), founded in 1924, which works to develop norms and standards in the field. The two latest uniting topics for international conferences should be mentioned: "Criminal justice and corporate business" (2016–2019) and "Artificial intelligence and criminal justice" (2021–2024) (de la Cuesta, Blanco Cordero, Odriozola Gurrutxaga 2020).

Conclusions

I finish with the following conclusions as an outlook. A fair balancing between the effective enforcement and a solid protection of fundamental rights should be sought. The focus should be directed to the needs of citizens, treating criminal law as a last resort (*ultima ratio*) and encompassing, at the level of the EU, the principles of subsidiarity and proportionality. We should strive toward a more comprehensive control policy perspective, including penal administrative sanctions and the dimensions of national, international, and transnational relations. We need more theoretical discussion about the pluralism in criminal and other types of punitive law. Theories on the constitutional and other limits of criminalization and punishment should take into account trans-border crime and transnational enforcement. There should be more interaction between the states and inter-/supranational organs. The increased internationalization and regionalization (Europeanization) of criminal law should be based on widely acceptable (legitimate) and rational criteria. Criminal scientists in Finland and the rest of Scandinavia ought to strive more actively to influence both European (the EU's) and global criminal policy toward the "Nordic model", which emphasizes crime prevention, applies specific criteria of rationality – such as legitimacy and humaneness – and plays down repression in criminal sanctions in favor of more restitutive and responsive sanctions.

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The translation of humanity into prison design: How do the new, standardised "Model 2015" prison buildings meet normative demands in Norwegian crime policy?

Przełożenie zasad humanitaryzmu na projektowanie więzień. Jak nowe, wystandaryzowane zgodnie z „Modelem 2015", budynki więzienne spełniają normatywne wymogi norweskiej polityki karnej?

Abstract: Prison architecture reflects the ideas and values of a penal policy, providing insights into punishment philosophies. In Norway, normalisation, resettlement and dynamic security norms have shaped correctional care. Based on a mixed method study, this article examines how these norms are translated into "Model 2015" prisons. Despite spaces for positive prisoner relationships, the design faces challenges in escaping pervasive systems of control and discipline. Architectural boundaries obstruct dynamic security and impede the staff's involvement in resettlement. Inadequate facilities for prisoner progression and daytime activities further undermines these processes. While some architectural and technological initiatives aimed at normalising prison life have proved successful, they tend to normalise not only the prison environment, but also the prisoners. The study demonstrates architecture's critical role in realising humane prison conditions and emphasises the need for humane design.

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Keywords: prison architecture, quality of prison life, normalisation, resettlement, dynamic security, humanity, mixed methods

Abstrakt: Architektura więzienna odzwierciedla idee i wartości polityki karnej, dostarczając wglądu w filozofie kary. W Norwegii normy normalizacji, resocjalizacji i dynamicznego bezpieczeństwa kształtują opiekę karną. Niniejszy artykuł opiera się na metodologii mieszanej i zawiera analizę, jak wspomniane normy, są przekładane na więzienia typu „Model 2015". Pomimo przestrzeni sprzyjających pozytywnym relacjom między więźniami, model nie pozwala uniknąć wszechobecnych systemów kontroli i dyscypliny. Ograniczenia architektoniczne utrudniają praktykę dynamicznego bezpieczeństwa oraz zaangażowanie personelu w procesy resocjalizacji. Niewłaściwe warunki dla postępu więźniów i aktywności dziennej dodatkowo osłabiają te procesy. Niektóre architektoniczne i technologiczne inicjatywy mające na celu normalizację życia więziennego okazały się skuteczne, przy czym normalizują one nie tylko środowisko więzienne, ale także samych więźniów. Artykuł ukazuje kluczową rolę architektury w zapewnieniu humanitarnych warunków więziennych.

Słowa kluczowe: architektura więzienia, jakość życia w więzieniu, normalizacja, resocjalizacja, bezpieczeństwo dynamiczne, humanitarność, metody mieszane

Introduction

Over the span of five years, from 2016 to 2020, Norway witnessed a substantial growth in high-security prison bed capacity. This notable increase may be attributed to 1) the need to replace old prisons where the maintenance of the buildings had been neglected for years and 2) efforts to get rid of the "prison queue", i.e., the waiting list to enter a prison and serve one's prison sentence (Meld. St. 12 2014–2015). A standardised design of what is known as "rapidly built prisons" (Jewkes 2018) was developed by the initiative of the Conservative–Progress Party coalition governments (2013–2017 and 2017–2021). The position of Minister of Justice was held by members of the Progress Party (the most conservative and populistic political party in Norway) during most of the government's rule, and one of their election promises was to get rid of the "prison queue". While the prison queue has been presented as a symbol of a humane criminal policy, because people have time to plan their lives before going to prison and because prisons are never overcrowded (e.g. Pratt 2008a; 2008b; 2022; cf. Laursen, Mjåland, Crewe 2020), the Progress Party wanted to get rid of the queue as a part of their politics of "getting tough on crime" (Todd-Kvam 2019).

The standardised prison design, finalised in 2015 and known as "Model 2015" (M2015), comprises 96 beds. Over the course of a five-year period, five M2015 blocks were built to house adult men. The model features a four-pointed star-shaped block with three floors separated from each other, both at the wings and in the central component of the building. The wings are divided into eight units of 12 cells on the first and second floor. Workshops and the school are located on the ground floor. The design yields several benefits, according to the guideline for

implementing it, such as increased efficiency in the planning and construction of prisons, leading to cost and time savings. Moreover, it would enhance the cost-effectiveness of prison operations and create well-functioning prisons that maintain high quality at a low cost (Agder Fengsel n.d.). Notably, the building processes based on this design have consistently proved to be both cheaper and faster than initial estimates (see e.g., Oslo Economics 2023).

Architecturally, the M2015 may be interpreted as a "typical repressive, old[-fashioned] prison" (Moran, Jewkes 2014: 351), embodying the principle of "form follows function" (Möystad 2018: 44). The design of the M2015 has faced criticism from Norwegian scholars, with Yngve Hammerlin (2021) arguing that the emphasis has been placed more on austerity, cost efficiency and predictable planning and engineering processes, rather than prioritising the well-being and experiences of prisoners. According to Inger Marie Fridhov and Linda Grøning (2018: 284),

> In model 2015 profoundly ideological considerations seems to be, in a large extent, absent. Except for security considerations, it is difficult to find deeper reflections about how a prison should be constructed in order to satisfy legal requirements regarding rehabilitation and satisfactory conditions for the inmates. It seems unclear how these important principles should be realized architecturally.

Hedda Giertsen (2021: 164) follows up this critique writing: "for the first time since 1850, ideas on prison policy are absent in public documents, while the building and operations of prisons are presented as the main objectives".

Despite the criticism of M2015 for its lack of penal ideology and emphasis on cost efficiency and streamlined construction and operation, the Norwegian crime policy continues to prioritise humane prison conditions, guided by norms such as normalisation, resettlement and dynamic security (Meld. St. 12 2014–2015; cf. St.meld.nr 37 2007–2008).[1] Norwegian prison conditions are considered as exceptionally humane, especially in comparison with Anglo-American prisons (Pratt 2008a; 2008b; 2022; Pratt, Eriksson 2013), but this has been disputed – especially by Nordic scholars (e.g. Barker 2012; Ugelvik, Dullum 2012; Shammas 2014; Smith, Ugelvik 2017; Crewe et al. 2023). Even if the prison conditions described in this article can be understood as exceptional compared with those in other countries, we will follow the Nordic tradition of critical penological research.

The article presents a study on how the concept of humanity translates into the physical design of the M2015 prisons. The study was inspired by Ferdinando Terranova (2018: 288), who uses the concept of "designers' ethics", writing that "the task of architects is to translate concepts such as humanisation, dignity and solidarity into the architectural project; to find how to transfer the principles of European constitutions into the physical structures where sentences are meant to be served". Through a mixed-methods approach, we have empirically studied the prisoners' quality of life in three prisons built according to the M2015 design

[1] These norms also constitute central aspects of soft law, such as the European Prison Rules and the Mandela Rules.

– Eidsberg, Mandal and Froland[2] – investigating the influence of architecture and design on prison life.[3] This article explores how the M2015 aligns with the norms of normalisation, resettlement and dynamic security.

The article is structured as follows. First, we give a brief introduction to theory and the ideology of prison architecture throughout history in Norway. Then, we give a description of the M2015 prisons. Thereafter, we present our methodological approach, before presenting and analysing the data. Finally, we discuss the findings in the context of normalisation, resettlement and dynamic security, and conclude.

1. Ideology and theory

A brief review of history shows that Oslo prison, Norway's first cell prison was established in 1851, constructed following the Philadelphia model that features a central hall and radial prison wings. The design drew inspiration from the panoptic model, an institutional design with an inbuilt system of control and discipline, in which prisoners were divided, separated, isolated and monitored without any knowledge of when they were being observed (Bentham 1995; see also Foucault 1979). At the time, the panoptic idea, centred around repentance and spiritual reconciliation achieved through solitude and isolation, was considered a humane penal approach. Throughout the 1860s several smaller prisons (less than 50 beds) were built, mostly consisting of a single wing. They all followed the principle of solitude and isolation, but as the detrimental effects of isolation became apparent, alternative designs, including socialisation areas for the prisoners, began to replace the panoptic concept.

Along with the development of the welfare state (see especially Pratt 2008a; 2022; Pratt, Eriksson 2013; Smith, Ugelvik 2017), Ullersmo – known as the "industrial prison" – was built in 1970 with a focus on *resettlement* and social integration as its central principles, that is, supporting prisoners in leading law-abiding lives upon their release. Emphasising the importance of work, the prison incorporated large workshops, while also featuring an open department. The aim was to provide educational work opportunities that closely resembled ordinary working life.

In 1990 Bergen prison was opened, its design not only incorporating work and social integration, but also prioritising dignity and civil rights. Even if "dynamic security" was not a direct objective in the design of Norwegian adult prisons, the lack of guardrooms for the prison officers in units of this prison foster social interaction between staff and prisoners. Dynamic security is about relationships and the proactive impact of creating good relationships based on respect and trust

[2] Another M2015 block has been built to expand the capacity at Ullersmo prison, while a fifth is under construction there to expand the capacity even further.

[3] The main descriptive results from this study have been published in a Norwegian-language report (Johnsen et al. 2023).

(Normann 2022; Kilmer, Abdel-Salam, Silver 2023), and exercising this kind of "soft power" (Crewe 2011) is central in the professional role of a Norwegian prison officer (Pratt, Eriksson 2013; Kikas et al. 2021). In a Norwegian context, the concept includes an overall understanding of relationships in a prison, including the relationships between prisoners. In building Bergen prison, the concept of progression also emerged as a central tenet, where good behaviour would be rewarded with benefits such as leaves and finishing one's sentence in an open unit just outside the prison.

Humane prison conditions, emphasising normality, were pursued in the construction of Halden prison. This prison, together with Bastøy prisons – "the prison island" – have become the material expressions of what has come to be understood as an exceptional humane prison system (Pratt 2013; Johnsen 2018; Moore 2020). Opened in 2010, the key focus was on creating an environment that fostered "normalisation", on making prison life resemble life outside prison (Engbo 2017; De Vos 2023). This objective is reflected in the architectural design by the physical separation of the living units and the workshops/school facilities. Prisoners leave the living units in the morning for work and return in the afternoon, resembling a typical day-to-day routine. Aesthetic considerations also play a significant role in the design, with attention paid to factors such as lighting, outdoor areas, art and materials. Despite being a high-security prison, but one with an open unit right outside its gates, Halden prison is often characterised as the world's most humane prison (cf. Jewkes 2022; Abdel-Salam, Kilmer 2023), and according to John Pratt and Anna Eriksson (2013: 2),

> the investment in what is acclaimed as humane prison design in Norway is celebrated by prison management, staff, and the highest state authorities. All the usual indicators of prison existence have been variously camouflaged, hidden or removed. No expenses have been spared, it seems, to make this prison look 'as much like the outside world as possible'.

With a capacity of 227 beds, Halden prison is classified as a large prison in Norway. While small in an Anglo-American context, and in this regard exceptional (Pratt, Eriksson 2013), the fact is that in addition to expanding prison capacity, the opening of Halden prison replaced mostly small, "old fashioned" and worn-out prisons where maintenance had been neglected for decades. This is also the case with the building of the M2015 prisons.

2. M2015 prisons – location, size, architecture and design

As with Halden prison, Froland and Mandal prisons are located in the outskirts of cities (Arendal and Mandal, respectively), on sites dominated by commercial enterprises. Eidsberg prison is located in a residential area of Mysen. The relatively

central location of Eidsberg is most likely due to the M2015 block being built on the site of an existing small prison. Eidsberg and Mandal consist of one M2015 block each, with capacities of 100 and 102 beds, respectively. Additional wings, featuring four beds in Mandal and six beds in Eidsberg, are specifically designed for vulnerable prisoners. Froland prison has two M2015 blocks, jointly providing a total capacity of 200 beds, including an eight-bed wing for vulnerable prisoners.

In the central component of the M2015 four-pointed star-shaped block, there is a guardroom on each floor in a barycentric position, which is separated from the units. Outside the guardroom there is a hall, which the officers must traverse to reach the units. However, the units are visible to the officers through glass windows, which surround the whole guardroom and the part of the units closest to the hall. Officers also maintain control over the units through video feeds transmitted to computers from cameras installed in various areas. The guardrooms on different floors are connected by an internal staircase, facilitating communication and movement between them.

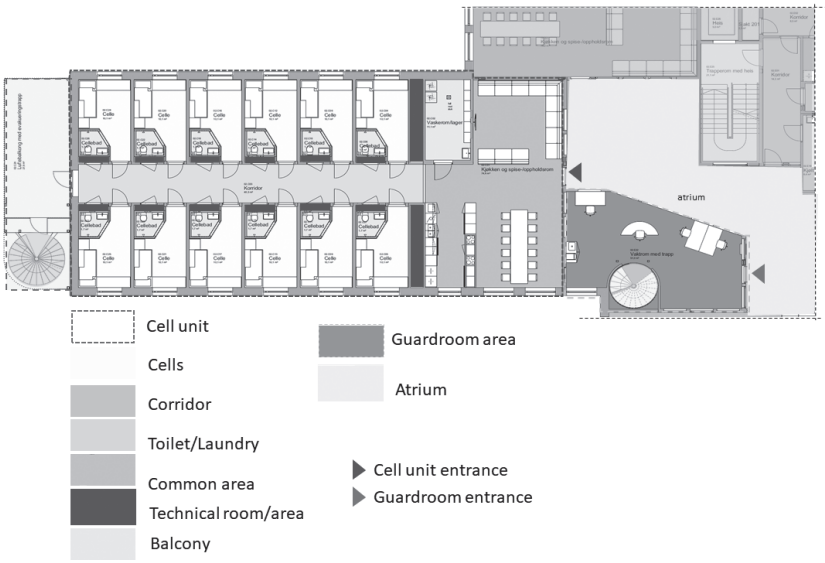
Figure 1. Illustration of second/third floor in M2015 with central component

Source: Statsbygg and the Norwegian Correctional Service plan, Francesca Giofrè.

All units include a kitchen, a dining area and a common area with a sitting arrangement of couches closest to the hall and the guardroom. The cells are situated in a corridor that spans the entire unit, with six cells on each side. At the end of the corridor is a balcony with a fire escape staircase in a closed section. Most cells are designed for single occupancy, although a few may be used as double cells. Each cell has a bathroom. Additionally, each cell is equipped with shelves, bed, desk, notice board, television set, chair, fridge and a telephone panel. The windows in the cells, as well as throughout the prison, do not have bars. The windows cannot be opened, but each cell has a valve beside the window to allow fresh air in and

a movable curtain. The interior is inspired by "Scandinavian design", using light wood materials and light colours. However, to create contrast, other colours such as deep green and blue are also used.

Figure 2. Illustration of a wing second/third floor and central component



Source: Statsbygg, Correctional Service.

During the construction of Mandal and Froland, a project to digitise some of the services for prisoners was undertaken, and certain parts of the project were operational. Computer screens (labelled "blue-boxes" by prisoners and staff) were installed in the corridors outside the units and the school facilities/workshops, so the prisoners can request appointments with medical staff, for example, and can read the responses electronically.

Photo 1. Computer screens

Source: Author's private collection.

The visiting rooms, special units for vulnerable prisoners, the gym and the library are not located in the M2015 block, but in other buildings within the prison complex. In Mandal and Froland, the grocery shop and the religious room are also situated in separate buildings. Mandal and Froland also have large, green outdoor exercise yards.

Photo 2. The yard at Mandal

Source: Author's private collection.

3. Methods

The mixed-method approach involved a rapid, site-switching ethnography (Armstrong, Lowndes 2018; Pink, Morgan 2014), team ethnography (Erickson, Strull 1998; Liebling et al. 2021b) and survey research. An interdisciplinary team (penologist, anthropologist, sociologist, psychologist and architect) conducted a series of intense ethnographic fieldwork visits (2–3 days) in each of the three prisons in August/September 2022. This enabled data collection in a short period while leaving enough time to investigate the local contexts and acquire enough knowledge to compare the three prisons. Information about the study was distributed to the prisoners before we arrived. The quantitative and qualitative data were collected simultaneously, but analysed separately and independently (Creswell, Clark 2018). All data were anonymised.

3.1. Qualitative data

Upon our arrival at the prisons, we received access cards, which granted us relatively unrestricted movement within the facilities. This enabled us to interact with prisoners and staff members, who willingly shared their experiences of the buildings and various spaces within the prisons. These "field conversations"

provided important insights since they were less structured around a set agenda and instead emerged from incidents or ongoing situations. We responded quickly to invitations to participate in various activities, such as preparing and/or eating meals or playing ping-pong or bingo. We were especially inspired by the concept of "walking interviews", as it reduces the power imbalances by facilitating conversations/interviews while walking or engaging in shared activities (Kinney 2022; Kusenbach 2003; Clark, Emmel 2010). This approach encouraged spontaneous dialogues and provided a deeper understanding of participants' routines and their immediate reflections. Additionally, it offered an opportunity to observe other activities and interactions among participants (Carpiano 2009; Kinney 2022). In total, over 180 hours of fieldwork were conducted across the three prisons. We had conversations/interviews with around 80 prisoners (in Norwegian, English, Polish and Italian) and 30 staff members.

The field notes were written throughout and somewhat after the fieldwork. They included "close, detailed reports of interaction" and "records of actual words, phrases or dialogue" (Emerson, Fretz, Shaw 1995: 14, 32), as well as notes from conversations/interviews. The first stage of analysis took place simultaneously with the data collection, as we stayed together throughout the whole fieldwork period. We discussed observations and findings continuously at meeting points inside the prison and over meals and recreational walks outside the prison (Erickson, Strull 1998; Liebling et al. 2021a; 2021b). The second stage of analysis was conducted by thematic coding.

3.2. Quantitative data

We collected survey data by means of paper-and-pencil questionnaires that included the *Prison Climate Questionnaire* (PCQ) (Bosma et al. 2020).[4] The study population comprised all prisoners residing in the M2015 block across the three prisons; the study group included the 181 (62%) prisoners who responded. The bulk of the respondents had solid knowledge about life in prison based on experience: 59% had been imprisoned previously, 69% had been imprisoned more than a year in their life and 52% had spent more than six months in the prison at which they were currently incarcerated. Due to a lack of data, attrition analysis could not be conducted. However, it is likely that the non-responders had poorer perceived quality of life than those who participated, which should be kept in mind when interpreting the results.

The PCQ items are formulated as statements that the respondents are asked to evaluate on a scale from 1 (strongly disagree) to 5 (strongly agree). Drawing on Anouk Bosma and colleagues (2020), we constructed six dimensions by adding up and averaging the responses to items that captured the prisoners' relationship with other prisoners (e.g. "The prisoners here help and support each other"), their relationship with the staff (e.g. "The staff members in this unit are kind to me"), independence (e.g. "There is much I can decide for myself here"), reintegration

[4] Permission to use the PCQ was obtained from its creators.

(e.g. "In this institution, I can prepare well for my return to society"), activities (e.g. "I am satisfied with the work") and visits (e.g. "The visiting rooms in this institution are pleasant"). The dimensions included 4–8 items each and their internal consistency was high (Cronbach's alpha ≥ 0.80).

We also assessed how strongly the prisoners felt the burden of punishment in different spaces in the prison. Again, the response scale ranged from 1 (very much) to 5 (not at all). The prisoners in two prisons (Froland and Mandal) bought and prepared their own food, and we assessed the extent to which they were satisfied with this self-catering arrangement (scale: 1–5).

All variables are coded such that the higher the scores, the more positive the evaluation. We report descriptive statistics, including the percentage whose scores on the PCQ dimensions indicated a predominately negative evaluation (scores below 2.5) and the percentage with a predominately positive evaluation (scores above 3.5).

4. Results, observations and analysis

4.1. The PCQ dimensions – an overview

As displayed in Table 1, the total score capturing the relationship with co-prisoners had the highest mean value (3.8), followed by the relationship with the staff, the activities in the prison and receiving visitors (mean: 3.2). The evaluations of issues related to independence and measures aimed at facilitating reintegration were both moderately negative (mean: 2.9 and 2.7, respectively). The percentages with a predominately positive evaluation and a predominately negative evaluation varied accordingly. Only one fourth (26%) of the respondents had high scores (>3.5) on the reintegration dimension, and a similar proportion (24%) perceived the level of independence as satisfying. The percentages of prisoners expressing dissatisfaction (score < 2.5) were 38% and 31%, respectively. In contrast, three in four (74%) expressed that they got on well with other prisoners, whereas only 6% did not.

Table 1. Descriptive statistics of the prisoners' scores on the PCQ measures

	Mean score[1] (SD)	Positive evaluation[2]	Negative evaluation[3]	n
Relationship with fellow prisoners	3.8 (0.8)	74.4	6.4	172
Relationship with the staff	3.2 (1.0)	39.0	22.8	164
Reintegration	2.7 (1.1)	25.8	37.7	164
Activities	3.2 (0.9)	36.6	24.7	159

Independence	2.9 (1.0)	24.6	31.0	171
Visits	3.2 (0.8)	36.0	12.5	150
[1] Scale: 1 (i.e. negative evaluation) – 5 (i.e. positive evaluation) [2] Percentage with scores >3.5 [3] Percentage with scores <2.5				

Source: Own elaboration.

The qualitative data provide insights into many other aspects of life in the M2015 prisons than those captured by the survey. Our fieldwork also adds context and meaning to the survey results. Thus, we elaborate on the findings in Table 1 in the further sections and the discussion of the qualitative data. We also report on how the participants responded to a few particular questions in the survey.

4.2. Space and relationships between the prisoners

The architectural layout of the units in a M2015 block appears to facilitate social interaction and friendship among the prisoners. The living room with the integrated kitchen area allows the prisoners to share meals, watch TV together and participate in indoor activities (e.g. chess and card games). The spacious balcony also serves as an important gathering space. This may be part of why a solid majority (74%) evaluated their relationship with fellow prisoners positively (Table 1). These results align with our observations, as we witnessed prisoners socialising in these common areas, aiding and supporting one another. However, we also encountered prisoners who experienced exclusion and difficulties in forming connections, though very few (6%) survey participants had a predominately negative evaluation of their relationships with co-prisoners.

Upon arrival at an M2015 prison, prisoners are assigned to a reception unit, where they stay before being transferred to other units. The officers decide on the placement, taking into consideration available cells and their assessment of the prisoners; they try to compose units where individuals are likely to get on well with each other. Prisoners who were not functioning well were often placed in their own unit. Staff members said this could be because they did not meet the hygienic standards. A certain standard is required because of the self-catering system, but we also observed that these standards were influenced by the prisoners' own expectations.

Officers also decide who is the "unit-runner" (*gang-gutt*), that is, the prisoner in charge on the unit. Particularly in Mandal and Froland, these prisoners played an important role, including taking care of other prisoners. This was partly due to the self-catering system, where they helped other prisoners buy and make food, but also because the officers in these prisons maintained a somewhat "hands-off" approach. For example, in Mandal, when we asked officers how prisoners convicted

of sexual crimes were accepted and included in the "prisoner society", the most common response was, "It'll be OK, just give it some time and they'll work it out". This indicates that the officers relied quite heavily on the prisoners themselves to establish and negotiate norms and rules for social interaction among them (cf. Album 1996), and their advice to prisoners who struggled for acceptance was to stay where they were, be patient and give it time.

Eidsberg prison, which houses a significant number of young gang members, faced specific challenges. The staff explained that they had to keep members of different gangs separated to prevent fights from breaking out when encountering each other. The logistics of composing units and moving prisoners around without their paths crossing was demanding. Due to the officers' involvement in managing prisoners' movements and the vigilance displayed by both prisoners and officers in maintaining the separation regime, we observed a generally more tense atmosphere in Eidsberg compared to Mandal and Froland. The material as well as immaterial borders represented potential conflict lines, and in the confined space of Eidsberg these lines were plentiful. Even the outdoor yard was divided by a fence, allowing prisoners belonging to different gangs to be outside simultaneously on either side of the fence. In this way, the prison design highlighted the conflicts between prisoners, focussed on separation and gave little encouragement to friendly coexistence.

The yard in Eidsberg contrasted with the large, green yards in Froland and Mandal. According to one officer in Froland, "this yard does something with the prisoners". Dominique Moran (2019) and Dominique Moran and colleagues (2019, 2023) have documented the relationship between green spaces and well-being in prison, but we found that the size of the yard also has an impact. When prisoners want to avoid conflicts by maintaining distance from one another, a spacious and open design can be beneficial. One prisoner articulated this perspective by stating, "It's nice to have such a large space. Then you can avoid those you don't want to meet. If they're on one side of the yard, I can just go to the other side" (see also Liebling et al. 2021a; Giertsen 2021).

4.3. Relationships between prisoners and staff

The prisoners evaluated their relationship with staff far less positively than their relationship with each other, but a significant minority (39%) reported that it was good (Table 1). A smaller proportion (23%) had a negative evaluation of this relationship. One factor hindering the development of an organic relationship between prisoners and staff was the placement of the guardroom.

The guardroom was designed to eliminate the need for officers to be physically present on the units to maintain visual control. In addition to windows, the guardroom is equipped with a console displaying images from cameras on the units. However, relying solely on cameras poses limitations. The cameras react to events after they have occurred, meaning that important cues may be missed. One officer highlighted the limitation by emphasising that "we don't hear anything".

This reliance on cameras restricts officers from utilising their senses to pick up on important cues, such as changes in atmosphere, tone of voice or the content of conversations. Multiple officers expressed that cameras fail to capture every aspect of an interaction or incident. "It can be too late when we see things on the screen", remarked one officer.

The officers referred to the guardroom as the "guard box", reflecting on its lack of flexibility, limited space and enclosed nature. We observed staff spending a significant amount of time inside the guardroom interacting with each other rather than the prisoners. The officers themselves acknowledged this and stated that the design clearly separates a "staff area" from a "prisoner area". This physical division created a higher threshold for prisoners to approach the staff and reinforced the sense of distance between them. Consequently, the physical layout became a social barrier.

Some officers expressed their dissatisfaction with this design, emphasising how it disrupted workflow and created sharp divisions between the two groups. Referring to the architectural aspect, one officer claimed it "could have been done 100% better". The multiple doors separating them from the units and other parts of the building are impractical and lead to unnecessary logistical challenges, especially when combined with understaffing. Navigating through these doors consumed a significant amount of time and energy.

Paradoxically, while the staff are very close at hand and visible from the units through glass walls in Mandal and Froland (in Eidsberg, the windows are covered with a brown film), they are not accessible for direct communication. Prisoners commented on this visibility, often perceiving officers as "doing nothing" when they were observed inside the guardroom engaged in paperwork or conversation: "Look, look, what are they doing? Talking to each other and not working", "just sitting together in there". The visibility allowed for heightened monitoring and an extreme focus on the officers' use of time, which often caused misunderstandings over interpretations of how officers actually spent their time.

The intercom as the sole way for prisoners to get in touch with the officers, apart from body language visible through the glass, intensified the perceptions of the officers' inaccessibility. Sometimes, prisoners could not reach their designated officer because the officer was occupied with another task and unable to respond immediately. In combination with other officers being present and highly visible in the guardroom just a few centimetres away, the prisoners perceived the intercom as unnecessary, dehumanising and causing a sense of distance. Many prisoners resorted to knocking on the glass for communication, which disrupted the expected silence of the guardroom. The officers perceived the continual noise of knocking and the buzzing intercom as out of place (Douglas 1966), disturbing their workflow and the expectation that the room is "theirs". The liminal (Turner 1969; van Gennep 2019) nature of the guardroom, simultaneously perceived as belonging to both the officers and the prisoners while truly belonging to neither, undermined the relationship between them.

The architectural layout that discourages staff–prisoner interaction complicated the establishment of mutual respect between the two groups: "To have respect, I need to be inside [the unit] and talk to people. And it goes both ways" (officer). The distance between staff and prisoners seemed significant, and while several prisoners desired more contact, they were also sceptical towards the officers. According to one officer, "I want to be there [on the unit], but they [the prisoners] don't want me there". The limited facilitation for contact exacerbated the challenge of making meaningful connections: "When you are rarely present on the units, it becomes harder to be there. It's a vicious cycle" (officer). The lack of physical presence by staff members on the units created a sense of communication breakdown, making interactions a disruption. The emphasis on physical boundaries were translated into relational boundaries, limiting the development of organic and less exhausting interactions and conversations. The lack of staff presence on the units also affected the resettlement work and resettlement measures. The high threshold for staff to be physically present on the units hampered their involvement in these efforts, contributing to prisoners' poor evaluation of reintegration measures (Table 1).

4.4. Spaces for resettlement and activities

The prisoners' evaluation of the reintegration efforts was not encouraging (Table 1), as indicated by the low mean score on the PCQ dimension (2.7) and the high proportion (38%) who expressed dissatisfaction. We encountered both prisoners and staff who were deeply disappointed by the inadequate provision of rehabilitative activities and follow-up support for prisoners, primarily due to cost-saving measures.

However, some limitations in the availability of daytime activities were also attributed to the architecture. In Froland and Mandal, both staff and prisoners expressed the need for open units, emphasising how crucial they were for motivation and progress in the resettlement process, as the prospect of being transferred to less stricter regimes served as an incentive. The only possibility for progression within the prisons was moving from the second to the third floor in the M2015 block when prisoners became employed or were enrolled in educational programmes.

In addition, cost-saving measures have reduced the number of workshop staff members and thereby decreased the possibilities for well-planned and pedagogic activities. Moreover, the combination of limited workshop staff and impractical design limits the number of prisoners in the workshop:

> We move on to the carpentry. Here [staff member] tells us that the space is very narrow. Because there is a lot of machinery installed in the room, there cannot be many in there. If a person moves around with a plank and turns, he might push someone standing beside one of the machines. If this person loses his balance and falls over the machinery, he might hurt himself. They must therefore be careful. (fieldnotes)

When prisoners could not attend work, the staff would call upon other prisoners to take their place so as to maximise the utilisation of the available capacity.

Most often, even if a prisoner received the offer while still in bed in the morning, they would usually respond promptly. We met several prisoners who wanted to work but were unable to do so because of a lack of employment opportunities. Consequently, when not at work, the prisoners were locked up in their cells during the daytime. The questionnaire revealed that 66% of the prisoners in Eidsberg spent the majority of the day locked up against their will.

The primary function of a cell is to separate and isolate individuals, representing "the monolithic values of the prison" (Turner, Knight 2020: 7). It symbolises penalty (Foucault 1979) and is recognised as the most intimate and private space within the prison environment; it is here where the prisoner rests, sleeps, eats and is alone with their thoughts (Gramsci 2011). The survey shows that the cell was where the prisoners felt the burden of punishment most intensely, as reflected in the mean score of 2.4. When confined to their cells, 38% felt this burden "very much". In contrast, the percentages were lower for other areas such as the unit, yard, visiting rooms, library, religious room, gym and workshops/school, ranging from 6% (visiting facilities) to 11% (the wing).

Despite the staff and prisoners' concerns related to employment, the PCQ dimension "Activities" received a slightly positive mean score of 3.2 (Table 1). This dimension included the prisoners' evaluation of employment, indicating a fairly high level of satisfaction (mean: 3.5). Qualitative data suggests that prisoners are content with the quality of the employment activities provided, but express dissatisfaction with the limited extent of these activities. On the other hand, the prisoners were least satisfied with the opportunities for leisure activities, despite the presence of well-equipped facilities, particularly in Froland and Mandal. This dissatisfaction can be attributed to the "TimeSpace" regime (Moran 2015), which imposes strict schedules on prisoners, limiting their time in the gym or yards for leisure activities. In Mandal and Froland, the prisoners could only spend 1–1 ½ hours in the yards every day. The large, green yards in these prisons are therefore mostly "a pleasure for the eye".

4.5. Level of independence

Table 1 showed that the mean score on the PCQ dimension "Independence" was in the mid-range (2.9), and that the proportion reporting a low level of perceived autonomy was slightly higher (31%) than the proportion reporting a low level (25%). This PCQ dimension included an item about freedom of movement, and the results show that a sizable minority (44%) were dissatisfied (scores of 1 or 2) with this aspect of prison life. As the M2015 prisons are high-security facilities, a strict "TimeSpace" regime is implemented to regulate the prisoners' movements throughout the day (Johnsen 2023).

Prisoners' movements between separate spaces in the prison were accompanied or supervised by staff. While some spaces had fixed borders that prisoners could not cross without permission (e.g. leaving the unit), other borders were more

fluid, allowing spaces to overlap. For example, during designated socialising time, prisoners freely moved between their cells and the communal areas within the units, illustrating that the prison cell was both open and locked, connected and disconnected (Fransson, Giofrè 2020).

The digitalisation of Froland and Mandal aims to enhance prisoners' independence and participation by facilitating the use of technology, including communication with external public services. This "technology of independence" enables prisoners to communicate with, for example, health staff without needing the assistance of officers to forward messages. This streamlines the officers' use of time and eliminates their need for involvement in the prisoners' health-related matters. It also protects prisoners' privacy and simplifies the health staff's adherence to professional confidentiality. However, in consequence, the informal conversations between officers and prisoners during requests for services, including the opportunity to solve various emergent problems right away, have disappeared: "The small talk is gone" (officer), "The emotional contact isn't there. I miss it. I don't need them to know everything, of course, that's between me and my doctor, but now there is no contact. We are emotional beings, we are humans. I miss it, this is challenging" (prisoner).

While the computer screens, or "blue boxes", have increased prisoners' independence in requesting services, the placement of the guardroom has made them more reliant on staff to fulfil various other tasks, referred to as "hotel functions" (Crewe 2011). To obtain their medication, prisoners had to call upon staff to either bring the medication to them or to allow them out into the hall to receive it. The same procedure was repeated when prisoners needed goods such as yeast or sugar, which could not be stored on the units but were kept in the guardrooms. Officers frequently moved between the units and the guardrooms, providing prisoners with these goods and emphasising their role in fulfilling these tasks.

4.6. Physical and digital visiting rooms

In Norwegian prisons, prisoners receive visitors in separate facilities where they can have privacy. Conjugal visits are allowed. The visiting areas in all three prisons are located outside the M2015 block, but still inside the prison complex and situated near the main entrance. This pragmatic arrangement allows prisoners to receive visitors without moving beyond the prison's security measures, while visitors can enter the prison without venturing deep into it.

Dominique Moran (2011) describes visiting areas in prisons as liminal spaces, albeit temporarily, as prisoners move in and out of these spaces. Here, the prison's outside and inside worlds become blurred as visitors, representing the outside world, enter the prison. In these spaces the prisoners construct situated temporal identities (Muedeking 1992), as they become husbands/partners, sons, fathers or friends (Johnsen 2023), allowing them to escape their identity as a prisoner for a while. Positive emotions, such as love and tenderness, may also be displayed in these spaces (Crewe et al. 2014). This could explain why a minority (28%) of the

participants reported they felt burdened "very much" or "much" by the punishment when in the visiting rooms.

Several prisoners had digital visits with their families and friends. These digital visits were implemented as a response to the COVID-19 pandemic when regular visits were suspended. To compensate, the Norwegian Correctional Service invested in several hundred iPads, enabling prisoners to connect with others remotely (Johnsen 2022). This arrangement has continued, and one can expect this to be quite extensive, particularly in "digital prisons" such as Froland and Mandal. However, in Mandal and Eidsberg, digital visits could only take place in the visiting rooms due to personal protection, since prisoners filming others through their cell window was considered a risk. The prisoners must book a visiting room for these visits, which limits the potential flexible arrangement and puts a lot of strain on the visiting rooms. This means that both physical and digital visits happened in the liminal space of the visiting room at Mandal and Eidsberg, while in Froland the cell may sometimes turn into a liminal space as well.

Table 1 showed that the prisoners' overall evaluation of visits (both physical and digital) was slightly positive (mean: 3.3), but quite a few skipped these questions. Moreover, the responses to the single items that were embedded in this PCQ dimension varied markedly, with mean values ranging from 2.5 ("The visiting hours in this prison are long enough") to 4.3 ("I enjoy receiving visits").

4.7. Self-catering

According to the guidelines (Directorate of Correctional Service 2019, para 2),

> [t]he principle of normality is a basic principle in the operation of the Correctional Service. As far as possible, life during the execution of one's sentence should mirror life in society in general. The purpose of the self-catering system is to develop and strengthen the prisoners' skills to handle daily life in society. Self-catering increases the possibilities for knowledge about cooking, nutrition, personal finances and social skills through social interaction with others on the wing. This will strengthen the principle of normality, reduce the unintended harms of the punishment and ease the return to life outside prison.[5]

Our survey showed that 86% agreed strongly or moderately with the statement "I am satisfied that this prison is self-catering". Only 8% disagreed more or less strongly. This positive evaluation supports Minke's (2014) study of self-catering in Danish prisons. In both Mandal and Froland, several officers were initially sceptical of implementing self-catering practices. They were concerned that it would increase their workload in terms of assisting and monitoring prisoners when cooking. However, both officers and leaders told us that they were pleasantly surprised by how well the self-catering arrangement worked.

An important finding in the study is the amount of energy, consideration, collaboration and care the prisoners put into cooking. Examples of prisoners

[5] Authors' translation.

speaking about cooking in positive terms include "men are generally better than women at making food", "many prisoners make good food" and "prisoners come from all over the world and bring their culture into the food". The making of food can be read as a space where prisoners construct masculinities and identities (see also Vanhouche 2022; Minke 2014; Ugelvik 2011; Earle, Phillips 2012). Several prisoners appreciated the good atmosphere that cooking created and many cooked together: "The prisoners find each other, see what others are cooking and like to join forces" (prisoner).

Photo 3. Kitchen facilities at Mandal

Source: Author's private collection.

The prisoners themselves organised food groups which collaborated to purchase, cook and share meals. This process varied, with one prisoner occasionally taking charge of the purchases or the group collectively creating lists and assigning responsibilities. However, there were instances where certain prisoners were not invited or "chose" not to participate in food groups. This raised delicate issues about hygiene and could also be associated with the nature of their sentences, such as sexual crimes: "Those who do not fit in here are those who struggle with poor hygiene" or "if you don't fit in, it has to do with you" (prisoners) (see also Minke 2014).

During weekends, the prisoners are locked up in the afternoon and must choose "between food or being physical" (prisoner), that is, either staying on the wing and cooking or being outside in the yard. Logistics due to time pressure could also generate conflicts, as there are not enough hobs for everyone to cook simultaneously. Furthermore, while some prisoners knew how to handle the kitchen utensils, others lacked experience and were in danger of destroying frying pans or other utensils. As they were used a lot, it could be a problem that broken items were not replaced: "There is a big difference between two using one frying pan and twelve" (prisoner).

5. Discussion

Despite changes in penal policies and architectural advancements over the years, the design of Oslo Prison in 1851 and M2015 bear a striking resemblance in their star-shaped constructions, with radial prison wings extending from a central building component. Perhaps more surprising is their panoptic nature, evident in the windows separating the guardroom from the units and the hall. Besides observations made by the human eye through these windows, which in Froland and Mandal actually go both ways – from staff to prisoners and prisoners to staff – the staff also surveilled the prisoners by the use of technology, that is, cameras. The architectural structure with its embedded technology reinforces a static security approach, emphasising surveillance and distant observation and eliminating the need for direct contact between staff and prisoners.

The quality of interaction between prisoners has recently gained recognition as an important part of prison life (Fransson 2018; 2023; Bosma et al. 2020; Johnsen et al. 2023) and hence important for dynamic security. Designing spaces that foster quality interactions between prisoners is crucial, as these interactions contribute to overall security within prisons. The M2015 design has rather small units incorporating spaces for prisoner interaction in the kitchen, living room and the balcony. Furthermore, prisoners interact with each other in various areas of the prisons, such as the school, workshops and exercise yards. The size and flexibility of these spaces play a crucial role. However, it is equally important to provide spaces that allow prisoners to maintain distance and avoid contact when necessary, recognising individual needs and preferences.

The compact design of the M2015 block proves to be somewhat effective when there is available capacity to relocate prisoners, allowing the establishment of well-functioning units that can accommodate the needs of different prisoners. This flexibility enables officers, with the assistance of responsible unit-runners, to navigate the hierarchical society of prisoners (Sykes 1958) and create cohesive units. However, challenges arise when conflicts occur between prisoners from different units, as the design of the M2015 lacks the necessary flexibility to handle prisoner movements outside the units without constant staff interference and vigilance.

While the M2015's design facilitates social interaction between prisoners, it poses challenges in terms of interaction between prisoners and staff. The relationship between prisoners and staff is at the heart of prison life and is crucial for the officers' dynamic security approach. To create proper relations (Liebling 2004; 2011; Beijersbergen 2016), the officers must build rapport and trust, which is an ongoing, demanding and complex process in prisons, characterised as "low-trust environments" (Liebling 2004: 246). It is crucial to reduce the asymmetrical power dynamic, which may be achieved by creating relationships where officers and prisoners get to know each other (Normann 2022). According to Laura Kikas and colleagues (2021: 12) to this end it is crucial to structure prisons "in such a way that prison staff are present and interact with prisoners throughout most of the day".

This structure is almost non-existent in M2015. This aligns with the findings of Karin Beijersbergen and colleagues (2016) from a large-scale Dutch study, where prisoners in panoptic-designed prisons evaluated their relationship with officers significantly less positively than those housed in other kinds of prisons.

Building relations and trust requires time (Normann 2022). However, due to staff shortages resulting from cost-saving measures and the need for staff to exercise hotel functions in M2015 prisons, there is not enough time to develop these relationships strategically and patiently. The physical separation between the "staff area" (the "guard boxes" – even liminal) and the "prisoner areas" (the units) also poses challenges in establishing relationships. As the contact between these areas primarily occurs through technological measures or by crossing the borders of locked doors, prisoners and staff mostly approach each other when they have an inquiry or an errand. Prisoners contact the officers when they need their assistance with something, and officers respond to these requests. In this setup, staff members, who have the power to regulate the interactions, may sometimes face delays in responding to prisoners' requests, leaving prisoners suspicious and interpreting the delays as an inappropriate exercise of authority (Sparks et al. 1996). This is counterproductive for building trust between officers and prisoners. Attempts by either party to establish contact outside the defined communication lines, such as knocking on the windows or sitting together in the socialising area, are often considered intrusive and lead to exclusion rather than inclusion. This creates distance, which hampers the officers' opportunity to do what they perceive as a good job and reduces the prisoners' trust in the officers' professionalism.

The design of the M2015 lacks spaces where both staff and prisoners feel a sense of shared belonging. Such "shared spaces" facilitate a kind of interaction between officers and prisoners, where jokes can be made and everyday chats about, for example, football matches can take place. Such interaction aligns with normality, as people having daily interactions get to know each other better. In prisons where officers and prisoners dine together, the dinner table serves as such a shared space (Fransson 2018), but becomes challenging to achieve with a self-catering system unless staff and prisoners make food together. This interaction may also occur in "the spaces in-between" (Grønvold, Fransson 2019), which could be related to place (e.g. officers accompanying prisoners to appointments with health care providers) or time (e.g. officers engaging in small talk with prisoners during lock-up time or while waiting for prisoners to enter their cells). However, the efficiency-driven architecture and technologisation of M2015 have erased many of these spaces.

In the context of dynamic security, prison officers also engage in dynamic observations, utilising all their senses to observe and assess the interactions between individuals within the prison environment (Halvorsen, Khawaja, Storvik 2019). This work highlights the importance of physical presence, as officers rely on their sensory perceptions to identify potential security threats. Familiar sounds or the absence thereof can be as significant as unfamiliar sounds in determining the nature of a situation. In these moments, the "magic" of prison officers' work may

occur (Hay, Sparks 1991), as they can recognise and address potential security risks. From a Deleuzian perspective, the officers interact with both human and non-human bodies (Deleuze, Guattari 1987), where deviations from "the normal" make the officers react. These deviations can be manifested as a handle in the wrong position or an unfamiliar smell, for example. However, their limited presence on the units and the dependence on technology deprive the officers of the affective and sensory components of communication and interaction with the prisoners.

Within the concept of dynamic security, staff involvement in prisoner resettlement work is crucial (Drake 2008; Kikas et al. 2021; Santorso 2021; Normann 2022; Kilmer 2023). Building trust is essential, as prisoners need to understand that officers are genuinely concerned about their well-being and have their best interests in mind. It is equally important that the officers trust the prisoners (Fransson, Brottveit 2015; Ugelvik 2022). However, this kind of professional work also suffers in M2015 prisons, as architectural borders translate to relational borders between officers and staff.

Considering the ambitious goals of resettlement and desistance (Norwegian Correctional Service 2021, cf. Act relating 2001: para. 2), the lack of activities to prepare prisoners for life after imprisonment in M2015 prisons is striking. In addition to the absence of facilities for interaction between officers and prisoners, other crucial factors are missing from the resettlement process. Firstly, unlike in the establishment of the Ullersmo, Bergen and Halden prisons, no open capacity was included in the building of Froland and Mandal. This means that the possibility to progress from closed to open units, which is considered important regarding resettlement in previous prison constructions, was not emphasised in designing and building these prisons. This may be a consequence of the populistic crime policy that prevailed during this process.

Secondly, the small workshops in M2015 prisons result in insufficient capacity to keep prisoners meaningfully occupied during the daytime. Work and purposeful daytime activity were fundamental principles in the design of the Ullersmo, Bergen and Halden prisons, tailored to accommodate these human activities. However, in the M2015's design, it seems to be the other way round: the single-block design becomes a premise for these activities. The design dictates the size of the workshop, and this size – along with the machinery installed – determines the level of activity that can take place. When the level of activity is inadequate to meet the needs of human engagement, the solution is not to add new space but rather to limit the scope of human activity. According to ESA para. 3, prisoners have a duty to work; as Yngve Hammerlin (2021) points out, however, the prisons' responsibility in this regard has received little attention or scrutiny.

The inability of M2015 prisons to fulfil the need for activities is also related to cost savings and limited workshop staff. Consequently, a significant number of prisoners are locked up during the daytime, particularly in Eidsberg. Such an inactive, isolated existence has been proved harmful (Smith 2006; Smith, Engbo 2012; Shalev 2014), as supported by our findings. Being locked up alone in a cell

was perceived as the harshest and most challenging aspect of life in an M2015 block. Even if the rather extensive locking-up regime cannot be categorised as solitary confinement (locked up for more than 22 hours a day), it hampers resettlement efforts.

Unlike the workshops inside an M2015 block, the facilities for leisure activities and visits outside the block, especially in Froland and Mandal, are spacious and accommodate a significant degree of human activity. Prisoners appreciated these activities, but due to "organisational security",[6] such as strict daytime schedules enforcing a rigid "TimeSpace" regime with detailed and narrow boundaries for keeping bodies in the right place at the right time, the time prisoners were able to spend in these places was quite restricted. The yard, together with the visiting rooms, library, workshops/school and religious rooms, were identified as the spaces in which the prisoners least felt the burden of imprisonment. These spaces resemble environments or activities outside of prison, such as a park, spending time with family or friends, engaging in intimate relationships, being at work/school or cooking in the kitchen. Consequently, these areas represent a normalisation of the prison environment and conditions, allowing prisoners to temporarily assume different situated identities (Snacken 2002 in van de Riit, van Ginneken, Boone 2023). As highlighted by Kristin Bronebakk (2012), Helene De Vos (2023), Hans Jørgen Engbo (2017), van de Riit (2023), and Vollan (2016), normalisation also entails a responsibility to facilitate resettlement. Creating "normal" spaces and providing opportunities for prisoners to spend time in these spaces serves the purpose of both resettlement and normalisation.

Due to the import model (see Johnsen, Fridhov 2019 for a description of the Norwegian import model), some spaces in the prisons, such as the religious room, classrooms, library and medical centre, are managed by externally employed professionals. The role of the Correctional Service is to provide material support and act as hosts for these services. For the teachers, health care staff, librarians and religious practitioners, when entering these spaces prisoners are primarily seen as students, patients or individuals borrowing books and films or seeking religious advice or assistance. Being in these places and interacting with professionals who perceive them differently than just prisoners may explain why some spaces were perceived as less burdensome than others.

Unlike the Halden and Ullersmo prisons in particular, the design of M2015 prisons does not operationalise a normal daily routine, such as leaving the house for work in the morning and returning in the afternoon. In theory, prisoners can spend their entire sentence inside the M2015 block without needing to leave. However, in the construction of the Froland and Mandal prisons, other architectural modifications have been made to encourage normalisation. In addition to facilitating digital solutions, the kitchen area on the units is designed to accommodate a self-catering system. The design approach that diverges to meet

[6] Organisational security "includes the organisation of security work, responsibility and authority. It involves staff planning, training and emergency plans, written routines and procedures. Furthermore, it involves how measures and resources are managed" (Kikas et al. 2021: 6).

different aspects of normalisation of everyday life in prison reveals a fragmented, inconsistent approach to normalisation in Norwegian prison policy. Rather than having a cohesive strategy where architecture reflects a progressive development towards increased normality, prison life is rendered normal in varying ways across different prisons. The lack of strategic coherence seems to relegate normalisation to a mere checkbox in the construction of new prisons, rather than a commitment to steadily enhance efforts to normalise prison life.

"The technology of independence" aims to enable prisoners to communicate online with public services and individuals outside the prison. Not having to rely on others to make requests to the medical department and others aligns with normalisation. However, this independence, for some prisoners, has severed a central communication channel with the officers. For the officers, it has eliminated a central source for exercising dynamic security. This suggests that when technology serves the purpose of efficiency and replaces human contact and communication, two important humane norms in prison become conflicting issues.

Self-catering is a concrete example of how prison design expresses normality through well-equipped and inviting kitchen areas. Both An-Sofie Vanhouche (2022) and Linda Minke (2014) highlight the normalising potential of this activity. A self-catering regime requires a normalised day routine with sufficient time for all prisoners to be in the kitchen and cook. Moreover, it requires new investments when utensils are broken, which is a normal practice. Apart from the activity of making food itself, which is something most people do, our study shows that this activity has a potential to somewhat normalise the relationship among prisoners. Creating a positive atmosphere and engaging in group cooking appears to alleviate some tensions among prisoners. However, the regime generates mechanisms of both inclusion and exclusion, with one excluded group being the officers since they do not participate in food preparation and consumption. Consequently, an important arena for dynamic security work is closed off. Without a legitimate presence in the kitchen area, where cooking and eating take place, officers find it difficult to intervene and facilitate the inclusion of excluded prisoners in cooking activities.

An interesting aspect in the guidelines for the self-catering arrangement is the dual interpretation of the principle of normality. The guidelines initially state that the principle of normalisation means to normalise the prison conditions, but then it claims that the self-catering system serves the purpose of normalising prisoners. This interpretation aligns with the description provided by Marianne Vollan (2016)[7] and discussed in Hans Jørgen Engbo (2017) and Helene de Vos (2023). In their discussions, they rightly argue that this interpretation implies that normalisation becomes a means rather than an end, but that Norwegian crime policy combines these two interpretations: normalisation is both a mean and an end.

[7] Marianne Vollan is the former Director of the Correctional Service in Norway.

Conclusion

The construction of M2015 prisons reflects a greater emphasis on neoliberalist ideas rather than humane ideals. This does not imply that humanity is absent in the M2015. Despite the focus on cost savings and efficiency, elements of humane prison policy that were reflected in earlier prisons designs, such as social interaction, normalisation, meaningful daytime occupation and resettlement, are still present. However, operationalising these ideas within the framework of the M2015 has proven challenging. The purposes of supervision, isolation, separation and division, reminiscent of the panopticon system employed in the Philadelphia model, seem to reemerge in M2015 prisons, albeit unintentionally. It appears as though these purposes are embedded in the architecture, making it difficult to escape their influence. This underscores the significance of architecture in the realisation of humane prison conditions and emphasises the importance of carefully considering how to translate humanity when designing prisons, even in a country known for its exceptionalism and commitment to humane prison practices.

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Dirk van Zyl Smit ■

Dignity unlocked? The Nelson Mandela Rules as a key to the transnational legal ordering of imprisonment

Godność uwolniona? Reguły Nelsona Mandeli jako klucz do transnarodowych rozwiązań prawnych w zakresie pozbawiania wolności

Abstract: This paper explains how the United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR), known since their 2015 amendment as the Nelson Mandela Rules, have become an international instrument regulating imprisonment. This explanation deals with the emergence of the original UNSMR and the process that led to their amendment. It pays particular attention to the impact of ideas about how prisons should ideally function, developed in a series of handbooks published by the United Nations Office on Drugs and Crime, both before and after the adoption of the Nelson Mandela Rules. The paper concludes that the campaign to publicise the Nelson Mandela Rules has made them an important component of discussions about prison reform worldwide. Although they are regarded as a soft law instrument, this has not lessened their impact on prison laws and policies. There is limited empirical evidence, however, of their ability to alter prison conditions substantively.

Keywords: Nelson Mandela Rules, transnational law, prison standards, United Nations Office on Drugs and Crime, prisons, prisoners

Abstrakt: Artykuł wyjaśnia, w jaki sposób Wzorcowe reguły minimalne Organizacji Narodów Zjednoczonych dotyczące postępowania z więźniami (UNSMR), znane od czasu ich nowelizacji w 2015 r. jako Reguły Nelsona Mandeli, stały się międzynarodowym instrumentem regulującym kwestię pozbawienia wolności. Analiza ta obejmuje pojawienie się pierwotnej treści reguł (UNSMR) i procesu, który doprowadził do ich zmiany. W szczególności uwaga poświęcona jest znaczeniu koncepcji idealnego sposobu

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funkcjonowania więzień, ujętych w serii podręczników publikowanych przez Biuro Narodów Zjednoczonych ds. Narkotyków i Przestępczości, zarówno przed przyjęciem Reguł Nelsona Mandeli, jak i po nim. Artykuł zawiera wniosek, że kampania mająca na celu upublicznienie Reguł Nelsona Mandeli uczyniła z nich ważny element dyskusji na temat reformy więziennictwa na całym świecie. Chociaż są one uważane za instrument prawa miękkiego, nie zmniejsza to ich wpływu na przepisy i politykę więzienną. Empiryczne dowody na to, że mogą one znacząco zmienić warunki panujące w więzieniach, są jednak ograniczone.

