PRISON OVERCROWDING AND ALTERNATIVES TO DETENTION

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EUROPEAN SOURCES AND NATIONAL LEGAL SYSTEMS

Edited by

ALESSANDRO BERNARDI

Coordinated by

ADRIANO MARTUFI

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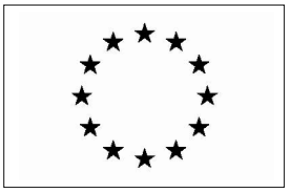

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ALESSANDRO BERNARDI

THE DEVELOPMENT OF ALTERNATIVE SANCTIONS IN EUROPE AND THE ISSUE OF PRISON OVERCOWDING

SUMMARY: 1. Preamble. – 2. The persistent prevalence of detention within the system of sanctions and delays in the implementation of effective alternative instruments to imprisonment. – 3. The comparative method and different criteria for classifying alternative sanctions or measures. – 4. Supranational sources on the subject of alternatives to detention: vertical comparison. – 4.1. Supranational sources on the subject of alternatives to detention: the law of the Council of Europe. – 4.2. Supranational sources on the subject of alternatives to detention: European Union law. – 5. Comparison and stimuli of a supranational origin: what are the trends in the evolution of alternatives to detention in Europe? – 5.1. Multiplication of the types of alternatives to detention in Europe. – 5.2. Quantitative increase in the alternatives to detention in Europe. – 6. The persistent differences between European penal systems in respect of the alternatives to detention and the obstacles to their broader application. – 7. Conclusions and layout.

1. *Preamble*

This book represents the main output of the research project titled "Prison overcrowding and alternatives to detention"[1], funded by the European Commission and completed in the spring of 2016[2]. The project in question was carried out by the criminal law research group of the University of Ferrara and its presentation to the Commission was stimulated by relatively recent events in Italy. However, the reasons that induced the present author to believe in such a project and develop it into its current form go back much further.

The decisive element that prompted us to apply to the European Commission for funding for this project was the realisation of the in-

[1] Official Title: *Prison Overcrowding and Alternatives to Detention.* Further information about the research project and the working groups involved in it, as well as related initiatives and the materials produced during the course of the project itself can be found on the official project website: *www.prisonovercrowding.eu.*

[2] EUROPEAN COMMISSION, Brussels, 12 November 2013, doc. C(2013) 7970 final, application n. 4000004539.

creasingly severe overcrowding which characterised Italian prisons – especially at the time the application was submitted – with all the negative implications of such a situation. Indeed, as it reduces the living space available to individual inmates to a bare minimum, overcrowding not only brings shame on our penal system and more in general our country, but it has long ceased being tolerated by the European Court of Human Rights (ECtHR), which, starting from 2009 (i.e. from the Sulejmanovic judgment) has condemned Italy on more than one occasion considering that this state of affairs represents in itself inhuman and degrading treatment.

The factor which ultimately triggered the project was, without a doubt, the judgment in the case of Torreggiani and others v. Italy, issued on 8 January 2013; in its ruling, as is well known, the Court did not limit itself to ascertaining that the Italian State had violated Art. 3 ECHR due to the serious overcrowding of the prisons in which the applicants were confined, but went on to acknowledge the "structural and systemic nature" of the problem of overcrowding. This finding led the ECtHR to issue a so-called "pilot judgment", i.e. a ruling which implied the suspension of all proceedings brought by Italian prisoners on similar grounds and allowed our country a period of one year (from the date on which the judgment became final) to implement the measures necessary to put an end to the situation.

In any event, the idea of presenting this research project was not inspired solely by the "Torreggiani issue" and the need to respond with broad-ranging legislative interventions that were more carefully meditated and comprehensive than the provisional solutions adopted until then by the Italian legislator. There was more in general an awareness – acquired as a result of the growing number of ECtHR judgments condemning many member states of the Council of Europe[3] and reinforced by the penal statistics recently offered by this international organisation[4] – that prison overcrowding is a problem common to other countries belonging to the Council of Europe and the European Union[5].

The effects resulting from this pathology of the prison system are likewise common to all European countries: suffice it to say that such effects may regard both the functioning of prisons, and the protection of the fundamental rights of detained individuals.

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[3] See, in particular, for specific references to the relevant case law, A. Martufi, *Diritti dei detenuti e spazio penitenziario europeo*, Napoli: Jovene, 2015, p. 194 ff.

[4] M. Aebi, M. Tiago, C. Burckhardt, *SPACE I - Council of Europe Annual Penal Statistics: Prison populations. Survey 2014*, Strasbourg: Council of Europe, 2015.

[5] H.J. Albrecht, *Prison Overcrowding - Finding Effective Solutions. Strategies and Best Practices Against Overcrowding in Correctional Facilities*, Freiburg im Breisgau: Max Planck Institute, 2012, p. 13 ff.

In particular, with reference to the effects of overcrowding on the functioning of prisons, it is necessary to address several issues everyone is familiar with. We are referring specifically to the fact that having a disproportionate number of inmates in relation to the capacity of the facilities makes it more difficult to organise a prison treatment that is truly geared toward social rehabilitation. In many countries this means defeating what is considered the priority purpose of the penalty. As a further effect, the lack of adequate rehabilitation programmes increases the likelihood of recidivism among individuals who have served their sentence and thus damages the society at large.

As for the fundamental rights of detained persons, it should be highlighted that overcrowding often forces inmates to serve their sentence under "inhuman and degrading conditions". So much so that that, as we shall see, not only the ECtHR but also the European Parliament, in its 2012 resolution on fundamental rights in the European Union[6], expressed "serious concern" about the situation of detainees in EU countries and called on "the Commission, the Council and the Member States to bring forward proposals, together with the Council of Europe and the Committee for the Prevention of Torture, to ensure that prisoners' rights are respected".

2. *The persistent prevalence of detention within the system of sanctions and delays in the implementation of effective alternative instruments to imprisonment*

An additional feature is shared by the states considered in the present study: we are referring to the principle, of liberal inspiration, which rejects degrading treatment and inhuman punishment. We Europeans are all – to some extent – grandchildren of Beccaria and Bentham, and thus we oppose the death penalty, physical punishment, torture and inhuman and degrading treatment.

However, as children of our own time, we are likewise conditioned, whether we like it or not, by the idea of punishment as the deprivation of liberty: indeed, deprivation of liberty in a prison setting. Despite the varying opinions of the participants in the study, from the very first meetings we were all in agreement on one point, namely, the substantial indispensability – in the current state of affairs – of detention, at least as a primary response to some more serious forms of crime.

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[6] European Parliament resolution of 12 December 2012 on the situation of fundamental rights in the European Union (2010-2011) (2011/2069(INI)).

Despite the conviction that detention remains – under certain conditions – a suitable and legitimate response for the purposes of retribution and prevention under criminal law, we are aware that in order to be fair and fulfil its functions it must be limited as much as possible. Imprisonment should represent the very last resort, that is, an extreme penalty applicable only for the most serious offences which, given their social intolerability, must be subjected to penal rather than administrative, disciplinary, or civil sanctions.

Starting from these considerations, our research was thus aimed at the formulation of proposals for ensuring that the sanctions or measures adopted as alternatives to detention – in terms of how they are conceived, regulated and actually used – are fully able to fulfil all or at least most of the functions of a penalty: we are alluding, in particular, to the functions of general prevention, both negative and positive, and the functions of special prevention (neutralisation, concrete intimidation, social rehabilitation). Only if this condition is met will detention cease being an inflated measure, and as such unable to perform its essential function of social rehabilitation, even before being branded as inhuman, degrading and tantamount to torture.

To this will shall add that the statistics on the rates of reoffending among individuals who leave prison appear extremely discouraging and for this reason should induce us to seek punitive instruments more conducive to social rehabilitation: even those guilty of the most serious crimes should have access to effective non-custodial measures, albeit in the presence of a favourable prognosis and only in the final phase of a progressive treatment. As we shall see in the course of the discussion in this book, however, the "alternative paths" to detention have long been characterised (in many contexts) by evident deficiencies and ineffectiveness, which have greatly contributed to undermining their credibility and thus further favoured the centrality of detention as punishment.

Also because of these historical imperfections, the systems examined within the framework of our research (and analysed in this book) must necessarily undergo a radical reform aimed at creating truly valid alternatives to detention. Such a reform requires first of all a change in mentality, one that enables us to forget the crime-prison equation we have almost always been conditioned by and induces us to refine the alternative sanctions that have brought satisfactory results in other countries and – with the appropriate adaptations – we assume can also work in any European country. Naturally, in order to become thoroughly acquainted with these instruments we must engage in a serious, in-depth comparative analysis which focuses not only on what is laid down in the books,

but also involves a direct exchange among the experts of different countries who can share their reflections and respective pilot experiences.

3. *The comparative method and different criteria for classifying alternative sanctions or measures*

Our research was thus aimed at providing a comprehensive reconstruction of the current legislative framework in each of the countries involved in order to identify the most useful solutions for correcting the defects detected in the system of sanctions of individual states and favouring a reduction in the prison population to within the bounds of tolerability.

Therefore, this book follows the approach adopted in other studies where comparison is used as the method for assessing non-custodial sanctions. We are referring to studies which – like this one – examine a plurality of more or less coordinated national relationships with the aim of offering an overview of alternatives to detention in a given European country. As noted earlier, however, the choice of this method was not dictated solely by the variety of legal systems examined, but is also justified in consideration of the objective of offering useful stimuli, with a view to reform, to national legislators and European bodies involved in different capacities in the reform of the current system of sanctions.

The comparative study of law, in fact, serves not only as a method of gathering knowledge for survey and classification purposes (the subject in our case being alternative sanctions, precisely). This method of study is also useful for the development of new categories, new models and new instruments, as well as an overall rethinking of current legal systems with an eye to favouring their rationalisation and evolution; it is thus aimed at facilitating future reforms and the progress of the domestic system through a comparison with other national systems[7]. Moreover, it is an undisputed fact that comparison leads to the reception of models (of sanctions, in the case concerned here) wholly or partly beyond the experience of individual states. This all takes place in a climate that at least tends to be spontaneous, in the absence of significant pressures or limitations coming from the outside[8].

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[7] See, in particular, P. NUVOLONE, "Il diritto penale comparato quale mezzo di ricerca nell'ambito della politica criminale", in *Ind. pen.*, 1980, 10.

[8] On the risks of an uncritical reception of models created in other legal systems, see J. HURTADO POZO, *La ley "importada": recepción del derecho penal en el Perú*, Lima: Cedys, 1979.

In this regard it seems worth highlighting that the phenomenon of reception induced by states desirous of "inspiring" the legal systems of others by way of comparison is manifested rather clearly in the field of alternatives to detention. In fact, it seems possible to affirm – albeit with a certain degree of simplification – that alternative sanctions have essentially spread from one state to another by virtue of the comparative method. Since people first started talking about alternatives to short prison sentences (that is, since the second half of the 19th century) there has been an intense production of literature based precisely on a "horizontal" comparison among different legal systems.

Given the fact, as well, that in the 19th century, in most European countries short prison sentences represented a large majority of the sentences inflicted, the issue took on considerable importance, such as to become a subject of study and debate not only among individual legal scholars, but also within the first international societies specifically dedicated to the study of criminal law. One need only consider that the first Conference of the *Union Internationale de Droit Pénal* (U.I.D.P.), held in Brussels in 1889, was focused precisely on combating short prison sentences and the instruments through which this could be achieved.

In any event, in the study of alternatives to detention the horizontal perspective continues to be largely adopted still today. In this regard, however, it should be said that although much of the literature on penal sanctions is characterised by the comparative method, there are considerable divergences in the classification criteria used.

It needs to be highlighted, in fact, that many authors who have addressed the subject of alternatives to detention from a comparative standpoint have had to accompany their work of merely surveying such alternatives with the further work of cataloguing them and fitting them into precise models and categories. The schemes offered by Dolcini and Paliero at the end of the 1980s are emblematic in this regard: these authors, as is well known, examined the different types of alternatives and distinguished them in terms of content and structure: in respect of content, and according to the degree of intensity, they distinguished between alternatives of a symbolic (or moral) character, fines and interdictive sanctions, community service and restrictions on personal freedom; from a structural standpoint, they broke down the alternatives according to the character of each, whether a suspensory measure, or a substitutive one in the strict sense, alternative and autonomous.

However, in actual fact many other classification schemes have been formulated and they vary greatly from one another. For example, there are schemes based on a preliminary *summa divisio* between alternative

sanctions conceived to avoid custody (and thereby prevent the experience of prison and the foreseeable criminal influences resulting from it) and alternative sanctions designed to reduce the time spent in prison (i.e. to enable an early release from prison and thereby favour the social reintegration of the inmate). In other schemes, the *summa divisio* adopted is of a different type; as in the case of schemes that distinguish among alternative sanctions "in a strict sense" and "in a broad sense"; or in the case of the scheme that distinguishes among alternative penalties that imply a restriction on the freedom of movement (e.g. home detention, with or without electronic monitoring) and the alternative penalties which, without imposing a restriction on the freedom of movement, limit the lifestyle of the convicted individual.

The classification scheme chosen for this study, by contrast, places emphasis on the stage of the proceedings in which the alternatives to detention come into play. That is to say, we felt that the alternatives should be distinguished based on whether they are adopted in the *pre-trial* stage (and hence as a provisional measure), in the *trial* stage (i.e. during the proceedings in court) or in the *post-trial* stage (hence in the enforcement of the sentence). Such a division, besides being frequently used in the literature, is the one chosen in the texts of the Council of Europe which address the alternatives to detention[9]. We have thus sought to lend the concept of "alternative sanctions" a meaning that is very broad on the one hand and "autonomous" on the other, as it is independent of how the concept itself is interpreted by individual national legal systems[10].

Moreover, Recommendation No. R(92)16 of the Committee of Ministers of the Council of Europe on the European Rules on community sanctions and measures also appears to favour a broad interpretation of the concept of alternative sanctions to detention. In defining the scope of application of the recommendation, the appended glossary clarifies that the term "community sanctions and measures" refers to any sanction "imposed by a court or a judge" and any measure "taken before or instead of a decision on a sanction", as well as "ways of enforcing a sentence of imprisonment outside a prison establishment".

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[9] See, for example, Recommendation R (99) 22 concerning prison overcrowding and prison population inflation.

[10] All the more so because – as highlighted in the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union (COM/2004/0334 def.) in para. 2.1.10. (Alternative sanctions) – "Given the significant differences between the criminal law of the Member States, particularly as regards the classification of punishments into primary, additional and ancillary penalties, it is hardly surprising that the term 'alternative sanction or penalty' is not interpreted in the same way in all Member States".

4. *Supranational sources on the subject of alternatives to detention: vertical comparison*

The reference just made to some texts of the Council of Europe and European Union enables us to introduce an additional fundamental aspect characterising our approach to the study of alternatives to detention within the framework of this study. As we shall see, ample space is dedicated to sources of criminal law issued by supranational organisations with the aim of promoting or imposing incisive forms of interstate harmonisation in respect of alternatives to detention. This is due to the increasing importance assumed by the provisions – binding or non-binding, depending on the case – adopted by the aforesaid organisations in order to further the development and evolution of alternative sanctions and measures to imprisonment.

In addition to a (traditional) "horizontal" comparison between states, we intend to propose a "vertical" assessment approach based on a supranational perspective[11]. Our aim, that is, is to evaluate the influence of the normative instruments of the Council of Europe and European Union on the legislation and practice of European countries when it comes to alternative sanctions and measures: these sources are in fact largely aimed at promoting the widespread application of non-custodial penalties and measures in order to increase their use in place of detention.

4.1. *Supranational sources on the subject of alternatives to detention: the law of the Council of Europe*

Here we intend to lend a broad and generic meaning to the adjective "supranational", so as to be able to use it to refer to the sources adopted by every regional organisation which transcends purely national considerations or interests, and which transcends national boundaries. However, it should be stressed that the sources in question are truly numerous. They originate mostly from the Council of Europe; even though by now, as we shall see below, the European Union itself has produced some important texts concerning alternatives to imprisonment.

An examination of the texts adopted by the Council of Europe over the years clearly reveals the main focus of the policy of the Council of

[11] In this respect, the present study shares some features in common with the method used recently by other authors, such as F. McNeill, G. Robinson, *Community Punishment: European Perspectives*, London: Routledge, 2016; D. Flore, S. Bosly, A. Honhon, J. Maggio, *Probation Measures and Alternative Sanctions in the European Union*, Cambridge: Intersentia, 2012.

Europe in respect of criminal sanctions, namely, the promotion of alternatives to detention[12]. Indeed, the Strasbourg-based organisation has been working in this area since the 1960s: we need only mention the 1965 resolution concerning suspended sentences, probation and other alternative measures to imprisonment; a further resolution of 1976 on certain alternative penal measures to imprisonment; and the 1979 recommendation concerning the application of the European Convention on the supervision of conditionally sentenced or released offenders.

Starting from the 1990s, the recommendations in this area multiplied: they included recommendation R(92)17 concerning consistency in sentencing, which urges members to reduce the reliance on custodial instruments and use measures of diversion and community sanctions and measures; recommendation R(92)16 on the European rules on community sanctions and measures; recommendation R(2000)22 on improving the implementation of European rules on community sanctions and measures; recommendation R(2003)22 on conditional release (parole); recommendation CM/Rec(2010)1 on the Council of Europe probation rules; and recommendation CM/Rec(2014)4 on electronic monitoring.

As can be clearly seen, there is an abundance of texts, but as they are not legally binding they may be considered soft law. It should be stressed, however, that this characteristic does not significantly undermine their importance; also because in the framework of negotiations for admission to the European Union there has been an increasing tendency to oblige candidate states not only to comply with standards concerning the rights of persons subjected to measures depriving them of their freedom but also to adopt and establish rules for measures such as probation, for which shared standards of implementation are to be found in the recommendations of the Council of Europe[13].

In any case, the Council of Europe did adopt a specific legally binding text addressing the subject of alternatives to detention, namely, the 1964 European Convention on the supervision of conditionally sentenced or released offenders. Under the Convention, offenders are allowed to leave the territory of the State in which they were conditionally sentenced or released and take up residence in another State under the supervision of the competent authorities.

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[12] P. Poncela, R. Roth, "Introduction", in *La fabrique des sanctions pénales au Conseil d'Europe*, Paris: La documentation française, 2006, 6.

[13] D. van Zyl Smith, "Community Sanctions and European Human Rights Law", in L. Zedner, J. V. Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, Oxford: Oxford University Press, 2012,197.

The Council of Europe possesses a further powerful tool capable of imposing constraints in respect of alternatives to detention: the European Convention on the protection of human rights and fundamental freedoms (ECHR). Some of the general principles enshrined therein – first and foremost the prohibition of torture and inhuman or degrading treatment under Article 3[14] – can be interpreted by the ECtHR in such a way as to condition national rules and practices concerning alternative sanctions. In this regard it is worth mentioning that this activity of interpretation is in turn often influenced by the above-mentioned sources of soft law: this stands as confirmation of the fact that soft law rules can influence the meaning attributed to provisions of hard law, and thus end up becoming "hard" through judicial interpretation[15].

ECtHR case law implies at least two possible forms of influence on the alternatives to detention. The first, now clearly evident, regards the choice between custodial and non-custodial measures; here the case law of the ECtHR tends to impose a reduction in the margins allowed for the various forms of deprivation of liberty (pre-trial detention and prison sentences)[16]. Yet it is also true that some ECtHR judgments seem to go in the opposite direction, in that they aim to prevent an unconditional access of detainees to alternative instruments: the Maiorano judgment[17] comes to mind above all, but also, in certain respects, the Choreftakis judgment[18] (which saw no fewer than three dissenting opinions of considerable interest). On the other hand, these judgments regard very particular questions related to the failure of the competent authorities to consider the elements that should have precluded a release from prison. Generally speaking, it may thus be reiterated that in the dialectic between recourse and non-recourse to imprisonment in response to crime the ECtHR clearly leans towards a sparing use of deprivation of liberty and a greater use of non-custodial measures.

The second form of influence, much less conspicuous up to now, concerns the limits to the possible contents of the alternatives to detention. In this regard, it is sufficient to note that the European Convention on Human Rights makes the legitimacy of community service conditional

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[14] But also, in actual fact, nearly all ECHR provisions concerning penal matters as well as other rights – such as the right to respect for private and family life under Art. 8 ECHR – potentially compromised by the application of punitive measures.

[15] On this subject see, among others, A. BERNARDI, "Sui rapporti tra diritto penale e *soft law*", in *Scritti in onore di Mario Romano*, Milan: Giuffrè, 2010, vol. I, p. 29 ff.

[16] ECtHR, *Neshkov and others v. Bulgaria*, 27.1.2015; *Varga and others v. Hungary*, 10.3.2015.

[17] ECtHR, *Maiorano and others v. Italy*, 15.12.2009.

[18] ECtHR, *Choreftakis and Choreftaki v. Greece*, 17.1.2012.

upon the consent of the person concerned (Article 4(2) ECHR). However, the ECtHR has not yet expressed an opinion about whether certain highly problematic alternative measures are consistent with the respect for fundamental rights. For example, physical castration – allowed and practiced in Germany and in the Czech Republic as punishment for persons convicted of sexual offences who accept it in the place of detention – has been strongly and repeatedly criticised by the European Committee for the Prevention of Torture; yet this extreme form of non-custodial alternative has not yet been adequately sanctioned by the ECtHR. Similarly, the Court has yet to rule on the tensions arising from the different forms of electronic monitoring by now provided for in the majority of European states and the right to respect for private and family life as per Article 8 ECHR.

4.2. *Supranational sources on the subject of alternatives to detention: European Union law*

Let us now look at the normative instruments of the European Union which touch upon the subject of alternatives to detention. As is well known, it was not until the adoption of the Maastricht treaty and the creation of the third pillar, aimed at regulating police and judicial cooperation in criminal matters, that the European Union inaugurated a criminal policy of supranational character, demonstrating a certain degree of sensitivity towards the issue of alternative sanctions.

It should be said right away that EU sources are less rich than those of the Council of Europe as regards indications about the models of alternative sanctions, how they should be implemented and the overall framework of principles and criteria governing their use. Unlike the recommendations of the Council of Europe, however, these sources often lay down veritable legal obligations. Indeed, such obligations are becoming increasingly frequent in the present context of progressive construction of the Union and the consequent Europeanisation of criminal sciences.

This obviously does not mean that instruments of soft law are lacking on the subject concerned.

On the contrary, in the context of a more general tendency of the European Union to make an increasing use of non-binding instruments, the EU has introduced a whole series of texts of "softened law" in which it catalogues and compares the alternative sanctions of Member States[19],

[19] Green Paper on the on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, op. cit., Annex II Inventory and comparison of Member States' legislation regarding alternative sanctions.

addresses the issue of whether it is advisable to adopt measures aimed at promoting – or mandatorily introducing – some alternative penalties and for which offences, and "reaffirms the need for Member States to honour the commitments made in international and European fora to making greater use of probation measures and sanctions which offer an alternative to imprisonment, including decisions taken within the Council of Europe"[20].

These are actually soft law instruments of considerable significance: in fact, they are undoubtedly apt to stimulate Member States to implement the political objectives emerging within the EU as a whole[21], and are simultaneously characterised by what is in some regards a great deal of flexibility in legal areas of shared competence which are by now oriented toward the Community method, but at the time of the third pillar were entrusted to decisional dynamics of an intergovernmental character and in respect of which Member States are still sometimes loath to accept obligations imposed without unanimous consent.

In any case, the most important instruments of the European Union likely to condition the choice of sanctions adopted by Member States with a view to limiting reliance on detention are those of a binding character. Particularly significant, in this regard, are several EC and EU regulations that provide for the violation of mandatory European provisions to be punished with administrative sanctions (which may be of either a centralised or decentralised character) and are applicable in the individual countries without needing to be transposed into national law. It is true that EU sanctions do not have the primary aim of establishing alternatives to detention, but are rather more generally intended as alternatives to the diverse sanctions adopted by Member States serving to safeguard the precepts of EU origin. However – as some have pointed out – in practice they can end up playing a role as substitutes for criminal sanctions[22] and detention itself[23].

The content of some instruments containing lists of the alternative sanctions provided for in third pillar framework decisions is more prob-

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[20] European Parliament Resolution of 15 December 2011 on detention conditions in the EU (2011/2897(RSP)), para. 11.

[21] In this regard, see the observations of S. Baroncelli, O. Farkas, *Il Metodo di Coordinamento Aperto e le sue applicazioni al governo economico e occupazionale dell'Unione europea: il contesto comunitario e le ricadute sull'ordinamento interno*, in *www.osservatoriosullefonti.it.*

[22] A. Bernardi, "I tre volti del diritto penale comunitario", in *Possibilità e limiti di un diritto penale dell'Unione europea*, Milano: Giuffrè, 1999, 58-59.

[23] As previously noted, they agree on the fact that administrative sanctions as well can limit the use of detention P. Poncela, R. Roth, "Introduction", in *La fabrique des sanctions pénales au Conseil d'Europe*, op. cit., 6.

lematic, particularly in the case of framework decision 2008/947/JHA. More precisely, Article 4 of this instrument provides a detailed list of probation and alternative measures subject to mutual recognition by the judicial authorities of the Member States. Generally speaking, there is no doubt that the provisions contained in framework decisions are binding for EU countries, which are called on to transpose them. However, the framework decision containing the aforesaid list of alternative sanctions is not aimed at the harmonisation of sanctions among Member States, but rather at the mutual recognition of judicial decisions relating to non-custodial sanctions. Therefore – we would be inclined to say – rather than imposing on EU countries an obligation to adopt all of the models of sanctions listed in it, the framework decision in question starts off from the assumption that there is a general consensus concerning these models, such as to facilitate their mutual recognition irrespective of whether there exist perfectly matching instruments in the two countries called on to cooperate.

Despite what has just been affirmed, the EU Commission did make a point of specifying that as "Member States have to provide for at least the probation measures and alternative sanctions as mentioned in Article 4(1) of this Framework Decision [2008/947/JHA], a positive side effect will be the promotion and approximation of alternatives to detention in the different Member States"[24]. As can be easily inferred, therefore, the EU Commission considers the Member States to be under an obligation to adopt all the alternative sanctions susceptible of mutual recognition[25]. In short, as a result of this stance taken by the Commission, a cooperation directive ends up being, in actual fact, a harmonisation directive.

Finally, we might be induced to believe that, insofar as regards the adoption and multiplication of EU directives aimed at the harmonisation of criminal law, some binding or discretionary provisions on the subject of non-custodial sanctions may once again have the effect of eroding the scopes of application of detention. Examples include Articles 5 and 6 of Directive 2014/42/EU on the subject of confiscation, also from third par-

[24] Art. 4.2, paragraph three of the Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention – COM/2014/057 final.

[25] So much so that the paragraph quoted above continues by observing that "A preliminary assessment of the legislations shows that some Member States have not implemented all mandatory measures (BG, PL)", thus suggesting the possibility – it would seem – of initiating an infringement procedure.

ties, as well as Article 10 of Directive 2011/92/EU on "combating the sexual abuse and sexual exploitation of children and child pornography", which obliges Member States to introduce into their system interdictive sanctions of a temporary or permanent character against the authors of some offences envisaged by the Directive itself. It is true, however, that the sanctions provided for in the aforesaid articles are not conceived as alternatives to detention, but rather as additions to the extensive array of sanctions envisaged for particular types of offences.

What has been described thus far forms the framework of EU legislation on the subject of alternative sanctions, which ultimately embraces a very limited number of soft and hard law sources. Moreover, it is well known that up to now, at least as far as offences of a certain gravity are concerned, the penal instruments adopted by the European Union prevalently rely on detention, evidently considered in these cases to be the only "proportionate, effective and dissuasive" penalty. It would seem, therefore, that there is a certain distance between EU policy on sanctions and that of the Council of Europe: the EU embraces a conception of criminal law that prioritises security and is characterised by the use of custodial sentences focused on the repressive element; the Council of Europe, as seen, is especially careful to ensure that the aims of prevention are pursued by relying on highly differentiated types of sanctions and avoiding imprisonment to the extent possible[26].

5. *Comparison and stimuli of a supranational origin: what are the trends in the evolution of alternatives to detention in Europe?*

As a result of the aforementioned activity of "horizontal" comparison and the conspicuous "vertical" phenomenon of the Europeanisation of criminal law, alternative sanctions and measures are undergoing a process of harmonisation on a continental scale.

It is indubitably an arduous process, made slower by the general favour that detention continues to enjoy just about everywhere, so much so that it has given rise to a veritable "prison-centric ideology" which largely cuts across different social classes and different political orientations. And it is not easy to understand whether this ideology is a cause or

[26] The different attitude of these large supranational organisations towards alternatives to imprisonment could be more apparent than real, if we consider that, as noted earlier, the constraints placed on EU Member States in relation to the use of custodial sentences mostly regard offences of considerable gravity, for which the reliance on non-custodial sanctions might be scarcely realistic.

a consequence of the undoubted "lack of alternative planning" which helps to perpetuate, even in today's societies, models of sanctions centred on imprisonment – desocialising sanctions that are essentially not very different from the ones in vogue at the time of the industrial revolution.

Yet in spite of the aforesaid difficulties, this slow process of harmonisation advances. Therefore, though they continue to have features that do not coincide or indeed differ from one European country to another, the sanctions can by now be grouped fairly easily into broadly shared categories according to whether they are of a symbolic (or intended as a warning), civic, compensatory, punitive-financially penalising character or involve a restriction of personal freedom.

Furthermore – albeit not in a fully homogeneous manner from one State to another – just about everywhere in Europe the alternatives to detention are multiplying and their use is on the rise.

5.1. *Multiplication of the types of alternatives to detention in Europe*

We are witnessing an extraordinary proliferation of alternative sanctions, also by virtue of the trend observable in some countries to apply accessory penalties independently of (or in place of) principal penalties; or the emergence of measures that were still unknown at the start of the century. In respect of the latter, what comes to mind first of all is the forms of electronic monitoring, which only in some states are considered as a penalty in themselves rather than – as in Italy – methods of enforcing other alternative sanctions, in particular home detention.

Above all, however, we are witnessing the fusion, interaction and overlapping of different alternative sanctions, with a consequent diversification and enrichment of their punitive content (measures of mere supervision, prohibitions) or rehabilitative features (voluntarily accepted community service, obligation to take part in rehabilitation or detoxification programmes, etc.).

Essentially, while in many EU countries the role of measures involving a simple waiver of penalties is being progressively reduced, we are seeing a gradual emergence of types of alternative sanctions of a composite character, exhibiting a variable degree of innovativeness and targeting individual rights, freedoms and assets with varying intensity and by means of different methods. One need only consider the alternative sanctions that differently combine the various forms of probation, community service, reparation for damage and compensation for the victim. Or the alternatives consisting in varying degrees of restriction of movement and residence culminating in home detention, and in which depri-

vation of liberty is not accompanied by some typical components of imprisonment, namely, the uprooting from the habitual places of residence, confinement in close quarters and criminal influences, but is rather supplemented with various types of measures that can be discretionally modulated based on the characteristics of the offender and the offence committed.

In some cases, however, the revamping of already existing alternatives is so profound as to give rise to substantially new instruments. One example of this is the previously mentioned French *contrainte pénale*, to date applied to individuals who have committed offences that are not particularly serious. It is an alternative sanction which, without involving imprisonment or *sursis avec mise à l'épreuve*, imposes a whole series of obligations and prohibitions on offenders and places them under reinforced supervision and monitoring.

5.2. *Quantitative increase in the alternatives to detention in Europe*

With respect to the increase in the use of alternative penalties, though it is true that some of the models are often used only in very rare cases, it is undeniable that overall reliance on such penalties is becoming, at least generally speaking, more and more frequent across the whole of Europe. This is due to a wide variety of reasons, such as the acquired awareness of the unsustainability of the current situation of prison overcrowding, the lower costs of alternative sanctions compared to custodial ones, and the better results the former appear to achieve in terms of combating recidivism.

In fact – leaving aside fines, which as we all know have been a constant feature of all penal systems even in periods when alternative sanctions as presently construed were not even imagined – in the majority of countries that are members of the Council of Europe, the persons subjected to the various types of alternatives to detention by now outnumber those receiving custodial sentences. In particular, the data of the Council of Europe tell us that the European average number of individuals subjected to alternative sanctions reached 209.1 per 100,000 inhabitants in 2011. Although this average appears to have fallen to 184.7 in 2014 per 100,000 inhabitants, it nonetheless remains a great deal higher than the European average number of inmates, which stood at 127 per one hundred thousand in 2012, 134 in 2013 and 124 in 2014[27].

[27] M. Aebi, M. Tiago, C. Burckhardt, *SPACE I - Council of Europe Annual Penal Statistics: Prison populations. Survey 2014*, op. cit.

Generally speaking, therefore, the average rates of incarceration and prison overcrowding have shown a downward trend over the past several years, though this is not only due to the use of alternative sanctions. And although it is true that considerable differences remain between one European country and another[28], it is likewise true that these differences are being progressively narrowed thanks to the persuasive effect of European soft law sources, as well as the desire to avoid the reprimands of the highest European courts. The latter, in fact, appear more and more inclined to implement the principles of proportion-strict necessity of the punitive response and the ban on inhuman and degrading treatments in such a way as to limit, in practice, the use of detention and consequently to enhance the role of alternative sanctions.

6. *The persistent differences between European penal systems in respect of the alternatives to detention and the obstacles to their broader application*

In spite of the above-described process of harmonisation on a European scale, considerable differences may still be observed among states that are members of the European Union and the Council of Europe. Though it is true that the basic models of alternative measures are roughly the same, it is also true that some legal systems envisage alternatives which are completely unknown in neighbouring countries. We need only consider – with reference to the pre-trial stage – that in Romania, as in a number of other European countries, one very frequently used alternative to imprisonment is payment of a bail bond, possibly subject to compliance with several conditions. It is in any event a measure that generally benefits only affluent individuals, and is thus often criticised and rejected by many countries. As can be easily understood, it differs profoundly from the "security for good behaviour" provided for under the Italian criminal code, so any comparison would be inappropriate.

In any case, even the generally shared alternative models take on an infinite variety of nuances of content. One need only think of the varied cases in which a penalty (including detention) is waived, also irrespective of whether the accused person will be acquitted by the judge who examines the case. In fact, depending on the legal system considered, on the

[28] Differences that regard both the percentage of detained persons and the tendency of that percentage, and the ratio between the number of inmates and the number of available places in prisons, to grow or decrease, and, finally, the greater or lesser success of the individual measures directly or indirectly influencing the process of decongestion of prisons.

one hand, such waivers are allowed for offences subject to penalties that may differ greatly in type and entity; on the other hand, they can be founded both on heterogeneous objective data (such as the modest unlawfulness or minor entity of the offence, or in general on the material circumstances in which the fact took place) and on a plethora of changing subjective data[29].

Moreover, in some legal systems the non-application of a penalty is conditional upon additional elements, such as reparation for all or part of the damage (reparation not necessarily always made by the offender), the cessation of the disturbance caused by the offence, the absence of any preclusive grounds of prevention, i.e. the absence of any public interest in continuing the criminal action, or the emergence of particular circumstances after the commission of the offence. Ultimately, considering that the conditions fragmentarily and incompletely examined here can be alternative or cumulative, it can be easily understood that the variables related to the forms of waiver of sentences or penalties are practically infinite and range from extremely detailed solutions to others – as in the case of the British "discharge" – left almost completely up to the judge's discretion. As can be easily imagined, a similar variety of content is to be found in many other measures designed to limit the use of detention, such as deferral of sentencing, suspension of the effects of the latter, probation, electronic monitoring, etc.

More in general, it should be said that in Europe the alternatives to detention are applied within substantive and procedural criminal law systems which often obstinately differ in a thousand ways from one country to another, and that these differences (particularly accentuated in the procedural realm) influence when or how the aforesaid alternatives are used. So, for example, in France the alternatives to detention came to be applied during the trial stage and were later timidly extended to the sentence enforcement stage; whereas in Italy, on the contrary, the alternatives were first adopted in the enforcement stage and did not colonise the trial stage until later (and only to small degree and with difficulty, especially as regards the alternatives other than fines). Thus, more in general, the countries with a criminal law system founded on the principle of mandatory or discretionary prosecution tend to develop very different

[29] Subjective data ranging from the degree of guilt of the offender to the non-habitual nature of the illicit behaviour, the successful social rehabilitation of the offender, his or her personality, the prejudice caused to the offender by the continuation of the proceedings, the work, study, family or health-related needs of the person charged or undergoing investigation, and the particular damaging consequences caused by the offence to the offender him or herself.

techniques for combating prison overcrowding, or make different use of alternatives abstractly similar in content.

Moreover, for reasons that that go beyond the purely legal realm, the rates of effectiveness of alternative sanctions also frequently differ to a very substantial extent. Let us consider the almost paradoxical case of fines, in many European countries paid by nearly all sentenced persons, whilst in Italy this penalty – be it the principal one or an alternative sanction – is actually paid in a statistically negligible number of cases (national average 3%, nearly 0% in certain parts of the Italian territory). Remaining on the subject of numbers, but from a much more general perspective, it must be acknowledged that precisely the statistical data seem to demonstrate incontestably that, within Europe, Italy is very far behind when it comes to the use of alternative sanctions as a whole. More precisely, the Space 2 reports of the Council of Europe tell us that in Italy the rate of incarceration, after having amply exceeded 100 prisoners per one hundred thousand inhabitants, presently stands at around 85 prisoners per one hundred thousand inhabitants, whereas the Italian average in respect of the offenders benefitting from alternatives to detention would appear to be 55.5 persons per one hundred thousand inhabitants.

Admittedly, these data do not take into account a whole series of elements, including the number of persons who benefit from alternatives to pre-trial detention; but this sloppiness in the collection and dissemination of statistical data regarding the alternatives to detention is after all a symptom of the scant importance attached to them or in any case the haphazardness that still surrounds the subject of alternative measures.

7. *Conclusions and layout*

The research we have conducted thus rests upon two pillars: on the one hand, acknowledgement of an accentuated process of expansion and approximation between states in respect of the alternatives to detention; on the other hand, the recognition of a wide range of differences that hinder the development of such alternatives within the systems considered, as well as their harmonisation on a European scale.

There is also an awareness of the fact that both European and national sources increasingly associate the use of non-custodial sanctions and measures with the "pragmatic" objective of reducing the prison population. The specificity of this study thus mainly lies in the fact that it openly places an accent on the relationship between the expansion of alternatives to detention and a reduction in incarceration rates.

It is true that this correlation has always been criticised, since it is difficult to corroborate by means of empirical findings, and according to some even disproven by the facts. However, it is undeniable that the affirmed deflationary purposes constitute the main grounds invoked today in Europe (and not only) for justifying alternative penalties and measures to imprisonment. Analysing the evolution of sanctions and measures from this angle thus not only makes it possible to confirm or disprove the assumption embraced by a majority of policy makers, but also has the advantage of bringing to light the genetic mutation these sanctions have undergone over the past three decades in Europe.

The book thus begins with a *first section* dedicated to the supranational sources addressing the alternatives to detention. The various essays making it up highlight the priority deflationary function that alternatives to imprisonment have taken on under European law. As we shall see, this is a corollary of the growing attention dedicated by supranational bodies to the protection of fundamental rights in connection with conditions of detention. The overall evolution of supranational sources in this area has in any case tended towards the formulation of increasingly stringent guidelines regarding the content of alternatives to detention. The principles and rules enshrined by supranational law thus outline some fundamental aspects that should characterise the system of sanctions in different European countries. Here it is sufficient to mention the preference displayed by these sources for alternatives to detention involving the imposition of obligations of reparation or restitution.

The book also features a *second section* made up of national reports. The latter all have the same structure. They start off by providing an overview of the prison population in the fifteen years between 2000 and 2015. This overview is based on an analysis – conducted by the authors of the individual essays – of the data provided by the prison authorities of the countries concerned, or in some cases of data drawn from the Space I reports. Then follows a presentation of the alternative sanctions or measures in force in the national legal system, broken down – according to the classification scheme proposed here – based on the procedural stage in which they can be applied. For each of these stages, the national reports also offer a critical assessment of the penal sanctions provided for under national law. This critical assessment focuses both on the impact of each type of non-custodial sanction or measure on the prison population and the consistency of such sanctions or measures with the European sources analysed in the first section.

The book ends with a chapter dedicated to some *conclusions* of a "cross-cutting" character drawn on the basis of the results of the re-

search and in particular the conclusions of the individual national reports. These results will be presented analytically and compared with the findings of the most recent literature on alternatives to detention and "community" sanctions in Europe. The aim is to generalise the teachings offered by the studies carried out beyond the confines of the individual legal systems taken into consideration; this task seems achievable only by comparing the results obtained with those reported in other studies recently conducted in the same field of study. The *conclusions* include a number of critical considerations and a series of proposals. The latter, in particular, aim to identify the most useful solutions for correcting the defects detected in the system of sanctions of individual countries and, if possible, reducing the prison population to within the bounds of tolerability.

Section I

THE EUROPEAN FRAMEWORK

ADRIANO MARTUFI - THIBAUT SLINGENEYER[1]

SOFT LAW INSTRUMENTS OF THE COUNCIL OF EUROPE AND COMMUNITY SANCTIONS: CRIMINAL POLICY ISSUES

SUMMARY: 1. Introduction. – 2. Reductionist policy: imprisonment as a last resort. – 3. The effectiveness of community sanctions: compliance and risk management. – 4. Rehabilitation and social adjustment: from correctionalism to "what works?" – 5. Punitive character of non-custodial sanctions and human rights protection. The principles of legality and proportionality. – 6. The requirement of the offender's cooperation. Other restrictions based on the human rights of offenders subjected to non-custodial sanctions. – 7. Conclusions: evolution or retreat of European standards in the field on non-custodial sanctions?

1. *Introduction*

The aim of this work is to offer a comprehensive presentation of the standards developed by the bodies of the Council of Europe in the field of non-custodial sanctions. After some short introductory remarks, this paper will go through a critical examination of what could be roughly defined as the *acquis* of principles and rules governing the imposition and the enforcement of this type of measures.

The use of non-custodial sanctions in Europe has grown steadily over the last decade. This is particularly true for the so-called "community sanctions", the implementation of which implies oversight of the offender in the community and the imposition of a variable number of conditions and obligations. This term is increasingly being used by scholars in reference both to the penalties handed down by Courts in the sentencing phase and the measures associated with early release schemes as a part of the enforcement of a penalty[2].

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[1] Parr. 1, 5, 6 and 7 written by A. MARTUFI; parr. 2, 3, 4 written by T. SLINGENEYER.

[2] F. MCNEILL, "Community sanctions and European penology", in T. DAEMS, S. SNACKEN, D. VAN ZYL SMIT (eds.), *European penology*, London: Hart, 2013; G. ROBINSON, "The Cinderella complex: Punishment, society and community sanctions", in *Pun. & Soc.*, 2016, 96.

Based on recent analyses, the numbers of adult offenders under supervision via "sanctions or measures executed in the community" is now believed to have outnumbered the figures of offenders detained in custody in many European countries[3]. More generally, a qualitative and quantitative increase in community sanctions and measures can be observed, with a growing number of clients referred to probation services[4] and a tendency of measures implying supervision in the community to be applied not only in the criminal realm, but also increasingly under civil and administrative law[5].

As appears clear from a review of legal and criminological literature in this field, this dramatic growth has not been welcomed without criticism. Not only have critics suggested that the "growing use of community-based sanctions" might cause a widening of the penal net and a resultant increase in state control[6], commentators have also raised questions about the increasingly punitive content of the conditions and obligations attached to some forms of non-custodial measures.

One may however suggest that, over the last three decades in particular, attempts have been made on both a domestic and supranational level to spell out legal restrictions to the arbitrary and disproportionate use of noncustodial sanctions and guarantee accused and convicted persons a certain number of rights which cannot be infringed by judicial and administrative authorities when imposing and executing sanctions in the community. Such arguments, which may have the effect of counterbalancing the bleak prospects envisaged by critics, highlight the ever-growing importance of legal standards in shaping penal practice[7].

As far as methodology is concerned, this paper does not embrace any of the above-mentioned theoretical frameworks. Rather it develops a legal analysis of the most significant standards set by the legislation of the

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[3] M. Aebi, F. Chopin, "Council of Europe. Annual penal statistics: persons serving non-custodial sanction and measures in 2013", Strasbourg: Council of Europe, 2014; M. Aebi, N. Delgrande, Y. Marguet, "Have community sanctions and measures widened the net of the European criminal justice systems?", in *Pun. & Soc.*, 2015, 575-597.

[4] A. Van Kalmthout, I. Durnescu, "Probation in Europe", Nijmegen: Wolf Legal Publishing, 2008.

[5] F. McNeill, "Community sanctions and European penology", op. cit.

[6] S. Cohen, "The punitive city: Notes on the Dispersal of Social Control", in *Crim. law soc. change*, 1979, 339-363. This concept was later clarified by Tonry and Lynch who distinguished the risk of net-widening associated with front-door programs and the equivalent risk underlying the use of back-door schemes. See M. Tonry, M. Lynch, "Intermediate sanctions", in *Crim. just.*, 1996, 99-144.

[7] I. Durnescu, "Community sanctions" in S. Body-Gendrot, M. Hough, K. Kéreszi, R. Levy, S. Snacken (eds.), *The Routledge Handbook of European Criminology*, London: Routledge, 2014.

Council of Europe (particularly its soft law) without overlooking their significance from a penological perspective. In other words, this article combines a thorough account of the legal framework designed for the implementation of non-custodial sanctions with an assessment of the "ancillary" and "latent" functions of community punishments[8].

Our interest is to show how individual guarantees and sentencing purposes established by European standards reflect the political and social dynamics underlying these types of punishment.

This interdisciplinary approach is essential in order to grasp the new identity of community sanctions, as in many jurisdictions the content and aims of these instruments have evolved over the last twenty years and have significantly departed from their original justifications. Notably "the traditional view of probation" as a means of re-educating and correcting the offender so as to enable social integration and inclusion has been downplayed, while a growing emphasis has been placed on managing risk and public protection. At the same time, the commitment to a progressive reduction in the use of imprisonment (so-called reductionism) may have been watered down, although the connection between the implementation of community sanctions and the reduction of the prison population remains strongly emphasised in several jurisdictions.

Developments of this kind are visible in European law, as the most recent recommendations of the Council of Europe are believed to embed some elements that reflect a positive commitment to the use of community sanctions as a means of risk management without referring to their ability to facilitate social adjustment and reducing prison population. To what extent such recent trends have actually changed the European approach[9] to community sanctions is however the main question this paper will try to respond to.

In section 2 of this paper we start off by addressing the reductionist policy promoted by the Council of Europe within the broader framework of European human rights law. In section 3 we discuss the shift of European standards from a reductionist agenda based on proportionality and justice to a growing emphasis on the effectiveness of community sanctions. In the sections that follow, the general principles underlying European standard setting are discussed more extensively. In section 4, we turn our attention to the developments that have affected the understanding of the concept of rehabilitation, while in section 5 we focus on the principles of legality and proportionality. In section 6 the require-

[8] M. Tonry, "Purposes and functions of sentencing", in *Crim. & Just.*, 2006, 1-54.
[9] S. Snacken, "Resisting punitiveness in Europe", in *Theor. Crimin.*, 2010, 273-292.

ment of offender's consent to the imposition of community sanctions is critically discussed. Conclusively, in section 7 we relate the findings of our research to the international debate on the evolution of community sanctions.

2. *Reductionist policy: imprisonment as a last resort*

A significant body of scholarship has emerged in the last two decades suggesting that the tendency to resist punitiveness is a peculiar feature of European penal policy and practice[10]. Despite the obvious local differences in the degrees of punitiveness – which become apparent when comparing incarceration rates and prison populations – a distinguishing feature of European penal practice is the way in which human rights have served as a bulwark against criminalisation and over-penalisation[11]. As Michael Tonry has observed, the emphasis placed on fundamental rights has played an important role in moderating the severity of punishments and reducing the recourse to penal intervention, overcoming the crime control values that have inspired penal policies in the United States[12].

The focus on the rights of accused and convicted persons has been paralleled by an increasing attention to the detrimental effects of imprisonment. More specifically, the overarching concern with the dignity of prisoners has led supranational organisations in Europe to embrace some fundamental tenets of reductionist policy, while revealing a clear scepticism towards the possible positive effects of imprisonment. The essential conditions for a reductionist policy, as described by Rutherford[13], are a strong intolerance towards prison overcrowding, the refusal to expand prison capacity, and the corresponding development of "both 'front-door' policies to reduce the input of prisoners into the system and 'back door' policies to limit their length of stay in prison"[14]. It is noticeable that both "front-door" and "back-door" policies involve the implementation of non-custodial sanctions as a means to reduce incarceration by making it a measure of "last resort".

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[10] S. Snacken, "A reductionist penal policy and European Human Rights Standards", in *Eur. J. Crim. Pol. Res.*, 2006, 14; D. Van Zyl Smit, S. Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights*, Oxford: Oxford University Press, 2009.

[11] S. Snacken, "Resisting Punitiveness in Europe", op. cit., 283.

[12] M. Tonry, "Symbol Substance and Severity in Western Penal Policies", in *Pun. & Soc.*, 2001, 519. See also J. Q. Whitman, *Harsh justice: criminal punishment and the Widening Divide between America and Europe*, Oxford: Oxford University Press, 2003.

[13] A. Rutherford, *Prisons and the Process of Justice: the Reductionist Challenge*, London: Heinemann, 1984.

[14] S. Snacken, "A reductionist penal policy and European Human Rights Standards", op. cit., 14.

This view is apparent in several resolutions and recommendations of the Council of Europe, such as the Recommendation R(80)11 on Pre-trial detention, R(87)3 and R(2006)2 on the European Prison Rules, R(92)16 on the European Rules on community sanctions and measures, and R(99)22 concerning prison overcrowding and prison population inflation, as well as in the standards and reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (11th general Report on the CPT's activities, CPT/Inf (2001) 16, Strasbourg, September 2001). Moreover the Council of Europe has recently come back on this topic with a White paper on prison overcrowding issued in June 2016[15].

The legally non-binding nature of these instruments did not prevent them from bringing about significant legal changes[16]. Particularly noteworthy in this regard is the increasing tendency of the European Court of Human Rights (ECtHR) to recognise the findings of the CPT and the recommendations of the Council of Europe. The European Court of Human Rights has thus finally addressed the role of non-custodial sanctions in national jurisdictions, stressing that the member states should reduce prison overcrowding by applying non-custodial sanctions and limiting the imposition of pre-trial detention[17]. This obligation is intended to prevent severe overcrowding from resulting in a violation of Article 3 ECHR, as poor conditions of detention are with increasing frequency equated with inhuman and degrading treatment in the case law of the ECtHR itself[18].

As may have become apparent, supranational legal sources in Europe make the use of non-custodial sanctions a political priority (if not a legal obligation) framed in a broader set of human rights principles that should orient the activity of all the actors in the criminal justice system. Consensus is emerging on the fact that prison law and alternatives to custody represent a human rights issue, in line with the growing penological insights into the many detrimental effects of deprivation of liberty. This explains in particular the great number of legally non-binding texts (resolutions and recommendations) issued by the Committee of Ministers of the Council of Europe, which relies heavily on the work of specialist

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[15] CM(2016)121-add3. The White Paper was endorsed by the European Committee on Crime Problems of the Council of Europe relying on the work of an *ad hoc* drafting committee.

[16] S. Snacken, "Punishment, legitimate policies and values: Penal moderation, dignity and human rights" in *Pun. & Soc.*, 2015, 397-423.

[17] ECtHR, *Torreggiani and Others v Italy*, 8.1.2013 § 93-94. See also ECtHR, *Orchowski v Poland*, 22.10.2009; ECtHR, *Ananyev and Others v Russia*, 10.1.2012.

[18] P. Voyatsis, "Alternative measures to detention in the European Court of Human Rights", in *Eur. Crim. Law Rev.*, 2014, 169-178.

bodies such as the European Committee on Crime Problems; their aim is to counter the rise in the prison population by "emphasizing the advantages of alternatives to imprisonment".

It is undisputable, however, that the comprehensive set of recommendations issued by Council of Europe elaborates more than simple policy suggestions on how to reduce the use of imprisonment. The setting of European standards for non-custodial sanctions, indeed, entails broad and detailed regulation of the different types of measures that are most conducive to attaining the goal of reducing the prison population. Whilst the first drafts and studies[19] supported an extensive use of financial penalties – noting that for many offenders supervision was likely to be as ineffective as a custodial sanction in preventing recidivism – subsequent initiatives placed particular emphasis on the "different legal forms of probation", spanning from the continental model of the pure suspended sentence to the Anglo-Saxon prototype based on the oversight of the offender.

At the beginning, though, the inherent values of these European provisions clearly pointed towards a progressive reduction in the intervention of criminal law[20]. Not only was it generally stated that "custodial sentences should be regarded as a sanction of last resort"[21], but this principle also had to be implemented by "pursuing policies of decriminalisation, using measures of diversion such as mediation, and of ensuring the compensation of victims"[22] and, last but not least, via an expanded use of community sanctions and measures[23]. Resort to sanctions in the community thus appeared to be only one of the items in a more comprehensive toolbox for making the criminal justice system less repressive[24] and creating room for programmes of social intervention that could be better provided outside the penal system.

As a matter of fact, in recommendation R (92) 17 on the consistency of sentencing, provision was made that the legislator should consider in-

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[19] European Committee on Crime Problems, "Alternative Penal Measures to Imprisonment", Strasbourg: Council of Europe, 1976.

[20] Even more significantly, the 1990 United Nations Standard Minimum Rules for Non-Custodial Sanctions are defined as being "part of the movement towards depenalization and decriminalization".

[21] Recommendation R (99) 22, rule 1; Recommendation R (92) 17, rule B5.

[22] Recommendation R (92) 17, rule A6.

[23] Recommendation R (99) 22, rule 3 suggests that Member States should introduce a wide array of alternatives to detention, thereby enabling the judicial authorities to "pick and choose" those most suitable for the offender.

[24] D. Van Zyl Smit, S, Snacken, D. Hayes, "One cannot legislate kindness: ambiguities in European legal instruments on non-custodial sanctions", in *Pun. & Soc.*, 2015, 3-26.

dicating a non-custodial sanction or measure instead of imprisonment as a reference sanction for certain offences.

In more recent texts, by contrast, one may notice a shift of emphasis, as the scope of recommendations is restricted only to the sanctions that imply supervision in the community. The above-mentioned recommendation R (99) 22 requires that the national legislator provide for "a large array of community sanctions and measures, possibly graded in terms of relative severity"[25]. Although some of these instruments indicate additional policy options for reducing the prison population – such as the introduction of sentencing criteria[26] and the reform of procedural rules to restrict the prosecutor's right to appeal[27] – emphasis is increasingly being placed on the role, the effects and the management of probation and other community punishments.

3. *The effectiveness of community sanctions: compliance and risk management*

A closer look at the soft law instruments of the Council of Europe reveals the two-tier nature of the commitment to use prison as a means of last resort.

On the one hand, this principle is grounded on the ideal of proportionality, as deprivation of liberty should be provided for only when the seriousness of the offence would make any other punishment clearly inadequate. On the other hand, such an obligation is supported by a utilitarian argument, as the recommendations repeatedly stress that community sanctions can better achieve the aims of sentencing while satisfying the need for public protection and safety[28]. Whereas the first, proportionality-based, argument is intended to prevent deprivation of liberty from resulting in an excessive burden on the offender, the utilitarian justification for resorting to community punishments emphasises the effectiveness of such measures. Significantly, the recommendations urge national legislators to graduate community sanctions according to the dif-

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[25] Recommendation R (99) 22, rule 3.

[26] Recommendation R (2000) 22, rule 6; Recommendation R (99) 22, rule 5, 18 and 20; Recommendation R (92) 17, rule A6. In particular Recommendation R (92) 17, rule E1 requires Courts to give specific reasons for imposing custodial sanctions.

[27] Recommendation R (92) 17, rules F1 and F2 require the legislature to restrict the possibility of circumventing the principle of prohibition of *reformatio in pejus.*

[28] Recommendation R (99) 22, rule 22. See also Resolution (65) 1, on suspended sentence, probation and other alternatives to imprisonment, rule 1. Recommendation CM/Rec (2010) on the European Prison Rules, rule 54.

ferent degree of seriousness of the offence; this assumption echoes the "just desert" theories according to which non-custodial sanctions should be included in sentencing scales in order to allow courts to choose the most suitable penalty for the offender[29].

However, the recent developments in European standard setting with respect to non-custodial sanctions show an increasing concern with effectiveness. This objective is traditionally taken into account with reference merely to the offender's compliance with the legal requirements imposed in the sentence or in the probation order. One of the aims of R (92) 16 is indeed to propose clear rules of conduct to staff responsible for the implementation of community sanctions and measures in order to ensure that "this implementation is in conformity with any conditions and obligations imposed"[30]. Compliance with legal requirements serves to ensure the credibility of community sanctions. As Bottoms put it, the concept of compliance is inextricably linked to the ideal of effectiveness[31] of non-custodial sanctions[32], although it is unfortunate that European standards only deal with what he refers to as "short-term requirement compliance" (and not with the more far-reaching goal of long-term compliance related to non-reoffending).

The concern with effectiveness may also explain the preference for individualised sanctions over collective measures – such as collective pardons and amnesties – for the management of prison overcrowding in the post-sentencing phase[33]. While the former allow close oversight of the offender's conduct in the community, the latter are sentence reductions that usually do not involve any type of control and mostly result in forms of unconditional release. For the same reason, the mechanisms of the suspended sentence and early release are not included in the array of measures for reducing the prison population inasmuch as they are based on the simple condition of not reoffending. Conditional release, in particular, is defined as "a community measure" implying early release of prisoners under an individualised post-release condition[34]. Suspended sentence and early release are thus regarded as not sufficiently interventionist for the purposes of European soft law when they are not imple-

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[29] A. VON HIRSCH, "The Ethics of Community-Based Sanctions", in *Crim. & Delinq.*, 1990, 163-173.

[30] Recommendation R (92) 16, preamble a); Recommendation R (99) 22, rule 22.

[31] A. BOTTOMS, "Compliance with community penalties", in A. BOTTOMS, L. GELSTHORPE, S. REX (eds.), *Community Penalties: Change and Challenges*, Cullompton: Willan, 89

[32] Recommendation R (92) 16, preamble c).

[33] Recommendation R (99) 22, rule 22; Recommendation CM/Rec (2014) 1, preamble.

[34] Recommendation R (2003) 22, rule 2.

mented via offender's supervision[35]. In contrast, electronic monitoring "can help reduce resorting to deprivation of liberty, while ensuring effective supervision of suspects and offenders in the community"[36].

A different understanding of effectiveness has recently been developed by European standards. Ever since the adoption of Recommendation R (99) 22 concerning prison overcrowding, Member States have been called on to develop and use "reliable risk-prediction and risk-assessment techniques as well as supervision strategies, with a view to identifying the offender's risk to relapse and ensuring public protection and safety"[37]. Programmes and interventions put in place to assist offenders under supervision should therefore properly deal with public safety[38] and ensure the good administration of justice. This shift in emphasis from justice to effectiveness is confirmed by a significant change in the principles regulating the length of community sanctions. While the 1992 recommendation prescribed that no community sanction should be of indeterminate duration[39], in 2000 an amendment was introduced which authorised exceptions to this rule if someone posed a continuing grave threat to life, health or safety in the community[40]. More recently, recommendation CM/Rec (2014), 3 has allowed life-long supervision and even preventive detention for dangerous offenders[41] as a condition for probation and early release from prison[42]. By opening the door to indeterminate supervision, recent recommendations reveal an overemphasis on the objective of preventing recidivism and protecting victims. The effectiveness of community sanctions is then assessed with reference to their objective ability to diminish the risk for public safety.

We can therefore observe a further shift from an "old-fashioned" utilitarian perspective to a "modern" managerial approach[43], as concern

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[35] D. Van Zyl Smit, S, Snacken, D. Hayes, "One cannot legislate kindness: ambiguities in European legal instruments on non-custodial sanctions", op. cit., 3-26.

[36] Recommendation CM/Rec (2014) 4, preamble.

[37] Recommendation R (99) 22, rule 22. See also Recommendation R (2000) 22; Recommendation CM/Rec (2010) 1, preamble and rule 11; Recommendation CM/Rec (2014) 3, rule 34; Recommendation R (2003) 22, preamble and rules 3, 8 and 11.

[38] Recommendation R (2000) 22, commentary on rule 19; Recommendation CM/Rec (2010) 1, rules 1, 12, 49 and 61.

[39] Recommendation R (2) 16, rule 5.

[40] In Recommendation R (2000) 22 it is merely stated that this "ordinarily" shall not be the case. This amendment is indicative of a change in the penal climate according to C. Morgenstern, "European initiatives for harmonisation and minimum standards", in *Eur. Journ. Prob.*, 2009, 135

[41] Recommendation CM/Rec (2014) 3, rule 25.

[42] Recommendation CM/Rec (2014) 3, rule 23.

[43] For a summary of the practices underpinning the "new penology", see M. Feeley,

with predictable control of risk is paralleled by the analysis of cost-effectiveness and other qualitative indicators with a view to evaluating the performance of rehabilitative programmes[44].

4. *Rehabilitation and social adjustment: from correctionalism to "what works?"*

European standards on community sanctions and measures have insisted, from the very beginning, on the objective of rehabilitation as the main theoretical justification to support the use of community sanctions. This can be explained with the historical origins of non-custodial sanctions, which developed in the late 19th century as a response to criticisms raised against the de-socialising effects of short-term prison sentences[45]. Alternatives replacing short terms of imprisonment have been provided for under the legislation of Member States with a view to enabling courts to pursue aims of rehabilitation by ordering non-custodial measures where the imposition of a prison term may have counterproductive effects. Similarly, in several European states the rehabilitation ideal constitutes the overarching principle of the post-sentencing phase[46]. It underlies national rules on the early release of sentenced prisoners and guides the implementation of alternative forms of enforcement of prison sentences[47].

In this context, it comes as no surprise that European law places particular emphasis on the need for social reintegration: the recommendations adopted by the Committee of Ministers of the Council of Europe, in particular, stress the aim of contributing to the personal and social development of the offender[48] in order to restore his status as a law-abiding person[49]. Significantly, the importance given to the aim of rehabilitation endured throughout the eighties and the nineties, despite an influential trend in legal scholarship which increasingly affirmed the ineffectiveness of rehabilitative treatments. However, far from being a uniform concept,

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J. Simon, "The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications", in *Criminology*, 1993, 449-474.

[44] Recommendation CM/Rec (2014) 4, preamble; Recommendation R (2000) 22, rule 19 which prescribes that criteria of effectiveness should be laid down to assess, from various perspectives, the costs and the benefits associated with programmes and interventions.

[45] See A. Van Kalmthout, "Alternative sanctions in Europe: their counter-productive effects and their impact on prison conditions", in *Tilb. law rev.*, 1994, 335.

[46] See, inter alia, the seminal work of H. Müller-Dietz, "Methoden und Ziele der heutigen Strafvollzugswissenschaft", in *Z. St. W.*, 1967, 330.

[47] See Recommendation CM/Rec (2010) 1 on the European Probation Rules, glossary.

[48] Recommendation R (2006) 2; Recommendation R (2003) 22, rule 3 and rule 13; Recommendation R (92) 16; Recommendation R (82) 16; Recommendation R (92), rule 55.

[49] See Recommendation CM/Rec (2010) 1 on the European Probation Rules, glossary.

"the rehabilitation of offenders appears to refer to a variety of processes and outcomes, not all of which are entirely compatible"[50].

Such diversity is reflected by the number of definitions recurring in the legal texts adopted by the Council of Europe. These definitions are supported by different arguments, which set various and to some extent conflicting goals for the punishment and the related rehabilitative treatments. One may however retrace the theoretical influences underlying the various understandings of "rehabilitation" as they appear in European standards. As a matter of fact, some of the guidelines can be easily connected to a "welfare-based" conception of the rehabilitative approach, the main goal of which is to be identified in a utilitarian pursuit of the common good through the transformation of offenders into decent and useful members of the community[51]. Member States are thus invited to implement rehabilitative treatments addressing the individual, social and economic factors that are believed to be most relevant causes of crime.

Although some provisions exist which tend to place the focus on the individual's need for "reform"[52], in line with an old-fashioned correctional approach[53], what emerges from an accurate reading of European recommendations is a vision of punishment linking rehabilitation with social adjustment. In this perspective, "rehabilitation" appears to be equated with "social inclusion", as legal standards focus on "reintegration in the community"[54] and on a transition from a life in prison to a law-abiding life in the community[55]. In some of the instruments adopted in the nineties, indeed, the connection with a utilitarian ideal is almost self-evident as the implementation of penalties in the community is optimistically regarded as a means offering better protection for society in the long term[56].

As for the particular emphasis placed on after-prison resettlement, it can be observed that, while up to the 1999 recommendation on prison

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[50] P. RAYNOR, G. ROBINSON, "Rehabilitation, crime and justice", Basingkstoke: Palgrave McMillan, 2005, 14.

[51] P. RAYNOR, G. ROBINSON, "Why help offenders? Arguments for rehabilitation as a penal strategy", in *Eur. journ. prob.*, 2009, 7.

[52] See Convention ETS n 51, Art 1 and Recommendation R (99) 19 concerning mediation in penal matters, preamble.

[53] This model of rehabilitation over-emphasises the endogenous (internal/personal/individual) reasons for offending with the effect of underplaying the exogenous causes of crime; see D. GARLAND, "Punishment and welfare - A History of Penal Strategies", Aldershot: Gower, 1985.

[54] Recommendation R (2002) 22, rule 17. But see also Rec (2003) 23, rule 10, "social adjustment" (Recommendation R (92) 16, preamble et rule 55; CM/Rec (2010) 1, rules 1, 12 and 47.

[55] Recommendation R (2003) 22, rule 3 and 20; see also CM/Rec (2010) 1, Glossary, where resettlement is defined as the process of a prisoner's reintegration into society.

[56] Recommendation R (92) 16, preamble and rule 55.

overcrowding, social reintegration was pursued by simply encouraging recourse to non-custodial measures as a means capable of favouring social reintegration *per se*[57], this goal is now more ambiguously pursued via the imposition of post-release conditions that simultaneously aim to ensure "public safety and the reduction of crime in the community"[58]. Moreover, some recently introduced instruments seem to endorse a radically different understanding of "rehabilitation" which apparently focuses more on participative social learning and self-responsabilisation, than on social inclusion.

This change emerged in 2000 recommendation on community sanctions[59], reflecting the renewed optimism about the rehabilitative effectiveness of cognitive-behavioural and psycho-social interventions. New findings of meta-analyses associated with these kinds of interventions[60] prompted the development of the so-called "what works" movement, initially led by Canadian and UK-based correctional researchers and practitioners. These methods gained momentum in the nineties, particularly in Anglophone and Northern European jurisdictions, in the light of evidence of their effectiveness in reducing reoffending and contributing to public safety[61]. Following this new trend in scholarship, European standards openly endorsed a "risk-needs-responsivity" approach, the primary and most widely used model for guiding offender assessment and treatment according to the "what works" philosophy. Belonging to this model are methods that tailor the interventions to "the learning style, motivation, abilities and strengths of the offender"[62], trying to address his or her "criminogenic needs" by empowering offenders to take control of their lives and behaviour and to make more pro-social choices[63].

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[57] Recommendation R (1999) 22, rule 9.

[58] Recommendation R (2003) 22, rule 3; Rec (2003) 23, rule 10.

[59] Recommendation R (2000) 22, rule 21 See also N. Bishop, U. Schneider, "Improving the implementation of the European Rules on Community Sanctions and Measures: Introduction to a New Council of Europe Recommendation", in *Eur. Journ. Crim.*, *Law Just.*, 2001, 180.

[60] C.R. Hollin, "Treatments programs for offenders. Meta analysis, what works and beyond", in *Int. Journ. Law Psych*., 1999, 361.

[61] D.L. MacKenzie, "What Works in Corrections. Reducing the Criminal Activities of Offenders and Delinquents", New York: Cambridge studies in Criminology, 2006, 55. G. Robinson, F. McNeill, S. Maruna, "Punishment in society: the improbable persistence of probation and other community sanctions and measures", in J. Simon, R. Sparks (eds.), *The SAGE Handbook of Punishment and Society*, 329.

[62] J. Bonta, S. Wormith, "Risk and Need Assessment", in G. Mcivor, P. Raynor (eds.), *Developments in Social Work with Offenders*, London: Jessica Kingsley, 2007, 131-152.

[63] J. McGuire, P. Priestle, "Reviewing 'What works': Past, Present and Future", in J. McGuire (ed.), *What Works: Reducing Reoffending*, 1995, 3

Eloquently, the 2010 Recommendation makes a case for interventions that should not only consist in "advising, assisting and motivating offenders"[64], but also in programmes addressing some purportedly common difficulties found in the offender population (such as lack of basic skills and drug addiction)[65]. Perhaps even more openly, "what works" strategies are invoked to deal with dangerous offenders who are likely to relapse into serious crime[66]. The emphasis on the individual capacity of probation clients to responsibly develop self-awareness is complemented by a concern with matching the intensity of treatment with the risk level of the offender. This requirement is far from being unproblematic, as it not only demands the development of sophisticated risk-assessment tools[67], which would often constitute unprecedented innovations in several Member States, but it also encourages a risk-driven selection of probationers eligible for programmes; this may result in a severe reduction in the number of actual rehabilitative treatments compared to what is now granted to offenders[68]. More generally, in this perspective rehabilitation is cast as a personal project rather than a social one, which is at odds with the conceptions (and the related methods of treatment and decision-making) still predominant in several European jurisdictions.

5. *Punitive character of non-custodial sanctions and human rights protection. The principles of legality and proportionality*

The punitive character of non-custodial sanctions has been a "perennial topic of debate"[69], partly due to the long-standing ambiguities surrounding the sentencing aims of these punishments. Comparative studies carried out during the nineties showed that, also due to an incomplete ideological basis, in most European countries community sanctions were still considered as alternatives subordinated to the "real" sanction of imprisonment, and not sanctions in their own right. Legal

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[64] Recommendation CM/Rec (2010) 1, rule 55.

[65] Recommendation R (2000) 22, rule 21.

[66] Recommendation R (2000) 22, rule 23.

[67] Recommendation CM/Rec (2010) 1, rule 66: "an assessment of offenders shall be made involving a systematic and thorough consideration of the individual case, including risks, positive factors and needs, the interventions required to address these needs and the offenders" responsiveness to these interventions". See also Commentary to Recommendation CM/Rec (2010), point 71.

[68] G. Robinson, F. McNeill, S. Maruna, "Punishment in society: the improbable persistence of probation and other community sanctions and measures", op. cit., 331

[69] G. Robinson, "The Cinderella complex: Punishment, society and community sanctions", op. cit., 103.

qualifications of community sanctions have only slightly changed in continental Europe over the last twenty years, and this may perhaps explain why in these jurisdictions courts might still be tempted to consider them only as a special favour to offenders of certain types of non-serious crimes[70]. Additionally, the historical origins of these sanctions conspire to foster a widespread lack of belief in their actual punitive character and reinforce the idea that non-custodial sanctions are only a "letting off"[71]. This has at least partly to do with the fact that in many jurisdictions the origins of community sanctions lie in a sovereign act of mercy or clemency resulting in an exemption from punishment rather than in a different form of punishment[72]. Scepticism regarding the punitive character of the alternatives to detention may also affect suspended sentences and punishments, as they are based on the idea that the offender should be given a second chance (though living under the threat of the enforcement of the suspended sentence or punishment in the event of reoffending). Robinson has recently argued that the ambiguous nature of community punishment may explain the surprising neglect towards this issue in "punishment and society" scholarship, underlining that their elusive character may have raised difficulties in clearly understanding them as forms of punishment[73].

It is nonetheless true that, in order to address the credibility issues related to the insufficient retributive nature of community sanctions, attempts have been made in some jurisdictions to recast their identity in a way that is more focused on delivering punishment in the community[74]. More generally, however, it is a merit of some of the most prominent exponents of the "just desert" philosophy to have clearly acknowledged the punitive nature of community sanctions and that, as a general rule, the latter should be devised in a manner that is clearly consistent with the offender's dignity. As Von Hirsch noted, community sanctions – like any other form of punishment – both deprive and censure and, in spite of their labelling, they always contain potentially penal elements. This stance has led to the recognition that, irrespective of any theoretical

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[70] For instance this view is particularly widespread among Belgian judges, see V. Scheirs, K. Beyens, S. Snacken, "Belgian sentencing as a bifurcated practice", in *Crim. just.*, 300.

[71] N. Morris, M. Tonry, *Between prison and probation: Intermediate Punishments in a Rational Sentencing System*, Oxford: Oxford University Press.

[72] F. Mc Neill, "Community Sanctions and European Penology", op. cit.

[73] G. Robinson, "The Cinderella complex: Punishment, society and community sanctions", op. cit., 105.

[74] G. Robinson, F. McNeill, S. Maruna, "Punishment in society: the improbable persistence of probation and other community sanctions and measures", op. cit., 331.

choice concerning their purposes, non-custodial sanctions may nonetheless result in a violation of fundamental rights.

In line with these assumptions, European standards avowedly affirm that the sanctions enforced outside the prison gate must not exceed what can be regarded as an "acceptable punitive content". Recommendation R(92)16 on the European Rules on community sanctions and measures, in particular, offers a number of safeguards to ensure that the "legal citizenship" of the offender is respected. This approach is embedded in the general guarantee that community sanctions "restricting the civil and political rights of an offender" will not be created or imposed if they "are contrary to the norms accepted by the international community concerning human rights and fundamental freedoms"[75]. Similarly, Recommendation CM/Rec (2010) stipulates that probation agencies must respect the human rights of offenders, making sure that their interventions have due regard to "the dignity, health, safety and well-being of offenders"[76]. Such prohibitions can be regarded as essential to ensure that, even when non-custodial sanctions are applied, restrictions exist on the ability of the state to impose sanctions.

In order to ensure that community sanctions do not exceed an "acceptable punitive content", the process of their application is also bound to comply with the principles of legality and proportionality. As for the principle of legality, one may argue that its observance is crucial to ensure that, while a given type of sanction is imposed, additional punitive elements which go beyond the limits defined by the law are not inflicted by the judicial or administrative authorities. Recommendation R(92)16 spells out that "the definition, adoption and application of community sanctions and measures shall be laid down in law"[77]. A further justification underlying this principle may be that the public should know which punishments may be imposed and what their imposition will entail for the offender[78]. This reading of the above-mentioned provision seems to be confirmed by what European standards reiterate with regard to the conditions of eligibility for conditional release[79]. The principle of legality

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[75] Recommendation R (92)16 on the European Rules on community sanctions and measures, rule 21. Rule 22 adds that "[t]he nature of all community sanctions […] shall be in line with any internationally guaranteed human rights of the offender".

[76] Recommendation CM/Rec (2010), rule 2.

[77] Recommendation R (92)16, rule 3.

[78] D. Van Zyl Smit, "Legal standards and the Limits of Community Sanctions", in *Eur. Journ. Crim. Law. Just.*, 1993, 321.

[79] Recommendation R (2003) 22 establishes that when starting to serve their sentence, prisoners should know either when they become eligible for release by virtue of having served a minimum period and the criteria that will be applied to determine whether they will

also encompasses the rule that the conditions and obligations of the sanction should be defined precisely, as should the consequences in case of non-observance.

The focus of this principle is mainly on the foreseeability of the legal consequences attached to a sanction; for this purpose, the legal basis to impose community penalties must be specified clearly. The term "law" is used here as a general term, which refers to any national legal text regulating issues related to community sanctions (laws passed by national parliaments, governmental legislation, by-laws, regional and internal rules, etc.). Significantly, the notion of law encompasses the case law of courts and tribunals, insofar as these forms of creating law are recognised by the national legal system. The substantive notion of law under the terms of Articles 6 and 7 ECHR is thus retained, and no reservation for written law is provided. The principle of legality, however, does not apply to the duration of punishment. As pointed out earlier, the imposition of indeterminate non-custodial sanctions is allowed when the offender manifestly poses a continuing threat to life, health or safety in the community.

Limits to the overall length of the sanction can however derive from the principle of proportionality, as Recommendation R(92)16 provides that the nature and duration of a community sanctions shall be "in proportion to the seriousness of the offence" and take into account "the personal circumstances" of the offender[80]. However difficult this can be in practice, the principle of proportionality may thus be invoked in order to set upper limits on sentences, be they enforced in prison, in the community or both. More problematically, the ban on disproportionate penal intervention may also imply that imprisonment should not necessarily be imposed when a non-custodial sanction is revoked[81]. Moreover, the proportionality doctrine requires that the right to access non-custodial measures should not be interpreted too narrowly. Notably, European standards state that the minimum or fixed period of detention to be served in order to become eligible for post-release supervision should not be so long as to preclude achieving the purpose of early release[82]. As may be

be granted release ("discretionary release system") or when they become entitled to release by virtue of having served a fixed period defined in absolute terms and/or by reference to a proportion of the sentence ("mandatory release system").

[80] Recommendation R (92) 16, rule 6; Recommendation CM/Rec (2010) 1, rules 5 and 58. As for the proportionality in the implementation of electronic monitoring, see Recommendation CM/Rec (2014) 4, rules 4 and 16; Recommendation CM/Rec (2010) 1, rule 58

[81] Recommendation R (92) 16, rule 86 of the European Rules, which deals with the issue of revocation of community sanctions, states that the decision to revoke a community sanction or measure should not necessarily lead to a decision to impose imprisonment.

[82] Recommendation R (2003) 22, rule 10; Recommendation CM/Rec (2014) 4, rule 2.

seen from this provision, the principle of proportionality does not refer solely to the seriousness of the offence, but rather also needs to be linked to the purposes that non-custodial sanctions are supposed to achieve. In particular, the imposition of a penalty should not imply a "disproportionate hardship and obstacles to social reintegration"[83] and the conditions of execution should not be so restrictive "as to prevent a reasonable quality of everyday life in the community"[84]. From a slightly different perspective, European recommendations encourage Member States to ensure that very intrusive community sanctions such as electronic monitoring are implemented in a way that reduces their potential negative effects on the private and family life of a person under electronic monitoring and any third parties concerned.

6. *The requirement of the offender's cooperation. Other restrictions based on the human rights of offenders subjected to non-custodial sanctions*

Perhaps the most characterizing guarantee spelt out by European standards is the requirement that the offender cooperate in the enforcement of a community punishment. Unlike the principles of legality and proportionality, which build upon a long-lasting legal and constitutional tradition in criminal matters, the requirement of the offender's consent has recently emerged as a peculiar feature of a new generation of community punishments[85]. This has partly to do with the very nature of this kind of sanctions, as for the purpose of implementing the restrictions on liberty that form the punitive core of community sentences it is often essential that the offender chooses to cooperate. Arguably, however, there is also a criminal policy concern underlying the choice of seeking the offender's willing cooperation. From a utilitarian perspective, once the offender's consent has been obtained, the sanction is more likely to reach its aim, that of deterring the offender from criminal conduct during the enforcement of the sanction and in the future[86]. Moreover, an offender's participation in the enforcement of his or her own penalty is often regarded

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[83] Recommendation CM/Rec (2012) 12, rule 14.3.

[84] Recommendation CM/Rec (2014) 4, rule 19.

[85] A. Van Kalmthout, "From community service to community sanctions: comparative perspectives", in H.J. Albrecht, A. Van Kalmthout (eds.), *Community Sanctions and Measures in Europe and North America*, Freiburg: Max Planck Institute, 2002, 573-601.

[86] D. Van Zyl Smit, "Community Sanctions and European Human Rights Law", in L. Zedner, J. Roberts (eds.) *Principles and values in criminal law and criminal justice*, Oxford: Oxford University Press, 2012, 206.

as a "warranty" that the implementation of a community sentence will lead to successful reintegration. Thus, as a general rule, the offender's cooperation serves to enhance the effectiveness of community sanctions and can be obtained on the basis of a mere willingness of the offender to be actively involved in the process of implementation of the sanction.

This seems to be the main focus of European standards, as Recommendation Rec (92) 16 stipulates that a community sanction should only be imposed when it is known what conditions or obligations might be appropriate and whether the offender is prepared to cooperate and comply with them[87]. Consent only needs to be obtained when an accused person is candidate for a measure to be applied before trial or instead of a decision on a sanction[88], as this constitutes a prerequisite to be met in compliance with the overriding principle of the presumption of innocence[89]. In other words, it may be argued that European standards stress the importance of treating the offender as an active collaborator, in line with efficiency-oriented aspects that aim to improve the chances of success of community sanctions. The offender's acceptance of the rehabilitative treatments imposed with the sanction is part of the broader strategy of the "what works" philosophy, based on the self-responsibilisation of "probation-clients". This observation may explain why more recent instruments require that the working plan for the sanction's implementation "is negotiated and, as far as possible, agreed with the offender"[90] and that the risk assessment on potentially dangerous offenders involves their participation in the process of evaluation[91].

The considerations set forth above must however be counterbalanced by a series of principled objections. The obtainment of consent attenuates the coercive nature of the sanction and helps to make its implementation consistent with the dignity and the autonomy of offenders. What is more, under certain circumstances, the offender's consent is regarded as an essential legal requirement for the imposition of a community sanction when its content implies an obligation for the convicted in-

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[87] Recommendation R (92) 16, rule 31.

[88] Recommendation R (92) 16, rule 35 states that: "The consent of an accused person should be obtained before the imposition of any community measure to be applied before trial or instead of a decision on a sanction".

[89] Art. 6 (2) European Convention on Human Rights. See also Recommendation R (2006) 13, preamble.

[90] Recommendation CM/Rec (2010) 1, rule 73. For the purpose of tailoring the interventions to the offender's personal situation it is also required that the offender's view regarding the relevance of supervision be included in the evaluation, see Recommendation CM/Rec (2010) 1, rule 83.

[91] Recommendation CM/Rec (2014) 4, rule 32.

dividual to carry out community service or other kind of unpaid work. Where community service is qualified as a sanction in its own right, the failure to obtain consent would be viewed at least as a violation of the prohibition of forced or compulsory labour as laid down in Article 4 ECHR and included in several national legal systems[92]. Save the cases of conditional release, where the obligation to work constitutes a condition imposed on prisoners released early[93], the requirement of the offender's consent should be understood as mandatory according to legally binding sources.

Finally, a number of guarantees are defined by the recommendations in order to secure "the legal citizenship" of offenders subjected to non-custodial sanctions, ie, to ensure that they are not deprived of their civic, political, and social rights[94]. Indeed, while it remains undisputed that certain rights of offenders can be legitimately affected by the sanctions imposed on them, a case can be made that the law should clearly establish which rights are restricted by a given community sanction, while safeguarding every other of the offender[95]. Besides the limitations imposed on the legally defined punitive content of community sanctions, the offender must be guaranteed every other right, including the rights to work and to receive social security benefits. Among the various safeguards set to ensure that fundamental rights are respected, particular emphasis is placed on the privacy and the right to family life of the offender serving a community sanction[96]. This raises the question as to how impose restrictions on the methods of supervision and control, as these may be likely to violate the individual's private sphere and potentially strain the dignity of offenders and their families. A series of provisions stem from this general principle, such as the requirement that rules regarding professional confidentiality, data protection and exchange of information must be provided by national law[97]. While privacy concerns arise in rela-

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[92] C. Morgenstern, "The Requirement of Offender's Consent to Community Service", in M. Groenhujisen, T. Kooijmans, T. de Roos (eds.), *Fervet opus. Liber amicorum Anton van Kalmthout*, Antwerpen: Maklu, 160.

[93] Article 4 of the European Convention on Human Rights indeed accepts the obligation to work during conditional release from detention. It is disputed whether this exception can also apply to substitutes of a custodial sanction such as a suspended sentence.

[94] C. Morgenstern, "European initiatives for harmonisation and minimum standards", op. cit., 132.

[95] This assumption relies and expands on the concept of "legal citizenship" developed by Constantijn Kelk in defining the legal position of prisoners. For a summary of Kelk's position in English see D. Van Zyl Smit, S. Snacken, *Principles of European Prison Law and Practice*, op. cit., 69-72.

[96] Recommendation R (92) 16, rule 23.

[97] Recommendation CM/Rec (2010) 1, rules 41 and 89.

tion to every kind of community sanction, special safeguards should be applied in the case of electronic monitoring. Member States are therefore urged to adopt specific regulations, based on the relevant international standards, regarding the storage, use and sharing of data[98].

In order to enable offenders under supervision to validly claim their rights, the SOST con recommendations emphasise the importance of judicial guarantees and complaint procedures in the implementation of community sanctions. Decisions to impose or revoke a community sanction or pre-trial measure must therefore be taken by a judicial authority[99]. Furthermore, Recommendation Rec (92) 16 requires that complaints procedures must be available to an offender who wishes to complain against a decision concerning the implementation of the sanction or the failure to take such a decision[100]. However, only when the offender wishes to complain against a decision affecting his or her liberty, or when the order imposed is believed to be unlawful, will the appeal be submitted to a judicial authority[101]. A more complex set of rules can nonetheless be construed which refers more generally to the right to fair trial. Firstly, the procedure before the competent authority should be simple and swift and the adjudicating body should be impartial[102]. Secondly, careful consideration should be given to the desirability of hearing the complainant in person[103], especially when he or she has expressed such a wish[104]. It is unfortunate that this provision does not require a clear procedural duty to hear the offender, at least when the appeal addresses decisions affecting personal liberty, such as orders modifying or revoking the sanction. Under these circumstances, it would have been appropriate to ensure the right to be heard in person[105], as the offender serving the sentence is the only subject who bears a personal interest in the final decision of the process and therefore should have the right to directly present the case to the court for the sake of a proper participation to the process.

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[98] Recommendation CM/Rec (2014) 3, rules 12 and 29.

[99] Recommendation R (92) 16, rule 12 and glossary, point 4; R (2006) 13, preamble, rules 13 and 16.

[100] Recommendation R (92) 16 rule 15.

[101] Recommendation R (92) 16, rule 14.

[102] Recommendation Rec (92) 16, rule 16.

[103] When the complainant exercises the right to appeal against a decision concerning the imposition, modification or revocation of a community sentence he or she shall be given the right to be assisted by a person of choice or if necessary by an officially appointed lawyer.

[104] Recommendation R (92) 16, rule 17.

[105] But see Recommendation R (2003) 22, rule 32 which states that the convicted persons should have the right to be heard in person and to be assisted according to the law, before every decision granting, postponing or revoking conditional release is taken.

7. *Conclusions: evolution or retreat of European standards in the field on non-custodial sanctions?*

In this article we tried to analyse how the most recent trends in penal policy and practice have contributed to change the "traditional European approach"[106] to community sanctions. To this end we focused on the evolution of European standard setting in this field, in order to address the most visible changes that have occurred in the European legal and policy framework. It is a widespread belief among scholars that a distinguishing feature of European penal practice is the way in which human rights have served as a bulwark against criminalisation and over-penalisation. This principled approach was apparent in the early recommendations issued by bodies of the Council of Europe, whose main policy suggestions pointed towards a strong reduction in incarceration rates and advocated for a massive implementation of alternatives to imprisonment. More specifically, one may note an enduring emphasis on human rights and human dignity of offenders under supervision, as the body of principles and rules developed over the last two decades heavily relies and expands on the concept of "legal citizenship" of the offender.

According to a certain number of general principles defined in European recommendations, national authorities are bound to impose only sanctions in line with any internationally guaranteed human right of the offender, though it may not always be easy to clearly define what type of measures infringe on the norms accepted by the international community concerning human rights. There is nonetheless a growing consensus that certain practices – such as surgical castration of sex offenders – constitute inhuman and degrading treatments. Regrettably, such measures are not explicitly outlawed under existinting recommendations, as they include only vague and hold-all provisions which do not specify which rights may under no circumstances be infringed by a sanction[107].

The guidelines laid down by the standards should however be read in connection with the rules of other European human rights instruments, notably the above mentioned reports by the Committee for the Prevention of Torture, which have firmly condemned those practices as inhuman and degrading treatments. We would conclude that while the recommendations have helped to cast an overall strategy to reduce the role of imprisonment in line with the tenets of *extrema ratio* and proportionality, they have done little to consolidate minimum standards of de-

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[106] S. Snacken, "Resisting punitiveness in Europe", in *Theor. Crimin.*, 2010, 273-292.

[107] D. Van Zyl Smit, "Legal standards and the Limits of Community Sanctions", op. cit., 317.

cency by indicating what measures and practices are totally or partially prohibited.

Perhaps an exception can be found in the provisions regulating the principle of legality, as the recommendations interestingly emphasise a need for legal certainty and the resultant possibility for the public to foresee what the sanction will entail for the offender. To what extent this commitment can be merged with the increasing attention to risk prediction and incapacitation is hard to predict, although the admissibility of forms of indeterminate supervision merely based on the risk of reoffending seems very likely to downplay the aim of legal certainty and precision.

At the same time we share the point of view of those scholars who have stressed that supranational standard setting has evolved from a clear reductionist agenda, expressed by the instruments introduced in the early nineties, to a positive commitment to an "expanded use of community sanctions as opposed to other non-custodial sanctions"[108]. We would go further by arguing that what used to be the means of a reductionist policy, have now become the ends of a strategy that consistently advocates a more widespread use of the sanctions enforced in the community. This seems to be confirmed by the instruments adopted after the turn of the 21st century, whose primary purpose is to propagate community sanctions and measures and give guidance to the activity of probation agencies. It is noteworthy that in Recommendation CM/Rec (2010) 1 on the European Probation Rules none of the provisions seems to refer to the aim of reducing the prison population, though this objective is mentioned in the preamble. What emerges from this text is indeed the idea that probation is the most flexible and effective tool to deal with a large class of offenders. In this instrument one may notice the lack of any reference to the need to graduate penal interventions on the basis of the seriousness of the offence[109]. More generally, there is no mention of any proportionality-oriented assessment, which may lead the competent judicial authority to question whether and to what extent limitations imposed with a non-custodial sanction are necessary.

We tend however to disagree with the view that only recent instruments have discouraged the use of non-interventionist measures such as suspended sentences, fines or collective pardons. Early recommendations by the Council of Europe already departed from the previous UN stan-

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[108] D. Van Zyl Smit, S, Snacken, D. Hayes, "One cannot legislate kindness: ambiguities in European legal instruments on non-custodial sanctions", op. cit., 19.

[109] A. Ashworth, "Towards European Sentencing Standards", in *Eur. Journ. Crim. Pol. Res.*, 2, 1994, 7.

dards on non-custodial sanctions[110] by ruling out the possibility of attain the purposes of social adjustment and penal reductionism by means of verbal sanctions or conditional discharges. This is due to the great emphasis placed on the concepts of compliance and effectiveness, which from the very beginning have underpinned European policy on these issues[111]. There is indeed no doubt that, starting from the early nineties, policy-makers at the Council of Europe have endorsed a pragmatic rationale for community sanctions by emphasising their credibility as effective alternatives to custody. Probably, however, the most recent instruments unveil a further and possibly more unsettling development.

Along with the several detailed provisions on decision-making and the assessment of offenders eligible for probation, recent standards support an efficiency-based logic seeking to evaluate and rank interventions in light of the overall costs of their outputs. This approach is well represented by the suggestion to apply performance indicators to the implementation of programmes and techniques, as put forward for the first time by Recommendation R (2000) 22. Likewise we are witnessing an increasing focus on risk prediction and management, which is apparent in the adoption of sentencing schemes allowing for indeterminate detention and supervision based upon the risk profile of the offenders (see Recommendation CM/Rec 2014, 4). All these findings seem to underline the tendency of European deliberative bodies (and consultative organs) to recast community sanctions along the lines of what is usually referred to as "new penology"[112].

It would however be too simplistic and probably incorrect to describe this trend as the main or only feature of a presumed "new approach" to community sanctions in European law and policy. Quite the opposite, in the recommendations one may notice a number of provisions apparently contradicting this evolution. It has been noted that the managerial trend in criminal justice usually implies a shift in the understanding of probation agencies, from social work agencies to partners of police and prison authorities involved in activities of law enforcement. Recommendation CM/Rec 2010, 1 however makes clear that supervision

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[110] For an overview on the development of the international instruments for setting standards for community sanctions see D. Van Zyl Smit, "Legal standards and the Limits of Community Sanctions", op. cit., 313.

[111] N. Bishop, U. Schneider, "Improving the implementation of the European Rules on Community Sanctions and Measures: Introduction to a New Council of Europe Recommendation", in *Eur. Journ. Crim., Law Just.*, 2001, 180.

[112] T. Slingeneyer, "The new penology: a grid for analyzing the transformations of penal discourses, techniques and objectives", in *Ch. pén.*, 2007.

should not be seen as "a purely controlling task, but also as a means of advising, assisting and motivating offenders"[113]. By the same token, one may note that the emphasis on offender's compliance is not complemented by the threat to resort systematically to custody in the event of revocation or recall[114]. Indeed, the recommendations seem to show particular concern that the failure to respect conditions imposed under supervision may have the effect of raising the incarceration rates and envisage milder alternatives to default imprisonment to avoid this.

More significantly, there is no sign that risk assessment tools should be based on actuarial techniques focused on the likelihood of reoffending associated with de-individualized aggregates of dangerous offenders[115]. If anything, the recommendations seem intent on ensuring that risk assessment tools are not affected by cultural, gender and social biases[116] and provide that the eligibility for community measures should not be made dependent on the type of offense committed, nor on the individual qualities of the offender.

Finally, the recommendations lay down rehabilitative justifications for punishment, although the methods which appear to have served as a benchmark for the experts who advised on the drafting of such instruments belong to the Anglo-Saxon "what works" tradition[117]. True, the risk-need-responsivity model embeds elements of risk prediction that may influence the content and nature of interventions depending on the risk profile of the offender. However, this model suggests that risk assessments should focus on dynamic risk factors (drug addiction, unemployment) that can be worked on and are amenable to change[118], thereby

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[113] Recommendation CM/Rec 2010, 1 rule 55.

[114] Recommendation R (92) 16, rule 84, which establishes that the decision to revoke a community sanction or measure should not necessarily lead to a decision to impose imprisonment.

[115] As for the risk assessment of dangerous offenders, see N. PADFIELD, "The Sentencing, Management And Treatment of 'Dangerous' Offenders", Council of Europe: Strasbourg, 2010. This report was presented to the CDPC at its meeting on 7 June 2010, in the framework of the negotiations that led to the draft of Recommendation CM/Rec (2014) 3 concerning dangerous offenders. It describes the situation in Europe and explains the possible risks and dangers should there be a misbalance between the public interest and the need to safeguard against the abuse of individual rights.

[116] Recommendation CM/Rec (2014) 3, rule 11.

[117] D. VAN ZYL SMIT, S. SNACKEN, D. HAYES, "One cannot legislate kindness: ambiguities in European legal instruments on non-custodial sanctions", op. cit., 15.

[118] Recommendation CM/Rec (2010) 1, commentary point 71, which states that even though actuarial techniques are said to be more reliable, they have limitations in predicting the specific risk level of individuals. For this reason practitioners are warned that "actuarial methods only generate statistical probabilities and can be seriously misleading if used uncritically".

requiring individualized evaluation and follow-up. While this approach to rehabilitation is far from being unproblematic[119], it does not necessarily entail the use of actuarial risk predictors[120]. It is thus possible to conclude that the "language of probabilistic calculations and statistical distributions applied to populations", underpinning actuarial justice and managerial methods, has not entirely colonized the European discourse on community sanctions. An overview of the evolution of European recommendations on community sanctions confirms that the adaptations to the demise of the welfarist rehabilitative ideal underlying the birth of community sanctions, while visible, remain multiple and fluid[121].

To what extent the visions put forward by European standards will be influential in reshaping policy and practice at a national level, however, will also depend on the way in which superior human rights standards (notably the ECHR) will be interpreted, as one can imagine them being invoked alternatively as limitations to intrusive forms of supervision or as a further validation of their increased use.

[119] The risk-need-responsivity model has been subject to several criticisms for its tendency to favor a risk-driven selection of offenders eligible for probation. What is more, it has been demonstrated that the concept of "criminogenic need" has been based on data collected from the white male population and then unduly generalized to women and minorities. See K. Hannah-Moffat, "Needle in Haystack. Logical Parameters of Treatment Based on Actuarial Risk-Needs Assessments", in *Amer. soc. crimin.*, 2015, 115.

[120] Recommendation CM/Rec (2014) 3, commentary, point 117 indicates that "most European countries use clinical assessments of dangerous offenders, although actuarial risk predictors are becoming more widespread"; for this reason "a combination of different approaches can promote systematization and consistency, and still be flexible enough to take into account the diversity of offenders".

[121] G. Robinson, F. McNeill, S. Maruna, "Punishment in society: the improbable persistence of probation and other community sanctions and measures", op. cit., 324.

ANGELA DELLA BELLA

EUROPEAN COURT OF HUMAN RIGHTS CASE LAW CONCERNING PRISON OVERCROWDING AND ALTERNATIVE MEASURES TO PRISON

SUMMARY: 1. Introduction. – 2. Case law concerning prison overcrowding: the protection provided by European Court of Human Rights Article 3. – 2.1. Detention in less than 3 m^2 of space: an irrefutable presumption of liability? – 2.2. A rebuttable presumption in the presence of countervailing factors? – 2.3. The pilot and quasi-pilot judgments. – 2.4. The conclusions we can draw from this case law. – 3. Alternative measures in European Court jurisprudence. – 3.1. Alternative measures and prison overcrowding. – 3.2. Alternative measures and life imprisonment. – 3.3. The limits of usefulness of the alternative measures. – 3.4. Alternative measures in the pre-trial phase.

1. *Introduction*

This paper has the goal of analysing case law from the European Court of Human Rights on the issue of prison overcrowding and the use of alternative measures to imprisonment.

As it is well known, the European Convention on Human Rights (hereinafter ECHR) does not specifically address the issue of penalties, nor their purpose, nor the rights to be granted to those who are incarcerated. However, the ECHR has had to address all of these issues in relation to Article 3, which prohibits torture and inhuman and degrading treatment; Article 5, which protects personal freedom; and Article 2, which safeguards the right to life[1].

In an attempt to identify the European Court's view on our topic of interest, the first point on which we must focus attention is the abundant amount of case law developed in relation to prison overcrowding.

As we all know, the last few decades have been characterized, at the European level, by a continuous and relentless growth of the prison pop-

[1] Regarding this issue see P. VOYATSIS, "Alternative measures to detention in the European Court of Human Rights' case law", in *Eur. Crim. Law Rev.*, 4, 2014, 169-178.

ulation (which only now seems to have stopped)[2]. This phenomenon, which does not seem to be able to be explained in terms of increased criminal behaviour – because, in fact, statistics reflect a reduction of criminal activity in Europe in the last decade[3] – but rather it finds its reasoning in the affirmation of "securitarian" criminal policies focused on the use of the custodial penalty and on the tightening of the sanctioning levels. This process of prison institutionalization has led to a phenomenon of overcrowding, often unbearably so, of the prison institutions, resulting in the deterioration of prison conditions, which has led the Court to recognize, in many cases, a violation of Article 3.

2. *Case law concerning prison overcrowding: protection provided by ECHR Article 3*

While the Convention does not contain rules which expressly relate to the rights of prisoners, the Court it has always occupied itself with this issue, starting from the assumption that the mere fact of detention does not take away from inmates rights that the Convention recognizes to everyone. In this sense, the Court, in the famous Campbell and Fell v. The United Kingdom case, clarified that "justice cannot stop at the prison gate"[4]: this means, obviously, that all of the principles set forth in the Convention remain valid in a custodial setting.

The rule with which we must confront, when discussing the compatibility of detention conditions with the fundamental rights of a person, is the prohibition against torture and inhuman and degrading treatment that, in addition to being expressly acknowledged in ECHR Article 3, is also the subject of a mandatory regulation of general international law.

From Article 3, the Court has extracted the rule according to which a State must ensure, to those persons under its jurisdiction, that prison conditions will respect their dignity and physical and mental health. As indeed it is well known, in order for a violation of Article 3 to manifest, the detention must involve suffering which exceeds that inevitable ele-

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[2] See the Annual Criminal Statistics of the Council of Europe and, specifically, the Space I-2014 and Space II-2014 Projects, published in March 2016 and available at: *https://wp.unil.ch/space/2016/03/space-i-and-ii-2014/*.

[3] See the Eurostat statistics at: *http://ec.europa.eu/eurostat/web/products-statistics-in-focus/-/KS-SF-13-018*, which reveal a marked decrease in the number of crimes reported from 2005 until today (with the exception of home burglary). See also the data set forth in the following report: *Dieci anni di criminalità in Europa, Italia e Trentino*, available at: *www.transcrime.it*.

[4] See ECtHR, *Campbell and Fell v. The United Kingdom*, 28.6.1984.

ment of deprivation of personal liberty. In identifying the threshold of severity of the treatment beyond which Article 3 can be considered violated, the Court takes into consideration both the objective characteristics of the detention (the type of restrictions that the prisoner is subjected to, its magnitude and length of time), and the subjective characteristics of the inmate (his age, sex, state of health…)[5].

The Court frequently references its statement that the prohibition set forth in Article 3 represents one of the pillars of democratic societies and States must pay homage to it in all situations. In fact, the Court observes that: "even in the most difficult circumstances, such as the fight against terrorism or organized crime, the Convention prohibits torture and inhuman or degrading treatment in absolute terms"[6].

The absolute nature of the prohibition – expressly stated by Article 15 of the Convention, which excludes Article 3 from the list of standards which may be derogated from in the event of war or serious danger to the life of a nation, carries with it some important corollaries, which are also relevant in our area of interest.

First of all, precisely due to the absolute nature of the prohibition, the Court held that if the growth of the prison population prevents the State – due to financial or logistical difficulties – from ensuring that conditions of detention conform to the standards set forth by Article 3, it has a duty to modify its sentencing policy in order to reduce the number of inmates, introducing alternative sanctions[7].

Additionally, the Court draws, from the absolute nature of the prohibition, the conclusion that a Member State is required to not only prevent, within its territory, that treatment contrary to Article 3 occurs (so-

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[5] The intensity of the treatment is thus, that on which the Court relies to distinguish prohibited conduct. Specifically, the Court has held that the treatment is *degrading* when it causes feelings of fear, stress, inferiority, humiliation or degradation; it is *inhumane*, if characterized by particularly intense mental and/or inflicted physical suffering. The Court speaks of *torture* when the inflicted pain, which is particularly severe, is directed towards the aim of obtaining information or confessions. See on this issue D. J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, Oxford: University Press, Second Edition, 2009, 75 and ff.

[6] See ECtHR, *Labita v. Italy*, 6.4.2000.

[7] See ECtHR, *Mamedova v. Russia*, 1.6.2006. In the sense that the lack of State resources does not exclude liability for the violations of human rights due to the custodial conditions, see ECtHR, *Neshkov v. Bulgaria*, 27.1.2015, wherein the Court affirmed that "a high crime rate, a lack of resources, or other structural problems are not circumstances that exclude or attenuate the State's liability for such conditions. As the Court has repeatedly emphasised, it is incumbent on the State to organise its penitentiary system in a way that does not give rise to such conditions, regardless of financial or logistical difficulties". Similarly, see *Orchowski v. Poland*, 22.10.2009.

called direct violations), but it is also prohibited from transferring an inmate to a State – even a non-member of the Council of Europe – where the banned treatments (so-called indirect violations) are carried out[8]. This principle (the so-called non-refoulement) finds its application as a rule of law in cases in which the inmate, due to extradition or in any event a transfer to another State, runs the risk of being subject to the capital punishment or life imprisonment with the possibility of release (irreducible life-sentence), but the rule may also find application even in cases in which the custodial conditions are contrary to the conventionally required standards. Although there are no European Court precedents in this sense, there are, however, judgments from the national courts, which followed this rule. Consider, for example, the decision of an English Court that denied extradition of a prisoner to Italy because of the significant situation of prison overcrowding (which had been censured by the European Court of Human Rights in the pilot judgment *Torreggiani v. Italy* dated January 8, 2013)[9]. On the contrary – however, with the judgment always indicting the possible application of the principle of *non-refoulement* on the prison conditions – a Swiss court held that it was possible to extradite an inmate to Italy, in view of the recent reforms introduced in the Italian legal system precisely as a result of the above-mentioned Torreggiani decision[10]. In another case, thereafter, it was an Italian judge who refused to extradite an inmate to another State due to the custodial conditions in that legal system[11].

Always with reference to the nature of the absolute prohibition set forth in Article 3, the European Court has handed down to the Member States, in addition to *negative obligations*, consisting of the obligation to refrain from exercising prohibited actions, *positive obligations*, consisting of activities to be undertaken that, in the area that concerns us, are related to the prison system's duty to ensure detention conditions conform to the convention standards. Among the positive obligations arising under ECHR Articles 3 and 5 there is also, as we will see, that of creating an adequate system of non-custodial sanctions[12].

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[8] The principle was affirmed for the first time in the famous judgment, *Soering v. The United Kingdom*, Grand Chamber, 7.6.1989.

[9] See Westminster Magistrates' Court, 17.3.2014, which is available at: *www.penalecontemporaneo.it*.

[10] See Federal Supreme Court of Switzerland, 12.5.2014, Pres. Fonjallaz, DTF 1C_176/2014, which is available at: *www.penalecontemporaneo.it*.

[11] See Court of Cassation n. 13823 dated 31.3.2015.

[12] See in this situation P. VOYATZIS, "*Alternative measures to detention in the European Court of Human Rights' case-law*", op. cit., 169 and ff., according to which: "The obligation not to restrict disproportionately transforms into a duty to undertake a specific initiative. In

Furthermore, in addition to these substantive obligations, procedural obligations also arise from Article 3. Starting from the premise that, for the inmate it is often difficult, if not impossible, to provide evidence of mistreatment inflicted within a prison institution, the Court held that Member States have the obligation to carry out thorough and timely investigations and that any eventual violation of these obligations will result in a "procedural" violation of Article 3[13].

Moreover, the Court went even further, recognizing the *substantial* violation of ECHR Article 3 on the basis of a presumption of State liability, in the case in which the prison system did not produce sufficient evidence to refute the inmates statements regarding the prison overcrowding conditions in which he was restricted (see, for example, on this issue, *Varga v. Hungary*, where the Court – in the absence of probative evidence to the contrary – considered the reconstruction supplied by the petitioner, who complained of having had less than 3 m^2 of available space, reliable)[14].

2.1. *Detention in less than 3 m^2 of space: an irrefutable presumption of liability?*

Having already examined the type of protection, which arises from ECHR Article 3, we must now ask ourselves when, according to the Court's case law, prison overcrowding becomes inhuman or degrading treatment.

In general it should be noted that, to ascertain if the detention conditions are inhuman or degrading, the Court will take into consideration a number of factors, such as the amount of personal space available, the lighting and ventilation of the cell, the accessibility and condition of the toilet facilities, the quantity and quality of time spent outside of the cell. In most cases, the inhuman or degrading nature of the treatment stems from a cumulative effect of these various factors, especially in light of the length of time of the detention. As a rule, thus, prison overcrowding is just one of the many elements that make up a violation of ECHR Article 3.

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the context of detention conditions, this means that the Member State, besides its obligation not to submit the applicant to appalling detention conditions, may occasionally be called on to take positive measures to form a framework for humane detention conditions, for example as regards ensuring the prisoners' health".

[13] For the necessary case law references see D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, op. cit., 108 and ff.

[14] See ECtHR, *Varga v. Hungary*, 10.3.2015.

Nevertheless, since the early 2000s, as a consequence of the increasing prison overcrowding situation in the various European systems, the Court held that, in cases of particular seriousness, the lack of space inside the prison institutions alone is sufficient to constitute inhuman and degrading treatment.

As expressly set forth in the Ananyev v. Russia decision of 2012, the lack of personal space can create in itself a violation of Article 3 in three cases[15]:

If the inmate does not have his own "bed" (the Court specifically referred to an "*individual sleeping place*"). Therefore, for example, a violation was found in the case in which the cell where the inmate was detained had fewer beds than the number of occupants in the cell so the inmates were forced to take turns sleeping in the available beds[16];

If it is impossible to move around within the cell. Thus, for example, a violation was found in the case in which the cell surface area was entirely taken up by beds, a table and furniture at which point it became extremely difficult to reach the exit door[17];

If the individual space available was less than 3 m^2 per person.

It is now necessary to delve deeper into this last parameter, which, as is well known, is the most frequently used by the Court.

In order to identify the "desirable" minimum amount of space, the Court has made reference to several standards indicated by the Committee for the Prevention of Torture (hereinafter referred to as the CPT) in its assessments: 7 m^2 for police cells[18]; 6 m^2 and 4 m^2 for the respective individual or multi-occupancy cells of the penal institutions[19]. These CPT guidelines represent only an "ideal" guideline, an auspice to strive towards, rather than a minimum standard, which has instead been established by the same Court in the realistic measurement of 3 m^2 per inmate.

Specifically, adopting a so-to-speak "quantitative" approach, the Court, in the various appeals that it has had to decide, distinguished between three situations, depending on whether the inmate had a space greater 4 m^2 available; an available space covering between 3 and 4 m^2; or an available space of less than 3 m^2.

According to the Court, a space greater than 4 m^2 should be con-

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[15] See ECtHR, *Ananyev v. Russia*, 10.1.2012.

[16] See ECtHR, *Kalaschinkov v. Russia*, 15.7.2002.

[17] See ECtHR, *Yevgeniy Alekseyenko v. Russia*, 27.1.2011.

[18] Thus, see the second General Report of CPT (CPT/Inf (92) 3, § 43).

[19] Regarding this guideline, indicated by the CPT in some national reports, for example, reference is made to the ECtHR judgment *Torreggiani v. Italy*, 8.1.2013.

sidered adequate and, therefore, does not constitute a material element leading to inhuman or degrading treatment.

The lack of available between 3 and 4m², while not being a factor which of itself results in a violation of Article 3, must, instead, be taken into account, because it can be symptomatic of inhuman or degrading treatment, if it occurs together with other factors, such as the structural inadequacy of the cell (in terms, for example, of poor ventilation or lighting), the lack of rehabilitative activities, the small number of hours that the inmate can spend outside of his cell[20].

However, when the inmate has less than 3 m² available space, the Court considers this fact alone enough to trigger a violation of ECHR Article 3: the lack of space is so severe as to clearly create, in itself, inhuman and degrading treatment. Thus, for example, in the *Sulejmanovic v. Italy* judgment, the Court held that "*where the applicants have at their disposal less than three square meters of floor surface, the overcrowding must be considered to be so severe as to justify of itself a finding of a violation of Article 3*"[21]. Reading the reasons for the decision, the impression one gets is that of true and actual automatism, in that the reduction of the amount of the living space below 3 m² leads to a violation of the convention guideline without the possibility to prove otherwise.

2.2. *A rebuttable presumption in the presence of countervailing factors?*

Deviating from the approach described above, some judgments have held that the availability of space less than 3 m² does not reflect inhuman or degrading nature of the treatment per se, but constitutes only a presumption of a State violation which may be overcome in the case in which it is demonstrated that the lack of space only lasted for a brief period of time or was "counter-balanced" by other factors, such as the adequacy of the structural conditions of the institution, the sufficient freedom of movement outside of the cells, or the possibility to play sports or participate in rehabilitation.

An example of this different approach is the *Mursic v. Croatia* judgment, decided by Section I of the Court in March 2015, in which the Court did not find a violation of Article 3 in a case in which the inmate was restricted to short periods of time in a space slightly smaller than 3 m². Specifically, the Court noted that breaching the threshold of 3 meters occurred for a total period of 50 days (out of an eleven month deten-

[20] See ECtHR, *Vlasov v. Russia*, 12.6.2008.
[21] See ECtHR, *Sulejmanovic v. Italy*, 16.7.2009.

tion); the period was non-consecutive (the time in super over-crowded cells was "intermittent" and the longest period of stay was 27 days)[22]. According to the Court, therefore, the lack of space was "counter-balanced" by other factors, such as the opportunity to spend three hours a day outside of the cell (in common areas, such as the gym, the library and a room where the inmate could watch TV); two hours in the open air; and in the presence of structural conditions defined as "not appalling"[23].

The approach adopted in this judgment was later substantially confirmed by the Grand Chamber, to which the matter was referred pursuant to Article 43 of the Convention[24]. In this ruling, it was reiterated that detention in a space less than 3 m^2 – considered the "minimum standard" to ensure compliance with ECHR Article 3 – creates a strong presumption of State liability which can be overcome if the detention in these conditions lasted for a short period of time and the State demonstrated the presence of countervailing factors. In applying the principle to the present case, the Grand Chamber slightly deviated from the 2015 judgment, considering whether there was a violation in relation to the detention period in a space smaller than 3 m^2 for 27 consecutive days. As far as the other periods, of shorter durations, were concerned, the Court affirmed the prior judgment regarding the existence of counter-balancing factors.

While reasonable on the premises – where it distinguished that the inhumanity of the treatment did not coincide with the problem of physical space available to the inmate, but arose from a combination of factors to consider in an overall view, – the argument supported by the Court in these judgments inevitably leads to a decline in the protection of prisoners' rights.

The solution adopted in the *Torreggiani* judgment – according to which the 3 m^2 guideline is an irrefutable limit – may apparently be rough in its quantitative logic. However, in my opinion, it has significant merit, which is to establish, at least in terms the inmate's living space, a precise measurable and, thus, univocal standard to which all of the European prison systems understand that they have to necessarily adapt to in order to prevent the condemnation of Strasbourg judges.

In contrast, the ability to derogate from the limit (in cases in which the detention in less than 3 m^2 is either brief or in the presence of coun-

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[22] See ECtHR, *Mursic v. Croatia*, 12.3.2015. In the same sense (with reference to detention in a space a little less than 3 m^2 , lasting approximately ten days), see also *Belyayev v. Russia*, 17.10.2013.

[23] See ECtHR, *Mursic v. Croatia*, 12.3.2015, § 66.

[24] See ECtHR, Grand Chamber, *Mursic v. Croatia*, 20.8.2016.

tervailing factors), in addition to making the outcome of the judicial determination very uncertain – as also demonstrated by the divergence of the solutions adopted in the two *Mursic* judgments – allows the States to adopt "defensive strategies" which are not necessarily functional to the goal of improving the quality of treatment: take for example the possibility of continuous inmate transfers, in order to avoid the situation where his detention in a space less than 3 m^2 is prolonged for a significant number of consecutive days or the opening of the cells for a considerable number of hours but in the absence of space and activities to usefully fill that time.

2.3. *The pilot and quasi-pilot judgments*

European case law on prison overcrowding is also characterized by the frequent use of the pilot procedure, which is explained in the view of the often-structural nature of this phenomenon within national penitentiary systems.

As it is well known, the European Court in the presence of "repetitive" violations of a certain convention regulation, which arise from the same structural problem, uses the pilot procedure. In making its decision according to the pilot procedure, the Court is not limited to establishing the existence of the violation in the case at hand, but also gives the State clear indications of the measures that must be adopted to resolve such and setting a time limit within which the State must adopt the remedies and eventually freezing pending cases until the expiration of such term[25].

It must be noted that, regarding the present issue, along with the pilot judgments there are also so-called quasi-pilot judgments. These are judgments in which, while taking notice of the systemic nature of the violations, the Court does not go as far as indicating the type of measure that the State must adopt; however, in the event that it does do such, the Court does not establish a deadline for its implementation and does not suspend the pending appeals[26].

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[25] For the pilot procedure, which is found in Article 61 of the Rules of the Court, see the document created by the European Court at: *http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdfsul*.

[26] Although the line between the pilot judgments and the quasi-pilot judgments is not always clear, I believe I can identify as pilot judgments: *Ananyev v. Russia*, 10.1.2012; *Iacov Stanciu v. Romania*, 24.7.2002; *Torreggiani v. Italy*, 8.1.2013; *Neshkov v. Bulgaria*, 27.1.2015; *Vargas v. Hungary*, 10.3.2015. Among those judgments noted as quasi-pilot are: *Orchowski v. Poland*, 22.10.2009; *Norbert Sikorski v. Poland*, 22.10.2009; and *Vasilescu v. Belgium*, 25.1.2014.

The particularly large number of pilot and quasi-pilot judgments handed down in this area (if compared with the Court's very sparse use in general of such procedure) reveals that prison overcrowding, far from being a fleeting phenomenon, represents a serious problem with a "structural" nature which is common to many European jurisdictions[27].

For the purposes of our work, the pilot judgments (and the quasi-pilot judgments) are of particular interest in the way they contain the indications on the measures to be adopted in order to reduce prison overcrowding.

Despite starting from the premise that it is not its responsibility to identify the specific measures to be adopted, since every State is free to choose how to comply with the convention principles, the Court, in the judgments examined, provided the Member States with important guidance on the remedies to be undertaken.

In this regard, the Court drew a distinction between general measures (i.e. functional measures meant to influence the causes of overcrowding and which, therefore, entail "sustained efforts over the long term") and individual measures (i.e. functional measures meant to "rectify violations taking place" against individual inmates).

With reference to the former, the Court, in all the judgments in which it dealt with this issue, has held that to achieve a lasting solution to the problem, a policy of expansion of existing prison facilities is not enough (even though, in some cases, it may be necessary), but it is necessary to bolster the system of non-custodial measures and likewise strengthen the precautionary measures program and penalty system.

With reference, however, to the individual measures, the Court, in the pilot judgments, has required the Member States to establish a set of preventive and compensatory remedies such as to ensure an "effective remedy" of the Convention violations resulting from prison overcrowding[28]. The States must deal with preventive remedies, directly so that an inmate can be removed from a situation that generates a violation of his fundamental right to freedom from inhuman treatment, and the State must address compensatory remedies, such as to ensure relief for those who have suffered such a violation.

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[27] With specific reference to the *Torreggiani v. Italy*, 8.1.2013 case, we can note that the deadline for compliance – initially fixed by the Court for the end of the month of May 2014 – was thereafter prolonged one year. Thereafter, only with a resolution dated 8 March 2016, did the Committee of Ministers definitively evaluate the Italian situation, believing that the structural problems underlying the violations could be considered resolved thanks to the reform efforts put in place by the Italian Government in these last years.

[28] See for example, *Torreggiani v. Italy*, 8.1.2013, § 99.

In relation to preventive remedies, the Court has held that in every State there should be an entity with the task of supervising detention conditions and more generally monitoring the respect for the inmate's rights of personal freedom. This entity – which could be, according to the instructions of the Court, judicial in nature (such as in the case of the surveillance court in the Italian legal system), or administrative in nature (such as the Independent Monitoring Boards in the UK or the Complaints Commission in the Netherlands) – must be vested with autonomy and independence from the prison system.

In relation to compensatory remedies, the Court has expressly stated that the relief must not necessarily be money; it could also consist of a "discount" of the penalty proportionate to the duration of the violation[29]. It was, however, clarified that a form of monetary compensation for those cases in which the applicant was no longer detained at the time of the ruling must, nevertheless, be foreseen. As far as the amount of the compensation is concerned, it should not diverge unreasonably from that which was established by the same Court in similar cases[30].

2.4. *The conclusions we can draw from this case law*

What are the lessons we can learn from the European Court jurisprudence for the purpose of sentencing policy implementation, which is no longer focused on the custodial penalty?

An initial result of such case law shows that it has highlighted the seriousness of the problem posed by prison overcrowding and its spread throughout all of the European States. By having set a common mandatory minimum standard (quantified, as we know, in 3 m^2 of available space), the Court, above all, allowed the Member States to give dimension to the problem. From the judgments we learn that many State systems do not define the minimum space per inmate and that where such measures do exist, they vary greatly from State to State (in particular, this measure varies from 3 m^2 in Poland; to 3.5 m^2 in the Czech Republic; to 4 m^2 in Bosnia and Herzegovina; to 6 m^2 in Bulgaria, Romania, Spain and Austria; to 7 m^2 in Germany, Portugal, and Finland; to 8 m^2 in Croatia;

[29] In this sense, in the *Ananyev v. Russia*, 10.1.2012, § 222 judgment it was affirmed that "a mitigation of the sentence may under certain conditions be a form of compensation afforded to defendants in connection with violations of the Convention that occurred in the criminal proceedings against them".

[30] See *Ananyev v. Russia*, 10.1.2012, § 230, where the Court observed that "the level of compensation awarded for non-pecuniary damage must not be unreasonable in comparison with the awards made by the Court in similar cases".

to 8-9 m² in Turkey; to 9 m² in Belgium, Cyprus and Italy; and to 10 m² in Greece, Ireland and the Netherlands)[31].

The diversity of this data reveals that when we talk about prison overcrowding we are referring to a phenomenon with very different characteristics in the various national legal systems. Furthermore, it is clear that by identifying a minimum standard, which is the same for everyone, and binding[32], the Court has taken the first, necessary step in allowing all the legal systems within the Council of Europe to "speak the same language".

The action of the Court, which through the use of pilot judgments forced the States to find immediate solutions to the problem, has produced to some extent a positive effect, at least in the short term: in this I am referring to the Italian experience, which saw a significant reduction of its prison population as a result of the Torreggiani v. Italy pilot judgment. From the Space II project created by the Council of Europe and published in March 2016 (which contains updated data up to September 2014) it emerges that prison overcrowding is in a slow downsizing phase at the European level, albeit with significant differences between the States. In general, it can be observed that the ratio between inmates and prison beds (now stands at 93.6% versus 96% the previous year) is decreasing; the number of countries where a problem of overcrowding remains (today 13 versus 21 in 2013) is decreasing; specifically, the overall number of prisoners (now 1,600,324 versus 1,679,217 in 2013) is decreasing; and the average rate of incarceration (124 prisoners per 100,000 inhabitants compared with 134 in 2013) is also decreasing[33].

This is encouraging data, even if it is still not possible to understand if this downward trend is the result of structural changes or whether instead it is the effect of emergency policies intended to exhaust their effects in the short-term. Therefore, it is still essential to reflect on the strategies to be adopted in order to steadily reduce the space occupied by custodial measures in the European policies on crime and it is on this plan that valuable information can be obtained from European Court jurisprudence.

3. *Alternative measures in the European Court jurisprudence*

Unlike the issues related to the enforcement of custodial penalties, which are the subject of a lot of the Court's attention, the field of alter-

[31] The data is included in the *Orchowski v. Poland*, 22.2009 decision.

[32] Regarding the possibility of derogating from the criteria in the most recent Court judgments see above paragraph 2.2.

[33] See the previously cited Annual Crime Statistics of the Council of Europe.

native measures to detention has not been significantly discussed in European case law.

It is well known that, the European Convention does not ratify a right of the accused or convicted offender to benefit from non-custodial measures. However, the European Court takes these into consideration inasmuch as their introduction and usage in criminal sentencing systems is considered necessary in some circumstances in order to prevent the violation of certain convention requirements[34]. I refer to the use of alternative measures: as a tool for preventing and facing the prison overcrowding phenomenon and, thus, avoiding a violation of ECHR Article 3 ECHR (paragraph 3.1); as a tool for the required provision of a form of release from custody to prevent the perpetuity of the penalty in case of a life imprisonment sentence in relation to ECHR Article 3 (paragraph 3.2); as a utilization tool of pre-trial detention only as a last resort, and thus, to ensure compliance with ECHR Article 5 (paragraph 3.3).

3.1. *Alternative measures and prison overcrowding*

The judgments on the issue of prison overcrowding, which we have previously examined, and above all, the pilot judgements, are of particular interest in view of our research on the "alternative" sentencing solutions because they contain the directions which the Court provides to the Member States in order to solve the structural problem at the base of the violation of ECHR Article 3.

A fundamental point that the Court, on several occasions, has reiterated concerns the failure of policies based on the enlargement of the prison system capacity: this type of action – although in some cases necessary[35] – does not, in fact, represent a lasting solution to the problem of overcrowding.

Rather, the Court has always very staunchly supported the need to adopt policies on crime aimed at reducing prison institutionalization rates through the development of non-custodial measures capable of

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[34] See P. VOYATSIS, "Alternative measures to detention in the European Court of Human Rights' case-law", op. cit.

[35] See, for example, ECtHR, *Neshkov v. Bulgaria*, 27.1.2015, wherein the Court took note of the obsolete nature of the system and encouraged the State to broaden and restructure the prison institutions ("the insufficient capacity of the Bulgarian correctional facilities and their obsolescence and poor state of repair, may chiefly be attributed to the protracted lack of investment by the authorities in the penitentiary system's facilities. Others, such as the lack of ready access to the toilet for inmates at night, appear to be due to the physical characteristics of the correctional facilities, the inmate management practices followed in them, and perhaps an insufficient number of guards").

achieving a reasonable balance between community protection needs and the protection of fundamental human rights, which today seem seriously compromised by the widespread prison overcrowding situation that characterizes the European prison systems.

Such Court position is consistent with the approach/organization of the Council of Europe, which is clear from all of the Recommendations on the subject[36]. Without going into the merits of the measures to be adopted or strengthened – seeing as how the Court believes that it should leave the greatest possible freedom to the Member States regarding the choice of strategy to adopt – from the judgments an indication in the diversification of the actions seems to appear: in this respect, how the enhancement of non-custodial measures should invest as much as in the pre-trial stage (in the sense of the introduction and utilization of alternative custodial measures to imprisonment), as in the sentencing phase is continuously highlighted. In relation to the measures, furthermore, the Court seems to advocate for the introduction as much for alternative measures as for suspensive measures with the aim being to reduce the flow of incoming offenders into prison institutions (front-door approach) and to allow for the early release of inmates (back-door approach)[37].

3.2. *Alternative measures and life imprisonment*

Another area in which the European Court identified an essential tool in the alternative measures to detention in order to ensure compliance with convention principles is life imprisonment.

It is well known that, according to established European Court jurisprudence, life imprisonment it is not in itself incompatible with ECHR Article 3, provided that it is not grossly disproportionate to the crime committed; that its enforcement is functional for one of the purposes of the penalty; and that there is, in the legal system, the possibility, *de jure* or *de facto*, that the sentenced offender will be set free[38].

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[36] Regarding the insufficiency of the policies of expanding the penal system capacity, see, for example, Recommendation R (99) 22 of the Committee of Ministers of the Council of Europe which states that "the extension of the prison estate should rather be an exceptional measure, as it is generally unlikely to offer a lasting solution to the problem of overcrowding".

[37] See, for example, ECtHR, *Neshkov v. Bulgaria*, 27.1.2015, § 276t, where the Court suggested the introduction of a "combination of measures", among which: "…reduced recourse to imprisonment as a form of penalty, resorting to shorter custodial sentences, replacing imprisonment with other forms of penalty, increasing the use of various forms of early release, and suspending the enforcement of some custodial sentence".

[38] See ECtHR, Grand Chamber, *Kafkaris v. Cyprus*, 12.2.2008; *Vinter et al. v. The United Kingdom*, 17.1.2012; Section IV, decision 17.1.2012, *Harkins and Edwards v. The United Kingdom*, 17.1.2012; and *Babar Ahmad et al. v. The United Kingdom*, 10.4.2012.

Regarding this last aspect, there have been, in recent years, important developments in case law with the starting point being the Grand Chamber judgment *Kafkaris v. Cyprus* in 2008. In this case, the Court made an important statement of principle ruling that life imprisonment may be in conflict with ECHR Article 3 when the system does not provide for a mechanism, which gives the convicted offender a *chance* of being released into civilized society. The impact of such statement was, however, diminished, by the simultaneous statement that this *chance* must be considered to exist – and such as to avoid violation of ECHR Article 3 – even in the event that consists in granting a discretionary measure of clemency by the President of the Republic (extremely remote, in practice)[39].

This position has, however, now been overruled by the Grand Chamber decision in Vinter v. The United Kingdom, which holds that the legality of life imprisonment is subject to the presence, in the legal system, of periodical review of sentence mechanisms, which must take place within a specific time frame and which involve the real possibility of freeing the convicted offender[40]. The case law cited in this case is relevant for our purposes because, from the incompatibility of perpetual life imprisonment with ECHR Article 3, the Court creates a positive obligation imposed on the Member States (see above paragraph 2), namely that of establishing for themselves suitable non-custodial measures, being not only *de jure* but also *de facto*, to ensure the "possibility of reduction" of the life imprisonment sentence. As is its style, the Court did not discuss the characteristics of such measures, the configuration of which was left to the discretion of the States[41].

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[39] See ECtHR, Grand Chamber, *Kafkaris v. Cyprus*, 12.2.2008 as previously cited. In the same regard, see also *Vinter v. The United Kingdom*, 17.1.2012, as previously cited, which held that the "whole life order" was legitimate under English law, i.e. a life sentence without the possibility of release, determining that the discretionary power to release an inmate for "humanitarian reasons" granted to the Home Secretary is sufficient to satisfy the convention guarantees (despite the fact that, in practice, such power turns out to be almost never exercised). The following cases are also expressions of the same guidelines with respect to cases of extradition: *Harkins and Edwards v. The United Kingdom*, 17.1.2012 and *Babar Ahmad v. The United Kingdom*, 10.4.2012.