Słowa kluczowe: Reguły Nelsona Mandeli, prawo transnarodowe, standardy więzienne, Biuro Narodów Zjednoczonych ds. Narkotyków i Przestępczości, więzienia, więźniowie

Introduction

On 17 December 2015, the General Assembly of the United Nations adopted the "Nelson Mandela Rules" (UNGA 2015). This was the new designation for the extensively revised version of what had been known since 1955 only by the more cumbersome title of the United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR) (ECOSOC 1957). How important were these changes in reinforcing the role of the United Nations in setting international standards for imprisonment? This paper demonstrates that the revised UNSMR in their reincarnation as the Nelson Mandela Rules have become the lynchpin of a UN-led initiative to specify how prisons worldwide should and could operate. It also considers some of the practical implications of this development.

In the structure of its analysis, the paper uses the concept of transnational legal ordering as a heuristic tool. Transnational legal ordering was originally developed by sociologists of law working with international lawyers to understand the various kinds of international (and regional) legal interventions that are used to influence a wide range of national social and economic practices (Zumbansen 2021). The concept allows the consideration of a broader range of factors than those traditionally used to explain the international law instruments that ostensibly determine such interventions, and it can identify specific transnational legal orders that provide a vehicle for these interventions. Such thicker descriptions, which increasingly are being applied to a wide range of criminal justice questions (Aaronson, Shaffer 2020), focus particularly on the knowledge base that informs these interventions. This also allows for a better understanding of the potential impact of international ordering strategies and their intended, and sometimes unintended, consequences.

What is meant by a transnational legal order in the prison context? Elsewhere, I have argued that, for better or worse, imprisonment worldwide is increasingly the subject of transnational legal ordering at both the regional and international levels (Van Zyl Smit 2020). This conclusion was based on a few fundamental facts: Notwithstanding abolitionist challenges, prisons are at the core of punishment

in all countries worldwide. In their modern form, they are indubitably bureaucracies subject to "legal" ordering at the national level. My 2020 paper shows that prisons, to a greater or lesser extent, are also subject to "transnational" legal ordering through the operation of a wide range of international and regional legal instruments and institutions, which has important consequences for international cooperation in criminal matters.

Leading theorists of transitional legal ordering have pointed out that identifying transnational legal orders that operate in a particular context, such as criminal justice, is merely a point of departure. In order to understand their impact, one has to study not only (1) the formation of criminal justice transnational legal orders, but also (2) the institutionalisation of criminal justice transnational legal orders and (3) the consequences that transnational legal orders have as a means for shaping policies and practices (Aaronson, Shaffer 2020).

The paper undertakes such a tripartite analysis by focussing in more depth on one aspect of the transnational legal ordering of imprisonment, namely the role of the Nelson Mandela Rules and their institutionalisation and propagation by the United Nations Office on Drugs and Crime (UNODC) in particular. The paper is introduced with a brief synopsis of the early history of the 1955 UNSMR, of which the Nelson Mandela Rules are the latest iteration. It then turns to the emergence of the Nelson Mandela Rules. The paper focusses primarily on what has happened at the international level in the past decade, during which the Nelson Mandela Rules took form, became institutionalised by the United Nations and are now increasingly being applied both in the UN system and elsewhere.

Particular attention is paid to the sources of knowledge about prisons that informed the changes to the Nelson Mandela Rules and to the ambiguous legal status of the Rules. Methodologically, this meant closely analysing the documents generated by the UN when preparing for and subsequently propagating the Nelson Mandela Rules, and then placing the evolutionary process that these documents reveal in a wider context. The examples of the impact of the Nelson Mandela Rules are illustrative rather than systematic, and a fuller empirical analysis of their impact must await further research.

The paper concludes that the Nelson Mandela Rules have become a key element in the discourse about the transnational ordering of imprisonment and that, in some instances, they have contributed to improved prison conditions. There is limited evidence, however, of whether in fact they have succeeded in "unlocking" dignity for prisoners on a large scale worldwide.

1. The formation of the Nelson Mandela Rules

1.1. Background

Part of the case for recognising the international dimension to the transnational ordering of imprisonment is that there is a long history of conscious international attempts to specify in a single international instrument the ideas that should govern the functioning of prisons. This work was preceded by exposés by moral entrepreneurs, such as John Howard (1792) and Elizabeth Fry (1827), of inhumane prison conditions that undermined the human dignity of persons detained therein. From the mid-19th century onwards international conferences and meetings of prison experts, many with close government links, from European and North American countries – that is, "Western" countries – sought to provide the intellectual underpinnings for guidelines on how prisons and prisoners should be managed (Radzinowicz 1999: 359–371). These meetings provided the intellectual underpinnings for this endeavour.

An institutional structure, the International Penal and Penitentiary Commission (IPPC), was also created, which after the First World War worked closely with the League of Nations. This well-researched history reveals attempts by the League of Nations to formulate "prison rules" that were to be lent the imprimatur of an international body (Clifford 1972). However, the League of Nations did not succeed in adopting these guidelines before its demise in the tensions that led to the Second World War. However, the work of the IPPC for the League of Nations was absorbed into the United Nations structures of the early 1950s (UNODC 2023). It eventually culminated in the adoption of these guidelines, in the form of the 1955 UNSMR, by the first United Nations Congress on the Prevention of Crime and Treatment of Offenders (Radzinowicz 1999: 390).[1]

The UNSMR attracted considerable attention as the first international standard-setting product in the criminal justice sphere of the post-WWII United Nations (Clark 1994; Joutsen 2016). Nevertheless, the UNSMR did not have international law treaty status. On the contrary, the UNSMR went out of their way to stress their "soft law" status. Thus, Rule 1 of the 1955 UNSMR emphasised that they were not intended to describe in detail a model system of penal institutions (ECOSOC 1957). Rule 2 states further that "in view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times", while adding that "they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations" (ECOSOC 1957).

The UNSMR would remain largely unaltered for 60 years. Only one further Rule was added during this time; Rule 95 in 1977, which extended the protection of the SMR to persons arrested or imprisoned without charge (ECOSOC 1977). It was

[1] The 1955 UNSMR was the first example of a widespread trend for the UNO to develop criminal justice standards generally. For an overview, see Redo (2012).

a minimal addition, proposed as a compromise by the UN Committee on Social Development, which regarded the UNSMR as having already become "a kind of prisoners' 'Magna Carta'", and was reluctant to put forward an amendment to any of the existing rules (ECOSOC 1976: para. 90). Similarly, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted in 1988 (UNGA 1988), and the Basic Principles for the Treatment of Prisoners, adopted in 1990 (UNGA 1990), emphasised the general principles that should govern imprisonment worldwide, but were less comprehensive than the UNSMR and did not have a comparable worldwide impact. Between 1990 and 2015 there was no significant further development in comprehensive international standards for imprisonment.

Part of the reason for this long period of relative inaction was a change in the structure of the UN for developing such standards. The initial criminal justice standards were the product of a series of quinquennial international UN Congresses on the Prevention of Crime and Treatment of Offenders, starting in 1955, which adopted such standards, largely on the recommendation of the expert-driven UN Committee on Crime Prevention and Control, and then passed them up the UN chain to its Economic and Social Council and eventually to the General Assembly, where they were routinely adopted (Clark 1994).

International politics, however, upset this comfortable relationship. Following the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders in Havana in 1990, where the Congress adopted resolutions critical of the penal practices of individual member states, the USA, which was one of the states that had been subject to criticism, led a campaign to cut back the decision-making powers of the Congress. The Congress was kept in place, but its power to adopt new standards was largely curtailed. The Committee on Crime Prevention and Control was abolished. It was replaced by the Commission on Crime Prevention and Criminal Justice (the Crime Commission), consisting of representatives of a number of elected UN member states, which in the future would take the primary decisions on new standards that could be advanced through the UN system (Clark 1994). In 2006 the Crime Commission also became the governing body of the UNODC, thus giving it formal control of the officials within the UN that are directly responsible for its prison policies (Joutsen 2016).

1.2. Towards the emergence of the Nelson Mandela Rules

The changes to this process did not make it impossible for the reorganised UN organs to engage in further transnational legal ordering of imprisonment worldwide, but it did make it harder for them to do so. For example, at the 1995 Congress on the Prevention of Crime and Treatment of Offenders – the first Congress held under the new structure – the government of the Netherlands, working closely with the international non-governmental organisation (NGO) Penal Reform International (PRI), tabled a comprehensive document, "Making Standards Work" (PRI 1995),

that sought to give renewed impetus to the UNSMR, not by amending them but instead by commenting in detail on their provisions and suggesting broader interpretations of them. However, even this limited and carefully crafted initiative was not adopted directly by the Congress, as some states feared that it would provide the basis for stricter international standards that could be used to criticise their national prison systems. Instead, the Congress simply noted "Making Standards Work", "with appreciation" (UN 1995: 16), and emphasised the collection of further data on the operation of the UNSMR.

While the scope for transnational legal ordering of imprisonment was being constrained by the more restrictive framework imposed on the part of the UNODC that deals with criminal justice matters, other developments were taking place that would eventually contribute to the institutionalisation of a UN-led transnational legal order on imprisonment.

1.2.1. Regional developments

Some of these developments were regional. The European Prison Rules were adopted in 1987 (Council of Europe 1987) and were followed by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment, which came into force in 1989. The latter was particularly important as the key operating body set up by the Convention. The European Committee on Torture (CPT) also began formulating its own, highly influential prison standards. In 2006, the European Prison Rules were substantially rewritten (Council of Europe 2006), including several features that went further than the 1955 UNSMR in protecting prisoners' rights.[2]

In Africa there were similar progressive developments of standards. These were reflected in the 1996 Kampala Declaration on Prison Conditions in Africa (Pan African 1996), the 1999 Arusha Declaration on Good Prison Practice (CESCA 1999) and the 2002 Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms in Africa (PRI, African Commission 2002). In the Americas, the 2008 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Inter-American Commission on Human Rights 2008) set a particularly high bar for prison standards (Morales Antoniazzi 2022). These developments are significant as they reflect interventions beyond the Western core that led to the eventual emergence of the 1955 UNSMR.

1.2.2. Developments within the United Nations framework

For a while, further important developments broadly related to imprisonment took place primarily within the wider UN human rights structures, rather than within the specific framework of the UN criminal justice initiatives led by the

[2] In 2020 the European Prison Rules were amended, *inter alia* to reflect the Nelson Mandela Rules (Council of Europe 2020).

UNODC. Key amongst these was the treaty-level International Covenant on Civil and Political Rights that came into force in 1976, which not only outlaws "torture or cruel, inhuman or degrading treatment or punishment" (Art. 7), but also provides, somewhat enigmatically, that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation" (Art. 10.2). Also of particular relevance was the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force in 1987. Both these treaty-level instruments had enforcement mechanisms: the Human Rights Committee (HRC) and the Committee against Torture, respectively. Both committees required detailed knowledge of prisons and prison standards to decide whether the conduct of states in respect of imprisonment met the requirements these instruments set out in general terms, and turned to the 1955 UNSMR in this regard (Williams 1990; Rodley and Pollard 2009).

In the case of the 1955 UNSMR, by as early as 1987 Nigel Rodley was able to quote several references by the HRC to rules pertaining to diverse prison conditions, ranging from cell size to the use of dark cells and handcuffs as punishment, which the HRC now regard as embodying direct legal obligations of states, as they infringed the International Covenant on Civil and Political Rights as interpreted in the light of the UNSMR (Rodley 1987: 222). Since the adoption of the Nelson Mandela Rules this process has accelerated, as noted in the decision of the UN tribunals referred to above. Arguably, as Nigel Rodley explained, several specific rules could be regarded as reflecting customary international law. This meant that, notwithstanding their ostensible "soft law" status, they were regarded in international law as legally binding.

The United Nations Office of the High Commissioner for Human Rights (UNOHCHR) also produced technical manuals to support the work of these bodies. Prominent amongst these was the so-called Istanbul Protocol, the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNOHCHR 2004), which focussed on the medical indicia for torture. The need for such information increased when the Optional Protocol to the Convention against Torture (OPCAT), itself a treaty-level instrument, entered into force in 2006. The OPCAT set up a new UN inspecting body for places of incarceration, the Subcommittee for Prevention of Torture (SPT), and required State Parties to create National Preventive Mechanisms to perform a similar function at the national level and to liaise with the SPT (Murray et al. 2011).

1.2.3. Knowledge production on prisons within the UNODC

During the first decade of the 21st century the UNODC began to expand its series of meticulously produced Criminal Justice Handbooks, which focussed on prison-related topics. The series was aimed primarily at senior civil servants worldwide dealing with criminal justice and penal policy at the national level, and also at diplomats who, while not necessarily criminal justice experts, would

be engaged in setting international standards. While earlier handbooks, such as the "Handbook on Alternatives to Imprisonment" (UNODC 2007), had dealt with wider policy issues, newer handbooks covered topics relating directly to the implementation of imprisonment. Particularly important in this regard were the "Handbook on Prisoner File Management" (UNODC 2008a), the "Handbook for Prison Managers and Policymakers on Women and Imprisonment" (UNODC 2008b) and the "Handbook on Prisoners with Special Needs" (UNODC 2009). What these handbooks did most effectively was combine principles extracted from human rights treaties, such as the International Covenant on Civil and Political Rights and the UN Convention against Torture, and existing UN prison-related standards, such as the UNSMR, with a detailed and expert examination of how practical aspects of imprisonment should be dealt with.

Within the UN system this material was complemented by a comprehensive publication, "Human Rights and Prisons", produced by the United Nations Office of the High Commissioner for Human Rights (UNOHCHR 2005). As may be expected, it emphasised human rights principles, but it was given a strong practical focus by its presentation as "a Manual on Human Rights Training for Prison Officials". All the knowledge generated in this way, both by the UNODC and the UNOHCHR, formed an invaluable basis for a critique of the existing standards, combining a familiarity with human rights law and prison practice.

1.2.4. The Bangkok Rules as a forerunner of wider reforms

In 2009 the Crime Commission took an important step towards introducing a new set of Rules dealing with an aspect of adult imprisonment, when it formally set in train the process to develop rules on the treatment of women in prison. At the time, the improvement of prison conditions for women was widely seen as less controversial than the development of more rigorous general prison standards. The initiative of the Crime Commission led to the adoption by the General Assembly of the UN in December 2010 of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) (UNGA 2010a). A full analysis of how and why the Bangkok Rules emerged in the form they did is beyond the scope of this paper, but they have been criticised from a gender perspective for adopting a narrow view of what women in prison require and ignoring the problems faced by prisoners who do not conform to cisgender stereotypes (Barberet, Jackson 2017; for a more positive overview, see Huber 2016). Nevertheless, the Bangkok Rules are of considerable relevance to the history of the Nelson Mandela Rules, insofar as they demonstrated that it was still possible to introduce new Rules that would complement the somewhat outdated UNSMR.

When one considers the substance of the Bangkok Rules, it is noteworthy that several of its rules that deal with imprisonment are written in the form of glosses on specific rules of the UNSMR. For example, Rule 5 of the Bangkok Rules, which deals with "personal hygiene", is preceded by a note that explains

that it supplements Rules 15 and 16 of the UNSMR. The Rule then states that "the accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs" and spells these out. This way of working provided a clear indication of areas in which the UNSMR could be improved. The further history of the Bangkok Rules also provided a model of how the UNODC Handbook Series could be used to institutionalise a body of Rules: the UNODC produced a much-expanded version of its "Handbook on Women and Imprisonment" (UNODC 2014), which referred in detail to the substantive provisions of the Bangkok Rules and integrated them closely into what previously had simply been policy suggestions.

1.3. The adoption of the Nelson Mandela Rules

The process that would lead to the Nelson Mandela Rules being adopted formally began with a careful resolution adopted by the UN General Assembly in December 2010 during the same meeting at which the Bangkok Rules were adopted. In this resolution, the UNGA requested the Crime Commission to establish:

> an open-ended intergovernmental expert group … to exchange information on best practices [in relation to imprisonment], as well as national legislation and existing international law, and on the revision of existing United Nations standard minimum rules for the treatment of prisoners so that they reflect recent advances in correctional science and best practices, with a view to making recommendations to the Commission on possible next steps. (UNGA 2010b: para. 9)[3]

The Crime Commission duly convened the first of a series of Intergovernmental Expert Group Meetings (IEGM), which met in Vienna from 31 January to 2 February 2012.

Before the first IEGM, however, the UNODC first held two informal "high level" meetings to consider possible revision strategies. This strategy allowed the UNODC to incorporate non-governmental "experts", including members of NGOs, who were both knowledgeable on prison policy and sympathetic to the UNODC's knowledge agenda to be incorporated into the revision process at an early stage. The first such meeting in Santa Domingo, was broadly pessimistic, expressing concerns that amendments to the UNSMR would weaken them and suggesting instead other means to increase their impact (UNODC 2011). It was equally pessimistic about the prospects of a treaty-level Charter of Prisoners' Rights being adopted.

In partial contrast, the second informal, high-level meeting, held in Vienna, was more optimistic, expressing the view that it might be possible to go further than merely producing a new commentary on the existing UNSMR (UNODC

[3] The General Assembly was reacting to a proposal contained in "the Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World" adopted by the 12th quinquennial Crime Congress in April 2010 (UN 2010).

2012a: 6). While it also regarded a treaty-level Charter of Prisoners' Rights as politically unrealistic in the sense that few national governments appeared to have any appetite for such change, and was also concerned about the possibility of regressive changes to the existing UNSMR, it did not reject the option of a targeted reform. Instead, it came up with a short list of aspects of the existing SMR that were ripe for improvement. These were not formal proposals, however, and the UNODC officials could mould the ideas that emerged from the two informal meetings into alternatives to be put forward at the IEGM.

The first formal IEGM came to a similar conclusion as the second informal meeting that preceded it, in terms of rejecting the options of a binding instrument, radical changes to the existing UNSMR or a mere commentary on the existing rules. Instead, the IEGM, having confirmed the "consensus that any changes to the Rules should not lower any of the existing standards" (UNODC 2012b: para. 4), recommended, as a middle way, "a list of areas for possible consideration in order to ensure that the Rules reflected recent advances in correctional science and best practices". These were:

a) respect for prisoners' inherent dignity and value as human beings;
b) medical and health services;
c) disciplinary action and punishment, including the role of medical staff, solitary confinement and reduction of diet;
d) investigation of all deaths in custody, as well as any signs or allegations of torture or inhumane or degrading treatment of prisoners;
e) protection and special needs of vulnerable groups deprived of their liberty, taking into consideration countries in difficult circumstances;
f) the right of access to legal representation;
g) complaints and independent inspection;
h) the replacement of outdated terminology;
i) training of relevant staff to implement the Standard Minimum Rules (UNODC 2012b: para. 5).

Once the basic decision had been taken at the first Vienna IEGM on the initial scope of the reform, much further work had to be undertaken. This was conducted through three further IEGMs held in Buenos Aires from 11–13 December 2012 (UNODC 2012c), Vienna (again) from 25–28 March 2014 (ECOSOC 2014) and Cape Town from 2–5 March 2015 (ECOSOC 2015a). At the final IEGM, the Nelson Mandela Rules emerged in the form in which they would be adopted almost unaltered by the UNGA in December 2015, after having duly received the approval of the appropriate chain of UN bodies: the Crime Commission (ECOSOC 2015b) and ECOSOC (ECOSOC 2015c).

In her thorough study of the emergence of the Nelson Mandela Rules through the four IEGM meetings devoted to the Rules, Jennifer Peirce (2018) focusses on a number of factors that go beyond what can be gleaned from the official records of the IEGM meetings, where the changed rules were given substance. Although Jennifer Peirce does not use the language of transnational legal ordering, her ob-

servations are fully congruent with this analytical framework. In particular, she points to the role of international NGOs, such as PRI, and the individual experts who were actively involved in the process from the beginning. They were given the opportunity to do so by the way in which the UNODC cooperated with them, both in building up its own knowledge base through its early Handbooks and by ensuring that they were able to play a larger role than otherwise expected at the IEGM meetings (Huber 2015).

Jennifer Peirce (2018) rightly draws attention to the so-called "Essex papers", which were a key source of substantive proposals of what reforms could be made to the existing UNSMR. The Essex papers were initiated by PRI and the University of Essex, which brought together a diverse group of representatives of NGOs specialising in prison matters and independent experts to participate in the development of the papers. The substantive proposals were grounded in analyses of high-status legal instruments, such as the ICCPR. Attention was also paid to the latest ideas on rehabilitation-orientated prison management, which recognised that rehabilitation should not be imposed on prisoners, but rather that opportunities to rehabilitate should be offered to them in a human rights-compliant way. "Essex Paper 1" (PRI, University of Essex 2012) was a direct response to what should be done in the areas of change identified at the first Vienna IEGM and fed into the debate at the second IEGM in Buenos Aires, while "Essex Paper 2" (PRI, University of Essex 2014) focussed on a narrower range of issues that emerged in Buenos Aires – safety of prisoners, prisoners in a position of vulnerability, use of force and restraints, body searches, deaths and injuries in custody and record keeping, case management and training – and placed them before the third IEGM in Vienna.

Formally, the IEGMs remained state-driven because, as in treaty negotiations, the member states who were represented were given priority in speaking and leading the discussion at the various meetings. However, the state delegations varied greatly in the degree of "prison expertise" that they brought to bear on the topics discussed. This was particularly true at the final IEGM, in Cape Town, where the US delegation included experienced American prison managers who could speak with authority on a number of issues, including the advantages of limiting the use of solitary confinement as disciplinary punishment (UNODC 2015a). Similarly, the pragmatic approach adopted by the NGO representatives allowed them to play an important role. This cooperation proved crucial in the adoption of perhaps the most significant change introduced by the Nelson Mandela Rules, namely the definition of solitary confinement as "confinement of prisoners for 22 hours or more a day without meaningful human contact", and the limitation of its use to a maximum of 15 consecutive days (UNGA 2015: Rule 44).

Looking back at the process after the new draft rules had gained the imprimatur of the Crime Commission in May 2015, Andrea Huber of PRI reflected that most of the specific reform objectives of the participating NGOs, including restrictions on the use of solitary confinement, had been met (Huber 2015). The immediate further challenge was to ensure that the Nelson Mandela Rules became embedded as a key part of the transnational legal order governing prisons.

2. The institutionalisation of the Nelson Mandela Rules

The process of institutionalising the Nelson Mandela Rules at the international core of the transnational legal ordering of imprisonment began immediately on their adoption by the General Assembly in late 2015. Not surprisingly, the lead was again taken by the UNODC, the body most actively involved in developing the Nelson Mandela Rules, had been declared the "custodian of the Nelson Mandela Rules" (UNODC n.d.a) and had been instructed by the UN General Assembly to provide technical assistance for implementing the Rules in resolutions adopted in 2017 (UNGA 2017: para. 26) and 2018 (UNGA 2018a: para. 11). In this process the prison specialists within the UNODC, or those appointed ad hoc by it to perform specific tasks, played a prominent part by further developing the body of knowledge that had underpinned the emergence of the Nelson Mandela Rules and pointing to its implementation in a way that gave further prominence to specific aspects of the Rules.

One way in which this was done was through further expanding the set of Criminal Justice Handbooks on aspects of imprisonment published by the UNDOC, and by linking the guidance that the handbooks give to the Nelson Mandela Rules. A good example is the "Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons" (UNODC 2016a), on which work had begun prior to the adoption of the Nelson Mandela Rules but which was published after their adoption. In this Handbook, as in several others produced after 2015, pride of place was given to the Nelson Mandela Rules. As the "Handbook on the Management of Violent Extremist Prisoners" explains in its contextual introduction:

> As the core standard applicable to prisons adopted by the United Nations General Assembly, the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* are considered as an overall lens through which all other guidelines and recommendations should be read and interpreted. (UNODC 2016a: 7)

This approach is followed throughout the Handbook, with more than 30 references being made to the Nelson Mandela Rules, including extensive quotations on minimum standards to which "violent and extremist" prisoners are entitled, as they progress through the prison system, from admission and allocation to work, education and leisure activities through to release and post-incarceration supervision.

The "Handbook on the Management of Violent Extremist Prisoners cross-references the Handbook on the Management of High-Risk Prisoners" (UNODC 2016b), which appeared in the same year. The latter Handbook references the Nelson Mandela Rules even more fully (45 times), and also places security concerns, which are raised by the "high-risk" prisoners on which it focusses, in the framework of structures guaranteeing prisoners' rights in respect of various aspects of an "ordinary" prison regime.

A third Handbook published just after the introduction of the Nelson Mandela Rules was the "Handbook on Dynamic Security and Prison Intelligence" (UNODC 2015b).[4] It cross-references the "Handbook on Managing High-Risk Prisoners" and refers to "violent extremists". The "Handbook on Dynamic Security and Prison Intelligence" also refers extensively to various of the Nelson Mandela Rules in order to ensure a balanced prison regime even where the emphasis is on security. This Handbook moves the attention away from physical security and towards "dynamic security", where the emphasis is on good staff–prisoner relations. These relations ideally should enable staff to know what prisoners need and want, and allow these needs and wants to be dealt with promptly in order to avoid unrest. At the same time good relationships should provide the staff with intelligence that will also ensure that potential security breaches are nipped in the bud. Interestingly, "dynamic security" is not mentioned in the 1955 UNMSR at all, and in the Nelson Mandela Rules it appears only in the context of something that staff must be trained to apply. Nevertheless, by making it a central theme of this important Handbook, the way was opened for "dynamic security" to become a key element in national legislation derived from the Nelson Mandela Rules put forward by the UNODC.

Also in the Criminal Justice Handbook Series was the "Roadmap for the Development of Prison-Based Rehabilitation Programmes" (UNODC 2017a), which built directly on the earlier introductory "Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders" (UNODC 2012d). The difference was that the 2017 "Roadmap" referred in considerable detail to the Nelson Mandela Rules, with particular reference to the rules on education, vocational training and work.

An interesting further contemporaneous development was the "Handbook on Anti-Corruption Measures in Prisons" (UNODC 2017b), a joint product of the Corruption and Economic Crime Branch of the UNODC and the Justice Section of the UNODC. While the Justice Section was solely responsible for the other handbooks discussed here, the corruption experts brought with them a body of "hard law", the Convention Against Corruption – which is a core component of the transnational criminalisation of corruption (Hatchard 2015; Ivory 2020) and which can be applied to prisons. As the introduction to the "Handbook on Anti-Corruption Measures in Prisons" explains:

> [T]he handbook highlights which articles of the Convention Against Corruption and which provisions of the Nelson Mandela Rules are of particular relevance to preventing corruption in prisons and presents practical measures to implement those provisions to strengthen integrity, accountability, transparency and oversight in the prison system. While it is not a direct focus, this handbook also recognizes

[4] The given publication date is December 2015, which is the same month that the Nelson Mandela Rules were adopted by the General Assembly. However, in practice it may have been later, as it hard to see how the details for the Nelson Mandela Rules could have been added only in December 2015 and the Handbook published in the same month. Alternatively, the approval of the Nelson Mandela Rules may have been anticipated by its authors as its substance had been agreed before the General Assembly gave the Rules its imprimatur.

> the correlation between the level of corruption and the prevalence of torture and ill-treatment: corruption breeds ill-treatment, disregard for human rights and contributes to the prevalence of corruption. (UNODC 2017b)

With its multiple references to the Nelson Mandela Rules, what this Handbook effectively does is place the "soft-law" Nelson Mandela Rules on the same level as a "hard-law" treaty, the Convention Against Corruption, when developing a knowledge base in this overlapping area.

Two further handbooks were introduced explicitly to propagate the Nelson Mandela Rules. The introduction to the Handbook, "Assessing Compliance with the Nelson Mandela Rules" (UNODC 2017c: 1), notes that it was undertaken with the specific objective of responding to the request made by the UN General Assembly when it adopted the Nelson Mandela Rules that the UNODC should:

> ensure broad dissemination of the Nelson Mandela Rules, to design guidance material and … provide technical assistance and advisory services to Member States in the field of penal reform, in order to develop or strengthen penitentiary legislation, procedures policies and practices in line with the Rules. (UNGA 2015: para. 15)

The Handbook proceeds to develop an elaborate checklist that refers systematically to the substance of specific Rules. In so doing it feeds directly into the operationalisation of the additional emphasis – in comparison to the original UNSMR – that the Nelson Mandela Rules place on inspection.

In 2022 the UNODC added "Incorporating the Nelson Mandela Rules into National Prison Legislation" to its Handbook series (UNODC 2022a). As its subtitle, "A Model Prison Act and Related Commentary", reveals, this Handbook is designed to give states clear guidance on what would be entailed in converting the Nelson Mandela Rules into national legislation. Model legislation produced at the international level has been used to entrench transnational legal ordering of other criminal justice areas as well, for example, in the report, "Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary" (UNODC 2013). The advantage of applying this technique to the Nelson Mandela Rules is that specific rules that may have been stated in abstract terms are made more concrete by converting them into statute law which national officials can envisage applying to their existing prison systems in order to produce better outcomes.

The work of specialist international NGOs since the adoption of the Nelson Mandela Rules has complemented that of the UNODC, also in terms of knowledge production. Thus, for example, PRI and the University of Essex collaborated again early in 2016 to produce "Essex Paper 3", which not only complemented their influential inputs ("Essex Paper 1" and "Essex Paper 2") during the development of the Nelson Mandela Rules, but also provided an extended commentary in what was modestly subtitled "Initial Guidance on the Interpretation and Implementation of the UN Nelson Mandela Rules" (PRI, University of Essex 2017). PRI also joined the Warsaw-based Office for Democratic Institutions and Human Rights

(ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) to produce an even more comprehensive "Guidance Document on the Nelson Mandela Rules" (OSCE ODIHR, PRI 2018).[5]

While the handbooks and the various NGO-related commentaries were aimed at international and national policymakers and higher-level prison management, steps have also been taken by the UN to bring the Nelson Mandela Rules to the attention of prison officers worldwide. In 2023 the Secretary General could report that by the end of 2022, 74,000 users from 160 countries had completed the UNODC scenario-based e-learning course on the Nelson Mandela Rules, adding that:

> [t]he course remains the most popular course on the UNODC e-learning platform and is currently available in 15 languages. UNODC continued to promote its use and formal inclusion in the national training curriculum for prison officers in several Member States, including Ethiopia, Indonesia, Kazakhstan, Malaysia, Nigeria, Thailand and Viet Nam. UNODC also finalized the translation of the course into Bangla and Kazakh. (ECOSOC 2023: para. 13)

Similar programmes are provided by NGOs or developed by national governments directly.[6]

The association of Nelson Mandela's name with the revised Standard Minimum Rules provided opportunities for various organs of the United Nations to support the institutionalisation of the Rules. When the General Assembly adopted the Nelson Mandela Rules in December 2015, it also decided to extend the scope of Nelson Mandela International Day, observed each year on 18 July, by allowing it "to be also utilized in order to promote humane conditions of imprisonment" (UNGA 2015: para. 7). On 18 July 2016, the first anniversary of Mandela's birthday following the adoption of the Rules, the United Nations Special Rapporteur on Torture, Juan Méndez, together with the Rapporteur on Prisons, Conditions of Detention and Policing in Africa, Med Kaggwa, the Rapporteur on the Rights of Persons Deprived of Liberty of the Inter-American Commission on Human Rights, President James Cavallaro, and the Council of Europe Commissioner for Human Rights, Nils Muižnieks, jointly welcomed the Nelson Mandela Rules as "one of the most significant human rights achievements in recent years" and commented that "the revised Rules represent a universally accepted minimum standard for the treatment of prisoners, conditions of detention and prison man-

[5] A noteworthy feature of the "Guidance Document" is that it begins by emphasising the importance of "Prisoner File Management", a topic raised in one of the earlier UNODC handbooks, which, perhaps unexpectedly, had become a key reform in the revision of the Nelson Mandela Rules.

[6] See, for one example among many, the "Introduction to the Nelson Mandela Rules Training Course for Italian Prison Staff" organised by the OSCE Office for Democratic Institutions and Human Rights (ODIHR), held in partnership with the Italian Department of Penitentiary Administration from 10 to 14 October 2022 at the Italian Department of Penitentiary Administration's Training School for prison staff, *Castiglione delle Stiviere* (Mantova Province), Italy (OSCE ODIHR 2022).

agement" (UNOHCHR 2016). Mendez added that "the revised Rules are premised on the recognition of prisoners' inherent dignity and value as human beings, and contain essential new procedural standards and safeguards that will go a long way in protecting detainees from torture and other ill-treatment" (UNOHCHR 2016).

In 2017 the link between Nelson Mandela's name and the ongoing institutionalisation of the Rules was formalised with the establishment, following a proposal of the government of South Africa, of the Group of Friends of the Nelson Mandela Rules. Since then, more than 30 Member States of the United Nations and other entities have joined the Group of Friends of the Nelson Mandela Rules. Its purpose is to create awareness and promote the practical application of the Nelson Mandela Rules worldwide. It works closely with the UNODC by "serving as a main support vehicle for the technical assistance" delivered by the UNODC "including by means of financial, technical and/or political support". It also facilitates "the widest possible involvement of Member States in the yearly celebrations of Nelson Mandela International Day … to promote humane conditions of imprisonment and the application of the Nelson Mandela Rules" (UNODC n.d.b).

The careful use that the UNODC has made of the events hosted by the Group of Friends has allowed it to focus overall UN prison policy on the Nelson Mandela Rules, thus contributing greatly to the institutionalisation of the Rules. Typically, Group of Friends gatherings are held during the annual Crime Commission meetings and on Nelson Mandela International Day.

A good example of the former was the launch of the "United Nations System Common Position on Incarceration" (UNODC 2021a) at a public event hosted by the Group of Friends of the Nelson Mandela Rules during the May 2021 meeting of the Crime Commission. The "Common Position", which was developed by the UNODC, together with the UNOHCHR and the Office for Rule of Law and Security Institutions in the Department of Peace Operations (DPO), "constitutes the common framework for the United Nations support to Member States in relation to incarceration … [and] efforts to rethink the current overreliance on and implementation of incarceration, including through better coordination and integrated efforts" (UNODC 2021a: 2). The primary source for this strategic document was again the Nelson Mandela Rules, which are referred to 19 times. The "Common Position" places the Rules at the heart of the UN's overall prison strategy:

> Constituting the minimum conditions accepted as suitable by the United Nations, the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) have led to a renewed momentum in prison reform efforts worldwide, and form the basis for United Nations support. The Nelson Mandela Rules promote a human rights-based approach to prison management that places the human dignity of prisoners at centre stage and outlines what is generally accepted as being good principles and practice in the treatment of prisoners and prison management. (UNODC 2021a: 12)

The 2022 meeting of the Group of Friends on Nelson Mandela International Day underlined the importance of the Nelson Mandela Rules-related material being presented in this forum. The event was organised around the theme "dignity unlocked". This time the substantive focus of the event in Vienna was on presentations regarding two handbooks most closely associated with the Nelson Mandela Rules, namely "Assessing Compliance with the Nelson Mandela Rules" (UNODC 2017c) and "Incorporating the Nelson Mandela Rules into National Prison Legislation" (UNODC 2022a). Diplomats representing 37 countries, from Algeria to the USA, responded by linking Mandela the political figure to prison reform, and then specifically to support for the Nelson Mandela Rules and the requirements of the Rules on matters such as solitary confinement. Several also claimed that prisons in their countries now conformed to the Nelson Mandela Rules.[7] Although these claims have not been tested empirically, the fact that they were being made indicates the extent to which the Rules are becoming part of the international discourse on prisons.

3. The consequences of the Nelson Mandela Rules

As Gregory Shaffer and Ely Aaronson (2020: 19) noted when reflecting on the consequences of criminal justice transnational legal orders generally, "[t]he production of new legal norms and institutional forms is not an end in itself. Rather it is meant to shape behavior". Beyond the 2022 Nelson Mandela International Day event, the UNODC "dignity unlocked" campaign sought to involve both prison leaders and ordinary prison staff worldwide directly in order to influence their behaviour. In this regard it achieved a remarkable degree of outreach, with more than 3.5 million users verified as having accessed the campaign on social media (ECOSOC 2023: para. 74). A striking feature of the campaign was the wide range of responses addressed to the UNODC, in both text and video format from practitioners in diverse countries applying the different aspects of the Nelson Mandela Rules directly in the field. They included the reactions not only of prison officials, but also NGOs and even UN peacekeeping operatives who claimed to be applying the Nelson Mandela Rules in practice.

The Report of the Secretary General on the "use and application of United Nations standards and norms in crime prevention and criminal justice" in 2022 reflects on how the Nelson Mandela Rules are being put into practice (ECOSOC 2023). The UNODC prioritised prison management in line with the Nelson Mandela Rules in the more than 30 countries where it intervened directly to strengthen the capacity of the prison services (ECOSOC 2023: para. 64). The UNODC also

[7] Much of the electronic record of the 2022 Nelson Mandela Day meeting is available online (UNODC 2022c).

increased the impact of the Nelson Mandela Rules by contributing to the promotion of the UN Common Position on Incarceration, which is applied by UN agencies involved in peace missions or in rule-of-law assistance to post-conflict countries (ECOSOC 2023: para. 83).

A good example of how the Nelson Mandela Rules have become central to the outreach work of the UNODC is the three-year prison reform project it launched together with the Ghana Prison Service in December 2021 (UNODC 2021b). Subsequent reports state that in 2022 representatives of the UNODC visited more than half of all prisons in Ghana to design a tailor-made project that focusses on improving – in line with the Nelson Mandela Rules – various aspects of prison conditions, including health and basic services, the classification, categorisation and allocation of prisoners according to their individual risk and needs, and on enhancing prisoners' access to sustainable rehabilitation programmes. Similar UNODC-led initiatives are underway in Iraq, Kazakhstan, Kyrgyzstan, Nigeria, Tajikistan, Tunisia and Uganda (UNODC 2022b).

The application of the Nelson Mandela Rules has also gathered pace in the work of agencies of the United Nations other than the UNODC. Not only the Human Rights Committee (Zhaslan Suleimenov v. Kazakhstan [2012]: para. 8.7; Pavel Barkovsky v. Belarus [2013]: para. 6.2), but also the Committee on the Rights of Persons with Disabilities (Munir Al Adam v. Saudi Arabia [2016]: para. 11.3) and the Committee Against Torture (John Alfred Vogel v. New Zealand [2015]: para. 5.3; Ali Aarrass v. Morocco [2017]: para. 8.5) have relied on the Nelson Mandela Rules when dealing with applications from individuals alleging infringements of provisions of the key treaties. In the *Suleimenov* case, for example, the Human Rights Committee relied on the right to adequate medical care set out in Rule 24 of the Nelson Mandela Rules to find that the human dignity of prisoners guaranteed in Art. 10 of the International Covenant on Civil and Political Rights had been infringed. In the *Al Adam* case the Committee on the Rights of Persons with Disabilities referred generally to limitations on solitary confinement and prohibitions of violence against prisoners in the Nelson Mandela Rules to support its finding that the treatment to which a prisoner with disabilities had been subject violated Art. 16 of the Convention on the Rights of Persons with Disabilities. In *Ali Aarrass v. Morocco*, the Committee against Torture considered in some detail the strict limitations on the use of solitary confinement set out in Rule 44 of the Nelson Mandela Rules. The Committee concluded that Morocco, in its solitary confinement of Aarrass, had not adhered to these limits and thus infringed Art. 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In each instance, the Nelson Mandela Rules were crucial to the interpretation of a general provision of those treaty-based instruments when applied to prisoners, thus underlining their importance in the application of international law.

When commenting on prison conditions in countries, rather than dealing with individual cases of abuse of prisoners' rights, the UN Special Rapporteur on Torture (UNGA 2018b: para. 19; UNGA 2021: para. 13), the Committee Against

Torture (CAT 2019: para. 15; CAT 2023: para 22) and the specialist, detention-focussed Subcommittee for the Prevention of Torture (SPT 2020: para. 8; SPT 2022: para. 53) refer routinely to the Nelson Mandela Rules as setting overall standards that countries' prisons must meet. To take a single recent example, the Committee Against Torture, in its report on Brazil (CAT 2023), refers to the Nelson Mandela Rules nine times. Some of these references are quite specific. Rule 45(2) of the Nelson Mandela Rules is invoked to warn Brazil that minors should not be subject to solitary confinement, while the importance of due process in prison disciplinary proceedings is underlined with reference to Rule 41. Brazil is also instructed to "ensure the allocation of the human and material resources necessary for the proper medical and health care of prisoners, in accordance with rules 24 to 35 of the Nelson Mandela Rules" (CAT 2023: para. 28(b)).

It must be recognised, however, that whilst court judgments relying heavily on the Nelson Mandela Rules may lead to legislation designed to improve prison conditions, effective change does not follow automatically. In 2019, for example, two major decisions by provincial appellate courts held that "administrative detention" in Canada was solitary confinement as defined in the Nelson Mandela Rules and that it was being enforced for longer than the 15 days that these Rules allow (British Columbia Civil Liberties Association v. Canada (Attorney General) 2019; Canadian Civil Liberties Association v. Canada (Attorney General) 2019). Accordingly, they applied the Nelson Mandela Rules to support their finding that such lengthy solitary confinement was therefore inherently a "cruel and unusual" form of punishment forbidden by Art. 12 of the Canadian Charter of Rights. These judgements led to an amendment of Canadian prison law that explicitly outlawed detention practices that would amount to solitary confinement.[8] However, empirical research has shown that this legislation is not always enforced in practice, and that de facto solitary confinement is still a feature of imprisonment in Canada (Sprott, Doob 2021).

In the USA too, developments are similarly patchy. The Nelson Mandela Rules have been referred to in court decisions, and legislation limiting the use of solitary confinement has been passed in a number of individual states (Resnik et al. 2021). However, such legislation has not been adopted everywhere. Even in relatively liberal California, when the legislature adopted the aptly named "California Mandela Act", which was designed to drastically limit solitary confinement, it was vetoed by the governor on grounds that it was too expansive (Wiley 2021). Overall, excessive solitary confinement is still widespread in many federal states in the USA.

[8] This was done by the Act to amend the Corrections and Conditional Release Act and another Act, Bill C-83 (42nd Parliament, 1st session), which received royal assent on 21 June 2019.

Conclusion

When reflecting on the historical role of the UNSMR, and particularly the impact of their modern iteration as the Nelson Mandela Rules, it is clear that their formal legal status has not determined their influence. Throughout the process of producing and propagating these Rules, they have been classified as a "soft law" instrument. The Nelson Mandela Rules contributed to this perception by retaining, in its Preliminary Observations 1 and 2, the formulation of the 1955 UNSMR that emphasised that they were not intended to describe in detail a model system of penal institutions and noting that not all the rules can be applied in all places and at all times (UNGA 2015: 7). The UNODC has also continued to emphasise the soft-law designation of the Nelson Mandela Rules, and has therefore implied that they are never binding in international law (UNODC n.d.a). In some ways, however, these formulations are disingenuous, even from a narrowly legal point of view. As explained above, at least by 1987 some of the individual rules of the UNSMR were regarded as reflecting legally binding customary international law. Since the adoption of the Nelson Mandela Rules this process has accelerated, as noted by the reference to them in the decisions of UN tribunals.

When viewed through the lens of transnational legal ordering, it is clear that what matters is not the formal legal status of the Nelson Mandela Rules, but how they have become integrated into international policymaking on prisons. The early recognition of the UNSMR as a Magna Carta of prisoners' rights, even though they were not initially conceived as a human rights instrument, points to the evolutionary status that such rules can have. My analysis of the role of the UNODC, particularly in preparing the ground for, institutionalising and propagating the Nelson Mandela Rules, illustrates how a focussed international campaign can impact the transnational legal ordering of imprisonment. The effect has been that policies about how imprisonment should be organised, and even the extent to which it should be used at all, are open to influence by the Nelson Mandela Rules. I predict that such influence will increase in future.

The UNODC's catchy slogan, linking "dignity unlocked" to the Nelson Mandela Rules, should not be dismissed as a mere aspiration, for it has fed effectively into a wider debate on prison policy. Clearly, however, more needs to be done to make it a reality. In this regard the UNODC's development of assessment tools in its handbook, "Assessing Compliance with the Nelson Mandela Rules" (UNODC 2017c: 1), is particularly important, as is the growing network of national, regional and international inspecting bodies (Van Zyl Smit 2010) that can now refer to the Nelson Mandela Rules for guidance.

These developments do not mean that the substantive Rules are uniformly enforced worldwide. On the contrary, as the examples from Canada and the USA reveal, even changes explicitly informed by the standards of the Nelson Mandela Rules may be implemented only to a limited extent, if at all. More such independent research is needed to measure and evaluate the impact of the Nelson Mandela Rules in the many countries worldwide where lip service is paid to them.

Declaration of Conflict Interests

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Dealing with "dangerous" life-sentence inmates around the world and in Poland: Theoretical and practical problems

Postępowanie z więźniami „niebezpiecznymi" odbywającymi karę dożywotniego pozbawienia wolności na świecie i w Polsce. Problemy teoretyczne i praktyczne

Abstract: Perpetrators of murder sentenced to life imprisonment are usually considered dangerous because of the crime they committed. The prison administration classifies many of them as "dangerous" prisoners and places them under higher security, in line with "supermax prisons". This is an interesting research topic since supermax conditions raise legitimate controversies, not only among researchers. The article presents an analysis of previous research on prisoners placed in supermaxes, the practice of dealing with dangerous prisoners in Poland and the results of research conducted on a group of 98 life-sentence prisoners classified as dangerous between 1995 and 2014.

Keywords: perpetrators of murder, life-sentenced, dangerous, supermax, criteria for decision

Abstrakt: Sprawcy zabójstw skazani na karę dożywotniego pozbawienia wolności są zazwyczaj uznawani za niebezpiecznych ze względu na popełnioną zbrodnię. Administracja więzienna klasyfikuje wielu z nich jako więźniów „niebezpiecznych" i umieszcza ich w warunkach podwyższonego bezpieczeństwa, typu „supermax prison". Jest to interesujący temat badawczy, a warunki supermax budzą uzasadnione kontrowersje nie tylko wśród badaczy.
W artykule przedstawiam wyniki analizy dotychczasowych badań dotyczących więźniów umieszczanych w zakładach typu supermax, praktykę postępowania z więźniami „niebezpiecznymi" w Polsce oraz wyniki badań przeprowadzonych na grupie 98 więźniów skazanych na karę dożywotniego pozbawienia wolności zakwalifikowanych do kategorii niebezpiecznych w latach 1995–2014.

Słowa kluczowe: sprawcy zabójstw, skazani na dożywocie, niebezpieczni, supermax, kryteria decyzji

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Introduction

Murderers sentenced to life imprisonment are considered dangerous because of the crime they committed and the length of their sentence. The prison administration in Poland classifies many of them as "dangerous" ("D") prisoners and places them under higher security and control, similar to that of supermax prisons, understood as a prison with the levels of highest security and solitary confinement.

There is no single term to describe the conditions of a supermax prison, and some words can be misleading. This diverse terminology is due to different cultural or national conditions, and the terms can be treated as synonyms – in fact, they describe the same phenomenon. It pertains to a special regime of solitary confinement (isolation from the prison community) to ensure maximum security; these are special security units for prisoners classified as dangerous. It is not about the regime of high-security prisons, i.e. the harshest type of prison in the prison system or a stage of serving a sentence for convicts staying in such conditions.

In Poland and elsewhere it is sometimes assumed that because they have committed aggravated murder, convicts have nothing to lose whilst serving their life sentence (Porporino 1990: 35; Cunningham, Sorensen 2006: 686; Liebling 2014: 263; Niełaczna 2014a: 31, 135; Sorensen, Reidy 2019: 56). Life imprisonment is an indefinite sentence, and the current practice of carrying it out in Poland shows that no matter how a convict acts in isolation, they will not earn parole or clemency.

The results of previous studies discussed herein, as well as those I have conducted, contradict this stereotypical statement. Life inmates do not pose a proportionately greater threat to prison staff than other inmates serving designated long-term sentences, and many years into their sentences they cease to threaten public safety, as they stabilise their relationships with the community (Mauer, King, Young 2004; Cunningham, Sorensen 2006: 701; Sorensen, Reidy 2019).

There is also no single satisfactory definition of "dangerous offender" or "dangerous prisoner". "Danger" is a complex concept, and people can pose a threat to order or security in many ways. There is no direct causal relationship between lifers[1] and the danger or threat from them. On the contrary, most of them adapt to the prison routine satisfactorily over time (Maghan 1996: 2, 9), which helps them maintain or regain their self-esteem (Richards 2015: 178; Styles 2019: 27). They usually come to terms with the need to live in prison, and they find constructive ways to cope with time and isolation through self-improvement, personal development, religious practice and stronger contact with family members or the outside world (Schinkel 2014: 578; Kazemian, Travis 2015: 368; Crewe, Hulley, Wright 2019).

In Poland, it has long been observed that "D" prisoners make up a negligible percentage of the prison population. According to the December 2021 monthly statistics (BIS.0332.16.2021.MM), they accounted for less than 0.02% of the total prison population, whilst the average number of "D" prisoners in Polish prisons remains at 150 inmates per year (compared to an average of 70,000 incarcerated persons).

[1] The term is found in professional literature (Liem, Richardson 2014; Warr 2020).

In the case of lifers, the serious nature of the crimes they have committed and the indefiniteness of the end of their sentence makes their behaviour difficult to predict, both for the prison service and the general public (Drake 2011: 380). Therefore, some of them are placed in a supermax unit, often for a long period.

In this article, part 1 presents a literature review of previous research on the topic, part 2 discusses the origins and practice of dealing with "D" prisoners in Poland and part 3 is about life-sentenced prisoners who have been classified as dangerous. I present the results of my own file research of 290 lifers in Poland, one in three of whom were qualified as "D" between 1995 and 2014. Thus, the detailed analysis concerns a group of 98 subjects. The main research questions were as follows:

1) What do the statistics show about the phenomenon? What proportion of the 290 life inmates were classified as "D"?
2) What were the grounds for qualification during pretrial detention versus during life imprisonment?
3) How have this qualification (its verification) and the resulting trends in the reaction of the prison service and the behavioural tendencies of life prisoners changed over time? Do they give less reason for qualification?
4) How much time was spent in the supermax unit?

To answer these questions, I conducted a quantitative analysis of the prison files of 290 life prisoners. Then, through a qualitative analysis of the 98 of them classified as "D", I tried to respond the following research questions:

1) How "dangerous" were some of the prisoners (the severity of their offences and the conflictual nature of their relationships with prison staff or other inmates)?
2) Was there (non)uniformity of the criteria for qualifying for "D", and how did it look?
3) Was there (non)convergence of the criteria for verifying the "D" status of those staying in the supermax unit the longest?

The main thesis is that not all life-sentenced prisoners are dangerous or that their "dangerousness" may lessen over time, although this is not taken into consideration in decisions about their classification. In other words, "dangerous" prisoners (also those sentenced to the most severe punishment) are more of a bureaucratic phenomenon than a reality.

1. "D" prisoners in light of research findings

An analysis of previous research indicates that researchers have focussed on eight areas: the definition and purpose of the supermax prison, the community of "D" prisoners, the nature of segregation, the criteria and conditions of isolation, the

rules for managing "D" prisoners, the negative effects of solitary confinement and law-and-order concerns. The following is a synthesis of the analysis.

1.1. One definition, different goals and profiles of prisoners

The analysis of the literature shows that the supermax units in different countries have similar origins. Most prison administrations experienced an increase in the prison population due to a rise in violent crime, inmate violence and prison escapes (Ross 2013: 178–180). New categories of serious criminals, especially from organised crime groups and perpetrators of violent acts, have appeared in prisons.

In addition, these units have been uniformly defined as free-standing facilities or segregated units within a prison that, through a far-reaching restriction and security system, provide for the safe management (including control) of inmates who are found to be violent or seriously disorderly whilst in prison (Riveland 1999a: 191; 1999b: 6; Kurki, Morris 2001: 388; Pizarro, Stenius, Pratt 2006: 249). Therefore, the supermaxes use the latest architectural and technological advances in security to monitor their behaviour (Pizarro, Narag 2008: 24). This includes separating them from the general population housed in regular security units.

At the same time, the researchers found that the purpose of supermaxes and their community are not universal (Riveland 1999: 4). As originally conceived, the purpose of the units was to ensure security and order in prisons (Kurki, Morris 2001: 391). However, the diverse community of detainees in supermaxes gave rise to other goals, which increased over time and depended on local practices. As further goals of supermaxes, researchers have identified holding the "worst of the worst" inmates, incapacitating the most "incorrigible", reducing institutional violence, deterring those inmates who contemplate acts of violence or disorder whilst in prison and "storing" difficult-to-manage though not necessarily dangerous inmates (Toch 2001: 386; Briggs, Sundt, Castellano 2003: 1345; Mears 2006: 5; Pizarro, Narag 2008: 24; Haney 2018: 366). In other words, the idea was to incapacitate certain categories of criminals or prisoners in order to minimise the risk of error by the prison service in dealing with them in the regular units.

1.2. Diversity of "D" prisoners

Studies on supermax units show that the inmates placed in them, compared to the general prison population, are younger, serve longer sentences, are more likely to be convicted of violent crimes and are more likely to commit serious offences whilst incarcerated (Lovell et al. 2000: 34; Rhodes 2004: 59; Ross 2007: 63; Pizarro, Narag 2008: 27). At the same time, the research shows that not only dangerous and violent prisoners, who pose a real and immediate threat to order and prison security, are placed in supermaxes, but so are other types of convicts:

- those who are troublesome to manage, fractious, prone to insubordination and rioting or antagonistic to the prison service – in other words, "trou-

blemakers" (King, McDermott 1990: 458; O'Keefe 2008: 124; O'Donnell 2015: 107)
- those who are very difficult to detain under regular unit conditions and, for various reasons, cause chronic problems in terms of order and security (Pizarro Stenius, Pratt 2006: 249; Scharff Smith 2009: 5)
- those who participate in prison or gang subculture (Kurki, Morris 2001: 389; Haney 2003: 150; Browne, Cambier 2011: 46; O'Donnell 2015: 107)
- those who have been placed under protective supervision and have difficulty coping with prison life (Riveland 1999b: 1; Lovell et al. 2000: 34; Mears, Reisig 2006: 36)
- those suffering from mental illness who are placed in supermax units due to a lack of other suitable placements (Riveland 1999b: 6; Briggs, Sundt, Castellano 2003: 1343; Kupers 2008: 1010; O'Keefe 2008: 125).

Thus, a triad of properties appears in the diverse characteristics of "D" prisoners: difficult, dangerous and disruptive. The heterogeneous profile of this category indicates that not everyone presents the same management problem (Lovell et al. 2000: 37).

1.3. Administrative segregation

The analysis of the literature indicates that the qualification for category "D" is administrative segregation (Pizarro, Stenius, Pratt 2006: 251; O'Donnell 2015: 105), meaning that the decision-making process is discretionary (prison authorities have a wide margin of discretion) and relating to the due process standard (Maghan 1996: 8; O'Keefe 2008: 125), as opposed to criminal and disciplinary segregation (Scharff Smith 2009: 5; Steiner, Cain 2016: 170). In some countries, prisoners are not informed of the reason for their "D" classification, and there are limited opportunities for reassessment or transfer back into the general prison community (Browne, Cambier 2011: 47). In addition, administrative segregation is usually indefinite and can be prolonged in the case of prisoners deemed a security risk (Arrigo, Bullock 2008: 627; Browne, Cambier 2011: 47; King 2011).

1.4. Unclear eligibility and verification criteria for "D"

Studies have shown that no criteria for the qualification and verification of "D" prisoners are specified (Pizarro, Stenius, Pratt 2006: 253; O'Keefe 2008: 125; Pizarro, Narag 2008: 26) or that the reasons for declaring prisoners dangerous "are so vague and ephemeral that they cannot be articulated" (O'Donnell 2015: 108). There is also a lack of clarity on what is required for convicts to be transferred from a supermax unit to a regular unit. Qualifying for category "D" is thus a "state of endless duration: it is a lock without a key" (Korn 1988: 13).

Researchers also found that a prisoner's risk assessment tended to depend on the length of their sentence, any changes in their behaviour, changes in their physical and mental state and their willingness to relinquish their gang affiliation

(Kurki, Morris 2001: 388). Thus, the criteria do not fit into the scientific model of risk assessment, as most of them are static and some are based on the convict's declaration or communicated stance.

1.5. Management principles

The research revealed two models for managing "D" prisoners: dispersion and concentration. Supermax units implement the latter model (DiIulio 1990; Riveland 1999b: 1; Briggs, Sundt, Castellano 2003: 1342). Studies have shown that it is more costly, but not necessarily effective when it comes to reducing violence among the prison population (Mears 2006: 49; Mears, Reisig 2006: 45). There are alternative ways to ensure order and security in a prison, such as dispersing "troublesome" prisoners throughout the prison system, which allows the workload to be evenly distributed among all staff (the first model) (Mears, Reisig 2006: 48; Pizarro, Stenius, Pratt 2006: 250; O'Keefe 2008: 124); increasing and specialising staff training (Mears, Castro 2006: 421); or providing "D" inmates with a clear prospect of transfer to a regular unit, which motivates them to behave well and abandon antagonistic strategies (Coyle 2019: 274).

It is noted that the concentration model is a manifestation of the new penology, which is not concerned with responsibility, culpability, moral sensitivity or individual diagnosis or intervention, but with techniques for identifying, classifying and managing groups of offenders sorted by the level of perceived threat (Feeley, Simon 1992: 466; Pizarro, Narag 2008: 25). In the new penology, as in other areas of crime control, the language and technology of risk management strive to make prisons safe (Zedner 2007: 265; Drake 2011: 375). However, they do not necessarily work well in practice when dealing with an individual case.

1.6. Living conditions – isolation equals seclusion

The results of the study confirm that supermax incarceration is characterised by being in solitary confinement for 22.5 to 24 hours a day in a sterile environment, which means radically limited sensory stimuli and mobility and being under constant high-tech supervision. In addition, direct contact with staff or outsiders is severely limited, and most verbal communication is done through intercom systems. A stay in a supermax also means a lack of access to correctional, educational and religious programmes (Riveland 1999b; Kurki, Morris 2001: 388–390; Pizarro, Stenius, Pratt 2006: 249; Lovell, Johnson, Cain 2007: 633; Scharff Smith 2009: 5; UNODC 2016: 14). This is a typical regime of lockdown and seclusion, and the living conditions include 24-hour lighting, no windows, no opportunities for physical exercise and especially outdoor recreation, limited interpersonal contact, no reading materials or other relevant activities and limited corrective/

therapeutic interactions (Rhodes 2004: 23; O'Keefe 2008: 125; Browne, Cambier 2011: 46; Haney 2018: 366).

Such conditions reinforce the psychological burden and stigma. According to the researchers, they cause effects similar to victimisation. Ian O'Donnell recalls Roy D. King and Kathleen McDermott's concept described in *The State of Our Prisons*, who applied the term "depth" for "the degree to which an inmate is embedded in the security and control systems of the prison", whilst "weight" refers to "the degree to which relationships, rights and privileges, standards and conditions affect him" (O'Donnell 2015: 114).

1.7. Negative effects of isolation

Most studies provide unequivocal evidence of the negative impact of supermax conditions and defend the thesis that they inflict varying degrees of psychological pain and emotional trauma on the prisoners housed there (Haney 2003: 149). Findings on the psychological effects of being in isolation have been consistent. They show a wide range of common negative psychological reactions from inmates: depression, despair, anxiety, rage, claustrophobia, hallucinations, impulse control problems, impaired thinking, concentration and memory and PTSD-like symptoms (Scott, Gendreau 1969: 337; Suedfeld et al. 1982: 336; Grassian 1983: 1451; Grassian, Friedman 1986: 63; Korn 1988: 14; Kamel, Kerness 2003: 3; Haney 2018: 365; 2020: 252). Empirical studies also indicate that supermax prisons cause or exacerbate existing mental illness in prisoners (Pizarro, Stenius 2004: 255–257; Kupers 2006; Mears, Reisig 2006: 36). Few researchers have found that the solitary confinement regime has little effect on the psychological functioning of "D" prisoners (Chadick et al. 2018: 110; Labrecque, Smith 2019: 1452; Labrecque et al. 2021: 2).

1.8. Controversy over human rights

Most researchers have found that placement in supermaxes raises serious ethical and legal concerns, primarily because it limits opportunities for prisoners to participate in corrective interactions (education, vocational training and therapy) that can help improve behaviour (Toch 2001: 385; Pfeiffer 2004; Vasiliades 2005: 98; Mears, Castro 2006: 399; Richards 2015: 15; Reiter Sexton, Sumner 2018: 108; Labrecque, Smith 2019: 1453).

The qualitative research based on the ethnographic method and interviews is convincing. Firsthand accounts reveal that "D" prisoners are arbitrarily placed in maximum security prisons with few procedural safeguards, and the conditions they face may encourage further acts of violence or exacerbate their mental disorders or illnesses (Mears et al. 2013: 591).

2. "D" prisoners in Poland

2.1. Genesis

The distinction of categories of prisoners first referred to as "dangerous" and then as "posing a serious social threat or a serious threat to the security of the prison" (Journal of Laws of 2003 No. 142, item 1380) has a long history and stems more from the needs of practice than from political trends (Machel 2009). The distinction of this category proved necessary for practical reasons (to ensure safety in prisons) and due to significant restrictions on prisoners' rights and freedoms (their treatment had to be regulated in separate legal provisions).

As early as 1931, a decree of the Minister of Justice on prison regulations introduced classification criteria that excluded certain categories of convicts from the progressive system, which consisted of dividing the time of imprisonment into several stages, whilst easing the conditions of imprisonment as the convict shows improvement (Journal of Laws of 1931 No. 71, item 577). The exclusion was based on the recognition that certain categories of criminals are unreformable, and consequently it is necessary to apply elimination-deterrence safeguards (Ziembiński 1973: 148). Institutions of the strictest rigour were intended for this category of inmates – isolation prisons – to which were sent: 1) professional criminals, 2) criminals with addictions, 3) repeat offenders and 4) disciplined inmates, for whom the developmental and correctional rules of regular prisons were unsuccessful and whose impact on the other inmates was harmful.

Subsequently, the local practices of individual prisons, in accordance with code principles of individualisation and security, divided the diverse prison population into different categories of offenders. This generic identification and segregation allowed better management of the prisoner community. Long before the introduction of the first Executive Penal Code in 1969, the prison system had dealt with detainees or convicts who posed a threat to order or the safety of others, and for whom the educational and correctional principles of regular prisons were ineffective.

The Rules and Regulations for the Execution of Imprisonment (Journal of Laws of the Minister of Justice of 1966 No. 2, item 12), in effect since 1966, introduced three stages of rigour of punishment, that is, ways of carrying out punishment under certain conditions of isolation, which limited the rights and freedoms of prisoners to varying degrees (Merz 1968: 32–33). The rigours (essential, restricted and mitigated) differed in their severity and the extent of the rights, freedom of movement around the prison and communication with the outside world they granted to prisoners. Prisoners who were classified as "D" by the penitentiary commission – although not in the current sense of that status – were placed in strict rigour, i.e. under conditions of increased supervision and security.

The first Polish Executive Penal Code of 1969 did not contain any provisions for "D" prisoners. However, in the 1970s, the prison system began to develop an

internal practice for dealing with "D" prisoners (e.g. it mandated that lists of prisoners administratively classified in this category be maintained and that individual plans for "de-escalation" of these prisoners be developed) (Misztal 2000: 41). An unpublished 1974 Order of the Minister of Justice on the Protection and Defence of Prisons and Remand Prisons regulated the technical safeguards that a prison for "D" inmates should meet, and directed that officers take special precautions when dealing with this category of inmates (Order of the Minister of Justice 1974).

Procedures and criteria for qualifying and dealing with "D" prisoners were standardised in 1978 in *Guidelines for the Treatment of Prisoners and Temporary Detainees Dangerous to Order and Security*[2] (Information Bulletin 1978; Brożyna-Kowal 2012: 5). The category "D" included those prisoners who, due to pronounced antisocial attitudes or particularly aggressive behaviour, posed a significant threat to order and security in the prison. Specifically, these included convicts who committed or were suspected of committing a serious crime, attempted or carried out a prison escape or had such an intention, disrupted order in the prison, displayed an aggressive attitude towards officers or other inmates, activated or reinforced negative manifestations of prison subculture among inmates or committed a serious crime during their current or a previous stay in confinement.

Their living conditions and handling were subject to security and strict isolation. According to the *Guidelines*, qualification for category "D" was not to last longer than was justified by the particular threat to order and security the prisoner may have presented. Thus, it was a transitional status, albeit indefinite, not least because "D" prisoners had to be subjected to appropriate developmental efforts aimed at removing the causes that put them in this category.

As a result of the Ombudsman's intervention, in late 1988 the prison authorities amended the *Guidelines* and made the prerequisites for category "D" eligibility more specific. The amendment to the Executive Penal Code dated 12 July 1995 required that specific categories of convicts be placed in a closed-type penitentiary, under special conditions that ensure the protection of society and the security of the facility (Godyla, Bogunia 2013). This concerned convicts who showed a significant degree of depravity or danger to society, or who were convicted of a crime committed in an organised criminal group.

However, it was not until the 1997 Executive Penal Code, which was the first universally binding law to regulate the treatment of this category of inmates, that special supermax units were established in Polish prisons. The main reason for their creation was a new group of prisoners that emerged during the Polish transition from a totalitarian to a democratic system: members of organised crime groups (Knap 2007; Machel 2008).

At the beginning of the 21st century, the prison service created these units and developed rules for dealing with "D" prisoners through its own efforts, without

[2] This was a secret document issued by the Central Board of Prisons and sent to all penitentiary units, with instructions to carry out the tasks specified therein.

more specific guidelines. It was not until 10 years later, in 2010, that the Central Board of the Prison Service (CZSW) issued instructions on the principles of organising and conditions for conducting penitentiary interventions with this special category of prisoners (Instruction 2010). However, this document was not preceded by consultation between the central authorities and the experienced officers working in prisons with an exchange of experiences and comments. Even after it was issued, the CZSW did not offer support or clarification of the wording contained therein, nor training to prepare for service in a supermax unit. Line officers and prison governors had to develop a standard for dealing with lifers with "D" status, including risk assessment criteria, which were also eligibility and vetting criteria. The prison system took a shortcut: dealing with "D" prisoners turned out to be a systemic error and a violation of human rights.

2.2. Dealing with "D" prisoners – a systemic error in the Polish prison system

After Poland lost the Piechowicz (Submission No. 20071/07) and Horych (Submission No. 13621/08) cases before the European Court of Human Rights (ECtHR) in 2012, the central authorities again contacted the governors of prisons, sending them Instruction No. 15/10, the cover letter of which stated that they should familiarise themselves with the ECtHR judgments, that the commissions deciding on "D" status should particularly carefully analyse and justify their decisions to maintain it and that they should abandon the schematic duplication of justifications.

The order included wording that was relevant but enigmatic, limiting the adoption of uniform, evidence-based criteria for estimating the risk for each "D" qualifier, which is, after all, a key element in justifying the qualification decision. The prison service was left to its own devices. The CZSW – equipped with a staff of experienced professionals, a pool of knowledge and a mission towards "its people" and society – has not equipped prison officers with either specific guidelines or tools for assessing a prisoner's "dangerousness".

This is the main reason that for 26 years, since the first visit of the Committee for the Prevention of Torture in Poland in 1996, despite the good work observed at the supermax units, Poland has failed to meet international standards. Following the pilot cases of Piechowicz and Horych it lost more cases filed by "D" prisoners, and in several others it reached settlements, admitting human rights violations (ECHR 1608/08 2013; ECHR 13421/03 2013; ECHR 8384/08 2015; ECHR 54511/112016). Life prisoners also won their cases.

Criticism from both review bodies, which decided that the handling of "D" classification was a systemic problem, concerned the automatic extension of status not being based on a fair assessment of the prisoner's individual circumstances and behaviour, but instead amounting to the routine repetition of the same facts and arguments in the prison administrators' decisions, whilst in fact the justification

should have become increasingly more detailed over time. Each time and in each decision to maintain the status, it should have been possible to determine whether the authorities had made another assessment that considered any changes in the circumstances, the prisoner's situation or their behaviour (Horych v. Poland §84 and §92–93). Indeed, there had to be a real, direct link between the granting of "D" status and the prisoner's actual behaviour. Otherwise, the procedure for verifying "D" status was a mere formality (Glowacki v. Poland §96). A qualitative analysis of the files of the 98 lifers classified as "D" during pretrial detention confirms this arbitrary practice.

2.3. The "D" prisoner according to the law

Category "D" is a special status defined in the current 1997 Executive Penal Code (Articles 88a and 212a §1) that relates to the specific behaviour of a convict prior to their imprisonment (committing a serious crime) or presented during it, or during a previous stay in prison if the convict is a repeat offender. The behaviour is supposed to be characterised by a high degree of social harm and threat to the safety of others. The eligibility criteria indicate the type and manner in which the prisoner committed the crime or offence as well as their personal characteristics and conditions. Separation from the general population is justified by two considerations – penitentiary and protective – emphasised in modern penitentiary systems (Postulski 2014: Art. 88 thesis 20). The penitentiary aspect requires that the corrective influence be adjusted to the personality of the "D" prisoner, taking into account the restrictive conditions in which they are held, whilst the protective aspect requires that this convict be handled in a way that maintains the necessary order and guarantees safety.

There must be a balance between these aspects (Machel 2003: 220), which is very difficult in practice (Kalisz 2017; Szczygieł 2002: 117). Describing her research on the treatment of category "D" qualifiers in Poland, Maria Niełaczna used the metaphor of a "man in an aquarium" (Niełaczna 2014a: 454 et seq.; 2014b). The analogy of the aquarium allows us to understand and almost experience what the change from a natural environment to an unnatural environment for humans is all about. Restricting with transparent walls, the aquarium limits one's space and subjects one to easy control; the aquatic environment slows down impulsive or unpredictable movement and neutralises, or at least weakens, potential outbursts of a "dangerous" person. At the same time, this artificial, hermetic environment leads to harmful and hard-to-measure effects. Without oxygen, the brain dies. Aspects of our functioning die along with it. In the case of "D" prisoners, the oxygen is the minimal amount of autonomy (which alleviates feelings of powerlessness), a real impact on status verification and, above all, contact with others. In other words, the oxygen is the space in which a person can meet their basic needs. Meanwhile, placement in a supermax unit implies a heightened degree of restraint and control

and almost complete social isolation, referred to in the literature as "high-security" (Mears 2006; Ross 2013; Richards 2015: 16; Coyle 2019), "solitary confinement" (Suedfeld et al. 1982; Grassian, Friedman 1986; Pizarro, Stenius, Pratt 2006; Arrigo, Bullock 2008; O'Keefe 2008; Scharff Smith 2009; Haney 2018) or "the hole" (Barak-Glantz 1983; Kurki, Morris 2001: 397; Toch 2001: 385; Ross 2007).

Despite the good living conditions provided in these units, despite the efforts of prison staff working on the front lines with this difficult category of prisoners and despite innovative interaction programmes aimed at controlling aggression, there is no model to achieve the main goals behind applying extraordinary status: to reduce the "serious threat" to a level that is manageable under the conditions of a regular unit and to reduce the risk that a prisoner will repeat the security-threatening behaviour in prison.

3. "D" prisoners in my own research

3.1. Research sample

The research sample was selected in a purposive manner (Babbie 2013: 212; Prior 2009: 154; Vito, Kunselman, Tewksbury 2014: 123): it included all those ultimately sentenced to life imprisonment, from its institution in 1995 after the political transformation in Poland to the end of 2011. These were the first 15 years when the justice system, including the prison system, was learning how and for whom to justify the ruling and continuation of indefinite isolation, as well as how to deal with this special category of convicts. The research sample included a total of 290 life inmates held in Polish prisons until the end of 2014. All of them had committed at least one murder, and a significant number of them did so as part of an organised group or with firearms.

The empirical material I analysed regarding each of the subjects included justifications for the court sentences, psychological and psychiatric opinions of court experts and prison records documenting the subjects' long-term functioning in isolation. The group of subjects I further analysed, including qualitatively, consisted of 98 lifers classified as "D" prisoners.

3.2. Research methods and tools

The research was both quantitative and qualitative. I used methodological triangulation, which increases the objectivity of the research and allows for a more holistic view of the phenomena under study (Jupp 2006: 179; Silverman 2013: 142; Adams, Khan, Raeside 2014: 100). The main method was content analysis of prison documents (Walliman 2006: 139; Prior 2015; Rennison, Hart 2019: 359).

Documents are the official source of facts and information about processes, which makes it possible to judge their reliability (Salminen, Kauppinen, Lehtovaara 1997: 644; Łobocki 2011: 216–223; Finch, Fafinski 2016: 37, 58). At the same time, they present them unilaterally: they are a subjective image of the reality that is recorded (Given 2008: 839; Prior 2009: 104; Guthrie 2012: 157).

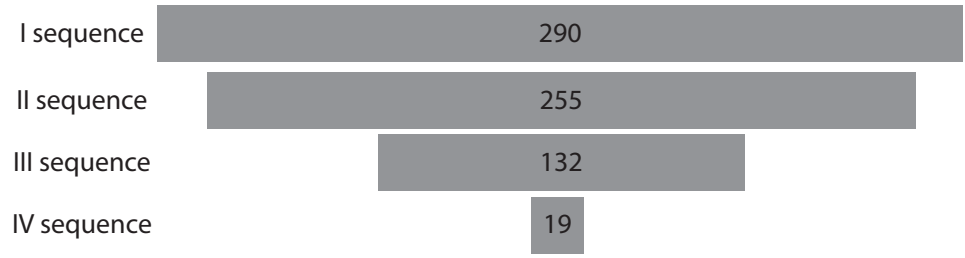
These documents made it possible to collect demographic, criminal and performance data on the subjects in isolation. I used a structured questionnaire to collect them. For coding purposes, I used the software programme SPSS (Jupp 2006: 287; Walliman 2006: 112; Adams, Khan, Raeside 2014: 99, 152; Rennison, Hart 2019: 693). In addition to closed-ended questions, the questionnaire included open-ended questions requiring qualitative data to be extracted from prison records. After identifying the group of 98 "D" classified subjects, I subjected their files to qualitative analysis.

In order to capture the dynamics of the subjects' qualification for category "D" and the trend of how it changed over time, I studied it in five-year periods counting from the date of the final sentence of life imprisonment and separately for the pretrial detention period:

- Pretrial detention period
- Period I: the first 5 years
- Period II: years 5–10
- Period III: years 10–15
- Period IV: beyond 15 years.

The periods specified two issues: firstly, each respondent was at one of these four stages, with the majority having 10 years of their sentence behind them; secondly, some of the questions on the questionnaire required the respondent to mark an answer for each of the periods they went through. I used two types of questions. The first concerned questions about which period something happened in (e.g. qualification for category "D"). The response made it possible to conclude that the fact in question existed or did not exist. The second type of question used the periods to capture a given fact over time. So, in order to determine the dynamics of the "dangerousness" of life prisoners and the system's response, I asked whether a given event occurred in every possible period. As a result, I obtained answers that indicated whether and how the trend of the phenomenon under study had changed over time. For these questions, the answer for the first period always concerned all 290 subjects, whilst the subsequent periods were correspondingly fewer, as there were 255 subjects in Period II, 132 in Period III and 19 in Period IV (Figure 1).

Figure 1. Number of respondents covered by questions from each period



Source: Elaborated by Joanna Klimczak and Maria Niełaczna.

Due to the sequential division counted from the date of the final judgment, the period of pre-trial detention was naturally distinguished. As evidenced by the research, this period is associated with numerous limitations on the subject's functioning, stress caused by isolation, the criminal process and the uncertainty of one's fate – especially in the case of people who are relatively young, lack self-control and face the prospect of a long-term sentence for a crime, such as the respondents (Harvey, Liebling, Maruna 2005; Toman et al. 2015: 512).

4. Research results

What was the average life prisoner like on the date of their pretrial detention for an aggravated murder case? Most of them were young men (the average age was 28 years), without proper social experiences related to education (half of the respondents had primary or incomplete education), professional work (half had not worked before their incarceration) or stable family ties (at least half came from a single-parent family and were themselves single), with a previous criminal record (three quarters) who abused alcohol or drugs (three quarters). The respondents began serving their sentences with poor personal and social capital. All of them had committed at least one murder, and a significant number of them did so as a member of an organised crime group or with firearms.

On the end date of the analysis of prison records, the vast majority of respondents had, on average, served 9 years and 6 months of their sentences, counting from the date of the final judgment; they were therefore at the post-trial stage and waiting for a sentence, and past the phase of "rebellion" and "adaptation" (Nosek-Komorowska 2001: 218; Machel 2003: 208; Kowalczyk-Jamnicka 2017: 232). Half of them were in prison for the first time, whilst the other half were repeat offenders.

4.1. Period of pretrial detention and qualification for category "D"

During pretrial detention, nearly one in three of the 290 respondents was classified as a "D" prisoner (28%). The main basis for such classification was the nature of the crime for which the suspect was being investigated: murder. This was the case for nearly three quarters of those qualified (73.8%). A rare basis for qualification was escape, committing murder or rape of a fellow inmate or assaulting an officer, although such isolated cases did occur (see case descriptions B128, B240, *Prison Killer*).

Table 1. Basis for qualifying for category "D" during pretrial detention

	N	%
Suspicion of committing a crime with a very high degree of social harm	59	73.8
Escape from the Police convoy	3	3.8
Prison escape	2	2.5
Rape of another prisoner	1	1.3
Murder of another prisoner	2	2.5
Assault on an officer	1	1.3
Other / Multiple of the above	12	15.0
Total	80	100.0

Source: Own elaboration.

In the case of 21 subjects, the "D" status was lifted during pretrial detention. On average, they stayed in a supermax for 919 days (2 years and 6 months). The shortest period was 77 days, whilst the longest was 3,719 days, or 10 years, due to a complicated legal process. In most cases, this status continued throughout the subjects' detention. In the case of 59 of the 80 subjects, the penitentiary commission maintained the "D" status after the final verdict. The average total duration of this status was 6 years. The shortest period was 354 days, and the longest was 15 years and 6 months.

The status given during pretrial detention was most often reaffirmed in Period I of life imprisonment (38 respondents). In Period II, the "D" status was lifted for another 13 subjects. Eight prisoners remained in the supermax unit until the end of the ongoing study.

Two respondents classified as "D" for the murder of a prisoner during pretrial detention committed the crime whilst serving another sentence. Thus, the very basis for their qualification did not arise during a period of detention, but during a prior sentence. Both cases provide unique insights into the genesis of crimes in isolation. We can assume that they would not have occurred if not for conditioning – the pressure of subcultural rules – and the failure of prison staff to recognise the "banal evil" in the form of daily conflicts between and incompatible personalities of fellow inmates.

Case B128, Prison killer

> On the date of the murder, the inmate was 25 years old and was serving a six-year sentence for robbery and battery. At school, he was truant, repeated years, caused educational problems and started smoking, drinking alcohol and taking drugs at an early age. He had been using amphetamines and marijuana for about eight years. He has an abnormal personality conditioned by long-term psychoactive substance use and psychosocial stress. Under the influence of psychoactive substances, he became aggressive and experienced lowered mood states and social anxiety. Prison staff found him to have dissocial and adaptive disorders. In addition, the respondent was bound to the rules of the criminal subculture, from which he deviated, without giving reasons or circumstances. He has been disciplined several times because of his aggressive behaviour. He was also under the care of psychiatrists and taking sedatives. At the end of serving a sentence, he was promoted to a semi-open facility and then demoted due to his deteriorating behaviour. As a result of his dissocial and adaptive disorders, he was placed in a prison hospital setting. A month after his demotion, whilst in a hospital cell, he killed a fellow inmate by smashing his head with a stool. He claimed that he had killed "because of nerves", "because he has evil in him". The subject was classified as "D", and after a two-year trial he was sentenced to life imprisonment.

Case B240, Prison killer

> He was 25 years old at the time of the murder. He had been in conflict with the law since childhood. He committed his first killing at age 13; it was revenge against the perpetrator of his sister's rape and murder. Forensic experts consistently described him as a psychopath. He was serving a sentence in the therapeutic system for murder and robbery. In total, he has spent 12 years in prison. He was highly depraved, with little receptivity to corrective and therapeutic interactions. He disobeyed prison rules, repeatedly harmed himself and caused conflicts with fellow inmates. He belonged to the prison subculture and considered himself a Satanist. At the end of serving a sentence, the respondent jointly smothered a fellow inmate in his cell with a pillow. The motive for the crime was a desire for self-justice: revenge for denunciation and for the victim's religious beliefs. After a year-long trial, he was sentenced to life imprisonment. He was an unpredictable and erratic case. These characteristics appeared in subsequent decisions to extend his qualification as a "D" prisoner.

4.2. Period of life imprisonment and "D" qualification

The pretrial detention data shows that aggravated killers and "future" life prisoners are automatically perceived as a threat to prison security and society. Data from the period of imprisonment shows that the automatic assumption that they are dangerous is inaccurate, although understandable given how the prison system handles "difficult" prisoners with limited conditions and resources.

With the passage of time and adaptation to prison conditions, the subjects stopped committing risky acts – there was a dramatic decrease in the number of

those qualifying for "D" status. Twenty-six prisoners qualified in Period I, seven in Period II and two in Period III. Two subjects were qualified in both Period I and Period II. The declining trend is illustrated in Table 2.

Table 2. Percentages of respondents classified as "D"

	Per cent
Pretrial detention	28
Period I (N = 290)	9
Period II (N = 255)	3
Period III (N = 132)	1.5
Period IV (N = 19)	None
The percentages do not add up to 100 because they refer to the number of subjects in each period.	

Source: Own elaboration.

Regardless of the period, a total of 33 prisoners (11%) out of the 290 subjects presented reasons during their life sentence to be classified as "D". The basis for qualification is not as clear-cut as in the pretrial detention period (Table 3).

Whilst the most common reason was the serious nature of their crime, which allowed officers to qualify a respondent for category "D" even for a lesser threat or simple insubordination – as was the case for 16 prisoners – other fairly common justifications were violence against a fellow inmate or an escape attempt (10 respondents). Three respondents were categorised for collective protest, whilst three others were categorised for assaulting an officer. In addition to the aforementioned two convicts classified as "D" in two different periods, two others were classified twice during a single period. In the case of two of them, the basis for the second qualification to "D" during life imprisonment was an escape attempt. For the others, it was the nature of the crime they committed and assaulting an officer.[3]

Table 3. Basis for categorising respondents as "D" during life imprisonment

	N
Committing a crime with a very high degree of social harm	16
Escape from the convoy	1
Prison escape	4
Violence against another prisoner	5
Collective gathering	3
Assault on an officer	3
Other / Multiple of the above	1
Total	33

Source: Own elaboration.

[3] These assaults did not involve injury to officers; they included attempted beatings and dousing with soup.

The average duration of the "D" status of the study sample during life sentences (excluding the pretrial detention period) was 2 years and 6 months (the shortest 77 days and the longest 12 years).

4.3. Qualitative analysis – verification criteria with "D"

The analysis of the 98 files of "D" prisoners regarding the status verification criteria was inconclusive. The prison service took into account the length of stay in a supermax and the prisoner's declaration that they would act in accordance with the law, in a way that does not pose a threat to the order and security of the prison. The criteria are based more on the intuition and experience of officers than a sound analysis of risk assessment. This is understandable in view of the fact that the verification criteria – unlike the eligibility criteria – are not defined by law and that the prison service does not use any risk assessment tool. Verification appears to be a gentleman's agreement between a prisoner who has suffered living under supermax conditions and those who have the power to continue it.

A detailed qualitative analysis of the files of 39 convicts who had been in a supermax for more than five years (including the period of pretrial detention and life sentences) confirmed the general trend. The verification criteria are

- a significant period spent on the unit
- the convict's declaration of appropriate behaviour
- an observable change in the prisoner's attitude towards staff or improvement in their behaviour within a given period (no disciplinary punishments).

A rare criterion for evaluation was the positive effect of penitentiary interventions, with mostly non-accredited correctional programmes involving convicts' independent work (reading books, modelling, board games, programmes or working with a psychologist) or anti-stress courses (concentration training or breathing exercises).

Meanwhile, the logic of dealing with this category of convicts and the principles governing the execution of sentences dictate that the criteria for verification should be specified, in particular, taking into account the changing circumstances or facts that indicate a likelihood of threatening behaviour on the part of the convict, as well as the circumstances that argue against continued detention in the supermax unit. Verification of "D" status should clearly indicate what steps need to be taken to allow the prisoner in question to leave the supermax; it should to provide clear criteria for evaluating changes. The review of the eligibility decision should be part of a positive process aimed at solving the prisoner's problems and allowing them to (re)integrate with the rest of the prison population.

Conclusions

The results of both previous studies and the current research show that "dangerous" prisoners are more of a bureaucratic phenomenon than a real one. Most of those classified as "D" do not pose a real and immediate threat to human life or the safety of the prison. The number of prisoners qualified and the duration of this status are the result of discretionary decisions taken by the prison administration in the name of prevention – the only valid reason for which is the nature and gravity of the crime (the circumstances of the act or the violent manner of the perpetrator). This reason is static and becomes obsolete with the passage of time and interventions. Despite this, a significant portion of the study group stayed in a supermax for more than five years (39 subjects).

The prison service has not developed a uniform, empirical method for measuring risk, despite Poland's successive losses before the Strasbourg Court in the cases of "D" prisoners. Among the respondents, decisions to qualify, extend or verify status were rarely supported by concrete facts about the convict's behaviour or the effects of interventions. The criteria used by the prison administration rarely referred to the criteria developed in the jurisprudence of international courts or the results of scientific research (risk assessment of criminal behaviour).

The qualification of prisoners for "D" status in Poland has for years concerned a small part of the prison community (0.02%) and of the life prisoners under study (30%), and as a rule concerns the initial period of their isolation, although a significant portion of the study group have been in solitary confinement for longer than five years (40%).

The results show that over time, a significant minority of convicts warrant placement in a supermax unit. The few convicts who try to escape or attack officers are both prisoners with adaptation problems and those with a pro-crime mindset – their world is one of fighting, whether on the street, in pre-imprisonment or in prison. A qualitative analysis of the prisoners' records allows us to conclude that the basis for their qualification as "D" prisoners is their criminal and antisocial past, which has cast a shadow over their entire lives. It raises concerns about the future behaviour of the subjects in isolation, though it should be noted that it is associated with their disturbed personality and unwillingness or inability to change. Therefore, those who are actually a threat are exceptions due to their recalcitrance and hostility, whilst the majority of those analysed have a "difficult character" but do not pose a serious threat to the safety of other people or the prison.

The criteria for verifying "D" status are ambiguous and heterogeneous. It is not uncommon for them to rely on prisoners' declarations that they will do the right thing, and the legitimacy of the decision is hidden behind the scenes in undocumented negotiations between officers and the prisoner. The justifications of the prison service's decisions contain rather vague and brief wording (Kalisz 2017: 183), which was criticised by the ECtHR in the cases of Polish "D" prisoners as a manifestation of arbitrariness.

In conclusion, the supermax units and the separation of the category of "D" prisoners are necessary. It is the way the prison system, which has limited resources, deals with those who deviate "from the norm", whether because of the real threat they pose, because of mental illness or because of their tendency to have trouble with the law.

"D" classification, meaning solitary confinement and extremely restrictive segregation of convicts, has been used in prisons since their inception. Prisoners are placed in more restrictive conditions for a variety of reasons, but in almost all cases the goal is to increase control over them (Arrigo, Bullock 2008: 622). The situation is similar in Poland, where it has not been possible to develop a system designed for lifers that is adapted to their individual situation. Instead, all or many of them are automatically deemed "dangerous" or in need of increased scrutiny. An automatic approach is a mistake, because with the passage of time they will be able to apply for parole, whilst many of them will much earlier adapt to the rules of coexistence in the prison community, develop their personal and social potential and abandon the antagonistic strategy of adapting to prison isolation. The problematic ones are in need of more curative and therapeutic interventions than "D" qualification and administrative segregation.

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Krzysztof Krajewski ■

Penal exceptionalism in countries of Central Europe: Why is the region different?

Odrębność penalna krajów Europy Środkowej. Dlaczego ten region jest inny?

Abstract: The countries of Central Europe have for many years occupied a leading position in Europe when it comes to the level of incarceration. This begs the question of what lies behind this state of affairs. It may be connected with the history of the region, being under authoritarian rule for years. Another factor may be the penal populism that is present everywhere in the world, but has specific features in this region. One version of such explanations is the concept of "penal nationalism". The research also indicates a relationship between social policy and egalitarianism, among other factors, and the size of the prison population. This raises the question of the extent to which the concepts relativizing punitiveness to categories of political economy apply to the region. Finally, there are other explanations that point to some prosaic factors of a "technical" nature that may have an undesirable influence on punitiveness. None of these concepts fully explain the unique situation of the region as a whole. However, they can be a starting point for building a more integrated concept.

Keywords: penal policies, punitiveness of criminal justice, penal exceptionalism, incarceration rates, penal climate

Abstrakt: Państwa Europy Środkowej od lat zajmują czołową pozycję w Europie, jeśli chodzi o wysokość współczynników prizonizacji. Rodzi to pytania o przyczyny takiego stanu rzeczy. Mogą one leżeć w historii regionu pozostającego przez lata pod rządami autorytarnymi. Innym czynnikiem może być populizm penalny obecny wszędzie na świecie, ale w regionie mający specyficzne cechy. Wersją takich wyjaśnień jest koncepcja „penalnego nacjonalizmu". Wyniki badań wskazują także na zależność m.in. pomiędzy polityką socjalną i egalitaryzmem a rozmiarami populacji więziennej. Powstaje pytanie, na ile do regionu odnoszą się koncepcje relatywizujące punitywność do kategorii z zakresu ekonomii politycznej. Wreszcie wymienić można wyjaśnienia autorów wskazujących

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na pewne prozaiczne czynniki „technicznej" natury mogące wywierać poniekąd niechciany wpływ na punitywność. Żadna z tych koncepcji nie wyjaśnia do końca specyfiki regionu. Mogą jednak stanowić punkt wyjścia do budowania koncepcji o bardziej zintegrowanym charakterze.

Słowa kluczowe: polityka karna, punitywność wymiaru sprawiedliwości, ekscepcjonalizm penalny/odrębność penalna, współczynniki prizonizacji, klimat penalny

Introduction

In recent decades the term exceptionalism has been used on several occasions to refer to certain particularities of penal policies implemented in various countries or regions. In general this term indicates that the policies in a given country or region differ somehow from the "average" that is observable in neighbouring countries or regions or around the world. The main criterion qualifying a country to be exceptional in regards to its penal policies is the punitiveness of those policies. This means that the penal policies in a given country may be more or less punitive than the average. The very term *punitiveness* is not always absolutely clear, as the severity of penal policies, sentencing outcomes and other aspects of a state's reaction to criminal behaviour may be assessed using various quantitative and qualitative criteria. Nevertheless, there is likely a set of such data which may give rise to a more or less adequate assessment of the issue. And the quantitative data most commonly used for international comparisons in that area are incarceration rates.

The term (penal) exceptionalism was probably used for the first time by John Pratt in his discussion of unique forms – not only globally, but also in Europe – of penal policies in Scandinavian countries: Denmark, Finland, Norway and Sweden (Pratt 2008a; Pratt 2008b). Those countries were, and despite all the changes in fact still are, well known for low incarceration rates and many other features of their criminal justice systems which make them somehow unique in their approach to crime control policies. It may be claimed that the repressiveness of their systems is visibly below average, not only worldwide, but also within Europe. In other words, the "penal climate" in those countries may be characterised as rather mild, or even sunny.[1] There were and still are other examples of such mild penal climates in Europe. For a long time the Netherlands constituted another one, especially during the 1970s and 1980s, enjoying the lowest imprisonment rates in Europe – even lower than those in Scandinavia (Downes, van Swaaningen 2007). Another example of such "below-average" exceptionalism during the last three decades is Slovenia, a country which substituted the Netherlands in the European ranking of countries with the smallest prison population (Meško, Fields, Smole 2011; Meško, Jare 2012; Aebi et al. 2016; Flander, Meško 2016). But the exceptional mildness of

[1] I use the term "penal climate" from Steenhuis, Tiggers and Essers (1983), who in their assessment of the Dutch penal policies juxtaposed two types of penal climate: sunny and cloudy. This may be substituted by the terms *mild* and *rough* penal climate.

a penal climate is only one type of penal exceptionalism. On the other end of this punitiveness continuum are countries characterised by the excessive harshness of their penal policies, distinctive in their extremely high incarceration rates and the very harsh practices of their criminal justice systems. The Unites States is the most conspicuous example in that respect: American penal exceptionalism – not only during the last 30–40 years – and its origins have been thoroughly analysed and discussed in the literature of recent decades (Whitman 2003; Garland 2020; Cullen 2022). However, visible traces of similar penal excesses are to be found in crime control policies across the Anglosphere, such as in the UK, Australia or New Zealand – with the exception of Canada (Tonry 2022).

From that point of view, it is interesting to note that for many decades penal climate on the European continent, although relatively mild – especially as compared with Anglosphere countries – has by no means been uniformly mild. European countries always implemented different crime control policies, bringing about different sentencing outcomes, incarceration rates and penal climates (Christie 2000; Dünkel 2017). It would not be easy to indicate the "European average" regarding punitiveness, including incarceration rate. However, there are certainly two regions distinguishing themselves in that respect, located on opposite poles of the European "penal continuum". The first one is Scandinavia, as mentioned above. Even despite recent changes, this region is still the European leader in terms of the mildness of its penal climate and is one of the least punitive regions in the world. At the same time, there is no doubt that there is another region in Europe which bears clear traces of penal exceptionalism at the opposite extreme, marked by a rather cloudy, even rough penal climate: the formerly communist-governed countries of Central and Eastern Europe, which before 1989 were either members of the Warsaw Pact or Soviet republics. Still, there are also substantial differences between the penal policies of those countries, and they become even more visible when one includes the countries of former Yugoslavia, also once communist-governed but not dominated by Moscow. Nevertheless, it is true that in general most countries of the region have stood out for years because of incarceration rates higher or even much higher than the European average. This raises the question of why. What are the reasons for this Central and Eastern European penal exceptionalism against the Western European background?

As Michael Tonry indicated some time ago, "penal policies and imprisonment patterns result from policy decisions. What we don't know is why particular policies emerge in particular places" (Tonry 2007a: VII). This of course also applies to reasons for the eventual penal exceptionalism of a given country. This essay is not intended to provide a definitive answer to the above questions; it is only an attempt to briefly present the nature of Central and Eastern European exceptionalism and a rather brief overview and evaluation of some explanations proposed so far to unravel that phenomenon. For the sake of simplicity this analysis will be at the same time limited in principle to countries that are currently Member Sates of the European Union, regardless of whether they were formerly members

of the Warsaw Pact or Yugoslav or Soviet republics. This means the analysis will concentrate on Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. In other words, EU Member States of Central Europe and the Balkans are included; other countries of the region, like Belarus, Moldova, Russia and Ukraine are left out of the analysis. Only Serbia, a former Yugoslav republic but not an EU Member State, will be included to supplement the picture of developments in former Yugoslavia. Despite having many common features with the group selected for analysis, countries of the region which are not EU Member States are – for various reasons – politically, economically or socially somewhat different cases. The main criterion for inclusion in the analysis therefore remains EU membership, a somewhat formal but clear and precise enough criterion. For the sake of simplicity those countries will be referred to as Central European countries, although in purely geographical terms this may be considered an unjustified extension of the notion of Central Europe.[2]

1. Central European exceptionalism compared to Europe overall

1.1. Incarceration rates in Central and Western Europe

There are many possible definitions of the notion of punitiveness (Green 2009). In general, this concept

> refers to a wide variety of 'actors': to 'popular' attitudes towards punishing in the so-called 'public opinion' or in the media, to political discourse, to primary criminalization by legislators, to decisions taken by practitioners within the criminal justice system (police, prosecution, sentencing, implementation of sentences, release procedures, etc.), or to attitudes of revenge or forgiveness of victims of crime. (Snacken, Dumortier 2012b: 2)

This essay concentrates on one aspect of the above broad understanding of the term punitiveness, namely the punitiveness of the criminal justice system or penal policies. This aspect in itself is again a very complex issue, having quantitative and qualitative dimensions (Snacken, Dumortier 2012b: 2) which may be assessed using various indicators. The most commonly used quantitative indicators are those regarding sentencing outcomes, such as the frequency and structure of various types of sanctions, the average length of imprisonment or the severity of other sanctions. Another group of indicators is related to the implementation of sanctions, primarily incarceration and its various aspects. They may be static and include the so-called stock of prison population, or the number of persons

[2] For instance, in geographical terms some former Yugoslav republics, Bulgaria and Romania are hardly located in Central Europe.

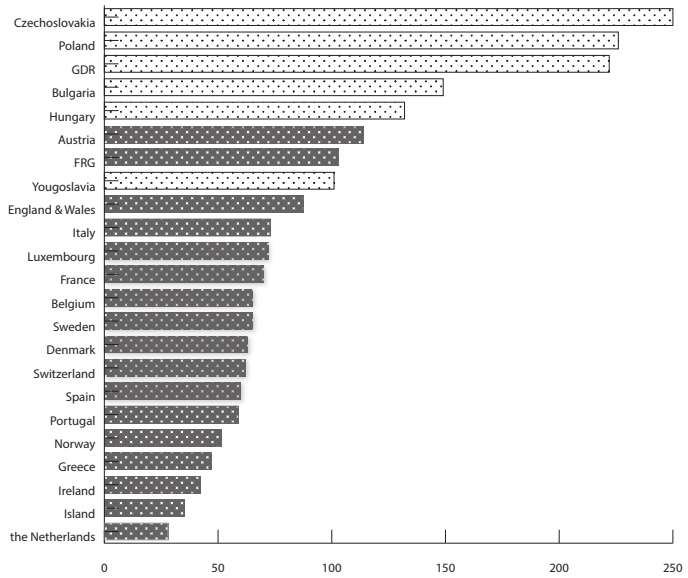
incarcerated, the incarceration rate and indicators regarding prison overcrowding (all at a given moment). They may also indicate various dynamic aspects of imprisonment, the so-called flow of entries as well as the average time spent in prison, the proportion of inmates released on parole, etc. Among qualitative indicators it is possible to mention the use of capital punishment, the existence of mandatory minimum sentence laws and laws to increase sentence length, the use of pre-trial detention, the availability and use of prison alternatives, trying juveniles in adult courts and the weakening of procedural protections (Tonry 2007b: 7–13).

The indicator of punitiveness most commonly used in comparisons is incarceration rate. This is due to the fact that imprisonment, or deprivation of liberty, is nowadays the harshest penal sanction available (apart from those countries which still use the death penalty). Therefore, it is reasonable to assume that a large prison population in a given country indicates frequent use of imprisonment and repressive penal policies. In other words, the higher incarceration rate in a given country, the more repressive its sentencing policy. Of course this may be considered a serious simplification, an approach that reduces a very complex issue to a single indicator, but there are good reasons for such an approach. One of the main such reasons is the relative availability of reliable data on incarceration rates, not only cross-sectional, but also longitudinal. Such data from the last 40–50 years are available for most countries, but it is especially true for developed countries in Europe and North America, as well as Australia, New Zealand, Japan and a few others. The availability of other, more complex indicators of punitiveness sometimes poses problems even in regions with highly developed systems for collecting statistical data on criminal justice systems, like Europe. Such data are in most cases collected according to different national standards and in a way often either making international comparisons very difficult or simply impossible. Moreover, some data are just not collected at all, or are available only with enormous difficulty. Therefore, taking into account all the problems posed by comparisons using only data on the prison population, the analysis of Central European exceptionalism in this essay will be based primarily on the data regarding incarceration rates.

The first set of comparative data is presented in Figures 1–4. Each of those figures provides a ranking of European countries regarding the imprisonment rate for the years 1983, 1995, 2006 and 2018, respectively,[3] with bright bars representing countries of Central Europe and dark ones countries of Western Europe.

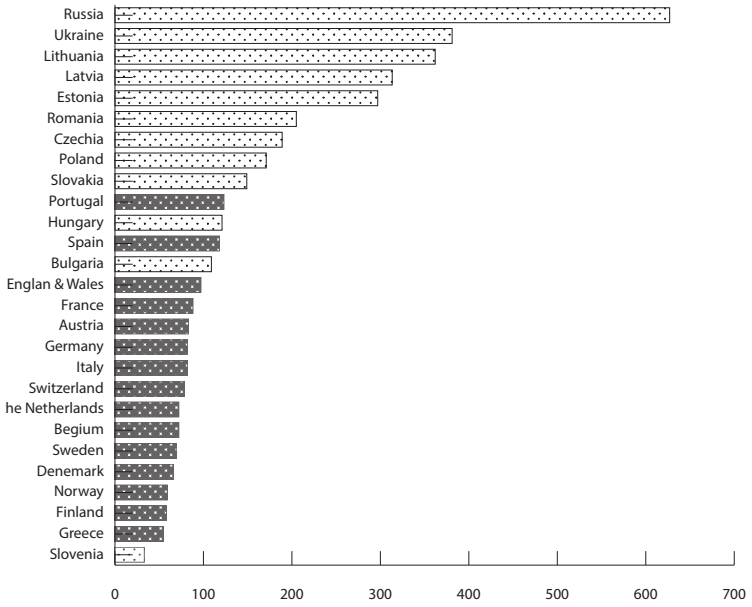
[3] The data for the years 1995 and 2006 are taken from respective editions of the *European Sourcebook of Crime and Criminal Justice Statistics*, while the data for the year 2018 are from the 2022 edition of the SPACE I prison population statistics of the Council of Europe. The data on Bulgaria, Czechoslovakia, the GDR, Hungary and Poland for the year 1983 are taken from Jasiński (1984). At that time, data on imprisonment rates were officially available only in Hungary and Poland, but not in other countries of the Warsaw Pact. Jerzy Jasiński obtained the data for a few other countries through private contacts.

Figure 1. Incarceration rates in European countries (1983)



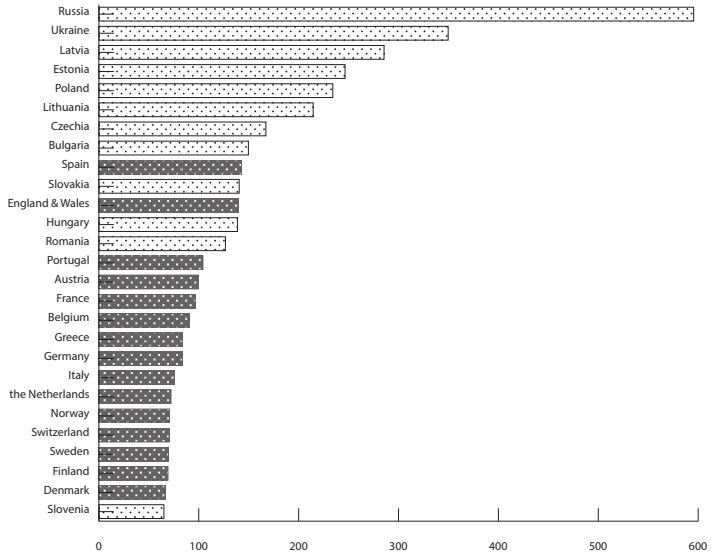
Source: Own elaboration.

Figure 2. Incarceration rates in European countries (1995)



Source: Own elaboration.

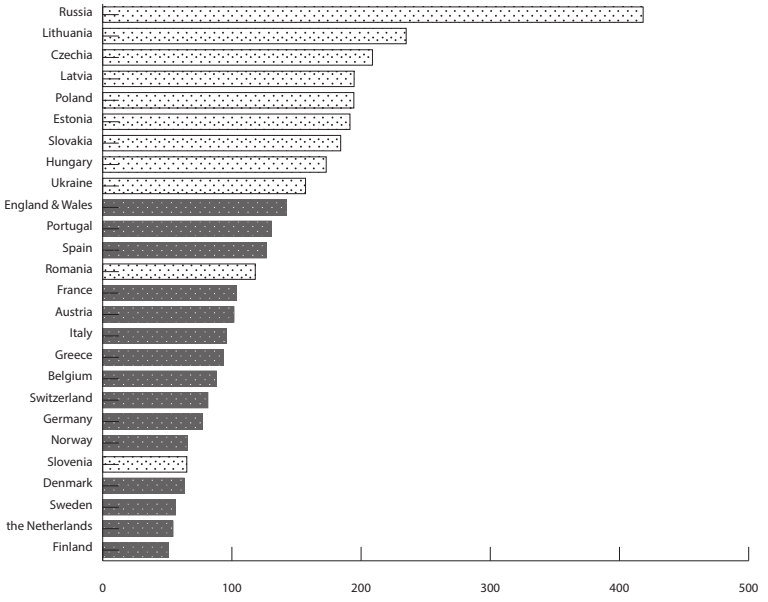
Figure 3. Incarceration rates in European countries (2006)



Source: Own elaboration.

There is one striking feature of ranking orders for those four selected years, en-

Figure 4. Incarceration rates in European countries (2018)



Source: Own elaboration.

compassing a span of more than 35 years: the consistently leading position of Central European countries in national incarceration rates. Of course, there were some changes in the positions of some countries, although in most instances they were not fundamental changes.[4] Also, the emergence of newly independent countries in Central Europe and former Yugoslavia contributed to some changes in those rankings. It is also true that around the turn of the century incarceration rates in many European countries tended to grow, while during the last few years they started to decrease somewhat (see below). However, regardless of all those changes one element remained practically constant: some sort of "penal divide" between the Western part of the continent and its Central (not to mention Eastern) part, with the latter retaining substantially higher incarceration rates throughout the entire period. This is true despite the noticeable differences in incarceration rates between the countries of Western Europe, as well as between those located in the central and eastern parts of the continent.

There is one crucial aspect to that phenomenon: the above pattern remained unchanged despite the political, economic and social transformation initiated in Central Europe in 1989–1990. Since 1948, the European continent had been divided in political, military, economic and social terms by the so-called Iron Curtain. Although it disappeared in 1989, it seems that there were curtains or divides of another nature, one of them being a "penal divide" resulting in substantial differences in the punitiveness of the criminal justice systems (Krajewski 2014). Any systematic analysis of incarceration rates in Warsaw Pact countries, especially of trends thereof, was impossible because any data regarding incarceration rates in those countries (except for Hungary and Poland) were very difficult or impossible to obtain.[5] Nevertheless, the unique analyses by Jerzy Jasiński (Jasiński 1973; 1976; 1984) show clearly that during the 1970s and 1980s, countries of the Warsaw Pact were notorious for extremely high incarceration rates: exceeding in most cases 200 per 100,000 population, and sometimes even 300. This was unusually high by the standards prevailing at the time in liberal democracies in Western Europe. Moreover, incarceration rates in Central Europe were higher than in most US states at that time. Nothing in this assessment is changed by the fact that those rates in Central Europe were most likely lower than in the Soviet Union. Only Yugoslavia, also a communist-governed country but to a large extent politically independent of direct interference from Moscow and its orthodoxy, had at that time somewhat lower incarceration rates, comparable with Western European leaders of incarceration.

This phenomenon is not difficult to explain: countries of the region at that time were in political terms single-party autocracies. Although the outright terror of the Stalinist era generally ended after 1956, communist regimes in countries of the so-called "real socialism" retained their repressive character (even if there

[4] Examples of exceptions to this are the Netherlands in Western Europe, because of a substantial increase in the incarceration rate between 1998 and 2008, and Slovenia because of a substantial drop (compared with the average for Yugoslavia before 1990).

[5] Not to mention interventions by the state censors when publishing studies on such issues, especially if they were critical. This was the case at least with some such studies in Poland.

were differences in the level of political repression between countries like Romania, Czechoslovakia or Poland). This applied not only to political repression, but also – or even primarily – to the approach to "ordinary" crime control. Therefore, penal law and criminal justice systems in those countries had all the features of authoritarian systems and were extremely punitive (Pomorski 1981). Under the circumstances, it is no wonder that sentencing outcomes there were as they were and that countries of the "socialist brotherhood" were leaders of incarceration not only in Europe but also worldwide. Astonishingly, after the fall of communist regimes in the region and the ascent of political systems aspiring to be called liberal democracies, after practically all countries of the region (with the exception of Belarus) became members of the Council of Europe, and after a majority of them became Member States of the European Union, the patterns of imprisonment remained fairly unchanged. It is true that during the 1990s incarceration rates in Central European countries usually dropped somewhat, while in Western Europe, primarily during the 1990s and 2000s, they tended to grow. It is also true that for the last 10–15 years those rates in most European countries have tended to fall (Aebi et al. 2016). But despite all those changes mentioned earlier, the "penal divide" between Western and Central Europe remained visible and fairly unchanged for the last 30 years. Did so much need to change in Central and Eastern Europe since 1990 for imprisonment patterns there to remain the same? As mentioned earlier, before 1989–1990 Central European penal exceptionalism in comparison with Western Europe could be easily explained by the undemocratic, authoritarian nature of the communist regimes in power there. Unfortunately, getting rid of those regimes and becoming liberal democracies which integrate European values and standards in general, and the criminal justice system in particular, obviously had no profound impact on sentencing outcomes and punishment patterns throughout the region, or at least the impact was much less visible than could be expected.