[40] ECtHR, Grand Chamber, *Vinter v. The United Kingdom*, 9.7.2013. Such guidelines were thereafter reiterated in the more recent Court decisions on the issue, namely, in *Ocalan v. Turkey* 18.3.2014; *Laszlo Magyar v. Hungary*, 20.5.2014; *Manolov v. Bulgaria*, 4.11.2014; *Bodein v. France*, 13.11.2014; Grand Chamber, *Murray v. The Netherlands*, 26.4.2016; as well as, in *Trabelsi v. Belgium*, 4.9.2014, where the Court acknowledged a violation of ECHR Article 3 when the State extradited the convicted offender to a State in which he would have been subject to a life sentence without the possibility of early release.

[41] See *Kafkaris*, § 99 regarding "this part of the Court's case-law under Article 3 indirectly concerns alternative measures to detention, as the commutation of life sentences may be accompanied by their imposition".

Moreover, it is appropriate to point out that, to ensure that a life imprisonment sentence comply with ECHR Article 3, the possibility of prison release is sufficient, it is not, however, necessary that the offender sentenced to life imprisonment actually be freed: it is entirely legitimate – and even a necessary duty, as we will see, in relation to ECHR Article 2 – that the State keep a person who has been ascertained to be persistently social dangerousness in custody[42].

The judgments relating to life imprisonment are fascinating, for our purposes, because in those cases the Court developed some interesting considerations on the purpose of the penalty. In this regard, in the previously mentioned *Vinter v. The United Kingdom* decision, the Grand Chamber noted that "a person sentenced to life imprisonment with no prospect of release nor possibility to re-visit its perpetual penalty risks of not being ever able to redeem himself": the fact that the penalty remains unalterable and is indifferent to potential progress made by the convicted offender leading to re-socialization does not guarantee that the sanction imposed is indeed just and proportionate, especially after the lapse of a long period of time. In the same vein, the Court held that the inflexible nature of life imprisonment is incompatible with human dignity since it deprives the inmate of any hope of freedom even in a distant future. An argument that the Court attaches great importance to because, we are reminded again, respect for human dignity is the "essence" of the European Convention on Human Rights[43].

Even more specifically, in the recent *Murray v. The Netherlands* decision, it is stated that, although not expressly provided for in the Convention, it must be held that the penalties including life imprisonment should aim towards the objective of rehabilitation[44]. The Court arrived at this conclusion observing how the principle of re-socialization finds expression, referring also to those serving life imprisonment sentences, in European legislation regarding prison (see Article 6, 102 and 103.8 of the European Prison Rules, Resolution 76 (2) of the Committee of Ministers and Recommendation 2003 (23) for those sentenced to long term penalties); in the constitutional jurisprudence of many European legal systems; and in international law (see, to this effect, the Standard Minimum Rules for the Treatment of Prisoners and the International Treaty on Civil and Political Rights).

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[42] See *Vinter*, § 108.

[43] See *Vinter*, § 113.

[44] See ECtHR, *Murray v. The Netherlands*, citing § 103: "notwithstanding the fact that the Convention does not guarantee, as such, a right to rehabilitation, the Court's case-law thus presupposes that convicted persons, including life prisoners, should be allowed to rehabilitate themselves".

In order to ensure that the objective of re-education is actually feasible, "the authorities must also give life prisoners a *proper opportunity to rehabilitate themselves*"[45]: this is an extremely important step for our purposes because it expresses the concept according to which the objective of rehabilitation entails that the enforcement of the penalty, both custodial and non-custodial, is oriented in its content towards this purpose[46].

3.3. *The limits of usefulness of the alternative measures*

The findings of the case law on the issue of life imprisonment are not contradicted, as apparently it may seem, by those judgments in which the Court censures the State for releasing inmates who then committed heinous crimes back into society.

The issue is that of the limits of use of the alternative measures to detention arising from ECHR Article 2. Such article, in defending the right to life, involves not only the obligation for the Member State to refrain from causing the deaths of persons under its jurisdiction, but also the positive obligation, to take steps to protect those individuals whose lives are threatened by the criminal behaviour of others.

As the Court has had the opportunity to observe, such positive obligation is limited to cases in which the authorities either knew or should have known that a real threat to the life of one or more individuals existed and they did not adopted measures which would have reasonably obviated this risk. In this context, the Court distinguished the cases in which the protection applied to one or more individuals identifiable in advance as targets of murderous action from cases characterized by the uncertainty of the potential victims.

For our purposes, the *Maiorano v. Italy* decision is particularly interesting. In this case, the Court recognized a violation of ECHR Article 2 because of the murders committed by a person sentenced to a custodial penalty who had been granted the alternative measure of semi-custody[47]. In its reasoning of such judgment, the Court observed that the objective

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[45] See ECtHR, *Harakchiev and Tolumov v. Bulgaria*, 8.7.2014, § 264.

[46] See in this regard, the concurring opinion of judge Abuquerque in the *Khoroshenko v. Russia*, 2015 decision, in which he reiterated, like the Grand Chamber in the *Vinter* case had expressly stated, that from ECHR Article 3 it must be deduced that the penalty must necessarily strive for the re-socialization of the convicted offender and he pointed out that this objective will necessarily reflect on the manner of enforcement of the penalty.

[47] Such measure governed by Articles 48-50 of Law no. 354 of 26 July 1975 allows the inmate to spend part of the day outside the institution penitentiary, to carry out work or educational activities or otherwise useful activities to his social reintegration.

of re-socialization – to which alternative measures are aimed – needs to be balanced with the protection of the needs of social defence and, in particular, with the State duty to protect the lives of those people under its jurisdiction from other people's criminal behaviour.

According to what is set forth in the decision – and this is an important step for the purpose of our project – the result of such balance must be reflected in national legislation, in the sense that the provision of non-custodial sanctions must be accompanied by sufficient measures to ensure the protection of the community.

As far as the present case is concerned, it is noted in the judgment that the legislative regulation of alternative measures and, in particular, semi-custody is adequate because it reasonably reconciles the two different interests at stake and that the violation is due, rather, to a "poor" application of the same (the judges not having diligently evaluated some of the elements that would have enabled us to ascertain the persistent social dangerousness of the inmate)[48].

3.4. *Alternative measures in the pre-trial phase*

Another area in which the European Court has taken the issue of alternative measures to detention into account is that of precautionary measures. In order to implement ECHR Article 5, under which an accused offender must, as a rule, be free during his trial, the use of pre-trial custody should be a last resort.

As stated with increasing clarity in European case law in recent years, ECHR Article 5 requires that, as a rule, the accused offender is free during the trial phase, portraying pre-trial detention as an exception to be applied only in the presence of justified precautionary needs[49]. Specifically, the Court has held that making use of prison custody is le-

[48] See *Maiorano v. Italy*, on the contrary citing *Ckoreftakis and Ckoreftaki v. Greece*.

[49] See *Balkin v. Moldavia* 16.1.2016 according to which: "the presumption is in favour of release. (…) the second limb of Article 5 § 3 does not offer judicial authorities a choice between bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable. The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain period has elapsed it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. When such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings".

gitimate only when it is demonstrated that other non-custodial measures are not capable, in the specific case, of satisfying the precautionary requirements. Thus, for example in the case *Kaszczyniec v. Poland*, the Court stated "the authorities, when deciding whether a person should be released or detained, are *obliged to consider alternative measures* of ensuring his appearance at trial"[50].

The Court, therefore, recognized the violation of Article 5 even in cases in which, while the precautionary needs still apply in theory[51], in the actual case, the application of pre-trial detention was found to be disproportionate, for example, in its excessive length of time[52].

From our point of view, this case law is relevant because the obligation to use custody in prison as a last resort involves, preliminarily, the obligation for Member States to create an adequate system of non-custodial precautionary measures ("*preventive alternative measures*"). As for the type of such measures, the Court – despite having never tackled the question directly – has, however, been able in several decisions in which it dealt with the topic, ruled on the adequacy of some of the alternatives, including house arrest; electronic monitoring; the duty to check in with the police; release on bail; and a foreign travel ban with the surrender of the offender's passport[53].

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[50] See ECtHR, *Kaszczyniec v. Poland*, 22.5.2007 and, in the same regard, *Jablonsky v. Poland*, 21.12.2000.

[51] When the precautionary needs which justify the application of prison custody are concerned, the Court has, on more than one occasion, reiterated that the mere suspicion of the commission of a crime is not sufficient reason to trigger custody. From an examination of the case law we can extract that the purposes that justify the use of imprisonment in the pre-trial phase are the need to: ensure the accused appears at the trial; avoid tampering with the evidence; prevent the commission of new crimes; and protect the safety of that person under investigation in exceptional cases.

[52] See, for example, ECtHR, *Gallardo Sanchez v. Italy*, 24.3.2015, where a violation of Article 5 was found because of the excessive length of the precautionary detention.

[53] See *ex multis* ECtHR, *Bolech v. Switzerland*, 29.10.2013; *Lind v. Russia*, 6.12.2012; and *Idalov v. Russia*, 22.5.2012.

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NON-CUSTODIAL SANCTIONS AND MEASURES. PRINCIPLES AND RULES IN THE FRAMEWORK OF EU LEGISLATION

SUMMARY: 0. Introduction. – 1. Strategies for prevention of overcrowding. – 1.1. Preliminary aspects. – 1.2. Front door strategies. – 1.3. Back door strategies. – 1.4. Alternative to detention – community sanctions and measures. – 2. Major documents at EU level. – 3. – Principles and rules. – 3.1. Respect of fundamental rights. – 3.2. Fair trial. – 3.3. Legality. – 3.4. Right to liberty. – 3.5. Social rehabilitation. Social inclusion and reintegration. – 3.6. Proportionality. – 3.7. Adaptation principle. – 3.8. Regular review of pre-trial detention. – 3.9. Role of the victim. Protection of the victim. – 3.10. Consent. – 3.11. Principle of non-discrimination. – 3.12. Costs. Language. Protection of personal data. – 4. Conclusion.

0. *Introduction*

Starting with the 2000's, all member states of the EU level, as well as the EU organs as well had to acknowledge the existence of an ongoing problem in each particular system which gradually has become a problem of the EU: prison overcrowding.

We underline the year 2001, when the European Court of Human Rights explicitly mentioned in its *Peers v. Greece* judgment that miserable prison conditions resulting from overcrowding could constitute by itself a violation of Article 3 of the European Convention of Human Rights and Fundamental Freedoms[1]. It was thus predictable that each state can and will be convicted in the near future if positive steps are not taken in order to solve the problem of overcrowding.

The case-law of the ECtHR confirmed all these fears, in the following years, and we make reference to *Florea v. Romania* (2010), where the identified overcrowding and poor hygiene conditions in Romanian

[1] The Court concluded that a violation of Article 3 is present even if the authorities act without any "positive intention of humiliating or debasing the applicant" – see, H. DE VOS, E. GILBERT, I. AERTSEN, *Reducing prison population: Overview of the legal and policy framework on alternatives to imprisonment at European level*, Leuven: KU Leuven, Leuven Institute of Criminology, 2014, 3.

prison system, *Canali vs. France* (2013) – "cramped conditions" –, *Vasilescu v. Belgium* (2014) – overcrowding and sanitary conditions etc. Even more important, we mention the *Torreggiani and Others vs. Italy* (2013) pilot judgment, where the ECtHR identified a "structural and systemic nature of overcrowding" and the highly likely pilot judgment which will be rendered against Romania somewhere in the near future.

The gravity and scale of the problem – only partially highlighted by the ECtHR case-law – determined the competent bodies at EU level to focus on non-custodial sanctions and measures as alternatives to imprisonment. For example, in most European jurisdictions, the offenders under supervision outnumber the ones in custody[2], thus making prison overcrowding a pressing problem for the entire Union.

Although initiatives are to be seen, as previously mentioned, starting with the beginning of 2000's (more specific, with the European Arrest Warrant Framework Decision of 2002), the problem is far from being solved, as the recent pilot judgment against Italy showed and the one against Romania will probably confirm in the near future. Despite steps already undertaken – starting with initiatives from EU level and followed by efforts of member states to have correspondent transpositions in domestic legislation –, the representatives of the European Commission still consider prison overcrowding as a major problem of the EU, yet unsolved[3].

The fundamental approach in the prevention of overcrowding at the level of EU member states should consist in a coherent system of measures and strategies with the purpose of using non-custodial sanctions and measure, shortening the length of imprisonment and enhancing the possibility for early release[4]. Embedding all these appropriate measures is

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[2] See, F. McNeil, "Community Sanctions and European Penology", in T. Daems, S. Snacken, D. Van Zyl Smit (eds.), *European Penology*, Oxford: Hart Publishing, 2014, 171-193.

[3] In particular, Viviane Reding, the then Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship asked herself the following question, when talking about the European legislation on transfer of prisoners: "what judicial authority would authorize the transfer of detainee to a place where he or she would face a substantial risk of being ill-treated?". See, V. Redding, "The Future of European Criminal Justice under the Lisbon Treaty", European Law Academy, Trier, 12 March 2010, available online at *http://europa.eu/rapid/press-release_SPEECH-10-89_en.htm*. See also, H. De Vos, E. Gilbert, I. Aertsen, *Reducing prison population: Overview of the legal and policy framework on alternatives to imprisonment at European level*, op. cit., 11, clearly seeing Viviane Reding's speech as a plea for the "use of alternatives to imprisonment […]".

[4] See also, European Commission, *Green Paper. Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention*, Brussels, 14.6.2011, COM(2011), 327 final.

the next step, in order to help overcoming the problem on a medium and long term strategy.

To what extent all these initiatives and efforts helped overcoming the problem is a question which our entire project tries to answer – and, partially, the answer will be provided in this study.

The present paper is divided into several sections: *the first section* deals with the major strategies which can be helpful in the control of prison population; *the second section* provides a brief overview of the major documents at the EU level enacted in the field of alternatives to custodial sanctions and measures; eventually, *the third and most important section* tries to identify the major principles and rules in the common EU policy in the framework of legislation alternative to imprisonment, starting off from the most important documents already presented within section 2.

1. *Strategies for prevention of overcrowding*

1.1. *Preliminary aspects*

Helene de Vos and Eli Gilbert mentioned the "number of attempts (to solve the problem, we add) is as high as the number of causes"[5], which is obvious, "since a multifaceted problem typically requires a multifaceted solution"[6].

The complexity of the problem at stake makes it clear from the beginning that the answers are not easy to find and although a "fix" can be found for a particular case, usually it works even in that particular case for short term and has its own shortcomings. Such examples can be maximizing the use of community service, shortening by law the length of imprisonment, but carefully focusing on each of these one will conclude that applied singularly and excessively each measure can do more wrong than good[7], even on a medium time assessment.

Therefore, a combined strategies and approaches are needed[8], care-

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[5] H. De Vos, E. Gilbert, I. Aertsen, *Reducing prison population: Overview of the legal and policy framework on alternatives to imprisonment at European level*, op. cit., 14.

[6] J.M.A. Pitts, O.H. Griffin III, W.W. Jonhson, "Contemporary prison overcrowding: short-term fixes to a perpetual problem", in *Cont. Just. Rev.: Iss. Crim., Soc. Rest. Just.*, 17, 1, 2014, 128.

[7] See "Scientific Recommendations", in D. Flore, S. Bosly, A. Honhon, J. Maggio (eds.), *Probation Measures and Alternative Sanctions in the European Union*, Cambridge: Intersentia, 2012, 566.

[8] A. Kuhn, P. Tournier, R. Walmsley, "Report on prison overcrowding and prison population inflation", Strasbourg: Council of Europe, 2000.

fully balanced to correspond best to the specificity of each domestic legal system of EU member state. Thus, a coherent body of measures and strategies aimed at preventing prison overcrowding is necessary to be drafted a the EU level and consequently transposed in each domestic system, having in mind the particularities of each individual member state and the complexity and scale of overcrowding locally.

Concluding, reducing prison overcrowding is not possible without "embedding these appropriate measures within a coherent and national criminal policy directed towards the prevention of crime and criminal behaviour, effective law enforcement, public safety and protection, the individualization of sanctions and measures and the social reintegration of offenders"[9].

Starting from the definition above and from the goals and objectives of this coherent body of strategies and approaches, two distinct types of strategies have emerged: the so-called *front door strategies* and, respectively, the so-called *back door strategies*.

1.2. *Front door strategies*

This body of measures and strategies can be defined by its main objective: keeping prison population low, by making a careful selection of offenders to imprison and by keeping the "door closed" for others[10]. So, one can say that this body of strategies focuses at the limitation of the *input* of offenders in the prison system.

The *in concreto* strategies and measures consist (and are not limited) of: decriminalization, adopting certain prosecution guidelines and sentencing policies, legally limiting the length of prison sentences, enacting a system of effective non-custodial set of sanctions and measures etc.[11].

As well, it should be noted that the strategies are supposed to work both at the pre-trial stage and post-trial. If no one can deny that most concern is given to the post-trial phase (due to the fact that the vast majority of cases derive from this stage), the pre-trial stage must be also benefit from a set of strategies with the same aim. After all, overcrowding of prison facilities is caused both by an increased number of con-

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[9] H. De Vos, E. Gilbert, I. Aertsen, *Reducing prison population: Overview of the legal and policy framework on alternatives to imprisonment at European level*, op. cit., 15.

[10] H. De Vos, E. Gilbert, I. Aertsen, *Reducing prison population: Overview of the legal and policy framework on alternatives to imprisonment at European level*, op. cit., 15.

[11] See also H.-J. Albrecht, "Sanction policies and alternative measures to incarceration: European experiences with intermediate and alternative criminal penalties", in *Res. Mat. Ser.*, UNAFEI, Tokyo, 80, 2010, 28.

victed persons and pre-trial detainees. Therefore, if the general principle regarding post-trial phase is to use imprisonment as a "last resort" or "ultimum remedium", the same has to apply in the pre-trial stage. In this particular phase, preventive arrest (pre-trial detention) must be reduced at minimum (in cases of severe gravity) in favour of all other preventive measures (supervision, house arrest etc.).

1.3. *Back door strategies*

The other facet of strategies aimed at combating prison overcrowding is the so-called "back door strategies". In this case, the hypothesis starts from the fact that the convicted person is imprisoned – therefore, it aims at reducing prison overcrowding by releasing inmates as soon as possible. As it was noted in the doctrine, using a back-door strategy can lead to an immediate decrease of prison population and it can be done by stimulating early release of prisoners, for example through parole, electronic monitoring, and house arrest and so on[12].

Although usually this kind of strategies are to be seen in the post-trial phase, it can be also be the case of pre-trial cases: for instance, you have a person who is in remand (pre-trial detention), but as time lapses, a more lenient preventive measure will suffice. So, in these situations, a back-door strategy will be incident, when shifting between pre-trial detention and a less serious preventive measures, which does not involve deprivation of liberty (or at least, not in a prison system) – e.g. judicial supervision, community service order, referral to an attendance centre, house arrest, any other mode of non-institutional treatment or some combination of the above mentioned measures.

1.4. *Alternative to detention - community sanctions and measures*

Separate from the classification of front or back door strategies (as it covers both types), the general principle is that prison overcrowding is avoided if pre-trial detention or imprisonment as a final sanction are not imposed, or in cases where these measures and sanctions were imposed, there is a mechanism which controls the duration of such extreme infringement of personal liberty.

The general term of all these combined strategies will be *alternatives to detention* and it will be used to describe the full package of measures and sanctions which can operate alternatively to detention (either pre or

[12] J.M.A. Pitts, O.H. Griffin III, W. Jonhson, "Contemporary prison overcrowding: short-term fixes to a perpetual problem", op. cit., 128 and ff.

post trial) – *community sanctions and measures*. The best definition or explanation is provided, at least in our opinion, by the Recommendation Rec (92)16 of the Committee of Ministers to member states of the European rules on community sanctions and measures (19 October 1992), where the European label of "community sanctions and measures" are described as being "those sanctions and measures which maintain the offender in the community and involve some restriction of his liberty though the imposition of conditions and / or obligations, and which are implemented by bodies designed in law for that purpose. The term designates any sanctions imposed by a court or a judge and any necessary measure taken before or instead a decision on a sanction as well as ways of enforcing a sentence of imprisonment outside a prison establishment".

To what extend and under what circumstances a complex set of community sanctions and measures implemented at the domestic level of each member state succeeds in reducing prison overcrowding is still a matter to be established, due to the fact that each EU member states provides partially for such institutions in its legal system, but still overcrowding persists (as the ECTHR recent judgments proves for). As well, the mere existence of community sanctions and measures and the mere possibility of its application do not necessary imply that courts and judges apply it ("old habits die hard").

Still, it is our opinion, that clear provisions at the EU level providing for such a multi facet mechanism and correct transposition in the domestic order of each member state are a good starting point for trying to reduce the number of prison population. In the next section (2), we will focus on the exhaustive list of legal documents in criminal matter relevant for our discussion.

2. *Major documents at EU level*

As previously mentioned, we have dedicated a specific section in order to present an overview of the major documents at the EU level enacted in the field of alternatives to custodial sanctions and measures. The list contains relevant documents which deal *per se* with custodial sanctions and measure (e.g. Framework Decision 909/2008/JHA), so one could ask him or herself why do we make reference to these instruments, given the topic? The answer will be provided in the next section, when it will be clear that a comprehensive assessment of rules and principles in the field of non-custodial sanctions and measures can not be reached without dealing with fundamental normative instruments which govern the custodial sanctions and measures.

Before embarking on presenting the principal legal EU instruments, we underline the following: first, from a formal perspective, the list is chronologically ordered and second, from a substantial perspective, it can be observed in time, the tendency of the European legislator to shift from a conservatory approach (e.g., a prevalence of pre-trial detention) to a modern one, which has its bases on the emergence of supervisory sanctions as an alternative to detention (be it either pre-trial detention or post-trial detention).

1. Joint Action 98/669/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime;

2. The Charter of Fundamental Rights of the European Union 2000;

3. Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime;

4. Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States;

5. Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence;

6. Council Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property;

7. Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties;

8. Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders;

9. Council Framework Decision 2008/909/JHA on the application 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;

10. Council Framework Decision 2008/947/JHA 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;

11. Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters;

12. Council Framework Decision 2009/829/JHA - European Supervision Order (ESO);

13. Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/

783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial;

14. Directive 2011/99/EU on the European protection order;

15. Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA;

16. Subsidiary legislation 9.17 - Custodial sentences or measures involving deprivation of liberty orders (execution in the European Union) Regulations, 3rd February, 2012;

17. Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

As well, the following documents must be taken into consideration:

– Statements made by certain Member States on the adoption of the Framework Decision 2002/584/JHA;

– The European Parliament resolution of 25 November 2009 on the Communication from the Commission - An area of freedom, security and justice serving the citizen (2009)

– The Stockholm Programme - An open and secure Europe serving and protecting citizens [Official Journal C 115 of 4.5.2010];

– Green Paper - Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, Com (2011);

– European Parliament's February 2011 Written Declaration on infringement of the fundamental rights of detainees in the European Union;

– Report from the Commission on the implementation of the European Arrest Warrant - COM (2011).

Alongside these two lists of documents, the entire package of measures designed at the EU level to safeguard the procedural rights of the suspected and accused persons is worth being mentioned, as it is a component necessary to achieve the minimum mutual trust between various legal systems of the member states.

3. *Principles and rules*

All sanctions and measures which could constitute an alternative to detention are, without a doubt, responsibility of member states, as it involves aspects of domestic legislation, part of the national legal system of each member state. Still, notwithstanding the principle of subsidiarity,

there are several reasons why the common rules and principles in this field are developed at the EU level[13].

After all, detention issues – with its entire package, including the overcrowding problem – come with the purview of the EU, from at least two main reasons: they are relevant aspects of the rights that must be safeguarded in order to promote mutual trust and ensure the proper functioning[14] of mutual recognition instruments and the EU has certain values to uphold.

Setting off from these realities, the Commission has already stressed out that respect for fundamental rights within the EU is a key concept to help build mutual trust between member states. Therefore, the Charter of the Fundamental Rights of the European Union sets a standard which all member states must comply when implementing EU law. In the same field, Article 4 of the EU Charter is identical with Article 3 from the European Convention of Human Rights, so all the conclusions reached by the ECtHR in its jurisprudence are so applicable.

Having in mind the objective underlined by the Commission in its 2011 Green Paper on detention – to promote mutual trust, to strengthen procedural rights by way of minim rules for suspects or accused persons –, we can move on and import the objective, rules and principles thus established in the field of alternatives to detention. *Mutadis mutandis*, the same safeguards must apply in the field on non-custodial sanctions and measures.

In order to achieve a more complex perspective on the fundamental rules and principles, we have relied, as well, on the conclusion of the Council of Europe Recommendations Rec 92(16) on community sanctions and measures.

And finally, we have looked closely to the domestic fundamental rules in major legal system within the EU – the so-called comparative law principles, generally recognized by most criminologist and penologists.

3.1. *Respect of fundamental rights*

According to Article 6 TEU, "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the

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[13] For a similar discussion regarding detention issues, see, European Commission, Green Paper. Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention, 2011, 3.

[14] "Smooth" functioning, according to European Commission, Green Paper. Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention, 2011, 3.

European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties". As well, paragraph 3 provides that "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

Explicit reference to the respect of fundamental rights is also made in the Preamble of the European Arrest Warrant (pct. 12), but also in Article 1 paragraph 3, where Article 4 of the EU Charter and Article 3 of the ECHR are mentioned.

Similar references are made in the Preamble of the Framework Decision on financial penalties (pct. 5) and in Article 3, or in the Preamble of Framework Decision 2009/829/JHA on the European supervision order.

More concrete, Article 3 paragraph 4 from Framework Decision 2008/909/JHA on custodial sanctions provide that after removing the requirement that the sentenced person must consent to transfer, a greater attention must be given to the possible infringement of fundamental rights post-transfer[15]. In the same context, there is explicitly mentioned the right to information about the time actually needed to be serve in the executing state, in order to accept the transfer in full knowledge.

The respect for fundamental rights is also enshrined in the Preamble of Framework Decision 2008/947/JHA on non-custodial sanctions and measure – pct. (5), while Article 1 paragraph 4 stipulates that no derogation is possible from the obligation to respect fundamental rights and fundamental legal principle.

3.2. *Fair trial*

The right to a fair trial is explicitly provided by Article 47 of the EU Charter: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

As concrete examples of provisions designed to protect this fundamental right, we mention Article 19 from European Arrest Warrant

[15] See, Preamble, pct. (5) – respect for procedural rights; Preamble, pct. (13) – respect for fundamental rights; Preamble, pct. (14) – due process.

Framework Decision, which explicitly provides the compulsory hearing of the person by a judicial authority, or pct. (6) from the Preamble of Framework Decision 2008/909, where is states that the principle of fairness governs the entire transfer procedure.

Focusing on the sub-component of right to an expeditious trial (*expeditious proceedings, determinate duration of proceedings*), Article 17 from European Arrest Warrant Framework Decision stipulates the time limits imposed for the final decision on the execution of the warrant, while Article 23 provides the time limits for the surrender. The same is the case in the matter of recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, where Article 12 imposes a limit of maximum 60 days for the entire procedure.

Specific provisions regarding time limit can be found in Article 10 paragraph 5 or Article 19 paragraph 1 from the European Supervision Order Framework Decision, or in the Preamble, pct. (18) of Framework Decision 2008/947 – in these cases, the limits do not deal with the duration of the procedure itself, but with duration of the sanctions or supervision measures which are to be recognized or imposed.

3.3. *Legality*

The principle of legality is two-folded in this case, being imposed both from the European level and, distinctly, from the domestic level. From the EU legislation, we mention only that each normative instrument provides explicitly for definitions, measures, conditions, exceptions, and sanctions etc. – all these elements are laid down in law.

Due to the specifically of the field – the involvement of at least two member states – numerous discussions can arise on a new facet of the principle of legality: which law is applicable – of the executing or of the issuing state? In this particular domain, we stumble upon a new problem, namely the supra-abundance of legislation and specific rules need to establish the applicable. In this context, the general rule (e.g., proscribed by Article 16 from European Supervision Order, Article 9 from Framework Decision 2005/214/JHA on financial penalties, Article 17 paragraph 1 from Framework Decision 2008/909, Preamble pct. (15) from Framework Decision 2008/947 etc.) is that the governing law is that of the executing state. Exceptions are strict and, usually, it is possible to apply the law of the issuing state, when the domestic legislation of the executing state explicitly provides for – see the case of Article 17 from Framework Decision 2008/909.

A particular case is the one of the European Supervision Order (Framework Decision 2009/829/JHA), where the applicable law is the one of the executing State regarding the monitoring of supervision measures (Article 16), whilst all other decision belong to the competent authority from the issuing State (Article 18)[16].

3.4. *Right to liberty*

The right to liberty is specifically provided by Article 6 from the EU Charter, importing the solutions of Article 5 paragraph 1 and Article 6 paragraph 2 ECHR.

Article 12 from the European Arrest Warrant Framework Decision recognizes the importance of this fundamental right by providing the possibility of provisionally release at any time, as well as alternative measures to the one of provisional arrest. The same is the case with the European Supervision Order, whose whole objective is to preserve the liberty of the person.

3.5. *Social rehabilitation. Social inclusion and reintegration*

Within this sub-section we will deal with both social rehabilitation and social inclusion (or reintegration) principle, as both aim at the same objective – enhancing the possibilities for the sentenced person to return to his or her previous life, within the community.

Regarding *social rehabilitation*, the Preamble of Council Framework Decision 2008/909/JHA stipulates that the "enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation" and that the "issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State"[17]. As well, Article 4 paragraph 6 states that Member States shall adopt measures, in particular taking into account the purpose of facilitating social rehabilitation of the sentenced person"[18]. The same general idea is resumed in the Green Paper on the application of EU criminal justice legislation in the field of detention, where article 6.2 states that "good detention conditions are a prerequisite for rehabilitation".

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[16] See also sub-section 3.8.

[17] See pct. (9) of the Preamble.

[18] A. Klip, *European Criminal Law. An Integrative Approach*, Cambridge-Antwerp-Porland: Intersentia, 2012, 330.

The principle is underlined in the Preamble of Framework Decision 2008/947/JHA[19]: when dealing with consent of Member States for forwarding a judgment, it is provided that such consent will be given "with a view of social rehabilitation" of the sentenced person. Even more, Article 1 explicitly mentions that the Framework Decision "aims at facilitating the social rehabilitation of sentenced persons"[20].

On the topic of *social inclusion / reintegration*, this principle is generally recognized as a requirement of social justice and a key guiding principle in probation practice. Its importance is highlighted in the Preamble of Framework Decision 2008/909/JHA, where it is established that the social inclusion or reintegration of the sentenced person is easier in the executing State, because of the "(…) person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State". As well, the Preamble of Framework Decision 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 mentions at pct. (8) that one of the objectives shall be "to enhance the prospects of the sentenced person's being reintegrated into society, by enabling that person to preserve family, linguistic, cultural and other ties, but also to improve monitoring of compliance with probation measures and alternatives sanctions […]".

3.6. *Proportionality*

The concept of proportionality is used in this field in order to assist in discerning the correct balance between the restrictions imposed by a judge or court of justice and the severity of accusation.

Regarding our analysis, it covers both phases – pre-trial and after the final judgment. In the pre-trial phase the judge or court should consider remand or pre-trial detention only in utmost important cases, so to speak, using this coercive measure as the only and final remedy (last resort) and relying in most cases on alternative preventive measures. As to the other phase of the trial – after the final judgment has been rendered –, the sanction imposed must correspond to the gravity of the offence and, therefore, imprisonment should be applied only in particular cases, after the conclusion that less coercive measure do not suffice or are not appropriate has been reached. In cases where such a conclusion has been

[19] See pct. (14).

[20] See H. Satzger, *International and European Criminal Law*, München: C.H. Beck, 2012, 125.

reached and imprisonment was deemed necessary, the individualization principle also cover aspects as the length (duration) of the penalty, the possibility of parole etc.

As an example, pct. (13) from the Preamble of the European Supervision Order Framework Decision (2009/829/JHA) provides that such a measure (the E.S.O., we add) will be "generally applied in case of less serious offences".

3.7. *Adaptation principle*

The adaptation principle is not one of the common principles in most domestic jurisdiction and the reason for this is logical: one does not need such a mechanism within a single legal system. At the European level, when several legal systems, each with its own particularities, intersect, such a principle is mandatory.

Pct. (19) from the Preamble of Framework Decision 2008/909/JHA on custodial sanctions mentions the possibility for the executing State "to consider (…) adapting the sentence" before refusing to recognize and enforce it, on the grounds that is not provided in the domestic legislation. More precisely, Article 8 provides that "where the sentence is incompatible with the law of the executing State in terms of duration, the competent authority of the executing State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law".

Similar provisions are enacted regarding the adaptation of the probation measures or alternative sanctions, according to Article 9 from Framework Decision 2008/947/2008, following the general idea that the "adapted probation measure, alternative sanction or duration of the probation period shall correspond as far as possible to that imposed in the issuing State".

As well, the European Supervision Order Framework Decision mentions in Article 13 the general principle of adaptation of supervision measures, with the similar objective of levelling the supervision measures imposed by the issuing State as far as possible in line with the types of supervision measures which can be applied under the law of the executing State.

3.8. *Regular review of pre-trial detention*

Article 47 of the EU Charter makes general reference to both rights to an effective remedy and to a fair trial, as we have seen in section 3.1

above. In the case of effective remedy, Article 47 stipulates that "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article".

For example, Article 18 of the European Supervision Order Framework Decision regulates the competence regarding subsequent decisions and governing law regarding, *inter alia*, the renewal, review and withdrawal on supervision measures.

3.9. *Role of the victim. Protection of the victim*

A special focus is given to the victim and his or her protection in the case of community sanctions implementation. The reasons behind this optic are easy to understand: if in case of custodial sanctions and measures the offender is confined and can not represent any threat to the public in general or the victim, in particular, when alternative non-custodial sanctions are applied, there is a theoretical risk to the general public and the victim.

The approach of the European legislator is complex and involves both stages of the trial. In the pre-trial phase, the European Supervision Order Framework Decision (2009/829/JHA) underlines the need of improvement of the protection of victims and the general public[21]. The same criteria apply after the final judgment – in the Preamble of Framework Decision 2008/947/JHA the protection of the victim and of the general public is considered a general objective, aspects reiterated by Article 1.

More specifically, we should mention Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/222/JHA, where emphasis is put on information provided to the victim about the escape or release of the offender[22] and Directive 2011/99/EU on the European protection order which has as primarily objective to offer practical support measures for the protection of victims.

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[21] Article 2 paragraph 1 let. *c*). See also, H. SATZGER, *International and European Criminal Law*, op. cit., 123, 130.

[22] See, Preamble pct. (32). On this issue, see A. KLIP, *European Criminal Law. An Integrative Approach*, op. cit., 332 – analyzing the similar provisions of Article 4 paragraph 3 Framework Decision 2001/220 on the Standings of Victims, Klip considers that the notification of the victim in case the prosecuted or sentenced person is released "was certainly not written to further the integration of the accused back into society".

3.10. *Consent*

The consent of the offender is a landmark of the EU legislation framework in the field of recognizing and transferring the execution of sanctions and measures.

In cases of custodial sanctions and measure, the consent of the sentenced person is a general principle – for example, pct. (10) from the Preamble of Framework Decision 2008/909/JHA underlines that the general rule is the opinion of the sentenced person. This is reiterated in Article 6, which also provides the exceptional cases when the consent of the sentenced person is not required. As well, in the case of the European Arrest Warrant, the absence of consent can function as a ground for optional non-execution of the warrant.

On the contrary, in the case of non-custodial sanctions and measures, the general rule is that the consent of the sentenced person is not necessary, as the provisions of Framework Decision 2008/947/JHA do not require such a condition at any time.

3.11. *Principle of non-discrimination*

In the case of European criminal law and judicial cooperation in criminal matters, a new risk may arise: different treatment between accused or sentenced persons who are not citizens or do not reside in the trial state[23].

Such a discrimination criterion is normally not present in the domestic legal order of a state, but due to the particularities of EU law, it can become quite a challenge. The Preamble of the Framework Decision on the European Supervision Order acknowledges the possibilities of such a discrimination, namely, the risk for a non-citizen or non-resident to be remanded in custody pending trial even when in similar circumstance, a citizen or resident of the trial state would not[24].

In order to prevent such a risk, Framework Decisions 2008/909/JHA and 2008/947/JHA forbid such discrimination: in the Preamble of the custodial sentences Framework Decision the principle of equality is explicitly mentioned[25], while the later explicitly bans any criteria of discrimination[26]. Similar provisions are found in Council Framework Deci-

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[23] H. Satzger, *International and European Criminal Law*, op. cit., 123.

[24] See, Preamble pct. (5).

[25] See, Preamble of the Framework Decisions 2008/909/JHA, pct. (6). See for more details, A. Klip, *European Criminal Law. An Integrative Approach*, op. cit., 316.

[26] See, Preamble of the Framework Decisions 2008/909/JHA, pct. (5).

sion 2005/214/JHA on the application of the principle of mutual recognition to financial penalties[27].

3.12. *Costs. Language. Protection of personal data*

More of an administrative nature, common rules can be identified regarding the following aspects: costs of the procedures, language used and the need for protection of personal data of each individual case.

Regarding the *costs* of all procedures involving recognition and transfer, the general rule is that these belong to the executing state[28]. Additionally, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime regulates the reimbursement of expenses of victims incurred as a result of their participation in the criminal proceedings[29].

On the topic of the *language*, the general rule is that the official language or one of the official languages of the executing State will be used. As well, one of official languages of the institutions of the European Union can be used, in cases where the executing Member State provided at the adoption of the particular normative instrument or later, in a declaration, that it accepts that translation in one of these languages[30].

In this field, particular attention must be accorded to the need to provide information and advice to victims in "simple and accessible language". As well, "it should also be ensured that the victim can be understood during proceedings. In this respect, the victim's knowledge of the language used to provide information, age, maturity, intellectual and emotional capacity, literacy and any mental or physical impairment should be taken into account"[31].

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[27] The Court has addressed this issue in its case-law: see 8 July 2010, Joined Cases C-447/08 and C-448/08, *criminal proceedings against Otto Sjöberg* (C-447/08) *and Anders Gerdin* (C-448/08), § 55-57; 28 February 1988, Case 299/86, *criminal proceedings against Rainer Drexl*, § 23-25.

[28] See, Article 25 from Council Framework Decision 2009/829/JHA - European Supervision Order; Article 30 from Council Framework Decision 2002/584/JHA on the European Arrest Warrant; Article 24 from Framework Decision 2008/909/JHA on custodial sanctions; Article 22 from Council Framework Decision 2008/947/JHA 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 etc.

[29] See Article 4 paragraph 1 let. k) and Article 14.

[30] See Article 8 paragraph 2 from Council Framework Decision 2002/584/JHA; Article 23 from Framework Decision 2008/909/JHA; Article 21 from Council Framework Decision 2008/947/JHA; Article 24 from Council Framework Decision 2009/829/JHA etc.

[31] Preamble, pct. (21) from Directive 2012/29/EU.

Particular account should be taken of difficulties in understanding or communicating which may be due to a disability of some kind, such as hearing or speech impediments. Equally, limitations on a victim's ability to communicate information should be taken into account during criminal proceedings

Finally, another aspect that has reached the status of a general rule is the need to *safeguard the personal data of individual*. In this particular case, it worth's mentioning the Preamble of Directive 2012/29/EU and, especially, the general provisions of Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

4. *Conclusions*

At the end of this study, we can conclude that at the level of EU legislation, measures have been taken in order to reduce prison overcrowding. The judges and courts from Member States can rely on a normative framework which provides solutions to one of the most pressing problems in most domestic orders. The following section will try to present the way in which the normative instruments enacted at the EU level are receipted by the Court of Justice of the European Union and the courts at the national level.

MARTA MUÑOZ DE MORALES ROMERO

THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE EXECUTION OF SENTENCES

SUMMARY: 1. Introduction. – 2. The right to liberty and the principle of proportionality in the time of detention during the enforcement of a European arrest warrant (*Lanigan case*). – 3. The principle of reintegration. – 4. Mutual recognition and prohibition of torture, inhuman and degrading treatment. – 5. The Ognyanov case: Interpretation favor rei with or without "buts"? – 6. By way of a conclusion: "Cross-country race" for the ECJ.

1. *Introduction*

The almost inexistent *case-law* on matters of prison policy pronounced by the European Court of Justice (ECJ) is a reality that may be explained, if three aspects are taken into account. One aspect is the context in itself: the role of the principal actor of the Council of Europe and the ECtHR concerning prison policy (1). The other two, in contrast, are connected with the specificities of the European Union (EU) legal order: the pre-trial competences of the Court at Luxembourg until the entry into force of the Treaty of Lisbon (2) and the tension between fundamental rights and mutual cooperation in general that have their origin in the premise on which the principle of mutual recognition is founded as the cornerstone of judicial cooperation in criminal matters[1]: mutual trust between the Member States (3).

(1) Despite the conventions that have existed within the EU that clearly refer to the enforcement of penalties, these were always conceived as complementary with regard to those of the European Council[2] and their ratification had little success among the Member States[3]. On the

[1] Conclusions of the Tampere European Council, 15 and 16 October 1999, point 33.

[2] Convention between the Member States of the European Communities on the execution of foreign criminal convictions, Brussels, 13 November 1991 and the Agreement on the Application of the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons of 25 May 1987.

[3] See A. PALOMO ARCO, "Reconocimiento mutuo y ejecución de sentencias penales dictadas en otro Estado europeo", in *Rev. Jur. Castilla-León*, 21, 2010, 142-143.

other hand, with the exception of some dispositions of the Convention implementing the Schengen Agreement, of 14 June 1985, on the gradual abolition of checks at their common borders[4] and the Framework decision on the European Arrest Warrant[5] (EAW) that refer specifically to prison-related questions, it is the second generation instruments of mutual recognition that really cover the question, in other words, those adopted in 2008 or thereafter[6], which implies that they would not have been transposed until relatively recently[7].

Linked to the above, it should not be forgotten that the Council of Europe[8] and, therefore, the ECtHR have at a supranational level "taken charge" of contributing to improvements in prison conditions[9] by setting European standards on prison policy and, in consequence, overseeing the protection of rights in this field. So much so that there are "few" EU documents that contain in-depth reflections on the conditions of imprisonment. However, there are some. Of interest in that regard is the Recommendation from the EP to the Council on the rights of prisoners in

[4] Under the heading *transfer of the enforcement of criminal judgments*, articles 67-69 had the purpose of completing the Convention of the European Council, of 21 March 1983, on the transfer of sentenced persons between the states that integrate "Schengen". It permitted the enforcement of a penalty, at the request of the State that had convicted a person escaping to the territory of another State of his own nationality, to serve the sentence in the State to which that person had fled. With the adoption of Framework Decision 2008/909/JHA, of 27 November 2008, 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, articles 67 to 69 of the Schengen Agreement are no longer applicable (see article 26).

[5] Council Framework Decision 2002/584/JHA, of 13 June 2002 [OJ L 190, 18.7.2002].

[6] With the exception of Council Framework Decision 2005/214/JHA, of 24 February 2005, on the application of the principle of mutual recognition to financial penalties [OJ L 76, de 22.3.2005], the deadlines for transposition of them all ended as from December 2011.

[7] Without mentioning that according to the Report from the Commission (12) on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, "the level of implementation of these three important pieces of legislation is far from satisfactory". See Report COM(2014) 57final, Brussels, 5.2.2014.

[8] Green Paper from the Commission: Strengthening mutual trust in the European judicial area. Green Paper on the application of EU criminal justice legislation in the field of detention, Brussels, 14.6.2011 [COM(2011) 327final], 12: "Given its substantial experience and work in this area, the Council of Europe has a leading role" (12 no 13).

[9] Without prejudice to the work of the European Commission, financing studies on prisons, long-term incarceration, the population of foreign inmates, etc. On this question, see D. Van Zyl Smit, S. Snacken, *Principios de política penitenciaria y política penitenciaria europea. Penología y derechos humanos*, Valencia: Tirant lo Blanch, 2013, 67.

the EU[10], in which the Member States were urged to improve the conditions of prisoners through a Framework Decision on the protection of the standing of victims in criminal proceedings or the Green paper of the Commission of 2011[11], which took note of the interest in the conditions of detention and prison management to guarantee the smooth running of the principle of mutual recognition, despite both matters coming under the competence of the Member States[12]. A step forward was at least taken in the case of prisoners in preventive custody with Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. Its recital nº 29 is quite explicit enough when it indicates that "The conditions in which suspects or accused persons are deprived of liberty should fully respect the standards set out in the ECHR, in the Charter, and in the case-law of the Court of Justice of the European Union (the Court of Justice) and of the European Court of Human Rights". And more so, the lawyer in attendance "may raise a question with the competent authorities regarding the conditions in which that person is deprived of liberty".

(2) Added to the lack of leadership of the EU in comparison with the Council of Europe, it should be added that the ECJ has not, up until very recently, (1 December 2014[13]), had full pre-trial competences over the acts of the former Third Pillar, in other words, over the framework decisions; those which have in a more general spirit addressed questions of prison policy more directly.

(3) Finally, the principle of reciprocal trust, upon which the principle of mutual recognition is founded, begins with the premise that the legal orders of the Member States have a degree of respect towards similar fundamental rights, which is expressed as a rejection by the examining magistrate of any sort of inquiry into fundamental rights when cooperating[14].

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[10] OJEC C 102 E, of 28.4.2014. Earlier see European Parliament Resolution of 15 December 2011 on detention conditions in the EU [OJ 2013, C 168 E, p. 82].

[11] Green Paper on the application of EU criminal justice legislation in the field of detention, *op. cit.*

[12] *Ibidem*, 2 and 3. Likewise, see Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, § 4 [COM(2011) 175 final].

[13] Article 10 of Protocol num. 36 of the Treaty of Lisbon.

[14] See A. Nieto Martín, "La cooperación judicial en la UE como medio de lucha contra la pena de muerte y la expansión de los derechos humanos", in L. Arroyo, P. Biglino,

This "blindness" with regard to what happens in the issuing State has meant that the overriding interest in mutual cooperation in criminal matters in the field of the EU has been the efficacy of mutual cooperation in criminal matters[15], in order to avoid the impunity of criminals who might evade the workings of justice by using their freedom to travel throughout the Union[16]. And that overriding interest has also been reflected in the responses of the ECJ to the great majority of the preliminary questions in the sense that it has sought interpretations that, with a view to guaranteeing the efficacy of the cooperative act, have at times left the substantive-criminal guarantees (*Advocaten voor de Wereld*[17]), as well as the criminal-procedural guarantees (*Melloni*[18], *Radu*[19], etc.) in the background.

The few cases that have come before the ECJ to rule on fundamental rights in the prison system are, in consequence, hardly surprising. Neither is it surprising that as extradition is the act of cooperation that has traditionally provoked tensions between fundamental rights and legal assistance[20], the majority of cases brought before the Court of Luxembourg have concerned its substitute, the European Arrest Warrant.

To date, eight cases may be identified in which, in one way or another, principles of prison policy are called into question, such as the principle of proportionality with regard to the duration of the term of preventive custody (*Lanigan case*); the principle of social integration (*cases of Kozlowski, Wolzenburg, I.B., and Lopes Da Silva*); that of the prohibition of inhuman and degrading treatment (*Pál Aranyosi and*

W. SCHABAS (eds.), *Hacia la abolición universal de la pena capital*, Valencia: Tirant lo Blanch, 2010, 454.

[15] Giving priority along the lines of security in the area of freedom, security and justice. Critically, on the doctrine, see A. NIETO MARTÍN, "Fundamentos constitucionales del sistema europeo de Derecho penal", in *Rev. Gen. Der. pen.*, 3, 2005; N. GONZÁLEZ-CUÉLLAR, "La 'euroorden': Hacia una Europa de los carceleros", in *Diar. La Ley*, 6619, of 26 December 2006; C. GÓMEZ-JARA DÍEZ, "Orden de detención europea y Constitución europea: reflexiones sobre su fundamento en el principio de reconocimiento mutuo", in *Diar. La Ley*, 6069, of 26 July 2004; N. PADFIELD, *Tests and Materials on the Criminal Justice Process*, Oxford: University Press, 2008, 11. More recently, see S. BRAUM, "Conclusions", in S. BRAUM, A. WEYEMBERGH (eds.), *Le contrôle juridictionnel dans l'espace pénal européen*, Brussels: Institute of European Studies, 2009, 334 and M. CERIZZA, G. MARTINICO, "Supranationalism in UE Criminal Justice: Another incoming tide?", in *Sant'Anna Legal Studies Research Paper*, 7, 2010, 16.

[16] Thus, from the *Conclusions of Tampere*, § 5.

[17] ECJ, Judgment of 3 May 2007, C-303/05, *Advocaten voor de Wereld case*.

[18] ECJ, Judgment of 5 April 2013, C-399/11, *Melloni case*.

[19] ECJ, Judgment of 29 January 2013, C-396/11, *Radu case*.

[20] Although, as NIETO MARTÍN mentions, "it is mistaken to think that extradition alone implies a danger for fundamental rights". See A. NIETO MARTÍN, "La cooperación judicial en la UE como medio de lucha contra la pena de muerte y la expansión de los derechos humanos", op. cit., 457.

Căldăraru cases) and a sort of principle of *favor rei* (*Ognyanov case*). In some of these cases, possible indirect violations of fundamental rights are raised; future violations that could happen once the cooperative act has taken place (for example, once handed over, the requested person will be judged without guarantees or will have to serve his sentence in a prison system under unacceptable conditions of imprisonment). In others, it is a question of a possible direct violation[21] as it is the cooperative act that raises the problem. Thus, the right to liberty is at stake in the *Lanigan case* for the duration of the time spent in detention in the framework of the European arrest warrant.

2. *The right to liberty and the principle of proportionality in the time of detention during the enforcement of a European arrest warrant (*Lanigan case*)*

The *Lanigan case*[22] addresses the maximum length of detention when awaiting the decision of the court of the Member State on a European Arrest Warrant (EAW). In particular, the ECJ was asked whether the non-observance of the deadlines established in article 17 of the EAW FD[23] had any effect for the executing Member State, in the sense that it would no longer be obliged to enforce the EAW (1), and whether it could afford the prisoner such rights as, for example, the right to be released from detention (2).

(1) The response to the first question is based on the dominant logic in all ECJ case-law on the EAW: the efficacy of judicial cooperation. Beginning with the *Jeremy F case*[24], the ECJ established that the time-limits foreseen in article 17, read in connection with article 15, so that the court of the executing state may decide over surrender, are, *in principle*, unsur-

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[21] On the distinction, see A. Nieto Martín, "La cooperación judicial en la UE como medio de lucha contra la pena de muerte y la expansión de los derechos humanos", op. cit., 460.

[22] ECJ, Judgment of 16 July 2015, C-237/15 PPU, *case of Minister for Justice and Equality v. Francis Lanigan*.

[23] In accordance with article 17 of the EAW, the judge of the executing Member State should pronounce on the case within a maximum time-limit of 10 days from the time at which the requested person had agreed to surrender. The time-limit is increased to 60 days from the time of detention when the agreement of the requested person was not forthcoming.

[24] ECJ, Judgment of 30 May 2013, C-168/13, *Jeremy F. case*, § 62, § 64. Although a different problem is approached here, to wit, the option of a right of appeal against the decision of the judicial authority that is pronounced to authorize the trial of the requested person for offences committed before his surrender, which differ from those that motivated that surrender process.

passable[25], such that the Member States must respect those limits[26]. However, mere non-compliance will not suppress the obligation to pronounce on the EAW. It would otherwise "run counter to the objective pursued by the Framework Decision of accelerating and simplifying judicial cooperation"[27], as it "could […] force the issuing Member State to issue a second European arrest warrant in order to enable a new surrender procedure to take place within the time-limits stipulated in the Framework Decision"[28].

(2) The response to the second question is more substantial from the point of view of fundamental rights, because it sets out whether detaining the requested person in custody once the time-limits foreseen in article 17 have elapsed implies a violation of the right to liberty. The ECJ once again opts for the focus of efficacy, because before addressing a possible violation it leaves it very clear that "to release that person purely and simply upon expiry of those time-limits or where the total duration of the period that person has spent in custody exceeds those time-limits could limit the effectiveness of the surrender system put in place by the Framework Decision and, consequently, obstruct the attainment of the objectives pursued by it"[29].

It justifies this decision in part by the fact that the total period of deprivation of liberty served by the requested person in the executing Member State, while his surrender is decided upon, is then deducted from the total period of imprisonment that will be served in the issuing Member State (article 26.1 of the EAW), even the period of detention that follows the expiry of the time-limits foreseen in article 17[30].

Having emphasized the perspective of the efficacy of mutual cooperation, the ECJ underlines the obligation to respect fundamental rights and the fundamental legal principles enshrined in article 6 TEU and reflected in the EU Charter of Fundamental Rights (CFREU). Given that the EAW can imply – in fact almost always implies- the adoption of a provisional custodial order with regard to the requested person, the con-

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[25] ECJ, Judgment of 16 July 2015, C-237/15 PPU, *case of Minister for Justice and Equality v. Francis Lanigan*, § 32.

[26] *Ibidem*, § 33.

[27] *Lanigan case*, § 40. The Attorney General, Pedro Cruz Villalón, in his opinion presented on 6 July 2015, very pertinently indicated that the establishment of time-limits not only has the function of guaranteeing the promptness of criminal justice, but also of "ensuring that the requested person, who benefits from the presumption of innocence, may be brought promptly before the courts of the issuing Member State" (§ 128).

[28] *Lanigan case*, § 40.

[29] *Lanigan case*, § 50.

[30] *Lanigan case*, § 51.

ditions of detention should comply with those of CFREU and in consequence the ECHR. On this point, the ECJ turns to the jurisprudence of the ECHR relating to article 5.1 f) of the ECHR in relation to extradition processes[31]. From this body of case-law[32], it emerges that the deprivation of liberty of a person who finds himself in an extradition process – *mutatis mutandis* execution and surrender process of an EAW – is no longer justified when the procedure is not processed with due diligence[33]. *Sensu contrario*, deprivation of liberty is justified "only in so far as the procedure for the execution of the European arrest warrant has been carried out in a sufficiently diligent manner and in so far as, consequently, the duration of the custody is not excessive"[34]. To do so, the national executing judge should verify whether an essential failure to act by the judicial authorities in question and whether the actions of the requested person have also contributed to the delay in the proceedings. Equally, the ECJ continues, the potential penalty that would be imposed on the requested person in case of being convicted or that would have been imposed for the acts that had led to the emission of an EAW should be taken into account[35], a risk of absconding[36], as well as having broadly enlarged the time-limits foreseen in article 17, as these by application of the

[31] On the pertinence of using the extradition procedures as a referential framework, the Attorney General, Pedro Cruz Villalón, indicated in his opinion that "the case-law of the European Court of Human Rights on extradition procedures and thus Article 5(1)(f) of the ECHR […] is most relevant for the assessment of the situation in the main proceedings, with the result that it is indispensable to take it as a starting point. That being said, it must not be forgotten that, as I have already stated, the European arrest warrant is not a mere variant to extradition procedures. The consequence is that it is not always necessary, nor always sufficient, merely to assess compliance with the case-law on extradition of the European Court of Human Rights". In this sense, he pointed out that when treating the EAW as a different figure it may on occasions require a "stricter approach in the light of the failure to observe the time-limits stipulated in Article 17 of Framework Decision 2002/584" (§ 157).

[32] ECtHR Judgment, of 22 March 1995, series A, num. 311, *case of Quinn v. France*, § 48 and of 24 March 2015, application num. 11620/07, *case of Gallardo Sánchez v. Italy*, § 51.

[33] *Lanigan case*, § 57.

[34] C-237/15 PPU, *Lanigan case*, 7.

[35] For the Attorney General is crucial – referring to the ECJ Judgement in *Gallardo Sánchez v. Italy*, § 42 – to take into account that "The holding of a person in custody is not as serious in a situation where that person has already been sentenced to a custodial sentence pursuant to a final court decision as it is in a situation where that person has not yet been tried and thus benefits from the presumption of innocence. (53) It is sufficient, in that regard, to refer to Article 26 of Framework Decision 2002/584, which provides that the issuing Member State is to deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served. […] it cannot, however, be ruled out that that person will ultimately be acquitted in the issuing Member State…" (§ 146).

[36] *Lanigan case*, § 59.

principle of mutual recognition are presumed *a priori* as sufficient to decide on surrender[37].

Nevertheless, once the 10 or the 60 days have passed, according to each case, fixed in article 17, the national court can order provisional liberty. Once again, here, the ECJ turned to the efficacy of the cooperation, when it indicated that, in reference to articles 12 and 17.5, it is the executing Member State that should guarantee compliance with the necessary material conditions for surrender while awaiting the final decision of the court. And that implies the necessary adoption of measures, in the case of ordering the provisional release of the requested person, to avoid his flight[38].

Having arrived at this point, it would have to be asked why the habitual response in EAW procedures is provisional custody, despite article 12 of the FD on the EAW, as mentioned above, permitting the provisional release of the requested person at any point in time[39]. A partial explanation, at the very least, for the generalized use of provisional detention in the framework of the EAW is that the requested persons are in a large majority of cases neither nationals nor residents of the executing member State, which in practice leaves them in a clearly disadvantageous situation. "In practice, however, non-nationals are often at a disadvantage in obtaining bail because they are seen as a greater flight risk than national defendants"[40].

3. *The principle of reintegration*

When it is a question of an EAW for the effects of serving a sentence, the EAW FD permits the surrender in cases of nationals, residents

[37] *Lanigan case*, § 60.

[38] *Lanigan case*, § 61.

[39] Article 14 of the Proposal from the Commission was much more specific on the matter of ordering provisional release and linked the decision to there being no risk of reoffending, destruction of evidence or failure to meet the terms of justice. In the explanatory note to the article it referred to the adoption of such measures as the bail, restrictions on geographical movement, the obligation to appear at regular intervals before law enforcement bodies, etc. In the debates in the EP, the introduction of "Eurobail" was even mentioned, but the amendment was not passed. The anecdote is from F. FONSECA MORILLO: "La orden de detención y entrega europea", in *Rev. Der. com. eur.*, 7, 14, 2003, 80-81. Since then, the author warned (90) that "the introduction of a time-limit to decide on surrender (…), will have to lead to more rapid decision-making, and in consequence to limit the possible periods of provisional detention" but equally "cases of non-compliance with the reasonable time-limit should be limited, which as is well known, constitute no small part of the case-law of the European Court of Human Rights on this topic".

[40] Green paper from the Commission: Strengthening mutual trust in the European judicial area, *op. cit.*, 10.

and people living in the executing Member State, although that State should commit itself to execute the penalty or detention order in accordance with internal Law (article 4.6 FD on the EAW). A similar provision also appears as a guarantee in those circumstances in which the EAW is issued with the purpose of applying criminal measures, although in this case surrender is subject to the requested person being returned to the issuing State to serve the custodial sentence or detention order passed there (article 5.3 FD EAW)[41].

Both provisions were introduced to give greater relevance to the principle of social reintegration or reinsertion of the requested person once the sentence had been served[42]. In this respect, the FD of the EAW has transformed the grounds of this reason for refusal. Similar clauses appear in the extradition agreements that have as their *raison d'être* the prohibition on the surrender of nationals. In consequence, maintaining the sovereignty of the State has a lower priority than safeguarding the right to respect for privacy and the family life of the requested person (article 8 ECHR and article 7 CFREU)[43]. However, as will be seen, the principle of reintegration has not in practice always been behind the decisions of the ECJ, but has rather "resuscitated" the old grounds of these types of clauses, in such a way that they have been used by the Member States as a reason for not surrendering their own nationals[44].

The ECJ has up until now had four windows of opportunity to interpret both precepts: *the Kozlowski case*; *the Wolzenburg case; the I.B. case, and the Lopes Da Silva case*[45].

In the *Kozlowski case*[46], the ECJ had to determine what should be understood by a resident or a person who lives in the executing member State in terms of article 4.6. In the first place, it indicated that the scope of the term "live" cannot be so broad as to form the ground to deny the

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[41] A similar provision is also foreseen in relation to situations of transit (article 25.1 of the *FD on the EAW*). The difference in this case is that the precept itself establishes that the decision will be adopted once the requested person "has been heard".

[42] ECJ, Judgments of 17 July 2008, C-66/08, *Szymon Kozlowski case*, § 45; of 6 October of 2009, C-123/08, *Dominie Wolzenburg case*, § 62 and 67; of 21 October 2010, C-306/09, *I.B. case*, § 32 and 52; of 5 September 2012, C-42/11, *Joao Pedro Da Silva Jorge case*, § 23.

[43] C. MAPELLI MARCHENA, *El modelo penal de la Unión europea*, Cizur Menor (Navarra): Thomson Reuters-Aranzadi, 2014, 516 and 517. Likewise, B. MAPELLI CARAFENA, M.I. GONZÁLEZ CANO, *El traslado de personas condenadas entre países*, Madrid: Mac Graw Hill, 37.

[44] C. RIJKEN, "Re-balancing Security and Justice: Protection of Fundamental Rights in Police and Judicial Cooperation in Criminal Matters", in *Comm. Mark. Law Rev.*, 47, 2010, 1476.

[45] For a factual commentary on these judgments, see L. KLIMEK, *European Arrest Warrant*, Springer, 2015, 235-252.

[46] ECJ, Judgment of 17 July 2008, C-66/08, *Szymon Kozlowski case*.

enforcement of an EAW, for the mere reason that the requested person finds himself temporarily in the territory of the executing Member State[47]. However, neither can it be interpreted in such limited terms as to discount in all cases the establishment of any type of links between the requested person and the executing Member State[48]. Moreover, a restrictive interpretation cannot be founded on the reason for refusal on the basis that when an EAW is issued with the purpose of instituting criminal actions, article 5.3 does not include the inhabitants of the executing Member State[49]. Likewise, it is a matter that "cannot be left to the assessment of each Member State" [50]. On the contrary, it is a question of autonomous concepts that with a view to guaranteeing the uniformity of EU law should be defined with "regard to the context of the provision and the objective pursued by the legislation in question"[51].

Before activating the reason for facultative refusal in article 4.6, the judicial authority should, in the first place, ascertain whether the requested person is one its nationals or residents, whether he is a person staying in its territory. In second place, it should decide whether there is a legitimate interest that justifies that the sentence imposed in the issuing Member State may be enforced in a prison of the executing Member State[52]. A legitimate interest – not the only one- is to increase the opportunities for social reinsertion of the requested person having complied with the penalty that has been imposed[53]. In consequence, it should be proven that the requested person "has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence"[54] in order to activate a refusal to implement the EAW. Thus, "It is necessary to make an overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State"[55], in order to assess those links of a similar nature.

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[47] *Ibidem*, § 36.
[48] *Ibidem*, § 37.
[49] *Ibidem*, § 40.
[50] *Ibidem*, § 41.
[51] *Ibidem*, § 41-43. Likewise, the Attorney General, Yves Bot, in his opinion of 28 April 2008, § 137.
[52] *Ibidem*, § 44.
[53] *Ibidem*, § 45.
[54] *Ibidem*, § 46.
[55] ECJ Judgment, *Kozlowski case*, § 48.

The national judge asked the ECJ if a series of situations could be taken into account to assess those links; not staying uninterruptedly or not staying legally in the executing Member State[56]; dedicating himself to committing crimes and even being in prison in that State[57]. Although not of a conclusive nature, the ECJ only considered the first two of those four indicators pertinent[58] to the activation or otherwise of the reason for refusal[59]. However, the other two criteria are not relevant.

It is startling that the ECJ overlooked the concept of European citizenship at all times to which, on the contrary, the Attorney General, Yves Bot, did refer. In this regard, he indicated that the capability of an illegal resident to stay in the executing Member State, having served his sentence, depends on whether or not he is a European citizen[60]. In the first case of European citizenship, "the fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative provisions in the host Member State"[61]. Even though having committed criminal acts can deprive him of the right of residence through an expulsion decision[62], that is no reason not to consider that Mr Kozlowski would not be a legal resident once he has served his sentence[63]. But the ECJ opted for real residence on the part of the requested person. In consequence, and despite having previously indicated that the task of determining the links of the requested person with the executing Member

[56] Mr. Kozlowski had visited Germany on numerous occasions.

[57] Mr. Kozlowski had been in prison in Germany, serving a term of 3 years and 6 months for having committed numerous frauds.

[58] ECJ Judgment, *Kozlowski case*, § 50. In somewhat of a different way, for the Attorney General, it was fundamental that the requested person had the main part of his principal interests in the executing member State to consider that he "lived" in it. Therefore, going abroad on vacation or for professional reasons will not in itself mean a move away from main centre of interests of the requested person (Conclusions of 28 April 2008, § 150). Applied to the cases in question, the fact that Sr. Kozlowski had been absent from Germany on some occasion "does not in itself prove that his main interests lie outside that Member State" (Conclusions AG, § 151).

[59] Unlike the other two criteria. See ECJ Judgment, *Kozlowski case*, § 51. The Attorney General attached no importance to demonstrating the condition of resident or otherwise from the fact of being in prison in the executing Member State, as in his opinion staying in one place or in another depends on the intention of each person (§ 154), an inexistent intention when serving a prison sentence: "that place is not chosen by him but by the judicial authorities and he is deprived there of the exercise of a significant number of his rights" (AG Conclusions, § 155).

[60] Conclusions of the AG, Yves Bot, § 161.

[61] Conclusions of the AG, Yves Bot, § 165.

[62] Conclusions of the AG, Yves Bot, § 169.

[63] Conclusions of the AG, Yves Bot, § 168.

State fell to the national judge[64], the ECJ decided that it could not be considered that Sr. Kozlowski "lived" or "resided" in the executing Member State (Germany) in the sense of article 4.6 of the *FD* on the EAW[65].

The strict interpretation of the facultative reason for denegation is coherent with the priorities of the ECJ on matters of mutual recognition: the efficacy of judicial cooperation in criminal matters[66].

It is convenient to analyze the *Wolzenburg*[67] and *Lopes da Silva*[68] *cases* jointly, because both of them give cause for a possible violation of the principle of non-discrimination and by implying, fundamentally in the *Lopes da Silva case*, the movement from the functionalist focus (efficacy in cooperation) to a perspective that is more aligned with the protection of the rights and safeguards of the requested person[69].

In *Wolzenburg*, the deliberations were over the extent to which the application of article 5.6 could be subject to[70] the requested person having an indefinite residence permit (1) or to him having resided in the executing Member State for at least five years (2). The question had its importance, because it concerned a national from a Member State, and therefore, a European citizen and, in consequence, the establishment of excessive requirements could give rise to a violation of the principle of non-discrimination for reasons of nationality.

(1) In relation to the indefinite residence permit as a requirement to be able to refuse an EAW on the basis of article 4.6, the ECJ ruled on its inadmissibility. According to European legislation, such permits are not obligatory and have no essential effects. On the contrary, it only certifies

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[64] ECJ Judgment, *Kozlowski case*, § 49.

[65] ECJ Judgment, *Kozlowski case*, § 53 and 56. It was of little significance that Mr. Kozlowski had expressed his intention of staying in Germany having served the sentence.

[66] Likewise, on this sentence, see M. FICHERA, "C-66/08, proceedings concerning the *Szymon Kozołwski case*, Judgment of the Court (Grand Chamber) of 17 July 2008", in *Comm. Mark. Law Rev.*, 46, 2009, 248. Also, C. MAPELLI MARCHENA, *El modelo penal de la Unión europea*, op. cit., 524.

[67] ECJ, Judgment of 6 October 2009, C-123/08, *Dominie Wolzenburg case*.

[68] ECJ, Judgment of 5 September of 2012, C-42/11, *Joao Pedro Da Silva Jorge case*.

[69] C. MAPELLI MARCHENA, C.: *El modelo penal de la Unión europea*, op. cit., 526.

[70] Whereas here the legislation of the executing Member State (Netherlands) established additional requirements to those foreseen in article 4.6 of the FD on the EAW, national law in the *Kozłowski case* was limited to reproducing the content of the *FD* provision. This is why the ECJ had to pronounce on the national margin of appreciation in the *Wolzenburg case* when implementing the FD. On this question, see C. JANSSENS, "Case C-123/08, Dominic Wolzenburg, Judgment of the Court of Justice (Grand Chamber) of 6 October 2009", in *Comm. Mark. Law Rev.*, 47, 2010.

that the person has lived on a continuous basis in a Member State for at least 5 years[71].

(2) A different question is that the national law of the executing State requires a fixed period of time, to determine that the requested person "lives" in that State, in this case 5 years. That limitation is not discriminatory with regard to the situation of the nationals of the executing Member State. It is not discriminatory because the limitation amounts to an objectively different treatment that is justified and legitimate. The reason for refusal is grounded in "the possibility of increasing the requested person's chances of reintegration" and that objective is "to facilitate the reintegration of the convicted person at the end of his sentence"[72] in the executing Member State. The requirement for continuous residence of five years precisely guarantees that degree of integration and is, in addition, proportionate to the objective pursued by national Law (guaranteeing the integration of the requested person in the executing Member State)[73]. Likewise, that period – five years – is not disproportionate in the opinion of the ECJ[74], taking into account that it is taken as the starting point to gain the right to a permanent residence permit for an indefinite period of time in Directive 2004/38/EC, of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[75], and so that the Member States, grounded precisely in the principle of reintegration, do even more to facilitate the transfer of sentences in accordance with Council Framework Decision 2008/909/JHA, of 27 November 2008, 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[76].

Permitting a temporal requirement, the ECJ placed the principle of reintegration in the background, which was highly criticized by the Attorney General. He thought that if the principle of reintegration – the sole and unique motive for refusal- should be interpreted along the lines of the Recommendations of the Committee of Ministers to Member

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[71] ECJ Judgment, *Wolzenburg case*, § 51-53. Likewise, Attorney General Yves Bot, in his conclusions of 24 March 2009 (§ 75-78).

[72] ECJ Judgment, *Wolzenburg case*, § 68.

[73] ECJ Judgment, *Wolzenburg case*, § 69 and 73.

[74] For a positive commentary on this sentence, in a certain way equating European nationals and citizens, see E. HERLIN-KARNELL, "European Arrest Warrant Cases and the Principles of Non-discrimination and EU Citizenship", in *The Mod. Law Rev.*, 73, 5, 2010, 824-857.

[75] OJ L 128 of 30.4.2014, 8-14.

[76] OJ L 327 of 5.12.2008, 27-46.

States on the European Prison Rules[77], then the prison rules should in so far as possible concern themselves with maintaining and reinforcing the relations between the prisoner and his family, in such a way that the prisoner does not have the feeling of being excluded from society when his sentence is over, as well as having possibilities of obtaining or returning to a job. If the reason is that the enforcement of the penalty harms "the detainee's connections with his family and his social and professional environment as little as possible"[78], then these connections with the executing Member State will have to be proven, to refuse the EAW[79]. And those links or ties can exist even though the permanence of the requested person "although he has been staying there for only a short period of time"[80] might not exist in the case of nationals who had not ever stayed in the executing Member State[81]. Taking the above into account, Mr. Wolzenburg could be considered, in the opinion of the Attorney General, as a resident of the Netherlands "since, at the time when the Netherlands authorities received the European arrest warrant relating to him, he had established his principal residence in that State for just over a year, he lived there with his wife and he was exercising a professional or trade activity in the Netherlands"[82].

On another matter, and despite the silence of the ECJ, because it was not asked about it, it is very interesting to look at the other requirements that the Dutch legislation establishes to refuse the EAW on the basis of article 4.6 of the *FD*. Dutch law subjects the application of the reasons for refusal to the possibility of being able to prosecute the requested person in the Netherlands for the facts that gave rise to the EAW and, that it is foreseeable that the requested person will not lose his right to residence in that State as a consequence of a penalty or preventive measure that is imposed on him following his surrender. The Attorney General, Yves Bot, dedicated part of his conclusions to setting out the first of the reasons contrary to the FD, while he understood the second to be correct. To do so, he referred to the uniform interpretation in all States of the concepts of "living" and of "resident" that the ECJ had previously conceptualized in the *Kozłowski* case; uniform interpretation that comes unstuck when a State *motu proprio* establishes additional requirements[83]

[77] Conclusions of the Attorney General, Yves Bot, § 65. In particular, Recommendations num. R (87) 3 [§ 65, c), 70.1 and 88] and Rec(2006)2 (§ 24, 103 and 107).

[78] Conclusions of the Attorney General, Yves Bot, § 66.

[79] Conclusions of the Attorney General, Yves Bot, § 68.

[80] Conclusions of the Attorney General, Yves Bot, § 66.

[81] Conclusions of the Attorney General, Yves Bot, § 63.

[82] Conclusions of the Attorney General, Yves Bot, § 69.

[83] Conclusions of the Attorney General, Yves Bot, § 82.

which have nothing to do with the purpose of the regulation. The establishment of a requirement based on the jurisdiction of the executing Member State has nothing to do with the objective of the reason for refusal: the reintegration of the requested person. In this sense, the Attorney General pointed out that "There is, in principle, no link between the place where an offence is committed and the place where a person's interests are centred and where his detention therefore has the greatest chance of facilitating his reintegration"[84].

On the contrary, the requirement relating to the requested person not having lost his right to residence in the executing Member State is indeed in accordance with the *FD*, as the reason for refusal of article 4.6 "implicitly presupposes that the requested person may continue to reside in that State"[85]. Were that person expulsed for having committed an offence, his subsequent reintegration would no longer be an issue[86].

The opinion of the Attorney General is also very interesting, in relation to the use of article 4.6 of the FD as a reason for absolute refusal when it is a question of the surrender of nationals for the mere fact that their situation is not comparable with that of the nationals from other Member States. The fact of being a national from one Member State entails a presumption of links between the requested person and the executing Member State, but it does not mean that there can be no evidence to the contrary[87]. The presumption is, therefore, of the *iuris tantum* type and is not *iuris et de iure*. In the words of the Attorney General, a case would be possible of "a Netherlands national living for many years in a Member State other than the Kingdom of the Netherlands, in which he has a family and employment, and which he left solely to avoid execution of a sentence delivered against him in the first State"[88]. In this case, "it is, in my view, possible to establish an irrebuttable presumption that reintegration of the person concerned will necessarily be better ensured by execution of the sentence in the Netherlands"[89]. Activation or otherwise of the reason for refusal therefore requires granting full powers to the judge to determine whether the objective of reintegration is better achieved in his State or in the issuing State[90].

In subsequent decisions (*cases I.B. and Lopes Da Silva*), the ECJ changed perspective to position itself more as a court safeguarding the

[84] *Ibidem*, § 84.
[85] *Ibidem*, § 84.
[86] *Ibidem*.
[87] *Ibidem*, § 123-124.
[88] *Ibidem*, § 124.
[89] *Ibidem*.
[90] *Ibidem*, § 125.

rights[91]. In the *Lopes Da Silva case* the principle of non-discrimination was also at stake. It was not a question of interpreting the term "resident", but of determining whether a Member State, in an assertion of its national margin of appreciation, could categorically exclude nationals from other Member States residing in the executing Member State from the reason for refusal in article 4.6 of the FD on the EAW.

The French procedural Code established the fact of being a French national as a reason for facultative refusal in article 695-24. Nothing could on the contrary be said with respect to the residents. Sr. Lopes considered that it was non-justifiable and discriminatory treatment. The French government referred to the impossibility under its domestic law of enforcing a foreign conviction on a person who was not of French nationality.

Beginning with its doctrine on the principle of non-discrimination, according to which the differences in treatment should be objectively justified and should be proportionate, the ECJ considered that a limitation of domestic Law did not in an absolute and automatic way justify non-application of the reason for refusal in article 4.6 in the case of nationals from other Member States[92]. The French State was a signatory to the Convention on the transfer of sentenced persons, of 21 March 1983, by which the signatory States undertake to enforce the sentences delivered in other States against their nationals. Although not expressly stated, that impossibility of internal law is not real, as in compliance with article 3.4 of the aforementioned Convention, any signatory State, by means of declaration, can ascribe the term "national" to those people who live or reside in their territory, without having the nationality of the State that is enforcing the sentence[93].

In any case, the ECJ reiterated that the decisive factor is to verify the links of the requested person with the executing Member State; links that demonstrate a degree of integration in the society of that State comparable to a national and that, therefore, bring better reintegration of the person[94]. If in the specific case, the French judge can verify those links,

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[91] K. Lenaerts, "The Principle of Mutual Recognition in the Area of Freedom, Security and Justice", *The Fourth Annual Sir Jeremy Lever Lecture, All Souls College*, University of Oxford, 30 January 2015, 16, available at *http://1exagu1grkmq3k572418odoooym.wpengine.netdna-cdn.com/wp-content/uploads/2015/02/The-Principle-of-Mutual-Recognition-in-the-area-of-Freedom-Security-and-Justice.pdf* (Last accessed 05/09/2016).

[92] ECJ Judgment, *Lopes Da Silva case*, § 49 and 52.

[93] ECJ Judgment, *Lopes Da Silva case*, § 48. In fact, some States had issued declarations of that sort (for example, Denmark, Ireland, Italy, Finland, United Kingdom and Northern Ireland).

[94] ECJ Judgment, *Lopes Da Silva case*, § 51.

he has no other alternative than to make an interpretation in accordance with domestic law with respect to EU law. To do so, he should have to take the internal provisions of the FD on the EAW into account and "the principles and provisions of domestic law governing the conclusions which a court is entitled to draw from the existence of discrimination prohibited under that law, and in particular the principles and provisions enabling that court to alleviate such discrimination until the legislature has taken the measures necessary to eliminate it"[95].

A final note for the Spanish legal order. Law 23/2014, of 20 November, of mutual recognition[96] in its article 48.2 b)[97] permits the facultative refusal of the EAW delivered for the purpose of compliance only and exclusively when the requested person is of Spanish nationality. In contrast, when it is a question of an EAW delivered with the purpose of initiating criminal actions, article 55.2 of the above-mentioned law permits surrender subject to the condition that the person will be returned to Spain to serve the sentence whether a national or a resident. The Spanish judges[98] will have to interpret whether article 48.2 b) also includes residents, whether they demonstrate sufficient links with the Spanish State as to advise the enforcement of their penalty in Spain, in order to avoid discriminatory treatment and to respect the case-law passed down in the *Lopes Da Silva case*[99].

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[95] ECJ Judgment, *Lopes Da Silva case*, § 57. As a solution, the Attorney General, Paolo Mengozzi, in his conclusions of 20 March 2012, pointed to a broad interpretation of the expression "French nationality" from article 695-24 of the Procedural Criminal Code, to make room for nationals from other Member States (§ 61).

[96] BOE num. 282, 21.11.2014.

[97] Likewise, article 12.2 f) of Ley 3/2003, de 14 de marzo, sobre la orden europea de detención y entrega [BOE num. 65, 17.3.2003] now no longer in force.

[98] So, in relation to the earlier regulation (Ley 3/2003 which on this point has maintained the same wording), the Ruling of the Second Section of the Criminal Chamber of the Spanish High Court (Audiencia Nacional), of 21 March 2011. On the contrary, the Ruling of the Third Section of the Criminal Chamber of the High Court, of 26 July 2013, did not activate the reason for refusal in the case of an Italian resident in Spain since 1999, because it literally understood that the reason for refusal foreseen in Spanish law is only applicable to nationals. The Italian citizen appealed before the Constitutional Court which upheld a violation of the right to effective judicial protection because of a lack of motivation with regard to the reasons that led the High Court not to equate residents and nationals in the terms of ECJ, Judgement of 5 September 2012, *Lopes Da Silva case*. See STC 50/2014, of 7 April. The curious aspect of this case is the "little" that the decision served the appellant, as the ruling that was appealed against had already been enforced, in other words, the appellant has already been surrendered to the Italian judicial authorities.

[99] Another option is to declare the precept unconstitutional as done by the Italian Constitutional Court in its sentence 227/2010, of 24 June. On this question, see C. Grasso, "The European Arrest Warrant Under Scrutiny of the Italian Constitutional Court", in *New Jour. Eur. Crim. Law*, 4, 1-2, 120-133.

A non-functionalist view by the ECJ may also be appreciated in the *I.B. case*[100] in which the possibility of applying articles 4.6 and 5.3 of the FD on the EAW is addressed when the requested person has been convicted *in absentia*. Mr. I.B. had been sentenced in Romania in absentia. The Belgium judge raised the guarantee of the then article 5.1 in accordance with which the surrender could be conditional upon holding another trial with all due guarantees. The problem was that it was not very well known whether the EAW that had been delivered had to be considered as a sort of order issued for the purpose of enforcing a penalty or for the purpose of initiating a criminal prosecution. Were it an EAW of the first type – enforcement of a sentence –, Mr. I.B. could not request that it be served in Belgium on the basis of article 4.6, as it was not a firm sentence as it needed a further trial to be held. On the other hand, if considered as an order delivered for the purposes of a criminal prosecution, it could mean the return of Mr. I.B., a Belgium citizen, for him to complete his sentence there. The Romanian issuing judge had qualified it as an EAW for the purpose of enforcing a sentence. Hence, the preliminary question from the Belgium judge.

The ECJ disregarded typologies[101] and gave its sentence guided by the finality of both precepts – increasing the possibilities of the reintegration of the person –, equating the situation of a convicted person in absentia and who still has the possibility of requesting a new trial other than that which is the object of an EAW delivered with the purpose of conducting a criminal trial[102].

4. *Mutual recognition and prohibition of torture, inhuman and degrading treatment*

As it is an international norm of *ius cogens*[103], any breach of the prohibition on torture, inhuman and degrading treatment is a classic exam-

[100] ECJ, Judgment of 21 October 2010, C-306/09, *I.B. v. Council of Ministers*.

[101] The Attorney General, Pedro Cruz Villalón, in his conclusions of 6 July 2010, determined that in reality a detention order of such characteristics is formally an order to enforce a custodial sentence or detention order, but that later on-from the time at which the affected person declares that he wishes to be put on trial again- it is materially turned into an order for the exercise of a criminal action. That being so, he continued, it is not possible not to apply any of the guarantees foreseen in the FD in either of the two cases (§ 50).

[102] ECJ Judgment, *I.B. case*, § 57 and 58.

[103] In other words, an imperative norm clearly accepted and recognized by the international community beyond its previsions in the treaties. See F. Quispe Remón, "Las normas de *ius cogens*: ausencia de catálogo", in *An. Esp. Der. int.*, 28, 2012, 159.

ple of the dangers of international judicial cooperation. It was a question of time for that controversy to arise in relation to the surrender or transfer of persons within Member States of the EU. And a considerable number of convictions of EU[104] countries by the ECtHR or the reports of the Committee of Ministers of the Council of Europe for the Prevention of Torture (CPT) demonstrate "the existence of recurrent problems in the penitentiary systems of the 47 Member States of the Council of Europe, including Member States of the Union"[105]. This case-law brings into evidence therefore the protection of this inalienable right of the person and leaves the principle of mutual recognition "in stalemate"[106].

The combined cases of *Pál Aranyosi*[107] and *Căldăraru*[108], for the first time in the context of the EU, addressed the conditions of imprisonment and their effects in the field of judicial cooperation. Both have their origin in requests for preliminary rulings submitted by the same criminal court, the *Hanseatisches Oberlandesgericht* of Bremen (Germany) and examine identical situations: that of a person[109] who opposes surrender in the framework of an EAW, because the prisons of the issuing Member State fail to meet European standards relating to the conditions of imprisonment[110].

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[104] ECtHR Judgment, of 24 July 2012, *case of Iavoc stanciu v. Romania*, application num. 35972/05; ECtHR Judgment, of 10 March 2015, *case of Varga and others v. Hungary*, application num. 14097/12 and others (pilot sentence); ECtHR, of 8 January 2013, *case of Torregiani and others v. Italy*, application num. 43517/09 and others; ECtHR, of 25 November 2014, *case of Vasilescu v. Belgium*, application num. 64682/12.

[105] Conclusions of the Attorney General, Yves Bot, presented on 3 March 2016, to the *cases of Aranyosi and Căldăraru*, § 33 and ff.

[106] The Commission itself in its Green Paper from the Commission: Strengthening mutual trust in the European judicial area, op. cit., 4, indicated that "Detention conditions can have a direct impact on the smooth functioning of the principle of mutual recognition of judicial decisions. Pre-trial detainees and convicted prisoners alike are entitled to a reasonable standard of detention conditions. Prison overcrowding and allegations of poor treatment of detainees may undermine the trust that is necessary to underpin judicial cooperation within the European Union".

[107] Request for a preliminary ruling proposed by the *Hanseatisches Oberlandesgericht* in Bremen (Germany), 24 July 2015, case C-404/15.

[108] Request for a preliminary ruling submitted by the *Hanseatisches Oberlandesgericht* in Bremen (Germany), 9 December 2015, case C-659/15.

[109] Sr. Aranyosi was arrested on 14 January 2015 in Bremen following the delivery of a EAW to conduct a criminal prosecution by a Hungarian judge, because he was suspected of having committed robbery on two occasions. Mr. Căldăraru had been convicted in his absence to a prison term of 8 months in Romania for driving without a driving licence. The Romanian judge issued an EAW for the purposes of enforcement.

[110] At a national level, cases of refusal to surrender because of considering that the conditions of imprisonment in the issuing Member State were not in accordance with the provisions of article 4 of the CHREU and 3 of the ECHR. The Commission had likewise warned

The German judge submitted the preliminary question to the ECJ to decide, in the first place, whether article 1.3 of the FD on the EAW, the so-called clause of fundamental rights, permits the refusal of surrender when there are solid indications of inadequate prison conditions on the basis of article 3 of the ECtHR. Likewise, the judge asked whether the executing Member State can or should formulate minimum concrete requirements applicable to the conditions of imprisonment that have to be guaranteed and, finally, whether the national court issuing the EAW can constitute guarantees relating to compliance with the conditions of imprisonment. The hearing of the ECJ took place on February 15[111] and as is normally done, the various Member States and the Commission presented their various arguments. The Attorney General, Yves Bot, in his conclusions[112] discounted the possibility of refusal to execute an EAW on the basis of article 1.3.

In reality, the questions raised can be expressed as follows: can the executing judge deny the surrender of a person by asserting the violation of fundamental rights as a reason for the risk of violation, which is not included in articles 3, 4, 4*bis* and 5 of the FD on the EAW? (1). If the answer is yes, what type of risk? (2); how can the existence of such a risk be proven? (3). Finally, do alternatives to refusal exist, for example, conditional surrender? (4).

(1) The first question is not in vane given the clear posture of the ECJ on earlier occasions: an EAW can only be refused by maintaining the reasons foreseen in articles 3, 4 and 4*bis* of the FD on the EAW and can only be conditional in the circumstances established in article 5 of that norm[113].

The question entails reflection on the model of judicial cooperation that is desired within the EU: a traditional one of a *bidimensional* character that only affects the two States that are involved, founded on inter-

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of this situation in its Green Paper on Strengthening mutual trust in the European judicial area, op. cit., 5, with regard to the Sentence of the Supreme Court of Ireland, of 23 June 2010.

[111] On the hearing, see HENNING BAN FUGLSANG MADSEN SORESNSEN, "Mutual trust - blind trust or general trust with exceptions? The CJEU hears key cases on the European Arrest Warrant", in *EU Law Analysis, Expert insight into EU law developments* (*http://eulaw-analysis.blogspot.com.es/2016/02/mutual-trust-blind-trust-or-general.html*).

[112] Conclusions of the Attorney General, Yves Bot, op. cit.

[113] ECJ, Judgments of 26 February 2013, C-399/11, *Melloni case*, § 38; of 29 January 2013, C-396/11, *Radu case*, § 35 and 36; of 1 December 2008, C-388/08 PPU, *Leymann and Pustovarov case*, § 51; of 6 October 2009, C-123/08, *Wolzenburg case*, § 57. Equally, with regard to other instruments of mutual recognition in the context of civil cooperation, ECJ, Judgment of 11 July 2008, C-195/08, *Rinau case*, § 50. Likewise, the Conclusions of the Attorney General, Yves Bot, op. cit., § 81.

national relations and on the effective fight against crime and that is fed by principles such as *non inquiry*; another of a *tridimensional* nature that strikes an acceptable balance between the two aforementioned interests at stake together with a third that is precisely the protection of fundamental rights of the person that is involved.

The principle of *non inquiry*, of North-American origin, limits the role of the judge to formal control over the requirements that are established in national Law to agree on the extradition of a person. Therefore, the judge will not take violations of fundamental rights into account that happened in the issuing State when making his decision, for example, as a consequence of the poor state of its prisons. This type of question is supposed to have been taken into account by the States that are involved when signing and ratifying an international convention on the matter or in the political phase of each particular legal hearing[114]. On the contrary, a model of cooperation of a three-dimensional type places the judge in charge of extradition as the guarantor of the rights of the requested person. Therefore, he should take into consideration the degree of compliance with fundamental rights when cooperating in the country with which he is cooperating. That is achieved through the incorporation of clauses on public order.

The first approach, the bi-dimensional model, appears to respond to the opinions of Spain and Lithuania defended in the hearing before the ECJ in the *Pál Aranyosi* and *Căldăraru* cases. Both countries showed themselves in favour of recognizing solely and exclusively the provisions of the FD on the EAW (articles 3, 4 and 4 *bis*) as reasons for refusal. Spain cited the *Melloni case* as a precedent for such an interpretation[115] in which the Spanish judge had to deliver the requested person convicted in absentia without being able to require the establishment of additional guarantees from the issuing State[116]. Lithuania, in turn, warned of the ab-

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[114] On *non inquiry*, its origin, examples and evolution, see N. Nieto Martín, "La cooperación judicial en la UE como medio de lucha contra la pena de muerte y la expansión de los derechos humanos", op. cit., 472-474 and by the same author: "El concepto de orden público como garantía de los derechos fundamentales en la cooperación penal internacional", in L.M. Díez-Picazo, A. Nieto Martín, *Los derechos fundamentales en el Derecho penal europeo*, Cizu Menor (Navarra): Thomson Reuters, 2010, 463-467.

[115] ECJ, Judgment of 26 February 2013, C-399/11, *case of Stefano Melloni v. Ministerio Fiscal*.

[116] It should however be noted that it was not the impossibility of asserting the violation of fundamental rights in the *Melloni* case as a motive for refusal other than those expressed in the framework decision on the EAW, but of determining to what standard of protection it could be asserted. The Attorney General, Yves Bot, used *Melloni* in his conclusions to justify the automatic nature of surrender (§ 117 and 164).

sence of content of the principle of mutual recognition, if the executing judges were permitted to examine the conditions of imprisonment in the issuing State.

Lithuania also noted the impunity that would in many cases arise and the fact that the Council alone is competent to make an appraisal of a clear risk of a serious violation of fundamental rights, in application of article 7 TEU and recital num. 10 of the FD on the EAW[117]. This standpoint is placed on the side of mutual cooperation as an integral part of international relations and as such, the violations of fundamental rights that take place in another State as a consequence of the act of cooperation may only be taken by bodies of a political nature[118].

The other States (Germany, Ireland, France, Hungary, Netherlands, Romania and the United Kingdom) and the Commission distanced themselves from the idea of the principle of recognition as "blind confidence", preferring, on the contrary, to defend a general trust that, on very exceptional occasions, can be baseless[119]: precisely when there is a serious risk of a violation of fundamental rights[120]. Put another way, judicial criminal cooperation in the field of mutual recognition is of a tri-dimensional type and therefore demands an acceptable weighing of all the interests at stake (effective prosecution, international relations and protection of fundamental rights). And a joint reading of recitals 5, 6, 10, 12 and 13 and article 1.3 of the FD of the EAW can only be interpreted as a reason for refusal added to those established in articles 3, 4 and 4*bis*. It also reinforces the reason for refusal in article 67.1 TFEU according to which "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".

The ECJ at no point discussed whether an EAW can only be refused on the basis of the concurrence of some of the reasons for refusal assessed in the FD, nor whether the surrender procedure should only be

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[117] The appeal to article 7 TEU had already been noted by the Attorney General, Yves Bot, in his conclusions to the *Wolzenburg case*, § 150.

[118] Conclusions of the Attorney General, Yves Bot, op. cit., § 86-88.

[119] On this point, although referring to the consistent and specific proof a violation of fundamental rights, see the conclusions of Attorney General, Eleanor Sharpston, on the *Radu case*, presented on 18 of October 2012, § 41 and 97.

[120] In the doctrine, C. MAPELLI MARCHENA, *El modelo penal de la Unión europea*, op. cit., 570. Also Möstl, for whom, if the costs of mutual recognition are so high in view of fundamental rights it is not worth it. See M. MÖSTL, "Preconditions and limits of mutual recognition", in *Comm. Mark. Law Rev.*, 47, 2010, 420-421. Along the same lines, A. SUOMINEN, "Limits of mutual recognition in cooperation in criminal matters within the EU – especially in light of recent judgments of both European Courts", in *Eur. Crim. Law Rev.*, 4, 3, 2014, 223.

suspended through the executive functions of the Council[121]. However, the former cannot leave the clause of article 1.3 FD on the EAW without meaning. This precept had traditionally been considered as a European public order clause[122], although the doctrine had for some time criticized the lack of consequences that were extracted from it.

In truth, at that time of presenting the Proposal for an EAW, the Commission was much more explicit. In the explanation of its reasons, it indicated that the EAW was an instrument concerned with the protection of fundamental rights, which implied a series of precisions, among which a fundamental one for the case covered here: "Lastly, in the issuing and execution of European arrest warrants, the national courts will of course remain subject to the general norms relating to protection of fundamental rights, and particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union". This concern over fundamental rights was explained afterwards when interpreting the reasons for refusal. In this respect, the Commission indicated that the reasons for refusal were limited to those foreseen in the FD, which meant that "Subject, *of course*, to the general rules *for the protection of fundamental rights*, and particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union, it will not be possible for the judicial authority of a Member State to refuse to execute a European arrest warrant on a ground not provided for here". A reflection of this position was recital num. 11: "In order to ensure the effectiveness of the procedure, and *on condition that the execution of the warrant does not lead to a violation of fundamental rights*, the possibility to refuse the execution of the European arrest warrant should be limited to clearly identified circumstances" (author's italics).

There would not have been so many problems of interpretation with regard to the possibility of refusing an EAW on the ground of a violation of fundamental rights if that recital had been maintained in the text that was finally approved. It did not happen like that and "instead" the phrasing in article 1.3 appeared. The debates within the Council are revealing in that regard and the fact was that faced with the requests from some delegations to expressly include contradictions with the fundamen-

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[121] ECJ, Judgment of 5 April 2016, cases C-404/15 and C-659/15/PPU, § 80-81.

[122] Thus, C. Mapelli Marchena, *El modelo penal de la Unión europea*, op. cit., 515; M. Masse, "La reconnaissance mutuelle", in G. Giudicelli-Delage, C. Lazèrges (eds.), *Le droit pénal de l'Union européenne au lendemain du Traité de Lisbonne*, Paris: UMR de Droit Comparé de Paris, 28, 2012, 213.

tal principles of the executing State and the public order as a reason for facultative non-execution, the response was: "The Presidency asked those five delegations to reconsider their request, given, firstly, the principle of mutual recognition, which would be difficult to reconcile with a multiplicity of checks in the executing Member State and, secondly, the references made in the enacting terms (Article 1(3)) and the preamble (Recitals 10, 12, 13 and 14) to the need strictly to ensure compliance with fundamental rights and individual freedoms as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutional traditions common to the Member States (Article 6(2) TEU)"[123].

Two points may be deduced from this explanation on the absence of an explicit reason for refusal on the grounds of fundamental rights: the first is that it was not intended to introduce a reason for *systematic* refusal in case of a risk of violation; something that the Attorney General sought to avoid at all costs in his reasoning. The second was that the introduction of article 1.3 was the consensus solution that was agreed upon. The norms of the old Third Pillar required the unanimity of all Member States and there was no wish to complicate the simplicity of the system. Additionally, there was the context in which the FD was adopted: just before the attacks of 11 December 2001 in New York, which meant that the negotiations were accelerated to the point at which, despite radical changes to the viewpoint on greater judicial cooperation (extradition), it took at least 9 months to approve the proposal. The rejection of a reason for automatic refusal had to be compensated by a generic clause that would permit exceptional controls under certain circumstances. The European Commission has been interpreting it in this way in its reports on the implementation of the EAW. It has never sanctioned the introduction of explicit reasons for refusal in national legislation, due to the violation of fundamental rights in those reports[124]. On this point, it was very explicit: "(…) A judicial authority is, of course, *always entitled* to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union and the constitutional principles common to the Member States"[125] (author's italics). However, this type of control has

[123] Council Document num. 14867/01, Brussels, 4 December 2001, 3.

[124] Up to two thirds of the Member States have done so. See Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 5 [COM/2006/0008 final].

[125] Report from the Commission, op. cit., 7.

been considered exceptional. In its last Report of 2011, which the Attorney General cites on various occasions, although not in relation to this point, the Commission follows the same approach: "A number of judgments of the European Court of Human Rights have highlighted deficiencies in some prisons within the EU. The court has ruled that unacceptable detention conditions (which must reach a minimum level of severity) can constitute a violation of Article 3 of the European Convention on Human Rights, even where there is no evidence that there was a positive intention of humiliating or debasing the detainee. *It is clear* that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights) *does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person's fundamental rights arising from unacceptable detention conditions*"[126] (author's italics).

The Attorney General, Yves Bot, did not understand it in this way. He attributed merely symbolic effects to the precept in his conclusions. With the idea that the principle of mutual recognition and mutual trust are "two sides of the same coin", the Attorney General understood that recognition can only be forthcoming because each Member State trusts that its counterpart "respects Union Law, and in particular fundamental rights"[127]. In his opinion, article 1.3 only appears to remind Member States that they have the obligation "to respect fundamental rights"[128]. And if they do not do so, it is the Council that under *exceptional circumstances* and, in accordance with recital num. 10 of the FD, may initiate the procedure for the suspension of an EAW on the basis of article 7.2 TEU[129]. For the Attorney General, this standpoint is in accordance with what is established by the ECJ in Opinion 2/13 of the Court (Full Court). In the aforementioned opinion, the ECJ indicated that control by the Member States over respect for fundamental rights could only take place under *exceptional circumstances*[130]. The Attorney General therefore continues, "According to the Court, the principle of mutual confidence

[126] Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 7 [COM/2011/0175 final].

[127] Conclusions of the Attorney General, Yves Bot, op. cit., § 74-78.

[128] *Ibidem*, § 74.

[129] *Ibidem*, § 86-87.

[130] Opinion 2/13 of the Court (Full Court), of 18 December 2014, § 191-192.

therefore precludes a Member State checking whether another Member State has actually complied, in a specific case, with the fundamental rights safeguarded by the Union, because that '[would upset] the underlying balance of the EU' "[131].

The specific paragraph of Opinion 2/13 to which the Attorney General refers in his conclusions (point 194) does nothing more than establish the absence of control as a general rule in relation to respect for fundamental rights. It was for that reason that the ECJ in its opinion rejected the adhesion to the ECHR, as it implied such controls. In other words, a system that permits control in all cases would leave the principle of mutual confidence in a vacuum, moving in consequence, to reciprocal mistrust. However, mutual confidence may continue to be preserved in very limited cases, that is, in exceptional circumstances control over respect for fundamental rights in another Member State is permitted. The ECJ understood it to be so in the aforementioned Opinion[132] and has reiterated it in the *Căldăraru and Aranyosi cases*[133]. Therefore, the principles of mutual recognition and trust, despite being fundamental in the creation and maintenance of an area without internal frontiers[134], accept limitations. In consequence, the function of article 1.3 cannot be circumscribed to merely symbolic effects. The Recitals exist for that purpose (thus, for example, recital num. 12 of the FD on the EAW). In fact, it was the Attorney General himself, Yves Bot, who in earlier cases appeared to wish to seek out not only symbolic effects to article 1.3 linked to the recitals: "(…) the Council of the European Union took care to specify, in Article 1(3) of the framework decision, that the *surrender obligation* imposed thereby *must in no way infringe the fundamental rights and principles enshrined in Article 6 EU* (…)". Therefore, "The executing judicial authority therefore could, *in a particular case and as an exception, refuse to execute a European arrest warrant* when, as is stated in the 12th recital in the preamble to the framework decision, there were 'reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons'" (author's italics)[135].

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[131] Conclusions of the Attorney General, Yves Bot, op. cit., § 109.

[132] ECJ, Opinion 2/13 of 18 December 2014, § 191.

[133] ECJ, Judgment of 5 April 2016, C-404/15 and C-659/15/PPU, § 82.

[134] *Ibidem*, § 78.

[135] Conclusions of the Attorney General, Yves Bot, presented on 24 March 2009, on the *Wolzenburg case*, § 148-149.

Taking into account that the principles of recognition and mutual trust accept limitations in exceptional cases[136], considering that article 1.3 obliges respect for fundamental rights[137] and given that the prohibition on torture and inhuman or degrading treatment is an absolute right that permits no limitations of any type and that is recognised in article 3 ECHR and 4 CFREU[138], it would be possible to refuse the surrender of a person if a real and effective risk of a violation of that right were noted[139]. Another question is what type of risk (2), how to prove that risk (3) and what should be done before raising that reason for refusal as it will not be automatically done (4).

(2) The ECJ divides the examination into two phases. In a first phase, the generic risks that might arise from different sources have to be noted: systematic failings in prisons, membership of a particular group, subject in general to harsher conditions of imprisonment (for example, in the case of homosexuals) or, even, risks associated with the conditions of imprisonment in certain prison centres[140]. At a later date, as will be seen, an individualization of those risks is required.

(3) With respect to how to prove the existence of the risk, the opinions of the Commission and various Member States (Germany, France, and the United Kingdom) coincided in the reports from the CPT, the Council of Europe, NGOs and the judgments of the ECtHR[141]. These sources are the ones that led the ECJ, in the *N.S. case* to remark on the risk in the case of surrendering the appellant to Greece[142]. The Commission in addition mentioned the statistics of prison overpopulation in the issuing Member State.

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136 ECJ, Judgment of 5 April 2016, C-404/15 and C-659/15/PPU, § 82.

137 ECJ, Judgment of 5 April 2016, C-404/15 and C-659/15/PPU, § 83.

138 ECJ, Judgment of 5 April 2016, C-404/15 and C-659/15/PPU, § 85-86.

139 Applying the case-law of the ECtHR, the risk would have to be serious, which in the case of the prohibition on torture and inhuman and degrading treatment will depend on the nature and the context of the treatment or penalty, its form of enforcement, its duration and the physical and psychological effects that they produce. In this sense, see STEDH, *case of Soering v. United Kingdom*, op. cit., § 100.

140 ECJ, Judgment of 5 April 2016, § 89.

141 Hungary objected that the reports from the CPT referred to the situation of a specific country at least one year earlier and that the facts to which the sentences of the ECtHR referred, which verified the violation, might have been earlier than the factual circumstance that had to be substantiated.

142 *Case of N.S. v. United Kingdom*, § 86 and 90-93. In the same sense, ECtHR, of 12 April 2005, *case of Shamayev and others v. Georgia and Russia*, application num. 36378/02, § 337 and ECtHR, of 1 April 2010, *case of Klein v. Russia*, application num. 24268/08, § 47, 50 and 51. In this last case, the evidence evaluated by the Court at Strasbourg included recent reports from independent organizations for the protection of human rights, such as NGOs and trustworthy governmental sources, such as the Department of State of the USA.

The ECJ has determined that sources may be judicial decisions from international courts, not only therefore from the ECJ, judicial decisions from the issuing Member State, and reports, decisions, etc. from bodies of the Council of Europe and the United Nations[143].

Having determined the sources, the fundamental question is the rigour when appreciating the risk. The ECJ set a high threshold referring to elements of objective, reliable, precise, and duly updated evidence[144] but makes no distinctions with regard to which risk is the most important to prove[145]. Proof of one of them permits the move to the second phase to activate the reason for refusal: the request for information to verify the existence of a specific risk. This approach coincides with that of the ECtHR, which to declare a breach of article 3 ECHR requires the presentation of evidence of a risk "beyond all reasonable doubt"[146], which has meant no breaches of the ECHR, undermining in some cases the reports from international bodies on the general situation of the country, if it is not possible to contribute other evidence of concrete and specific risks[147].

In matters of asylum, there is greater flexibility, as the identification of a generic risk is enough to distract from the presumption of respect

[143] ECJ, Judgment of 5 April 2016, § 89.

[144] ECJ, Judgment of 5 April 2016, § 89.

[145] In some Member States, it is not enough to prove the existence of systematic or generic risks with regard to membership of a specific group. Thus, in the TS Judgement STC 199/2009, of 28 September, in which a Romanian judge requested the surrender of a citizen of British nationality to serve a prison term of four years for an offence relating to child sexual exploitation, the Spanish TS asserted that to refuse surrender because of a risk of prosecution on the basis of the sexual persuasion (homosexual) of the appellant was precisely to contribute "particular and specific elements (…), which implies that the alleged fear or risks have to be well founded, in the sense of minimally accredited by the requested person himself, and must make specific allegations in relation to his person and rights, the formulation of generic references or allegations on the situation of the country being insufficient in themselves". The risks reported by the appellant were of a generic nature: situation of discrimination and persecution that homosexuals suffer in Romania, overcrowded conditions of Romanian prisons, etc. The same may be said with respect to the *case of Jaso, López and Hernández* in which the British *High Court* indicated that taking into account the risk of torture and degrading treatment in a systematic way would call into question the assumption of trust between Member States, although it expressed its concern over the situation in Spain detected in some reports from international bodies. See *case of Jaso, López and Hernández v. Central Criminal Court num. 2*, Madrid [2007] EWHC 2983 (Admin.).

[146] ECtHR Judgment, of 7 June 2007, *case of Garavayev v. Russia*, application num. 38411/02, § 76.

[147] ECtHR Judgment, of 6 April 2003, *case of Mamatkulov and Abdurasulovic v. Turkey*, application nums. 46827/99 and 46951/99, § 72. The probative rigour had already been criticized in earlier cases. See A. G. Chueca Sancho, *La expulsión de extranjeros en la Convención europea de Derechos humanos*, Zaragoza: Egido, 1998, 45-61.

for fundamental rights and, therefore, not to proceed to surrender[148]. This question will be returned to later on. (4) Although, it permits the executing judge when deciding on surrender to verify the real and effective risk of violation of fundamental rights, it does not automatically have to imply refusal to surrender. This refusal would imply that the clause on public order is a reason for obligatory refusal and that it would generate the classic principle *aut dedere aut judicare*, in other words, the executing Member State, in this case Germany, would have to judge the requested person, Mr. Aranyosi, or would have to enforce the sanction, if it were an EAW delivered for the purpose of prosecution, which happened in the case of Mr. Căldăraru. As the Attorney General clearly pointed out, not all States either recognize this principle of "extradite or put on trial" nor do they in all cases, as the scope of application of the circumstances of refusal usually applies to the surrender of nationals. In addition, even though the principle is applied, its practical implementation is not simple. In many cases, the probative material and the witnesses will be in the issuing State and, therefore, the process would become impossible[149]. The German judge warned of it in that way in the hearing before the ECtHR in relation to the *Aranyosi case*. With respect to Mr. Căldăraru, the possibilities that German national law offer for penalty to be served in Germany are very limited, because the cause for refusal grounded in the principle of reintegration only covers nationals and residents. Mr. Căldăraru was neither a national and nor had his residence in Germany been sufficiently lengthy to guarantee his reintegration once the penalty had been served. In other words, to apply the principle of *aut dedere aut judicare* would practically imply impunity in both cases.

There is another possibility: the establishment of guarantees – or move to conditional surrender. This very approach was defended in the hearing by France, Germany and the judge ordering the surrender. On the contrary, the Netherlands and Ireland argued that the establishment of guarantees was irrelevant, as the importance of grounding the surrender or its refusal lay in verifying whether a real risk of violation of fundamental rights existed and if there were one, there would be no other remedy than refusal to surrender. Spain did not show itself in favour of the establishment of guarantees because each Member State could use that faculty in a different way and it will be of influence with regard to the uniformity of EU law. Lithuania, in turn, also expressed a contrary

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148 Thus, the Attorney General Verica Trstenajak in her conclusions presented on 22 September 2011, on the *N.S. case*, § 135.

149 A. Nieto Martín, "La cooperación judicial en la UE como medio de lucha contra la pena de muerte y la expansión de los derechos humanos", op. cit., 479.

opinion as the issuing Member State might then not meet the conditions. Hungary argued in favour of dialogue facilitated through article 15.1 of the FD for the EAW. This precept authorizes the executing judge to request complementary information from the issuing judge. Hungary, Romania, the United Kingdom, the Netherlands and the Commission contended that the risk of a violation of fundamental rights is a concrete and specific problem and as such may be resolved with solutions of the same nature, in other words, by establishing guarantees: for example, the application of alternative measures to custody (such as suspension of the punishment), serving the sentence at a particular prison complex, etc. It could even go further by imposing periodic visits from an authority of the executing State, diplomats, objective spectators, etc. to the prison complex to verify that the established conditions were in place[150].

The ECJ argued this second scenario, leaving it very clear that the perception of a real and effective risk of subjection to inhuman or degrading treatments was not to say *ipso facto* a refusal to surrender[151]. The latter amounted to saying that article 1.3 of the *FD* did not represent a reason for automatic refusal. On the contrary, what was demanded by the executing authority was to institute the individualization of generically forewarned risk[152], regardless of where it takes place (systematic failings belonging to vulnerable groups, the situation of prison complexes)[153]. With this type of risk, an examination of the impact of surrender on the rights of the requested person in each specific case is required. To do so, it turns to channels of communication at the hearing that had been pointed out by the Hungarian delegation, such that the executing court has to request urgent information from the issuing Member State through article 15.2 FD on the conditions of imprisonment that would be imposed on the person whose surrender has been agreed.

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[150] A. Nieto Martín, "La cooperación judicial en la UE como medio de lucha contra la pena de muerte y la expansión de los derechos humanos", op. cit., 480. So too, the European Parliament in its Resolution, of 15 December 2011, op. cit., § 13: "Believes that measures should be taken at EU level so that national MPs are guaranteed the right to visit prisons and that this right is likewise granted to MEPs within the territory of the EU".

[151] ECJ, Judgment of 5 April 2016, § 91-93.

[152] In reality, this is the approach that the ECJ has been using since Soering in the framework of judicial cooperation. Here, before a circumstance of extradition to the USA, the ECJ appreciated the risk of inhuman treatment because of the phenomena of "death row". In doing so, it took into account the general situation of country, but above all, his particular circumstances (the mental state of the requested person played a crucial role). See STEDH, of 7 July 1989, *case of Soering v. United Kingdom*, application num. 14038/88. More recently, ECJ, Judgment of 1 April de 2010, *the case of Klein v. Russia*, application num. 24268/08.

[153] ECJ, Judgement of 5 April 2016, § 94.

With that additional information the risk that is generically foreseen is individualized and may be sorted out by means of a specific solution afforded by the court of the issuing Member State. This last point might suggest that an alternative measure will be applied to the requested person, for example, suspension, that the sentence will be served in a particular prison complex the conditions of which will respect international standards on the matter, that a visit from an international body is taking place at that time and that a favourable report will be published, etc. In other words, without making express mention to the establishment of guarantees by the issuing court, in the end, the purpose of the request for information is precisely to guarantee that in some way the requested person will not be subjected to inhuman or degrading punishment.

In fact, having received the information, if the executing judge could discount the existence of risk, he would assent to the surrender, regardless of whether the requested person used the proper legal channels in the issuing Member State to question the conditions of confinement in the prison systems of that State[154].

If, on the contrary, the existence of a real and effective risk of inhuman or degrading treatment could still be verified from the complementary information that had been received, the executing judicial authority should postpone surrender for a reasonable length of time under the terms foreseen in article 17.4 DM (extensions for periods of 30 days). In that case, it will inform Eurojust, indicating the reasons for the delay. Likewise, the issuing State will communicate the delay with the EAW to the Council if the situation has repeated itself various times[155].

The ECJ refers to the case-law in the *Lanigan case*[156] to avoid both an excessively lengthy period of detention in preventive custody and will take into account the presumption of innocence of the requested person[157]. If during this time, the judicial authority decides that the preventive detention is excessive, then it will grant provisional freedom, but it should take all necessary measures to avoid the flight of the requested person and, in any case, should continue to guarantee his surrender in the future, if necessary[158].

But, and this is the most relevant point, if despite everything the risk persists, after a reasonable period of time has elapsed or, in other words, the guarantees that the issuing judicial authority has given are not ac-

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154 ECJ, Judgment of 5 April 2016, § 103.
155 ECJ, Judgment of 5 April 2016, § 99.
156 *Vide*, *supra*, *sub* par. 2.
157 ECJ, Judgment of 5 April 2016, § 100-101.
158 ECJ, Judgment of 5 April 2016, § 102.

ceptable, the executing authority will have to decide whether to end the proceeding leading to surrender[159]. It is curious that the ECJ avoids saying clearly "will have to end". It leaves it in the hands of the executing judge with the expression "must decide whether the surrender procedure should be brought to an end." Perhaps it is not so incisive, when considering that if the jurisdictional guarantees fail, other channels might be used such as diplomatic ones. However, consultation with diplomatic channels may be a last resort even before the executing judge has to set a deadline to receive complementary information, a time-limit that is established in accordance with the generic time-limits available to it to pronounce on the surrender envisaged in article 17 FD (generally, 60 days as it would be cases in which the requested person will not have consented to surrender) and, for what is of interest here, in accordance with the need for intervention from the central authority (article 7 DM)[160]. Therefore, the ECJ should have been much more incisive and opted for a phrase like "should bring the surrender procedure to an end".

There is no doubt that refusal is the last option, which responds precisely to exceptional control by the executing judge over respect for fundamental rights in the issuing Member State. A solution half way between giving importance at all costs to the efficacy of judicial cooperation and sorting out the problems of possible violations of fundamental rights.

The response of the ECJ is of importance for other instruments of mutual recognition, very especially, in the case of the *Framework Decision on the transfer of sentenced persons*. As the Commission indicated in its Green Paper of 2011, "In this case surrender was therefore contested on grounds related to detention issues, as conditions in the issuing State were perceived as not being in conformity with EU Charter and ECHR standards"[161]. This FD foresees transfer without any need for the consent of the sentenced prisoner and it could happen that those people with no wish to be transferred might argue that "the transfer could subject them to inhuman or degrading treatment"[162]. In this case, it would be the issuing judge who would have to conduct an analysis in two phases: generic risks and subsequent individualization after examining the information that was submitted.

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[159] ECJ, Judgment of 5 April 2016, § 104.

[160] ECJ, Judgment of 5 April 2016, § 95.

[161] Commission Green Paper: Strengthening mutual trust in the European judicial area, op. cit., p. 6. In the same sense, Resolution of the European Parliament, of 15 December 2011, on detention conditions in the EU (2011/2897(RSP), § 7.

[162] *Ibidem*.

The decision of the ECJ may be positively valued, despite the surprising absence of some references. In particular, it is striking that at no time is mention made of the doctrine set down in the *N.S. case* on matters of asylum[163]. In this case, the ECJ faced a very similar circumstance: to determine whether national judges could refuse to transfer an asylum seeker to the "responsible Member State"[164], in the terms foreseen in the "Dublin II" regulation when there are risks of a violation of fundamental rights. The Court in Luxembourg established that "In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR"[165]. It justifies as much in the *raison-d'être* of the EU and in the creation of the area of freedom, security and justice and, more specifically, the Common European Asylum System, based on mutual trust and, in turn, the presumption of compliance by the other Member States with Union Law and, in particular, Fundamental Human Rights[166]. However, this presumption, the ECJ indicated, is *iuris tantum*[167]: "It is not however inconceivable that that system may, in

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[163] ECJ, Judgement of 21 December 2011, C-411-10, *case of N.S. and others v. United Kingdom*.

[164] In this case, the "Responsible Member State" was Greece. Article 10 of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [OJ L 50, 25.2.2003], states that when the asylum seeker crosses the frontier from one member State to another in an irregular way by land, sea or air from another country, the "Member State responsible" for examining the asylum request will be the one in which the asylum seeker had entered in that way.

[165] *Case of N.S. v. United Kingdom*, § 80.

[166] *Case of N.S. v. United Kingdom*, § 83.

[167] Curiously, one year earlier, the ECJ in the *I.B. case* appeared to equate the presumption of respect for fundamental rights by the Member States in matters of asylum and the Euro-order: it even appears to establish an irrefutable presumption (§ 44): "(…) the sole article of Protocol No 29 on asylum for nationals of member states of the European Union (…) provides inter alia that, given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States are to be regarded as constituting safe countries of origin in respect of each other *for all legal and practical purposes* in relation to asylum matters" (author's italics). The approach of the ECJ in the *N.S. case* was quite the contrary and established the possibility of overturning the presumption. In subsequent cases, it confirmed the *iuris tantum* nature of the presumption. See ECJ, Judgement of 10 December 2013, C-394/12, case of *Shamso Abdullahi and Bundesaylamt*. As IPPOLITO explained, the impact of this case-law at a legislative level is evident. Article 3.2 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [OJ L 180, 29.6.2013] establishes that "Where it is impossible to transfer an applicant to the Member State primarily designated as

practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights"[168]. And an assumption *iuris et de iure* (irrefutable) of full respect for fundamental rights "that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights"[169]. The regulation itself not only contains a clause on public order under recital nº 15 but also in article 21.3.

The doctrine had previously questioned whether it would be acceptable if the ECJ were not to apply the same standard of protection in matters of asylum and judicial cooperation in criminal matters[170]. In reality, the *N.S. case* is in some way or other present in the pronouncement from the ECJ, for example, when making reference to risks of a systematic nature. The difference is that the mere assertion of this type of risk in the *N.S. case* entails *ipso facto* a refusal to return the requested person to the Member State where he was at real risk of suffering inhuman or degrading treatment. In the field of judicial cooperation, the same solution could not be reached without laying to rest the principle of mutual recognition and, therefore, the principle of mutual confidence.

Unlike the Attorney General[171], the ECJ has not complicated the matter and has understood from its doctrine that different rules are es-

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responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible". This provision amounts to recognition that there may, in effect, be cases in which the Member States are uncertain as to what the prohibition on torture, inhuman or degrading treatment refers. See F. IPPOLITO, "The contribution of the European courts to the common European asylum system and its ongoing recast process", *MJ*, 2, 2013, 270.

[168] *Case of N.S. v. United Kingdom*, § 81.

[169] *Case of N.S. v. United Kingdom*, § 99.

[170] R. DERUITER, G. VERMEULEN, "Balancing Between Human Rights Assumptions? and Actual Fundamental Human Rights Safeguards in Building an Area of Freedom, Security and Justice: a Cosmopolitan Perspective", in *Eur. Jour. Crim. Pol. Res.*, 2016, 12-13.

[171] The Attorney General pointed to the end-purpose of the Common European Asylum Area – to offer an area of protection and solidarity to those fleeing from some persecution or who are at risk of suffering serious harm and who request international protection – to argue that the extrapolation of the *N.S. case to the Căldăraru and Aranyosi case* did not coincide with the objective of the EAW, which is "to ensure the prosecution and punishment of

tablished in matters of judicial cooperation, which give rise to systematic risks and to others of a different nature leading to a motive of facultative refusal, the activation of which is not automatic, but, on the contrary, requires undergoing a series of processes beforehand (request for information, implicit establishment of guarantees by the issuing judge, etc.).

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criminal conduct in the Union by enabling the prosecution, trial and conviction of the perpetrators of criminal offences" (§ 51). The procedure in the Common European Asylum System is of an administrative nature and aims "to ascertain whether or not the person concerned is entitled to refugee status and, if not, to remove him from the territory of the Union." (§ 52). In the case of the EAW, the procedure is internal at the level of the EU and judicial. Detention in the case of the Common European Asylum System is exceptional; in contrast, in the case of the EAW, it is the general rule (§ 53). This last point links in with the consequences appreciated by the Attorney General in the case of extrapolating the solution to the *N.S. case and others* to those now under examination. In asylum matters, the ECJ came to introduce "an exception to a rule of territorial jurisdiction, laid down in order to spread the burden of administrative procedures subject to substantive criteria common to all the Member States." (§ 55). In the EAW, it could lead to impunity and reoffending by the person who is not surrendered "thus infringing the rights and freedoms of the other citizens of the Union" (§ 60). And, unlike what happened in matters of asylum, the substantive and procedural criminal Law of the Member States is not harmonized (§ 50), which would mean that the executing Member State could not prosecute the requested person because it would in principle no longer have jurisdictional authority (§ 59 and 125). And if it were an EAW delivered for the purposes of compliance with a sentence, the problems would, as the Attorney General remarked, be lessened, because the requested person could serve the sentence in the executing Member State. To do so, article 4.6 of the *FD* would have to be applied, which permits that possibility, if a national or a resident, with a view to facilitating his reintegration and, were this approach not feasible, it could use Council Framework Decision 2008/909/JHA of 27 November 2008 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 (§ 61-62). However, following these procedures there would, in his opinion, be a difference of treatment in accordance with the type of detention and surrender order delivered: for the purposes of compliance it would lead to refusal and the enforcement of the punishment in the executing Member State; with the purpose of initiating criminal proceedings, it would not lead to refusal to execute the EAW.

Other problems of applying the doctrine of the *N.S. case* to the combined cases of Căldăraru and Aranyosi pointed out by the Attorney General were the *forum shopping* for prison sentences that might take place, as it could motivate the requested persons "to go to other Member States in order to escape those prosecutions or to be able to serve their sentence there" (§ 63). And these countries would be States of refuge that could have difficulties in enforcing the punishments because they could have problems of overcrowded prisons and "Already overburdened, there is little likelihood that they will further increase the occupation rate of their prisons by accommodating individuals convicted by the judicial authorities of other Member States" (§ 62-64). Along the same lines, he pointed out that apart from the cases in which the social reintegration of the requested person is pursued and that the enforcement of an EAW is refused on the basis of article 4.6 of the FD, the solution is not "to reduce prison overcrowding in one Member State only to increase it in another is not a solution" (§ 126).

In reality, the Attorney General with his reasoning sought exactly the same thing: to avoid at all costs that article 1.3 of the FD on the EAW become a reason for automatic refusal and he turned to the principle of proportionality as an alternative[172] precisely to "measure" the impact that surrender would have on the rights of the persons for the purpose of serving the sentence[173]. On this point, he defended that under exceptional circumstance, one of which being the detection of a systematic failing in the conditions of confinement in the issuing Member State – previously noted by the ECtHR –, the executing judge can legitimately ask whether the person to be surrendered "risks" effectively being detained under disproportionate conditions[174]. To do so, he should request all the necessary information from the issuing judge[175].

The Attorney General also gave some guidelines on what he considered as proportionate and disproportionate. Thus, an EAW issued for compliance with a prison term should be qualified as proportionate "where the conditions of execution do not lead to adverse consequences out of all proportion to those which would result from the sentence imposed if it were executed under normal circumstances"[176]. Following this guideline, there would be disproportion where the surrendered person might be subjected to very harsh conditions of detention because of his sexual or religious condition.

An EAW delivered for the initiation of criminal proceedings would, in his opinion, be proportionate, "it is proportionate if its conditions of execution are compatible with the sole necessity of ensuring that the requested person does not evade the course of justice"[177]. *The case of Ladent v. Poland* is cited as an example[178], in which the ECJ considered

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[172] Likewise, the case-law on restrictions of community liberties. See ECJ, Judgment of 12 June 2003, C-112/00, *Schmidberger case*, § 76; of 14 October 2004, C-36-02, *Omega Spielhallen case*, § 34-35. In general, on this point, T. MARGUERY, "European Union Fundamental Rights and Member States Action in EU Criminal Law", in *MJ*, 20, 2, 2013, 298.

[173] He also proposed the principle of proportionality as a parameter to take into account in the first place by the issuing judge when serving an EAW, which could nevertheless be an obstacle to the principle of procedural legality. Likewise, in his conclusions he raised the possibility of considering an disproportionate EAW when issued for slight offences (for example, when an EAW is used for the robbery of 2 square meters of tiling or the robbery of a bicycle, proposing in these cases that the issuing court request for the preliminary ruling to the ECJ, which is solely competent to define the scope and the limits of the principle of proportionality. See Conclusions of the Attorney General, Yves Bot, op. cit., § 137-161 and 68.

[174] Conclusions of the Attorney General, Yves Bot, op. cit., § 133 and 167.

[175] *Ibidem*, § 168.

[176] *Ibidem*, § 169.

[177] *Ibidem*, § 170.

[178] ECJ, Judgment of 18 March 2008, *case of Ladent v. Poland*, application num. 11036/03.

it disproportionate to deliver an EAW for the perpetration of an offence for which provisional detention would be inappropriate. For example, it should be considered disproportionate if a Spanish judge issued an EAW for the purposes of criminal actions for an offence with a maximum punishment of less than or equal to 2 years, in cases where the Spanish Law on Criminal Procedure does not permit the imposition of provisional detention. Taking into account that an EAW almost always implies preventive custody in the executing Member State, its issuance would be disproportionate[179].

The reasoning of the Attorney General around the principle of proportionality also appears to open the doors to conditional surrender, although he did not propose it as clearly as such. In fact, he limited himself to indicating that the principle of loyal cooperation and mutual trust obliges the Member States to take all necessary measures to guarantee respect for fundamental rights. In this sense, if the executing judicial authority must surrender a person in circumstance similar to those of *Căldăraru* and *Aranyosi*, it is because the issuing judicial authorities from which trust is expected and, above all, the issuing Member State "should take all necessary measures, including necessary reforms of criminal policy, to ensure that that person serves his sentence in conditions which respect his fundamental rights and is able to avail himself of all legal remedies available to defend his individual freedoms"[180]. This opinion goes beyond the concrete guarantees defended by some Member States at the hearing (application of alternative measures, serving the sentence at a specific prison, etc.). The inconvenient aspect is that it is a little naïve to trust in legislative reforms that require high expenditure to modernize prisons[181]. The advantage is that the reforms of a legislative type would improve the detention conditions for all prisoners and would solve a problem involved in the solution to the specific conditions that are imposed: if the people named in an EAW are surrendered subject to specific guarantees that will place them in better conditions than the other inmates in the issuing state, the latter would be benefitting from unequal

[179] The Attorney General proposed the possibility of the executing judge requesting a preliminary ruling before the ECJ, to control the proportionality of the EAW. However, he himself warned that it would place the Court in Luxembourg in a position of a human rights court; something that, in addition, he understood as inevitable sooner or later in the criminal context. See Conclusions of the Attorney General, Yves Bot, op. cit., § 172 and 175.

[180] Conclusions of the Attorney General, Yves Bot, op. cit., § 178.

[181] In this respect, the Attorney General thanked Hungary and Romania for having committed themselves to instituting the necessary reforms to criminal policy to guarantee that the surrendered person can serve his sentence under acceptable conditions. See Conclusions of the Attorney General, Yves Bot, op. cit., § 179.

and clearly unfavourable treatment. This would be a "lesser evil" for France and so too for Germany, as it would be the only form of honouring the judgment in the *Soering case*.

Nieto Martín[182] has proposed the establishment of federal prison centres throughout the Member States as a possibility, for the purposes of judicial cooperation that would obviously meet European standards on detention. It is true that there would be first-class and second-class prisons and that to go from one to another would depend on having been taken into custody in another Member State from which the surrender takes place. However, it could also be seen as a form of introducing improvements to the rest of the prisons, in other words, as a form of indirect harmonization of the detention conditions. An economic commitment from the Union would evidently be necessary for this idea to work.

Finally, the absence of a mention to the responsibility of the other community institutions is also surprising. And in the case of verifying a serious structural risk associated with systematic failings by the ECJ, the European Commission and Council should proceed to activate the existing mechanisms of protection within the framework of the Union. In principle, the Commission should take action beforehand to activate the New EU Framework to strengthen the Rule of Law[183], as this mechanism is designed as a preliminary and complementary instrument to proceedings for non-enforcement and to the mechanisms for both prevention and sanctioning of article 7 TEU. The Framework procedure permits the Commission, when clear signs of a systemic threat to the Rule of Law in a Member State exist, to initiate a structured exchange with that State divided into three phases (evaluation, recommendation and follow up by the Committee). Among other objectives, the process is intended to seek a solution through dialogue with the Member State in question and to guarantee an objective and exhaustive evaluation of the situation with the study of all measures that may be taken. To date, the Commission is yet to activate the new Framework, not even in cases of asylum, which the EP has criticized[184].

A legislative intervention may also be considered, as the Attorney General pointed out, by the institutions of the EU through article 82.2

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[182] Prof. Adán Nieto Martín has referred to this possibility in conversation on the matter.

[183] Communication from the Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law, Strasbourg, COM(2014) 156 final, 11.3.2104.