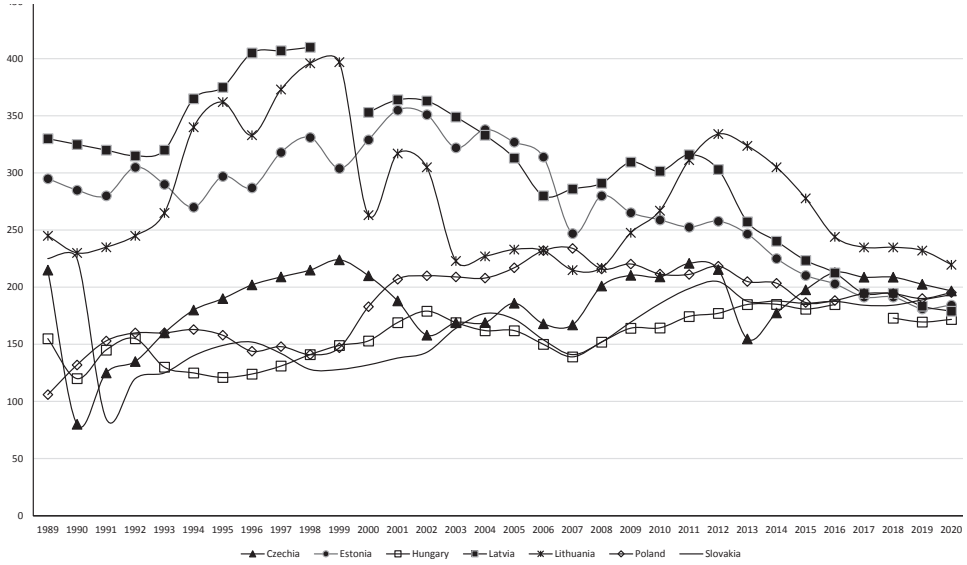
1.2. Trends of incarceration rates in Central and Western Europe

The differences described above regarding the punitiveness of sentencing outcomes between Central Europe and other parts of the continent are to a large extent confirmed if one uses longitudinal data for the selected years instead of cross-sectional data to compare trends in incarceration rates (see also Aebi et al. 2016). Data regarding such trends are presented in Figures 5–9. There are usually no fundamental problems accessing the data, as during the 1990s all Member States of the Council of Europe started to provide such data for the purpose of compiling the SPACE I annual prison population statistics. An additional source was the consecutive editions (since 1999) of the "European Sourcebook of Crime and Criminal Justice Statistics". Although the data for some countries and some years may be missing, those two sources provide reliable data on trends in incarceration in Europe since 1990 (notwithstanding general reservations regarding the use of official statistical data to measure crime and crime-related phenomena).

For the sake of clarity, the graphic presentation of the situation on the European continent has been split into five regions: the countries of Central Europe (Czechia, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia), the Balkan countries (Bulgaria, Croatia, Romania, Serbia and Slovenia), countries of Western Europe (Austria, Belgium, France, Germany, the Netherlands, Switzerland and the UK [represented by England and Wales]), countries of southern Europe (Greece, Italy, Portugal and Spain) and Scandinavian countries (Denmark, Finland, Norway and Sweden). The regions have been distinguished primarily using geographical criteria, although they overlap to a large extent with regional differences in imprisonment rates (punitiveness or "penal climate").[6]

Even a cursory look at the diagrams seems to confirm that in certain of those regions there are fairly similar trends in incarceration rates. Starting with Central Europe (Fig. 5), it is easy to discern two regional patterns of development, as developments in the Baltic states seem to differ from the other countries assigned to that region. Throughout the entirety of the last 30 years, Estonia, Latvia and Lithuania had the highest incarceration rates in Europe (in some cases exceeding 400, and typically well above 300). As a matter of fact, for many years they had comparable rates to other former Soviet republics like Russia itself, Belarus or Ukraine. However, since about the year 2000 those rates started to decrease, and around 2020 they

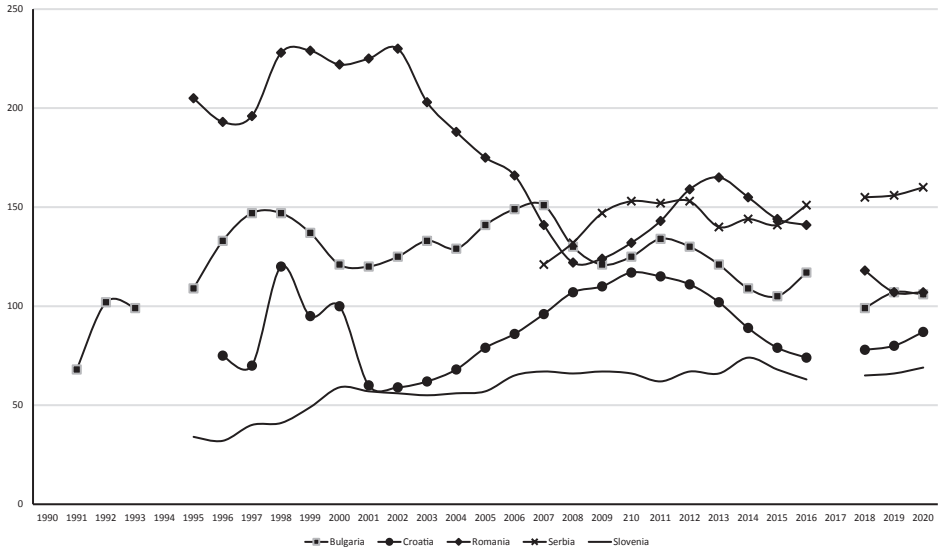
Figure 5. Trends in incarceration rates in Central European countries (1989–2020)



Source: Own elaboration.

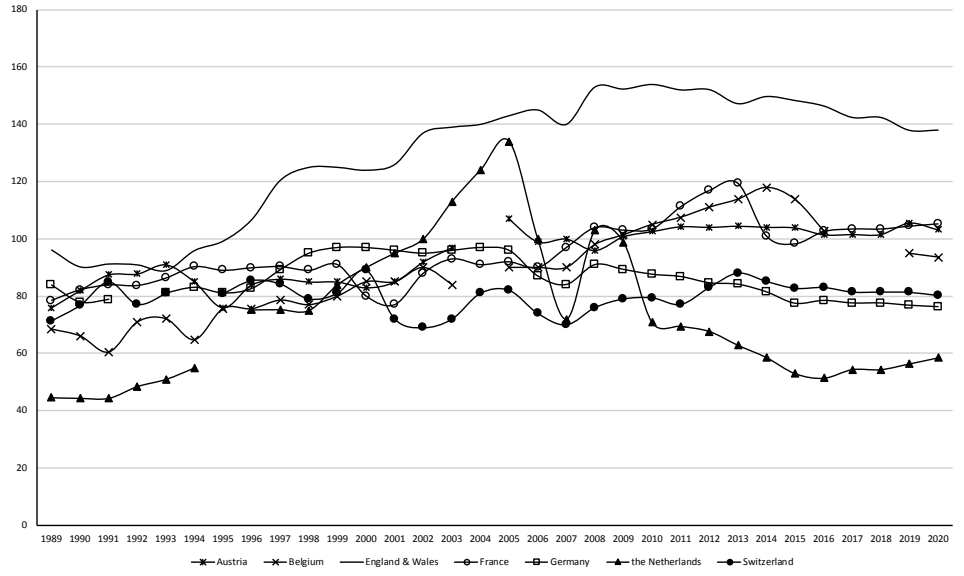
[6] Similar regions were delineated by Tapio Lappi-Seppälä (2008: 318). The only difference in his categorisation is the fact that there is no separate region of Southern Europe, whose countries he included in Western Europe.

Figure 6. Trends in incarceration rates in Balkan countries (1989–2020)



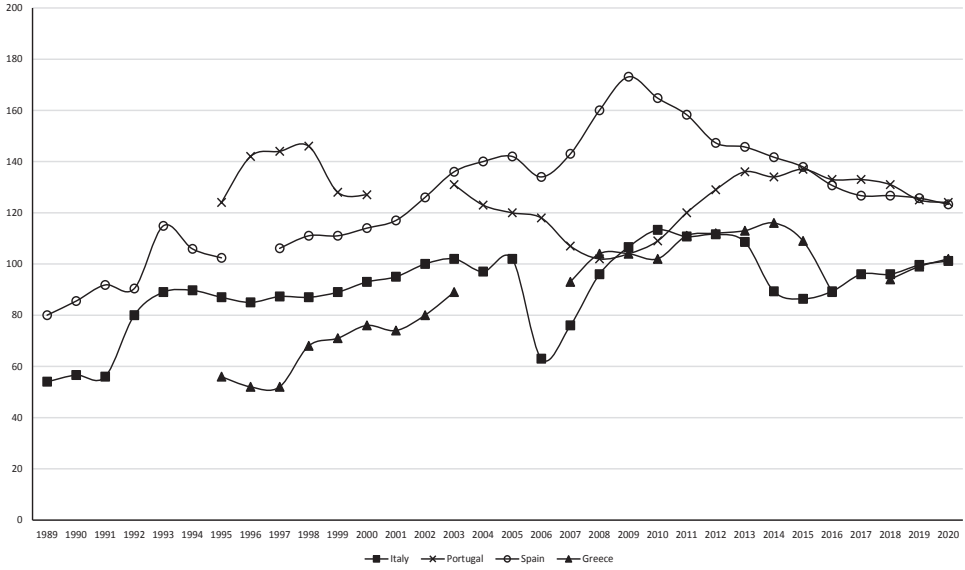
Source: Own elaboration.

Figure 7. Trends in incarceration rates in Western European countries (1989–2020)



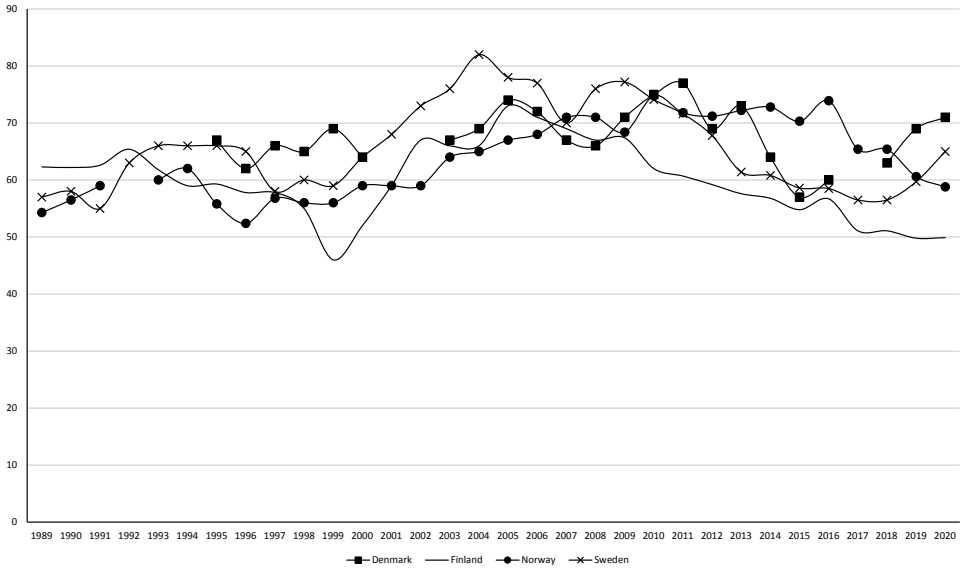
Source: Own elaboration.

Figure 8. Trends in incarceration rates in Southern European countries (1989–2020)



Source: Own elaboration.

Figure 9. Trends in incarceration rates in Scandinavian countries (1989–2020



Source: Own elaboration.

fell slightly below 200 (with the exception of Lithuania, where it remains slightly above that mark). It seems that those three countries during the last 20 years successfully undertook a serious effort to detach themselves from the Soviet penal inheritance and to reduce their prison populations, even if they remain among the highest in Europe.

However, the Baltic states are no longer clear European outliers regarding prison populations, as Czechia, Hungary, Poland and Slovakia have had very similar positions, with incarceration rates between 170 and 190 during the last few years. This may be considered a substantial improvement as compared with the previous decade, when in certain years the incarceration rate was well above 200 (>230 in Poland in 2007, >220 in Czechia in 2011 and >200 in Hungary in 2012; only Slovakia never crossed that mark, despite remaining close to it in recent years).[7] Unfortunately, it is necessary to stress that the somewhat lower incarceration rates in the region in recent years are hardly a major success story: at the beginning of the 1990s, immediately after the fall of their communist regimes, all four countries had substantially lower rates. Subsequently, however, those rates started to grow and around 2000 returned – sometimes close to standards known from the communist times. Nevertheless, two things are clear. Firstly, despite differences between developments of imprisonment rates in the Baltics and in the remaining four countries, they share fairly similar patterns: drops in prison populations immediately after 1990, followed by substantial increases around the turn of the century, followed in turn by reductions since about 2015 (although those reductions never amounted to a return to the situation from the beginning of the 1990s). In consequence, the "penal divide" between the Baltics and the remaining countries, very visible in the period 1990–2015, practically disappeared in recent years. Secondly, while these developments may be considered a substantial success for the Baltic countries, they are hardly an achievement for the remaining ones. Despite reducing their imprisonment rates below the mark of 200, they still have the largest prison populations among EU Member States and other European countries.

A much more differentiated situation is observable in the Balkan countries, i.e. Bulgaria, Croatia, Romania, Serbia and Slovenia[8] (Fig. 6). Romania is the only country where trends in incarceration rates bear some resemblance to Central Europe. Until 2002 the country had incarceration rates well above 200 (230 in 2002), but since that time the rate tended to fall (with some reverses in the period 2010–2015) to about 110 in 2020. Interestingly enough, neighbouring Bulgaria never reached such a high incarceration rate. During the entire period it remained at around 150, or well below that mark; in recent years the figures have been almost identical to Romania's. Serbia remains the only country of the region which still

[7] For more details regarding developments in Hungary and Poland, see Kerezsi and Lévay (2008) and Krajewski (2004).

[8] Slovenia is a clear outlier here, representing penal exceptionalism of a completely different kind to other countries of Central and Eastern Europe (Flander, Meško 2016).

has an incarceration rate around 150, while Croatia remains close to the European average, with 87 in 2020, and Slovenia remains within the Scandinavian average, with 69 in 2020 (although it no longer enjoys the status of a clear outlier as during the 1990s, when it had an incarceration rate below 50, the lowest on the European continent). To sum up, Romania seems to be closer to the countries of Central Europe, while former Yugoslav republics (Slovenia and Croatia, and to a lesser extent Serbia) seem to have much milder penal policies. In that way they seem to continue the Yugoslav exceptionalism of the communist era. The situation in Bulgaria is similar. In consequence Balkan countries keep closer to the European average than their counterparts in Central Europe. The exception is Slovenia, which to a large extent retains its exceptionalist position.

From that point of view it is clear that the countries of Central Europe, despite drops in incarceration rates in recent years, retained their special position as compared with countries of Western Europe (Fig. 7). The only exception there remains England and Wales, which since the beginning of the century have had the highest incarceration rate among Western European countries (above 140) – and have retained it despite drops in recent years. The only country with a comparable incarceration rate for some time is the Netherlands (134 in 2005). The Dutch growth of imprisonment in the period 1998–2008 seems to have been a rather brief episode, though, as in recent years incarceration rates there have fallen again below 60. Brief episodes of significant increases in incarceration rates in between 2010 and 2015 also occurred in Belgium and France, but since that time those rates dropped again, now remaining at around 100 (along with Austria). Germany and Switzerland, despite some fluctuations, have probably been the most stable European countries in regards to incarceration rate: at the moment they remain around 80. This shows that most countries of Western Europe, despite various changes during the last 30 years, recently experienced a decrease in their prison populations. Their incarceration rates, between 50 and 110, are practically half those of Central European countries (at the moment between 170 and 220). It seems that despite all the turbulence and changes in incarceration trends experienced on the continent in the past 30 years, the "penal divide" between Western Europe and Central Europe remains.

This conclusion holds true if one includes in the analysis the countries of Southern Europe (Greece, Italy, Portugal and Spain). Greece experienced a rise in incarceration until about 2013, but in recent years the rate went down to about 100. Italy, despite various fluctuations, remained fairly stable, and after a drop in recent years also remains at around 100. The countries of the Iberian peninsula are somewhat different cases. Portugal experienced some more significant fluctuations, but again went through a substantial decrease in the incarceration rate in recent years. Finally, since the beginning of 1990 Spain has experienced constant and substantial growth in the incarceration rate, in the year 2009 achieving a record level of 173, competing in Western Europe only with England and Wales. Since that time, however, the prison population went down significantly, and in recent

years remains – like Portugal's – at around 120. This is rather high for European standards, but still substantially lower than 10 years ago.

In Scandinavia, despite various national fluctuations in Denmark, Finland, Norway and Sweden, the incarceration rates remain, as usual, the lowest in Europe (between 50 and 70), to be compared only with the current Dutch and Slovenian rates. This is the case despite some increases at the beginning of the century, which were reversed later on (even if substantial increases were experienced by Denmark and Sweden in the years 2019 and 2020).

To sum up, it seems that around the turn of the century most European countries experienced rising incarceration rates, sometimes – like in the case of the Netherlands, Spain and the UK – of substantial proportions. Those trends were paralleled by similar developments in Central Europe. In most cases these trends started slowly to reverse during the last decade. As a result, the comparative map of incarceration rates throughout Europe remains very similar to the one from 30 years ago. The numbers are sometimes different, but the proportions remain quite the same: the "penal divide" between Central Europe and Western Europe remains very visible (with Balkan countries and countries of Southern Europe retaining an intermediate position and Scandinavia [along with the Netherlands and Slovenia] retaining its clearly exceptional status). Despite some reductions in incarceration rates in Central Europe in recent years – which are especially visible in the Baltic states – and parallel reductions in most other European countries, the "penal divide" between the formerly communist-governed countries of Central Europe and countries of Western Europe did not shrink substantially, let alone disappear.

One more comment is necessary here. It may be even more important to explain differences in the patterns of punishment in Europe, especially between its central part and the rest, considering other characteristics of their penal policies apart from incarceration rates. In other words, it is not only high incarceration rates that makes penal policies in Central Europe different; most of them also show fairly similar sentencing patterns in terms of the penal sanctions they impose. It is not necessarily frequent use of long imprisonment sentences, however. As a matter of fact, imprisonment is not the most common sanction. In some countries it is just the opposite. Usually the penalty that is most often applied is the suspended sentence, amounting in some countries (like Poland) to even 50%–60% of all sanctions handed down by courts (Krajewski 2016). At the same time, most of those countries very infrequently impose fines, which are usually the dominant type of sanction in most Western countries. Also, the use of other alternatives to imprisonment, such as community service, is very "parsimonious" in the region. Therefore, it may be observed that the very high imprisonment rates in the region are accompanied by certain specific sentencing policies with many common features. In many respects, those policies are not necessarily very harsh per se, but at the same time the countries using them seem to have substantial problems finding appropriate alternatives to imprisonment (Krajewski 2013). At the same time, all this does not necessarily mean that in other respects the penal policies of the re-

gion are uniform. For instance, the flow of entries and the average length of stay in prison are quite different in Czechia, Hungary, Poland and Romania (Dünkel 2017: 632), although incarceration rates in those countries do not differ enormously. This suggests that similar figures for the prison population may be produced by different types of sentencing policies. This raises the question of "whether countries who incarcerate less people but for longer sentences are more or less punitive than countries incarcerating more people but for shorter sentences" (Snacken, Dumortier 2012b: 2; see also Steenhuis, Tiggers, Essers 1983). It is also well known that the welfarist Scandinavian penal policies resulting in low incarceration rates also have another side that involves various coercive measures, giving them a somewhat less mild, liberal character (Barker 2012). Therefore, caution should be advised when evaluating penal policies and sentencing policies exclusively with the use of incarceration rates. Nevertheless, there remains little doubt that there are substantial differences in the penal policies implemented in Central and Western European countries and that those differences, easily explainable before 1989–1990, persist till today, more than 30 years after the fall of the Iron Curtain. This raises the question of why things turned out the way they did. The scholarly literature dealing with this problem is by no means abundant. Nevertheless, an attempt is made below to review and discuss some of the concepts that try to explain this phenomenon. It constitutes a very brief and cursory analysis of selected concepts which either were directly intended to explain Central European exceptionalism or may be applicable in that particular context. Detailed analysis and criticism of those concepts would be beyond the scope of this essay.

2. Explanations of Central European penal exceptionalism

2.1. Shadows of the past or the impact of long-lasting authoritarian rule?

Central European penal exceptionalism may be considered a sort of puzzle. As Lynne Haney observed,

> at least in the abstract, one might assume that Central Europeans would be suspicious of penal power, particularly given their experience under state socialism with how confinement can be used to quash political dissent and social conflict. … [O]ne could imagine that the carceral world of state socialism would make Central Europeans less sympathetic to calls for renewed harshness. (Haney 2016: 347)

Obviously this assumption turned out to be wrong.

Interestingly, it seems that this assumption is also not necessarily true in the case of other countries sharing a similar experience. In other words, the end of an authoritarian regime does not always mean an end to punitiveness. Several

countries, not only in Europe, can provide examples, emerging in recent decades from shorter or longer periods of authoritarian rule or from various types of right-wing dictatorships typically installed by military coups: first of all, Argentina, Greece and Spain, but also South Africa or Brazil. All these countries went through sometimes long dictatorships, with an especially brutal character. Their criminal justice systems were not only punitive, but also often characterised by massive, widespread abuses of human rights. One could expect that the fall of those dictatorships and the return to or establishment of democratically elected governments based on the rule of law would have a profound impact on the repressiveness of their criminal justice system. The literature on the subject shows that the relationship between the type of government and its eventual change, on the one hand, and the punitiveness of the criminal justice system, on the other hand, is by no means obvious. The ascent of democracy does not automatically imply a liberalisation of penal policies. Therefore, the experience of Central Europe in that respect may not necessarily be unique. The first case is Argentina, where after the fall in 1983 of a particularly brutal military dictatorship a tendency towards penal moderation could initially be observed. However, as early as the 1990s, a visible "punitive turn" occurred (Sozzo 2016). Similar developments seem to have taken place in Brazil (Fonseca 2023). Finally, Greece represents a very similar case after the fall of their military dictatorship in 1974 (Cheliotis, Xenakis 2016). Also, the democratic transition in Spain after the death of Francisco Franco in 1975 did not necessarily result in clear-cut reductions in the criminal justice system's punitiveness. According to Brandariz-Garcia (2018), Spanish penal policies in the post-Franco era were characterised by constant "penal expansionism" and growing incarceration rates. Finally, South Africa (Super 2016) seems to confirm the above pattern, as democratisation did not always go along with certain liberal values, including those regarding the criminal justice system. Therefore, the consequences of transitioning from dictatorship or authoritarian systems (regardless of whether they were right- or left-wing) to democracy are not always necessarily as one might expect. In other words, a transition from dictatorship or authoritarian system to liberal democracy does not automatically involve a radical reduction in punitiveness of the penal law and crime control policies. From that perspective, the specific experience of Central Europe does not seem to be unique.

The fact that the punitiveness of the criminal justice system often persists after a democratic transition, or returns very soon afterwards to previous levels, may result from various factors. The first possible explanation for this phenomenon is the influence of the authoritarian past and the possibility that changes in punitiveness, of both the criminal justice system and public opinion towards offenders, may somehow lag behind changes in other areas. In other words, the source of the problem is shadows of the past or the long-lasting influence that punitiveness of authoritarian provenience has on a society, extending well beyond the life of the authoritarian regime itself. This may be especially true in the case of longer periods of authoritarian rule, which are able to reshape a society in more profound ways

and leave longer-lasting effects. This could be true for countries of Central Europe, where communist regimes dated back to the end of WWII, thereby ruling for 45 years (even longer for Baltic states, as they were occupied by the Soviet Union in 1940). But it may be equally true of Spain, where Franco's dictatorship lasted from 1936 till 1975–1977, i.e. for about 40 years, or Argentina, where six military coups d'etat occurred between 1930 and 1983. Likewise, the policy of apartheid in South Africa became state policy at the end of the 1940s, although as an ideology it emerged before WWII. Long-lasting authoritarian rule may have a profound and lasting impact on society and its members, including their mentality, beliefs and attitudes. Perhaps authoritarian personality is not only a breeding ground for authoritarianism, of any kind, but can also be a product of long-lasting authoritarian influence. If punitiveness is a necessary element of any dictatorship, a society living for a longer time under an authoritarian regime may itself became punitive. The inheritance of the past in that case involves the creation of a punitive mentality, not only among political elites but also among the population at large, who do not know any approach to various social problems other than harsh punishment. Moreover, such a mentality may also deeply permeate the criminal justice system and its actors. Of special significance for Central Europe may be the ability of communist regimes to initiate social changes with profound and lasting consequences. Communist takeovers in Central Europe involved completely reshaping those societies, not only in political or economic terms but also in social terms – sometimes beyond recognition. Old social elites of "bourgeois" provenience were completely marginalised and in many cases physically annihilated. The structure of societies were radically changed by the massive social advancement of people from lower strata of the society. Those groups functioning within a punitive state framework could easily acquire punitive attitudes, and it is not easy to get rid of them under a democratic regime. As I wrote ten years ago,

> countries of Central and Eastern Europe governed by communists and dominated by the Soviet Union were for several years effectively cut off from the mainstream of penological discourse of the post-war period, with significant consequences for their penal law and criminal justice systems. Even if certain modern penological ideas were known and discussed, and there were some attempts to implement them in practice, political realities were such that criminal justice systems in the region were governed primarily by punitive Soviet orthodoxy. Offenders were treated simply as bad people deserving harsh punishment. This was an approach equivalent to that underlying the contemporary 'punitive turn' and the phenomenon of the penal state. As a matter of fact, countries of 'real socialism', and particularly the Soviet Union with its Gulags, may be considered to be model 'penal states' based on widespread repression not only of political dissent, but also of ordinary crime. The collapse of the communist system created expectations that this would change. Unfortunately, such did not prove to be the case. (Krajewski 2013: 335–336)

In other words, the punitive mentality so characteristic of Soviet communism, although certainly not exclusively a communist property, could in the region outlive the communist system itself. The claim put forward by Maria Los that the post-communist transformation involved "an invisible process of informal reproduction of the communist power/knowledge complex" (Los 2002: 173) may be an overstatement,[9] but the communist past exerted (and probably still exerts) a significant impact on what happened after communism disappeared. As Michael Tonry writes, "in Eastern and Central Europe, the lingering effects of Communist rule, in concert with longer-term features of the distinctive histories and traditional cultures of individual countries, are important backdrops to contemporary policies and practices" (Tonry 2012: XVIII).

It seems that Milena Tripkovic adopts a similar approach while explaining post-communist punitive tendencies in Serbia. According to her, despite the fact that

> penal norms and policies have undergone a significant degree of democratization in that their outlook has tended not to be punitive, the judiciary (and, to some degree, other actors in the penal field) has been increasingly inclined towards punitive practices. … [P]ockets of authoritarianism in the executive have survived the transition to democracy and have continued to exert pressure on the judiciary in ways that have tipped the balance of judicial decision-making towards punitiveness. What has thus emerged is what may be termed 'authoritarian governance of crime within democracy'. (Tripkovic 2016: 370)

Her argument seems to be somewhat narrower, as it primarily regards the punitive mentality of governing elites and its impact on the judiciary. But the claim about the existence of "pockets of authoritarianism" resulting from cultural transmission within the criminal justice agencies of certain types of professional ideology under communism seems to be quite convincing. This may be confirmed by the example of the Polish public prosecution system's years-long struggle for change and independence. Unfortunately, this struggle was not successful, and after 2015 the public prosecution system was quickly politically subordinated to the new government and started to function in a way that eerily resembled the old communist public prosecution system: as a rigid hierarchy with actors at each level almost totally subordinated in political terms, willingly fulfilling the wishes of their superiors. Unfortunately for many prosecutors, it was not a major problem to adjust to that situation. Older ones knew it from their own experience and transmitted this knowledge effectively to the younger ones (Krajewski 2012).

[9] I do not wish to indulge in a discussion of the extent to which the fall of the communist system was somehow "prearranged" by communist secret services to preserve through privatisation their influence and power during the post-communist era (Los, Zybertowicz 2000), but the following is relevant to this essay. In Poland (but also in Hungary) political parties of the post-communist left usually represented a relatively moderate, less punitive approach to crime control policies. It was the staunchly anti-communist right which, while in power, indulged in all kinds of penal populism and implemented policies producing the highest imprisonment rates and reminiscent of a carceral state.

The argument of "pockets of authoritarianism" or "pockets of punitiveness" is supported by one interesting observation. As mentioned earlier, the criminal justice systems of many Central European countries were usually somewhat less punitive immediately after the collapse of communism. This may be easily observed in a drop in imprisonment rates in most countries of the region at the beginning of the 1990s. This lasted relatively longer in Poland, where the drop in incarceration rates persisted till about 1998–1999. Interestingly, this change (which resulted from a substantial drop in the use of incarceration, accompanied by a search for alternatives, as well as some other changes with obviously "liberalising" effects) took place without any radical changes to penal law, as the old communist penal code of 1969, very often responsible for the punitiveness of sentencing policies before 1990, remained in force till 1998 (Krajewski 2016: 199–206; Krajewski 2019: 64–68). This means those changes resulted exclusively from the changed political atmosphere in the country, a "liberal optimism" about not only the prospects for political reforms, but also for reforms of the criminal justice system, such as making it less punitive. Many actors within the criminal justice system obviously accepted all this and acted accordingly, but there is no doubt that "pockets of resistance" with a punitive, and very often authoritarian essence survived (Krajewski 2012: 89–93; Krajewski 2013: 334–336). With the ascent at the end of the 1990s of significant changes regarding the general political atmosphere in the country, those "pockets" started to exert growing influence on political decisions regarding penal policies, and were finally able after 2015 to get almost unlimited control.

In other words, the original reduction of punitiveness in Poland and other countries of the region was reversed, and the "liberal optimism" towards prospects for criminal justice reform started to fade. It resulted in a "punitive turn" in the region around the end of the century, a turn which to a large extent coincided with a similar, if somewhat earlier phenomenon in the West, primarily in Anglosphere countries. Therefore, it is legitimate to inquire about the reasons for those growing punitive tendencies in the countries of Central Europe at the end of the century. Was it just a return to the "old punitiveness", with "pockets of authoritarianism and punitiveness" "hibernating" for some time and subsequently being revived and gaining advantage over the initial "liberal optimism"? Or was it rather the importation of a "new punitiveness" (Pratt et al. 2005) from the Anglosphere becoming very popular and influential among some of the political elites and criminal justice professionals (especially police officers and public prosecutors)? Writing ten years ago, I argued in favour of the first hypothesis, stressing the impact of the "old punitiveness". The main argument was the observation that punitive tendencies were characteristic of all countries of the region, suggesting that a common past and common experience under communist dictatorships may contribute to similar, even parallel developments in crime control policies after the fall of those regimes. It seems that past experience under authoritarian regimes shaped a very specific type of authoritarian attitude among some of the political elite and large portions of the population. After 1990 this attitude was

subject to cultural transmission, and therefore remained influential even 30 years after the fall of the communist regimes. But at the same time, there is no way to deny that the persistence of the "old punitiveness" coincided with the emergence and importation of the "new punitiveness" giving new power to the old patterns. This "new punitiveness" became a very useful political tool for political parties representing populist tendencies. This raises the question of the impact of populism in general, and penal populism in particular, on specific developments in penal policies in Central Europe. It seems that during the 1990s the entire region was on the road to a less punitive approach to crime control. It was the emergence of the "new punitiveness" and penal populism which made possible the return to the "old punitiveness". This coincidence completely changed the "penal climate" in Central Europe, thwarted efforts to reduce punitiveness and maintained the "penal divide" between Central and Western Europe.

2.2. Penal populism

This brings the review of the factors shaping Central European penal exceptionalism to the most frequently cited one, namely "penal populism". Penal populism is part of a wider political populism. As John Pratt writes, "populism should be understood as a particular kind of political phenomenon where the tensions between the elite and grass roots loom large" (Pratt et al. 2005: 9). He goes on to say that "populism represents in various guises the moods, sentiments and voices of significant and distinct segments of the public which feel that they have been ignored by governments, unlike more favoured but less deserving groups" (Pratt et al. 2005: 9). Penal populism results from the same type of tension in the area of governing crime, crime control and penal policy. Again, according to John Pratt,

> penal populism speaks to the way in which criminals and prisoners are thought to have been favoured at the expense of crime victims in particular and the law-abiding public in general. It feeds on expression of anger, disenchantment and disillusionment with the criminal justice establishment. It holds this responsible for what seems to have been the insidious inversion of commonsensical priorities: protecting the well-being and security of law-abiding 'ordinary people', punishing those whose crimes jeopardize this. (Pratt et al. 2005: 12)

Populism was always present in politics throughout the world, but it started to acquire a special significance during the 1980s and 1990s, originally in the Anglosphere and later spreading to other countries. It is certainly beyond the scope of this essay to discuss the causes which for the past 30 years have made populism and penal populism such a significant part of the political processes in many countries. Nevertheless, the emergence of penal populism may be considered a consequence of the growing fears and insecurities of post-modern, post-industrial societies (Baumann 2000), a response to those phenomena. The emergence of penal populism had profound consequences for crime control policies and penal policies throughout the

world, as it was one of the cornerstones for a "punitive turn", "new punitiveness" or "culture of control" (Garland 2001) so characteristic of criminal justice systems in some countries for 30–40 years. The fears and insecurities widely felt in some segments of societies were instrumentalised by politicians, who started to enact harsh crime control policies to win votes rather than to promote real justice or reduce the crime rate. From that point of view penal populism represents a purely expressive, and not an instrumental approach to crime control and punishment.

Although contemporary populism, and especially penal populism, emerged in the Anglo-American world and had a particularly significant impact on the punitiveness of those criminal justice systems, it can now be found throughout the world. Therefore, the notion of penal populism is broadly used to explain various new tendencies in penal policies, considered to be responses to popular expectations and resulting in the growing punitiveness of the criminal justice systems throughout the world. At the same time, because of widespread penal populism in the platforms and actions of many political parties, who are often either ruling parties or parties with a significant impact on the government, there are opinions that the ability of this factor to explain certain tendencies in punishment policies is limited. The punitiveness of the criminal justice system differs throughout the world (as attested to by the differences between the USA and Europe, or those among European countries, as discussed above in more detail). Therefore, penal populism's ubiquitousness is not a suitable explanation for those differences. Because of this, Tonry distinguishes between nonfactors, risk factors and protective factors in his discussion of determinants of penal policies, and he categorises penal populism as a nonfactor (Tonry 2007b: 16–17). As "every Western country experienced those developments, they cannot provide a basis for explaining widely divergent policy trends in different countries" (Tonry 2007b: 17).

The problem is that in fact penal populism may be present almost everywhere, but its intensity and its impact may differ from country to country. As an independent variable penal populism is certainly very difficult or even impossible to operationalise in a completely satisfactory way. However, Pratt and Miao rightly note that "the range and extent of the impact of penal populism varies considerably, … from society to society. Some, for reasons stemming from their own history, seem to have built-in resistances to this phenomenon" (Pratt, Miao 2019: 16). There is no doubt that there is a huge difference in penal populism and its impact between countries like the UK, Germany and Hungary. As a matter of fact, the impact of penal populism may depend not only on its local characteristics and "potency", but also on the ability of a given political and criminal justice system to resist the temptations of punitiveness (Snacken 2010; Snacken, Dumortier 2012a). In other words, it depends on the presence and effectiveness of protective factors. Therefore, penal populism or its special, particularly strong variants should not be completely abandoned as an explanans of penal exceptionalism in general, and in Central Europe in particular. For various reasons, countries of the region may be especially prone to the emergence of penal populism and its consequences being particularly acute.

The problem is that the emergence of penal populism in the region coincided with an unprecedented political, economic and social transformation. Life under "real socialism" before 1990 was certainly grey, dull and rather difficult, not to mention the lack of political liberty. But for many people it was a relatively safe and secure life. The disintegration of the centrally planned economy and very meagre but commonly available and stable "welfare state", and its substitution with a market economy in many cases brought about dramatic consequences for large segments of the population: the decline of unproductive heavy industry, the collapse of large, ineffective state-owned farms, massive unemployment, expanding poverty and uncertainty about the future. Those were common experiences for many in Central Europe during the 1990s. Central European societies started to experience a growing gap between winners and losers of the transformation and started to be increasingly polarised in social terms, which also had political consequences. All this was accompanied by additional negative phenomena like rising crime, changing patterns of crime and growing perceptions of the state being unable to deal effectively with it (Lévay 2000; Los 2002; Lévay 2012b; Šelih 2012). There was also an impact of such phenomena as fear of crime. There are few sources of data for Central Europe during the 1990s, but the available data and scholarly literature suggest that fear of crime in the East was higher, even much higher than in the West. This is confirmed by ICVS data for Poland (Kury et al. 2002: 331–332) and data for Western and Eastern Germany (Kury 1993). Naturally, growth of crime and rising fear of it were also present in the West. However, it seems that liquid modernity in Central Europe could be particularly problematic, creating a particularly suitable breeding ground for penal populism. This could be reinforced by an additional factor: the lack of democratic traditions and of a system with established political parties made more or less rational public discourse (or deliberative democracy), especially difficult, sometimes simply impossible. This created unique opportunities for various "miracle workers", offering various recipes in a given area, including crime control and punishment. In any case, it became quite common in the literature from the region to apply the term "penal populism" as a very important concept to explain the developments in Central Europe regarding the punitiveness of crime control policies (Krajewski 2013; Gönczöl 2022; Bencze 2022; Boda et al. 2022; Woźniakowska-Fajst, Witkowska-Rozpara 2022). The use of the notion of penal populism in the region is especially important considering one of the crucial problems in the region in recent years, namely disregard for the rule of law significantly contributing to growing punitiveness (Lévay 2012a; Lévay 2016).[10] Therefore, being aware of the fact that penal populism is by no means unique to Central Europe, specific features of its manifestation in the region may justify its use in explaining at least certain features of the penal exceptionalism there.

[10] One of the most conspicuous examples was the recent "reform" of the Polish penal code (entered into force on 1 October 2023), which is characterised not only by draconian increases of punitiveness, but also by many solutions unacceptable from the point of view of the rule of law, which may be clearly traced back to the communist penal code. It caused Polish penal law to regress to the times before 1990.

2.3. Penal nationalism

A somewhat different, although not completely different alternative to penal populism as an explanation for Central European penal exceptionalism was proposed by Lynne Haney (2016), who introduced the special notion of "penal nationalism". She notes that "while overlapping with the penal populism we see in other national contexts, the East European version differs in key respects, particularly in the ways it appeals to the nation as it defines transgressions and equates punitiveness with national sovereignty and protection" (Haney 2016: 348). Therefore, penal nationalism may be considered a specific Central European version of penal populism that equates punitiveness with national sovereignty and protection of national interests. According to her, across Central Europe politicians and state actors used tough, law-and-order rhetoric to reimagine the post-socialist community. Secondly, like other forms of nationalism that have sprouted up across Central Europe, penal nationalism is intricately linked to the dilemmas of societal transformation in the region (Haney 2016: 348). One may say penal nationalism is a special device to manage that transformation during a legitimacy crisis, featuring because "actors who now operate on a political landscape in which much of their power has been taken over by transnational forces, while the populations that elect them harbour deep and persistent distrust of the state" (Haney 2016: 349). Discussing the nationalistic approach to crime and crime control, Haney observes that "penal nationalists' punitiveness has become the basis of national sovereignty – it is as if being 'soft' on punishment will mean a loss of national independence and autonomy" (Haney 2016: 357). Further on, she writes:

> this focus on criminal threats to the nation has frequently led penal nationalists to invoke metaphors of national essence and blood ties. On the one hand, they link the courage to resist criminals to 'Polish strength'. Or they connect the will to be tough on crime to the 'Czech spirit'. On the other hand, those thought to be a criminal threat are deemed internally different. Politicians from Poland's Law and Justice Party are notorious for portraying criminals as both less than human in their evil essence and as superhuman in their violent prowess and abilities. In both cases, those who pose a criminal threat are represented as intrinsically other, as non-Polish. (Haney 2016: 357–358)

Haney provides examples of various statements by politicians from Czechia, Hungary and Poland which illustrate an approach where various punitive ideas, sometimes critically received by the EU, are defended using arguments about national identity and the state's right to manage its own affairs in accordance with national interests, traditions, etc. One example is the problem of constitutionalising life imprisonment without parole in Hungary, usually discussed in the literature as an example of a purely populist penological exercise (Lévay 2016). Haney points out that Prime Minister Viktor Orbán and his government, facing a decision of the European Court of Human Rights in that matter, "refused to withdraw the sentence,

claiming it is their national prerogative to decide who and how to punish" (Haney 2016: 354). Another example may be Czechia's row with European institutions, namely the European Committee for the Prevention of Torture (CPT), over the possibility of surgically castrating sex offenders. In its 2009 report, the CPT called such punishment "degrading and mutilating" and indicated that more than 50% of castrations are done to first-time, nonviolent sex offenders without informed consent. The Czech government's response proclaimed that "it was their 'right' as a 'sovereign nation' to decide how to treat 'men who can't control their sexual instincts and are sexually aggressive" (Haney 2016: 354). Finally, "in Poland, the Law and Justice Party campaigned throughout the 2000s almost exclusively on its promise to protect the nation from internal and external threats" (Haney 2016: 356). Moreover, "the Polish castration law was put into effect by the more moderate Tusk government after public outrage over and media obsession with a high-profile case of paedophilia" (Haney 2016: 355).[11] Additionally, she provides various quotes from Hungarian, Czech and Polish politicians, commentators and activists treating problems of crime control as a matters of national sovereignty, identity, etc. For Hungary she also provides examples of vigilantism by extreme-right groups to protect Hungarians against the supposed threat from the Roma community.

To assess Haney's concept of penal nationalism, it is necessary to emphasise one point: there is certainly no lack of nationalism in Central Europe, and many right-wing political parties use nationalistic paroles and appeals indiscriminately. In a region with a long history of foreign domination and occupation, and full of past and current ethnic conflicts, this may not be completely unusual. Moreover, nationalism and populism very often come together – not only in Central Europe – to create a very dangerous, explosive mix. In any case, European (and other) history teaches that it may be very useful politically to instrumentalise various national problems and nationalistic ideas. After 45 years of communist rule – which *ex definitione* stressed "proletarian internationalism" – a revival of traditional brands of nationalism may also be somewhat expected. However, one should be cautious about directly linking nationalism with punitiveness and crime control issues. It seems that nationalism and issues of sovereignty are overemphasised in Haney's argument and sometimes based rather on anecdotal evidence. Drastic, extremist statements, events, etc. happen everywhere. The problem is identifying the extent to which they represent the political spectrum in the country. The nationalist

[11] Unfortunately, on this point she is incorrect, as in Poland it was never even officially considered to introduce surgical castration. It is true that after a high-profile case of sexual abuse in the year 2009, then Prime Minister Donald Tusk made some highly unfortunate public statements about the perpetrator (referred to in the media as "Polish Fritzl" in reference to the notorious Austrian case of a father sexually abusing his own daughter for years). Tusk denied the perpetrator's humanity and called for the adoption of a castration law. However, journalists obviously misinterpreted his words, as he was not speaking about surgical castration, but "chemical castration". The latter is a colloquial, not necessarily precise term used in the media for pharmacological therapy of sex drive disorders. The possibility of such therapy has in fact since been introduced within the framework of special, post-penal security measures for sexual offenders which had been part of the law for a few years. But it had nothing to do with surgical castration.

background of law-and-order campaigns may be true to a certain extent in the case of Hungary, as Viktor Orbán and his party, FIDESZ, having been in power for 13 years, have been in more or less open conflict with European institutions. "Scapegoating Brussels" for all ills befalling Hungary became standard procedure there, eventually also including crime control issues (especially in regard to migration). However, in Czechia and – surprisingly – in Poland, the applicability of those concepts and arguments requires a caveat. As indicated by Drápal, "it is rather unclear to what extent the presented development in Hungary can be generalized to the other countries in the region" (Drápal 2021: 3). In his opinion

> methodologically, the argument [relating to Czechia] is based on examples from a single persona, omitting any analysis of the broad political spectrum, or even of the primary holders of legislative powers (political parties). In singling out Klaus' views, Haney noticeably overlooks those of another defining figure of the 1990s and 2000s, Václav Havel (president in 1990–2003), who cannot be labelled a penal nationalist in any respect. Finally, other of Klaus' statements and actions draw a rather different picture. He criticized overly wide criminalization and promoted alternative sanctions, while advocating strict punishments for violent offenders … and enacted one of the largest amnesties ever. … To label Václav Klaus' punitiveness as a 'main voice of nationalist' appears at the very least to overlook the complexity of his views, at worst to mislabel him. (Drápal 2021: 7)

Interestingly enough, Drápal's analysis of the political manifestos of Czech political parties shows that penal populism is neither widespread in that country nor does it play an enormous role in Czech politics. Moreover, he provides evidence that creating penal law and formulating penal policies in Czechia is still under the substantial influence and control of academia and the criminal justice establishment. Therefore, to speak about the enormous influence of penal populism, not to mention penal nationalism, is wrong in Czechia's case.

The story of Poland is somewhat more complicated. Polish politics is certainly full of penal populism, especially since the new, supposedly unacceptably liberal new penal code came into effect in 1998. Political rhetoric in Poland was also always full of nationalistic overtones. But before 1998 there was relatively little public discourse on crime and crime control, and the drafting of the code was left to experts from academia and criminal justice professionals. The situation changed drastically when Lech Kaczyński, twin brother of Jarosław, leader of the populist, right-wing party Law and Justice (*Prawo i Sprawiedliwość* or PiS), became minister of justice in 2000–2001. He started to indulge in indiscriminate penal populism and to criticise the leniency of existing penal law and the liberal attitudes among the criminal justice establishment and academia. Since that time, penal populism has become a permanent feature of public discourse about crime in Poland. Moreover, Law and Justice for a long time remained a single-issue party, concentrating almost exclusively on law-and-order issues and repeating ad nauseam arguments about the leniency of penal law and of judges. However, at that time the Kaczyński twins

and their party did not indulge much in nationalistic arguments and certainly did not campaign "throughout the 2000s almost exclusively on … [its] promise to protect the nation from internal and external threats", as Haney writes. They campaigned on issues related to internal security, but never did so in the context of external threats. They were certainly extreme populists, but with relatively little nationalism. This remained the case during the period 2005–2007, when Law and Justice formed a government with Jarosław Kaczyński as prime minister for some time. They proposed various reforms of penal law, and Minister of Justice Zbigniew Ziobro, also serving as Chief Public Prosecutor, implemented extremely populist law enforcement policies. All this was strongly reminiscent of a pattern described by Jonathan Simon as "government through crime" with explicitly populist overtones (Simon 2007). Still, there was little nationalism in it. Between 2007 and 2015 the Law and Justice party was becoming increasingly populistic and tough on crime, leaving the liberal government of Civic Platform (*Platforma Obywatelska* or PO) constantly on the defensive over penal policy. It was only after winning an absolute majority in 2015 that Law and Justice became visibly nationalist and sparked various conflicts with the European Union. However, interestingly enough, law-and-order issues have lost their importance for the party. Battles with the EU, in which Law and Justice constantly resort to national sovereignty arguments, are fought not over penal policies and punitiveness, but over general issues of the rule of law, the independence of the constitutional court and the National Judiciary Council and judicial independence. Moreover, in parallel with this tendency to use broad arguments of defending national sovereignty against the "evil schemes of Brussels", Law and Justice (like Viktor Orbán's government in Hungary) started to indulge in highly populist rhetoric directed against all kinds of elites, while direct recourse to issues of crime control, punishment, etc. visibly diminished. This suggests the developments described by Pratt as the path from the original, rather narrow penal populism to much broader rhetoric and populist policies (Pratt, Miao 2019; Pratt 2020).

2.4. Welfare, trust and political conflict

Tapio Lappi-Seppälä's well-known research established clear-cut correlations between the punitiveness of a country's criminal justice system, as measured by a dependent variable for incarceration rate and several independent variables characterising a country in terms of its political, social and economic characteristics (Lappi-Seppälä 2008, 2011). He indicates clearly that his

> analyses do not aim to produce 'the final causal model' explaining differences in penal severity with the help of one or two overriding factors. Individual variations between countries make such efforts futile. The aim is less ambitious and more realistic: to examine how differences in penal severity relate to differences in a number of social, economic, and political factors. (Lappi-Seppälä 2008: 320)

It is important to note that his research is not limited to Central Europe, but includes most European countries and also some outside Europe. However, it provides a very inspiring analysis framework that enable several important conclusions regarding the specific position of Central European countries and their penal exceptionalism.

With regards to socioeconomic indicators, Tapio Lappi-Seppälä's research attempted to establish the relationship between the punitiveness of crime control policies and such characteristics as social solidarity, shared responsibility (as opposed to individualism), material prosperity and security. One of the crucial indicators for those variables was expenditure for social protection as a proportion of GDP per capita. It shows a clear pattern, as those countries that scored the highest in Europe on those indicators (Scandinavian countries) had the lowest imprisonment rates, while those scoring lowest (Central European countries) had the highest imprisonment rates. The correlation regarding the GINI index, intended to measure income, wealth and consumption inequality, was somewhat less clear. In this case, Central European countries did not represent a uniform pattern. Czechia, Hungary and Poland were less equal than Scandinavia and Western Europe, but more equal than Anglosphere and Mediterranean countries. All those countries were more equal than Baltic states, which were the most unequal countries in Europe. This last finding correlates highly with their very high incarceration rates (at least 20 years ago), while for the remaining countries the relationship is not clear. The relatively equal countries of Central Europe had higher incarceration rates than the much more unequal Anglosphere and Mediterranean countries. Therefore, it seems that the relationship between inequality and imprisonment rate is not as clear-cut as that between welfare and imprisonment rate. In general, this seems to confirm the thesis that there is some sort of relationship between welfare policies and the egalitarian nature of a society and the punitiveness of its criminal justice system (Downes 2012). It also seems to confirm Pratt's thesis that the main sources of Scandinavian penal exceptionalism are the region's uniquely generous welfare systems and their egalitarian character (Pratt 2008a, 2008b). From that point of view, it seems that the relatively high inequalities in Central Europe and the relatively low expenditures for social welfare may have something to do with the high imprisonment rates there.[12]

It is another matter to find the reasons for the region's poor performance (at least 20 years ago) of their social welfare systems, not only as compared with Scandinavia, but as compared with most other European countries. Some may indulge in that respect into "blaming neoliberalism" and its impact on the economic and social transformation in the region after the fall of communism. It is probably true that neoliberal economic concepts had a substantial impact on the way the centrally planned economies in those countries were transformed after

[12] It is important to emphasise that this applies to the data from the turn of the century. Since that time all those indicators and rankings of European countries could have changed. Therefore, it is by no means certain whether the relationships established in Lappi-Seppälä's research are still valid. It would be necessary to replicate his research using up-to-date data in order to confirm his conclusions, which is of course well beyond the scope of this essay.

1989. The notion of "wild capitalism" was often used during the 1990s and 2000s to describe what was going on in the region, especially regarding the privatisation of state-owned enterprises. At the same time, the impact of the neoliberal approach in various countries differed substantially. It was probably relatively significant in Poland (which in 1989 was practically bankrupt, with the economy in complete disarray), and much less influential in Czechia or Hungary (which emerged from communism with their economies in much better shape). Nonetheless, "blaming neoliberalism" for all possible ills probably goes too far. This topic is well beyond the scope of this essay, but Central European economies probably never deserved the label of neoliberal, especially as compared with Anglosphere countries. It is also legitimate to point out that the transformation to a market economy was a fairly chaotic process, entailing a huge number of negative side effects that were very difficult to predict and manage. This justifies the question of what may be blamed on "neoliberalism" and what is due to chaos and a lack of any precedents for a post-communist economic transformation.[13] After all, some countries of the region which hardly indulged in any type of "full-scale" neoliberal market reforms – like some Balkan countries or Moldova, not to mention Belarus or Ukraine – did not perform much better, or sometimes fared much worse. This does not change the fact that transformations in Central and Eastern Europe produced relatively large groups of "losers" left without any state care or state welfare. This certainly became a huge social problem, creating an ideal breeding ground for penal populism. To what extent those groups started to fill prisons is another question.

As Tapio Lappi-Seppälä's results indicate, the above-mentioned characteristics of Central European countries have been accompanied by remarkably low scores for the countries of the region on measures of trust and social capital. Practically all countries of the region scored low on such variables as trust in people, trust in the police and general trust in justice, with Scandinavian countries being located on the opposite end of the continuum. Low trust in people, low trust in police and low trust in justice in most cases were highly correlated with high imprisonment rates, with Scandinavia located again on the opposite end of the continuum (Lappi-Seppälä 2008: 363–364; Lappi-Seppälä 2011: 313–314).

It is interesting to ask to what extent this results from the specific historical experience of the region, with practically all its nations being deprived of their statehood during the 19th century and remaining under foreign rule? The brief interval between the two world wars was unable to bring substantial change, especially as practically all countries of the region (with the exception of Czech-

[13] This may be the main difference to other countries emerging from authoritarian regimes at the end of the 20th century, like Argentina, Greece, South Africa or Spain. Those countries had to undergo first of all a political transformation. There was no need for a deep economic transformation as all of them had more or less established, functioning market economies, private ownership, etc. (even if the degree of development and the state of their economies varied). Central Europe had to not only reform politically, but also to turn a complete mess of centrally planned, dysfunctional – sometimes almost bankrupt – economies into functioning market economies. This was impossible to do without profound changes to the structures of ownership, which was a particularly difficult task.

oslovakia) at that time could hardly be described as exemplary democracies. Then came the disaster of WWII, followed by the Red Army's "liberation" and 45 years of Soviet-imposed communist, authoritarian dictatorships. This created an extremely complicated relationship between those societies and state authority. The latter was often at least deeply mistrusted, but in many cases treated as an alien, even hostile entity. At the same time, the societies of the region generated particular forms of social cohesiveness and social bonds necessary for survival under such circumstances (such as the special role of family bonds and staunch, very conservative Catholicism in Poland). All this goes along with the societies of the region scoring very high on measures of feeling unsafe and on various punitiveness measures (Krajewski 2009), as well as very low scores on the scale of social tolerance. All those measures correlate strongly with incarceration rates (Lappi-Seppälä 2011: 313–314).

Finally, it is necessary to mention that Tapio Lappi-Seppälä includes in his analysis yet another set of indicators potentially related to punitiveness and incarceration rates, namely the dominant political culture in a country. Two indexes were used here as measures of independent variables. The first one was the Lijphart index, containing indices for the extent and centralisation of interest group participation, the number of political parties, the balance of power between executives and parliaments and the type of electoral system. It illustrates differences between the two types of democratic systems and processes: conflictual and consensual. The former is represented by majoritarian democracies (like in most Anglo-American countries) governed according to the principle of "winner takes all", leaving said winner with relative freedom to implement any type of desired policy, without considering other opinions. The latter system characterises pluralistic democracies, where various coalitions are necessary to form a government and those coalitions require constant compromise. This tends to eliminate radical, extreme ideas and policies and to encourage moderation, in penal policies as well. The second index is the Luxembourg income study, using an 11-component neo-corporatism index to measure wage bargaining processes, the role of the unions and the degree of centralisation in interest group participation. Unfortunately, those indicators were not available for Central European countries. However, Scandinavian countries again scored high on consensus and low on neo-corporatism. This correlates closely with their low imprisonment rates, while Anglosphere countries, having high or very high imprisonment rates, scored high on conflict and neo-corporatism index. It would be most interesting to be able to locate the countries of Central Europe on those indices in order to confirm or disprove the above patterns.

Generally speaking, Tapio Lappi-Seppälä's analysis indicates a fairly consistent set of political, social and economic indicators that constitute a specific pattern for Scandinavian countries. It seems that this specific pattern may be very useful in explaining Scandinavian "penal exceptionalism". At the same time, it is most remarkable that the countries of Central Europe – representing completely different patterns of punitiveness, incarceration, etc. – are usually located on

the opposite end of the European continuum for the above-mentioned political, social and economic indicators. This is of course a preliminary statement requiring further research and verification. However, the patterns established in Tapio Lappi-Seppälä's research seem to be useful not only in explaining Scandinavian "penal exceptionalism", but perhaps also extremely helpful in explaining Central European "penal exceptionalism" of quite an opposite nature.

2.5. Political economy and incarceration rate

Yet another explanation for the differences between countries in punitiveness and use of incarceration has been proposed by Michael Cavadino and James Dignan (2006). As the explanandum they use a categorisation of countries according to political/economic criteria which in their opinion impact incarceration rates. In other words, they argue that there is a relationship between certain distinctive features of various forms of capitalist societies and the punitiveness of crime control policies (Lacey 2008; Downes 2012). Their typology of political economies in contemporary capitalism includes four regime types: neoliberalism (exemplified by the USA, the UK, Australia, New Zealand and South Africa), conservative corporatism (exemplified by Germany, the Netherlands, France and Italy), social democratic corporatism (exemplified by Sweden and Finland) and oriental corporatism (exemplified by Japan). Those four categories are distinguished not only by specific features of their political and economic systems, but also by differences in incarceration rates. Neoliberal countries are characterised by high incarceration rates, conservative corporatist countries are characterised by moderate incarceration rates and social democratic and oriental corporatist states by low imprisonment rates (Cavadino, Dignan 2006: 22). Of crucial importance are two opposite models of contemporary capitalism, namely neoliberalism and social democratic corporatism, as they seem to bring completely opposite results regarding punitiveness and incarceration rate. Neoliberal states, because of certain characteristics of their political/economic systems, are exceptionally punitive, while social democratic corporatist states are exceptionally moderate in the punitiveness of their crime control policies. The socioeconomic and penal indices used to characterise these types of states are reproduced in the second and third columns of Table 1 (Cavadino, Dignan 2006: 15).

Table 1. Political economies and penal tendencies of neoliberalizm, social democratic corporatism and postcommunism

	Neoliberal state	**Social democratic corporatism**	**Post-communist countries of Central Europe**
Economic and social policy organisation	Free market, minimalist or residual welfare state	Universalistic, generous welfare state	Free market ideology accompanied by a rather weak welfare state
Income differentials	Extreme	Relatively limited	Rather substantial, although probably not extreme
Status differentials	Formally egalitarian	Broadly egalitarian, only limited occupational status differentials	Predominantly formally egalitarian, but still with a population accustomed to egalitarianism
Citizen–state relationship	Individualised, atomised and limited social rights	Relatively unconditional and generous social rights	Rather individualised and atomised, but social rights – at least theoretically – are unconditional
Social inclusivity/ exclusivity	Pronounced tendency towards social exclusion, ghetto formation, etc.	Very limited tendency towards social exclusion	Situation unclear: visible tendencies towards social exclusion of some groups, although rather without explicit ghetto formation, etc.
Political orientation	Right-wing	Left-wing	Rather right-wing, although not always
Dominant penal ideology	Law-and-order	Rights-based	Rather law-and-order
Mode of punishment	Exclusionary	Inclusionary	Increasingly exclusionary
Imprisonment rate	High	Low	High
Receptiveness to prison privatisation	High	Low	Low

Source: Adapted from Michael Cavadino and James Dignan (2006: 15).

Michael Cavadino's and James Dignan's analysis assumes a clear-cut relationship, or even a causal relationship, between the type of political economy and the punitiveness of crime control policies. Again, certain features of Scandinavian countries – first of all a generous welfare state and an egalitarian society – result in low incarceration rates. It may be said that a high level of social solidarity implies that there is no need for the broad use of repressive methods of crime control or high punitiveness. In other words, effective social policy makes unnecessary recourse to broad and intensive use of repression. Just the opposite is true in neoliberal countries: a lack of expanded welfare state and sometimes huge social

differences result in high incarceration rates. Individualisation, atomisation and a lack of social solidarity are connected with the broad use of repressive methods for crime control and high punitiveness. Or to put it in other words, ineffective or missing social policy is substituted with repressive penal policies.

Michael Cavadino and James Dignan apply their analytical tool to highly developed, wealthy capitalist countries with established market economies. Their explanation of national differences in punitiveness leaves out the countries of Central Europe or the Balkans undergoing post-communist transformation. It may be interesting to ask whether it is possible to fit countries with very high or high incarceration rates like Czechia, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia – or Bulgaria, Romania and Serbia – into their model. Certainly not directly. They represent neither social democratic corporatism known from Scandinavia, nor conservative corporatism known from Western Europe. But they are also hardly examples of full-blown neoliberalism, as discussed above. They have several distinctive features, including their past. They were never the heartland of capitalism, but were rather predominantly agrarian societies lagging behind Western Europe or North America in terms of industrialisation. For a long time during the 19th century, they were even not independent nations; in the 20th century they had relatively little democratic experience. Finally, and probably most importantly, for a substantial part of the 20th century they remained under the domination of Soviet communism, which interrupted their development and separated them from rest of the world for almost 50 years. Such features may make those countries unfit for Cavadino and Dignan's model. Despite this, the last column in Table 1 characterises them using their indices. The results are probably rather ambiguous. It seems that those countries may share some features with the neoliberal socioeconomic model, or at least are closer to it than to conservative corporatism, not to mention social democratic corporatism. At the same time, their neoliberalism seems to be limited to some extent by other elements and characteristics, also those regarding their past. On the one hand, it may be tempting to consider those countries predominantly neoliberal, which could well explain their punitiveness and their high incarceration rates. On the other hand, one should be cautious jumping to conclusions. As mentioned earlier, "blaming neoliberalism" may be an oversimplification. Further discussion on the specific model of capitalism represented by those countries (post-transformative capitalism?) may certainly be worth an attempt.

2.6. Punitive by negligence or other "technical" reasons?

The concepts discussed so far to directly explain Central European penal exceptionalism, or the application of broader concepts to explain differences in punitiveness between nations, are based on the assumption that in those countries there are factors at work contributing specifically to the high punitiveness and high incarceration rates. In other words, certain factors inherently push penal

policies in those countries in the general direction of punitive outcomes. However, this is not necessarily the case. A good example is Jakub Drápal's (2021) recent explanation of high imprisonment rates in Czechia, a country notorious for its very high imprisonment rate, competing with Poland in that respect throughout the last 20 years. However, the climate of "penal discourse" in the country does not seem to be excessively punitive – with some exceptions (such as the persistence in surgically castrating sex offenders, discussed earlier). There is relatively little penal populism in political discourse; no political party indulges in excessive penal populism; and the role of experts in shaping penal policies seems to be still relatively important. How then do sentencing outcomes produce one of the highest incarceration rates in Europe? According to Jakub Drápal, this seems to be the result of a purely technical legal problem which has long been neglected by legislators and ministries. Therefore, Czechia seems to be "punitive by negligence" or by default (and certainly not because of omnipresent penal nationalism). Without going into details, the problem is that current legislation, in force since independence was regained in 1918, requires that offenders convicted for multiple offences at various times have to serve their sentences consecutively. Such an accumulation of multiple convictions produces a relatively large group of convicts serving quite long sentences behind bars, contributing to a persistently high incarceration rate. For years, neither the ministry of justice nor legislators have been willing to deal with that problem. Of course, the situation may result from the belief that this approach to multiple convictions is not wrong. Therefore, the negligence may be grounded in the punitive attitudes of decision-makers. Still, it is different than constantly pushing for penal law reforms with harsher sentences and harsher sentencing rules. Jakub Drápal argues that this purely technical, legal issue combined with a reluctance or inability to deal with it has resulted in the persistently high incarceration rate in Czechia.

Interestingly enough, something of a similar nature has been diagnosed in the case of Poland. For years there was an intensive search for the causes behind the high incarceration rates, and various factors were blamed (punitiveness of penal law, punitiveness of the judiciary, populism of right-wing ministers of justice, reluctance of liberal ministers to resist punitiveness, pressure to abuse preliminary detention, pressure to curb liberal policies for granting parole, etc.). A closer analysis of certain statistical data regarding the composition of the prison population finally yielded interesting conclusions: the crucial factor contributing to the high imprisonment rate was the very generous use of alternatives to imprisonment, in particular the suspended sentence! How is this possible? It was always a puzzle that in Poland since 1990 the proportion of incarceration sentences was constantly decreasing (it remained for some time even below 10% of all convictions) and the average length of sentences was not increasing visibly, but the incarceration rate was very high. If about 90% of sentences handed down used non-custodial sanctions, how was this high incarceration rate possible? The problem was that the predominant alternative to imprisonment became the suspended sentence – in

some years it was applied in more than 60% of all convictions (Krajewski 2016). At the same time, a large proportion of convicts reoffended during their probation period, were convicted again and had their suspended sentences revoked. Moreover, if they had accumulated several such convictions with suspended sentences, all revoked sentences had to be served consecutively. Statistical analysis has shown that a substantial proportion of inmates serving sentences in Polish prisons are not incarcerated because they were originally sentenced to prison (Mycka, Kozłowski 2013; Krajewski 2016). Many of them originally received suspended sentences and had them subsequently revoked, thus finding themselves behind bars. This was a consequence of a very inefficient probation system, too few probation officers and a general model of probation services that stressed control of probationers rather than social work. Nevertheless, for years about 60% of the prison population in Poland comprised inmates who had originally been sentenced to non-custodial sanctions (Mycka, Kozłowski 2013). If one adds to this individuals sent to prison for not paying fines or for avoiding community service, the proportion of inmates originally sentenced to non-custodial sentences increases further – beyond 70% of the entire prison population.

Unlike in Czechia, the previous government decided to take action on this issue, and in 2015 a fundamental reform of the penal code was adopted with the intent of substantially curbing the use of suspended sentences, and encouraging the use of other alternatives to imprisonment, combined with various measures to prevent such convicted persons being sent easily to prison. Interestingly, the reform proved to be at least partially successful. The proportion of suspended sentences has dropped substantially since 2015. The number of revoked suspended sentences also started to drop, in turn lowering the incarceration rate below 200. That drop was not as significant as some expected, however, mainly due to the fact that – against the intent of the reform – the use of custodial sanctions increased somewhat (i.e. some suspended sentences were substituted with prison terms instead of with fines or community service). Nevertheless, the Czech and Polish cases illustrate that important factors contributing to high incarceration rates may be purely technical or legal, without any underlying specific punitive intent. Moreover, in some cases they may be relatively easy to deal with.

Concluding remarks

It seems that the analysis provided in this essay leaves no doubts about the existence of some sort of Central European exceptionalism in penal policies. At least in terms of their exceptionally high incarceration rates since 1989, most of them stand out from practically all other European countries. Moreover, the analysis of the longitudinal data shows certain characteristic patterns. While in Central Europe prison populations decreased – sometimes substantially – at the beginning of the

1990s, some other European countries began to have higher imprisonment rates. For a moment it appeared that some sort of convergence was approaching. Unfortunately, this never happened. The decreasing trend in Central Europe reversed at the end of the 1990s, and prison populations there started to grow. Since about 2010 imprisonment rates throughout Europe seem to have decreased somewhat again. However, as the starting point for Central European countries was much higher, and the decreases seem to have been largely parallel, the region so far has been unable to catch up with the rest of the continent in that respect. The only exception is the Baltic countries, who ceased to be clear European outliers and managed to catch up with their Central European neighbours (though not with other parts of Europe). More than 30 years after the fall of the Iron Curtain, the "penal divide" between Central (and Eastern) Europe and the rest of the continent persists.

This raises the most interesting question of why this is so. The overview of certain concepts and factors presented above does not provide a definitive answer to this question. However, this was not its purpose; it was intended to provide a summary of the discussion so far in order to stimulate further research and discussion on the topic. The reasons for Central European penal exceptionalism seem to be complex, and one should be cautious with single-factor explanations (as is probably true in the social sciences in general, and in criminology in particular). Some explanations seem to better fit certain countries, while not necessarily being convincing in other cases. This is reminiscent of false perceptions of the region before 1989. The Eastern bloc was often perceived in the West as a kind of monolith characterised by a complete uniformity imposed from Moscow. This was not necessarily the case (though in fact communist countries did tend to function according to very similar patterns). This may be also the case with the persistence of punitiveness in the region after 1989. It remains undoubtedly the most conspicuous common feature of crime control policies in the region. At the same time, attempts to find common causes to explain the phenomenon exclusively at the regional level may be futile. Closer analysis, in terms of national particularities, may be necessary to find different causes resulting in similar outcomes. This seems to be an important task for future research.

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Theoretical framework for an analysis of the recent criminal law reforms in Poland

Teoretyczne ramy analizy ostatnich reform prawa karnego w Polsce

Abstract: In the article, I analyse certain aspects of recent criminal law reforms in Poland from the perspective of criminal punishment being a complex legal and social institution of a processual nature. It is intended to enable a critical examination of the punitiveness of the penal system, which can hardly be explained by its effectiveness or even by penal populism. In the study I use the following methods: historical legal, comparative legal, formal logical, dialectical, analytical, synthetical and inductive/deductive. The synthesis and triangulation of the methods follow the principles of culturally integrated social and legal studies (Królikowska, Utrat-Milecki 2010b).

Keywords: punishment as a legal and social institution, processual nature of punishment, the potentiality of punishment, enforceability of punishment, full enforceability of punishment, completion of punishment, penal denial

Abstrakt: W artykule analizuję wybrane aspekty ostatnich reform prawa karnego w Polsce z perspektywy kary kryminalnej jako złożonej prawnej i społecznej instytucji o procesualnej naturze. Ma to umożliwić krytyczne badania punitywności systemu karnego, której nie da się wystarczająco wyjaśnić badaniami efektywności czy nawet zjawiskiem tzw. penalnego populizmu. W studium posługuję się następującymi metodami: historyczno-prawną, prawno-porównawczą, logiczno-formalną, dialektyczną oraz analizami i syntezami z wykorzystaniem indukcji i dedukcji. Synteza i triangulacja metod została przeprowadzona według zasad przyjętych dla społecznych i prawnych badań integralnokulturowych (Królikowska, Utrat-Milecki 2010b).

Słowa kluczowe: kara jako prawna i społeczna instytucja, procesualna natura kary, potencjalność kary, aktualizacja kary, pełna aktualizacja kary, zakończenie kary, negacjonizm penalny

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Introduction

The Penal Code, the Code of Penal Procedure and the Code of Executive Penal Law of Poland were adopted in 1997 and have already been amended hundreds of times (J.o.L. of 1997 No. 88, item 553; J.o.L. of 1997 No. 89, item 555; J.o.L. of 1997 No. 90, item 557). The most recent criminal code reform of 2022 alone, most of which entered into force on 1 October 2023, amended the criminal code in more than 250 places (J.o.L. of 2022, item 2600). These codes were first introduced in order to implement the new constitutional principle of a democratic state ruled by laws that was adopted in the amendment to the Constitution of December 1989. The systemic changes introduced at that time significantly impacted the development of the protection of the rights of convicted persons (Szymanowski 1996: 20–30).

Earlier, until 1970, a very modern criminal code from 1932 was in force in Poland, containing many innovations from the sociological school of penal law, such as the dominance of individual prevention in punishment and post-penal security measures (deleted after World War II) and a synthetic description of crimes. Until 1970, the Code of Penal Procedure of 1928, whose original provisions were based on German and French tradition, was also in force in Poland (parts of criminal law concerning juveniles were in force until 1983). However, the provisions of executive proceedings were not codified until the adoption of the Executive Penal Code of 1969. Requests for their codification were reported in Poland as early as the 1930s; it was also associated with requests for judicial supervision over the execution of prison sentences, formulated in the doctrine of criminal law much earlier (Śliwowski 1965: 1–108; Kalisz 2010: 65–76). In 1970 the Penal Code of 1969 (substantive criminal law) entered into force in Poland, which limited the links with the sociological school of penal law (a greater role of general prevention and the deletion of standard post-penal measures). It provided special provisions for the protection of the authoritarian system of the communist state, including social property. At the same time, apart from the penalty of imprisonment and the fine, as a separate, independent penalty, the code introduced the penalty of unpaid work in the local community for the benefit of that community. The penalty of a community service order was already part of the Penal Code of 1932 and the Act of 1920, but only as a substitute for a fine, not an independent penalty (Utrat-Milecki 2016: 100–106). In 1970, a new Code of Criminal Procedure entered into force to protect the interests of the authoritarian state. In 1970, for the first time, the Executive Penal Code was instituted, containing the most important statutory provisions for regulating the execution of penalties. This code, following the Romanesque (French and Italian) model, contained the institution of a penitentiary court competent in matters of executing penalties, including parole from prison. Both earlier criminal codes, from 1932 and 1969, were amended much less frequently than the three criminal codes from 1997, which is also important. This fact indicates a major change in the legal culture, now associated with a clear tendency where constant change in criminal legislation is the only constant (Filar

2011). This changeability of the law is nevertheless not a demand of the doctrine; the doctrine had to come to terms with this state of affairs as determined by politics. This problem of rapid changes in substantial, procedural and executive criminal law concerns the legal culture beyond Poland as well and has a significant impact on the criminal policy being pursued (Filar 2014; Rogacka-Rzewnicka 2021: 219–333). A large part of the numerous amendments to the criminal codes of 1997 and other acts containing criminal law provisions in the last 25 years have led to a more punitive criminal system in terms of the scale of criminalisation and the repressive nature of its solutions. This was supposed to translate into efficient administration of justice (Koredczuk 2020). The increase in penalties and rules defining the statutory standards of administration and the execution of penalties particularly involved violent crimes, sexual crimes, economic crimes and traffic crimes (Filar 2009). In addition, as part of strengthening the protective function of criminal law after 2005, post-penal protective measures – previously considered inappropriate for the rule of law – were reintroduced in Poland, in particular against so-called paedophilic criminals. At the beginning of the 21st century, the possibility of settling a case without a trial – based on agreements with the prosecutor or at the request of the accused person at the trial – and the institution of a crown witness were widely introduced into criminal proceedings. In 2003, the Executive Penal Code introduced a category of so-called dangerous prisoners. Since 2007, electronic monitoring has been gradually introduced, in particular stationary monitoring, as a modern form of executing the penalty of imprisonment (Przesławski 2020).

Assumptions of the 2015 managerial reform, in particular with regard to suspended penalties

In 2015, the most comprehensive amendment to the Penal Code (of substantial criminal law) since 1997 was adopted.[1] Its main objective was to limit the discretion of judges in the scope of imposing suspended prison sentences (Zoll 2013; Zawłocki 2016). The imposition of a suspended prison sentence in Poland was not, as a rule, based on a criminological prognosis. The courts often did not treat the suspended sentence as a response to the characteristics of the perpetrator and the criminological prognosis, but rather imposed it as a result of the conviction that imprisonment would be too serious a punishment for the perpetrator of a given crime. Therefore, they applied a specific interpretation of the principles of imposing a penalty, but not an assessment of its legitimacy in terms of the advisability of executing a penalty using this institution for individual and preventive reasons.

[1] The reform was introduced by the Act of 20 February 2015 (J.o.L. of 2015, item 396), in force since 1 July 2015 (hereinafter referred to as the 2015 reform).

This way of treating suspended sentences has been maintained in Poland since at least the introduction of the institution in the Penal Code of 1932 (Melezini 2013: 300–305).

Such treatment of suspended prison sentences has been criticised in criminology for years (Skupiński 2009a; Góralski 2020: 45–47). As it was argued, convicts in many cases – in particular from pathological environments – do not regard suspended sentences as penalties (Radzinowicz 1935: 579; Wróblewski, Świda 1939: 480–483). It was also pointed out that more severe suspended prison sentences were administered than the courts would have imposed if the sentence of imprisonment were to be enforced. This was done to condemn the act and to warn the public, symbolically expressed by the severity of the suspended sentence. Such a practice was supported even in the 21st century in the judicial decisions of the Supreme Court (II AKa 217/00 2001; WA 19/06 2006). The more severe suspended sentence was reinstated in the case of a subsequent conviction, sometimes only a third or additional one. It led to extended prison stays of such persons beyond the considerations of justice or criminological arguments (Zoll 2013: 30).

With the introduction of the 2015 reform, in the amended Article 69 of the Penal Code there remained the possibility of suspending a prison sentence only to a limited extent and only for sentences no longer than one year (previously it was traditionally possible in the case of a prison sentence of up to two years). This amendment also removed entirely from Article 69 of the Penal Code the possibility to impose suspended fines and community service as penalties, despite the fact that prior to the reform the courts used them in only about 1% of all convictions (Skupiński 2009a: 20–21). This in turn means that the suspension of a fine or community service order could be justified as part of the general assumptions of the penal policy, which can be deduced from the Polish Penal Code. It was consistent with the principles of individualising the penalty, the economy of the penalty and introducing alternative forms of responding to crime, including the possibility for the court to withhold punishment in some cases (Ornowska 2014).

In order to reduce the population of prisons, the 2015 amendment introduced mixed penalties (Article 37b of the Penal Code), with the possibility of imposing them even on the perpetrators of crimes punishable by imprisonment from one to ten years. The new mixed penalty consists of execution in the first place of shorter imprisonment of up to three or six months instead of the basic imprisonment provided for the crime. Then, as part of a mixed penalty, the convict performs socially useful work (for up to a maximum of two years). As a rule, in accordance with Article 35 of the Penal Code, this is from 20 to 40 hours a month of unpaid work for the benefit of the local community. This construction of the punishment, which is primarily focussed on retaliation and is supplemented with possible further significance for social rehabilitation, is debatable in regards to its penological consistency (Utrat-Milecki 2022b: 255–257). The initial period of isolation is usually the most difficult time in prison, and the length of stay limits the possibility of positively influencing the prisoner. Only after this very negative experience will

the phase of unpaid work in the community take place, which, assuming that it is well organised, can potentially have a positive psychosocial impact on the convicted person. This construction of a mixed penalty cannot be said to be based on the idea of social rehabilitation or the goal of incapacitation. In fact, before the reform courts were likely to impose a suspended sentence in cases where they would now impose a mixed sentence. Nationwide, mixed sentence convictions in the first years after the reform did not exceed 1,5% of all convictions (Melezini 2019: 128–131; Melezini 2020: 137–138). Similarly, the introduction of the possibility to impose fines or community service as penalties for crimes punishable by six months to eight years (Article 37a of the Penal Code) may concern cases in which the court would have ordered a suspended prison sentence prior to the reform.

As a result of the 2015 reform, there was a significant change in the breakdown of penalties imposed. In the first years after the reform, the number of suspended prison sentences decreased markedly, from about 50% or even 60% of all convictions before the reform to about 20%. On the other hand, the number of fines imposed increased from about 20% to about 35%. The number of community service orders imposed also more than doubled, from about 10% to nearly 30% (Melezini 2020: 137). On the other hand, this reform did not lead to similar changes in the use of absolute deprivation of liberty, for which the opposite phenomenon occurred. Among the penalties imposed, the imposition of absolute imprisonment increased from around 10% before the 2015 reform to nearly 20% afterwards (Melezini 2019: 128; Melezini 2020: 137). This did not lead to an increase in the population in prisons, as at the same time Poland recorded a decrease in most categories of registered crimes and criminal cases dealt with by the courts (Melezini 2019: 126–127). In addition, the reintroduction in 2016 of stationary electronic supervision at the place of residence as a form of executing a sentence of imprisonment had some impact on keeping the number of inmates in Polish prisons under control (it could be applied to sentences of up to one year of imprisonment, and since 2020, those up to 18 months [Article 43la(1) of the Executive Penal Code]).[2]

Thanks to the restoration in 2016 of house arrest, at the beginning of 2023 over 7,000 people were serving a prison sentence outside of prison, under stationary electronic supervision in their homes. The capacity of the electronic surveillance system was expanded in 2023 from 8,000 to 10,000. It is very important that the court imposes a penalty of imprisonment, and that the possibility of executing it using house arrest under electronic supervision is adjudicated by the penitentiary court at the request of the convict, defence counsel, prison manager, probation officer or public prosecutor (Article 431c of the Executive Penal Code). The decision of the penitentiary court on house arrest should, as a rule, be based on the criteria related to the rules of executing, and not administrating the sentence. In addition, from 1 January 2023, the Executive Penal Code allows this method of executing

[2] Cf. Article 43c para. 1 of the Executive Penal Code, in the wording established by the Act of 11 March 2016 (J.o.L. of 2016, item 428).

a prison sentence of up to four months to be imposed on the basis of a decision of the penitentiary commission responsible for determining the rules of serving a sentence in a penitentiary institution, without the participation of a penitentiary court if the case is undisputed (J.o.L. of 2022, item 1855: Art. 43 lla). The penitentiary court, and in less serious cases the penitentiary commission, should assess, after verifying that house arrest is technically feasible and in accordance with the criteria for serving a sentence of imprisonment, whether or not there are any special characteristics of the perpetrator which would cause house arrest to not meet the purpose of the penalty (Article 43 la, section 2 of the Executive Penal Code).

Despite some controversies caused by its detailed regulations, the 2015 reform has made it possible, in the unanimous opinion of the doctrine, to rationalise the penal policy in a certain way. However, the change in penal policy and this rationalisation of it did not take place through liberalising, but through modifying the proportions of sanctions imposed. This led mainly to the intensification of repressions as part of non-custodial sentences, with a simultaneous increase in the percentage of absolute imprisonment sentences, and the maintenance of a relatively high imprisonment rate for Poland (about 190 people per 100,000 inhabitants).[3]

The 2015 reform also provides for an expanded, comprehensive application of post-penal protective measures against a relatively wide category of perpetrators of violent and sexual crimes (J.o.L. of 2015, item 396: Art. 93a–99; J.o.L. of 2022, item 1086; J.o.L. of 2022, item 2600). This reform, incorporated into the Penal Code, modified rules from the emergency act of 2013 that had been adopted on an ad hoc basis (J.o.L. of 2014, item 24; Dawidziuk, Nowakowska 2020).

Comprehensive punitive reforms of 2019 and 2022

In 2019, the Ministry of Justice initiated a criminal law reform, the official goal of which was to strengthen protection against particularly dangerous criminals (Konarska-Wrzosek 2020). Before its publication, the President referred the draft amendment to the Constitutional Court in 2019, which ruled in 2020 that the amendment's procedure grossly violated the standards of the rule of law. Therefore, this amendment did not enter into force. It should be emphasised that the rapid pace of work on the 2019 amendment, carried out in violation of the procedure, was paradoxically justified by the need to quickly protect the public from dangerous crimes, the number of which, according to the statistics at that time, had shown

[3] As of 31 December 2014 (the last year before the reform), there were a total of 77,321 people in prisons, including 6,238 remand prisoners, 70,125 convicts and 1,008 people sentenced to imprisonment for up to one month under the Code of Petty Offences (Melezini 2019: 134). As of 26 May 2023, there were a total of 78,035 people in prisons, including 8,468 remand prisoners, 68,709 convicts and 812 people imprisoned for up to one month under the Code of Petty Offences (Cf. www.sw.gov.pl 31.05.2023).

a strongly decreasing trend for years (with the exception of economic crime). For illustration, the police statistics for crimes identified in 2001 and 2021 in ten basic categories are compared in Table 1.

Table 1. Number of selected crimes in 2001 and 2021 according to police statistics (Statystyka n.d.)

Type of crime	Year 2001	Year 2021
Murder	1,325	625
Rape	2,399	1,081
Assault and battery	14,369	2,450
Robbery/theft	49,862	4,089
Burglary/theft	325,696 (1999 – 369,235*)	71,625
Car theft	59,458 (1999 – 71,543*)	8,383
Stealing someone else's things	314,820	109,768
Damage to health	16,968	8,226
Traffic crimes	138,817	70,727
Economic crimes	103,521	224,775

Source: Own elaboration.

Trends in the number of detected crimes influenced the similar dynamics of convictions in that period (cf. Melezini 2019: 128–131). After this failure, the Ministry of Justice continued working to increase penalties for particularly dangerous crimes. As a result, a broad reform of the system of penalties was adopted in 2022, seriously increasing criminal liability for many crimes, in particular those committed with the use of violence, sexual and economic crimes (bribes) and those against road safety (J.o.L. of 2022, item 2600). Most of the amended provisions of the Penal Code are to enter into force on 1 October 2023.

The 2022 criminal law reform modified the rules of the judicial imposition of penalties and punitive measures (additional penalties) provided for in Article 53 of the Penal Code (Bogacki, Olężarek 2023). Article 53 § 1 of the Penal Code, which concerns the general conditions for imposing a penalty, in the version before the reform of 2022 provided for the principle of judges' freedom in imposing penalties within the limits of the statutes. It stipulates that the punishment cannot exceed the degree of guilt. It draws attention to the proportionality of the punishment to the degree of social harm of the act. It obliges the judge to take into account the preventive and educational goals that the punishment is to achieve in relation to the convicted person, as well as the need to develop legal awareness among the population. In the criticism of the principles of judicial imposition of a penalty under Article 53 of the Penal Code, it has been emphasised for many years that the lack of a leading directive may contribute to discrepancies in the court's con-

sideration of individual criteria for imposing a penalty (Mącior 2005). The 2022 amendment retained the general structure of the basic principles of imposing penalties and penal measures contained in Article 53 of the Penal Code, including a formally significant limitation of the penalty imposed according to the degree of the perpetrator's guilt. However, it has introduced some significant modifications that are worth paying attention to, concerning three issues.

First of all, this provision obliges the court to take into account aggravating and mitigating circumstances indicated by the new Article 53 §§ 2a and 2b of the Penal Code when imposing a penalty. The amendment introduced in Article 53 §§ 2a and 2b of the Penal Code is an open catalogue (using the phrase "in particular") of those circumstances which the court is obliged to consider aggravating and those which it should consider mitigating. Therefore, this should be reflected in writing in the judicial imposition of a penalty. Nevertheless, until now, the recognition of a given circumstance as aggravating or mitigating has been at the judge's discretion and only limited by the statutes. Particularly important from the perspective of criminal policy is the current wording of Article 53 of the Penal Code, that the court should accept ex officio a previous criminal record for an intentional or unintentional crime as an aggravating circumstance. Similarly, it should be considered important that the fact of committing a crime under the influence of stimulants must always be an aggravating circumstance if this condition contributed to the commission of the crime or increased its effects. The fact that an attack concerned a particularly vulnerable victim (a disabled person, elderly person or child) or that a crime was associated with particular anguish or was committed with a motivation deserving special condemnation shall always be an aggravating circumstance. On the side of mitigating circumstances, attention is drawn to crimes committed under the influence of anger, fear or agitation justified by the circumstances of the event, crimes committed in response to an emergency or committed with a significant contribution of the aggrieved party. Moreover, Article 53 § 2b of the Penal Code includes reconciling with the aggrieved party, taking action to prevent damage or harm resulting from the crime and repairing or compensating for the damage as mitigating circumstances, which all were previously part of the Code as significant factors in the imposition of a penalty. The circumstances indicated in the amended Article 53 of the Penal Code as aggravating or mitigating circumstances are, in principle, not aggravating or mitigating circumstances if they fall within the characteristics of a given type of crime, unless they are particularly intense (Article 53 § 2c of the Penal Code). This is an important reservation provided for in the amended Article 53 of the Penal Code because the Penal Code is gradually becoming more and more casuistic and many circumstances of a crime are already bases for distinguishing qualified or privileged types of crime. In particular, many qualified types of crimes were introduced to the code, including as part of the last reform of 2022, in order to significantly increase criminal liability even at the statute level, thus limiting the discretion of judges in terms of imposing penalties for a given subtype of crime (Bogacki, Olężarek 2023).

As a rule, also in practice, most if not all of the mitigating and aggravating circumstances indicated in the amendment could be (and were in practice) previously treated by courts as significant aggravating or mitigating circumstances. With the amendments, however, it is a statutory obligation of the court to take them into account, as defined by law. This precludes omitting them from the reasons for the penalty or, for example, assigning a given circumstance a different nature from that provided for in the Act, owing to the specifics of the case. For example, it is currently formally disallowed to assume that if someone has previously had a conflict with criminal law, owing to the specific circumstances of the case, this will not affect the imposition of a penalty as an aggravating circumstance. In this respect, the statutory principle of individualising punishment has been limited, which may lead to accurate decisions in typical cases, but is unnecessary in others. By distinguishing aggravating and mitigating circumstances, the legislature wanted to indicate those aspects of punishment in which the degree of condemnation of the perpetrator should be taken into account. Thus, in the entirety of the editorial and content-based changes of Article 53 of the Penal Code, a strengthening of the imperative (retributive) thinking about punishment can be seen. Generally, criminological considerations regarding the impact of punishment on crime prevention are not at the forefront of this reform.

The nature of these amendments to Article 53 of the Penal Code, which strengthens the imperative (retributive) rationalisation of the judicial imposition of a penalty, is also linked in the amended Article 53 of the Penal Code with the second fundamental amendment. It is an indication of the general prevention defined as the social impact of punishment being a priority of criminal policy. This expression refers to the tradition of the Penal Code of 1969 and to the classic idea of deterrence. The justifications for the amendments claimed that the previous approach to general prevention as positive prevention (raising the legal awareness of society) was unrealistic and did not take into account the real functions of criminal punishment in terms of deterring potential perpetrators. The problem is that for many reasons indicated in criminological studies, the nature of many acts and the characteristics of their perpetrators mean that the deterrent effect from increasing the punishment for committing such acts is relatively small, if any. On the other hand, the very threat of punishment and its being determined by the seriousness of the violation may in fact affect the general public, particularly if its recipients are properly socialised. The threat of a penalty proportional to a specific crime ratio has an informative function and warns citizens against committing a crime, which means that it undoubtedly has a preventive function as part of general prevention. However, in most cases, the mere increase of penalties for certain types of crimes, in particular against life and health or sexual freedom, does not have a major impact on potential perpetrators. Committing this kind of crime is not subject to the calculation assumed by the legislature when radically increasing the penalties. On the other hand, in the case of other crimes, particularly traffic crimes or those committed for profit, it may be particularly important to create a justified belief among the population that they are likely to be caught and punished, and not to

make penalties more severe (Christie 1991: 35–38; Kleck, Sever 2018: 316–318, 324 ff). It is noted in the literature that "[d]evising sensible deterrence-based crime policies also requires much better knowledge of the determinants of sanction risk perception" (Appeal, Nagin 2011: 430). The return to the deterrent function of punishment as one of the main reasons for imposing punishment, in connection with a clear emphasis on the retributive function of punishment – demonstrated by the catalogue of mitigating and aggravating circumstances – indicates the repressive direction of changes in criminal policy. The code scale of the measure of the proportionality of criminal liability has been gradually more strictly defined over the years, and it was comprehensively regulated by the reform of 2022 in the amended Article 53 of the Penal Code and Article 37 of the Penal Code, providing for a more severe scale of imprisonment from 1 month to 30 years instead of 1 month to 15 years.

The third important amendment to Article 53 of the Penal Code introduced by the reform of 2022 concerns removing the educational purpose of the penalty's impact on the perpetrator from the principles of sentencing. The justification of this amendment indicated that prevention can also be achieved through education, and so exposing the educational impact on the perpetrator in Article 53 of the Penal Code as the purpose of the punishment, apart from prevention, is not justified. However, there is no doubt that the wording of this provision indicates the priority of neutralising the perpetrator through intimidation or physical incapacitation in the case of imprisonment, as propounded by some researchers, thereby limiting the role of education as a premise for imposing punishment and treating social rehabilitation as generally less important in crime prevention (Kaczor 2007). It should be mentioned that the reform of 2022 did not change the provision of Article 54 § 1 of the Penal Code, according to which, when imposing a penalty on a juvenile or a young offender (a person up to 21 years of age at the time of committing the act), the court is primarily guided by the need to educate the perpetrator. At the same time, in the case of the most serious crimes of murder, Article 10 § 2a of the Penal Code (added by the 2022 reform) enables the court to impose a penalty of imprisonment of up to 20 years on a juvenile over 14 years of age (amended Article 10 § 3 of the Penal Code). Before the 2022 reform of the penal code, a juvenile aged 14 could, in such a case, be placed in a closed correctional facility for no more than seven years in a procedure before a family and guardianship court, as they would always have to be released unconditionally from the correctional institution when they reach 21 years of age.

In Poland, there is no problem of murders committed by 14-year-old perpetrators. Thus, the amendment to Article 10 § 2a of the Penal Code, and similarly the amendment to Article 53 of the Penal Code, are not justified by penal policy understood as crime prevention. As a side note, it should be added that education/resocialisation are still important goals for the execution of a community service order (Article 53 of the Executive Penal Code) or deprivation of liberty (imprisonment) (Article 67 of the Executive Penal Code). In addition to the awareness among

prison service and probation officers of the importance of this educational impact of punishment on convicted persons, we probably owe this to international and European legal recommendations on prison and probation, whilst the analogical international standards do not have a similar impact on sentencing.

Gradation of the most severe penalties in the Penal Code of 1997

In the general part of the Penal Code of 1997 (Article 32 of the Penal Code), there were three separate sentences of imprisonment: a standard sentence from 1 month to 15 years of imprisonment, an independent sentence of 25 years of imprisonment and life imprisonment – in practice imposed in the case of especially heinous murders. The penalty of 25 years of imprisonment was introduced into the Penal Code of 1969, following criticism of the life sentence provided for in the Penal Code of 1932. It was supposed to be the maximum criminal punishment apart from life imprisonment (Wilk 2010: 138–151). Ultimately, however, although the life sentence was abolished in that code, the death penalty was formally retained as an extraordinary penalty. After the moratorium on the death penalty in 1988, the maximum penalty in Poland for several years was 25 years of imprisonment. This state of affairs was criticised, and the life sentence was therefore reinstated by the 1995 amendment to the Penal Code; the new Penal Code of 1997 recognised it as the maximum penalty without indicating in the regulations that it was formally extraordinary. In the first years, the courts only occasionally imposed life imprisonment, treating it as extraordinary, but gradually they got used to it and began to use it much more often (Wilk 2010: 135).

The Penal Code of 1997 retained the independent penalty of 25 years of imprisonment (as a rule, the courts could not impose a penalty between 15 and 25 years of imprisonment). The current 2022 reform of the penal code abolished the penalty of 25 years of imprisonment. As part of this reform, the standard custodial sentence set out generally in Article 32 of the Penal Code has been doubled, now ranging from 1 month to 30 years. This may lead to a different calculation of the relative proportionality between the severity of punishment and the offence compared to the previous scale for the sentence of deprivation of liberty from 1 month to 15 years, and to an overall increase in the severity of penalties imposed by the courts. Earlier, the gradual ease of imposing a life sentence also resulted in the more frequent imposition of sentences of 25 years of imprisonment (Wilk 2019: 135–136).

In the Polish Penal Code, individual crimes are subject to flexibly defined criminal sanctions within the range indicated in the special part (Konarska-Wrzosek 2002: 39–45 ff). For example, for ordinary murder (Article 148 § 1 of the Penal Code after the 2022 reform), the penalty is from 10 to 30 years or life imprisonment (before the reform it was from 8 to 15 years, 25 years or life imprisonment). In addition, the reform of 2022 introduced the possibility of imposing a life sentence in special cases

without the right to apply for parole (Article 77 § 3 and § 4 of the Penal Code). This solution does not exclude the possibility of the President pardoning the perpetrator (Articles 560–568 of the Code of Penal Procedure). However, in the light of the principles and restrained practice of pardons in Poland, it seems controversial from the perspective of European standards, which provide hope for every perpetrator.

As a result of the 2022 reform, the threats of punishment for dozens of other crimes have been increased accordingly. From the point of view of criminal policy, it should be noted, as indicated above, that the vast majority of penalties were increased for those categories of crimes that showed a clear downward trend. Therefore, it cannot be said that the increased penalties resulted from the well-known phenomenon of a legislature's response to a wave of crime of a given type or general social disorder, which, for example, can be the result of a war or a serious social or economic crisis (Królikowska 2009).

The crimes for which more severe criminal liability is provided include, in particular, crimes against sexual freedom (Articles 197–203 of the Penal Code), bribes (Article 229–230a of the Penal Code) and robbery (Article 280 of the Penal Code). A register of paedophiles and rapists had already been introduced by the Act of 2016, and in some cases the register is open (Kwieciński 2017: 383–394 ff; J.o.L. of 2022, item 152). Anyone in the world can view the photos and learn the basic data of those convicted in Poland for certain sex crimes on the website of the Ministry of Justice.

The lifetime driving ban has been extended to include those who consumed alcohol or drugs after causing an accident and before being tested for alcohol or drugs – unless there is an exceptional case justified by special circumstances. The amendment, despite criticism, stipulates that if a person driving a car has no less than 1.5 per mille blood alcohol content or 0.75 mg/dm^3 in their exhaled breath, such person will lose their vehicle, regardless of whether they have caused a road accident (Articles 178–178a of the Penal Code). It should be noted that in Poland, compared to other European countries, there are relatively many fatal accidents on the roads, and that, as I indicated above, the number of road accidents, including fatal accidents, in the last 20 years has fallen by half. Therefore, in this case as well, it is difficult to talk about a crime wave which could be the basis for far-reaching punitive changes.

Extended criminalisation of the criminal foreground was introduced, particularly the acceptance of a murder order and general preparations for murder (Article 148a of the Penal Code). It should be pointed out that Poland has fewer homicides per capita than most Western European countries, and as indicated above, fewer than half as many homicides per year as 20 years ago, when there were feuds between rival gangs.

It seems impossible that the general reason for the vast majority of the increased statutory penalties for numerous crimes introduced by the reform of 2022 can be related to changes in the structure and dynamics of crime, or to new and previously unknown research on their effectiveness. The changes introduced by the 2022 reform cannot be convincingly explained as a manifestation of classically understood penal populism (Pratt 2007). Unlike at the beginning of the 21st century, crime of the type covered by the 2022 reform is not currently the main topic of election campaigns in

Poland. Polish society now clearly feels more secure (Ostaszewski 2014; Szczygieł 2019: 121). Therefore, it is particularly reasonable to attempt to interpret the criminal law reform of 2022 as the expression of a change in the "philosophy of punishment". This assumes that these changes are motivated by considerations which remain outside the classical current of criminological reflection, but also cannot be reduced to the instrumentalisation of law as in ordinary penal populism (Kojder 2011). This in turn means that theoretical penological analysis may prove more important for the research into them than classic criminological arguments regarding the effectiveness of specific measures of criminal law response, as measured by the impact of repression on the level of future crime or mechanisms of penal populism (Lappi-Seppälä 2012; Snacken, Dumortier 2012).

Penological criticism of the 2022 reform

In my proposed new classification of the theory and criticism of punishment, I distinguished the category of populist punitiveness as grounds for justifying a policy that increases the punitiveness of the penalty system and penal policy (Utrat-Milecki 2010: 33–124). Penal populism is commonly distinguished in the literature, understood as the repressive instrumentalisation of criminal law in the service of politics or in response to certain states of societal awareness (Czapska, Szafrańska, Wójcik 2016). However, in the concept of populist punitiveness, I also distinguish manifestations of it in which the change in penal policy is justified by scientific concepts and even research. There remains a problem that such trends in criminal policy lead to changes in the understanding of the rights of an individual in relation to a social group, and thus affect the understanding of the basic principles of the rule of law. Therefore, it is important to analyse them from the perspective of the "philosophy of punishment" rather than strictly criminological justifications of their effectiveness as a means of preventing future crime (Lernell 1977: 25; Utrat-Milecki 2008). They primarily concern changes in the system of control of the entire society and the rights of all individuals, and not only the issue of combating specific forms of crime (Garland 2002; Melossi 2008).

Structure of criminal punishment and its processual nature

From the perspective of penology, criminal punishment is a general category of a legal and social institution of a processual nature, meaning a series of undertaken operations (Utrat-Milecki 2022a). Punishment as the subject of research is therefore a model of action inscribed in law and official documents, and above all, real human action taken on the basis of the law and professional pragmatics

in response to a crime, as long as the patterns of action which provide for it by law meet the criteria of the general category of criminal punishment. In the penal code and executive criminal law, various organisational forms of punishment can be distinguished. However, not every response to a crime under criminal law is clearly a criminal punishment. From the penological perspective, it is important whether the actual actions taken in response to the crime can be described as punishment or as other reactions of a purely protective, curative, therapeutic or compensatory nature and purpose. This is important because, depending on the nature of a given sanction, its rationalisation and systemic legitimation should differ. Justifications and rationalisations of punishment make sense as long as they refer to an organisational form of action that can be rationally described as punishment. Otherwise, those reactions to crime would require a separate justification appropriate to their nature. This remark applies as much to punishment under consequentialism/utilitarianism as it does to retributive punishment. Unfortunately, these issues are often insufficiently taken into account, even in very serious criminological literature (Hudson 2003: 17–37 ff).

As to the analysis of criminal punishment as a general legal and social institution, I refer to the concept of the structure of criminal punishment. As Leszek Lernell writes:

> In science, structure is understood as a system of diverse and interconnected elements of a given phenomenon (a section of social reality) and their mutual connection with the whole system. Creating the structure of a phenomenon is a thought process, a method for a deeper examination of reality, a separate area of it. The structure and the empirical reality do not coincide. We create it mentally in the image and likeness of reality. This reality, or rather a fragment of it, is decomposed into elements in thought, then reassembled in order to better grasp the meaning of the examined fragment of reality, to understand it better and deeper. The structure is then a mental reconstruction that reconstructs from the elements given to us from observation, in experience, a logical arrangement relating each of these elements to the whole, thanks to which both the whole and its elements become more meaningful to us, and acquire meaning. (Lernell 1977: 28)

The Polish Penal Code does not contain a definition of criminal punishment (nor a definition of guilt). Based on the analysis of the literature from the penological perspective, it can be concluded that criminal punishment, i.e. a punishment for an offence, is an intentional condemnation pronounced by the court on behalf of the political authority, expressed by a legally defined unpleasantness of the perpetrator of a crime. Therefore, apart from the classic elements indicated in the definition by Anthony Flew (1972), it also contains an indication of the element of condemnation, which is important for the administration of criminal justice, as its expressive function, related to morality based on the catalogue of human rights. This aspect of criminal punishment was more widely presented in the Anglo-Saxon literature by Noel Feinberg (1984–1985; 2006).

In his considerations on the structure of criminal punishment, Leszek Lernell distinguishes the internal structure of punishment, by which he understands "the arrangement of its diverse and at the same time interconnected elements (or their sets)" (Lernell 1977: 29). By the external elements of the structure of criminal punishment, Lernell means "linking this system of elements with another whole, which is a crime, together with its elements. Criminal punishment means punishment for a crime" (Lernell 1977: 29).

As can be seen, Leszek Lernell's distinction between the elements of criminal punishment and its internal and external structure aptly highlights the fundamental and constitutive relationship between criminal punishment and crime (Flew 1972). Anthony Flew rightly pointed out that punishment is a concept found in culture and not created for the needs of criminal law, which is especially important when punishment is considered in the context of legitimising the sociopolitical order.

Leszek Lernell's theoretical approach makes it possible to more clearly capture the categorial separation of the internal elements of criminal punishment, which is essential for the process of executing punishment, especially in penitentiaries. It enables penology to refer to the processual aspect of punishment itself, analysed as an internally coherent system of orders, prohibitions and influences on the person being punished, regardless of its causally necessary connection with a separate external structure, i.e. a crime. The approach to this issue introduced by Leszek Lernell in his exposition on penology makes it possible to clearly outline the difference between punishment in the course of its administration and a penalty in the course of its execution. Therefore, it constitutes a good theoretical framework for the processual analysis of the phenomenon and institution of criminal punishment (Utrat-Milecki 2018).

At the stage of administering a punishment, it is particularly important to compare the findings regarding the internal structure of the penalty with its external structure, which, apart from the criminological aspect, is also related to the legitimacy of power and social order (Henham 2012). The rightness of a given penalty will be co-determined by its cohesion and adequacy, not only in relation to the elements of the internal structure of the penalty, which are considered from the criminological perspective to be important for the prevention of future crimes. First of all, its relationship to the external structure, i.e. to the crime, will be important both *in abstracto* and *in concreto*. A reference to the external structure of punishment constitutes an element of rationalisation of its ruling as to the extent and, to some degree, the choice of its organisational form.

At the stage of executing a penalty, the elements related to the external structure of punishment become a completely independent and static variable (they are not subject to any modifications, as they are determined by the court in a final judgment). Both the subjective and objective circumstances of the crime are in the past. Therefore, the rationalisation of the execution of the penalty should shift to an analysis of the internal structure of the execution of the previously imposed penalty. The announcement of the penalty takes into account the external structure, whilst

the execution serves not only to make more credible the sentence's declaration of condemnation to the society, but also to implement the individual and preventive function of punishment for the future.

It should be noted with regard to the execution of a penalty that if a court imposes imprisonment, then in principle only this deprivation of freedom of movement should be the penalty. Any aggravation of the conditions of serving a sentence for reasons other than the safety and proper functioning of the prison, and thus particularly aggravation in order to increase the severity of the punishment, is a violation of the relevant standards of international law. In the case of Poland, it would be a direct violation of European prison rules[4] (Machel 2003: 273–275). In this context, doubts may be raised, for example, by the excessive formal requirements provided for in Article 89 § 2 of the Executive Penal Code for the transfer of life prisoners from a closed facility to a semi-open facility (15 years) or an open facility (20 years). There may be situations where a stay in a closed prison, particularly because of the need to protect the public, may be justified for even much longer. However, the assessment of this issue is related only to the internal structure of the penalty. Therefore, the decision should be made by the penitentiary court, and not by the legislature or the trial criminal court. Similar doubts in the Polish penal system are raised by including among the substantive conditions for conditional release specified in Article 77 of the Penal Code static elements related to the circumstances of the crime (Utrat-Milecki 2022a: 195–204). Meanwhile, both from the theoretical perspective and the relevant European recommendations, these should be primarily dynamic, individualised preventive considerations (protection of society and social rehabilitation), i.e. those that may be subject to change in the course of the execution of the penalty. The *ratio legis* for conditional release is not only humanitarianism, but above all increasing the effectiveness of punishment. According to the principle formulated by Jeremy Bentham, it is more important for the prevention of crime to present to the public a penalty that shows the court's attitude to the crime (sentence) rather than a penalty that is fully carried out, as its execution is necessary only to some extent in order to authenticate the condemnation contained in the sentence. According to Jeremy Bentham's utilitarian principle of frugality, the punishment in execution can be appropriately modified to reduce the overall costs of the penal system whilst achieving the same or even better effects in terms of crime prevention in future (Utrat-Milecki 2006: 167–204). Jeremy Bentham himself did not want conditional release because he was afraid of manipulation by convicts pretending to improve, but today it should be prevented by a proper personal identification diagnosis possible in a prison. This is important, particularly because modern conditional release, well organised thanks to the supervision of a probation officer, may increase the chances of socially reintegrating the convict. Similar arguments derived from the principle of the economy of punishment may also justify replacing punishment

[4] Cf. Rule 102.2 of the European Prison Rules (Rec 2006)2-rev: "Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment."

with compensation, as well as various forms of restorative justice, such as in cases of relatively less serious crimes. Meanwhile, changes in the penal policy in Poland, basically throughout the entire period that the 1997 codes were valid, led to a reduction in the number of conditional releases. This led to the conclusion that the legislature was trying to limit sentencing to imprisonment as much as possible, but once someone goes to prison, it becomes increasingly difficult for them to get out of prison early (Skupiński 2009: 31b: 2–313).

The concept and structure of criminal punishment and its organisational forms

In penology, it is emphasised that the institution of criminal punishment may manifest itself in various organisational forms (Utrat-Milecki 2022a: 222–227). There are penalties that consist of constraints of liberty and a special type of which are the so-called detention penalties, involving deprivation of free movement. These restrictions are accompanied by a number of positive obligations related to the need to comply with the regulations of a closed unit, the conditions of conduct specified by the court when restricting freedom and the need to undertake certain activities or abandon certain other activities. Other forms of punishment relate to the issue of property – in this respect, the most important is the fine. It is surprising that now, as a result of the 2022 reform, there is a return to an institution that is not inherently a criminal penalty institution: repressive confiscation, specifically the confiscation of a vehicle in the event of a serious traffic accident. The 1997 Penal Code originally only recognised the confiscation of the instruments and the fruits of a crime because after 1989, extended, purely repressive confiscation was considered incompatible with the rule of law. In 20th-century Poland, the confiscation of a car in connection with a misdemeanour was practiced in the 1980s during martial law. At that time, a car was subject to forfeiture as a tool of a misdemeanour if it was found to have been used to transport, for example, magazines or leaflets promoting freedom and democracy.

Positive and negative elements and active and passive aspects of criminal punishment

Leszek Lernell further distinguishes positive and negative elements in his analysis of punishment. The positive element of punishment is the extraordinary coercion (violence) used by the prevailing social forces (the people representing these forces) in relation to an individual being punished – the ontological aspect of punishment.

This coercion consists in imposing on them the obligation to behave in a certain way (Lernell 1977: 29; Utrat-Milecki: 2014). Measures of direct coercion may also be used to implement the positive element of punishment, especially against prisoners.