[184] Resolution of the European Parliament, of 8 September 2015, on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI), § 9.

TFEU[185], "to ensure that the Member States meet all their obligations or, at least, take the necessary measures"[186].

5. *The Ognyanov case: Interpretation favor rei with or without "buts"?*

In the *Ognyanov case*[187] the ECJ had to offer an interpretation, for the first time of the Council Framework Decision 2008/909/JHA of 27 November 2008 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[188] (FD on the transfer of sentenced persons).

The court of the executing State faces a dilemma when deciding whether to accept the transfer for the purposes of partial compliance of the sentence[189]. Although domestic law recognizes the institution of sentence remission through prison work, the court is uncertain whether the prison work that the convicted person has done *in the issuing Member State* may be taken into account. The executing court can propose various possibilities: to take it into consideration either with regard to the time-limit that should be served in its country (1), or in relation to the time already served in the issuing Member State sentence (2). Taking the specific example of Mr. Ognyanov, he was sentenced in the Danish courts to a prison term of 15 years for aggravated robbery and for murder. He served part of his sentence in Denmark, from 28 November,

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[185] The Attorney General pointed to this legal basis. However, to regulate the criteria on detention conditions in Member States by means of directives or the measures that need to be taken in this sense is perhaps literally beyond the scope of application of article 82.2 TFEU. The Council and the EP are in effect habilitated through this precept to establish minimum norms to facilitate mutual recognition of judicial sentences and resolutions. However, the provision also indicates the areas in which this accessory competence may be applied: mutual inadmissibility of evidence between Member States; the rights of the people during the criminal proceeding; the rights of crime victims; or other specific elements of the criminal proceeding, which the Council will have previously determined through a decision. Or a broad interpretation of "criminal proceeding", or the accessory competence of article 83.2 TFEU is used as the legal basis, which permits the approximation of legal and regulatory provisions of the Member States in criminal matters when it is essential to guarantee the effective implementation of a Union policy in an area that has been the object of harmonization measures. "Criminal matters" is a much broader concept that covers prison conditions.

[186] Conclusions of the Attorney General, Yves Bot, op. cit., § 181-182.

[187] Request for a preliminary ruling from the *Sofiyski Gradski Sad* (Bulgaria) of 3 December 2014 - case C-554/14, *Criminal proceedings against Atanas Ognyanov*.

[188] OJ L 327 of 5.12.2008.

[189] As part of the sentence had been served in the issuing Member State.

2012, to 1 October 2013 (around 10 months), the date on which he was surrendered to the Bulgarian authorities to serve the rest of his sentence in Bulgaria.

(1) Taking into account that in accordance with article 17.1 the enforcement of the sentence is governed by the legislation of the executing Member State, the time spent at work could reduce the sentence that was left to serve in its territory. In the case of Mr. Ognayanov, the 14 or so years remaining to be served in the executing Member State would be reduced by X time spent at work in the *issuing Member State* in the terms foreseen under Bulgarian Law.

(2) Another option is take that time spent at work in the *issuing Member State* into account with regard to the part of the sentence already served. Given that article 17.2 obliges the executing Member State to subtract from the total period of deprivation of liberty that has to be served in its territory the whole period of deprivation of liberty already served in relation to the sentence that is to be transferred, it could be understood that the time spent at work there could be added to the 10 months served in the issuing State. In this way, the period of deprivation of liberty to discount would be equal to the 10 months already spent in prison plus X time that would correspond to the work completed once the reconversion had been done in accordance with internal Bulgarian law.

However inventive this latter interpretation may be, it is a little forced. One question is whether the executing member State respects the remaining part of the sentence to be served in its territory and over which it is free to apply its internal law. Another very different question is that it does so with regard to the sentence already served in the issuing Member State over which it has not powers beyond the adaptation of article 8. This is why the key to the matter will probably revolve[190] around article 17.1.

Although the preliminary question provides little information on the specific case, perhaps one of the guidelines to resolve the case is in recital nº 6 of the FD on the transfer of sentenced persons: "This Framework Decision should be implemented and applied in a manner which allows general principles of equality, fairness and reasonableness to be respected". It would be paradigmatic if a transferred offender could not benefit from those positive aspects offered by the legislation of the Member State to which he will be transferred and he did "suffer" the negative

[190] At the time of writting this contribution the ECJ has yet to pronounce judgment. Neither has the Attorney General done so. The only published material are the Conclusions of the Attorney General, Yves Bot, presented on 23 February 2016 to case C-614/14, which although it also refers to Mr. Ognayanov, addresses different questions that are not of immediate interest here.

effects. It is true that article 17 can lead to that conclusion, because if the sentenced person to be transferred, in accordance with Bulgarian Law, were given an early or provisional release after he would have been released, had he not been transferred, there would be the possibility of taking into account the legislation of the issuing Member State (article 17.4). But that is a facultative decision[191], in other words, the executing Member State has a margin of appreciation to decide whether or not to take into account the Law of the issuing Member State and, therefore, if it were not taken into account, the transfer would on that point be more harmful for the transferred person. A disadvantageous effect that, as it happens, has been supported by the ECJ, provided the remaining time that the transferred person will serve in the executing Member State is not excessively long; or is, in short, not disproportionate[192].

Here, exactly the contrary took place: Bulgarian Law, which in accordance with article 17.1, should govern the enforcement of the sentence, would imply a reduction of the effective duration of the prison sentence. If the time spent at work in the issuing Member State is not taken into account, and therefore, the Law of the executing Member State is not taken into account, it could amount to an interpretation that is literally contrary to article 17.1 of the FD. Likewise, it could be considered contrary to the principle of equal treatment of convicted persons in Bulgaria and those in another Member State[193]. In any case, it will be important to determine whether the unequal treatment is justified, which refers to the principle of proportionality. In the circumstance of unequal treatment, because the work is not taken into account, the interest of the transferred person, the possibilities of his reintegration, and the interests of the victims of the crime who "want" effective enforcement of the conviction in line with the regulations of the issuing member State would all have to be weighed up, so as not to appreciate a violation of the principle of equality. But this question is not one for the judge of the issuing member State, but for the executing member State. And the executing judge, precisely by giving equal treatment to the situation of the con-

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191 Without mentioning that there are Member States, for example Romania, which have not implemented this precept.

192 ECtHR Judgment, of 27 June 2006, *case of Szabó v. Sweden*, application num. 28578/03. In this case, the appellant when transferred had to serve 20% more time than if he had not been transferred. But the ECJ indicated that his right to liberty had not been violated because it was not disproportionate.

193 It is true that this problem also appears when the legislation of the issuing Member State is taken into account and this more beneficial for the transferred person with regard to those convicted the executing Member State (so-called reverse discrimination), but this question goes beyond the confines of this work.

victed person with regard to those who have been convicted in his territory, will take into account the prison work in the other State and, despite not being obliged to do so in accordance with article 17.3, because the issuing Member State has not requested so, should inform it as a question of courtesy. And if the issuing State "fears that transfer would lead to what they would regard as a premature release, it may decide not to transfer the person concerned and to withdraw the certificate"[194].

The last point links in with the second question submitted by the executing judge: Should the issuing State be informed, if it has so requested? The logical response would be "yes", as a prison benefit such as the reduction of sentences in lieu of prison work is neither literally "conditional release", nor "early release" but teleologically, when assuming an earlier release, comes under the scope of application of article 17.3. The problem arises when the issuing Member State has not requested to be informed. As indicated, the ideal situation would be to provide such information but there is no obligation to do so and as such it should be understood that if the issuing Member State does not "ask", it is because it tacitly accepts the enforcement of the sentence there, without attaching importance to the effective duration of the sentence.

The fact that issuing Member States request no information on the norms that govern conditional or early release raises doubts over their true interests. On this point, the European Commission warned in its Green Paper of 2011 of the risk that "transfers may be used to ease overcrowding i5 one Member State, possibly exacerbating overcrowding in another"[196], something that may become a specific problem "where one Member State has a high proportion of prisoners who are nationals of another, perhaps neighbouring, Member State"[196]. Normally, the Member States request this type of information, as practice shows that some requests for transfer are rejected precisely for that reason[197]. Avoidance

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[194] Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, 9. Brussels, 5.2.2014 COM(2014)57 final.

[195] Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention, op. cit., 6.

[196] *Ibidem*.

[197] J.D. Mujuzi, "Legal pluralism and the convention on the transfer of sentenced persons in practice: highlighting the jurisprudence of the European Court of Human Rights on the transfer of sentenced persons within and to Europe", in *Jour. Leg. Plur. Unoff. Law*, 47, 2, 2015, 327.

of overcrowding is a legitimate end for the executing Member State judge to refuse the transfer of the sentenced person to one of its prison centres. Obviously, reintegration cannot take priority with regard to the prohibition of inhuman or degrading treatment. However, where the judge of the issuing Member State makes no request for the transfer to another State, considering that the effective time-limit of the sentence will be shorter is open to criticism, as the interest of the criminal – his reintegration – is placed in the background with regard to state interests[198].

With regard to the way in which the issuing Member State should be informed, the executing judge questioned whether it was sufficient for the executing Member State to give notification of its norms on matters of early or conditional release and whether the information had to be more concrete; in other words, whether it should cover the specific time-limit of the sentence of the transferred person having applied the reduction of the sentence for the time spent at work. Literally, article 17.3 only obliges it to follow the first option (the regulation in the abstract), but if the aim is that the issuing Member State should have the specific records of the situation of the person who will be transferred, the logical step will be to facilitate the *specific* information.

Finally, the executing judicial authority submitted a complementary question on the possibility of applying its domestic law, because it would be more beneficial, were none of the provisions of the FD on the transfer of convicted persons applicable. Article 17.1 of the European text appears to raise no problems when making that interpretation provided the parameters of proportionality are followed.

The question is of great interest. In a certain way, it recalls the principles that govern the application of criminal law over time: non-retrospective/retrospective criminal law. Evidently, it is not a question of the application of criminal law over time but in space. The FD on the transfer of sentenced persons has opted for the principle of retrospectiveness in space, Law 2, in other words, that of the executing Member State. However, there is a *facultative* exception that Law 1 (of the issuing Member State), which is "before" in spatial terms, is more favourable in relation to granting conditional or early release. The problem is that in the *Ognyanov case* it is not a question of trying to take a provision of the national Law of the issuing Member State into account, but a factual ques-

198 Thus, D. Van Zyl Smit, J.R. Spencer, "The European Dimension to the Release of Sentenced Prisoners", in N. Padfield, D. Van Zyl, F. Dunkel (eds.), *Release from Prison: European Policy and Practice*, Cullompton Devon: Willan Publishing, 2010, 43.

tion: the fact of having spent time at work while serving his sentence in Denmark.

In any case, recognition of a principle of this nature will not scupper the final end of the transfer, reintegration of the sentenced person, and should not, therefore, be a hindrance, unless the issuing Member State were to decide not to continue with the transfer and, therefore, withdraw the certificate in accordance with article 13 of the FD. Although to do so it would have to have requested information on the enforcement of the punishment in the country of transfer, it in no way prevents the executing judge from providing such information *de oficio*.

6. *By way of a conclusion: "Cross-country race" for the ECJ*

Of the few cases in which the Court in Luxembourg has had to pronounce on questions that are specifically related to the enforcement of penalties, it may be said that it has gone through two stages. At a first stage, the ECJ has not distanced itself from the functionalist interpretative tendency of other cases on substantive (*Advocaten voor de Wereld*) and procedural (*Melloni*, *Radu*, etc.) guarantees. Its sentences therefore seek at all times to favour the process of European integration and to guarantee the efficacy of judicial cooperation (*Kowzloski*, *Wolzenburg*). At a second stage, aspects concerning the protection of fundamental rights (*I.B.* and *Lopes Da Silva*) begin to be seen. This viewpoint on legal guarantees has reached its highest peaks with the most recent cases brought before the ECJ. And the hour of truth came for the ECJ which very recently in the *Aranyosi and Căldăraru cases* was capable of bringing together both views, recognizing the assertion of certain real and effective risks as a reason for facultative refusal of an EAW.

This pronouncement has meant the court was capable of conciliating the three fundamental interests that are at stake in the framework of judicial cooperation: international relations (safeguarding sovereignty), effective cooperation (avoiding impunity) and the protection of fundamental rights. As a criticism, it may be reproached for not having transferred the commitment to improve the poor quality of prison regimes to European institutions, urging them to initiate the suspension procedure of article 7 TEU, in the case of the Council, or the framework of the EU with regard to the Commission. It could also have "given the nod" to the European Prison Rules[199]. The Stockholm Programme had previously in-

[199] Recommendation of the Committee of Ministers to member states REC(2006)2.

dicated the need to apply those rules[200]; The Attorney Generals have also made use of them[201] and the ECtHR has used them as the basis upon which to analyze criticism of detention conditions[202].

The problem of detention conditions inside prison centres is no isolated problem, as a large number of countries have been pointed to by the ECtHR and other international bodies (Belgium, Hungary Romania, Italy, etc.). It is perhaps the moment to propose an intervention at a legislative level. Nevertheless, an action of these characteristics sets out problems of a practical nature[203]: overlap with the work of the Council of Europe, the grounds of the accessorial authority and competence of the EU to take action, etc. In *Căldăraru* and *Aranyosi*, article 1.3 FD on the EAW has been interpreted as a reason for facultative refusal under exceptional circumstances. At a legislative level, perhaps it should go further, to become in an explicit manner, as the EP has requested[204], a motive for refusal. The European legislator had already noted as much in the new directives based on the principle of mutual recognition. In this sense, article 11.1 f) of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters[205] makes it possible to refuse recognition or the enforcement of a European investigation order where "there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the

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[200] Stockholm Programme - An open and secure Europe serving and protecting citizens, § 3.2.6. OJ C 115, 4.5.2010.

[201] Conclusions of the Attorney General, Yves Bot, § 65. In detail, Recommendations num. R (87) 3 [§ 65, letter c), 70.1 and 88] and Rec(2006)2 (§ 24, 103 and 107).

[202] ECtHR Judgments, of 17 September 2009, *Enea v. Italy*, application num. 74912/01; of 4 July 2006, *case of Ramírez Sanchez v. France*, application num. 59450/00; of 16 October 2008, *case of Renolde v. France*, application num. 5608/05; of 20 January 2009, *case of Sławomir Musiał v. Poland*, application num. 28300/06.

[203] On this point, W. De Bondt, G. Vermuelen, "Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU", in M. Cools, M. Easton, B. Ruyver, *EU and International Crime Control*, Antwerpen: Maklu, 2010, 31.

[204] European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), § 7. This document also places emphasis (§ 16) on "the link between detention conditions and EAW measures and reminds Member States that Article 3 of the ECHR and the case-law of the ECtHR impose on the Member States not only negative obligations, by banning them from subjecting prisoners to inhuman and degrading treatment, but also positive obligations, by requiring them to ensure that prison conditions are consistent with human dignity, and that thorough, effective investigations are carried out if such rights are violated".

[205] OJ L 130, 1.5.2014.

Charter". The fact that the reason for refusal is facultative should not be judged in a negative light, as it takes into account the possibility of establishing conditions by the executing Member State.

Finally, if the principle of reintegration is behind the reasons for refusal in articles 4.6 and 5.3 of the FD on the European Arrest Warrant and, very especially, of the FD on the transfer of sentenced persons, the means of effectively verifying that the transfer or the surrender of the person contributes to meeting the demands of reintegration will sooner or later come to light. To date, both the legislative instruments[206] and the ECJ judgments (*Kozlowski*, *Wolzenburg*) have as their priority objective the establishment of the links (nationality, residence, family and economic ties) with the State where the sentence is to be served. In this way, it is presumed that reintegration is more viable in the place where the subject has those links. It might perhaps be necessary to go one step further than the ECtHR[207] has dared to go: to start to link the principle of reintegration with the existence and the quality of the rehabilitation and social reinsertion programmes of the prison centres of the State to which the person will be transferred. In line with De Bondt and Suominen, it can only be interpreted in two ways: either the principle of reintegration is limited to those ties, or the existing programmes of rehabilitation in the Member States are not sufficiently different to influence the possibilities of reintegration in relation to the person who has been transferred[208]. There is nonetheless empirical evidence to sustain both affirmations[209] and the rehabilitation programmes are impossible to compare, as there is no consensus over their content[210].

Notwithstanding the above, the ECJ should be congratulated for having started a cross-country race some time ago now at a very slow pace towards the consideration of fundamental rights. *Căldăraru and Aranyosi* are the best mirror of this race in that direction. Let us hope that there will be no changes of direction.

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[206] Thus, recital num. 9 of the FD on the transfer of sentenced persons. Also the earlier Explanatory Note to the Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the EU, according to which the executing the Member State is obliged to accept that nationals, residents, permanent residents and people with other close links can serve their prison sentences in its territory, unless particular reasons for refusal are submitted.

[207] J.D. Mujuzi, "Legal pluralism and the convention on the transfer of sentenced persons in practice", op. cit., 326.

[208] W. De Bondt, A. Suonimen, "State Responsibility When Transferring Non-consenting Prisioners to Further their Social Rehabilitation - Lesson Learnt from the Asylum Case Law", in *Eur. Crim. Law Rev.*, 2015, 365-366.

[209] *Ibidem*, 366.

[210] *Ibidem*, 367.

Section II

THE NATIONAL FRAMEWORK

YVES CARTUYVELS - CHRISTINE GUILLAIN
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1. *Introduction: the development of alternative sanctions in the Belgian context*

1.1. *The origins: social defense, or, the concern towards more flexible and individualized sanctions*

The history of alternatives to imprisonment and its progressively more flexible implementation began in the late nineteenth century in Belgium. The neoclassical Penal Code of 1867 foresaw two main penalties: imprisonment and fine. At the heart of this retributive system, we find a social defense movement, led by A. Prins, which introduced the first step toward an individualized treatment of punishment, based on the social dangerousness of offenders. In 1888, the "Act Le Jeune" on suspended sentence and conditional release (law of 31 May 1888 establishing parole and conditional sentences in the penal system) allowed for suspended sentences and for conditional suspended sentences for less serious offenders. In case of conditional release, a guidance was performed by "patronage committes", reflecting an ideal of rehabilitation under control[2]. These measures were designed both as alternatives to imprisonment for purposes of rehabilitation and as modalities to control the condemned for the purpose of social defense[3]. In 1930, an Act of social defense (Social Defense Act of April 9, 1930 against abnormal and habitual offenders) introduced the principle of internment for mentally ill offenders considered dangerous. Characterized as a measure of safety and care, this social defense measure was designed as an alternative to prison sentences[4].

In 1964, these two legal devices were amended. The Social Defence Act of 1930 for mentally ill offenders was reformed, however without altering its fundamental philosophy[5]. Furthermore, the Act of 29 June 1964 with regard to suspension, suspended sentence and probation, extended the terms of suspended sentence and introduced probational sus-

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[1] Parr. from 1 to 2.2 written by Y. Cartuyvels, C. Guillain and T. Slingeneyer; parr. from 3 to 3.2.2 written by C. Guillain; parr. from 4. to 4.2.2 written by Y. Cartuyvels; parr. from 5 to 5.2.3 written by T. Slingeneyer; parr. from 6 to 6.3 written by Y. Cartuyvels, C. Guillain and T. Slingeneyer.

[2] *Pasinomie*, 1888, 245.

[3] M. van de Kerchove, "Punir hors les murs en Belgique. La place des sanctions pénales non privatives de liberté dans le système penal", in P. Poncela, R. Roth (eds.), *La fabrique du droit des sanctions pénales au Conseil de l'Europe*, Paris: La Documentation française, 2006, 121.

[4] The 1930 Act also introduces a safety measure following the sentence for habitual offenders.

[5] Y. Cartuyvels, G. Cliquennois, "The punishment of Mentally Ill Offenders in Belgium: Care as legitimacy for Control", in *Champ Pén.*, 12, 2015, 1-30.

pension. During a period in Belgian history marked by the new social defense[6], the belief in the ideal of rehabilitation and treatment contributed to expanding the possibilities of alternatives to prison sentences, or imprisonment itself. But despite the extension of the field of application of probation, these new measures turned out to be a failure. They were perceived as insufficiently punitive, and the ideology of rehabilitation attached to them was ill-fitting with the retributive sentencing culture of the judges at the time[7]. The general trend was not yet to alternatives, even if, as early as in 1979, the Criminal Code Revision Commission suggested diversifying sanctions "in order to avoid the systematic use of imprisonment" and proposed to raise withdrawal of rights interdictions and confiscation to the rank of autonomous sentences[8]. Furthermore, at presentence report level, the prosecution office had at its disposal a discretionary power, which allowed it to take no further action against certain infractions and, since 1935, to offer a transaction to the authors of lesser criminal offenses.

1.2. *The 1990s: expanding the pool of alternatives to fight against insecurity and prison overcrowding*

In 1990, Article 35 of the new Act on preventive detention introduced, in certain circumstances, an alternative to pre-trial detention, in the form of keeping the accused out of custody (under certain conditions). The goal of this measure being to reduce pre-trial detention, which significantly contributes to prison overcrowding. In 1994, an Act of 10 february amending the 1964 Act with regard to suspension, conditional release and probation (Law of 10 February 1994 amending the law on suspension, suspended sentence and probation) and an Act on penal mediation (Act of 10 February 1994 organizing a victim-offender mediation process) aimed at boosting the principle of alternative sanctions, and promoting the development of a 'third way' between unconditional waiver by the public prosecutor (deemed too soft) or imprisonment (deemed too severe). The first Act introduces community service and training orders as new modalities of probation at the sentencing stage. The goal is to revive the probation system by introducing more "punitive" conditions that would make it more compelling. The second Act al-

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[6] M. Ancel, *La défense sociale nouvelle*, Paris: Cujas, 1954.

[7] K. Beyens, *Straffen als Sociale Praktijk. Een Penologisch Onderzoek naar Straftoemeting*, Brussels: VUBPress, 2000.

[8] Commission pour la révision du Code pénal, *Rapport sur les principales orientations de la réforme*, Bruxelles, 1979, 142.

lows the prosecutor (at pre-sentencing stage) to propose to the accused a victim-offender mediation, community service, training order, or therapy, rather than dismissing the case, or remanding the accused to the trial court. This Act also expands the scope of transaction to other offenses. These initiatives emerged in a social context dominated by the rise of insecurity linked to petty crime, and ~~a~~ strong criticism of the "lax character" of criminal justice. The concern, using these 'third way' devices, was to fight against the feeling of impunity felt by the offenders, and to give more weight to the victim[9].

1996 was a key year in the development of Belgian penal policies. The Minister of Justice at the time, Stefaan De Clerck, proposed to discontinue short prison sentences for certain offenses, and to replace them with non-custodial sentences, in order to reverse the idea whereby imprisonment would be the "only true penalty"[10]. The Minister also proposed to develop alternative sentences and to bring players in charge of monitoring people on extramural probation within so-called "Houses of Justice" ('Maisons de justice'). The first initiative was rather unsuccessful. 1996 was the year when the "Dutroux Case" scandal broke out in Belgium[11]. Under public pressure, the authorities focused on reforming parole (access to which was made more difficult) and on building new prisons. However, in May 1999, the service of Houses of Justice was enshrined in law. Probation workers, victim support workers, penal mediators and other social workers of the para-judicial services were integrated as «judicial assistants» in 27 Houses of Justice, which were placed under the authority of a «General Directorate of the Houses of Justice»[12].

Besides, at post-sentencing stage, the flexibility and individualization of execution of the sentence increased. Other devices were added to the conditional release in order to individualize the trajectory of the condemned. Let us but point out the semi-liberty regime, introduced in various forms in the 1960s, and provisional release introduced in 1972. Both were applied more systematically by the prison administration in the 1980s and 1990s. Furthermore, provisional release, justified for reasons of prison overcrowding, was expanded to sentences of up to three years,

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[9] L. Van Campenhoudt, Y. Cartuyvels, F. Digneffe, D. Kaminski, P. Mary, A. Rea (eds.), *Réponses à l'insécurité. Des discours aux pratiques*, Bruxelles: Labor, 2000; S. Snacken, "Penal Policy and Practice in Belgium", in *Cr. and Just.*, 2007, 127-215.

[10] S. De Clerck, *Les arbres et la forêt. Réformer la justice*, Gent: Lanoo, 1997.

[11] The Dutroux case involved "the kidnapping and murder of four little girls" by Mr Dutroux, a repeat offender on parole.

[12] A. Bauwens, A. Devos, "Probation in Belgium", in A.M. Van Kalmhout, I. Durnescu (eds.), *Probation in Europe*, 2015, CEP, 7.

whereas prison sentences of up to six months were not systematically implemented, for the same reasons[13].

1.3. *The second wave of alternatives in the 21st century: diversification and empowerment of means to fight against impunity and reduce prison overcrowding*

The 2000s witnessed the emergence of a new development of alternative sanctions, with the creation, at sentencing stage, of autonomous alternative sanctions. The first of these new sanctions is the work penalty, introduced in 2002 as police penalty for misdemeanor and for offense. This new sentence, meant to replace community service as a probational option, is explicity conceived as a substitute for imprisonment[14]. The goal is, by giving a status of "real penalty" to community service, to encourage its use by judges who seldom resort to it as probational condition. In 2003, the Sentence Implementation Courts Commission proposed to introduce conviction itself as a form of punishment, and to turn probation into an autonomous sentence[15]. That same year, the autonomisation of the training order (another probational modality) as a specific penalty was also considered, based on the work penalty model. Proponents of this new penalty noted that the training order indeed did have a punitive character; that it should help empower and rehabilitate the defendant and, that, as a discrete and autonomous penalty, it should help reduce prison overcrowding. The project was nonetheless rejected[16]. Unlike community service, whose punitive nature had been recognized, training order was deemed insufficiently punitive to be elevated to a punishment in its own right[17]. The Minister of Justice of the time, Mr. Marc

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[13] S. Snacken, K. Beyens, M.A. Beernaert, "Belgium", in N. Padfield, D. Van Zyl Smit, F. Dünkel (eds.), *Release from prison. European policies and practice*, Cullompton Devon: Willan Publishing, 2010, 70-130.

[14] C. Guillain, "La peine de travail, peine autonome? Analyse de la loi du 17 avril 2002 instaurant la peine de travail comme peine autonome en matière correctionnelle et de police", *JT*, 2002, 641-649.

[15] Commission Tribunaux d'Application des Peines Statut Juridique Externe des Détenus et Fixation de la peine, *Rapport final*, Bruxelles, 2003, 28 and 38.

[16] Proposed law of 7 April 2003 establishing training as a penalty in matters of misdemeanor and minor offenses, *Documents parlementaires*, Chambre des représentants, 2002-2003, 50-2451/1.

[17] C. Françoise, D. Kaminski, "L'injonction formative en matière pénale: valorisation et obstacles à son effectivité", *Rev. dr. pén. crim.*, 5, 2008, 541.

[18] Proposal to amend the Criminal Code and introducing community service and training as alternative sanction, *Documents parlementaires*, Chambre des représentants, 2000-2001, 0549/11, 5.

Verwilghen, even considered that making training order into a separate sentence would, given its helpful character to the litigant, constitute a "bonus to the offense"[18].

During its evolution, the work penalty enjoyed increasing success. While probational or community service were not perceived by the judges as "real sentence"[19], work penalty transpired indeed as a multifunctional penalty, satisfying both the goals of retribution and rehabilitation, or even reparation[20]. It was also perceived as an effective alternative to the policy of non-enforcement of short prison sentences, correlated to prison overcrowding. Following the success of the work penalty, political authorities concluded that the creation of other autonomous alternative penalties should further reduce the use of imprisonment, contributing thereby to reducing prison overcrowding[21]. Thus two new autonomous sanctions were introduced into the Criminal Code in 2014. The electronic monitoring penalty (EM as autonomous penalty) was introduced by an Act of 7 April 2014, and the autonomous probation penalty (probation as an independent sanction) by an Act of 10 April 2014. The regime of these new penalties, enforced on 1 July 2016, was modeled in many ways on the system of the work penalty. But unlike work penalty, which replaces community service as probational condition, these two new sentences do not replace, but rather add to the probation system introduced by the 1964 Act as well as to the electroning monitoring system, which has constituted an execution modality of the custodial sentence since 1998.

At the postsentencing stage, the 'justicialization' of the execution of the sentence enjoyed significant progress. Initiated in 1996 by the Minister of Justice S. De Clerck, a substantial prison law reform project led to a reform of the prisoner's external (*extra muros*) status by two Acts of 17 May 2006[22]. A new body – the Sentence Implementation Court was called upon to play a key role in monitoring and controlling the execution of the sentence[23], especially regarding the procedure for granting

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[19] K. Beyens, *Straffen als Sociale Praktijk. Een Penologisch Onderzoek naar Straftoemeting*, op. cit.

[20] H. Luypaert, K. Beyens, C. Françoise, D. Kaminski, *Werken en leren als straf. Le travail et la formation comme peines*, Bruxelles: VUBPress, 2007, 37.

[21] K. Beyens, "The new generation of community penalties in Belgium. More is less…", in G. Robinson, F. McNeil (eds.), *Community Punishment. European Perspectives*, Abingdon: Routledge, 2016, 17.

[22] A reform of the internal status of the prisoner is also provided by the "Law of 12 January 2005 on the prison administration and the legal status of inmates".

[23] P. Mary, *Enjeux contemporains de la prison*, Bruxelles: USL, 2013.

and executing imprisonment – such as semi-liberty, electronic monitoring and parole. Furthermore, the legislation on mentally ill offenders was also revamped in the 2000s. The 1930-1964 social defense Act was first reformed by an Act of 21 April 2007 on internment of mentally ill offenders (Law of 21 April 2007 on the internment of people with a mental disorder). This law however never entered into force, and was itself replaced by a new Act of 5 May 2014 on the internment of mentally ill persons (Act of 5 May 2014 on the internment of individuals) whose enforcement is scheduled as of 1 october 2016, but the contents of which are already currently the subject of a draft revision[24]. The main changes made by the latter two laws are, firstly, the judiciarisation of the internment measure as an alternative to punishment, now controlled by the Sentence Implementation Court (TAP); secondly, the desire to improve healthcare for internees.

By means of conclusion, we propose three final comments. First, the path chosen in recent years is clearly that of a diversification of measures and alternative sanctions, in order to foster rehabilitating sanctions and to fight against recidivism, to answer the ineffectiveness of short prison sentences and to fight against prison overcrowding[25]. Secondly, there is increased use of technology to promote custody modes outside of the prison walls (such as in-house arrest, etc). This applies to all three stages of the criminal process, with the implementation of electronic monitoring as a means of executing the custodial sentence (1998), as a means of executing the pre-trial detention (2014) and as a standalone penalty (2016). Thirdly, an important methodological problem remains in Belgium regarding the collection and publication of statistical data in criminal matters. Despite or because of the existence of various databases, crime statistics remain scattered among various services which sometimes produce different figures about the same realities. Comparing these figures is often hazardous, due to differences in elements being counted (facts, people, files), delays in encoding, difference in the counting modes/systems or the non-inclusion of some statistically relevant facts (as in matters of internment). Belgium still lacks a truly integrated statistics system. The figures presented in this report must therefore be taken with caution.

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[24] Legal bill of 18 January 2016 relative to internment and various provisions of Justice, *Documents parlementaires*, Chambre des représentants, 2015-2016, 54/1590.

[25] F. Tulkens, M. van de Kerchove, Y. Cartuyvels, C. Guillain, *Introduction au droit pénal. Aspects juridiques et criminologiques*, Bruxelles: Kluwer, 2014, 594-600.

2. *Prison population*

2.1. *Numbered data*

TABLE 1. *Prison population*

Year	Number of citizens	Number of inmates	Detention rate (%100 000 habitants)[26]	Prison capacity	Overcrowding rate (pour 100 places)[27]	Amount of square footage provided by law
2000	10 237 300	8 688	84,8	7 462	116	NAP
2001	10 262 200	8 544	83,2	7 436	114	NAP
2002	10 263 400	8 605	83,8	7 436	115	NAP
2003	10 355 800	9 308	89,8	7 866	118	NAP
2004	10 490 000	9 245	88,1	8 092	113	NAP
2005	10 445 900	9 375	89,7	8 133	114	NAP
2006	10 430 300	9 635	92,3	8 311	115	NAP
2007	10 392 200	10 008	96,3	8 311	120	NAP
2008	10 404 000	9 858	94,7	8 384	117	NAP
2009	10 753 100	10 159	94,4	8 404	120	NAP
2010	10 839 900	10 561	97,4	8 949	118	NAP
2011	11 000 638	11 065	100,5	9 128	121	NAP
2012	11 094 850	11 212	101	9 159	122	NAP
2013	11 161 642	11 645	104,3	9 384	124	NAP
2014	11 203 992	11 578	103,3	9 931	116	NAP
2015	NA	NA	NA	NA	NA	NAP

Source: Direction générale des Établissements pénitentiaires du SPF Justice; Eurostat (*http://ec.europa.eu/eurostat*); Statbel (*http://statbel.fgov.be*). Abbreviations: NA: not availabel; NAP: not applicable.

2.2. *Analytical Findings: growth of the incarcerated population and prison overcrowding*

Imprisonment figures have been substantially on the rise since the turn of the 21st century in Belgium. Between 2000 and 2014, Belgium has seen its overall population increase by 9%. Yet during the same period, the Belgian prison population increased by 33%, extending its prison estate by the same figure. Nevertheless, a slight decrease of the

[26] This column is calculated by us.
[27] This column is calculated by us.

prison population has been noticeable since 2014, although this statistics is offset by increasing use of electronic monitoring as a term of "imprisonment without walls"[28] (see below). Prisoners are divided between 33 establishments in the country, as well as a prison in the Netherlands (Tilburg) that rents out space for Belgian inmates. Prison overcrowding rates are endemic. Thus, the latest SPACE I report puts Belgium at a sad fourth position in a ranking of countries with the highest rate of prison overcrowding[29]. This situation has led to a condemnation of Belgium by the European Court of Human Rights, stressing the "structural character" of prison overcrowding in Belgium[30].

Increase in prison population, in Belgium and in other countries, is linked to both the increase in the average length of detention and the increasing number of imprisoned people[31]. This increase, together with the resulting prison overcrowding, poses a variety of problems. Prison overcrowding reduces the possibility of operating a coherent classification within prisons. This lack of classification worsens overcrowding, as it delays early releases: prisoners are placed in institutions according to available space, instead of being placed in the most accurate institutions to prepare their rehabilitation plan. The distinction between imprisonment as punishment and remand has lost its relevance in the current situation[32]. The scale of the problem has as its consequence that no legal provision has dared to set the number of square footage a prisoner is entitled to in jail. The law of 12 January 2005 on the internal legal status of detainees evokes the "living space" of prisoners. But the text does not specify said living space's size. Moreover, it does not retained the original concept of space of "individual" stay, despite the fact that this specification was in conformity with the requirements of the Council of Europe (Rec (2006) 2, Rule 18.5). In practice, the latest report of the Committee for the Prevention of Torture (CPT) shows great disparities between institutions and even within the same establishment (CPT / Inf (2012) 36)[33].

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[28] K. Beyens, M. Roosen, *Electronic Monitoring in Belgium*, Briefing paper, Criminal Justice Programme of the European Commission (JUST/2013/JPEN/AG/4510), 2016.

[29] M. F. Aebi, N. Delgrande, "SPACE I - Council of Europe Annual Penal Statistics: Prison Populations", Strasbourg, Council of Europe, 2014, 60.

[30] ECtHR, *Vasilescu v. Belgium*, 25 November 2014, § 73.

[31] G. Chantraine, A. Kuhn, P. Mary, M. Vacheret, 2007, "L'État en retrait? Trente ans d'usages des peines (Belgique, Canada, France, Suisse)", in *Dév. et Soc.*, 2007, 505-526.

[32] M.-S. Devresse, L. Robert, C. Vanneste, "Classification et régimes dans les prisons belges", in *Rev. dr. pén. crim.*, 2014, 174.

[33] Thus, within the same institution, the CPT has noted that a cell of 9 to 10 square meters was occupied by one to three inmates.

To address the problem of prison overcrowding, the European Council recommends several strategies. The first one is to consider various forms of decriminalization. The European Council calls on states to "consider the possibility of decriminalizing certain types of offense, or reclassifying them so as to prevent their calling for imprisonment" (R (99) 22, Rule 4; R (92) 17). It is uncertain that lawmakers have acted in this direction in Belgium, as the Belgian system is rather characterized by a process of penal inflation[34], as well as by maintaining custodial sentence as the reference penalty.

The second strategy proposes to *reduce the use (and length) of remand* (R (99) 22, rule 11). However, despite the various reforms of pretrial detention in Belgium, this goal has never been reached[35]. The number of incarcerated defendants increased by 19% between 2000 and 2014, from 3023 to 3610 people[36], despite alternative measures being in place at this stage of the procedures (see below, pre-sentencing stage).

A third recommended strategy consists in setting a maximum capacity number of inmates per establishment, in order to "avoid excessive levels of overcrowding" (R (99) 22, rule 6). But in Belgium, prison capacity is continually exceeded and the concept of "capacity" was not even taken into account by the Act of 12 January 2005 on the internal legal status of detainees. The issue was debated, but the government did not adopt the idea for reasons of an economic nature. It was estimated that the introduction of a quota system would require to build new prisons, an investment deemed too expensive. Ten years later, this justification is perplexing: the main measures taken by successive governments to fight against prison overcrowding has indeed been an extension of the penitentiary estate[37]. The European Council is however skeptical as to the advisability of such a reaction: "The extension of the penitentiary estate should rather be an exceptional measure, since it is not generally likely to offer a lasting solution to the problem of overcrowding […]" (R (99) 22, rule 2). This finding of the European Council has indeed be-

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[34] S. Snacken, "Penal Policy and Practice in Belgium", op. cit.

[35] A. Jonckheere, L. Kennes, "Les solutions radicales pour limiter la détention preventive", in D. Vandermeersch, B. Dejemeppe (eds.), *Détention préventive: 20 ans après?*, Bruxelles: Larcier, 2011, 163-181.

[36] SPF Justice, *Justice en chiffres*, 2013, 46; SPF Justice, *Justice en chiffres*, 2011, 56; General Directorate of Prisons of the Federal Justice, *Rapport annuel*, 2015, 50.

[37] V. Seron, "La loi de principes concernant l'administration pénitentiaire et le statut juridique des détenus: vers la fin d'un non-droit?", in *Jour. des trib.*, 2006, 553-562; M.-S. Devresse, "La gestion de la surpopulation pénitentiaire: perspectives politiques, administratives et juridictionnelles", in *Dr. et Soc.*, 2013, 84, 339-358.

come reality in Belgium, since the increase in prison capacity was accompanied by a steady increase in the average overcrowding rate.

Finally, in order to reduce prison overcrowding, the European Council also recommends *reducing the use of long prison sentences and replacing short custodial sentences by community sanctions/service* (R (99) 22, R 14). With respect to the first point, Belgium has witnessed an increase in the number of convicts serving a long prison sentence[38]. With regard to the second point, the European Council sees it as a priority and calls on States to have at its disposal a wide range of community sanctions: "There should be an appropriate set of sanctions and measures applied in the community, possibly graded in terms of severity; it should encourage prosecutors and judges to use them as widely as possible" (R (99) 22, Rule 3). Belgium has partially responded to these calls, diversifying the range of measures and sanctions in the community. Studying these devices, their forms, their goals and their impact in terms of prison overcrowding is the subject of the present report.

3. *Alternative measures at the pre-sentencing stage*

3.1. *Analytical Inventory of existing devices at the pre-sentencing stage*

The Belgian criminal system is guided by the principle of discretionary prosecution, that is to say that the prosecutor's office has the power to decide which response it will give to criminal cases introduced before it. Once they have been introduced to the prosecutor's office, files can go down a multiplicity of channels. The file can thus be made available to other parquets or be attached to other dossiers. The files can be concluded at prosecutor's office level, through transaction, victim-offender mediation, unconditional waiver by the public prosecutor (and, since February 29, 2016, through a kind of plea bargaining); or be sued before courts and tribunals; or lead to the examination of a case by an investigating judge.

It emerges from the prosecutor's office statistics that most of the files brought to its attention are processed and closed (taken no further action on) at the prosecutor's office level, without referral to the investigating judge or the court. The examination and closing of a case by the prosecutor's office at the 'information' stage is the most common form of treatment of criminal cases.

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[38] M. VAN DE KERCHOVE, "Punir hors les murs en Belgique. La place des sanctions pénales non privatives de liberté dans le système penal", op. cit.; P. MARY, "La surpopulation pénitentiaire", in *Cahier hebdomadaire du CRISP*, 2012, n° 2137.

TABLE 2. *Decisions by the prosecutor's office to dismiss the cases*[39]

Year/End	Information	Instruction	Sentencing	Total
2003	888 483 (96%)	16 634 (1,80%)	20 405 (2,20%)	925 922
2004	796 474 (95,28%)	17 438 (2,09%)	21 983 (2,63%)	835 895
2005	746 921 (94,91%)	18 926 (2,40%)	21 119 (2,68%)	786 956
2006	697 800 (94,56%)	19 943 (2,61%)	20 920 (2,83%)	737 963
2007	670 384 (94,37%)	18 621 (2,62%)	21 383 (3,01%)	710 388
2008	678 332 (94,58%)	17 786 (2,52%)	20 500 (2,90%)	706 618
2009	680 447 (94,55%)	17 299 (2,40%)	21 949 (3,05%)	719 695
2010	700 267 (94,65%)	16 906 (2,34%)	21 777 (3,01%)	723 740
2011	696 035 (94,77%)	16 634 (2,31%)	21 004 (2,92%)	718 703
2012	677 714 (95,06%)	15 186 (2,13%)	20 024 (2,81%)	712 924
2013	666 919 (95,09%)	14 324 (2,04%)	20 124 (2,87%)	701 367
2014	632 732 (94,86%)	14 677 (2,20%)	19 630 (2,94%)	667 039
Total	**8 532 508 (95,36%)**	**204 374 (2,28%)**	**250 818 (2,80%)**	**8 947 210**

3.1.1. *Unconditional waiver by the public prosecutor*

The unconditional waiver by the public prosecutor is the fact, for the prosecutor's office, of setting a file aside, and consists in a temporary waiver of prosecution. It may be subject to compliance with certain conditions, in which case one speaks of 'pretorian probation', or conditional waiver by the prosecutor. If the unconditional waiver by the public prosecutor is part of the principle of discretionary prosecution and was legally consecrated in 1998, there is no legal basis with regard to the conditional waiver by the public prosecutor ("pretorian probation")[40].

[39] Source for Tables 2-7: Annual statistics of the prosecution, the Prosecutors. State on December 31 of each year (*http://www.om-mp.be/stat/corr/start/f/home.html*). The percentages have been approximated to the lower or higher tenth. Figures are not available before 2003 or after 2014 (as of 19 February 2016). For Table 2: the "Information" category sector gathers the cases handled without the intervention of a judge and includes the unconditional waiver by the public prosecutor, transaction and victim-offender mediation, but also cases attached to others cases, as well as cases available to other prosecutor's offices; the "Instruction" category includes examining the case while "Judgment" sector includes direct transmission of the case to the judge.

[40] C. JANSSEN, J. VERVAELE, *Le ministère public et la politique de classement sans suite*, Bruxelles: Bruylant, Centre national de criminology, 1990.

Cases can be dropped as soon as they are introduced to the prosecutor, or after being subjected to examination by the prosecutor's office ('information'). To a lesser extent, they can also be dropped after going through other decisions (such as an unsuccessful or incomplete victim-offender mediation proposed by the prosecutor). The practice of unconditional waiver by the public prosecutor can be determined by a range of factors, sometimes related to the structure or organization of prosecutor's offices, sometimes to the elements in the case, sometimes even depending on the current criminal policy. The unconditional waiver by the public prosecutor can thus intervene on technical grounds (author unknown, no offense, insufficient evidence, prescription of the public action, …), but also for reasons of opportunity, where the prosecutor's office considers that the prosecution, although possible, is not appropriate (priorities in terms of research policy and prosecutions, limited social repercussions of the offense, absence of criminal record, small prejudice, insufficient investigation means, …)[41]. The unconditional waiver by the public prosecutor is considered provisional as long as the public action is ongoing or hasn't been closed, and the case can be reopened on the basis of new evidence.

TABLE 3. *Number of cases dropped, and percentages compared to the overall number of cases closed by the prosecutor's office*

Year	Case dropped	Prosecutor's office
2003	716 635 (77,40%)	925 922
2004	624 880 (74,76%)	835 895
2005	581 981 (73,95%)	786 966
2006	535 681 (72,59%)	737 963
2007	506 772 (71,34%)	710 388
2008	505 254 (71,50%)	706 618
2009	515 704 (71,66%)	719 695
2010	528 493 (73,02%)	723 740
2011	522 322 (72,68%)	718 703
2012	515 976 (72,37%)	712 924
2013	506 696 (72,24%)	701 367
2014	484 046 (72,57%)	667 039
Total	**6 544 440 (73,14%)**	**8 947 210**

[41] See annex 1 of the circulaire COL 12/98 of the Collège des procureurs généraux, regarding the 12 March 1998 Act relative to the improvement of the legal procedure at the stage of information and instruction (see also annex 1 of the circulaire 16/2014, 26 june 2014).

TABLE 4. *Orientation of cases dropped and percentages relative to the entirety of cases dropped ('classés sans suite' - CSS)*

Year	Technical reason	Reason of opportunity	Other reasons	Unknown/ Other	Total of cases dropped
2003	516 998 (72,27%)	178 928 (25,01%)	19 428 (2,72%)	1281	716 635
2004	428 137 (68,57%)	178 543 (28,60%)	17 660 (2,83%)	540	624 880
2005	385 338 (66,26%)	179 684 (30,90%)	16 498 (2,84%)	461	581 981
2006	345 612 (64,58%)	173 897 (32,49%)	15 685 (2,93%)	491	535 681
2007	313 015 (61,84%)	175 364 (34,65%)	17 754 (3,51%)	639	506 772
2008	309 883 (61,40%)	174 819 (34,64%)	20 006 (3,96%)	546	505 254
2009	319 101 (61,93%)	173 602 (33,69%)	22 541 (4,37%)	460	515 704
2010	322 097 (60,99%)	176 205 (33,37%)	29 781 (5,64%)	410	528 493
2011	319 582 (61,26%)	167 533 (32,11%)	34 597 (6,63%)	610	522 322
2012	320 470 (62,17%)	158 035 (30,66%)	36 979 (7,17%)	492	515 976
2013	315 029 (62,24%)	151 480 (29,93%)	39 675 (7,84%)	512	506 696
2014	303 698 (62,75%)	143 434 (29,64%)	36 863 (7,62%)	51	484 046
Total	**4 198 960 (64,22%)**	**2 031 524 (31,07%)**	**307 467 (4,70%)**	**6 493**	**6 544 440**

The unconditional waiver by the public prosecutor is the most common mode of processing criminal offenses (Table 3). However, it is most often used for reasons of a technical nature and, to a lesser extent, for reasons of opportunity (Table 4). If we try to really evaluate the policy of unconditional waiver by the public prosecutor as it is conducted by the prosecutor's office, it seems relevant to favor another statistical approach which, as is the case in France, does not take into account "non prosecutable cases"[42] or "forced unconditional waiver"[43]. Such approach is tantamount, in Belgium, to disregarding closed cases for technical reasons, and to calculate the rate of unconditional waiver by the public prosecutor for reasons of expediency alone, based solely on the numbers of "prosecutable cases"[44]. If one favors this approach, the dismissal rates drops to 43% of all prosecutable cases handled by prosecutors (Table 5).

[42] *Annuaire statistique de la justice*, ed. 2011-2012, La Documentation française, 2012, available on *http://www.justice.gouv.fr/art_pix/stat_annuaire_2011-2012.pdf*.

[43] Sénat français, *Les infractions sans suite ou la délinquance mail traitée*, Rapport de la Commission des Finances, n° 513, available on *http://senat.fr/rap/r97-513/r97-513_mono.html*.

[44] The number of prosecutable cases includes the entirety of cases taken up by the prosecutor's office, minus those that were dropped for technical reasons.

TABLE 5. *Number of cases dropped for reasons of opportunity and percentage relative to the entirety of prosecutable cases*

Year	CSS for reason of opportunity	Prosecutable cases
2003	178 928 (44%)	408 924
2004	178 543 (44%)	407 758
2005	179 684 (45%)	401 628
2006	173 897 (44%)	392 351
2007	175 364 (44%)	397 373
2008	174 819 (44%)	396 735
2009	173 602 (43%)	400 594
2010	176 205 (44%)	401 643
2011	167 533 (42%)	399 121
2012	158 035 (40%)	392 454
2013	151 480 (39%)	386 338
2014	143 434 (44%)	329 034
Total	**2 031 524 (43%)**	**4 713 953**

3.1.2. *Transaction*

Introduced by the Royal Decree of 10 January 1935, *penal transaction* is a procedure that allows the prosecutor's office to close a case in exchange for payment in money by the offender. The transaction is an initiative of the prosecutor's office, and is therefore unilateral and facultative. Since its inception, transaction has aimed to differentiate the treatment of infringements depending on their severity, and to relieve courts from benign cases, so that they may focus on their "real mission"[45]. The procedure was amended several times thereafter, most recently in 2011 and 2016, to relax the conditions of application of transaction, and to expand its scope.

A transaction can be proposed when the prosecutor's office "considers that the deeds do not seem to be of such gravity that they should be punished with imprisonment of more than two years or a more serious penalty, including confiscation, and that the deed had no serious consequence on bodily integrity". The penalty to be taken into consideration here is the *in concreto* penalty, namely the sentence likely to be imposed by the judge in case of prosecution, after admission of mitigating circumstances. In practice this means that the transaction can be applied

[45] Report to the King, *Pasinomie*, 1935, 6.

to facts that entail, *in abstracto*, a penalty of up to twenty years in prison (felony). This underscores the very wide scope coverable by transaction. Since its amendment in 2011, a transaction can occur at any stage of the procedure, provided that no criminal judgment has been pronounced.

The amount to be paid, proposed to the offender by the prosecutor's office, can not exceed the maximum fine established by law, and must be proportionate to the offense. In addition, "damage caused to the other parties must eventually be fully repaired" before the transaction can be proposed or, at least, the author should have "acknowledged in writing his/her civil liability for the damage done and produced evidence of compensation for the uncontested part of the damage and settlement arrangements thereof". Once the author has met all the conditions of the transaction, the prosecution is extinguished. Since the Act of 5 February 2016, transactions are recorded in the central criminal record if they occurs after a judge has been seized with the case, without however being transcribed in records issued to individuals.

TABLE 6. *Number of transactions paid, percentage relative to the total of decisions made by the prosecutor's office, and percentage relative to the total of prosecutable cases*

Year	Transaction	Total Prosecutor's office	Prosecutable cases
2003	7 663	925 922 (0,83%)	408 924 (1,87%)
2004	6 441	835 895 (0,77%)	407 758 (1,57%)
2005	5 988	786 966 (0,76%)	401 628 (1,49%)
2006	5 380	737 963 (0,73%)	392 351 (1,37%)
2007	5 683	710 388 (0,80%)	397 373 (1,43%)
2008	5 075	706 618 (0,72%)	396 735 (1,27%)
2009	6 682	719 695 (0,93%)	400 594 (1,66%)
2010	6 210	723 740 (0,86%)	401 643 (1,54%)
2011	4 985	718 703 (0,69%)	399 121 (1,24%)
2012	6 677	712 924 (0,94%)	392 454 (1,70%)
2013	7 549	701 367 (1,08%)	386 338 (1,95%)
2014	7 363	667 039 (1,10%)	329 034 (2,23%)
Total	**75 696**	**8 947 210 (0,84%)**	**4 713 953 (1,60%)**

In quantitative terms, transaction is not often mobilized by the prosecution: it intervenes in less than 1% of all cases closed by prosecutors, and less than 2% of all prosecutable cases (Table 6).

3.1.3. *Mediation*[46]

The *penal mediation* was introduced by the Act of 10 February 1994 and was part, at the time, of a Justice reform aimed at speeding up the sentencing of petty crime, while also promoting other forms of penal reaction which do not involve the Court's intervention. Much like with transaction, the penal mediation allows the prosecutor's office to offer to the perpetrator to extinguish public action, in exchange for compliance with certain conditions, which may be formulated separately or cumulatively.

In order for the public action to be extinguished, four different conditions can be proposed to the perpetrator. The condition(s) must be "accepted" by the offender, and then "satisfied". The first condition consists in duly attested compensation or reparation for the damage caused by the offense; the second condition is that the offender follow medical treatment or any other adequate therapy, and to periodically provide evidence of said treatment, within a period not exceeding six months[47]. This applies in the event that the perpetrator has invoked, as the cause behind the offense, circumstances such as illness or addiction to alcohol or drugs; the third condition is for the offender to perform community service, or to follow a specific training lasting 120 hours at most. The fourth measure, which alone deserves the qualification of penal *mediation*, is for the prosecutor's office to "set up a meeting with the victim (simultaneously or at another time) and to intervene between the accused and the victim" in order to obtain their agreement regarding "the compensation and its terms".

Much as in the case of transaction, the prosecutor's office may resort to penal mediation for any criminal offense, provided that "the deed does not appear likely to be punished with a main penalty of imprisonment of more than two years or a heftier penalty." The penalty to be considered here is also the penalty *in concreto*, which again emphasizes the very broad scope of the penal mediation. Unlike transaction, mediation can only occur at the stage of examination of a case by the prosecutor's office ('information' stage), i.e. before any prosecution with trial courts

[46] A draft law, approved by the Council of Ministers March 25, 2016, about reforming the procedure before the Commercial Court (tribunal du commerce) and the appeal to judgments pronounced by this court, changing the legal status of detainees and imparting various provisions in matters of justice, aims to change the name of the penal mediation, and to replace it by "extinguishing of public action after the execution of measures".

[47] The aforementioned draft law aims to extend this period to one year, much as is the case with community service and training.

has taken place, or ahead of any referral to an investigating judge[48]. It is not recorded in a person's criminal record (so that it can not appear on documents issued to individuals).

TABLE 7. *Number of completed criminal mediations, percentages relative to all cases closed by prosecutors and percentages relative to all prosecutable cases*

Year	Mediation	Total Prosecutor's office	Prosecutable cases
2003	1 939	925 922 (0,21%)	408 924 (0,47%)
2004	1 949	835 895 (0,23%)	407 758 (0,47%)
2005	1 998	786 966 (0,25%)	401 628 (0,49%)
2006	2 157	737 963 (0,29%)	392 351 (0,54%)
2007	2 226	710 388 (0,31%)	397 373 (0,56%)
2008	2 361	706 618 (0,33%)	396 735 (0,59%)
2009	2 324	719 695 (0,32%)	400 594 (0,58%)
2010	2 420	723 740 (0,33%)	401 643 (0,60%)
2011	2 304	718 703 (0,32%)	399 121 (0,57%)
2012	2 800	712 924 (0,39%)	392 454 (0,71%)
2013	2 800	701 367 (0,40%)	386 338 (0,72%)
2014	2 763	667 039 (0,41%)	329 034 (0,83%)
Total	**28 041**	**8 947 210 (0,31%)**	**4 713 953 (0, 59%)**

The penal mediation is a marginal occurrence, both with regard to cases closed by the prosecutor's office, and in relation to the overall numbers of prosecutable cases (about 0.50%) (Table 7).

3.1.4. *Plea bargaining*

The law of February 5, 2016 (effective February 29, 2016) introduced, in the Code of Criminal Procedure, the plea bargaining. The latter "implies that the public prosecutor and the suspect or the accused, after pleading guilty to the acts attributed to them, pass an agreement on the sentence that they then submit to the court for approval." The pro-

[48] The draft legislation aims to model the procedure of penal mediation on that of transaction, to allow its application to all stages of criminal procedure, provided that no definitive criminal judgment has been pronounced.

cedure can be applied to those facts that do not seem likely to call for imprisonment of more than 5 years (penalty *in concreto*). Save for exceptions as provided for by law (certain serious crimes and acts punishable *in abstracto* by a sentence of more than 20 years in prison), the procedure can be applied to all offenses. This new procedure tends to "quickly and efficiently [solve] those cases in which the facts are clear and the author has confessed to them". It aims to "alleviate the workload of the criminal court and the police court, and to reduce the length of criminal procedures" and it "also allows a more effective enforcement of penalties since the suspect previously agreed to his/her punishment"[49].

The procedure is flanked by a number of safeguards meant to respect the rights of the defense and to avoid any form of pressure on the accused. Thus, the presence of the lawyer is mandatory during the guilty plea, and the accused may confer confidentially with him/her, after having acquainted themselves with the file. The law specifies that the prosecutor's office can offer reduced sentences than were required earlier, or offer a suspended sentence (single or probationary), or even provide suspension of the sentence (single or probationary) in keeping with the guidelines provided by the law of 29 June 1964 on suspension, suspended sentence and probation[50]. As stated in the explanatory memorandum, "the recognition of guilt is therefore taken into account in the proposed penalty"[51]. The final decision belongs to the trial court required to approve the agreement and to impose the penalties proposed. The sentences are recorded in the criminal record and appear on criminal records issued to individuals. The accused is heard by the court which checks whether he/she has satisfied all the conditions, if the agreement was made in a free, fair and informed way, and if this agreement corresponds to the facts and their legal classification. The court also checks whether the penalties proposed by the prosecution are proportionate to the seriousness of the facts, the personality of the accused and his/her desire to repair the damage. The court has the option to defer consideration of the case to a later hearing, in particular to allow the plaintiff to clarify the damage or the accused to provide information about his/her willingness to repair it. The court may refuse to approve the agreement, but it can not modify it. In case of refusal of approval, the file is delivered to the prosecutor's office which may, prior to referral to the court, consider mediation or transaction.

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[49] Draft law amending the criminal law and criminal procedure, and laying down miscellaneous provisions in matters of justice, *Documents Parlementaires*, Chambre des Représentants, 2015-2016, 54-1418/1, 88-89.

[50] See below, sentencing stage.

[51] *Ibidem*, 94.

3.1.5. *Alternatives to pre-trial detention: release under conditions or on bail and electronic monitoring*

The investigation of a case by the prosecutor's office with the intervention of an investigating magistrate is mandatory for crimes, and optional for offences. When such examination of a case is opened, the judge may issue an arrest warrant. But they may also release the accused, subject to compliance with certain conditions, or bail. One speaks, in such case, of 'alternative to pre-trial detention' or 'release under conditions or on bail'. Such alternatives to pre-trial detention were introduced by the Law of 20 July 1990, and aimed at reducing the number of preventive detentions, in order to reduce prison overcrowding. Alternative measures are expected to be given priority over detention, since "the decision to place an accused under arrest may only be made after the non-existence of real alternatives has been established"[52].

Being a replacement to pre-trial detention rather than a complementary measure, release under conditions or on bail is only permitted if the conditions to issue an arrest warrant exist. First, the offense must lead to, *in abstracto*, a one-year imprisonment or more. Secondly, the judge may only issue a warrant in cases of absolute necessity for public safety. Finally, if the maximum applicable penalty does not exceed 15 years in prison, the judge has to see if there are serious reasons to fear that the accused might commit new crimes or offenses, abscond the course of justice, attempt to remove evidence, or collude with third parties. Legal criteria can thus still pursue the same objectives as well as other devices, particularly in terms of risk of recidivism or threat to public safety. If the criteria for issuing an arrest warrant are not met, the judge can not release the accused under conditions or on bail, and has no other choice but to not put the accused in custody.

In case of a release under conditions, the conditions with which the accused must comply are at the discretion of the investigating magistrate. They may be imposed on the accused without his/her consent, unless they affect the accused's physical or psychological integrity[53]. The conditions that are recurrently found in the records may either be obligations, or abstentions[54]. Release on bail is subject to the prior payment in full of

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[52] H.-D. Bosly, D. Vandermeersch, "La nouvelle loi belge sur la détention preventive", in *Rev. dr. pén. crim.*, 1991, 188.

[53] Review of the Conseil d'Etat, *Documents Parlementaires*, Sénat, 1988-1989, 658/1, 64.

[54] C. Guillain, C. Scohier, "La gestion pénale d'une cohorte de dossiers stupéfiants. Les résultats disparates d'une justice dite alternative", in L. Van Campenhout, Y. Cartuyvels, F. Digneffe, D. Kaminski, P. Mary, A. Réa, *Réponses à l'insécurité. Des discours aux pratiques*, Bruxelles: Labor, 2000, 312.

an amount of money, fixed by the investigating magistrate, taking into account the financial capacity of the accused.

In keeping with a view to reduce the prison population, pre-trial detention can also be performed under electronic monitoring since 1 January 2014. As home detention or house arrest, it involves the permanent presence of the accused at a specific address, controled through a GPS system. The only authorized movements of the accused are those that are necessary in the context of legal procedure, those motivated by a medical emergency or other case of *force majeure*.

Contrary to release under conditions or on bail, pre-trial detention under electronic monitoring does not constitute an alternative to an arrest warrant, but a mode of execution of the latter[55].

TABLE 8. *Number of alternative measures to pre-trial detention, and percentage of the measures relative to the total of persons under arrest warrant*[56]

Measures / Year	Arrest warrant	Alternatives to pre-trial detention	Arrest warrants and alternatives
2000	*9 171*	ND	
2001	*9 230*	ND	
2002	*10 434*	ND	
2003	10 745 (77%)	3 181 (23%)	13 926
2004	10 090 (74%)	3 460 (26%)	13 550
2005	10 611 (74%)	3 713 (26%)	14 324
2006	11 810 (74%)	4 107 (26%)	15 917
2007	10 309 (69%)	4 563 (31%)	14 872
2008	10 842 (69%)	4 917 (31%)	15 759
2009	12 123 (71%)	4 949 (29%)	17 072
2010	12 161 (73%)	4 436 (27%)	16 597
2011	11 788 (72%)	4 606 (28%)	16 394
2012	10 183 (69%)	4 495 (31%)	14 678
2013	10 611 (69%)	4 850 (31%)	15 461
Total (2003-2013)	**121 273 (72%)**	**47 277 (28%)**	**168 550**

[55] M. A. BEERNAERT, N. COLETTE-BASECQ, C. GUILLAIN, O. MANDOUX, M. PREUMONT, D. VANDERMEERSCH, *Introduction à la procédure pénale*, 5e éd., Bruxelles: La Charte, 2014, 251.

[56] Source: Justice en chiffres 2013, Service Public Fédéral Justice. Regarding arrest warrants: (*http://justice.belgium.be/fr/information/statistiques/justice_en_chiffres/2013/cours_*

The deprivation of liberty appears as the favorite instrument of the investigating magistrate, representing over 70% of all cases to have been examined by the prosecutor's office with the intervention of an investigating magistrate, and having led either to an arrest warrant, or to an alternative to pre-trial detention (Table 8)[57].

3.2. *Global evaluation of existing devices at the pre-sentencing stage*

3.2.1. *Analytical evaluation of legal texts in view of European standards*

Several recommendations of the Council of Europe deal with the implementation of sanctions and measures in the community at pre-sentencing stage. These recommendations suggest the recourse to the principle of prosecutorial discretion and plea bargaining to favor an alternative treatment for minor offenses and remedy the slowness of the criminal justice system (Rec (87) 18). Similarly, Rec (99) 19) encourages mediation in criminal matters at all levels of the procedure, in order to promote a negotiated justice involving the perpetrator and the victim, while also involving the community. With regard to pretrial detention, the European *soft law* insists that the use of remand be exceptional and always justified (Rec (2006) 13). It encourages the use of alternatives to detention (Annex 2 to Rec (2000) 22), notably by advocating the use of electronic monitoring measures (Rec (2000) 22, CM / Rec (2014) 4). On this note, the various alternative devices of prosecution and pre-trial detention introduced in Belgium are generally in line with the recommendations of the Council of Europe.

Regarding the implementation of these devices at the PSR stage, the law of the Council of Europe also emphasizes observance of various principles, such as the principle of legality, which requires that the conditions and obligations of sanctions be defined by clear and explicit provisions (R (92) 16, CM / Rec (2010) 1, Rec (2000) 22), or the principle of the sanction's proportionality to the gravity of the offense, which prohibits indefinite sanctions (R (92) 16, R (99) 19, R (2000) 22 (Appendix

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et_tribunaux/siege/juges_d_ instruction). Regarding alternatives to pre-trial detention: (*http://justice.belgium.be/fr/information/statistiques/justice_en_chiffres/2013/maisons_de_justice/matieres_penal es*). The percentages have been rounded to lower or higher tenths. Some figures are not available before 2003 or after 2013, so that the totals were calculated only for the years 2003 to 2013 (as of February 19, 2016). It should be emphasized that alternative measure to pre-trial detention may follow an arrest warrant.

[57] Let us specify that there can be several people indicted per instruction.

1), CM / Rec (2010) 1). This law also emphasizes the need to obtain the informed consent of the alleged perpetrator (R (92) 16) and the necessary existence of legal guarantees and recourse (R (92) 16).

In light of these principles, a number of difficulties arise. While the various existing Belgian devices observe the *principle of legality* at PSR stage, several elements must be specified. While the unconditional waiver by the public prosecutor made by the prosecutor's office, according to its power of opportunity, is inscribed in the law, there is no legal criterion that determines either the conditions governing the unconditional waiver by the public prosecutor, or the conditions that may accompany it (conditional waiver by the public prosecutor). One may lament the fact that these conditions are sometimes stipulated in the criminal policy directives, instruments issued by the executive power encroaching upon the principle of separation of powers.

Regarding the *principle of proportionality*, probationary terms that come with an unconditional waiver by the public prosecutor can be cumulated without limit in time, except for that of the prescription of the public action. The Council of Europe does however only approve the use of sanctions of undetermined duration in exceptional cases and for serious offenses which represent, due to personal characteristics of the offender, "a constant and serious threat to the life, health or safety of community members "(Annex 1 to the Rec (2000) 22). This is certainly not the case for the majority of offenses, whose cases are dropped. The same applies with those conditions that may be imposed in connection within the frame of release under conditions. While limited in time, these conditions are left to the discretion of the investigating magistrate, subject to control exercised by the investigating authorities. Be it penal mediation, transaction or unconditional waiver by the public prosecutor, the law does not specify the consequences in case of non-compliance with the conditions.

Regarding *consent*, the unconditional waiver by the public prosecutor, with conditions, is imposed on the offender, while R (92) 16 states that a community sanction or measure "shall be imposed only once it is known what conditions or obligations might be appropriate for the offender, and whether or not the latter is willing to cooperate and observe them." Since the different alternatives to prosecution or to pre-trial detention formally require the agreement of the offender, one can question the measure to which the scope of the consent that must be made "freely" (R (99) 19) is indeed made freely and in an informed and unencumbered manner, while the only alternative in case of refusal consists of legal procedure, or the issuance of an arrest warrant.

If the prosecutor's office must in no way *give a reasoned justification for* its decision to resort to mediation or transaction, it must indicate the reason for said decision to close a case without further action. The headings of unconditional waiver by the public prosecutor, however, are not required by law but by a circulaire of the Collegium of general prosecutors[58]. Furthermore, these headings are particularly short and boil down to whether the classification occurs for technical reasons or opportunity. It is difficult, in this context, for the offender, to whom the decision is not communicated, "to understand the sanction as a just and reasonable reaction to the offense" and to strive toward an individualization of punishment (R (92) 16).

At PSR stage and with alternatives to pre-trial detention as an available option, the community sanctions are taken on by the prosecutor and not by the trial court. Admittedly, this is not contrary to European soft law, which states that "the decision on the imposition or revocation of a sanction or a pre-trial measure in the community must be taken by a judicial authority", the latter being understood as "a court, judge or prosecutor". It is nevertheless difficult to talk about *justicialization* at this PSR stage: such decisions as the unconditional waiver by the public prosecutor, mediation and transaction are not taken by a sentencing judge[59]. They are sovereignly decided by the prosecutor's office at *information* stage, without the possibility of consulting the file by the *accused*[60] and / or *revocation* by a higher authority (R (92) 16, R (99) 19). Under certain circumstances, the prosecutor's office is thus sovereign in the exercise of public action and, because of the separation of powers, the criminal court can not interfere in political prosecutions conducted by the prosecutor's office[61].

3.2.2. *Impact, difficulties and issues raised by the devices*

It appears from the judicial statistics (Table 2) that, of all cases notified to the prosecutor's office, only a small minority leads to the pro-

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[58] See Annex 1 of the 12/98 COL circulaire of the Collège des procureurs généraux regarding the 12 March 1998 law on the improvement of criminal procedure at the stage of information and instruction.

[59] Except the transaction decided at the sentencing stage.

[60] *Ibidem*.

[61] C. Guillain, "Les directives de politique criminelle comme source du droit", in Y. Cartuyvels, H. Dumont, P. Gérard, I. Hachez, F. Ost, M. van de Kerchove, *Les sources du droit revisitées. Normes internes infraconstitutionnelles*, Vol. 2, Bruxelles: Université Saint-Louis, Louvain-la-Neuve: Anthémis, 2012, 347-381.

nouncement of a sentence bt a judge (less than 3%) or are the subject of an investigation by a investigating magistrate (just over 2%). Most offenses are processed and closed at the information stage by the prosecutor's office (95%). The relative stability in time of the recorded data is also noteworthy. Whatever the real crime, it is clear, from year to year, that the percentage of closed cases by the prosecutor's office is broadly similar.

As an actor of discretionary prosecution, the prosecutor's office now plays a central position within the judiciary[62]. Certainly, we know of its dependency vis-à-vis the police force, as the latter makes a series of choices, as to which offenses and informations they tranfer (or not) to the prosecutor's office[63]. However, once past this first filter, the prosecutor's office has not only at its disposal the ability to determine which offenses will be subject to research in its district, but also the power to choose the offenses it will prosecute or not, and the terms of such procedures[64].

Moreover, the majority of cases of offenses dealt with at the prosecutor's office stage are closed with an unconditional waiver by the public prosecutor (over 70%) (Table 3). Even if one "neutralizes" those cases dropped under technical motifs, on the grounds that they are not "triable", one sees that mediation and transaction only occupy a small place on the criminal spectrum, less than 1% and less than 2% of all prosecutable cases respectively (Table 6 and 7). However, transaction procedures and penal mediation clearly aspired to replace the unconditional waiver by the public prosecutor for two reasons: on the one hand, to enable a more credible response to the offense than the unconditional waiver by the public prosecutor (probationary)[65]; on the other hand, on

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[62] C. JANSSEN, J. VERVAELE, *Le ministère public et la politique de classement sans suite*, op. cit.; C. MINCKE, *Efficacité, efficience et légitimité démocratique du ministère public. Quand l'arbre cache la forêt*, Louvain: Leuven University Press, Samenleving Criminaliteit en Strafrechtspleging, 2002.

[63] P. PONSAERS, Y. CARTUYVELS, V. FRANCIS, C. GUILLAIN, J. VAN EX, W. VANHAVERBEKE, A. VERHAGE, M. VOGLIOTTI, *Le traitement policier: une autonomie relative? Etude empirique sur le traitement policier autonome*, Gent: Academia Press, Politique sicentifique fédérale, 2003.

[64] "From this perspective, we can consider that the public prosecutor plays a complementary role in creating criminal law by *de facto* defining the outline of criminalization, which may be the object of a penalty for the justiciable, and, conversely, by 'des-incriminating an act that will not be prosecuted" (C. GUILLAIN, "Les directives de politique criminelle comme source du droit", op. cit., 354).

[65] Bill organizing the penal mediation, *Documents Parlementaires*, Sénat, 1992-1993, 652/1, 4; see also the circulaire of 1 June 1995: "It is applicable in cases where a waiver, even with conditions, is not a sufficient response to the offense", and the circulaire of 12 Septem-

the grounds that these procedures provide for legal control, which offers more guarantees than hierarchical control in case of unconditional waiver by the public prosecutor, and which are described as inquisitorial or even arbitrary[66].

It is clear, in practice, that both penal mediation and transaction are very seldom used, despite their wide scope of application. Both devices ultimately have quite a marginal effect on the discretionary exercise of the prosecuting power, while the Council of Europe urges prosecutors to use community sanctions "as widely as possible "(R (99) 22). As the Federal Public Service Justice admits, "paid transactions and successful criminal mediations occur in very small proportion of all cases closed by prosecutors in correctional matters (offences). In 2008, these two types of closure decisions accounted for just 1% of all closed cases[67]. This particularly limited use of mediation or transaction leads one to conclude to the failed attempt to strengthen the legal framework governing the power of opportunity of prosecutors. It is also telling of the latter's capacity not to be locked into a legal framework considered too rigid or inappropriate, where measures such as unconditional and conditional waivers by the public prosecutor offer it more leeway. Thus, contrary to the transaction or penal mediation which extinguish the prosecution, the (always provisional) waiver allows the prosecutor's office to exercise greater control over a person over time, since it can theoretically go on until the extinction of public action. In addition, it imposes compliance with certain requirements unmarked by law and left to the discretion of the magistrate. The record may be reactivated on the basis of new information or non-observance of conditions. Besides, the unconditional waiver by the public prosecutor does not imply procedural constraints and can be organized in collaboration with the police, without having to resort to judicial assistants, as is the case in penal mediation[68].

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ber 1995: "to avoid the feeling of impunity caused by measures of unconditional waiver by the public prosecutor, in cases that require an organized social reaction, without having to resort to the pronouncement and execution of a short prison sentence".

[66] Bill on the extension of the scope of public action, for certain offenses, in exchange for payment of a sum of money, *Documents Parlementaires*, Chambre des Représentants, 1982-1983, 698/1, 3: "the possibility of recourse to the extinguishing of the prosecution by paying a sum of money, presents less risks that the right to drop a case, which is much more arbitrary. […] The right to take no action presents more risks because it can be sovereignly exercised by the public prosecutor and does not exclude the possibility of some outside interventions or pressures".

[67] *Justice en chiffres 2009*, Service Public Fédéral Justice, 2010, 35.

[68] C. Guillain, "Le parquet: entre dépendance institutionnelle et autonomie décisionnelle", in L. Van Campenhout, Y. Cartuyvels, F. Digneffe, D. Kaminski, P. Mary, A. Réa (eds.)*, Réponses à l'insécurité. Des discours aux pratiques*, op cit.

The few figures available to us as to the application of alternatives to pre-trial detention compels us to remain cautious in drawing any sort of conclusion. However, we note that if release, and release under conditions, or on bail are supposed to be given priority over detention, they represent less than 30% of cases, whereas the arrest warrant is issued in more than 70% of cases (Table 8). This could partly be explained by the fact that the instruction is often limited to sufficiently serious cases, which more frequently call for the issuance of an arrest warrant. Numerous studies have, however, highlighted the massive application of pre-trial detention despite stressing its exceptional nature, and the relative absence of alternatives to pre-trial detention[69]. Several factors may explain this phenomenon. First, it appears that the prosecutor's office has a significant influence on the decision of the investigating judge, so that the latter would only confirm a decision taken upstream of the penal system[70]. Thus, sorting of files is done by the prosecutor's office, the latter frequently sending files for instruction, even in the case of minor offenses. In addition, the prosecutor's office only rarely, if ever, requires some sort of means of release under conditions. Both examination of a case by the prosecutor's office with the intervention of an investigating magistrate and the use of pre-trial detention would therefore be more functions of the policy pursued by prosecutor's office than dictated by procedural constraints. Besides, the 24 hours during which the investigating judge must decide on the release of the suspect is often considered too short a span of time to favor a measure of freedom, the use of detention being perceived as a safer option in view of the relative guarantees that the litigant can provide. Finally, we have often stressed the ambiguity of the legal criteria to meet to decide on an arrest warrant or a release under conditions, especially regarding the risk of recurrence or threat to public safety[71]. An increased use of pre-trial detention testifies to the will of the penal system to keep the offender under control, tipping the balance in favor of a 'securitarian' rather than an alternative justice system. The recent appearance of electronic monitoring as an embodiment of pre-trial detention does not seem likely to reverse the trend. Several stud-

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[69] S. Snacken, A. Raes, K. De Buck, K. D'Haenens, P. Verhaegen, *Onderzoek naar de toepassing van de voorlopige hechtenis en de vrijheid onder voorwarden*, Vrije Universiteit Brussel en National Instituut voor Criminalistiek en Criminologie, 1996-1997.

[70] S. Snacken, A. Raes, S. Deltenre, C. Vanneste, P. Verhaegen, *Recherche qualitative sur l'application de la détention préventive et de la liberté sous conditions*, Vrije Universiteit Brussel en National Instituut voor Criminalistiek en Criminologie, 1998-1999, 34 and 233.

[71] C. Guillain, C. Scohier, "La gestion pénale d'une cohorte de dossiers stupéfiants. Les résultats disparates d'une justice dite alternative", op. cit.

ies have highlighted the factual obstacles to its implementation, such as the requirement to have a fixed address and reside there permanently. This emphasizes the static side of electronic monitoring, which often amounts to house arrest in the absence of any rehabilitation goal. This has as its paradoxical consequence that the legal regime of the electronic monitoring is stricter at PSR stage than at sentencing stage, or that of the execution of the sentence, while the accused is still presumed innocent. This reality also encourages the risk of widening the penal net[72]. Finally, studies point to the reluctance of judges to resort to electronic monitoring for certain disputes, such as domestic violence, or because of inadequate means of control[73].

4. *Alternative measures to the sentencing stage*

4.1. *Analytical review of existing devices at sentencing stage*

Two generations of alternatives to imprisonment can be distinguished here. On the one hand, we have the fine and the suspended sentence, a legacy of the twentieth century. On the other hand, the work penalty, the autonomous probation penalty and electronic monitoring, introduced in the 21st century. Furthermore, internment could also be considered as an alternative punishment to imprisonment for insane offenders.

4.1.1. *The fine*

A fine may be imposed as principal penalty in matters of misdeamenor (fine of 26 euros at least) and matters of minor offense ('affaires de police') (fine of 1 to 25 euros), but it constitutes also an accessory penalty in criminal, correctional and police matters, added to the main sentence. Only as a main penalty may a fine constitute an alternative to imprisonment[74]. The judge must consider factors invoked by the defendant in relation to his social position to determine the amount of the fine, and he may impose a fine inferior to the legal minimum if the offender

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[72] K. Beyens, M. Roosen, *Electronic Monitoring in Belgium*, op. cit., 110.

[73] E. Maes, B. Mine, C. De Man, R. Van Brakel, "Thinking about electronic monitoring in the context of pre-trial detention in Belgium: a solution to prison overcrowding?", *Eur. Jour. Prob.*, 4, 2, 2012, 10; E. Maes, B. Mine, "Some Reflections on the Possible Introduction of Electronic Monitoring as an Alternative to Pre-trial Detention in Belgium", in *THJ*, 52, 2, 2013, 154.

[74] The available numbers do not provide information about the status (main or accessory), of the fine.

submits a document that brings proof of his/her precarious financial situation. In case of non payment of a fine, the public prosecutor may initiate the execution of the subsidiary imprisonment sentence, which the judge must include in their sentence. In practice, the use of this alternative penalty no longer applies since a circulaire of 17 January 2005[75].

TABLE 9. *Numbers of fines*

2000	2001	2002	2003	2004	2005	2006
169632	182932	180264	190116	207352	242124	211695
2007	2008	2009	2010	2011	2012	2013
182537	18775	200745	193254	194454	216134	186234

Source: Website of the Service de la politique criminelle (*www.dsb-spc.be*).

Recourse to fine is characterized by an irregular evolution, which makes it difficult to draw any valid interpretation.

4.1.2. *Suspension*

Under the Act of 29 June 1964 on suspension, suspended sentence and probation, *suspension of the sentence* is the decision of the judge who, on the one hand, finds the facts charged to the defendant (guilty verdict) and, on the other hand, does not pronounce a sentence on the condition that, during a probationary period of one to five years determined by the judge, the suspension of the conviction is not revoked. This suspension may be simple (*suspension*) or assorted with conditions (*conditional suspension*). The suspension is pronounced by the sentencing Courts (with the exception of the Assize Court) or by the investigating Courts (juridictions d'instruction) and, facultatively, it comes with a prior social investigation and/or short information report (brief pre-report) on the behavior and environment of the accused. The objective of the measure is to reduce the inconvenience to imposition of a sentence, in terms of stigma and desocialization[76].

The suspension implies first and foremost a guilty verdict. It presupposes that the accused has not been subject to a prior conviction to a sentence of more than 6 months of imprisonment. It also presupposes

[75] D. DILLENBOURG, M. FERNANDEZ-BERTIER, "L'exécution effective des peines pécuniaires: un coup 'd'EPE' dans l'eau?", in *Actualités de droit pénal*, *Recyclage en droit*, Limal, Limal: Anthémis, 2015, 66.

[76] R. CHARLES, "La loi du 29 juin 1964 concernant la suspension, le sursis et la probation", in *Ann. dr. Louv.*, 1964, 4, 193-240.

that the offense is neither punishable by more than 20 years of imprisonment, nor likely to result *in concreto* in correctional imprisonment exceeding 5 years, or a more severe punishment. It requires the agreement of the accused. If the suspension is conditional, social guidance is provided, entrusted to a "justice assistant" under the supervision of a "probation commission", in charge of checking the probationary measures. Suspension may be revoked by the prosecutor's office 1) if the offender commits, during the probation period, a new offense leading to a conviction and main penalty of prison sentence of at least one month; 2) if the offender does not meet the conditions of probation, and that this breach appears serious enough in the eyes of the justice assistant and probation commission responsible for monitoring the measure. The revocation is never mandatory. Simple suspension can be replaced with a conditional suspension, which can also be subject to new conditions. If the suspension is revoked, the sentence for the facts giving rise to the suspension is combined with the sentence for the new offense committed during the probation period.

TABLE 10. *Numbers of (conditional) suspensions of the sentence*

Year	Number of simple suspensions		Number of conditional suspensions		Total number of suspensions
1995	*6041*	*(87,3%)*	*876*	*(12,6%)*	*6917*
2000	5945	(72%)	2314	(28%)	8259
2001	6656	(73%)	3244	(27%)	9909
2002	7063	(68,4%)	3259	(31,6%)	10322
2003	6699	(79,6%)	1716	(20,4%)	8415
2004	6940	(86,8%)	1055	(13,2%)	7995
2005	8307	(84,5%)	1519	(15,5%)	9826
2006	9146	(86%)	1488	(14%)	10634
2007	8137	(83,5%)	1610	(16,5%)	9747
2008	6116	(78,9%)	1633	(21,1%)	7749
2009	5789	(78,4%)	1591	(21,6%)	7380
2010	6400	(81,2%)	1478	(18,8%)	7878
2011	6466	(81,3%)	1489	(18,7%)	7955
2012	7971	(79,9%)	2001	(19,1%)	9972
2013	5739	(75,5%)	1858	(24,5%)	7597

Source: Website of the Service de la politique criminelle (*www.dsb-spc.be*).

After a rather promising start, conditional suspension was practically no longer applied in the early 1990s[77]. The system was revived in 1994, with the introduction of community service and training as conditions of probation. A sharp increase in simple suspensions was observed between 1995 and 2006 (+ 50%), followed by a downturn in the following years, and a further increase from 2010 on[78]. The increase in conditional suspensions is more spectacular, with a 200% jump between 1995 and 2002, mainly attributed to the activity of the police courts[79]. We then see a decline, which could be related to the entry into force in 2002 of the autonomous work penalty, and the concomitant suppression of community service as a probationary condition.

4.1.3. *Suspended sentence*

As stated in the Act of 29 June 1964, a *suspended sentence* allows the judge to decide that the sentence will not be executed in whole or in part if, during a probationary period (from one to five years)[80] determined by the judge, the suspended sentence is not revoked. To justify their decision, the judge may ask to a justice assistant a preliminary social investigation and/or a brief information report on the behavior and environment of the accused. The suspended sentence can be simple (*simple suspended sentence*) or with conditions (*probationary suspended sentence*). A suspended sentence may be pronounced by all trial courts and may cover all the main penalties (imprisonment and fine) unless they are pronounced as a subsidiary alternative, and with the exception of work penalties, autonomous probation, electronic monitoring and confiscation. The objective of the suspended sentence is to reduce the inconvenience of a sentencing, particularly short prison sentences (stigma and desocialization), but also to facilitate the amendment of the condemned.

The granting of a suspended sentence is subject to several conditions. On the one hand, a suspended sentence may be granted if the author has previously been sentenced to more than 3 years of imprisonment. However, since the Law of 5 February 2016, the simple suspended sentence may be ordered only against the author who has not previously incurred a higher sentence than 12 months of imprisonment. In other

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[77] V. Demaegt, R. Serlet, *Trente ans de probation. Bilan et perspectives*, Bruxelles: Ministère de la Justice, Service social d'exécution des décisions judiciaires, 1994.

[78] Because of delays in data encoding, the figures for 2013 are more than likely underestimated. The same goes for the other numbers mentioned for 2013.

[79] P. Mary, *Probation: histoire, normes, pratiques*, Bruxelles: Bruylant, 2015, 50.

[80] With regard to fines and prison sentences not exceeding six months, the duration of the suspended sentence cannot exceed three years (art. 8, § 1, al. 4).

cases, only the probationary suspended sentence may be granted, which seems to reflect an increased desire to control recidivists. On the other hand, while prison sentences pronounced by the judge can not be higher than 5 years imprisonment, a simple suspended sentence may be imposed on the convict. If it is probationary, granting it requires the consent of the convict to comply with probation. In which case, the person on probation is subject to a social guidance by a judicial assistant, under the supervision of the probation commission.

A suspended sentence can be revoked (optional revocation) by the judge if the convict commits a minor offense during the probationary period, or does not observe the conditions of probation. But, in case of simple suspended sentence, the judge may prefer to impose probationary conditions and, in case of a probationary suspended sentence, to modify

TABLE 11. *Number of convictions with (probationary) suspended sentence*

Year	Simple suspended sentence	Probationary suspended sentence	*Penalty without suspension* (peines sans sursis)[81]	Total
1995	*14583*	*1656*	*13584 (45,5%)*	*29827*
2000	12205 (45,8%)	2156 (8,1%)	12248 (46%)	26609
2001	12787 (45,3%)	2300 (8,1%)	13123 (46,5%)	28210
2002	12536 (45,5%)	2210 (8,0%)	12810 (46,5%)	27556
2003	11341 (42,8%)	2032 (7,6%)	13074 (49,4%)	26447
2004	10897 (41,4%)	1944 (7,3%)	13478 (51,2%)	26319
2005	10247 (39,7%)	1978 (7,6%)	13578 (52,6%)	25803
2006	9578 (38,1%)	1956 (7,7%)	13576 (54%)	25110
2007	9134 (36,8%)	2098 (8,4%)	13586 (54,7%)	24818
2008	8079 (34,1%)	2325 (9,8%)	13273 (56%)	23677
2009	7870 (32,8%)	2371 (9,9%)	13692 (57,2%)	23933
2010	8140 (32,6%)	2574 (10,3%)	14241 (57%)	24955
2011	8710 (32,8%)	2571 (9,6%)	15269 (57,5%)	26550
2012	9366 (33,9%)	2685 (9,7%)	15578 (56,4%)	27629
2013	8338 (31,4%)	2544 (9,5%)	15623 (58,9%)	26505

Source: Website of the Service de la politique criminelle (*www.dsb-spc.be*).

[81] This column is calculated by us.

the unmet probationary conditions. However, a revocation becomes mandatory in case of more serious offenses (punishable by a custodial sentence of more than 6 months without suspension) committed during the probation period. In case of revocation, the suspended sentence is enforceable and combined with the sentence for the new offense. However, a circulaire of 15 July 2015 recommends the automatic provisional release of the imprisoned convict, if the operative part of that prison sentence does not exceed one year. This release comes after a period which depends on the length of the enforced sentence. The provisional release becomes optional if the enforced part of the prison sentence is longer than one year, with additional specific conditions in the case of sex offenders.

Over the course of twenty years, the number of simple suspended sentences has decreased sharply (around 40%), even if this tendency seems to have taken a new turn since 2010. However, probationary suspended sentences – even if they are granted proportionally rarely – are experiencing an overall increase, which becomes continuous from 2005. The number of sentences without suspension has also been on the rise consistently, both in real terms as well as in percentage terms.

4.1.4. *Work penalty*

Introduced as an *autonomous* penalty in correctional and police matters in 2002, the *work penalty* consists of work done for free by the convict during his free time, for a public service, a non-profit association or a foundation. Its duration varies between 20 hours and 45 hours (police penalty), 46 hours and 300 hours (misdemeanor), but the total can reach up to 600 hours in case of recurrent offense[82].

The objective of this autonomous work penalty is to propose a rehabilitative sentence as an alternative to imprisonment, and aims to fight against prison overcrowding[83]. In order to avoid limiting work penalties to minor offenses and to counter the risk of *net-widening*[84], the legislator intended the work penalty to be in fact applicable to all offenses, except in cases of particularly serious offenses, which are listed by law, or, since the law of 5 February 2016, if the crime is punishable, *in abstracto*, with

[82] C. Guillain, "La peine de travail, peine autonome? Analyse de la loi du 17 avril 2002 instaurant la peine de travail comme peine autonome en matière correctionnelle et de police", op. cit., 643.

[83] K. Beyens, "The new generation of community penalties in Belgium. More is less…", op. cit., 17.

[84] K. Beyens, "De werkstraf als hedendaagse straf", in *Panopt.*, 2006, 4, 7-18.

a maximum sentence exceeding 20 years of imprisonment. Similarly, the existence of a criminal record is not a barrier to work penalty, a fact which underscores its quality as an autonomous penalty, and the will to extend its scope. Finally, if the work penalty is listed in the central criminal record, it is not listed on the criminal records issued to individuals and constitutes no basis for recidivism[85]. Besides, the law also mentions that if the consent of the person (in person or via their representative) were required, the judge could ask a brief information report or a social survey conducted by a judicial assistant to inform their decision. If they do not pronounce the work penalty, the judge must justify their choice.

Finally, the execution of the work penalty is subject to monitoring by a judicial assistant, under the supervision of the probation commission responsible for monitoring the work penalty. In case the work penalty is not completed (partly or in full), the prosecution may order the application of the alternative penalty of fine or imprisonment, taking into account the amount of the work penalty already executed.

TABLE 12. *Numbers of work penalties*

2000/2001 NAP	2002 1027	2003 5382	2004 7658	2005 9323	2006 10071	2007 9474
2008 9033	2009 8868	2010 9604	2011 8620	2012 9471	2013 8971	

Source: Website of the Service de la politique criminelle (*www.dsb-spc.be*).

Since its inception, the work penalty has enjoyed a spectacular increase before stabilizing itself. This "success story" can be explained, on the one hand, by the fact that work penalty, as a genuine 'penalty', is more popular with judges than other alternatives, deemed 'too soft', and which it is in competition with; on the other hand, the success can be accounted to the fact that work penalty has largely substituted itself to fines or short prison sentences that are not executed[86], thereby contributing to the classical phenomenon of net-widening[87] rather than fighting against prison overcrowding.

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[85] F. TULKENS, M. VAN DE KERCHOVE, Y. CARTUYVELS, C. GUILLAIN, *Introduction au droit pénal. Aspects juridiques et criminologiques*, op. cit., 594.

[86] Cour des Comptes, *Mesures de lutte contre la surpopulation carcérale. Rapport transmis à la Chambre des représentants*, Bruxelles, 2011, 67.

[87] S. COHEN, *Visions of social control*, Cambridge: Polity Press, 1985.

4.1.5. *Probation as an autonomous penalty*

Introduced by an Act of May 8, 2014 as principal punishment in correctional and police matters, and having entered into force on 1 July 2016, *probation as an autonomous penality* is the imposition of the conditions to be met by the convict during a probationary period set by the judge. This period may not be shorter than six months but cannot be longer to two years. As in the case of work penalty, probation as an independent sanction can in fact be applied to all offenses, with the exception of serious crimes and other deeds punishable *in abstracto* by a maximum sentence exceeding 20 years of imprisonment. Recidivism does not preclude probation penalty, and its pronouncement, which is not included in the criminal record issued to individuals, can not be considered a base for a recurrent offense. A subsidiary imprisonment penalty or a fine must be included in the court order. In this case, the judge does not have the option to request a summary report or a social survey toward the delivery of a sentence, this in order not to delay the procedure[88]. If the information and consent of the defendant (in person or through his/her representative) on the principle of punishment is required, the concrete content of the sentence is left to the probation commission. If a judge refuses to grant probation, they must give reasons for their decision.

The purpose of probation is threefold: to diversify the penalties in order to avoid the use of imprisonment, to contribute to the individualization of punishment to promote reintegration, and to fight against recidivism. It aims in particular those defendants who no longer have a right to suspended sentence because of their criminal record[89]. Its implementation is subject to judicial guidance exercised by a judicial assistant, under the supervision of the probation commission. This commission may suspend all or part of the actual content of the probation or adapt it to given circumstances. It can also, if necessary, extend once the probation period to a maximum of one year or, conversely, prematurely end said probation if the goal of the latter is met before the end of the appointed term. In case of total or partial breach of probation, the prosecutor may decide to execute the sentence of imprisonment or fine alternative, while taking into account the probationary sentence already executed.

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[88] M. Giacometti, C. Guillain, "Les peines de surveillance électronique et de probation autonome, nouvelles peines alternatives à l'emprisonnement?", in M.-A. Beernaert (ed.), *Actualités de droit pénal*, Limal: Anthemis, 2015, 128.

[89] M. Giacometti, C. Guillain, "Les peines de surveillance électronique et de probation autonome, nouvelles peines alternatives à l'emprisonnement?", op. cit., 122-123.

4.1.6. *Electronic monitoring as an autonomous penalty*

Introduced by an Act of 7 February 2014 as autonomous penalty in correctional matters, EM as an autonomous penalty, *has been applicable since 1 July 2016* and consists in imposing on the accused permanent stay under a specific address, except for authorized movements or leaves of absences. The duration of this penalty is equal to the duration of the prison sentence that the judge pronounced. The duration of this penalty may not be inferior to one month, nor exceed one year. It is meant to replace imprisonment when the deed is liable to be punished with imprisonment of up to one year (*in concreto*). In practice, it can therefore apply to criminal offenses punishable in abstracto by a prison sentences of up to twenty years, but does not apply to those crimes that call for work penalty and probation sentences. Recurrence does not preclude its application. The pronouncement of the sentence, while indicated in the criminal record, is not included in the criminal records issued to individuals, and may not constitute a basis for the status of recidivist. A subsidiary prison sentence is included in the conviction, and, in order to calculate the term of the sentence, one day of electronic monitoring is considered equivalent to one day of imprisonment. In preparing their sentence, the judge can rely on a social investigation and/or a brief information report entrusted to the "competent authority for the organization and control of electronic monitoring". The accused must be informed of the scope of the penalty and must give his/her consent, in person or through their counsel. If the judge refuses to issue an EM as an autonomous penalty, he must give reasons for this decision.

EM as an autonomous penalty has several goals: to diversify penalties, in order to avoid the negative effects of prison, and curb prison overcrowding; to fight against recidivism, but also to put an end to the non-execution of prison sentence terms between six months and one year[90]. This reflects a significant change in philosophy. A few years earlier, the introduction of electronic monitoring as an autonomous penalty had been ruled out, because of the risk of net widening (Commission on the Sentence Implementation Courts, 2003, 53).

When EM as an autonomous penalty is pronounced by the judge, the detailed modalities of its implementation are set by an official of the relevant authority for electronic monitoring, and controlled by this service as well as the prosecutor's office. After serving a third of his/her term, the convict may request a suspension of the sentence, which

[90] Draft law of 17 January 2011, instituating electronic monitoring as autonomous penalty, *Documents Parlementaires*, Chambre des Représentants, 2010-2011, 53-1042/1, 4.

amounts to a form of provisional release or parole. If EM as an autonomous penalty is not served in full or in part in accordance with established procedures, the prosecution may decide to repeal it and proceed with the subsidiary imprisonment deducting, from the period of sentence, the number of days spent under electronic monitoring[91].

4.1.7. *Internment for "insane offenders"*

Section 71 of the Penal Code, combined with the Social Protection Act of April 9, 1930, amended in 1964, stipulates that the perpetrator of a crime or misdemeanor, who is in a *state of dementia* or in a *serious state of mental imbalance* or *mental impairment*, rendering them incapable of controlling their actions, escapes criminal repression. However, if this person constitutes a social danger, the investigating or judgment court may subject the offender to a measure of internment for an indefinite period. The internment, considered as a measure of care and safety, is an alternative to custodial sentences. Although they are the author of an offense punishable by imprisonment or confinement, the "offender", because of his/her criminal irresponsibility, enter an alternative system of "social defence", under the supervision of a social defence commission ('Commission de défense sociale', CDS). In principle, internment takes place in a specialized institution. In practice, in a system dominated by the question of the risk of recurrence, the shortage of space and the reluctance of healthcare institutions, such internment still overwhelmingly takes place in the psychiatric wards of prisons[92]. This fact did earn Belgium several convictions by the European Court of Human Rights in 2014 and 2015, for breaches of Articles 3 and 5 of the ECHR[93].

A law of 21 April 2007 on the internment of persons with mental disorder was meant to substantially modify the system of internment. This law reflected a justicialization of social defense, with the replacement of the Social Defence Committee by the Sentence Implementation Court as a monitoring actor of the internment measure. This law was replaced before it came into force by an Act of 5 May 2014 on the internment of people, implemented on 1 october 2016. Until that moment, the regime of the 1930 Act was the applicable act.

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[91] O. Nederlandt, "La surveillance électronique comme peine autonome et comme modalité d'exécution des peines. Présentation et commentaire de la loi du 7 février 2014", *Jour. des Trib.*, 2014, 6568, 441-446.

[92] Y. Cartuyvels, G. Cliquennois, "The punishment of Mentally Ill Offenders in Belgium: Care as legitimacy for Control", op. cit.

[93] G. Cliquenois, Y. Cartuyvels, B. Champetier, "Le contrôle européen et national sur les prisons belges", in *Dév. et Soc.*, 2015, 4, 491-519.

TABLE 13. *Internment figures (partial data)*

2007	2008	2009	2010	2011	2012	2013	2014
969,4 10,1%	1013,3 10,2%	1061,0 10,4%	1095,7 10,4%	1091,4 9,9%	1132,7 10%	1138,7 9,8%	1087,7 9,4%

Source: Direction Générale des Établissements penitentiaries.

"The total number of internees in Belgium is not the subject of a systematic count and is therefore difficult to assess"[94]. The figures above, available from 2007 on, take into account the internees placed in psychiatric annexes of prisons and Social Defense Facilities (Etablissements de Défense Sociale, EDS) under the Ministry of Justice. These figures underline the relative stability in the number of prisons internees, as well as their percentage relative to the overall inmate population (about 10%). But other figures show an increase in the number of internees of over 80%, relatively speaking, between 2002 and 2013, a period over the course of which the number of convicts and defendants saw their population grow by "only" 50% and 15% (Justice en chiffres, 2013). These figures also greatly understate the reality of internment. To these numbers, one must add those of internees housed in two institutions of Social Defence under the governance of the Ministry of Health (Mons, 32 beds, and Tournai, 344 beds), to which similar establishments in the Flemish Region were recently added. In addition, many 'low risk' internees are often under a regime of conditional release, in secure wings of general psychiatric hospitals (mainly in the Dutch-speaking region of the country). In overall numbers, a research report mentioned 3306 internees in 2004[95]; another inquiry evoked an approximate number of 4000 internees in 2009[96], and other more recent sources report a total population of 3,800 internees in 2013[97].

4.2. *Global evaluation of the existing devices at sentencing stage*

4.2.1. *Conformity to European standards? Yes, but…*

Overall, European standards are generally met by alternative measures and penalties in Belgium, whether to diversify the range of sanc-

[94] Cour des Comptes, *Mesures de lutte contre la surpopulation carcérale. Rapport transmis à la Chambre des représentants*, op. cit., 121.

[95] P. COSIJNS, *Werkgroep Forensisch Psychiatrisch Zorgcircuit, Syntheseverslag*, Brussel: Ministère de la Justice, 2005.

[96] Annales, Sénat, 23 february 2001, COM 5-43.

[97] Y. CARTUYVELS, G. CLIQUENNOIS, "The punishment of Mentally Ill Offenders in Belgium: Care as legitimacy for Control", op. cit.

tions in the community, to give them an objective of social rehabilitation and fight against prison overcrowding, or to respect, in their implementation, various fundamental principles of criminal law of human rights (legality, proportionality, information and consent of the convict, individualization, non-automaticity of subsidiary punishment, procedural guarantees). This choice responds to an explicit wish of the political authorities, something stressed by the Minister of Justice S. De Clerk in 2009 when he spoke of the "great challenge" to the practical implementation of European recommendations on "probation rules"[98].

Observance of European 'soft law' in this area is far from being absolute and several shortcomings can be highlighted.

First, the *principle of legality* is not always clearly observed. Thus, while the content of the work penalty or autonomous probation penalty is defined by the judge, it is actually set by the probation commission and the judicial assistant, at best in collaboration with the probationer as a model of consensual justice. Regarding probation as an independent sanction, this delegation was denounced as illegitimate or problematic under the principle of legality, both by the Council of State and the High Council of Justice[99].

Secondly, the *principle of proportionality* is not always planned in case of revocation and application of a subsidiary prison sentence. Thus, in the case of work penalties, autonomous probation and electronic monitoring, it is up to the prosecutor (ministère public) to decide, in a discretionary manner, of the application of the subsidiary prison sentence. And yet, with regards to work penalty and probation as an independent penalty, the law provides no method of calculation to derive the proportional share of the sentence already served from the duration of the subsidiary sentence[100]. The risk here being, as already stressed in the case of work penalty, that the alternative/subsidiary penalty be applied disproportionately; or that it be applied in full[101]; or that its duration be longer than the prison sentence that would have been imposed directly as a primary penalty[102]; or that it would not be enforced because of its short duration.

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[98] S. De Clerck, "Allocution", in *10 ans des Maisons de Justice. Bilan & Perspectives. Actes du colloque des 2&3 décembre 2009*, Bruxelles, 2012.

[99] M. Giacometti and C. Guillain, "Les peines de surveillance électronique et de probation autonome, nouvelles peines alternatives à l'emprisonnement?", op. cit., 134.

[100] F. Kuty, "La peine de probation autonome", in *Rev. dr. pén. crim.*, 12, 2014, 1001.

[101] P. Reynaert, "Pourquoi tant de peines? La peine de travail ou les metastases de la pénalité alternative", in *L'exécution des peines/ De strafuitvoering*, Bruxelles: La Charte, 2006, 377.

[102] K. Beyens, "De werkstraf als hedendaagse straf", op. cit., 10.

Thirdly, *information*, *informed consent* and *will to cooperate* by the probationer, while mentioned by the legal texts, can also be problematic in practice. First, the probationer may be represented at the hearing by his/her lawyer, and the judge's decision thus be taken without any real contact having occurred with the probationer (to-be). Then, the information given at the hearing by the judge on the contents of penalties or measures may be purely formal, given the overload of the courts and the speed with which cases are handled in court[103], but also given the accused's lack of understanding of the labyrinth that is the judicial system[104]. The consent of the probationer is thereby potentially biased and this makes one regret the decline in the use of brief pre-report or social inquiry prior to the court decision, despite the fact that these are considered the relevant instruments of *individualized* punishment by the Council of Europe. Optional and rarely used by judges since the inception of probation, the social survey was made mandatory in 1994 for probational community service until 2002. Made optional only for the work penalty and EM as an autonomous penalty, because of reasons of speed and cost, these preliminary reports are no longer considered for probation as an independent sanction. And yet, while they are intended to enlighten the judge[105], these reports also allow the judicial assistant to inform the prospective probationer of the content and effects of probation, and thus to prepare his/her informed consent to the sanction[106].

Fourthly, the application of the subsidiary penalty for non compliance with the conditions of probation or non-performance, partial or total, of work penalty, of probation or electronic monitoring, is still sometimes *systematic* or *automatic* when it should always be optional. On the one hand, the addition of these main penalties to imprisonment as subsidiary punishment may, in case the case is returned to the prosecutor's office due to "serious problems"[107], favor the systematic execution of the subsidiary prison penalty, lest it discredit the main sentence[108]. On the other hand, in case of probationary suspended sentence, revocation remains mandatory if an offense committed during the probation period is punishable by a prison sentence of more than six months without sus-

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[103] K. Beyens, "De werkstraf als hedendaagse straf", op. cit., 11.

[104] P. Mary, *Probation: histoire, normes, pratiques*, op. cit., 99.

[105] K. Beyens, V. Scheirs, "Encounters of a different kind. Social enquiry and sentencing in Belgium", in *Pun. & Soc.*, 2010, 309-328.

[106] P. Mary, *Probation: histoire, normes, pratiques*, op. cit., 63.

[107] H. Luypaert, K. Beyens, C. Françoise, D. Kaminski, *Werken en leren als straf. Le travail et la formation comme peines*, op. cit., 121.

[108] F. Kuty, "La peine de probation autonome", op. cit., 1001.

pension. In other words, in this case, the main sentence, which has the practical status of subsidiary sentence, is automatically implemented (which is not the case if the offense at the source of the revocation is less serious).

Finally, the procedural guarantees provided by the European recommendations raise questions on two levels. First, one may question the role granted to the prosecutor's office in case of possible revocation of a community measure or sentence. On the one hand, the mission could have been entrusted to the Sentence Implementation Court, a judicial body better equipped to deliver a possible alternative and individualized punishment taking into account the original offense, the situation of the probationer and grounds for revoking the main sentence[109]. On the other hand, there is no appeal for the decision to impose the alternative sentence. Finally, it is emphasized in Rec (99) 22 that judges specifically justify their decision to impose a prison sentence. In Belgium, another system exists, which refers to the principle of negative selection: the judge must motivate their decision to go with imprisonment only if they do not choose work penalty or autonomous probation, which are less severe sentences.

4.2.2. *Rehabilitation and treatment, imprisonment as* ultima ratio *and prison overcrowding: increase or decrease?*

Two essential tenets of the use of alternative sanctions, present in the European soft law, have yet to be examined. The first one has to do with the goal of *treatment and social rehabilitation*. Claimed in 1964 by the Act on suspension, suspended sentence and probation, this goal of treatment must of course, from the outset, deal with the law's concern for control, highlighting the difficulties of social work in court. But the emergence of a "new generation" of alternative penalties[110] has clearly expressed, since the 2000s, a shift of priorities towards risk control and punishment. The discursive change (one now speaks of autonomous *penalty*) and the evolution in objectives (the fight against impunity, preventing recidivism through effective control, the fight against prison overcrowding) attest to this. In practice, the decline in pre-reports but also the changes in guidance of probationers also underline this trend. In 1964, the Act on suspension, suspended sentence and probation introduced the principle of a "social guidance", focused on helping and treating the probationer. In 2002, the Act on work penalty mentioned "mon-

[109] K. Beyens, "De werkstraf als hedendaagse straf", op. cit., 11.
[110] K. Beyens, "De werkstraf als hedendaagse straf", op. cit., 16.

itoring" by a judicial assistant and "control" by the probation commission. In 2006, the Act on suspension, suspended sentence and probation stated that social guidance "aims at avoiding recidivism" by "tracking and monitoring the compliance with the conditions". In 2014, the Autonomous Probation Act evoked a "judicial guidance" and the law on electronic monitoring the "control", the "monitoring" or the "guidance" of the condemned by the "department officials in charge of electronic monitoring" and not any more by judicial assistants. This semantic evolution, coupled with managerial evolution of social work in court, underlines a decline in social welfare ideals and treatment goals, in favor of a control and risk reduction logic[111]. A similar tension between care and control is noticeable in the field of insane offenders internment. On this note, Belgium was the object of repeated condemnations by the ECHR in 2014 and 2015, due to the lack of care given to the internees in psychiatric wards of prisons. The recent construction of "(highly secure) forensic psychiatry centers" is a response to this recurrent problem in an area marked increasinbly by the categorizing of the inmates based on the level of risk they represent (*high*, *medium*, *low risk*)[112].

The second founding tenet concerns a systemic objective of the use of alternatives to detention. One must contribute, through the multiplication of alternative sanctions and penalties, to making deprivation of liberty a *last resort measure* (*ultima ratio*). In this regard, the current development does not inspire optimism. While the number of alternative measures and sentences has increased in recent years, with some success for some of them, such as work penalty, this phenomenon goes hand in hand with a continuous increase of the daily population in custody, although a slight decrease has been noticeable since 2014 (see above). In other words, it is likely that alternative sanctions in effect (suspension, suspended sentence, work penalty) clearly reflect a *net widening* phenomenon: sometimes they encroach upon one another, sometimes they are preferred by judges, as in the case of work penalty, to replace short prison sentences that would likely not be executed anyway.

Three factors may explain, in part, the phenomenon of net-widening that could also have bearing on the new probation as independent sanction (probably less so in the case of EM as an autonomous penalty). First, the discourse on the deprivation of liberty as a last resort competes in Belgium with the "impunity narrative", which has of late gained legit-

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111 P. Mary, *Probation: histoire, normes, pratiques*, op. cit., 84-96.

112 Y. Cartuyvels, G. Cliquennois, "The punishment of Mentally Ill Offenders in Belgium: Care as legitimacy for Control", op. cit.

imacy among both politicians and legal representatives[113]. Secondly, autonomous alternative punishments did not impose themselves as the go-to reference penalty for certain categories of offense. They are therefore not formally contributing to exclude imprisonment for some offenses. Thirdly, alternative sentencing, although autonomous, is related to imprisonment as a subsidiary sentence. However, the weak preparation of probationary sanctions and changes to guidance increases the chance of failure and thereby encourage all the more the application of the subsidiary prison sentence[114]. In other words, we can conclude here, as does the Auditors Copurt ("Cour des Comptes") with regard to the work penalty, that alternative sentences, in their current configuration, can undoubtedly contribute to "a humane penal policy" but have "little potential as an effective instrument to fight against prison overcrowding"[115].

5. *Alternative measures at the post-sentencing stage*

5.1. *Analytical state of the art of existing devices at post-sentencing stage*

Once governed by ministerial circular, the main measures related to the execution of the prison sentence are now regulated by a law of 17 May 2006 on the external legal status of inmates. If this law formally improves the judicial security of inmates, it is however *not yet fully in effect*. This should only be the case as of January 1 2017[116], but in the meantime, the status of those sentenced to three years or less is still partly regulated by ministérial circular.

The law of 17 May 2006 reflects a justicialization of the implemntation of the sentence. This law entrusts to two authorities – the Sentence Implementation Judge (Juge de l'application des peines, JAP) for sentences of three years or less, and the Sentence Implementation Court (Tribunal d'Application des Peines, TAP) for sentences of more than three years – the competence hitherto entrusted to the Minister of Justice, namely to grant most of the implementing measures for the deprivation of liberty. If JAP is a professional judge linked to the trial court, the TAP is a body composed of three judges: one professional judge, and two 'lay-judges', one specializing in sentence enforcement and the other

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[113] K. Beyens, M. Roosen, "Electronic monitoring in Belgium: a penological analysis of current and future orientations", in *Eur. Journ. Prob.*, 2013, 3, 5, 56-70.

[114] P. Mary, *Probation: histoire, normes, pratiques*, op. cit., 141.

[115] Cour des Comptes, *Mesures de lutte contre la surpopulation carcérale. Rapport transmis à la Chambre des représentants*, op. cit., 74.

[116] Caution is required here, because the legislature has already pushed back this date several times.

in social reintegration. These bodies *are as of 1 october 2016*, the relevant authority to grant the implementing rules of internment.

A wide array of measures prevents the deprivation of liberty from being executed in prison. It is possible to classify these measures, depending on whether they constitute a suspension ("temporary" non-execution) of the deprivation of freedom outside the prison walls (S); a mode of execution of the deprivation of freedom outside the prison walls (M); a reduction in the execution of deprivation of liberty (R) and a "definitive" non-execution of deprivation of liberty (I). It is also possible to distinguish between discretionary measures taken on the basis of the assessment of an individual dossier (D), and quasi-automatic measures (A).

TABLE 14. *Overview of measures at post-sentencing stage*

	Convict ≤ 3 years	Convict > 3 years	Convict put at the disposal of the TAP	Internee[117]	Decision maker (and type of decision)	Legal basis
Release in view of removal (libération en vue d'un éloignement) (M)	X (foreigners)	X (foreigners)	X (foreigners)		MJ (D)	Law 17.5.06
Short prison leave (M) (permission de sortie) Permission de sortie (M)	X	X	X		MJ (D) TAP (D)	Law 17.5.06 Law 17.5.06
Furlough (M) (congé)	X	X	X		MJ (D) TAP (D)	Law 17.5.06 Law 17.5.06
Provisional release for medical reasons (M) (libération provisoire pour raiosns médicales)	X	X	X		JAP (D)	Law 17.5.06
Interruption of the sentence execution (S)	X	X	X		MJ (D)	Law 17.5.06
Electronic monitoring (M)	X	X	X		DIR (A) ou MJ (D) TAP (D)	Circulaire 17.7.13 Law 17.5.06

Continues

[117] Once the Act of 5 May 2014 on the internment of persons (1 october 2016), the internees may apply for leave permissions, furlough, semi-liberty, an electronic monitoring and early release for foreign prisoners with a view to their expulsion.

Follows: TABLE 14. *Overview of measures at post-sentencing stage*

	Convict ≤ 3 years	Convict > 3 years	Convict put at the disposal of the TAP	Internee	Decision maker (and type of decision)	Legal basis
Provisional release (S) (libération provisoire)	X		X		DIR (A ou D) ou MJ (D)	Circulaire 15.7.15
Parole (M)		X			TAP (D)	Law 17.5.06
Provisional release (for foreign prisoners with a view to their expulsion) (M)		X (foreigners)	X (foreigners)		TAP (D)	Law 17.5.06
Conditional release (for individual placed at the TAP's disposal) (M)			X		TAP (D)	Law 17.5.06
Probationary release for internees (M) (Libération à l'essai)				X	CDS (D)	Law 9.4.30
Pardon (R ou I)	X	X	X		King (A ou D)	Const.
Amnisty (I)	X	X	X		PARL (A)	No written legal basis
Prescription of the penalty (I)	X	X	X		AUTO (A)	Penal Code

Abbreviations: A: automatic; AUTO: automatically; CDS: Commission de Défense (Social Defense Committee); D: discretionary; DIR: Directeur de prison (prison director); JAP: Sentence Implementation udge; MJ: Minister of Justice; PARL: Parliament; TAP: Sentence Implementation Court.

The main measures will be presented by taking into account the impact (from the lowest to highest) they have on incarceration. This criterion corresponds for the most part to the temporal criterion of eligibility for these various measures.

Release in view of *removal or transfer* is a recent measure (2012), which ensures that the administrative detention of foreigners subject to deportation take place in closed centers of the Foreigners' office[118]. This measure appears to facilitate removals of prisoners, which have increased from 378 in 2012 to 625 in 2013[119].

[118] *Documents Parlementaires*, Sénat, 2011-2012, 5-1364/3, 4.
[119] Office des étrangers du SPF Intérieur, *Rapport d'activités*, 2013, 15.

The *short prison leave permission* is the authorization given to the convict to leave the prison for a fixed duration, which may not exceed sixteen hours. This measure is occasionally granted, to respond to social, family or medical needs, and periodically, so as to prepare the inmate for social reintegration. In the latter case, it can only be granted in the two years preceding the date of eligibility for parole (see below).

TABLE 15. *Requests and granting of prison leave permission*

	2000/2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Request	ND	6122	ND	5484	4963	ND	ND	5101	5027	ND
Granting	ND	3760	ND	3019	2617	ND	ND	2614	2799	ND
% Granting[120]	ND	61,4	ND	55,1	52,7	ND	ND	51,2	55,7	ND

Source: Direction générale des Établissements pénitentiaires du SPF Justice, 2008, 44; 2010, 151 et 154; 2011, 169 et 172; 2014, 76; 2015, 56.

The number of jail leaves granted and the grant rate decrease from 2007 to 2013.

TABLE 16. *Success in the case of short leave permissions and furlough*

	2000/2008	2009	2010	2011	2012	2013	2014	2015
Granting	ND	3928	3451	ND	ND	3586	ND	ND
Failure	ND	595	341	ND	ND	274	ND	ND
% Failure	ND	15,1	9,9	ND	ND	7,6	ND	ND

Source: Direction générale des Établissements pénitentiaires du SPF Justice, 2010, 151, 154 et 155; 2011, 169, 172 et 173; 2014, 76.

The "failure" rate, which unfortunately does not distinguish short prison leave from furlough, seems encouraging. High refusal rates may lead to two interpretations: either these high refusal rates are regrettable considering the low failure rate (argument of an overly cautious security system) or the failure rate is low because the refusal rates are high (argument of reliable prediction).

A *prison leave* is the authorization given to the convict to leave the prison for a term of up to three times thirty-six hours per trimester. This measure is meant to help maintain family bonds and social contacts, and to prepare the inmate for reintegration. It can only be granted in the

[120] This line is calculated by us.

year preceding the date of eligibility for parole. Except in the case of an incident, prison leave is renewed automatically[121].

TABLE 17. *Requests and grantings of prison leaves*

	2000/2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Request	ND	6137	ND	3688	3641	ND	ND	3815	3077	ND
Granting	ND	2093	ND	909	834	ND	ND	972	1208	ND
% Granting[122]	ND	34,1	ND	24,6	22,9	ND	ND	25,5	39,3	ND

Source: Direction générale des Établissements pénitentiaires du SPF Justice, 2008, 44; 2010, 151 et 154; 2011, 169 et 172; 2014, 76; 2015, 56.

The number and rate of granted leaves stabilize over time.

Semi-liberty allows offenders to leave, on a regular basis, the penitentiary for a fixed term of maximum twelve hours per day[123]. The convict therefore leaves prison during the day and spends the night in jail. This measure is granted to allow the convict to be able to attend to professional, family or educational interests. It can only be granted six months prior to the date of eligibility for parole. Semi-liberty (for sentences of three years or less) is used very seldom (1% of convicts serve their sentence under this modality). Semi-liberty faces competition from electronic monitoring.

Electronic monitoring (EM) allows the condemned to serve all or part of his/her prison sentence outside of prison, following a predetermined execution plan, compliance with which is monitored through electronic means. Electronic monitoring should help "optimally promote reintegration" and "pursue the objectives of limiting the harmful effects of detention and compensation for victims"[124]. More recently, EM has been presented as a tool to fight against impunity by allowing some "effective and rapid execution of […] short prison terms, [which] is a necessity in order to restore credibility to the legal system". EM should "become the standard for penalty execution […] for those convicted to sentences of up to three years"[125]. It can only be granted (for those sen-

[121] This line is calculated by us.

[122] This line is calculated by us.

[123] A statutory amendment, not yet in force, states that the duration spent outside the institution may be of no more than 16 hours (*Documents Parlementaires*, Chambre des Représentants, 2015-2016, 54-1418/17).

[124] *Documents Parlementaires*, Sénat, 2004-2005, 3-1128/1, 21, 45 and 46.

[125] This policy recommendation has not yet been reached, and there is already shortage of electronic bracelets (C. HOFFMANN, O. NEDERLANDT, "L'exécution des peines à l'heure de

TABLE 18. *Convicts* under *electronic monitoring*

	2000	2001	2002	2003	2004	2005	2006	2007
Number	NAD	22	167	286	278	277	337	523
%[126]	NAD	0,5	3,6	5,6	5,6	5,4	6,2	8,8

	2008	2009	2010	2011	2012	2013	2014[127]	2015
Number	599	827	933	983	1009	1338	1783	ND
%	10,3	13,2	14,3	14,3	13,7	16,6	20,8	ND

Source: SPF Justice, 2013, 46; Direction générale des Établissements pénitentiaires du SPF Justice, 2008, 130; 2009, 160; 2010, 145; 2011, 163; 2012, 193; 2013, 107; 2014, 71; 2015, 51.

tenced to more than three years of imprisonment) six months from the date of eligibility for parole.

These figures reflect the political intentions of the various justice ministers, to put forward EM for the past ten years. Politicians seem attracted by the "technological" dimension of this device, allegedly a guarantee of its credibility as a control device.

TABLE 19. *Success of electronic monitoring*

Year	Mission accomplished		Mission non executable/ not carried out		Interrupted mandate/ revocation		Death		TOTAL
	N	%	N	%	N	%	N	%	N
2010[128]	2580	78,7	210	6,4	477	14,6	10	0,3	3277
2011	2801	80,5	183	5,3	486	14	11	0,3	3481
2012	2622	74	320	9	601	17	7	0	3550
2013	2581	73	285	8	656	19	8	0	3530
2014[129]	3494	74	305	6	935	20	11	0	4745

Source: Direction générale des Maisons de Justice du SPF Justice, 2011, 256; 2012, 251; 2013, 100; 2014, 111; Administration générale des Maisons de Justice, 2015, 54.

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la traçabilité", in A. JACOBS, A. MASSET (eds.), *Actualités de droit pénal et de procédure pénale*, Bruxelles: Larcier, 2014, 302).

[126] This calculation can be meaningful in that the convicts serving their custodial sentence through electronic monitoring are administratively attached to a prison; they can therefore be considered part of the prison population. This line is calculated by us.

[127] The 2014 figures are not easily comparable with previous years, since electronic monitoring also concerns the defendants (see above).

[128] For the year 2010, the percentages have been calculated by us.

[129] The 2014 figures are not easily comparable with previous years, since electronic monitoring also concerns the defendants (see above).

The reasons for the closure of the mandates of a judicial assistant (in charge of monitoring) can be used as an indicator of the failure rate of EM (for those sentenced to terms of more than eight months only, since other convicts are not controlled by a judicial assistant). The success rate, of over 70%, is encouraging.

Parole allows the offender to serve his/her sentence outside prison, subject to the conditions imposed during an appointed probationary period. Parole "ensures better protection of society because [it] is based on the rehabilitation of the convict, and because measures can be taken to reduce recidivism through the guidance and supervision exercised on the parolee"[130]. Parole can be granted once one third of a sentence has been served, for "primary" convicts, and once two thirds of the sentence have been served, for recidivists[131]. This measure applies only to those sentenced to more than three years of imprisonment. The duration of the probationary period is equal to the length of the custodial sentence that

TABLE 20. *Granting of parole and percentage relative to release at the end of the penalty*

	2000[132]	2001	2002	2003	2004	2005	2006	2007
Number	678	800	662	670	704	645	598	754
%[133]	76,1	76,7	64,9	65	72	61	58,6	64,2

	2008	2009	2010	2011	2012	2013	2014	2015
Number	742	711	688	781	713	666	717	ND
%	61,8	56,7	51,9	55,7	50,1	46,7	47,5	ND

Source: S. DELTENRE, *Des commissions de libération conditionnelle aux tribunaux d'application des peines: analyse de l'impact des libérations conditionnelles et des libérations provisoires en vue d'éloignement sur la population pénitentiaire*, Rapport non publié, 2008; Direction générale des Établissements pénitentiaires du SPF Justice, 2000, 112; 2008, 135 et 136; 2009, 163 et 164; 2010, 147 et 148; 2011, 165 et 166; 2012, 195 et 196; 2013, 109 et 110; 2014, 73 et 74; 2015, 53 et 54.

[130] *Documents Parlementaires*, Sénat, 2004-2005, 3-1128/1, 22.

[131] Specific rules, which were tightened in 2013, concern those sentenced to a minimum of 30 years in prison.

[132] Figures for 2000 to 2006 are from S. DELTENRE, *Des commissions de libération conditionnelle aux tribunaux d'application des peines: analyse de l'impact des libérations conditionnelles et des libérations provisoires en vue d'éloignement sur la population pénitentiaire*, Rapport non publié, 2008. These figures and those of future years should be compared with caution. Indeed, Deltenre's figures only concern custodial sentences of more than three years, while the figures for later years relate to all convicts.

[133] This line is calculated by us.

the offender must still undergo on the day when the decision relative to parole has become enforceable. However, the duration of the probationary period may not be of less than two years.

Between 2000 and 2014, the numbers of paroles granted are stationary, while the population of convicts is clearly increasing. The proportion of parole compared with *regular penalty releases* steadily decreases.

TABLE 21. *Success rate of parole*

Year	Mission accomplished		Mission non executable/ not carried out		Interrupted mandate/ revocation		Death		TOTAL
	N	%	N	%	N	%	N	%	N
2010[134]	388	54,4	9	1,3	302	42,3	14	2	713
2011	406	56,1	9	1,2	295	40,7	14	1,9	724
2012	389	53	12	2	312	43	16	2	729
2013	458	60	6	1	289	38	15	2	768
2014	422	62	8	1	240	35	10	1	680

Source: Direction générale des Maisons de Justice du SPF Justice, 2011, 256; 2012, 251; 2013, 100; 2014, 111; Administration générale des Maisons de Justice, 2015, 54.

The reasons behind the closing down of the mandates of judicial assistants can be used as an indicator of the parole failure rate. Again, with a success rate of over 60%, the results are encouraging.

Provisional release (for foreign prisoners with a view to their expulsion) is a measure destined to foreign convicts who have no right to stay in Belgium. Eligibility conditions are very similar to those of parole. In a concern to "not discriminate", the 2006 lawmaker (législateur)[135] gave good results, as the release rate of these foreign prisoners were similar to the rate of parole[136]. However, the situation could be complicated since the Law of 5 February 2016 prohibits, to those convicted PS, CP, semi-liberty, the SE and parole.

Probationary release is available to internees. It may be granted when the mental state of the internee has sufficiently improved and his/her conditions of social rehabilitation are met (Social Protection Act

[134] For the year 2010, the percentages have been calculated by us.

[135] *Documents Parlementaires*, Sénat, 2004-2005, 3-1128/1, 61.

[136] S. DELTENRE, *Des commissions de libération conditionnelle aux tribunaux d'application des peines: analyse de l'impact des libérations conditionnelles et des libérations provisoires en vue d'éloignement sur la population pénitentiaire*, op. cit., 45.

of 9 April 1930). In 2004, out of internees 3306, 1999 (60.5%) were released as part of a socio-legal experiment[137].

Provisional release is the main measure allowing for the early release of those sentenced to terms of imprisonment of three years or less[138]. The primary objective of provisional release is to fight against prison overcrowding. Most recently, it was presented as allowing "more energetic enforcement of sentences" and as fighting against a certain type of impunity (*circulaire* of 15 July 2015). Depending on the circumstances, this measure, granted by the Director or Minister of Justice, is sometimes automatic (which is the exception in Belgian law), sometimes discretionary. To benefit from provisional release, the convict must have served a portion of the sentence in custody; this portion ranges from one month to one third of the sentence[139]. When the offender must meet specific conditions (which is an exception: see below), the duration of the supervision is two years.

TABLE 22. *Granting of provisional release and new guidance mandates*

	2000	2001 to 2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Number	3860	ND	5411	5030	5857	6248	6348	6202	7289	8038	ND
Guidance	NAP	ND	229	245	279	290	299	212	178	108	ND

Source: Direction générale des Établissements pénitentiaires du SPF Justice, 2000, 112; 2001, 53; 2008, 135 et 136; 2009, 163 et 164; 2010, 147 et 148; 2011, 165 et 166; 2012, 195 et 196; 2013, 109 et 110; 2014, 73 et 74; 2015, 53 et 54; Direction générale des Maisons de Justice du SPF Justice, 2013, 97; 2014, 108; Administration générale des Maisons de Justice, 2015, 53.

The number of provisional release has been steadily on the rise from 2000 to the present. This measure could nevertheless not thwart the rise in prison population over the same period. The "exceptional" character of provisional release "with conditions" seems to be observed (as indicated by the (reduced) number of new guidance mandates carried out by judicial assistants).

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[137] P. COSYNS, C. D'HONT, D. JANSSENS, E. MAES, R. VERELLEN, "Les internés en Belgique: les chiffres", in *Rev. dr. pén. crim.*, 4, 2008, 367.

[138] This measure is not a modality of executing the sentence, but a suspension thereof. This has negative consequences for the beneficiary (postponment of the date of the prescription of punishment, non- inclusion of the period of liberation "that went well" to determine the re-admission period in case of revocation, postponment of the date allowing for rehabilitation).

[139] It can be considered a pure non-execution of the deprivation of freedom sentence, for those convicted to not more than 4 months without having to serve a portion of that sentence.

TABLE 23. *Success rate of provisional releases*

Year	Mission accomplished		Mission non executable/ not carried out		Interrupted mandate/ revocation		Death		TOTAL
	N	%	N	%	N	%	N	%	N
2010[140]	173	64,3	10	3,7	83	30,9	3	1,1	269
2011	192	69,3	21	7,6	58	20,9	6	2,2	277
2012	194	67	14	5	78	27	2	1	288
2013	173	75	8	3	50	22	1	0	232
2014	110	77	5	4	24	17	3	2	142

Source: Direction générale des Maisons de Justice du SPF Justice, 2011, 256; 2012, 251; 2013, 100; 2014, 111; Administration générale des Maisons de Justice, 2015, 54.