The negative elements of punishment, as Leszek Lernell points out, are the various types of deprivation that have been well described in the literature in the field of penitentiary and prison sociology (Matthews 2009). Deprivation is the taking away of certain goods or property, of freedom of movement or of the agency to take certain actions or choose one's place of residence. Therefore, it is a feature not only of imprisonment, but also of other organisational forms of criminal punishment. It describes the deprivation of certain socially important goods. Also, the negative elements of punishment are the ontic aspect of punishment, so they refer to the description of criminal punishment and not to its rationalisation (Lernell 1977: 29).

In many instances, the negative and positive elements of criminal punishment are related to each other like the obverse and reverse sides of a coin: they are two sides of the same phenomenon and of the social institution of criminal punishment.

In the course of study, the active and passive aspects of criminal punishment have also been clearly distinguished (Lernell 1977: 21; Walker 1991: 3; Hudson 2003: 2). The deprivations experienced in the course of applying criminal punishment can be analysed from the perspective of a system which, under certain rules, forcibly deprives a person subjected to the punishment of something – the active aspect of punishment. It is also important, and sometimes more important, to study punishment from the passive aspect of these deprivations being experienced by the convicted person. In this research, there is also room for the use of psychological and pedagogical methods. Similarly, from the active and passive side, one can analyse the positive aspects of punishment, i.e. the obligations imposed on the convict (Ross, Richards 2003; Utrat-Milecki 2022a: 171–173).

According to Leszek Lernell, the active and passive aspects of criminal punishment make it possible to scientifically analyse it; one might add, free from direct ethical evaluation. The examination may concern the formal aspects of punishment. It may also cover the actions of entities involved in the punishment process. It can examine the perception of the punishment process at each stage by the person subjected to the punishment. This means that aspects of criminal punishment understood in this way may be subject to scientific analysis from the perspective of legal, sociological, psychosocial, psychological, criminological and pedagogical knowledge. According to Leszek Lernell, the integral link between the internal structure of a punishment and its external structure, i.e. the crime, makes it impossible to disregard in sentencing the evaluation of harms and wrongs of the offence, and thus moral issues in the course of analysing just punishment. A particularly negative assessment of the classified behaviour, to which the punishment responds by expressing condemnation, is the essence of recognising an act as a crime. Thus, the statement in the doctrine of criminal law that it speaks "with a distinctively moral voice" is not found in other branches of law (von Hirschie, Simester 2011: 4).

This state of affairs – linking the punishment with the moral condemnation of the crime – means that the analysis of criminal punishment, regardless of being based in the above-mentioned sciences, begins from a philosophical and ethical standpoint (Lernell 1977: 25). The dominance of such a moralising, philosophical approach to criminal law and criminal policy may pose problems. This may lead to subordinating not only the imposition of the penalty, but also the course of the execution of a criminal penalty to criteria based to a large extent on the external structure of the penalty. In such a case, when designing the execution of a criminal penalty, the issues of its processuality, extension in time and division into specific interdependents – yet still categorially separate stages – are not duly taken into account. In this way, the impact of the scientific analysis of criminal punishment on determining an effective way to execute it is significantly reduced. It seems that in particular the last reform of criminal law in Poland in 2022 is based on the idea of linking criminal punishment, primarily unilaterally, mainly with the external structure of punishment, i.e. crime. Such thinking sets back the development of criminal law, limiting the influence of the social sciences, including criminology, on criminal policy.

Positive general prevention versus deterrence and the concept of penal denial

Condemnation as a constitutive element of the concept of criminal punishment is associated with the expressive function of punishment (Feinberg 1984–1985; 2006). From this perspective, the task (function) of punishment is to adequately communicate to citizens what values are important in society, which legitimises the legal and social system and prevents crime to some degree. Criminal punishment does this through a criminal trial, a kind of ritual condemnation of acts detrimental to the rights and goods protected by law. This condemnation is made credible to the general public (general prevention) by afflicting the punishment on the perpetrator. Earlier, this aspect of criminal punishment was pointed out by Anselm Feuerbach whilst referring to Kant's theory and Jeremy Bentham's utilitarian theory of punishment in the early 19th century (Lernell 1977: 112–118; Utrat-Milecki 2016; 2022a: 189–191). Criminal punishment is intended to prevent anomie whilst creating the foundations of a liberal democratic social community. Today, the social and communicative significance of criminal punishment, in relation to the dialogue between society and the perpetrator, is highlighted in the Anglo-Saxon legal literature by Anthony Duff, for example (Duff 2001). The general preventive function of punishment derives from emphasising the importance of condemnation in punishment perhaps even more than the possible moral message to the offender. First of all, it concerns the prevention of anomie, i.e. integrating prevention (*Integrative Prävention*). It is also referred to as general positive prevention.

Possible deterrence from committing crimes is the desired effect of the function (purpose) of criminal punishment, which is to develop a legal awareness among the population, and not a direct constitutive element of it. This is important because positive general prevention naturally relates to the seriousness of the crime, to the "moral" overtones of the crime, guilt and damage. Positive general prevention assumes that social awareness is developed through the process of punishment (application of criminal punishment) in a manner that is desirable from the perspective of principles decoded from constitutional standards and human rights. Only from this perspective can the preventive impact of criminal punishment on members of society be considered. Penalties are a deterrent, but the measurement of the deterrent effect that justifies increasing penalties is difficult to measure, even if it often justifies punitive policy (Apel, Nagin 2011; Kleck, Sever 2018). This is why positive prevention as a function of punishment, related to its constitutive features, should not be confused with the idea of general negative prevention, i.e. the function of deterring the general public from crime through especially harsh punishment.

A separate issue is a situation when the legislature sees the need to protect against perpetrators and this need cannot be met by means of a criminal penalty, understood as presented above. Repressive measures that do not meet the scientific criteria for the description of a criminal punishment may then be used in response to the crime. The departure from the model of criminal punishment allows for a more effective response to a crime and more adequate protection of society against the perpetrator in the future (Ramsay 2011). I place penological trends that justify such repressive actions in the category of penal denial (Utrat-Milecki 2022b: 286–378). In similar situations, the legislature is tempted to break the integral bond that must exist between the internal and external structures of criminal punishment. Such responses require a different justification to those provided to rationalise criminal punishment, regardless of whether we seek a more utilitarian or retributive justification for punishment. Therefore, it is important to treat these measures of criminal law reaction separately from the general category of the legal and social institution of punishment and to study their theoretical justification separately. This separate theoretical justification is especially necessary to justify the isolation of perpetrators (deprivation of liberty), which can no longer be rationalised by reference to the classical understanding of criminal punishment. It can take place through the use of criminal law institutions consciously defined as means other than punishment (in particular, therapeutic and protective post-penal measures). A person treated with these kinds of measures is no longer officially being punished. They are not being sentenced to these measures for the crime, but rather to protect society from serious risks posed by a given person. The use of these measures is not directly associated with condemnation of the past criminal behaviour of the person who is deprived of liberty. A post-penal sanction is applied based on a specific assessment of the threat that the perpetrator may pose to society owing to their characteristics. In a slightly different way, the link between the response to a crime and the crime itself (its

negative assessment) may be broken, even if the letter of the law still defines the means of criminal law reaction as punishment. This may be the case with long-term confinement for repeat offenders, e.g. in the USA under "three strikes" laws. This is a means of "cleaning" society of people who are considered undesirable (recidivists), rather than a punishment for the crimes they have committed. In the case of multi-recidivists, Paul Robinson believes that one cannot appeal to the rationalisation of punishment when applying the rule of "three strikes and you're out" because it is, according to Robinson, simply "preventive detention" and the evaluation of the risk that justifies it should be *de lege desiderata* decided by civil courts – as is the case when placing in closed psychiatric institutions people who are dangerous due to mental illness (Robinson 2010: 129). The literature's omission of the fact that rationalisations of punishment have value so long as they refer to the institution of criminal punishment with specific characteristics leads to many misunderstandings (Matravers 2011; Utrat-Milecki 2022a: 60–227).

Punishment as a kind of human action in time and place

In the case of the punishment process, such behaviour as announcing a sentence or taking actions strictly defined by law to execute a punishment are conventional legal actions. They are elements of the entire punishment process, i.e. criminal punishment in its processual sense. Operational activities are factual activities that are not conventionally defined in the regulations so as to associate them with a penalty. However, performing them in a specific context (e.g. serving a prison sentence) makes them an element of the entire punishment process. In the case of criminal punishment, we are talking about conventional legal actions and the operational actions related to them, which together form the punishment. Jointly, we can define both of these types of activities as carriers of the punishment process. This is the active side of punishment. The study of the impact of these activities determining the existence of punishment on the punished person is already the study of the passive side of punishment. The passive side of punishment is generally a reflection of the punishment in the consciousness of the punished person, and indirectly also includes the study of the endogenous effects of the punishment on the future behaviour of the individual being punished. It affects their capacity for social reintegration, for example, and primarily their ability to refrain from recidivism. Mutual relations between the active and passive sides of punishment are subject to examination. To a large extent, they concern the degree to which and under which conditions a given organisational form of punishment can be effective as a method of crime prevention in relation to specific convicts. Whether the given conventional and factual actions are part of the punishment process is determined by their semantic relationship, including the formal and legal relationship, and the cause-and-effect relationship with the process of pun-

ishing the perpetrator. Criminal punishment understood as a set of conventional human activities and related operational activities taking place on the basis of the law and within its limits should be perceived as a dynamic, processual phenomenon. Accordingly, just as we talk about the stadial forms of crime (punishable preparation, attempt and execution), so in penology we can talk about the stadial forms of criminal punishment. In the case of criminal punishment, it is proposed in penology to distinguish as its stadial forms the stage of the potentiality of the punishment, the enforceability of the punishment, its full enforceability and its completion (Utrat-Milecki, 2018). The potentiality of punishment begins with the individualised impact of the threat of punishment on a specific individual, i.e. in the formal sense, from the bringing of charges. A number of consequences of this state can have similar effects on a person as punishment. For this reason, studies on punishment include, among other things, the issue of pre-trial detention, which is the most drastic manifestation of the potentiality of punishment (Morgenstern 2016). The enforceability of a penalty in the penological sense is the validation of the judgment, whilst the full enforceability consists in the process of completely executing the penalty. The mere validation of a judgment cannot be equated with the process of punishment. Moreover, the punishment is sometimes carried out even long after the judgment or is never formally carried out. In the formal sense, a penalty may be completed after the conviction has been erased, and in the social sense after the positive social reintegration of the convicted person. In the case of serious crimes, more and more often, the full completion of the punishment's impact on the individual is not foreseen, so it is becoming increasingly permanently stigmatising or even eliminating. The punitive changes do not concern only Poland or Central Europe (Archives of Criminology 2022), which justifies the attempt to build a theoretical framework for an analysis of this phenomenon.

Summary

The analysis of criminal law reforms in Poland from the perspective of criminal punishment as a complex legal and social institution of a processual nature is intended to present the concept of a critical examination of the punitiveness of the penal system. That critical approach is intended to help researchers and specialists in the field of criminal policy to deal with penal reforms and penal practices; thus, the analysis is not only for researchers but also for practising lawyers.

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Recall to prison in Belgium: Experiences of parolees who live under licence conditions

Powrót do więzienia w Belgii: doświadczenia warunkowo zwolnionych więźniów

Abstract: In the recent penological literature, the back door of a prison is often presented as a revolving door through which many prisoners leave the prison prematurely, but then return after a short period. A large number of prisoners who have been conditionally released are sent back to prison during the licence period or before the end of their sentence due to a breach of the licence conditions. Since the revocation of a release modality (such as parole) might affect reintegration, a careful balance is needed between proportionality, the risks, the possibility of behavioural change and the opportunities for reintegration. In other words, the impact on detainees should not be underestimated if a decision to recall is being taken. Since the majority of parolees in Belgium are sent back to prison after non-compliance with the imposed conditions, this article discusses the experiences of interviewees who lived under these conditions when being granted a release modality before being recalled to prison.

Keywords: recall to prison, non-compliance, breach, pains, license conditions

Abstrakt: Zgodnie z najnowszą literaturą penologiczną tylne drzwi więzienia często są przedstawiane jako obracające się drzwi, przez które wielu więźniów wcześniej opuszcza więzienie, ale także często wraca do niego po krótkim czasie. Duża grupa więźniów, którzy zostali warunkowo zwolnieni, trafia z powrotem do więzienia podczas okresu warunkowego zwolnienia lub przed zakończeniem okresu wykonywania kary – z powodu naruszenia warunków zwolnienia. Ponieważ cofnięcie formy zwolnienia (takiej jak warunkowe przedterminowe zwolnienie) może wpłynąć na reintegrację, konieczne jest zapewnienie właściwego balansu między proporcjonalnością, ryzykiem, możliwością korekty zachowania a szansami na reintegrację. Innymi słowy, przy podejmowaniu decyzji o cofnięciu warunkowego zwolnienia nie powinno się bagatelizować wpływu tej decyzji na więźniów. Ponieważ większość osób zwolnionych warunkowo w Belgii trafia z powrotem do więzienia z uwagi na nie-

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przestrzeganie nałożonych warunków, w artykule omówione są doświadczenia badanych, na których zostały nałożone te warunki w związku z ich zwolnieniem z więzienia, zanim ponownie do niego trafili.

Słowa kluczowe: powrót do więzienia, nieprzestrzeganie zasad, naruszenia, dolegliwość, warunki zwolnienia

Introduction

"Back door release decisions can have as much influence as front door sentencing practices in terms of sentence length and maintaining overall prison populations" (Padfield and Maruna, 2006). According to Nicola Padfield and Shadd Maruna (2006), a large group of detainees who have been conditionally released are returned to prison during the licence period because they commit a new offence or do not comply with the licence conditions. These recalls can therefore not only be explained as a result of a rise in recidivism, but also due to non-compliance with the conditions related to the release. The published figures emphasise this as being an issue. On 30 June 2018, around 6,300 prisoners were being held in detention in England and Wales due to the revocation of a conditional release. This concerns 10% of the prison population (Howard 2019: 180). We also see similar figures in Scotland. Before 1998 the recalls were limited to less than 1% of the average daily population; the figures increased significantly in 2011 to 9% (Weaver et al. 2012; 2020). However, these findings cannot simply be translated to Belgium. Indeed, the total number of revocations in Belgium has remained relatively stable over the last decade (Breuls, Scheirs 2017; Breuls et al. 2020). For Belgium, no systematic figures are available on the number and nature of the revocations. Limited and partial data from 2010 to 2014 indicate that the number of revocations during the licence period seemed to decline during the period 2010–2014 (with the exception of 2012). Figures published in 2020 indicate that 363 modalities (parole, electronic monitoring [EM] and semi-detention[1]) were revoked in 2019 compared to 303 in 2019 (College van hoven en rechtbanken 2020b; College van hoven en rechtbanken 2020a). In other words, a large proportion of those released under conditions were recalled to prison before the end of the licence period or sentence. However, according to the literature, this proportion appears to be higher in Anglo-Saxon countries than in Belgium (Padfield 2013; Steen et al. 2013; Aebi, Tiago 2018; Webster 2023). Nicola Padfield and Shadd Maruna (2006) therefore represent the prison door as a revolving door through which many prisoners leave the prison prematurely, then return after a short period.

Unfortunately, little is known about the practice of recall. The few existing studies highlight the negative aspects and the particularly painful experience (Digard 2010;

[1] When a convict is granted semi-detention, they may leave the prison during the day to work or to participate in a course. The convict has to return to prison after the course or work to spend the evening and night in prison. During the release modality, they must comply with the general and individualised conditions imposed by the Court.

Padfield 2013; Howard 2019). For instance, they indicate that the process of revocation is considered unjust and is associated with a lot of loss (including family ties and employment) and fear. Revocation is also seen as punitive rather than part of the reintegration process. In addition, recall is also associated with a feeling of powerlessness and a lack of inclusion in the decision-making process (Digard 2010; Padfield 2013; Howard 2019). In Belgium, non-compliance with the imposed conditions will not always lead to an immediate decision to recall someone. Research indicates a more reintegration-orientated recall practice (Breuls et al. 2020). In Belgium the decision to review, suspend or recall the parole, EM or semi-detention of offenders who are sentenced to more than three years' imprisonment (up to life imprisonment) is taken by multidisciplinary Sentence Implementation Courts (Act of 17 May 2006). The Belgian Sentence Implementation Courts have a broad discretionary power they can use to take into account the specific circumstances, individual background and underlying problems of the people on parole (Scheirs 2014b). According to Yves Van Den Berge and Frank Verbruggen (2014), the court still focusses too much on the facts, imposing standardised conditions without effectively considering whether they apply to the person in question. Whilst Belgian research from Veerle Scheirs (2014), Joséphine Bastard (2017) and Olivia Nederlandt (2020) provides us with insight into the functioning of the Sentence Implementation Courts, research on other areas, such as the practice of recall or life under licence conditions, is lacking. In addition, Veerle Scheirs (2014) clarified in her research that members of the court already make limited individualised decisions by weighing the possible negative consequences of a recall against the positive elements so that the people on probation can be further supported in the process of reintegration. It is already known that granting a release modality such as conditional release is an important step in the reintegration process of a prisoner. The members of the Sentence Implementation Courts want to give the convicts the opportunity to return to society gradually and with support, with the idea that they will become rehabilitated, take a different approach and take the right path (Scheirs 2014b). On the other hand, to provide the necessary control mechanisms and to be seen as a threat, a licence period and/or conditions are imposed along with the granted release modality (Scheirs 2014a; Beyens et al. 2020: 9). It is within the framework of these control mechanisms that recall can take place. However, because a revocation can interfere with the reintegration process – namely employment, housing and social ties (Uit Beijerse et al. 2018: 86) – a careful balance needs to be made between proportionality, risks, the possibility of behavioural change and the opportunities for reintegration. In other words, the impact on detainees should not be underestimated if a decision to recall is being taken.

This article is part of a larger project that aims to provide insights into the experiences of recall with regard to semi-detention (e.g. supra), EM and conditional release and its impact on detainees in Belgium. First, the legal framework is briefly outlined. Following a definition of "pain", an overview of the various pains and the dimensions of pain is then given. Next, the method of data collection is discussed.

Then, based on an analysis of semi-structured interviews with 40 detainees who were recalled to prison between 2019 and 2021, the article discusses the experiences of participants regarding the conditions imposed before being recalled. The experiences discussed in this article are divided into three main topics: the feeling of having a sword of Damocles above one's head, the realities of living in an open prison and the many conditions and lack of individualisation. The article ends with some final thoughts and a conclusion.

1. Legal framework[2]

As mentioned above, in Belgium the decision to impose, review or recall a conditional release, semi-detention or EM of offenders who are handed down a prison sentence of more than three years (up to life imprisonment) are taken by multidisciplinary Sentence Implementation Courts (Act of 17 May 2006). The licence conditions are imposed for a minimum period of one year and a maximum of ten years. The legislature defined three general conditions which every person on semi-detention, EM or parole has to comply with when released under one of these modalities: (1) the prohibition to commit new offences, (2) the obligation to have a fixed address (except for semi-detention) and immediately inform the public prosecutor – and, where appropriate, the justice assistant responsible for their supervision – of their address and (3) to follow up the calls of the public prosecutor and, where appropriate, the justice assistant responsible for supervision (Act of 17 May 2006: Art. 55). In addition, the Sentence Implementation Court can also impose specific, individualised conditions such as the obligation to follow a treatment plan or to have a daily activity (for instance, (volunteering) work) or the prohibition to use drugs, alcohol and/or possess guns. In addition, authorisations can also be granted, for example, the authorisation to take specific medication (Beyens and Scheirs 2017). According to Veerle Scheirs (2014; 2016) and Olivia Nederlandt (2020), the release procedure in Belgium is orientated to both social reintegration and risk reduction. In practice the conditions are formulated this way so as to enhance the prisoners' reintegration, but also to minimise the possible risks of reoffending. During the licence period a recall to prison is possible. In brief, the recall takes place after an adversarial procedure where the public prosecutor and the offender are heard. The public prosecutor can initiate the recall procedure if the legal requirements for a recall are met, but is not obliged to do so. The public prosecutor can refer the case to the Sentence Implementation Court in the following cases:

[2] Since September 2021, the Sentence Implementation Judge can also decide to impose release modalities for prisoners with a prison sentence of more than 2 years (up to 3 years). This study was conducted before the implementation of this part of the law. Therefore, the legal framework will be discussed as it applied at the time of the data collection, which took place in 2020–2021.

1) when a new offence is committed during the licence period,
2) when the convict poses a serious risk to the physical or psychological integrity of third parties,
3) when the specific imposed conditions are not complied with,
4) when the convict fails to respond to the appointments with the justice assistants,
5) when the convict fails to communicate a change of address to the justice assistant, and
6) when the convict is not complying with the programme and schedule of the release modality (in the case of a semi-detention or EM).

Since a single breach of licence conditions can initiate a recall procedure, these legal requirements can be easily met (Breuls et al. 2020: 9).

After the referral by the public prosecutor, the Sentence Implementation Court has to take the final decision. The court can issue a warning, suspend the release modality for up to one month while the person is detained, tighten the conditions or impose additional specific conditions with the consent of the parolee, impose another release modality or ultimately revoke the release modality. If a decision to recall is made, the person will be sent back to prison (Act of 17 May 2006: Art. 67). Regarding the time frame, Article 68 of the Act on the External Legal Position stipulates that the justice assistant must provide a report at least every six months. This clause also stipulates that the hearing needs to take place within 15 days and that a decision needs to be taken within seven days after the hearing is closed. In practice, the person can also receive an additional chance to work on their reintegration plan. The Court will then decide to not close the hearing, but to take the final decision after an additional hearing. In the next section, the different pains and dimension of pains are discussed in order to give a broader framework for the ongoing research about the experiences regarding recall.

2. Pains and experiences

The existing research shows that the recall of a release modality (e.g. conditional release) can be an extremely painful experience (Digard 2010; Padfield 2013; Howard 2019). Painful experiences during detention or during a release modality can take different forms: repeated unassigned modalities, uncertainty in and outside the prison, stigmatisation, living under a large number of conditions, constant control and supervision, etc. According to the definition of Nils Christie (1982), pain can be defined as a subjective, negative experience. According to him, pain is not limited to physical suffering, but can also be mental anguish or emotional trauma in response to a negative or positive stimulus. In addition, he states that the experience of pain is individual. In the penological literature, the term pain is used in

different contexts (Johnson, Toch 1982; Crewe 2011; Durnescu 2011; Shammas 2014; Hayes 2015; Nugent, Schinkel 2016; Crewe et al. 2017; Durnescu 2019; Griffin, Healy 2019). The following paragraphs give an overview of the various pains (i.e. pains of imprisonment, pain of non-custodial sentences and pains of re-entry) that have emerged throughout the years. Afterwards, the different dimensions of pain will be described based on the contributions of Ben Crewe (2011) and Lori Sexton (2015).

2.1. Pains of imprisonment

The study of the pains of imprisonment originated in Gresham Sykes' *The Society of Captives* (Sykes 1958). Sykes tried to create a broad, thorough overview of the elements that characterise detention as punitive. For Sykes, the pains consist in "the deprivations and frustrations of prison life" and provide a framework for describing the challenges of imprisonment from the experiences of prisoners. Specifically, Graham Sykes identified five major categories of deprivations linked to the prison sentence: the deprivation of freedom, the deprivation of goods and services, the deprivation of heterosexual relations, the deprivation of autonomy and the deprivation of security (Sykes 1958). These deprivations are determined by criminal and penitentiary policies, by the prison regime and by the place that prison is given in the wider society. According to him (and Shammas), experienced pains can vary between secured, closed prisons and open prisons (Sykes 1958; Shammas 2014). According to the same logic, the pains in a classic Ducpétiaux prison will differ from a modern (semi-)open regime or a halfway house. Moreover, it is also expected that the pains of imprisonment will differ regarding the prisoner's demographic characteristics, such as gender, ethnicity and sexual orientation (Crewe et al. 2017). The pains of imprisonment offer a more structured and nuanced vocabulary of how prison life is experienced daily (Hayes 2019). They remind us that detention cannot only be seen as the deprivation of freedom (Sykes 1958). In addition, they enable us to determine what makes a prison sentence so painful and provide us with a conceptual framework for further research (Sykes 1958; Johnson, Toch 1982; Hayes 2019).

Sykes' classic pains of imprisonment were reviewed by Ben Crewe. This led to three new pains of imprisonment based on the idea that modern penal practices involve additional burdens and frustrations. The first one is the pain of indeterminacy, in particular, the emotion of uncertainty experienced in the context of whether or not a release modality will be obtained during a detention of predetermined length (Crewe 2011). The second pain concerns the pain of psychological assessment. It relates to the process of being psychologically assessed, which not only impacts the detainee's future, but also their daily life. The third and last new pain concerns the pain of self-government, where detainees are given only a limited degree of autonomy to manage their own conduct and be held responsible for the outcome. While the classic discussion of Graham Sykes' pains has always been highly regarded amongst researchers, only recently has the attention been shifted to other penal contexts.

2.2. Pains of non-custodial sentences

It is only in the last two decades that there has been some attempt to apply a pain-based analysis to non-custodial sentences. In brief, the literature on the pains of community penalties can be described as the study of the pains of oversight, linking the study of the pains to the control and supervision of non-custodial sentences (Durnescu, 2011; Hayes, 2015; Gainey and Payne, 2000; Payne and Gainey, 1998). According to David Hayes, this supervision can take different forms: technological supervision, human supervision or a combination of the two (Hayes 2019). The pains of community penalties reflect substantial differences between custodial and non-custodial sentences. However, they also dispute the view that non-custodial sentences are "softer" alternatives with no punishing character (Hayes 2015; 2017). Hayes emphasises three major differences between the pains of custodial and non-custodial sentences (Hayes 2019). Firstly, non-custodial sentences such as parole and EM are characterised by a less objective deprivation of freedom. Although participants of both forms of punishment report pains related to the release process, this deprivation is generally considered less important than other pains in non-custodial sentences (Hayes 2015). Secondly, people on parole experience pains of shame linked to their reintegration (Hayes 2019). These pains of rehabilitation , as well as these pain of desistance studied by Briege Nugent and Marguerite Schinkel (2016), also imply that pains are not equivalent to the suffering that imprisonment entails. Finally, according to David Hayes, the character of non-custodial punishments is more intrusive than a prison sentence (Hayes 2015). New opportunities for pains are created because of the interaction between penal life and social life (Hayes 2019). Although David Hayes (2015) mainly talks about suffering associated with physical and psychological well-being – a lifestyle change (for example, the cessation of an addiction) or a feeling of shame (about the offences committed) – feelings of fear and uncertainty regarding one's reintegration and the sudden assumption of responsibilities can also be considered forms of suffering that arise from a non-custodial sentence.

On the other hand, Brian K. Payne and Randy R. Gainey (1998) emphasise that many of the pains described by Graham Sykes, as well as a number of additional pains, are also experienced by people on EM. Firstly, there is the impact of EM on the convicted person's family. Secondly, the individuals are often forced to watch others engage in activities that they would like to participate in, but this is made impossible by the licence conditions. Finally, there is the impact of wearing an ankle monitor. They often have to choose between wearing trousers or living with the uncomfortable feeling associated with these devices. This mutual exposure between the criminal and the social context undermines the traditional notion that punishment is entirely independent of the social life of the interviewee and reveals a complex web of interactions between actors responsible for the control of the parolee and the actors responsible for their guidance.

These different groups of pains emphasise the way actors from the criminal justice system actively contribute to the experiences of the participants. These participants are not prisoners, but nor are they completely free. They are therefore in a transitional period. Consequently, it is not possible to disconnect the classic pains of imprisonment from the other pains (Hayes 2017). The pains of probation refer to the experiences of offenders who are under probation supervision (Durnescu 2011). Ioan Durnescu (2011) identified six pains: the deprivation of autonomy, the deprivation of time, the financial costs, the effects of stigmatisation, the forced return to the offence and living under a tremendous threat. The pains of community penalties described by David Hayes (2015) include the pains of rehabilitation, the pains of deprivation of liberty, penal welfare issues, the pains of external agency interventions, process pains and stigma. The pains of deprivation of liberty include the loss of time, money and freedom. In addition, the penal welfare issues include accommodation, job searches, welfare, finances and relationships with family members. Next, the pains of external agency interventions refer to the intrusive interventions of controlling actors. The process pains represent the procedural justice and the supervision of the police that are experienced. Stigmatisation is also included among the pains/community penalties. Finally, the pains of desistance describe three central pains: the pain of isolation, the pain of goal failure and the pain of hopelessness. Not being able to participate fully in life outside prison and failing to achieve established goals will lead to a loss of hope. According to the authors, this hopelessness causes a lack of motivation to achieve one's original goals and finally leads to a feeling of helplessness (Nugent, Schinkel 2016). This does not mean that community-based pains are worse than detention – it simply means that they are different and that, in consequence, more attention should be paid to the way in which individuals experience their punishment (Durnescu 2011; Gainey, Payne 2011).

2.3. Pains of re-entry

Recently, further steps have been taken in applying pain-based analysis. In 2019 Ioan Durnescu described the pains of re-entry (Durnescu 2019). This concerns obstacles or frustrations reported by prisoners before and after release. Kristel Beyens highlights the difficult path that characterises this process (Beyens 2020). The numerous obstacles people on parole are facing in this process, according to her, contrast greatly with the perception that parole is awarded to all persons at one third of the way through their sentence. This translates into an increasingly stringent legal framework to grant a release modality, which leads to more uncertainty for the prisoners concerned. This uncertainty can also be found in the research of Ioan Durnescu, Diarmuid Griffin and Deirdre Healy (Durnescu 2019; Griffin 2019; Griffin, Healy 2019). According to Durnescu, some examples of the pains linked to reintegration (in and outside the prison) concern adaptation to the new environment, social isolation, stigma and instability. These pains proved to

be universal. Stigma, failures, despair and a lack of social support are universally cited in the stories of ex-detainees when questioned about their reintegration (Bahn, Davis 1991; Cullen 1994; Funk 2004; Lebel 2012; Durnescu 2019). However, a number of other identified pains appeared to be context-bound, given that the study took place in Romania. This concerns, for example, the pains of poverty and fighting against bureaucracy (Durnescu 2019). As part of his results, Ioan Durnescu indicates that not all pains are equally present at every stage of the reintegration process. For example, a number of pains can only be active in the first months after release, and others can only be present later. In the reintegration process, social, personal, cultural and economic characteristics play a fundamental role in the presence or absence of specific pains at a specific time (Shammas 2014).

Diarmuid Griffin and Deirdre Healy also applied the existing pains, but to people on their way to parole (Griffin and Healy, 2019). Their analysis shows that three large pains are experienced by this group: firstly, the deprivation of autonomy (Sykes 1958), and in particular the denial of prisoners' autonomy and their ability to make their own choices; secondly, the pains of indeterminacy (Crewe 2011); and finally, the pains of desistance (Nugent, Schinkel 2016). In contrast, people on parole experienced three large groups of pains: isolation/loneliness, failure and loss of hope. These pains can form one entity and can lead to a feeling of hopelessness among prisoners, undermine their confidence in the system, cause them to disengage in reintegration and ultimately slow down their release.

2.4. The different dimensions of pain

For a long period, the pains of punishments were studied in binary terms: either they were experienced or not. Although certain pains seemed more significant than others, binary thinking made it practically impossible to compare the experiences of two respondents with similar painful experiences. Recently, however, several attempts have been made to discuss these pains in less binary terms. Ben Crewe (2011) examines the different dimensions of pain. He tries to map pain using four broad dimensions: depth, weight, tightness and breadth. In brief, depth acts as a metaphor for the extent to which a punishment constrains, controls and isolates the subject from wider society. Weight represents the level of oppressiveness and psychological trauma caused by incarceration. Tightness measures the extent to which the exercise of power within the prison regime is coercive and authoritarian. Finally, breadth is the level of what is called the penetration of penal control into the subject's everyday life before, during and after the punishment. These dimensions can tell us something about the type and dimension of the pain experienced by a specific person and allows us to make comparisons. Lori Sexton (2015) emphasises that the subjective perceived severity of the punishment is very dependent on the expectations of the people living it. Her analysis suggests that punishment will be more painful when the deprivations have a symbolic load of stigmatisation or power abuse. In short, the pains of punishment have expanded far beyond

Graham Sykes' catalogue of deprivations. The pains were examined in all kinds of penal contexts with attention paid to the different experiences of people with different backgrounds, ethnicities, genders and sexual orientation. Pains also offer the possibility to measure the relative gravity of criminal interventions from an intersubjective approach. The extent to which pains are taken into account in criminal decision-making is part of a large number of debates (Downes 1988; Crewe 2011; 2015; Crewe et al. 2017). The potential value of a pain-based analysis is that it allows us to see punishment as a process that includes subjective and objective advantages and disadvantages (Christie 1982). Despite the fact that the pains were examined in all kinds of contexts, there is no research into the possible pains of recall. However, the limited international literature on the subject shows that the revocation of implementing procedures is a particularly painful experience (Digard 2010; Weaver et al. 2012; Padfield 2013; Howard 2019). In the next section, the method used to gather the data for our study is discussed.

3. Research method and data

Purposive sampling was used to select a sample of participants from 13 prisons in Belgium. Prison staff provided the researcher with lists of all prisoners who had been sentenced to more than three years and had been recalled between 2019 and 2021. The prisoners of the first ten establishments received an envelope containing a letter, an informed consent letter and an answer form because of COVID-19 restrictions in effect at the moment of data collection. The prisoners from the other three prisons were approached in person by the researcher. In total, 233 prisoners were approached, 61 agreed to participate (although later) and 21 withdrew from the study. The final sample therefore consisted of 40 prisoners. The participants were male and their age ranged from 23 to 60 years. The majority had Belgian nationality, while six had a different nationality. Half of the respondents had experienced more than one recall. Most of the respondents (n=28) were recalled because of a breach of licence conditions. The licence conditions varied, as did the number and types of breached conditions.

Each participant was interviewed separately in 2021. The interviews lasted between 35 and 134 minutes and were facilitated by a topic guide. The topics included the detention period, the period before the recall, the process of recall (perception of the conditions, compliance and non-compliance with the conditions, communication and cooperation with the different actors and guidance), the revocation (motive, perception, legitimacy, objective, perceptions of judicial actors and prevention), the period after the revocation and related consequences and the new path to reintegration (understanding, obstacles, engagement, activities, guidance and support). All interviews were strictly confidential and pseudonyms were used

to refer to the interviewees. All interviews were audio-recorded and transcribed afterwards. Data analysis followed an iterative data analysis process, which is often part of qualitative research – grounded theory, in particular (Mortelmans 2013). After the data collection was finalised, open coding was used to identify themes through line-by-line analysis. This phase was followed by more focussed coding using the memos that had been written and the links that had been made between the themes, while assuring that these themes were relevant to and appropriate for the full dataset.

4. Findings

The findings are divided into three sections: the feeling of having a sword of Damocles above one's head, the feeling of living in an open prison outside the prison walls and the many, small individualised licence conditions imposed.

4.1. Sword of Damocles

As the discussion above clearly stated, it is important to highlight the pains and suffering that imprisonment and probation entails. These pains can be diverse (e.g. pains of imprisonment, pains of non-custodial sentences and pains of re-entry), as explained, but another of these pains is the execution of a sentence in the community under the threat of being recalled to prison if the licence conditions are not complied with. When the parolees fail to comply with these conditions, there is a high probability that they will be sent back to prison. They are therefore regularly reminded of the consequences of any breach of the conditions. If a release modality is granted while there is still significant time remaining on their sentence, this time can be seen as a deterrent. In fact, if the modality is revoked, the parolee knows that they will return to prison for a time. Also, if they are recalled to prison, the time spent in release will not always be deducted from the remaining sentence (Breuls, Scheirs 2017). Article 62 of the Act on the External Legal Position states that it is the Court who determines the part of the custodial sentence that the parolee still must undergo when being recalled to prison following a period of conditional release, taking into account the probation period that has gone well and the efforts that the participant has made to respect the licence conditions (Act of 17 May 2006: Art. 68). When a person is recalled from EM or semi-detention, the time spent in the community is always deducted from the remaining sentence. Almost all interviewees therefore have the feeling that they are living under a huge threat of being recalled to prison. The feeling of having a sword above one's head was actually expressed by over half of the participants. This expression reflects the feeling of all these interviewees. For example:

> It isn't even about the conditions, but it's the sword of Damocles that is hanging over my head. Because if someone is hit, by accident, and I have a three-year licence period, it is considered a breach of my conditions… Or there may still be other things that are punishable, but which are out of my control. Accidents happen every day and the driver is still condemned for unintentional manslaughter. Or something like that. Everything can happen… so I'm taking a huge risk… if I lose my self-control, although I have been managing for years now… (R106_PI5)

Research also shows that some participants hesitate to accept a conditional release because of the pressure they have to live under for years, along with the chance of being recalled to prison at any time if they violate a condition during the release modality (Beyens, Boone 2013). The experiences described by 23 interviewees have convinced them that no matter how hard they try, they can be put in prison at any time because of a new recall. The following quote from a respondent confirms this finding, along with the experiences of 23 other interviewees:

> Yes, that was really heavy for me, frankly it was a bit suffocating. So you know, it's the six years above my head and knowing that, when I'm walking down the street, you know, if he looks at my girlfriend's ass, for example, and I get mad and hit him, I'll go back to jail, six years and a half will drop. You know what I mean? Six and a half years down the road. (R35_PI7)

Because of the threat of being recalled to prison at any moment, but also because of the threat that the time spent under parole will not be deducted from the remainder of the sentence, almost half of these participants prefer to "max out" with EM instead of being released on parole:

> Or maybe you say hello to someone – that person, you don't know if he's been in prison – if you come across the police, you go back to prison. Or maybe the person smokes, you don't smoke, a control, you go back to prison. Parole is too, too difficult. No, the bracelet, frankly, the bracelet, you don't break your head as much. There are schedules to comply with…. With the bracelet you can hang out with people who do drugs, who've served time, you know. Now, when I hear about parole, it scares me…. No, no, no, never again. I'm wearing the bracelet. I'll be released on a bracelet or I'm staying here. That's what I want to do, but parole – give me a break, it's too difficult and that's it. No, parole is over, it's over, I'm done with it. (R29_PI4)

Below, another interviewee also states that he would prefer to carry out the full sentence in prison rather than to live with this sword of Damocles over his head a second time. Just over half of the respondents who were interviewed also clearly stated this. In effect, the prisoners are opting to stay in prison rather than continuing to pursue early release.

> No, no. My sentence ends in 2023. Not two, but three years were added. That's the thing with parole. My sentence is ending in 2023, not a few years later with a lot of conditions to comply with. I want to get away from the judicial system by 2023. I don't want to have anything to do with it anymore. My sentence will be maxed out.

> The feeling... it isn't a normal feeling, those conditions. It's not normal. I suffered so much. I had underestimated it. I can't live with the possibility of a recall every second of the day. (R12_PI3)

According to Luc Robert (2009), it is not possible to identify one single explanation for committing to fulfilling one's prison sentence. He also states that prisoners seem to be influenced by different combinations of elements when carrying out their full sentence in prison, suggesting that the mechanism of maxing out is based on the unique circumstances of the detainee. These findings are consistent with the narratives in the interviews conducted for this study. In addition, the length of the licence period, which can sometimes be longer than the original sentence, makes it difficult to be on conditional release with this so-called sword of Damocles being there, and it can lead someone to decide to max out in prison.

> Because if you have two years left on your sentence, they'll give you a five-year licence period, although you have only two years left. It's like they're reconvicting you, it's like they're adding a new offence. (R26_PI4)

Furthermore, Article 54 of the Act on the External Legal Position stipulates that the person has to agree with the conditions being imposed. However, according to Olivia Nederlandt (2020; Nederlandt et al. 2022) some of these conditions are not discussed at the hearing, such as the prohibition of contact with ex-convicts. Moreover, just over half of the interviewees stated that not every condition is easily accepted and can lead to a discussion in court. When the conditions are accepted, it is often for the wrong reasons. Different grounds for accepting the conditions were identified. According to ten respondents, the main reason to accept is for their family. This was the most important motive that was identified. People who are close to the parolees are often the reason why they want to stay out of prison. Secondly, four of the respondents had a clear purpose in life, for instance, starting a family, having a home, getting married and creating their own business. This was mentioned when asking about the motivations that led to compliance with the licence conditions. Thirdly, five of the participants thought it would speed up the process to accept the conditions without a debate. Finally, four interviewees wanted to reach the end of the sentence and be done with it, be free, regardless what was asked of them. This last element is contradictory, because four of the respondents also indicated that the modality has a greater chance of success if they have themselves compiled the reintegration plan and if they were able to apply it as planned. If the conditions are accepted for the wrong reasons, there will be a greater risk of being recalled to prison because of a breach of conditions.

The denial of the ability to make their own choices can be related to the pains of parole described earlier (Griffin, Healy 2019). Moreover, in the interviews, 29 prisoners felt that they had been "set up to fail" by unreasonable licence conditions, relating to the pain of failure described by Ioan Durnescu (2019). The expression most often used was that they felt it was impossible for them not to fail. According to them, licence conditions can be somewhat muddled and/or confusing. The prisoners were clear

that many licence conditions were inappropriate and unnecessary, but also impossible and illogical; most of the respondents felt the weight of their conditions. The weight of numerous conditions might make it difficult for the 29 parolees to succeed. The emotion of uncertainty resulting from not knowing if and when a recall will take place was clearly present (Crewe 2011; Griffin, Healy 2019). Our findings also emphasise the intrusive character of the licence conditions, not only for themselves but also for housemates.

> I think the functioning and fallout, the follow-up is certainly not what it should be. And also, all these conditions, it's too much. So yes, it's not livable. For the time being, you're thinking about maxing out. These conditions, it's an intrusion in your life. That's what it comes downs to. (R104_PI5)

People on parole may feel that the conditions and the follow-up regarding these conditions are an intrusion into their privacy. Once outside the prison, they reported feeling constantly under control because their daily life is regulated by the licence conditions or certain other prohibitions of behaviours (e.g. you must work and you cannot consume alcohol), places (e.g. you must see the judicial assistant and you cannot go to the pub or places where your victim lives) and relationships (e.g. it is necessary to develop a relationship of trust with the judicial assistant because of the importance that the Court gives to this aspect and it is no longer possible to see ex-prisoners or former accomplices because of the risk of recidivism). Finally, the common-sense value of complying with the licence conditions was obvious for only a minority of the respondents. This "common sense" can be interpreted according to the model of compliance by Anthony Bottoms (2002). For Bottoms, legitimacy is fundamentally relational, but it is distinct by virtue of its concern with the proper exercise of formal authority. Here, the actors of the criminal justice system (like the Sentence Implementation Court or the judicial assistant) might exercise influence over the person's behaviour in and through their cognition that the authority is legitimate and, moreover, that its exercise is fair and reasonable. In this way, it will be "normal" for the person to comply. For example,

> If you lived in a world where you are all alone, the conditions there are… I won't worry about the conditions, it's just a reminder of daily life in the outside world, we'll say. With moderations. It's normal to drink in moderation. I'm not a drug addict, so it's normal. They aren't conditions that…. Yes, I had no problems with the conditions, it's like a normal life, rules and standards of living. (R35_PI6)

4.2. Open prison

In line with the findings from previous research, the respondents saw parole and EM as a chance, but also as a penalty (Payne, Gainey 1998; Martin et al. 2009). It felt like an open prison, a prison outside the prison walls. It must be said that nine respondents reported feeling more emotionally stable in prison than out

on licence, partly due to the uncertainty surrounding their ambiguous licence conditions. They had the feeling that they could be recalled to prison at any moment for any transgression, however small, that they were set up to fail (e.g. pain of failure and indeterminacy). Going on a release modality was thus not always the easiest option. Another aspect that amplified this feeling of living in an open prison is the stigmatisation as a result of having a criminal record. This criminal record and the pain of stigmatisation (Durnescu 2019) remain important obstacles through the reintegration path of the parolee:

> And then there's this perpetual prison. Society says you can, but you don't. Your criminal record and this famous, uh, this famous risk of reoffending. The slightest thing you do can be blamed. The slightest accusation can send you back to prison. I just found stability – that isn't always ease. (R30_PI7)

The criminal record can be an obstacle to employment and can create an additional difficulty in finding housing (Claes et al. 2016; Travis 2002). This feeling was confirmed by eight other respondents, implying that not only could the imposed licence conditions interfere with the reintegration process, but so could the stigmatisation of being a person viewed as an (ex)convict, evoking anxiety and stress. A few decades ago, Joan Petersilia (1990) noted that community sentences may be experienced as more punitive than imprisonment. Nine respondents suggested that it was easier to do time in prison than on parole and said that they would actually prefer to do time in prison since they do not have as much responsibility in prison as in the community. The interviewees developed expectations about what they thought was awaiting them after release. They were expecting more freedom and less control and constraints; they therefore had the feeling of living in an "open prison" with no freedom at all. An interviewee on semi-detention stated:

> Yes, that's not freedom. That's just… doing your time outside the walls of the prison! Excuse me, Madam, what freedom? I'm getting up in the morning to work my hours and then go back to my cell. Yes, I'm getting released every day, but I'm not free. But what is freedom? Being inside the prison, it's actually just the location that's different. I work in a different location, but that's not freedom. (R93_PI6)

For 30 respondents, "being outside of the prison" was seen as one of the most appealing elements of a release modality. While they all mentioned some disadvantages of being under supervision, the advantages (like being able to be with family, to work, to pay off debts, etc.) exceeded the disadvantages of having the feeling of being imprisoned outside the prison walls.

4.3. Many small individualised conditions

Research has shown that with the exception of one Sentence Implementation Court that has chosen to limit the number of licence conditions imposed, all the other Courts impose a significant number of conditions when prisoners are released on

a modality, with a general average of about 15 conditions being added to the three general conditions (Nederlandt et al. 2022). With the exception of five respondents, all the interviewees for our project also considered the number of conditions excessive; the terms these 35 respondents used to describe the situation included "exaggerated", "unworkable", "unbearable", "doomed to failure", "difficult to respect", "stressful" and "mentally harsh", making the conditional release unattractive. As respondent 141 stated:

> At the end of the day they give you so many conditions. On paper you can still follow and still understand, you see, but in real life you're not a robot. You can't be programmed. It was a whole list. (R141_PI2)

Nine respondents also pointed to the lack of individualised conditions specifically, and 33 interviewees said they had the same conditions as everyone else, or that the conditions were copied and pasted. The findings also highlight the fact that those affected sometimes do not know the difference between a general condition and a specific condition, that they are often convinced that all conditions apply to all convicted offenders (as a "package" of conditions) and that there is no room for negotiation.

> But most of them were standard procedures. The standard conditions. General condition. Don't commit new offences, don't flee… no contact with drugs, continue my daily activity, continue my guidance, pay my fines on time. Yes, 19 conditions in total. That was, just, the standard conditions. (R7_PI6)

Vague or ambiguous conditions can also be more easily breached. Conditions are not always specific or clear enough for the parolees, which makes them difficult to comply with. This also allows the Court to use the conditions as a "tool" to recall. This is particularly the case when an interviewee complies with the conditions, but the Court notes a situation of tension within the home environment, or when the convicted person is questioned as a suspect for a new offence – without being able to establish grounds for revocation on the basis of the presumption of innocence.

> Because they also say you were out on a good reintegration path and you've kept that up for a long time. It's not that you were back in prison after a month. No, that went well. I think, they also once controlled me when I was smoking drugs. Then I also had to go to the Court for a hearing. But they also immediately told me…. If they see your probation is going okay, they usually let you go without a recall to prison…. But it wasn't the case, because of the drugs and the tensions at home… uh… so in that period I had to go to court twice … perhaps, because of a breach and because of tensions and drugs, because afterwards I had this offence, all of them…. I didn't understand it… But that's really a violation of your conditions. (R4_PI6)

Regarding the nature of the conditions, 11 respondents considered that they are standardised and minimally individualised. This lack of precision can lead to uncertainty, confusion and therefore to conditions that are difficult to comply

with in practice. For example, there is a general prohibition against associating with ex-inmates rather than a prohibition against associating with a particular person (Nederlandt et al. 2022). The same conditions are used as an example in the following quote of a participant who had been recalled to prison:

> Because yes, I had to come to the court because I had come into contact with an ex--prisoner. But that was someone I worked with at work. Yes, I said that to the court. They don't walk around with an 'ex-convict' sign'. He answered me directly that if I wanted to stay on parole, I had to ask. I thought to myself, what the hell is he saying now? (R141_PI2)

The above statements show the difficulties, pains and some of the experiences of being released under licence conditions and living with this sword of Damocles above one's head.

Final thoughts and conclusion

The experiences associated with recall are not only painful, but also associated with a large number of deprivations because of the interference with the steps already taken towards reintegration. The article shows the relevance of pain-based research. A pain-based analysis enables us to see punishment as a process that includes subjective and objective pros and cons. Despite the fact that the benefits were not part of this article, they were investigated and will be part of the final results. When this article was written, no positive aspects of recall were identified. A pain-based analysis also offers the possibility of using an intersubjective approach to measure the depth, weight, tightness and breath of criminal interventions, of which pain is an intrinsic part. A confrontation with the pains that are caused encourages less painful and harmful alternatives to be considered in order to achieve the result that is pursued in the criminal justice system. Although pains were examined in all kinds of contexts, research on the pains of recall is lacking. If people who have been convicted wish to be able to execute a part of their custodial sentence outside of prison on licence, they will have to seize the Sentence Implementation Court and prepare a reintegration plan to be put in place when leaving the prison. The content of this plan has to be sufficient to regulate the risk of recidivism in the eyes of the Court. The Court will also impose specific, individualised conditions. Once the convicted person carries out their sentence(s) in the community, the Sentence Implementation Court will seek to avoid a recall and a return to prison. Indeed, they will generally give someone who has not respected the conditional device an opportunity to regain control. As the majority of the recalls to prison in Belgium are due to non-compliance with the licence conditions, we took a closer look at the experiences of living under these conditions. A range of conditions,

such as the prohibition of contact with ex-convicts, are not discussed at hearings. In addition, certain conditions, which are not adapted to either the situation of the convicted person or to life in society, seem difficult to understand and therefore difficult to respect; this is particularly the case with the prohibition of consuming alcohol, visiting establishments which serve alcohol or meeting ex-prisoners; the time constraints of EM and the intrusive character of the different modalities are also difficult to reconcile with social life. In addition, certain conditions seem too demanding in view of their precarious situation and the socioeconomic context; this is particularly the case with conditions that require a convicted person to pay various debts despite their criminal record remaining a significant obstacle to employment and their time in prison not only preventing them earning a proper income, but also worsening their financial situation and that of their loved ones. Another structural challenge is the stigmatisation of ex-detainees, preventing people who have served their sentence from investing or reinvesting in their role as citizens. This perpetual feeling of being seen as an outsider makes it difficult to reintegrate and increases the chance of being recalled to prison. The parolee lives under control and supervision, with the constant threat of being sent back to prison if the conditions are not complied with – conditions that they do not always perceive to be significant and/or meaningful, which leads to a source of additional stress and anxiety. Also, being granted a release modality does not allow the individual to reintegrate in all aspects of social life, but rather limits their sociability by prohibiting them from certain activities and imposing others, by forbidding them to visit certain places and persons and by requiring them to constantly "hunt for certificates". So many difficulties and constraints assigned to people already in a precarious situation, in a context lacking in social assistance, inexorably results in many of them determining not to execute the remainder of their sentence on probation. It has been shown how probation subjects the parolees to an experience just as "totalising" as that of prison, by deploying around them a panopticon that encompasses all aspects of their existence (living space, occupation, people and places they visit). These experiences can form a whole and can lead to a feeling of hopelessness in someone who is recalled to prison, undermining their confidence in the system, causing them to disengage in the reintegration process and ultimately slowing down their release or even resulting in them choosing to stay in prison. Despite the fact that revocation is intended as a transition phase to a new release modality, and therefore does not constitute an end point within the reintegration process, it is important to look at how the negative effects can be reduced to match the purpose of the revocation. The impact of recall on the convicted person and their family must certainly not be underestimated. The impact can be significant. To understand this impact and remedy, further research into the perception of those affected who had their modality revoked is necessary.

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Short-term detention in Austria

Krótkoterminowe pozbawienie wolności w Austrii

Abstract: One of the main concerns of the 1975 Austrian criminal law reform was to largely avoid the execution of short prison sentences. Due to their predominant disadvantages, they were to be replaced with fines wherever possible, and the execution of short custodial sentences was to be suspended as a subsidiary measure. Under Section 37 of the Austrian Criminal Code, a short custodial sentence for an offence that carries a maximum term of imprisonment of ten years is to be replaced by a monetary penalty if the court deems it justifiable for preventive reasons.

Keywords: short-term detention, resocialisation, preventive prognosis, negative effects of imprisonment, alternatives to imprisonment

Abstrakt: Jednym z głównych celów austriackiej reformy prawa karnego z 1975 roku i późniejszego rozwoju prawa sankcji było w dużej mierze uniknięcie wykonywania krótkoterminowych kar pozbawienia wolności. Ze względu na ich przeważające wady, w miarę możliwości miały być one zastępowane grzywnami, a wykonanie krótkoterminowych kar pozbawienia wolności miało zostać zawieszone jako środek pomocniczy. Zgodnie z paragrafem 37 austriackiego kodeksu karnego, krótkoterminowa kara izolacyjna za popełnienie przestępstwa zagrożonego karą pozbawienia wolności do lat dziesięciu, ma zostać zastąpiona karą pieniężną, jeżeli sąd uzna to za uzasadnione względami prewencyjnymi.

Słowa kluczowe: krótkoterminowe pozbawienie wolności, resocjalizacja, prognoza prewencyjna, negatywne skutki pozbawienia wolności, alternatywy dla pozbawienia wolności

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Introduction

Austria's current Criminal Code (*Strafgesetzbuch*, hereinafter "ACC") went into force on 1 January 1975. One of its main aims was to prevent the execution of short prison sentences. Because of their various known disadvantages, short-term sentences have primarily been superseded by fines, or the courts should at least suspend the execution of the punishment. According to Section 37 ACC, a short-term sentence of imprisonment – up to six months, and since 2015 up to one year – shall be replaced by a fine if the criminal act was punishable by a term of imprisonment of ten years at most and the court decides that a fine would have a sufficient preventive effect.

1. History of short-term detention in Austrian criminal law

The adoption of Section 37 ACC was hailed as one of the most significant achievements of the Austrian criminal law reform of 1975 (Pallin 1996: sec. 37 para. 1; Flora 2021: sec. 37 para. 1). Pursuant to Section 261 of the Austrian Criminal Code 1852, which was re-enacted in 1945 and thus remained in force until the 1975 Criminal Code, the court could in some circumstances replace detention with a fine commensurate with the convicted person's income. Common offences against the property of others could therefore be punished by a fine. However, this required circumstances that were particularly worthy of consideration, so that the change in the type of punishment was to be seen as a form of extraordinary mitigation of punishment (Nowakowski 1973: 2).

Interestingly, Section 260(a) of the 1945 Criminal Code even provided for the reverse: changing a fine into a custodial sentence. The court had to impose a proportionate sentence of imprisonment if a fine would cause serious damage to the financial situation of the convicted person or their family. For every five guilders, one day's detention was to be imposed.

Section 262 of the 1945 Criminal Code – according to which house arrest could be imposed instead of first-degree detention if the person to be punished was of good reputation and if removing them from their home would prevent them from pursuing their office, business or professional activity – seems very progressive. This created an essential instrument for preventing desocialisation.

1.1. The original version of the 1975 Austrian Criminal Code

The prioritisation of fines over short prison sentences is summarised in the explanatory material with the programmatic sentence: "The necessity of avoiding short prison sentences wherever possible has been recognised … in all its urgency" (EM ACC 1974: 94). And this was acted upon with the introduction of Section 37 ACC.

The years-long reform process in the run-up to the 1975 Criminal Code centred around the question of the conditions under which a custodial sentence could be "converted" (EM ACC 1974: 129) into a monetary penalty, among other questions. The preliminary drafts provided for the imposition of a fine in lieu of a custodial sentence only in the context of extraordinary mitigating circumstances. Thus, according to the 1964 Ministerial Draft, the criminal offence must not be punishable by more than one year and no prison sentence exceeding six months could be assessed in any individual case. According to the 1966 Ministerial Draft and the 1968 Government Bill, the penalty of imprisonment could not exceed six months. In addition, the 1966 Ministerial Draft stated that the imposition of a custodial sentence must not be indispensable to the legal system and to influence the offender. The Government Bill of 1968 allowed a fine instead of a prison sentence if the latter was not necessary to deter the offender from committing further criminal acts and to prevent others committing criminal acts.

It was not until the Government Bill of 1971 that the imposition of fines in lieu of custodial sentences was established as a separate sentencing provision, independent of mitigating circumstances. If general and special preventive considerations did not militate against it, under the proposed provision a fine could be imposed instead of a mandatory custodial sentence of no more than six months, provided that the offence was not punishable by more than ten years' imprisonment. The six-month limit was in line with Austria n tradition, for example, equal to the maximum duration of the arrest penalty under Section 247 of the 1945 Criminal Code (Nowakowski 1973: 3). Later in the legislative process, the Judiciary Committee considered it necessary to further differentiate the application requirements of Section 37 ACC, therefore proposing a distinction depending on the penalty, as was finally adopted (JC Report ACC 1974: 10). The imposed fine must not exceed 360 daily rates. Therefore, Article 37 ACC was in line with the general Austrian system of fining: In Austria, a fine is calculated by multiplying the number of daily rates corresponding to the amount of the offender's guilt by the amount of the daily rate (between 4 and 5.000 Euro), which is determined according to the offender's income.

According to the original version of Section 37(1) ACC, which was in force until 31 December 2015, instead of a custodial sentence no longer than six months, a fine of no more than 360 daily rates was to be imposed if the offence was not punishable by a more severe penalty than imprisonment for up to five years – even in combination with a monetary penalty – and if a custodial sentence was not required in order to deter the offender from committing further criminal offences or to prevent others committing criminal offences. General and special preventive aspects were thus to be taken into account equally in the case of threats of imprisonment of up to five years.

Section 37(2) ACC stipulated stricter requirements for the general preventive prognosis for threatened prison sentences of more than five but no more than ten years. The imposition of a fine had to be sufficient to counteract the commission of criminal acts by others for special reasons, for example, because the circumstances of the case were borderline for justifying or excusing the unlawful act. Thus, the fine for offences with a threatened term of imprisonment of more than five years was limited to exceptional cases under general prevention aspects.

1.2. The criminal law reform of 2015

The Criminal Law Amendment Act 2015 (Federal Law Gazette I 2015/112) extended the applicability of Section 37 ACC in several ways. On the one hand, the maximum hypothetical prison sentence was increased from six months to one year for both paras. 1 and 2; correspondingly, the maximum number of daily rates was increased from 360 to 720. On the other hand, the general prevention requirement for a threatened custodial sentence of a maximum of five years was deleted (Section 37(1) ACC). Since then, the only prognostic requirement is that the fine suitably deters the offender from committing further criminal acts. The legislature justified the omission of this requirement with the goal of avoiding short prison sentences in favour of a fine and promoting a uniform application of Section 37 ACC. Moreover, in para. 2, the requirement of general prevention was retained due to the fact that these are more serious offences with a penalty of up to ten years. However, the "special reasons", such as "circumstances [which] come close to a circumstance of justification or excuse" were deleted in order to extend the applicability of the norm (EM Criminal Law Amendment Act 2015: 11).

At the same time, the Criminal Law Amendment Act 2015 added an alternative fine as part of standardised penalties for all offences of the Criminal Code with a custodial sentence of up to one year in order to emphasise the principle of prioritising fines. This did de facto limit the application of Section 37 ACC, because recourse to Section 37 ACC became obsolete for minor crimes. As a result, however, this could lead to an extended pushback on short custodial sentences.

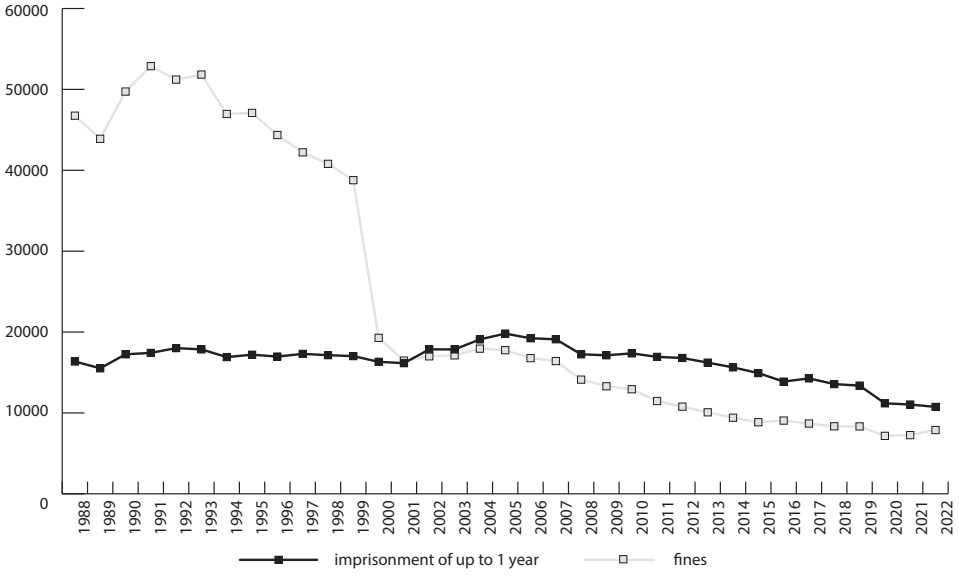
2. Practical significance of Section 37 ACC

The reduction of short-term detention has not been very successful so far. In 2021, 953 prison sentences of no more than one month were imposed, corresponding to seven per cent of all prison terms in that year. However, the number of custodial sentences in this category (the shortest recorded in the statistics) has been declining with fluctuations (3,799 in 1988, 4,482 in 1992, 2,962 in 2000 and 1,957 in 2013; Statistik Austria 2014). Although the absolute amount of short-term custodial sentences has been declining since 2004 – just as longer terms of imprisonment have been – the percentage of prison sentences of up to one year has only fallen from 91% of all prison sentences in 1988 to 79% in 2021. Therefore, four out of five terms of imprisonment should be considered "harmful" according to the unanimous expertise of criminologists (see section 3 below) and could be replaced by a fine if the only requirement for this was the extent of the prison sentence. Thus, there must be mostly special preventive reasons that would allow the courts to refrain from imposing fines. The statistical data on convictions in Austria reveal that the special

preventive reasons which speak against a fine are diverse. The criminal record of the convict is not the only factor that leads the courts to opt for imprisonment for special preventive reasons. In fact, almost half of all short prison sentences in the last ten years have been imposed on first offenders. Consequently, there must be other substantial preventive causes which call for short-term detention. In the absence of research in that respect, it can only be speculated what these reasons may be.

Furthermore, the developments in fines is noteworthy. In 1988, more than 46,000 fines were imposed, with the maximum of nearly 53,000 fines being reached in 1991. In recent decades, this number has decreased rapidly. In 2020, only 7,165 criminal acts were punished by a fine, the lowest so far. Even considering the fact that the number of convictions has decreased sharply from 67,756 (1988) to 25,626 (2021) over time, the percentage of fines on all penalties fell disproportionately in this period, from 68% to 30%. The explanation for this development can presumably be found in the implementation of a legal instrument called "diversion" (Sections 198 et seq. Criminal Procedure Act), which the criminal justice system can use to react to petty and medium criminality. These criminal acts used to be punished with fines, so the massive reduction of more than 20,000 fines can plausibly be attributed to this alternative method of reacting to delinquency. This can be seen in Figure 1: diversion went into force in 2000. Therefore, the decrease in fines does not necessarily lead to an increase in short-term imprisonment.

Figure 1. Statistical development of short-term imprisonment and fines



Source: Own elaboration.

3. Negative aspects of short-term detention

Generally, Austrian criminal law allows terms of imprisonment as short as one day and as long as 20 years, as well as imprisonment for life (Section 18 ACC). By way of comparison to similar legal systems, in Germany the statutory minimum term of imprisonment is one month (Section 38(2) German Criminal Code), and in Switzerland it is three days (Section 40(1) Swiss Criminal Code).

For a perpetrator who has committed a serious criminal act, imprisonment is widely undisputed as the necessary and most suitable method of sanctioning. Even though prison sentences of any length undoubtedly carry unwanted drawbacks, no better alternative to them has been created so far. However, if it is deemed sufficient to react to a criminal offence with short-term detention, these disadvantages will gain weight, and it must be carefully evaluated whether the prison sentence is more useful than harmful.

Generally, the harmfulness of short-term detention has been a much-discussed issue since the beginning of the 20th century. Franz von Liszt rejected short-term imprisonment out of the consideration that it lacks usefulness. It is not an appropriate way to convince those convicted of living in accordance with the law in future. Therefore, Liszt called for a "crusade against short-term imprisonment" (Liszt 1905: 347).

The preparatory works of the Austrian Criminal Code see the restriction of short-term detention as a requirement of good criminal policy. Furthermore, it is in the public interest to reduce short prison sentences (EM ACC 1974: 129). Reasons for this assessment include the desocialisation of the prisoner, the lack of a positive influence on them and the risk of "criminal infection" in prisons. The concept of the interchangeability of punishments declares that less severe sanctions can have the same preventive impact as harsher ones. In light of this thesis and the principle of *ultima ratio*, imprisonment must only be a last resort.

3.1. Desocialisation, lack of positive influence and risk of criminal infection

Short-term detention risks desocialising the prisoner. To avoid this the courts ruled as early as the 1970s that imprisonment should only be imposed in exceptionally serious cases where the law responds to a criminal act with a fine or a prison term (Austrian Supreme Court ["*Oberster Gerichtshof*"] 9 Os 70/75). Fines are more beneficial to the resocialisation of the perpetrator than imprisonment as a "drastic rupture of the convict's existence harms his/her social integration" (Austrian Supreme Court 13 Os 125/75). The enforcement of a custodial sentence not only disrupts relationships and social ties, but also has negative professional and financial effects – often the loss of one's job and the risk of unemployment and poverty. Thus, detention must be considered antagonistic to resocialisation (Weigend 1986: 263; Birklbauer 1998: 76; Fuchs, Zerbes 2021: para. 2/13; Seiler 2022: para. 90).

Additionally, there is the known risk of criminal infection by fellow inmates. The prison could become a school of crime for prisoners, providing them with new ideas for criminal acts and more effective ways of committing them (Nowakowski 1973: 1; Zipf 1976: 166; Kunz 1986: 187; Weigend 1986: 263; Birklbauer 1998: 76). The lack of occupation and daily routines, the shared experience of being convicted and stigmatised for it and the general conditions of living in an institution encourage exchanges between like-minded people and facilitate mutual interaction. That must be particularly avoided for petty and medium criminals who could leave the prison with "upgraded" ideas for more serious crimes.

In addition to that, a first brief experience of imprisonment could diminish or remove completely the deterrent effect which a penitentiary normally has (EM ACC 1974: 129). In this respect, short-term detention could even have crime-enhancing effects. The psychological barrier of a prison sentence could be lowered by the experience of incarceration (Nowakowski 1973: 1; Zipf 1976: 166; Kunz 1986: 187).

Furthermore, a positive, behaviour-changing influence can only be exerted on people under exceptionally good conditions. In most cases, the above-mentioned facts of prison life do not provide a good setting for preventively meaningful support and treatment (Mayerhofer 2009: sec. 37 para. 1; Kunz 1986: 187). As stated in Section 20 of the Austrian Penitentiary System Act (*Strafvollzugsgesetz*, hereinafter "APSA"), enforcing a prison sentence is meant to assist the convicted person in obtaining an honest approach to life that is adapted to the needs of life in a community, as well as to prevent them acting on criminal leanings. A great number of short-term prison sentences would likely interfere with these purposes, as financial, spatial and human resources must be divided amongst all inmates, whilst they would better be distributed primarily to long-term detainees. If the penitentiary system lacks resources, this would therefore multiply its negative aspects (Nowakowski 1973: 1; Kunz 1986: 187; Birklbauer 1998: 76).

Additionally, it is stigmatising to be known as someone with a criminal record – even more so if one has served time in prison. This stigma may hinder the successful resocialisation of the convicted person and may produce a negative self-image. The enforcement of a prison sentence states clearly and publicly that the crime in question was a serious one (Birklbauer 1998: 76). For these reasons, courts must deliberate thoroughly whether imprisoning the convicted person is necessary or if a fine would be the more useful sanction, especially with a view to successful resocialisation.

3.2. Alternatives to short-term detention

Empirical research regarding the effectiveness of various criminal sanctions in terms of future legal conduct led to the concept of the interchangeability of punishments (Kunz 1986: 192; Weigend 1986: 266; Bommer 2017: 380; Singelnstein, Kunz 2021: sec. 20 para. 39). According to this thesis, on average, short-term imprisonment does not have a greater special preventive impact than alternative, non-custodial sanctions. Even if selection effects are considered, meaning that

prison sentences are more often imposed on convicted people with a poorer preventive prognosis, the data clearly suggest that incarcerated people are more likely to reoffend than those who are fined (Mazzucchelli 2018: sec. 41 para. 10). There is no scholarly research as to which cases may hold more preventive promise given a short prison sentence (Bommer 2017: 380). The only argument for this sanction can be the evident ineffectiveness of previous fines on recidivists. Considering the concept of the interchangeability of punishment, the principle of *ultima ratio* demands a sanction that interferes in the most minimal way with the fundamental rights of the convicted person. This must be honoured by legislators as well as the judiciary (Mazzucchelli 2018: sec. 41 para. 11).

Austrian lawmakers have drawn up various alternatives to short prison sentences. Firstly, there is the possibility of suspending the execution of imprisonment for up to two years and granting probation, if it can be expected that the sentence will serve the convicted person as a warning and that they will commit no further crimes in future – even without the influence exerted by serving the sentence (Section 43 ACC). Secondly, there is the combination of paying a fine and suspending the execution of the punishment (Section 43a(2) ACC). A provision for extraordinary mitigation of punishment (Section 41(3) ACC) and special regulations for juveniles and young adults (people under the age of 21) allow more leeway for granting parole (Sections 5(9), 19(2) AJCA). Although electronically monitored house arrest (Sections 157 et seq. APSA) is formally a method for executing a custodial sentence, it prevents most of the disadvantages of front-door sentencing. Finally, diversion (Sections 198 et seq. Austrian Criminal Procedure Act) should also be mentioned in this context, because it is an alternative form of sentencing that extends into the medium range of criminality and to a large extent also avoids short custodial sentences.

3.3. Special designs for the execution of a prison sentence

A complete abolition of short prison sentences has not been on the political agenda in Austria so far. The legislature continues to believe in a certain special preventive need for short-term detention and imposes this sanction to a considerable extent, as shown above. In the juridical literature strong commitments can be found for short prison sentences, as well. The motives for this viewpoint vary.

One of the advantages of short-term detention is seen in a sort of shock therapy (a "short, sharp shock"), at least for certain groups of offenders, such as economic, juvenile or first-time offenders (Jescheck 1977: 261; Kunz 1986: 201; Mayerhofer 2009: sec. 37 para. 7). A general preventive need for the short prison sentence has also repeatedly been cited (EM ACC 1974: 129). It is sometimes argued on the grounds of social equality that financially weaker offenders would benefit far less from the primacy of the monetary penalty than wealthier offenders (Killias 1994: 124; Killias 2011: 632). However, this egalitarian claim is rejected by the majority due to the overwhelming disadvantages of the short custodial sentence (Birklbauer 1998: 79; Mazzucchelli 2018: sec. 41 para. 11).

In order to avoid the danger of desocialisation, proponents of short prison sentences are also considering alternative models such as imprisonment for employed persons during statutory recreational leave (Kohlmann 1996: 614) or imprisonment in instalments at weekends or during free time only (Kunz 1986: 200; Weigend 1986: 263; Laun 2002: 273). This would turn the short custodial sentence into a "leisure sentence" (Dolde, Rössner 1987: 424). The above-mentioned electronically monitored house arrest is a front-door form of imprisonment also intended to protect convicted persons from these disadvantages, and is thus also used as an argument for leaving the short custodial sentence in place. In Switzerland, there is the institution of so-called semi-detention ("*Halbgefangenschaft*", Art 77b Swiss Criminal Code) in order to keep short prison sentences acceptable (Kunz 1986: 189).

3.4. Community service instead of default imprisonment

If a fine is uncollectible, a substitute term of imprisonment is imposed. One day of default imprisonment corresponds to two daily rates (Section 19(3) ACC). Since a fine can currently amount to a maximum of 720 daily rates and given the two-to-one ratio, a substitute term of imprisonment is necessarily short (up to 360 days). Only the application of Section 39 ACC (penalty aggravation for recidivism) and Section 313 ACC (exploitation of an official position) may result in a fine of up to 1,080 daily rates and thus the possibility that the default imprisonment exceeds one year (up to 540 days, i.e. almost 18 months). Since there is no difference in the execution of primary and substitute custodial sentences, both are to be judged as equally harmful. For societal reasons and in order to prevent the negative effects of imprisonment, in 2008 the legislature created the possibility for convicted persons to escape the execution of a substitute custodial sentence by performing community service (Sections 3 third sentence and 3a APSA, Federal Law Gazette I 109/2007): Execution of a substitute term of imprisonment of less than nine months shall not be carried out if the offender performs community service. This possibility is missing for primary prison sentences in Austrian criminal law, in order to ultimately avoid the creation of a new primary sanction (in contrast to Section 79a Swiss Criminal Code). The extent to which the introduction of community service as a primary sanction could be a way forward is a controversial topic of discussion.

4. Section 37 ACC in detail

If a criminal act is punishable by a fine as an alternative punishment to imprisonment, there is no need to revert to Section 37 ACC and its restrictive requirements for the imposition of a fine. An explicit legal priority of a fine in the case of an alternative threat of a fine and imprisonment as proposed by the 1971 govern-

ment bill did not enter into force. However, this does not change the principle of giving priority to fines over imprisonment. A custodial sentence is only justified in exceptional cases if the law gives the court the choice between the two (Supreme Court 12 Os 137/90; Venier 2016: 818; Flora 2021: sec. 37 para. 30; Fabrizy, Michel-Kwapinski, Oshidari 2022: sec. 37 para. 6).

4.1. Conditions for the application of Section 37(1) ACC

Section 37(1) ACC cumulatively requires a criminal act punishable by no more than five years of imprisonment, a hypothetically imposed custodial sentence of up to and including one year and a positive special preventive prognosis. These three prerequisites are sufficient; there is no need, for example, for special mitigating reasons in order to be able to impose a fine instead of a prison sentence, because Section 37 ACC classifies fines and custodial sentences as equivalent sanctions. Besides, imposing a fine due to the fact that the offender is unfit for detention is inadmissible (Pallin 1996: sec. 37 para. 15).

Furthermore, for the application of Section 37 ACC it is irrelevant whether the defendant is able to (legally) raise the funds required to pay a fine (EM ACC 1974: 130; Supreme Court 9 Os 19/81; Pallin 1982: para. 135; Pallin 1996: sec. 37 para. 15; Flora 2021: sec. 37 para. 27). The (limited) financial means of the offender are to be taken into account only when assessing the daily rate's amount at the second stage of assessing a fine (Supreme Court 9 Os 148/86) and not at the first stage, when determining the number of daily sentences appropriate to the offender's guilt. Moreover, the legislature's aim in setting a minimum daily fine of €4.00 (Section 19(2) ACC) is to ensure that there are no unaffordable fines.

It is also irrelevant whether the convicted person will pay the fine themselves or whether someone else is likely to pay it for them. This circumstance was generally accepted by the legislature when regulating fines (Pallin 1982: para. 135; Flora 2021: sec. 37 para. 27). Otherwise, the imposition of a fine on an offender who has a particularly good financial situation or an extraordinarily high income, so that even the maximum daily fine of €5,000 would not amount to a noticeable loss for them, would also have to be inadmissible.

4.1.1. Imprisonment of up to five years

To determine the maximum penalty of imprisonment as the first prerequisite, it is necessary to examine not only the upper limit of the penalty provided for in the offence to be sentenced, but also whether other sentencing provisions are to be applied. When it comes to the Criminal Code, cases of imposing an additional penalty (Sections 31, 40 ACC) and increasing the penalty range according to Sections 39 and 313 ACC come into consideration for this. Section 5(4) of the Austrian Juvenile Court Act (*Jugendgerichtsgesetz*, hereinafter "AJCA") is relevant to juvenile offenders.

4.1.2. Hypothetical prison sentence of up to one year

As a second prerequisite, the court must carry out a hypothetical assessment of the custodial sentence and determine whether a custodial sentence of more than one year would be appropriate for the offence and the culpability of the offender, weighing the mitigating and aggravating circumstances. If the court concludes that a prison sentence of no more than one year would be appropriate for the punishable act, Section 37 ACC is indicated. The extent of this hypothetical term of imprisonment does not have to be included in the reasons for the judgment (Tipold 2020: sec. 37 para. 8), nor does the court have to determine it exactly. It is only necessary to assess whether a custodial sentence of a maximum of one year is appropriate in terms of the crime and the offender's guilt. Any credit for prior imprisonment pursuant to Section 38 ACC is not to be taken into account here.

4.1.3. Positive special preventive prognosis

The imposition of a fine in accordance with Section 37 ACC is mandatory if the first two conditions outlined above are met, unless a custodial sentence is indispensable for special preventive reasons and is thus the last resort (Supreme Court 13 Os 32/79). This provision reflects the legislature's assessment that in some cases a fine is not as effective as a prison sentence in deterring an offender from committing further criminal acts. In this respect, suspending the execution of a prison sentence could be necessary as a special preventive measure, for example, if a resocialising effect on the offender during the probationary period can be assumed (EM ACC 1974: 130; Tipold 2020: sec. 37 para. 12). Of course, this effect can also be achieved by a partially suspended execution of a fine (Section 43a (1) ACC). The objection to a short, executed prison sentence is that it can hardly have a resocialisation effect in terms of special prevention and that it only has a security effect in those months in which the convicted person is in prison. The deterring and warning function – which has not been empirically proven – cannot legitimise a short prison sentence for special preventive reasons (Kunz 1986: 188; Pallin 1996: sec. 37 para. 11; Flora 2021: sec. 37 para. 12). Thus, in the end, the prevention requirement remains very case-specific and it is difficult to determine the line.

Numerous published decisions on the prevention requirement under Section 37 ACC concern alcohol-related road traffic accidents, with a particular emphasis on the influence of alcohol and previous criminal offences. For example, the Higher Regional Court of Innsbruck (7 Bs 207/89) ruled that Section 37 ACC should not be applied to a traffic offender who had a particularly high blood alcohol level at the time of the accident and a history of traffic fines. In another case, the requirement of a short prison sentence was negated in the case of a motor vehicle driver with multiple administrative convictions who had already caused a serious traffic accident once in the past (Higher Regional Court of Innsbruck, 8 Bs 444/89).

However, the perpetrator's alcohol use, being the cause of a traffic accident resulting in injury or death, does not generally prevent the application of Section 37 ACC (Higher Regional Court of Innsbruck 4 Bs 666/85). The Higher Regional Court of Graz (10 Bs 168/81), for example, ruled that the imposition of a fine may be considered in extremely exceptional cases where the intoxicated driver of a vehicle causes death or serious injury to a person. Such an exception would be if the injured person was a good acquaintance of the perpetrator, had consumed alcohol with the latter before starting the journey, was not wearing a seat belt during the journey (having a great influence on the degree of injury) and knew the road conditions, whilst the driver could only be blamed for a minor fault (skidding when downshifting on an icy road). The Higher Regional Court of Vienna (25 Bs 97/92) also ruled in this direction when it exceptionally refrained from imposing a custodial sentence on a 66-year-old intoxicated motor vehicle driver who had not been at fault up to that point and who had surrendered his driving licence after a traffic accident for which he was responsible, because the severity of the victim's injury (whiplash) was based only on her inability to work for the duration of 24 days. The imposition of a fine was also not precluded by the heavy alcohol consumption (2.5 per mille), as the perpetrator "took refuge in alcohol" due to a serious illness.

Irrespective of alcohol-related accidents, both case law and the literature emphasise that previous convictions, even if they are for similar offences, do not prevent the application of Section 37 ACC in principle and that the execution of a fine after previous convictions with suspended punishment is suitable for resocialisation (Supreme Court 9 Os 83/76; 9 Os 178/76; 12 Os 65/79). In addition, a previously orderly lifestyle (Supreme Court 11 Os 93/77) or a long period of good conduct following an offence are explicitly cited as characteristics for a positive prevention prognosis (Supreme Court 13 Os 118/76).

4.2. Conditions for the application of Section 37(2) ACC

Section 37(2) ACC differs from subsection (1) in the requirement for an abstract threat of punishment and in the requirements for the prevention prognosis. The requirement of a hypothetical custodial sentence of up to one year is identical for both provisions. For juvenile offences, the application of section 37(2) ACC is excluded by section 5(8) AJCA. This is in line with the general principle of section 5(1) AJCA, which states that the application of juvenile criminal law primarily serves the purpose of deterring an offender from committing criminal acts. Therefore, the consideration of general preventive aspects, as allowed by section 37(2) ACC, cannot be reconciled with this principle. For young adults, on the other hand, section 37(2) ACC is applicable, although the emphasis on special prevention also applies to this age group (cf. section 19(2) AJCA).

4.2.1. Imprisonment of up to ten years

The first criterion for Section 37(2) ACC is the threat of a custodial sentence of more than five but no more than ten years for committing a criminal offence. It seems doubtful that the criterion of a maximum term of imprisonment makes sense in this context, especially since for an offence punishable by more than ten years' imprisonment it is hardly conceivable to have cases in which a hypothetical term of imprisonment of no more than one year seems appropriate. The threatened minimum term of imprisonment for such serious offences usually already exceeds one year, meaning that without a considerable preponderance of the mitigating over the aggravating circumstances (extraordinary mitigation of punishment as defined in Section 41(1) ACC), the second criterion required for Section 37 ACC cannot be met. However, the legislature expressly intended to exclude imposing fines for the most serious offences due to their abstract threat of punishment, even if the individual case is to be assessed as extraordinarily low in guilt (EM ACC 1974: 131). For example, in the case of a conviction for murder (Section 75 ACC), a fine is excluded even in the least serious cases which are punished by the absolute minimum of imprisonment of one year. This exposes the offender to the disadvantages of a short prison sentence. The drawbacks of short-term detention can be avoided only by suspending execution (Section 43 ACC) of the punishment or using electronically monitored house arrest.

4.2.2. Positive special and general preventive prognosis

Section 37(2) ACC requires a positive special preventive prognosis to the effect that a fine will deter the offender from committing further criminal acts and that the imposition of a custodial sentence is not necessary to achieve this purpose. Furthermore, the imposition of a fine must be sufficient to deter others from committing criminal acts. Since the Criminal Law Amendment Act 2015, there no longer have to be any special reasons for this general preventive requirement that would indicate that a fine would also deter other potential offenders from committing criminal acts. In this respect, the requirements for the general preventive requirement for a custodial sentence have been lowered, ultimately leaving few cases for non-application of Section 37(2) ACC on general prevention grounds.

According to the jurisprudence, general preventive reasons prevent the application of Section 37 ACC in the case of a robbery offence (Supreme Court 11 Os 14/77). This case law must be rejected and its generality criticised, not only because of the lack of empirical evidence of a general preventive effect from stricter penalties (see e.g. Delle-Karth 1985: 146). For the court, the possibility must remain open to sanction a robbery offender (Section 142 ACC) with a fine appropriate for their guilt in atypically light cases. Serious robbery offences (Section 143 ACC) are outside the scope of Section 37 ACC in any case due to the threat of punishment.

Moreover, general prevention considerations preclude the application of Section 37 ACC even in the case of less atypically light attacks against the integrity of justice (Section 302 ACC; Supreme Court 14 Os 148/88). According to the jurisprudence, general prevention requires the imposition of a custodial sentence in the case of drink drivers who are at fault for a traffic accident, due to the frequency and dangerousness of drink driving (Supreme Court 12 Os 122/76; 12 Os 88/81). However, all these cases now fall under Section 37(1) ACC due to the penalty, which means that since the Criminal Law Amendment Act 2015, general preventive aspects are no longer relevant for these offences. This case law is therefore obsolete.

4.3. Legal consequences

4.3.1. Original imposition of a fine

If the conditions of Section 37(1) or (2) ACC are met, a fine is imposed in accordance with the rules of Section 19 ACC. The number of daily sentences under Section 37 ACC is determined originally and not by a mathematical conversion of the custodial sentence assessed as appropriate to the offence and the defendant's guilt (EM ACC 1974: 130; Supreme Court 13 Os 74/05i; 14 Os 60/91; Zipf 1976: 176; Mayerhofer 2009: sec. 37 para. 43; Tipold 2020: sec. 37 para. 9; Flora 2021: sec. 37 para. 10; Fabrizy, Michel-Kwapinski, Oshidari 2022: sec. 37 para. 5). This results from the fact that the legislature deliberately refrained from first having a concrete custodial sentence visibly measured and then converting it into a monetary penalty according to Section 19(3) second sentence ACC (Supreme Court 14 Os 60/91). The two types of punishment are too different in their preventive effect for such an approach (EM ACC 1974: 130). In any case, the waiver of the more severe prison sentence may not lead to a higher number of daily sentences of the fine in return. Despite the original assessment of the fine, the conversion rate of Section 19 (3) ACC must serve as a guideline (EM ACC 1974: 131; Mayerhofer 2009: sec. 37 para. 5). The upper limit of no more than 720 daily sentences provided for in Section 37 ACC also suggests bearing the conversion rate in mind; it results from the hypothetical custodial sentence of up to one year and the legislature's assessment in relation to the substitute custodial sentence, which equates one day's deprivation of liberty with two daily sentences of a fine.

In the original fine assessment of Section 37 ACC, the multi-part approach of the daily rate system must be taken particularly seriously. The personal financial means of the offender must not influence the determination of the number of daily sentences in such a way that a low expected daily rate is compensated for by a higher number of daily sentences in order to achieve a considerable total amount of the fine. In such an approach, an unaffordable fine would result in the execution of an unreasonably high substitute term of imprisonment, which would undermine the objective of Section 37 ACC.

As a result of the original assessment of fines according to Section 37 ACC, there is no need to apply the provision of extraordinary mitigation of punishment (Section 41 ACC). The court may impose a fine even if the requirements stated therein are not met (Supreme Court 14 Os 60/91; Mayerhofer 2009: sec. 37 para. 43; Medigovic, Reindl-Krauskopf, Luef-Kölbl 2016: 100; Flora 2021: sec. 37 para. 34). Thus, the mandatory imposition of a prison sentence in the case of death as provided for in Section 41(2) ACC does not preclude its application due to the independence of Section 37 ACC (Pallin 1983: para. 133; Tipold 2020: sec. 37 para. 10; Flora 2021: sec. 37 para. 35). This also corresponds to the criminal policy intention of Section 37 ACC, which not only provides for prioritising fines in particularly mild cases, but is also to be understood as a separate sentencing rule. Whether the substitute term of imprisonment specified for a fine is below the minimum penalty for the convicted offence is thus irrelevant (Tipold 2020: sec. 37 para. 10).

4.3.2. Fine of up to 720 daily sentences

Section 37 ACC provides for an upper limit of 720 daily sentences for the fine. Partial suspension of the execution of a fine imposed under Section 37 ACC is permissible in the same way as for any other fine. Section 43a(1) ACC does not make any distinction here (Higher Regional Court of Vienna, 23 Bs 317/88). However, the preventive considerations for the imposition of a fine under Section 37 ACC and for its (partial) suspension under Sections 43 and 43a ACC may lead to different results due to the different points of reference (Pallin 1982: para. 137). For example, a fine under Section 37(1) ACC could be ruled out because of special preventive concerns, but suspending the execution of a custodial sentence imposed under Section 43 ACC could be regarded as sufficient to deter the offender from committing further criminal acts. However, there are no tangible criteria for one or the other option, especially since the preventive prognosis cannot truly be empirically substantiated, but is rather a "question of faith". The relevant case law, which regularly does not find its way to the Supreme Court, has not been published either.

Conclusions

Due to the grave negative effects of brief prison sentences, the legislature has striven to avoid short-term detention of offenders, or at least its execution. There are various possibilities to sanction criminal acts without putting the perpetrator in prison. The most important one in Austrian criminal law is likely the application of Section 37 ACC, which states that a short imprisonment term for committing an offence that is punished by a maximum of ten years' imprisonment shall be replaced by a fine if the court deems it justifiable for preventive reasons. A distinction is made according to whether the threatened penalty is only a custodial

sentence of up to a maximum of five years (para. 1). Here, it is exclusively a matter of special preventive requirements. In the case of offences punished by more than five and up to ten years' imprisonment, general prevention aspects must also be taken into account (para. 2). Consequently, short custodial sentences are only permissible if the requirements of Section 37 are not met (*ultima ratio* principle). Even if short-term detention is modified to mitigate its negative impact, it must be a last resort for sanctioning petty or medium criminality. However, in recent years a policy push towards a more severe approach against criminality can be observed. According to the empirical evidence (see Figure 1), however, the courts have so far not allowed themselves to be pressurised into giving in to these punitive efforts.

It is therefore gratifying to note that in Austria, since the 2015 criminal law reform, short custodial sentences under Section 37 ACC have been for up to one year, whereas previously this only applied to those of up to six months. In order to further promote this welcome legal development, it is proposed to abandon the criterion that the criminal act must not be punishable by more than ten years. In addition, the general prevention requirement could be removed. There are no reliable empirical studies concluding that stricter penalties have a better preventive effect (cf. the thesis of the interchangeability of punishments). It would be sufficient to standardise the hypothetical imposition of a custodial sentence of no more than one year (and a positive special preventive prognosis) as a prerequisite for the application of Section 37 ACC. Although the abstract threat of punishment indicates the legislature's assessment of the seriousness of a crime, the concrete crime and the culpability of the offender should ultimately be decisive for the sanction. Lastly, it must be recommended to raise the general minimum term of imprisonment from one day (Section 18(2) ACC) to at least one month.

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Convergent and divergent pathways: Electronic monitoring (EM) in England and Wales and Poland

Ścieżki zbieżne i rozbieżne. Monitoring elektroniczny (ME) w Anglii i Walii oraz Polsce

Abstract: Electronic monitoring (EM) is a fixture in most criminal justice systems in Europe and around the world, but there is limited research on how EM operates in Eastern European states. Previous comparative research identified two distinct approaches to how EM is used and operated but Eastern Europe was not included in the analysis (Hucklesby, Beyens, Boone 2021). This paper addresses this knowledge gap by examining the use of EM in Poland and comparing it with England and Wales, thereby identifying similarities and differences in their approaches. The two jurisdictions are good comparators because the Polish system was originally modelled on England and Wales, they were both early adopters of EM in their respective parts of Europe, they share common problems of high prison populations and overcrowded prisons and they use EM extensively. The paper explores whether Poland has a distinct approach to EM implementation which differs from the British or Western European approaches and whether there might be a distinctive Eastern European model of EM. It argues that whilst the Polish approach to EM has evolved away from the British approach to share many of the features of the Western European model, it is sufficiently distinctive to suggest the existence of a third model or approach. Consequently, it raises questions about whether there is an Eastern European model or whether Poland's approach is unique. The paper concludes by examining enduring questions about whether the approach of England and Wales or Poland have more effectively managed prison populations. It suggests that EM's impact on prison populations has been marginal at best in both jurisdictions, putting ethical issues about its use into sharper focus.

Keywords: electronic monitoring, non-custodial sanctions and measures, alternatives to prison, suspended sentences, pre-trial measures

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Abstrakt: Monitoring elektroniczny (ME) jest elementem większości systemów sprawiedliwości karnej w Europie i na całym świecie, ale liczba badań na temat funkcjonowania ME w państwach Europy Wschodniej jest ograniczona. Wcześniejsze badania porównawcze zidentyfikowały dwa różne podejścia do korzystania z ME i jego funkcjonowania, model brytyjski i europejski (Hucklesby, Beyens, Boone 2021), ale Europa Wschodnia nie została uwzględniona w analizie. Niniejszy artykuł ma na celu wypełnienie tej luki poprzez zbadanie wykorzystania ME w Polsce i porównanie go z Anglią i Walią, w celu zidentyfikowania podobieństw i różnic. Obie jurysdykcje są dobrymi obiektami porównań, ponieważ system polski pierwotnie wzorowano na modelu Anglii i Walii, oba kraje wcześnie wprowadziły ME w regionach Europy, mają wspólne problemy z dużą liczbą więźniów i przepełnionymi więzieniami oraz są aktywnymi użytkownikami ME. W artykule staramy się ustalić, czy Polska bardziej przypomina podejście do ME brytyjskie, czy europejskie oraz czy może istnieć odrębne podejście wschodnioeuropejskie. W artykule stwierdzamy, że chociaż podejście Polski do ME ewoluowało, oddalając się od modelu brytyjskiego w kierunku modelu europejskiego, to jest wystarczająco charakterystyczne, aby sugerować występowanie więcej niż jednego modelu w Europie. W związku z tym w artykule rozważamy, czy wcześniej zidentyfikowany model europejski ME to właściwie model zachodnioeuropejski, co rodzi pytania, czy istnieje także model wschodnioeuropejski, czy też podejście Polski jest unikalne. Artykuł kończy się analizą zawsze aktualnych pytań dotyczących tego, czy podejście Anglii i Walii oraz Polski pozwalało na bardziej efektywne zarządzanie liczbą więźniów. Sugerujemy, że wpływ ME na liczbę więźniów był co najwyżej marginalny w obu jurysdykcjach, co powoduje skupienie się na kwestiach etycznych związanych z jego wykorzystaniem.

Słowa kluczowe: monitoring elektroniczny, nieizolacyjne kary i środki, alternatywy dla więzienia, kara z warunkowym zawieszeniem wykonania, środki zapobiegawcze

Introduction

Electronic monitoring (EM) is now widely deployed in Europe and around the world, and the number of individuals required to wear monitoring devices continues to increase. Its growing importance to justice systems requires increased scrutiny at both national and international levels. EM is an umbrella term used to describe a growing and diverse collection of technologies which remotely monitor the presence, movements and/or behaviour of individuals in conflict with the law. Individuals subject to EM are required to wear devices specifically designed for the purpose, usually around their ankle, for a specified time. The devices collect and send data to alert the authorities about non-compliance events. There is no standard model of EM. EM technologies are implemented in different ways and for various purposes using different regimes within and between countries (Hucklesby 2016; 2021). Consequently, referring to EM as one homogeneous tool is misleading. Unfortunately, the EM literature often does not refer to the regime or identify the technology when discussing research findings or making theoretical contributions (Belur et al. 2020). Many policy and theoretical debates also take place without sufficient understanding and/or explanation of the technology and/or regime (McNeill, Beyens 2013; Hucklesby et al. 2016). Policy transfer has been a feature throughout the development of EM, and governments draw on

international research as a basis for their decision-making – often without full knowledge of the context in which EM operates (Gudders 2017; Scottish Government 2019). Consequently, conclusions are drawn about crucial questions, such as what makes EM effective, without an appreciation of the variety of ways in which it is used, and how this may influence outcomes (Beyens, McNeill 2013; Hucklesby et al. 2016). Simultaneously, theoretical contributions are sometimes based on a limited understanding of EM and/or extrapolate from one context or technology to EM in general.

Very little comparative research has been done on EM, despite its growing importance in the penal landscape (cf. Hucklesby et al. 2016; Hucklesby, Beyens, Boone 2021; Lopez Riba 2023). Whilst comparing statistics on the use of EM is valuable, the paucity of published statistics means that it can only be a starting point. This approach also fails to take account of the nuances of how EM is used in different jurisdictions (Hucklesby, Beyens, Boone 2021). Detailed comparative research, as described in this paper, allows differences and similarities between jurisdictions to be explored which improves understanding and provides additional explanatory power to inform theoretical and policy debates (Nelken 2010; Nelken, Hamilton 2022). It also increases the likelihood of identifying effective practices providing the basis for evidence-based policymaking. This type of research is now possible because of the spread of EM across Europe and the rest of the world, facilitating comparisons and uncovering the different ways in which it is implemented in terms of the technologies deployed, the intensity of the regimes, use groups and so on (Hucklesby et al. 2016; Hucklesby, Beyens, Boone 2021).

To our knowledge three comparative studies of EM have been completed in Europe (Hucklesby et al. 2016; Parkànyi, Hucklesby 2021; Lopez Riba 2023). These studies have mostly focussed on Western European jurisdictions. The exception is Eszter Parkànyi and Anthea Hucklesby's (2021) study of EM use with juveniles in England and Wales, the Netherlands and Hungary. This study highlighted the different approach taken by Hungary, an Eastern European state, compared to the other two jurisdictions in relation to some aspects of how EM was implemented. These included being managed by the police rather than probation services and a strict regime including 24-hour house arrest and stringent enforcement of breaches. However, it was unclear whether a similar approach was used with adults and/or whether it was shared by other Eastern European states. These questions are explored in this paper, adding to knowledge about another Eastern European country by comparing it to England and Wales and addressing the question of whether there is a distinctive Eastern European model of EM.

The first comparative study of EM in Europe explored the use of EM with adults in five Western European jurisdictions (Belgium, England and Wales, Germany, the Netherlands and Scotland) (Hucklesby et al. 2016; Hucklesby, Beyens, Boone 2021). Germany made very limited use of EM because of its complicated history, and was thus an outlier (Dünkel, Thiele, Treig 2016; 2017). From the other four jurisdictions, two approaches to EM's implementation were identified: the British

and Western European models. England and Wales and Scotland conformed most closely to the British model, whilst Belgium and the Netherlands adhered more to the Western European model (Beyens, Roosen 2016; Boone, Van der Kooij, Rap 2016; 2017). The main features of the models are set out in Table 1.

Table 1. Models of EM

	British model	**Western European model**
Integration with criminal justice agencies and structures	Low	High
Probation involvement	Low	High
Standalone EM available	Yes	No
Supervision and support provided to monitored individuals	24/7 monitoring centre operated by a private company	Probation Services – not 24/7
Regime intensity	Low	High
Maximum time of EM	Shorter	Longer
Use groups	Diverse	Prisoners
Language used to describe EM regimes	Restriction	Freedom
Breach procedures	Regulated and routinised	Discretionary and informal
Use of EM	Higher	Lower

Source: Hucklesby (2016).

The most prominent features which delineate the models are their level of integration into the criminal justice system, and particularly whether EM is an integral part of probation services and is managed by them; the regime intensity and use groups. In the British model, EM is not managed as part of the probation service but is a separately managed service. In both England and Wales and Scotland, all aspects of EM are run under government contract by the private sector, which provides the telecommunications infrastructure, EM equipment and EM service, including the monitoring centre and field workers who visit wearers' homes to fit and remove equipment and to investigate violations and so on (Hucklesby 2018). These two factors have meant that EM has not been well integrated into the criminal justice system and instead runs on a parallel track (CJJI 2008; 2012; Mair, Nellis 2016; HMIP 2020).

In the Western European model, EM is run and managed as an integral part of the criminal justice system, and probation services are involved in all or most of the EM operation. Equipment is purchased from multinational EM companies under contract. Probation staff are involved in managing all aspects of EM, from fitting the equipment to responding to breaches (Boone, Van der Kooij, Rap 2016; 2017). The Western European model is also characterised by intensive regimes that manage wearers wholistically, closely resembling penitentiary-style control (Beyens,

Kaminski 2013). Wearers are usually provided with a structured plan for each day, the number of hours under curfew in any given day is high (around 20 hours per day), wearers are required to participate in useful activities (work, education etc.) and they are closely supervised and supported by probation services. Wearers are technically prisoners and EM is described as providing hours of "freedom". Breach procedures are managed by the probation service and are generally discretionary and informal (Boone, Van der Kooij, Rap 2016).

By contrast, in the British model EM is used as a standalone measure or can be combined with other requirements of community sentences, but even multi-requirement orders do not involve probation services overseeing the EM element (Hucklesby, Holdsworth 2016). This is generally left for the EM contractor to manage. Curfew hours are referred to as restrictions rather than freedom, and they are generally shorter compared with the Western European model (around 12 hours). Wearers are not required to participate in useful activities or abstain from alcohol or drug use whilst subject to EM (except when an Alcohol Abstinence Monitoring Requirement is imposed [see below]). Under the British model, there is a clear and strict breach policy which is followed for standalone orders and managed by the EM contractor. Breaches of the EM requirements of combined orders are more discretionary because the probation service is the decision-maker rather than the rigid breach procedure followed by the EM contractors (CJJI 2012). Many of these differences are explained by the main use group for EM post-sentence. Under the Western European model, EM is predominantly a way of serving a prison sentence, so EM wearers are technically prisoners. Under the British model, EM is a tool used with the full repertoire of community sanctions and measures to restrict the liberty of wearers. As a result, the British model deployed EM for many different cohorts from the beginning, including pre-trial and as a standalone sentence, and most wearers are deemed not to be prisoners, even when released early from prison and on licence.

These models are ideal types which form a continuum. Jurisdictions can move along the continuum over time, and there have been several instances of this. For example, Kristel Beyens and Marijke Roosen (2016; 2017) found that whilst the probation service continued to manage EM in Belgium, some of the elements – such as close supervision by probation staff – had been reduced for certain groups of wearers (those serving sentences of under three years). England and Wales has increased the curfew hours available for community sentences over time, so they now more closely resemble those found in the Western European model, but practice has not changed significantly as a result. Despite these changes the core features of the models in both of these jurisdictions remain largely intact.

There has been limited scrutiny in the English-language literature of penal policies in general, and EM in particular, in Eastern European states (Dràpal 2023). There is very little information available in English on the Polish EM system, and what does exist is dated, referencing regulations which no longer apply (Stańdo-Kawecka, Grzywa-Holten 2015; Jaskóła, Szewczyk 2017). This article

therefore also improves knowledge and understanding of the current EM system in Poland, which is one of the largest in Europe.

This article fills a knowledge gap about EM in Eastern European states, using Poland as a case study and comparing it to England and Wales. By doing so, it addresses the question of whether Poland more closely resembles the British or Western European models and whether a distinctive Eastern European EM model exists. Poland is a particularly interesting case study because its EM system was modelled on England and Wales after being advised by the UK Ministry of Justice when it was established. It was also one of the first Eastern European states to begin the process of joining the European Union and may be expected to conform more closely to the Western European model as a result, particularly because of the policy transfer activities in criminal justice carried out under EU cooperation agreements. The two jurisdictions are also good comparators because they share common reasons for establishing EM, including high prison populations and overcrowded prisons, and they were both early EM adopters in their respective parts of Europe. The paper argues that Poland has a distinctive approach to implementing EM which has evolved to share many of the features of the Western European model – though not all. This raises questions for future research about whether there is an Eastern European model of EM in additional to a British and Western European model or whether Poland's approach is unique.

The paper proceeds by comparing the context in which EM operates between England and Wales and Poland, before identifying the EM modalities and usage of EM in the two jurisdictions. This is followed by an account of the ways in which EM expanded over time, identifying the different strategies of England and Wales and Poland. The final sections of the paper discuss the operating models for EM and EM regimes before drawing conclusions.

EM in context

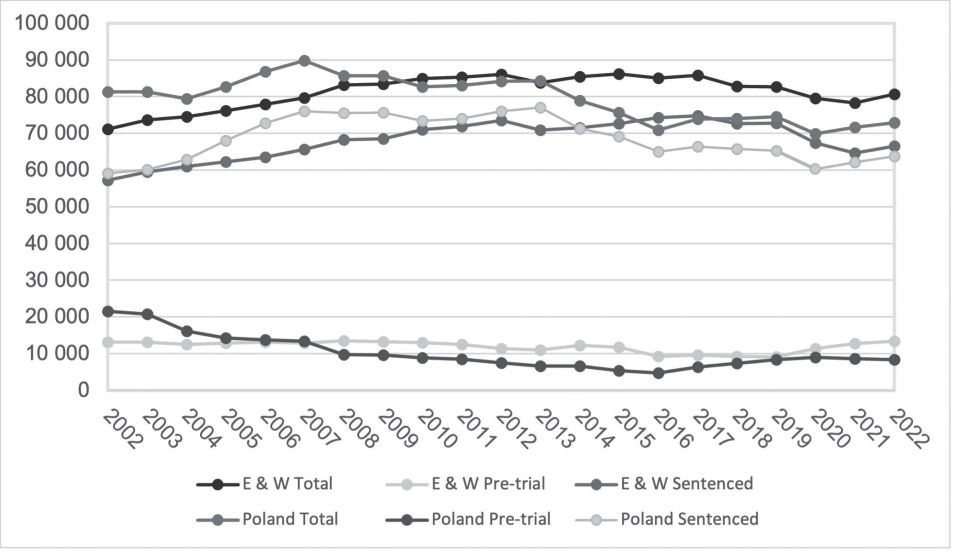
A widely shared reason for governments introducing and expanding EM is to tackle high prison populations and prison capacity issues, although there is limited evidence of EM's effectiveness in meeting this ambition. This section begins by comparing prison populations and prison capacity in England and Wales and Poland to demonstrate that they share a particularly acute challenge in this regard, which has fuelled their appetite for EM and influenced the way in which it has been implemented. The second part of the section identifies several other factors which have impacted upon how EM operates in one jurisdiction or the other.

Historically, both England and Wales and Poland have had high imprisonment rates compared to the rest of Europe. In 2020, the imprisonment rate in England and Wales was 133 per 100,000, compared with 179 per 100,000 in Poland. Both

jurisdictions have reduced their imprisonment rates after 2012 (England and Wales from 153 and Poland from 221) but they rebounded during the pandemic (England and Wales 140 and Poland 208 in March 2023) (ICPR 2023). Figure 1 shows the prison populations for both jurisdictions from 2002 to 2022. It demonstrates that despite a falling imprisonment rate, the prison population in England and Wales has remained above 80,000 since 2007, except for the period 2020–2022, coinciding with the pandemic. By contrast, Poland's prison population tracks its falling imprisonment rate, dropping since 2007 and reaching less than 70,000 in 2020, before rising slightly during the pandemic. Figure 1 shows that sentenced populations comprise most of the prison population in both jurisdictions.

Poland has had considerable success in reducing its pre-trial detention rates, from 35 per 100,000 in 2005 to 11 in 2015, although the rate has since risen to 23 in 2023 (ICPR 2023). This is reflected in Figure 1, which shows that Poland halved its pre-trial detention population between 2002 and 2020. This reduction took place without EM and may explain why it has not been introduced at the pre-trial stage, despite it being considered (Jasiński 1993; Waltoś 2002; ICPR 2023). By contrast, the pre-trial imprisonment rate in England and Wales has remained relatively stable – in the low 20s during the period 2002–2020 – which is also reflected in a relatively stable pre-trial prison population, as shown in Figure 1. EM may provide part of the explanation for the stability of England and Wales' pre-trial prison population (Hucklesby 2023). The population has increased significantly since the pandemic, demonstrated by the rise in the pre-trial imprisonment rate to 27 per 100,000 in 2023.

Figure 1. Prison population in England and Wales and Poland



Source: Ministry of Justice England and Wales (2023a) and Służba Więzienna (2022).

Both jurisdictions have also faced prison capacity issues for many years. In March 2023, prisons in England and Wales were operating at 109 per cent of capacity, which was unevenly distributed across the prison estate (MoJE&W 2022b). Official projections suggest that the prison population will continue to increase to an estimated high of over 106,000 by 2027 (MoJE&W 2023b). Overcrowding and poor conditions have also been major problems in the Polish prison system, resulting in pressure from domestic and international sources to reduce its population. Until 2009, the occupancy rate exceeded 100 per cent, reaching 120 per cent in 2006 (Służba Więzienna 2022). In 2009, the European Court of Human Rights confirmed that the prison overcrowding and conditions amounted to torture (Orchowski v. Poland (17885/04) and Sikorski v. Poland (17599/05)). Although the official occupancy rate had reduced to 92.8 per cent at the time of writing (May 2023), the validity of this measure is contested by the European Committee for the Prevention of Torture and Inhumane and Degrading Treatment and Punishment (CPT 2017; 2022).

England and Wales and Poland have contrasting official discourses about EM's purpose. In Poland the focus has been on alleviating the negative impacts of imprisonment on prisoners and their families and keeping offenders in the community to continue their education, work and family life (Przesławski, Sopiński, Stachowska 2020). There has also been a focus on preventing violations of the human rights of prisoners (Daniel 2019). By contrast, the purpose and function of EM is much broader in England and Wales. Reducing prison populations has featured in debates, but discussions about EM's role in making community sanctions more punitive, credible and enforceable have been much more prevalent. For example, the Minister for Crime and Policing, Kit Malthouse, explained the role of EM in his forward to the Government's EM strategy: "Electronic Monitoring … [is] a valuable tool available to criminal justice partners – a tool which can drive *rigour, discipline, incentives and consequences* in community-based offender management" (MoJE&W 2022a: 3, emphasis added). EM's role is firmly linked to the broader agenda of cutting crime, reducing reoffending and protecting the public in England and Wales (MoJE&W 2022a). However, these claims appear to be rhetoric rather than practice.