The reasons behind the closing down of the mandates of judicial assistants can be used as an indicator of the rate of provisional release failure. However, these figures (encouraging in terms of success) give only a very partial view, since they concern only the exception, that is to say those provisional releases that have been subject to control by a judicial assistant.

5.2. *General evaluation of existing devices at post-sentencing stage*

Characterized by measures of a discretionary nature, the Belgian system of alternative sanctions at the post-sentencing stage pursues, as a priority, an objective of social reintegration, in accordance with the recommendations of the Council of Europe. The Belgian system is also characterized by individualized and consensual measures, which is also stated by the Council of Europe. Moreover, the major procedural safeguards promoted by the Council of Europe (legality, proportionality, non-discrimination and *justicialization*) are generally adhered to in the Belgian system, although not without bending some rules.

5.2.1. *Discretionary and controlled measures in the service of a reintegration objective*

For the Council of Europe, community sanctions should be *discretionary measures*, taken on the basis of an "individual case". It is only in-

[140] For the year 2010, we did calculate the percentages.

cidentally that the Council of Europe envisages automatic measures, granted "automatically" (Rec (2003) 22). The CE is very critical of collective measures aimed primarily at the management of prison overcrowding (R (99) 22). In Belgium, most of the post-sentencing measures are indeed discretionary, except for collective pardon, amnesty, electronic monitoring (for some convicts sentenced to up to three years of imprisonment) and provisional release.

These measures are clearly *at* the service of a *reintegration objective* by the legislator[141] even if the Belgian lawmaker mentions regularly, in recent reforms, an objective to fight against impunity. To contribute to reintegration, it is essential to avoid late access to these measures. Several difficulties should be pointed out here. First, if the Council of Europe asks "to grant prison leave as early as possible and as frequently as possible […]" (R (82) 16, Rule 3), in Belgium, a convict qualifies for leave only a year before he/she becomes eligible for parole[142]. In addition, the frequency with which leave is granted (three times thirty-six hours per trimester) remains low. When it comes to the subject of parole, the Council of Europe recommends that "competent authorities" open the procedure toward obtaining parole, such that "the decision […] can be made as soon as the prisoner has served the minimum period required" (Rec (2003) 22, rule 17). Belgian law used to conform to this request, since it provided an automatic transmission of the file to the TAP. Since 2013 however, a written request from the convict is required, to have his/her case handled by the TAP. This amendment, which causes a delay in the processing of files, could prove detrimental *for* isolated or vulnerable prisoners, ill-informed (or not informed at all) of their eligibility for parole. Finally, in general, the practice of "gradual expansion" (not required by law) delays the granting of the measures. In fact, the Minister of Justice does only grant leave after "successful" short prison leaves[143]. Similarly, the TAP dare only grant parole after first subjecting the convict to a period of electronic monitoring[144].

Overall, the Belgian system also meets the requirement of sanctions accompanied by individualized and controlled conditions. However,

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[141] *Documents Parlementaires*, Chambre des Représentants, 2005-2006, 51-2170/1.

[142] Besides, access to the latter has been delayed by recent legal *changes.*

[143] B. Mine, L. Robert, "Des avis et des décisions: un contraste éclairant pour un processus décisionnel méconnu", in B. Mine, L. Robert (eds.), *Uitgaansvergunningen en penitentiair verlof: de deur op een kier. Permissions de sortie et congé pénitentiaire: la porte entrouverte*, Antwerpen: Maklu, 2014, 201.

[144] T. Slingeneyer, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l'ère des commissions belges de libération conditionnelle*, Saarbrücken: PAF, 2014.

there are in principle no individualized conditions to observe, be it for electronic monitoring for convicts sentenced to less than eight months, or in the case of provisional release[145]. In such cases, the intervention of a judicial assistant is not provided.

While the Council of Europe emphasizes the *importance of monitoring* to ensure the credibility and effectiveness of measures in the community, it also believes that "*monitoring should not be considered simply as a form of control*" but must also come with advice, assistance and guidance (CM / Rec (2010) 1, rule 55, emphasis added). This concern is particularly strong in the case of electronic monitoring, which should not "undermine or replace the establishment of constructive professional relations", but should instead be a complementary measure to the existing means of support, "on the social and psychological levels" (CM / Rec (2014) 4). In this respect, while Belgium had gotten ready for a "global" social care for detainees under EM, things seem now to be moving more towards a purely technical control, justified by a calculation of efficiency and traceability[146]. Moreover, in the eyes of the Council of Europe, the *modalities of control must have certain limits* in order not to compromise reintegration. In order to not aggravate the "punitive character" of sanctions (R (92) 16, R 27), these rules should be limited to what is "require[d] to a strict enforcement of the sanction" (R (92) 16, rules 24 and 74) and the authorities may not subject the offender to requirements beyond those provided by the deciding authority (R (92) 16, rule 73). In Belgium, this limitation is not always observed[147], among other reasons because the guidance work of judicial assistants is officially presented as a work of "verification" of conditions (*circular* of 30 July 1999 and March 12, 2015). Moreover, one of the goals of reintegration is to allow "early termination" of a sanction if the latter is no longer deemed necessary ("principle of minimum intervention"; R (92) 16, rule 88). This pos-

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[145] Without calling into question the qualities of the principle of required controlled conditions, certain terms and designs of said control can be counter-productive to the goal of rehabilitation. This is the case when revocation is seen more as a result of successful control than as a failed rehabilitation. The European Council is aware of the problem, and has set up limits to said control (see below).

[146] K. Beyens, M. Roosen, "Electronic monitoring in Belgium: a penological analysis of current and future orientations", in *Eur. Jour. Prob.*, 2013, 5, 3, 56-70; M.-S. Devresse, "La surveillance électronique des justiciables", in *C. H. CRISP*, 2014.

[147] T. Slingeneyer, "Rôles des services psychosociaux et des assistants de justice dans le cadre de la libération conditionnelle en Belgique: l'hypothèse d'une colonisation sécuritaire", in P. Mbanzoulou (ed.), *Les métiers pénitentiaires, enjeux et évolutions*, Agen, Les presses de l'Énap. 2014, 141-158; Id., *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l'ère des commissions belges de libération conditionnelle*, op. cit.

sibility does not exist in Belgian law: it is possible to eliminate (or reduce) individualized conditions, but not to shorten the duration of the penalty.

The goal of reintegration implies certain *limits to the sanctions for behavioral problems identified by control*. According to the Council of Europe (R (92) 16), revocation must not be the only sanction (the Belgian system also provides for the suspension and the tightening of conditions) and should not necessarily lead to incarceration (the Belgian system consistently proposes imprisonment in case of revocation). Moreover, in case of revocation, in order to determine the portion of the sentence to be served in prison, "One must take into account to what extent and in which manner the set conditions and obligations have been met by the offender" (R (92) 16, rule 85). Belgian law has observed this rule in case of semi-liberty and electronic monitoring. But, in case of parole, a period of probation that "went well" is not automatically deducted. And in case of provisional release, the period that "went well" is not deducted, since provisional release is only a "suspension" of the custodial sentence.

5.2.2. *Measures that are individualized and accepted by the convict*

A. *The principle of individualization*

The *personal circumstances of the offender* should have bearing on the type and duration of the sanction granted in the community. Belgian law does not give details about the elements that should guide this individualization. Thus, for measures of parole, electronic monitoring and semi-liberty, it is expected that the *Sentence Implementation Court* designate "individualized special conditions" related to the reintegration plan, the risk of recidivism and the victims' interests. Belgian law therefore operationalizes the personal circumstances of the offender in a "defensive" manner, as the primary concern is risk prevention[148]. This is not the case of the Recommendations of the Council of Europe, which evoke more "positive" elements ("individual needs", "the potential" of the offender, "receptivity […] to the intervention", "likely effect of the punishment on the person of the offender", "health"…) allowing the penalty to have "greater meaning" and to contribute to "personal and social development". Compared with the content of "individualized special condi-

[148] Many legal measures on the execution of sentences in Belgium were taken following the Dutroux case, which may explain in part the tone of a legislator "under pressure", and having to demonstrate the ability to avoid other "dysfunctions".

tions", some studies have been able to show a use of "standardized" conditions, highlighting the limitations of this work of individualization[149].

The *duration and monitoring of measures* should be tailored to the individual. In Belgium, this is not always the case. Thus, the length of parole depends on the portion of the sentence that the offender must still serve, but is also subject to *minima* whereby the device is standardized (see above). The duration of provisional release is automatically set at two years without individualization. Moreover, in the current securitarian climate, the work of monitoring by judicial assistants is highly controled. This type of managerial control is promoted by circular and encouraged by the use of IT tools[150]. It results in a standardization of practices, problematic in light of the requirement of measures "appropriate to each particular case" with "sufficient flexibility" given to the operational staff (R (92) 16, rule 71).

Finally, individualization is regularly mentioned in the most recent Recommendations in the context of *risk assessments* (CM / Rec (2014) 3; CM / Rec (2014) 4; CM / Rec (2010) 1). Such a development is also reflected in the Belgian legislation. A directive from February 2007 imposes onto prison psychologists the use of at least a "risk assessment technique", the results of which will be forwarded to decision makers. This legal rule recommends a 'categorial' inflection, which alters the very concept of individualization (as well as the tools to achieve it).

B. *Free consent and acceptance by the convict*

Recommendations of the Council of Europe formally require the *consent* of the convict to non-custodial measures (even if the CE's recommendations are ambiguous on the scope of this requirement; see above). Similarly, the Council of Europe insists on an *authentic acceptance* of the sanction by the convict, which would allow the latter's *cooperation* and *active participation* (R (92) 16, CM / Rec (2010) 1). At post-sentencing stage in Belgium, the legislation (including ministerial circular) holds the agreeing of the convict to the community sanction as a condition for granting it. This agreement does not, however, necessarily constitute a real acceptance on the part of the convict. This would presuppose a true explanation of the content of the measure, in accessible

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149 K. Beyens, M. Roosen, "Electronic monitoring in Belgium: a penological analysis of current and future orientations", op. cit.; T. Slingeneyer, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l'ère des commissions belges de libération conditionnelle*, op. cit.

150 A. Jonckeere, "L'accompagnement socio-judiciaire saisi par l'informatisation en Belgique", *Dév. et Soc.*, 2013, 345-357.

language, to the convict. Moreover, this agreement as a source of accountability may also reflect a form of "allegiance" of the condemned[151]. Indeed, these injunctions toward accountability are particularly difficult to implement for convicts, and the way the agreement is reached also points to a transfer of responsibility in case of failure.

5.2.3. *Procedural guarantees: a shifting degree of observance*

A. *The legality principle*

The very existence of the sanction in the community should be provided by law (R (92) 16, Rule 3). Under Belgian law, the regimes of semi-liberty, electronic monitoring[152] and of provisional release are provided only by ministerial circular. To be more specific, a law exists (and has for almost ten years now) but it is not yet in force. The reasons for this delay are probably of budgetary nature (Sentence Implementation Judges should be appointed) but above all, they are organizational. There is concern that the projected system, bringing a justicialization of the decision making, will slow down the flow of releases and thus worsen prison overcrowding.

The principle of legality does not preclude the inclusion of service enforcement measures in *operating instructions* ("instructions de service"). These instructions cannot be "manifestly in conflict with the legal instruments" (R (97) 12, Annex II, Regulation 1). Some directives require that the justice assistant control those elements that are beyond their control (which are only conditions for release) that is provided legally. Research has shown that, faced with such a normative conflict, the practice of justice assistants is influenced more by the directive than by law itself[153].

B. *The Proportionality principle*

According to the Council of Europe, *access to the measure must be proportionate to the length of the term of incarceration*. The term of incarceration required for access to parole should, insofar as possible, not be "so long that the purpose of parole [cannot] be achieved" (Rec (2003)

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[151] D. KAMINSKI, "Prenez la peine d'adhérer: entre police du contrat et politique de la responsabilité", in Actes du colloque *Le pénal aujourd'hui, pérennité ou mutation. Punishment today, permanence or mutation*, Centre International de Criminologie Comparée, 2008, 9.

[152] As of 31 December 2012, 64.5% of convicts who obtained electronic monitoring did obtain it on the basis of a ministerial circular (Direction générale des Maisons de Justice du SPF Justice, 2014, 120, calculated by us).

[153] T. SLINGENEYER, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l'ère des commissions belges de libération conditionnelle*, op. cit., 396.

22, rule 6). A legal reform of 2013 has delayed the date of eligibility for certain convicts. Research[154] indicates that parole is granted increasingly late. Other studies have also pointed out that some judges forestall "the non-execution of sentences and therefore pronounce more severe sentences, to ensure that the convicted person spends at least some time in prison"[155]. Postulating the almost automatic non-execution of short sentences, those magistrates (judges and members of the prosecutor's office) thus contribute to extending the length of sentences all the while, suggesting the existence of a certain laxism (which they think they should stand up against).

The duration of the sanction must be proportionate to the remaining length of sentence to be served. Parole "ought be imposed for a period which should not be out of proportion with that of the sentence remaining to be served" (Rec (2003) 22, rule 10). This rule seems to be observed, because Belgian law states in principle that the duration of the probationary period be equal to the length of the sentence remaining to be served. However, exceptions to this principle are numerous: no probationary period may be of less than two years, this period may have to be between five and ten years, or still, to be a mandatory ten years. Such exceptions may push the convict to refuse community sanctions, which is counterproductive for both reintegration and for the protection of society. Regarding provisional release, a fixed term of two years is the same for all convicts, regardless of the remaining length of sentence to be served.

According to the Council of Europe, the *consequences of breaching* the conditions of the measure must be proportionate to the seriousness of the breach. While the Council of Europe makes a distinction between "minor" failure and "significant" failure (R (92) 16, Rules 78 and 80; Rec (2003) 22, rule 30), Belgian law does not include this distinction and states that the penalty for breach of post-sentence stage, should be the revocation of the measure. Thus, in the case of provisional release, dismissal is the only possible sanction for new conviction or non-compliance with the conditions. In the case of parole, there are three possible sanctions (revocation, suspension and tightening of conditions), but they all target the same assumptions. For instance, relatively benign behavior

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154 A. Rihoux, "Tendances passées et effets de la réforme sur les flux d'entrées, les flux de sorties et les durée de detention", in *La libération conditionnelle: évaluation des pratiques*, Nivelles-Louvain-la-Neuve: Département de droit pénal et de criminologie, 2000, 259; T. Slingeneyer, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l'ère des commissions belges de libération conditionnelle*, op. cit., 457.

155 K. Beyens, C. Francoise and V. Scheirs, "Les juges belges face à l'(in)exécution des peines", in *Dév. et Soc.*, 34, 3, 2010, 401.

(e.g., to fail to notify the authorities of a change of address) can lead to revocation. In 2006, the revocation of parole was primarily related to non-compliance with conditions (49%), the cumulation of non-compliance with an offense (38.8%) and finally to the fact of committing an offense (12.2%)[156]. The heaviest sanction is therefore not systematically related to the most serious behavior.

C. *The non-discrimination principle*

According to the Council of Europe, *foreign convicts* may obtain alternative measures to facilitate reintegration, and without discrimination. In Belgium, access to provisional release (for foreign prisoners with a view to their expulsion) is currently doubly disrupted. On the one hand, the legislator created (in 2012) a competing measure, the *release with a view to the remoteness*. This measure is hardly a genuine release because, while it actually allows the convict to leave the prison walls, it does not allow for any return to "free life." Indeed, it leads the convict from the walls of the prison to those of a closed center[157]. Moreover, since 2016, the legislator no longer allows the foreign convict who has no residence permit to effectively prepare this release, since the foreign convict can not be granted leave permissions, furloughs, semi-liberty or electronic monitoring.

The *economic and social circumstances* of the convict (his/her difficulties in finding employment or permanent housing) should not "constitute a ground for refusal or deferral" of alternative measures (R (92) 16, rule 20; Rec (2003) 22, rule 19; CM / Rec (2014) 4, rule 7). Under Belgian law, the absence of "reintegration prospects" and of "the potential […] to have a home" are counter-indications which justify the refusal to grant semi-liberty, electronic monitoring, parole and provisional release (for foreign prisoners with a view to their expulsion). Regarding provisional release for convicts sentenced to more than a year in prison, the "inability to meet their material needs (shelter, livelihood)" is a counter-indication to the release (circular of July 15, 2015). The security context transforms the conception of social reintegration: rather designed initially as the reason for the release, it becomes a possible counter-indication to it.

Finally, the principle of non-discrimination does not preclude the Council of Europe from seeing, in the convict's *dangerosity*, a relevant criterion of distinction (CM / Rec (2014) 3; R (2000) 22). It seems, un-

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156 T. SLINGENEYER, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l'ère des commissions belges de libération conditionnelle*, op. cit., 445.

157 To speak of "release" is akin here to what VAN DE KERCHOVE called the "mystifying power of legal language" ("Des mesures répressives aux mesures de sûreté et de protection. Réflexions sur le pouvoir mystificateur du langage", in *Rev. dr. pén. crim.*, 1976, 245-279).

fortunately, that the Belgian legislation, in terms of parole, makes distinctions (considered non-discriminatory by the Constitutional Court)[158], based more and more explicitly on this highly questionable criminological concept.

D. *The justicialization principle*

In principle, the decisions to grant (or deny) and to revoke (or not) the measure must be taken by a "judicial authority" (R (92) 16). However, some more recent Recommendations recognize a decision taken by a "judicial or administrative authority" (CM / Rec (2010, 1), or even a decision "by a judge or subject to judicial review "(CM / Rec (2014) 4). The Belgian lawmaker immediately took advantage of this. Thus, (short) prison leave, furlough, release with a view to remoteness, electronic monitoring for those sentenced to maximum sentences of less than three years and provisional release are not taken on by a judicial authority, but by the Minister of Justice.

The Council of Europe mentions the *motivation* for decisions (Rec (2003) 22, 32d rule.). Thus, it deems important to "signify, to the greatest possible extent, the reasons behind a prison leave refusal to the inmate" (R (82) 16, rule 9). In Belgium, the decisions of the Minister of Justice only very rarely include an overview of the detainee's situation justifying a refusal of leave, but are instead limited to certain counter-indications. This way of drafting decisions is counter-productive (phenomenon of "self-fulfilling prophecy") in that it is a source of demotivation in the convict and exacerbates a series of negative feelings (confusion, discouragement, helplessness, frustration and even anger)[159].

Finally, a *right of appeal* to a higher independent and impartial body must be included, regarding both the substance of the decision and procedural safeguards. However, the TAP's decisions are not subject to appeal. Only appeal to the Supreme Court (cassation) is possible. As for decisions to grant or refuse provisional release, they are subject to neither appeal nor cassation.

6. *Conclusion*

As recommended by the Council of Europe, the range of community sanctions and measures has greatly expanded in Belgium in recent

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[158] T. Slingeneyer, "Une étape dans la neutralisation des 'monstres' jugée constitutionnelle", in *Rev. dr. pén. crim.*, 2016, 222-233.

[159] B. Mine, L. Robert, "Des avis et des décisions: un contraste éclairant pour un processus décisionnel méconnu", op. cit., 207-209.

years, on all three stages of the criminal trial. From the analytical presentation laid out above, we propose to draw some general conclusions relative to three points: the conformity of Belgian criminal law to European soft law; major inflections expressed, in supervision of offenders, by the implementation of these sanctions and measures; and the impact of these devices on the use of imprisonment and prison overcrowding.

6.1. *The conformity of Belgian criminal law with the recommendations of the Council of Europe: a globally observed imperative*

Regarding the implementation of community sanctions and measures, the Council of Europe focuses on a number of principles. These are generally respected, at least at the level of primary criminalization. Some differences exist, however, which are sometimes reinforced by the practical implementation of sanctions and measures.

The *principle of legality*, relative to the creation and content of the sanctions, is globally respected. However this is only made possible at the expense of resorting to a principle of "extended legality"[160], also accepted by the Council of Europe, and probably better equipped to meet the principle of individualization of sanctions. Thus, at pre-sentencing stage, the discretionary power of prosecution of the prosecutor's office, enshrined in law, remains discretionary and is sometimes framed by criminal policy directives, instruments which are issued by the executive power. At the sentencing stage, the concrete content of the work penalties or autonomous probation is *de facto* passed onto the commission of probation and the judicial assistant. Similarly, the content of EM as an autonomous penalty is entrusted to services dependent on the administration. Finally, at post-sentencing stage, several early release measures are created by minsterial circular and their modalities governed by operating instructions, the content of which sometimes exceeds their legal requirements.

The principle of *proportionality* is regularly undermined. It is thus that probationary conditions that may accompany an unconditional waiver by the public prosecutor can accumulate without limit in time, other than the requirement of public action. Moreover, in case of non execution of a work penalty, of an autonomous probation penalty or of EM as an autonomous penalty, it is up to the prosecutor's office to discretionarily decide whether or not to enforce a sentence of imprisonment or

[160] F. Tulkens, M. van de Kerchove, Y. Cartuyvels, C. Guillain, *Introduction au droit pénal. Aspects juridiques et criminologiques*, op. cit., 250-269.

of subsidiary fine. In this case, if the prosecutor's office must take into account the work penalty, autonomous probation or electronic monitoring already carried by the convict, no method of calculation has been provided by the legislator regarding work penalties and probation. The convict runs the risk of undergoing a relatively heavy subsidiary penalty, potentially disproportionate since it can reach five years of imprisonment[161]. As for the post-sentencing stage, it happens that the trial period of the measure exceeds the length of the sentence remaining to be served (parole). Besides, in matters of provisional release, revocation appears to be the only possible sanction, regardless of observed misconduct, which goes against the principle of proportionality. The same applies for parole since, if more sanctions are possible in case of a breach, the law allows revocation, even for modest violations.

The Council of Europe also emphasizes the principle of *justicialization* of the process of granting and modification or revocation of community sanctions or measures. In Belgium, one should point out, in this regard, the important role played by other actors than the *sentence judge*. At pre-sentencing stage, the prosecutor's office plays a central role, the sole decision-maker in matters of granting (or not) alternatives penalties or alternatives to the prosecution. At the sentencing stage, it is the *probation commission* which decides about potential amendments to the penalty, while the prosecutor's office decides of the possible execution of subsidiary penalty, when the convict fails to meet the conditions. This latter decision cannot be the object of any appeal, whereas one could have expected the intervention of the *Sentence Implementation Court.* Finally, at post-sentencing stage, if the setting up of the *Sentence Implementation Court* clearly reflects a desire to *justicialize* the monitoring of the enforcement of sentences, the fact remains that certain decisions remain the purview of the Minister of Justice. To the *justicialization* concern, the soft law of the Council of Europe associates an obligation to *justify* the measures for purposes of understanding and individualization of the penalty. Nonexistent or purely formal at PSR stage, motivation refers to a principle of "negative selection" at sentencing stage: judge must not positively motivate their choice of a custodial sentence or a fine, but merely highlight, in their decision, the counter-indications to the choice of a 'softer' penalty (work penalty or autonomous probation). Finally, at post-sentencing stage, motivation is the rule for decisions taken by the Sentence Implementation Court, but these decisions are not subject to appeal.

[161] In the case of EM as an autonomous penalty, the law provides that a penalty run day equals one day of imprisonment.

Moreover, the decisions taken by the Minister of Justice are limited to emphasizing the counter-indications to the granting of a measure, and these measures are not subject to appeal.

The Council of Europe's Recommendations also stress the foundations of a consensual justice system, which requires *information* and *acceptance* of a sanction by the recipient, in order to obtain real *cooperation*, considered a guarantee of success. In Belgium, the requirement of consent is usually formally required by the legislation, even though this is not always the case (see release under conditions as an alternative to pretrial detention). But the outlines of the requested consent shed proper light on the ambiguities of a "consensual" justice model as a new modality of the exercise of power[162]. First, the agreement is only free formally. Requested under the threat of resorting to a more severe punishment, it is more akin to a form of "subjugation"[163], a sort of pledge of allegiance following which the offender "becomes the manager of his/her own punishment"[164] on top of being also held responsible in case of its potential failure. Moreover, obtained at pre-sentencing stage, this agreement allows to "launder" the liberties taken by the legal authorities with respect to fundamental rights. On the other hand, the recipient's acceptance and willingness to cooperate assumes that this consent be informed. Actually, it often is the case that the recipient's agreement is given by his/her representative, or that the offender does not measure the true extent of his commitment. In this respect, the absence or decline of recourse to prior social relationship to the ruling, found in practice and/or endorsed by some of the more recent laws, stresses the formal nature of of the requested consent[165].

The *individualisation* of the process of granting or withdrawal of community sanctions and measures is another important axis of the soft law of the Council of Europe. This principle is generally respected by Belgian law, as evidenced by the generally facultative character of sanctions and measures granting, and the amount of choice left to the judicial authorities in case of breach by the convict. However, this individualization space is also limited in part by the automatic quality (intended or likely) of some decisions. Thus, in matters of probationary suspended

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[162] A. SUPIOT, *Homo Juridicus. Essai sur les fondements anthropologiques du droit*, Paris: Seuil, 2005.

[163] D. KAMINSKI, "Prenez la peine d'adhérer: entre police du contrat et politique de la responsabilité", op. cit.

[164] M. FOUCAULT, "Alternatives à la prison: diffusion ou décroissance du contrôle social. Une entrevue avec Michel Foucault", in *Crim.*, XXVI, 1, 1993, 18.

[165] P. MARY, *Probation: histoire, normes, pratiques*, op. cit.

sentence, revocation is, in some cases, the only option, and it can also be mandatory in some cases. Furthermore, the attaching of autonomous work penalties, probation and electronic monitoring to a subsidiary penalty of imprisonment makes the latter a likely alternative in case of failure or breach of conditions by the convict[166]. At the post-sentencing stage, it is also expected that the TAP appoint individualized conditions, which take into account the circumstances of the convict. However, this practice reflects the increasing use of standardized conditions[167], that the use of computerized procedures in the handling of cases might very well increase.

6.2. *The main inflections of offender supervision: from personal assistance to control, from handiwork to management, from relational to technical interactions*

Community sanctions inevitably raise, in their implementation, the question of social work in the field of justice. In Belgium, several inflections mark the evolution of this work of accompaniment of accused or convicted individuals. These can be broadly grouped into three main trends, something that is emphasized both in the legal texts and the latest devices, as well as in the practice of social workers in penal justice. The first trend enshrines the *shift from a logic of assistance and treatment toward a will to control and toward risk management*. A product of the times, the 1964 Act on probation was clearly taking over penal welfarism. Focusing on an ideal of treatment and reintegration, this law showed the concern to favor the reclassification of the convicted on the prevention of recidivism[168]. It is thus that the social enquiry, although optional, was oriented as much on the person as on the environment of the offender, in an attempt to identify the environmental causes of the offender's acting out[169]. Similarly, social guidance was individualized, linked to the structural causes of acting out, and useful in the treatment of the author and his/her reintegration[170]. On the field, probation officers were mainly social workers, characterized by a "need-based approach". The latter, it has to be noted, was not necessarily consistent with the retributive culture of

166 F. KUTY, "La peine de probation autonome", op. cit.

167 T. SLINGENEYER, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l'ère des commissions belges de libération conditionnelle*, op. cit.

168 P. MARY, *Probation: histoire, normes, pratiques*, op. cit., 25.

169 M.L. MARCK, "L'enquête de personnalité", in *Bulletin de l'administration pénitentiaire*, 1966, 153-167.

170 J. CORNIL, "Déclin ou renouveau de la répression pénale", in *Revue de droit pénal et de criminologie*, 1965, 8, 718.

the judges. Benefiting from significant leeway, these social workers favored a relational approach with probationers, sometimes reluctantly applying the dimension of control to their work.

Much as happens in other European countries, the "new generation of community sanctions"[171] that emerges in Belgium at the turn of the 21st century emphasizes a change of direction. More directly influenced by a *securitarian* environment, these new community sanctions take on a punitive rhetoric, closer to the culture of judges. Although they do not endorse the emergence of an actuarial risk logic[172], they nevertheless reflect a punitive inflection and the primacy of a control logic over the dimension of rehabilitation. Competition made to the social enquiry (need approach) by the brief information report (output oriented) and the gradual decline of the two instruments is a first sign of such a tendency. The transformations of the "guidance", which, device after device, becomes "monitoring", or the "social" which becomes "judicial", is the second indicator of this trend. These changes also raise professional identity problems for justice assistants, whose relational ideals and logic of help to the offender are in conflict with the control logic of their institutional mandate[173]. Composed more often of people with university degrees of various backgrounds rather than people with a social workers' training, the new generation of judicial assistants gradually gets used to this culture of control, although some scholars find important differences between the "old" and the younger generation of judicial assistants[174].

The second strong trend, congruent to the first, emphasizes the influence of *New Public Management* on the organization of work in court. From the late 1990s on, the creation of *Houses of Justice* has reflected a principle of centralization of the terms of social work in the field of justice, with a goal of increasing consistency and standardization. A few years later, the *Houses of Justice* system was subjected to *Business Process Reengineering*[175]. The latter brought a new dimension to the judiciary institution, namely managerial work technology. This tool promotes the standardization of professional standards, of practices in the processing of files, and allows quantitative comparative evaluations of workers' perfor-

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171 A. Bottoms, S. Rex, G. Robinson (eds.), *Alternatives to Prison, Options for an Insecure Society*, Cullompton, Devon, Willan, 2004.

172 K. Beyens, V. Scheirs, "Encounters of a different kind. Social enquiry and sentencing in Belgium", in *Pun. & Soc.*, 12, 2010, 315.

173 P. Mary, *Probation: histoire, normes, pratiques*, op. cit., 82.

174 A. Jonckheere, D. Kaminski, "Les maisons de justice: le travail au travail", in *Rev. dr. pén. crim.*, 2013, 1173.

175 P. Mary, *Probation: histoire, normes, pratiques*, op. cit.

mance. Using a *PARajudicial Computer System* (SIPAR), it also introduces the principle of a computerized control of social work in the legal field[176]. Made compulsory from 2005 on, the use of this software responds to a quadruple concern: administrative rationalization (objectifying practices and allowing a comparison of social workers in terms of performance and needs); standardization of procedures and reporting (for purposes of equal treatment); standardization and implementation of data network (for purposes of control and continuous monitoring); and trajectory modeling (identification of "standard-path" of the probationer, according to his/her profile)[177]. This computerized-turn was welcomed on behalf of its potential of objectification and efficiency[178], and appreciated by some judicial assistants who see, in the tool and protocols the system provides, a shelter in terms of accountability. Yet this turn is also criticized in the name of the effects it has had, including through an overly formalized communication. Potentially reducing the complexity of the case handled[179], computer (pre)coding work would allegedly focus on control, and reflect the shift away from assistance to the offender toward serving the justice administration[180]. Overvaluing a technicist and conformist management of the files, this turn reduces the relational part, the creative dimension and the individual aspect of the job. As such, it is sometimes challenged or circumvented by the older social workers, in the name of the threats that the tool carries on the ethics of social work[181].

Finally, the third trend reflects the growing confidence in the *technicisation* of offender supervision. While this is a landmark in the growing use of computerization, it is also evident in the popularity, in recent years, of electronic monitoring to the three stages of the criminal process. While, initially, a balance was sought in the implementation of electronic monitoring between social support and technical control, this "Belgian model" nonetheless witnesses a decline in relational supervision in favor

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176 A. Jonckheere, "SIPAR, un système informatique emblématique des transformations observables au sein des maisons de justice", in *Champ pén.*, Séminaire innovations pénales, 2008.

177 A. Jonckheere, X. De Larminat, "L'édifice informatique des services socio-judiciaires en France et en Belgique: une architecture paradoxale?", in *Gouvern. act. pub.*, 105-128.

178 A. Bauwens, "Organisational change, increasing managerialism and social work values in the Belgian Houses of Justice, Department of Offender Guidance", in *Eur. Jour. Prob.*, 3, 2011, 15-30.

179 A. Jonckheere, "SIPAR, un système informatique emblématique des transformations observables au sein des maisons de justice", op. cit., 10.

180 A. Jonckheere, D. Kaminski, "Les maisons de justice: le travail au travail", op. cit., 1162-1174.

181 A. Jonckheere, X. De Larminat, "L'édifice informatique des services socio-judiciaires en France et en Belgique: une architecture paradoxale?", in *Gouvern. act. pub.*, 105-128.

of a purely technical control[182]. The same trend is underlined in the case of GPS tracking at pre-sentencing stage[183]. This trust in technology, also justified by an economic calculation, is echoed still in electroning monitoring as autonomous penalty, since supervision by a judicial assistant is no longer required[184].

The three trends identified above could very well underline the gradual shift from an ideal of rehabilitation towards a "culture of control"[185] in social work in the legal field. In this sense, this evolution is part of a broader movement endorsed by the Council of Europe. Indeed, in various recent recommendations, the Council stresses "intensive monitoring", "preventive monitoring" or even measures to extend monitoring to an "indefinite" duration or even "for life" (CM / Rec (2014) 4; Rec (2003), 22; Rec (2000) 22; R (99) 22). Similarly, some texts focus on rehabilitation, not any more as an end in itself, but as a means to serve "risk reduction of recidivism" (CM / Rec (2014) 4, Rule 8). This shift toward a control logic, encouraged in Belgium by a renewed reading of the goals, the import of *New Public Management* instruments and the increasing use of technical tools, could however take a different configuration in the future. If it maintains the competence of enactment of alternative sanctions and measures on the Federal State, the last reform of the State, however, decided the transfer of the offender supervision from the Federal State to the Communities (Flemish, Francophone and German-speaking) effective from 1 July 2014[186]. If it is likely to undermine the process of standardization of current practices, this transfer is still too recent for us to be able to evaluate its impact on substantive directions the legal system will take.

6.3. *Alternative sanctions and prison overcrowding: a shot in the dark?*

Since the 2000s, the new wave of community measures and sanctions has been largely justified by the need to fight against prison overcrowding. Both the work penalty and electronic monitoring – the two

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[182] K. Beyens, M. Roosen, "Electronic monitoring in Belgium: a penological analysis of current and future orientations", 56; M.-S. Devresse, "La surveillance électronique des justiciables", op. cit.

[183] K. Beyens, M. Roosen, *Electronic Monitoring in Belgium*, op. cit.

[184] K. Beyens, "The new generation of community penalties in Belgium. More is less…", op. cit., 18.

[185] D. Garland, *Culture of control: Crime and Social Order in Contemporary society*, 2001, Chicago: University of Chicago Press.

[186] M. Giacometti, C. Guillain, "Les peines de surveillance électronique et de probation autonome, nouvelles peines alternatives à l'emprisonnement?", op. cit., 142.

devices that have dominated the field from a quantitative standpoint for the past 15 years – reflect this objective, regularly reminded by the lawmaker[187]. In fact, this goal is not reached, even if the increased recourse to electronic monitoring at pre- and post-sentencing stage allowed for a stabilization of the *intra muros* incarcerated population from 2014 on[188]. The increase in the prison population has been continuous in Belgium for years, with Belgium being sentenced in recent years by the European Court of Human Rights, both because of poor detention conditions related to the overcrowding, and for the poor conditions of reception and care given to the internees.

How can we explain the failure of alternative measures and sanctions on that point? Several explanatory factors can be mobilized. First, certain sanctions (such as work penalty) or some modalities of implementation of the sentence (such as electronic monitoring) have also been introduced as a substitute for the non-execution of short custodial sentences. They can thus fulfil, like the work penalty whose quantitative success is unquestionable, a *net-widening* role in strengthening the effectiveness of short prison sentences, rather than being an alternative to prison overcrowding. Secondly, autonomous alternative sentences were not imposed as a unique, go-to, default-type penalty for the categories of offense they were aimed at. They are therefore not formally contributing to excluding imprisonment as a penalty for some offenses. Furthermore, although autonomous, these penalties are attached to imprisonment as an alternative sentence. However, the weak preparation of probationary sanctions, the decline of social guidance and increase of a purely technical monitoring (including via electroning monitoring) increases the chances of failure of community sanctions, and encourage all the more the application – still too often automatically – of the subsidiary penalty, namely imprisonment[189]. Thirdly, the discourse on the deprivation of liberty as last resort competes in Belgium with the "impunity narrative", which has gained legitimacy among politicians but also legal actors[190]. The latter do not hesitate to impose sentences of three years or more (sometimes three years and 1 day) to avoid an untimely process of provisional release[191].

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[187] K. Beyens, "The new generation of community penalties in Belgium. More is less…", op. cit., 19.

[188] K. Beyens, M. Roosen, *Electronic Monitoring in Belgium*, op. cit., 5.

[189] P. Mary, *Probation: histoire, normes, pratiques*, op. cit., 141.

[190] K. Beyens, M. Roosen, "Electronic monitoring in Belgium: a penological analysis of current and future orientations", op. cit., 56-70.

[191] K. Beyens, "The new generation of community penalties in Belgium. More is less…", op. cit., 19.

Can we conclude, as does the Court of Auditors about the work penalty, namely that if, in their current configuration, alternative penalties contribute perhaps in some cases to a "humane penal policy", they have "little potential as an effective instrument to fight against prison overcrowding" (ECA, 2011, 74)? It would be tantamount to embracing the diagnosis whereby "without active and radical politics […], diversification of 'sanctions' is not accompanied by the reduction of the use of/recourse to prison"[192]. Such a policy would probably fancy itself as acting on two levels. From a technical point of view, it would be good 1) to promote all the "alternative" sanctions and measures as one single reference penalty, exclusive of imprisonment, for certain categories of offenses. Indeed, the only reasonable reductionist policy involves "legislative reforms limiting the recourse to imprisonment"[193]. 2) to remove the backing of these sanctions and alternatives to subsidiary imprisonment (or fines) in case of failure. If this does not appear possible, the *automatic* nature of recourse to the alternative punishment in case of failure of community sanctions should at the very least be deleted; 3) to introduce greater automaticity in granting alternatives to post-sentence stage; 4) to maintain and strengthen support systems and human accompaniment of offender supervision in order to reduce the number of failures. From a societal point of view, it would be necessary to fight against the success of the "impunity narrative" with judges and politicians. On this note, it is important to remind the reader that the Council of Europe emphasizes the importance of strengthening the credibility of alternatives with the judicial authorities, the general public and politicians, explaining "the economic and social interest in resorting less to prison sentences and to make greater use of community sanctions and measures…" (Rec (2000) 22).

[192] D. Kaminski, S. Snacken, M. van De Kerchove, "Mutation dans le champ des peines et de leur execution", Déviance et Société, 31, 4, 2007, 500.

[193] D. Kaminski, S. Snacken, M. van De Kerchove, "Mutation dans le champ des peines et de leur execution", op. cit., 492.

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FRANCE

SUMMARY: 1. Introduction. – 1.1. Background. – 1.2. Legal framework and criminal philosophy. – 2. The state of prison overcrowding in France. – 2.1. The structure of prison overcrowding. – 3. Detention and alternatives to detention during the presentencing stage. – 3.1. Analytical inventory of the existing arrangements at the presentence stage. – 3.1.1. General: the principle of discretionary prosecutions. – 3.1.2. Alternatives to prosecution and/or detention decided by the public prosecutor. – 3.1.3. Alternatives to detention decided by the investigating judge. – 3.2. Overall assessment of arrangements existing at the pre-sentence stage. – 4. Alternatives to detention during the sentencing stage. – 4.1. Analytical inventory of the existing arrangements at the sentencing stage. – 4.1.1. General: the French approach to alternatives to incarceration at the sentencing stage. – 4.1.2. Presentation of the sentences and alternative measures to detention. – 4.2. Overall assessment of arrangements existing at the sentencing stage. – 4.2.1. Compatibility with European standards. – 4.2.2. Difficulties. – 4.2.3. Impact on overcrowding. – 5. Alternatives to detention during the post-sentencing stage: sentencing facilities. – 5.1. Analytical inventory of the existing arrangements at the post-sentence fase. – 5.1.1. Courts for application of sentences. – 5.1.2. The court for application of sentences (tribunal de l'application des peines: TAP). – 5.1.3. The terms of sentence planning. – 5.2. Overall assessment of arrangements existing at the post sentencing stage. – 6. Conclusion. – 6.1. French legislation and European recommendations: broadly compatible. – 6.2. Non-custodial measures: many practical rationales. – 6.3. Alternative penalties and prison overcrowding: a failure that can be overcome?

1. *Introduction*

1.1. *Background*

The French prison system has undergone profound changes since the 1970s. On the one hand, "*reforms were implemented to ease the conditions of detention: end of the rule of silence (1972), liberalisation of mail (1974), removal of high security areas (1982), installation of visiting rooms*

[1] Parr. from 1 to 2.1 written by J. ALIX; from 3. to 3.2. written by C. MAURO; parr. from 4 to 4.2.3 written by J. TRICOT; parr. from 5 to 5.2 written by R. PARIZOT; parr. from 6 to 6.3 written by G. GIUDICELLI-DELAGE.

without separations (1983), etc."[2]. On the other hand, institutions had to deal with unprecedented management issues faced with the incessant growth of the prison population (28,088 male inmates on January 1, 1970[3], 66,818 persons detained on December 1, 2015).

To deal with this overcrowding, governments have increased responses: more places available, and a broader offering for criminal penalties, promotion of alternatives to incarceration and a penal philosophy of rehabilitation.

1.2. *Legal framework and criminal philosophy*

At the same time, the enactment and pronouncement of criminal punishment was subjected to constitutional principles: the principle of necessity of punishments, the principle of legality of punishments and more recently, the principle of individualisation of punishments (all three established by or deduced from Art 8. of the Declaration of the Rights of Man and of Citizens). The principle of necessity of punishments controls the action of the legislature. The principles of legality and individualisation of punishments applies to both the legislator and the judge; the legislature has the obligation to provide for sentences in the law – or the regulation if it relates to misdemeanour penalties –, and cannot in principle provide mandatory mechanisms that would impede the judge's power of individualisation; the judge must choose, from among the penalties for the offence committed, the most appropriate penalty for the circumstances and personality of the offender, and the most likely to achieve the objectives of sentencing.

Article 130-1 of the Criminal Code sets out these functions: "*To ensure the protection of society, prevent the commission of further offences and restore social equilibrium, while respecting the victim's interests, the penalty has the responsibility:*

1° To punish the perpetrator of the offence;

2° To favour his correction, his integration or his reintegration".

The text therefore distinguishes the *functions*, to punish and to reintegrate, which are aimed at the offender and must be carried out in a

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[2] P. Castel, "La diversité du placement à l'extérieur. Etude sur une mesure d'aménagement de la peine", in *Dév. et soc.*, vol. 25, 1, 2001, 53.

[3] B. Aubusson de Carvalay, "Statistiques pénitentiaires et parc carcéral, entre encombrement et (sur)occupation (1900-1995). La gestion des effectifs détenus, des mots aux indicateurs chiffrés", *Criminocorpus* [Online], Savoirs, politiques et pratiques de l'exécution des peines en France au XXe siècle (25 et 26 mars 2014), Communications, posted online on September 2, 2014, consulted on October 9, 2014. URL: *http://criminocorpus.revues.org/2732*.

complementary manner, and the *goals* of the punishment, which is aimed at the entire social body[4]. Under this article, the primary objective of the sentence is to prevent offences – which includes a dimension of combating recidivism. But recent laws also pursue the objective of combating prison overcrowding.

Preventing offences and combating prison overcrowding are goals pursued jointly today by the reaffirmation, by the Law of August 15, 2014, of the principle of individualisation of punishments which gives judges broad power in the initial choice of the sentence but also in its changes in the course of its execution. The law multiplies the mechanisms intended to ensure the principle of individualisation of punishments throughout its scope, both at the stage of imposition of the sentence and at the stage of its execution[5], which also leads to multiplying the mechanisms intended to avoid incarceration or accelerate its completion. As regards misdemeanours, although imprisonment remains a leading sentence – therefore a reference sentence – it aims to become exceptional. In all cases, when it has been imposed, imprisonment is only a time of incarceration and the facilities of custodial sentence are no longer designed as a concession, but as an essential element for reinsertion and preventing recidivism. Now it appears to be presumed that there is the idea of avoiding incarceration for offences of low or medium gravity, even when committed by repeat offenders. Similarly, the idea is affirmed and presumed that any custodial sentence – even the heaviest – must evolve and that the sentencing facilities and supervised and planned releases form an integral part of inmates' prison journey.

2. *The state of prison overcrowding in France*

According to the last SPACE I report from the Council of Europe and the University of Lausanne, on statistical data for 2013[6], France is one of the European States with a growing rate of overcrowding of 117.2 per 100 inmates compared to a European average of 94.2 per 100 inmates, a detention rate with a duration of less than one year of 36.6%, among the highest in Europe, and a suicide rate of 14.4 per 10,000 inmates, compared to a European average of 11.2.

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[4] J.-H. Robert, "Punir dehors. Commentaire de la loi du 15 août 2014", in *Dr. pén.*, 16, 2014.

[5] Art. 132-1 CP and 707 CPP.

[6] M. F. Abeli, N. Delgrande, "SPACE I - Council of Europe Annual Penal Statistics: Prison populations. Survey 2013", Council of Europe, 2015.

TABLE 1. *Table of prison population 2000-2015*

Year	No. of people*	No. of inmates**	Detention rate	Prison capacity (theoretical/ Operational)	Rate of overcrowding (per 100 places)
2000	60,508,000	51,441***	0.085%	Theoretical capacity: not available operational: 49,294	104.4
2015	66,628,000	66,818	0.1%	Theoretical: Not available Operational: 58082 (+4328 unoccupied places) or 53754 occupied places	115.04% on the basis of operational capacity; 124.30% on the basis of effectively occupied places[7]

* *Source*: Insee: *http://www.insee.fr/fr/themes/tableau.asp?reg_id=0&ref_id=NATnon02145%C2*.
** *Source*: Ministry of Justice; Opale - P.V. TOURNIER, "Etat du surpeuplement carcéral au 1er décembre 2015".
*** *Source*: Ministry of Justice, Série statistique des personnes placées sous main de justice - 1980-2014: *http://www.justice.gouv.fr/art_pix/ppsmj_2014.PDF*.

2.1. *The structure of prison overcrowding*

Although the number of offenders on January 1, 2015, was 249,298, including 172,007 monitored while unconfined, the number of persons in custody was 77,291, including 66,270 inmates[8]. The population monitored while unconfined is therefore higher by nearly three times than the inmate

[7] Analysis of prison population on Dec. 1, 2015, by PIERRE V. TOURNIER on the basis of online data, December 29, 2015, on the site of the Ministry of Justice: "*Out of 58,082 operational places, 4,328 are unoccupied (766 in remand centres and 3,562 in detention centres). The 66,818 inmates are therefore distributed among 58,082 – 4,328 = 53,754 places. Also, the number of excess inmates is 66,818 – 53,754 = 13,064. The rate of overcrowding is therefore 13,064 / 58,082 = 22.5 inmates in excess per 100 operational places. Of these 13,064 excess inmates, 989 sleep on a mattress on the floor.*

Neither inflation nor deflation: stability (December 1, 2015 / December 1, 2014): Population in custody: 77,227, rate of growth of – 1.5% per year. Prison population: 66,818, rate of growth of – 0.4% per year. Number of inmates in excess: 13,064, rate of growth of +5.0% per year. Number of inmates sleeping on a mattress on the floor: 989, rate of growth of +1.0% per year".

[8] Série statistique des personnes placées sous main de justice, the Prison Administration, table 1 – unconfined persons, 10808, are persons under electronic monitoring and placed outside, not in custody. Those partially released and placed in outside accommodation are counted as inmates (table 4).

population. However, on January 1, 2015, the average inmate density of French prison institutions was 114.57%, or 66270 persons detained for an operational capacity of 57841 places[9]. However, on January 1, 2014[10], the average inmate density of French prison institutions was 116.6%, or 67075 persons detained for an operational capacity of 57516 places[11].

Since 1990 and with the exception of 2001 (98.2), the density has always been greater than 100%, despite programmes for construction of new prison places to increase the "prison inventory": the accommodation capacity has grown from 36615 operational places in 1990 to 57516 places in 2014[12]. France is therefore facing the dual phenomenon of inflation of prison population and chronic prison overcrowding[13]. This situation demonstrates that the increase in prison inventory cannot be thought of as a long-term solution to the phenomenon of prison overcrowding, and can only be presented as at most an exceptional solution – as prescribed by Recommendation R 99(22) of the Committee of Ministers of the Council of Europe on overcrowding of prisons and prison population inflation, in which the appendix specifies (1.2): "*Extension of the prison inventory should rather be an exceptional measure, since it does not, as a general rule, offer a sustainable solution to the problem of overcrowding*".

However, the average occupation rate of prison institutions is not sufficient to reveal the status of the population density, the types of penal institutions[14] must be distinguished[15]:

– Detention centres (or quarters within detention centres) have not had overcrowding in the last ten years, with their occupancy rate remaining roughly stable at more or less 90%).

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[9] Les chiffres clés de l'administration pénitentiaire, 2015: *http://www.justice.gouv.fr/art_pix/chiffres _cles_2015_FINALE_SFP.pdf*.

[10] Most often, we reason on 2014 figures which are more complete.

[11] Série statistique des personnes placées sous main de justice, the Prison Administration, table 3.

[12] 13000-place programme in 1988, 4000-place programme in 1996, 13200-place programme in 2002; a programme of 3200 new places is under study.

[13] On the concepts, their meaning and their mode of calculation, v. P. V. Tournier, "Surpopulation des prisons", in *Dict. de crim. en ligne*, *http://www.criminologie.com/categorie/ articles-mots-clés/surpopulation-carcérale*.

[14] Remand centres (98) receive persons in provisional custody (detainees awaiting judgement or for whom sentencing is not finalised) as well as convicted persons whose sentence or remaining sentence is less than two years.

Penal institutions (85) are divided into *central prisons* (6), *detention centres* (25) and *day-parole centres* (11), based on the type of prison population they accommodate. Penitentiary centres (43), mixed institutions, include at least two different quarters (remand centre, detention centre and/or central prison).

[15] Série statistique des personnes placées sous main de justice, the Prison Administration, table 9.

– Central prisons (or quarters within central prisons) have also had an occupancy rate which varies overall between 75% and 85%.

However, low overcrowding can be seen in these penal institutions given the number of unoccupied places[16].

– Remand centres are however in a situation of chronic inmate overcrowding since 2000 (date of the first figures available). A study conducted by the Ministry of Justice[17] observes that on January 1, 2013, and

TABLE 2. *Evolution of inmate density for 100 places based on the type of institution on January 1st of each year*(1)

Au 1er janvier	Type d'établissement ou quartier d'établissement							
	Centre de détention et quartier de centre détention	Centre / quartier de centre nationale d'évaluation	Centre pour peines aménagées	Centre de semi-liberté	Etablissement pénitentiaire pour mineurs	Maison d'arrêt et uartier de maison d'arrêt	Maison centrale et quartier de maison centrale	Ensemble des établissementes
2000	89,9	–	–	69,2	–	114,0	93,3	104,4
2001	87,4	–	–	72,6	–	104,8	88,9	98,4
2002	85,3	–	–	63,4	–	110,1	92,0	101,2
2003	89,8	–	12,6	74,9	–	130,5	92,1	115,5
2004	96,4	–	66,5	66,9	–	138,2	82,7	121,9
2005	98,5	–	36,4	68,0	–	129,3	90,7	116,2
2006	95,2	–	61,0	80,6	–	125,4	88,0	113,8
2007	96,6	–	68,3	73,6	–	127,9	87,8	115,4
2008	96,4	–	82,0	91,1	80,0	135,7	90,9	120,5
2009	95,2	–	86,4	94,9	90,8	135,5	89,6	119,7
2010	91,9	–	81,8	91,1	73,3	124,5	77,0	110,9
2011	91,7	–	82,6	95,0	69,9	118,8	76,9	107,4
2012	92,5	–	82,1	88,2	75,1	128,3	78,4	113,2
2013	94,9	73,3	73,7	80,7	74,4	133,3	84,6	116,8
2014	93,9	76,4	71,0	77,2	72,8	134,5	80,2	116,6

Source: Statistique mensuelle des personnes écrouées (DAP/PM15).
(1) La densité carcérale (ou taux d'occupation) est calculée en rapportant le nombre de personnes écrouées détenues à la capacité opérationnelle.

[16] P. V. TOURNIER, "OPALE Observatory on deprivation of liberty and measures and sanctions applied in the community", Sept. 2014.

[17] Série statistique des personnes placées sous main de justice, the Prison Administration, table 9.

January 1, 2014, this rate was 133.3% and 134.5% respectively. Specifically, on January 1, 2014, 36% of persons detained in a remand centre were in an institution whose occupancy rate exceeds 150%, and 4% of them (or 1714 people) were in an institution whose occupancy rate is over 200%[18].

Another study[19] reports the number of inmates in excess and finds that institutions were accommodating, on September 1, 2014, 13,330 excess inmates compared to 9510 excess inmates in 2006.

TABLE 3. *Evolution of the average number of excess inmates per year*

	2006	2007	2008	2009	2010	2011
Détenus en surnombre	9 510	11 620	13 600	11 900	9 280	10 640

	2012	2013	2014*	2015	2016	2017
Détenus en surnombre	12 340	12 910	13 330			

* Sur 9 mois.

This study confirms that excess inmates are accommodated in remand centres:

TABLE 4

	Ensemble	Maison d'arrêt et CLS non autonomes	Etablissement pour peine
Places opérationnelles	57 520	33 545	23 975
Détenus	66 354	44 564	21 790
Surpopulation apparente	8 834	11 019	– 2 185
Places inoccupées	3 206	660	2 546
Détenus en surnombre	12 040	11 679	361
% de détenus en surnombre / places	21%	35%	1,5%

This alarming situation has led the government to take up the problematic situation of short sentences. Indeed, remand centres are intended to accommodate accused persons awaiting judgement as well as

[18] *Ditto*, Tables 10 (in %) and 11 (in numbers).

[19] P. V. TOURNIER, "OPALE Observatory on deprivation of liberty and measures and sanctions applied in the community", op. cit.

convicted persons whose sentence or remainder of sentence does not exceed two years' imprisonment. The situation of short sentences is doubly problematic, on the one hand because they are the most affected by overcrowding, and on the other hand because they are often too short for a rehabilitation plan to be undertaken. So, on January 1, 2012, 10,222 convicted persons in custody served a sentence of less than 6 months, or 17.8% of convicted persons[20]. For these persons, French law allows for solutions intended to limit the use of incarceration.

A notable absence from the last reform, however, is the question of pre-judgement detention which still currently concerns almost 25% of the detainees (rate declining for 10 years: in 2005 34.6% of inmates were accused), or 1 out of 4 inmates who have not yet been finally judged. However, this audience is also concerned about prison overcrowding since inmates are incarcerated in remand centres – and for increasingly long durations.

Without taking into account effective judicial consideration of the state of prison overcrowding and its impact on the penal journey of an individual[21], it is the legislature that is mainly responsible for organising the fight against prison overcrowding. In addition, article 707 of the Code of Penal Procedure, amended by the Law of August 15, 2014, posits today (III): "*Any convicted person imprisoned in execution of a custodial sentence is entitled, whenever possible, to a progressive return to liberty, taking into account the material conditions of detention and the rate of occupancy of the prison institution* […]" mechanisms are introduced at the pre-sentencing, sentencing and post-sentencing stages to promote the use of alternatives to detention.

3. *Detention and alternatives to detention during the pre-sentencing stage*

3.1. *Analytical inventory of the existing arrangements at the pre-sentence stage*

Although the most effective solutions to combat prison overcrowding are obviously based on sentencing law, the French system allows for

[20] Lutter contre la délinquance. Une réforme pénale au service des citoyens, Ministry of Justice, Oct. 2013: *http://www.justice.gouv.fr/publication/reforme_penale_2013.pdf.*

[21] On this question, v. A-G. Robert, "Conditions de détention: lorsque les juges nationaux prennent le relais de la Cour européenne des droits de l'homme", in *Dr. Pén.*, 10, study 15, 2013; J.-M. Delarue, "Le contrôleur général des lieux de privation de liberté et les conditions de détention", interview conducted by F. Fourment, Gazette du Palais Feb. 9,

limiting the use of detention at the preliminary stage of penal proceedings.

3.1.1. *General: the principle of discretionary prosecutions*

French penal procedure is governed by the principle of discretionary prosecutions understood as the possibility for the public prosecutor, and in a certain indirect way for the government, to assess the appropriateness of instituting proceedings and so exercise criminal prosecution and at the same time to decide what procedure to follow (sections 40 and 40-1 of the Code of Penal Procedure). Now, in addition to dismissal, the Code provides numerous alternative measures to prosecution – conditional dismissal of cases, penal settlement and plea bargain – to respond to a crime without triggering criminal prosecution, but also an increasing range of more or less rapid procedures that are alternatives to the conventional procedure, with involvement of an investigating judge and then trial court. Thus, as the French system is designed, the principle of discretionary prosecutions lets the public prosecutor establish a graduated penal response, based on the gravity of the acts and the resources available to it in court. It allows the prosecutor to assess the possibility of criminal prosecution for the imposition of a custodial sentence or, conversely, to respond to the offence other than by criminal prosecution – thus excluding any criminal conviction, and any imposition of a custodial sentence[22].

It is in this context that there is a multiplication of procedures available to the public prosecutor to refine the response to an offence. When investigations are undertaken in the form of a preparatory inquiry led by an investigating judge, pre-sentencing detention becomes possible in the form of remand. But the legislature has developed alternatives and restrictive conditions intended to reduce recourse to custody before judgement.

40, 2013, 26; A. Ponseille, "Aménagement de peine et surpopulation carcérale", in *AJ Pénal*, 2014, 494.

[22] This discretionary choice is however mitigated by the pyramid structure of the prosecutor's office. Although the Prosecutor of the Republic is the head of his prosecutor's office and as such sets the criteria for discretion for his jurisdiction, he his however himself subject to the control of the Attorney General at the Court of Appeal, to which he must send specific reports – including on individual cases – as well as an annual report of penal policy. At the top of this pyramid structure is the Minister of Justice to whom belongs the responsibility to establish and guide policy for criminal prosecution in view of consistent application of penal law throughout the territory. Each prosecutor must implement this penal policy established at the national level, taking into account the specific context of his jurisdiction: Art. 39-1 CPP.

3.1.2. *Alternatives to prosecution and/or detention decided by the public prosecutor*

A law of December 31, 1970, on combating addiction, for the first time provided the possibility for the public prosecutor to order people having illicitly used narcotics to undergo detoxification or be placed under medical supervision.

In 1993, the legislature included in the Code cases of conditional dropping of charges among measures put in place within certain prosecutors' offices: indeed, to relieve the court's activity, some prosecutors were content with a threat of prosecution to incite certain persons to repair damage or perform certain legal obligations. Thus was born the hypothesis of conditional classification – reminder of the law, direction of the perpetrator to a health, social or professional organisation and penal mediation – which Article 41-1 CPC provides that the prosecutor can use, regardless of the gravity of the offence, if he considers that they can ensure reparation of the damage, put an end to the resulting trouble from the offence or contribute to the rehabilitation of the perpetrator – which implicitly assume an informal recognition of guilt. Since 2004, in case the measure fails, the prosecutor is obliged to implement a penal settlement or prosecute.

Penal settlement was introduced in June 1999 to Article 41-2 CPP and, while being the equivalent of an American *deferred prosecution agreement*, it was considered as a first step towards introduction in French law of the North American *plea bargain.* In effect it is an agreement between the public prosecutor and an adult who acknowledges having committed one or more misdemeanours punishable by a sentence equal to or less than five years imprisonment. But the unlike the *plea bargain*, penal settlement is an alternative measure to prosecution which does not lead to conviction and a sentence. Only a settlement measure can be proposed in this framework (payment of a fine, performance of unpaid work, divestiture to the benefit of the State of the thing used to commit the offence or profited from it, withdrawal of driver's license, compensation to the victim of the offence). The response to the offence cannot therefore in any case take the form of a deprivation of liberty. The agreement of the person concerned on the proposed measure must be approved by a judge. Only in case of refusal of validation by the judge or non-performance of the measure by the person concerned is the prosecutor required to trigger prosecution, then opening the way to deprivation of liberty.

With these better known alternative measures, the legislature gradually added new cases of penal transactions, consisting mainly of paying a

fine of a limited amount or in compensation for the resulting harm from the offence and having the main effect of stopping criminal prosecution in the event of performance[23].

Although mainly used today for efficiency and speed, conditional dropping of charges, penal settlement and bargaining measures are theoretically intended primarily to avoid the sentence. They are therefore, in all cases, alternatives to detention. In this, they differ from accelerated procedures which allow a sentence to be completed outside the court system to some extent.

For quick procedures, among the many procedures that criminal prosecution can exercise, leading to a sentence being pronounced as quickly as possible, there is the simplified procedure or summary penalty orders inspired by the German model, introduced first in offence matters and provided in correctional matters since 2002 under Articles 495 and ff. CPP[24]. The summary penalty order can only lead to an alternative sentence to imprisonment, even if the offence is punishable by imprisonment. Indeed, for a limited list of misdemeanours, it permits the prosecutor to apply to the presiding judge who will decide without debate and only on the basis of the investigation's record. In return for this non-adversarial procedure, the judge can only sentence a fine less than or equal to 5000 Euros, regardless of the sentence, or supplementary sentences: if he judges that the case deserves a sentence of imprisonment or debate, he can refer the case to the public prosecutor.

3.1.3. *Alternatives to detention decided by the investigating judge*

Regarding restrictions to the freedom of movement in the preliminary phase, the provisions of the Code of Penal Procedure have had many changes: the beginnings of a legislative movement tending to strengthen respect for the principle of the presumption of innocence and to limit the use of detention before judgement has been given by Law

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[23] For a general analysis, see J.B. Perrier, *La transaction en matière pénale*, Paris: LGDJ, 2014. Having a power of bargaining are: the defender of discrimination rights (Art. 28 of Organic Law N° 2011-339 of March 29, 2011), the mayor for certain infractions (Art. 44-1 CPC) or the judicial police officer, with the authorisation of the Prosecutor of the Republic for the infractions and for certain less serious misdemeanours, as long as the sentence is less than one year of imprisonment or, in case of theft, when the value of the thing stolen is below 300 Euros (Arts. 44-1-1 CPC and Art. 1 Decree N° 2015-1272 - October 13, 2015).

[24] Other quick procedures, such as immediate appearance or the appearance on prior admission of guilt (CRPC) allow the judge to impose a sentence of detention for which the maximum can be equal to or reduced from the maximum sentence of imprisonment incurred. They are therefore not as alternatives to detention.

No. 70-643 of July 17, 1970. This movement was particularly deepened by Law N° 2000-516 of June 15, 2000 and N° 2009-1436 of November 24, 2009. From this legislative movement follows a relatively complex system that provides three measures that are deprivative or restrictive of freedom before judgement during the preparatory inquiry phase: judicial supervision[25], house arrest[26] and remand[27].

Without exception, these measures cannot be used during the preparatory inquiry phase (phase of judicial investigation) and against a person investigated, which assumes the existence of serious and/or concordant indications making guilt truly probable. This double condition limits in practice the use of these measures since the preparatory inquiry is only involved on average in 1 to 5% of cases and even in the case of investigation, the investigating judges often tend to postpone the indictment[28].

The order of provisions as well as the letter of Article 137 CPP impose however a sort of hierarchy to the judge: remand is only a last resort and can be ordered only by the magistrate for custody and for the more serious offences[29] if it is "*the only way*" to achieve one or more objectives which "*cannot be achieved*" by alternatives to detention[30].

To understand the contributions of this legislative movement that began in 1970 with the introduction of judicial supervision, three measures should be considered separately: legislative changes relating to remand, the relatively new provisions on house arrest and those well known today of judicial supervision.

Without going into the details of the remand system which does not concern this paper, we will limit ourselves to point out that the legislature has intervened on several occasions to limit the number and duration of

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[25] Articles 138 and ff. of the Code of Penal Procedure.

[26] Articles 142-5 and ff. of the Code of Penal Procedure.

[27] Articles 144 of the Code of Penal Procedure.

[28] According to statistics from the Ministry of Justice, in 2012 29,180 people were indicted (–12.5% compared to 2011); 33,300 new indictments were counted in 2014: *Key figures of justice*, Paris: French documentation, 2013 and 2015.

[29] Remand thus assumes that the offence will be punished by at least three years of imprisonment, while judicial supervision may be decided in the presence of a misdemeanour punishable by a sentence of imprisonment.

[30] Art. 144 CPC: retain the evidence or the physical evidence necessary for manifestation of the truth; prevent pressure on witnesses or victims and their families; prevent concerted fraud between the person charged and his co-perpetrators or accomplices; protect the person indicted; ensure the accused is available to the Court; put an end to the offence or prevent its repetition; put an end to an outstanding and persistent disruption to public order caused by the gravity of the offence (only in correctional matters, being aware that in any case this disorder cannot result solely from the media impact).

remands, not only by introducing alternative measures to detention, but also and above all by changing the remand system: requirements related to the motivation of the need for the measure[31], proceedings leading to the imposition of remand[32] and especially the duration of the measure[33].

In the hierarchy established by the Code of Penal Procedure, house arrest is an alternative measure to remand of medium gravity.

Articles 142-5 and ff. of the Code of Penal Procedure provide for two different types of house arrest by reference to the provisions on the application of sentences[34]: placement under fixed electronic surveillance and placement under mobile electronic surveillance. In the first case, the judge determines the place where the person concerned must remain and a technical procedure allows remotely detecting the presence or absence of the person in this place. In the second case, an electronic bracelet locates the person concerned and remotely monitors his movements throughout the national territory. It is up to prison administration officials to remotely monitor the person, including by visiting the place of assignment, without however entering the person's residence without his consent.

These two methods nevertheless assume that many conditions are met beyond indictment, including the agreement or request of the interested person and an offence of some gravity[35].

Judicial supervision is the first alternative to remand that was introduced by the legislature and, in the gradation established by the Code of Penal Procedure, it is also the first alternative to be considered by the investigating judge. This measure compels the indicted person to one or

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[31] The judge must find that the offence is a crime or a misdemeanour punished with a sentence of a duration equal or superior to three years imprisonment, which implies a certain severity (e.g. theft.). He then must set out the considerations of law and of fact on the inadequacy of the obligations of judicial supervision and house arrest as well as the reason for the detention by reference to a restrictive list of 7 objectives provided for by Articles 143-1 and 144 CPP. Finally, Article 144 CPP also requires that the judge show that remand is "*the only way*" to achieve one or more of these objectives which "*cannot be achieved*" by alternatives to detention.

[32] The decision must be made by a magistrate for custody on application by the investigating judge or prosecutor, after an adversarial argumentation, in principle open to the public for adults.

[33] Art. 144 CPC: remand may not exceed a "reasonable" time taking into account the gravity of the acts and the complexity of the investigations necessary for manifestation of the truth. Articles 145-1 for misdemeanours and 145-2 for crimes provide "end date" deadlines beyond which detention must cease.

[34] Articles 723-8 and 763-12 of the Code of Penal Procedure.

[35] Offence punishable by at least 2 years of imprisonment for local monitoring and at least 7 years (or certain offences of domestic violence/threats punishable by at least 5 years' imprisonment) for mobile surveillance.

several obligations under the law. In that it is a less substantial interference with individual freedom, its conditions for implementation are less demanding than those providing for detention and does not depend on specific techniques. Article 138 CPP provides an exhaustive list of 17 obligations likely to be imposed on the indicted person. This list is constantly changing according to the intention of the legislature to encourage the use of this measure and to respond effectively to any assumption: measures for monitoring, prohibition or limitation of movement, prohibition to perform certain acts, prohibitions of exercising certain activities of professional or social nature, prohibition from meeting certain people, obligation to provide a surety bond or to grant real or personal security to guarantee the representation in court of the person concerned, payment of damages and fines.

3.2. *Overall assessment of arrangements existing at the pre-sentence stage*

The French legislature must face the developments in substantive criminal law and the growing criminalisation of all areas of life for acts that are often of lesser gravity and do not necessarily deserve a penal response, a growing criminalisation that it has itself created. The courts are in effect increasingly faced with "mass criminality": offences of lesser gravity, often very similar to each other, which do not always deserve long debates before a full court[36]. Known in many European systems, this phenomenon has very important consequences in France: although they are among the fewest in Europe[37], French prosecuting magistrates are more encumbered with 7996 new cases per 100,000 inhabitants in 2012, while in the same year 1336 new cases were forwarded to prosecutors in the Netherlands, 1566 in Finland, 5723 in Germany, 5766 in Italy, 6314 in Austria[38]. It is thus clear that the legislature multiplies and favours procedures that tend to limit or even prevent the intervention of a judge in cases where guilt is acknowledged or for less serious offences with a deflationary view. The first can lead to a conviction within a very short time by avoiding the preparatory inquiry phase and/or discussions

[36] S. Guinchard, *L'ambition raisonnée d'une justice apaisée*, Paris: French Documentation, 2008.

[37] For example, on average, per 100,000 inhabitants, for members of the public prosecutor there are 2.9 in France, 3.2 in Italy, 4.1 in Austria, 4.7 in the Netherlands, 5.3 in Spain, 5.8 in Turkey, 6.5 in Germany and 7.4 in Belgium. See J.P. Jean, "La justice pénale en Europe dans le rapport 2014 de la CEPEJ", in *AJ pénal*, 2, 2015, 76 and ff.

[38] CEPEJ, European judicial systems. *Efficacité et qualité de la justice*, CEPEJ studies, 20, Council of Europe, 2014.

before a full court, the second involves assessment of discretionary prosecutions and allows for dropping charges under certain conditions.

It should not be forgotten however that the alternatives to prosecution were first developed in practice in the 1970s as a way to avoid sentences considered to be little suited to the acts committed and so to develop theories related to *restorative justice*[39]. Sections 41-1 and following CPP were then established by the legislature that open a third way to the public prosecutor. Alternatives to sentencing were then transformed into alternatives to the judge or to a way that allows some diversion from the judicial system. This path lies between dropping charges altogether and criminal prosecution: it is expected to respond to an offence without triggering prosecution and without bringing the case before a judge with a view to sentencing. However, statistically, measures along this avenue are calculated in terms of the rate of penal response to offences, a rate which rose from 67.9% in 2000, to 83.7% in 2007, to 89.2% in 2012 and finally to 89.6% in 2013[40]. For some, these figures show that far from fitting into a deflationary process, which would lead to decriminalisation of acts, alternatives to prosecution are involved in practice in cases where the public prosecutor would have closed the case in the past[41]. Therefore these alternatives are a new means of punishment left in the sole hands of the public prosecutor[42] who becomes a new competitor to the criminal court[43]. The figures also show the practical success of these measures

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[39] F. Ruellan, "Les modes alternatifs de résolution des conflits: pour une justice plurielle dans le respect des droits", in *JCP*, 1999, I, 235; M. E. Cartier, "Les modes alternatifs de règlement des conflits en matière pénale", in *Rev. gén. proc.*, 1998, 1 and ff.; A. Mihman, *Juger à temps: le juste temps dans la réponse pénale*, Paris: L'Harmattan, 2008.

[40] Ministry of Justice, *Key figures of justice*, Paris: French documentation, 2014.

[41] For example, one of the tables published in the *Key figures of justice*, 2014 (14), op. cit., shows that since 2003 the number of cases dropped without charge is decreasing while those dropped with conditions and penal settlement continue to grow and that the number relating to criminal prosecution is steady (despite a peak in 2006). This observation was already made by the legislature in 2004 (L. Beteille, F. Zocchetto, "Juger vite, juger mieux? Les procédures rapides de traitement des affaires pénales, état de lieux", Reports of the Senate, 17, 2005-2006, spec. 30.

[42] J. Danet, "Bref commentaire de quelques chiffres sur la justice pénale", in *AJ Pénal*, 3, 2011, 122; C. Lazerges, "Médiation pénale, justice pénale et politique criminelle", in *Rev. sc. crim.*, 1997, 186 and ff.

[43] See for example, V. Perrocheau, "La composition pénale et la comparution sur reconnaissance préalable de culpabilité: quelles limites à l'omnipotence du parquet?", *Dr. et soc.*, 74, 2010, 55 and ff.; P. Conte, "La nature juridique des procédures alternatives aux poursuites: de l'action publique à l'action à fin publique?", in *Mélanges en l'honneur de R. Gassin*, PUAM, 2007, 189 and ff.; J. Danet, "La concurrence des procédures pénales", in *Arch. phil. droit*, 53, 2010, 201 and ff.; L. Aubert, "Systématisme pénal et alternatives aux poursuites en France: une politique en trompe – l'œil", in *Dr. et soc.*, 74, 2010, 17 and ff.;

which keep multiplying: now, as was seen, the Code provides a wide range of alternatives ranging from the simple reminder of the law to penal settlement, validated by a judge, based on an acknowledgement of guilt and consisting of a settlement fine with a maximum that can be equal to the maximum incurred for the offence. Finally, the Law of August 15, 2014, introduced a new case of penal bargaining that can be proposed by a judicial police officer for some misdemeanours. However, in 2013 these various measures were adopted in 43.5% of all prosecutable cases while dropping charges without prosecution was decided in only 10.4% of these cases[44].

The success of these alternatives is also explained by the "hierarchical" organisation or graduated measures: since 2004, for example, when the public prosecutor decided to try one of these alternatives but without success, he is obliged – and not just invited – to consider the most serious alternatives, then criminal prosecution. It is understood that these alternatives to prosecution are used as an alternative to punishment, and especially to the custodial sentence. However, in the event of failure, they are a first step towards prosecution and, therefore, to the sentence.

This success, however, naturally raises the question of guarantees related to these procedures. Although the use of these measures is inspired by, and as a result is initially in line with, the recommendations of the Council of Europe[45], *a first general remark concerns the procedural stage at which they operate: as alternatives to the exercise of criminal prosecution, these measures close the investigation. However, in the French system, the preliminary phase is potentially double and always includes an investigation, then, in some more serious or complex cases*[46]*, a preparatory in-*

C. Saas, "De la composition pénale au plaider coupable: le pouvoir de sanction du procureur", in *Rev. sc. crim.*, 2004, 829 and ff. Some insist that this is a goal of the legislature: criminal mediation was introduced in 1993 specifically to combat the rate of dropping charges 80%, found to be excessive at the time (J.P. Ceré, P. Remillieux, "De la composition pénale à la comparution sur reconnaissance préalable de culpabilité: le plaider coupable à la française", in *AJ Pénal*, 2003, 45 et s.).

[44] Ministry of Justice, *Key figures of justice*, 2014, op. cit. The figures for 2014 are more nuanced: Although dropping charges without prosecution was decided in 11.5% of prosecutable cases (+11.3% from 2013), the number of penal settlements is down –5% with 5.3% on prosecutable cases and the number of conditional droppings of Article 41-1 CPP is an increase of 1.9% from 2013, with 38.2% of the total. See Ministry of Justice, *Key figures of justice*, 2015, op. cit.

[45] Council of Europe, Council of Ministers, Recommendation (87)18 of December 17, 1987, concerning simplification of criminal justice; Council of Europe, Council of Ministers, Recommendation (99)19 on mediation in criminal matters; Council of Europe, Council of Ministers, Recommendation (2000)19E of October 6, 2000, on the role of public prosecutor in the criminal justice system.

[46] Preparatory inquiry is mandatory in criminal matters.

quiry. While the investigation phase must collect elements for the researching and prosecuting of offences[47]*, the preparatory inquiry phase enables determination of the truth*[48]*. Although the two phases share their secret character, they differ significantly as to the adversarial examination. During the preparatory inquiry, the accused has access to the case through his lawyer and can challenge certain decisions of the investigating judge by appeal or nullities. During the inquiry phase, however, the Code of Penal Procedure at present does not arrange for any adversarial examination: since two Acts of April 14, 2011, and May 27, 2014, the only time where the suspect has the right to be assisted by a lawyer, without having access to all the documents in the case, is that of his hearing by the judicial police officer. A new reform, adopted in June 3, 2016, lastly grants the right to the suspect for his counsel to be informed of and to assist to several investigation measures such as searches and provides on the other hand for the right to access to the file six months after the first hearing. Thus, irrespective of the guarantees provided from time to time for each measure, these alternatives to prosecution raise considerable criticism. First, they give judicial or quasi-judicial powers to a public prosecutor dependent on a hierarchy and responsible to support the charge in case of prosecution. Then they come in a procedural stage where, if the prosecutor knows the results of the investigation, the suspect has late or no access at all to the file. In practice, because in simple cases, there is no hearing at all, the suspect is in principle not assisted by a lawyer and just discovers that she is being investigated at the time where she is notified of or proposed concerning the measure.*

Despite the latest reforms, this last criticism can still be raised also for the simplified procedure, or summary penalty orders, which excludes any debate before conviction. However, while practitioners seem to follow other quick procedures and, in particular, appearance on prior acknowledgement of guilt with great caution, statistics for 2015 show that the simplified procedure is a success, increasing 5.1% from 2014[49]. This success has several procedural reasons but also by the fact that the simplified procedure allows the prosecutor to dismiss the punishment of detention ahead of time and to supervise the judge in exercising his discretion for individualisation of the punishment.

Regarding restrictions to liberty before judgement, data published by the prison administration[50] show that the proportion of persons in

[47] Article 41 of the Code of Penal Procedure.

[48] Article 81 of the Code of Penal Procedure.

[49] Ministry of Justice, *Key figures of justice*, 2015, op. cit. For the CRPC, these figures indicate that it was followed less than in 2014 (-2.7%).

[50] Data cited in F. Desportes, L. Lazerges-Cousquer, *Traité de procédure pénale*, London: Economica, 2013, 1776.

custody out of all of those detained has been decreasing since 1999, which suggests that the number of those in decided remand is declining: indeed, it can be noted that although the number of inmates has increased, and except for a parenthesis in 2003 to 2007 which saw a turn to security, the number of detained persons fell from 18,101 in 1999 to 16,170 in 2010 and the proportion of accused therefore decreased from 37.0 in 1999 to 26.3 in 2010.

Although the number of accused in detention has remained relatively stable in recent years, the number of inmates is increasing, which significantly reduces the proportion of prisoners awaiting final judgement. The reduction in the use of remand was also confirmed recently: in 2012, there were 14,411 decisions for placement in detention before judgement and therefore 9.2% fewer decisions compared to 2011. 2014 data however show a return in force of this measure with 35,200 new decisions for placement in remand[51].

Regarding the distribution of the accused relative to the reasons for their detention: at January 1, 2013, 67% of the detained accused were awaiting completion of the preparatory inquiry, about 30% of the rest were awaiting immediate trial or appearance before the judge (remand that can be used after the investigation to ensure appearance of an individual at the trial court or another court) or during the appeal or review procedure. In 2014, 44% of accused were awaiting completion of the preparatory inquiry and 51% were waiting to appear before the judge.

These data allow us to consider that, thanks to the many reforms adopted, remand is slowly becoming an exception and is more and more only being used when the judge considered it strictly necessary and as a last resort, in accordance with the requirements of the Recommendation of 1980[52] and the Recommendation of 2006[53]. They hide however a relatively disturbing reality: although the number of remands has significantly declined since 1999, the average length of detentions has increased: from 5.3 months in 1990 it rose to 5.9 in 1995, 6.5 months in 2000 and 8.7 months in 2005, according to the report from the Remand Monitoring Committee in 2007. In 2012, according to figures published by the Ministry of Justice, the average remand duration was 24.7 months for crimes and 6.8 months for misdemeanours (in the case of preparatory

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[51] Ministry of Justice, *Key figures of justice*, 2015, op. cit.

[52] Council of Europe, Council of Ministers, Recommendation (1980) 11 of June 27, 1980 on remand.

[53] Council of Europe, Council of Ministers, Recommendation (2006)13 of September 27, 2006, on remand, the conditions in which it is executed and the implementation of safeguards against abuse.

inquiries). These figures show a trend: remand is used in more serious and/or complex cases requiring lengthy investigations during the preparatory inquiry and long delays for hearings before the Court of Assizes. They thus explain the many recent condemnations of France by the European Court of Human Rights due to breach of the obligation arising from Article 5 ECHR to ensure that the duration of remand does not exceed a reasonable limit[54].

With respect to alternatives to remand, whose adoption is encouraged by the Recommendations of 1980 and 2006, since house arrest has been established independently, and that the technical means have been strengthened, the use of this type of measure has grown. This use is relatively recent and the figures are rather sparse: figures for 2012 show that at January 1, 2013, 350 persons were placed under electronic surveillance before judgement[55].

Introduced in 1970, judicial supervision is now well known and therefore has had relatively significant practical success. At January 1, 2013, for 2012, figures released by the Ministry of Justice counted 20,625 decisions for placement under judicial supervision for 14,411 decisions for placement in remand. Compared to 2011 figures, there was a 3.4% decrease in the use of judicial supervision which can be explained by: the reduction of the preparatory inquiries underway and indictments (29,180 in 2012), on the one hand, and the strengthening of means for placing under electronic surveillance, on the other hand. It may be recalled also that in these 20,625 decisions, 4, 969 judicial supervisions had been decided following a release after a first remand. In 2014, 45,500 placements under judicial supervision were counted by the Ministry of Justice, including 47% during a preparatory inquiry.

4. *Alternatives to detention during the sentencing stage*

4.1. *Analytical inventory of the existing arrangements at the sentencing stage*

Before presenting alternative measures to detention available to the judge at the trial stage (4.1.2.) and the data available to measure their use

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[54] ECtHR, *Gosselin v. France,* 13.12.2005, n. 66224/01; ECtHR, *Cretello v. France*, 23.2.2007, n. 2078/04; ECtHR, *Maloum v. France*, 8.10.2009, n. 35471/06; ECtHR, *Naudo v. France,* 8.10.2009, n. 35469/06; ECtHR, *Barasategi v. France*, 26.1.2012, n. 29095/09; ECtHR, *Vosgien v. France*, 3.10.2013, n. 12430/11.

[55] *Key Figures of Justice* published in 2015 for 2014, op. cit., do not however show the number of placements in house arrest.

and/or impact (4.1.3), the concepts and principles that govern sentencing in France (4.1.1) should first be considered. These determine the general features of the French "alternatives to incarceration" approach at the sentencing stage.

4.1.1. *General: the French approach to alternatives to incarceration at the sentencing stage*

To grasp the French approach to alternatives to incarceration during the sentencing phase[56], a brief discussion of penalties classification should be made, which determines the general economy of the French criminal law concerning the powers of the trial Court as to the choice of sentence. On this basis will then be considered the very broad freedom of choice available under the constitutional principle of individualisation of punishment[57]. In terms of alternatives to detention, this liberty is first framed by a series of constraints that are designed to be unfavourable to incarceration. It then operates within a range (recently extended) of penalties or measures that are not custodial.

A. Prerequisites: classification of penalities

The extent of the judge's margin of manoeuvre is first dependent on the legal classification of penalties that distinguishes the principal penalties, alternative penalties (or substitutes) and additional penalties.

Principal penalties are the penalties provided by law to punish, primarily, a given unlawful conduct. They determine the degree of gravity of the offence as a crime, misdemeanour or petty offence. In criminal matters, these are criminal detention and fine.. In correctional matters, the principal penalties are imprisonment, fine and exceptionally community service (TIG).

Alternative penalties can be imposed by the judge instead and in place of the principal penalty. They were initially introduced by Law N° 75-624 of July 11, 1975, to avoid pronouncing short prison sentences. Alternative penalties include penal constraint (which has been in force since October 1, 2014), citizenship courses, community service and certain deprivative or restrictive penalties (listed in Art. 131-6 CP). The sanction called "penalty-reparation" must be added (it can however be imposed at

[56] From the outset, a clarification is necessary. French criminal law is based on a tripartite classification of offences that distinguishes crimes, misdemeanours and petty offences. For constitutional reasons, deprivation of liberty cannot be incurred in petty offence matters. Petty offences are therefore excluded from the scope of our analysis.

[57] Constitutional Council, July 22, 2005, decision N° 2005-520 DC, cons. 3.

the same time as a sentence of imprisonment) as well as the day-fines (although their alternative penalty status remains uncertain, see below).

Additional penalties are penalties that supplement the principal penalty. They must be expressly provided for in the text of the offence. In criminal and correctional matters, Article 131-10 CP sets out the lists, concerning individuals, in general terms[58]. They can be imposed cumulatively with the principal penalty or penalities. But in correctional matters, they may be pronounced as a principal penalty and thus play the role of alternative penalties (including alternative to imprisonment).

B. Legal constraints and incentives in favour of alternatives to detention

The judge's freedom of choice with respect to custodial sentencing is governed by a certain number of constraints and the primary duty of individualising the sentence[59]. With the Law of August 15, 2014, (entered into force on October 1, 2014), these constraints have been pointed in one direction: disfavouring or avoiding the use of incarceration (specifically (short) sentences of firm imprisonment).

Thus, minimum sentences were repealed[60].

With respect to misdemeanours, sentences of unconditional imprisonment may only be imposed "as a last resort", if "any other penalty is clearly inadequate" (132-19 CP). A criminal court which imposes a sentence of imprisonment without suspension must especially provide the motives its decision, on the facts of the case and the personality of their perpetrator as well as his material, family and social situation (Art. 132-19 *in fine* CP)[61].

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[58] It relates to interdiction, forfeiture, incapacity or removal of a right, the injunction of care, the obligation to act, the immobilisation of an object, the forfeiture of an object or an animal, the closure of an institution or the display of the pronounced decision or its dissemination, either by printed media or by any means of communication to the public by electronic means. Adds to this list, the specific case (little used in practice) of socio-legal monitoring imposed as a principal penalty.

[59] See New Art. 132-1 CP: "Every penalty imposed by the court shall be individualised.

Within the limits set by law, the court shall determine the nature, the quantum and the regime of the penalties imposed based on the circumstances of the offence and the personality of its perpetrator as well as the material, family and social situation, in accordance with the purposes and functions of the penalty set out in article 130-1, according to which: "To ensure the protection of society, prevent the commission of further offences and restore social equilibrium, while respecting the victim's interests, the penalty fulfils the functions of: 1° Punishing the perpetrator of the offence; 2° Favouring amendment, integration or reintegration."

[60] These penalties called "fixed penalties" were applicable to repeat or violent offenders. A judge who imposes a sentence of imprisonment is therefore completely free to impose the sentence he considers the fairest, from 1 day to the maximum prescribed by law.

[61] However, the impact of this requirement to provide for special grounds remains un-

Even when ann unconditional prison sentence is imposed, the judge is encouraged to provide *ab initio* for the adjustment of the sentence towards non-custodial punishments (Art. 132-19 CP)[62]: the trial or sentencing judge can thus provide for the convicted person with a term of six months' imprisonment to carry out this sentence under the system of electronic surveillance.

In all cases, when the sentence imposed is less than two years (or one year for a repeat offender) and that the convicted person is not incarcerated at the end of the hearing (no warrant of committal was issued), the sentencing judge must summon him to consider the adjustment of the sentence: day-parole, outside placement, placement under electronic surveillance[63].

C. The variety of mechanisms for avoidance of detention

The judge is thus officially encouraged to avoid imprisonment, especially short sentences of unconditional imprisonment. As a result of the power of individualisation, a wide range of penalties and implementation modalities of sentences is at his/her disposal. In this sense, the scale and diversity (supposed to allow a true individualisation of the sentence) of the range offered to the judge already presents – on the surface at least – in themselves an additional incentive.

The judge has the opportunity to impose a non-custodial sentence. And even when the judge chooses to impose a custodial sentence, it can still be provided that this will not be executed or will be subject to adjustment.

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certain, see the experience predating the Law of August 15: A. Ponseille, "La double motivation de l'article 132-24 du Code pénal, outil de limitation du recours judiciaire à la peine d'emprisonnement ferme: de l'illusion à la désillusion…", in *Arch. pol. crim.*, 35, 2013/1, 61-89.

[62] Art. 132-19 para. 2 CP: "In this case, the sentence of imprisonment must, if the personality and the situation of the convicted person permits, and subject to a material impossibility, make use of one of the measures provided for in subsections 1 and 2 of section 2 of this chapter".

[63] Article 723-15 para. 1 CPP: "People not incarcerated or serving a sentence under the system of day-parole, outside placement or placement under electronic surveillance, sentenced to less than or equal to two years imprisonment or for which the duration of detention remaining is less than or equal to two years, or for which, in the event of cumulation of sentences, the total of the sentences of imprisonment imposed or remaining is less than or equal to two years may, to the extent possible and their personality and their situation permitting, and following the procedure laid down in this paragraph, benefit from day parole, outside placement, placement under electronic surveillance, a splitting or a suspension of sentences, parole or the conversion provided for in Article 132-57 of the Criminal Code. The two-year duration provided for in this paragraph are reduced to one year if the convicted person is in a legal state of re-offending".

D. Imposition of non-custodial sentences

The Criminal Code offers the judge several possibilities allowing to favour non-custodial penalties over a sentence of incarceration incurred as as a principal penalty[64].

Indeed, first of all, in criminal matters (with certain reserves, see below) and correctional matters, when it is imposed principally (i.e. as a principal sentence of reference), a fine may be imposed alone. Article 132-17, para. 2 CP provides that "the court may only impose one of the sentences for the offence for which it is seized".

Then, in correctional matters (excluding criminal matters), the judge may impose "instead of imprisonment", the aforementioned alternative sanctions[65].

Finally, in correctional matters (excluding criminal matters), the judge may pronounce as a principal penalty a sentence as an additional sentence[66].

E. Adjustment *ab initio* for custodial sentence

In addition to the opportunities offered to the judge to impose, instead of incarceration, a non-custodial sentence, the judge may also provide, as a mode of personalisation of the sentence, for the adjustment of the custodial sentence in order to avoid imprisonment for the convicted person. Thus, in criminal and correctional matters, the judge has the opportunity to combine the custodial sentence with suspension (which may be simple or with probation, or even with community service), to place *ab initio* the convicted person under electronic surveillance or to plan for the penalty to be completed by day-parole or outside placement.

In correctional matters (only), imposition of sentencing may also be deferred (deferment may be simple, with probation or injunction).

Finally, the judge has also the power to exempt the convicted person from any sentence.

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[64] That is, as a principal sentence of reference. Principal penalties are the penalties provided by law to punish, primarily, a given unlawful conduct. They determine the degree of gravity of the infraction as a crime, misdemeanour or petty offence. In criminal matters, the principal penalties incurred are detention and fine. In correctional matters, they consist in imprisonment, fine and exceptionally community service (TIG).

[65] Penal constraint, Art. CP 131-4-1; citizenship courses, Art. 131-5-1 CP; deprivation and restrictions of rights, Art. CP 131-6; community service, Art. 131-8. Penalty-reparations (Art. 131-8-1 CP) and day-fines (131-5 CP).

[66] Art. 131-11 CP: "When a misdemeanour is punished by one or more of the additional penalties referred to in article 131-10, the court may impose only the additional sentence or one or more of the additional penalties as a principal penalty".

4.1.2. *Presentation of the sentences and alternative measures to detention*

A. Content of the measures (typology)

The French judge has a very wide range of measures or sanctions allowing to opt for a non-custodial sanction. These sentences can be listed[67] according to the intensity of their effects for the convicted person. Thus it is possible to distinguish six levels or degrees of intensity[68].

The degree of zero, first, consists in the exemption of the penalty[69]. The judge has the power, in correctional matters, not to sentence the accused declared guilty[70]. In 2013, 5904 exemptions were imposed, representing 1% of all sentences.

First degree, then, is represented by the penalty-reparation[71]. This obligation for the convicted person, within the time and in the manner prescribed by the court, to compensate the victim seems[72] to be rarely imposed[73].

The second degree provides more. It consists of four penalties involving property: a fine, day-fine, immobilisation of a vehicle[74] and forfeiture. Fines, which are also a reference penalty along with the custodial penalty, represent in correctional matters the most often imposed alternative sentence to incarceration (or 35% of the total convictions in 2013). Day-fines, a monetary penalty consisting of a daily financial contribution paid to the Treasury for a certain number of days[75], represented in 2013 4.15% of the total of the principal penalties with respect to misdemeanours. The penalty of forfeiture may be imposed as an alternative or additional penalty. In the latter case, the scope of the property con-

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[67] This breakdown is based on that proposed in the working papers of the consensus conference, available at *http://conference-consensus.justice.gouv.fr/wp-content/uploads/2013/01/fiche-5-mesures-alternatives-a-lincarceration.pdf* (consulted in August 2014).

[68] However, this gradation is sometimes only partially correct. It offers a general framework which provides for exceptions when observing the measures in detail.

Thus, within a single category of penalties or measures, the intensity felt can be very variable. Although patrimonial penalties are of a lesser intensity, forfeiture is one that can be particularly intense depending on the nature and quantity of goods and assets on which it is exercised.

In addition, the intensity varies considerably depending on the terms of the penalty imposed (duration, for example).

[69] See sheet on "discharge" measure (dispense de peine).

[70] Art. 132-58 and 132-59 CP.

[71] See sheet on "penalty-reparation" measure.

[72] J.Y. Maréchal, *JCL Pénal Code*, Art. 131-3 à 131- 9 CP, number 20.

[73] It is not shown in the Annuaire statistique de la justice.

[74] See sheet on "Vehicle immobilisation" measure.

[75] See sheet on the "day-fine" measure: the maximum amount is 1000 euros per day and the maximum is 360 days, Art. 131-5 CP.

cerned is potentially very wide depending on the offence[76]. In 2010, sentences of forfeiture represented 13.5%[77] of alternative or additional penalties and 4.56% of total convictions.

The third degree corresponds to reputational penalties which consist of posting or broadcasting the sentence[78]. Lack of statistical data prevents assessing the use and impact of this type of measure, but it could indicate low use and as a result very limited effects.

The fourth degree consists of penalties that restrict rights[79]. This category is well used[80]. Data about it are nonetheless rare and incomplete. Thus, among them, only two measures appear to be assessed (a sign, perhaps, of their more frequent use?). The main use is suspension of the driver's licence, no doubt due to the importance of traffic offences (which have also been the subject of a partial correctionalisation, on which see below). In 2012, as an alternative penalty, it represented 2% of the total of convictions and 23% of the total of alternative penalties imposed. Then, follows the prohibition of issuing cheques, representing in 2012 0.01% of the total of sentences imposed.

The last degree comprises penalties that restrict freedom[81]. It is the most common category and is divided into four subsections.

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[76] See sheet on the "Forfeiture" measure.

[77] In 2006, this percentage only amounted to 1.9%.

[78] See sheet on "Posting or broadcasting the decision of conviction" measure.

[79] Very useful with respect to certain offences, penalties consisting in restrictions of rights suffer from a defect that should be corrected. Judges have a very great power in their regard. They can replace imprisonment (or fine) when the misdemeanour is only punished by such penalty, by one or more of the list of penalties set out in Art. 131 6 CP. However, this list does not take into account the nature of the offence (with the exception of the penalty of prohibition to exercise a professional activity) so that the relationship between the sentence and the misdemeanour may be totally false. But above all it does not take into account the gravity of the offence so that the combination of these penalties is likely to lead to very severe or even disproportionate penalties with respect to the seriousness of the acts. To address this risk, removing the mechanism of Art. 131-6 CP concerning restrictions of rights could be envisaged while settling for the mechanism that allows for imposing additional penalties as a principal one. This would restore the link with the offence and, in principle, ensure proportionality (see J.Y. MARECHAL, in *JCL Penal Code*, Art. 131-3-131-9 CP, number 20).

[80] It includes withdrawal of a hunting permit, prohibition from carrying a weapon, prohibition from keeping an animal, deprivation of the right to drive, suspension of driver's licence, cancelling driver's licence, prohibition from driving certain vehicles, prohibition from issuing cheques, prohibition from using payment cards, prohibition from civil, civic and family rights, closing an institution, exclusion from public tenders, prohibition from exercising a public function or a professional or social activity, banning from a commercial or industrial profession, or from leading or managing a company or corporation.

[81] General category: restriction of freedom of movement and/or imposition of diverse obligations.

In the first place are warnings which include simple suspension (corresponding to a conditional exemption from executing all or part of the sentence) and simple deferment (which allows delaying the sentencing)[82].

In the second place are "citizen penalties" consisting of either the obligation to participate in courses[83] or performance of a community service. Although enjoying a largely positive image, this ancient measure (applicable since 1984) remains marginal, due to the consistent low number and variety of positions available.

In the third place, there are various prohibitions (being with people, visiting certain places, leaving or entering the country)[84] which are mainly temporary but can be permanent.

In the fourth place are social support and surveillance measures which are the most common and regularly strengthened or reformed by the legislature which appears to prefer them. These include measures to defer sentencing which are combined with either a probation or an injunction or even allow the judge to collect the information necessary for his decision. Added to these are the conditional suspended sentence (accompanied by a probation or community service), socio-judicial surveillance, penal constraint, *ab initio* electronic surveillance, *ab initio* outside placement and *ab initio* day-parole. The latter measures, which include the traditionally most commonly imposed alternative – probation[85] – are characterized overall by the desire to subject the convicted persons to obligations performed while not in detention which are always more common and still more restrictive (the most recent example of penal constraint provides the illustration). As a result, probation and testing take priority over support. Indeed, although this latter objective is formally present in the legal texts, it is too often in practice relegated to the background, the fault essentially of sufficient means being totally absent for execution of the measure, thereby jeopardizing their "chance of success" and thus credibility.

B. Use of measures (statistics)

Available data allows for a grasp in broad terms, on the one hand, of the proportions in which the measures are imposed (and so to identify

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[82] See the sheets on "Simple suspension" and "Simple deferment".

[83] See the sheets "Citizenship course", "Road safety awareness course", "Course on awareness of the dangers of narcotics", "Parental responsibility course" measures.

[84] See the sheets on "prohibition from associating with certain people", "banishment", "prohibition from leaving the French territory", "permanent or temporary ban from French territory".

[85] See measure "Suspension with probation".

the "preferences" of the courts), and on the other hand, the developments to which they are subject.

In 2010[86], 892,140 sentences (crimes, misdemeanours and petty offences of 5th class) were imposed, including 628,052 which were primary (imposed as a principal penalty). In this set, convictions for misdemeanours represent 581,867 convictions or more than 92% of the total. Of these, sentences of imprisonment or combined with a partial suspension represent 122,160 decisions, or nearly 21% of all misdemeanours, while sentences of imprisonment combined with suspended sentences amounted to 181,812, or more than 31% of the total. In correctional matters, fines are the most often imposed alternative penalty to incarceration with 183,898 convictions in 2010 (31.6% of the total). It is followed by the total simple suspension at 116,927 decisions (20% of the total), then by probation with 55,584 convictions (9.5% of the total), fines with 24,246 convictions (4.2% of the total) and community service with 15,936 convictions (2.7% of the total). Placement under electronic surveillance is not included in these figures because it is not a sentence. The number of community services imposed rose from 8,853 in 2002 to 15,770 in 2008. Similarly, the total number of suspended sentences with probation has increased over the last 5 years from 51,370 convictions in 2006 to 55,584 in 2010. On January 1, 2012 it represented 74% of non-custodial measures monitored by the prison service for insertion and probation and involved more than 173,000 persons. Courses to raise awareness (road safety, narcotics, etc.) are also increasing (100% between 2003 and 2008).

A recent study has provided a summary of the structure of the sentences imposed in 2014 by the correctional courts (which represent the vast majority of criminal convictions)[87]. It shows that sentences of imprisonment represent 50% of the total number of sentences; 23.5% being imposed with an unconditional portion and 26.4% with full suspension (three out of ten are combined with probation). Fines and day-fines imposed as primary amount to 42% of sentences imposed. Then come community services (3.7%), other alternative sentences including those related to drivers' licence (3.3%) and sentence suspensions (0.7%)[88].

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[86] Data extracted from the working documents of the consensus conference.

[87] O. TIMBART, "Diversité des réponses pénales des parquets et des tribunaux correctionnels selon la nature des affaires", *Infostat*, 136, September 2015.

[88] But these figures need to be corrected by removing the sentences under the summary penalty order procedure that excludes imposition of imprisonment.

TABLE 5. *Convictions according to the nature of the principal penalty in 2012*

	2010	2011 (r)	2012 (p)
Réclusion criminelle	1 145	937	1 006
Peine d'emprisonnement	300 441	291 849	292 399
Emprisonnement ferme	88 420	90 317	90 570
Emprisonnement avec sursis partiel	33 684	32 468	31 731
Emprisonnement avec sursis total	178 337	169 064	170 098
Peine d'amende	212 524	206 049	225 582
Peine de substitution	61 481	62 159	66 393
dont suspension du permis de conduire	*12 257*	*14 500*	*17 012*
Mesure et sanction éducative	27 257	25 510	23 315
Dispense de peine	7 144	6 639	5 526
Total	609 992	593 143	617 221

p: données provisoires.
r: données révisées.
Champ: France.
Source: SDSE, exploitation statistique du casier judiciaire national.

TABLE 6. *Sentences imposed in convictions in 2012*

Nature de la peine principale	Nombre	Quantum mnoyen ferme
Toutes peines	617 221	
Réclusion criminelle	1 006	14,3 ans*
dont: à perpétuité	*16*	
Peine d'emprisonnement	292 399	
dont: avec partie ferme	*122 301*	6,9 mois
Peine d'amende	225 582	466 euros
Peine aternative	66 393	
dont: suspension de permis de conuire	*17 012*	
dont: jour amende	*24 271*	
dont: travail d'interêt général	*16 588*	
Mesure et sanction éducative	23 315	
Dispense de peine	6 526	

* hors réclusion criminelle à perpétuité.

4.2. *Overall assessment of arrangements existing at the sentencing stage*

The assessment of provisions allowing French courts, during the sentencing phase, to favour a non-custodial sentence over a sentence of

incarceration is a difficult exercise in view of the considerable number of measures offered by the legislature to the penal judge and the lack of quantitative and qualitative studies providing an overall and up to date view of the use of these measures and their implementation. However, the exercise can be attempted by assessing the range of measures with respect to European standards, which then allows, firstly, identifying the main difficulties these measures face and, secondly, assessing their actual and potential impact on prison overcrowding.

4.2.1. *Compatibility with European standards*

The assessment of alternative measures to detention at the trial stage in the light of European standards requires to make two preliminary warnings. Firstly, although the European Union is not losing interest in the prison question and in particular issues related to the use of the custodial sentence and overcrowding suffered by most of its Member States, it is the standards developed by the other Europe that will guide us[89]. Secondly, although the instruments developed by the Council of Europe are far from unambiguous and present a certain ambivalence maintained in the long term, the standards will be retained here as a main reference point that unequivocally favours alternatives to detention and disfavours incarceration.

Overall, looking at the measures available, a very positive assessment of the French legal order results: the French measures all appear compatible (or, at the very least, are not significantly incompatible)[90] with European standards not only merely considered individually, but also considered jointly; they indicate that the French legal order offers a diverse palette, with very extended scope and terms. In this sense, subject always to possible additions or supplements (and also envisaged)[91], it seems to offer a complete set. It does not show any obvious lack or deficiency.

In terms of the general economy of alternatives, and more broadly of the general philosophy of imposition of sentences, the recent multiplication should be noted of encouragement to avoid incarceration, particularly short prison sentences, and to favour sentences which are restric-

[89] Moreover, these standards are intended to serve as a guide to the European Union itself.

[90] A reservation should be made, however, for the case of measures which themselves raise difficulties not simply with standards related to alternatives but with fundamental human rights guaranteed by the ECtHR (think for example of the case of forfeiture in some of its harshest terms).

[91] Lastly, see Cotte Report, for an overhaul of sentencing law, December 2015.

tive of rights. The custodial sentence is – on paper – a penalty "of last resort", within the meaning of point 1 of Recommendation R (99) 22.

More specifically, in addition to the continual diversification of alternatives, ultimately including creation of the sentence of penal constraint, the search by the legislature should be noted for tools for the judge to take into account[92] the prison capacity and in particular the institution's occupancy rate[93]. In line with paragraphs 7 and 18 of the aforementioned recommendation, although such a perspective appears attractive because it allows "sanctioning" but with some flexibility, the requirement of point 6 of the recommendation which consists of providing for the maximum capacity of institutions; there is also the risk of inequalities.

However, French criminal law is far from free of all weaknesses with regards to European standards.

In the first place, one cannot fail to insist on the first and most effective means of combating prison overcrowding that decriminalisation represents. However, French criminal law largely ignores this avenue[94], or even clearly contradicts it. The creation of new offences is far from rare; it comes in addition to the correctionalisation of older offences[95]. Conversely, repeal of offences appears exceptional, as is the case of reducing crime or misdemeanour to petty offences.

Secondly, regarding the nomenclature of penalties, their diversification has not changed the "ever-present" status of the custodial sentence as a reference sentence, in every sense of the term. It remains the point of reference around which the whole penal system seems to revolve. The abortive attempt to make penal constraint a main reference sentence alongside imprisonment and fine with respect to misdemeanours provides a significant example[96].

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[92] This consideration is probably already integrated in the practice of the courts. Providing for it in the law would have the effect of making it visible and express.

[93] See Art. 5 quaterdecies of the Bill on adaptation of criminal procedure to European Union law, become Art. 27 of the Law and repealed by the Constitutional Council (August 13, 2015, 2015-719 DC). The article related to the power of the judge to grant additional penalty reductions.

[94] Encouraged by paragraph 4 of the aforementioned recommendation.

[95] The example of traffic offences is revealing, see O. TIMBART, *op. cit.*

[96] It should be added that this new penalty also illustrates the search (more or less assumed) to "mimic" incarceration outside. This is especially true given the lack of resources allocated to achieve the social support dimension of the measure with the effect of prevalence or exclusivity of its surveillance dimension, see below, point following on the difficulties.

See discussion earlier of the "ersatz of incarceration" about the big brother of penal constraint: suspenion with probation: S. PORTELLI, "Les alternatives à la prison", in *Pouvoirs*, 4, 135, 2010, 15-28, 19. S. PORTELLI, "Les alternatives à la prison", op. cit.

Thirdly, the analysis seen in the wider and more comprehensive criminal policy framework reveals deficiencies as fundamental as structural which raise doubts about the real, effective[97] compatibility of French law. Indeed, compatibility in the letter does not hide the appearance of compatibility in spirit, if not an (relative) incompatibility in practice. In this sense, one must insist on the general inconsistency of criminal policy[98]. The finding is old[99]. It remains valid. It is not merely about alternating political choices, according to political majorities, but a more profound overlapping and stacking of rules of contradictory inspirations that is regrettable. There is now a schizophrenia in which the penal institution is understood to be found: it is blamed sometimes for being "lax" and sometimes for the evils of "any incarceration". To this mitigated finding must be added the difficulties that weaken alternatives to detention.

4.2.2. *Difficulties*

It is precisely the refusal of a comprehensive reading (or inability to propose one) which leads to obscuring the difficulties that limit or deprive alternative measures of their ability to produce a tangible and lasting effect, including on the state of prison overcrowding.

In the first place, it should be noted how the type of procedure is decisive in the context of the judge's decision. Indeed, "the choice between imprisonment and an alternative penalty is, to a large extent, conditioned by the measures that preceded this choice"[100]. Thus, the type of procedure should be taken into account among the factors, and even more among the main factors, which determine the use of the alternative (its principle, its terms), either to favour it or on the contrary to discourage it[101].

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[97] Considering the compatibility of national measures with regards to European standards entails designing these standards to be practical and effective and not theoretical or illusory, as it is the case of the fundamental rights enshrined by the ETHR and protected by the ECtHR.

[98] S. PORTELLI, "Les alternatives à la prison", op. cit.

[99] CNCDH, *Sanctionner dans le respect des droits de l'homme*, 2007, vol. 2: Alternatives to detention.

[100] S. PORTELLI, "Les alternatives à la prison", op. cit., 17.

[101] Voir O. TIMBART: the data relating to decisions of convictions change radically when one distinguishes different types of procedure. The figures above do not take this into account and as a result the structure of penalties is "largely influenced by the summary penalty orders", which excludes the imposition of the sentence. "*If we exclude them, the share of fines is halved (22% of total) in favour of conditional sentences (37%) or sentences with an unconditional portion (33%). These are immediate appearances that represent the heaviest sentences with more than three convictions out of four to a sentence of unconditional imprisonment (77%), in front of the convictions imposed on referral from the investigating judge (55%). "Convictions follow-*

In the wake of this consideration, it is important to focus on the effects of the essentially or exclusively quantitative reasoning or rationale which, far from answering the questions, move them around, or constantly delay the response. The development of real-time and quick proceedings, which is more about managing the flow than that of a quest for promptness (as a component of the fundamental right to a fair trial) illustrates it. The same applies for the temptation to reduce the alternatives to detention to their effects – the "decongesting" of prisons – and forgetting their purpose – facilitating reintegration. In other words, although alternatives to detention can be a valuable tool to combat prison overcrowding, we must beware the slope that would lead to reducing its use or its *raison d'être* for this sole purpose[102]. Especially since the real effects on prison overcrowding are far from certain.

Secondly, among the factors affecting the use of alternatives, the type of offences (and the legal protected interest) also plays a significant role. So, notably, in terms of assaults on the person, imprisonment is present in nearly four cases out of five, with 46% of the total suspended (very often with probation); community service and suspension-community service fall to 3.5%. For damage to property, three out of four penalties are imprisonment, either unconditional or with a partial suspension (41%), or combined with total suspension (32%). Fines and day-fines represent less than one conviction in five, and community service and suspension-community service close to 8%. 60% of attacks on the authority of the state[103] are penalised by sentences of imprisonment, of which more than half has an unconditional portion. One-third of the convictions impose a sentence of a fine or day-fines, one in twenty impose a community service. Public health violations[104] give rise to equal sentences of imprisonment and fines (47% each). For these, more than half have an unconditional part. In traffic and transportation cases, a fine

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ing a referral to the court through immediate appearances and summonses by statement of charges from the prosecutor are finally distinguished by a high proportion of probation for fully combined suspended imprisonment (half compared to 27% for the summons by police officers and 15% for direct citations). "In contrast, the CRPCs have the lowest rate of unconditional imprisonment or with partial probation (7%) but the highest rates of imprisonment with total suspension and suspended community service, with 48% and 11% of sentences respectively".

[102] The consensus conference on the prevention of repeat offending echoed: "[The interest of alternative measures] should not be limited to a reasoning of management of prison flows and to consider the benefits in terms of preventing repeat offending and limiting restrictions of liberty imposed on people", see Sheet 5: Les mesures alternatives à l'incarcération, 145.

[103] The category is broad and diverse. It includes acts of corruption, forgery, contempt, terrorism, criminal association, weapons and legislation on foreigners.

[104] Mainly consists of drug trafficking ("usage").

is most commonly used (64%). Imprisonment, mainly with full suspension, is in the minority (27%). Economic, financial and labour cases are characterised by a preference for fines (56%) and sentences of imprisonment fully (26%) or partially (11%) combined with suspension. The rate of penalty suspensions is well above average (3%).

Lastly, but in reality it should always start there, the overwhelming majority of alternative measures are adversely affected by the structural deficit in financial and human resources suffered by the French justice system and particularly criminal justice. So for example, the resources allocated to the SPIP influence most of the alternatives. However, these services are structurally understaffed. A similar observation can be seen with regard to the penalty of community service, where the lack of positions remains. Similarly, the issue of the delay between judgement and enforcement of the sentence is very largely dependent on the resources of the judicial system. Yet, this delay determines success as much as the credibility of the measures. Sentences that restrict rights suffer in particular from a deficit of control related to a lack of communication and information between authorities and services in charge of verifying compliance.

The compelling character of the challenge of resources, which unfortunately remains constrained, if not denied, takes a new turn if we now look at the impact of alternatives on overcrowding.

4.2.3. *Impact on overcrowding*

Introduced to substitute for custodial sentences, the development of alternative measures should have the effect of at least containing, or even reducing the number of incarcerations. However, nothing could be further from the truth. During the past 20 years, the prison population has been increasing overall, while alternatives to incarceration were growing quantitatively[105]. Several reasons can be put forward.

First, there are the weaknesses and difficulties mentioned above (inconsistency of criminal policy which issues to judicial authorities, especially judges, adversarial injunctions, flow rationale, lack of resources, see above).

It is necessary to add another with a formidable effect. It appears in fact that the truly alternative character of alternative measures is partly if not largely theoretical. In reality, penalties provided for by the legislature as alternative penalties are not alternatives to incarceration: "They are imposed when the judge has already ruled prison out of his reasoning

[105] Documents from the consensus conference, Sheet 5: Les mesures alternatives à l'incarcération, *op cit*.

and tries to best adapt a penalty which will fully take place "out of detention"[106]. These measures add to the range of penalties but are only rarely substitute for imprisonment. The result is an appearance of substitution that disguises an additive reality and hides an expansion of the scope of the "criminal net". So alternative sentences are imposed not in place of detention but instead of a different and less restrictive penal measure, or even as a substitute for the absence of a penal measure. However, although the reality of the phenomenon leaves no room for doubt, it is difficult to measure[107]. This forestalls the argument that fails to weigh on the framework of penal policies in general and those devoted to combating prison overcrowding in particular, being caught in either the trap of penal inflation, systematisation of penal response or the managerial approach of procedures.

5. *Alternatives to detention during the post-sentencing stage: sentencing facilities*

5.1. *Analytical inventory of the existing arrangements at the post-sentence stage*

The principle of sentencing facilities is stated in Article 707 CPP, which is the first article of the fifth book of the Code of Criminal Procedure relating to enforcement procedures. This article has been rewritten and enriched by the Law of August 15, 2014, *on individualisation of punishments and strengthening the effectiveness of penal sanctions*:

"I. – Upon decision or under the control of the judicial authorities, sentences imposed by criminal courts are, except for insurmountable circumstances, executed effectively and promptly.

II. – The enforcement of penalties deprivative and restrictive of liberty is intended to prepare for the integration or reintegration of the convicted person, to allow him to act as a responsible person, respectful of the rules and interests of society, and to avoid the commission of further offences.

This regime is adapted as the sentence is executed, based on the evolution of the personality and the material, family and social situation of the convicted person, and is subject to regular evaluations.

III. – Any convicted person imprisoned in execution of a custodial sentence is entitled, whenever possible, to a progressive return to liberty, taking into account the material conditions of detention and the occupancy rate of the prison institution, as part of a measure of day-parole, outside

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[106] S. Portelli, "Les alternatives à la prison", op. cit., 18.

[107] CNCDH, *Sanctionner dans le respect des droits de l'homme*, op. cit.

placement, electronic surveillance, parole or release with limits, to avoid release without any form of judicial supervision.

IV. – During execution of the sentence, the victim has the right:

1° To be heard by the judicial authority on any harm to his interests;

2° To obtain reparation for damages, by compensation for it or by any other suitable means, including, if applicable, a proposition of a measure of restorative justice;

3° To be informed, if he so wishes, of the end of execution of a custodial sentence, in the cases and under conditions provided for in this code;

4° To taking into account, if applicable, of the need to ensure his peace and safety.

The judicial authority is required to ensure all of these rights throughout the execution of the sentence, regardless of the terms".

As the explanatory statement of the Law of August 15, 2014 (Art. 11) explains well, it was to "*subscribe in a clear and consistent way to all principles governing implementation of sentences once they have been imposed by the penal courts, in the same way as the preliminary article of this code deals with the principles of the procedure leading to a conviction*".

Appearing in this new article are guidelines for the execution of sentences:

1) the search for effectiveness[108];

2) preparing for insertion or reinsertion (combating repeat offending is at the heart of execution of sentences);

3) the evolving character of the execution regime that led it to be modulated according to changes of the convicted person through regular assessments of his personality and his personal situation;

4) in case of imprisonment, progressive return to liberty by a support measure, whose choice also depends on the material conditions of detention and the occupancy rate of the prison institution;

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[108] In practice, the Law of August 15, 2014 advances effectiveness on two points at least (J.-H. ROBERT, "Punir dehors. Commentaire de la loi n° 2014-896 du 15 août 2014", in *Dr. pén.*, 16, 2014):

– The statutory use of the offices of execution of sentences was previously only provided by implication in the code. Now, "In every court of first instance and in every court of appeal, an office of execution of sentences is established, whose composition, missions and operating procedures are set by decree.

This office is responsible to deliver to any convicted person present at the end of the court hearing a record of criminal conviction mentioning the sentences that were handed down" (Art. 709-1 CPP).

– Strengthening of surveillance of persons before the courts (either in respect of judicial supervision or in respect of a conviction) particularly by the possibility of a search of the home of the convicted person to search for weapons if the ban on possession is a type of sentence incurred, by the possibility of intercepting emails in order to check that the person is not contacting people they are prohibited from being in contact with, by geolocation.

5) taking into account the rights of the victims.

Therefore, if determined at the time of the sentencing, the regime for execution of the sentence is required to be set out in the execution phase of the sentence, whether at the beginning of execution of the sentence or during execution of the sentence.

In general, the sentencing facilities are under the jurisdiction of a court for application of sentences. Sentencing courts may be classified into two categories.

5.1.1. *Courts for application of sentences*[109]

There are two courts of first instance: the sentencing judge and the sentencing court.

The sentencing judge (juge de l'application des peines: JAP)

Created by Order n° 58-1296 of December 23, 1958, the sentencing judge (JAP) is a judge attached to the court of first instance. His territorial jurisdiction is that of the jurisdiction in which the prison institution is located if the convicted person is imprisoned and that of the jurisdiction in which the free convicted person habitually resides.

His jurisdiction continues to expand:

– He is competent to follow certain sentences: suspended sentence with probation, sentences or measures that restrict liberty, execution of imprisonment or a fine in case of violation of the obligations of community service.

– He is competent to define the terms of certain sentences. Thus for the new penal constraint[110].

– He is similarly competent on the choice of certain sentences.

Thus, Article 747-1-2 CPP introduced by the Law of August 15, 2014 gives jurisdiction to substitute for a sentence of day-fines a sentence of suspension combined with performing community service. Thus again, Article 721-2 CPP, amended by the law of August 15, 2014 (Art. 44) gives the JAP the power to subject a convicted person who has had one or more sentence reductions, after his release, to a prohibition to enter into a relationship with the victim, accompanied by the need for the obligation to compensate the injured party. If the convicted person does not comply with these obligations and prohibitions, the JAP may with-

[109] To these courts for application of sentences under common law are added courts for application of sentences with special competences: courts for retention of security and courts for application of sentences for minors (in principle, the judge for children).

[110] The Constitutional Council did not see in the "*multiplicity of powers of the sentencing judge*" a violation of the principle of impartiality of the courts (Cons. const., August 7, 2014, n° 2014-696 DC, considering 19 and ff.)

draw all or part of the term of the sentence reductions received and order his re-incarceration.

– His "natural" jurisdiction remains despite all the sentence planning and the monitoring/control of sentence management.

5.1.2. *The court for application of sentences (tribunal de l'application des peines: TAP)*

A Collegiate Court (introduced by the Law of March 9, 2004), it is composed of three sentencing judges. There is at least one within the jurisdiction of each court of appeal. Its territorial jurisdiction follows the same rules as for the JAP.

Its material jurisdiction is largely subsidiary to that of the JAP (Art. 712-7 CPP): it is competent to deal with raising the period of unconditional imprisonment and matters of parole or suspension of sentence but only where the JAP is not competent (in practice for convicted persons sentenced to a custodial sentence exceeding 10 years, or for which, regardless of the sentence originally imposed, the duration of detention remaining is more than 3 years[111].

The court for application of sentences is the jurisdiction for application of sentences of the second degree.

5.1.3. *The terms of sentence planning*

The terms of sentence planning are, in the order of the Code (Art. 720 and ff. CPP)[112]:

1) Release with restrictions;
2) Suspension and splitting of sentences*;
3) Sentence reductions;
4) Outside placement*;
5) Day-parole*;
6) Temporary absences;
7) Permissions for release under escort;
8) Placement under electronic surveillance*;
9) Parole.

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[111] Art. 730 CPP for parole.

[112] Note that the Code of Penal Procedure distinguishes, without great relevance, in its fifth book "Execution procedures", a title on detention (including a chapter I on "execution of remand" and a chapter II on "the execution of the custodial sentences" comprising mainly of splitting of sentences, the period of unconditional imprisonment, reductions of sentences, outside placement, day-parole, temporary absences, permissions for release under escort and placement under electronic surveillance) and a title on parole.

* Measure also possible at the sentencing stage.

It is difficult to rank these measures by degree of intensity, especially since most of them are accompanied by monitoring measures and obligations during the time spent outside the walls of the prison. Subject to the weight of penal constraint on the outside, it can however be considered that those are less severe that offer the longest period of freedom outside the prison walls, and that on the contrary the more intensive ones impose a regular return to detention, or are similar to a change in the place of detention without offering a total return to free life. Under these conditions, penalty measures could be classified thus:

1) Parole;
2) Release with restrictions;
3) Suspension and splitting of sentences;
4) Sentence reductions;
5) Temporary absences;
6) Permissions for release under escort;
7) Outside placement;
8) Day-parole;
9) Placement under electronic surveillance.

Some figures summarizing the number of persons before the courts[113].

TABLE 7

	Number of people before the courts[114]	Including persons monitored without confinement[115]	Detained	Inmate density per 100 places[116]
As of 01/01/1980	108,123	71,210	36,913	
As of 01/01/1990	137,757	92,337	45,420	124
As of 01/01/2000	186,461	135,020	51,441	104.4
As of 01/01/2010[117]	234,760	168,671	60,978	110.9
As of 01/01/2012	246,843	173,063	64,787	113.2
As of 01/01/2014	251,991	174,108	67075	116.2

[113] *Statistical Series of persons before the courts (1980-2014)*, the Prison Administration, 2014.

[114] Persons before the courts are persons placed under the court's authority.

[115] Without confinement means, as opposed to solutions of confinement, forms of execution of the sentence outside prison.

[116] Occupancy rate, that is, the number of persons detained relative to the operational capacity.

[117] As of 2005, the calculation changed and persons in custody but not detained (mainly people placed under electronic surveillance) are accounted for separately.

TABLE 8

	Number of people before the courts	Including persons monitored without confinement	Including persons in custody[118] without sentencing arrangement	Including convicted persons with sentencing arrangement
As of 01/01/1980	108,123	71,210		
As of 01/01/1990	137,757	92,337		
As of 01/01/2000	186,461	135,020		
As of 01/01/2010	234,760	168,671	58,797	7292
As of 01/01/2012	246,843	173,063	62,559	11,221
As of 01/01/2014	251,991	174,108	64,935	12,948

TABLE 9

	Number of persons in custody with sentencing arrangement	Including placement under electronic surveillance	Including outside placement	Including day-parole
As of 01/01/2010	7292	4489	1138	1665
As of 01/01/2012	11,221	8417	947	1857
As of 01/01/2014	12,948	10161	1022	1765

TABLE 10

	Number persons monitored without confinement[119]	Including suspended sentence with probation	Including suspension with obligation of performing community service	Including parole
As of 01/01/1980	71,210	66,327	/	4883
As of 01/01/1990	92,337	82,182	0	5618
As of 01/01/2000	135,020	113,499	0	4852
As of 01/01/2010	168,671	141,156	12,618	7023
As of 01/01/2012	173,063	144,060	17,280	6752
As of 01/01/2014	174,108	141,107	20,392	6428

[118] Custody is the formality of taking responsibility of a convicted person with a custodial sentence by the prison administration. This formality is recorded in the custodial registry which collects all custodial actions and which is held by the clerk of the prison institution.

[119] Persons monitored without confinement are those under probation, community

French law provides many mechanisms intended to limit the duration of incarceration, and especially to support release from prison. However, 80% of released prisoners are not subject to any supervision or control (this rate rises to 98% for people who had six months' imprisonment or less to run – which explains the importance of avoiding short imprisonment in the context of combating repeat offences)[120]. The practical challenges in this area are therefore significant[121].

5.2. *Overall assessment of arrangements existing at the post-sentencing stage*

Like any mechanism of criminal law, execution of sentences is subject to the principle of legality. However, and this is the first criticism that can be made of the French mechanism, the law governing execution of sentences is complex and confusing. It is in this perspective that the Commission is working for an overhaul of sentencing law[122]. Among the envisaged avenues of reform, the Commission suggests submitting the measures of penalty (day-parole, outside placement, placement under electronic surveillance, sentence-splitting, suspension of sentence and parole) to the same terms, whether[123]:

– threshold for granting: two years for all these arrangements, except for parole for which it would retain the threshold of half the sentence.

– conditions for granting: proof of the exercise of a professional activity, followed by an internship or attending course, vocational training or looking for a job; essential participation in family life; the need for medical treatment; existence of serious efforts at social rehabilitation resulting from sustainable involvement in any other project characterised by insertion or reinsertion so as to prevent repeated offending.

– obligations combining the arrangement: the control measures referred to in Article 132-44 of the Criminal Code and, where appropriate,

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service, parole (in figures here) and also those under judicial supervision, prohibition of residence, social-judicial monitoring (not listed here).

120 "Lutter contre la délinquance. Une réforme pénale au service des citoyens", Ministère de la justice, oct. 2013: *http://www.justice.gouv.fr/publication/reforme_penale_2013.pdf*.

121 For example, sustainability of financing for outside placement; or terms of facilities, schedules or location of the day parole centres, in particular: see Comptroller General for places of detention, *Notice of October 23, 2012 regarding day-parole*, Also studied in the *Rapport Annuel*, 2012, 9.

122 This commission, chaired by Mr Bruno Cotte (Honorary President of the Criminal Chamber of the Court of Cassation and former president of the Chamber of First Instance of the International Criminal Court), submitted its report to the Minister of Justice in December 2015.

123 Commission for the overhaul of sentencing law, December 2015, 67.

the measures laid down by Articles 132-45 and 132-46 of the Criminal Code.

– reasons for withdrawal: non-compliance with obligations imposed, refusal of a change required in the conditions for execution of the measure; bad behaviour characterised by either non-compliance with the internal rules of the prison institution or of the receiving organisation or by the repetition of a delinquent behaviour of acts committed during the measure; possibly at the request of the convicted person himself.

Thus reconsidering the regime of sentencing arrangements would include respect for the principle of legality, that is, of a better readability and accessibility of legal texts that would not only facilitate the work of judges for application of sentences (and maybe would encourage them to use such instruments more if they are clearer) but also, perhaps, to contribute to the necessary adherence of the convicted person to his own sentence. On the more specific issue of the permitted absences, so that the convicted person understands, at the time of granting the first permission to leave, in order that he enters a process which is by all means favourable but also includes obligations, it is important to simplify the very complex system, which provides different conditions of granting the same permissions for leave, depending on whether the convicted person is in a remand centre or in a detention centre[124].

The execution of sentences must also continue and more specifically have a goal of reinsertion that both fits a humanistic perspective but also has in mind protection of society through the prevention of repeated offences. This goal of reinsertion must be present from the beginning of custody, until exit from prison and, as the case may be, more or less of a long time after release.

Taking the individual's future into account begins at his entry into prison by drawing in the best possible way on the "shock of incarceration"[125]. The construction of the most effective possible "prison career", the least "de-insertion" as possible (rehabilitation research and combating repeat offending are a way to address prison overcrowding) translates to attention from the first moments of incarceration and by respect for

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[124] *Idem*, 63-64.

[125] "(…) depending on the position we occupy in the penal world and the main mission that results, the shock of incarceration takes on a distinct meaning: a salutary punishment for magistrates, it becomes a factor of recidivism for the prison services for insertion and probation and risks of suicide for supervisory personnel. The only point of agreement between the three categories of actors in the penal scene: incarceration certainly represents a real shock" (D. Fassin, *L'ombre du monde. Une anthropologie de la condition carcérale*, Paris: Le Seuil, 2015, 159).

fundamental rights (dignity, family, health…), as they are today set out in the Prison Law of November 24, 2009[126].

Moreover, far from being static, the situation of the inmate must be changeable, and take the form of a real "prison career". There are two ways to think of this career, this prison evolution.

We can first consider an automatic evolution, detached from the powers of the judge and the attitude/consent of the inmate, at least with regard to evolutions favourable to the inmate. Thus, except for the intervention of a judge because of the convicted person's attitude, an obligation could be foreseen for release after X time spent in prison. The advantage of such an approach would somehow create for the State a positive obligation of release from prison (what better way to combat overcrowding?) while imposing real supervision outside. But such an approach is not without drawbacks. First, it returns control to outside the prison, with the pitfall that control outside prison, on the grounds that it is "outside", can last longer; the issue of overcrowding would be replaced then with the (less severe?) issue of too many people under surveillance[127]. Secondly, this approach would be a strong limit to a fundamental principle in the matter: the principle of individualisation of punishments.

Indeed, then, we can consider a change that is not more – partially – automatic but – totally – personalised for the prison career, a translation of respect for the principle of individualisation of punishments. However, although the sentencing judge has seen his powers grow in recent years, he is also dependent on complex legal texts (see what was said above about respect for the principle of legality) that sometimes are restrictive of the options at his disposal. Repeating the offence is always taken into account in the post-sentencing stage, while decisions likely to be made at this point should only be dictated by the efforts made by the person concerned, his pledges for rehabilitation, the risk of committing a new offence or not. Conversion, a mechanism available to the sentencing judge, also remains fairly closed. In this sense, the proposals in the Cotte Report, to no longer consider recidivism at the post-sentencing stage[128] and to extend the possibilities of conversion of the sentence, appear to

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[126] Articles 22 and ff. of the Prison Law impose the right to dignity, to information on his detention regime, to a lawyer, to freedom of opinion, conscience and religion, civic and social rights, the right to private and family life, the right to access of information, to safety, to health.

[127] "Punish outside rather than inside? It seems that the wind of history blows in this sense, however, to listen to the sounds of justice, sentences served outside can neutralise and punish as much as inside" (P. Poncela, "Dehors…la prison dans la tête. Quelques réflexions à propos des peines de milieu ouvert", in *Arch. pol. crim.* "Punir dehors", 2013, 22).

[128] 58.

be interesting avenues[129]. The sentencing judge is best placed to himself create– for long sentences or oversee creation – for shorter sentences – the necessary "relationship of trust" with the inmate[130]. But this assumes strengthening the mesh for monitoring of the inmate (especially with the resources given to the Prison Service for insertion and probation, not only in terms of control but also support[131]) to not let the sentencing judge face the difficulties of his job alone[132].

6. *Conclusion*

The French situation is undeniably paradoxical: despite strong legislative activity to develop alternatives to imprisonment, the prison overcrowding rate continues to grow. Yet the French initiatives are generally in line with the European recommendations. This demonstrates that it is

[129] 67: it proposes letting the sentencing judge convert a prison sentence of 6 months or shorter to a penal constraint or social and legal supervision of probation.

[130] With regards to long sentences, PHILIPPE LAFLAQUIÈRE rightly writes: "Trust, a clear and strong concept, is the key to any action aimed at the reinsertion of convicted persons, without which the prison would have to close its gates. This imperceptible line is able to hold the detainee from abusing the freedom that he is granted, first from venturing on too perilous seas: "forgetting" to return from leave of absence, or, worse still, committing new abuses after getting parole. Without being infallible, it is a line of amazing strength, which I was able to experience thousands of times (*Longues peines. Le pari de la réinsertion*, Milan: Milan eds., 2013).

Invisible, but complex, it consists of a tight message of neutral and technical information (the elements of the criminal record, prison behaviour, expert assessments) and of perceptions from those who mix with the inmate on a daily basis for months or years. Among them are the responsible social worker, overseers, shop foremen, sports monitors, teachers. As many observers look sharply: over a few weeks, a convicted person can be deceptive about his real personality, difficultly over several years" (*Longues peines. Le pari de la réinsertion*, op. cit., 22).

[131] However, on January 1, 2015, there were 103 SPIP and 4538 personnel of SPIPs for 250,000 people in custody (*http://www.justice.gouv.fr/prison-et-reinsertion-10036/les-chiffres-clefs-10041/*), or a mathematical average of 55 cases per SPIP staff, in fact probably more per counsellor, to the extent that the expression "SPIP personnel" includes counsellors but also administrative staff and technical workers.

[132] "I wonder if it would be unreasonable to leave without waiting longer for sentencing this function of unlimited moral responsibility, psychologically wearing, or even destructive. Too much power over human beings, but an all-power that sometimes escapes you until it annihilates itself. I was reminded of this cruel formula for which I do not know the author: "Judging, this strange craft that start as a magician, and ends as Castrato". And tell me, too, that the decision in 2000 by politicians to put the responsibility for parole in the hands of the magistrates was undoubtedly a great gift (the power of granting freedom to some, the duty to preserve the lives of others), but a poisoned chalice, similar to these orchids of a special variety that is displayed in a glass cage, because contact with them is deadly" (PHILIPPE LAFLAQUIÈRE, *Longues peines. Le pari de la réinsertion*, op. cit., 151-152).

not sufficient to modify sentencing law for an effective response to prison overcrowding; it is also important to understand the practices and their rationale; and perhaps consider other guidance (which could also be the priorities of European recommendations because the paradox is far from being only French).

6.1. *French legislation and European recommendations: broadly compatible*

Indeed, the review of the French system results in a very positive assessment.

In the first place, *in the light of the available measures*, not alone – taken individually they all appear compatible with European standards – but considered overall they also constitute a diverse palette, with very broad scope and procedures (that the legislature never ceases to increase such as the penal constraint created in 2014 and that the Cotte Report still proposes to enhance). The French system thus offers a set that shows no obvious lack or deficiency in relation to European recommendations.

Secondly, *with regards to the general philosophy of sentencing*, the increasing encouragement to avoid incarceration (especially short sentences) and to favour penalties that restrict rights must be emphasised. The custodial sentence is therefore, in law, a penalty "of last resort" within the meaning of point 1 of Recommendation R (99) 22) (which is why the judge must specially provide reasons for a sentence of firm imprisonment).

Thirdly, *in terms of guiding principles* as advocated by the Council of Europe, compatibility is also evident. The enactment and imposition of sentencing is subject to European principles that also have constitutional value (as consecrated by or deduced from Article 8 of the Declaration of the Rights of Man and of the Citizen): the principle of necessity of punishments, the principle of legality of sentences and the principle of individualisation of punishments. Although the principle of necessity of punishments controls the action of the legislature, the principles of legality and individualisation of punishments are as much for the judge as for the legislature. However, one must find that the law provides the judge with a prominent place, in accordance with the principle of giving the judge – and even the jurisdiction – the power to handle decisions of sentencing, modification, revocation of sanctions and penal measures; to which is added that the legislature cannot in principle provide mandatory mechanisms which would impede the judge's power of individualisation. Finally, there is a consensual justice developed which supposes information from the person concerned and acceptance by him of the penalty, as well

as a restorative justice ("in any criminal proceedings and at all stages of the proceedings, including during the execution of the sentence": Art. 10-1 CPP).

Without doubt, we can consider that a more critical assessment would be necessary. We must however distinguish according to reservations that could be made. So, as to consensual justice, it is often noted that the individual's consent, the admission of his guilt, is somehow constrained. But this is not a French incompatibility with European recommendations but only a difficulty inherent in the very idea of consensual justice in criminal proceedings. The possible shortcomings of the French law are to be sought elsewhere.

Firstly, in *sentencing law itself*, and in particular the execution of sentences. It is a complex and confusing law which, in a certain manner, puts into perspective respect for the principle of legality (in its material aspect: some loss of readability and accessibility), which reflects on the principle of individualisation (under-use of measures because they are little-known or misunderstood by judges). Added to this is that despite the recent developments, the judge's power of individualisation is sometimes restricted by certain mechanisms (impact of repeat offence during the post-sentencing stage). The proposals from the Cotte Commission for a redesign of sentencing law, if they were followed, could give fullness to the principles of legality and individualisation.

Then, *criminal procedure* on some occasions allows a break from a guiding principle, that of the adversarial process. Thus, at the sentencing phase, conviction by a summary penalty orders is done without argumentation; in the pre-sentencing phase alternatives to prosecution, which are alternatives to the exercise of criminal prosecution, take place during a phase of the procedure for which, despite the progress made by the Laws of April 14, 2011 and May 27, 2014, the adversarial hearing is not the rule. It is true that these measures (inspired by the Recommendations of the Council of Europe) have the advantage of not allowing issuance of a custodial measure and therefore do not contribute, at least directly and immediately, to easing overcrowding.

Finally, in *the powers that are specific to the prosecutor*, in implementing these alternatives to prosecution. Although it is considered that the principle of legality is not actually involved (the power of discretionary prosecutions is enshrined in the Code of Penal Procedure, the measures that can be taken are provided and well detailed by this same code), no more than that of individualisation (such a duty weighs on the prosecutor, although one may wonder if, in practice, he actually has the information necessary to make an informed decision), the principle of

proportionality can be misused because, for some measures, nothing prevents the prosecutor from accumulating them, or even follow them with prosecution. But it is obviously the issue of the status of the prosecutor which poses a problem. As a public prosecutor dependent on a hierarchy and responsible to support the charge in case of prosecution, he seems hardly able to be considered an independent and impartial judge. Still, he is a "member of the judicial authority" for the Constitutional Council; as such he is guarantor of individual liberties, and the penal settlement measures must be validated by a judge.

6.2. *Non-custodial measures: many practical rationales*

"Contrary to what is suggested, by ignorance or by choice, by most players favourable to the development of this sector, "probation" (or "non-custodial") is *far from being a new idea* that would now be imported into France." Although this part of the penalty has, in the past, rarely been a political investment and a real public display, this has not prevented it from developing in silence for many years, as shown by available figures for measures of non-confinement"[133]. It should be also emphasised that some of these measures were first experimented with in certain courts before being established and generalised by the legislature (this is particularly the case for alternatives to prosecution which have developed in practice from the 1970s – as a way to avoid penalties considered to be little suited to the acts committed and to introduce elements of restorative justice[134] – and were only written into the Code of Penal Procedure in the 1990s. But, "early in the 2000s, the prison crisis beginning with structural overcrowding and the denunciation of detention conditions[135] marked the starting point of *a new cycle*, characterized by a relative shift of prison policy from the closed environment to the open environment"[136]. Such a development, more broadly related to recomposition of the judicial institution and more widely still to "moderni-

[133] X. DE LARMINAT, "La probation en quête d'approbation: du consensus politique à l'aveuglement positiviste", in *Arch. pol. crim.*, 35, 2013.

[134] F. RUELLAN, "Les modes alternatifs de résolution des conflits: pour une justice plurielle dans le respect des droits", in *JCP*, I, 1999, 235; M.E. CARTIER, "Les modes alternatifs de règlement des conflits en matière pénale", in *Rev. gén. proc.*, 1998, 1 and ff.; A. MIHMAN, *Juger à temps: le juste temps dans la réponse pénale*, op. cit., 2008.

[135] V. VASSEUR, Médicine chef à la prison de la Santé, Paris: Cherche-Midi, 2000.

[136] X. DE LARMINAT, "Conducteurs ou passagers? Les cadres intermédiaires des services de probation face aux réformes pénitentiaires", GOVERNMENT & criminal prosecution file, 4, 4, October-December 2015; ID., *Hors des murs. L'exécution des peines en milieu ouvert*, Paris: PUF, 2014; ID., "L'exécution des peines en milieu ouvert entre diagnostic criminologique et gestion des flux", in *Quest. pén.*, 24, 2, 2011, 1-4.

sation of public services", has been the source of "deep *institutional reconfigurations*"[137], leaning to renewed rationale.

Institutional reconfigurations have affected, in the first place, the *prosecutor's office*. Alternatives to prosecution have *first of all upset the equilibrium* in the organisation of prosecutors, labour relations, relations between members of the prosecutors offices and the other participants in the proceedings. For members of the prosecutor's office, the pace is accelerated, resources have diversified, the division of labour has been changed so that several magistrates become involved on the same case at different stages. The result is the strengthening of hierarchical character of the prosecutor's office and the collective nature of the work[138] (which may lead to a certain lack of accountability of various stakeholders, each of whom may hesitate to call into question the work of others but each also relying on the watchfulness/control of others). For others in the procedure, and especially for members of the police force, processing in real time (which leads to specialisation of the prosecutors)[139] and alternative measures have brought about a sense of better recognition and a better response to their requests (prosecutors are now seen as more/better associated with police action)[140]. The existence of a third way has *led prosecutors to engage in a process of rationalisation* for purposes of uniformity and standardisation – that computerisation has facilitated – (even if they are sometimes "smokescreen"[141] practices and objectives that can be different from one jurisdiction to the other[142]).

These changes have, secondly, affected, in the same way, *the probation services.* "The saturation of capacity, a result of the sharp increase in the number of measures, have helped administrative streamlining and the rise of the management imperatives; at the same time, the objective

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[137] X. DE LARMINAT, see aforementioned references.

[138] P. MILBURN, K. KOSTULSKI, D. SALAS, *Les procureurs. Entre vocation judiciaire et fonctions politiques*, Paris: PUF, 2010.

[139] B. BASTARD, C. MOUHANNA, "L'introduction du traitement en temps réel dans les TGI", in *Une justice dans l'urgence*, Paris: PUF, 2007, 31 and ff.

[140] C. MOUHANNA, B. BASTARD, "Procureurs et substituts: l'évolution du système de production des décisions pénales", in *Le parquet et les politiques pénales en France*, *Dr. et soc.*, 1, 2010, 35 et s.

[141] L. AUBERT, "Systématisme pénal et alternatives aux poursuites en France: une politique pénale en trompe l'œil", in *Le parquet et les politiques pénales en France*, *Dr. et soc.*, 1, 2010, 17 et s.)

[142] See, for the penal settlement, at least initially: S. GRUNVALD, J. DANET, *Une première évaluation de la composition pénale*, Nantes: GIP Report, Mission de Recherche Droit et Justice, 2004; A. BUREAU, "Etat des lieux d'un dispositif procédural atypique: la composition pénale", *APC*, 1, 2005, 125 and ff.; P. MILBURN, C. MOUHANNA, V. PERROCHEAU, *Enjeux et usages de la composition pénale. Controverses et compromis dans la mise en place d'un dispositif pénal inédit*, CAFI, Rapport GIP, Mission de Recherche Droit et Justice, 2005.

of preventing repeat offences has been supported by the import of new standardised assessment methods[143] and new methods of intervention[144] inspired by anglo-saxon criminology[145]"[146].

There are, indeed, similar reasonings that underly the changes noted, *renewed reasonings* in a movement that is not unique to the France (see the Belgian report). There is the same rationale of administrative and technical efficiency, the same inflection to a punitive logic, the same shift from a rationale of assistance and rehabilitation to the reasoning of control and risk management (institutional reports are revealing that they place themselves under the prism of the effectiveness of penalties[147] or the prevention of repeat or even dangerous[148] offences). Without developing these points, it can be said that the rationale of the efficiency of management of flows[149] (and resources), effectiveness and efficiency (criminal policy, penalties[150], monitoring of people in custody) has found support and development in a technological view of the work (the computerised instrument appearing to be the gauge of rationalisation and an objective equality of treatment). The efficiency targeted here is immediate efficiency, where mainly quantitative rationales prevail (unclogging the

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[143] E. Dubourg, V. Gautron "La rationalisation des méthodes d'évaluation des risques de récidive", in *Champ pén.*, 2014, 1-27.

[144] V. Moulin, *Les Groupes de parole de prévention de la récidive des personnes placées sous main de justice*, Paris: Mission de recherche Droit & Justice, 2012.

[145] M. Feeley, J. Simon, "The New Penology: Notes on the Emerging Strategy of Corrections and its Implications", in *Criminology*, 1992, 449-474.; A. Bonta, D.A. Andrews, *Risk-need-responsivity model for offender assessment and rehabilitation*, Ottawa, Public Safety Canada, 2007.

[146] X. de Larminat, "Conducteurs ou passagers? Les cadres intermédiaires des services de probation face aux réformes pénitentiaires", op. cit.

[147] J.-L. Warsmann, *Les Peines alternatives à la détention, les modalités d'exécution des courtes peines, la préparation des détenus à la sortie de prison*, Paris: Report of the parliamentary mission, 2003; E. Ciotti, *Pour renforcer l'efficacité de l'exécution des peines*, Paris: Report to the President of the Republic, 2011; D. Raimbourg, S. Huyghe, *Penser la peine autrement: propositions pour mettre fin à la surpopulation carcérale*, Paris: Information report, National Assembly, 652, 2013.

[148] J.P. Garraud, *Réponse à la dangerosité*, Report on the parliamentary mission entrusted to the Prime Minister, Paris, 2006; V. Lamanda, *Amoindrir le risque de récidive criminelle des condamnés dangereux*, Paris: Report to the President of the Republic, 2008; J.-M. Camu, P. Lemaire, *Rapport de mission au Garde des Sceaux*, Paris, 2011.

[149] For the willingness of the prison administration to promote efficiency in flow management, see J.-C. Froment, M. Kaluszynski (eds.), *L'Administration pénitentiaire face aux principes de la nouvelle gestion publique*, Grenoble: PUG, 2011.

[150] For the concern by prison management to favour the effectiveness of penalties and the effectiveness of monitoring persons in custody, see J.-L. Warsmann, *Les Peines alternatives à la détention, les modalités d'exécution des courtes peines, la préparation des détenus à la sortie de prison*, op. cit.; IGSJ, *Évaluation du nombre de peines d'emprisonnement ferme en attente d'exécution*, Report, 02-09, 2009.

courts, decongesting prisons): an accounting logic as much applicable as it must deal with the *political requirement to fight against impunity* ("zero tolerance") which has strongly developed over the past decade, and in particular has shown a new principle of "legality of the criminal justice response" mandating a response from prosecutors by at least the third way (thus making alternative prosecution that is, in law, penal settlement, a mode practiced in prosecution[151]), and which, furthermore, meeting a pressure of opinion in its favour, has largely encouraged judges to a punitive rhetoric (within the walls but also outside the walls[152]). This *punitive turn* thus puts into question the equilibriums of the open environment, including "the specificity lies in articulation between a rationale of socio-educational support, according to a principle of rehabilitation, and rationale of control, according to a principle of protection of society"[153]. However, changes of viewpoint have occurred: the rationale of control, of surveillance outweighs the dimension of rehabilitation, individualisation is "misguided by a rationale of accountability"[154], and protection of society ("by the prevention of recidivism") seems to impose its primacy, regardless of the gravity of violations of the individual freedoms of those who are subject to control and monitoring mechanisms.

However, these renewed rationales do not fully substitute for the former rationales, including a philosophy of rehabilitation[155]. *All at once produce sedimentations / hybridisations*[156] *and clashes / differences between policies, between practices (collective or individual), which render findings of practices and their appreciation sensitive.*

But it must be noted that although these renewed rationales are not shared unanimously, they are more in favour among younger people, which could lead, in the future, to deeply transforming the culture of both prosecutors and probation officers. Indeed, studies have showed that, among prosecutors, while older ones wonder about the aims of their decisions, the younger ones seem to consider efficiency and speed

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151 F. Feltz, "La nouvelle action publique", *RPDP*, 3, 2003, 461 and ff.

152 J. Danet, "Entretien", in *La justice après Outreau*, *Esprit*, 5, 2006, 103 and ff.

153 X. de Larminat, "Conducteurs ou passagers? Les cadres intermédiaires des services de probation face aux réformes pénitentiaires", op. cit.

154 "Which tends to unfold for a decade, as if we were dealing with individuals arising above the contingencies of the society whose actions would only be subject to their goodwill": X. de Larminat, "Un continuum pénal hybride. Discipline, contrôle, responsabilisation", in *Champ pén.*, 2014.

155 F. Tulkens (ed.), *Pour une nouvelle politique publique de prévention de la récidive*, Paris: Jury's report of the consensus conference, 2013.

156 X. de Larminat, "Un continuum pénal hybride. Discipline, contrôle, responsabilisation", op. cit., 1-23.

as the ultimate goal; and among probation services senior managers, two "generations" coexist, "an 'old school' consisting of former practitioners with field experience, concerned about social work, and a 'new wave ' of young law graduates, with little experience and concern for professional ascent which initially translates into a greater conformity"[157] (*i.e.* a greater acceptance of criminal and prison policies, of the rationales of control and surveillance).

6.3. *Alternative penalties and prison overcrowding: a failure that can be overcome?*

The finding is brutal. France is facing the dual phenomenon of growth of prison population and chronic prison overcrowding. Regardless of the rates reviewed (overcrowding, short terms of imprisonment, suicide, etc.), they are still above the European average. And that is *essentially in remand centres*, that is, in the same institutions that should benefit from the impact of alternative penalties, since they mainly receive the people who should be the target of these measures. It is not the fault however, as has been recalled above, of the legislative arsenal or even application of this arsenal (for the record: nearly half of prosecutable cases are subject to an alternative penalty to prosecution – and thus to imprisonment –; in 10 years, the number of people monitored while unconfined has increased 40% [the number of inmates increasing its share to 14.3% over the same period]; today there are nearly 190,000 litigants who follow a probation measure including sentence management [this figure was multiplied by 2.5 since 1980] for about 65,000 people in prison).

How then to *explain the failure*? Without claiming to be exhaustive, it is possible to put forward several reasons.

The first – however hardly measurable, although the reality of the phenomenon is without doubt – is that the alternative nature of substitute measures is largely overestimated. Just as judicial supervision (introduced in 1970 and now functioning well) contributed little to the decline in remands because it only applied in circumstances where, in the absence of this measure, indicted persons would have been left free, alternatives claimed to prosecution (whose real aim is the increase in the rate of criminal justice response) are often rather alternatives to dismissal[158],

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[157] C. Mouhanna, B. Bastard, "Procureurs et substituts: l'évolution du système de production des décisions pénales", op. cit.

[158] For example, one of the tables published in the *Chiffres clés de la justice* of 2014 (14) shows that since 2003 the number of cases dropped without charge is decreasing while those dropped with conditions and penal settlement continue to grow and that the number relating to exercising criminal prosecution is steady (despite a peak in 2006). This observa-

when alternative sentencing is not imposed in lieu of custodial sentences but instead of a different and less restrictive penal measure, or even as a substitute for a lack of penal measure[159]. In short, the appearance of substitution masks *expansion of the penal net*.

The second is *an effect of aggravation*. Alternative measures to prosecution, far from being part of a deflationary process, which should lead to a de facto decriminalisation, or prison deflation, are a new means for repression. Not simply because these alternatives may be regarded as a real sentences, but also because on the one hand, if they fail, they are the reason for prosecution (while in their absence, no prosecution would have been conducted), and on the other hand, in the case of new "incivility", the prosecutor considers – as it would with a repeat offender – that a heavier penalty is necessary, leading more easily to the entry into the criminal circuit or even prison (not to mention the type of procedure in which judge's decision is crucial: "the choice between imprisonment and an alternative penalty is, to a large extent, conditioned by the measures that preceded this choice")[160].

The third is the *effects of remand*. Although the number of remands is in significant decline, it should be noted that this hides a relatively disturbing reality: first, because a pressure of opinion in favour of remand would encourage judges to pronounce yet again too many placements; then because the duration of detention is growing; finally because the use of remand leads judges to more often choose (if the accused appeared freely) a firm prison sentence (if only to "cover" the detention)[161]. All this significantly reduces the impact on the prison population that the reduction of detentions might have had.

The fourth is that alternative measures remain *backed by incarceration*. First, because diversification of sentences has not changed the "ever-present" status of the custodial sentence as a reference sentence; autonomous alternative sentences have not succeeded as unique reference sentence, if only for certain offences. Then, because the failure of these penalties can lead to the application of a custodial sentence (while even the initial behaviour was not judged as requiring a sentence of imprisonment).

The fifth is the *consequences of quantitative reasoning* (seen above) that, far from answering the questions posed, moves them, or constantly

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tion was already made by the legislature in 2004 (L. BETEILLE, F. ZOCCHETTO, "Juger vite, juger mieux? Les procédures rapides de traitement des affaires pénales, état de lieux", Reports of the Senate, 17, 2005-2006, spec. 30).

[159] S. PORTELLI, "Les alternatives à la prison", op. cit., 18.

[160] S. PORTELLI, "Les alternatives à la prison", op. cit., 17.

[161] *Ibidem*, 15 and ff.

defers the answer, without favouring or contributing to what should be the purpose of the measures, namely reinsertion.

The sixth is that the overwhelming majority of alternative measures suffer from the *structural deficit in financial and human resources* that are specific to the French criminal justice and particularly probation services.

The seventh is the *inconsistency of penal policy* which addresses judges (who sometimes are reproached for their "laxity", sometimes the misdeeds of "any incarceration") with contradictory injunctions, especially since there is recurring criminal inflation (creating new incriminations is far from rare; accompanied by additional penalisation of old offences[162]; on the other hand, the repeal of incriminations appears exceptional, as is similarly the case of making new offences).

Addressing this failure would at least require reversing some technical arrangements and choosing a clear criminal policy (while not forgetting that, regardless of the choices made, their success assumes that the financial, structural, and human resources necessary are implemented).

It is therefore important, in the first place, to *give full effect to the principles of necessity, proportionality and individualisation.* For the principle of necessity, by proceeding with *decriminalisation* for behaviours that do not impose the use of criminal sanctions. For the principle of proportionality, on the one hand, *spreading the field of penalties incurred*, for certain offences, *the custodial sentence*, on the other hand, by not allowing failure of an alternative punishment to be punished by deprivation of freedom. For the principle of individualisation, by *rejecting any automatic legal mechanism* which would deprive the judge of his power to adapt the measures and penalties to each particular case, and in particular, by not depriving repeat offenders of the granting of reinsertion devices.

It would be important, secondly, to *make the choice of criminal policy* which alone may be suitable for a democratic society whose values are based on the equal dignity of human beings, namely a *policy of reinsertion*[163] (excluding any exclusionary reasoning, of neutralisation and elimination, for all to assert the contrary that, regardless of what he has done, every human being retains his right to represent a value to society). This is a requirement that sometimes seem to forget not only state policies but also European recommendations when they yield to the attraction of proclaimed benefits of control and monitoring reasoning.

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[162] The example of traffic offences is revealing, see O. Timbart, op. cit.

[163] "La réinsertion est un impératif constitutionnel pour toute société faisant de la dignité humaine son pilier": Decision by the German Constitutional Court; see G. Giudicelli-Delage, "Punir dans une société démocratique' ou le devoir d'espérance de l'Etat", in *Mélanges en l'honneur de Christine Lazerges, Politique(s) criminelle(s)*, Paris: Dalloz, 2014, 191.

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ITALY

SUMMARY: 1. Introduction. – 2. The pre-sentencing phase: personal preventive measures. – 2.1. Analysis of existing legal provisions. – 2.2. Statistical data. – 2.3. Evaluation of alternatives to pre-trial detention. Compatibility with European standards. – 2.4. Impact on the prison population. – 3. Alternatives to trials in the Italian penal system: placement of the person charged on probation. – 3.1. Analysis of existing legal provisions. – 3.2. Evaluation of the new approach. Compatibility with European standards. – 3.3. Statistical data and impact on the prison population. – 4. Alternative measures to imprisonment in the sentencing phase. – 4.1. Critical analysis of the applicable measures in the sentencing phase. – 4.1.1. The pecuniary fine. – 4.1.2. Substitutive penalties and suspension measures. – 4.1.3. Alternative penalties. – 4.1.4. The conditional suspension of the sentence. – 4.1.5. The main penalties for crimes under the jurisdiction of the justice of peace. – 4.1.6. Other measures. – 4.1.7. Diversion programs. – 4.1.8. Settlement through payment of a fine. – 4.2. Global analysis of the measures applicable in the sentencing phase. – 4.2.1. Compliance with European standards. – 4.2.2. Impact on prison overcrowding: summary and concluding remarks. – 5. Breakdown of alternative measures to imprisonment in the post-sentencing phase. – 5.1. General overview. – 5.1.1. Probation. – 5.1.2. Home detention. – 5.1.3. Day release and conditional release (parole). – 5.2. Assessment of alternatives to prison in the stage of execution. – 5.2.1. Compatibility with European standards. – 5.2.2. Observation of personality and risk assessment. – 5.2.3. Methods of treatment and obligations imposed on the offender. – 6. Conclusions. – 6.1. The conformity of Italian criminal law with the recommendations of the Council of Europe. – 6.2. The status of offender supervision in Italy: social work, lack of resources and voluntarism. – 6.3. Are non-custodial sanctions really effective in reducing prison population? The Italian case.

1. *Introduction*

An analysis of the data reveals a constant upward trend in the prison population in Italy since 1971. This trend, initially very slight, gained momentum starting from the beginning of the 1990s, resulting in a doubling

[1] Par. 1 written by A. MARTUFI; parr. from 2 to 2.4 written by S. CARNEVALE; parr. from 3 to 3.3 written by B. BERTOLINI; parr. from 4 to 4.2.2 written by M. LOMBARDI STOCCHETTI; parr. 5 to 6.3. written by A. MARTUFI.

of the number of inmates between 1990 and 2010. That is to say, the number of prisoners rose from about 30,000 in 1990 to over 68,000 in 2010[2], the year which saw the highest peak in the number of individuals incarcerated in Italian prisons since the post-war period. The data refer to the number of prisoners as of 31 December of each of the years taken into consideration and show an almost constant increase in the number of people imprisoned until at least 2010. The reaching of this threshold was followed by a sizable reduction and, in more recent times (starting from the end of 2015), a slight increase in the prison population, mostly ascribable to the rise in the number of remand prisoners.

At the culmination of the increase in the prison population in 2010, when the number of inmates stood at about 68,000, the capacity of the penitentiary system amounted to only 45,000. Therefore, a situation of prison overcrowding arose in Italy, like in other countries analysed in this study. The proportions of the phenomenon (in 2010 the national rate of overcrowding was 151%) and the high number of applications lodged by Italian inmates to the European Court on Human Rights (ECtHR) induced the latter to condemn the Italian State (judgment in the case *Torreggiani v Italy*)[3] for violating Article 3 of the European Convention on Human Rights (ECHR). Under this ruling – defined a pilot judgment since its conclusions refer in general to applications against the respondent State having similar contents – the national authorities were called on to adopt the necessary measures to remedy the situation within one year.

Already in 2010, however, the seriousness of the situation had persuaded the Italian Government to undertake more vigorous actions to reduce the prison population. The legislator thus intervened by adopting several measures which regarded above all the regime of pre-trial detention and the subject of alternative measures in the period after conviction. At the same time, starting from 2010, "a state of emergency"[4] was declared in regard to the situation in prisons, in response to which the Government launched a "prison plan" for the construction of new prisons. The regulatory capacity of the prison system thus increased from

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[2] Source: Department of Prison Administration. Ministry of Justice - Statistics. Unless specified otherwise, the data presented in this report are based on surveys conducted by the Ministry of Justice - Department of Prison Administration.

[3] ECtHR, *Torreggiani and Others v Italy*, 8.1.2013 § 93-94. Italy had already been condemned in the past for violating Art. 3 ECHR due to the overcrowding to be found in prison institutions, see judgment of the ECtHR, *Sulejmanovic v Italy*, 16.7.2009.

[4] Decree of the President of the Council of Ministers of 13 January 2010, containing the declaration of a state of emergency due to excessive overcrowding in prisons across national territory.

about 45,000 inmates in 2010 to 49,600 in September 2015[5]. As a result of the urgent measures adopted following the formal acknowledgement of the prison emergency, there was also a reduction in the number of inmates: the prison population as of 31 December 2015 (52,164) was in fact slightly smaller than the one recorded in 2000 (53,337).

Over this period of time, however, important changes took place, which deserve to be duly highlighted. In fact, even before the gradual but constant reduction observed between 2010 and 2015, the prison population had already undergone a major contraction in 2006 as a result of a general clemency measure – a pardon – which had served to reduce the number of inmates by over 20,000 in a single year. Despite such reductions, the long-term pattern does not appear to contradict the overall uptrend in the number of people in custody, which shows very high peaks followed – after the pardon of 2006 and as a result of the measures adopted starting from 2010 – by visible reductions. It should be said, however, that in the first months of 2016 the prison population started growing again, indicative of the episodic and non-structural character of the contraction that occurred in the previous five years.

In actual fact, a large part of the prison population in Italy is concentrated in the so-called *case circondariali* (district prisons)[6], facilities intended to accommodate people charged with an offence (or arrested or detained by the police) and – only in the presence of "particular needs" – who have been sentenced to detention or received sentences of no more than five years. According to a survey conducted in 2013, in that year no fewer than 52% of Italian inmates were being held in *case circondariali*[7]. This figure is a consequence, among other things, of the very high number of people who are remanded in custody pending trial, a phenomenon that will be discussed in greater depth in the next section. Therefore, the highest degree of overcrowding is to be found in the ordinary sections of district prisons; the remaining half of inmates is divided between *case di reclusione* – i.e. prisons generally used for inmates serving prison terms and not detained in *case circondariali* – and the sections of institutions where the so-called differentiated regimes or circuits

[5] The available places are calculated on the basis of an allocated space of 9 m^2 per single inmate + 5 m^2 for others, the same criteria as used in Italy to define whether housing meets habitability standards (Art. 2 of the Ministerial Decree of 5 July 1975). The criteria are more favourable than the 6 m^2 + 4 m^2 established by the CPT. The data on prison capacity, however, do not take into account transitory situations that bring about temporary deviations from the specified value.

[6] L. Cesaris, "Prassi giudiziarie e sovraffollamento", in *Rass. Penit. Crimin.*, 2013, 158.

[7] National Statistics Institute, "I detenuti nelle carceri italiane. Anno 2013", Rome: Istat, 2014, 11.

are implemented: high security, prisoners placed under protection, "semi-liberty" (detention with day release), mitigated custody, etc.[8]. Despite the lack of official data, it may be inferred that these circuits or sections are not subject to the overcrowding problems afflicting ordinary sections.

In Italy, as in the other countries taken into consideration in this study, the phenomenon of overcrowding – together with the chronic insufficiency of prison facilities – has led, de facto, to a blurring of the distinction between institutions intended to accommodate persons charged with an offence and those intended for convicted prisoners[9]. The growth of the prison population has led to a recurrent practice – allowed under Italian penitentiary law – of directly assigning people sentenced to short prison terms directly to *case circondariali*, which results in the problematic joint presence of sentenced and untried prisoners inside the same sections and the consequent sacrifice of the rights connected to the principle of "innocent until proven guilty". The rule providing for the separation between the two types of prisoners is also commonly violated due to organisational deficiencies, with the result that inmates awaiting trial and those serving a prison sentence are confined together in the same sections and cells[10].

It is not possible here to analyse the causes underlying the variable recourse to detention observed in Italy over the past two decades. It is the product of a large variety of factors that have long been brought to light in the legal-sociological literature[11] and are outside the scope of the present discussion.

The prevalently legal-penal perspective guiding this study requires that we limit our analysis to the strategies of criminal policy implemented to counter overcrowding and improve the reliance on measures and sanctions that do not imply imprisonment. More in particular, in Italy – and in the other countries taken into consideration in this study – the legislator seems to have decidedly focused on implementing alternatives

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[8] The high security circuit is characterised by a higher level of surveillance, whereas under the regimes of detention with day release and mitigated custody, inmates have the possibility of spending several hours of the day outside the prison. In the case of prisoners under protection, by contrast, these are sections in which contact with other inmates is precluded, either because of the type of crime committed or the fact of being homo- or transsexual or a member of the police force. "Mitigated custody" sections are also provided for prisoners with problems of drug dependency and for incarcerated mothers.

[9] G. Neppi Modona, "Ordinamento penitenziario", in *Dig. disc. pen.*, vol. XIX, Torino: Utet, 1995, 52.

[10] S. Margara, "La magistratura di sorveglianza tra un carcere da rifiutare e una riforma da attuare" in *Il carcere dopo le riforme*, Milano: Feltrinelli, 1978, 54.

to detention in order to reduce the number of inmates and bring it back within the limits of the regulatory capacity. Such an approach appears to be in line with the recommendations of the Council of Europe, from which the deflationary function assigned to measures other than imprisonment clearly emerges. The task of the pages that follow is therefore to reconstruct the role played by such measures in the Italian system. We shall take into consideration the instruments operating before, during and after sentencing and analyse the rules, aims and impact on the prison population.

2. *The pre-sentencing phase: personal preventive measures*

2.1. *Analysis of existing legal provisions*

As mentioned in the introduction, the issue of prison overcrowding has exploded in Italy over the past decade. By 2006 the prison population had already reached unprecedented levels. A pardon granted in that year served to control the number of inmates temporarily, but its effects were destined to last for a very limited period. Indeed, between 2009 and 2013 the number of prisoners again began rising considerably, to such an extent as to provoke two condemnations by the ECtHR[12] and a declaration of a "prison state of emergency" by the Italian government[13].

In those years, the data provided by the Space report revealed two conspicuous anomalies. Despite being characterised by a low incarceration rate[14], Italy held the record in terms of prison population density[15]. The apparent contradiction could be easily explained by the scarcity of available places in prison facilities, whose number was decidedly limited compared to countries of similar size[16]. These few places were largely oc-

[11] Some recent studies specifically addressing the Italian situation suggest ruling out, however, that the increased push toward detention is associated with a rise in crime rates, see M. Pavarini, "Governare la penalità. Struttura sociale, processi decisionali e discorsi pubblici sulla pena", Bologna: Ius 17, 2013, 52; L. Manconi, G. Torrente, *La pena e i diritti. Il carcere nella crisi italiana*, Roma: Carocci, 2015, 121 ff.

[12] ECtHR, judgment of 16 July 2009, *Sulejmanovic v Italy* and judgment of 8 January 2013, *Torreggiani and others v Italy*.

[13] Decree of the President of the Council of Ministers of 13 January 2010, containing the declaration of a state of emergency due to overcrowding in the prisons located in national territory.

[14] In 2013 the recorded rate was 108.6 (European average 136.3).

[15] Dramatic record reached in 2013, with an overcrowding rate of 148.4 (European average 95.5).

[16] Barely 44,608 in 2010, versus nearly 70,000 prisoners. There were 56,426 places in France and 85,002 in England.

cupied by remand prisoners, i.e. people still undergoing criminal proceedings. They accounted for over 40% of the total number of inmates, one of the highest percentages among all member states of the Council of Europe. The ECtHR, censuring the endemic state of overcrowding in Italian prisons in a pilot judgment, declared itself to be "struck" (*frappé*) by this highly intensive use of pre-trial detention, deemed to be one of the main causes for the excessive number of inmates[17].

The ample recourse to detention of the accused prior to the definitive ascertainment of their guilt is a phenomenon that has always characterised the Italian system[18]. Yet domestic legislation provides for an especially rich – even in relation to other European countries – array of other measures involving deprivation of personal liberty that could be applied during the criminal proceeding, from the investigation stage to the final sentencing[19].

The new Code of Criminal Procedure (CCP), in force since 1988, was intended, also in respect of this relevant aspect, to mark a divergence from the previous system[20], which exclusively envisaged preventive custody. According to the abolished provisions, detention during the trial was in many cases the rule: the principle of mandatory apprehension of the accused[21] was the symbol of a markedly authoritarian legislation which showed little concern for individual guarantees.

The basic philosophy of the new procedural rules aimed to overturn the assumptions of the preceding ones: in line with both constitutional principles (Articles 27(2) and 13 of the Italian Constitution) and conventional ones (Articles 6(2) and 5 ECHR) concerning the presumption of innocence and inviolability of personal freedom, any constraint on the possibility of movement of the accused person was to be viewed as exceptional and subjected to thorough judicial verification that a series of rigid prerequisites had been met[22].

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[17] ECtHR, *Torreggiani and others v Italy*, 8.1.2013, § 94.

[18] S. MARGARA, "Sorvegliare e punire: storia di 50 anni di carcere", *Quest. giust.*, 2010, 101; E. VALENTINI, "Sovraffollamento carcerario e custodia cautelare: fotografia del presente e alcuni spunti per il futuro", in *Pol. dir.*, 2011, 287 ff.

[19] Compared to the countries included in this study, Italy is the one that provides for the largest number of alternative tools to pre-trial detention.

[20] Code of Criminal Procedure of 1930, issued during the Fascist period.

[21] Art. 253 CCP 1930.

[22] In accordance with what is proclaimed at the beginning of several sources of soft law of the Council of Europe: see in particular rule 1 of the Recommendation of the Committee of Ministers of the Council of Europe Rec(80)11, rule 1 of the Recommendation Rec(99)22, and rule 3(2) of the Recommendation Rec(2006)13. The principles regarding this subject are also echoed in Resolution of the European Parliament 2011/2897, para 9.

Such verifications are conducted on three levels, in relation to: the seriousness of the offence, based on the maximum entity of the penalty; the amount of evidence against the suspect, which must be substantial; and the existence of a specific risk tied to their remaining free. These conditions serving to legitimise every restrictive measure play a fundamental role in limiting reliance on pre-trial detention and act as a primary factor of control of the potential number of inmates.

To begin with, not all criminal proceedings allow constraints to be imposed on the defendant, much less detention: in order to hold the latter in custody in prison, the offence being investigated must be punishable by a maximum of over five years imprisonment[23]; for other types of restrictions the limit goes down to three years, thus embracing a wider spectrum of target offenders (Article 280 CCP).

Moreover, there must be *substantial evidence of guilt* (Article 273 CCP) of the commission of one of these offences[24]. How this expression should be interpreted is the subject of lively debate among legal scholars in Italy, one that is focused above all on the degree of proof that needs to be reached before ordering provisional measures pending trial and the rules of evidence applicable for this purpose[25]. This factor, too, influences the quantity of restrictive measures that can be issued: the lower the threshold of evidence and the looser the conditions that need to be met in order for the available knowledge to be considered valid and reliable, the easier it will be to limit freedom prior to the trial. Since the final decision will be based on stricter criteria, a divergence in the rules applicable for the remand proceedings and the main trial could lead to the accused receiving a harsher treatment during than trial than the one imposed at the end of it. Aware of the problem, the Italian legislator undertook to realign the two sets of rules several years ago (Article 273 (1) *bis*)[26].

The presence of substantial evidence against the suspect is still not sufficient to legitimise a provisional measure pending trial. The judge must also ascertain compliance with one of the requirements, strictly defined by law (Article 274 CCP), which identify the sole purposes for

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[23] The ceiling was recently raised by Law no. 94 of 9 August 2013 precisely to reduce the number of prison inmates, albeit with one bizarre exception, limited to the offence of illicit funding of political parties, for which remand is always allowed. Before this amendment, the threshold was set at four years.

[24] The requirement corresponds to what is provided for under Art. 5(1) ECHR, Rec(80)11, rule 3, and Rec(2006)13, rule 7.

[25] See generally D. Negri, *Fumus commissi delicti. La prova per le fattispecie cautelari*, Torino: Giappichelli, 2004.

[26] Introduced by Law no. 63 of 1 March 2001.

which the restrictions may apply: the risk of suppression of evidence, flight[27], or the commission of specific categories of offences[28]. The fulfilment of all these prerequisites legitimises the adoption of a provisional measure, requested by the public prosecutor and ordered by the judge with a reasoned decision, whose mandatory contents are described in detail by law (Article 292 CCP)[29]. The same measure will establish which type of action, among the many envisaged by the Code, is best suited to the concrete case. The law also intervenes in this choice, however, by dictating a series of criteria founded for the most part on the principle of the smallest sacrifice necessary (Article 275 CCP). The measure must firstly be *appropriate* to the nature and intensity of the risks perceivable in the concrete case: as we shall see, there are suitable tools for avoiding certain risks that would be wholly unsuitable for preventing others.

Given a set of limitations all abstractly capable of preventing the feared risks, it is necessary to choose the one that is least harsh on the defendant. Moreover, the constraints imposed must be *proportional* to the entity of the offence and to the punishment it is deemed might be inflicted at the end of the trial, or has already been imposed by a court of first or second instance. This second guiding principle is intended to prevent the accused from having to suffer, pending the outcome of the criminal proceedings, a worse treatment than would be due after their conviction[30]. In any case, the maximum restriction of liberty, i.e. imprisonment, is viewed as a last resort, imposable only when the other restrictions, even cumulated ones, prove insufficient[31]. The choice should fall, at least in theory, more easily on another of the numerous options offered by Italian law.

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[27] In Italy, the defendant's presence at the trial is not compulsory. Provisional measures thus cannot serve to assure his or her participation in the proceedings. The risk of flight is assessed in relation to the possible avoidance of future enforcement of the sentence. The ECHR (Art. 5(1)c) and the case law of the European Court, by contrast, allude to the necessity of assuring the defendant's presence at the trial (European Court, *PB v France*, no. 38781/97, 1 August 2000, para 59).

[28] In particular, serious crimes (if committed with weapons or other means of personal violence, directed against the constitutional order or tied to organised crime), or of the same type as the one to which the proceedings relate. Less clear on the purposes of pre-trial restrictions is Art. 5(3)c) ECHR (O. MAZZA, "La libertà personale nella Costituzione europea", in M.G. COPPETTA (ed.), *Profili del processo penale nella costituzione europea*, Torino: Giappichelli, 2005, 54 ff), whereas a provision corresponding to that of the Italian legal system is to be found in Rec(88)11, rule 3, where analogous risks are identified as necessary for restrictions to be applied during the trial. Rec(2006)13, rule 7 considers further ones, in particular serious threats to public order.

[29] Provision complying with the guidelines of Rec(80)11, rule 8, and Rec(2006)13, rule 21.

[30] In accordance with Rec(80)11, rule 7, and Rec(92)16, rule 6.

This ample catalogue includes instruments distinguished into *coercive* and *interdictive*, according to the right they have an impact on: the first category includes measures that limit freedom of movement, from the prohibition on leaving the country, which is the smallest sacrifice, to custody in prison, which imposes a state of captivity on the defendant; the second category embraces *temporary suspensions* from exercising other rights or powers, such as parental authority (Article 288 CCP), the possibility of engaging in professional and business activities (Article 290 CCP) or holding public office (Article 298 CCP). The latter instruments, the least severe, entail the impossibility of exercising the powers or functions or engaging in the activities specified for the period of time established by the judge[32]. The law, in turn, sets the maximum duration, traditionally two months. Such a limited period has created a strong disincentive to the application of these measures, orienting judicial authorities toward solutions that are more restrictive but characterised by greater stability.

Recently, the maximum duration of interdictions was raised to twelve months, precisely with a view to incentivising recourse to this solution rather than more intense coercive measures[33]. When the prohibition regards the exercise of a public office, to safeguard the prestige and sound administration of the public authorities, the accused must undergo prior questioning to enable exculpatory evidence to be produced and prevent even brief unjustified applications[34]. This is the only case under Italian legislation of a defendant having a right to be heard before the imposition of pre-trial restrictions, for which the surprise effect is considered essential.

Coercive measures are distinguished in turn into *custodial* and *obligatory*: the former imply the impossibility of leaving confined places such as a prison cell, hospital room or private home, whereas the latter allow greater movement in space, according to different degrees of constraint.

Among the obligatory measures, the mildest limitation that can be imposed on the defendant is a *ban on leaving the country* (Article 281 CCP) without authorisation from the court. In order to render this restriction effective, the adoption of the measure must be notified to the

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[31] Criterion also adopted by Rec(2006)13, rule 7(c).

[32] F. Peroni, *Le misure interdittive nel sistema delle cautele penali*, Milano: Giuffrè, 1992.

[33] Law no. 47 of 16 April 2015. P. Bronzo, "Le modifiche alle misure cautelari interdittive", in L. Giuliani (ed.), *La riforma delle misure cautelari personali*, Torino: Giappichelli, 2015, 168 f.

[34] Pre-trial questioning of the defendant was established by Law no. 234 of 16 July 1997.

competent administrative authorities, who will confiscate the passport or other documents valid for travel abroad – solely for the duration of the measure. Shortly after the entry into force of the Code, Italian law established that this constraint would be automatically imposed whenever any other coercive measure was applied. However, the Constitutional Court soon stepped in and abolished this automatic mechanism, judging it to be unreasonable and in contradiction with the obligation to provide grounds for every measure restricting personal liberty, even the least punitive[35].

The *obligation to report to the police* (Article 282 CCP), on the other hand, requires the defendant to show up at a given office of the criminal police on certain days and at certain times, according to frequencies decided by the judge based on the requirements of the concrete cases. In determining the specific degree of coercion, the law requires only that account be taken of the place where the person charged resides and his or her working needs, which cannot, however, prevail over the precautionary ones[36]. It is a fact that such controls, being left up to the initiative of those subject to them, are not viewed as particularly effective for avoiding the risks the measure is intended to prevent[37].

Compliance with the *residence ban and obligation* (Article 283 CCP) is instead ensured through periodic checks by the police; these are measures containing opposite obligations: the former forbids the person charged from entering a certain place, the extent of which is left up to judicial discretion[38], whereas the second – which implies a higher level of constraint – obliges the person charged not to leave the territory of the municipality where he or she usually resides. This measure can be made stricter at the discretion of the judge, who may forbid the person charged from leaving his or her home several hours a day, in which case it is usually that person who specifies the times of availability for the purpose of the checks. On the other hand, both restrictions can be loosened thanks to specific judicial authorisations which exceptionally allow entry into the prohibited areas.

A newly devised measure, *ban on approaching places frequented by the injured party* (Article 282 *ter* CCP), introduced in 2009 together with the new offence of stalking, is characterised by an unprecedented vari-

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[35] Constitutional Court, judgment no. 109 of 31 March 1994.

[36] See for example Court of Cassation ruling of 10 November 2015, Gallo, in *C.e.d.* no. 232914.

[37] E. FASSONE, "Art. 282", in M. CHIAVARIO (coordinated by), *Commento al nuovo codice di procedura penale*, vol. III, Torino: Utet, 1990, 108.

[38] And which range from a municipal territory to a regional one. On this point see Court of Cassation ruling of 30 April 1992, Bambolino, in *Cass. pen.*, 1993, 257.

ability in the places off limits to the target of the measure[39]. It is an instrument conceived primarily to protect victims of persecution and implies restrictions of a highly uncertain character on the target of the provisional measure, who may be barred either from the specific places habitually frequented by the injured person, or else the spaces surrounding the latter during his or her movements. The obligation not to approach a place or to keep a due distance away from someone can also be extended to the relatives, cohabitants or partner of the victim. It follows that an accused person could be subjected to a large number of restrictions, whose entity will depend on the lifestyle of the victim and his or her family members. It may be difficult even to identify the actual extent of the off-limit areas[40]. Given its indeterminate nature, the measure may also appear problematic as far as verifying compliance with the restrictions is concerned, although the task of reporting violations will plausibly be fulfilled by the victim of the offence.

Another measure conceived for specific criminal behaviours, in particular for abuse and violence perpetrated in domestic settings, is the *obligation to leave the family home* (Article 282 *bis* CCP), a measure introduced in 2001 and subsequently amended[41], which draws inspiration from the *order of protection* applied in the United States. The target of the measure is ordered to leave the family home immediately and not to return to it without the authorisation of the judge, who may allow some visits, also to protect the relationship with children. Further conditions may be added to this basic restrictive measure, such as a prohibition on approaching the places frequented by the victim and family members and the obligation to pay support money for members of the household who are not financially independent. For a series of offences, especially of a sexual nature, the law provides that the measures adopted can also go beyond the ordinary limits of the power to impose pre-trial restrictions and envisages the possibility of electronically monitoring compliance with the restrictions imposed.

A measure that is antithetical to the obligation to leave home is *house arrest* (Article 284 co. 5 CCP), considered a *custodial* instrument: Italian law treats the *status* of a person under house arrest the same as

[39] Art. 612 *bis* CCP, introduced, like the precautionary measure mentioned, by Law Decree no. 11 of 23 February 2009, converted into Law no. 38 of 23 April 2009.

[40] Case law has not yet produced a well-defined orientation concerning the actual contents of this provisional measure; in some cases it has been judged necessary to provide a detailed list of the places the accused is barred from entering (Court of Cassation ruling of 4 April 2013, in *C.e.d.* no. 257697), in others it has not.

[41] Law of 4 April 2001 and Law no. 119 of 15 October 2013.

that of a person held in prison (Article 284(5) CCP), in view of the limited room for movement allowed. In truth, the entity of the restriction can be closer or farther from a situation of detention depending on the actual contents of the restrictive measure, which can range from a ban on leaving the house and communicating with people other than those living under the same roof to milder restrictions compatible with engaging in work activities and other authorised travel. In order to incentivise recourse to this measure, the most appealing as a replacement for custody in prison, today the law imposes the adoption of electronic monitoring instruments, which can be omitted only if the judge deems them unnecessary based on the nature and extent of the needs to be satisfied[42]. The rule is thus that home detention must be accompanied with electronic surveillance – merely a method of enforcement, not an autonomous measure – which should answer complaints about the absence of effective and frequent checks on the persons subjected to limitations other than imprisonment. However, the adoption of these instruments is subject to two conditions: the consent of the person charged[43], for the purpose of protecting his or her dignity, and the actual availability of remote monitoring devices. Whilst the former is unlikely to be denied, since if it were, custody in prison would be practically inevitable, it is in fact the latter which hinders broad recourse to this method of supervision. Although it has been available as an option for fifteen years, the very limited number of electronic instruments allocated to the police and numerous malfunctions have thus far deprived the provisions of law of any effect.

The last measure envisaged, also in numerical order, by the Italian Criminal Code is *custody in prison* (Article 285 CCP), to which recourse should be made only when every other measure proves inadequate (Article 275(3) CCP).

In order to assess the extent to which alternative instruments may be used, it is essential to consider a series of rules regarding remand in custody, precisely. With the aim of encouraging the use of less harsh in-

[42] As a result, Law no. 10 of 21 February 2014 inverted the relationship between rule and exception established by previous legislation, whereby the judge had to order electronic monitoring only if deemed necessary (this was the rule according to Law no. 4 of 19 January 2001, which introduced Art. 275-*bis* CCP). In order to further encourage recourse to this measure, Law 47 of 2015 recently introduced a stricter justification requirement for judges oriented toward pre-trial detention, who today are obliged to set forth the specific reasons why they feel that house arrest accompanied by electronic monitoring is not sufficient to prevent risks pending trial.

[43] As suggested by rule 15 of the Recommendation of the Committee of Ministers of the Council of Europe Rec(2014)4, which emphasises, from a different perspective, that consent may be viewed as a commitment to comply with the restrictions.

struments, European sources as well focus primarily on the limits to be placed on the application of the most restrictive one[44]. The law reinforces the residual character of this option with many specifications, requiring the trial judge to ideally envisage the moment of the final decision: if it may be supposed, because the conditions established by law can already be found to exist, that the sentence will be conditionally suspended, detention must be ruled out; as it must when the sentence can already be assumed not to exceed three years, a term that usually enables access to alternative sanctions (Article 275 (2) *bis* CCP). This double limit is intended to avoid undue disproportions between the treatment of convicted individuals and persons charged with an offence, who, given the presumption of innocence, should not be subjected to worse conditions than when their guilt is definitively established.

There are also a series of prohibitions on the use of detention which are aimed at safeguarding other values of constitutional relevance, such as the protection of mothers or health (Article 275 (4) and (4 *bis*) CCP): pregnant women or mothers of children up to six years of age should not be put in prison, but at most placed in a mitigated custody institution (Article 285 *bis* CCP)[45]; people with very serious health conditions, AIDS sufferers in particular, should be placed under house arrest in a treatment facility; whereas the mentally infirm should be held in custody in special psychiatric facilities that guarantee their supervision (Article 286 CCP). However, in addressing precautionary needs of exceptional relevance, the judge may nonetheless opt for custody in prison, which is thus not a solution ruled out altogether.

Notwithstanding these limits and the presence of a wide array of alternatives to pre-trial detention, which covers nearly all the possibilities envisaged by European sources[46], remand in custody has always been an instrument used on a mass scale[47]. The provisions described up to now should all discourage recourse to restrictive measures and to imprisonment in particular: the strictness of the conditions, the constraints in the

[44] This is the approach followed by Rec(80)11, Rec(99)22 and Rec(2006)13.

[45] This approach is also suggested in Rec(2006)13, rule 10.

[46] The possible alternative measures to detention are enumerated in Rec(80)11, rule 15, and Rec(99)22, rule 12. As to EU legislative sources, Art. 8 of Framework Decision 829/2009 provides a list of applicable restrictions which Member States are obliged to reciprocally recognise. Of the options that may be drawn from European sources, Italy does not provide for release on bail, a rather controversial measure whose approval is nowhere in sight, the obligation to appear before a judicial authority, and supervision entrusted to court-appointed agencies.

[47] See paragraph below on data.

criteria of choice, the variety of the restrictions that can be imposed, and the limits set to protect vulnerable individuals all push in this direction.

However, the Italian legal system, subject to conflicting pressures, also contains rules that go in an opposite direction, i.e. in favour of detention. For a long list of offences considered particularly alarming, there is a dual presumption, which – in the recent past – has undoubtedly favoured the application of custody in prison instead of other measures: given strong evidence of the commission of one of the crimes included in the catalogue[48], the risks of allowing the person charged to remain free are presumed by law; in the same cases, it is assumed, again *ex lege*, that the only suitable solution for preventing them is imprisonment (Article 275(3) CCP). The application of this measure is thus largely facilitated, since the judge only needs to verify that there is strong evidence against the accused person. It will be up to the latter, according to a complicated inversion of the burden of proof, to demonstrate that the need for provisional measures does not exist, or can be satisfied with milder ones than detention[49]. In the case of mafia-type, subversive or terrorist organisations, the law precludes even this latter option and makes remand in custody the only possible choice.

In addition to this system of assumptions there is a rule which, in the case of arrest in *flagrante delicto*, also allows provisional measures to be adopted in derogation of the ordinary limits on punishment, undermining the selective effectiveness of this condition (Article 391(5) CCP). Therefore, if a person is caught in the act of committing an offence, even not a particularly serious one, it is also possible to opt for pre-trial detention, even though this harsh treatment, connected to the contingencies of the case, does not appear wholly reasonable. There are further provisions that strongly encourage the judge to adopt restrictive measures in concomitance with a conviction in the first instance or on appeal (Articles 275(1) *bis* and (2) *ter* CCP), although the presumption of innocence should not be affected by the direction the proceedings are taking. A further rule should be included among those apt to increase the number of people in prison: under this rule, if persons under house arrest violate the obligation not to leave their home, their detention will automatically be converted into custody in prison, unless the fact is of minor

[48] Which features a long list of crimes of association, sexual offences and other serious offences like homicide.

[49] This possibility was recently introduced thanks to Law no. 47 of 16 April 2015, which superseded the previous system based on the absolute assumption of imprisonment as the only suitable solution, implementing the judgments of unconstitutionality (no fewer than 9) that had condemned this rule in previous years.

entity; this latter exception was added recently to break the rigidity of the automatic mechanism[50].

2.2. *Statistical data*

There are few available data regarding the application of provisional measures in Italy. The only retrievable information regards the number of people confined to prison prior to sentencing, broken down according to the phases of the criminal proceedings in which the measure is adopted. As of 31 March 2016, the people remanded in custody in Italian prisons numbered 18,514, i.e. 34.5% of the total. About half (9,074) were involved in proceedings still at the investigation stage or in first-instance proceedings, whilst the other half (9,440) were awaiting the outcomes of the appeals lodged against the conviction: under the Italian Constitution, in fact, no penalty should be applied until the definitive judgment is rendered (Article 27(2) Const.). The percentage of remand prisons, though very high, has been significantly reduced in the past few years, and now stands at the lowest level ever reached since the new code came into force. A diachronic analysis of statistical trends may help us to understand the causes of overcrowding and, if read in relation to legislative changes, consider possible remedies. Some significant periods for the issue of overcrowding are considered in the table that follows.

TABLE 1

Year	Remand prisoners	Sentenced prisoners	Offenders subjected to "safety measures"	Total prisoners	Percentage of remand prisoners
1991	19.875	14.319	1.275	35.469	56%
1994	23.544	26.265	1.356	51.165	46%
2001	23.302	30.658	1.315	55.275	42%
2006	21.820	38.193	1.251	61.264	36%
2007	28.188	19.029	1.476	48.693	58%
2010	29.691	36.781	1.786	68.258	43%
2013	24.547	40.301	1.180	66.028	37%
2014	20.040	36.926	1.126	58.092	34%
2015	17.785	33.896	440	52.164	34%
2016	18.514	34.580	364	53.495	35%

[50] The recent Law no. 47 of 2015 addressed this point as well, mitigating the previous provision, which called for the replacement without exceptions.

In the early ninety-nineties, when Italy was hit by a series of crime emergencies – from mafia violence to the vast corruption investigations targeting the political and business classes – the number of remand prisoners reached a peak of 56% of the total prison population. At that time, the legal community severely censured the abuses of the custodial instrument, improperly used for purposes of social stigmatisation or applying pressure to obtain confessions[51]. The legislator took into account the criticisms advanced and intervened in the mid 1990s with a series of amendments on the conditions and procedure for applying provisional measures, aimed at countering this propensity of the judiciary[52]. The data demonstrate that the intervention served to reduce the number of inmates still undergoing criminal proceedings, but not to bring it within narrow limits: the percentage continued to exceed 40% of the total number of prisoners, and the statistics subsequently remained stable around this threshold. The previously mentioned pardon of 2006, issued in response to the first signs of a prison emergency, led to a reduction only in the number of sentenced prisoners, which was again surpassed by the number of remand prisoners (58% of the total). Thereafter, the new increase in sentenced prisoners went hand in hand with an increase in those provisionally detained, until a peak was reached in 2010, when the number of accused individuals in prison amounted to nearly 30,000, 10,000 more than in the early 1990s. It does not seem a coincidence that precisely in the previous years Italy had adopted a series of measures placing a high emphasis on security. As far as pre-trial measures are concerned, 2009 was the year in which the legal presumptions in favour of custody proliferated. Starting from the acknowledgement of a state of emergency in Italian prisons, the number of prisoners began progressively to decrease, above all in this specific category, which was reduced by nearly one third compared to the peak in their number. The data reveal that it was precisely the significant decrease in remand prisoners which enabled Italy to overcome the overcrowding emergency[53].

A reading of the data in temporal succession makes it clear that such achievements do not depend on the number of available alternative measures: neither the original presence of a wide array of restrictions at the

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[51] See generally E. MARZADURI, "Quale rimedio è invocabile dinanzi a prove costituite da dichiarazioni rese sotto la pressione della custodia in carcere in atto o annunciata da inequivoci precedenti giudiziari", in *Critica dir.*, 1995, 58 ff; E. AMODIO, "Le misure coercitive nella procedura penale vivente", in *Quest. giust.*, 1995, 16 ff.

[52] Law no. 332 of 8 August 1995.

[53] 77% of the reduction in the number of prisoners between 2010 and 2015 was due to the decrease in remand prisoners.

judge's disposal, nor the subsequent introduction of newly conceived instruments, served to prevent massive recourse to custody. The real spur was the stances taken by the ECtHR, particularly in the judgment *Torreggiani v Italy*: the finding of an endemic condition of overcrowding and setting of a deadline to remedy it served to shake up the political class and assure the support of a portion of public opinion for measures that would otherwise have been unpopular. Numerous legislative amendments ensued, which had an impact on the conditions for the application of provisional measures, the criteria for choosing them, the procedure for applying them and the regime of remedies[54].

However, on their own the few available data are not able to reveal what the weak point in the mechanism was: whether the provisions of law, such as, for example, those relating to the presumptions of dangerousness established for many offences; or the attitude of judges, who tend in many cases to choose prison. Nor is it easy to identify the main reason for the decrease in the past few years: whether the improvement is largely due to a specific legislative intervention or a changed attitude in practical application in response to the warnings of the European Court. In order to get an idea, we would need to know what percentage of provisional measures is issued every year, how many measures other than pre-trial detention are applied, for what offences one option is preferred over another and for what targets, citizens or foreigners. This information is all available in the contiguous field of detention imposed as punishment in the event of conviction. This persistent gap is one of the largest obstacles to a thorough understanding of the concrete trend in pre-trial detention. The recent Law 47 of 2015 established that it would be filled in the future, requiring the Government to produce this data on 31 January of each year. However, the obligation has not yet been fulfilled for the year 2016.

2.3. *Evaluation of alternatives to pre-trial detention. Compatibility with European standards*

As regards the general framework governing provisional measures, the Italian system, as previously highlighted, meets the requirements set

[54] In particular Law no. 94 of 2013, Law no. 10 of 2014, Law no. 117 of 2014 and Law no. 47 of 2015. See G. Illuminati, "Le ultime riforme del processo penale: una prima risposta all'Europa", in *Dir. pen. cont.*, 26 March 2015; D. Chinnici, D. Negri, "Una riforma carica di ambizioni ma troppo cauta negli esiti", in D. Chinnici (ed.), *Le misure cautelari personali nella strategia del «minimo sacrificio necessario» (legge 16 aprile 2015, n. 47)*, Rome: Dike Giuridica, 5 f.

by the sources of soft law of the Council of Europe and European Parliament: they provide a varied set of instruments as alternatives to detention, which is in turn viewed as the last resort thanks to the formulation of rigid conditions legitimising its use. There has been a decided turn toward the logic of the "minimum sacrifice necessary", above all in the past three years with the laws passed in the wake of the *Torreggiani* judgment against Italy. These measures have amended numerous provisions with the aim of limiting custody in prison as much as possible (by introducing stricter legal requirements) and inducing judges to avail themselves of the other existing options (by increasing the burden of justification)[55] However, there are still some significant divergences from the required standards of protection of rights which may have had, for different reasons, an impact on the broad recourse to detention.

The reasons for the excesses characterising the Italian system may be addressed on three different levels, all taken into consideration by European sources: the first relates to some provisions of law (or lack thereof), which facilitate the use of the most restrictive instruments; the second to the attitudes of the judiciary, inclined to choose custodial measures; and the third, correlated with the second, to the deficiencies in the administrative support and supervision structures, which is likely to condition the orientation of judges.

Although the Italian legal system fully complies with the coordinates set at a supranational level as far as the general rules governing the conditions of applicability of provisional measures are concerned, the broad area of exceptions envisaged by domestic law clashes with the required standards. In particular, the previously mentioned regime of absolute and relative presumptions, whereby the law orients the choice of judges toward custody pending trial for a wide range of offences, considered to arouse considerable public alarm (Article 275(3) CCP), disregards various recommendations of the Council of Europe. It is a sort of crime black list, which was progressively extended to embrace nearly forty criminal provisions[56], some of which in turn include a large variety of

[55] One may clearly recognise an "educational" objective in Law no. 47 of 2015, as it aims to influence the propensities of judges, especially when it comes to evaluating precautionary needs.

[56] In addition to mafia-type, terrorist and subversive organisations, the legislation refers to various types of unlawful association as well as a number of offences perpetrated by individuals. The former include, for example, organisations that engage in human trafficking, sexual exploitation of minors, sexual violence, also against adults, drug trafficking, tobacco smuggling and illegal trade of waste. The latter include murder, numerous sexual crimes and kidnapping.

possible conducts[57]. Paragraph 1 of Rec(80)11, echoed more recently by paragraph 3(2) of Rec(2006)13, established that detention during the trial can never be mandatory. Notwithstanding this rule, the Italian system *imposes* detention as the only option in the presence of mere indications that a person has committed the offence of association with a mafia-type, subversive or terrorist organisation. The provision was upheld, not without perplexity, by the ECtHR, when the exceptional regime regarded only mafia-related crimes and not the other two cases that stand alongside it today[58].

As for the remaining types of offences channelled into this special "track", Italian law assumes the existence both of the risks tied to a provisional release and the suitability of pre-trial detention as the only option, rather the last resort. The burden of demonstrating the contrary lies on the person concerned, in defiance of the principle enshrined in paragraph 8(2) of Rec(2006)13, which places the burden on the prosecution or judge. What is more, the reversal of roles applies throughout the term of the provisional measure, whereas the European Court has affirmed that the opposite assumptions should be made, in favour of release as opposed to remand in custody[59]. Legislative solutions of this type considerably limit the possibility of adopting alternatives to detention.

There is another automatic mechanism that works against the person charged and is partly in contradiction with the recommendations of the Council of Europe, aimed at reducing the use of pre-trial detention. Rule 12 of Rec(2006)13 bans the automatic application of remand in custody even where alternative measures have been infringed, requiring in any event that specific grounds be given to justify custody. In the case of house arrest, Italian law, by contrast, automatically calls for remand in custody when the order to remain at home is not complied with, except in the case of minor violations (Article 276 (1) *ter* CCP). The obligation of providing grounds for the replacement of the measure *in peius* is thus required as an exception, not a rule; justification must be given for continuing the application of the less restrictive measure, not for applying the more severe one[60].

Therefore, in respect of some crucial procedural steps the Italian system fails to meet the required standards and the causes of massive re-

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[57] Some of the offences enumerated are completely open to interpretation, as only the purpose (terrorism or aiding and abetting mafia-type organisations) or method (the method of intimidation typical of the mafia) are sufficient to bring any criminal conduct under the special regime.

[58] ECtHR, *Pantano v Italia*, 5.2.2004.

[59] Cases of *Ilijkov v Bulgaria*, 26.7.2001, § 145.

[60] Comment on Law no. 47/2015, which introduced this safeguard clause.

course to pre-trial detention may lie precisely in these deficiencies. The guarantees due to the offender can help to prevent its application or at least to shorten the length of custody in prison. In this respect, it should be noted that, in contrast with the provision of paragraph 25(1) of Rec(2006)13[61], domestic legislation does not provide for prior questioning of the person charged, who cannot have any communication with the judge until after the imposition of the measure (Article 294 CCP). This first contact, which should be prompt according to European sources (paragraph 2 of Rec(80)11) and preferably take place within the first 48 hours of detention (paragraph 14 of Rec(2006)13)[62], can instead take place 5 days after the issuance of the remand order. This extension, where the measure is later revoked or replaced with a more lenient one thanks to the clarifications provided by the accused, can result in a significant increase in the brief stays in prison, which, multiplied by thousands of cases, undoubtedly have an impact on the overcrowding rate.

Analogous considerations apply for the available remedies in the case of undue provisional measures. Italy has an extensive system of appeals (Article 309, 310, 311 CCP)[63], as well as envisaging the possibility for the judge to reassess, at any time, the conditions of the restrictive order (Article 299 CCP). However, there is no provision for an automatic periodic review, to be performed at regular intervals by the judicial authority, as is repeatedly recommended in the documents of the Council of Europe (paragraph 14 of Rec(80)11, paragraphs 17, 23 and 24 of

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[61] "The *intention* to seek remand in custody and the reasons for so doing shall be promptly communicated to the person concerned in a language which he or she understands". For the Italian debate on the introduction of a prior questioning of the accused, modelled after the French system, see L. GIULIANI, *Autodifesa e difesa tecnica nei procedimenti* de libertate, Padova: Cedam, 2012, 215.

[62] The case law of the ECtHR also insists on this rapidity. In the case *Brogan and others v United Kingdom*, 29.11.1988, § 62, the Court ruled that deprivation of liberty without contact with the judicial authority for over four days was excessive. O. MAZZA, "La libertà personale nella Costituzione europea", in M.G. COPPETTA (ed.), *Profili del processo penale nella Costituzione europea*, Torino: Giappichelli, 2009, 60; G. UBERTIS, *Principi di procedura penale europea. Le regole del giusto processo*, 2nd ed., Milano: Raffaello Cortina, 2009, 111; T. RAFARACI, "Le garanzie del procedimento de libertate", in A. BALSAMO, R. KOSTORIS (ed.), *Giurisprudenza europea e processo penale italiano*, Torino: Giappichelli, 2008, 272 ff; G. PARISI, G. SANTORO, A. SCANDURRA, *La custodia cautelare: analisi delle misure alternative e del processo decisionale dell'autorità giudiziaria in Italia*, e-book edited by Associazione Antigone (in *www.antigone.it*), 9.

[63] However, Italy has been condemned more than once for the delay with which the decisions of supervising judges are issued after the submission of requests. European Court, 19.5.2005, *Rapacciuolo v Italy*, 3.6.2007, *Naranjo Hurtado v Italy*, 4.3.2008, *Marturana v Italy*. On this point see T. RAFARACI, op. cit., 277 ff. The recent Law no. 47 of 2015 has sought to solve the problem by imposing stricter time-frames.

Rec(2006)13) and European Union (EU Parliament Resolution 2011/2897, no 10). It is indeed usually the person concerned who has to request the judge to review the decision on their freedom, according to a distribution of burdens that is once again a reversal of what is suggested at a supranational level[64].

In short, mechanisms aimed at facilitating the suspect's contribution in the early phases of the remand proceedings and favouring subsequent judicial reconsideration may prove decisive for orienting the competent authorities toward the choice of a measure other than detention[65]. These important procedural rules are thus capable of having an indirect effect on the other aspect to be considered, i.e. the attitudes of the judiciary, openly addressed by the European sources of soft law: the need to make as much use as possible of alternatives to detention can be met by guiding judges toward this choice (paragraphs 3 and 12 of Rec(99)22 and paragraph 10 of EU Parliament Resolution 2011/2897). An objective to be pursued not only by establishing a suitable legislative framework, but also by providing sufficient financial and human resources (paragraph 13 of Rec(99)22), such as to ensure that restrictive measures are applied in a serious and reliable manner.

In order to induce the judicial authorities to trust these instruments and consider them a "valuable and responsible option" it is thus necessary to be able to rely on appropriate systems of supervision and surveillance, as highlighted by rules 25 and 26 of Rec(99)22. From this standpoint as well, Italy appears to be deficient. The electronic monitoring systems for persons under house arrest, for example, despite the rules designed to encourage their use, entail high costs and practical difficulties. In the first ten years of application of the law, remote monitoring devices were used only 14 times. And case law has raised the question as to whether the persisting unavailability – for which the person charged is not to blame – can lead to a legitimate diagnosis of the insufficiency of home detention, such as to warrant its replacement with remand custody[66].

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[64] Rule 17(2) of Rec(2006)13 takes into account systems that allow the detainee to apply for a release at any time. However, this possibility renders acceptable only the exceeding of the recommended time criterion, whereby the intervals between periodic reviews should "normally" be no longer than one month. However, it does not release the judicial authority from its responsibility to perform these reviews regularly, as is clarified by the subsequent para (3) of the same rule. Rule 23 of Rec(2006)13 rules out, moreover, that the specification of maximum periods of pre-trial detention, which in Italy are established by law, may exempt the judicial authority from conducting periodic reviews.

[65] This is confirmed by an empirical study conducted by Associazione Antigone: see G. Parisi, G. Santoro, A. Scandurra, *La custodia cautelare*, op. cit., 26.

[66] For an account of the contradictions in case law on this point, see F. Maisano, "Ar-

The difficulties of monitoring a person undergoing trial are felt to a more marked degree when the latter does not live in Italy on a regular basis and is therefore not supported by solid family and social networks. This factor frequently induces judges to prefer detention as a solution[67], so much so that foreigners account for nearly 40% of remand prisoners[68], but only 30% of those serving a prison term following conviction. The European Supervision Order outlined by Framework Decision 2009/829/JHA, just implemented in Italy, aims to offer a solution to this specific problem[69]. It is the first compulsory instrument adopted within the European Union aimed at favouring the adoption of provisional measures other than detention for persons who do not have their habitual residence in the Member State where the trial is taking place[70]. The provisional order issued in the place where the criminal proceedings are pending should also be recognised abroad, notwithstanding limited possibilities of refusal, so that the issuing judicial authority can rely on the supervision of the competent authorities of another country.

However, it is unlikely that this mechanism will produce the hoped-for results, not so much because of the absence of mutual trust among the authorities of different States, but rather because both European legislation and above all domestic legislation fail to address a crucial aspect, namely, what means should be used to assure that the defendant has the possibility of returning to the place where the trial is taking place in order to participate in it. Criminal proceedings, unlike the execution of final sentences[71], are a highly dynamic phenomenon and there are thus countless occasions on which the person undergoing trial may be called on to take part, either at the initiative of the investigators themselves (need for interrogations, meetings, inspections, surveys), or because of the wish to be present during the fact-finding activities. Consent to removal, required as a condition for transfer abroad, thus risks entering

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resti domiciliari e braccialetto elettronico: è il momento delle Sezioni Unite?", *www.giurisprudenzapenale.com*, 2 December 2015.

[67] Again see G. Parisi, G. Santoro, A. Scandurra, *La custodia cautelare*, op. cit., 34-36.

[68] At present there are 17,920 foreign detainees in prison, 7,154 of whom in remand custody.

[69] With the very recent Legislative Decree no. 36 of 15 February 2016 (which entered into force on 26 March 2016).

[70] In actual fact, the majority of foreign detainees in Italy are from non-EU countries: in 2015 only 3,672 out of 17,340 prisoners (in custody for any reason) were Community citizens and the majority were from Romania.

[71] Which may be executed in another Member State under the rules established by Framework Decision 2008/909/JHA of 27 November 2008, implemented in Italy with Legislative Decree no. 161 of 7 September 2010.

into conflict with the fundamental right to participate in trial activities in order to fully exploit the occasions for defence and self-defence[72]. If a person charged with an offence is subject to a restrictive measure, and his or her freedom of movement is limited, it becomes essential to regulate the terms of these possible returns, at least establishing which authorities will be responsible for supervision during cross-border journeys. In fact, lying at the basis of the provisional measure is an assessment as to the dangerousness of the individual concerned, who would not have been subjected to restrictions if considered reliable. In a brief passage, the recitals of the Framework Decision leave it up to national legislations to govern this delicate aspect, with the related expenses to be borne by the issuing State[73]; this could constitute a strong disincentive to the adoption of the ESO; or else suggest the use of video-conferencing equipment and telephones[74], which, however, besides not always being able to act as a substitute for a person's physical presence, raises numerous doubts with respect to the effective exercise of the right of defence, already hindered by language differences. For its own part, domestic legislation completely fails to address these delicate issues, and we may thus expect little use to be made of the new instrument.

Another highly important factor conditioning the choices of the judiciary is the long duration of trials, a pathological trait of the Italian system. The substantial amount of time that elapses between the initiation of an investigation and its conclusion may induce judges to rely on more restrictive measures and bend the rules for improper aims, such as that of demonstrating a prompt reaction of the state serving to reassure public opinion. Remand in custody thus ends up acting as a surrogate for a penalty whose execution is foreseen in a faraway future[75]. Although, in

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[72] First of all, Italian law does not clarify when the consent of the party concerned must be obtained (Arts. 5 and 6 of Legislative Decree no. 36 of 2016). As there is no provision in the Italian system for prior questioning of the person to be subjected to a restriction, and the wish to be transferred abroad may be a decisive element in order for the judge to choose an alternative to detention, domestic legislation should have addressed this aspect. Given the silence of the law, it is thus probable that any consent will be given after the imposition of a custodial measure, so that its temporary application will not be avoided even if all the conditions for leaving the country are met.

[73] As per recital 14. The use of video-conferencing equipment and telephones is envisaged as a means of avoiding "unnecessary costs and difficulties". However, besides not always being able to act as a substitute for a person's physical presence, it raises numerous doubts with respect to the effective exercise of the right of defence, especially in the case of defendants who are already facing greater difficulties due to unfamiliarity with the language.

[74] As per recital 10.

[75] The use of pre-trial detention for concealed aims of inflicting punishment has been repeatedly denounced by Italian legal scholars: see generally M. Nobili, *Scenari e trasfor-*

fact, in observance of European recommendations (paragraph 16 of Rec(80)11, paragraph 24(2) of Rec(2006)13), proceedings involving persons remanded in custody are given the priority and required to be conducted expeditiously[76], the law nonetheless allows the restrictions of liberty to be extended for very long periods of time[77]. This circumstance comes into conflict with European Parliament Resolution 2011/2897, which in paragraph 9 allows the possibility of pre-trial detention only "for a limited period of time", as well as with the case law of the ECtHR[78].

Without a doubt, one of the causes of these drawn-out proceedings is ascribable to the system of mandatory prosecution that is applied in Italy: the large number of criminal proceedings that are required to be conducted results in a backlog of pending cases and a consequent delay in trials. The guidelines provided by the Council of Europe have not been observed in this respect: precisely in its recommendation regarding prison overcrowding, the Council again suggested adopting systems of discretionary prosecution (paragraph 10 Rec(99)22), a measure already encouraged in a previous recommendation dedicated to the simplification of criminal justice (Rec(87)18). Other countries involved in this study (France and Belgium in particular), recognise the alternatives to trials, rather than to detention, as the key to reducing – albeit indirectly – the prison population. Italy is bound by the Constitution to implement a system of mandatory prosecution (Article 112 Constitution). This choice, associated with the total independence of the judiciary from the executive power and hence the impossibility of reviewing decisions as whether to prosecute or not on a political level, is deeply rooted in the Italian legal culture and it seems unlikely that it will be called into question.

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mazioni del processo penale, Padova: Cedam, 1998, 106 ff and 198 ff; more recently, A. Presutti, "Le cautele nel processo penale come forma di anticipazione della pena", in *Riv. it. dir. proc. pen.*, 2014, 45 ff.

[76] As provided under Art. 132 *bis*(1)(c) and d) of Legislative Decree no. 271 of 28 July 1989, added in 2000 (Law Decree no. 341 of 24 November 2000, converted into Law no. 4 of 19 January 2001) to the implementing provisions of the Code of Criminal Procedure and amended in 2008 (Law Decree of 23 May 2008, converted into Law no. 125 of 24 July 2008).

[77] In this regard, there is an elaborate system of time limits for each stage of the proceedings, modulated in relation to the seriousness of the offence (Art. 303 CCP) and susceptible of extensions and suspensions (Arts. 304 and 305 CCP), so that for the most serious crimes, remand prisoners could be held in custody for up to 9 years.

[78] The trial must be initiated within a reasonable time, in accordance with Art. 5(3) of the ECHR, and in general proceedings regarding a person provisionally held in custody must be conducted in an especially diligent and expeditious fashion. Whether this was achieved must be assessed case by case, in light of the facts. The ECtHR has considered periods of pre-trial detention of between two and a half years and five years to be excessive.

2.4. *Impact on the prison population*

It has already been highlighted that Italy is seriously deficient when it comes to monitoring the application of provisional measures[79]. The lack of available data precludes a thorough diagnosis of which factors are to blame for the traditional excessive application of pre-trial detention, and which, by contrast, can explain the drastic improvement of recent years. As highlighted earlier, Italian law already formally imposes a more thorough collection of data on custody pending trial and recourse to alternative measures, but for the time being this provision seems to have been disregarded, most likely due to the burden that such an information gathering task would place on courts[80].

As far as the impact on the prison population is concerned, an analysis of the flows of provisional measures should necessarily take into account the mechanism of substitutability – also recommended by the Council of Europe (paragraph 17 of Rec(80)11 and paragraph 33 of Rec(2006)13) – whereby the period of remand in custody during the criminal proceedings must be deducted from the length of the prison term to be served, thus reducing the actual entity of the latter (Article 657 CCP). In the Italian system, the reduction regards only the time spent in custody pending trial and house arrest, which is deducted from the sentence of imprisonment and arrest, or the corresponding fine or alternative penalties. The deduction does not apply, however, for the various forms of restriction of liberty imposed during the proceedings, a possibility that even the recommendations of the Committee of Ministers treat as purely optional for national legal systems (an option likewise provided for in paragraph 33 of Rec(2006) 13).

This means that, albeit with significant exceptions, the periods of pre-trial detention – from a dynamic perspective – do not actually weigh upon the prison systems to the degree reflected by the statistics, since in their absence, the prison terms to be served would be correspondingly longer. Indeed, any periods of detention suffered during the trial, deducted from the final sentence established by the judge, contribute to reaching the thresholds (normally 3 years) which make a convicted person eligible for the application of alternative measures without having to spend time in prison. Paradoxically, from the standpoint of the mere burden on the justice system, if a person charged with an offence under-

[79] See above paragraph on data.

[80] Remand proceedings are undoubtedly characterised by considerable complexity, due to possible revocations and substitutions of the measures applied, the issuance of new restrictive measures, extensions and suspensions of the time limits for the individual phases.

goes mandatory provisional measures – which in any case imply supervision activities to be conducted by security forces – and is subsequently sentenced to prison, the result will be worse, because the sentence of imprisonment will have to be completed in its entirety. Considering solely the impact on overcrowding, recourse to house arrest should thus be encouraged, as it appears to be the most convenient option: this measure implies restrictions outside of prison which do not weigh upon the prison system during the trial; however, as they are considered on a par with custody in prison, they are deducted to the same degree from the final amount of the prison sentence.

In the case of pre-trial detention as well, the rate of imprisonment is naturally influenced by the cases in which the deductions provided for cannot be made: this occurs when the person charged is acquitted or sentenced to pay a fine, receives an alternative penalty or suspended sentence, or is sentenced to a term of imprisonment that is shorter than the time already spent in custody[81]. In order to measure the actual impact of these measures on the prison population, it is thus indispensable to know the duration of the restrictions and the final outcomes of the trial in which they were applied[82].

However, we should beware of adopting purely arithmetical tools of evaluation, which neglect to consider other extremely important variables. One need only consider that short stays in prison, which are frequent in the case of provisional measures[83], create strong pressure on the prison administration, as it is precisely the early period of detention that entails the largest number of operations: registration and allocation of the inmates to cells, visits and preliminary interviews, constant observation of the prisoner to assess his or her reactions to the state of captivity, as well as expenses tied to the kit distributed upon entry[84]. Moreover, we should not overlook the fact that pre-trial detention serves a purpose

[81] However, the Italian system allows these periods also to be deducted from any other sentences of imprisonment, provided that they related to an offence committed prior to the periods of provisional detention to be deducted (Art. 657 (3) CCP).

[82] As for acquittals, some studies reveal that the phenomenon is by no means negligible: the estimates vary, but it is believed that around 20% (Eurispes 2012 data) or even 30% of those acquitted had been remanded in custody.

[83] Some studies of the sector (F. Cascini, "Il carcere. I numeri, i dati, le prospettive", in *Quest. gius.*, 2010, 56) report that a very high percentage of persons remanded in custody remain in prison for a short time only. In particular, about half of the remands during the course of a year end up being brief stays, often lasting just a few days, i.e. the time necessary to conduct a review.

[84] Towels, toothbrushes, soap and so forth, which are often wasted in the case of short or very short periods of detention.

purely of confinement, as it is not accompanied by any correctional or rehabilitative measures typically associated with criminal sentences: indeed, such measures would be incompatible with the presumption of innocence. Despite being deducted from the final sentence, detention during a trial is thus more stressful for those who experience it, also because they are allowed few occasions for socialisation[85].

3. *Alternatives to trials in the Italian penal system: placement of the person charged on probation*

3.1. *Analysis of existing legal provisions*

Among the measures that can be applied in a phase preceding the issuance of a court judgment and which may contribute to containing prison overcrowding, there is the newly introduced "suspension of trial with probation", introduced into the Italian legal system with Law no. 67 of 28 April 2014 (pre-trial probation).

Articles 464 *bis* et seq. of the Code of Criminal Procedure envisage the possibility for the accused offender to request, where certain objective and subjective conditions are met, the suspension of the trial with probation[86]. This translates into a period of time during which the criminal proceedings are frozen and the person undergoing trial asks for an opportunity to show, through active and personal behaviour, that he or she is capable of autonomously undertaking the path of re-socialisation, so that the punishing intervention of the State is no longer necessary. A request to stay the proceedings can be submitted during the preliminary investigation (Article 464 *ter*), in which case the consent of the public prosecutor is necessary, or after prosecution has begun, but in any case not beyond the opening of the trial (Article 464 *bis* (2)). The request must contain a programme (Article 464 *bis* (4)) drawn up in agreement with the probation agency (*Ufficio di esecuzione penale esterna* - UEPE or *servizi sociali*), which is entrusted with monitoring and support during the operational phase of probation. The program lists the concrete commitments that the requesting party intends to fulfil to ensure the positive outcome of probation and may include, for example, compensation or reparations, volunteer work or mediation with the victim of the offence.

[85] An issue also addressed by the ECtHR in the *Torreggiani v Italy* judgment, where, in para 47, it is underscored that the European Committee for the Prevention of Torture noted that the activities in many prisons were extremely limited.

[86] The provisions on probation due not consist solely in procedural rules; the substantive aspects are addressed by the Criminal Code in Art. 168 *bis* et seq.

However, these are all merely possible elements of the probation program. The only really essential commitment that must be made in order for the probation to be granted is to perform community service (which is not the same as volunteer work). The request will be inadmissible unless this requirement is fulfilled.

The judge will evaluate the application and suitability of the program, and make a prognosis as to whether the accused will abstain from committing new offences (Article 464 *quater* (3)). If probation is granted and concludes with a positive outcome, the offence will be extinguished and the proceedings will close with an acquittal; otherwise, the proceedings will resume.

As far as the rationale of this instrument is concerned, it was devised also with the aim of favouring a solution to the Italian prison situation. The judgments of the Strasbourg Court in the *Sulejmanovic*[87] and *Torreggiani*[88] cases triggered an acceleration which led to final approval of the provision, after an arduous legislative process. The legislation seems to be focused precisely on the objective of reducing remands in custody[89] using an instrument *ante iudicium* that makes it possible not only to avoid the trial, or at least the hearing stage, but also and above all the penalty.

3.2. *Evaluation of the new approach. Compatibility with European standards*

There are numerous European documents which touch upon issues related to probation, in particular recommendations of the Committee of Ministers of the Council of Europe, as well as EU sources.

The first, undoubtedly positive, aspect of the legislation lies in the fact of having created an opportunity for individuals on probation to show a sense of responsibility through their active, personal involvement, as required by Rec(99)19 and Rec(92)16[90]. The consent of the person

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[87] ECtHR, *Sulejmanovic v Italy*, 16.7.2009.

[88] ECtHR, *Torreggiani v Italy*, 8.1.2013.

[89] R. Piccirillo, *Relazione* no. III/07/2014, Ufficio del Massimario della Corte di Cassazione, 5 May 2014, 4; the author spoke of achieving a "balanced de-incarceration".

[90] Respectively concerning mediation in penal matters and sanctions and measures other than detention, applicable to both an accused and a sentenced person; the former calls on States to encourage "the offenders" sense of responsibility […] offering them practical opportunities to make amends", and according to the latter "the imposition and implementation of community sanctions and measures shall seek to develop the offender's sense of responsibility to the community in general and the victim(s) in particular".

charged plays a key role in this respect, being not only a necessary condition for the application of a measure at a stage prior to sentencing[91], but also important as a rehabilitative instrument, since a person cannot be made to assume responsibility against their will[92].

Moreover, instilling a sense of responsibility necessarily entails a careful effort of creating awareness of the harm caused to victims[93]. The second point to be examined regards precisely the victims. On the one hand, the legislator made a point of specifically addressing the person injured by the offence, guaranteeing the latter the right to be informed and to express his or her opinion[94]. It must be acknowledged that a few steps have been taken in the direction advocated by the Recommendations in the respect. However, it should be pointed out that this has occurred mainly, or perhaps exclusively, in relation to the strictly procedural aspects of the question. The real needs of the person affected by the offence are not taken care of. Therefore, no measures have been implemented in response to the Recommendations where they call for "medical, psychological, social and material help" for victims in view of their suffering[95]. Nor does the legislation appear to be geared toward avoiding secondary victimisation, similarly a subject of numerous recommendations[96]. The distance between what is hoped for at a European level and what is implemented in domestic legislation is even more evident if we compare the provisions in question with the guidelines contained in Directive 29/2012/EU, recently transposed into Italian law with Legislative Decree no. 212 of 15.12.2015.

From another point of view, however, we may observe with satisfaction that the term "mediation" appears for the first time in ordinary legislation along with probation. Therefore, a first step has been taken toward implementing the numerous Recommendations promoting that instrument[97]. This should certainly be greeted with favour and justifies our expectations to see the beginning of serious and broad reflection on the

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[91] Rec(2010)1, rule 7, states: "Any intervention before guilt has been finally established shall require the offender's" informed consent and shall be without prejudice to the presumption of innocence". The Recommendation deals expressly with probation, understood to include measures applied irrespective of a conviction.

[92] Rec(2010)1, rule 1.

[93] Rec(2010)1, rule 96.

[94] Art. 464 *quater* (1), (3) and (7) CCP, in accordance with the guidelines provided in rules 6 and 7 of Rec(85)11.

[95] Rec(87)21 and Rec(85)11, in particular recitals nos. 2-4.

[96] Rec(2006)8, Art. 3, Rec(2010)1, rules 3 and 96.

[97] *In primis* Rec(99)19, but also Rec(87)21 and Rec(2006)8; the latter particularly underscores the guarantees that must be provided to the victim in this context as well (Art. 13).

value of such an institution. However, it cannot be denied that problematic aspects remain, in particular the circumstance that in Italy there is still a lack of coordination among the providers of mediation, which, despite being highly qualified, are not homogeneous in terms of their presence across the territory and operational approach[98]. Furthermore, there are no uniform rules concerning the training of mediators, nor is there any recognition of qualifications through enrolment in professional registers. Consequently, in this regard it cannot be said that Italy has implemented European Recommendations, according to which "mediation services should be governed by recognised standards" and "standards of competence and ethical rules, as well as procedures for the selection, training and assessment of mediators should be developed"[99].

From another perspective, the operational capabilities of those who are called upon to implement a probation programme are jeopardised by the lack of reinforcement, in numerical and financial terms, of the agencies responsible for managing probation, i.e. the UEPE (or *servizi sociali*). From this standpoint as well, European legislation, attentive to the implementation aspects, has repeatedly called for particular attention to be paid to this issue[100], which to date has not been seriously addressed by our legal system[101].

The last element that warrants specific consideration is the assumption that probation can be considered like an instrument of restorative justice[102]. This is a paradigm of justice that is also envisaged and encouraged by European legislation[103]. However, it should be pointed out that there are some serious doubts as to whether probation actually fits this paradigm. Such doubts are founded on the mandatory and essential requirement of community service, understood, by general consensus, as a

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[98] A. Ceretti, C. Mazzucato, "Mediazione reo/vittima: le 'istruzioni per l'uso' del Consiglio d'Europa", in *Nuove esp. giust. min.*, 2008, 202.

[99] Rec(99)19, rules 19 and 20.

[100] Rec(2010)1, rules 10 and 18.

[101] Which has similarly not followed the indication of Rec(92)16, whereby a person subjected to the alternative measure, also prior to sentencing, must be provided with insurance and no costs can be borne by the offender (rules 68 and 69). This issue is not minimally addressed by Italian legislation and creates enormous problems when it comes to the application of the measure, so that people end up offering to pay for the insurance themselves just so that they can be put on probation (V. Bove, "Messa alla prova, a poco più di un anno. Quali, ancora, le criticità?", *Dir. pen. cont.*, 22 December 2015, 16).

[102] F. Fiorentin, "Rivoluzione copernicana per la giustizia riparativa", in *Guida dir.*, 21, 2014, 63; F. Giunchedi, "Probation Italian style: verso una giustizia riparativa", in *Arch. pen.*, 2014, 3.

[103] The subject is addressed in Rec(99)19 and Rec(2010)1, as well as in Directive 29/2012/EU.

punitive instrument[104], and as a voluntary means of reparation. Although the consent of the accused offender, which underpins the entire institution of probation, serves to avoid any problems of compatibility with Article 4(2) of the ECHR, which prohibits forced labour[105], this does not automatically mean that we are dealing with an instrument of restorative justice, which implies something quite different.

What is more, precisely in light of the mainly punitive elements of probation, a number of voices have raised the doubt that the institution in question represents a serious violation of the principle whereby the defendant is presumed not guilty until a final judgment has been reached concerning his or her position[106]. This issue has already been brought before the Constitutional Court, which was called upon to express its opinion as to the compatibility of the legislation with Article 27(2) of the Constitution. The question, which ultimately depends on the value to be ascribed to the accused person's consent to probation[107], is highly problematic, especially in a legal system like Italy's, which places great emphasis on the defence of civil rights in the context of criminal proceedings.

3.3. *Statistical data and impact on the prison population*

In 2015, 9690 people were "placed on probation"[108]. This institution accounted for 11.7% of the total of the alternative measures imple-

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[104] Reference is made to the "penalty of public service" (V. Bove, "Messa alla prova a poco più di un anno", op. cit., 12), "punitive core of the new measure" (R. Piccirillo, "Relazione", op. cit., 8), and "subservience of the institution to purely punitive logics" (F. Caprioli, "Due iniziative di riforma nel segno della deflazione: la sospensione del procedimento con messa alla prova dell'imputato maggiorenne e l'archiviazione per particolare tenuità del fatto", in *Cass. pen.*, 2012, 10).

[105] See on this point G. Ubertis, "Sospensione del procedimento con messa alla prova e Costituzione", in *Arch. pen.*, 2015, 2, 728.

[106] R. Orlandi, "Procedimenti speciali", in G. Conso, V. Grevi, M. Bargis (eds.), *Compendio di procedura penale*, Padova, 2014, 748; P. Ferrua, "Una messa alla prova sul filo del rasoio costituzionale", in M. Daniele, P.P. Paulesu (eds.), *Strategie di deflazione penale e rimodulazione del giudizio* in absentia, Torino: Giappichelli, 2015, 189.

[107] It is no coincidence that those who view the legislation as unconstitutional maintain that the fact that the defendant consciously and freely chooses to undergo the penalty is not sufficient, given that, as it has been understood up to now, the presumption of innocence implies a commitment of the State towards all citizens and cannot be a subject of occasional waivers, R. Orlandi, "Procedimenti speciali", op. cit., 748. In contrast, those who defend its constitutional legitimacy affirm that, despite being punitive at least in part, the programme should not be compared to a sanctioning measure also because it must be agreed on in detail beforehand by the requesting person, see G. Ubertis, "Sospensione del procedimento con messa alla prova", op. cit., 728.

[108] All data retrieved from the website *www.giustizia.it*.

mented in the same year. The number is not altogether irrelevant, considering that it was the first year of its application. Moreover, the trend appears to be rising, since 7,818 suspensions of criminal proceedings were recorded in the first quarter of 2016, along with 10,112 investigations of the U.E.P.E. concerning the practicability of probation.

However, this does not mean that there were nearly 10,000 fewer prisoners in 2015 thanks to the newly introduced institution, nor may it be said that the deflationary effect will increase in 2016. Some essential data are missing, which precludes arriving at such a conclusion. Firstly, no numbers have been provided concerning the probation terms that were successfully completed, and thanks to which the offence was actually extinguished. But above all, there is no evidence to suggest that a person who successfully completed his or her terms of probation in fact avoided detention. As the criminal proceedings had not come to an end, we do not know if that person actually risked imprisonment, or would have instead obtained a suspended sentence, a declaration of irrelevance of the fact, or even an acquittal. In other words, it is not possible to establish with certainty in what manner the probation numbers influence the prison population. We can only make reasonable assumptions based on the few data available.

The numbers, as mentioned, do not seem exiguous in the context of alternative measures, but if considered in relation to the trials that take place over a one-year period they appear immediately more modest[109]. There may be two types of explanation for this. The first regards the objective novelty of the legislation, which may still need time in order to firmly establish itself in courtroom practice. If this is the case, we should witness an exponential increase in the use of probation in the upcoming years.

However, there is reason to believe that the true cause of these numbers is structural in nature, and lies in the eligibility criteria provided by the legislator. In establishing the cases in which a request to suspend proceedings is admissible, Article 168 *bis* of the Criminal Code (CC) lays down stringent rules, which point to persons who, in the event of conviction, would in any case benefit from alternatives to detention[110]. Fur-

[109] In 2012 there were 876,408 proceedings with a known defendant that only reached the end of the preliminary stage. Added to these are the actual trials before a single judge (328,764) and panel of judges (12,951).

[110] These are offences punishable by a maximum of 4 years of imprisonment, plus some specifically identified offences. Habitual offenders, professional criminals and people with a criminal tendency are excluded (Arts. 102, 103, 104, 105 and 108 CC) and a suspension cannot be granted more than once.

thermore, in order to allow probation, the judge must have arrived at the conviction that the accused person will abstain from committing further offences (Article 464 *quater* (3), CCP).

4. *Alternative measures to imprisonment in the sentencing phase*

4.1. *Critical analysis of the applicable measures in the sentencing phase*

The goal of this section is to identify, among the measures that may be applied in the sentencing phase, those which are the most functional and effective for reducing reliance on imprisonment, without, however, causing prejudice to the general and specific preventive objectives of the criminal sentencing system. To do this, we must look not only at the regulatory configuration, but also at the practical application of sanctions so as to understand their actual role within the criminal justice system.

Before proceeding with the analysis of the individual measures, it is necessary to make a few introductory statements regarding the systematic organization. First of all, it should be noted that, in the Italian system, jurisdiction over criminal matters is divided between an ordinary judge and a justice of the peace: the latter is an honorary judge who has been able to exercise jurisdiction over criminal matters since 2002, as established by Legislative Decree no. 274/2000, which represents the governing regulation.

From the point of view of the arsenal of sanctions, the justice of the peace system is based on the absence of the custodial sentence and on the provision of moderate, but effective, penalties, namely, pecuniary fines, home detention and community service.

Regarding the ordinary court system where the ordinary judge presides, it is based on two main penalties: the custodial penalty and pecuniary fines. In the space occupied by the custodial penalty, the legislator has identified several functional measures to reduce its application area, with reference to short-term sentences: there are the substitutive sanctions and, among the measures with a suspended nature, the conditional suspended sentence, which plays a fundamental role. As we will see, however, often these solutions have resulted in a substantial "lack of penalty" for those offenders to whom they are applied frustrating the functions of deterrence.

Finally, there are three other measures that are taken into account in this phase, even if they play a less important role in terms of prison reduction: the exclusion of punishment for particularly minor-natured offenses, the settlement with a fine and diversion programs.

4.1.1. *The pecuniary fine*

In Italian law, pecuniary fines play different roles. Firstly, a fine is the main penalty for crimes that fall under the jurisdiction of the ordinary judge and they may be ordered alone, as an alternative to the custodial penalty, or together with the custodial penalty. Secondly, they are also the main penalty for crimes that fall under the jurisdiction of the justice of the peace. Finally, pecuniary fines are also utilized as an alternative sanction to the custodial penalty.

As far as the system of the ordinary court and ordinary judge is concerned, the pecuniary fine is now the only main penalty different from the custodial penalty[111]. Unfortunately, however, in practice, this penalty has become marginalized; becoming a merely symbolic penalty.

In fact, the rate of application of pecuniary fines in Italy is very low. Statistics show that in recent years the sentences limited to only pecuniary fines represent a continuously decreasing percentage with respect to total convictions: if they represented 49% of sentences in the year 2000, in the year 2014 solely pecuniary fine sentences accounted for only 30.5% of the total, and only 21.7% of the sentences for convictions for crimes and 50% of sentences for convictions for misdemeanors[112].

According to doctrine, the ancillary role assumed today by the pecuniary fine is due to multiple factors. First of all, it is granted a limited role in terms of inflicting a penalty according to the law[113]. If, from one side, legislators have timidly tried to broaden its scope of application through the enhancement of its role as a substitutive sanction, from the other side, the legislators have eroded its scope of application, yielding ground to administrative sanctions[114].

Furthermore, doctrine places the responsibility for this failure on the proportioning criteria adopted in our legal system[115]. The Italian sys-

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[111] With Law no. 67 dated 28 April 2014, Parliament granted the government authority to introduce new main penalties which are non-custodial. Such responsibility has, nevertheless been allowed to lapse.

[112] For the most recent data available, see resource: Annuario Istat (ISTAT annual report) 2015, relating to 2014.

[113] Regarding such, the doctrine highlights the necessity to introduce alternatives to the pecuniary fine and the custodial penalty, for all of those crimes which only rarely have a dangerous or serious nature such as to rationalize the grant of a custodial penalty while the majority of cases can be resolved due to the modest severity of the crimes. See M. Miedico, *La pena pecuniaria. Disciplina, prassi e prospettive di riforma*, Milano: Egea, 2008, 167.

[114] See among such, E. Dolcini, "*Pene detentive, pene pecuniarie, pene limitative della libertà personale: uno sguardo sulla prassi*", in *Riv. it. dir. proc. pen*, 2006, 95; and L. Goisis, *La pena pecuniaria. Un'indagine storica e comparata*, Milano: Giuffrè, 2008, 9.

[115] See L. Goisis, "*L'effettività (rectius ineffettività) della pena pecuniaria in Italia, oggi*", in *Dir. pen. cont.*, 13 Nov. 2012.

tem provides that the amount of the pecuniary fine will be determined based on the so-called total sum model, namely, on a one-time flat rate. According to this model, the corrective benchmark of the economic conditions of the offender pursuant to Article 133-*bis* helps in determining the amount of the fine, equal to and without regard to other proportioning criteria.

Regarding this issue, it has been correctly observed that the lack of assessment of the economic conditions of the offender as a criterion in its own right leads to the high risk that this corrective benchmark is inadequate to influence the procedure and merely remains a statement of principle[116]. In contrast, the daily rate model, widely applied in other European countries, by setting aside a separate time to assess the economic conditions of the offender, allows for the effective adaptation of the fine to the individual's economic situation[117]. As we will see, even our legal system recognizes such model, but grants it a negligible role, foreseeing its utilization only in the event in which the pecuniary fine is relied upon as a substitute for a custodial penalty (Article 53, paragraph 2 of Law no. 689/1981).

According to the doctrine, an additional reason for the failure of the pecuniary fine is the fact that it may be included as part of a conditional suspended sentence and the data reflects that this happens often.

However, the most problematic aspect is clearly reflected by the problems arising in the enforcement phase: according to the latest available data, which refer to 2004, only 0.99% of the fines were paid, while 2% were forcibly enforced. This leads us to conclude that the remaining 97.01% of the imposed fines were converted into controlled release or community service, but, in practice, this occurred in only 2.33% of the cases[118].

With regard to this "condition", it has been noted how some of the responsibility for such can certainly be attributed to the excessive complexity of the current collection system, as well as, to the lack of means

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[116] See E. DOLCINI, "*Pene pecuniarie e principio costituzionale di uguaglianza*", in *Riv. it. dir. proc. pen.*, 1972, 443.

[117] At first, the judge must operate solely making reference to the criteria used for the application of the custodial penalty, thus, determining "days for the pecuniary fine". Later, the judge will determine the amount of a daily fine, taking into account the offender's financial condition. See E. DOLCINI, "*Pene pecuniarie e principio costituzionale di uguaglianza*", op. cit.

[118] See Istat, Statistiche giudiziarie e penali, (ISTAT Judicial and penal statistics) 2004. Such data have been revisited in the following monographs: M. MIEDICO, *La pena pecuniaria. Disciplina, prassi e prospettive di riforma*, op. cit., and L. GOISIS, *La pena pecuniaria. Un'indagine storica e comparata*, op. cit.

and personnel necessary to ensure a successful outcome of the enforcement proceedings. Furthermore, it is believed that even the fact that the amount of the pecuniary fine, which is determined according to the total sum model that, as stated above, does not allow for proper consideration of the offender's economic situation, with the risk that the fine imposed proves to be unenforceable, may have influenced the lack of effectiveness of the pecuniary fine[119].

Therefore, as has been correctly demonstrated, "pecuniary fines are neither enforced nor converted"[120], and we may reasonably assume that the current situation does not differ much from that of 2004.

It is clear that such state of ineffectiveness of the pecuniary fine leads to the loss of any effective general and special preventive functions, which inevitably reflect on the credibility of the entire criminal sentencing system[121].

In conclusion, what emerges from this analysis is that the pecuniary fine is not capable of accomplishing the task of being an unfailing main penalty, so as to constitute a real alternative to the custodial penalty. Even today, in fact, it is the custodial penalty which serves as the cornerstone of our sentencing system, while the pecuniary fine occupies only a marginal role.

4.1.2. *Substitutive penalties and suspension measures*

It is clear that the custodial penalty is the lead actor in our sentencing system, however, the legislature, in accordance with the *principle of subsidiarity* and aware of the criminogenic influence of short-term imprisonment, has tried to limit the role of the custodial penalty.

However, this has occurred not through the predisposition of non-custodial penalties at the main level, but by entrusting the possibility of using alternative measures (such as conditional suspended sentences) or alternatives (such as substitutive penalties) to judicial discretion.

Despite the fact that both substitutive penalties and the conditional suspended sentence were created as tools to be used in the struggle against short-term imprisonment, the two measures differ in many respects. Firstly, the substitutive penalty replaces the main penalty, while

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[119] See L. Goisis, "*L'effettività (rectius ineffettività) della pena pecuniaria in Italia, oggi*", op. cit.; and M. Miedico, *La pena pecuniaria. Disciplina, prassi e prospettive di riforma*, op. cit.

[120] See E. Dolcini, "*Pene detentive, pene pecuniarie, pene limitative della libertà personale: uno sguardo sulla prassi*", op. cit., 102.

[121] Among which see E. Dolcini, "*Pene detentive, pene pecuniarie, pene limitative della libertà personale: uno sguardo sulla prassi*", op. cit.; and L. Goisis, "*L'effettività (rectius ineffettività) della pena pecuniaria in Italia, oggi*", op. cit.

the suspended measure suspends the application of the main penalty. Precisely for this reason, in the first case, the duration of the substitutive penalty is equal to that of the penalty which was initially imposed while, in the case of the suspended sentence, there is a predetermined duration. Another difference concerns the oversight system of the effectiveness of the measure: while, for the conditional suspended sentence it is the revocation of the measure, for the substitutive penalties it is the conversion into a substitute custodial penalty[122]. In the first case, the entire custodial penalty will be served, instead in the second case, simply for the fact that the substitution, in any event, requires the imposition of another penalty, the enforcement of the custodial penalty will be limited to the part of the sentence which has not yet been served.

In practice, judges have always preferred, whenever possible, the suspension option. As the statistical data make clear, in fact, substitutive penalties have a very low rate of application, in contrast to the conditional suspended sentence, which is a massively applied measure. Because, however, our conditional suspended sentence is essentially a measure "void" of content, the achieved result is that of a "generalized departure from the custodial penalty"[123], that is evident in the failure to enforce the penalties threatened in the abstract and undermines the needs of general and special prevention[124].

4.1.3. *Substitutive penalties*

According to Law no. 689/1981, custodial sentences of up to six months may be replaced with a pecuniary fine; custodial sentences up to one year may be replaced with controlled release; and custodial sentences of up to two years may be replaced with semi-detention. In this regard, we note that, despite the expanded options, the space dedicated to substitute pecuniary fines is still very small.

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[122] In this regard, for further information see E. Dolcini, C.E. Paliero, *Il carcere ha alternative? Le sanzioni sostitutive delle detenzione breve nell'esperienza europea*, Milano: Giuffrè, 1989, 267 etc.

[123] See G. Marinucci,"*Il sistema sanzionatorio tra collasso e prospettive di riforma*", in *Riv. it. dir. proc. pen.*, 2000, 164.

[124] On this issue, see G. Fiandaca, E. Musco, *Diritto penale. Parte generale* (VII ed.), Bologna: Zannichelli, 2014, p. 839; D. Pulitanò, *La sospensione condizionale della pena: problemi e prospettive*, a cura di CNDPS, Convegno di studio "Enrico de Nicola", XXIII, Milano, 2002, p. 116; E. Dolcini, "*La pena in Italia, oggi, tra diritto scritto e prassi applicativa*", in *Scritti in onore di Giorgio Marinucci*, vol. II, Milano: Giuffrè, 2006, 1073 etc.; and T. Padovani, "*Fuga dal carcere e ritorno alla sanzione. La questione delle pene sostitutive tra efficacia della sanzione ed efficienza dei meccanismi processuali*?, in *Sistema sanzionatorio: effettività e certezza della pena*, a cura di CNDPS, Convegno di studio "Enrico de Nicola", Milano, 2002, 75.

As far as the substitute pecuniary fine is concerned, that which has been stated for the main pecuniary fine also applies, with the difference that in this case, the legislator, in 2003, established as a proportioning criterion that of the daily rate: according to Article 53 of Law no. 689/1981, indeed, the judge in determining the amount of the pecuniary fine must first identify a daily amount, taking into account the offender's economic conditions, and then multiply it by the number of days of the custodial penalty[125].

Semi-detention (semi-detenzione) and controlled release (libertà controllata) are, respectively, governed by Articles 55 and 56 of the aforementioned Law and they are penalties which restrict the offender's freedom and involve, respectively, the opportunity to spend a few hours a day outside of the prison and a limitation of the offender's freedom of movement. Consistent with the objective of preventing the de-socialization of the offender, the prison where the prisoner must spend at least ten hours a day must be located in his hometown or in a neighboring locality.

Together with the substitutive penalties mentioned above, the legislature has established other alternatives in specific areas: we refer here to community service for matters involving traffic offenses according to Articles 186 and 187 of the Highway Code; to community service for matters involving drug offenses pursuant to Article 73, paragraphs 5-*bis* and 5-ter of the Drug Consolidation Act; and to expulsion of foreigners as set forth by Article 16 of the Immigration Consolidation Act.

We must here digress on the role of community service in the Italian legal system where this measure has taken on a greater role, even if more so at the regulatory level than in practice. In fact, in addition to being an alternative penalty, community service is a main penalty for offenses which fall under the jurisdiction of the justice of the peace, the execution of which must, mandatorily, be subordinate to the application of a diversion program, and, moreover, a penalty to be converted from a pecuniary fine which was not enforced due to the offender's lack of financial solvency.

As for the rules governing community service, the general standard for all of these situations is Article 54 of Legislative Decree no. 274/2000 which relates to matters under the jurisdiction of the justice of the peace. According to this provision, community service consists of activities which are performed without remuneration to be carried out at the premises of public, social welfare or volunteer organizations. The legislature has provided that such entities or organizations must be located

[125] See L. Goisis, *La pena pecuniaria. Un'indagine storica e comparata*, op. cit., 101.

within the province of the offender's hometown, thus, highlighting a very important aspect of this penalty: the way it is applied must meet the offender's living needs.

The offender's consent is an essential precondition for the application of community service. This provision has a dual basis on the one hand, its retributive nature, and on the other, the observance of the prohibition on forced labour, ratified in Article 4 ECHR.

As far as the case set forth by the Highway Code is concerned, the act of community service without remuneration must be carried out, as an absolute, in a safe environment and with roadway education purposes. However, what primarily characterize this alternative penalty are the consequences in the event of successful community service completion: in fact, the judge, in addition to declaring the offense discharged, will cut in half the offender's license suspension period and, above all, will revoke the requirement of confiscation of the offender's vehicle. As we will see, this has a major impact in practice.

Within the scope of the drug laws, we must first emphasize that there are two situations where this sentence may be applied: the first refers to those offenders who are drug addicts or drug abusers and who are convicted of crimes involving drug dealing and trafficking of minor quantities; the second, however, has extended community service also to drug addicts or drug abusers who, in this case, habitually use or abuse drugs, beyond the fact that the offenses that they committed were either dealing or trafficking minor quantities of drugs, even if the legislature has, nonetheless, required the existence of a relationship between the offender's situation of dependence and the commission of the crime. In this case, the maximum limit of this alternative penalty is one year[126].

A final substitutive penalty is established for foreigners who are sentenced to less than two years' imprisonment and provides for the possibility that they, instead of being incarcerated, be expelled from Italy for a period of five years[127].

The alternative penalties have always had a very low rate of application, notwithstanding that their scope of application was broadened with Reform no. 134 of 12 June 2003, by which the objective limits set forth by Article 60 of Law no. 689/1981 were eliminated and the penalty limits were raised.

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[126] For a more thorough analysis see A. Della Bella, *Emergenza Carceri e sistema penale*, Torino: Giappichelli, 2014, 72.

[127] For a more thorough analysis see C. M. Caccialanza, sub. "*Art. 16 d.lgs. 25 luglio 1998 n. 286*", in E. Dolcini, G. L. Gatta (eds.), *Codice penale commentato*, Milano: Giuffrè, 2015.

The data clearly show that, today, both semi-detention and controlled release are penalties which are not substantially applied: during 2015, they were, in fact, respectively applied only 15 and 262 times, a truly ridiculous number[128]. Unfortunately, it is not possible to obtain data with reference to the application of pecuniary fines as alternative penalties because the statistics relating to such sentence do not separate, into individual component parts, the data relating to main pecuniary fines and the data relating to substitutive pecuniary fines.

The same unfortunate fate has befallen community service for drug offenses: the latest available statistical data, dating back to 2015 reflect that, for the cases set forth in paragraph 5-*bis*, such penalty was only applied 100 times[129]. Regrettably, it is impossible to retrieve any data relating to the situations outlined in paragraph 5-ter.

As far as the expulsion of foreigners is concerned, despite the lack of data, it can be reasonably assumed that it is not frequently applied, primarily because of its limited scope of application. In fact, expulsion is only applicable in the presence of premeditated crimes, theoretically punishable with only a custodial penalty, which, actually, may not exceed two years. Additionally, some crimes listed in Article 407 of the Italian Code of Criminal Procedure are excluded from its scope of applicability. Moreover, we must highlight that, for the enforcement of an expulsion sentence, it is necessary for the offender, who is illegally in the territory of the State, to be identified.

One of the reasons which can be attributed to the poor implementation of alternative penalties is certainly the overlap with the conditional suspended sentence's scope of application[130]. Both of the measures may be applied to sentences of up to two years in prison and, between the two, the conditional suspended sentence is certainly more favorable and, thus, preferred by the competent judge to whom the choice is left.

A positive exception is shown in community service for traffic offenses. Indeed, the data shows that, during 2015, community service for traffic offenses was applied towards 13,355 people out of a total of 15,033: certainly a high number when compared with the statistics relating to the other alternative penalties[131].

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[128] Source: Ministry of Justice, Statistics for 2015.

[129] *Idem*.

[130] See G. Marinucci, E. Dolcini, *Manuale di diritto penale. Parte generale*, E. Dolcini e G.L. Gatta (eds.), Milano: Giuffrè, 2015, 627.

[131] Source: Prison Administration Department - Directorate General for the enforcement of penal measures outside of penal institutions - Monitoring alternative measures. Ministry of Justice - Statistics. Unfortunately, it is impossible to know with certainty how many

It seems that a reason for this success is certainly due to the fact that, only in this situation, the successful carrying out of community service includes the right to the return of a confiscated vehicle. This departure from the normal rules on confiscation clearly represents a strong incentive and makes it a particularly attractive alternative penalty.

The hope is that, on the model set forth by the Highway Code, the legislature will intervene to ensure that community service will have an increasingly important role because it is a measure with great potential especially in terms of special prevention and re-socialization.

4.1.4. *The conditional suspension of the sentence*

The conditional suspended sentence is governed by Articles 163-168 of the Criminal Code (CC)[132]. It is a measure with a suspensive nature that involves a substantial waiver conditional upon the execution of the penalty for those offenders for whom the enforcement could lead to greater harm than benefits[133].

With the view of special prevention, it bets that the objective of rehabilitation and special intimidation may be reached with the simple act of sentencing and the threat of revocation of the measure, and subsequent application of the penalty, in the event of violation of the requirements attached to the suspension[134]. Regarding the doctrine, it evokes the image of the "Sword of Damocles" hanging over the head of the accused[135].

In order to avoid, however, that the function of general prevention of the penalty is diminished by the lack of the enforcement phase, the scope of application of the measure was initially very narrow: originally, in fact, those offenders affected by the measure were, for the most part, first-time offenders of non-serious crimes.

Thereafter, however, primarily for the needs of prison population reduction, the legislator intervened expanding both the types of sus-

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times in 2015 they were applied as the data also applies to persons subject to this penalty in the previous year and whose execution was carried out during 2015.

[132] For a more thorough picture of the conditional suspended sentence discipline see G.L. Gatta, sub "*Art. 163-168*", in E. Dolcini, G.L. Gatta. (eds.), *Codice penale commentato*, Milano, 2015.

[133] See G. Marinucci, E. Dolcini, *Manuale di diritto penale. Parte generale*, op. cit., 688 etc.

[134] See among others A. Martini, *La pena sospesa*, Torino: Giappichelli, 2001, 125; F. Palazzo, R. Bartoli, *Certezza o flessibilità della pena? Verso la riforma della sospensione condizionale della pena*, Torino: Giappichelli, 2007, 6.

[135] See G. Marinucci, E. Dolcini, *Manuale di diritto penale. Parte generale*, op. cit., 693.

pendable penalty and the duration of such[136]. Currently, the law sets forth that sentences for up to two years' imprisonment may be suspended or even longer if the offender is a young adult or a minor. Even substitutive sanctions and pecuniary fines are included among the types of suspendable penalties in addition to the custodial penalty.

The reform of this measure in 2004 also lead to the irrelevance of the pecuniary fine in order to suspend the custodial penalty allowing for the fact that the prison doors do not open to an increasing number of offenders. If before, in the case of a combined sentence of a pecuniary penalty and a custodial penalty, the sum of the two penalties exceeded the limits set by law, neither of the two could be suspended. Today, however, the judge may always order the suspension of the custodial penalty regardless of the existence of a pecuniary fine in any amount.

Additionally, the conditional suspended sentence may now be applied up to two times, as long as the sum of the penalties imposed by the two sentences does not exceed the limits set forth by law. Therefore, today, even those offenders who have already been sentenced before may be eligible for this measure.

The legislature has even conditioned the application of the measure on a subjective requirement, namely, the favorable prediction that the offender will not be a recidivist. Such prerequisite for application highlights the special prevention purpose of the measure: the judge will assess the deterrence potentiality that the suspension may have on the individual offender. As we will see, however, in practice this part has been sacrificed.

As far as the duration of the suspension is concerned, it is five years in the case of conviction for a crime and two years in the case of conviction for a misdemeanor. Article 164 paragraph 4 also outlines a special suspension situation, referred to as "brief", which reduces the suspension period to only one year, in the case of offenders sentenced to a year in prison.

With reference to the criteria, the legislature established an increasingly dense system of obligations and requirements for the sentenced offender, with the intent to "fill" the measure, from one side, positively utilizing the criteria in order to facilitate offender re-socialization, and, from the other side, giving the measure a retributive nature in terms of general prevention[137]. Currently, the requirements that may be attached the mea-

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[136] For a more thorough analysis on the regulatory development of the conditional suspended sentence see F. GIUNTA,"*Sospensione condizionale della pena*", in *Enc. dir.*, vol. XLIII, 1990, 87.

[137] See F. PALAZZO, R. BARTOLI, *Certezza o flessibilità della pena?*, op. cit., 12.

sure are: the obligation of restitution, the payment of compensation for damage caused, elimination of the harmful and dangerous effects of the offense, or the performance of community service subject to the consent of the sentenced offender.

Nevertheless, the application of these criteria is left to the discretion of the judge and, as we will see, in practice the suspension remains an "empty" measure. Only in the case of a second application of the measure or the so-called "brief" suspension is the judge obligated to impose one of the abovementioned requirements.

On this matter is it necessary, however, to point out that in recent years in Italy a tendency to strengthen these obligations has arisen, with particular reference to those which provide compensation or restitution, in order to demonstrate to the local community that "the failure to enforce the penalty does not mean there is a lack of concern for the legal interests damaged by the crime"[138]. Furthermore, it is necessary to highlight the recent introduction of paragraph 4 of Article 165 CC which sets forth the obligation to subordinate the suspension to financial compensation in the case of conviction for certain crimes against the public administration (Law no. 69 of 25 May 2015). This obligation is also found in the case of a conviction for aggravated vandalism pursuant to Article 635 paragraph 3 CC.

Notwithstanding its nature as a special prevention tool, in practice, the conditional suspended sentence has actually become a streamlining instrument, becoming a sort of automatically applied "benefit"[139].

The statistical data confirm the tendency in the jurisprudence to apply this measure extremely broadly. In 2012, the year for which the latest data is available, it was applied in 80,760 cases; specifically, 43% of all convictions were suspended. This figure, when compared to those of the previous years, reveals the tendency of judges to make increasingly greater use of this measure: in fact, in 2010, this was applied in 36% of all convictions, while in 2008 it was applied in 30% of convictions[140].

Always with reference to 2012, the conditional suspended sentence was ordered in relation to half of the sentences with a custodial penalty (49.8%) and to a third of sentences with a pecuniary fine (36%)[141]. When we consider that the percentage is calculated on the total number of convictions and not only on those which were eligible to be sus-

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[138] See G. Marinucci, E. Dolcini, *Manuale di diritto penale. Parte generale*, op. cit., 692.

[139] See A. Martini, *La pena sospesa*, op. cit., 123.

[140] Source: Ministry of Justice. Statistics for 2012.

[141] *Idem*.

pended, it is evident that the application of the measure is virtually automatic[142].

It is clear that the trend is to almost always grant a conditional suspended sentence based only on the existence of the objective requirements set forth by law, without actually making any assessment on the offender's personality, with the unfortunate consequence of ignoring that which on paper would represent the most important operative part in the measure's application phase.

The judge's failure to use his discretionary power is due to the fact that judges perceive the current custodial penalties to be excessive and they try to overcome the legislature's inertia, to whom the task of reducing reliance on the custodial penalty falls, by expanding, as much as possible, the scope of application of the measure[143].

In addition to the automatic application, the practical application of a conditional suspended sentence presents an additional problem: in 98% of cases, the suspension of the penalty is not combined with the imposition of any type of obligation, thus, remaining an "empty" measure[144].

The lack of any sanctioning content leads to the conditional suspended sentence becoming a "pillar of leniency"[145] and an instrument for "escape from punishment".

The consequences of this application decline significantly reflect on the credibility of the criminal sentencing system by sacrificing its objectives of general and special prevention. Authoritative doctrine has clearly reflected this concept by asserting that "*from* the threat of draconian punishment *freely flows impunity*"[146].

On the other hand, it is proper to highlight that the option of the suspension is absolutely fundamental to prevent the collapse of our prison system, which is already under strain. Therefore, the solution is certainly not to eliminate this measure, but rather to seek solutions consistent with the purposes of the penalty, with a view to ensuring greater

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142 See A. Della Bella, "*Sovraffollamento carcerario e alternative alla detenzione. La situazione in Italia*", relating to the conference held in Milan on 16 October 2014, in *www.prisonovercrowding.eu*.

143 See A. Della Bella, "*Un viaggio tra le misure sospensive: i nodi da sciogliere in attesa della promessa riforma del sistema sanzionatorio*", in *Dir. pen. proc.*, 2016, 377.

144 See G. Marinucci, E. Dolcini, *Manuale di diritto penale. Parte generale*, op. cit., 695.

145 See E. Dolcini, "*Riforma della parte generale del codice e rifondazione del sistema sanzionatorio penale*", in *Riv. it. dir. e proc. pen*., 2001, 836.

146 See E. Dolcini, "*Sui rapporti tra sospensione condizionale della pena, pena pecuniaria e pene accessorie*", in *Boletim da Facultade de Direito, Universidade de Coimbra*, 2000, 65.

optimization of the criminal law system and, consequently, to influencing, in terms of reduction, the rate of prison overcrowding.

4.1.5. *The main penalties for crimes under the jurisdiction of the justice of peace*

Alongside the ordinary court system with the ordinary judge, we find that of the justice of the peace, the structure responsible for overseeing non-serious crimes which frequently occur such as assault, vandalism or defamation. Precisely for this reason, the legislature had to create penalties that would be effective while being less punitive than the custodial penalty. Therefore, for such crimes, along with the pecuniary fine, with Legislative Decree no. 274/2000, two situations of freedom restricting sentences were introduced: home detention and community service[147]. Furthermore, consistent with the objectives of effectiveness, the legislature excluded such penalties from the scope of application of the conditional suspended sentence.

The home detention sentence governed by Article 53 of Legislative Decree no. 274/2000 consists of the imposition, on the offender, of the obligation to remain in his home or in another designated location on the days of Saturday and Sunday but the judge may specify different days according to the offender's family, work, study, health, or even religious needs. The unique flexibility that characterizes this penalty and that it strives to achieve highlights the fundamental objective of preventing offender de-socialization.

The legislature, in creating such penalty went on to specify that "the convicted offender is not considered to be in custody".

As far as the regulation of community service is concerned, we refer to what has been previously stated about community service as a substitutive sanction. This penalty, in addition to being used as an instrument to appease local community sensitivity in terms of redress, also pursues a rehabilitative purpose: it is the convicted offender who opts for this type of penalty, thus demonstrating a serious desire for re-socialization which is binding for the judge, who is obliged to apply such[148].

Regarding the practical application of the main penalties that a justice of the peace can apply, the statistics clearly reflect the predominant role of the pecuniary fine, which, in 2012, was applied in 99% of the

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[147] For a more thorough understanding of the criminal sentencing system and discipline see S. Turchetti, sub. "*Art. 50-60 d.lgs. 28 agosto 2000 n. 274*", in E. Dolcini, G.L. Gatta (eds.), *Codice penale commentato*, Milano, 2015.

[148] See S. Turchetti, sub. "*Art. 50-60 d.lgs. 28 agosto 2000 n. 274*", op. cit., 2974.

cases. In contrast, home detention was applied only in 0.8% of the cases, and community service in 0.2% of the cases[149].

The very marginal role played by this latter penalty is certainly due, on the one hand, to the fact that its application is subject to the offender's request, who may prefer that one of the other two concurring penalties be ordered, which undoubtedly have a less punitive nature and, on the other hand, to the vast difficulties related to its implementation. As seen, community service plays an important role only in the area of traffic offenses, but only because its punitive nature is mitigated by the incentives provided by the legislature.

4.1.6. *Other measures*

Other grounds for exclusion from punishment are due to the minor nature of the offense.

The minor nature of an offense, as a reason for the exclusion of punishment pursuant to Article 131-*bis* CC, is also relevant in the sentencing phase. If, in fact, the judge who has jurisdiction over the matter determines that the particular fact is characterized as a minor offense, such as to not justify punitive action, he will order an acquittal.

Regarding the discipline of the penal irrelevance of the specific offense, we refer to what has already been stated with reference to its use in the investigation phase.