The growth of EM in England and Wales also relates to a lack of confidence in the probation service's ability to supervise community sanctions robustly and effectively (Hucklesby and Holdsworth 2016). The roots of the probation service in social work and its continued social work ethos have been viewed as antithetical to the tough approach to community sanctions needed to increase their use and divert individuals from prison (Mair, Nellis 2016). A second unique factor in England and Wales is an ideological commitment by successive governments to private-sector involvement in state services (Hucklesby 2016; Mair, Nellis 2016). These two factors have resulted in a separate EM system which is not fully integrated into the criminal justice system (CJJI 2008; 2012; Mair Nellis 2016; HMIP 2020).

EM uses in England and Wales and Poland

Both jurisdictions were early adopters of EM and first introduced it when there was significant pressure on prisons because of high populations. Whilst they share some of the reasons for introducing and continuing to expand EM, England and Wales and Poland have taken different approaches to implementing it, which fit their legal and penal cultures and the specific needs of their criminal justice systems. England and Wales has adopted a diversified approach, deploying EM at all stages of the criminal justice process. By contrast, Poland has largely stuck with a single use as an alternative means of serving prison sentences. This approach more closely resembles the uses of EM in Europe rather than England and Wales, despite its EM system being modelled on the British system (Beyens, Roosen 2016; Boone, Van der Kooij, Rap 2016). This section examines the development of EM in both jurisdictions identifying common features and differences in the ways EM has been implemented.

In England and Wales EM is available for use at the three stages of the criminal justice process. It has been used pre-trial since 2002 to monitor curfews imposed as a condition of bail. Legally, bail conditions may be imposed to mitigate identified bail risks, including absconding, offending and/or interfering with witnesses (Airs, Elliott, Conrad 2000; Hucklesby 2011). Curfew orders, a community sentence, were implemented nationwide in 1999 (Mair, Nee 1990; Mair, Mortimer 1996). They were originally monitored using Insert (RF) technology, which monitors the presence of wearers in a specific location. Curfew orders required wearers to stay indoors for between two and 12 hours a day for up to six months. In practice, most curfews were imposed overnight for 10–12 hours seven days a week and continue to be (Hucklesby, Holdsworth 2016). They were abolished by the Criminal Justice Act 2003 and became one of 12 (now 14) requirements of community or suspended sentence orders. Currently, EM curfews may be single requirement orders or combined with other requirements such as supervision, unpaid work and drug and alcohol treatment.

So-called backdoor EM measures have been limited in England and Wales compared with many other European countries (Hucklesby et al. 2016). Until recently, Home Detention Curfews (HDC) were the only post-prison use of EM. HDC was introduced in 1999. It allows eligible prisoners serving four years or less to be released up to 180 days earlier than their automatic release date. They are required to comply with a curfew, which must be for at least nine hours a day at an approved residence. In practice, curfew periods are usually 12 hours overnight. Since 2019, Global Positioning System (used to monitor exclusion and inclusion zones and which can provide trial data on the movements of wearers) and Radio Frequency technologies have been available. In common with Poland, HDC is viewed as a privilege and not a right, and prisoners are required to apply. Responsibility for the decision to release sits with Prison Governors, so in contrast to Poland, release on HDC is an executive and not a judicial decision.

EM is also used in immigration cases in England and Wales (Bhatia 2021; ICIBI 2022; Home Office 2023). Currently, GPS monitoring is used with individuals who are not British citizens and who are awaiting deportation after being released from prison, having served sentences of at least 12 months (UK Borders Act 2007).

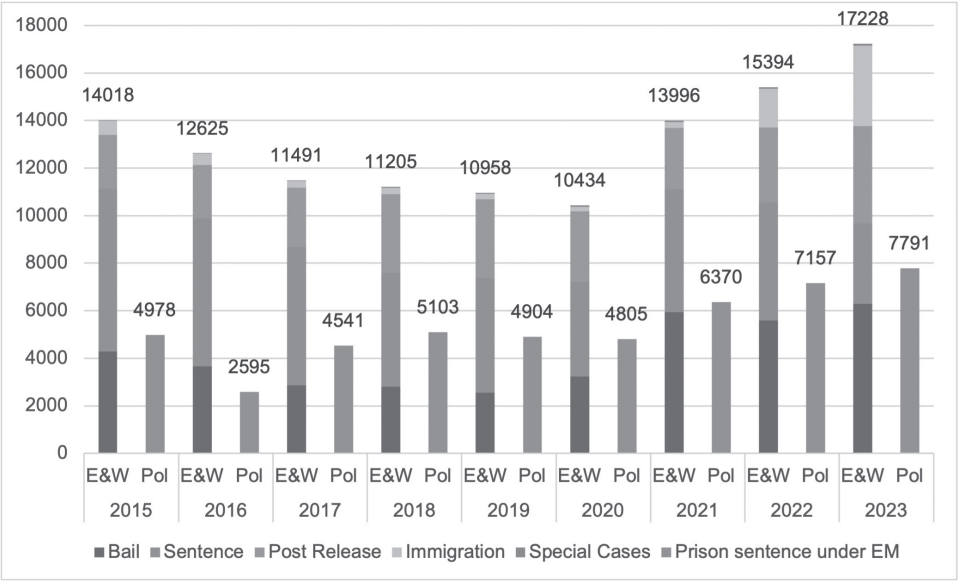
The current uses of EM in Poland are largely limited to a means of serving prison sentences, mirroring original uses in many European countries (Beyens, Roosen 2016; Boone, Van der Kooij, Rap 2016; Nellis et al. 2016). It is not available as a separate punishment, and thus differs from English and Welsh approach of providing alternatives to custody/community sentences. EM is available to everyone sentenced to imprisonment, including those who have been sent to prison because of breaches of other sentences. EM was introduced in 2007 and made available nationwide in January 2012 (Mamak 2014). Prisoners must apply for their sentences to be served on EM. The majority (95 per cent) of applications are submitted by offenders or their lawyers, although they can also be submitted by probation officers, prosecutors or prison directors (Służba Więzienna 2023). The number of applications has been rising since 2016, with 44,829 being submitted in 2020 (Służba Więzienna 2023). They can be submitted when individuals begin to serve their sentences or whilst they wait to enter prison before their sentences start. Consequently, EM in Poland operates as a deprivation of liberty and a direct alternative to prison, and as a front- and back-door measure. This allows some offenders to avoid going to prison and others to be released, mirroring how it is used in some other European jurisdictions, for example, Belgium (Beyens, Roosen 2016). Research in 2012 found that just over half (55 per cent) of those applying for EM did so from prison with just less than half applying whilst in the community (Institute of Justice 2012, cited in Stańko-Kawecka, Grzywa-Holton 2015).

Whilst most EM use in Poland relates to prison sentences, it is also available as a security measure and is used in a small number of cases for these purposes (48 in 2022) (Stasiak 2018). These measures include monitoring bans on attending large events, supervising restraining orders and monitoring individuals when proceedings against them have been discontinued because of findings of insanity or diminished capacity. Since 2015, EM has also been an element of precautionary measures with high-risk individuals convicted of specific offences to prevent further offences (Stasiak 2018; Tużnik 2022). A small number of individuals in England and Wales are also monitored for similar purposes (so-called special cases). In Poland, these individuals are subject to "mobile EM", which tracks their current location, and/or "contactless EM", where wearers are required to keep a minimum distance from a named person. The third type of EM available in Poland is "stationary EM", which requires offenders to stay in at a specified address i.e., curfews and is the most often used type of EM (Jaskóla, Szewczyk 2017).

EM statistics

This section utilises official statistics in England and Wales and Poland to compare the use of EM. Figure 2 shows that on 31 March 2023, 17,350 individuals were on EM in England and Wales. This is compared to 7,791 individuals in Poland in 2023. Based on these figures, Poland has a lower EM rate (21 per 100,000 population) than England and Wales (29 per 100,000) (Służba Więzienna 2023). However, as Figure 2 demonstrates, 3,522 of those on EM in England and Wales on 31 March 2023 were immigration cases rather than criminal justice cases. Removing this cohort from the statistics makes the data more comparable and demonstrates that the rate of EM use in England and Wales is 23 per 100,000 population, which is similar to that of Poland. However, trends in EM use differ. In England and Wales, EM use declined year on year from 2015 until 2020, when it began to increase. By contrast, EM use in Poland has been rising steadily over the same period, except for a brief period in 2016 because of the failed introduction of an EM sentence (see below). Since 2020, the use of EM in Poland has accelerated due to legal changes and expanded capacity.

Figure 2. Electronic monitoring use in England and Wales and Poland 2015–2023



Source: Ministry of Justice England and Wales (2022c; 2023e) and Służba Więzienna (2023).

Figure 2 also shows the breakdown in EM use by cohort in England and Wales. Pre-trial use has increased significantly. In March 2023, it accounted for over a third (36 per cent) of EM orders, and is now the largest single cohort (Mo-

JE&W 2023e). By contrast, there has been a sharp decline in individuals subject to EM as a requirement of community or suspended sentence orders, reaching a low of just under 3,500 in 2023. This decline is likely to be explained by disruption in the probation service due to organisational changes (Dominey, Gelsthorpe 2018; Cracknell 2023) and the introduction of mandatory domestic and safeguarding checks before EM can be imposed (see below) (HMIP 2020). Sentences accounted for a fifth of the EM caseload in March 2023 (MoJE&W 2023a).

Post-custody uses of EM in England and Wales accounted for a quarter of the caseload in March 2023 (MoJE&W 2023e). Figure 2 shows that the number of individuals on EM post-release has been relatively stable since 2015 but has risen since 2021, largely due to the introduction of remote alcohol monitoring for this group (see below).

The continuing expansion of EM in England and Wales and Poland

The previous two sections established the ways in which EM is used in England and Wales and Poland, as well as the extent to which it has been used over time. Both jurisdictions have seen a sharp increase in EM since 2020. Some of the increase is explained by EM being utilised during the pandemic years to limit and control the use of imprisonment and to manage incarcerated populations. The increase in the use of EM in both jurisdictions (see Figure 2) demonstrates their contrasting approaches to EM. In England and Wales, the expansion has been concentrated in pre-trial, post-release and immigration, whereas in Poland the increase is wholly accounted for by the one available option. However, both jurisdictions have signalled their commitment to EM by increasing its use. The Government in England and Wales has made a commitment to expand EM to 26,000 individuals by 2024–2025 (MoJE&W 2021a). In Poland, the operational capacity of EM has been increased over time. Between 2012 and 2021 the capacity of the system remained at 6,000, after which it increased to 8,000 in 2022 and again to 10,000 in 2023 (Służba Więzienna 2023). In this section we turn our attention to the strategies that each jurisdiction has adopted to date to increase the use of EM. England and Wales has taken a diversified approach, whereas Poland has taken a unitary approach.

By the end of the 20th century in England and Wales, the three main modalities of EM still in place today were established. However, EM policy has continued to develop to increase its use to tackle the twin challenges of creating robust community sanctions and measures, and persuading decision-makers to use prison less. Safeguarding and prevention have also become important rationales for the growth of EM use. EM is increasingly viewed as a mechanism to monitor unsafe and unwanted behaviours and to safeguard "vulnerable" individuals, including victims, witnesses, defendants and offenders. The drive for many of these initia-

tives has come from the police, Police and Crime Commissioners and the Mayor's Office for Policing and Crime (MOPAC) in London, who have set up and funded a myriad of schemes to meet specific policing needs. Several Government ministers have also been ardent advocates for the expansion of EM. Private sector suppliers of EM equipment and systems have also lobbied for greater use (Nellis 2018).

This section begins by providing examples of the ways in which EM use has been expanded in England and Wales. The aim is not to provide a comprehensive overview of every change made to EM. It is also important to acknowledge that EM policy is not linear or always pushing in one direction: there are many contradictory trends as well as differences between official discourse and policies and practices. Furthermore, using the term "strategy" does not signal a coordinated, well-planned approach. Rather, many initiatives arise from the specific circumstances in place at the time or from individuals championing a particular use.

The first identifiable strategy used in England and Wales is increasing the range of technologies available and therefore the types of behaviour which can be monitored. Initially RF equipment was the only available technology. Courts were given the power to use GPS to monitor bail conditions and community sentence requirements in November 2018 and it was made available for HDC in 2019. This is noticeably later than many other jurisdictions. It is primarily used to monitor exclusion zones, but trial monitoring (plotting the movements of wearers) is also available. Although GPS accounted for two fifths of those subject to EM in March 2023, its use in criminal justice cases is relatively low and a small proportion of EM use. A total of 7,398 individuals were wearing GPS devices on 31 March 2023, but just over half (n=3872) were criminal justice-related cases (MoJE&W 2023e).

By contrast, England and Wales has been an early adopter of alcohol monitoring technologies (Bainbridge, 2023). This allows remote monitoring of alcohol consumption and is available for people convicted of offences which are alcohol related but who are not dependent on alcohol. The alcohol abstinence monitoring requirement (AAMR) of community and suspended sentence orders has been available since March 2021. AAMRs last up to 120 days and require wearers to abstain from alcohol. Alcohol monitoring was extended to prison leavers, including HDC, in June 2022 (MoJE&W 2023e). Alcohol monitoring on licence (AML) requires either total abstinence or limited alcohol consumption, both of which are monitored remotely via the wearable device. On 31 March 2023, 2,248 individuals were wearing alcohol monitoring devices (MoJE&W 2023e).

The second strategy to promote the use of EM in England and Wales has been to increase the intensity of orders with the objective of broadening the pool of potential wearers by making EM tougher (Hucklesby, Beyens, Boone 2021). This has included increasing the number of hours that curfews can be imposed from 12 hours to 16 hours and the length of curfews from six to 12 months when used as requirements for community and suspended sentence orders. Most recently, the Police, Crime, Sentencing and Courts Act 2022 allows for curfews of up to 20 hours a day, but only for a maximum of 112 hours a week.

Unlike in Poland, the use of EM for people leaving custody was limited to HDC until relatively recently. The numbers of those released have been relatively small and have dropped over time (MoJE&W 2023e). In 2022, 8,695 prisoners were released on HDC and 1,809 individuals were on HDC on 28 April 2023 (MoJE&W 2023e). The low numbers are partly explained by more and more prisoners being automatically disqualified because of their offences or past behaviour (Hucklesby, Holdsworth 2016). However, only about a fifth of eligible prisoners are released (MoJE&W 2023a). The low success rate is explained by a complex set of factors, including prisoners not applying, a risk-adverse culture in the prison service, delays in the decision-making process and a lack of housing (Hucklesby, Holdsworth 2016). Policies have been implemented to increase the number of releases, including streamlining the application process (MoJ 2018) and bringing forward the earliest date that prisoners become eligible before their automatic release date, from 60 days to 90 days in 2002, to 135 days in 2003 and to 180 days in 2023 (HM Government 2023).

The third strategy has been to expand EM to new cohorts and new offences/behaviours. This has included those convicted of alcohol-related offending via the AAMR (see above). A second group are all those leaving custody on licence having served a determinant sentence of 90 days or more (originally 12 months) for acquisitive offences (robbery, burglary and theft) (NAO 2022). This group is monitored using GPS devices via a compulsory licence condition in place for the remainder of their licence period or for 12 months (HM Government 2021; MoJE&W 2021b). The stated reason for introducing the power was to reduce reoffending and recalls to prison. Recalled prisoners comprised a significant proportion of the prison population (14 per cent; n=11,450 on 31 March 2023), adding to the pressure on the prison system (MoJE&W 2023a). This project alone resulted in 1,868 new EM orders in the year ending 31 March 2023 (MoJE&W 2023e).

Other expansion projects have not required legislation and include those suspected or convicted of knife-related offences, identified gang members and those involved in county lines (drug supply chains which exploit children and young people). The rationales for extending EM to these cohorts are complex and go beyond the initial reasons for introducing EM. They include the desire to increase control over individuals in the community, tackle specific types of offending; reduce reoffending and safeguard victims and "vulnerable" individuals involved in offending. This demonstrates well the underlying assumptions of many, that EM can be used in a multiplicity of ways for many purposes which go beyond the original rationales of managing prison populations (Hucklesby, Holdsworth 2016; Hucklesby et al. 2016).

In Poland, the main expansion strategy has been to increase the pool of eligible prisoners whilst still sticking to one modality of EM. This contrasts with other Western European nations, which have diversified EM into other areas, including pre-trial and sentencing measures (Beyens, Roosen 1996; Boone, Van der Kooij, Rap 2016; Lopez Riba 2023). Originally, only individuals serving sentences of six

months or less were eligible for EM in Poland. This criterion was changed to 12 months in 2010 and further extended to 18 months in March 2020. The most recent change was made in response to the COVID-19 pandemic, with the expectation that it would impact 20,000 sentenced individuals, of whom 16,000 would not have begun their sentences. The long-term benefits were also highlighted, including the larger number of individuals who would be eligible for EM (Polish Government 2020). The extension of the eligibility criteria has also led to individuals spending longer on EM, increasing from a maximum of six to 18 months.

To be eligible for EM, individuals must also meet conditions: they cannot have served a prison sentence of one year or more imposed according to special provisions relating to reoffending (Art. 64 para. 2 Polish Penal Code); they must have a permanent place of residence; adult cohabitees must consent to EM; and monitoring must be technically possible. Most importantly, serving a sentence on EM must achieve the purpose of the sentence, which in the Polish penal code refers to "evoking in the sentenced individual a willingness to cooperate in shaping socially desirable attitudes, particularly a sense of responsibility and the need to abide by the legal order, thereby refraining from returning to criminal behaviour" (Polish Government 1997a; 1997b; Daniel 2019).

In January 2023, EM for early release was introduced in Poland, demonstrating Poland's commitment to using EM only as a tool to manage its prison population via back-door measures. Prisoners sentenced to up to three years can apply to serve the final six months of their sentence under EM if they meet all the conditions mentioned above. The stated purpose of this measure is to prepare prisoners for release. It was also justified as a mechanism to expand the number of eligible groups and reduce the prison population (Polish Government 2022).

A second strategy has been to change the decision-makers in certain cases, enabling executive rather than judicial decisions and moving closer to the decision-making model for HDC in England and Wales. Two factors have led to this change: delays in the decision-making process and high refusal rates (72 per cent of applications were refused in 2020) (Służba Więzienna 2023). Before January 2023, decisions to use EM could only be made by the Penitentiary Court (a division of the District Court, which adjudicates on matters relating to prisoners, including the execution of sentences, the calculation and enforcement of penalties and EM). In January 2023, the Penitentiary Commission was given the power to grant EM to prisoners serving a maximum sentence of four months. Unlike the Penitentiary Court, which is a judicial body, the Commission is an executive body comprising specialist staff, including prison officers, education staff and trusted representatives of associations, foundations, organisations and religions. The aim of the initiative is to speed up the process, thereby increasing the number of individuals released (Polish Government 2022). Whether its aim will be realised in practice remains to be seen, given that the similar HDC process in England and Wales results in many fewer releases than prisoners who are eligible, because the decision-makers – officially prison governors, but in practice a specialist group of staff – tend

to be risk-adverse and to err on the side of caution. Delays are also a continuing problem, with many prisoners being released well after they become eligible for HDC (Hucklesby, Holdsworth 2016).

A third strategy to increase the take-up of EM in Poland has been to remove some of the restrictions originally put in place when EM was introduced, such as requiring offenders to pay towards the cost of EM and to consent to EM, which were both removed in 2010 (Stańdo-Kawecka, Grzywa-Holton 2015). Other changes have included enabling early release from prison sentences served under EM from 2012, mirroring the provisions for incarcerated individuals. This removed one of the disincentives to applying for EM, that time served on EM would be longer than time served in prison (Stańdo-Kawecka, Grzywa-Holton 2015).

Poland has also experimented with other modalities of EM, but without permanently adopting them. In 2015, Poland briefly used EM as a form of community service, but the initiative stopped after less than a year because it resulted in a loss of confidence in EM and a fall in its use (see Figure 2) (Przesławski, Sopiński, Stachowska 2020). Poland has also piloted remote alcohol monitoring for prisoners housed in a semi-open prison during temporary release for employment, but there are no plans to expand this at the time of writing (Nowak, Grzesiak, Zawaszka 2023).

Whilst the main purpose of legal and policy changes to EM over time in both countries has been to increase its use, there have also been developments which have, or are likely to have, the opposite effect and limit the use of EM. In England and Wales, safeguarding considerations have become important because of a recent thematic report by HM Inspectorate of Probation (2020). The review identified that EM could exacerbate domestic abuse because potential risks were not being identified due to a lack of background checks on offenders and/or cohabitees. As a result, before offenders can be given an EM requirement as part of community sentences, safeguarding checks must be carried out. As discussed above, the effect has been dramatic, significantly reducing the use of EM with community sentences since 2022 (see Figure 2), reportedly because of the time and resources involved in the process of gathering information.

In Poland, there has been a shift to immediate enforcement of prison sentences because of concerns about people losing confidence in the government's ability to punish offenders due to the lack of prison space (Stańdo-Kawecka, Grzywa-Holten 2015). This measure reduces the opportunities for sentenced individuals to apply for EM before being imprisoned. Historically, convicted individuals waited in the community to be called to prison to serve their sentences if they were not detained pre-trial. During this period, they were able to apply for EM and, consequently, some never went to prison. The changes are likely to lead to more individuals spending time in prison before being released on EM, thereby increasing the prison population and negatively impacting upon their lives.

Operating models

One of the defining features of the British and European EM models is the operating model. This section examines the operating models adopted by both England and Wales and Poland. It highlights how after initially following the private sector model of England and Wales, Poland moved to a state operated model resembling those more commonly found in Europe (Hucklesby et al. 2016). However, it differs from many models in Western Europe because it is managed by the prison service rather than the probation service.

As discussed above, in England and Wales EM is run wholly by the private sector with oversight from the Ministry of Justice (Hucklesby 2018). It is notable that Poland initially followed the UK in establishing a wholly private sector-run EM system. At the time, there was an active process of coordination and consultation taking place across Europe, in which many jurisdictions with established EM systems supported other jurisdictions in setting up their EM systems, particularly Western European countries working with Eastern European ones (Gudders 2019). This policy transfer dialogue was augmented by the activities of the private sector companies providing EM equipment and services, who were quick to identify and offer help to any countries considering, or in the process of, setting up an EM system (Gudders 2019; Nellis 2024). The size of Poland and the anticipated EM caseload made it a particularly lucrative potential market. Although none of these activities are documented, the Head of EM in Poland confirmed that the Polish EM system was modelled on England and Wales.

Since EM was first introduced in Poland, significant changes have been made to the operating model, diverging from the British approach. During the first five years (2009–2014) EM was run as a public/private partnership. Initially, EM was operated wholly by the private sector, mirroring the British model. The private sector provided the equipment and the EM service, including running the monitoring centre, undertaking home visits and fitting and removing equipment. The start of the move towards a state operated EM system began very quickly. After seven months the prison service took over running the monitoring centre. Over the next three years, take-up was lower than expected, again mirroring the experience in England and Wales, where the introduction of all new EM initiatives resulted in lower numbers than anticipated (Mair 2005; Stańdo-Kawecka, Grzywa-Holton 2015). In Poland, this led to difficult negotiations with the private providers because the contract was not delivering the expected numbers, nor the anticipated income. At the same time, problems occurred with the IT system, and Poland decided to build its own system to support EM.

During the second EM contract period (2014–2018), Poland moved further away from the British model. A different private company, G4S, provided the equipment, partnering with a local private provider for field services. The prison service managed the IT system and the monitoring centre. Concerns about the

security of data stored in the UK emerged during this time. In 2018, the prison service took complete control of EM, purchasing equipment from a Polish company. Since then, EM has been operated within Polish borders. As far as we are aware this makes Poland unique in Europe given that every other jurisdiction relies on multinational corporations for EM equipment.

EM is managed by the Electronic Supervision Bureau (ESB), which is part of the Central Administration of the Polish prison service. The ESB is responsible for running the monitoring centre, installing electronic monitoring devices, supervising wearers and collecting, processing and protecting wearers' personal data (Przesławski, Sopiński, Stachowska 2020). It works with all of the agencies involved in the execution of sentences and security measures, so although it is a separate entity it is embedded within the criminal justice system, in contrast to the position in England and Wales.

In many respects the Polish operating model now resembles the Western European model, whereby EM is run by the state and integrated within the criminal justice system. It differs, however, from most Western European jurisdictions because it is managed by the prison service rather than the probation service, although probation officers are tasked with supervising individuals on EM (Hucklesby et al. 2016). A second feature differentiating it from both the British and Western European models is that it does not rely on international companies for equipment and data services, instead developing its own data system and sourcing its equipment from within its own borders, albeit from a private company.

EM regimes

Having established that the operating model in Poland differs from both the British and Western European models in important respects, this section turns to comparing EM regimes. Previous research highlighted the fact that the intensity of EM regimes differs for different modalities within and between jurisdictions (Hucklesby et al. 2016; Hucklesby, Beyens, Boone 2021). This section demonstrates that Poland more closely resembles the Western European model of EM rather than the approach of England and Wales. However, there is clear convergence in other respects between these two systems.

In England and Wales, decision-makers set the hours of confinement, that is, the number of hours that monitored individuals are required to stay in their place of residence (Hucklesby, Holdsworth 2016). Since the introduction of GPS, it is also possible that monitored individuals have no curfew requirement. This contrasts with the approach in Poland, where the Penitentiary Court always requires monitored individuals to abide by curfews and sets hours of "freedom" rather than confinement, i.e. when monitored individuals can leave their residence. In this

respect, Poland conforms to the Western European model (Boone, Van der Kooij, Rap 2016; Hucklesby et al. 2016). In England and Wales, curfews are normally overnight, resulting in monitored individuals being able to complete many of their everyday activities such as going to work or school, shopping, attending medical appointments and carrying out caring responsibilities during the day (Hucklesby, Holdsworth 2016). Only if curfew hours impinge on these activities, for example, if they work shifts, will the court need to receive and take account of information relating to individuals' responsibilities and activities. Curfew hours are normally the same for every day of the week, although recently enacted legislation aims to make curfews more flexible (see above). By contrast, the Penitentiary Court in Poland mandates an EM schedule that sets hours of freedom allowing individuals to undertake basic tasks and responsibilities, including work, education, religious observance, maintaining relationships with family, caring for children or other dependents, attending medical appointments, participating in cultural, educational and sports activities, meeting with their lawyers, etc. (Daniel 2019). This resembles the Western European model (Beyens, Roosen 2016). However, as wearers may have up to 12 hours of freedom a day, it aligns more closely with the British model rather than the Western European model, which tends to have shorter periods of freedom unless wearers are low-risk or have been on EM for some time (Hucklesby et al. 2016; Hucklesby, Beyens, Boone 2021).

Both jurisdictions have systems in place for individuals to vary the requirements of their orders. In England and Wales, individuals can make requests to the court to amend their EM requirements if their circumstances change (for pre-trial and sentences), prison service (HDC) or probation (early release licences). Problems and delays in the decision-making process have been reported, which can result in difficulties for individuals (Hucklesby, Holdsworth 2016). To make the system more responsive, amendments have been made to the process for community sentences that allow the probation service to take some decisions without needing court approval (Home Office 2022a). In Poland, court-appointed probation officers oversee the implementation of EM. They can make recommendations to change the obligations and revoke EM, but schedules can only be modified by the Penitentiary Court and the reasons must be fully justified. Similarly, Poland has a stricter mechanism for emergency situations. Individuals must contact their probation officer, either directly or by phone, before leaving their curfew address; this resembles the procedures in other European countries (Beyens, Roosen 2016; Ministry of Justice Poland 2022b). By contrast, in England and Wales, individuals may leave their address during curfews for medical and other emergencies, and evidence from relevant third parties is collected later (Hucklesby, Holdsworth 2016). In all other respects the two jurisdictions' regimes are remarkably similar. For example, both have a central monitoring centre open 24/7 which wearers can contact, and they have similar breach policies and procedures.

Concluding comments

There are some aspects of the Polish EM system which resemble the British model, such as the relatively high use of EM. Other features of the British model which also appear in the Polish system include the 24/7 support provided via a centralised monitoring centre and the strict, regulated breach procedures. However, unlike England and Wales and many other Western European jurisdictions, Poland has not expanded the modalities of EM, sticking instead to only using it as a way of serving a prison sentence, except for a small number of public protection cases. The absence of its use at the pre-trial stage is notable and also sets it apart from England and Wales and many jurisdictions in Western Europe.

The Polish system also diverges from England and Wales in other respects. The operating model deployed in Poland has shifted over time from a private-sector provider to a state-operated model more akin to the European approach. Crucially, however, it also differs from most Western European jurisdictions because EM is managed by the prison service and not the probation service, and it does not rely on multinational companies for equipment or IT systems. By contrast, other elements of the regimes resemble the Western European approach rather than the British model. This includes individuals on EM being classified as prisoners and the rigid, and high intensity regime which allows for up to 12 hours of freedom a day, but only for specified activities and according to a pre-determined plan. In Poland EM is a deprivation of liberty rather than a restriction of liberty, as it is England and Wales.

Consequently, despite EM originally being modelled on the British system, Poland has a hybrid approach to EM which draws on both the British and Western European models, but which also has distinctive features. This may reflect the initial influence of policy transfer activities of England and Wales, which have since been tempered by several factors, including the European legal and criminal justice cultures and traditions, Poland's membership of European institutions such as the Council of Europe and the European Union and later by security concerns and a growing confidence to mould a unique Polish EM system. Poland, therefore, has an approach to EM implementation that differs significantly from most other jurisdictions in Western Europe. This finding raises the question of whether an Eastern European EM model exists or whether Poland has a unique approach. Together with Eszter Parkànyi and Anthea Hucklesby's (2021) earlier findings in relation to Hungary which found that EM there was managed by the police – this paper suggests that Eastern European jurisdictions have a distinctive approach to EM which uses state agencies other than the probation service to manage the system, which has implications for its day-to-day operation. Further comparative research is required to fully understand whether these two examples are replicated in other Eastern European jurisdictions and whether their approaches align sufficiently to suggest the existence of an Eastern European model of EM.

The identification of a distinctive Polish approach to EM, and possibly an Eastern European one, raises questions about whether one approach is more effective in

meeting its goals. In both England and Wales and Poland, one of the main reasons for implementing and expanding EM has been to reduce prison populations. In Poland this is the explicit and primary focus whereas its purpose is broader in England and Wales, extending to strengthening or toughening up community sanctions and measures for defendants and offenders who are unlikely to receive immediate custodial sentences. Consequently, whilst the target groups overlap in some respects, they also differ, with EM being targeted more broadly and likely used with less serious offenders in England and Wales compared with Poland. These differences compound the challenges of drawing conclusions about the impact of EM on prison populations from comparative data (Aebi, Delgrande, Marguet 2015).

On a macro level, the introduction and expansion of EM may have played a role in the stabilisation of the pre-trial prison population which was at historically low levels since the beginning of the 21st century prior to the pandemic in England and Wales (Hucklesby 2024). Yet, this trend has since reversed with both pre-trial EM and pre-trial detention increasing, although this is partly explained by cases taking longer to conclude because of court backlogs. The introduction of EM has not stemmed the expansion of the overall prison population in England and Wales to historically high levels, but it is also impossible to know whether it would be even higher if EM did not exist. In Poland, the prison population fell prior to the pandemic, during the time when EM was introduced and expanded, but a causal link between the two is difficult to prove. However, in both jurisdictions the numbers on EM and prison populations sum to greater numbers than any reductions in prison populations, suggesting that EM has been a vehicle to cast the net of the criminal justice system wider and deeper (Cohen 1985). In England and Wales, where EM is often viewed as a "technological fixer" which can, *inter alia*, increase the robustness of community alternatives, monitor compliance, enhance deterrence and safeguard victims, amongst other ascribed attributes, its inability to make significant inroads into lowering prison populations may not matter to those who advocate for its expansion.

The availability of EM is likely to make the difference between a decision to imprison and one which allows some individuals to stay in, or return to, the community earlier than otherwise would be the case. Arguably, the Polish approach provides more safeguards against "net-widening" than the more expansive and less restrictive approach of England and Wales, but it still has risks for example, the imposition of longer prison sentences making prisoners ineligible for EM. The requirement to apply for EM and the high refusal rates in the Polish system also result in individuals unnecessarily serving additional time in prison, with all the damaging consequences which follow. The recent changes to the Polish system which require everyone to begin their sentences immediately will likely lead to more individuals spending some time in prison, even if they are later released on EM. This leaves the ethical choice of whether to support EM and other measures which allow some individuals in conflict with the law to spend time in the community under tighter control than is necessary, rather than languishing in prison with all the harmful consequences which follow.

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In search of the future of penology: Can we escape the fatalistic vision of criminal law?

Przyszłość penologii. Czy możliwa jest ucieczka od fatalizmu prawa karnego?

Abstract: Penology, like the criminal law to which it essentially refers, is seen as a science in crisis. This crisis is related to the unclear conceptual and problematic scope to which it is intended to refer. In this text, the author presents a proposal for the broadest deployment of penology and juxtaposes it with contrology, a science that also includes methods of influence and control over human behaviour other than criminal. The author notes that it is impossible to predict the development of penology without reference to three factors that determine the development of almost all modern fields of knowledge: technological progress, medicalisation and economisation. It seems a sad anachronism to think about punishment as the basic response to crime in future. Instead, we should be aiming to develop methods to help people avoid situations in which their behaviour must be corrected through suffering.

Keywords: penology, criminology, contrology, penal law, criminal law

Abstrakt: Penologia postrzegana jest, podobnie jak prawo karne, do którego się zasadniczo odnosi, jako nauka w kryzysie. Kryzys ten związany jest z niejasnym zakresem pojęciowo-problemowym, do którego ma się ona odnosić. Autor w niniejszym tekście prezentuje propozycję najszerszego rozumienia penologii i zestawia ją z kontrologią, nauką która obejmować ma również metody oddziaływania i kontroli ludzkich zachowań inne niż penalne. Autor zauważa, że predykcja rozwoju penologii nie jest możliwa bez odniesienia się do trzech czynników determinujących rozwój niemal wszystkich współczesnych dziedzin wiedzy. Chodzi o postęp technologiczny, medykalizację oraz ekonomizację. Wydaje się, że myślenie o karaniu i o karze jako podstawowej reakcji na przestępstwo w odniesieniu do przyszłości jest smutnym anachronizmem. Winniśmy zmierzać raczej do opracowania metod pomocy ludziom w unikaniu sytuacji, w których trzeba będzie korygować ich zachowania za pomocą cierpienia.

Słowa kluczowe: penolologia, kryminologia, kontrologia, prawo karne, polityka kryminalna

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Introduction – basic research questions

The basic question I ask myself in this text is about the future of criminal law and penology. The specific questions I try to answer are as follows: (1) Which of the possible approaches to penology is the most appropriate? (2) Is the metaphor, often cited in the literature, of changes in criminal law – and consequently, in penology – being a pendulum (between retribution and resocialisation) accurate? and (3) If not, what factors give a chance to break with the pendular movement in the development of criminal law?

Attempts to describe criminal law cannot disregard the practice of its application. This is well known in the Anglosphere, in which the arguments are focussed on creating criminal law around specific cases (*R. v. Dudley and Stephens* 1884; *P. v. Kellog* 2004; Hoffmann, Stuntz 2021), on which theory is based and the institutions that constitute criminal responsibility are developed. It is no different in Europe, contrary to appearances, including in German law and doctrine, which is an inspiration for the Polish science of criminal law (Greco 2021). These are positive examples of the symbiosis of jurisprudence and doctrine influencing the development of criminal law. However, there is no shortage of negative illustrations of the influence of "practice" on criminal law and the shape of the system of criminal sanctions.

In Poland, changes in criminal law in the 21st century have predominantly not been inspired by subtle scientific analysis or the results of specific criminological studies, but rather the politically motivated consequences of dramatic events loudly reported in the media. One can mention, for example, the case of the so-called "monster from Siemiatycze" leading to changes in the regulation of security measures, the so-called "gambling scandal" resulting in changes in the criminal provisions of the "gambling act" and the Criminal Code (prohibition of entry to gambling casinos), the so-called "lex Trynkiewicz" (i.e. the introduction of a law on post-penal detention) and recent statements by politicians about the legitimacy of reinstating the death penalty resulting from the shocking murder case (Nie żyje 8-letni Kamil 2023). More examples can be found. Recently (as of the beginning of October 2023), an amendment came into force in Poland that radically tightened criminal sanctions – a comprehensive implementation of the populist announcements of the government (J.o.L. of 2022, item 2600).

In almost every contemporary piece of legislation we can find similar examples. They add up to a grim picture of criminal law changed by the influence of penal populism. The above-mentioned Polish cases differ fundamentally from the positively used cases taken from Anglo-Saxon and German law. Indeed, they have not become a contribution to critical reflection on the law, nor an inspiration for the creation of comprehensive theories (Widłak 2016). On the contrary: they have become an impetus for direct action and have punctuated changes in the law, often without the slightest concern for systemic coherence. The Polish examples are only an illustration of a broader phenomenon (Pratt, Miao 2019).

1. Context of penological research – the meaning of penal populism

When we talk about modern penology, it is therefore impossible to dissociate it from the phenomenon of penal populism. There is no room here for a broader discussion of penal populism itself, so it is necessary to refer to other publications on this point (Zalewski 2009; Widacki 2017). Instead, an earlier definition should be recalled. In my opinion, penal populism is a set of social beliefs, as well as political and legislative actions undertaken with programmatic limitation of the role of experts, co-shaped by the media, characterized by a strict attitude to crime, a lack of sympathy for its perpetrators and the instrumental use of crime victims (Zalewski 2009: 31).

For the present argument, it is important to state that penal populism as a complex sociopolitical/legal phenomenon forms an important framework for contemporary penological considerations. It is impossible to talk about punishment whilst overlooking this key phenomenon. An interesting paradox is drawn here. It is postulated to scientifically and rationally consider a method of lawmaking and application that is saturated with irrationality and current political practice. To put it somewhat metaphorically: Does the old saying that "all is fair in love and war" also work in the face of fighting crime? Do prohibitions and harsh sanctions bring the desired results?

Practice, so far, proves the opposite. By way of example, two huge political and criminal experiments – alcohol prohibition and drug prohibition in the 20th and 21st centuries – proved that regulating human behaviour with criminal sanctions can not only fail to combat certain undesirable (in the opinion of those in power) phenomena, but can even result in their multiplication, introducing a number of further negative side effects (Rosmarin, Eastwood 2012; Stuart, Buchanan, Ayres 2016), including the institutional collapse of entire countries and profound economic crisis. The best example is Mexico, which is considered a state in decline, partly as a result of the lost "war on drugs" (Grinberg 2019).

2. Definition and scope of basic concepts

Before proceeding further it is necessary to establish the meaning of the fundamental concept we are using. The concept of penology is sometimes understood inconsistently. From the beginning, authors differed in the scope that the term was to encompass. For Franz von Liszt, penology was the study of the concept of punishment, the reasons for its application and the differences between punishment and safeguards; for Quintiliano Saldana, likewise, penology was to be the science of punishment. However, Bartłomiej Wróblewski saw penology as a broad

synthesis of "punishment in the most general sense" and Philipp Allfeld even considered penology to be the science of fighting crime: *Verbrechenbekämpfungslehre* (Wróblewski 1926). Clearly, some people have framed the scope of the study of penology narrowly (punishments), and others broadly (all measures to combat crime). Penology is understood in different ways today as well (Utrat-Milecki 2022). Jarosław Utrat-Milecki presents an indirect position by linking the subject of penology with sanctions (not only penalties), but adjudicated only on the basis of criminal law. He points out that "penology deals primarily with the issue of criminal punishment and other crime prevention measures [adjudicated] on the basis of criminal law from the theoretical and practical side" (Utrat-Milecki 2022). I believe that it is necessary to opt for the broadest view. It seems that in modern times penology cannot be limited to the study of reaction measures described by legislators as "punishments" (Snacken, Van Zyl Smit 2017). Currently, criminal law involves a wide range of reaction measures. In addition to penalties, there are both post- and predelictual detention, compensatory measures and punitive measures. Legislators also establish administrative, civil and other sanctions. In all these cases, it is up to the legislature to decide what type of sanction to apply in a given case, in view of the negative social phenomenon in question (Bogusz, Zalewski 2021). It is not uncommon for fiscal considerations to decide, but more than the variously named fines come into play. Legislators decide in a non-penal mode to apply even isolation sanctions in the form of detention ordered by civil courts for those who pose a certain high degree of threat to the legal order (J.o.L, of 2022, item 1689). This is done in order to bypass constitutional, legal and international restrictions on criminal penalties, including the prohibition of double punishment (*ne bis in idem*) (Zalewski 2018b). I believe that the task of penology should be the study of areas bordering on criminal law, despite the fact that they formally fall outside the scope strictly defined by this branch of law. The broadest concept, which includes penology, would be c o n t r o l o g y, which is a broad concept encompassing the study and evaluation of the effectiveness of all methods of preventing and combating crime, starting with traditional punishment and ending with methods of restorative justice (Zalewski 2021).

To summarise this part of the argument: the consideration of the future of criminal law and penology should take into account not only penal populism, but also the above-mentioned phenomenon of "blurring the boundaries" and the mutual penetration of negative state reactions, in the face of acts prohibited by law. I use the term "acts prohibited by law" and not "crime" because of the actions of legislators in this field. It can happen that an act which was a crime is reclassified as an administrative tort, or vice versa; therefore, using the term "crime" to describe a specific sanctioned behaviour may be inadequate for a comprehensive examination of a particular case.

3. Overcoming fatalism – breaking the pendulum

For many authors analysing contemporary criminal punishment systems, the state of affairs in many countries appears pessimistic. There is no shortage of fatalistic visions of the future. Most appealing to the imagination is the comparison of penal and criminal policy in the 20th and 21st centuries to the movement of a pendulum (Stunz 2011). The fatalistic vision of penology as a reflection on criminal punishment is, as I assume for the purposes of this paper, a picture of this science intellectually closed and moving conceptually on a tight axis between harsh and lenient punishment, with no real impact on crime.

Of course, the mechanical, pendular movement of penal policy from one extreme to another (rehabilitation–retribution, mild–severe) – although a simplification – is not the only problem facing the modern justice system, even in countries with established democracies. In the USA, the problems noted in the study are the breakdown of the primacy of the rule of law, the dominance of discretion in adjudication and the ever-present racial discrimination (Stunz 2011). In Poland, we can add undermining the values of the constitutional tripartite division of power, attempts by those in power to influence adjudication, direct threats to judicial independence, courts overloaded with cases through inefficient administration and underfunding, restrictions on judicial discretion in adjudication through changes in the statutory basis for adjudication, including the directives for judicial assessment of punishment (Zalewski 2023b), etc.

However, the metaphor of the pendulum is common in popular, political and academic discussions of criminal justice and serves many useful purposes. Current events, changes in the law, changes in criminal policy, analyses of individual court decisions or selected crime statistics can be viewed against its background. The metaphor of the pendulum has some explicative value, but being a simplification, it does not reflect the complexity of the issues. Philip Goodman, Joshua Page and Michelle Phelps are right in advocating a more complex approach (Goodman, Page, Phelps 2017). These authors propose an "agonistic approach", that is, based on a vision of penal policy as permanent competition. In their view, the current criminal policy is the product of a constant dispute between proponents of implementing different ideas about the shape of criminal sanctions. The starting point of the agonistic approach is the seemingly accurate observation that in the modern era no single approach has been absolutely dominant in a given country. Even in the USA at the height of just deserts and mass incarceration policies at the turn of the 20th century, there was no shortage of examples of rehabilitation and therapeutic programmes (Cullen 2013; Lösel 2020). The authors accept the following axiom: the development of criminal law "is the product of a struggle between actors of different types and magnitudes of power" (Goodman, Page, Phelps 2017: 8).

In my opinion, even the broad vision of Goodman, Page and Phelps – though tempting – is incomplete, as it focusses mainly on sociopolitical struggles.

It seems that today's criminal law should take into account three further factors that affect, or will soon affect, the development of the sanctions that the state offers to combat negative social phenomena.

4. Factors determining the development and accuracy of predictions

First, consider *technological advances*, especially the development of artificial intelligence. Since modern technologies have such a large impact in so many areas, and will result – as some scholars prophesy (Babinet 2019) – in the end of the nation-state, traditionally understood sovereignty and perhaps *ius puniendi* as the exclusive prerogative of the ruler, the criminal justice system and punishment as such are also likely to be redefined, since they are closely linked to a certain perception of the state.

The justice system can and should be reinvented (Zalewski 2023a). However, shouldn't this mean a qualitative change, not just a quantitative one? Some authors assume that the technological revolution will basically be limited to an expanded catalogue of punishments, that new means of penal response will be introduced and applied to subjects, basically humans, but perhaps also androids(?) raised in the world of the Internet. Thus, new sanctions are postulated: deprivation of Internet access, banishment from social networks, digital exile and social media pillorying. For Kamil Mamak, the criminal response and punishment must continue to be a nuisance, and nuisance is invariably inherent in the essence of punishment (Mamak 2021). This *de lege lata* obvious view is not necessarily accurate *de lege ferenda*, namely in the technological world of the future. Accepting the obvious that in modern times, and universally, the essence of punishment is suffering, it is no longer necessarily the case that punishment is an indispensable response to crime, and certainly punishment is not the best or only remedy for illegal behaviour. The future will bring a change in the ways we influence people, including as early as the embryonic stage (Fukuyama 2004). We may be able to effectively change human behaviour pharmacologically by affecting neuronal structures (Beaver, Walsh 2011; Zalewski 2018b). I will return to this statement below.

China appears to be a leader in technological changes to the judiciary. The PRC has introduced and is implementing a plan to build a "smart court" (*Zhi Hui Fa Yuan*). As a result of the adopted assumptions for the plan, there is a gradual modernisation of the entire judicial system in the country through the use of various technological innovations. The smart court requires that court services be accessible and conducted online. Initially, many of the changes were aimed at serving litigants and their lawyers and ensuring the availability of information about verdicts. By 2015, three important developments had been introduced: China Judicial Process Information Online, China Judgments Online and China Judgments Enforcement

Information Online. Programmes using artificial intelligence technology are helping to maintain the uniformity of jurisprudence. An example used in Beijing County is the "Wise Judge" (*Rui Fa Guan*). No less important is the information system on pending enforcement (execution) proceedings, which has merged with the Chinese Social Credit Score System gaining efficiency. Data on "discredited" individuals (including names and corresponding identification numbers) can be used, for example, to preclude such individuals from certain activities, including buying property or traveling by air (Shi, Sourdin, Li 2021).

The introduction of modern technology into the criminal justice system in the UK is interesting. The Judicial Review and Courts Act, passed in 2022, referred to a number of research findings. The most important development in the area currently under discussion turned out to be the new procedure for automatic online conviction and standard statutory punishment (Automatic Online Conviction and Punishment for Certain Summary Offenses, AOCPCSO). In a nutshell: for certain non-custodial offences that are tried by summary trial, the new procedure will allow cases to be handled completely online and without a judge, but using artificial intelligence. The simplest acts are to be eligible for the procedure, and the Government's intention is to initially apply the provision to, for example, traveling on a train or tram without a ticket or fishing without a licence. Defendants must agree to this procedure and choose an automatic online conviction and the punishment specified for their offence (JRaCA 2022).

US courts most often use artificial intelligence systems to assess the likelihood of recidivism or absconding by those awaiting trial or by criminals in bail procedures, and to evaluate the possibility of parole. A study of 1.36 million pretrial detention cases found that a computer can predict whether a suspect will flee or reoffend better than a human judge (Kleinberg et al. 2018). Often, other programmes are used for similar purposes, totalling about 200; one well-known and frequently used programme is COMPAS (Brennan, Dieterich 2009).

Regardless of the highlighted advantages, the use of algorithms even as an enabling technology has, for the time being, raised numerous questions. In the USA, COMPAS has been accused of bias, and the way it predicts behaviour as the basis for applying probation measures is subject to errors due to racial bias (Angwin et al. 2016). In recent years, the doubts have multiplied. In 2020 Santa Cruz became one of the first cities in the United States to ban predictive policing based on artificial intelligence (Silverman 2023). It is assumed that AI will reach the human level around 2040 (Bock, Linner, Ikeda 2011).

This raises an important question: do we need AI courts? On the one hand, criminal punishment, understood as an ailment for a culpable act, makes sense for people, but not for things. On the other hand, it also seems that punishment makes the most sense when it is adjudicated by a human, not artificial intelligence. At this stage, it is imperative to preserve a certain degree of "human" autonomy of courts in decision-making. It seems necessary to base adjudication on the personal experience and human empathy of judges in reaching a verdict (Ofterdinger 2020).

Perhaps these considerations will prove pointless in view of the development of biochemical and neurological technologies for influencing and evaluating human behaviour. I now turn to the second factor, which I call the "medicalisation of punishment". Thomas Douglas and David Birks, in the introduction to an important book on the subject (Douglas, Birks 2018), pointed out that at the interface between neuroscience and criminal law there are lively debates about the extent to which neuroscientific discoveries can undermine the attribution of criminal responsibility, and whether and how neuroscientific evidence, such as brain CT scans, should be used in criminal trials. It is already possible in criminal cases to order the administration of brain-acting drugs as part of recidivism prevention programmes. A number of criminal justice systems provide for the administration of drugs that dampen sexual desire (Forsberg 2018), and methadone treatment is administered to offenders addicted to opioids, etc.

It is too early to draw firm conclusions about whether and when neuroscientific and broader medical findings will affect adjudication. However, it seems inevitable. A study by Annalise Perricone, Arielle Baskin-Sommers and Woo-kyoung Ahn (Perricone, Baskin-Sommers, Ahn 2022) of Yale University attempted to clarify how the impact of neuroscientific evidence on sentencing interacts with beliefs about the goals of the criminal justice system. The 784 participants of their study recommended sentences for defendants before and after reviewing neuroscientific evidence about the offender's condition. Those who accepted retribution as the main goal of imprisonment recommended significantly more lenient sentences. On the other hand, when the stated goal of imprisonment was protection of society or rehabilitation, the participants suggested longer sentences.

The discussion of the principle of not deteriorating the situation of an inmate in penitentiary isolation is interesting in this context. Since we have more and more effective possibilities to influence an offender's nervous system, endocrine system etc., the postulate of the so-called "right to hope" should be redefined (Dore-Horgan 2023). The convict should serve their sentence in conditions that will prevent physical and mental degradation – or even improve their state – so as to enable them to function independently when free. Of course, one must not lose sight of the potential and actual risks, including the unexplored side effects of the pharmaceuticals used (Zalewski 2014). It is worth noting that Scandinavian countries have long taken into account the health of prisoners, especially mental health, in the context of early release. This also applies to those sentenced to life imprisonment, who must commit to treatment conditions and other related treatment and support before release (Lahti 2021).

The last factor I would like to draw attention to in this text is the issue of the "economisation of criminal justice". By this term I mean the problem of the costs of the criminal justice system, which are increasingly taken into account. Of course, the financial aspect of the functioning of the judiciary has been under consideration for a long time. For instance, the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1975 recommended the encouragement

of cost-benefit thinking in criminal policy (Lahti 2017). In recent years, however, it has become increasingly important.

This measure is particularly characteristic of an era in which crime policy is measured more by the scale of budget expenditures than by the social effectiveness of the programmes being implemented, which is often not financially measurable. A good example is the UK's Payment by Results policy, which is a manifestation of cost containment. The Transforming Rehabilitation agenda involves funding only those services that produce measurable results. It has been pointed out that this approach implies the commercialisation of criminal justice policies and the reduction of funding for programmes that do not necessarily contribute to the rehabilitation of the wards. There has been a reluctance on the part of policymakers to use risk assessment and evidence-based policing more broadly, due to this type of backlash, in the form of reduced funding for meaningful programmes (Ugwudike, Raynor, Anniston 2018).

The cost of maintaining the justice system has been rising immeasurably in recent decades. The leader of the Western world remains the United States, spending nearly USD 300 billion a year to police and incarcerate 2.2 million people. If one includes the so-called social costs of imprisonment, including lost wages, adverse health effects and damage to the families of inmates, the cost rises significantly – this has been estimated at as much as triple the direct costs, or USD 1.2 trillion (O'Neill Hayes 2020). Crime has not decreased; on the contrary, in some areas it has even increased.

Poland also incurs significant costs in the area of justice. Poland's inmate population is among the largest in the European Union. The Ministry of Justice does not provide official figures on the cost of living per person, but estimates range from PLN 3150 (EUR 732) to as much as PLN 4930 (EUR 1146) per month. The total cost of living is about PLN 300 billion a year (ca. EUR 70 billion) (Wysocki, 2022). It should come as no surprise that the Ministry of Justice is trying to develop alternatives to imprisonment, including electronic monitoring, which is nearly six times cheaper (Cost Comparison, 2023). However, it is not an ideal solution.

Summary

We have a chance to develop criminal law in a way that departs from the fatalistic, simplistic and intellectually poor vision of a pendulum moving from harsh to mild punishment, from retributivism to rehabilitation and back again. Instead of being harsh we should respond intelligently (smart on crime), and move from "tough on crime" towards "smart on crime".

The agonistic vision of the development of criminal law seems more accurate than the linear (pendular) vision, although it also seems necessary to take account of extra-legal factors such as technological development and the medicalisation

and economisation of criminal law. Perhaps we are at the threshold of a change that will force us to radically redefine our approach to crime, and thus to radically redefine penology.

Penology as a separate science cannot abstract from the study of sanctions of a repressive nature other than criminal law. It seems necessary to consider the need to broaden the field of research, and therefore the accuracy of the term used. I propose to use the term "contrology", since nowadays more than punishment (*poena*) is involved in the response to criminal acts.

It is unclear what the future holds for the latest technological developments. Artificial intelligence seemed to be the hope for crime control, but recent studies point to growing threats. The suspension of the use of some AI programmes in the USA due to faulty algorithms is very telling. The ongoing medicalisation of the criminal justice system is similarly cautionary. "The right to hope" cannot mean an obligation to take certain medications, especially those with unproven effects and many adverse side effects. And finally, the need to count every penny should prompt prudence in action. One cannot limit oneself to counting only the financial costs, but the social and emotional costs of actions are especially important.

In the long run, it seems that thinking about punishment as the primary response to crime in future is a sad anachronism, resulting from a lack of ability and/or imagination to go beyond today's patterns and the current reality. Rather, it seems that the world should aim to develop methods to help people avoid situations in which their behaviour must be corrected through suffering. Recovery from a conflict, which in most cases is a crime, cannot take place without the victim of the criminal act or without their participation.

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Legal acts

Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 7 lipca 2022 r. w sprawie ogłoszenia jednolitego tekstu ustawy o postępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób. Dz.U. z 2022 r., poz. 1689 [Announcement of the Speaker of the Sejm of the Republic of Poland of July 7, 2022 on the announcement of the unified text of the law on treatment of persons with mental disorders posing a threat to the life, health or sexual freedom of others. Journal of Laws of 2022, item 1689].

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