Suffice it to point out that the exclusion of punishment due to the minor nature of the offense, despite mainly performing a procedural reduction function, is potentially even a prison reduction instrument capable of being applied to theoretically punishable crimes with a sentence of up to five years imprisonment. We must, however, consider that in most cases, those accused of crimes falling within the scope of application of Article 131-*bis* CC would actually be sentenced to a penalty well below the theoretically applicable 5 year prison sentence, with the result that, in any event, it is difficult to imagine that the prison doors would open for them. Take for example, the theoretical possibility of competition between this measure with that of the conditional suspended sentence: the modest penalties actually imposed for minor offenses could easily fall within the scope of application of the suspensive measure.

4.1.7. *Diversion programs*

As far as the discipline of this suspensive measure is concerned, we

[149] Source: Ministry of Justice - Department of Judicial Organizations and Services, 2012.

make reference to what was set forth relating to its application in the phase prior to the beginning of the trial.

This measure is relevant even here, as it is also applicable during the trial before the conclusions.

Notwithstanding, the intention of taking advantage of the diversion program as a means of prison reduction, in practice, this measure will primarily relieve procedural reduction needs.

4.1.8. *Settlement through payment of a fine*

Articles 162 and 162-*bis* CC govern the measure of settlement through the payment of a fine which consists of a payment of a sum of money to the State: the payment discharges the crime. For our purposes, we should only take note of the special settlement through payment of a fine set forth in Article 162-*bis* of the Italian Penal Code, which allows for the discharge of the crime, even in the event of misdemeanors which are alternatively punishable with a pecuniary fine or with a custodial penalty.

In reality, however, the judge will decide on settlement through payment of a fine only when he determines that, in that particular case, he would not have anyway imposed a custodial penalty but rather only a fine. In this sense, for our purposes, the settlement through payment of a fine is not considered an alternative instrument.

4.2. *Global analysis of the measures applicable in the sentencing phase*

4.2.1. *Compliance with European standards*

The measures applicable during the sentencing phase, despite the obvious differences, are, as a whole, in line with the majority of European standards identified by the Council of Europe and the European Union.

First of all, they comply with the basic principles of criminal law, such as the *principle of legality*, the *principle of individuality* and the *principle of proportionment*, which are emphasized in various Recommendations of the Council of Europe.

In this regard, we merely highlight that community service, for example, expressly sets forth that the carrying out of such must meet each offender's work, study and familial needs. The same principle is also foreseen for the enforcement of the home detention penalty. Furthermore, it is worth noting that the system of applicable measures in this

phase is significantly shaped in compliance with the *principle of proportionment*, structuring the various applicable measures on the criterion of the seriousness of the offense committed.

As far as compliance with the directives of the European Union is concerned, data which should absolutely be highlighted relates to some of the most recent actions with which Italy has implemented several Framework Decisions issued by the European Union on matters of reciprocal recognition. In particular, for this phase two legislative decrees are of interest: Legislative Decree no. 37 of 15 February 2016 which implemented Framework Decision 2005/214/JHA with regard to mutual recognition of financial penalties and Legislative Decree no. 38, passed on the same day, which implemented Framework Decision 2008/947/JHA relating to the mutual recognition of judgments applying substitutive sanctions and probation.

This last action is of particular importance due to the fact that, by implementing such, any gaps that could have arisen from the Italian definition of the conditional suspended sentence have been filled in and, as we will see herein below; this is not exactly consistent with what is provided by the European Union.

Despite this general adherence to European standards, there are, however, some significant non-conforming characteristics that deserve to be considered here.

First of all, a primary issue concerns the compatibility of our criminal sentencing system with the *principle of subsidiarity*, which envisages the need for the custodial penalty only as a *last resort*.

In order to ensure compliance with this principle, European legal standards have identified two possible avenues: the first is that of decriminalization, an avenue which was also followed recently by the Italian legislature, even though with limited effect in practice; the second avenue is the provision, by the individual States, of a wide range of different main penalties and alternatives to the custodial penalty.

As far as this second avenue is concerned, the Italian criminal sentencing system, in its present structure, does not seem completely in line with what is set forth in the European regulations with particular reference to Recommendation (2000) 22, Rule 2, which states that, for certain crimes, the legislature should identify main penalties different from the custodial penalty.

On this matter, the lack of non-custodial sanctioning instruments at the main penalty level (except for the pecuniary fine, which, however, suffers from serious problems of effectiveness) has already been mentioned. Moreover, it should be noted that recently the Parliament, with

Law no. 67 of 28 April 2014, entrusted the government with the responsibility for modifying the criminal sentencing system with the creation of new non-custodial main penalties such as arrest and home detention. Such authority, however, has not been exercised by the Government.

Notwithstanding the lack of alternatives at the main penalty level, the Italian incarceration rate is, nonetheless, below the European average: 89.3 incarcerated prisoners for every 100,000 inhabitants while the European average is 124 incarcerated prisoners[150]. This means that the problem is not the excessive presence of prison in the practice, but rather more so, the fact that the alternatives set forth in our legal system are not effective, as is instead required by the European legislation (the guidelines on the subject of *probation* and the creation of content rich measures come to mind).

In actuality, the European credibility and effectiveness standards are also not met by the pecuniary fine; by the conditional suspended sentence measure; or by the system of alternative measures, primarily because of the serious problems related to their practical application. These problems have resulted in the loss of credibility of these measures in the eyes of society with inevitable negative repercussions also on the credibility of the entire criminal justice system.

The only exception among the substitutive sanctions is seen in the area of community service for traffic offenses: a measure that, in practice, reflects growing success and that appears credible and effective, also because it is characterized by specific sanctioning criteria.

An additional issue of great interest is the lack of compliance with the doctrine of the *conditional suspended sentence* with the necessity that the enforcement of this measure is not merely related to only the obligation not to commit further crimes, but rather, instead, is coupled with the *provision of positive criteria*.

In fact, Framework Decision 2008/947/JHA defines the conditional suspended sentence as a measure that envisages the enforcement of the sentence is suspended by *imposing one or more probation measures*. These probation measures are specifically set out in the decision as a series of obligations for the sentenced offender. The same principle also finds explicit reference in Recommendation no. 22 of 2000 of the Council of Europe.

Under Italian law, for an ordinary conditional suspended sentence, the imposition of positive criteria obligations is merely optional and left to the discretion of the judge. As seen in the analysis of the statistical data, however, in almost all of the cases, the judges forego the option

[150] See *The Space I - 2014 report*. The data refers to 1 January 2014.

and, consequently, the suspension remains effectively an "empty" measure.

For this reason, in our legal system, we refer, for the most part, to a simple suspension and not a suspension of the proceedings with a suspended sentence of the convicted offender, as is required by European legal regulations.

Additionally, however, we should highlight the recent legislature trend of reinforcing the positive obligations connected to this measure, with particular reference to those measures with compensatory or restitutionary components. This applies, for example, to cases of convictions for aggravated criminal vandalism or for some of the crimes against the public administration: in these cases, the granting of a conditional suspended sentence depends on the application of these obligations.

A final area of discrepancy is seen in the failure to follow the instructions relating to violations of the requirements and the revocation of the measures.

Specifically, the European regulatory instruments provide, on the one hand, that the revocation should not be followed by an automatic reversion to the custodial penalty (Rule 84 of the Recommendation (92) 17) and, on the other hand, that the violation of the requirements must not constitute an independent crime.

These indications are not met by either the discipline of the main penalties applicable by the justice of the peace or by the rules outlined in the case of revocation of the substitutive measures such as the pecuniary fine and controlled release; if these were applied upon the defendant's request pursuant to Article 77 and the following of Law no. 689/1981. In fact, in both cases, the violation of the requirements relating to the measures operates as an independent type of crime (pursuant to Article 56 of Legislative Decree no. 274/2000 and Article 83 of Law no. 689/1981).

Furthermore, our legal system provides that, in the case of revocation of community service, there is an automatic reversion to the custodial penalty that must be fully served regardless of the sentence period that has already been served.

4.2.2. *Impact on prison overcrowding: summary and concluding remarks*

Upon the results of the analyses carried out, it is evident that the impact on prison overcrowding, as regards the alternatives present in the judgment phase, is not particularly relevant with the exception of two measures: community service in the area of traffic offenses and the conditional suspended sentence. Thus, it is necessary to summarize the is-

sues raised in the course of this study before proceeding to the evaluation of the roles played by these latter two measures.

A first consideration relates to the lack of alternatives to the custodial penalty at the main penalty level. In this respect, there is a paramount need for the legislature to introduce, even at the main penalty level, less severe penalties than the custodial penalty but which are, at the same time, just as effective[151], according to the rationale already supporting the structure of the criminal sentencing system available to the justice of the peace.

As far as the substitutive sanctions are concerned, however, what emerges from the completed analysis is a substantial failure of their practical application mainly due to the overlap of these measures with the certainly more palatable conditional suspended sentence. In this respect, we should highlight the lack of a clear framework for coordination between the substitutive sanctions and this suspension measure, which is necessary because they can coexist without the first being rescinded in the presence of the requirements for applying the second. Furthermore, we should point out that the legislature has opted for an affirmative solution regarding the suspension of the substitutive sanctions themselves.

To overcome these problems, it has been proposed to provide for the application of substitutive sanctions in event in which the suspension cannot be applied or has been denied, thus, avoiding the risks of ineffectiveness which arise from «rivalry» between the two measures[152].

As previously stated, an important exception in this regard is provided by community service as an alternative sentence for traffic-related crimes.

With reference to this specific measure, the analysis of statistical data leads to two realizations: not only does such measure appear as the most applied among the substitutive sanctions, but it is only in this context that community service finds its place in practical application. In fact, at the main penalty level for crimes under the jurisdiction of the justice of the peace, community service has rarely been ordered. This is certainly due, on one side, to the fact that its application is conditioned upon the request of the sentenced offender who normally would prefer that one of the other two concurrent penalties be imposed, which are, without a doubt, less punitive and, on the other hand, to the issues re-

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[151] See F. Palazzo, "*Fatti e buone intenzioni. A proposito della riforma delle sanzioni penali*", in *Dir. pen. cont*., 14 February 2014, in which the author presents the work of the Ministerial Palazzo Commission.

[152] See F. Palazzo, R. Bartoli, *Certezza o flessibilità della pena?*, op. cit., 139.

lated to its implementation, starting with the difficulty of creating agreements with the institutions concerned.

We must, however, observe that, in reality, the previously mentioned difficulties concern the community service measure in general, regardless of the role it plays in the legal system (as a main penalty for the crimes under the jurisdiction of justices of the peace or as substitutive sanctions).

Thus, it is natural to wonder why community service for traffic-related offenses, notwithstanding these implementation difficulties, nonetheless assumes an undoubtedly significant role.

The answers as to why this measure has a much higher practical application than that of the other substitutive sanctions are found in the presence of the above-mentioned incentives which certainly make it more attractive in the eyes of the convicted offender.

It is, in fact, envisaged that in the event of successful completion, the vehicle confiscation will be revoked.

This departure from the normal rules on confiscation is undoubtedly the primary instrument of effectiveness of this measure.

This data is certainly significant because it reveals how the idea of creating a particularly favorable incentive for the convicted offender can be an effective solution to the lack of effectiveness of the alternatives to incarceration, especially in the judgment phase.

Moreover, we should note that the confiscation of a vehicle in accordance with Article 224-ter of the Highway Code, is an additional administrative sanction and not a collateral penalty, and, therefore, it is excluded from the scope of application of the conditional suspended sentence.

This means that, even if the penalty imposed for the crimes set forth in Articles 186 and 187 is suspended, the confiscation of a vehicle will still be immediately enforced and will not lose its quality of durability, which, however, occurs in the case of substitution of the penalty with community service.

Therefore, it is clear that the substitution of the custodial penalty will undoubtedly become more favorable to the convicted offender than the suspension of the same, a circumstance that does not occur between the conditional suspended sentence and other substitutive sanctions.

We must also point out another positive feature of the community service discipline, specifically, the fact that the substitution and, thus, the application of community service, becomes immediately enforceable right after the trial level judgment. This distinctive feature may also be foreseen for the conditional suspended sentence.

The hope is that, based on the model set forth in the Highway Code – namely combining the measure with reward-scheme mechanisms – the legislature will intervene to ensure a greater role for community service, even because it is a measure with significant potential especially in terms of special prevention and re-socialization.

In reality, it is a measure heavily geared towards the rehabilitation of the convicted offender and his reintegration into society because it is a tool for social inclusion. Furthermore, it is also a valuable mitigation tool dealing with community sensitivity.

Considering these features, community service can absolutely be recommended as a "best practice", and, indeed, could even be proposed to be included in the ranks of the main penalties, as is the case in many European guidelines and, thus, being able to structure the punitive response by finding an effective middle ground between the custodial penalty and pecuniary fines.

As shown through examination of the statistical data, in addition to community service for traffic-related offenses, another measure with a strong reductionist nature and playing a central role in the Italian system is the conditional suspended sentence.

This suspensive measure is not, however, exempt of criticisms, mainly aimed at its practical application: on the one hand, because it is automatically granted and, on the other hand, because, in the majority of cases, it remains an essentially "empty" measure.

In fact, notwithstanding its nature as a special prevention tool, in practice, the conditional suspended sentence has become, in fact, a streamlining instrument; a sort of automatically applied "benefit".

Moreover, we must ask ourselves whether, in the long run, the suspension has actual positive results in terms of prison reduction. Considering that this measure is, in most cases, perceived as a kind of "impunity" the deterrent effect of the so-called "Sword of Damocles" is not always fully realized.

On the other hand, it should be pointed out that the suspension measure is absolutely fundamental to preventing the collapse of our prison system, which is already strained.

Therefore, as stated by authoritative doctrine[153], the solution is certainly not to eliminate this measure, but rather to unburden the conditional suspended sentence from the "task" of reducing the prison overcrowding, incorrectly attributed to it, through reform measures that are consistent with the preventive purpose of the sentence and that are de-

[153] See F. Palazzo, R. Bartoli, *Certezza o flessibilità della pena?*, op. cit., 140.

signed to ensure greater optimization of the penal system and, consequently, to affect, in terms of reduction, the rate of prison overcrowding.

The goal of such reform measures, as foreseen by the legal scholars, would be to relieve the conditional suspended sentence from the "task" of reducing prison overcrowding, incorrectly attributed to it, so that the measure can be used for achieving the most relevant special preventive functions such as re-socialization and the individualization of sanctioning actions[154].

The protection of the specific prevention function of the suspended sentence can be ensured through the strengthening the special intimidation function of the measure, or even through the enhancement of its re-socialization – rehabilitation function. In order to best meet these requirements, some authors have proposed creating two conditional suspended sentence models: a "simple" model, i.e. without any retributive criteria and envisaged in terms of purely special intimidation, and a "probatory" model, full of content and based on re-socialization objectives[155].

For the implementation of the first model, it is certainly necessary that, on the one hand, the implementation requirements be revised and, on the other hand, the revocation mechanism be revised. Furthermore, in order to prevent this type of suspension from remaining completely empty, the mandatory application of compensatory obligations for those cases such as vandalism and crimes against the public administration, as mentioned above, for the brief suspension could be included[156].

As far as the second model is concerned, because it assumes the actual features of *probation*, it is, instead, necessary that its scope of application be restricted and that the measure be filled with criteria even having a punitive nature.

In conclusion, it is important to point out that it is certainly not enough to simply modify the regime of the conditional suspended sentence but it is absolutely necessary that the legislator intervene in a more extensive way in our criminal sentencing system starting from the creation of main penalties which are less punitive than the custodial penalty, but at the same time credible, effective – and, thus, not-suspendable – taking its cue from the experience seen in other countries, such as Holland or the United Kingdom.

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[154] See A. Della Bella, "*Un viaggio tra le misure sospensive: i nodi da sciogliere in attesa della promessa riforma del sistema sanzionatorio*", op. cit.

[155] See F. Palazzo, R. Bartoli, *Certezza o flessibilità della pena?*, op. cit., 140.

[156] See A. Della Bella, "*Un viaggio tra le misure sospensive: i nodi da sciogliere in attesa della promessa riforma del sistema sanzionatorio*", op. cit.

5. *Breakdown of alternative measures to imprisonment in the post-sentencing phase*

This final section focuses on the measures applicable in the post-sentencing phase, i.e. within the framework of the enforcement of a sentence.

5.1. *General overview*

Alternatives to detention in the phase following final sentencing were already envisaged in the Criminal Code of 1930. The law makers of the time in truth, had provided for only one means of modifying the prison term inflicted with the sentence: conditional release (or parole). The granting of this benefit, inherited from the liberal Zanardelli code of 1889, was originally left to the discretion of the minister of justice, who had the task of first ascertaining the "sure repentance" of the offender. Apart from this case, there was thus no possibility of modulating the contents or duration of the prison term based on the progress shown by the convicted person while serving it. The Italian penal system was therefore long characterised by an almost absolute correspondence between the penalty inflicted by the judge for the fact of which the individual was found guilty and the punishment concretely imposed on the latter.

This state of things was a reflection of the two principles on which the laws governing the execution of sentences continued to be founded: the indefectible or rigid nature of the judgment and formal equality before criminal law.

The fixed nature of the sentence and the centrality of imprisonment as the form of execution were not called into question until 1975 with the approval of Law no. 354 regarding the prison system. This reform established a system of alternative measures alongside the regime of imprisonment, i.e. forms of serving a sentence either wholly or partly outside prison. According to the original approach adopted by the reform, the main function of alternative measures was to ensure the flexibility of execution and enable the contents of the penalty to be differentiated by allowing prisoners to serve their sentences "in the community". For this purpose specific jurisdictional bodies (the supervisory judge and court) were assigned the task of modifying the quality and quantity of the penalty on the basis of an observation of the convicted person's personality.

There were a number of reasons behind the choice to entrust the supervising judiciary with the task of amending the penalty during its execution.

Firstly, this choice was tied to a draft reform aimed at implementing, also while a sentence was being served, the objective of social reintegration ("rehabilitation") which the Italian Constitution (Article 27(3)) attributes to the criminal sanction and from which it follows – as clarified by the Constitutional Court – that the convicted person has the right to see the remainder of the sentence to be served reviewed on the basis of the progress made.

Secondly, the introduction of alternatives to imprisonment was founded on the fact that the process of social recovery which the execution of the penalty is supposed to bring about cannot be limited to the treatment provided within the prison, but will rather strongly benefit from a progressive re-adaptation to a life of freedom obtained through the admission to circles outside the prison facility[157].

Thirdly, the realisation as to the intrinsic limits and defects characterising detention suggested the need to diversify the methods of enforcement of the penalty, introducing ways for the most deserving inmates to serve their sentence without being deprived of their personal liberty.

Lastly, the choices made by the Italian legislator when drafting the reform were influenced by the stances taken by criminal law experts and international organisations (the UN and Council of Europe) which were pushing for an effective diversification of the types of response to offences based on the seriousness of the fact and the personality of the author[158].

The nature of the alternatives to prison in the 1970s reform thus reflected an interpretation of the enforcement of criminal sanctions founded on constitutional principles and geared toward a progressive reduction in the recourse to imprisonment, to be understood as the first step towards a more complete diversification of the types of punishment.

In the last four decades, however, prison legislation has undergone changes inspired by underlying logics that differ radically from the ones originally espoused by the authors of the reform[159].

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[157] F. Bricola, "Le misure alternative alla pena nel quadro di una 'nuova' politica criminale", in *Pene e misure alternative nell'attuale momento storico. Atti del convegno*, Milano: Giuffrè, 1977, 363

[158] Also based on the conviction that seeking to correct a whole range of different behaviours – from the most serious to crimes to minor offences – in an undifferentiated manner relying solely on punitive means and detention results in "distributive injustice" as well as manifest social harm; G. Di Gennaro, R. Breda, G. La Greca, *Ordinamento penitenziario e misure alternative alla detenzione*, Milano: Giuffrè, 1997, 223.

This is due both to the profound transformations that have affected both the entity and composition of the prison population and new needs of social defence arising as a result of the strengthening of criminal phenomena seen as a source of great public alarm, first and foremost organised crime associated with terrorist or mafia-type groups.

The former of the two phenomena induced the legislator, starting from the beginning of the 1980s, to increase the number of possible ways to leave prison. The last two decades of the twentieth century saw the introduction of measures driven by a logic of de-incarceration which led to a broadening in the scope of application of alternatives to detention as well as the creation of the important instrument of *permessi-premio*, special leaves granted to reward the "good behaviour" of inmates with periods to be spent outside.

In parallel, the aforementioned legislative initiatives of the 1980s and 1990s aimed to differentiate the custodial regime and treatments offered based on the presumed dangerousness of certain categories of prisoners. The perpetrators of offences considered to be a cause of heightened public alarm were denied access to the alternative measures[160]. In particular, in the case of the crimes considered to be the most serious (above all organised time and terrorism), access to alternative measures was made to depend on helpful cooperation with the prosecution, whereas for offences of an intermediate level of gravity, the granting of such measures was subject to the demonstrated absence of ongoing links with organised crime. This led to a transformation of the alternative measures, converting access to enforcement out of prison into a reward for the usefulness of the cooperation provided or for the disavowal of membership in criminal organizations[161].

Moreover, the differentiation of the regime governing the eligibility for non-custodial measures also affected the perpetrators of sexual offences against minors, in an only partly dissimilar manner; in the case of convicted offenders, the grant of alternative measures is conditional on the willingness to undergo a "psychological treatment aimed at rehabilitation and support".

However, the system of alternative measures has undergone an even more profound metamorphosis as a result of the possibility – already al-

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[159] M. Bortolato, "Le misure alternative tra prassi applicative ed esigenze di riforma" in *Giur. it.*, 2016, 1522.

[160] This initiative fits into a trend toward the differentiation of treatment that began with Law no. 663 of 1986, which governs the "special surveillance" of inmates who exhibit particularly dangerous behaviour inside prison.

[161] A. Presutti, "Affidamento in prova al servizio sociale", in V. Grevi (ed.), *L'ordinamento tra riforma ed emergenza*, Padova: Cedam, 1994, 309 ff.

lowed under the amendments introduced with Law no. 663 of 1986 and then reaffirmed with Law no. 165 of 1998 – of granting alternative measures to definitively sentenced persons against whom a detention order has not yet been issued and who are therefore still free.

This possibility, initially allowed only for certain types of measures and where specific requirements were met[162], has since been generalised, to the extent that the alternatives to detention available to such persons have come to constitute an "autonomous circuit" distinct from the one whereby such measures are granted as final benefits. In other words, following the above-mentioned amendments, the same measures that were originally intended only for those who had been held in custody for a period of greater or lesser duration can also be applied before the experience of detention begins. This policy is designed to prevent persons sentenced to short terms from entering prison.

To favour the use of alternative measures as a replacement for short prison sentences, the legislator introduced a peculiar procedural mechanism consisting in the suspension of sentences of up to three years (or in particular cases, four and six) and granting of a period of thirty days to request the application of an alternative measure prior to the entry in prison. This is intended to encourage sentenced persons who are eligible to request the grant of alternative measures, in the hope of reducing the number entering prison. However, the relentless growth of the prison population in the past three decades points to the partial failure of this strategy.

Leaving aside the factors not correlated to the system of prison benefits, the upward trend in the number of people in prison may have depended on the previously mentioned denial of admission to alternative measures that the Italian legislator introduced in the 1990s.

We are referring above all to the presumptions of dangerousness associated with the offences specified in Article 4-*bis* of Law no. 345 of 1975. As already mentioned, this provision identifies the offences causing the greatest alarm among the general public; in respect of such offences, eligibility for non-custodial measures is conditional, depending on the case, on cooperation with the criminal justice authorities or the absence of links to organised crime. If these conditions are not met, the supervi-

[162] Probation without monitoring in a prison could be granted only to those who had already served a period of custody prior to conviction. This preclusion was later struck down by the Constitutional Court, which judged it to be unreasonable and contrary to the principle of equality because it excluded sentenced individuals who, even without having had any experience of detention, had exhibited behaviour while free such as to rule out the risk of recidivism.

sory judiciary will not have the option of evaluating the progress achieved by the convicted offender to determine his or her eligibility for a non-custodial alternative sanction.

Further limitations to access to alternative measures are imposed in the case of repeat offenders[163]: based on a provision of law adopted in the middle of the first decade of this century, the benefit of alternative measures cannot be granted to this category of convicted individuals[164]. The legislator thus established an absolute assumption that those who have been convicted three times for committing an offence other than out of negligence are a danger to society. Further exclusions for repeat offenders, subsequently removed, included the impossibility of suspending the enforcement order to enable access to alternative measures from a state of freedom and a more general denial of the benefit of home detention. Despite the absence of specific data, it can certainly be affirmed that the restrictions referred to above have greatly contributed to the growth in the number of inmates over the past decade[165].

For this reason, following the previously cited *Torreggiani* judgment, broad segments of the Italian legal community and the world of prison operators called for a reform that would enable all prisoners – irrespective of the type of offence – to access alternative measures and other prison benefits[166]. This call has been answered only in part: in fact, though the automatic mechanisms that limited the granting of benefits to repeat offenders have been largely removed, the recent reforms have not modified the regime applicable to prisoners under Article 4-*bis*. In actual fact, as we shall see, the partial removal of the restrictions in the case of repeat offenders seems to have had very little impact on the trend in the prison population; nor does the attempt to strengthen several alternative measures by progressively broadening their scope of application seem to have had a more successful outcome.

Before examining the impact of the various measures on the prison population in greater detail, however, it is necessary to provide a brief summary of the rules underlying them. Furthermore, in order to assess their compatibility with European legislative sources, we will illustrate

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163 The restriction was provided for under Law no. 251 of 2005 and included in Article 58-*quater* para 7-*bis* of Law no. 354 of 1975.

164 The Constitutional Court clarified, however, that the first benefit has a preclusive effect only if granted in relation to a penalty inflicted with an increase in the sentence as per Art. 99(4) CC and only when the new offence followed experimentation with the measure.

165 P. Corvi, "Sovraffollamento carcerario e tutela dei diritti del detenuto: il ripristino della legalità", in *Riv. it. dir. proc. pen*., 2013, 1794 ff.

166 G. Giostra, "Sovraffollamento carceri: una proposta per affrontare l'emergenza", in *Riv. it. dir. proc. pen*., 2013, 55 ff.

their content, focusing special attention on the amendments that have progressively extended their scope of application and, as noted, have been largely inspired by the need to reduce the number of inmates.

Based on this analysis we will try to understand whether, in the Italian context, it is possible to establish a correlation between the rules governing alternative measures and trend in the prison population. For this purpose we shall take into consideration, in particular, the conditions for access to the measures and the cases in which they may be revoked.

5.1.1. *Probation*

The most significant and recurrent means of enforcing sanctions other than imprisonment is probation (*affidamento in prova ai servizi sociali*). Under this measure, a convicted person who must serve a sentence of no more than four years can be placed on probation under the supervision of the *servizi sociali* (probation services). This agency has the task of preparing a programme for the social reintegration of the sentenced person, as well as the obligation of assessing whether the programme is being carried out correctly. If the probation has a successful outcome, the sentence and all other penal effects associated with the conviction are extinguished. Among the various measures envisaged by prison legislation and by the code, probation eliminates any relationship of the sentenced person with the prison institution and does not entail any deprivation of liberty, not even in the form of confinement to one's home.

The conditions for granting the measure can be divided into objective and subjective requirements. A first objective (or formal) requirement concerns the length of the custodial sentence "inflicted", which cannot exceed three years or, subject to a more in-depth assessment, four years. The length of the sentence refers not only to the sanction applied at the time of conviction, but also to the remainder of a sentence yet to be served[167]. The scope of application was originally narrower, and there is no doubt that the legislator intended to limit the application of probation to short sentences imposed by the judge at the end of the trial. However, the Constitutional Court, and later the legislator, deemed that probation could also be granted in relation to the remainder of a sentence to

[167] This solution was reached after a long activity of interpretation regarding the concept of "sentence inflicted" to which the provision of Article 47 of Law no. 354 of 1975 makes reference in order to establish the maximum sentence beyond which probation cannot be granted. In the second half of the 1980s case law appeared divided, with some courts deeming that the expression should be interpreted as a reference to the sentence handed down by the judge at the time of conviction and others that extended the concept also to include the residual term to be concretely served.

be served[168], provided that it did not exceed the maximum threshold provided by law. Probation is thus today a measure that can be applied not only as a replacement for sentences of short duration, but also as a benefit, granted at the end of the period of detention, for long sentences and serious offences.

A second requirement, this time of a subjective character, regards the prognosis as to the likelihood of resocialisation of the offender. In other words, the judge must be of the opinion, in light of the personal attributes of the individual offender, that the help and support of the probation service will be a more effective means than prison for achieving the aim of better social reintegration. This prognostic assessment can be accompanied with a further evaluation regarding the absence of the risk of recidivism, which the requirements imposed by the judge on the offender assigned to the probation service must be able to adequately confront.

The prognostic assessment underlying the grant of probation represents one of the most delicate aspects in the practical application of this measure. In its original configuration, the measure entailed a minimum term to be served in prison. The time spent in detention enabled the prognostic assessment to be founded on a study of the offender's personality, to be conducted for at least one month in prison by an "observation and treatment group"[169]; the latter had the task of drawing up periodic summary reports giving an account of the process of critical self-evaluation undertaken by the offender.

This option, still provided for, has played only a residual role following the extension of alternative measures also to offenders who are not detained in prison[170]. In the absence of institutional tools of observation, the judge must formulate a prognostic assessment on the basis of a vast array of elements that the legislator did not take the trouble of identifying in strict terms; however, the main elements are the information of

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168 After deducting the part of the sentence already served, as well as pre-trial detention and the part of the sentence no longer to be served due to extinguishing causes.

169 According to Art. 28 of the implementing regulations of the penitentiary law, the activity of observation is carried out by employees of the prison administration (educators, social workers and personnel of the penitentiary police) and, if necessary, professional experts (psychologists, psychiatrists and clinical criminologists) under the coordination and responsibility of the prison director.

170 The introduction of probation in such cases responded to the need to avoid compromising a rehabilitation process already undertaken by the person while still free prior to execution of the sentence. See A. Presutti, "Art. 47. Affidamento in prova al servizio sociale", in F. Della Casa, G. Giostra, *Ordinamento penitenziario commentato*, Padova: Cedam, 2015, 520.

the law enforcement authorities and the report submitted (obviously before the measure takes effect) by the probation agency[171].

The substance of the measure consists in the imposition of direct rules aimed both at incentivising the resocialisation of the convicted offender and preventing the risk of his or her committing other crimes.

Taking into account this dual aim, the rules can be distinguished according to their contents, which can be positive (rules of conduct concerning the relations with the probation service, work, obligations of solidarity toward the victim of the offence, obligations to support the family) or negative (prohibitions and obligations of residence, limitations to the freedom of movement, prohibition on engaging in certain activities or associating with certain people).

It is up to the probation service to ensure that the individual complies with the rules, and to help him or her, where necessary, to overcome the difficulties of adapting to social life through support activities. The tasks of the probation service also include, however, a monitoring activity to be carried out constructively so as to maintain the objective conditions for effective reintegration of the author of the offence. Notwithstanding the necessary distinction between the tasks entrusted to the probation service and monitoring by the police, the former has an obligation to draw up a report on the offender's behaviour at least once every three months and submit it to the supervisory judge.

On the basis of this report (as well as the information provided by the police and by the judicial authority itself) the supervisory judge and court can decide whether to amend the conditions imposed on the offender. In situations incompatible with the continuation of probation, the judge may also decide to provisionally suspend the measure or revoke it completely[172].

Given the absence of any explicit legislative provision regarding the consequences of the revocation, the Constitutional Court, in an important ruling, set guidelines for such cases, clarifying that it was up to the judge who revoked the measure to determine the entity of the residual sentence to be served, taking into account the behaviour shown by the offender during the period of probation. In line with the principle of re-

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[171] A more debated issue is to what extent the criminal record of the offender should be taken into account in the prognostic assessment; a part of case law recognises that the assessment should be founded on "basic dangerousness", understood as an element of comparison for evaluating the results of scientific observation of the personality.

[172] However, a violation – even a serious one – of the obligations is not sufficient grounds for revoking the probation; rather, the incompatibility with the continuation of the measure must be inferred from an overall attitude expressing the individual's failure to respond to the treatment during the period of liberty.

habilitation that, according to the Italian Constitution, must underlie the imposition of punishment, the judge has a duty to identify the period positively completed by the person on probation in order to deduct it from the time still to be served following the revocation. The residual custodial sentence must also be commensurate with the contents and duration of the obligations imposed on the offender.

In short, in the event that the probation is revoked, there is no automatic return to detention and the judge is endowed with discretionary power in order to ensure that the residual sentence is proportional to the degree of social reintegration achieved by the offender as well as the burden of the obligations imposed within the framework of the probation.

5.1.2. *Home detention*

Though it is included among the alternative measures, home detention (*detenzione domiciliare)* is actually a different way of serving a prison term[173]. Introduced with the prison reform of 1986, it was originally designed as a measure serving primarily humanitarian and charitable purposes. That is to say, there was a wish to prevent some types of individuals considered to be more vulnerable from coming into contact with prisons by allowing them to serve their sentence at home rather than in prison. For sentences of less than four years, even where they represent the residual term of longer sentences, home detention can still today be granted to seriously ill individuals who need to maintain constant contacts with health care providers outside prison, pregnant women or mothers with children younger than ten, people over sixty who are partially disabled and not self-sufficient and offenders under twenty-one years of age for health, study and work reasons.

However, starting from 1998, in response to the need to reduce the prison population and tackle overcrowding, a wholly distinct form of home detention was introduced[174]. It is also known as "generic" home detention and is applicable to offenders who have to serve custodial sentences of less than two years. It may be granted to detainees for whom the rehabilitation prospects are insufficient to make them eligible for probation and provided that confinement to the home is deemed suffi-

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[173] Or, as has been said, "a borderline case between imprisonment and an alternative measure", M. Canepa, *Manuale di diritto penitenziario*, Milano: Giuffrè, 2010, 318 ff; M. Pelissero, "La detenzione domiciliare: i vantaggi in chiave deflattiva e il problema dell'offerta trattamentale", in *Riv. it. dir. proc. pen*., 2016, 559, ff. But also see the Constitutional Court judgment no. 327 of 1989.

[174] G. M. Pavarin, "Le ipotesi di detenzione domiciliare" in F. Fiorentin (ed.), *Misure alternative alla detenzione*, Torino: Giappichelli, 2012, 270 f.

cient to prevent the risk of recidivism. What strikes us most when we analyse this measure is the absence of any element geared toward resocialisation, so much so that home detention can be granted even when it entails the impossibility of engaging in any type of work activity[175].

Home detention is in fact a penalty characterised by restrictions and authorisations imposed by supervisory judges on the convicted person for the sole purpose of loosening or tightening the controls he or she is subjected to. The restrictions may include, in particular, granting of authorisation to leave home only for the time strictly necessary to carry out a work activity or an imposition of stricter surveillance[176], also via electronic monitoring. This latter form of enforcement thus does not represent, in the Italian legal system, a typical feature of home detention, but only a possible form of the measure aimed at individuals deemed to pose a greater social threat.

The absence of any rehabilitative treatment and the emphasis placed on surveillance needs reveal the main functions of this form of home detention: as noted, it is primarily aimed at reducing the prison population[177] and only indirectly at favouring the resocialisation of the sentenced person through a progressive reintegration into free society. Moreover, The latter function is completely fulfilled exclusively in cases in which the measure is granted not from the outset, but rather as a benefit applied prior to the complete release from detention, the conditions of which can also be graduated in such a way as to take into account public security needs[178].

5.1.3. *Day release and conditional release (parole)*

Day release (*semi-libertà*) is an attenuated form of imprisonment and enables the inmate to spend part of the day outside prison in order to engage in activities conducive to his or her reintegration into society. In its most typical form, it represents a classic way to serve the last por-

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[175] A. Presutti, "Art. 47-*ter*. Detenzione domiciliare", in F. Della Casa, G. Giostra (eds.), *Ordinamento penitenziario commentato*, op. cit., 568 ff.

[176] On this point, reference may be made to Art. 284 CPP, which authorises the judge who orders the arrest to impose limits on or prohibit communication of the accused with people other than those who live with or assist them.

[177] The law further establishes that the prison administration will bear no costs for the support, care or medical treatment of the convicted person serving a sentence under home detention; see Art. 47-*ter* (5) of Law no. 354 of 1975.

[178] The Constitutional Court (judgment no. 422 of 1992) has clarified that home detention for those with a sentence of up to two years can be granted when it serves to prevent the risk of recidivism and favour the gradual transition to complete liberty.

tion of medium/long-term custodial sentences or life sentences and is founded on the principle of progressive treatment.

Day release can thus be granted to inmates who have served at least half of their sentence (or twenty years in the case of a life sentence) if they have shown progress in terms of rehabilitation over the course of their imprisonment and there are conditions favourable to their progressive reintegration into society. The supervisory court is supposed to verify, on the one hand, whether the convicted individual has undertaken a critical review of the past and, on the other hand, whether there exist conditions for him or her to engage in the activities that the measure aims to enable, related to work or education, or in case activities conducive to social reintegration. In practice, however, the granting of the measure is almost always conditional upon the existence of an opportunity to work outside prison.

Like the other alternative measures, day release can be granted to convicted offenders before they enter prison[179]: the measure is applicable, subject to suspension of the detention order, also to persons sentenced to short prison terms (arrest and imprisonment of up to six months). However, in the latter case, the subjective requirements for admission to the measure are highly questionable: the individual concerned must manifest a desire to be reintegrated into social life, i.e. exhibit "good intentions". A requirement that has been interpreted as wholly empty by legal scholars and allegedly favours a generalised application of the measure in the absence of an appropriate personality assessment[180].

As regards inmates serving medium to long-term sentences, day release must be granted or denied on the basis of the findings drawn from observation of the prisoner's personality during his or her detention. These must point to a positive evolution of the convicted individual towards models of social solidarity and respect for formal legality. Essentially, what is involved is not a prognostic assessment, but rather an a posteriori one, which may suggest the start of a process of critical review[181].

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[179] Provided that the supervisory judge does not deem it preferable to apply a probation measure, at least where the conditions for the latter exist; if the inmate has not behaved in a manner while free such as to suggest a prospect of rehabilitation, there will be a consequent need for monitoring in an institution for at least one month, something the offender could avoid by applying for day release pursuant to Art. 50(1) of Law 354 of 1975.

[180] According to some authors, like other forms of execution that may be implemented prior to the enforcement of the sanction, the measure should be subject to the acquisition of information from the police and a social and family assessment on the part of the probation agency; see L. DAGA, "Semilibertà", *Enc. dir.*, vol. XLI, Milano: Giuffrè, 1992, 1123.

[181] An opinion influenced by the original dangerousness of the offender (inferable from the seriousness of the offence, the conduct preceding it, any assessment as to dangerousness made by the judge overseeing the trial or criminal precedents).

When a person is granted *semi-libertà*, he or she will be subjected to a particular regime of detention which, besides the alternation between freedom and confinement in prison, provides for his or her being assigned to special institutions or autonomous sections of the same, as well as the formulation of a special treatment programme designed to regulate how the measure is implemented by means of specific rules: the timetables for leaving and re-entering and relationships with family members and the probation service[182].

Monitoring of compliance with these rules is left up to the police first of all and only secondarily to the probation agency, which carries out supervisory functions as well as providing the help necessary to ensure that the treatment programme is duly implemented[183]. The measure can be tailored according to the degree of resocialisation of the individual concerned by modifying the treatment programme and granting leaves by way of reward. As in the case of probation, the suspension or revocation of the measure does not depend on a conduct violating the law or the established obligations, but rather on a general unsuitability of the individual to whom it has been applied[184]. Revocation can also be due to failure to return to the prison on time[185].

Liberazione condizionale (conditional release or parole) is also a measure aimed at favouring the convicted individual's gradual reintegration into society. It may be granted only after a minimum time in prison has been served: more specifically, the offender must have served at least thirty months or in any case half of the sentence inflicted. The minimum term of imprisonment is higher (at least three quarters of the sentence) in the case of repeat offenders, whereas those sentenced to life imprisonment can be granted a conditional release after serving at least twenty-six years behind bars.

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[182] The obligations imposed on a person granted day release thus do not have any rehabilitative or treatment purpose, as the latter is supposed to be achieved by carrying out a work or educational activity; they serve only to render the regime of *semi-libertà* feasible in practice.

[183] The combined provisions of Arts. 101(3) and 118(8) of the implementing regulations of Law no. 354 of 1975 should be interpreted in this light.

[184] This concept embraces not only the insufficiency of the progress achieved by the individual concerned, but also the absence of conditions such as to make the measure conducive to his or her gradual reintegration into society; the loss of the job for which day release was granted is a contributing factor in this case.

[185] If the convicted person is less than twelve hours late, he or she will be punished according to disciplinary rules and revocation will be optional; in the event of greater tardiness, the conditional release will be mandatorily revoked and the person concerned will be charged with attempting to escape from custody as per Art. 385 CC.

Another requirement of conditional release is fulfilment of the civil obligations arising from the offence[186]. The material impossibility of doing so does not constitute an obstacle to the grant of the benefit; however, the sentenced person must show to have made sufficient efforts to mitigate or repair the damage caused to the victim[187]. As far as the subjective requirements are concerned, conditional release, unlike day release, depends on the ascertained fulfilment of a different and stricter condition: after spending time in prison, the inmate must provide proof of genuine repentance, meaning a full resocialisation. In other words, convicted individuals must demonstrate that they have reacquired "the fundamental values of social life" while serving time in prison[188].

The establishment of a minimum period of detention as a condition for granting a conditional release or parole is indicative of the legislator's intention to safeguard the notion of "paying one's dues"[189]. Conditional release is indeed the only alternative measure that cannot be applied to short sentences[190]. However, the measure can be granted earlier based on reductions in the sentence ascribed by way of "advance release", a reward mechanism enabling the sentence to be reduced by forty-five days for every six months in which the inmate has given evidence of "participating actively in the rehabilitation effort".

Moreover, as we shall explain better, this is the only measure to remain strictly within a logic of progressive treatment and gradual according of benefits: case law in fact confirms that, once granted, parole cannot be replaced by other alternative forms of execution. The measure in question thus remains the final stage in the process of social reintegration that precedes the complete return to freedom and, from this perspective, the opinion as to the genuine repentance of the offender can be founded on the results of the application of alternative measures accorded prior to the conditional release. A person admitted to this benefit will be sub-

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186 Here we refer to compensation for the financial and non-financial damage resulting from the offence and trial expenses as well as the cost of being maintained in prison.

187 In this manner the offender manifests an interest in the moral and material situation of the victim, which can be evaluated by the judge for the purpose of ascertaining his or her "repentance".

188 L. Degli Innocenti, F. Faldi, *I benefici penitenziari*, Milano: Giuffrè, 2014, 335. It should likewise be stressed that the subjective requirement for a conditional release cannot be identified with good behaviour in prison, but rather entails a global assessment of the convicted individual's personality.

189 As confirmed by Constitutional Court judgment no. 8 of 1979, which highlighted that the establishment of at least thirty months of time served defines the minimum period in which a sentence can express its intimidatory and repressive effectiveness.

190 The benefit is ruled out for persons sentenced to a prison term of less than two years and six months or four years if repeat offenders.

ject to a regime of probation and thus rules limiting his or her personal liberty[191]. Probation lasts for a period equal to the residual sentence to be served (or five years in the case of a life sentence), but this time can be decreased, as noted, thanks to reductions in the sentence granted by way of "early release".

5.2. *Assessment of alternatives to prison in the stage of execution*

5.2.1. *Compatibility with European standards*

Overall, the system of alternative measures meets the requirements set by the soft law of the Council of Europe. However, there continue to be some significant divergences from European standards. The discrepancy lies above all in the degree of effectiveness of the measures themselves, which are plagued by logistic and organisational deficiencies. As these undermine the credibility of the alternatives to prison, they can end up being a dangerous incentive to maintain the custodial regime.

In addition to these difficulties there are numerous legislative obstacles, which, as previously mentioned, have the effect of excluding an ample portion of the prison population from the scope of application of the measures.

Both the legal and factual circumstances clearly risk compromising the main objective of criminal policy that Council of Europe sources assign to non-custodial alternatives, namely, that of reducing the prison population. As if that were not enough, there are several points of friction with European law concerning the content and method of execution of alternative measures. In fact, Italian rules do not always seem to be in line with EU standards as regards the guarantee of fundamental rights that non-custodial measures should provide. In summary, therefore, the observance of the rights of persons subject to alternative measures might not be assured, and nor can it be said that the objective of reducing the prison population has been achieved through broad reliance on non-custodial measures.

As far as access to alternative measures is concerned, it should be noted that many automatic mechanisms still present in Italian prison legislation seem to be in stark contrast with the European objective of in-

[191] It is interesting to note that probation has the aim of enabling the beneficiary's behaviour to be monitored, in order to verify that the repentance of the offender is demonstrated in practice. It is therefore a regime with the effect of a sanction, whose enforcement is entrusted to the police authorities (see Art. 228 CC) and the probation agency, which must devise programmes to support and help released prisoners conditionally placed on probation (see Art. 55 of Law no. 354 of 1975).

creasing the use of such measures to reduce overcrowding. Worthy of criticism, in particular, is the legislator's choice to maintain a prohibition on granting alternative measures to repeat offenders (see Article 58-*quarter*, paragraph 7-*bis* of Law no 354 of 1975); and even more so is the choice to preclude – a priori – access to the measures for authors of crimes presumed to pose a particular danger for society (see the types of offences specified in Article 4-*bis* of the above-mentioned Law no. 354 of 1975).

Since 2000, the recommendations of the Council of Europe have urged Member States to amend the legislative provisions that prevent the use of community sanctions and measures for reasons tied to recidivism or the seriousness of the offence (see Recommendation Rec(2000)22, rule 3). The assessment concerning the observance of fundamental guarantees that States should ensure when imposing and enforcing alternative measures is more complex (see generally Rec(2000)22, preamble, and Rec(99)19, preamble)[192]. On this subject it is worth reviewing the different ways in which the procedure for applying the measures is carried out.

5.2.2. *Observation of personality and risk assessment*

An assessment of personality is required for the application of all alternative measures, whether they be granted in the place of short sentences or as benefits towards the end of a sentence, prior to the return to freedom. As previously observed, the fulfilment of these requirements is established through "prognostic assessments"[193], i.e. assessments of the evolution of the offender's personality during the course of the prison sentence served. However, it has been widely affirmed that such assessments have numerous limitations: these include the practical difficulties that hinder observation inside the prison; the absence of any real graduality between measures[194]; and the prevalent role assumed by a single person with jurisdictional authority (the supervisory judge), as opposed to a panel of judges (supervisory court)[195]. Moreover there are particular obstacles to carrying out an adequate observation of personality for the

[192] Provision is made for the observance of "garanties légales fondamentales telles qu'elles figurent dans la Convention de sauvegarde des droits de l'homme et des libertés fondamentales".

[193] Not in the case of conditional release, where a complete "repentance of the offender" is necessary.

[194] Concerning the problems tied to the preponderant role assumed by the single judge as opposed to a panel of judges, see R. Bianchetti, "Il contributo dei giudici onorari alla decisione dei collegi del tribunale di sorveglianza: il punto di vista dell'esperto componente", in *Dir. pen. cont.*, 26 February 2016.

[195] See Court of Cassation ruling of 25 September 2009, in *Cass. pen.*, 2009, 1199, with a critical note by F. Fiorentin.

purpose of assessing eligibility for benefits in the case of convicted individuals who are free rather than in custody: a means of accessing alternative measures which, as we shall see better, has by now become preponderant in Italy. What is troublesome is that in the phase preceding the granting of an alternative measures no provision is made for an expert investigation into the offender personality, when the person applying for the non-custodial scheme is not currently being in custody[196].

The perspective changes if we look at the rules in the Council of Europe's most recent recommendations on probation services. Borrowing Anglo-Saxon working schemes[197], European recommendations provide for an intervention of probation agencies throughout the entire criminal proceeding: from the investigation stage to final sentencing, to post-prison support (see Rec(2010)1 rule 53). For assessment purposes, therefore, a specific, preferred source of information is identified: the personal file and report presented by the probation agency at the judge's request, which the Council of Europe recommends always be acquired for the purpose of deciding which measure to adopt (see Rec(2010)1 rule 42).

Moreover, given that from a European perspective, personality assessment should be a continuous process, the report of probation agencies is useful not only for the purpose of deciding whether to grant an alternative measure, but can also play a role at an earlier stage; it could guide judicial discretion both in regard to the possibility of suspending a trial and placing the defendant on probation[198] and more generally when a choice has to be made between an alternative sanction and detention.

Despite the vagueness of some guidelines, it also appears clear that the competences of the probation service must be interdisciplinary in nature and include the contribution of clinical criminologists and psychologists. In this regard, the information that italian probation agencies can presently provide to the judge is of doubtful usefulness. They can at most offer information about the social and family background of the convicted person: mere exterior aspects tied the relational dimension and, given their ambiguity, such as to engender considerable inequalities among the potential beneficiaries.

5.2.3. *Methods of treatment and obligations imposed on the offender*

The obligations at the basis of alternative measures should in theory constitute the true *raison d'être* of their being applied in the place of a

[196] Asee the observations of S. Carnevale, *Contributo a Carceri: materiali per la riforma. Working paper*, in *Dir. pen. cont.*, 17 June 2015, 119.

[197] A. Van Kalmthout, A. Dornescu, "Probation in Europe", Nijmegen: Wolf, 2008.

[198] Rec(2010)1, rule 42.

prison sentence, and serve to provide them with a clearer purpose. From this standpoint, in Italy there may be less of a tendency than in other countries to endow the measures with a strictly neutralising content. Some measures, probation first of all, continue to be at least formally aimed at individuals in disadvantaged financial and social conditions: this type of offender corresponds only in part to the actual beneficiaries of the measure[199]. The fact that the measure – in the abstract – is geared towards this type of offender may be inferred both from the content of the obligations and the role performed by the probation agency to enforce them.

This has led on the one hand to a conception of supervision that is merely supportive in nature and has favoured, on the other hand, a standardisation of obligations as a result of treating all beneficiaries of the measure alike. This is in clear contrast with the need, affirmed in various recommendations of the Council of Europe, to tailor the sanction to the personal situation of the offender when choosing both the type and duration thereof (Rec(92)16, rule 6; Rec(2003)22, preamble and rule 9; CM/Rec(2014)4, rule 4).

European law, for its own part, fully espouses the objective of resocialisation, which the alternative measures should pursue, however, through positive interventions aimed at the social reintegration of the offender (on this point, see Rec(92)16, rule 67 and CM/Rec(2010)1, rules 47 and 76). As mentioned above, the necessary inclusion of positive initiatives as an essential element of the alternative measures implies a substantial ban on suspensory mechanisms aimed at intimidation alone: however, such mechanisms, which do not comply with the requirements of European law, being considered devoid of any real elements conducive to resocialisation, do not seem to be present in the Italian system of alternative measures in the post-sentencing phase.

Yet analogous doubts arise in regard to home detention and the (related although different) benefit of serving one's sentence at home pursuant to law 199 of 2010; these are substantially empty measures in terms of the treatment offered to the sentenced person. As was noted previously, in the Italian system the deprivation of liberty consisting in confinement to one's home appears to be wholly devoid of any element aimed at resocialisation[200]: the legislator has provided for an intervention of the proba-

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[199] Probation can now be applied also to "white collar" criminals and other kinds of "socially integrated" offenders; see M.T. Travaglia Cicirello, *L'affidamento in prova al servizio sociale: da misura "alternativa" alla detenzione a "misura penale di comunità" a contenuto riparativo?*, in *Giur. it.*, 2016, 1535 ff.

[200] M. Pelissero, "La detenzione domiciliare: i vantaggi in chiave deflattiva e i problemi dell'offerta trattamentale", op. cit., 559 ff.

tion service which seems designed above all to ensure compliance with the obligations rather than offering opportunities for a critical review of the criminal conduct (Article 118 of the implementing regulations)[201].

The recommendations on alternative measures and probation also place a special emphasis on the effectiveness of the obligations, whose punitive aspect must be safeguarded not only for general prevention purposes[202], but also in order to ensure credibility in the eyes of legislators and judges, as well as in eyes of public opinion (Rec(92)16, preamble, paragraph C and Rec(99)22, rule 22).

From this point of view, if we take a careful look we may see a change in the terminology of the soft law of the Council of Europe: from an initial reference to the application of "obligations and conditions" on the offender there has been a gradual transition to the concept of "programmes and interventions", with an increasingly frequent reference to techniques based on the method of cognitive behavioural therapy.

These, too, have been broadly experimented within the practice of British and Welsh probation system and have found their way into European regulations due to the culture of origin of the authors of the recommendations. Needless to say, in Italy, even where their compatibility with the current legislative framework is admitted, these forms of treatment still represent limited pilot experiments, despite being virtuously supported by some probation agencies[203].

It should also be said that although the scientific literature demonstrates the effectiveness of these treatment methods for the purpose of reducing the rates of recidivism, they pose a number of problems: first of all, the fact that the treatment offered must be modulated according to the coefficient of risk attributed to each beneficiary the effect being that in some cases the treatment ends up fulfilling purely restrictive purposes, especially in the case of conditionally released perpetrators of serious offences who are considered a danger to society.

Moreover, despite the emphasis placed on the contribution of probation agencies to ensure the effectiveness of the conditions imposed and the individualisation of the treatment, we should not forget the importance supranational sources attribute to the principle that penalties must

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[201] There might also be some doubt as to whether the use of "electronic means" to monitor compliance with the rules on home detention are in conformity with European law.

[202] This requirement appears to underlie the references to "punishment" and "severity" in Rec(92)17, rule B6.

[203] F. Baldini, G. Barin, R. Bricolo, P. Fraizzoli, F. Gamba et al., "La terapia cognitivo-comportamentale nella prevenzione della recidiva degli autori di reato. Un progetto multidiscplinare", in *Cogn. clin.*, 2014, 227-245.

have a proper legal basis (see generally Rec(92)16, rules 3, 4 and 5), with specific reference to substitute penalties and alternatives to detention.

This would seem to entail restoring the character of certainty of the obligations and conditions – long called for in the literature[204] – in view of a marked tendency on the part of courts to formulate conditions not related to legislative provisions, and which reflect the difficulty of conciliating the legalistic corollary of certainty with the needs of special prevention.

This tension has existed for some time but seems to have been accentuated recently, also as a result of some shortcomings in the judicial review of the obligations and conditions imposed with the alternative measures[205]. Added to the uncertain nature of the obligations and conditions to be fulfilled, moreover, there is a certain vagueness that similarly characterises the circumstances leading to revocation and the consequences in the event of non-observance of the rules of conduct imposed on the offender (Recommendation Rec(92)16, rule 4 and, as regards recourse to detention as a sanction in the case of non-observance, rule 9).

The certainty of obligations and conditions is also necessary to meet another requirement of European law, namely, that the sentenced person must willingly undergo the treatment. Recommendation Rec(92)16 and the recent reform proposal of 2016 require, in fact, that non-custodial measures can be applied only where it is possible to expect that the conditions or obligations imposed on the person concerned will be observed. Though it is true that even a generic treatment programme might be accepted for the sake of avoiding prison, it is however also true that in the absence of well-defined contents, there cannot be the voluntary adherence that must underlie the commitment to resocialisation and which cannot develop in the very short period of time elapsing between the issue of the judge's order and the signing of the statement containing the imposed conditions.

According to the recommendations of the Council of Europe, it is necessary for acceptance of the measure to mean an active personal participation in the treatment programme (Recommendation CM/Rec(2010)1, rules 78 and 85; Rec(99), preamble and paragraph I), such as to enable

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[204] G. Casaroli, "Misure alternative alla detenzione", *Dig. disc. pen.*, Torino: Utet, 1994, 663; G. Grasso, "Misure alternative alla detenzione", in G. Vassalli (ed.), *Diz. dir. e proc. Pen.*, Milano: Giuffrè, 1986, 645; G. Flora, "Misure alternative alla pena detentiva", in *Noviss. Dig., app.*, vol. V, Torino: Utet, 1984, 95.

[205] More specifically law no. 10 of 2014 admitted the interim application of probation by a supervisory judge with a decision adopted de plano.

an acceptance of the measure as a just and reasonable punitive reaction to the offence committed (Recommendation Rec(92)16, rule 34).

5.3. *The impact on prison overcrowding*

In conclusion, it seems worth attempting an analysis of the effects produced by alternative measures in terms of the prison population. It is necessary to start off by observing that the available data are largely incomplete and preclude an overall interpretation: this represents a serious limit to our ability to reconstruct the reality, given the close interpenetration between alternative measures and the many overlaps in their scope of application.

One thing that stands out in particular is the absolute lack of data regarding conditional release or parole, the only alternative measure that is not applied to offenders who receive short sentences; this gap makes it difficult to analyse the outflows from prison, above all among those serving medium to long-term sentences.

Our assessment of numerical data is also hindered by the difficulty of establishing a correlation between access to alternative measures and sentence reductions ascribable to the choice of alternative procedures. Finally, we lack data on the sentence reductions resulting from the application of early release[206] or the deduction of the period of custody spent during the investigation or the trial.

The analysis of the data taken into consideration refers to the period between 1 January 2010 and 31 December 2015: therefore, from a time shortly after the prison emergency was formally declared to a time just before the decision of the Council of Europe to close the "file" on Italy for the violation of Article 3 ECHR. During this period the legislative framework was radically transformed as a result of different interventions taking place after the acceleration triggered by the *Torreggiani* "pilot judgment".

Such interventions, as far as alternative measures are concerned, were prevalently, if not exclusively, intended to reduce the prison population: we are referring to the removal of some importance exclusions provided for repeat offenders, the broadening of the scope of application of probation and the stabilisation of a measure originally of a provisional character – the possibility of serving one's sentence at home – introduced by Law no. 199 of 2010. The question we might ask ourselves is thus

[206] F. Della Casa, "Misure alternative ed effettività della pena: una ricognizione della situazione odierna" in *Sistema sanzionatorio: effettività e certezza della pena*, Milano: Giuffrè, 2002, 91.

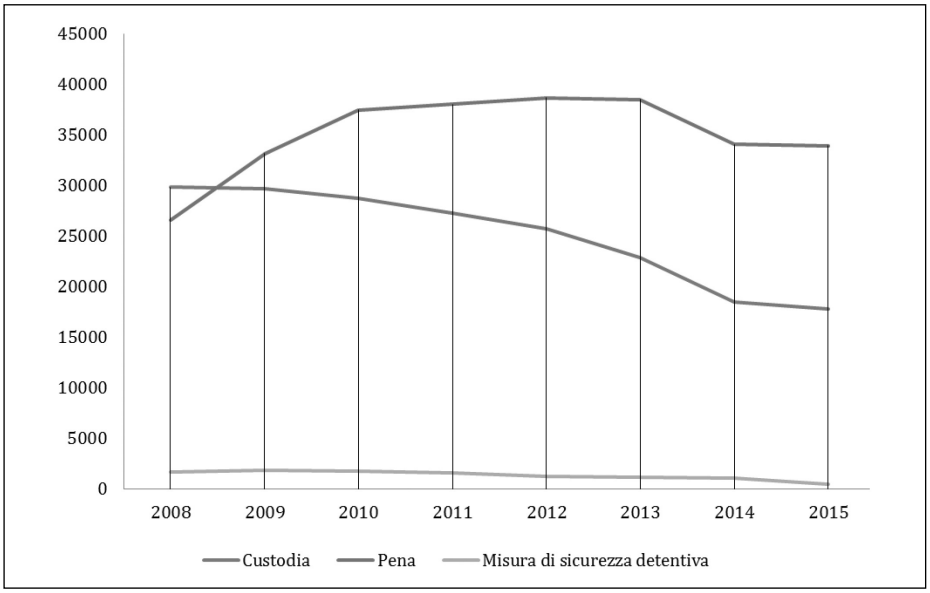
TABLE 2

Year	Remand prisoners	Convicted prisoners	Internees	Tran-sient Status	Total prisoners	Percentage of remand prisoners	Percentage of convicted prisoners
2008	28,836	26,587	1,639	65	58,127	49%	45%
2009	29,735	33,145	1,837	74	64,791	46%	51%
2010	28,692	36,781	1,786	90	67,961	42%	54%
2011	27,251	38,023	1,549	74	66,897	40%	57%
2012	25,696	38,656	1,268	81	65,701	39%	59%
2013	22,831	38,471	1,188	46	62,536	36%	61%
2014	18,475	34,033	1,072	43	53,623	34%	63%
2015	17,785	33,896	440	43	52,164	34%	65%

whether the downward pressure exerted on the prison population by the alternative measures – which the above-mentioned changes contributed to reinforcing – has had the effect of attenuating overcrowding.

It should be said, to begin with, that the data on definitively convicted inmates (Table 2) did not show a decrease comparable to the one mentioned previously with respect to the number of remand prisoners.

FIGURE 1. *Makeup of the prison population (as of 31 December)*



As of 31 December 2015, the number of prisoners serving a sentence was higher than in 2009: the year of the Sulejmanovic judgment, in which the ECtHR first condemned Italy for violating Article 3 ECHR due to the serious situation of overcrowding in the cells the claimants were confined to. Over the same period of time, the number of individuals remanded in custody pending trial decreased by nearly twelve thousand.

In contrast, the number of beneficiaries of alternative measures has grown progressively. More specifically, after the decrease that followed the general act of clemency adopted in 2006 (pardon law), the number of people benefitting from alternative measures gradually began to grow again. In the period between 31 December 2009 and 31 December 2015, the number of convicted individuals granted admittance to alternative measures more than doubled (Table 3).

TABLE 3

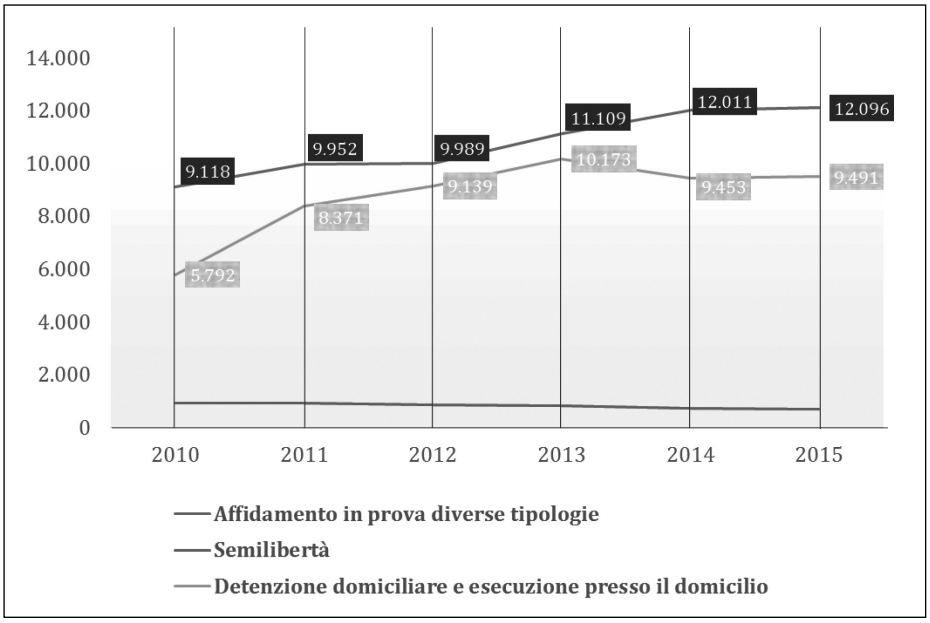
Year	Alternative measures being executed as of 31 December[207]	Total benefiting from alternative measures in the period[208]
2009	10,332	21,392
2010	14,247	31,422
2011	19,239	41,375
2012	19,986	45,978
2013	22,127	50,673
2014	22,209	51,492
2015	22,285	50,898

The increase in the number of beneficiaries is due above all to the application of two measures: probation and home detention (Figure 2), which includes custodial sentences of up to eighteen months served at

[207] The data refer to the alternative measures of probation, home detention and day release. The number of those placed on home detention includes beneficiaries of the measure providing for the option of serving sentences of up to eighteen months at home (Art. 1 of Law no. 199 of 26 November).

[208] The data related to the alternative measures applied in the period refer to the sum of the cases assigned to the probation agencies during the year and those already assigned as of 1 January of the same year (so-called managed assignments); see the explanatory note contained in the datasheet entitled "Misure alternative alla detenzione – Dati ripartiti per cittadinanza - Anno 2009" ("Alternative measures to Detention - Breakdown of Data by Citizenship - Year 2009") available on the website of the Ministry of Justice.

FIGURE 2. *Alternative measures currently in force (as of 31 December)*



home. The latter measure – provisionally introduced by Law no. 199 of 2010 and then permanently included among the alternative measures to detention in 2013 – contributed most to the spectacular growth in the number of offenders serving their sentence at home.

However, a closer look at the data regarding the two measures shows that the majority of the beneficiaries were free rather than in custody, thanks to the previously mentioned mechanism of suspending the enforcement order issued by the public prosecutor. The number of beneficiaries who were free is higher than those placed under ordinary probation[209], whose transformation into an alternative to detention in the case of short prison sentences seems by now irreversible in practice[210]. A significant and increasingly high number of offenders are also granted home detention after having spent time free prior to conviction, thanks again to the effect of stabilisation of the measure as provided under Law

[209] The number of measures applied to convicted persons not held in custody rose, as a result of the use of probation, from 4,676 in 1997 to 5,819 in 2015.

[210] R. BARTOLI, "L'affidamento in prova al servizio sociale tra istanze risocializzative e istanze di garanzia", in *Dir. pen. proc.*, 2002, 1230; A. DELLA BELLA, "Un viaggio tra le misure sospensive: i nodi da sciogliere in attesa della promessa riforma del sistema sanzionatorio", op. cit., 377.

199 of 2010 in relation to sentences of less than 18 months[211]. In the case of both measures, the number of prisoners who benefit from the measures after being held in detention has remained stable. It is worth pointing out the fact that this number includes not only convicted people subjected to detention in prison, but also those who were under home detention and house arrest.

We must therefore timidly venture to affirm that the widening of the array of alternative measures has reduced the entries into prison. Yet we are spontaneously led to doubt that the reform is accompanied by an increase in the number of inmates leaving prison facilities.

This can also be inferred from the smaller reduction that occurred in this period among inmates serving medium and long-term sentences, i.e. over five years. Whereas the number of individuals sentenced to *short* prison terms fell from 21,000 in 2010 to 15,000 in 2015, the figures for those serving *medium to long-term* sentences show an increase from 14,700 to over 17,000. This appears above all to reflect the low propensity of supervisory judges to use alternative measures as final benefits, that is to say, benefits that can be granted towards the end of the prison term in order to prepare the inmate for a return to freedom.

This trend seems to be confirmed also on the basis of long-term analyses, such as those focusing on the difference between the number of inmates present on a fixed day (in Italy, 31 December of every year) and the number of previously free inmates taken into custody within a certain reference period (generally the same year)[212]. This indicator enables us to measure the average length of the sentences served, because the larger the difference between the number of those present at a certain date and the total number of those entering prison, the shorter the average length of the period of detention in that year, be it a case of pre-trial detention or a prison sentence served by a convicted offender.

In the early post-war period in Italy the sum of incoming prisoners was much higher than that of those in custody on a fixed date (ratio of 4 to 1), which means that the average length of the sentences tended to be short. This gap was progressively closed, so much so that in 2012 the number of those present exceeded the number of incoming prisoners (65,071 versus 63,020). This difference shows that the growth in the prison population is not attributable to a rise in the number of entries

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[211] From 31 December 1998, the year of introduction of so-called generic home detention, in which there were 1,080 recorded non-detained beneficiaries, the number of measures applied to convicted persons not held in custody rose to 3,372 as of 31 December 2014.

[212] We rely heavily on the explanatory model proposed by M. Pavarini, "Governare la penalità. Struttura sociale, processi decisionali e discorsi pubblici sulla pena", op. cit., 55.

and hence on an increased inflow, but rather depends on a lengthening of the average prison term.

It is in this context that we should interpret the progressive decrease in the number of prisoners who benefit from day release, a measure that, as we have seen, mainly serves the purpose of progressively reintegrating the inmate into society. Statistics reveal in fact a constant decrease in the number of beneficiaries of this measure from 2010 to 2015; a trend that appears to be confirmed by a further reduction recorded in the early months of 2016. However, a complete analysis of this phenomenon appears to be precluded by the lack of available data concerning conditional release. As regards this measure, statistical surveys in Italy show a historical and inexplicable lack of data. This is the case even though the censuses carried out by ministerial departments include data for the regime of *libertà vigilata* ("supervised liberty", another form of probation), which, as noted previously, is mandatorily applied to beneficiaries of a conditional release.

It may thus be cautiously affirmed that the reform initiatives undertaken after the prison emergency came to the fore did not manage to have any impact on outflows from prison. Almost as if longer sentences, objective and subjective conditions being equal, corresponded to greater caution on the part of supervisory judges to place inmates on probation. This seems to confirm the suggestions offered by some recent sociological-legal studies dedicated to the subject of sentencing in Italy[213].

According to some studies, alternative measures in Italy, originally conceived as an instrument for early release from prison, have been progressively transformed into a replacement for detention or, stated in other terms, into an Italian version of the forms of "community justice" typical of Anglo-Saxon systems. The same studies reveal a lower recourse to alternative measures for the purposes of parole, i.e. early release of the prisoner. And this is the case in spite of the fact that international criminological literature has long recognised that the latter type of measure is capable of stabilising the prison population.

We may thus venture to affirm that the reform initiatives undertaken in the aftermath of the prison emergency were not able to influence the outflows from prison. This suggests that in the case of longer sentences, irrespective of the objective and subjective conditions, super-

[213] G. Torrente, L. Manconi, "La pena e i diritti. Il carcere nella crisi italiana", op. cit., 121; see also M. Pavarini, "Misure alternative alla detenzione dal 1986 ad oggi. Risultati ed incongruenze del sistema sanzionatorio nell'attuale contesto normative", in *Rass. penit. crimin.*, 2003, 207-225.

visory judges show greater caution in deciding whether to place inmates on probation.

Together with the growing reliance on alternative measures as a replacement for short custodial sentences, the Italian experience of the past two decades reveals another trend. The development of alternative measures has corresponded numerically to the introduction of suspensory instruments enabling convicted persons not held in custody to access alternative measures. Yet no reduction in the prison population was achieved in the same period. Therefore, it would seem that in Italy as well we are witnessing a net-widening trend, meaning an expansion of the scope of criminal monitoring tied to the concomitant expansion of the recourse to both imprisonment and non-custodial measures.

However, the Italian penal system has at least two peculiar features that need to be taken into consideration in order to evaluate this circumstance. On the one hand, substitutive sanctions appear to have played a wholly uninfluential role in the Italian experience. At present, imprisonment continues to be the only main penalty applied, whilst alternative measures are used as forms of execution of the penalty (especially in the case of short-term sentences) following conviction[214]. On the other hand, the attempts made elsewhere to control the prison population through benefits granted at the end of prison sentences continue to be blocked by the many exclusions imposed on certain categories of inmates (repeat offenders above all), which make them ineligible for alternative measures[215]. This may partially explain why the recent reforms that broadened the scope of application of the alternative measures did not influence significantly the outflows from prison.

6. *Conclusions*

The analysis presented in this report has highlighted three salient points it is worth again briefly drawing attention to.

The first point concerns the historically high number of individuals who are remanded in custody pending trial. The second point regards the extremely low degree of effectiveness exhibited overall by the system of sanctions due to the substantial inefficacy of fines as a penalty and the fact that the suspensory mechanisms lack any content. The third and last

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[214] F. Palazzo, "Fatti e buone intenzioni. A proposito della riforma delle sanzioni penali", op. cit., 1.

[215] G. Torrente, L. Manconi, "La pena e i diritti. Il carcere nella crisi italiana", op. cit., 121.

point relates to the evolution that has taken place as regards the alternative measures applicable during the phase of execution of penal sanctions, which are increasingly often restricted solely to inmates serving short prison sentences.

Based on these three fundamental aspects specific to the Italian experience we will be able to draw some conclusions as to the conformity of the national system with European law. To this we shall add some reflections concerning the most significant developments in the system of aid and supervision guaranteed by probation services. Finally, we shall conclude with an overall assessment of the impact of alternatives to detention on the prison population.

6.1. *The conformity of Italian criminal law with the recommendations of the Council of Europe*

The Italian system of alternatives to detention reveals to be substantially compliant with supranational legislation in this field. The general principles regarding the imposition and enforcement of these sanctions and measures appear, in fact, to be observed on the whole. However, we cannot fail to note that both the detailed rules governing each measure and their concrete implementation actually defeat the purposes enshrined in European law.

Among the numerous discrepancies, we should mention first of all the rules concerning the alternatives to pre-trial detention.

Despite the availability of a broad range of alternative instruments to incarceration and the avowal of the principle of "smallest sacrifice necessary" as the criterion for choosing a measure, Italian law identifies a long series of offences for which remand in custody is mandatory. As we have seen, this is in violation of rule 3 § 2 of Rec(2006)13.

There are moreover automatic mechanisms that deny the judge any margin of appreciation based on the merits of the case: for example, the judge is obliged to automatically replace a milder sanction with custody in prison if the conditions of the former are violated. Emphasis has been placed on a series of procedural rules that end up, in practice, favouring the prolongation of preventive custody, with a consequent negative impact in terms of the number of prisoners[216].

[216] For example, as previously noted, there is no provision for an automatic periodic review of the custodial measure, to be conducted by the judge at regular intervals. Such a review is recommended in the documents of the Council of Europe (rule 14 of Rec(80)11, rules 17, 23 and 24 of Rec(2006)13) and European Union (EU Parliament Resolution 2011/2897, no. 10). In addition, there is no possibility of prompt contact between the judge who orders the coercive measure and the person concerned.

No less conspicuous are the discrepancies with respect to the measures applicable during the trial stage. In fact, although we may note a substantial alignment with some fundamental principles such as the principle of legality and judicial review of the adoption of non-custodial sanctions, the main problems regard the principle of subsidiariety, whereby imprisonment may be provided for only as an *extrema ratio.*

As noted previously, this criminal policy objective is thwarted by the lack of non-custodial sanctions as main penalties, with the exception, naturally, of fines. However, the latter are gravely ineffective since – and this is perhaps the only case in Europe – only an extremely exiguous number of fines are collected or, in default of payment, converted[217].

Furthermore, many doubts arise as to the effectiveness of substitute sanctions and suspensory mechanisms that are aimed at avoiding the execution of short prison sentences.

As regards the alternative sanctions other than fines, it should be said that they are very rarely applied in practice due to overlap with the scope of application of suspended sentences (i.e. sentences of up to two years).

The primary penalties for offences falling within the jurisdiction of justices of the peace – namely, home detention and community service – have met with a similar fate. These penalties still remain infrequently used and as a consequence, for this category of minor offences, the sanction imposed consists almost exclusively in a fine: which as we have seen remains largely ineffective[218].

With respect, on the other hand, to suspended sentences, it has been said that in judicial practice this measure is almost automatically applied where its objective prerequisites are met. That is, judges limit themselves to applying it without conducting any previous observation of the convicted person's personality.

This is tantamount to a complete disregard for the principles set forth in Recommendations Rec(92)16, preamble, paragraph C and Rec(99)22, rule 22, whereby the punitive content of sanctions must be safeguarded not only for the purposes of general prevention, but also in

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[217] On the reasons for this deplorable phenomenon, see A. BERNARDI, "progetto di ricerca 'Prison overcrowding and alternatives to detention': contesto e linee programmatiche", in *Riv. it. dir. proc. pen*., 2014, 1750 f.; L. GOISIS, "La pena pecuniaria, un'indagine storica e comparata: profili di effettività della sanzione", op. cit., 123 ff.

[218] To date no in-depth studies have been conducted into the ineffectiveness of such sanctions. As regards community service, it is however reasonable to argue that its infrequent application, which always has to be requested by the person concerned, is due to the lack of incentives likely to persuade the latter to request it.

order to ensure their credibility in the eyes of legislators and judges, as well as within public opinion.

6.2. *The status of offender supervision in Italy: social work, lack of resources and voluntarism*

Alternatives to imprisonment were introduced into the Italian legal system to avoid exposing persons sentenced to short prison terms to the trauma of reclusion and, more in general, to enable forms of enforcement of the penalty imposed by the judge outside prison walls. In particular, the choice of the sanction and accompanying rehabilitation program must be founded on a logic of individualisation. This means that the exercise of discretion by the judge who applies a sanction or measure other than detention should always be based on a careful assessment of the personality of the sentenced person and his or her environmental context.

By their very nature, therefore, alternative measures imply competences that the judge responsible for deciding on a non-custodial sanction or measure generally does not possess. For the purpose of individualisation, an essential role is thus played, also in Italy, by the probation agencies.

The action of the probation agencies revolves around schemes of intervention which are geared toward eliminating the socio-environmental factors presumably lying at the root of the offence[219]. From this standpoint, the Italian system has failed to implement the European recommendation that probation services should work to encourage the self-responsibilisation of the offender vis-à-vis the society and the victim of the offence[220].

Another characteristic of the Italian experience lies, as we have seen, in the very limited role played by the reports (related to social and family aspects) of the probation agencies for the purpose of deciding whether to grant alternative measures and sanctions. As previously noted, moreover, there is no provision for any observation of the personality of beneficiaries of alternative measures who have not spent time in custody.

In-depth empirical research has demonstrated, moreover, that the magistrates responsible for making a prognosis as to the reliability of the offender choose to rely on information from the police and on criminal

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[219] R. Breda, C. Coppola, A. Sabbatini, *Il servizio sociale nel sistema penitenziario*, Torino: Giappichelli, 1999, 57 ff.

[220] See above all Rec(92)16 on "community sanctions and measures" and CM/REC(10)1 on "European rules on probation".

records, rather than basing their decision on the observations of the probation agencies[221]. In any case, the grant of a measure more and more often ends up depending on a "situational" assessment (based on the offender's objective living conditions), which ultimately penalises the most socially marginalised individuals: foreigners and drug addicts above all[222].

A final aspect worth highlighting in these conclusions is that probation agencies are both underfunded and understaffed.

This deficiency of financial means and personnel has been compensated for by an increasing reliance on volunteers, who provide support to the probation services. The recent introduction of pre-trial probation (which requires the probation agency to draw up a rehabilitation program at the stage of investigations) thus risks further exacerbating the already difficult situation of these agencies. The success of this procedural measure may in fact have the effect of draining the few available resources and personnel, thereby rendering the action of the probation services even more inadequate when it comes to measures applied to convicted offenders.

6.3. *Are non-custodial sanctions really effective in reducing prison population? The Italian case*

As noted in the introduction of this report, the year 2010 saw the highest number of inmates confined in Italian prisons since the post-war period. However, as a result of the emotional impact of the previously mentioned judgments of the ECtHR and the urgent measures adopted following the formal declaration of a prison emergency, the number of inmates was drastically reduced in a period of only five years. The prison population thus decreased from 67,961 as of 31 December 2010 to 52,164 as of 31 December 2015.

How can we explain such a conspicuous change? In order to answer this question we must attempt an indirect reconstruction since, as previously observed in this report, in Italy there are no surveys which can attest to the impact of individual measures on the prison population[223].

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[221] G. Mosconi, M. Pavarini, "Discrezionalità e sentencing penitenziario. La flessibilità della pena in fase esecutiva nell' attività dei Tribunali", in *Del. pen.*, 1993, 149-189.

[222] M. Pavarini, "Misure alternative alla detenzione dal 1986 ad oggi. Risultati ed incongruenze del sistema sanzionatorio nell'attuale contesto normative", op. cit., 219.

[223] The only significant exception is home detention as per Law 199 of 2010. The Department of Prison Administration has in fact reported the number of persons who have been released from prison thanks to this measure on a monthly basis since its entry into force.

We must nonetheless avoid misinterpreting the data. As we sought to demonstrate earlier, such a large reduction in the number of inmates cannot be entirely ascribed to an increased use of alternative measures in the phase of execution of penalties.

On the one hand, though it is true that during the period of the "prison emergency" there was an increase in the alternative measures granted, this number is much lower than the total number of inmates and does not exceed 6,000 cases[224]. On the other hand, the same period saw an increase in long-term sentences, a symptom of the inability of alternative measures to govern prison outflows[225].

At the same time, it still seems too early to be able to measure the deflationary effects on incarceration (not only pending trial) produced by the newly introduced pre-trial probation. If anything, it appears reasonable to fear that this measure will contribute to further widening the net in the area of penal control. Indeed, although it falls within the scope of application of suspended sentences and alternative sanctions (and for this reason we might expect a very limited application of this measure), in 2015 no fewer than 9690 people were "put on probation" and this sanction accounted for 11.7% of the total alternative measures implemented in the same year[226].

That being said, we can easily see that the downtrend in the prison population between 2010 and 2015 coincided with a reduction in the use of pre-trial detention, as remand prisoners decreased from 43% to 34% of the total number of prisoners. However, the scarcity of available data regarding the application of provisional measures in Italy precludes a complete assessment of what factors may be responsible for the improvement in recent years (and in particular to what degree the use of non-custodial measures has had an impact). The rise that occurred in the prison population in the first half of 2016 was the consequence of a more systematic use of pre-trial detention: the number of inmates recorded as

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[224] G. TORRENTE, "La popolazione detenuta in Italia tra sforzi riduzionisti e nuove tentazioni populiste", in *Dir. pen. cont.*, 27 October 2016, 11.

[225] The data concerning long-term prison sentences are even more striking if we consider that the number of persons entering prison fell from 90,000 to 45,000 between 2008 and 2015. More precisely, the prison inflow decreased by 50.62%. Breaking down this overall decrease, we may note in particular a reduction in new prisoners convicted of drug trafficking and possession, whose number fell by 57.44% between 2008 to 2015: this is the result of a judgment (no. 32 of 2014) whereby the Italian Constitutional Court declared the unconstitutionality of Law Decree 272 of 2005, which criminalised "hard drugs" and "soft drugs" to the same degree.

[226] On the reasons for this success. see R. BARTOLI, "La 'novità' della sospensione del procedimento con messa alla prova", in *Dir. pen. cont.*, 9 December 2015.

of 30 June 2016 showed an increase of 1,300 and no fewer than 1,078 were remand prisoners[227].

Therefore, while in the Italian case we cannot talk about a net-widening effect in the proper sense (since overall the penal net has been narrowed in recent years), there are conditions for this to occur in the future, given the absence of any correlation between the broadening of alternative measures and sanctions and the reduction in the prison population. At the same time, our analysis reinforces the conviction that the reasons for a higher or lower degree of secondary criminalisation may lie in the actions of many actors in the criminal justice system (judicial police, public prosecutors, judges) called upon in their various capacities to interpret and apply the rules[228].

The impression is that both the recent legislative reforms, aimed at reducing the number of inmates, and the concrete attitudes of judges, who seem to have corrected the inclination towards the most restrictive solutions, owe their change in course to the stances adopted by the ECtHR. The *Torreggiani v Italy* judgment, in particular, is to be credited with bringing about such a significant reversal of the previous trend. It should be said, however, that the above-mentioned legislative reforms have not led to a paradigm shift within the system (for example through an incisive reform of the sentencing system), but have rather limited themselves to specifically targeting some of the main factors underlying prison population inflation. This is an approach that inevitably leaves room for a new change of course on the part of the actors involved[229]. Particularly in the event of a new change in the political climate leading once again toward a use of criminal law for political ends[230].

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[227] Remand prisoners thus reveal to be the most volatile category of the prison population in Italy and at the same time the most decisive in determining the pattern of incarceration rates.

[228] C. Sarzotti, "Le Procure della Repubblica come attori del campo giuridico-penale", in *Studi quest. crim.*, 2006, 67-86.

[229] A first signal could be precisely the aforementioned increase in the number of prisoners which occurred in the first half of 2016.

[230] D. Falcinelli, M. Anselmi, S. Anastasia, *Populismo penale. Una prospettiva italiana*, Cedam: Padova, 2015.

CELINA NOWAK

POLAND

SUMMARY: 1. Prison population (2000-2015). – 2. Alternatives to detention in the pre-sentencing phase. – 2.1. Analytical examination of the applicable provisions. – 2.2. Global evaluation of the applicable provisions. – 3. Measures at the judgment. – 3.1. Analytical examination of the applicable provisions. – 3.2. Global evaluation of the applicable provisions. – 4. Measures after the judgment. – 4.1. Analytical examination of the applicable provisions. – 4.2. Global evaluation of the applicable provisions. – 5. Conclusion.

1. *Prison population (2000-2015)*

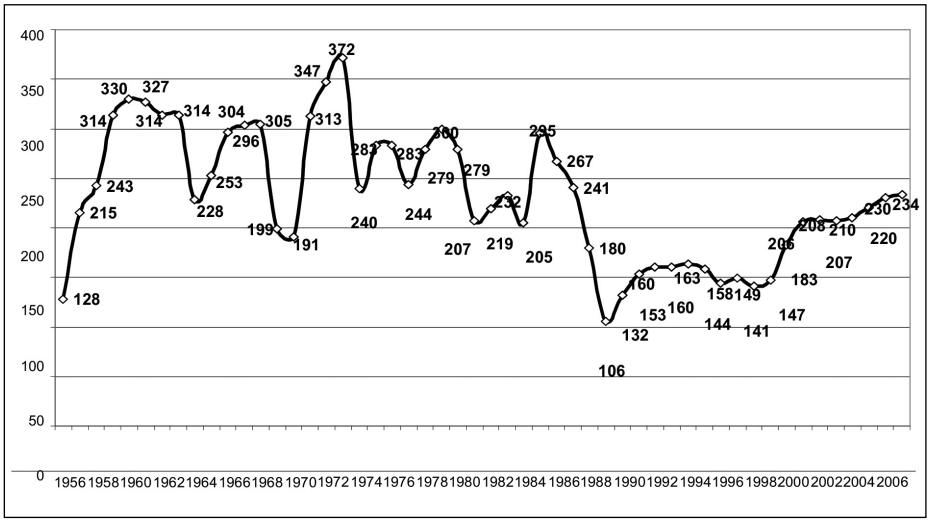
In the Polish criminal law system, imprisonment is the penalty of last resort in the hierarchy of penalties. This is an unquestionable principle underlying the process of application of penalties, expressed on the national level in Art. 58 § 1 of the Penal Code[1], and confirmed on the international level in numerous documents adopted by the organisations to which Poland belongs, in particular the Council of Europe. This principle is based on the premise that the detention has damaging effects on a human being. Therefore, first, the states should apply alternatives to imprisonment to the widest extent possible. Second, if the prison seems to be the only punishment applicable towards the offender, it should be executed with the utmost respect of his/her dignity. This means that the life in prison should approximate as closely as possible the positive aspects of life in the community (Rule 5 of the European Prison Rules[2]) and all detention should be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty (Rule 6).

However, the practice of the execution of penalties in Poland seems to have drifted away from this standard. Two main problems may be

[1] Statutory Act of 6 June 1997, which entered into force on 1 September 1998, published in the Official Journal (hereinafter referred to as "O.J.") No 88, item 553, as amended.

[2] Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies).

TABLE 1. *Evolution of the imprisonment rate in Poland in the years 1956-2006*



Source: Central Statistical Office[3].

identified. Firstly, Poland is one of the European countries with the highest imprisonment rates. Second, additionally, the conditions of detention are often deplorable, and for a long time overcrowding has been a problem for the Polish administration of justice.

Regarding the imprisonment rates, Poland has noted one of the highest imprisonment rates in Europe during the whole period after the World War II. This rate reached the highest levels during the time of the former communist regime (Table 1).

The decreases were due to the periodical amnesties[4]. The highest decline of the rate was observed in 1989 when an amnesty was adopted by the first post-communist government, for the first and last time after the democratic transformation. However, surprisingly, after 1989 the imprisonment rate did not remain low. Contrary, it has quite quickly started to grow again and – as early as around the year 2000 – attained a level similar to that noted in the 70s.

More recent and detailed data is shown in the table below.

[3] Table elaborated by K. Krajewski, see K. KRAJEWSKI, "Główne tendencje polityki karnej ostatnich dwudziestu lat", in J. JAKUBOWSKA-HARA, C. NOWAK (eds.), *Aktualne problemy polityki karnej w kontekście przeludnienia zakładów karnych w Polsce*, Warsaw: Scholar, 2010.

[4] Amnesties adopted in 1956, 1964, 1969, 1974, 1977, 1983, 1984, 1986 and 1989.

TABLE 2. *Situation of penal institutions in Poland*

	Population - annual estimates (thousands)	Total number of prisoners (including pre-trial detainees)	Prison population rate per 100 000 inhabitants	Total capacity of penal institutions / prisons	Prison density per 100 places
2000		65336	169	64836	101
2001		80004	207	68198	117
2002	38632,5	80610	208,7	69079	116,7
2003	38218,5	80692	211,1	69079	116,8
2004	38190,6	79344	207,8	69573	114
2005	38173,8	82656	216,5	69883	118,3
2006	38140,1	88647	229,9	75550	117,3
2007	38518,2	90199	234,2	76099	118,5
2008	38500,7	83152	216	83124	100
2009	38135,9	84003	220,3	84490	99,4
2010	38167,3	80728	211,5	85295	94,6
2011	38529,9	81382	211,2	86123	94,5
2012	38538,4	84156	218,4	86906	96,8
2013	38533,3	78994	205	97311	81,2
2014	38017,9	77371	203,5	87742	88,2
2015		77872	204,9	87661	88,8
2016[5]		72309			

In the analysed period, total capacity of penal institutions in Poland has been calculated by using the surface of cell equal to 3 m^2 per prisoner.

In Poland in the 90s, the number of places in the penitentiary institutions was higher than the number of detained persons. However, since 2001, when the number of detained persons has suddenly increased, it exceeded the capacity of penitentiary system, which contributed to a significant growth of prison density. The main reason of such an increase was a political decision made on the governmental level to apply pre-trial detention as widely as possible. In consequence of an increasing amount of motions for pre-trial detention submitted by prosecutors to the courts, more persons were incarcerated at the preliminary stage of the proceedings and eventually also sentenced to the penalty of deprivation of liberty. Data shows that since 2000 up to 30% of prisoners were in pre-trial detention[6]. This proportion started to change around 2007 and in 2015 only 6,9% of persons in prisons are in pre-trial detention.

[5] Third quarter of the year 2016. Source: Central Authority of the Prison Service.

Considering the density of prisons and the capacity of penitentiary institutions, pursuant to Art. 110 of the Polish Penal Execution Code ("the PEC")[7], a person sentenced to the penalty of deprivation of liberty is placed in an individual cell or a cell shared with other inmates, but in any case the surface of the cell per person may not be lower than 3 m^2. This rule has been considered not sufficient by the CPT on several occasions, which recommended it to be increased up to at least 4 square meters per person[8].

Despite these recommendations, before 2009, pursuant to Art. 248 of the PEC, in justified circumstances it was legally possible to place a detainee in a cell with a surface below 3 sq. meters for a determined period of time, which should have been specified in the decision but did not have to be limited. The right to take such a decision was vested with the director of prison. In practice, as allowed by this provision, a person could have been detained during the whole period of the execution of the penalty of imprisonment in an overcrowded cell.

This legal framework had been changed under the influence of the case-law of the Supreme Court and especially – the Constitutional Tribunal.

The Supreme Court considered that placing an offender in an overcrowded cell, with no partition between the lavatory part and the living part and no individual bed for all of the detainees, may constitute a violation of the detainee's right to dignity and intimacy and consequently is the basis for compensatory liability of the State Treasury[9].

Ultimately, the possibility to place a person in an overcrowded cell was found contrary to the 1997 Constitution by the Constitutional Tribunal. On 26 May 2008 it decreed that the provision in question would

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[6] See J. KOSONOGA, "Tymczasowe aresztowanie i jego wolnościowa alternatywa w postępowaniu karnym (na tle wybranych danych statystycznych)", in J. JAKUBOWSKA-HARA, J. SKUPIŃSKI (eds.), *Alternatywy pozbawienia wolności w polskiej polityce karnej*, Warsaw: Scholar, 2009, 267 ff.

[7] Statutory Act adopted on 6 June 1997, which entered into force on 1 September 1998, J.O. No 90, item 557, as amended.

[8] See *Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 June to 12 July 1996*, Strasbourg, 24.9.1998, 70, the same in *Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 19 May 2000*, Strasbourg, 23.5.2002, 61, as well as in *Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 15 October 2004*, Strasbourg, 2 March 2006, 46.

[9] Judgment of 28 February 2007,V CSK 431/06.

lose its binding force eighteen months following the publication of the Tribunal's decision, i.e. on 5 December 2009[10]. The Tribunal submitted that the subject provision and its practical application might result in an inhumane treatment of offenders. However, the Tribunal allowed – in exceptional circumstances – for a temporary placement of detainees in cells with less than 3 m^2 of surface per person. Yet it stated that the law should precisely provide for the conditions of the application of this extraordinary measure, including maximum time of detention in such cells.

This matter was also dealt with by the European Court of Human Rights that found a violation of Article 3 of the European Convention of Human Rights in two cases against Poland concerning the issue of overcrowding[11]. The Court based its judgments on the circumstances of the cases, however it considered as well that these cases revealed a systemic problem of overcrowding of detention facilities in Poland. It noted that almost 160 applications raising an issue under Article 3 of the ECHR with respect to overcrowding and consequential inadequate living and sanitary conditions were pending before the Court at the time the subject judgments were given[12]. The Court assessed that for many years Polish authorities appeared to ignore the existence of overcrowding and inadequate conditions of detention and, instead, chose to legitimize the problem on the basis of a domestic law which was ultimately declared unconstitutional[13]. The Court was aware that solving the systemic problem of overcrowding in Poland may necessitate the significant financial resources, however it emphasized the general rule that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention[14].

The amending domestic legislation was adopted in November 2009[15]. Currently, pursuant to Art. 110 § 2a of the PEC placement of a detained person in a cell with less than 3 m^2 per person, but no less than 2 m^2 of surface per person, is possible for up to 90 days in exceptional cases, including e.g. a necessity to prevent a danger of epidemics or some other hazard to the safety of the person in question or of the penitentiary institution as a whole. Pursuant to Art. 110 § 2b of the PEC it is also

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[10] Published in O.J. No 96, item 620, on 5 June 2008.

[11] *Orchowski v. Poland*, no. *17885/04*, 22 October 2009, *Norbert Sikorski v. Poland*, no. *17599/05*, 22 October 2009.

[12] I.e. October 2009, *Orchowski v. Poland*, § 147.

[13] *Ibidem*, § 151.

[14] *Nazarenko v. Ukraine*, no. 39483/98, § 144, 29 April 2003.

[15] Act Amending the Penal Execution Code, of 9 November 2009, published in O.J. No 190, item 1475, which entered into force on 6 December 2009.

possible to place a detainee in such a cell in other cases, generally when there is a necessity to detain other convicted persons (e.g. sexual offenders, recidivists, persons in pre-trail detention), but for a period no longer than 14 days (prolonged up to 28 days upon the consent of a penitentiary judge - Art. 110 § 2c of the PEC).

At the outset of the analysis of alternatives to detention in Polish criminal law it must be noted that in 2015 the Polish legislator, aware of the negative tendencies in the Polish criminal policy, considerably modified the Penal Code of 1997. The new law[16], amending the provisions on penalties, penal measures and probation measures, came into force on July 1, 2015. However, after the parliamentary elections and the change of the government in late 2015, some of the newly introduced provisions were repealed in April 2016[17] and the previously binding provisions were partially reinstalled. Regrettably, this decision was not based on any evaluation of the effectiveness of the institutions introduced in July 2015, anyway such an assessment was hardly possible as they were in force for a too short period of time. On the other hand, the impact of the April 2016 modifications on the imprisonment rate in Poland is yet to be established. Thus, this is a very dynamic and unstable time for the Polish system of penal sanctions.

2. *Alternatives to detention in the pre-sentencing phase*

As alternatives to detention during the pre-sentencing phase, the Polish criminal law knows the non-custodial preventive measures, on one hand, and the procedural possibilities to conditionally discontinue the proceedings, on the other.

2.1. *Analytical examination of the applicable provisions*

Preventive measures

Regarding the non-custodial preventive measures, the Code of Criminal Procedure enumerates: bail, surveillance, obligation to leave premises cohabited with the injured party (victim), suspension from official function or performance of profession or from driving specific types of vehicles, prohibition to leave the country combined with seizing the passport or other documents enabling the accused to cross the border. Only two of them are actual alternatives to pre-trial detention: surveil-

[16] Act Amending the Penal Code, of 20 February 2015, O. J. item 396.
[17] Act Amending the Penal Code, of 11 March 2016, O. J. item 428.

lance and bail. Others are not severe enough to be applied instead of detention and also they are statistically negligible.

As a rule, pursuant to Art. 249 CCP, preventive measure may be applied in order to secure the proper conduct of the proceedings, and exceptionally, to prevent a new serious offence from being committed by the accused. It may be applied only if the evidence collected indicates a high probability that he has committed an offence. The decision to apply a non-custodial measure is taken by the court or the prosecutor (the latter at the pre-trial stage of the proceedings). Pursuant to Art. 249 para 4 CCP, preventive measures may continue until the commencement of serving the sentence.

Following general provisions on the criminal proceedings, the decision on preventive measures may be subject to interlocutory appeal. A decision of the prosecutor for a preventive measure is subject to interlocutory appeal to the regional court before which the proceedings are pending. Such an interlocutory appeal from an order on preventive measure must be examined without delay.

Since the preventive measures interfere with the human rights of the accused, he is entitled at any time to ask to have a preventive measure revoked or amended; such a motion must be resolved by the prosecutor not later than three days after filing; or, if the indictment has already been filed, by the court before which the case is pending. The order of the court deciding on the motion may only be subject to the interlocutory appeal, if the motion was submitted after at least 3 months since the date of the issuing the decision on the preventive measure.

In addition, a preventive measure must immediately be revoked or amended if its basis has ceased to exist, or new circumstances arise which justify the revoking, or its amendment. The preventive measure applied by the court may also be, in the course of pre-trial proceedings, revoked or amended to a milder measure by the prosecutor.

Surveillance

In the pre-sentencing phase of the criminal proceedings, the accused may be committed to the surveillance of the Police and, if the accused is a soldier, to the surveillance of the soldier's commanding officer (Art. 275 par. 1 CCP).

A person under surveillance is obligated to comply with the conditions set forth in the order of the court or prosecutor. These conditions are flexible – the legislator mentioned that they may consists in the prohibition of absenting the accused from a designated place of residence, in his having to report to the agency under the surveillance of which he re-

mains in specified time intervals, and to inform such an agency of any intention to absent himself and the time of his return, in the prohibition to contact the injured person or other persons, to approach specified persons closer than a specified distance, to remain in specified places, but they may also take form of other limitations on the freedom of movement of the accused if these are necessary to assist the surveillance. Details on the modalities of the execution of the measure should be specified in the decision imposing this measure.

If the accused is charged with an offence connected with the use of violence or with the threat of its use to the detriment to the next of kin or another person cohabiting with him, surveillance may be applied instead of detention, provided that the accused moves out the premises which he cohabitated with the injured person at a specified time and indicates his place of residence.

A person supervised by the Police is obligated to appear at a specified Police station with a document stating his identity, and to provide information necessary to establish if he fulfils the requirements set in the decision or of the court or of the prosecutor. If he fails to fulfil these requirements, the supervising authority immediately informs the court or the prosecutor.

In 2014 surveillance was applied with regard to 15.769 persons, and in 2015 – with regard to 17.815 persons which constituted 45% of all preventive measures applied that year. It has been the preventive measure the most frequently applied since 2013.

Bail

Bail is the second most frequently applied non-custodial preventive measure. The Polish criminal procedural law provides for three forms of bail: material bail, group guaranty, guaranty by a trustworthy person. Material bail is used the most often, whereas the two other forms are very seldom applied.

When stated in monetary terms, bail may take the form of cash, securities, a bond, or a mortgage. It may be deposited by the accused or another person, the latter is more frequent in practice. The amount, kind and conditions of the bail, and particularly the time-limit for depositing, are specified in the decision, with due regard to the financial circumstances of the accused and the person posting bail, the gravity of the damage caused and the character of the act committed.

If the bail was posted by another person, this person enjoys certain rights within the framework of the proceedings, in particular he must be notified on each occasion that the accused is summoned to appear. He

must also be informed that, pursuant to Art. 268 CCP, the property and obligations which constitute bail will be subject to forfeiture or collection if the accused takes flight or goes into hiding. If the course of the criminal proceedings is otherwise hindered, such property may be subject to forfeiture or collection pursuant to an appropriate decision.

The forfeiture of the property constituting bail or the collection of the sum pledged is ordered *ex officio* by the court before which the proceedings are pending; or in the preparatory proceedings, by the court having jurisdiction over the case, on the motion of the prosecutor. The accused and the person posting bail have the right to participate in the court session or to file written statements. An accused deprived of liberty is brought to such session if the president of the court or the court itself consider it necessary. The order described here may be subject to interlocutory appeal.

The property or sum of money constituting bail which has been forfeited or collected, is transferred or paid in to the State Treasury; the injured person will then have priority in satisfying his claims resulting from the offence, if damages cannot be redressed by other means.

In 2014 material bail was applied with regard to 6.508 persons, and in 2015 – with regard to 6.892 persons which constituted 17,5% of all preventive measures applied that year.

Personal forms of guarantees are group and individual guaranty. A group guaranty has a more formal character and may be given by a manager of the plant, office, school or higher education establishment of which the accused is an employee or student, or by a community organisation of which he is member, on the motion of such persons. Such a guaranty states that the accused will appear whenever summoned and will not obstruct the course of the proceedings; if the accused is a soldier, such guaranty may be taken from the relevant collective of soldiers, declared through its commanding officer. Group guaranty was applied with regard to 7 persons in 2014 and 38 persons in 2015. An individual guaranty to the effect that the accused will appear whenever summoned and that he will not obstruct the course of the proceedings, may also be accepted from any trustworthy person (Art. 272 CCP). In practice these persons are celebrities, politicians, academics, etc. There were 22 cases of individual guaranty in 2014 and 59 in 2015.

Conditional discontinuance of proceedings

The Polish criminal proceedings are based on the principle of mandatory prosecution, which means that a prosecuting authority (pros-

ecutor, police or other authorised bodies) may not choose not to prosecute an offence. They may however strive to simplify the pre-trial proceedings and conclude them in a consensual way, negotiating the penalty with the accused who pleads guilty, though a final decision on the outcome of the proceedings always depends upon the court. A consensual conclusion of criminal proceeding, which has become rather frequent since 2003 when it was first introduced into the Polish law, fundamentally consists in receiving a sentencing judgement and imposing a penalty on the accused, no different from the penalties imposed within ordinary trial. Therefore, it seems useful to examine here the conditional discontinuance of proceedings, which is the least severe penal measure applied by the court in reaction to a crime[18].

The conditional discontinuance of proceedings is a probation institution allowing not to impose a penalty on the accused, but instead submitting him to probation for a period of time.

As any probation institution, it may be applied only when both substantive and formal conditions are fulfilled. The formal condition refers to the upper statutory limit of the penalty for an offence committed by the accused which may not exceed 5 years deprivation of liberty.

Concerning the substantive conditions, the court may conditionally discontinue the criminal proceedings if the guilt and social consequences of the act are not significant, the circumstances of its commission do not raise doubts, and the attitude of the perpetrator not previously penalised for an intentional offence, his personal characteristics and his way of life to date provide reasonable grounds for the assumption that even in the event of the discontinuance of the proceedings, he will observe the legal order and particularly that he will not commit an offence.

As in the case of all probation institutions in the Polish criminal law, the decision in the matter of conditional discontinuance is discretionarily taken by the court.

The conditional discontinuance is made for the term of probation which is between one and three years; it runs from the date the judgement becomes valid and final. When discontinuing conditionally the criminal proceedings, the court may, in the probation period, place the perpetrator under the supervision of a probation officer or a person of public trust, association, or community organisation whose activities include educational care, preventing the demoralisation of or providing assistance to sentenced persons.

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[18] See more in T. Kozioł, *Warunkowe umorzenie postępowania karnego*, Warsaw: Wolters Kluwer Polska, 2009, ch. 1.

Also, in discontinuing conditionally the criminal proceedings, the court must require the perpetrator to redress the damage in whole or in part, and may impose on him most of the obligations specified in Art. 72 § 1 PC[19] and also adjudicate a pecuniary consideration and an interdiction to drive a vehicle, for a period of up to 2 years.

If the perpetrator does not behave correctly, the court may be bound to resume the proceedings. It must obligatorily resume the proceedings, if the perpetrator has during the probation period committed an intentional offence, for which he has been validly and finally sentenced. Optionally, the court may resume the proceedings if the perpetrator during the probation period flagrantly breaches the legal order, and in particular if he committed an offence other than that specified above, evades supervision, does not perform the obligations or penal measure imposed or if he does not fulfil the settlement concluded with the injured person. This option becomes an obligation if the perpetrator misbehaved after having been previously reprimanded by his probation officer in writing.

Finally, the court may also resume the criminal proceedings if, after the decision on the conditional discontinuance was rendered but before it became valid and final, the perpetrator flagrantly breached the legal order, and in particular if he committed an offence within that time.

In any case, however, the criminal proceedings conditionally discontinued may not be resumed any later than 6 months after the expiration of the probation period.

The rate of the frequency of the conditional discontinuance of proceedings has remained rather similar over the last few years. The data indicates that it was used with regard to 26 022 persons in 2014, 29 710 in 2013, 30 732 in 2012. Over the last 15 years it was the least frequently applied in 2007 (with regard to 20 915 persons), and the most often in 2002 (with regard to 38 484 persons).

2.2. *Global evaluation of the applicable provisions*

The non-custodial preventive measure significantly contribute to the decrease of the prison population in Poland. Certainly, they could be modernized, for instance the surveillance could be mixed with the electronic monitoring, as advised in the Rule III.12. of the Recommendation (99) 22 of the Committee of Ministers. However, the current legal framework seems flexible enough from the practical point of view, allowing the authorities to ensure the proper conduct of the pre-trial proceedings and to adjust preventive measures to particular cases at the same time.

[19] See below on conditional suspension of the execution of the penalty.

However, aside the legal provisions, the impact of the non-custodial preventive measures on the size of the prison population is mainly related to the change of the policy on the pre-trial detention. These measures would not have constituted such a significant alternative to detention, if the policy on pre-trial detention had not been modified over the last several years. As it has been mentioned above, in the beginning of the years 2000 pre-trial detention was applied in up to 50% of cases of application of preventive measure[20], whereas at present it stands for 21% of all preventive measures. This is due to a change of approach towards the preventive measures by both the government and practitioners. For many years, until recently, pre-trial detention was considered as a primary preventive measure, whereas it should be an exception. Also, the length of the pre-trial detention was often excessive. This resonated with the penal populist policy formulated by the right wing politicians in power at the beginning of the years 2000s. and the general punitiveness of the Polish practitioners and Polish criminal law system, as well as the Polish society in general.

Yet, in recent years the fight against crime has to a large extent disappeared from the political agenda, and the punitive approach has evolved. Whereas in the beginning of the years 2000s preventive measures were used on a larger scale by the courts – in 2006 they were applied with regard to over 97 thousand people, this number have significantly decreased in recent years – in 2015 the preventive measures were applied with regard to 39.342 people. The decline of the number of people with regard to whom preventive measures were applied may be a result of, first, a general drop in the level of crime in Poland noted in recent years[21], second, a general less severe approach toward persons accused of committing a crime, and third, a partial decriminalization of driving while intoxicated. Also, for many years pre-trail detention was a preventive measure applied with regard to the highest number of persons, which has recently changed in favour of surveillance, as indicated above, consisting mainly in requiring the person concerned to reside at a specified address. This latest tendency is in line with Rule III.12 of the Recommendation (99) 22 of the Committee of Ministers[22].

These two factors combined: less frequent application of preventive measures in general and less frequent application of the pre-trail deten-

[20] See J. Kosonoga, *Tymczasowe aresztowanie*, n. 6, 302.

[21] *http://statystyka.policja.pl/st/ogolne-statystyki/47682, Postepowania-wszczete-przestepstwa-stwierdzone-i-wykrywalnosc-w-latach-1999-2015.html.*

[22] Although the length of the pre-trial detention has not decreased and in 2015 it was up to 7 months for less serious crime and up to 14 months for more serious crime.

tion in particular, have largely contributed to a decrease of the number of prisoners, as reflected in Table 1.

The new policy on non-custodial preventive measures, which certainly follows the Recommendation (99) 22 of the Committee of Ministers, has a much stronger impact on the number of prisoners than conditional discontinuance of criminal proceedings. However, the latter is an important tool of reaction to petty crime and may potentially be used on a larger scale since the 2015 reform, which enlarged the scope of application of this institution to all offences liable to a maximum upper limit of penalty of 5 years instead of 3 years. It is however too soon to assess the practical significance of this recent modification.

3. *Measures at the judgment*

3.1. *Analytical examination of the applicable provisions*

Based on statistical data, three types of measures which constitute alternatives to short-time detention at the judgment may be identified in Polish criminal law: (*i*) penalties alternative to deprivation of liberty, (*ii*)

TABLE 3. *Types of penalties in the years 2000-2014*

Year	Convicted persons in total	Fine (%)	Limitation of liberty (%)	Deprivation of liberty (%)	Deprivation of liberty conditionally suspended (%)
2000	222.815	15,1	6,6	13,8	64,4
2001	315.013	20,5	9,0	11,7	58,7
2002	365.326	20,7	10,7	9,8	58,7
2003	415.993	22,4	12,7	8,8	56,0
2004	513.410	21,7	14,0	9,5	54,2
2005	504.281	20,0	13,4	8,5	57,8
2006	462.937	19,1	12,5	9,2	58,9
2007	426.337	19,5	11,0	8,8	60,3
2008	420.729	21,2	9,7	9,1	59,6
2009	415.272	21,2	10,5	9,1	58,8
2010	432.891	21,3	11,5	9,1	58,0
2011	423.464	22,1	11,7	9,7	56,5
2012	408.107	22,4	12,4	10,2	54,9
2013	353.208	21,7	11,7	11,2	55,3
2014	295.353	21,4	11,2	12,1	55,4

Source: Ministry of Justice.

conditional suspension of the execution of the penalty, (*iii*) special measure. The catalogue of penalties, set forth in Art. 32 PC, enumerates five types of penalties: fine, limitation of liberty, deprivation of liberty, deprivation of liberty for 25 years, deprivation of liberty for life. The last three penalties consist in isolation, whereas the two first penalties constitute alternatives to detention and will be discussed below.

Fine

The fine is mentioned in Art. 32 PC first, which means that it should be applied as the first choice penalty[23].

The fine has two forms – it may be imposed autonomously, as a main penalty, or cumulatively, with the penalty of deprivation of liberty, if the perpetrator committed an act for material benefit or gained material benefit from his act. Only the first form of the fine constitutes an alternative to detention.

According to the 1997 PC fine is applied on the basis of a system of daily rates, commonly approved by experts as providing for wider possibilities for individualisation. Pursuant to Art. 33 para 1 PC, a fine is imposed in terms of daily rates defining the number of daily rates to be levied and the amount of each rate; unless otherwise provided by law, the lowest number of daily rates is 10, and the highest is 510[24]. Pursuant to Art. 33 para 3 PC, in setting the daily rate, the court considers the income of the perpetrator, his personal situation, family situation, property relationships and his earning capacity; the daily rate may not be lower than 10 Polish zlotys or higher than 2000 Polish zlotys.

If the offender does not pay the fine as imposed, he may be subject to enforced execution. If that fails, the fine may be changed into the penalty of limitation of liberty (with regard to fines up to 120 daily rates) or even the penalty of deprivation of liberty (with regard to fines above 120 daily rates or if the offender does not want to perform community service or if the limitation of liberty is impossible or not purposeful for other reasons).

Data indicates that in practice fine is applied in approximately 20% of sentences. On the average a fine amounts up to is around 2500 zlotys (600 EUR).

Limitation of liberty

This penalty is relatively new to the Polish legal systems, as it was first introduced in the Penal Code of 1969. The penalty was further

[23] See *Justification of the governmental draft*, *Uzasadnienie rządowego projektu*, 137.
[24] Originally it was 360.

maintained in the PC of 1997. In principle, this penalty resembles the community service known to other legal systems.

The penalty of limitation of liberty is mentioned second in the catalogue of penalties in Art. 32 PC of 1997, which suggests it should be applied when the court decides not impose a fine but before it imposes detention. The provisions on this penalty have been considerably modified in recent months.

Pursuant to the original version of Art. 34 PC of 1997, unless otherwise provided by law, the penalty of restriction of liberty was to be applied for not less than one month and not more than 12 months; it was imposed in terms of months. While serving the penalty of restriction of liberty, the sentenced person: (1) might not have changed his permanent place of residence without the permission of the court, (2) was to be obligated to perform work designated by the court, and (3) was to be obligated to provide explanations regarding the progress of terms of serving the penalty.

The obligation of work meant that the offender was to perform supervised work for 20 to 40 hours a month. It was also provided that the work was to be performed without remuneration and for community purposes designated by the court, in a suitable establishment, health service or social welfare unit, organisation or institution conducting charity work or work for the purposes of a local community. However, with regard to an employee, the court might have decided that, instead of the obligation to work, between 10 and 25% of the remuneration might have been deducted for the benefit of the State Treasury or for the community purpose so designated by the court; the offender while undergoing this penalty was not allowed to terminate his employment without the permission of the court. The latter form of limitation of liberty was hardly ever pronounced.

Pursuant to Art. 34 para 3 PC, the court should have determined the place, time, type and method of fulfilling the obligation of work after hearing the sentenced person's statement.

In 2010[25] it was specified that the work performed by the offender was "unpaid, supervised work for community purposes", and the obligation to consult the accused with regard to the conditions of the execution of the penalty, in particular to decide in which institution the penalty might be served, was shifted from the courts to the probation officers.

In the course of partial recodification of criminal law, conducted in 2015, the penalty of limitation of liberty was considerably modified.

[25] Act Amending the Penal Code, of 5 November 2009, O.J. No 206, item 1589, entered into force on June 6, 2010.

Firstly, the length was prolonged and it could be pronounced for up to 2 years (in terms of years and months). Secondly, the forms of the execution of the limitation of liberty were extended. Aside from the work for community purposes and the deduction of the remuneration this penalty might also have been imposed as a probation obligation (obligation to work, learn, to abstain from alcohol, drugs or other types of intoxicating substances, obligation to enter into therapy, obligation to abstain from remaining in certain circles or from contacting or approaching victim or other persons) and the obligation to remain in the place of residence was additionally secured by the electronic monitoring. The electronic surveillance might not have exceeded 12 months in total, 70 hours per month and 12 hours per day. The latter solution was revolutionary, as before July 1, 2015, that is before the entry into force of the reform, the electronic surveillance constituted a form of the execution of the penalty of deprivation of liberty. All of these forms of limitation of liberty could have been applied separately or jointly.

Eventually however, the two new forms of the execution of the limitation of liberty provided for in 2015 were repealed by the new law amending the Penal Code, which entered into force on April 15, 2016. The only amendment that was upheld refers to the prolongation of the period of limitation of liberty, which still amounts up to 2 years. On the other hand, the electronic surveillance was again turned into a form of the execution of deprivation of liberty.

Therefore, currently, the limitation of liberty may be applied for a period between 1 month and 2 years in a form of unpaid, supervised work for community purposes (20 up to 40 hours per month) or deduction of the remuneration (between 10 and 25% of monthly salary) for a community purpose so designated by the court. These forms may be applied separately or jointly. In addition, the offender may be obliged to submit to probation obligations set forth in Art. 72 PC.

The modalities of the execution of the penalty at hand are determined at the executory phase of the proceedings by the probation officer after having heard the offender. The work is provided in an organizational unit of the local self-government (e.g. city gardens company) or for the benefit of an organisation helping children, youth, poor, etc., close to the offender's residence. The execution of the penalty is supervised by the court. The cost of the insurance against accidents is covered by the State Treasury.

In case of any difficulties, the execution of the penalty may be postponed or a break may be made. The modalities may also be modified flexibly during the execution.

If the offender refuses to take up work, the court must change the limitation of liberty into deprivation of liberty. If the offender does not fulfil the obligation set forth by the sentencing court, this is optional. This decision may however be reversed again provided the offender declares that he would fulfil the obligations as required. In practice, the limitation of liberty is applied in around 10-12% of sentences.

Conditional suspension of the execution of the penalty

The conditional suspension of the execution of penalty is a probation measure, known to the Polish criminal legal system for almost a hundred years. As it is shown in Table 2, the conditional suspension of the execution of the penalty of deprivation of liberty has been the most frequent means of reaction to crime in Poland – since mid-90s. up to 60% of convictions are convictions to imprisonment the execution of which has been conditionally suspended.

The system of application of conditional suspension of penalty set in the PC of 1969 was remodelled in the Penal Code of 1997. Then it was modified again in July 2015. The actual impact of the amendments to the conditional suspension of the execution of the penalty which came into force on July 1, 2015 are yet to be established. The analysis below refers to both the old and new legal framework.

Pursuant to Art. 69 of the PC before the 2015 amendments, the court might have conditionally suspended the execution of a penalty of deprivation of liberty of up to 2 years, restriction of liberty or a fine adjudicated as a main penalty, if it was regarded as sufficient to attain the objectives of the penalty with respect to the perpetrator, and particularly to prevent him from relapsing into crime. The conditional suspension, as provided in the original version of the 1997 PC, was applicable to all types of penalties, including fine and limitation of liberty. That could have given grounds to very flexible and unconventional punitive policy. However, in practice the possibility to suspend the fine and limitation of liberty were hardly ever used – the proportion of both conditionally suspended fines and limitation of liberty has been below 1% of all convictions[26].

Currently, after the 2015 reform, the possibility to conditionally suspend the execution of penalty applies exclusively to the penalty of deprivation of liberty, up to one year, provided that the perpetrator was not al-

[26] Detailed data in J. Skupiński, "Warunkowe zawieszenie wykonania kary pozbawienia wolności", in J. Jakubowska-Hara, J. Skupiński (eds.), *Alternatywy pozbawienia wolności*, op. cit., 20-21.

ready convicted to deprivation of liberty at the time of the commission of the act and if it is regarded as sufficient to attain the objectives of the penalty with respect to the perpetrator, and particularly to prevent him from relapsing into crime (Art. 69 para 1 PC). This new provision provides for a threefold limitation of the application of the conditional suspension – the suspension does not apply anymore to either fine or limitation of liberty, the time limit of the imposed imprisonment has been decreased by half to one year (and that is currently the only formal requirement of the application of the conditional suspension), and it only applies to persons who were not already convicted to imprisonment at the moment of the commission of the offence.

In suspending the execution of a penalty, the court should primarily take into consideration the attitude of the perpetrator, his personal characteristics and conditions, his way of life to-date and his conduct after the commission of the offence (Art. 69 para 2 PC). This is a so-called positive criminological prediction, which is of utmost importance, as currently individual circumstances of the interested person constitute the exclusive substantive ground for the application of the conditional suspension of execution of the penalty.

The suspension of the execution is always facultative and depends upon the decision of the court. However, before 2015 the law provided for some limitation as to the application of the suspension. And so it might not have been applied to multirecidivists, perpetrators of terrorists acts, to persons participating in organised crime, unless it was an exceptional case justified by extraordinary circumstances. Currently, all these limitations are waived and the only relative limitation is set forth in Art. 69 para 4 PC, pursuant to which the conditional suspension may only exceptionally be applied to perpetrators of hooligan misdemeanour and of repeated driving under influence of alcohol or while intoxicated (criminalised under Art. 178a para 4 PC).

The suspension of the execution of the penalty is granted for a probation period. The duration of this period was also shortened in 2015. Before July 1, 2015, the probation period was to run from the time the sentence becomes valid and final and was for: (1) from 2 to 5 years – in the case of a conditional suspension of the execution of a penalty of deprivation of liberty, (2) from one year to 3 years – in the case of a conditional suspension of the execution of a fine or a penalty of restriction of liberty. In the case of the conditional suspension of the execution of a penalty with respect to a perpetrator who is a young offender or the multirecidivist or belonging to other exceptional category, the probation period was from 3 to 5 years. Currently, pursuant to Art. 70 PC, the probation period is from one year to 3 years and runs from the time the sen-

tence becomes valid and final. The probation period is from 2 to 5 years in case of the conditional suspension of the execution of a penalty with respect to a perpetrator who is a young offender or a perpetrator who committed a violent act to the detriment of a cohabiting person.

The conditional suspension of the execution of the penalty has always been a multifaceted measure, in the sense that in practice it might have taken diverse forms. It might have constituted a simple suspension, where the court pronounced the sentence and the convicted person left the court building without any further consequences. However, it might also have been accompanied by additional penal measures, such as a fine or probative obligations. After the 2015 reform, the application of at least one probative obligation, provided for in Art. 72 para 1 PC, is mandatory. This is a way to turn the conditional suspension of the execution of the penalty into a real, even though minimal, inconvenience for the offender in order to let him experience the repressive and probative character of this measure.

Regarding the additional measures imposed by the court when conditionally suspending the execution of the penalty, firstly, the court may impose a fine, if its imposition is not provided for on another basis. The amount of the fine was considerably increased – at first it was to be up to 180 times the daily rate, then up to 270 times. Currently Art. 70 para 1 PC does not provide for any upper limit which means that a fine may amount to the statutory upper limit, equal to 540 times the daily rate. The fine constitutes in this context a measure of repression, allowing the court to make sure that the offender suffers at least some minor inconvenience in result of the act he committed. In practice, this form of fine has been applied rather frequently – the courts imposed a fine in around 40% of cases in which they conditionally suspended the execution of the penalty[27]. On the other hand, its imposed amount is very low, even lower than when the fine is pronounced as a main penalty[28].

Secondly, in suspending the execution of a penalty, the court may impose one, several or all obligations, enumerated in Art. 72 para 1 PC. They are as follows:

1) to inform the court of the probation officer about the progress of the probation period,

2) to apologise to the injured person,

3) to carry out a duty incumbent upon him in order to provide support for another person,

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[27] J. Skupiński, *Warunkowe zawieszenie*, 45.

[28] J. Jakubowska-Hara, "Kara grzywny jako alternatywa pozbawienia wolności", in J. Jakubowska-Hara, J. Skupiński (eds.), *Alternatywy pozbawienia*, op. cit., 85.

4) to perform remunerated work, to pursue an educational activity or train himself for an occupation,

5) to refrain from abusing alcohol or using other intoxicants,

6) to submit to medical treatment for dependence,

6*a*) to submit to medical treatment, particularly psychotherapy or psychoeducation,

6*b*) to participate in corrective and educational activities.

7) to refrain from frequenting specified community circles or places,

7*a*) to refrain from contacts with injured person (victim) or other persons in a specified manner or to approach to injured person or other persons,

7*b*) to leave a place shared together with injured person,

8) to engage in other appropriate conduct in the probation period, if it may prevent the commission of a further offence.

The court may also obligate the perpetrator to redress the damage in whole or in part, or to pay a pecuniary consideration.

Finally, in suspending the execution of the penalty of deprivation of liberty, the court may, in the probation period, place the perpetrator under the supervision of a probation officer or a person of public trust, association, or community organisation whose activities include educational care, preventing the demoralisation or providing assistance to sentenced persons. This decision is facultative except for a young perpetrator of an intentional offence, multirecidivist, or the perpetrator of an offence committed on the basis of sexual orientations disorders, or the perpetrator who committed a violent act to the detriment of a cohabiting person, when the placing under supervision is mandatory.

Regarding the modalities of the probation obligations, the time and manner of the execution of imposed obligations is determined by the court after hearing from the offender, who only needs to consent to submit to medical treatment, particularly psychotherapy or psychoeducation, and to participate in corrective and educational activities.

In order to make the conditional suspension as flexible as possible, Art. 74 PC provides that if educational considerations so warrant, the court may, during the probation period, institute, extend or modify the obligations imposed on a person sentenced to deprivation of liberty with conditional suspension of its execution, as mentioned in sections 3 through 8 above, or release him from these obligations (except the obligation to compensate the victim), and likewise either place the offender under supervision or release him from the aforesaid. The release from supervision may also take place if the supervision is impossible or very difficult for reasons that are not a fault of the offender.

As any probation measure, the conditional suspension of the execution of the penalty of deprivation of liberty may end positively or negatively. A positive ending means that during the probation period the offender did not breach the conditions of the probation. In such event the condemnation is erased by virtue of law 6 months from the termination of the probation period (Art. 76 para 1 PC).

However, the probation period may also take a negative turn. In such event the execution of the penalty originally imposed by the court is at times mandatory and at times facultative. The court must order the execution of the penalty, if the offender during the probation period committed an intentional offence similar to the previous one[29], for which he has been validly and finally sentenced for a penalty of deprivation of liberty the execution of which was not conditionally suspended (Art. 75 para 1 PC).

Additionally, the court is obliged to order the execution of the penalty, if the person sentenced for a an offence connecter with the use of violence or with the threat of its use to the detriment of a next of kin or a cohabiting person in the probation period flagrantly breaches the legal order, with the use of violence or with the threat of its use to the next of kin or a minor cohabiting with the perpetrator.

Optionally, the court may order the execution of the penalty, if the sentenced person in the probation period flagrantly breaches the legal order, and, in particular, if he committed an offence other than that specified above, has not paid the fine, has evaded supervision, or failed to fulfil the obligations or penal measures imposed. The court may also order the execution of the penalty if, after the sentencing decision was rendered but before it became valid and final, the perpetrator flagrantly breached the legal order, and in particular if he committed an offence within that time. In both events, the court may shorten the penalty to be executed, by half at the most (Art. 75 para 3a PC). The order to execute the penalty may not be issued any later than 6 months after the end of the probation period.

Since the 2015 reform, pursuant to Art. 75a PC, it has also become possible to change the penalty of deprivation of liberty to be executed into the penalty of limitation of liberty in form of work for community purposes, or into a fine. In such event the penalty of limitation of liberty may not exceed 2 years and the fine – 810 times the daily rate. This swap

[29] Pursuant to Art. 115 para 3 PC, similar offences are offences of the same type; the offences committed with the use of violence or with the threat of its use, or the offences committed with an intent to secure financial or material benefits shall be regarded as similar offences.

is however only possible with regard to persons who in the probation period flagrantly breach the legal order, and, in particular, if they committed an offence other than that specified above, have not paid the fine, have evaded supervision, or failed to fulfil the obligations or penal measures imposed; or if, after the sentencing decision was rendered but before it became valid and final, they flagrantly breach the legal order, and in particular if they committed an offence within that time (Art. 75a para 2 PC). However, if the sentenced person fails to execute the penalty of limitation of liberty or the fine or other penal measures, the court orders to execute the penalty of deprivation of liberty (Art. 75a para 5 PC).

Autonomous penal measure

As a special measure, alternative to detention, or other penalties, the Penal Code provides for a possibility to autonomously impose a penal measure[30], forfeiture, or a compensatory measure, instead of imposing a penalty. Pursuant to Art. 59 PC, if the offence is subject only to the penalty of a deprivation of liberty not exceeding 3 years or, alternatively, a lesser penalty, and the social consequences of the act are not significant, the court may renounce the imposition of the penalty all together if it decides to impose a penal measure, forfeiture or a compensatory measure at the same time, and the purpose of such a penalty is thus served by the measure[31]. This measure is however applied very seldom, several times per year.

3.2. *Global evaluation of the applicable provisions*

Fine and limitation of liberty should be the penalties applied the most frequently in reaction to crime. However, in reality they are used not often enough and they do not constitute viable alternatives to short-time detention.

The legislator meant for the fine to be the most important alternative to deprivation of liberty, and at the same time a measure the most

[30] Pursuant to a catalogue provided in Art. 39 PC, the penal measures are: 1) deprivation of public rights, 2) interdiction preventing the occupation of specific posts, the exercise of specific professions or to engage in specific economic activities, 2a) interdiction of carrying out an activity connected with fostering, treating, educating of minor children and with protecting them, 2b) obligation to prevent from staying in particular environments or places, interdiction of communicating with particular person(s), or interdiction of leaving a specified whereabouts without court's permission, 2c) interdiction on participating in a mass event, 2d) interdiction on entering gambling houses and on gambling, 2e) obligation to vacate premises cohabitated with the injured person, 3) interdiction on driving vehicles, 8) making the sentence publicly known.

[31] A. Błachnio-Parzych, "Samoistny środek karny jako instrument racjonalnej polityki karnej", in J. Jakubowska-Hara, J. Skupiński (eds.), *Alternatywy pozbawienia*, op. cit., 147 ff.

frequently applied in reaction to petty and medium crime[32]. This did not happen, for two reasons. Firstly, the courts did not fulfil the requirement set forth by the legislator in Art. 33 para 3 PC and were unable or unwilling to accurately establish the financial situation of the accused in order to pronounce a fine that would constitute an actual burden for him/her. In practice, they would rather avoid the analysis of the accused's financial situation by using the escape doors provided by the legislator in Art. 58 para 2 PC, pursuant to which no fine is to be imposed when the income of the perpetrator, his situation or potential to earn provide reasonable grounds for the supposition that the perpetrator would not honour the fine and that enforcing the same by execution would not be possible. And, secondly, since the court is usually unaware of the actual financial situation of the offenders, and assumes that the offender is rather poor, as is the Polish society in general in comparison to the Western societies, the fine is usually very low, on the average amounting to 1000-2000 zlotys (200-400 EUR), which is too low for the fine to become an actual alternative to short-time detention.

This practice may change with the new wording of Art. 213 CCP, which obliges the prosecuting authority to collect information on the financial status of the accused. If necessary, they may electronically receive current information on the sources of income of the accused and his financial status, including data on his tax duties, from the electronic system run by the Minister of Finance. The actual impact of this provision is so far unknown.

The limitation of liberty was also meant to constitute an alternative to detention, however it has never really fulfilled this goal, as it was rarely applied in practice[33]. Seemingly, fearing that the penalty would not be enforced, the courts abstained from pronouncing it on a larger scale. There is data indicating that there are wide geographical discrepancies between different places in the country when it comes to the enforcement of the limitation of the penalty which suggests that the system worked only in communities where the courts were aware of the willingness and ability of the local government to organise community service.

The attempt undertaken in 2015 to make the limitation of liberty more flexible, to modernise it, inter alia by combining it with the electronic monitoring, politically failed and was revoked as early as in April

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[32] M. Melezini, "Kara grzywny", in M. Melezini (ed.), *Kary i środki karne. Poddanie sprawcy próbie. System prawa karnego*, 6, Warsaw: C.H. Beck, 2010, 304.

[33] B. Kunicka-Michalska, "Kara ograniczenia wolności jako alternatywa pozbawienia wolności", in J. Jakubowska-Hara, J. Skupiński (eds.), *Alternatywy pozbawienia*, op. cit., 103-104.

2016. Therefore today the limitation of liberty has almost the very same form as it had a couple of decades ago. One may fear that it will not be applied more often, unless there is more political pressure in this direction.

In fact, at present the one and only real alternative to detention in the Polish legal system is the conditional suspension of the execution of the penalty. Yet, at the same time, this very measure has largely been contributing to the high imprisonment rate in Poland in recent years. The data shows that annually around half of the prison population (approximately 40 thousand persons) are incarcerated because they violated the conditions of probation with regard to the conditionally suspended execution of THE penalty of deprivation of liberty. This is due to the fact that, as mentioned above, a breach of obligations of probation is a mandatory, and at time optional, premise for the court to order the enforcement of the penalty. In addition, the actual duration of the penalty the execution of which is conditionally suspended is longer than the duration of the penalty of deprivation of liberty non-suspended. Seemingly, the judges have a tendency to impose longer penalties as a warning to the offender when they suspend the execution of the penalty than when they actually enforce the penalty and directly send someone to prison. In such event, eventually, in consequence of his breach of the probation obligation, the offender spends more time imprisoned than he would have spent had the execution of the penalty of deprivation of liberty not been conditionally suspended. Also, the system of information on previous convictions was not effective – sometimes the court deciding upon a case was not aware of a previous conviction to a penalty the execution of which had already been suspended and therefore suspended the execution of yet another penalty. That led to situations of several consecutive suspensions and eventually to a prolonged detention, after one of the courts decided to enforce the suspended convictions.

The weakness of the Polish system was rightly identified by the legislator, hence the amendments introduced to the PC in 2015. It is however too soon to assess whether the new restrictions of the scope of application of this institution will effectively affect the dimension of the prison population.

But one may also justly suggest that the recent legal reform is not profound enough to make the conditional suspension of the execution of the penalty work. In practice the suspension has most often been devoid of actual probation measures. The surveillance of the probation officer has been pronounced with regard to one fourth of the offenders benefiting from this measure only. The same statistics apply to probation oblig-

ations[34]. The conditional suspension of the execution of the penalty will not become a true alternative to detention unless it is imposed and enforced as an actual probation measure. That however financial requires resources and trained staff. The Polish practice in this regard is not in line with Rule V.22 of the Recommendation (99) 22 of the Council of Ministers.

Regrettably, also the autonomous penal measure it is very rarely applied in practice, even though it could constitute an important and actual alternative to short-time detention. It is probable that it does not match the real level of punitiveness of the judges who find it too lenient.

The legislator is aware of the weaknesses of the Polish system of alternatives to detention and introduces measures aimed at encouraging the courts to use the alternative penalties more often. Aside from the general obligation provided for in Art. 58 para 1 PC to impose the deprivation of liberty only as the last resort, the judge may also apply the new institution set forth in Art. 37a PC, which came into force on July 1, 2015. It allows the court to pronounce a fine or limitation of liberty instead of the penalty of deprivation of liberty, provided the penalty of deprivation of liberty for the offence does not exceed 8 years.

In addition, in order to shorten the period of detention, a possibility to impose jointly a penalty of deprivation of liberty and the penalty of limitation of liberty has been provided for in the new Art. 37b PC. Pursuant to this provision, the deprivation of liberty imposed on the convicted person may not exceed 3 months and 6 months – if the statutory upper limit of the penalty was at least 10 years; whereas the limitation of liberty may not exceed 2 years. In such event, the penalty of deprivation of liberty is executed in the first place.

4. *Measures after the judgment*

4.1. *Analytical examination of the applicable provisions*

The category of measures applied after the judgment contains a variety of measures. There are measures applied shortly after the final and valid sentence is given, such as electronic surveillance and measures applied in a longer perspective such as conditional release of the execution of penalty. These do constitute credible alternatives to detention and will be discussed below. There are also measures which allow to manage the periodical increases of the prison population, such as postponement of the execution of the penalty of deprivation of liberty, but they do not constitute alternatives to imprisonment as such.

[34] J. Skupiński, *Warunkowe zawieszenie*, op. cit., 47 ff.

Electronic monitoring

Electronic surveillance is a measure relatively new to the Polish legal system. It was introduced for the first time in 2007 and structured as a means of execution of the penalty of deprivation of liberty. Interestingly, as a novelty the electronic monitoring was introduced in a separate statutory act, entitled Act on the execution of the penalty of deprivation of liberty outside of penitentiary institution in the framework of the electronic monitoring[35], instead of being directly incorporated into the penal codes. The system of monitoring was launched in 2009, but for technical reasons it took several years for it to become fully operational on the whole territory of the country, which eventually happened in 2012.

In the framework of the 2015 reform, willing to emphasise the importance of monitoring in the Polish legal system, the legislator incorporated the monitoring into the Penal Execution Code. As it has been mentioned above, at the same time the electronic surveillance was transformed into one of the forms of the execution of the penalty of limitation of liberty. This legislative decision resulted in a sudden and radical decrease of the number of persons covered by surveillance. Therefore, in the course of a consecutive reform in April 2016 the electronic monitoring was again turned into a form of the execution of the penalty of deprivation of liberty as originally conceived in the Act of 2007.

As of 15 April 2016 the penalty of deprivation of liberty may be executed in a form of stationary electronic monitoring. This form may be applied by the penitentiary court if all of the following conditions are fulfilled: the person was sentenced to a penalty up to one year of imprisonment, and is not a recidivist; the monitoring is sufficient to attain the goals of the penalty; the offender has a specified permanent residence, and all adults cohabiting with him agree to the execution of the penalty in such a form; finally – technical requirements allow for the penalty to be executed in the form of monitoring (Art 43la PEC).

This form of the execution of the deprivation of liberty may be applied both with regard to persons who have not started to serve the penalty, provided that security reasons and the degree of demoralization as well as other particular circumstances do not prevent the monitoring, and to persons who are already in prison, if the attitude and behaviour of the sentenced person speak for it.

The decision on the application of the monitoring is taken by the penitentiary court at the executory stage of the proceedings, i.e. after the

[35] Act of 7 September 2007, unified text published in: O. J. of 2010, No 142, item 960, as amended, abolished on 1 July 2015.

sentencing judgement has been given and become final and valid. The court acts upon a motion of the sentenced person, his attorney, prosecutor, probation officer or the director of the prison. The motion has to be written and provide reasons for the request. The court has 30 days to take a decision in this matter.

The person under monitoring is obliged to wear an electronic bracelet at all times, to preserve it from damage, and to inform the authorities of technical problems with the monitoring. His main obligation is to remain at a specified location (place of residence) for at least 12 hours per day. When deciding on the application of the monitoring, the court determines the modalities of the execution of the penalty in form of monitoring during the week and the day. The offender may be allowed to leave the residence for reasons of work, religion, education, sports, culture, health, family, shopping, or in order to provide care to minors or sick, or to communicate with his attorney.

Also, when applying the monitoring the penitentiary court may impose probation obligations on the offender, provided for in Art. 72 PC. They may be flexibly modified during the period of the execution of the penalty. In addition, it is possible to allow the offender to leave the residence he was confined to for up to 7 days for health, family or personal reasons. Also, the monitoring may be paused for longer periods because of serious health issues or personal reasons.

The penalty of deprivation of liberty is considered executed when the monitoring is finalized, unless the decision on the application of monitoring was waived because the offender was not fulfilling the obligations set by the court.

Agency responsible for supervising persons under electronic monitoring is a special private body supervised the Ministry of Justice.

Overall over 40 thousand people were monitored since the launch of the system in 2009. Current technical capacity of the system is 12,500 and as of 30 June 2016 it was used in 22,8% as only 2.850 persons were monitored[36].

Conditional release

The conditional release of the execution of penalty (parole) is an important legal instrument strongly influencing the dimension of the prison population.

The conditions of the conditional release are twofold: formal and substantive. Formal conditions refer to the time served by the offender.

[36] *http://www.dozorelektroniczny.gov.pl/?page_id=230*.

Generally, the rule is that the offender may be conditionally released after serving at least half of the sentence. A recidivist may be conditionally released after serving two-thirds of the sentence, and a multirecidivist after serving three-quarters of the sentence. The person sentenced to 25 years of deprivation of liberty may be conditionally released after serving 15 years of the sentence, and the person sentenced to deprivation of liberty for life, after serving 25 years of the sentence. In particularly justified cases the court, in imposing the penalty of deprivation of liberty, may however determine even more rigorous restrictions to prevent the possibility of him benefiting from the conditional release, but in practice this possibility is used very seldom with regard to perpetrators of most horrible cases of murders.

Concerning substantive conditions, the court may conditionally release a person sentenced to the penalty of deprivation of liberty from serving the balance of the penalty, only when his attitude, personal characteristics and situation, his way of life prior to the commission of the offence, the circumstances thereof, as well as his conduct after the commission of the offence, and while serving the penalty, justify the assumption that the perpetrator will after release follow a penal or preventive penal measure imposed on him by the sentencing court and that he will respect the legal order, and in particular that he will not re-offend.

Like any probation institution, the conditional release is applied for a probation period. Generally, the portion of the penalty which remains to be served constitutes a probation period, however, pursuant to Art. 80 PC, it may not be less than 2 or longer than 5 years. If the sentenced person is a multirecidivist, probation period may not be shorter than 3 years, and in a case of the conditional release of a person sentenced to deprivation of liberty for life, the probation period is 10 years.

The offender conditionally released from prison may be submitted under supervision of a probation officer, a trustworthy person, an association, organization or institution dealing with education, prevention of demoralization or assistance to offenders. The supervision is mandatory with regard to sexual offenders, young offenders who committed an intentional offence, as well as persons sentenced to life imprisonment. The court may also impose probation obligations provided for in Art. 72 PC or an obligation of compensation.

If the released person follows the conditions of the release and respects the law, and the conditional release has not been revoked in the probation period and in the course of the following 6 months, the sentence is considered to have been served at the time of the conditional release.

However, if the released person does not follow the rules, the court is obliged to, or at times may, revoke the release and the person goes back to prison to serve the remaining part of the penalty. In such event, however, the sentenced person may not again be conditionally released before the lapse of one year from the date of committing him to the penal institution, and in case of the penalty of deprivation of liberty for 25 years or for life, before the lapse of 5 years.

The penitentiary court mandatorily revokes the conditional release, if the sentenced person during the probation period, committed an intentional offence, for which he has been validly and finally sentenced for a penalty of deprivation of liberty, the execution of which was not conditionally suspended.

Also, the penitentiary court is obligated to revoke the conditional release, if the person sentenced for a an offence connected with the use of violence or with the threat of its use to a next of kin or another minor cohabiting with the perpetrator, in the probation period flagrantly breaches the legal order, and, in particular, if he flagrantly violates the public order, using violence or threats again toward a next of kin or another minor cohabiting with him.

Optionally, the penitentiary court may revoke the conditional release, if the sentenced person in the probation period flagrantly breaches the legal order, in particular, if he committed an offence other than that specified above, or a different penalty was imposed, has evaded supervision, or failed to fulfil the obligations or penal or compensation measures or forfeiture imposed. This option becomes an obligation if the perpetrator misbehaved after having been previously reprimanded by his probation officer in writing.

The decision on the conditional release is taken discretionarily by the penitentiary court upon a motion of the offender, his attorney, prosecutor, probation officer or the director of prison. The court may also statute ex officio, but that hardly ever happens. In practice, the motions are most frequently filed by the sentenced persons themselves, directors of prisons and occasionally prosecutors. Data indicate that the success rate is radically higher for the motions submitted by directors of the prison. The decision of the court may be subject to an interlocutory appeal, which must be decided upon within 14 days.

In 2014 in total 41958 motions on parole were filed to the penitentiary courts, out of which 32,010 were submitted by the offenders and 9,929 by the directors of prisons. The success rate for directors was up to 94,7%, as 9402 motions were granted, whereas the success rate for offenders was considerably lower and amounted up to 21% (6,773 motions

granted). The data is similar for 2015. In total 39,733 motions were filed, out of which 9,192 by the directors of prisons (with the success rate of 94,4% – 8,673 motions granted) and 30,518 by offenders (with the success rate of 20,3% – 6,193 motions granted). It should be mentioned that the overall number of motions for conditional release has declined in the last two years in comparison to previous decade. When the prison population in Poland was close to 90 thousand people, up to 59 thousand motions were submitted annually[37]. At the same time both main categories entitled to file the motions to the court: the directors of prisons and offenders, were more active, filing more motions than in the last two years. However, the respective success rates were similar to the ones for the years 2014 and 2015, the structure of the courts' decision has not changed in this respect. Yet, since at the time the number of motions was higher than in recent two years, effectively more people left prisons in consequence of positive decisions on conditional release.

4.2. *Global evaluation of the applicable provisions*

Electronic monitoring is a valuable instrument allowing to limit the prison population, which is reaffirmed in the Recommendation CM/Rec (2014) of the Committee of Ministers to member states on electronic monitoring. However, in practice in Poland it does not constitute a credible alternative to detention. To a large extent this is due to its legal construction. Firstly, the decision with regard to the application of monitoring is taken in the framework of a separate legal proceedings, regarding the execution of the penalty, after the sentence was rendered by the penal court. Such a decision requires a special motion and may not be taken ex officio by the penitentiary court. If the sentenced person (or another entitled body) does not ask for it, the monitoring may not be applied. Today the decision is taken at the stage of the execution of the penalty because the monitoring is a form of the execution of the penalty of deprivation of liberty – and following a well-established tradition in the Polish criminal law, modalities of the execution are decided upon after the sentence was imposed.

In order to make the electronic monitoring more popular it might have to be transformed into an autonomous type of penalty or penal

[37] More detailed data for the years 1999-2007 in H. Kuczyńska, "Kształt i praktyka stosowania warunkowego przedterminowego zwolnienia jako czynnik wpływający na liczebność populacji więziennej", in J. Jakubowska-Hara, J. Skupiński (eds.), *Alternatywy pozbawienia wolności*, op. cit., 193 ff.

measure. In such event the decision in this regard would be transferred to the competence of the sentencing court, and it could be used at a larger scale. That would require yet another amendment to the Penal Code, but is certainly advisable. Also, alternatively, the penitentiary court responsible for the execution of the penalty could be obliged by the legislator to ask the offender if he is interested in monitoring. That, on the other hand, would require an amendment to the Penal Execution Code.

Since in practice the monitoring is used on such a small scale, the fact that it has rather limited capacity is not even an issue today. Data indicate that today in Poland there are over 27 thousand people who could theoretically benefit from this measure[38], as they fulfil the basic requirement of having been sentenced to detention up to one year. Yet, as it has been mentioned above, only 10% of them actually is monitored.

Certainly, the progress in the development of the electronic surveillance of offenders in Poland is easily observable. The upper limit of the penalty of deprivation of liberty imposed by the court and executed in the form of electronic monitoring, originally set on 6 months, was increased up to one year in 2010. Also, some of the original provisions, considerably limiting the possibilities to apply the monitoring, were abolished in 2010, such as an obligation on the offender to pay a small amount of money for joining the system of monitoring. However, today, the electronic monitoring constitutes a real alternative to short-time detention (up to one year) on a very limited scale and its contribution to the decrease of prison population is also minimal.

On the other hand, the parole has a significant impact on the prison population. For a long time it has been a very convenient instrument of criminal policy allowing to manage the overcrowding of prisons. Today, after the prison population has decreased, this aspect is less important. However, certainly the conditional release serves as a valuable alternative for detention at the stage of the execution of the penalty. Annually, one fifth of the prison population benefits from the release.

Also, taking into consideration the data on the success rate of motions for conditional release, it is clear that the conditional release constitutes a powerful tool in the hands of directors of prisons, allowing them to manage prisoners. This is further emphasised by the fact that a subsequent motion of the director of prison does not have to rest for 3 months (if the penalty imposed is not more than 3 years) or 6 months (if the penalty is over 3 years) after the first motion was refused, like it happens with motions submitted by the offender or his attorney.

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[38] *http://www.dozorelektroniczny.gov.pl/?page_id=230*.

During the recent reforms of penal law, the conditional release has been made more flexible, and these recent changes are positive. The legislator abolished a condition according to which the offender must have served at least half of the time, but no less than 6 months for regular offenders and no less than one year for multi-recidivists. That limitation made the conditional release inaccessible for prisoners sentenced for short-time detention. Currently, they may benefit from it as any other person sentenced to a longer penalty.

Yet, what still seems to be one of the major practical obstacles in the application of the release is the excessive length of the probation period. As it has been mentioned above, the minimum probation period is in principle the portion of the penalty which remains to be served, but it may not be less than 2 years. That means that the conditional release is not an interesting option for the offenders sentenced to short-time detention and actually any detention below 4 years. For, if released, they would have to be submitted to the supervision of the criminal system for a longer time than the time that they would have to spend in prison. Taking into account that only 15% of penalties served in prisons in 2015 were penalties above 5 years (9,417 final courts' decisions out of a total of 62,635), this disadvantageous provision affects a large group of offenders. Certainly, some persons still apply for it, obviously preferring the liberty to isolation. But when it comes to persons who have short time left to serve, they often prefer to stay in detention than to be conditionally released, expressing their refusal to parole at the hearing held by the penitentiary court in prisons. In my view this is contrary to rule 10 in the Recommendation Rec (2003)22 of the Committee of Ministers to member states on conditional release (parole), stipulating that "conditions or supervision measures should be imposed for a period of time that is not out of proportion to the part of the prison sentence that has not been served".

5. *Conclusion*

The situation in Poland is similar to this in other countries of the former communist bloc. There are significant differences in the imprisonment rates between the Western and Eastern part of Europe. The imprisonment rate is the highest in the countries of Central and Eastern Europe.

In 2014, as it is stated in the SPACE report, the rate was 467,1 in Russia, 305 in Lithuania, 240,3 in Latvia, 225,1 in Estonia and 204 in Ukraine. Then follow Poland, Moldova, Turkey, Slovak Republic, Albania, Hungary, Czech Republic, Montenegro, Romania and Macedonia.

The first Western country mentioned in the statistics is the UK – England and Wales (17th position).

The only exceptions here are Croatia and Slovenia with the imprisonment rates amounting respectively to 88.6 and 73,8. It may be due to the fact that these are states with small populations, culturally closely related rather with Austria and Italy than with the East European countries. Besides, they were formerly parts of Yugoslavia, which had broken rather early from the Soviet Union influence sphere.

There may be various explanations of this situation[39]. However, it seems that one of the main reasons of the high imprisonment rate in the post-Soviet countries is the restrictive penal climate, a high level of punitiveness, resulting in frequent application of detention. Seemingly personal freedom is still more valued in the West of Europe than in the East – for instance there is a difference between the Western and the Eastern part of Europe with regard to the frequency of the application of the penalty of deprivation of liberty.

In Poland, in the beginning of the years 2000s the main problem contributing to the high imprisonment rate and to the overcrowding was too frequent application of pre-trial detention and too low number of places in prisons. Over the years, the number of places in prisons was increased by, firstly, adopting some practical arrangements, such as turning all spare rooms into cells, secondly, by periodically managing statistics in a way to calculate e.g. prison hospital places etc. as regular cell places (possible before 2010), and thirdly, by changing criminal policy to some extent in order to decrease the flow of people (e.g. decriminalization). In addition, the policy on pre-trail detention was modified and today the pre-trial detention rate is rather low. In the end, according to Polish norms the prisons are not overcrowded but one should not forget that the prison density in Poland is calculated based on the cell surface of 3 sq. m per person. Sadly that means that people are serving the penalty of deprivation of liberty in bad conditions. Had the provision on the minimum cell surface been amended following the European standard, the prisons would have turned out to be overcrowded again.

Yet, there are still some dysfunctionalities in the Polish system of execution of penalties which contribute to the high imprisonment rate. First, the penalty of deprivation of liberty is applied rather often, as apparently less severe penalties – fine and limitation of liberty, are not cred-

[39] Some valuable explanation provided by K. Krajewski in K. Krajewski, "Penal Developments in Poland: New or Old Punitiveness?", in T. Daems, D. van Zyl Smit, S. Snacken (eds.), *European Penology?*, Oxford-Portland: Hart, 2013, 311-338.

ible alternatives to detention[40]. The limitation of liberty is not imposed by the courts as they are aware of the practical difficulties in the enforcement of this penalty, and the fine is not imposed often enough as the courts are unaware of the actual financial situation of the offender and the society as a whole is relatively not wealthy. But the system needs some flexibility, it needs alternatives to detention, as not everyone can be sentenced to imprisonment. Therefore, seeking alternative measures the judged have been applying the conditional suspension of the execution of the penalty of deprivation of liberty very often. The conditional suspension should be a probation measure, but in reality it is not. The probation system in Poland is not operating correctly, it does not provide necessary assistance to offenders. In particular only 1/4 of the convicted persons have a probation officer assigned to assist and supervise them during the probation period, mainly because of the lack of resources. Naturally, some of the offenders breach the conditions of probation (e.g. commit another offence) and are sent to prison anyway, thus increasing the prison population. It is the structure of penalties applied as well as an average length of the penalty of deprivation of liberty, which becomes longer in time, which are the main factors contributing to the high imprisonment rates.

What Polish system might need today to deal with the high imprisonment rate are two things. Firstly, it might need a more flexible and varied set of instruments of criminal policy, as advised by the Recommendations of the Council of Ministers. The existing legal framework provides for some flexibility already, but new instruments might also be adopted, for instance electronic monitoring might be used at a larger scale. Secondly, Poland also needs a change of mind on the criminal policy in general. We need to admit that the conditions in prisons are bad and that in order to decrease the high imprisonment rate we need to spend more money on probation and assistance to offenders. However, in the light of the high social punitiveness for now that seems rather unlikely.

[40] See results of a research project on alternatives to prison, carried out by the Institute of Law Sciences of the Polish Academy of Sciences, published in A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska, B. Kunicka-Michalska, C. Nowak, J. Skupiński, J. Jakubowska-Hara, J. Skupiński (eds.), *Alternatywy pozbawienia*, op. cit.

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ROMANIA

SUMMARY: 1. Prison population table (2000-2015). – 2. Alternatives to detention in the pre-sentencing phase. – 2.1. Analytical examination of the applicable provisions. – 2.2. Global evaluation of the applicable provisions. – 3. Alternatives to detention in the sentencing phase. – 3.1. Analytical examination of the applicable provisions. – 3.2. Global evaluation of the applicable provisions.– 4. Alternatives to detention in the post-sentencing phase. – 4.1 Analytical examination of the applicable provisions. – 4.2. Global evaluation of the applicable provisions. – 5. Conclusion.

1. *Prison population table (2000-2015)*

TABLE 1. *Prison population table*

Year	Population (in millions) - approx. value	Detainees (at 31 December)	Incarceration rate	Prison capacity	Overcrowding rate	Legal standard in collective cells(m^2/m^3)
2000	22.44	48,267	215	33,611	143.6	6 m^3
2001	22.13	49,840	225	34,612	144	6 m^3
2002	21.73	48,075	221	38,227	125.76	6 m^3
2003	21.63	42,815	197	37,363	114.59	6 m^3
2004	21.52	39,031	180	38,606	101.1	6 m^3
2005	21.38	36,700	170	37,375	98.19	6 m^3
2006	21.26	34,038	158	37,925	89.75	6 m^3
2007	21.13	29,390	136	36,632	80.23	6 m^3
2008	20.64	26,212	122	34,299	76.42	6 m^3
2009	20.44	26,716	124	33,960	78.62	6 m^3
2010	20.29	28,244	132	34,192	82.60	6 m^3
2011	20.2	30,694	143,7	26,618	115.31	4m^2 / 6 m^3
2012	20.1	31,817	158,6	27,125	117.29	4m^2 / 6 m^3

Continues

Follows: TABLE 1. *Prison population table*

Year	Population (in millions) - approx. value	Detainees (at 31 December)	Incarceration rate	Prison capacity	Overcrowd-ing rate	Legal standard in collective cells(m^2/m^3)
2013	20.02	33,434	167,7	29,379	113.80	$4m^2$ / $6 m^3$
2014	19.94	30,156	151,23	28,901	104.59	$4m^2$ / $6 m^3$
2015	19.62	28,334	144,4	27,437	103.26	$4m^2$ / $6 m^3$

Source:

1. For the population – data collected from the website[1] of the National Institute of Statistics and The World Bank[2];

2. For the number of detainees - *National Administration of Penitentiaries Activity Annual Reports for 2009-2015*[3];

3. For the incarceration rate:

– Until 2010 - *National Administration of Penitentiaries "Document de politică publică privind îmbunătăţirea condiţiilor de detenţie"*[4];

– From 2011 - *Council of Europe Annual Penal Statistics - SPACE I, prison stock on 01 Jan. 2012 & 2013*[5] *and prison stock on 01 Jan. 2014 & 2015*[6];

4. For the prison capacity and overcrowding rates

– Until 2010 - *National Administration of Penitentiaries "Document de politică publică privind îmbunătăţirea condiţiilor de detenţie"*;

– From 2011 - *Council of Europe Annual Penal Statistics - SPACE I, prison stock on 01 Jan. 2012 & 2013 and prison stock on 01 Jan. 2014 & 2015; National Administration of Penitentiaries Activity Annual Reports for 2011-2015.*

As it can be seen, there is a considerable gap between the overcrowding rate for up until the year 2010, in regard to the sub sequential rates for 2011-2015 due to the latter fraction being calculated pertaining to both the volume [6 cubic meters (m^3)] and the surface [4 square meters (m^2)] standards provided by the Ministry of Justice's Order no. 433/C/2010. This being said, it seems that the real overcrowding rate prior to the year 2010 is actually impossible to determine, because the only standard used as a factor in calculating it was the 6 m^3 standard.

According to these internal provisions, the minimum space related conditions for detention are the following: 4 m^2 per prisoner (closed and

[1] *http://www.insse.ro/cms/*.

[2] *http://data.worldbank.org/indicator/SP.POP.TOTL*.

[3] Available at *http://anp.gov.ro/raport-de-activitate-anual* in Romanian, also in English from 2012.

[4] Available at *http://www.cpt.coe.int/documents/rom/2011-32-inf-fra-annexe2.pdf* in Romanian.

[5] Available at *http://wp.unil.ch/space/space-i/prison-stock-on-1st-january-2013/*.

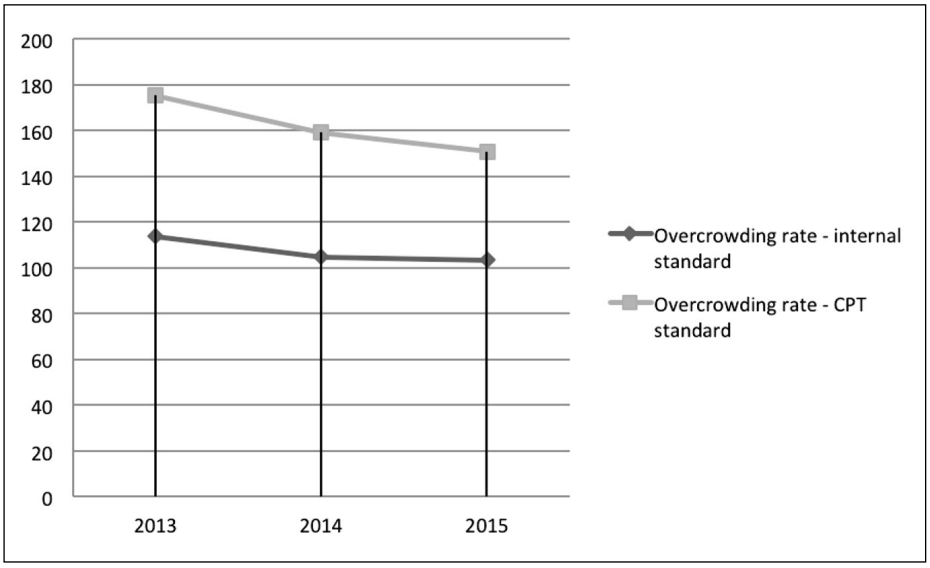
[6] Available at *http://wp.unil.ch/space/space-i/prison-stock-2014-2015/*.

maximum security regime, also minors, youth and arrested) and, respectively, 6 m^3 per prisoner (open and semi-open regime). Calculating in regard with the average prison cell height, we will find that 6 m^3 translates to approximately 2.4 m^2.

Even with these changes, the Romanian legislation is far from aligning with the CPT recommended standard, according to which the minimum condition standard when detained in common is that of 4 m^2 per prisoner.

For instance, for 2013 – 2015, the comparative overcrowding rates at the 4m^2 or 6m^3 alternative standard on one hand, and the 4 m^2 CPT standard, on the other hand, are the following:

TABLE 2. *Overcrowding rate*



The latest data made public was recorded on the 17th of May 2016 and shows an overcrowding rate of 150,41%, in regard with the 4 m^2 standard and much more reduced rate of 102.39% using the alternative standard method (4m^2 or 6m^3)[7].

[7] National Administration of Penitentiaries, *Situaţia privind capacitatea de cazare a unităţilor şi efectivele acestora la data de 17.5.2016, http://www.anp.gov.ro/documents/10180/8416710/Capacitatea+de+cazare+a+unitatilor+si+efectivele+acestora+la+data+de+17.05.2016.pdf/101ec7ab-428a-4cce-955e-696c42a27cfb*.

2. *Alternatives to detention in the pre-sentencing phase*

As alternatives to detention during the pre-sentencing phase, we find the non custodial preventive measures, on one hand, and the prosecutors' possibility to drop the charges due to lack of public interest, on the other.

As from the 1st of February 2014, the Romanian Criminal Procedure Code provides three new non custodial preventive measures, namely: judicial control, judicial control on bail and house arrest. According to Article 202 of the Criminal Procedure Code, as a general rule, preventive measures may be ordered if there is evidence or probable cause leading to a reasonable suspicion that a person committed an offense and if such measures are necessary in order to ensure a proper conducting of criminal proceedings, to prevent the suspect or defendant from avoiding the criminal investigation or trial or to prevent the commission of another offense.

2.1. *Analytical examination of the applicable provisions*

A. *Judicial control*

The judicial control is the least restrictive non custodial preventive measure. Its *sedes materiae* is provided by Article 215 and the following within the Criminal Procedure Code.

The judicial control measure can be ordered by the prosecutor, the Preliminary Chamber Judge, the Judge for Rights and Liberties or the Court, under the following conditions:

a) There is evidence or probable cause leading to a reasonable suspicion that a person committed an offense, regardless of the penalty stipulated by law;

b) There is no cause preventing the initiation or the exercise of criminal action (in regard with the causes stipulated at Article 16 of the Criminal Procedure Code);

c) The criminal action has already been set in motion by the prosecutor;

d) The hearing of the defendant already took place in the presence of his legal counsel;

e) the preventive measure is regarded as being necessary in order to ensure a proper conducting of criminal proceedings, to prevent the suspect or defendant from avoiding the criminal investigation or trial or to prevent the commission of another offense;

f) The measure is regarded as proportional to the seriousness of the charges brought against the person such measure is taken for, and necessary for the attainment of the purpose sought when ordering it.

While under judicial control, the defendant will be encumbered by a set of restrictions regarding the liberty of movement, his social life and/or his professional activities and the manner in which the defendant complies with the above mentioned will be periodically checked.

According to Article 215 paragraphs (1) - (2), while under judicial control the defendant is obliged to comply with the following obligations:

a) To appear before the criminal investigation body, the Preliminary Chamber Judge or the Court any time they are called;

b) To inform forthwith the judicial bodies having ordered the measure or with which their case is pending on any change of domicile;

c) To appear before the law enforcement body appointed to supervise them by the judicial bodies having ordered the measure, according to the supervision schedule prepared by the law enforcement body or whenever they are called.

However, in addition to these cumulative and mandatory obligations, the judicial bodies that have ordered the measure may require that the defendant will comply with one, or more of the following optional obligations[8]:

a) not to exceed a specific territorial boundary, set by the judicial bodies, without their prior approval;

b) not to travel to places set specifically by the judicial bodies or to travel only to places set by these;

c) to permanently wear an electronic surveillance system;

d) not to return to their family's dwelling, not to get close to the victim or the members of their family, to other participants in the committed offense, witnesses or experts or to other persons specified by the judicial bodies and not to communicate with these in any way, be it directly or indirectly;

e) not to practice a profession, craft or activity during the practice or performance of which they committed the act;

f) to periodically provide information their living means;

g) to subject themselves to medical examination, care or treatment, in particular for the purpose of detoxification;

h) not to take part in sports or cultural events or to other public gatherings;

i) not to drive specific vehicles established by the judicial bodies;

j) not to hold, use or carry weapons;

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[8] See N. Volonciu, A. S. Uzlău (eds.), *Noul Cod de procedură penală comentat*, Bucureşti: Hamangiu, 2014, 460-465.

k) not to issue cheques.

Regardless of the judicial body that imposes it, the document ordering a judicial control measure will explicitly specify the obligations that have to be observed by a defendant during the term of such measure and they are warned that, in case of breaching in ill-faith the obligations resting upon them, a judicial control measure can be replaced by a house arrest measure or a pre-trial arrest measure. The measure can also be replaced with a harsher one if the defendant is suspected of committing another crime after the judicial control was ordered against him.

All the above mentioned obligations are prone to changes, revocation or replacement according to the defendant's particular situation at any given time.

At first, the Criminal Procedure Code did not stipulate the maximum period in which a defendant can be hampered by the judicial control measure.

Following the Constitutional Court's decision from the 4th of December 2014, in which the Court stated the Articles 211-217 from the Criminal Procedure Code were unconstitutional as a result of not specifying a maximum period for the preventive measure, the Government urgently initiated amendments regarding the judicial control, considering that after 45 days from the publication of the decision in the Official Gazette, the unconstitutional provisions would have seized to apply, rendering the pre-existing judicial control measures obsolete. Thus, after only 11 days from the Constitutional Court's decision, the Government modified the Code by establishing a maximum legal period and a maximum total period for the measure. Hence, the judicial control measure can be imposed for a period of maximum of 60 days, after which it can be extended periodically. Cumulated, all the prolongations cannot exceed the following periods:

a) during the criminal investigation: a total of 1 year, if the penalty stipulated by law for the crime at hand is 5 years at most or a criminal fine, or 2 years, if the penalty stipulated by law for the crime at hand is above 5 years or life imprisonment;

b) during the preliminary chamber procedure and the trial period: a total of 5 years.

The measure will be extended by the judicial bodies only when the grounds having caused the initial ordering further require that the defendant remains under judicial control or if there are new grounds justifying the extension of such measure.

Against the judicial control ordered by the prosecutor, the defendant has the possibility to challenge (contest) it in front of the Judge of

Rights and Liberties, while against the judicial control ordered by any type of Court/judge, the defendant has the possibility to address the higher Court/judge.

Prior to the expiry of the judicial control period, the judicial bodies that ordered the control are obliged to summon the defendant and check the lawfulness and solidity of the preventive measure that encumbers him in order to revoke, maintain or replace it with a more suitable measure.

Regarding the final point, apart from the revoking or replacing hypothesis, the judicial control measure shall lawfully cease:

a) upon expiry of the term provided by law or established by judicial bodies;

b) in case the prosecutor decides to drop charges or the Court issues a judgment for acquittal, termination of criminal proceedings, waiver of penalty, deferral of penalty or a suspended sentence under supervision, even if this is not final;

c) on the date when the judgment to convict the defendant remains final.

Regarding the measure's utilization rate, in accord with data made public by the General Inspectorate of Romanian Police[9], we find that:

– during 1st of February 2014 - 31st of December 2014, the judicial control measure was ordered against 8,006 defendants;

– during 1st of January 2015 - 1st of July 2015, the judicial control measure was ordered against 3,958 defendants;

– on the 1st of July 2015, there were 5,458 defendants that were simultaneously under judicial control

Unfortunately, we cannot correlate these numbers with similar data regarding the custodial preventive measure (pre-trial arrest), because the available data regarding the pre-trial detainees is only accessible for the 31st of December 2014 and 2015, as follows:

– on the 31st of December 2014 there was a total of 2,514 pre-trial detainees;

– on the 31st of December 2015 there were a total of 2,453 pre-trial detainees.

Given this data, we could say that the judicial control measure is the most utilized preventive measure in Romania, fulfilling its purpose as an effective alternative to detention, being that there is at least twice the number of defendants under judicial control, than under arrest.

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[9] *https://igpr.ro/ro/stiri-si-media/comunicate/persoane-puse-sub-supraveghere-judiciara 1436685956. https://igpr.ro/ro/stiri-si-media/comunicate/persoane-puse-sub-supraveghere-judiciara*.

The above mentioned data also shows that the reasons for the common utilization of this preventive measure resides in it's statistical reliability, as in 2015 only 248 cases of measure replacement with a harsher measure have been registered, from a total of 3,958 cases (only 6.26%), mainly because of missing appointments with the supervising officer, contacting the parties with which communication was banned or by committing another criminal offence. An aspect that needs mentioning is related to the harshness of the replacement, as of a total of 248 cases, only 27 defendants were given another chance to a non-custodial measure (house-arrest), as against the other 221 custodial measures were ordered (pre-trial arrest, internment in detention or educational centres – for minors).

B. *Judicial control on bail*

Judicial control on bail can be ordered by the same judicial bodies as the judicial control measure, with the only element of specificity being the imposing of the bail. Everything we mentioned regarding the judicial control measure applies *mutatis mutandis* to the judicial control on bail.

Paradoxically, Article 216 from the Criminal Procedure Code, regarding the general conditions of the judicial control on bail, refers to "the requirements" provided by Article 223, even if the latter norm stipulates the conditions and cases in which the preventive pre-trial arrest measure can be ordered. In order to avoid redundancy, the cases provided by Article 223 will be analysed when discussing the house arrest measure.

In our opinion, the legislator's choice generates an inexplicable gap between the conditions under which the judicial control and the judicial control on bail can be mandated, even if, the only difference should normally be the depositing of the bail. Unfortunately, this manner of redaction highlights the judicial control on bail as a defendant's choice of replacing the arrest ordered against him, more like a auxiliary preventive measure than a *sui generis* one, even if the new Criminal Procedure Code was meant to promote this measure as an independent one, unlike the old legislation, where the "provisory release under judicial control" could only be ordered in replacement of the pre-trial arrest measure.

The bail shall be posted in the defendant's name, by depositing a set amount of money with the judicial bodies or by posting a property bond, in securities or real estate, within the limits of the set money amount, in favour of the same judicial bodies. The value of a bail must be of at least 1,000 lei (approx. 225 EUR), with no maximal limit whatsoever and is determined based on the seriousness of the accusation brought against

the defendant, their material situation and their legal obligations, in order to guarantee the participation by the defendant in criminal proceedings and their compliance with the obligations set by the ordering judicial body. The lack of a maximal bail limit has permitted, in the case of a well known female parliamentary representative, the setting of a 5,000,000 RON bail (approx. 1,200,000 EUR), which can be considered as a disproportionate way of refusing to apply the measure and/or a way of *a priori* covering the eventual damages caused by the offence.

The bail amount shall be refunded unconditionally only in two given cases: if the judicial control on bail measure is revoked and if the prosecutor closes the cases or drops the charges against the defendant.

Moreover, in case of a waiver of penalty enforcement, postponement of penalty enforcement or any form of conviction, acquittal or a solution regarding the end of the criminal proceedings, the bail shall be refunded, but only to the extent that payment from the bail money has not been ordered to cover, in the following order, monetary indemnifications granted for the remedy of damages caused by the offense, of Court fees or the criminal fine.

The bail money shall be confiscated in case the judicial control on bail set by the judicial body is replaced by a house arrest of pre-trial house arrest measure, if the defendant breaches his in ill-faith the obligations resting upon him. Also, the covering of the monetary indemnifications granted for the remedy of damages caused by the offense, of Court fees or the fines, shall be the main priority, making only the remaining bail money is subjected to confiscation.

Regarding the measure's utilization rate, in accord with data made public by the General Inspectorate of Romanian Police[10], we find that:

– during 1st of February 2014 - 31st of December 2014, the judicial control on bail measure was only ordered against 52 defendants;

– during 1st of January 2015 - 1st of July 2015, the judicial control on bail measure was only ordered against 15 defendants;

– on the 1st of July 2015, there were 37 defendants that were simultaneously under judicial control on bail.

Unfortunately, as we already stated above, this judicial control on bail did not have the broad applicability of its bail-less counterpart, but rather the contrary, as it has only been ordered against 67 defendants during a span of 1 and a half years.

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[10] *https://igpr.ro/ro/stiri-si-media/comunicate/persoane-puse-sub-supraveghere-judiciara 1436685956. https://igpr.ro/ro/stiri-si-media/comunicate/persoane-puse-sub-supraveghere-judiciara*.

This being said there is no real point in correlating these numbers with similar data regarding the custodial preventive measure.

Given this data, we could say that the judicial control measure is by far the least utilized preventive measure in Romania, thus not (yet) fulfilling its purpose as an effective alternative to detention.

C. *House Arrest*

The house arrest was meant to be the primary solution for prison overpopulation, as it combines intrinsic elements from both the pre-trial arrest and the judicial control measure.

Being a preventive measures that implies privation, more that restriction of liberty, in accord with the ECHR's point of view, as opposed to the judicial control and judicial control on bail measures, the house arrest cannot be ordered (only proposed) by the prosecutor, but exclusively by the Judge for Rights and Liberties, by the Preliminary Chamber Judge or by the Court, if such a measure is necessary and sufficient for the attainment of the purposes set by Article 202 paragraph 1 from the Criminal Procedure Code. The fulfilment of the above mentioned terms is assessed by considering the threat level posed by the offense, the purpose of such measure, the health condition, age, family status and other circumstances related to the person against whom such measure is taken, thus generating a series of factors that must be taken into account in order to chose between pre-trial arrest and house arrest.

As for the content of the measure, the house arrest consists of a general obligation imposed on a defendant, for a determined time period, not to leave the building where they reside, without permission from the judicial bodies having ordered such measure or with which the case is pending, and to observe certain restrictions imposed by those.

During house arrest, a defendant has the following obligations:

a) to appear before criminal investigation bodies, the Judge for Rights and Liberties, the Preliminary Chamber Judge or the Court whenever they are called;

b) not to communicate with the victim or with members of their family, with other participants in the commission of the offense, with witnesses or experts, as well as with other persons established by the judicial bodies.

Also, the Judge for Rights and Liberties, the Preliminary Chamber Judge or the Court may order that, during house arrest, a defendant permanently wear an electronic surveillance system, even though Romanian authorities have not yet managed to provide this much needed equipment on a national level, hardly in some isolated cases, the ones that gen-

erate a lot of media attention (for example the former Mayor of Bucharest).

All the above mentioned obligations are prone to changes, revocation or replacement according to the defendant's particular situation at any given time.

a) during the criminal investigation: a total of 180 days;

b) during the preliminary chamber procedure and the trial period: a total of 5 years.

Initially, the Criminal Procedure Code did stipulate that the term for deprivation of freedom established through a house arrest measure is not considered in calculating the maximum duration of the defendant pre-trial arrest measure during the criminal investigation, but on the 3rd of November 2015, the Constitutional Court declared this provision to be unconstitutional.

House arrest can be ordered under the same conditions and circumstances as pre-trial arrest, provided by Article 223 paragraph 1 and 2 from the Criminal Procedure Code, so only when evidence generate a reasonable suspicion that the defendant committed an offense and if one of the following situations exists:

a) the defendant has run away or went into hiding in order to avoid the criminal investigation or trial, or has made preparations of any nature whatsoever for such acts;

b) a defendant tries to influence another participant in the commission of the offense, or a witnesses or an expert to destroy, alter or hide or to steal physical evidence or to determine a different person to adopt such behaviour;

c) a defendant exerts pressures on the victim or tries to reach a fraudulent agreement with them;

d) there is reasonable suspicion that, after the initiation of the criminal action against them, the defendant committed a new offense with intent or is preparing to commit new offense.

Apart from these clearly defined situations, the Criminal Procedure Code enacts a list of cases in which the arrest can also be ordered, independently of the above mentioned situations. Therefore, pre-trial arrest of the defendant can also be ordered if the evidence generate reasonable suspicion that they committed a offense with direct intent against life, an offense having caused bodily harm or death of a person, an offense against national security as under the Criminal Code and other special laws, weapons trafficking, trafficking in human beings, acts of terrorism, money laundering, counterfeiting of currency or other securities, blackmail, rape, deprivation of freedom, tax evasion, assault of an official, ju-

dicial assault, corruption, an offense committed through electronic communication means or another offense for which the law requires a penalty of no less than 5 years of imprisonment and, based on an assessment of the seriousness of facts, of the manner and circumstances under which it was committed, or the entourage and the environment from where the defendant comes, of their criminal history and other circumstances regarding their person, it is decided that their deprivation of freedom is necessary in order to eliminate a threat to public order.

During the criminal investigation period, a prosecutor, if they believe that the requirements set by law are met, shall prepare a justified application for the taking of a pre-trial arrest measure against a defendant, by indicating the legal basis for it. The Judge of Rights and Liberties will either sustain or deny the application and has the ability to order a less harsh preventive measure.

During the Preliminary Chamber phase and during the trial, the Preliminary Chamber judge and the Court shall rule, on request or ex officio, on taking, maintaining, replacing, revoking or lawful cessation of preventive measures.

The defendant has the possibility to challenge (contest) the measure in front of the higher Court/judge.

In the event that a defendant breaches in ill-faith a house arrest measure or the obligations resting upon them, or there is a reasonable suspicion that they committed a new offense with direct intent in respect of which a criminal action was initiated against them, the Judge for Rights and Liberties, the Preliminary Chamber Judge or the Court, upon justified request by the prosecutor or *ex officio*, may order the replacement of house arrest by pre-trial arrest, under the terms set by the law.

A preventive measure is revoked *ex officio* or upon request, if the reasons that caused it ceased or new circumstances confirming the unlawfulness of such measure occurred, the release of the defendant being ordered, if they are held in custody or is under pre-trial arrest, unless arrested in another case.

Also, the house arrest measure can replaced at any moment, *ex officio* or upon request, by a harsher/milder preventive measure, if the requirements provided by law for its ordering are met and, after an assessment of the case's specific circumstances and the defendant's conduct in the process, it is deemed that the harsher/milder preventive measure is necessary/sufficient to achieve the objective laid down by Article 202 paragraph 1.

Regarding the final point, apart from the revoking or replacing hypothesis, the house arrest measure shall lawfully cease:

a) upon expiry of the term provided by law or established by judicial bodies;

b) in case the prosecutor decides to drop charges or the Court issues a judgment for acquittal, termination of criminal proceedings, waiver of penalty, deferral of penalty or a suspended sentence under supervision, even if this is not final;

c) on the date when the judgment to convict the defendant remains final;

d) during the criminal investigation or during the trial in first instance, upon reaching the maximum term provided by law;

e) during appeal, if the measure reached the duration of the penalty established by the Court sentence ordering conviction.

Regarding the house arrest's utilization rate, in accord with data made public by the General Inspectorate of Romanian Police[11], we find that:

– during 1st of February 2014 - 31st of December 2014, the house arrest measure was ordered against 1.568 defendants;

– during 1st of January 2015 - 1st of July 2015, the house arrest measure was ordered against 1.520 defendants;

– on the 1st of July 2015, there were 602 defendants that were simultaneously under house arrest.

Unfortunately, we cannot perfectly correlate these numbers with similar data regarding the custodial preventive measure (pre-trial arrest), because the available data regarding the pre-trial detainees is only accessible for the 31st of December 2014 and 2015, as follows:

– on the 31st of December 2014 there was a total of 2,514 pre-trial detainees;

– on the 31st of December 2015 there was a total of 2,453 pre-trial detainees.

Given this data, we could say that the house arrest measure, which was initially seen as the perfect alternative to pre-trial detention, has failed to live up to the hype and expectation brought forth by its enactment.

As it can be seen, the number of people that were simultaneously under house arrest at one given point in time, is approximately the quarter of the number of people that were at the same time under pre-trial arrest, thus bestowing the pre-trial arrest measure as the general rule in Ro-

[11] *https://igpr.ro/ro/stiri-si-media/comunicate/persoane-puse-sub-supraveghere-judiciara 1436685956. https://igpr.ro/ro/stiri-si-media/comunicate/persoane-puse-sub-supraveghere-judiciara.*

mania, in flagrant contradiction with the spirit of the new Criminal Procedure Code and the ECHR's vision.

Apart from this, it seems that the national Courts needed time to accommodate with the new set of preventive measures, as can be seen from comparing the data given for 2014 in comparison with the first half of 2015, from which it results that the measure's utilization has doubled from one year to another. We hope that this ascendant trend will maintain its course in the following years, granting the house arrest measure the status it deserves, even more given its consistently low rate of replacement with a harsher measure (pre-trial arrest, internment in detention or educational centres - for juveniles), exactly 92 cases out of a total of 1,520 during 2015 (6.05%).

D. Dropping charges (due to lack of public interest)

As stated in Article 7 paragraph 2 and, subsequently Article 318 and the following within the Criminal Procedure Code, the prosecutor can waive the exercise of the criminal action if, considering the concrete elements of the case, there is no public interest in performing its object. The principle of opportunity of the criminal investigation represents an exception the principle of legality, according to which the prosecutor is under an obligation to start and exercise the criminal investigation *ex officio* when evidence exists that shows the commission of an offense and there are no legal grounds to prevent them.

Although the dropping charges measure was widely used for minor crimes during 2014 - February 2016, on the 20th of January 2016, the Constitutional Court decided that this measure was unconstitutional as it implied that justice was made by prosecutors and not by judges and Courts, as the Constitution clearly states. It must be said that a similar institution (closing case or acquittal due to lack of social danger of an offense) existed under the former penal legislation and was never considered unconstitutional, even if it was actually applicable in more situations and its utilization seemed even more discretionary. The only notable difference is that, unlike the former institution, the dropping of charges could only be ordered by the prosecutor and only in cases of offenses for which the law requires the penalty of a fine or a penalty of imprisonment of no more than 7 years. This generated a discrepancy because in the case of a offense for which the maximum penalty was 7 years, the prosecutor could drop the charges, but the judge could not waiver the enactment of the penalty or even postpone the penalty, the only remaining solution being a conviction. Clearly giving more power of judgment to a prosecutor than a judge is not what the legislator had in mind when this

institution was enacted. As a result, the statistics[12] show us that during 2015 some prosecutors even dropped the charges in 4 cases of rape and 2 cases of manslaughter, on the grounds that proceeding with the investigation presented no public interest whatsoever (sic!). Without knowing the exact *status quo* of the above mentioned cases, given the fact that none of the situations regarding the closing of the case were applicable, the decision to drop the charges seems rather hazardous.

Rendering as unconstitutional the above mentioned institution came as a surprise especially in regard to the fact that the legislator's option regarding the enactment of the dropping charges institution was mainly based on the Recommendation of the Committee of Ministers (87) 18, concerning the simplification of criminal justice, adopted on the 7th of September 1987, more precisely point I, letters *a*) and *b*). After the above-mentioned decision was published in the Official Gazette, the legislator opted for resuscitating this institution taking into account the Constitutional Court's decision. As such, Article 318 was modified through Government Emergency Ordinance no. 18/2016. The most important aspect is that the dropping charges decision of the prosecutor is checked in terms of lawfulness and solidity by the Judge of Rights and Freedoms. Even though this solution has encumbered the activity of the said judges, we are glad that the legislator has found a suitable remedy to reinstate the institution.

According to Article 318 from the Criminal Procedure Code, in the situation of offenses for which the law requires the penalty of a fine or a penalty of imprisonment of no more than 7 years, the prosecutor can drop charges when, considering the contents of the offense, the modus operandi and the instruments used, the goal of the offense and the concrete circumstances of its commission, the consequences that occurred or could have occurred, they find that a public interest is not served in prosecuting[13].

The factors used to determine whether a public interest regarding a certain case exists or not, seem unpredictable at first, given that the Criminal Procedure Code does not stipulate clear conditions regarding the measurement of public interest.

Also, when the offender is identified, weighing the public interest aspect also involves the person of the suspect or defendant, their conduct

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[12] See the document adressed to the Constitutional Court by the General Prosecutor of Romania, 7.12.2015, available at *http://www.mpublic.ro/presa/2016/3070_C_2015_RENUNTARE_URMARIRE_PENALA.pdf*, 7.

[13] See M. Drilea-Marga, *Urmărirea penală în noul Cod de procedură penală*, Bucureşti, 2014, 86-87.

previous to the offense and the efforts they made in removing or minimizing the consequences of the offense.

Thus, the dropping of charges can envisage both the offense *in rem* when the offender's identity is unknown, and the suspect/defendant.

After consulting with the suspect or defendant, the prosecutor can order that they comply with one or several of the following obligations:

a) remove the consequences of the criminal offense or make redress, or agree with the civil party on an avenue of redress;

b) make a public apology to the victim;

c) perform community service for a time span of no less than 30 and no more than 60 days, except for the case where their health precludes them to provide such community service;

d) enlist in a counselling program.

In case the prosecutor orders the suspect or defendant to comply with the above mentioned obligations, they will include in their order the deadline by which those obligations shall be met, which can not be longer than 6 months in general or 9 months for obligations undertaken by mediation agreement signed with the civil party and which starts as of the date the order is communicated.

In case of non-compliance in ill-faith of the obligations within the stipulated deadline, the prosecutor shall rescind their order. The burden of proof for compliance with the obligations or submitting the reasons for failure to comply with the obligations shall fall on the suspect or defendant.

The following chart shows the utilization rate of the dropping charges institution (in cases where the investigation started *in personam*), in accord with data made public by the General Prosecutor[14].

TABLE 3. *Overcrowding rate*

Year	Total	Annual increase / decrease
2012	113,101	– 17.76%
2013	111,187	– 1.72%
2014	49,135	– 55.80%
2015	49,479	+ 0.70%

[14] See Public Ministry - Prosecutor's Office attached to the High Court of Cassation and Justice, *Raport privind activitatea desfăşurată de Ministerul public în anul 2015*, available at *http://www.mpublic.ro/presa/2016/raport_activitate_2015.pdf*.

Up until 2013, the data only envisages the former "lack of the social danger of offense" case closing solutions that were ordered by the prosecutors. Hence, it can be observed that the number of solutions of this nature has decreased significantly during 2014.

Even if the General Prosecutor's report does not mention if/when/how often the "lack of the social danger of offense" institution has been ordered during 2014 and 2015, it is clear that this institution is still applicable for offenses committed before the 1st of February 2014. So, this comes as an explanation for the much lowered total number of solutions, as most probably, the former institution was still applied during 2014-2015, but there are no available records of the number of cases it has been applied in regard to. We believe that, in reality, the number is approximately the same.

Apart from the cases where the investigation started *in personam*, the charges were dropped in a lot of the cases with unidentified offenders, for example, only in 2015, there were 134,436 total cases where the charges were dropped regardless of the number of offenders or their know or unknown identity.

2.2. *Global evaluation of the applicable provisions*

As previously shown, the new paradigm provided by the Criminal Procedure Code in matters regarding non custodial preventive measures has its upsides and downsides. On one hand, the preventive measure list has grown, so the judicial bodies have, in theory, the possibility to apply more alternative measures to pre-trial arrest. But on the other hand, the judicial bodies do not seem eager to order these new measures in the ratio one would expect, but rather tend to stick to their old habits in applying the original, longstanding measures.

Another reason for the Courts' scepticism is strictly related to the unwanted burden of writing the ruling differently than the prosecutor applied for, or differently than previously ruled by the same judge or Court.

Also, we find that prosecutors only scarcely apply for the house arrest measure, on the basis that, if they have to apply, they should apply for the harshest measure and let the judges make the final call. Applying the house arrest more often should contribute to reducing prison overcrowding given the fact that, first of all, the total duration of house arrest is computed from the imprisonment sentence, and second of all that being under house arrest will also contribute to less time spent in the penitentiary afterwards.

Despite the fact that the existing preventive measures are placed in a progressive succession, the judicial bodies tend to "jump" through extremes, without taking into consideration the measure that is next in line in regard of harshness/mildness when replacing the current one.

Another problem is that the pre-trial arrest measure is not regarded as being the exception, but more as the rule, whereas the rule should be that the defendant will be investigated while unencumbered by any measure and that the ordering of any given preventive measure should represent the exception[15]. Despite the theoretical existence of the presumption of innocence, in reality, in most of the cases, when the prosecutor applies for an arrest warrant, it is the defendant's task to prove that a milder measure should be applied in his case.

Point nr. III.11 from the Recommendation (99) 22 of the Committee of Ministers must be taken into consideration, as the application of pre-trial detention and its length should be reduced to the minimum compatible with the interests of justice. To this effect, member states should ensure that their law and practice are in conformity with the relevant provision of the ECHR and the case law of its control organs. From our point of view, the law is compatible with the afore mentioned Recommendation, but the applying of the law is far from reaching these guidelines.

It is also regrettable that the judicial control on bail is being ignored by all of the judicial bodies, despite its undeniable potential to resolve the overcrowding on one hand and guarantee at least the covering of the remedies of damages, Court fees and/or the fines, on the other.

In this regard, the problem is not only related to the manner in which the judicial bodies chose to embrace this new measure, but also in the way that the legislator enacted it. One could say that, unfortunately, the new Criminal Procedure Code stipulates relatively similar conditions of ordering the house arrest measure (a measure that implies privation of liberty) and the judicial control (a measure that only implies restriction of liberty), thus generating a lack of substance in relation to the progressive nature of preventive measures.

The choice not to apply these new measures as they were meant to be applied comes as an unpleasant surprise especially in regard to their astonishing rate of success, as only around 6% of the non custodial measures end up being replaced by harsher ones, hence in 94% of the cases, the non custodial measure that was ordered proved to be adequate. Also, as stated before, the replacement method does not comply with the mea-

[15] See G. Mateuţ, D. Niţu, L. Criste, *Aspecte actuale de drept şi procedură penală*, Bucureşti, 2015, 104.

sures' progressive hierarchy, as 89% of the judicial control measure were directly replaced with pre-trial arrest.

In regard with the basic principles provided by Recommendation No. R (99) 22 which was adopted by the Council of Europe's Committee of Ministers on 30 September 1999 concerning prison overcrowding and prison population inflation, deprivation of liberty should be regarded as a sanction or measure of last resort and should therefore be provided for only where the seriousness of the offence would make any other sanction or measure clearly inadequate.

According to point III.12 from the Recommendation (99) 22 of the Committee of Ministers, the widest possible use should be made of alternatives to pre-trial detention such as the requirement of the suspected offender to reside at a specified address, a restriction on leaving or entering a specified space without prior authorisation, the provision of bail and/or supervision, and assistance of a agency specified by the judicial bodies. As it can be seen by comparing the statistical data, it seems clear that this recommendation is not respected within the practice of the law, as, on one hand, house arrest remains a subsidiary measure in regard to the pre-trial arrest and on the other hand, judicial control on bail remains a "precious commodity". In this connection, attention should be paid to the possibilities for supervising a requirement remain in a specified place through electronic surveillance devices, or as we previously pointed out, the equipment necessary has not yet been provided on a national level.

As for the situation were house arrest can be ordered, while the first four cases sound reasonable and are also found in some form or another in most of the European judicial systems, we cannot say the same about the last one (threat to public order)[16]. This concept is ambiguous and finds no real anchor within the Criminal Procedure Code, thus being given different interpretations by the judicial bodies. It must also be said that most of the pre-trial arrests are ordered on the legal basis that investigating/judging the defendant under a milder measure would not be sufficient to halt the public threat at hand. Moreover, the public threat has been quantified in relation with the public opinion, so the media ends up influencing a judge's ruling, which is clearly unfortunate.

Regarding the dropping of charges, we salute the legislator's decision to reinstate the institution, correlating it with the provisions of the Constitution, especially when taking into consideration its widespread applicability and popularity amongst prosecutors.

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[16] See C. Tomuleţ, "Interese contradictorii în materia arestării preventive. De la prezumţia de nevinovăţie la pericolul pentru ordinea publică (II)", in *Caiete de drept penal*, 4, 2015, 84.

Therefore, in accordance with point III.10 of the Recommendation (99) 22 of the Committee of Ministers, appropriate measures should be taken with a view to fully implementing the principles laid down in Recommendation No. R (87) 18 concerning the simplification of criminal justice. This would involve in particular that member states, while taking into account their own constitutional principles of legal tradition, resort to the principle of discretionary prosecution (or measures having the same purpose) and make use of simplified procedures and out-of-Court settlements as alternatives to prosecution in suitable cases in order to avoid full criminal procedures. Art 318 from the Criminal Procedure Code respected this above mentioned point entirely, even taking into account the state's own constitutional principle of legal tradition if referred to the fact that the lack of social danger of a offense has never seen as being in contradiction with the Constitution.

This being said, in our opinion, the pre-sentencing phase provides enough alternative measures thus aligning with the European recommendations, but the main issue is that the alternative measures are not taken into consideration to their full extent by the judicial bodies.

3. *Alternatives to detention in the sentencing phase*

The best definition to the alternative measures to detention in the sentencing phase is provided, at least in our opinion, by the Recommendation Rec (92)16 of the Committee of Ministers to member states of the European rules on community sanctions and measures (19 October 1992), where the European labels of "community sanctions and measures" are described as being "those sanctions and measures which maintain the offender in the community and involve some restriction of his liberty though the imposition of conditions and / or obligations, and which are implemented by bodies designed in law for that purpose.

In the sentencing phase, the Courts have four different non custodial solutions that can be ordered against the defendant, namely: waiving enforcement of the penalty, postponing service of the penalty, suspending service of a sentence under supervision or the criminal fine.

3.1. *Analytical examination of the applicable provisions*

A. *Waiving enforcement of the penalty*

As previously stated, the new Criminal Procedure Code bestows the principle of opportunity as an exception to the principle of legality,

hence providing the prosecutor with the possibility to drop the charges during the criminal investigation.

The waiver of enforcement of the penalty comes as an extension of the above mentioned principle during the sentencing phase and is meant to replace and revise the former "lack of social danger of an offense" institution provided by the old penal legislation, which could have been applied by both prosecutors (during the criminal investigation) or judges (during the trial).

According to Article 80 of the Criminal Code, a Court can waive enforcement of a penalty if the following conditions are met[17]:

a) the committed offense has a low degree of seriousness, given the nature and extent of its consequences, means used, manner and circumstances of commission, reason and goal intended;

b) considering the person of the defendant, their conduct before committing the offense, their efforts to remove or minimize the consequences of their offense, and their likelihood of rehabilitation, the Court feels that enforcing a penalty would be untimely because of its consequences on the defendant.

Also, the enforcement of a penalty cannot be waived if:

a) the defendant has a previous conviction, except for the cases stipulated in Article 42 lett. *a*) and lett. *b*) (acts that are no longer stipulated in criminal law or violations that have been pardoned) or for which rehabilitation has taken place or the deadline for rehabilitation has arrived;

b) the same defendant has already had a case of penalty waiver granted to them in the 2 years previous to the commission of the offense for which they are on trial;

c) the defendant has evaded criminal investigation or prosecution or tried to obstruct discovery of the truth or identification and prosecution of themselves or participants in the offense;

d) the penalty for that offense is more than 5 years of imprisonment.

In case of multiple offenses, a waiver of penalty enforcement can be granted if the conditions in paragraph (1) and par. (2) are met for each of the multiple offenses.

When ruling to waive a penalty a Court will issue the defendant with a warning. A warning consists of a presentation of the factual reasons that led to the Court waiving enforcement of the penalty and telling the defendant about their future conduct and consequences of commit-

[17] Also see G. Bodoroncea, V. Cioclei (eds.), *Codul penal. Comentariu pe articole. Art. 1-446*, Bucureşti: C.H. Beck, 2014, 209-210.

ting further offenses. Only one warning can be granted in a situation of multiple offenses.

A defendant who has been granted a waiver of penalty shall not be subject to any restriction of rights, ban or incapacity that might devolve from the offense and no punishment shall be established against him in regard with the committed offense. Also, in opposition with the postponement of penalty enforcement and the suspended service of a sentence under supervision, the waiver of a penalty does not imply the defendant to be supervised or to respect any obligations.

A waiver of penalty enforcement does not cause effects on the serving of security measures and civil obligations ordered in the Court's judgment.

If, within 2 years of the waiver judgment remaining final, it is found that the recipient of the waiver had committed another offense previous to that judgment remaining final, and for which a sentence was returned even after the expiry of that deadline, the waiver is cancelled and a sentence will be enforced for the offense that originally received a waiver, after which stipulations shall apply, as the case may be, concerning multiple offenses, repeat offense or intermediate plurality.

As it can been seen, the waiver of a penalty cannot be revoked for a future conduct, but only cancelled based on a earlier demeanour. Cancellation of a waiver of penalty enforcement is ordered, *ex officio* or based on a notification from the prosecutor, by the Court deciding or having ruled on the offense causing cancellation in first instance.

According to Article 581[1] paragraph 2 from the Criminal Procedure Code, if it decides that the requirements set by Article 82 paragraph 3 of the Criminal Code by are met, the Court, by reversing the waiver of penalty enforcement, shall order the defendant's conviction for the offense in respect of which the penalty enforcement had been waived, shall establish a penalty for it, and shall apply afterwards the provisions on the multiple offenses, repeat offense or intermediate plurality, as applicable[18]. Therefore, whilst the legal text aims at "conviction" for the offense, the ordering of a postponement of penalty enforcement for the resultant penalty is out of the question. This is a correlation problem between the Criminal Procedure Code and the Criminal Code, the latter providing the possibility of a new postponement of penalty enforcement even when

[18] See N. Volonciu, A. S. Uzlău (eds.), *Noul Cod de procedură penală comentat*, op. cit. 1370-1371.

cancelling a previous postponement of penalty enforcement, which is clearly the next measure in line in terms of harshness[19].

In setting the penalty for an offense in respect of which the waiver of the penalty enforcement is cancelled, the Court shall consider exclusively the individualization criteria and the circumstances of the case in which the decision to waive the penalty enforcement was returned originally.

Unfortunately, there is now record of the number of waiver solution ordered by Courts, because there is no surveillance system for the defendants against whom this solution has been ordered, but a short survey of the judicial practice shows that this institution is scarcely applied, the Courts being extremely reticent in regard with its possible benefits. The explanation resides in the Courts' hesitation to apply the new measures, doubled by the total lack of surveillance and observation of the defendant in contact with society, which leads the Courts to the idea that the institution lacks substance. Another possible cause is that, being an extension to the opportunity principle, the cases that should have fallen under this institution are normally resolved by the prosecutor during the criminal investigation by dropping the charges.

Unlike its predecessor, the waiver has not been as widespread given the fact that in can be ordered in much stricter conditions, whereas the general applicability of the acquittal because of lack of social danger of the offense was almost discretionary.

B. *Postponing of penalty enforcement*

The postponement of penalty enforcement is a new institution meant to replace the conditional suspension provided by the former penal legislation, and implies that a penalty shall be established, but not applied, as the defendant will be observed for a period of 2 years, while having to respect a set of measures and obligations that have been rested upon him.

The Court can rule to postpone enforcement of a penalty and set a time period to be served on probation, if the following conditions are met:

a) the sentence, including for a situation of multiple offenses, is a fine or no more than 2 years of imprisonment*;*

b) the defendant has a previous conviction, except for the cases stipulated in Article 42 lett. *a*) and lett. *b*) (acts that are no longer stipulated

[19] See D. Niţu, *Anularea renunţării şi amânării aplicării pedepsei. Incongruenţe în aplicarea practică*, *Revista de note şi studii juridice*, 19.3.2014, available at *http://www.juridice.ro/314494/anularea-renuntarii-si-amanarii-aplicarii-pedepsei-incongruente-in-aplicarea-practica.html* and also A. Rîşniţă, I. Curt, *Renunţarea la aplicarea pedepsei. Amânarea aplicării pedepsei*, Bucureşti: Universul Juridic, 2014, 69-72.

in criminal law or violations that have been pardoned) or for which rehabilitation has taken place or the deadline for rehabilitation has arrived;

c) the defendant has consented to perform community service;

d) considering the person of the defendant, their conduct before committing the offense, their efforts to remove or minimize the consequences of their offense, and their likelihood of rehabilitation, the Court feels that enforcing a penalty immediately is not necessary, but it is nevertheless mandatory to have their conduct supervised for a determined period.

Enforcing a sentence cannot be postponed if:

a) the penalty stipulated by law for the committed offense is no less than 7 years of imprisonment;

b) if the defendant has evaded the criminal investigation or prosecution or tried to obstruct discovery of the truth or identification and prosecution of themselves or participants in the offense.

The first of the above mentioned negative conditions represents one of the main reasons why this institution is not used as often as it should have. Eliminating offenses for which the penalty if no less than 7 years, implies that this institution can basically be applied to the same categories of offenses as the waiver of the penalty enforcement, plus a couple of exceptional situations. The new Criminal Code's paradigm on custodial penalties is based on a hierarchy of punishments as follows: 3 months - 2 years, 6 months - 3 years, 1-5 years, 2-7 years, 3-10 years and so on. Therefore, by eliminating the offenses that are punished by 7 years, or less, the "2 to 7 years" category is left out, strongly affecting the institution's rate of applicability.

When ordered, it is mandatory to present the reasons for postponing enforcement of the sentence and warn the defendant about their future conduct and consequences of committing further offenses or failing to comply with probation or with their obligations for the duration of the probation period.

A defendant who has been granted a postponement of penalty enforcement shall not be subject to serving the penalty or to any restriction of rights, ban or incapacity that might devolve from the offense, unless they have committed a new offense before the expiry of the probation period, postponement has not been revoked and no cause for nullification has occurred. Nevertheless, postponement of penalty enforcement does not produce effects on serving the security measures and the civil obligations stipulated in the Court judgment.

The probation period is 2 years and starts as of the date when the judgment remained final that postponed enforcement of the penalty. For

the duration of the probation period the person on probation must comply with the probation measures and their obligations as part of it, as ordered by the Court. Also, for the duration of the probation period, a defendant who has been granted postponement of penalty enforcement must comply with the following probation measures[20]:

a) report to the Probation Service on the dates set by the latter;

b) receive visits by the probation officer appointed to supervise them;

c) give notice of changing domicile and of any travel longer than 5 days, as well as of their return date;

d) give notice of changing jobs;

e) provide information and documents of a nature that will make it possible to check into their livelihood.

Also, the Court can order a defendant who has been granted postponement of penalty enforcement to comply with one or several of the following obligations to:

a) take classes in school or a vocational training;

b) perform community service for a duration between 30 and 60 days, in the conditions ordered by the Court, except for the case where their health precludes them from performing that service. The daily number of hours to be performed shall be established as under the Law on the Service of Penalties;

c) attend one or more social reintegration programs operated by the Probation Service or given in cooperation with community entities;

d) comply with medical check-ups, treatment or care;

e) not communicate with the victim or the victim's family, with the persons together with whom they committed the offense or with other persons as established by the Court, or to not go near such persons;

f) not be in certain locations or attend certain sports events, cultural events or public gatherings established by the Court;

g) not drive certain vehicles established by the Court;

h) not own, use and carry any category of weapons;

i) not leave Romanian territory without securing agreement *from the Court*;

j) not take or exercise the position, profession, occupation or activity they used in the commission of the offense.

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[20] See. F. Ciopec, *Individualizarea judiciară a pedepselor - Reglementare. Doctrină. Jurisprudenţă*, Bucureşti: C.H. Beck, 2011, 414. The author points out the fact that the legislator was inspired by the German version of the postponement in contemplation of dismissal, but that the later does not provide any obligatory postponement measures, giving the Courts more power on judgment under this regard. Also see G. Bodoroncea, V. Cioclei (eds.), *op. cit.*, 214-219.

Consenting to performing unremunerated community service does not directly imply that the Court will order the defendant to effectively perform this duty, but simply represents an optional obligation, unlike in the case of the suspension of a sentence under supervision where performing community service is mandatory for at least 60 days.

During the probation period the Probation Service has the duty of checking into the manner of compliance with obligations stipulated above and shall take all necessary steps to ensure that the defendant complies with them within the shortest delay after the conviction remained final.

Accordingly, for the duration of the probation period the Probation Service is under an obligation to inform the Court if:

a) any grounds have emerged to warrant either an amendment to the obligations ordered by the Court or discontinuation of compliance with some of them;

b) the person under supervision does not comply with probation measures or fails to comply with their obligations in the conditions set for them;

c) the person under supervision has failed to comply with their civil obligations as ordered in the Court judgment, no later than 3 months before expiry of the probation period.

If during the probation period reasons occur that warrant either the ordering of new obligations or the increase or decrease of the existing compliance conditions, the Court shall order an amendment of the obligations accordingly, to provide the supervised individual with increased chances for rehabilitation. The Court shall order some of the original obligations to cease when it feels that maintaining them is no longer necessary.

In regard to the revocation of postponement of penalty enforcement, according to Article 88, if during the probation period the supervised individual, in ill-faith, fails to comply with the probation measures or obligations ordered them, the Court shall revoke the postponement and rule to enforce the penalty. In the case where, before expiry of the probation period, the supervised individual fails to fully comply with their civil obligations as ordered in the Court judgment, the Court shall revoke the postponement and rule to enforce the penalty except for the case where the individual can prove they had no avenue to comply. In the case where, after postponement of penalty enforcement, the supervised individual commits a new offense, with direct or oblique intent, which is discovered during the probation period, and for which a conviction was returned even after expiry of this term, the Court shall re-

voke the postponement and rule to enforce the penalty. The penalty enforced as a result of revocation and the penalty for the new offense shall be calculated according to the stipulations concerning multiple offenses.

As for the nullification of postponement of penalty enforcement, in accordance with Article 89, if during the probation period the supervised individual is found to have committed another offense before the date when the postponement judgment remained final, and for which they were sentenced to imprisonment even after the expiry of that term, the postponement shall be nullified, and the stipulations shall apply, as the case may be, on multiple offenses, repeat offense or intermediate plurality. In the case of multiple offenses the Court can order a postponement of resulting penalty enforcement if the conditions are met that are stipulated in Article 83. Another mishap regarding the lack of correlation between the Criminal Code and the Criminal Procedure Code, resides in the fact that Article 582 of the latter stipulates that, if it finds that the requirements set by Articles 88 or 89 of the Criminal Code are met, the Court, cancelling or, as applicable, revoking a postponement of the penalty enforcement, shall order the defendant's conviction and executional enforcement of the penalty established by the postponement Court decision, by applying subsequently, the provisions on the multiple offenses, repeat offense or intermediate plurality, as the case may be.

As it can easily be seen, while in the case of revocation for committing another offense during the supervision period, it seems natural that the defendant's executional conviction shall be enforced, we cannot understand the reasons why the legislator would provide the same regime in regard to the nullification of postponement of penalty enforcement. In spite of this obvious mistake, the national Courts have chosen wisely in applying the law in its spirit and not by grammatical interpretation, as judicial practice did not embrace the mandatory provisions stipulated in Article 582, but rather the opposite as, judging in equity, they chose to order a non custodial measure[21].

As stated before, even if the postponement of penalty enforcement was, in theory, meant to replace the conditional suspension provided by the former legislation, in reality, the Courts have manifested great reticence in applying this new measure, opting out on ordering the suspending of service of a sentence under supervision, in cases where, under the former legislation, they would have chosen the conditional suspension.

From the data provided upon request by the Superior Council of Magistracy (not made public), for the years 2011-2013, regarding the

[21] See A. RÎŞNIŢĂ, I. CURT, *op. cit.*, 194-196.

conditional suspended sentences, we managed to extract the following numbers presented in the chart below (the chart contains data on both majors and juveniles).

TABLE 4

Year	Total convictions	Custodial measures	Percentage	Conditional asuspension	Percentage
2011	47,696	14,446	30.28%	26,683	55.94%
2012	49,020	14,581	29.74%	26,965	55.01%
2013	47,133	13,700	29.06%	25,888	54.92%

The latter chart clearly shows that the conditional suspension has been the most applied institution during the reign of the former Criminal Code, being used in more than a half of the cases solved by the Courts. Also, we must point out that during 2011-2013, the number of conditional suspensions was almost the double of the total number of custodial measures ordered during this time.

Further on, when analysing the data provided by the Probation Department[22] in regard to the utilization rate of the postponement of penalty enforcement for the year 2015, we find the following:

TABLE 5

Year	Postponement enforcement of penalty	Suspension of service under supervision
2015	7,988	12,484

The numbers show the obvious reticence manifested by the Courts in ordering the new measure and their clear tendency to choose a measure that already existed within the former legislation, rather than "innovate". As we will see, the utilisation rate of the two most used non custodial measures has shifted 180 degrees, as from 2015 (and probably 2014 as well) the suspension of service under supervision gained a lot of popularity amongst judges, being used in three times more cases in 2015,

[22] National Probation Department, *Sistemul de probaţiune. Raport de activitate pentru anul 2015*, available at *http://www.just.ro/wp-content/uploads/2015/09/Raport-2015-DNP_11022016.pdf*.

than in 2013 (although juveniles are only prone to educational measures according to the new Criminal Code).

Unfortunately, we cannot correlate these numbers with the total number of convictions or the total number of custodial measures that have been ordered during 2015, because there are no records made available by the Superior Council of Magistracy.

C. *Suspending of service of a sentence under supervision*

Suspending of service of a sentence under supervision also existed in a similar form within the former Criminal Code[23].

The Court may suspend service of a sentence under supervision if the following conditions are met[24]:

a) the penalty imposed, including in case of multiple offenses, is a term of no more than three years of imprisonment*;*

b) the offender was not previously convicted to imprisonment for a term exceeding one year, except as under Article 42, when rehabilitation has taken place or the deadline for rehabilitation has arrived*;*

c) the offender agreed to perform community service;

d) by considering the offender's person, the offender's conduct prior to the commission of the criminal offense, their efforts to eliminate or mitigate the consequences of such criminal offense and their means of reformation, the Court feels that the penalty is sufficient, even without service thereof, that the convict will not commit other offenses, but that it is necessary to monitor their behaviour for a limited period of time.

Suspension of service of a sentence under supervision may not be ordered if:

a) a fine is the only penalty;

b) enforcement of the sentence was initially postponed, and such postponement was subsequently revoked;

c) the defendant has evaded criminal investigation or prosecution or tried to obstruct discovery of the truth or identification and prosecution of themselves or participants in the offense.

It is mandatory to submit the grounds for their sentence, as well as those that led to the suspension of the sentence enforcement and to warn the convict about their future conduct and about the consequences they are exposed to if they continue to commit offenses or fail to comply with the supervision measures or to fulfil their obligations during the term of supervision.

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[23] See C. Mitrache, *Suspendarea executării pedepsei ca formă a probaţiunii în dreptul penal român*, Bucureşti: Universul Juridic, 2008, 121.

[24] See G. Bodoroncea, V. Cioclei (eds.), *op. cit.*, 223-226.

The term of suspension of a sentence under supervision shall be the convict's supervision period, which ranges from 2 to 4 years, but may not be shorter than the term of the sentence enforced. During the supervision period, a convict shall comply with the following supervision measures:

a) report to the Probation Service on the dates set by the latter;

b) receive visits by the probation officer appointed to supervise them;

c) give notice of changing domicile and of any travel longer than 5 days, as well as of their return date;

d) give notice of changing jobs;

e) provide information and documents of a nature that will make it possible to check into their livelihood.

The Court can order a defendant to comply with one or several of the following (optional) obligations to:

a) take classes in school or a vocational training;

b) attend one or more social reintegration programs operated by the Probation Service or given in cooperation with community entities;

c) comply with medical check-ups, treatment or care;

d) not leave Romanian territory without securing agreement from the Court.

As we already stated, during the supervision period, a convict shall perform community service for a period between 60 and 120 days, under the terms set out by Court, unless their health prevents them from performing such work. Two hours of work equals one day of community service, according to the Law on the Service of Penalties.

If during the supervision term reasons justifying either the imposition of new obligations or the extension or reduction of the service conditions for those existing appeared, the Court orders the change of obligations accordingly so as to ensure better chances for the convict to reform. The Court suspends service of some of the obligations imposed by it when it deems that their maintaining is no longer required.

Also, the convict must comply in full with their civil obligations as ordered in the Court judgment, no later than 3 months before expiry of the probation period.

The suspension of sentence enforcement under supervision will be nullified and revoked under the same conditions as the postponement of the enforcement of the penalty, with the addition of the situation explained in Article 96 paragraph 3, more precisely, if the fine accompanying imprisonment under Article 62 was not paid and was replaced by imprisonment, the Court shall revoke suspension and shall enforce the sentence, plus the imprisonment which replaced the criminal fine.

From the data provided upon request by the Superior Council of Magistracy (not made public), for the years 2011-2013, regarding the conditional suspended sentences, we managed to extract the following numbers presented in the chart below (the chart contains data on both majors and juveniles).

TABLE 6

Year	Total convictions	Custodial measures	Percentage	Conditional asuspension	Percentage
2011	47,696	14,446	30.28%	3,473	7.28%
2012	49,020	14,581	29.74%	4,731	9.65%
2013	47,133	13,700	29.06%	4,564	9.68%

Further on, when analysing the data provided by the Probation Department[25] in regard to the utilization rate of the suspension of service under supervision for the year 2015, we find the following:

TABLE 7

Year	Postponement enforcement of penalty	Suspension of service under supervision
2015	7,988	12,484

Analysing the increased number of suspensions of service under supervision, it may seem that the Courts are leaning towards ordering more non custodial measures, but in reality the total number of suspension sentences is much lower than previously recorded. As we have already shown, the number of suspensions of service under supervision only tripled because of the fact that the conditional suspension is not available anymore. For example, during 2013 there was a total of 30,452 suspended sentences (both conditional and under supervision), while during 2015 the total number of suspended *and* postponed sentences was only 20,472.

D. *Criminal fine*

The fine consists of the amount of money a convicted individual is compelled to pay to the State.

In accordance to the new Criminal Code, the criminal fine can be scarcely found as the sole penalty for a given offense. In general, the crim-

[25] National Probation Department, op. cit.

inal fine is provided alternative to imprisonment in case of offenses punished by a maximum of 5 years. In opposition with the former criminal legislation's paradigm, the current Criminal Code generates the premises for applying the criminal more often, as it should be applied, in our opinion.

The amount of the fine shall be established in the system of fine-days. The amount for one fine-day ranges from 10 lei and 500 lei, and will be multiplied by the number of fine-days, which ranges from 30 and 400.

This fine-day system represents a novelty under Romanian criminal law and finds its utility in the fact that the Courts will easily replace the number of fine-days with an equivalent number of days of detention or community service days.

The Court shall establish the number of fine-days according to the general criteria for customization of sentencing. The amount that corresponds to one fine-day shall be calculated on the basis of the financial status of the convicted defendant and their legal obligations towards persons they are supporting.

The special thresholds for fine-days range between:

a) 60 to 180 fine-days, when the law stipulates only a penalty by fine for that offense;

b) 120 to 240 fine-days, when the law stipulates a penalty by fine alternatively for a term of imprisonment of no more than 2 years;

c) 180 to 300 fine-days, when the law stipulates a penalty by fine alternatively for a term of imprisonment of more than 2 years.

If the committed offense was intended to provide a material gain, and the penalty stipulated by law is only a fine or the Court chooses to only sentence to that penalty, the special thresholds for fine-days can be increased by one-third. Increments established by law for mitigating or aggravating circumstances shall also apply to the special thresholds for fine-days.

The new Criminal Code (Article 62) also stipulates the possibility of the fine to accompany the penalty by imprisonment in the situation when the committed offense was intended to provide a material gain, but we will not insist in detailing its regime due to the fact that such a fine always completes an imprisonment penalty and should not be regarded as an alternative to detention[26].

In case the defendant fails to pay their fine, in ill-faith, in whole or in part, the number of fine-days shall be replaced by the same number of days of imprisonment. Also, if the unpaid fine accompanied a penalty by

[26] For details, see V. Cioclei, *Critica raţiunii penale. Studii de criminologie juridică şi drept penal*, Bucureşti: C.H. Beck, 2009, 57-59.

imprisonment, the number of fine-days that was not paid up shall be replaced by the same number of days of imprisonment, which shall be added to the term of imprisonment, and the resulting penalty shall constitute one single penalty. In the latter situation a penalty by fine is replaced by a penalty by imprisonment as one fine-day shall be substituted by one day of imprisonment.

The fine penalty can also be served by performing community service. In this situation, the whole or part of the penalty by fine cannot be served for reasons not attributable to the convicted defendant, with the latter's consent, the Court can replace the obligation to pay a fine by the obligation to perform community service, except for the case where the person's health precludes them from performing such service. If the defendant does not consent to performing unremunerated community service, the amount of the fine will be replaced by a penalty of imprisonment. Again, one fine-day will be the equivalent to one day of community service. Also, if the replaced fine was accompanying a penalty of imprisonment, the obligation to perform the community service shall be served at the end of the term of imprisonment. The performing of community service will cease once full payment is received for the number of fine-days not yet served.

The Court shall replace fine-days that were not served as community service by a corresponding number of days of imprisonment if:

a) *the convicted defendant fails to perform community service as ordered by the Court;*

b) *the convicted defendant commits a new offense which is discovered before full performance of community service. The fine-days that were not served in the form of community service at the date of final conviction for the new offense, replaced by days of imprisonment, shall be added to the penalty for the new offense.*

TABLE 8

Year	Total convictions	Custodial measures	Percentage	Conditional asuspension	Percentage
2011	47,696	14,446	30.28%	2,777	5.82%
2012	49,020	14,581	29.74%	2,467	5.03%
2013	47,133	13,700	29.06%	2,678	5.68%

As it can be seen from the chart above, ordering a criminal fine has not been traditionally embraced under the former penal legislation as a

solution to prison overcrowding. This is because of the fact that, on one hand, criminal fines could rarely be applied taking into account the high penalties, and on the other hand, there was no way of replacing the fine with community service, as according to Article 64. For instance, during 2015, 70 people were under surveillance of the probation service while serving the applied criminal fine through performing unremunerated community service[27].

However, the new Criminal Code provides the much needed background for such a recourse, as most of the low-to-medium (maximum 5 years) graded offenses are provided with the possibility of ordering a fine, alternative to imprisonment. Despite having optimal conditions for applying criminal fines, the Courts still don't seem keen on ordering such penalties, probably due to the fact that the former vision on punishment is strongly rooted in the judicial culture.

3.2. *Global evaluation of the applicable provisions*

By comparing the two successive penal legislations, one must observe the decrease of length of imprisonment for the majority of offences and especially in case of crimes against property[28]. Also, the criminal fine was provided as alternative penalty for a greater number of offences. It is also important to note that, whenever the penal legislation provided for excessive penalties, the case law always adjusted the actually sentences applied to convicts. It was, as shown above, the case of the previous Criminal Code, which provided enormous penalties for offenses against property (for instance, from 3 to 15 years imprisonment for aggravated theft); however, in judicial practice, the penalties were always oriented towards the minimum value, even lowered in the majority of the cases because of the effects of the mitigating causes, which registered great success and popularity amongst judges under the former legislation.

However, the mild character of the Criminal Code is to be observed only in case of first-time offenders; in case of multiple offenses or recidivism, the resultant penalty is generally much more severe than under the previous Code. For example, in case of multiple offenses, according to the mandatory provisions of Article 39 from the Criminal Code, the final penalty will be calculated in a manner that usually results in having a penalty that cannot be suspended in any way because it exceeds 3 years of imprisonment. This mathematical way of calculation, which implies

[27] See National Probation Department, op. cit.
[28] See V. Cioclei, *Critica*, op. cit., 56.

that when only penalties of imprisonment have been established, the heaviest penalty shall be applied, which shall be increased by adding one-third of the total of all the other penalties handed down, only led to, what some scholars called, "The Giraffe Penalty"[29].

As such, the media recently brought into attention a lot of cases where people were convicted to exaggerated penalties, due to the new system provided by the law in this respect. For instance, a judge was convicted to 22 years imprisonment for several offenses consisting in receiving bribe. As was suggested in point no. IV.14 of the Recommendation R (99) 22 of the Council of Ministers, efforts should be made to reduce recourse to sentences involving long imprisonment, or it seems clear that this suggestion has been strongly neglected.

The Criminal Code therefore firmly reduces the judges' possibility to apply a non custodial measure by introducing this harsh punishment system for multiple offenses. In other words, even if the judge would want to order a non custodial measure, the punishing system will not allow it.

Apart from aggravating the punishment regime, the new Criminal Code also increased the number of situations in which multiple offenses may occur, by modifying the definition to the continuing offense in the manner that it requires a unity of passive subject (even in offenses against property) and as such, greatly reduced the area of incidence of the less-punishable continuing offenses.

As the former Criminal Code provided two types of suspended sentences (conditional and under supervision) the idea of pronouncing a suspended sentence has been vigorously inoculated in the judges' common knowledge and, as the numbers show, they rarely chose to assimilate the new measures into the judicial practice. Maybe (we hope) it is just a transitional period, given the fact that the new Criminal Code has entered into force only two years ago.

Also, in our opinion, the individualisation process currently provided by the Criminal Code is rather rigid, when it should be more flexible. For example, if a judge sets a penalty of 3 years of imprisonment for a certain offense, the only two options available in the sentencing phase from this point on are: effective serving of the whole penalty, or suspension under supervision (so, without any effective serving). This being said, we think that this individualisation process should be elaborated in a more complex manner, so that the judges could opt for a combination of custodial

[29] See, for example, V. Cioclei, "Pedeapsa girafă", in *Revista de note şi studii juridice*, 11.3.2015, available at *http://www.juridice.ro/364635/pedeapsa-girafa.html*.

and non-custodial measures rather that deciding between two extremes. This idea was otherwise proposed in point no. IV.17 of the Recommendation R (99) 22 of the Council of Ministers, but probably in respect to Romania's legal tradition, no measure was ever taken to effectively implement the combination system into the Criminal Code's paradigm.

As for the waiver of enforcement of the penalty, we previously stated that the Courts currently regard it as a substitute for the former "lack of social danger of the offense", but fail to envisage the fact that the latter was applicable in almost any situation, while the waiver is conditioned by a series of strict objective factors in regard to the defendant and the offense at hand. This view results in the fact that the institution is rarely applied in judicial practice and so it does not contribute whatsoever to reducing prison overcrowding. None the less, the waiver does not provide the necessary means to guarantee the social reinsertion of the defendant, as it does not imply the imposing of obligations or probation supervision in any way.

In regard with the postponement of enforcement of a penalty, despite the fact that it was unquestionably meant to become a substitute for the former conditional suspension, the Courts have never perceived the institution as being a suitable successor, but more like a much milder form of punishment, so they inclined towards pronouncing more suspended sentences under supervision instead. It must be said that the postponement of enforcement of the penalty was supposed to overcome the conditional suspensions shortcomings, by the fact that, on one hand, it entailed permanent supervision for a 2 year period, and on the other hand, that it did not imply any restriction of rights, ban or incapacity that might devolve from the offense. The latter lack of effect counts immensely in the social reinsertion of the defendant, in opposition with the suspension of the sentence under supervision, which equals to a conviction and as such the defendant attains the "recidivist" statute, a powerful stigma on his ability to reintegrate in society. We therefore think that more postponement solutions should be ordered, a trend that would have a positive and direct impact on reducing prison overcrowding.

As for the suspension of a sentence under supervision, as already stated, it seems clear that the institution has gained a lot of popularity, which is a good thing given the fact that community service is mandatory for at least 60 days, and that the supervision process is even more elaborated. Apart from this, even though this institution constitutes the main non custodial sentencing alternative in our opinion, one must keep in mind that the suspension under supervision is the harshest of the measures provided by the new Criminal Code, but still the most used one,

which seems unnatural. As such, we must observe the fact that in comparison with the former Criminal Code, the suspension under supervision within the new legislation is much harsher and is applicable to lesser situations that its predecessor. For instance, the maximum penalty that could have been suspended under supervision in case of a single offense under the former legislation was 4 years, while in its new form, the institution can only be applied for a maximum penalty of 3 years.

On the other hand, criminal fines come as a perfect future solution for reducing prison overcrowding. When saying this, we have in mind the fact that the great majority of detainees have committed low-to-medium graded offenses that could have been sanctioned with a criminal fine according to the new legislation. Alas, the judicial bodies have yet to fully comply with the imagery provided by the new Criminal Code, but things seem to be slowly improving in this respect.

4. *Alternatives to detention in the post-sentencing phase*

The main purpose of alternative measure in the post-sentencing phase is reducing the actual length of the sentence served, by giving preference to individualised measures such as early conditional release (parole). This type of measures ensure the "back-door" strategy to reducing prison overcrowding, as it basically represents a "reversed" suspension.

In this subsection we will examine the general provisions of conditional release and the permissions to leave the prison.

4.1. *Analytical examination of the applicable provisions*

A. *Conditional release*

According to Article 99 of the Criminal Code conditional release can be ordered in under following conditions:

Conditional release in case of life imprisonment may be ordered if[30]:

a) a convict effectively served 20 years in prison;

b) a convict had a good conduct during the entire sentence service;

c) a convict entirely met all civil obligations established by the judgment of conviction, unless they prove to have been unable to do so;

d) the Court is convinced that the convicted person has reformed and is able to reintegrate into society.

[30] See Co. Mitrache, Cr. Mitrache, *Drept penal român. Partea generală*, Bucureşti: Universul Juridic, 2014, 488-491.

It is mandatory to submit the *de facto* reasons that led to the granting of conditional release and to warn the convict about their future conduct and about the consequences they are exposed to if they continue to commit offenses or fail to comply with the supervision measures or to fulfil their obligations during the term of supervision. As of the date of conditional release, the convict is subject to a supervision period of 10 years.

Conditional release for imprisonment may be ordered if:

a) a convict has served at least two-thirds of the penalty, in case of a term of imprisonment no longer 10 years, or at least three quarters of the penalty, but no more than 20 years in prison, in case of a term of imprisonment exceeding 10 years;

b) a convict is serving their sentence in an open[31] or semi-open regime;

c) a convict fulfilled completely all civil obligations established by the judgment of conviction, unless they prove to have been unable to do so;

d) the Court is convinced that the convicted person has reformed and is able to reintegrate into society.

If a convicted person turned 60, conditional release may be ordered after the effective serving of half of the penalty, in case of a term of imprisonment not exceeding 10 years, or at least two-thirds of the penalty, in case a term of imprisonment exceeding 10 years, provided that the legal conditions are fulfilled. In calculating increments of the penalty, the part of the sentence term that may be deemed, according to law, as served due to the work performed is to be considered. In this case, conditional release may be ordered prior to the effective service of at least half of the prison sentence, when it does not exceed 10 years, and at least two-thirds, when the penalty is more than 10 years.

When calculating increments of penalty provided above, consideration shall be given to the part of the sentence term that may be regarded as served, according to law, due to the work performed. In this case, conditional release may be ordered prior to the effective service of at least one-third of the imprisonment sentence, when it does not exceed 10 years, and at least half of it, when the sentence is more than 10 years.

The period between the conditional release date and the date of the sentence expiry is the term throughout which the convict is supervised.

In regard to the supervision measures and obligations, if the remain-

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[31] For a detailed approach regarding the different executional regimes, see I. Chiş, *Drept execuţional penal*, Bucureşti: Universul Juridic, 2013, 177-187.

ing part of an un-serviced penalty is, upon conditional release, of 2 years or more, a convict shall comply with the following supervision measures:

a) report to the Probation Service on the dates set by the latter;

b) receive visits by the probation officer appointed to supervise them;

c) give notice of changing domicile and of any travel longer than 5 days, as well as of their return date;

d) give notice of changing jobs;

e) provide information and documents of a nature that will make it possible to check into their livelihood.

In the case referred to above, the Court may require a convict to perform one or more of the following obligations:

a) take classes in school or a vocational training;

b) attend one or more social reintegration programs operated by the Probation Service or given in cooperation with community entities;

c) not leave Romanian territory;

d) not be in certain locations or attend certain sports events, cultural events or public gatherings established by the Court;

e) not communicate with the victim or the victim's family, with the persons together with whom they committed the offense or with other persons as established by the Court, or to not go near such persons;

f) not drive certain vehicles established by the Court;

g) not own, use and carry any category of weapons.

The supervision measures and the obligations provided in lett. *a*) and lett. *b*) shall be fulfilled as of the date of release, for a period equal to one-third of the supervision term, but no more than 2 years, and the obligations set out in lett. *c*) - *g*) are to be performed throughout the entire supervision period. The performance of obligations under lett. *d*) and lett. *e*) may be monitored through an electronic surveillance system, as provided by the special law.

During supervision, the Probation Service has the obligation to notify the Court if:

a) certain reasons have occurred requiring either the change of the obligations imposed by the Court or cessation of some of them;

b) a supervised person does not comply with the supervision measures or fails to meet their obligations under the established conditions.

If during the supervision term, reasons justifying either the imposition of new obligations or the extension or reduction of the service conditions for those existing have appeared, the Court orders the change of obligations accordingly so as to ensure better chances for the convict to be socially reintegrated. The Court suspends service of some of the oblig-

ations imposed by when it deems that their maintaining is no longer required.

When during the supervision term a convicted person, in ill-faith, does not comply with the supervision measures or fails to perform the obligations imposed, the Court shall revoke release, and shall order service of the rest of the penalty.

In case that after conditional release is granted, a convicted person commits a new offense, which is discovered during the supervision period and for which a judgment for imprisonment was rendered, even after the expiry of such term, the Court shall revoke release and order service of the rest of the sentence. The penalty for the new offense is set and served, as applicable, according to the stipulations on repeat offenses and intermediary plurality.

The conditional release will be rescinded if during the supervision term it is found that a convicted person committed another offense before receiving conditional release, for which imprisonment was ordered even after this period, the stipulations on multiple offenses, repeat offenses and intermediary plurality shall apply accordingly.

In the event that, in respect of the penalty resulted, the conditions laid down in Article 99 or Article 100 are met, the Court may grant conditional release. If conditional release was granted, the supervision term is calculated as of the date of the first conditional release. When, after rescission, the Court orders service of the resulting penalty, the part of the ancillary penalty that prohibits the exercise of certain rights that was not served upon rescission of release shall be served after serving the imprisonment sentence.

If a convicted person did not commit a new offense that was discovered before expiry of the supervision term, revocation of the conditional release was not ordered and no rescission reason occurred, the sentence is deemed as served.

When the Court finds that the requirements for granting conditional release are not met, through its dismissal decision, it shall set a term after the expiry of which such proposal or request may be renewed. Such term may not be longer than one year and starts running from the date when the Court sentence remains final.

As it results from the *National Administration of Penitentiaries Activity Annual Report for 2015*[32], lately there is almost a perfect balance between the convicts postponed for a further evaluation or proposed for conditional release.

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[32] Available at *http://anp.gov.ro/documents/10180/7602375/bilant+Administratia+Nationala+a+Penitenciarelor+eng.pdf/797b7159-5c96-4d76-89ae-d3e08bffe61b*.

TABLE 9. *Comparative chart on the decisions issued by the conditional release commissions*

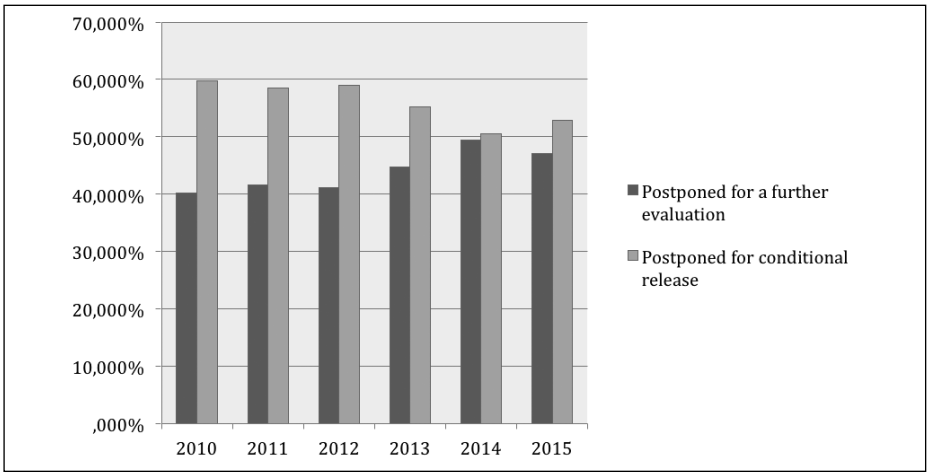
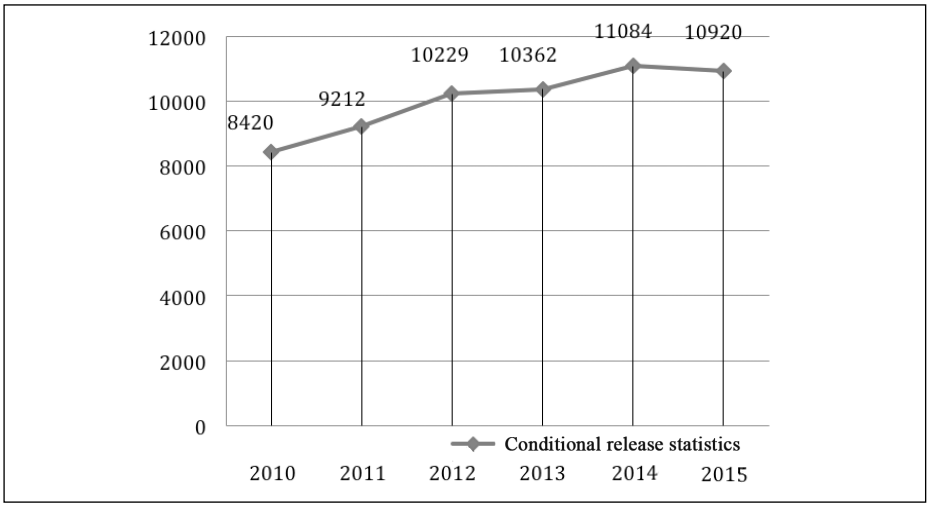


TABLE 9.1

Postponed for a further evaluation	40.22%	41.56%	41.06%	44.74%	49.45%	47.11%
Proposed for conditional release	59.78%	58.44%	58.94%	55.26%	50.55%	52.89%

This data must be correlated with the total number of conditional releases, as follows:

TABLE 10. *Conditional release statistics*



At the beginning of this subsection we presented the conditional release as being a reversed suspension, as it implies both supervision measures and obligations, but analysing the available data, we find exactly the contrary. For example, during 2015, only 63 people were registered as entering into the attention of the probation services, which means that from a total of 10,920 conditional releases ordered, only 63 had remaining penalties of 2 or more years of imprisonment (a staggering 0.57%). The explanation for this low percentage is to be found in the applicability, on a large scale, for the conditional release in the said year, of the former Criminal Code, as *lex mitior*. According to this latter law, no supervision measures could be imposed for the convicted person during the remaining part of an un-serviced penalty.

B. *Permission to leave the prison*

Permissions to leave the prison can be considered measures that are alternative to detention, but may never be perceived as a solution for prison overcrowding, due to their extremely short span and the fact that by only temporary missing from the penitentiary, a convict will actually not make room for more detainees.

Nevertheless, given the fact that the period while the detainee is not inside the penitentiary is considered as being effectively executed, we chose to remind about this institution.

The permission to exit the penitentiary may be granted out, under the terms of Article 98 of Law no. 254/2013, in the following cases:

a) the presentation of the sentenced person, to fill a job after release;

b) the sentenced person going through an examination;

c) maintaining family relationships of the sentenced person;

d) preparing the social reintegration of the sentenced person;

e) participation of the sentenced person to the burial of a spouse, child, parent, brother or sister or grandfather or grandmother.

The permission to exit the penitentiary for one day, in the cases referred to in lett. *a*) - *d*) may be granted for sentenced persons serving a custodial sentence in a closed regime.

The permission to exit the penitentiary for a period of 5 days, for cases provided in lett. *a*) - *d*), may be granted for the persons sentenced serving a custodial sentence in semi-open regime.

The permission to exit the penitentiary for a period of 10 days, for cases provided in lett. *a*) - *d*), may be given to sentenced persons executing a custodial sentence in open regime.

The permission to exit the penitentiary, for the case provided in lett. *e*), may be granted for a period of 5 days, to all sentenced persons, except for those executing a custodial sentence under a maximum security regime, provided that they fulfil conditions provided by law.

The request to exit the penitentiary shall be accompanied by an indication, from the detainee, of the place where she/he is going, the route followed, as well as the financial resources available throughout the permission to exit the penitentiary.

In addition to these, Article 98 from Law no. 254/2013 provides that the sentenced persons that proved to have good conduct and perseverance in work or within the educational activities, moral-religious, cultural, therapeutic, psychological counselling and social assistance, school education and vocational training the following rewards may be awarded:

a) permission to exit the penitentiary for one day, but not more than 15 days per year;

b) permission to exit the penitentiary for a period of 5 days at the most, but not more than 25 days per year;

c) allowed out of penitentiary for a period of 10 days but not more than 30 days per year.

The total number of days granted annually to sentenced persons for the permission to exit the penitentiary may not exceed 30 days, in case of changing the regime of enforcement of the custodial sentences.

Analysing the chart below it can be seen that the permissions to leave the prison are strongly growing in popularity as the benefit has been granted twice as more in 2015, than it has in 2010.

TABLE 11

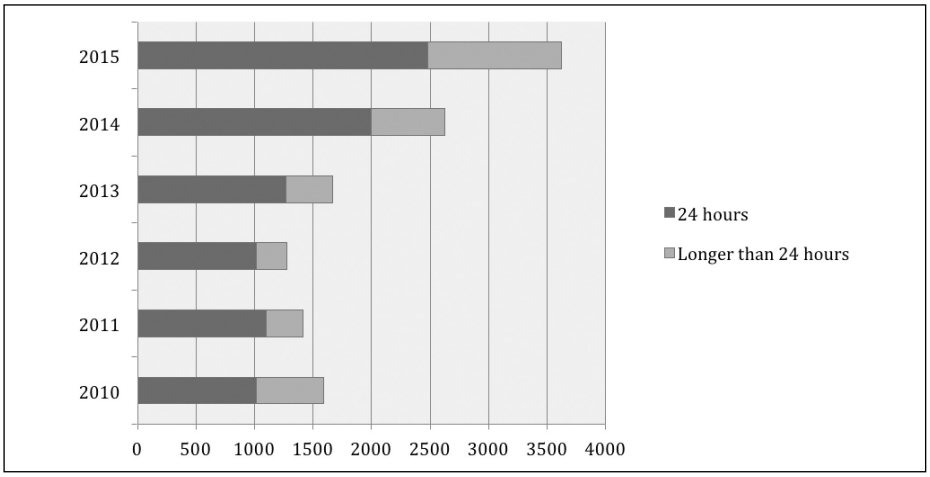


TABLE 11.1

Year	2010	2011	2012	2013	2014	2015
24 Hours	1,013	1,101	1,014	1,266	1,995	2,481
Longer than 24 hours	577	310	259	398	627	1,138

4.2. *Global evaluation of the applicable provisions*

Given the fact that by comparing the figures regarding the total number of detainees in 2015, in regard with the total number of convicts who benefited from conditional release in the same year, we find that approx. 39% of the prison population was "conditionally released" during this period.

This can be considered huge in terms of reducing prison overcrowding, as conditional release seems to be the only tool in fighting this phenomena in the post-sentencing phase. While under the other phases the alternative measures seem to form quite a variety, we cannot say the same in regard to this final phase.

In our opinion, the legislator should take into account this lack of diversity and find an solution to extend the palette of alternative measure that are available in the post-sentencing phase.

Moreover, we think that there should be a legal possibility for the convicts to execute a fraction of the penalty in some sort of home confinement, because it is inequitable and paradoxical that a person against whom pre-trial house arrest was ordered (generally, a person that posed public threat), will have had the opportunity to execute in advance a fraction of the penalty at home, while a person that was investigated without being encumbered by a preventive measure (generally, a person that does not pose public threat), will be deprived *de plano* of this possibility.

5. *Conclusion*

As shown before, the internal provisions are aligned with the European soft law, even if the European Recommendations provide for the use of a broader variety of alternative measures, including ones that are incompatible with the Romanian legal tradition. The biggest issue lies within the post-sentencing phase, where our national legislation lacks substance. The second problem is that, despite the fact that, *in abstracto*, the internal provision align almost perfectly with the European recommendations, *in concreto*, they are not applied by the judicial bodies in the manner that they were meant to be implemented. Empirical research has proven the fact that the alternative measures were taken into different accounts by the prosecutors, on one hand, and by the judges, on the other, giving the measures alternative and interpretable meanings. Even though both of the above mentioned categories should follow the same principles and standards (like the *ultima ratio* character of the pre-trial arrest

measure), the judged consider that the alternative measure are just as efficient as their executional counterparts, while the prosecutors consider them as being less efficient[33].

Analysing the available data and the judicial bodies' reaction to the new measures we conclude the following:

1. The judicial bodies manifest clear circumspection in applying new measures. The possibility and existence of non-custodial sentences do not necessarily imply that they are actually applied by judges (there are cases when a custodial sentence cannot be avoided, since the sentence has to 'cover' the pre-trial detention time);

2. The waiver of a penalty, but most of all, the postponement of the penalty are not being utilized as often as they were meant to be – correlatively, the suspension of a sentence under supervision is used too many times (at least it is used, thus reducing the overcrowding rate);

3. The judicial control is the main pre-trial tool in the struggle to combat prison overcrowding;

4. The judicial control on bail is mainly ignored by the judicial bodies[34];

5. Pre-trial arrest is still pretty easily ordered in Romania; in order to reduce overcrowding in prisons and detention centres, in our opinion, we should consider reducing as much as possible the cases in which pre-trial arrest is ordered as well thus observing the principle that preventive detention should be considered an exceptional measure and not the general rule. An empirical research shows that prosecutors seem prone to inclining towards the fact that pre-trial measures that imply deprivation of liberty are, in fact, more efficient, whilst judges seem to be balanced under this regard. Last but not least, we think that the parole officers' opinion should weigh the most (as the have direct contact with the person under surveillance and have the chance to analyse them correctly) and they see the measures that do not imply deprivation of liberty as being the most efficient[35].

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[33] D. Groza, *Libertatea de apreciere a judecătorului în materia sancţiunilor şi măsurilor neprivative de libertate*, Bucureşti: C.H. Beck, 2011, 414.

[34] In this regard, an empirical research shows that for this institution to work properly in the judicial practice, a detailed guide issued by the Superior Council of Magistracy is also needed for establishing value "levels" for bail, in accordance to the nature of the offence and the data which characterizes the defendant. All judges interviewed appear hesitant to order this alternative, arguing that there is no criteria for setting a certain amount of the bail, there being also no unitary practice. See APADOR-CH, *Is pre-trial detention used as a last resort measure in Romania*?, September 2015, available at *http://www.apador.org/wp-content/uploads/2016/02/Pre-trial-detention-in-Romania-by-APADOR-CH.pdf*.

[35] D. Groza, *op. cit.*, 392.

6. House arrest seems to gain popularity, but does not yet reach it's full potential;

7. There are clearly not enough post-sentencing non custodial measures;

8. The legislator could opt for increasing the work reward system, as too create the premises for a faster conditional release;

9. In accordance with the Ombudsman's Report[36] on prison overcrowding, we find that the lack of a secondary regulation for Law no. 254/2013 on the enforcement of sentences and of measures involving deprivation of liberty, ordered by the judicial bodies during criminal proceedings could bring a negative effect, but as from the 10th of march, such a regulation has be enacted through Governmental Decision;

10. In terms of over occupancy we observe the existence of a high or extremely high occupancy in some of the detention facilities, which do not provide the minimum area prescribed neither by domestic rules and especially not by international law;

11. In addition, the previously mentioned Ombudsman's Report explains that the reporting of legal accommodation capacity of prisons the number of detainees does not reflect the actual reality in the detention rooms. This means that the overcrowding rate is actually even higher than it is sought to be.

12. Although some studies[37] may suggest the fact that alternative measures cannot be regarded as a veritable solution to prison overcrowding, in our opinion, the conclusion should be taken into consideration in two different views: First, it seems clear that disposing an alternative measure to one that implies deprivation of liberty, will, directly and presently, reduce the prison population by one. Second of all, if we are to analyse the future effects of such a dealing we could, truly, stumble upon different results in different legislations, but one must keep in mind that reducing the prison overcrowding rate is a present and urgent matter, so the future effects should be taken into consideration on a secondary basis.

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[36] Romanian Ombudsman, *Raport special privind condiţiile de detenţie din penitenciare şi centre de reţinere şi arestare preventive, factori determinant în respectarea demnităţii umane şi a drepturilor persoanelor private de libertate*, Bucureşti, 2015, available at *http://www.avp.ro/rapoarte-speciale/raport_special_mnp_decembrie2015.pdf*.

[37] M. Aebi, N. Delgrande, Y. Marguet, "Have community sanctions and measures widened the net of the European criminal justice systems?", *Punishment & Society*, 17, 5, 2015, 576. The authors show that it is possible to conclude that the increased use of community sanctions and measures did not lead to a decrease of prison populations across Europe and instead of being alternatives to imprisonment, community sanctions and measures have contributed to widening the net of the European criminal justice systems.

We stress that promoting legislative proposals on reducing the number of prisoners would be likely to contribute to the avoiding adverse conditions of detention, to a significant decrease of the amount of money allocated from the budget or European funds for this purpose, as well eliminating the alarming rate of convictions suffered by Romania at the hand of the ECHR, including a pilot ruling in this matter (which is prone to happen in the near future in our opinion)[38].

The restorative justice system implies that the community should follow its interests, in the sense that introducing alternative community sanctions should be regarded as a favourable method to avoid labelling the defendants, providing their social reinsertion and also contributing to solving the overcrowding issue.

Last but not least, we too think that an amnesty or a collective pardon could prove to be a short term solution for the moment, as the prison overcrowding rate will, in our opinion, sky-rocket in the coming years. Another short term option could be building new penitentiaries, but as the Ministry of Justice clearly stated, in her honest opinion, probation should be key in lowering the prison overcrowding rate[39].

We conclude by stating that the alternative measures are insufficient in addition to also being inefficient, and that without the heartfelt acknowledgement of this problem by the authorities, followed by enacting one or more of the proposed solutions, the prison overcrowding rate will increase vertiginously in the upcoming years, amplifying this already tangible source of uneasiness.

[38] For the measures taken by the Romanian Government in order to avoid such a pilot ruling, see The Ministry of Foreign Affairs, *The Memorandum regarding the ECHR's intention to apply the pilot ruling procedure regarding detention conditions in Romania*, 19.1.2016, available at *http://penitenciare.info/wp-content/uploads/2016/01/procedura-pilot-CEDO.pdf*.

[39] *http://www.rfi.ro/social-84689-ministrul-justitiei-probatiunea-alternativa-viabila-la-detentie*.

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SPAIN

SUMMARY: 0. Introduction. – 1. Table of prison population between 2000-2015. – 2. Alternatives to imprisonment before trial. – 2.1. Regulation and functioning of existing measures. – 2.2. General assessment of existing measures. – 3. Alternative measures at the trial phase. – 3.1. Regulation and functioning of the measures. – 3.2. Global assessment of the measures. – 4. Post-trial measures. – 4.1. Regulation and functioning of the existing measures. – 4.2. General assessment of existing measures. – 4.2.1. Critical assessment with regard to European standards – 4.2.2. Effects, challenges and problems arising from the measures. – 4.2.3. The effect of each measure on prison population. – 5. Final conclusions.

0. *Introduction*

The purpose of this study is to analyze the alternatives to custodial sentences in the Spanish legal system in order to assess their compliance with the guidelines of the Council of Europe. It will also attempt to determine the extent to which the development of an alternative system is related to the size of the prison population. Several coordinates from the fields of economics, sociology, crime statistics, and politics (i.e. beyond the specific legal regulation) should be taken into consideration to read this report and correctly appraise its conclusions. Even from a strict legal perspective, this work has a significant handicap: Organic Act 1/2015, which entered into force on 1 July 2015, modified relevant aspects of the alternative system, as will be shown in detail. Obviously, the statistics and empirical data we have used do not reflect such legal amendment.

There is a major paradox with regard to Spain's prison population: while its crime rate is one of the lowest in the EU, its imprisonment and continued detention rates are above average. However, hence the paradox, our prison population density is quite acceptable. There is no problem of prison overcrowding, despite the inefficiency of our alternative system, as we shall see. This paradox, or at least a significant part thereof, may be explained by the prevailing economic development model in Spain before the 2008 crisis.

From the beginning of the 21st century, Spain was immersed in the so-called real estate bubble, which affected not only the private sector but also public infrastructures. In those years, roads, railway lines, universities, etc. were massively built… and, of course, penitentiaries too. In the first decade of the century, prison population increased by 16,000 inmates, certainly an impressive figure, but in that period 32,000 new prison places were created. That is why there are half-empty prisons today, just like hospitals, highways or airports. The real estate bubble allowed pursuing a punitive criminal policy without leading to prison overcrowding.

This punitive criminal policy is rooted in the 1995 Criminal Code. As regards the system of penalties, it was well-intentioned and right in trying to approach actual or effective execution of custodial sentences to the penalties prescribed in the abstract by the Code. For reasons grounded in the Spanish post-war period, the 1973 Criminal Code provided mechanisms to automatically reduce up to 1/3 of the imposed penalties in their execution phase. The 1995 Code intended to correct this divergence. Nonetheless, given that it did not substantially depart from the frameworks of the 1973 Code, it actually increased the punishments considerably. In particular, penalties for most frequent crimes (i.e. crimes against property and drug trafficking).

To this first reason, which is rather a miscalculation, must be added the fact that during the drafting process of the Criminal Code, a mantra found its way into the Spanish criminal policy, increasingly gaining presence over time: the so-called full serving of sentences. In accordance with this slogan, the legislator gradually tightened the requirements for the alternatives to the execution of custodial sentences. In short, longer terms must be served before having access to pre-release (open regime) and conditional release, and more conditions are required: explicit appeal for forgiveness to the victims, compensation for damages, etc.

Judges, prison authorities and politicians have contributed to this increase of effectiveness, and therefore of the sentences' length. Naturally, judges are in control of the alternatives before the execution of the sentence. In this regard, they act almost automatically, that is, verifying the formal requirements (e.g., if the perpetrator is a first offender and the penalty is below one year, they usually suspend the sentence). Although the 1995 Criminal Code required taking into account factors relating to the perpetrator's personality for the judicial individualization of penalties and for the application of alternatives, judges substantially lacked a sentencing culture in that sense.

Such deficiency goes back to the times of codification. One of the identifying features of the Spanish historic Criminal Codes is that judges

were left little scope for sentencing (in the sense of individualizing the penalty). In this regard, they were actually the "mouth that pronounces the words of the law." For a long time, the term for sentencing was "judicial arithmetic". It was merely a matter of "counting and adding." Even though the Criminal Code established an alternative system and somewhat broadened the discretion, little if anything was done to change that judicial culture. It would have been desirable to provide the judicial system with a group of specialists for the individualization of penalties and the adoption of alternatives. This situation contrasts with juvenile criminal law, where a specialized group advises the judge as to the measure to be adopted, significantly changing the sentencing culture in this field.

Such automatic application of alternatives to the execution of custodial sentences has benefitted particularly those who could be referred to as "new clients" of the criminal system; for instance, perpetrators of offences earlier qualified as administrative violations or not punishable by deprivation of liberty, as in the case of crimes against road safety or minor cases of gender-based violence.

The Penitentiary Administration, i.e. the executive branch, is competent for granting alternatives to prison in the execution phase. That includes not only pre-release, but also conditional release, where the judge's role is apparently greater, since the former is a pre-condition for the latter. In Spain, the Penitentiary Administration is highly hierarchical, probably as a reminiscent of its military past. The policy on the granting of alternatives is set by the Directorate-General for Penitentiary Administration, located in Madrid. Except for Catalonia, there is no decentralization. Prisons propose the granting of alternatives and the Directorate-General decides. Such centralism of the prison policy makes it very sensitive to political and ideological influences, to changes of government. Although the end of ideologies has become almost a commonplace, along with the statement that there is no left-wing or right-wing criminal policy, that is not the case in Spain. The Socialist Party's prison policy has been much more generous in granting alternatives than that – much more restrictive – of the conservative party.

This political orientation (which is not necessarily obvious, even if we talk about criminal policy) is equally clear with regard to the legislative power. As we have noted, since 1995 there is a progressive toughening of the penalties, but the two parties that have alternated in the Spanish government since the beginning of the 80s are not equally responsible. The 2003 reform, promoted by the People's Party (*Partido Popular*), was central to the stiffening of penalties. Similarly, the 2010 reform implemented by the Socialist Party was essential for reducing imprisonment

rates, for example by lowering the penalties for a key crime in that regard – drug trafficking –, and by easing access to pre-release.

In addition to these political, economic and sociological factors, the conclusions of this work beyond the purely regulatory realm should be read with caution, given the deficiencies of the Spanish system of criminal statistics.

Firstly, data from official statistics and from studies carried out by certain institutions widely differ, which is particularly alarming. The full Ombudsman's Report (*Informe del Defensor del Pueblo*) on the use of alternatives can be cited at this point. The information submitted to SPACE by the General Secretariat of Penitentiary Institutions should also be regarded with caution, at least in certain years. Data are sometimes incomplete, like in 2014, and other times inaccurate, confusing cases of suspension and substitution. The situation seems to have improved since 2014, with better statistics which distinguish between suspension and substitution, for instance. The lack of a national statistic is completely inexplicable. Catalonia, one of the most populated regions, is still outside of the statistical records, which is not accounted for by its penitentiary powers under the Spanish federal model. The improvement of statistics does not remedy, however, the aforementioned data submitted by the General Secretariat of Penitentiary Institutions for the preparation of the SPACE II reports. Stock data (number of persons with suspended sentences as at 31 December of each year) and flow data (number of persons who initiated their suspended sentence in the reference year) expressly refer to suspended sentences, but that in some years such information corresponds to the total number of substitutions and suspensions according to the General Secretariat of Penitentiary Institutions. Also, statistics fail to provide relevant data on the success or failure of the alternatives. Since the information is not broken down by measure, we do not know how many cases of suspension conclude successfully and how many are revoked.

1. *Table of prison population between 2000-2015*

In Spain, the Penitentiary Administration offers the annual prison population rates calculated on the basis of the last day of the year (Table 1)[1].

[1] Data on the size of prison population as at 31 December of each year. Available at *www.institucionpenitenciaria.es* or in the annual statistical reports of the Ministry of the Interior: *http://www.interior.gob.es/web/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas*.

TABLE 1. *Data on the evolution of prison population in Spain*[2]

Year	Total prison population
2000	45,104
2001	47,571
2002	51,882
2003	56,096
2004	59,375
2005	61,054
2006	64,021
2007	67,100
2008	73,558
2009	76,079
2010	73,929
2011	70,472
2012	68,597
2013	66,765
2014	65,017

However, the General Secretariat of Penitentiary Institutions does not provide in its official information the data on the prison population rate per 100,000 inhabitants, nor the annual availability of places. Prison overcrowding rates are thus also missing. Therefore, the data used here are those provided in the SPACE reports on Spain, since the Spanish Penitentiary Administration submits them to the Council of Europe for their preparation (Table 2).

TABLE 2. *Data provided in the SPACE reports on Spain*[3]

Year	Spain's population	Number of inmates	Prison population rate per 100,000 inhabitants	Total capacity of penal institutions	Surface area per inmate	Prison density per 100 places
2000		45,044	114	42,395		106
2001		46,962	117			
2002	40,409,300	50,994	126.2	45,320		112.5
2003	40,683,000	55,244	135.8	48,420		114.1
2004	42,197,900	59,224	140.3	45,733		129.5

Continues

[2] Total data for the Central State Administration and Penitentiary Administration in Catalonia, competent for prison enforcement. Surprisingly, these data do not fully correspond to the information provided in the Space Reports of the Council of Europe.

[3] Own compilation based on the data provided in the annual Space I reports of the

Follows: TABLE 2. *Data provided in the SPACE reports on Spain*

Year	Spain's population	Number of inmates	Prison population rate per 100,000 inhabitants	Total capacity of penal institutions	Surface area per inmate	Prison density per 100 places
2005	43,038,000	61,629	142.4	45,811		133.7
2006	43,886,800	64,120	146.1	45,811		140
2007	45,200,700	66,467	150.2[4]	48,659		143.2[5]
2008	46,157,800	71,778	159.7[6]	52,447		141.9[7]
2009	46,745,800	78,342	173.1[8]	55,421		153[9]
2010	47,021,100	75,859	164.8[10]	76,851		96.9[11]
2011	46,152,926	71,995	158.3[12]	75,647		91.8[13]
2012	47,265,321	69,621	147.3	77,895		89.4
2013	46,727,890	68,099	145.7	77,895	9.4	87.4
2014	46,512,199	66,786	145.7[14]	77,895		85.2[15]
2015		65,017		77,209		84.5[16]

Council of Europe until 2013, and data for 2014 and 2015 from Prison Stock on 1 January 2014 and 2015.

[4] Data provided in Space I for the Central State Administration. For Catalonia, the rate would be 130.3.

[5] Data provided in Space I for the Central State Administration. For Catalonia, the density would be 106.8.

[6] Data provided in Space I for the Central State Administration. For Catalonia, the rate would be 133.6.

[7] Data provided in Space I for the Central State Administration. For Catalonia, the density would be 141.9.

[8] Data provided in Space I for the Central State Administration. For Catalonia, the rate would be 138.5.

[9] Data provided in Space I for the Central State Administration. For Catalonia, the density would be 94.3.

[10] Data provided in Space I for the Central State Administration. For Catalonia, the rate would be 143.2.

[11] Data provided in Space I for the Central State Administration. For Catalonia, the density would be 111.4.

[12] Data provided in Space I for the Central State Administration. For Catalonia, the rate would be 144.1.

[13] Data provided in Space I for the Central State Administration. For Catalonia, the density is 120.6.

[14] Data provided in Space I for the Central State Administration. For Catalonia, the rate is 132.5.

[15] Data provided in Space I for the Central State Administration. For Catalonia, the density is 89.

[16] Data provided in Space I for the Central State Administration. For Catalonia, the density is 82.8.

Even though the analyzed data start at the beginning of the 21st century, it should be noted that the Spanish prison population starts to increase in the 90s[17]. First, as a result of the implementation of the 1995 Criminal Code, the first under democracy; while it introduced a limited renewal of the system of penalties[18], the suppression of a penitentiary benefit created under Franco's regime (namely, remission of sentences for work)[19], *de facto* triggered a lengthening of prison sentences[20]. Subsequently, through further reforms of the Criminal Code – the most relevant ones in 2003 –[21], a profound transformation of the system of penalties has been designed, including toughening the execution of prison sentences[22]. The combination of the new measures and their actual effect on lengthening prison sentences, rather than a significant rise in crime, accounts for the progressive growth of the prison population in Spain[23].

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[17] Increasing in that time by almost 34%, from 33,058 to 44,187 inmates. M.J. Benítez Jiménez, "Población penitenciaria: evolución, volumen y características demográficas", in A.I. Cerezo Domínguez, E. García España (coord.), *La prisión en España, una perspectiva criminológica*, Granada: Comares, 2007, 44.

[18] Lowering the maximum serving times from 30 to 20 years (exceptionally, from 40 to 30), suppressing short sentences – by establishing a minimum of 6 months –, and including weekend detention as an original or alternative penalty.

[19] Which consisted in the possibility of an ordinary reduction of 1 day of imprisonment for every two days of work, with greater reductions for extraordinary cases. It was a very useful tool to reduce prison population at a time of acute overcrowding after the Spanish Civil War, where overcrowding was one of the major problems. G. Gómez Bravo, *La redención de penas. La formación del sistema penitenciario franquista 1936-1950,* Madrid: Los Libros de la Catarata, 2007, 124.

[20] C. Rodríguez Yagüe, *El sistema penitenciario español ante el siglo XXI*, Iustel, 2013, 68 and 69.

[21] Organic Act of June 30, n. 7/2003, "On reform measures for the full and effective serving of sentences", in *BOE* n. 156 of 1 July 2003, and Organic Act of November 25, n. 15/2003, "Amending Organic Law 10/1995, of 23 November, on the Criminal Code", in *BOE* n. 283 of 25 November 2003.

[22] Specifically by enlarging the categories of crimes, toughening the penalties, reintroducing short-term sentences (from 6 months) and rising the maximum serving time to 40 years, suppressing weekend detention or the possibility of serving permanent traceability in prison for repeat property offenders, and tightening eligibility for open detention and conditional release. For an interesting analysis of this period, see J.L. Díez Ripollés, "La evolución del sistema de penas en España" (1975-2003), in *Rev. Electrónica de Ciencia Penal y Criminología*, n. 08-07 (2006), 1 ff.

[23] By no means is this growth attributable to a rise in crime, which has declined in recent decades. It is actually due to subsequent and recurrent increases, both legal and factual, in custodial sentences in recent years, thus entailing a considerable lengthening of the effective prison terms. S. Redondo Illescas, F. Pozuelo Rubio, A. Ruíz Alvarado, "El tratamiento en las prisiones: investigación internacional y situación en España", in A.I. Cerezo Domínguez, E. García España (coord.), *La prisión en España, una perspectiva criminológica*, Granada: Comares, 2007, 182.

This is especially true after 2003, exceeding the European average of prison population rate at the end of the 2000s[24].

Also a legislative reform, in 2010[25], will seek to reverse the increase in prison population, although it coincided with a drop both in crime and in the prison population serving pre-trial detention.

During that time, and except for the trend initiated at the beginning of the 80s (fostering alternatives to serving prison sentences under the original drafting of the 1995 Criminal Code, widening the scope for suspending execution of prison sentences, or introducing new alternatives to sentences), it may be concluded that the system of penalties has moved towards an intensive use of prison. Custodial sentences and deprivation of rights that mostly do not substitute but supplement prison sentences have been reinforced. There has been a lack of real political will to provide an alternative to custodial sentences[26].

2. *Alternatives to imprisonment before trial*

2.1. *Regulation and functioning of existing measures*

(A) *Alternatives to pre-trial detention*

Pre-trial or preventive detention is governed by Articles 528 et seq. of the Spanish Criminal procedure Act (in Spanish, *Ley de Enjuiciamiento Criminal*; hereinafter, LECrim). Like any other preventive measure, it must be imposed in accordance with the principle of proportionality and *prima facie* appearance. Preventive detention may be imposed in relation to offences punishable by a custodial sentence of more than 2 years, or where the accused has a criminal record for intentional crimes which has not been expunged. However, it may be imposed for any intentional crime – regardless of the sentence – in cases of domestic vio-

[24] In 2009, the year with a highest prison population, Spain was well above the European average (136.8), with a rate of approximately 161 prisoners per 100,000 inhabitants, which made it the country with the highest prison population rate in Western Europe. E. García España, J.L. Díez Ripollés, *Realidad y políticas penitenciarias*, Málaga: Instituto Interuniversitario Andaluz de Criminología, 2012, 2011.

[25] Organic Act of June 22, n. 5/2010, "Amending Organic Law 10/1995, of 23 November, on the Criminal Code". In particular, by reformulating Access to pre-release for the most serious crimes, and reducing the penalty for drug trafficking. On its effect, see C. Rodríguez Yagüe, *El sistema penitenciario español ante el siglo XXI*, op. cit., 103 ff.

[26] J.L. Díez Ripollés, "La evolución del sistema de penas en España", op. cit., 8 to 13. And this, because the limited attempt to implement the system of penalties of the 1995 Criminal Code suffered, first the lack of personal and criminal resources, as well as the judicial routines, to apply the new penalties; and, secondly, the prevailing policy trend towards a model based on an increased use of imprisonment, 23.

lence to protect the victims, or where it is established that the accused, together with others or within a criminal organization, plans to commit further crimes. Furthermore, such measure must be grounded on at least one of the following purposes: (*a*) to ensure the presence of the accused at the trial; (*b*) to avoid destruction of evidence; (*c*) to prevent the commission of further crimes and, in particular, to protect the victim.

Duration of preventive detention is always determined by the proportionality principle. Therefore, it must be restricted to the underlying purposes (Article 528 LECrim). However, the following maximum terms are provided: where it is ordered to avoid destruction of evidence, it may not exceed 6 months; in all other cases: (*a*) if the offence carries a sentence of more than 3 years, imprisonment may not exceed 2 years, although such period could be extended for another 2 years; (*b*) if the crime is punishable by a sentence of less than 3 years, preventive detention may not exceed 1 year, with a possible extension of 6 months; (*c*) where the accused is convicted, it may never exceed one-half of the sentence imposed.

There are certain alternatives to pre-trial detention:

A.1. Obligation to appear before the judge

The most usual alternative to preventive detention, when it is aimed at ensuring the presence of the accused at trial, is the obligation to appear before the judge, with the established periodicity, and as often he/she may be called before the court. To ensure compliance with this obligation, by means of a reasoned decision the judge or court may withhold his/her passport (Article 530 LECrim).

A.2. Release on bail

The obligation to appear may be reinforced by the imposition of a bail (Article 529 LECrim). Its purpose is to ensure the presence of the accused whenever he/she is called by the competent Judge or Court (Article 532 LECrim). In determining the bail, the nature of the crime, the accused's social situation and record must be taken into account, as well as any other circumstances that could influence the intention to flee from the judicial authority (Article 531 LECrim). The bail may be subsequently modified (Articles 591-596 LECrim). The imposition of a bail must be requested by the public prosecutor and by the parties, and the decision is subject to appeal by the parties.

A.3. Preventive detention served in the accused's residence

The judge or court may order preventive detention to be served in the accused's residence, subject to any necessary security measures,

where, due to illness, imprisonment would entail serious risks to the accused's health. The judge or the court may authorize the accused to leave the residence for as long as necessary for his/her treatment, always subject to the necessary security measures (Article 508 LECrim).

A.4. Preventive detention served in a detoxification center

When the accused is undergoing a drug or alcohol detoxification treatment and imprisonment might interfere with the outcome of such treatment, preventive detention may be replaced by admission to an official or duly authorized center in order to continue treatment, provided that the events giving rise to the legal proceedings took place before treatment started. In such cases, the accused may not leave the center without authorization from the judge or court ordering the measure.

A.5. Prohibition to approach the victim and prohibition of residence

The prohibition to approach the victim is an alternative to preventive detention when the latter is ordered to protect the victim (Article 544 LECrim). This measure is especially relevant in cases of gender-based violence, but it is also applied in cases of violent crimes against privacy or property (see offences of Article 57 of the Criminal Code). Removal measures may consist in a restraining order, a change of residence order, or a prohibition to approach certain places. In adopting these measures, the accused's economic situation and health requirements, family situation and work activity must be taken into account. Breach of the measure will give rise to another more restrictive measure or, in accordance with the proportionality principle, preventive detention.

(B) *Judicial expulsion of charged or accused aliens*

An alternative to pre-trial detention during the criminal proceedings, at a stage where presence is required, is judicial expulsion of aliens under aliens' legislation[27].

This type of expulsion is part of a set of measures aimed at preventing establishment of alien offenders in Spain, or at ensuring their expulsion. Indeed, criminal records are an obstacle for the entry and stay in the national territory[28]. Furthermore, aliens' legislation, like criminal law

[27] Provided in Articles 57(5) to (11) and 58 of Organic Act of January 11, n. 4/2000, "Rights and freedoms of foreigners in Spain and social integration" (LOEX), in *BOE* n. 10 of 12 January 2000.

[28] First, the Aliens Regulation (Royal Decree of April 20, n. 557/2011, "approving the Regulation of the Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social Integration", REX) establishes the prohibition of entry for aliens pursued by ju-

after 1995, provide for the expulsion of aliens as an alternative measure to criminal intervention. It can be applied in three different moments: pre-trial phase, replacing the proceeding and the punishment; at the sentencing phase, replacing the imposition of a sentence; or during the execution of a custodial sentence, replacing part of it[29].

Both the LOEX and the Criminal Code have attempted to turn the expulsion of aliens into the most relevant vehicle of a singular political response to aliens' delinquency, trying to ensure their absence from the Spanish territory[30]. On the grounds of merely defensive tenets, both provisions regulate expulsion in a sense that does not serve any criminal law purposes, imprisonment being limited to the most serious cases within a system oriented to the offender's social rehabilitation. Quite the contrary, expulsion is here conceived as a priority response to unwanted immigration, which implies a subordination of criminal law, its purposes and its principles, to economic and administrative immigration control policies[31].

Among the reasons underlying these measures are a wrong (and automatic) identification of immigration as a factor encouraging crime, as well as the implementation of a fundamentally economic immigration policy model, which tailors the type of alien wanted[32]. In this regard, Spain's geographical role as an entry point for immigration from South America and northern Africa to Europe should be recalled[33].

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dicial or police authorities from other countries for criminal cases arising from serious common crimes, provided that such offences are classified as crimes in Spain (Article 11). Secondly, temporary residence permits are subject to the alien's lack of previous criminal record in Spain or the previous countries of residence (Article 31(5) of the LOEX). Criminal records are an obstacle, although not insurmountable, in the assessment of applications for renewal of temporary residence permits, pardons and suspensions of custodial sentences being positively considered (Article 32(7) of the LOEX). In applications for long-term residence permits, aliens must submit a criminal record certificate certifying that the applicant has not been convicted of crimes under the Spanish Criminal Code (Articles 149(2) and (3) of the REX). Finally, the existence of criminal records that have not been expunged is one of the grounds for administrative expulsion of aliens under the LOEX (Article 57(2)).

[29] See below 3. Measures at the trial phase.

[30] C. Rodríguez Yagüe, "El modelo político-criminal español frente a la delincuencia de inmigrantes", in *Rev. Electrónica de Ciencia Penal y Criminología*, n. 14-07 (2012), 2 and 7 ff.

[31] J. Baucells I Lladós, "El Derecho penal ante el fenómeno migratorio", in *Rev. de Derecho y Proceso Penal,* n. 13, 2005, 60.

[32] This conception of aliens as enemies, replacing drug dependents as the most dangerous category, allows to maintain Western welfare states, enabling massive use of immigrants in uttermost conditions of exploitation and flexibility. J.A. Brandariz García, C. Fernández Bessa, "La construcción de los migrantes como categoría de riesgo: fundamento, funcionalidad y consecuencias para el sistema penal español", in S. Palidda, J.A. Brandariz García (eds.), A. Iglesias Skulj, J.A. Ramos Vázquez (coord.), *Criminalización racista de los migrantes en Europa*, Granada: Comares, 2010, 272 ff.

[33] J. Terradillos Basoco, "Política europea de inmigración", in F.J. Muñoz Conde (co-

Two seem to be the objectives pursued by the legislator with this measure. First and foremost, it intends to prevent aliens from committing crimes to avoid their own expulsion by means of criminal proceedings that would force them to stay in Spain. Second, as already explained, it subordinates the functioning of the criminal law system – which would require an investigation, a trial, and the potential punishment of the offender – to a specific immigration and aliens policy. Hence, this measure acts as in a way as a discretionary principle unprecedented in the Spanish legislation, since it allows the judge to choose the cases in which no criminal proceedings will be followed. The administrative expulsion already conducted by the Administration is thus given priority, renouncing to pursue criminal proceedings with regard to the alleged offence.

Judicial expulsion of accused aliens is restricted to aliens in an irregular administrative situation, and those with temporary residence permits. The following are therefore exempted from the application of this measure[34]:

– Aliens who have been legally resident in Spain for the last five years;

– Long-term residents[35];

– Aliens of Spanish origin who have lost their Spanish citizenship;

– Recipients of a benefit for permanent loss of working capacity due to accidents at work or occupational diseases occurred in Spain, or contributory unemployment benefit recipients, or recipients of social security integration benefits.

Aliens accused of illegal trafficking of workforce (Article 312(1) of the Criminal Code) and crimes against aliens' rights (Article 318*bis*) are also exempted under the LOEX. If such crimes are committed by aliens, whether resident or not, expulsion shall be carried out after serving the custodial sentence (Article 57(8) of the LOEX). The purpose of this clause is to prevent such crimes from going unpunished.

Judicial expulsion under the LOEX is not applicable to EU citizens,

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ord.), *Problemas actuales del Derecho penal y de la Criminología*, Valencia: Tirant Lo Blanch, 2008, 970.

[34] Unless in the event of offences consisting in participation in activities contrary to national security or that could harm Spain's relations with other countries, or activities contrary to public order considered very serious under the Public Safety Act (*Ley de Seguridad Ciudadana*), or in the case of offenders who have relapsed, within a year, to offences punishable by expulsion (Article 57(5) of the LOEX).

[35] Expulsion of long-term residents require considering the time of residence in Spain and the links established, their age, the consequences for him/her and his/her family, and the links with the country to which he/she may be expelled.

which are only subject to the LOEX in the aspects more favorable than those provided for in the EU regime (Article 1). The LOEX expressly refers to the judicial expulsion of long-term residents in Spain from another Member State, which may only be ordered for the commission of a more limited set of offences,[36] and after consulting the authorities of that Member State (Article 57(10) of the LOEX). If the expulsion concerns a long-term resident who is a beneficiary of international protection granted by another Member State, he/she may only be expelled to that Member State (Article 57(11)), unless there are reasonable grounds for regarding him/her as a danger to Spain's security, or if he/she has been convicted by a final judgment of a particularly serious crime.

Judicial expulsion implies the judge's authorization of an administrative expulsion previously processed for any of the reasons under the LOEX that give rise to an administrative violation expressly carrying the possibility of expulsion: most commonly, the alien's administrative irregularity[37]. The judge merely authorizes the expulsion within the shortest possible time, in any case within 3 days, after hearing the Public Prosecutor's Office (Article 57(7) of the LOEX). Hence, expulsions are not penalties in nature but administrative sanctions, where judicial authorization is a necessary condition for the expulsion to be carried out by the Administration[38]. The judge merely verifies that the government resolution of expulsion complies with the legal requirements. Even though it is a discretionary measure, expulsion is the general rule, unless a reasoned decision is taken upholding certain grounds for refusal. If the expulsion is authorized by the judge, it will be notified to the affected party, indicating any available legal remedies and the competent bodies.

As for the effects of such alternative, any authorization to legally stay in Spain will be filed, as well as any pending application for a residence or work permit. Furthermore, entry in Spanish territory is prohibited for a period of no more than 5 years, which may exceptionally be extended to 10 if the alien represents a serious threat for public order, public security, national security or public health.

If the expelled alien attempts to return to the national territory during that period, he/she will be refouled, and the 5 or 10 year expulsion

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[36] In particular, the ones provided in Articles 53(1)(*d*) and (*f*), and 54(1)(*a*) and (*b*) of the LOEX.

[37] Classified as a serious offence under Article 53(1) of the LOEX. Expulsion as an administrative sanction is only provided for very serious offences under Article 54 of the LOEX and serious offences established in Article 53(1)(*a*), (*b*), (*c*), (*d*) and (*f*).

[38] Constitutional Court, Ruling of January 31, n. 24/2000, in *BOE* n. 54 of 3 March 2000.

period will start to run afresh. However, if such refoulement cannot be carried out within the following 72 hours, the judicial authorities will be required to order the alien's detention in an Alien Detention Center (*Centro de Internamiento de Extranjeros*, CIES).

This alternative measure to trial and, therefore, to the deprivation of liberty is the competence of law enforcement bodies, police officers responsible for aliens, and border authorities.

2.2. *General assessment of existing measures*

(A) *Alternatives to pre-trial detention*

Alternative measures are clearly insufficient. For instance, there is no explanation for the absence of further possibilities regarding the application of preventive detention in the accused's residence. The lack of alternative measures for cases where there is a risk of destruction of evidence or obstruction of the proceedings is also inexplicable. Furthermore, it is customary in Spain to use preventive detention as a form of coercion to force the accused's cooperation.

On the other hand, the Spanish system largely complies with the requirements set forth in Recommendation (2006), point 7. Preventive detention may only be ordered when there are reasonable doubts and sufficient grounds to believe that the offender may flee (*i*), may commit a serious crime (*ii*), is obstructing the proceedings, or (*iii*) represents a serious risk for public order. However, with regard to (*ii*) and (*iii*), preventive detention is ordered without any previous risk assessment by the judge. Even though preventive detention actually works in those cases as a pre-crime security measure, its imposition does not follow a personality exam similar to those undertaken with regard to security measures.

However, the list of alternatives to preventive detention is very limited, compared to that arising from the Recommendation (2006). It should also be borne in mind that Spanish law does not provide for settlement or mediation measures, and establishes the principle of mandatory prosecution (principle of procedural legality).

With regard to the effects, challenges and problems posed by the measures, it is worth noting that persons in preventive detention in the middle of the 90s represented approximately 25% of prison population[39]. As can be seen in Table 3 below, there has been a significant decrease since that date, except for the rebound beginning in 2003, probably due to the 2003 reform of the Criminal Code (clearly punitive-ori-

[39] M. Barbero Santos (ed.), *Prisión provisional, detención preventiva y derechos fundamentales*, Cuenca: Ediciones de la Universidad de Castilla - La Mancha, 1997.

TABLE 3. *Prisoners in preventive detention in relation to total prison population*

Year	% pre-trial	Total prison population	In preventive detention
2000	20.2	45,104	9,100
2001	21.3	47,571	10,141
2002	22.8	51,882	11,810
2003	21.9	56,096	12,276
2004	22.1	59,375	13,112
2005	22.5	61,054	13,720
2006	23.5	64,021	15,065
2007	24.0	67,100	16,137
2008	24.3	73,558	17,849
2009	20.5	76,079	15,580
2010	18.7	73,929	13,837
2011	17.2	70,472	12,148
2012	13.4	68,597	9,170
2013	13.9	66,765	9,292
2014	13.2	65,017	8,595
2015	12.5	61,614	7,684

ented). After the 2010 reform, which reduced punishments for drug trafficking, the figures drop again.

In any case, nothing accounts for the significant decrease in the number of prisoners in preventive detention in relation to those sentenced. The only explanation one could venture is a growing acquiescence, thus shortening criminal proceedings, together with the expansion of expeditious trials, which also reduce the duration of proceedings and, therefore the length of preventive detention. Judges' mentality may have also changed as regards preventive detention, in a sense more in line with the proportionality principle.

Finally, we have no information on the effect of alternatives to pre-trial detention on the prison population.

(B) *Judicial expulsion of accused aliens*

Only very recently have data on judicial expulsion of aliens begun to be available. However, since we ignore the percentage of accused aliens

TABLE 4. *Number of expulsions alternative to criminal proceedings*[40]

	2009	2010	2011	2012	2013	2014
Accused persons	1,930	3,165	3,186	2,255	2,502	2,626
In preventive detention	58	84	98	127	71	59

that would be in the same situation, we cannot assess the actual effect of this alternative. Nonetheless, the high percentage of aliens in the sentenced prison population in Spain, which at some point reached 35%, shows the residual nature of expulsions ordered before trial and by rulings (Table 4).

It has been observed that judges are strongly reluctant to apply this figure. The reasons are manifold. First, of a material nature, since its application implies a waiver of the State's *ius puniendi*, resulting from a discretionary principle not provided in Spanish procedural law. Criminal proceedings are thus subordinated to the purposes of a defensive aliens' policy[41]. As a consequence, the rights to due process and constitutionally protected rights such as the right to be presumed innocent and to a public trial without undue delay, as manifestations of the right to effective judicial protection enshrined in Article 24 of the Spanish Constitutions. Furthermore, in many cases there are practical problems to carry out the expulsion, such as the refusal of the country of residence of the alien or even the ignorance of his/her nationality[42]. The victim and the society's interest in an adequate response by the criminal system to the offence committed also plays a role[43]. To overcome such reluctance, the Spanish legislator reformed the LOEX in an attempt to frame this figure as almost automatic, compared to its originally discretionary nature[44]. However, this automatic functioning has been questioned by courts in practice, rightly refining the cases in which this figure may be used. Hence,

[40] Data provided by the Public Prosecutor's Office in its annual Report 2015.

[41] A. PÉREZ CEPEDA, *Globalización, tráfico internacional ilícito de personas y derecho penal*, Granada: Comares, 2004, 339.

[42] A. ASÚA BATARRITA, *La expulsión del extranjero como alternativa a la pena: incongruencias de la subordinación del derecho penal a las políticas de control de la inmigración*, in P. LAURENZO COPELLO (coord.), *Inmigración y Derecho penal. Bases para un debate*, Valencia: Tirant Lo Blanch, 2002, 34 to 37.

[43] M.J. RODRÍGUEZ MESA, *Inmigración y sistema penal. Retos y desafíos para el siglo XXI*, Valencia: Tirant Lo Balnch, 2006, 271 and 272.

[44] Organic Act of September 29, n. 11/2003, "On concrete measures in the fields of citizens' security, domestic violence and social integration of aliens, art. 149 (amending the Criminal Code)", in *BOE* n. 234 of 30 September 2003.

the Spanish Public Prosecutor's Office has opposed its application for serious crimes (carrying sentences of 5 years) and supported it for minor offences (carrying sentences of less than 5 years). In that Office's view, criteria such as the relevance of the offence, any relation with organized groups, social alarm caused or the need for a reinforced response from the criminal system must be taken into account. Expulsion should not be carried out where those harmed by the offence expect to obtain compensation, or if the alien's statement is required to determine third parties' responsibility[45].

In conclusion, its effect is very limited, especially if we consider the importance the legislator wanted to attach to expulsion as a measure against aliens' delinquency, both under the LOEX and the Criminal Code.

3. *Alternative measures at the trial phase*

3.1. *Regulation and functioning of the measures*

When it comes to sentencing, the Spanish legal system offers a very limited list of measures. There are only two[46]: suspension of custodial sentences (A) expulsion as an alternative to custodial sentences (B).

(A) *Suspension of custodial sentences*

Organic Act 1/2015, of March 30, entered into force on 1 July 2015. After that date, the suspension regime is substantially modified. The reform introduces a single system unifying the two previous figures (suspension and alternative sentences) under a single one named "suspension of execution of custodial sentences" (Articles 80-87 of the Criminal Code). However, the imposition of an alternative sentence is established as an autonomous measure for the expulsion of aliens.

The aim of suspension is to put on hold the execution of custodial sentences in accordance with the special-negative preventive purpose. The execution of the sentence is thus suspended because it is not necessary to prevent further commission of crimes by the offender.

There are currently four types of suspension: ordinary (*i*); imposition of an alternative sentence as a type of suspension (*ii*); suspension in the case of the incurably ill (*iii*); suspension of sentences for crimes com-

[45] Circular of the Public Prosecutor's General Office number 2/2006.

[46] For the sake of concision, community service and fines as primary sentences alternative to imprisonment will not be addressed here.

mitted as a result of substance dependence (*iv*). Furthermore, specific rules apply for offences against the Public Treasury and Social Security (*v*).

(*i*) Under ordinary suspension, custodial sentences not exceeding 2 years (without taking into account those resulting from non-payment of fines), or sentences the addition of which does not exceed 2 years, may be suspended (hence, suspension is discretionary). In deciding the suspension, the judge shall take into consideration the circumstances of the offence committed, the offender's record, his/her subsequent conduct, in particular compensation efforts, and the expectations generated by suspension, alongside compliance with certain duties mentioned below.

The subject must be a first offender. For this purpose, criminal records for minor offences are not taken into account, nor are those for offences that – due to their nature or circumstances – are not relevant to assess the probability of further offences (the latter being a major novelty). Also, civil liability obligations must have been complied with. This second requirement has been somewhat relaxed, since such obligations shall be deemed fulfilled if the offender assumes a commitment in that regard in accordance with his/her economic capacity. For that purpose, the judge shall establish a reasonable deadline. Thirdly, and also an innovation, the subject must have given effect to the seizure ordered by the ruling, in order to prevent delaying tactics to bypass such delivery.

(*ii*) Suspension may also be ordered by imposing an alternative sentence (Article 80(3)). This is also at the judge's discretion, but it is conceived as an exceptional measure. It may be decided even in the event of non-primary offenders and regardless whether the sum of imposed sentences exceeds 2 years (except for habitual offenders)[47], provided that the sentences, individually considered, do not exceed 2 years. Suspension must be justified by the nature of the offence, the offender's personal circumstances, his/her conduct and, in particular, efforts to compensate the damage.

Reparation and compensation for damages may be substituted by compliance with the mediation agreement. Furthermore, the of-

[47] Habitual offenders are deemed to be those who have committed three or more offences under a same heading within a term not exceeding five years, and who have been convicted thereof (Article 94 CP).

fender must pay a fine or perform community service[48]. Fines may not be lower than that resulting from applying two quotas per day of imprisonment, with a limit of two-thirds of the term of the suspended sentence. As regards community service, its term may not be lower than that resulting from counting one day of works per day of imprisonment, with a maximum of two-thirds of the term of the sentence. Unlike the previous regime, permanent traceability may not be used as an alternative.

(*iii*) The third type of suspension is provided for the incurably ill (Article 80(4) of the Criminal Code). Similarly, it is a discretionary measure, different from the other types of suspension in that it is only subject to one requirement: that, at the time of committing the offence, the offender did not have another sentence suspended for the same reason.

(*iv*) Article 80(5) of the Criminal Code establishes a discretionary and specific suspension for those cases where the offender committed the offence due to his/her substance dependence (drugs, alcohol, etc.). As in the suspension by imposition of an alternative sentence, it may be ordered even in the case of repeat offenders, but only custodial sentences not exceeding 5 years may be suspended. The offender is required to be detoxified or undergoing detoxification treatment. This must be certified by a public or private center. Ongoing treatments must be completed in full.

(*v*) Suspension for offences against the Public Treasury and Social Security (Article 308*bis*) are governed by the rules established for suspension in Articles 80 et seq. of the Criminal Code, with some variations: the offender must have paid his/her tax or Social Security debt, or he/she must have reimbursed any aids or subsidies unduly received or used. In this regard, it is sufficient for the offender to assume the commitment to pay the debt and any civil liability obligations in accordance with his/her economic capacity, and to give effect to the seizure ordered.

The suspension term is 2 to 5 years for custodial sentences not exceeding 2 years, and 3 months to 1 year for minor sentences. The term of

[48] On community service as an alternative sentence after the reform, see J.A. Brandariz García, "Las penas de trabajos en beneficio de la comunidad y localización permanente (arts. 40, 48 y 35)", in J.L. González Cussac, *Comentarios a la reforma del Código penal de 2015*, Valencia: Tirant Lo Blanch, 2015, p. 242 ff., and N. Torres Rossel, "Trabajos en beneficio de la comunidad y localización permanente", in G. Quintero Olivares (dir.), *Comentarios a la reforma penal del 2015*, New York: Aranzadi, 2015, 101-114.

suspensions concerning offences due to substance dependence ranges from 3 to 5 years. In setting the term, the judge shall take into account the type of offence, the offender's personal circumstances, his/her record, his/her subsequent conduct, the effort to repair the damage caused, his/her family ties, etc.

There is a common procedure (Article 82) for all types of suspension. A novelty introduced by the reform is that suspension is generally decided at the sentencing (before, this only occurred in the event of acquiescence). However, if the decision could not be taken at the sentencing, it shall be ordered when the ruling becomes final, after hearing the parties. The term begins on the date of the decision ordering the suspension. If it was ordered by the ruling, the term shall begin upon such ruling becoming final. Parties have the right to be heard.

The possibility of subjecting the suspension to compliance with certain duties and prohibitions is also common to all types (Article 83). The judge shall assess the risk of further offences, guided by the proportionality principle. These measures have a preventive nature (prohibition to approach certain places, the victims, their relatives or other persons determined by the judge; the prohibition to communicate with certain persons, to drive vehicles, to reside in a certain place, to appear before the judge or in police offices, etc., the prohibition to drive motor vehicles without technological mechanisms that subject their startup or functioning to previous verification of the driver's physical condition); they also have a rehabilitation nature (participation in training or cultural programs, in detoxification programs regarding alcohol or drug dependence, etc.). It is not a closed list, since the judge may order any other measure considered appropriate for the offender's social rehabilitation, subject to his/her consent, and provided that they do not infringe upon his/her human dignity. If the offenders have been convicted of crimes committed by the husband or a person with an analogous affective relationship against his wife, the prohibition to approach the victim, to reside in a certain place, and participation in training or other programs must be mandatorily imposed.

Law enforcement bodies are responsible for monitoring compliance with such duties or prohibitions (for instance, in the case of prohibitions to approach or contact the victim, or to reside in a certain place, etc.). Training or detoxification programs are the competence of the sentence management and alternative measures services of the Penitentiary Administration.

In addition to these duties and prohibitions, the judge may also subject the suspension to compliance with certain provisions or mea-

sures (Article 84 of the Criminal Code), like the following: compliance with the parties' mediation agreement; payment of a fine as determined by the judge or court based on the circumstances of the case, which may not exceed that resulting from applying two quotas per day of imprisonment, with a maximum of two-thirds of the term, and/or performance of community service, especially when it may be an appropriate symbolic reparation in the light of the circumstances of the case and the offender. The judge or the court shall decide the term of such works taking into consideration the circumstances of the case, which may never exceed the result of calculating one day of works per day of imprisonment, with a maximum of two-thirds of the term. In the case of gender-based crimes of violence, fines may only be imposed when the absence of economic relations derived from the marital, cohabitation or son/daughter relationship, or the absence of common descendants, is proved.

In any event, the conditions of the suspension may be modified (for the offender's benefit) by the judge (Article 85 of the Criminal Code).

The suspension may be revoked in the cases provided in Article 86 of the Criminal Code. The major novelty of the reform lies in the suppression of the requirement that no offences be committed during the suspension term, which previously constituted automatic grounds for revocation. Committing an offence during that period will now only entail revocation if there is proof that the expectation underlying the suspension decision can no longer by maintained. Serious and repeated breaches of duties and prohibitions, as well as evading control of the sentence management and alternative measures services of the Penitentiary Administration, also give rise to revocation. New grounds for revocation are established: provision of inaccurate or incomplete information on the location of goods or objects under a seizure order; also, failure to fulfill the commitment to comply with any civil liability obligations (unless for lack of economic capacity), or provision of inaccurate or incomplete information on his/her assets. Suspension of sentences imposed for offences against the Public Treasury or Social Security, failure to comply with the commitment to pay the tax or Social Security debts, to reimburse any aids or subsidies unduly received or used, or to comply with any civil liability obligations, are also grounds for revocation. If breaches of duties or prohibitions are not serious or repeated, the judge may impose different ones, modify those imposed or extend the suspension term, which may never exceed one-half of the term initially established (Article 86(2) of the Criminal Code). Revocation of suspension does not imply reimbursement of expenses incurred by the offender to compen-

sate damages caused by the offence. However, fines and community work services will be deducted from the sentence imposed.

The judge shall order the remission of sentence on expiry of the suspension period, provided that the subject has not committed a crime invalidating the expectation on which the suspension was grounded. In the case of drug dependents, their detoxification or undergoing treatment must be certified (Article 87 of the Criminal Code).

From a critical perspective, the combination of substitution and suspension in a single alternative suspension measure should be welcomed in general terms, due to its greater flexibility and rapidity[49]. As for the increase in rapidity, the decision is adopted in a single resolution, avoiding certain maladjustments of the previous situation (which required a different application for each one, without clarifying the relation between them). Greater flexibility results from the fact that suspension may be ordered even in the case of ordinary repeat offenders. Crimes which – due to their nature or circumstances – are irrelevant to assess the probability of commission of further offences are no longer considered criminal records. Hence, the commission of a previous crime does not necessarily imply dangerousness (e.g., drug-related crimes due to substance dependence if the subject is already detoxified, or totally unrelated crimes such as driving under the influence of alcohol, or embezzlement or misappropriation)[50]. Furthermore, the legislator has done well in avoiding both automatic rejection and revocation. Again, committing a crime during the suspension period does not *ipso facto* entail revocation. Also, the suspension regime for crimes due to substance dependence is now much more flexible. Relapses are not considered "treatment withdrawal" if they do not show a permanent discontinuation of the detoxification treatment. This regime is more consistent for two reasons: (1) occasional relapses are frequent in this kind of treatments[51], and (2) detoxification, which is considered the best means for social reintegration, could be frustrated by the execution of the sentence[52].

The fact that the resolution is no longer based on the offender's criminal dangerousness or any other criminal proceedings against him or her is also a positive aspect, preserving the presumption of innocence.

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[49] R. García Albero, "La suspensión de la ejecución de las penas", in G. Quintero Olivares (dir.), *Comentarios a la reforma penal del 2015*, op. cit., 144.

[50] M. Roig Torres, "Suspensión de la ejecución de las penas privativas de libertad (arts. 80, 81 y 82)", in J.L. González Cussac (dir.), *Comentarios a la reforma del Código penal de 2015*, op. cit., 323.

[51] R. García Albero, "La suspensión de la ejecución de las penas", op. cit., 155.

[52] M. Roig Torres, "Suspensión de la ejecución de las penas", op. cit., 330.

Instead, personal circumstances are considered. On the other hand, criticism must be leveled at the maintenance of family and social circumstances as grounds for the resolution. The possibilities of suspension may thus be reduced for people who belong to families known for their criminal activities or those convicted of crimes with high media coverage (such as terrorism or violent crimes).

Finally, the new regime of duties and prohibitions, as well as civil liability, is also more consistent now. With regard to the former, the list of prohibitions and duties has been enlarged (Article 83)[53], and they may be adjusted (Article 85), although the suspension period originally set cannot be reduced. As for the civil liability regime, providing inaccurate or insufficient information on the own goods is now grounds for revocation, as is the default on civil liability obligations. The purpose is to prevent mismatches between the offender's declared and actual assets. However, the reference to the "social impact of the offence" as a judicial criterion for the determination of guarantees deserves criticism, since compensation should depend on private damages rather than on the crime's impact on public opinion[54].

With regard to the use of suspension in the Spanish legal system[55], the available data refer almost exclusively to the prior regulation, which distinguished between substitution and suspension of sentences. It should also be noted that data on execution of sentences in Spain are quite unreliable. At the national level, there are at least four official sources: the National Statistical Institute (*Instituto Nacional de Estadística*, INE), Penitentiary Institutions (*Instituciones Penitenciarias*, IIPP) through the General Services of Sentences and Alternative Measures (*Servicios Generales de Penas y Medidas alternativas*, SGPMA), the Ministry of Interior (MI), and the Central Register of Convicts and Rebels (*Registro Central de Penados y Rebeldes,* RCPR). The access to the latter is restricted, while the others are publicly available at their websites. At the European level, the SPACE II reports are supposedly prepared with data provided by Spain based on the aforementioned sources.

With regard to suspensions, the INE does not give any information. In its statistical summary reports, IIPP only offers data on suspensions and substitutions after 2009. Before that date, only figure number 6 of the *Anuario del Ministerio del Interior 2014* (2014 Annual Report of the Ministry of Interior) is available, showing data from IIPP, which offers just a total number of suspensions and substitutions. As for the data from IIPP, they sometimes refer exclusively to "suspensions" (e.g., years 2009, 2011,

[53] R. García Albero, "La suspensión de la ejecución de las penas", op. cit., 158.
[54] M. Roig Torres, "Suspensión de la ejecución de las penas", op. cit., 325.

2012), and other times, the reference is to "suspensions and substitutions" (years 2010 and 2013). However, the cited *Anuario del Ministerio del Interior* (Figure 1) shows that between 2009 and 2014, data were jointly collected, including in the same category both substitutions and suspensions. In any case, for that period it is impossible to know which part of that total were suspensions and which substitutions. It is also impossible to know whether suspensions were general, applied to drug dependents, etc. IIPP does break down the number of the previous year execution decisions, and the number of execution decisions in process during the specific year. Their processing status can also be known with respect to the total annual "suspensions and substitutions," distinguishing between those "served and filed," "being served" and "pending."

IIPP's statistics after 2014 are better for several reasons: a distinction is made between suspension and substitution in the case of orders received[56] (Table 5). The stock figure does not distinguish between suspensions and substitutions[57], and data are broken down by the type of crime[58], Autonomous Community (except for Catalonia, which has powers in prison matters).

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[55] Source: Instituciones penitenciarias (*http://www.institucionpenitenciaria.es/web/portal/PenasyMedidasAlternativas/*).

[56] It should be borne in mind that an order refers either to conviction rulings, court decisions ordering suspension, or execution decisions ordering execution of the sentence. The three cases may include one or several sentences. For instance, a court decision may include one sentence for community service (CWS) and compliance with one or more duties in the case of suspensions or substitutions.

[57] In the case of stock, a distinction is only made between community service and programs (substitution and suspension). Stock means the orders currently being served or whose enforcement is being managed, i.e. active. Already served or filed orders are not included. See *Estadísticas de Penas y Medidas Alternativas a la prisión. Metodología*, Secretaría General de Penas y Medidas Alternativas, 2014, 9, available at *http://www.institucionpenitenciaria.es/web/export/sites/default/datos/descargables/estadpm/Cuaderno_Metodolxgico.pdf* (last accessed 7.3.2016).

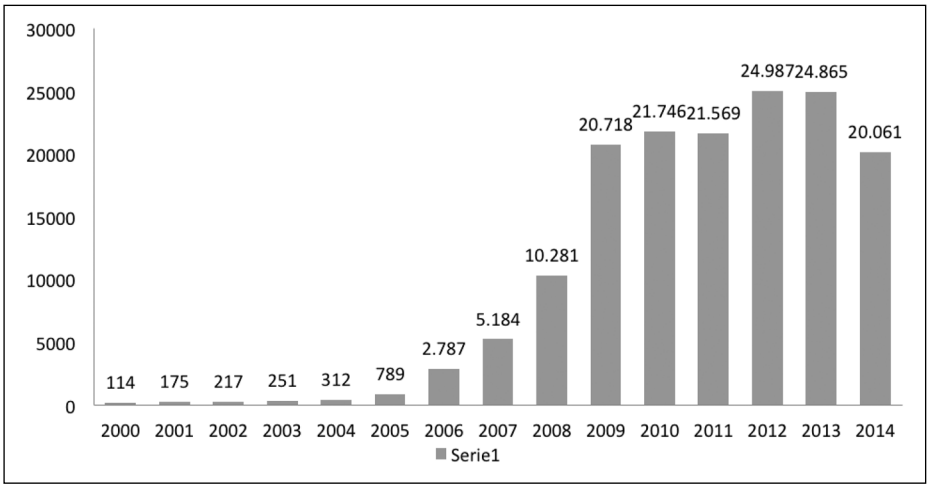
[58] Hence, it is found that the criminal area with more suspensions (own compilation based on IIPP's quarterly reports) are gender-based crimes (5,520 orders in 2014 and 5,043 in 2015), followed by crimes against property (791 orders in 2014 and 844 in 2015). Greater use of suspension for gender-based crimes may be accounted for by the fact that the 2004 reform classified as crimes certain actions that, beyond the emotional relationship, were previously misdemeanors (coercion and minor threats). Judges may have resorted to suspension as a solution to mitigate the increase in penalties. In this regard, explaining judges' use of suspension as a means to uphold the principle of proportionality (and not because of the appropriateness of the alternative), see E. Blay y E. Larrauri, "Community punishment in Spain. A tale of two Administrations", in G. Robinson y F. McNeill (eds.), *Community punishment. European perspectives*, New York: Routledge, 2015, 202. Many crimes against property are actually crimes due to drug dependency, etc., which broadens the scope of suspension to sentences of up to 5 years.

TABLE 5. *Orders received at the national level (excluding Catalonia)*[59]

Year	Community service as primary sentence	Community service as alternative sentence	Community service as main sentence by suspension	Suspensions	Substitutions (Program)
2014	59,454	23,253	–	8,318	1,664
2015[60]	51,501	21,248	675[61]	7,477	1,277

Before 2014, official data are very diverse. First, the annual evolution in the number of suspensions and substitutions of sentences (Figure 1).

FIGURE 1. Annual evolution in the number of suspensions and substitutions of sentences[62]



However, such data do not correspond to the ones in the Spanish Ombudsman's Report (*Informe del Defensor del Pueblo*)[63]. Its authors prepared a table with the percentage of suspensions of prison sentences in different years (Table 6). Given that the INE does not provide information on suspensions, they resorted to the Ministry of Justice, in particular

[59] Source: *Own compilation based on IIPP's quarterly reports (2014).*

[60] Statistical data from the Management Services under the Basque Government are not included.

[61] These are the only available data on suspension after the 2015 reform.

[62] Source: *Anuario Estadístico del Ministerio del Interior 2014*, 512, available at *http://www.interior.gob.es/web/archivos-y-documentacion/anuario-estadistico-de-2014* (last accessed 7.3.2016).

[63] L. MORILLAS CUEVA, J. BARQUIN SANZ, *La aplicación de las alternativas a la pena de prisión en España*, Madrid: Defensor del Pueblo, Servicio de publicaciones, 2013.

the Central Register of Convicts (*Registro Central de Penados*, RCP)[64] and cross checked the total number of custodial sentences imposed each year (available at the INE). They obtained the following results:

TABLE 6. *Suspension of prison sentences (%)*[65]

	2008	2009	2010	2011
Prison sentences suspended	63,114	59,185	55,447	49,854
Prison sentences (INE)	129,890	139,663	141,849	135,713
% Prison sentences suspended	48.59	42.38	39.09	36.73
% Prison	20.59	22.25	22.71	24.71
% Prison sentences served	10.59	12.82	13.83	15.63

Data from previous years provided by another rigorous academic study on the subject (Table 7) do not correspond to those of the IIPP either, nor to the figure of the statistical yearbooks of the Ministry of Interior (Figure 1). The study by CID MOLINÉ shows the following results based on data also provided to the author by the Ministry of Justice through the RCP:

TABLE 7. *Suspension of prison sentences (%)*[66]

	2000	2001	2002	2003	2004	2005	2006
Prison sentences suspended	14,763	20,677	26,716	34,638	51,894	54,576	33,919
Prison sentences (INE)	75,001	77,527	82,012	94,154	133,866	155,532	150,081
% Prison sentences suspended	19.7	26.7	32.6	36.8	38.8	35.1	22.6

The differences (Table 8) are huge, more so if we consider that the IIPP's figure does not only include suspensions but also substitutions. The difference could be even greater if we take into account that the Ombudsman's Report (p. 218 and 223) notes that the RCP's data refer to

[64] Available at *http://www.mjusticia.gob.es/cs/Satellite/Portal/es/areas-tematicas/registros/registro-central-penados* (last accessed 11.5.2015).

[65] L. MORILLAS CUEVA, J. BARQUIN SANZ, *La aplicación de las alternativas a la pena de prisión en España*, op. cit., 125-126 (source based on data of the Ministry of Justice, Central Register of Convicts - RCP).

[66] J. CID MOLINÉ, "El incremento de la población reclusa en España entre 1996-2006: Diagnóstico y remedios", in *Rev. Española de Investigación Criminológica*, 2008, 11 (source based on data of the Ministry of Justice, Central Register of Convicts - RCP).

TABLE 8. *Comparison of suspensions according to the information of IIPP and the Ombudsman's Report*[67]

Year	IIPP	Study by Cid Moliné	Ombudsman's Report	Difference
2000	114	14,763	–	+14,649
2001	175	20,677	–	+20,502
2002	217	26,716	–	+26,499
2003	251	34,638	–	+34,387
2004	312	51,894	–	+51,582
2005	789	54,576	–	+53,787
2006	2,787	33,919	–	+31,132
2007	5,184	–	–	–
2008	10,281	–	63,114	+52,833
2009	20,718	–	59,185	+38,467
2010	21,743	–	55,447	+33,704
2011	21,569	–	49,854	+28,285

suspensions ordered upon sentencing or immediately after, i.e. suspensions of execution that before the 2015 reform could only be ordered with the offender's consent. Therefore, academic studies do not include subsequent suspensions (ordered at a later stage), since court decisions ordering suspension usually are not submitted to the RCP.

The last available source to have a picture of the situation of sentence suspension in Spain is the Council of Europe, and particularly its SPACE II reports[68]. These include data provided by the IIPP, but also by its Catalonian counterpart, with information on the number of persons whose sentence has been suspended, both in stock and flow[69]. Although the data in the SPACE II reports are provided by IIPP, we cannot cross check them with those of Figure 1, since the latter refers both to substitutions and suspensions. However, data in Table 9 refer in principle only to suspensions imposing certain rules of conduct. The problem is that the IIPP's information on the total suspensions and substitutions sometimes correspond the stock data (2009) and other times to the flow data (2011, 2012, 2014), which precludes any reliable interpretation.

[67] Source: Own compilation based on the IIPP's data and the Ombudsman's Report.

[68] Available at *http://w unil.ch/space/space-ii/annual-reports/* (last accessed 11.5.2015).

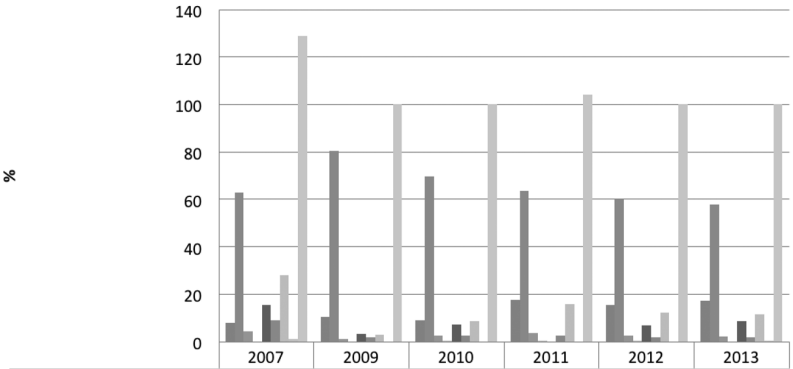
[69] "Stock" data refer to the number of persons with suspended sentences as of 31 December each year. "Flow" data refer to the number of persons whose sentence suspension began during the reference year. The difference has been calculated to verify whether the number of persons in stock corresponds to the one provided the following year.

TABLE 9. *Comparison of the data provided by the SPACE II Reports and the IIPP Reports*

Year[70]	SPACE II (stock)	SPACE II (flow)	IIPP (suspensions + substitutions)
2009	20,718	11,789	20,718
2010	8,263	18,945	21,746
2011	9,897	21,569	21,569
2012	10,566	24,987	24,987
2013	13,275	26,545	24,865
2014	9,319	20,061	20,061

With regard to the percentage of suspensions compared to the whole set of measures specifically adopted at the trial phase (including

FIGURE 2. Breakdown of the number of persons (stock) subject to different alternative measures as a percentage (%) of the total per 100,000 population[71]



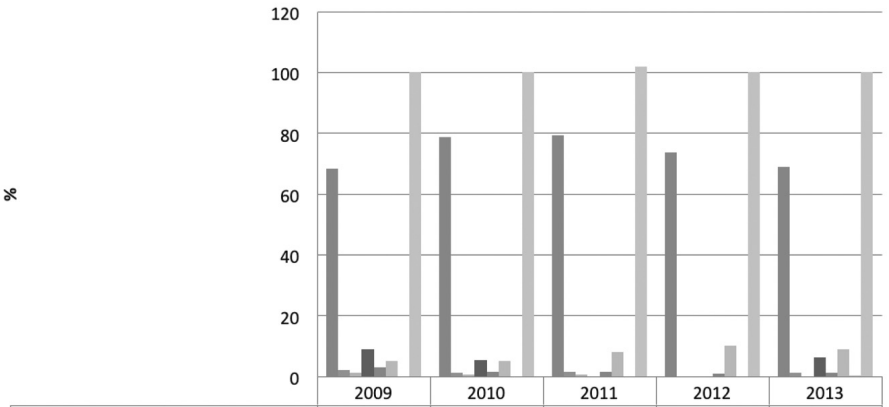
	2007	2009	2010	2011	2012	2013
Suspensions with specific obligations	8,1	10,4	9,2	17,6	15,6	17,4
Community service	62,8	80,5	69,7	63,6	60,5	58
Electronic monitoring	4,5	1	2,5	3,8	2,6	2,3
Home arrest/Permanent traceability			0,2	0,4	0,2	
Semi-liberty	15,4	3,2	7,1		6,9	8,5
Treatment	9,1	1,9	2,5	2,7	2	1,9
Conditional release	28,1	3,1	8,8	16	12,3	11,7
Mixed orders	1					0,2
Total	129	100	100	104,2	100	100

[70] Starting in 2009, given the lack of previous available data in the SPACE II Reports.

[71] Source: *SPACE II Reports*. Electronic monitoring mechanisms include prisoners under pre-release and those under permanent traceability.

prison sentences), the only available data refer to the totality of alternative measures in the terms of the SPACE II reports. As regards the latter, we will only refer to the information submitted by the IIPP (excluding the Catalonian Penitentiary Administration).

FIGURE 3. Breakdown of the number of persons (flow) subject to different alternative measures as a percentage (%) of the total per 100,000 population[72]



	2009	2010	2011	2012	2013
Community service	68,3	78,6	79,4	73,7	69
Electronic monitoring	2	1,2	1,4		1,1
Home arrest/Permanent traceability	1,1	0,5	0,7		0
Semi-liberty	8,9	5,4			6,4
Treatment	2,9	1,5	1,5	1	1,2
Conditional release	5,1	5	8,2	10,1	8,8
Mixed orders					0,1
Total	100	100	102	100	100

Finally, the information regarding servicing of suspension and/or its subsequent revocation are almost inexistent in Spain[73]. IIPP offers in its reports a common figure for already served and/or filed suspension and

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Mixed orders refer to the simultaneous execution of several types of alternative measures.

Semi-liberty includes subjects under pre-release at the end of the year (2009).

The total (%) sometimes exceeds 100% when the reference data are not accurate.

No data are offered for 2014 because they are not complete in 2014 report.

[72] Source: *SPACE II Reports*.

The figure begins on 2009 because IIPP did not provide any flow percentage.

The total (%) sometimes exceeds 100% when the reference data are not accurate.

No data are offered for 2014 because they are not complete in 2014 report.

[73] *Informe del Defensor del Pueblo*, op. cit., 223.

substitution orders. Processed files are usually filed without the sentence having been served for reasons attributable to the offender (in the case of suspensions, for example, due to a breach of the rules of conduct)[74]. The total number of served/filed sentences and the percentage thereof in relation to the total number of processed sentences (Table 10) could be known, but it is impossible to determine within the category of "served or filed sentences" which suspensions succeeded and which failed.

TABLE 10. *Annual flow of processed sentences (suspension and substitution)*[75]

Year	Served/filed sentences	Being served, being served, or pending, as of 31 December each year	Transfers to Catalonia	Total
2011	11,672 (54.1%)	9,897 (45.9%)	–	21,569 (100%)
2012	14,421 (57.7%)	10,566 (42.3%)	–	24,987 (100%)
2013	13,214 (53.1%)	11,564 (46.5%)	87 (0.4%)	24,865 (100%)
2014	2,752 (–)	9,319 (–)		
2015	1,840 (–)	–		

Again, the SPACE II reports after 2010 offer some interesting albeit not comprehensive information. Indeed, as from 2010 such reports include a table with the number of convicts that ceased to be under probation agencies[76], including community service, suspensions, semi-liberty, etc. (Tables 11 and 12). The table contains a column indicating the number of revocations. Despite the relevance of such information, it does not clarify the success or failure of any of these measures (including, as far as we are concerned, suspensions).

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[74] *Estadísticas de Penas y Medidas Alternativas a la prisión. Metodología*, op. cit., 9-11.

[75] Source: Own compilation based on the IIPP Reports.

[76] According to Rec(2010)1, probation agencies mean any body designated by law to fulfill the tasks and responsibilities related to the implementation in the community of sanctions and measures defined by law. Depending on the national system, the work of a probation agency may also include providing information and advice to judicial and other deciding authorities to help them reach informed and just decisions; providing guidance and support to offenders while in custody in order to prepare their release and resettlement; monitoring and assistance to persons subject to early release; restorative justice interventions; and offering assistance to victims of crime.

TABLE 11. *Number of persons that ceased to be under probation agencies (flow of exits)*[77]

Year	Total number of exits	Completion	Revocation	Imprisonment	Absconder	Deaths	Other
2010	141,600	141,143	475	–	–	–	–
2011	141,743	141,743	–	–	–	–	–
2012	–	–	–	–	–	–	–
2013	–	–	–	–	–	–	–
2014	101,992	100,891	985	–	–	116	–

TABLE 12. *Breakdown (%) of persons that ceased to be under the supervision of probation agencies (flow of exits)*[78]

Year	Total number of exits per 100.000 population	Completion	Revocation	Imprisonment	Absconder	Deaths	Other	Total
2010	358.4	99.7	0.3	–	–	–		100
2011	366.1	100	–	–	–	–		–
2012	–	–	–	–	–	–		–
2013	–	–	–	–	–	–		–
2014	260.9	98.9	1.0	–	–	0.1		–

(B) *Substitution of imprisonment for expulsion of aliens (art. 89)*

With the 2015 reform, substitution as an autonomous measure in itself is only maintained with regard to expulsion. It is mandatory for prison sentences of more than 1 year. Unlike the previous regulation, there is lower limit (a prison term of 1 year and 1 day) below which substitution of imprisonment for expulsion may not be ordered. Before, there was an upper limit (a prison term of 6 years) below which expul-

[77] Source: Own compilation based on the SPACE II Reports. Data on Catalonia are not included.

– No data.

[78] Source: Own compilation based on the SPACE II Reports. Data on Catalonia are not included.

– No data.

sion could be ordered. Furthermore, the reform makes it clear that only prison sentences may be substituted, while under the previous regulation there were doubts as regards the possibility of expulsion in cases of permanent traceability sentences.

Among the main novelties is the provision of two modalities depending on the person subject to the measure: expulsion of aliens (*i*) and expulsion of European citizens (*ii*)[79].

(*i*) "European citizen" (a much wider term tan the one previously used, i.e. "aliens without legal residence in Spain") means any non-Spanish citizen regardless of his/her legal or illegal administrative residence status. Therefore, expulsion of foreign offenders is grounded on the lack of Spanish citizenship, rather than his/her irregular situation[80].

(*ii*) Expulsion of a EU citizen is provided on an exceptional basis: only when the offender is a serious threat to public policy or public security, according to the criteria set forth in *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*[81], as well as in the case law of the ECJ. Article 89 of the Criminal Code has partially implemented the requirements, so that expulsion is only possible when the EU citizen offender is a serious threat to public policy or public security taking into consideration the nature, circumstances and seriousness of the crime, and his/her record and personal circumstances.

(*iii*) On the other hand, where the European offender has resided in Spain for the 10 years prior to the expulsion, this shall be ordered only under certain conditions: the subject must have been convicted of one or more crimes against life, freedom, physical integrity, or sexual freedom and integrity, carrying prison sentences of more than 5 years, provided that there is a serious risk of further

[79] The Spanish Criminal Code also provides for expulsion as an alternative for security measures (Article 108). However, the legislator of the 2015 reform forgot to harmonize expulsion as an alternative measure for prison sentences with expulsion as an alternative for security measures, since in the latter case it may only be ordered for aliens without legal residence.

[80] M. Roig Torres, "La expulsión de los extranjeros en el proyecto de reforma del código penal. Análisis desde la perspectiva del TEDH. Unas notas sobre el derecho británico", in *Estudios Penales y Criminológicos*, 2014. 481.

[81] OJ L 158, 30.4.2004.

similar crimes; or the offender must have been convicted of one or more crimes of terrorism or other crimes committed within a criminal group or organization.

Regardless whether the offender is a European citizen or not, Article 89 of the Criminal Code provides different cases depending on whether part of the prison sentence initially imposed shall be executed (expulsion at the execution phase). In this regard, in cases of sentences of more than 1 year (Article 89(1)), the judge may (discretionarily) order the execution of part of the sentence (never more than two thirds of its term) provided it is necessary to ensure protection of the legal system and to restore confidence in the effectiveness of the rule violated by the crime. As for sentences of more than 5 years or whose addition may exceed such term (Article 89(2)) the judge is required to order total or partial serving of the sentence in Spain if the abovementioned requirements are met (protection of the legal system, etc.). In those cases, expulsion shall take effect upon completion of the part of the sentence determined by the judge, or once the subject is placed on pre-release or conditional release.

Expulsion must be proportionate, and for this purpose the circumstances of the case and personal circumstances shall be taken into account, hence including the offender's integration in Spain. This last requirement reflects in a legal provision the case law of the Spanish Supreme Court (among others, Rulings 901/2004, of July 1, Legal grounds 2) and the Spanish Constitutional Court (among others, Rulings 242/1994, of July 20, Legal grounds 6).

There are some red lines as regards expulsion: it may not be ordered in the case of sentences for certain crimes (Article 89(9) of the Criminal Code): crimes of human trafficking (newly introduced by the reform), illegal trafficking and recruitment of labor and crimes against the rights of foreign citizens.

With respect to the procedure, Article 89(3) of the Criminal Code establishes that the judge shall decide on the expulsion upon sentencing or in a subsequent reasoned court order. Unlike the previous regulation, which provided for the offender's hearing, the reform only provides for the hearing of the Prosecutor and the "other parties," once the ruling has become final.

The expulsion of an alien prevents his or her return to Spain for a period of 5 to 10 years, after the expulsion date, considering the term of the substituted sentence and the offender's personal circumstances (Articles 89(5) and 89(6) of the Criminal Code). Furthermore, the expulsion

implies termination of any administrative proceedings regarding an authorization to reside or work in Spain. In the event the expelled person returned to Spain before the deadline set by the judge, Article 89(7) of the Criminal Code provides the automatic enforcement of the whole sentence imposed, unless the judge decides its reduction for not being necessary to ensure protection of the legal system or to restore confidence in the effectiveness of the rule violated by the crime. For that purpose, the judge shall take into consideration the time elapsed since the expulsion and the circumstances of its breach.

Finally, Article 89(8) establishes the possibility of placing the offender in an Alien Detention Center in order to ensure expulsion in cases where there is no deprivation of liberty. It is sometimes complicated to know the offender's country of origin. In such cases, expulsion becomes impossible, and the imposed sentence or the pending part thereof (for expulsions at the execution phase) is therefore executed or suspended if the conditions are met.

The supervisory authorities are the law enforcement bodies, in particular the police officers responsible for alien matters (Aliens Unit and border authorities).

An empirical analysis of expulsions can only be carried out on the basis of information prior to the reform (and it should be recalled that

TABLE 13. *Evolution in the application of substitution of custodial sentences for expulsion from Spain*[82] *in relation to the rest of sentences imposed*

Year	Custodial sentences	Sentences depriving of other rights	Fines	Substitution for expulsion (absolute numbers)	Substitution for expulsion (%)
2007	134,158	210,827	96,717	1,492	0.3
2008	147,449	335,758	145,819	1,954	0.3
2009	151,269	316,250	158,250	1,983	0.3
2010	150,155	346,209	126,199	2,036	0.3
2011	143,368	300,970	104,783	2,266	0.4
2012	144,542	302,688	108,373	2,190	0.4
2013	154,460	330,542	121,971	1,928	0.3
2014	157,236	331,275	125,223	1,906	0.3

[82] Own compilation based on information provided by the INE, available at *http://www.ine.es/jaxi/tabla.do?path=/t18/p466/a2014/l0/&file=01015.px&type=pcaxis&L=0* (last accessed 4.3.2016).

European citizens could not be expelled until now). On those grounds, there is a slight increase in the number of expulsions until 2011. Such slight increase could be explained by the growth in prison population until 2010. In any case, the percentage of expulsions has remained stable in recent years, between 0.3% and 0.4% of total sentences imposed (Table 13).

It should be taken into account that the INE does not provide a breakdown by the different possibilities established in Article 89 of the Criminal Code (expulsion upon sentencing or by a subsequent court order). Furthermore, even if it is not expressly indicated, it seems that these data do not include expulsions ordered at the execution phase, i.e. all those carried out when the offender is placed on pre-release or conditional release.

3.2. *Global assessment of the measures*

(A) *Suspension of custodial sentences*

Recommendation 87(18) of the Council of Europe[83] provides, as a means to reduce prison population, that the discontinuation of prosecution proceedings be subject to compliance with certain conditions, such as the payment of moneys or probation. Criminal law for adults[84] still lacks pre-trial solutions for criminal conflicts. It is true that the reform refers for the first time to mediation agreements as a condition (mandatory or discretionary, depending on the cases) to order suspension of sentences. However, mediation is far from being recognized as an alternative to initiation of criminal proceedings[85]. In this sense, the Spanish legal sys-

[83] *Recommendation (87) 18, concerning the simplification of criminal justice*, of 17 September 1987, Section 1, Article A-6.

[84] On the other hand, there are mediation alternatives in juvenile criminal law. See Organic Act of 12 January, n. 5/2000, "on the Criminal Responsibility of Minors", in *BOE* n. 11 of 13 January 2000. Article 19 entitles the Public Prosecutor to discontinue the criminal proceedings considering the seriousness and the circumstances of the facts and the minor, where any of the following conditions is met: *a*) conciliation between the minor and the victim; *b*) the minor's commitment to repair the damage caused to the victims or persons damaged by the crime; *c*) the minor's commitment to perform the activity proposed in the technical team's report. However, the foregoing is only possible in the event of minor offences.

[85] There are some experiences of mediation in criminal cases regarding adults, but they are still very limited. See, among others, J. CID MOLINÉ, "La política criminal europea en materia de sanciones alternativas a la prisión y la realidad española: Una brecha que debe superarse", in *Estudios penales y Criminológicos*, vol. XXX, 2010, 64; S. BARONA VILAR, "Mediación penal como pieza del sistema de tutela penal en el siglo XXI. Un paso más hacia la resocialización y la justicia restaurativa", in *Rev. de Derecho Penal*, 2009, 28 ff., and E. PASCUAL RODRÍGUEZ, "La experiencia práctica de la mediación penal en Madrid", in M. PILAR

tem should consider the application of the discretionary prosecution principle in criminal proceedings or the establishment of exceptions to the principle of legality in order to ensure the alternative use of mediation. An attempt in this direction[86] is *Second Final Provision of Organic Act 1/2015, amending the Criminal Code*, which confers powers upon the Public Prosecutor to request the investigating judge to close or terminate the proceedings with regard to facts that, having the appearance of a minor offence of personal injury or abuse by action, thefts in cases of *flagrante delicto*, threats, coercion or defamation, "where there is no relevant public interest in the prosecution. In minor property crimes, no relevant public interest in the prosecution shall be deemed to exist where the damages have been compensated and in the absence of complaint by the victim." In this regard, compensation may result from a mediation procedure.

In any case, recognition of mediation at the suspension phase is in line with Article 12 of *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*[87], and *Recommendation (99) 19*[88].

On the other hand, thanks to the recent reform of suspension, the Spanish system may be now considered in compliance with *Recommendation (2000) 22*[89], given that suspension is no longer automatically rejected for repeat offenders.

Imprisonment being a measure of last resort, *Recommendation 99 (22)* establishes that "[r]ationales for sentencing should be set by the legislator […] with a view to, *inter alia*, reducing the use of imprisonment, expanding the use of community sanctions and measures, and to using measures of diversion such as mediation or the compensation of the victim." In the words of CID MOLINÉ, the Spanish legal system lacks a priority criterion for alternative sentences which would allow resorting to prison only "when none of the existing alternative sanctions can reach the rehabilitation objective"[90]. Judges in Spain have discretion to impose prison or alternative sentences when the law provides for an optional

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SÁNCHEZ ÁLVAREZ, M. MARTINEZ ESCAMILLA (coord.), *Justicia restaurativa, mediación penal y penitenciaria: un renovado impulso*, Madrid: Editorial Reus, 2012, 361-392.

[86] See A. GARCÍA-HERRERA, "Justicia restaurativa: breve reflexión sobre su integración en el marco del proceso penal en España", in *Diario La Ley*, Number 8654, 26 November 2015.

[87] OJ L 315, 14.11.12.

[88] *Recommendation (99) 19, on mediation in penal matters*, of 15 September 1999.

[89] *Recommendation (2000) 22, on improving the implementation on the European rules on community sanctions and measures*, 29 November 2000, appendix 2, Article 3.

[90] J. CID MOLINÉ, "La política criminal europea en materia de sanciones alternativas a la prisión y la realidad española", op. cit., 69.

sentence as well as when it may be suspended. Most judges and courts adjust such discretion to the subsidiary nature of prison with respect to alternative measures. However, a minority case law gives priority to retribution or incapacitation to justify prison sentences (the last corruption cases are very illustrative in this regard). Hence, the academic doctrine has suggested to explicitly establish the priority of alternative measures over prison sentences[91].

According to *Resolution (70) 1*[92] and *Recommendation (92) 16*[93], judges must have a previous report on the offender before pronouncing a final sentence. Article 80(1) of the Criminal Code refers to the reasonable expectation that the execution of the sentence shall not be necessary to prevent the commission of further crimes by the offender. For that purpose, criteria such as the circumstances of the offence, the offender's personal circumstances, etc. shall be taken into consideration. Nevertheless, the reform missed an opportunity[94] to require mandatory technical reports as grounds for the judge's decision[95]. This absence, however, has been praised from the point of view of speed of the procedure. In this sense, ROIG TORRES notes that "although in principle the incorporation of mandatory technical reports issued by experts would be positive, it would also entail delays and the possible reduction in the benefits granted for a group of cases where they are now common, as when the offender has no criminal record"[96].

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[91] J. CID MOLINÉ, "La política criminal europea en materia de sanciones alternativas a la prisión y la realidad española", op. cit., 70.

[92] Resolution (70) 1, *Practical organisation of measures of the supervision and after-care of conditionally sentenced and conditionally released offenders*, Article 1b.

[93] *Recommendation (92) 16, on the European rules on community sanctions and measures*, of 19 October 1992, Article 56.

[94] Amendments number 114 by IU, ICV-EUiA, CHA: La Izquierda Plural, number 530 by Unión Progreso y Democracia, and number 635 by the Socialists required mandatory reports.

[95] Cid Moliné notes that, in practice, such reports are seldom requested by judges before adopting a decision. Therefore, their pronouncements are not grounded on the offender's specific needs, but on whether the subject has a criminal record or not. See J. Cid, E. Larrauri (coord.), *Jueces penales y penas en España (aplicación de las penas alternativas a la privación de libertad en los juzgados de lo penal*, Valencia, 2002. The absence of such prior reports accounts for the Spanish judges' lack of creativity when it comes to imposing different duties together with suspension. Except for the case of gender-based crimes, in which the imposition of restraining orders, prohibition of communication with the victim, etc., or the imposition of a training program are required, and for the case of crimes against road safety, the imposition of duties or tasks is quite infrequent. See E. BLAY Y E. LARRAURI, "Community punishment in Spain. A tale of two Administrations", in G. Robinson, F. McNeill (eds.), *Community punishment. European perspectives*, op. cit., 199-200.

[96] M. ROIG TORRES, "Suspensión de la ejecución de las penas privativas de libertad (arts. 80, 81 y 82)", op. cit., 320.

As already mentioned, Article 85 of the Criminal Code entitles the judge to modify or terminate all or some of the prohibitions, duties or tasks imposed as a condition for suspension. However, alternative measures (suspension, in this case) may not be terminated even if they have already fulfilled their purpose. For example, let us imagine an offender whose sentence has been suspended on the condition of the former being subjected to detoxification treatment. Even if such treatment is successfully completed, thus achieving the social reintegration purpose, the suspended sentence would be maintained, which is contrary to *Recommendation (92) 16*[97].

Resolution (70) 1[98] and *Recommendation (92) 17*[99] have stressed the importance of preventing automatic revocation due to the commission of a crime during the suspension period: "In states where the suspended sentence of imprisonment is available, it is important to ensure that, where an offender breaches the suspended sentence, the implementation of the suspended sentence is a judicial decision which allows some discretion, in terms of full implementation, part implementation or other possibilities." *Recommendation (92) 16*[100] also addresses this issue in relation to the breach of the conditions attached to alternative sanctions. The new regulation has significantly improved the situation of suspension in Spain: first, because the commission of a new offence does not entail automatic revocation; second, because in the case of suspension for drug dependents, discontinuation of treatment has been somewhat relaxed, accepting mere relapses; and third, because breach of prohibitions must be serious and repeated.

Finally, it is worth noting the absence of a probation agency in Spain. According to *Recommendation (2010) 1*[101], these agencies implement in the community sanctions and measures aiming at the social inclusion of the offender, and contribute to community safety by a range of activities involving supervision, guide and assistance. Among their more specific tasks are the preparation of pre-sentence reports to assist the judicial authorities on the consequences of imprisonment and the possibil-

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[97] *Recommendation (92) 16, on the European rules on community sanctions and measures*, of 19 October 1992, Articles 87 and 88.

[98] *Resolution (70) 1, Practical organisation of measures of the supervision and ?after-care of conditionally sentenced and conditionally released offenders*, Article 6c.

[99] *Recommendation (92) 17, concerning consistency in sentencing*, of 19 October 1992, Article 8.

[100] *Recommendation (92) 16, on the European rules on community sanctions and measures,* of 19 October 1992, rule 84.

[101] *Recommendation CM/Rec (2010) 1, on the Council of Europe probation rules,* 20 January 2010.

ities of alternative measures; the execution of alternative measures (community service, suspension, etc.), the assessment of the fulfillment of such measures' objectives, cooperation with other social agencies involved in the rehabilitation process, and the consideration of the victims' needs. These agencies even have an active role in restorative justice processes. Hence, agencies' intervention must be prior to the imposition of sanctions; that is, they should evaluate the offender's circumstances leading to the commission of crimes and all factors that may result in his/her resettlement. But they also have a parallel role to the execution of alternative measures. In this regard, the relationship between the probation officer and the offender must be close, since only in this way will the officer be able to help and motivate the offender, fostering social reintegration. There is no autonomous probation agency in Spain[102], nor any general regulation of the tasks of the different administrative services or departments in charge of probation[103]. As regards the Central State Administration[104], the typical functions of a probation agency are integrated in the own structure of the penitentiary administration, in particular in IIPP's department of management of sentences and alternative measures[105].

The absence of this agency in Spain may affect the confidence of other Member States regarding judicial cooperation[106]. In this sense, Article 64 of the abovementioned *Recommendation CM/Rec. (2010) 1* provides that one of the functions of such agency is to facilitate cooperation as regards mutual recognition of alternative sanctions to prison[107].

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[102] Among other reasons, because alternatives have always been conceived as much less costly options than imprisonment, which has held back investment in the development and training of qualified staff, as well as in the establishment of appropriate infrastructures for probation. See E. BLAY, E. LARRAURI, "Community punishment in Spain. A tale of two Administrations", op. cit., 201.

[103] J. CID MOLINÉ, "La política criminal europea en materia de sanciones alternativas a la prisión y la realidad española", op. cit., 80.

[104] The situation in Catalonia is better, since there is a structure of probation officers, prior reports are used, supervisory tasks are sometimes delegated to non-profit organizations, judges are coordinated, etc. See E. BLAY, E. LARRAURI, "Community punishment in Spain. A tale of two Administrations", op. cit., 203.

[105] Royal Decree of June 17, n. 840/2011, "Setting forth the circumstances for enforcing community service sentences and permanent imprisonment at penitentiary facilities, certain security measures, as well as the suspension of the enforcement of the sentences for imprisonment and substitution of sentences", in *BOE* n. 145 of 18 June 2011.

[106] Already pointed out by J. CID MOLINÉ, "La política criminal europea en materia de sanciones alternativas a la prisión y la realidad española", op. cit., 82.

[107] In this sense, the doctrine has noted that, in the context of the Framework Decision on the application of mutual recognition to judgments in criminal matters, pre-sentence reports should be submitted to the State execution agency to prevent legal diversity on sen-

(B) *Substitution of prison sentences for expulsion*

In general terms, it could be said that expulsion is still based on public policy reasons, such as the State's security and public order[108]. These grounds seem to follow the guidelines of "Criminal law of the enemy" rather than those of a democratic State, showing an opposition against a specific group of subjects considered a "risk group" whose common feature is that they do not hold Spanish nationality[109]. Furthermore, it is questionable whether the expulsion pursues general preventive purposes. Failure to execute prison sentences may have a pull effect, in the sense that if aliens do not serve their sentences (being expelled instead), that could not only attract foreign offenders but also encourage them to commit more serious crimes[110].

From a subjective perspective, the possibility of broadening the scope of expulsion to foreign citizens has been confirmed by the ECHR, but the expulsion must be justified by reasons of public security, it must be provided by law, and it must be necessary and proportionate[111]. However, some parliamentary groups proposed amendments so that expulsion would only apply to aliens without legal residence in Spain[112]. The academic doctrine has indicated that "although it does not necessarily entail an increase in the number of expulsions, it is certainly an indiscriminate broadening for non-nationals, regardless of their category, regular stay or residence situation (residents, non-residents, temporary or long-term residents, EU or non-EU residents) (…). Therefore, it could be argued that there is a special criminal law for aliens"[113].

With regard to the expulsion of European citizens, Directive 2004/38/EC (Articles 27(1) and 27(2)) establishes that expulsion measures "shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.

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tences from hindering transfer decisions. See D. Floré et al., *Probation Measures and Alternative Sanctions in the European Union*, Cambridge-Antwerp: Intersentia, 2012, 565.

[108] M.A. Iglesias Río, "La expulsión de extranjeros", in G. Quintero Olivares (dir.), *Comentarios a la reforma penal del 2015*, New York: Aranzadì, 2015, 177.

[109] *Ibidem*.

[110] J. Baucells I Lladós, "El Derecho penal ante el fenómeno inmigratorio", in *Der. y proc. penal*, number 1/2005, 61.

[111] Judgments of the ECHR of 18 February 1991, number 12313/86, *Moustaquim v. Belgium*, §43; 13 July 1995, number 19465/92, *Nasri v. France*, §41; 19 February 1998, number 154/1996/773/974, *Dalia v. France*, §52; 18 October 2006, number 46410/99, *Üner v. The Netherlands*, §54.

[112] Enmienda number 24 y 492 del Grupo Mixto; number 350 del Grupo Parlamenterio Entesa pel Progrés de Catalunya; number 759 del Grupo parlamentario Vasco y number 876 del Grupo parlamentario catalán Convergencia i Unió.

[113] M.A. Iglesias Río, "La expulsión de extranjeros", op. cit., 175.

Therefore, previous criminal convictions shall not in themselves constitute grounds for taking such measures." Also, "justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted." Furthermore, the Directive (Article 28(1)) sets forth that "[b]efore taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin." These humanitarian factors, although transposed in Article 15 of Royal Decree 240/2007[114], have not been incorporated into criminal law. Article 27 of Directive 2004/38/EC explicitly forbids expulsion on grounds not directly related to the specific case. Nevertheless, Article 89 of the Criminal Code requires expulsion upon partial completion of the sentence. Therefore, Article 89 of the Criminal Code is not fully in line with the basic contents underlying the European rule. The bases and requirements laid down in Article 89 should literally correspond to the provisions of the European Directive, since that would facilitate a consistent interpretation and application across the whole Union. In the light of the foregoing, the open and indefinite wording of Article 89 should be reconsidered, keeping instead the traditional expression referred to "aliens without legal residence in Spain"[115].

As regards the objective perspective, the doctrine has noted that, in general terms, prison sentences of more than 1 year, or one or more sentences adding to more than 5 years, do not necessarily imply a criminal conduct capable of destabilizing public order or security.

With respect to expulsions at the execution phase, i.e. after serving part of the sentence or when the offender is placed on pre-release or conditional release, it has been noted that they could breach the principle of *ne bis in idem*, since expulsion is here conceived as a kind of execution subsequent to the completion of part of the sentence[116]. However, the Spanish Supreme Court has already mitigated the undesired effects in these cases by preventing expulsion when the alien has practically served

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[114] Royal Decree of February 16, n. 240/2007, "On the entry, free movement, and residence of citizens of Member States of the European Union and other states party to the Agreement on the European Economic Area in Spain", in *BOE* n. 51 of 28 February 2007.

[115] M.A. Iglesias Río, "La expulsión de extranjeros", op. cit., 185.

[116] See Amendment number 122, IU, ICV-EUiA, CHA: La Izquierda Plural. Official Gazette of the Spanish Parliament, 10 December 2014, 92.

the sentence[117]. On the other hand, expulsion after serving part of the sentence may be advisable for particularly serious crimes in order to prevent a social feeling of impunity[118]. The problem is that such a wide margin of discretion may probably lead to inconsistent case law[119].

Criticism has also been leveled at the judicial margin of discretion in determining the necessary nature of expulsion to "ensure protection of the legal system and restore confidence in the effectiveness of the rule violated"[120]. On the other hand, the legislator has rightly clarified that when the sum of imposed sentences exceeds 5 years of imprisonment, they shall be totally or partially served in Spain, which was previously unclear and led to confusion.

For procedural purposes, the Council of State criticized the fact that the offender has no right to be heard, while the parties and the Public Prosecutor are entitled to express their opinion on the substitution of the sentence for expulsion[121]. Nevertheless, the offender must be given that opportunity, since the Constitutional Court has repeatedly held that the convicted person's right to the "final say" is not enough. The offender must be heard in order to substitute the sentence for expulsion from the national territory[122].

Criticism was also made to the termination of the administrative proceeding resulting from the adoption of the expulsion decision, since immigration policy reasons should not be confused with the nature, grounds and purpose of criminal sanctions[123].

In the cases of revocation, there is something objectionable about the absence of conversion rules to calculate the time the alien has been outside the country serving an alternative measure, which would be necessary

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117 Supreme Court ruling of 22 June 2010, n. 617/2010.

118 M.A. Iglesias Río, "La expulsión de extranjeros", op. cit., 178.

119 *Ibidem*.

120 Cano Cuenca notes that this provision may be contrary to the general principle of legal certainty (Article 9(3) of the Spanish Constitution), but also to those of legality and specificity. See A. Cano Cuenca, "Suspensión de ejecución de la pena condicionada al cumplimiento de prohibiciones y deberes, prestaciones o medidas. Modificación. Revocación. Expulsión de extranjeros (arts. 83, 84, 85, 308 bis y 89)", in J.L. González Cussac (dir.), *Comentarios a la reforma del Código penal de 2015*, Valencia: Tirant Lo Blanch, 2015, 364.

121 Along these lines, see Amendment number 534 by Unión Progreso y Democracia, Official Gazette of the Spanish Parliament, 10 December 2014, 340.

122 Constutional Court rulings of July 20, n. 242/1994 (Legal grounds 6) and of November 25, n. 203/1997 (Legal grounds 4 and 5).

123 J.M. Terradillos Basoco, D. Boza Martínez, "La expulsión del extranjero: art. 88 CP", in F.J. Álvarez García (dir.), *Estudio crítico sobre el Anteproyecto de reforma penal de 2012*, Valencia: Tirant Lo Blanch, 2013, 370.

to avoid a violation of the principle of *ne bis in idem*[124]. However, such criticism should be softened if the principle of proportionality is applied.

The possibility of placing the offender in an Alien Detention Center (CIEs) in order to ensure expulsion in cases where there is no deprivation of liberty is also questionable. It is somewhat paradoxical that the person convicted of a crime has to share the premises with other people who are only recriminated for lacking legal documentation[125]. In this regard, the State Public Prosecutor's Office has warned that the measure should be used restrictively, given that "CIEs are public non-penitentiary facilities without the appropriate security measures and the specialized personnel required for treating convicts. Their ordinary functioning regime is altered by the need to separate the inmates who have only committed an administrative violation from those convicted by a criminal court"[126].

Where expulsion is not possible, the execution of the sentence may be suspended. However, it is hard to understand why such suspension is conceived as a substitution of a sentence already substituted for an expulsion which cannot be enforced. In the words of RODRÍGUEZ YAGÜE, that is "an incorrect grading of the purposes of the sentence, once again subordinated to immigration policy, which only reemerge when it cannot be implemented for reasons beyond general and special preventive criteria"[127].

Regarding the victims, the compatibility of expulsion with the European regulation on the standing of victims is far from clear[128]. Indeed, victims are deprived of their right to damage compensation because aliens are not required to fulfill their civil liability obligations resulting from the offence[129].

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[124] See Amendment number 336 by Joan Tardà i Coma (Mixed Parlimentary Group), Official Gazette of the Spanish Parliament, 10 December 2014, 235. Among the academic contributions, see M.A. IGLESIAS RÍO, "La expulsión de extranjeros", op. cit., 178.

[125] A. CANO CUENCA, "Suspensión de ejecución de la pena condicionada", op. cit., 368.

[126] Circular of the State Public Prosecutor's Office n. 7/2015, "on the expulsion of aliens as an alternative measure to prison sentences after the reform implemented by Organic Act 1/2015", 41.

[127] C. RODRÍGUEZ YAGÜE, "El modelo político-criminal español frente a la delincuencia de inmigrantes", op. cit., 22.

[128] Act of April 27, n. 4/2015, "on the standing of victims of crime", in Official State Gazette of 28 april 2015, n. 101. This provision implements Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 "on the European protection order and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime", OJ L 338, 21 December 2011.

[129] M.J. RODRÍGUEZ MESA, "La expulsión del extranjero en el ordenamiento jurídico español", in M.J. RODRÍGUEZ MESA, "Inmigración y sistema penal. Retos y desafíos para el siglo XXI", op. cit., 280, 281 and 286.

On the other hand, due to the absence of probation agencies[130], it is doubtful whether the provisions of Article 35(4) of *Recommendation CM/Rec (2012)12*[131] may be complied with. According to this *Recommendation*, prior to the expulsion, "efforts shall be made to contact the authorities in the State to which they are to be sent with a view to ensuring support both immediately upon their return and to facilitate their reintegration into society."

Among the positive aspects of the reform are the enshrinement of the principle of proportionality, as well as the consideration of the circumstances of the case and the offender's personal circumstances, in particular his/her integration[132]. However, greater efforts towards regulatory specificity would be desirable. Judges will still have to interpret expulsion in conformity with EU law in the case of European citizens, and, in any case, with respect to international law and case law on human rights[133].

A final consideration ought to be made on the subsidiary nature of expulsion, instead of which serving of the sentence and conditional release in the countries of origin should be fostered[134]. That is the rationale of conventions on the transfer of sentenced persons[135] and, as regards European citizens, *Council Framework Decision 2008/909/JHA of 27 November 2008 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*[136], explicitly aimed at the social rehabilitation of the sentenced person in the country to which that person is attached.

The effect of expulsion measures, whether at a pre-trial, trial, or execution phase is *a priori* limited (Table 14). This is evidenced by the number of aliens that remain in penitentiary facilities. At the end of the

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[130] See above B in this section.

[131] Recommendation CM/Rec(2012)12 of the Committee of Ministers to member States concerning foreign prisoners, of 10 October 2012.

[132] On the need to allow aliens to remain in Spain when, in spite of their irregular administrative situation, they show a relevant attachment to the country enabling their future reinsertion, see C. RODRÍGUEZ YAGÜE, "El modelo político-criminal español frente a la delincuencia de inmigrantes", op. cit., 39.

[133] On the European case law preventing expulsion or extradition of persons that entail a risk to their life, torture or ill-treatment, see M. MUÑOZ DE MORALES ROMERO, "El Papel del Tribunal de Justicia de la Unión Europea en la ejecución de las penas", in this volume.

[134] See C. RODRÍGUEZ YAGÜE, "El modelo político-criminal español frente a la delincuencia de inmigrantes", op. cit., 39.

[135] Council of Europe Convention on the Transfer of Sentenced Persons, of 21 March 1983.

[136] OJ L 327 5.12.2008. On the EU judicial cooperation instruments at the pre-sentence, trial and post-sentence phases, see D. NITU, in this volume.

TABLE 14. *Evolution of alien prison population in Spain (IIPP)*[139]

Year	Alien prison population (absolute numbers)	Alien prison population (%)	Total prison population
1996	7,263	17.3	41,903
1997	7,536	17.6	42,756
1998	7,850	17.7	44,370
1999	7,900	17.9	44,197
2000	8,990	19.9	45,104
2001	11,095	23.3	47,571
2002	13,413	25.8	51,882
2003	15,205	27.1	56,096
2004	17,302	29.1	59,375
2005	18,616	30.5	61,054
2006	20,643	32.2	64,021
2007	22,977	34.2	67,100
2008	26,201	35.6	73,558
2009	27,162	35.7	76,079
2010	26,315	35.6	73,929
2011	24,502	34.8	70,472
2012	22,893	33.8	68,597
2013	21,116	31.6	66,765
2014	19,697	30.3	65,017
2015	17,870	29	61,614

90s, around 17% of prison population consisted of aliens. Between 2000 and 2009, this ratio has increased by almost 2% annually, which may be accounted for by the growth of foreign population in Spain during that period[137]. Since 2009, the number imprisoned aliens gradually decreased to 29% in December 2015, almost 6 points less than in 2009. One of the reasons is probably the reduction in the number of convicts sentenced for drug-trafficking crimes. The 2010 reform softened their regime, reducing their sentences[138].

[137] L. FERNÁNDEZ ARÉVALO, J. NISTAL BURÓN, *Manual de Derecho penitenciario*, Madrid: Aranzadi, 2011, 592-593.

[138] C. RODRÍGUEZ YAGÜE, "El modelo político-criminal español frente a la delincuencia de inmigrantes", op. cit., p. 26-27.

The decrease in alien prison population since 2010 also coincides with the lesser number of convicted aliens from that date (Table 15) and a more limited use of pre-trial detention[140]. However, no valid conclusions can be drawn from these data for several reasons. First, because neither the INE nor IIPP distinguish between expulsions ordered upon sentencing and those adopted by subsequent court orders. They seem to refer only to those ordered upon sentencing. This prevents an appropriate interpretation of the information, since in many cases an alien convicted in 2013 may have been expelled in 2014 after serving part of the sentence in Spain and after having been placed on pre-release or conditional release. And there are no data on these expulsions. Secondly, until 1 July 2015 expulsion was applied to aliens in an irregular situation, and it is impossible to know how many of all the convicted aliens were in such situation. Thirdly, the parallel decrease of alien inmates and those in pre-trial detention is not conclusive, since the number of prisoners in

TABLE 15. *Evolution of substitutions for expulsion with respect to the number of convicted aliens*[141]

Year	Total convicted aliens (absolute numbers)	Total convicted aliens (%)	Total convicted persons (absolute numbers)	Substitution for expulsion (absolute numbers)
2007	22,977	34.2	67,100	1,492
2008	26,201	35.6	73,558	1,954
2009	27,162	35.7	76,079	1,983
2010	26,315	35.6	73,929	2,036
2011	24,502	34.8	70,472	2,266
2012	22,893	33.3	68,597	2,190
2013	21,116	31.6	66,765	1,928
2014	19,697	30.3	65,017	1,906
2015	17,870	29	61,614	(not available)

[139] Source: Anuario Estadístico del Ministerio del Interior, 2014, op. cit., 494. Data for 2015 have been provided by the IIP.

[140] See above 2.2 (A).

[141] Own compilation based on the data provided by the National Statistical Institute (*Instituto Nacional de Estadística*), available at *http://www.ine.es/jaxi/tabla.do?path=/t18/p466/a2014/l0/&file=01015.px&type=pcaxis&L=0* (updated as of 17.7.2015) and Penitentiary Institutions (*Instituciones Penitenciarias*), available at *http://www.institucionpenitenciaria.es/web/portal/documentos/estadisticas.html*.

pre-trial detention does not differentiate between foreigners and nationals. Therefore, we cannot determine whether such general decrease also includes a decline in the number of alien prisoners in pre-trial detention. Logic suggests a negative answer, given pre-trial detention is applied to a greater extent to aliens on the grounds of risk of absconding and lack of family ties in the country.

4. *Post-trial measures*

4.1. *Regulation and functioning of the existing measures*

The Spanish legal system has traditionally provided two possible alternatives to execution within prison: pre-release or open regime, on the one hand, which allows for daily leaves to perform a job or activity; and conditional release, on the other hand, entailing release of the subject during the last part of the sentence. There is a third option, explained above: substitution for expulsion for aliens at the execution phase. The latter is built on the former two options, since it is executed upon the alien's fulfillment of the requirements for any of them.

The open regime and conditional release have been traditionally established as grades within the criminal execution system. The Spanish execution system of prison sentences is based on the so-called scientific individualization principle enshrined by the General Prisons Act of 1979 (*Ley Orgánica General Penitenciaria,* LOGP)[142]. It is an improvement of the traditional progressive system of serving, based on serving phases or grades the convict must undergo until final release, normally on the grounds of time parameters linked to the term of the sentence[143].

Unlike the classic progressive system, the scientific individualization system, introduced by Article 72 LOGP, is based on the principles of individualization, flexibility, and the scientific nature and professionalization of execution[144]. Its individualized nature implies that the classification system and the detention regime shall adapt at all times to the knowledge of the convict's specific situation. On that basis, he/she will receive an individual scientific treatment conceived as an activity per-

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[142] C. García Valdés, "El desarrollo del sistema penitenciario en España", in *Rev. de Estudios Penitenciarios*, n. 249/2002, 14 ff.

[143] See an analysis of its evolution in A. Téllez Aguilera, *Los sistemas penitenciarios y sus prisiones: derecho y realidad*, Madrid: Edisofer, 1998 and S. Leganés Gómez, *La evolución de la clasificación penitenciaria*, Madrid: Ministerio del Interior, 2004.

[144] C. Rodríguez Yagüe, *El sistema penitenciario español ante el siglo XXI*, op. cit., 51 ff.

formed by behavioral experts, fostering professionalization of the individual and collective bodies responsible for the treatment. As opposed to the progressive system's static nature, the scientific individualization system brings flexibility to the execution model. Grades or phases will now only depend on the evolution of the treatment and, therefore, the convict's active conduct. A series of consecutive steps will no longer be required to achieve final release. Likewise, the serving will not necessarily begin by the first of those phases, and no minimum term shall be required for each of them before applying the next one[145].

According to the Spanish legislation, the scientific individualization system is built on four phases or grades (Article 72 LOGP): the first one, under a close or isolation regime, is applied to inmates that show extreme unsociability or dangerousness; under the second one, largely applied as the ordinary serving regime, inmates are in a situation of normal cohabitation within the prison, and are only isolated at night; the third one, corresponding to a pre-release or open regime, allows for leaves during the week in order to perform a job or other activities, and even for continued stay out of prison under electronic monitoring. The fourth one consists in conditional release. Since its incorporation into our regulation in 1914, it was conceived as the last part in the serving of a sentence, allowing the subject to complete this fourth and last phase out of prison. However, after the 2015 reform of the Criminal Code, this conditional release has become a type of suspension of the last part of the sentence[146].

Classification of convicts according to penitentiary grades is proposed by the Treatment Board (*Junta de Tratamiento*) in each prison, on the basis of an individual study of the convict. That is also the body in charge of making proposals for advancement to a higher grade if the convict makes progresses, and vice versa, proposals for regression to a lower grade if the convict's evolution is negative. The body competent to decide on the classification, progression and regression proposals is the Management Center (General-Secretariat of Penitentiary Institutions). In

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[145] Article 72(3) LOGP illustrates the flexibility of the individualization system, divided in degrees. This provision establishes that whenever the observation and classification of an inmate shows conditions for it, he/she may be initially placed on a higher degree, without being required to undergo the preceding ones (except for conditional release). The fourth paragraph of that same provision prevents maintaining an inmate in a degree inferior to the one corresponding to his/her evolution in the treatment. C. García Valdés, *Reforma penitenciaria*, *Escritos (1982-1989),* Madrid: Ministerio de Justicia, 1989, 281 ff.

[146] For a comprehensive analysis of this model, see D. Fernández Bermejo, *Individualización científica y tratamiento en prisión*, Madrid: Ministerio del Interior, 2013.

any case, as a guarantee of the inmates' rights, they can appeal against the decision of the Administration before the Prison Supervision Court (Article 76(2)(f) LOGP).

In its original configuration under LOGP of 1979, the scientific individualization system gave priority to the prognosis regarding each convict's individual reinsertion as the basic classification and progression criterion (Article 65 LOGP)[147]. Traditionally, time parameters have only been relevant to conditional release, which has always required completion of three quarters of the sentence. However, through the different reforms of the Criminal Code, the legislator has opted for a progressive restriction of the use of these alternatives depending on the seriousness and the number of convictions, as well as the nature of the offence (with particular aspects regarding organized crime, terrorism and sexual offences). Hence, mandatory security terms to be served in prison have been introduced for serious convictions, which may not be revoked in cases of sexual offences against children under the age of 13 (Article 36)[148]. Also, full serving is required for cumulative offences resulting in very long sentences[149]. Along that lines, inmates convicted of economic offences, terrorism or organized crime have to fulfill special requirements in order to access to pre-release (third grade) and conditional release[150].

In conclusion, criminal and penitentiary legislation in Spain provides two alternatives to prison sentences at the execution phase: an open or pre-release regime, and conditional release. While the former implies serving part of the sentence in a regime of semi-liberty, the latter (which was conceived as serving the last part of the sentence at liberty) has become a suspension of the last part of the sentence by virtue of the 2015 reform.

Reviewable life sentence, recently introduced in the Spanish legal system, will be addressed separately due to its different nature and the particularities regarding its alternatives.

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147 Theoretically, classification of the convict under pre-release could be proposed from the beginning. However, the implementing regulation provides that, as regards pre-release proposals for inmates that have not completed three quarters of the sentence, their criminal record and social integration shall be especially considered (Article 104(3) of the Penitentiary Regulations).

148 Introduced by Organic Act of June 30, n. 7/2003 (in *BOE* n. 156 of 1 July 2003), and modified by Organic Act of June 22, n. 5/2010 (in *BOE* n. 152 of 23 June 2010), and Organic Act of March 30, n. 1/2015 (in *BOE* n. 77 of 31 March 2015).

149 Introduced by the Criminal Code of 1995 and amended by Organic Act of June 30, n. 7/2003, op. cit., and Organic Act of March 30, n. 1/2015, op. cit.

150 Organic Act of June 30, n. 7/2003, op. cit.

(A) Pre-release or open regime as an alternative to prison sentences.

Pre-release or open regime is a method of serving alternative to execution of prison sentences within the penitentiary facility. It allows serving the sentence in a semi-liberty regime for those convicts whose social rehabilitation prognosis is favorable[151]. Its purpose is, on the one hand, to foster self-responsibility by allowing performance of a job or other activities outside the prison, while facilitating social integration before completion of the sentence. This mitigates the family and social disruption attached to prison sentences.

The Spanish legislation provides for two different modalities of pre-release depending on the convict's profile and criminal history: full open regime and semi-open regime.

The most common one is the full open regime. As a general rule, convicts subject to this modality may leave the prison to perform a job or another activity during the week, and they have to return to the penitentiary facility for treatment and nightly rest (a minimum period of 8 hours). However, substitute electronic means can be used so that the inmate does not have to return every day to stay overnight at the prison, monitoring that he/she remains at home during the nightly rest hours (Article 86(4) of the Prison Regulations). Furthermore, convicts under this modality may leave the prison every weekend (from 4pm on Friday to 8am on Monday), as well as in official holidays. There are also ordinary leave permits, which can be used in blocks of one to seven days, for a total of 48 days per year.

Along with this modality, the legislation provides a second one: the semi-open regime. It is intended for situations that require more restricted leaves due to the convict's personal, social, work or treatment circumstances (Article 82 of the Prison Regulations). That is the case, in particular, for convicts with a peculiar criminal history, abnormal personality, or diverse personal characteristics, who cannot perform a job outside the prison, or for treatment reasons. In these cases, the penitentiary Administration, following communication to the Prison Supervision Court, shall determine a detention regime adjusted to the convict's particular circumstances. Leaves may be restricted for those under the ordinary regime, and conditions, controls or supervision modalities may be established.

The legislator has created several pre-release or open regime subsystems by setting requirements – especially time parameters – for their application. Curiously enough, it has done so by amending the Criminal

[151] The open regime or pre-release is governed by the Criminal Code (Articles 36 and 78), by LOGP (Article 72(5)), and by the Penitentiary Regulations (Articles 80 to 88, 100, 102(4), and 182).

Code instead of the LOGP. Hence, although in theory it was originally possible to classify the convict under this modality from the beginning, subsequent reforms have tightened that possibility on the grounds of two factors: the number and the nature of the offences committed.

The different modalities currently in force are:

(*i*) *Prison sentences of less than 5 years*: under this modality, the Spanish legislation establishes the same requirements for all convicts, regardless of the type and number of crimes committed: convicts must be able to lead a life in semi-liberty and they must have fulfilled their civil liability obligations resulting from the offence. The latter requirement[152] evaluates the actual conduct as regards restitution of any stolen goods, repair of damages caused, and compensation of any material and non-material damages. For that purpose, the offender's personal and financial situation shall be considered to determine his/her actual present and future capacity to fulfill such civil liability obligations and any guarantees that may allow future compliance, to determine the enrichment resulting from the offence, the damages or impair caused on public services, the nature of the damages caused, and the number and situation of the damaged parties. This requirement is particularly relevant in crimes against property and the socioeconomic order, against workers' rights, against the Public treasury and the Social Security, and against the public Administration (Article 72(5) LOGP).

Also since 2003[153], and with regard to offences related to terrorism or organized crime, the LOGP requires the offender to show clear signs of having abandoned terrorist purposes and means, as well as active cooperation with the authorities. This may be achieved by preventing further crimes, mitigating their effects, aiding in the identification, capture, or trial of their perpetrators, aiding in evidence collection, preventing the development or actions by these organizations, or issuing a statement explicitly rejecting their activities, abandoning violence and explicitly asking the victims for forgiveness (Article 72(6) LOGP)[154].

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[152] Introduced by Organic Act of June 30, n. 7/2003, op. cit.

[153] Organic Act of June 30, n. 7/2003, op. cit.

[154] This requirement has been severely criticized by the doctrine for considering it an unlawful encroachment on ideological freedom, reflecting an offender-based criminal law, and creating different categories of victims. FARALDO CABANA, "Medidas premiales durante la ejecución de condenas por terrorismo y delincuencia organizada: consolidación de un subsistema penitenciario de excepción", in M. CANCIO MELIÁ, C. GÓMEZ - JARA DÍEZ (coord.), *Derecho penal del enemigo: el discurso penal de la exclusión*, Madrid: Edisofer, 2006, 758; V. CERVELLÓ DONDERIS, "Los nuevos criterios de clasificación penitenciaria", in *La Ley Penal*, n. 8/2004, p. 5 ff.; M.L. CUERDA ARNAU, "El premio por el abandono de la organización y la

Proposals for placement on pre-release are made by the Treatment Board of each prison, and the Managing Center eventually grants or rejects such classification. Convicts may appeal against negative decisions before the Prison Supervision Court, which may grant pre-release in the decision on appeal.

(*ii*) *Prison sentences of more than 5 years: security period:* to the above requirements, the legislator added in 2003 a security period for prison sentences of more than 5 years. This required completion of the first half of the sentence within the penitentiary facility, without access to pre-release, for sentences over 5 years[155]. However, and with the exception of terrorist crimes, Prison Supervision Courts could ignore this system and apply the general one provided there was an individualized treatment prognosis, after hearing the Public Prosecutor, Penitentiary Institutions and the other parties.

Due to the effect of this measure on the increase of prison population in 2010,[156] it ceased to be mandatory. Hence, under the regulation in force (Article 36(2) of the Criminal Code) the court has discretion to decide on its application, except for the crimes of terrorism, organized crime, and sexual offences against children under the age of 13. In these last cases, its application remains mandatory, and Prison Supervision Courts can not set it aside[157].

The 2015 reform has entitled the victims to appeal against decisions of Prison Supervision Courts allowing placement of the convict on pre-release before completion of the first half of the sentence[158].

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colaboración con las autoridades como estrategia de lucha contra el terrorismo en momentos de crisis interna", in *Estudios penales y criminológicos*, n. 25/2004, 32; R. García Alberó, J.M. Tamarit Sumalla, *La reforma de la ejecución penal*, Valencia: Tirant Lo Blanch, 2004, 125; C. Rodríguez Yagüe, "El modelo penitenciario español frente al terrorismo", in *La Ley penal*, n. 65/2009, 76.

[155] The legislator justified this measure on preventive grounds, to foster confidence in the system. It tried to bring the period of imprisonment closer to the term of the sentence, thus considering pre-release as a sort of deprivation of prison sentences' substance. Priority is given to retribution, general prevention, and protection over social rehabilitation provided in Article 25(2) of the Spanish Constitution. J.L. Fuentes Osorio, "Sistema de clasificación penitenciaria y el 'periodo de seguridad' del art. 36.2 CP", in *InDret*, n. 1/2011, 9 ff.

[156] Organic Act of June 22, n. 5/2010, op. cit.

[157] This exception to the general regime is contrary to the social rehabilitation mandate set forth by Article 25(2) of the Spanish Constitution. It also breaches the principle of scientific individualization, returning – with regard to these offences – to the progressive system, in order to give priority to protection and general prevention purposes. C. Rodríguez Yagüe, "El sistema penitenciario español ante el siglo XXI", op. cit., 84; J.L. Fuentes Osorio, "Sistema de clasificación penitenciaria y el 'periodo de seguridad' del art. 36.2 CP", op. cit., 13.

[158] For crimes of homicide, willful abortion, personal injury, crimes against freedom, torture and moral integrity, sexual offences, robbery with violence and intimidation, terro-

(*iii*) *Cumulative sentences: full serving:* a third modality is provided for convicts subject to full serving under Article 78 of the Criminal Code, due to the amount and duration of their sentences. This figure was created in 1995 to bring maximum prison terms – limited in Spain to 20 years for single offences and 40 years for multiple offences – closer to the actual sentences imposed by the courts. If such maximum period (20 or 40 years) is lower than one half of the sum of the sentences imposed, the court may modify the calculation criteria for the mechanisms that allow temporary or final release (e.g., leave permits, access to pre-release, penitentiary benefits or conditional release). Hence, such criteria may be applied not to the maximum legal terms, but to the whole term of the sentence. In the case of serious sentences, this will prevent the convict's access to such mechanisms, since he/she will be finally released before their application[159].

The application of this calculation regime became mandatory for the most serious cases and for terrorist crimes after the amendment of the Criminal Code implemented by Organic Act 7/2003, of June 22. Following the 2015 reform, it is optional again[160]. Therefore, if applied, completion of one half of the sentence (security period) shall be calculated with regard to the whole term of the sentence imposed (for example, 300 years), and not to the maximum prison term (40 years).

Prison Supervision Courts may also decide not to apply such calculation regime if there is a favorable prognosis regarding social rehabilitation, after hearing the Public Prosecutor, Penitentiary Institutions, and the other parties[161]. However, in the event of terrorism or organized crime, the convict must have served 4/5 of the maximum term.

(*iv*) *Pre-release for humanitarian reasons:* pre-release for humanitarian and dignity reasons is a separated modality for convicts suffering from serious or incurable illnesses and those over the age of 70. In these cases, the above requirements are substituted by the consideration of low

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rism, and human trafficking (Article 13(1)(a) of Act of April 27, n. 4/2015, on the standing of victims of crime, op. cit.).

[159] The doctrine criticized this figure, noting that in practice it could become a life sentence. See V. Cervelló Donderis, "La restricción de beneficios penitenciarios en el Código penal de 1995", in *Cuadernos jurídicos*, n. 42/1996.

[160] Organic Act of March 30, n. 1/2015, op. cit.

[161] The victims may appeal against this decision of Prison Supervision Courts in the case of crimes of homicide, willful abortion, personal injury, crimes against freedom, torture and moral integrity, sexual offences, robbery with violence and intimidation, terrorism, and human trafficking (Article 13(1)(*b*) of Act of April 27, n. 4/2015, on the standing of victims of crime, op. cit.).

risk and limited possibilities of committing further crimes. Its granting lies with the Prison Supervision Courts or Tribunals, following a report by the Public Prosecutor, Penitentiary Institutions, and the other parties (Article 36(3) of the Criminal Code and 104(4) of the Prison Regulations)[162].

(*v*) *Pre-release for detoxification of drug-dependent and other substance-dependent convicts:* penitentiary legislation provides another pre-release modality for convicts in need of a specific detoxification treatment for drug or other substance dependency (Article 182 of the Prison Regulations). It is an alternative to treatment within prison for those drug dependents without access to alternative measures to prison sentences – suspension of the sentence under Article 80(5) of the Criminal Code.

This modality provides an open regime for the convict, although not intended to be enjoyed in semi-liberty, but to allow his/her placement in a facility to undergo a specific detoxification treatment. Such institution must commit to accept the inmate and monitor the detoxification program. The inmate must explicitly consent to his/her placement in the new detoxification center, and undertake to follow this new regime. The decision lies with the Treatment Board of the prison, which shall inform the Prison Supervision Court.

(*vi*) *Flexibility principle:* the last option under the penitentiary legislation is the configuration of an individualized execution system based on the subject's characteristics. This is the clearest manifestation of the scientific individualization (Article 100(2) of the Prison Regulations). This possibility allows the Treatment Board of the prison to define an individualized execution model combining characteristics of the different phases or grades. Such model must be justified by a specific treatment program that cannot be executed differently. Being an exceptional measure, it must be approved by the Prison Supervision Court. This principle would allow some of the leaves provided under pre-release for a convict still placed on second grade in prison.

The Spanish penitentiary legislation explicitly addresses the places and modality of execution. There are four possibilities, three of them linked to the penitentiary facility and one that allows serving the sen-

[162] Dignity and humanity reasons prevail over the probabilities of the convict's social rehabilitation. A.J. NIETO GARCÍA, "La excarcelación de prisión por enfermedad: análisis de la situación para internos penados, preventivos y penados con prisión provisional", in *La Ley*, n. 7406, 2010.

tence in the convict's residence (Article 80 of the Prison Regulations). The former depend on the facility in which the convict is placed. Firstly, the sentence may be served in a module or open section within a large prison with modules or sections adapted for different regimes. There are few of them, given that the predominant trend in recent decades has been to build big penitentiary facilities with capacity for 1,000 inmates (or 2,000 if the cells are shared) in rural areas remote from towns, which makes it difficult for convicts to find outside jobs. In these prisons, only those that perform some task within the facility are placed under this modality. Most of them are transferred to another penitentiary facility and sent to so-called open or reinsertion centers entirely devoted to such modality. Many have been built in different towns in the last decades. Within the city limits, this model of open regime provides for a significant reduction of security measures, bringing convicts closer to a social and work environment beneficial for their gradual and monitored reinsertion. In fact, the promotion of these facilities has left little scope for the third option, which consists of dependent units of shelter homes or apartments managed by associations and NGOs in cooperation with the penitentiary Administration. They have a more limited capacity and their cost is therefore higher. The fourth – and booming – modality allows serving the sentence in an open regime in the convict's residence under electronic monitoring. This modality must be justified by personal, family, health, work or treatment reasons. It is mostly applied to convicts who have a job offer in a place away from the penitentiary facility where they have to spend the night. It is explicitly provided for mothers – or fathers, in their absence – for the care of dependent children, and also for convalescence after illness or surgery. This modality is subject to the convict's consent. The obligation to return to prison for the night is thus substituted for electronic monitoring through a telematics or other device, certifying the inmate's presence in a specific place and during certain times established in a monitoring program[163].

Pre-release or open regime is conceived as another phase in the execution of prison sentences under the scientific individualization system. Therefore, just like one could attain that status through advancement in previous phases or grades, following a positive evaluation of the convict's evolution, it may be revoked if the prognosis changes. In this latter case, the convict would go back to serve the sentence under the ordinary regime. This will happen if the assessment of the convict's personality or conduct, or the prognosis regarding social rehabilitation is negative (Ar-

[163] Instruction 13/2006 of the General-Secretariat of Penitentiary Institutions.

ticle 106(3) of the Prison Regulations). The body responsible for proposing such regression is the Treatment Board of the convict's prison, and the Management Center shall decide on his/her new classification.

The return to prison to serve the sentence under the ordinary regime may also be ordered if the convict does not go back to the penitentiary facility after a leave or any other authorized absence, or if he/she is arrested, placed in prison or prosecuted for a new criminal offence. In these cases, the prison director shall order the suspension of leaves and the provisional return to the ordinary regime pending request of a new classification for the convict (Article 108 of the Prison Regulations).

(*vii*) *The open regime as an alternative to reviewable life sentences.* The 2015 reform of the Criminal Code[164] introduces life imprisonment in the Spanish legal system in the form of reviewable life sentence[165]. Given its lack of definition, this indefinite prison sentence is based on a set of minimum prison terms before allowing access to the three mechanisms provided by the penitentiary legislation towards liberty: limited temporary leave, through leave permits; a longer absence like the open regime; or suspension of the last part of the sentence through a revision of the sentence and conditional release.

By introducing also the open regime and conditional release as alternatives to prison in the execution of an indefinite sentence, the legislator intended to offer a theoretical possibility of social reinsertion for those convicts sentenced to life imprisonment, so that they retain the right to hope[166]. At the same time, the possibility of an early release tries to avoid constitutionality issues regarding a permanent custodial sentence, which has been almost unanimously rejected by the Spanish criminal doctrine[167].

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[164] Organic Act of March 30, n. 1/2015, op. cit., which entered into force on 1 July 2015.

[165] Provided in the Criminal Code for the most serious cases of murder (Article 40), terrorist murder (Article 573*bis* (1)), regicide (Article 485(1)), homicide of a foreign Head of State or internationally protected person (Article 605(1)), genocide (Article 607(1) and (2)) with death, sexual assault or very serious injuries. For an analysis in this regard, see V. Cervelló Donderis, *Prisión perpetua y de larga duración. Régimen jurídico de la prisión permanente revisable*, Valencia: Tirant Lo Blanch, 2015.

[166] In the words of the ECHR, in its judgment in case *Vinter and others v. The United Kingdom*, of 9 July 2013, Applications n. 66069/09, 130/10 and 3896/10.

[167] Also, the Socialist Party submitted an appeal against the alleged unconstitutionality of this provision before the Constitutional Court, which shall decide on the possible breach of the prohibition of inhumane punishments (Article 15 of the Spanish Constitution), of the right to freedom (Article 17(1)) in relation to the principle of proportionality, of the obligation of specificity imposed by the principle of legality (Article 25(1)), and of the social reha-

Regarding the open regime modality[168], there are two particularities with respect to the general regulation for prison sentences (see above).

First, the establishment of a set of terms which, as security periods, require the subject to remain in prison for "minimum" periods before having access to an open regime. The duration of such terms depends on the number and nature of the crimes (whether terrorism or organized crime or not) and, in the event of multiple offences, on the seriousness of the cumulative sentences[169]. This gives rise to complex subsystems of execution with little connection to the social rehabilitation purpose of the sentence. Instead, they seem guided by retribution criteria or, at best, general-prevention purposes.

Hence, the scientific individualization system, which provided for advancement towards a serving regime appropriate to the subject's social rehabilitation prognosis, yields to a progressive system which requires the convict to serve a set of terms regardless of the possibilities of reinsertion.

The second particularity lies in the body responsible for granting such regime and its procedure. The decision is no longer made by the penitentiary Administration, but it must be approved by the sentencing court[170], following an individualized favorable prognosis regarding social reinsertion, and after hearing the Public Prosecutor and Penitentiary Institutions (Article 36(1) of the Criminal Code).

In any event, and in cases of low risk, the court may order the application of the open regime to seriously or incurable ill convicts, as well

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bilitation purpose (Article 25(2)). For an in-depth analysis, see L. Arroyo Zapatero, J.A. Lascuraín Sánchez, M. Pérez Manzano (dir.), *Contra la cadena perpetua*, Cuenca: Ediciones de la Universidad de Castilla-La Mancha / Tirant lo Blanch, 2016.

168 Provided in Articles 36, 78*bis* and 92 of the Criminal Code.

169 Convicts sentenced for a single offence shall effectively serve at least 15 years of imprisonment; those convicted of terrorist crimes shall effectively serve at least 20 years of imprisonment (Article 36(1) of the Criminal Code); those convicted of several offences, one of which carries reviewable life sentence and the others adding to a prison sentence of more than 5 years, shall serve at least 18 years of imprisonment; convicts sentenced for several offences, two or more of which carry reviewable life sentences, or if one of them carries reviewable life sentence and the rest add to 25 years or more, shall serve at least 22 years of imprisonment; convicts sentenced for several offences including terrorist crimes, one of which carries reviewable life sentence and the rest adding to more than 5 years, shall serve at least 24 years of imprisonment; convicts sentenced for several offences including terrorist crimes, one of which carries reviewable life sentence and the rest adding to more than 15 years, shall serve at least 24 years of imprisonment; convicts sentenced for several offences including terrorist crimes, two or more of which carry reviewable life sentences or if one carries reviewable life sentence and the others add to 25 years or more, shall serve at least 32 years of imprisonment (Article 78*bis* (1) and (3) of the Criminal Code).

as for those over the age of 70, on humanitarian and personal dignity grounds (Article 36(3) of the Criminal Code) (see above).

(B) *Conditional release*

a) *Conditional release as an alternative to prison sentences.* Since its inclusion in the Spanish legislation in 1914 until the recent reform of the Criminal Code in 2015, conditional release was considered another execution modality for prison sentences. In particular, it was the last serving phase under a liberty regime. According to both the progressive system and then the scientific individualization system, conditional release was the last grade in the convict's serving of a sentence. It could only be attained upon fulfillment of certain regulatory requirements (including completion of three quarters of the sentence) which indicated a favorable social rehabilitation prognosis.

One of the most relevant innovations of the 2015 reform in terms of criminal penalties is the change in the nature of this measure. Indeed, conditional release has has become a form of suspension; in particular, suspension of the last part of the sentence[171].

The two conceptions of conditional release differ most importantly in the consequences attached to its violation (for instance, in the event of commission of further offences or serious breaches of the rules of conduct imposed by the Prison Supervision Court). Originally considered a method of serving the sentence, the Criminal Code used to order the convict's return to prison to serve the remainder thereof. However, now that conditional release is conceived as a form of suspension, in any of the aforementioned events the convict will be required to serve in prison the whole part of the sentence suspended, without taking into account the time spent at liberty[172].

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[170] Which is quite remote from the judicial authority specialized in execution matters and with a closest knowledge of the relevant inmate, i.e. the Prison Supervision Court. See V. CERVELLÓ DONDERIS, *Prisión permanente revisable*, op. cit., 230.

[171] In this regard, there is a divergence between the Criminal Code and the LOG The latter, not affected by the reform, still conceives conditional release as the last degree in the serving of a sentence (Article 72(1)).

[172] This configuration has been gradually defined. Its nature was first altered in a somewhat disguised manner, turning it into an execution modality, although at liberty, only for offenders convicted of terrorist crimes. Only for them, revocation of conditional release was to imply automatic loss of the time spent at liberty, which was a covert way of conceiving conditional release as a suspension of the sentence (apparently following retribution criteria). C. RODRÍGUEZ YAGÜE, "Las respuestas del Derecho penitenciario ante la delincuencia terrorista. ¿Hacia un modelo de prisión perpetua?", in *Rev. General de Derecho Penal*, n. 13/2010, 32.

Therefore, since the entry into force of the reform of the Criminal Code on 1 July 2015, conditional release is defined as an alternative measure to execution of the last part of the prison sentence[173]. It consists in the suspension of the last part of the sentence and the convict's release under two conditions: not to commit further offences and to comply with a set of rules of conduct. It is thus conceived as a test mechanism allowing the convict's reintegration into his/her personal, family, social and work environment before full completion of the sentence, provided that his reinsertion prognosis is favorable. It is also an important incentive for good behavior in prison, since conditional release may be granted in advance as a penitentiary benefit to reward those who demonstrate good conduct and who take active and continuous part in activities.

Like in the case of the open regime or pre-release, conditional release is based on a general regime and several specific regimes established for certain circumstances related to the convict's situation (aliens, humanitarian reasons) or to the number of sentences being served, or conceived as a penitentiary benefit. Unlike other models, Spain has adopted a discretionary non-mandatory system: its granting depends on the penitentiary Administration's assessment regarding the fulfillment of certain requirements[174].

*a.*1) *General regime.* Traditionally, three conditions have been required to access to conditional release. They are maintained, even if the mechanism has become a type of suspension of the sentence: the convict must be placed on pre-release (third grade), therefore enjoying a semi-liberty regime; he/she must have served three quarters of the sentence imposed; and he/she must have shown good behavior.

The 2015 reform of the Criminal Code lists for the first time the factors to be assessed in order to determine the good behavior of the convict giving access to this alternative. While prior regulation only required good behavior and an individualized and favorable prognosis regarding social reinsertion[175], the reform introduced new factors to be considered by the Prison Supervision Court (Article 90(1) of the Criminal Code): the convict's personality and criminal record, the circumstances of the

[173] Governed by Articles 83, 86, 87, and 90 to 93 of the Criminal Code, Article 72(1) LOGP and Articles 192 to 201 of the Penitentiary Regulations.

[174] H. Roldán Barbero, "El uso de la libertad condicional y su influencia en el tamaño de la población reclusa en España", in *Rev. Electrónica de Ciencia Penal y Criminología*, n. 12-04, 2010, 4.

[175] After the reform implemented by Organic Act of June 30, n. 7/2003, op. cit., compliance with civil liability obligations was required for this condition to be considered fulfilled.

case, the relevance of the legal assets that could be affected by the commission of further offences, the conduct while serving the sentence, the convict's personal and social circumstances, and the expected effects resulting from suspension of the execution and the measures imposed by the Prison Supervision Court. Although some of these factors are related to the convict's behavior and to the probability of social rehabilitation, a large part refer instead to elements beyond the convict's control or which were already essential for the imposition of the sentence. Such uncertainty and subjectivity regarding the assessment leads us to question the compatibility of these new factors with the principles of culpability and *ne bis in idem*.

Compliance with civil liability obligations arising from the offence is still required for considering the good behavior of the convict (Article 72 LOGP)[176]. Furthermore, convicts sentenced for offences committed within criminal organizations or for terrorist crimes are also required to abandon criminal purposes and means, and to cooperate with the authorities (Article 90(8) of the Criminal Code).

b) *Conditional release as a penitentiary benefit.* Along with the general regime, the Criminal Code has gradually introduced different modalities of conditional release as a penitentiary benefit. The sentence is thus reduced, since conditional release may be granted before serving three quarters of the sentence as provided by Article 90(1) of the Criminal Code.

*b.*1) *Conditional release upon completion of two thirds of the sentence.* The first modality entitles the Prison Supervision Court to grant conditional release to convicts upon completion of two thirds of their sentence. Hence, completion of the last third in prison is suspended. For that purpose, the convict must fulfill the general requirements: to be placed on pre-release (third grade) and to demonstrate good behavior. Furthermore, he/she must prove continuous – or beneficial for social rehabilitation purposes – engagement in work, cultural or occupational activities while serving the sentence in prison (Article 90(2) of the Criminal Code).

[176] Victims may appeal against the Order of the Prison Supervision Court granting conditional release to convicts sentenced for crimes subject to the application of a security period or, if the sentence exceeds 5 years, for crimes of homicide, willful abortion, personal injuries, crimes against freedom, torture and moral integrity, sexual offences, robbery with violence and intimidation, terrorism, and human trafficking (Article 13(1)(a) of Act of April 27, n. 4/2015, on the standing of victims of crime, op. cit.).

Convicts sentenced for terrorism or organized crime are excluded from this penitentiary benefit (Article 90(8) of the Criminal Code)[177].

*b.*2) *Early conditional release upon completion of one half of the sentence*. At the request of Penitentiary Institutions and following a report by the Public Prosecutor, Prison Supervision Courts may grant conditional release at an earlier stage where the convict has served one half of the sentence, considering up to 90 days per year effectively served. In addition to the requirements under the penitentiary benefit modality, the convict is required to effectively and favorably engage in victim compensation programs, or in treatment or detoxification programs (Article 90(2) of the Criminal Code).

Convicts sentenced for terrorism or organized crime are also excluded from this modality (Article 90(8) of the Criminal Code).

*b.*3) *Early conditional release during the first half of the sentence*. Another modality of conditional release as a penitentiary benefit has been introduced in 2015, which entails its granting during the first half of the sentence. Exceptionally, Prison Supervision Courts may apply it to convicts serving their first prison sentence, if it does not exceed 3 years, and provided that they meet the general requirements for pre-release and demonstrate good behavior. They are also required to have taken active part (or obtained good results) in work, cultural or occupational activities in prison (Article 90(3) of the Criminal Code).

Along with convicts sentenced for terrorism or organized crime (Article 90(8)), those convicted of sexual offences are also excluded from this modality.

c) *Conditional release in cases of cumulative sentences and full serving*. If the convict is serving several sentences totaling more than twice the maximum prison term under Spanish legislation, the sentencing court or judge may order full serving of the sentence (Article 78 of the Criminal Code). Hence, the terms for conditional release, in any of its modalities, are calculated with regard to the whole duration of the sentences imposed, instead of the maximum prison term (up to 40 years in Spain).

It is an optional measure, and Prison Supervision Courts may decide its discontinuation if there is a favorable prognosis regarding social rein-

[177] An expression of sheer retribution that has earned ample criticism. See, among others, F. Renart García, *La libertad condicional: nuevo régimen jurídico*, Madrid: Edisofer, 2003, 189.

sertion[178]. However, in the case of terrorism or organized crime, the general regime requires completion of seven eights of the maximum term of the sentence before having access to conditional release (Article 78(2) of the Criminal Code).

d) *Conditional release for humanitarian reasons.* The terms required for the different modalities of conditional release (general regime or penitentiary benefits) do not apply to convicts over the age of 70 – or who reach that age during the sentence – or to those seriously or incurably ill[179]. In both cases, they may be granted conditional release in any modality provided that the rest of conditions under the Criminal Code are met.

In these cases, Prison Supervision Courts responsible to decide on the penitentiary Administration's request for conditional release shall assess, along with personal circumstances, the possibilities of committing further crimes and the subject's low risk. When there is clear risk for the inmate's life due to his/her age or illness, the court or judge may order suspension of the sentence and conditional release regardless of the other conditions, taking only into account the convict's lack of relevant risk[180].

e) *Conditional release for aliens without legal residence in Spain or Spanish residents abroad.* With regard to aliens in an irregular situation or Spanish citizens with legal residence abroad, the penitentiary legislation provides the possibility of enjoying conditional release in the country of residence. The conditions are the same as in the above regimes. Only the place where such measure is enjoyed changes; in this case, it is not the Spanish territory but the place of residence abroad.

Unlike expulsion measures, the convict's consent is required for his/her transfer to the country of residence.

This measure was clearly justified by the previous conception of conditional release, understood as an execution modality of the last part

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[178] The victims may appeal against this decision of Prison Supervision Courts in the case of crimes of homicide, willful abortion, personal injury, crimes against freedom, torture and moral integrity, sexual offences, robbery with violence and intimidation, terrorism, and human trafficking (Article 13(1)(*b*) of Act of April 27, n. 4/2015, on the standing of victims of crime, op. cit.).

[179] The same applies to the other requirements established by the 2003 reforms: security period and compliance with civil liability obligations. C. Chaves Pedrón, "Reforma del artículo 92 del Código penal. Competencias del Juez de Vigilancia en la excarcelación de septuagenarios y enfermos muy graves", in *Rev. General de Derecho Penal*, n. 4/2005, 5.

[180] In these cases, the convict must provide any necessary information to evaluate the course of the disease. Otherwise, suspension of execution may be revoked, which would imply an obligation to serve the suspended sentence.

of the sentence, and providing for the competent authorities in the country of residence to monitor and control its application. Now that it has become a conditional suspension, certain doubts arise as to the procedure – not established – to be followed in the event of violation and revocation of the suspension[181].

The greatest problem with this figure is the (sometimes absolute) absence of supervision over these conditionally released convicts. In practice, this may entail final release given the impossibility of monitoring[182]. That is why Prison Supervision Courts tend to be reluctant to its application. Without effective control mechanisms in the convicts' country of residence, this modality risks becoming in practice a partial remission of the remaining sentence or a disguised consented judicial expulsion[183].

Suspension of the last part of the sentence by granting conditional release obviously implies the convict's release, who in any case – except perhaps for the humanitarian modality – was already under a semi-liberty regime. However, Prison Supervision Courts may subject such suspension to certain prohibitions and duties generally provided for suspension in the Criminal Code (Article 83)[184], if it is deemed necessary to prevent commission of further offences[185].

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[181] This measure, provided by Article 197 of the Penitentiary Regulations, has not been adapted to the change in conditional release implemented by the 2015 reform of the Criminal Code.

[182] C. Rodríguez Yagüe, "Los derechos de los extranjeros en las prisiones españolas: derecho y realidad", in *Rev. General de Derecho Penal*, n. 2/2004, 54.

[183] J.A. Bermejo Romero de Terreros, "El extranjero privado de libertad: paradojas del sistema", in *I Congreso Europeo de Derecho Penitenciario. X Jornadas Penitenciarias de Andalucía*, Jaén: Cámara Oficial de Comercio e Industria de la Provincia de Jaén, 2002, 273.

[184] Prohibition to approach the victim, relatives or other persons determined by the judge or court, their home, workplace or other places usually frequented, or to communicate with them by any means; Prohibition to contact certain persons or members of a certain group; Obligation to maintain residence in a specific place, including a prohibition to leave it or be temporarily absent without authorization of the judge or court; Prohibition to reside in certain areas or to visit them; Obligation to appear, with the established periodicity, before the determined judge or court, police stations or administrative offices; Obligation to participate in training, work, cultural, road safety education, sexual education, environmental protection, animal protection, equal treatment and other similar programs; Obligation to participate in detoxification programs for alcohol, drugs or narcotics dependence, or treatment of other addictions; Prohibition to drive motor vehicles without certain technological devices that subject their ignition or functioning to prior check of the driver's physical condition; Obligation to comply any other duties considered by the judge or court necessary for rehabilitation purposes, with the convict's consent, and provided they are not offensive to his/her dignity.

[185] The victims may request imposition of measures or rules of conduct to ensure their safety (Article 13(2)(a) of Act of April 27, n. 4/2015, on the standing of victims of crime, op. cit.).

Prison Supervision Courts are the competent bodies as regards granting and revocation of conditional release (Article 76(2)(*b*) LOGP). Until the 2015 reform of the Criminal Code, the penitentiary Administration processed *ex officio* the request upon confirmation, by the supervisory bodies, of compliance with requirements[186]. Under the new regulation, Prison Supervision Courts shall decide at the convict's request. In the event of rejection, a six-month deadline (that may be extended to one year by a reasoned decision) can be established before the convict is entitled to submit another application (Article 90(7) of the Criminal Code).

In the granting decision, the Prison Supervision Court must verify that the convict meets the requirements for the relevant modality. The application may be rejected in two cases: if the convict provides inaccurate or incomplete information on the location of his/her goods or objects to be seized, if he/she fails to comply with civil liability obligations in accordance with his/her capacity; or, concerning offences against the Administration of justice, if the convict fails to comply with financial obligations or the obligation to compensate for damages caused to the Administration (Article 90(4) of the Criminal Code).

Supervision of the conditionally released lies with the penitentiary Administration, in particular the prison or Social Reintegration Center nearest to the offender's place of residence. The individualized program established for those on conditional release, including any rules of conduct imposed by the Prison Supervision Court, shall be monitored by the prison's social services[187].

The suspension period may range between 2 and 5 years, and may not be less than the remaining term of the sentence (Article 90(5) of the Criminal Code).

Prison Supervision Courts may revoke the suspension and order execution of the suspended sentences in three cases (Article 83(1) of the Criminal Code). First, if further offences are committed. Nevertheless, the 2015 regulation rightly provides that the commission of further offences does not entail an automatic revocation of conditional release. This will only occur if the favorable expectation underlying the suspension is no

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[186] Consistently with the conception of conditional release as an execution modality of the prison sentence (the fourth and last grade), see C. Rodríguez Yagüe, C. Guisasola Lerma, M. Acale Sánchez, "Libertad condicional", in *Estudio crítico sobre el anteproyecto de reforma penal de 2012*, Valencia: Tirant lo Blanch, 2013, 390.

[187] Law enforcement bodies will be responsible for monitoring the prohibition to approach or to contact certain persons, the obligation to maintain residence in a specific place, or the prohibition of residence in a specific place imposed by Prison Supervision Courts (Article 83(3) of the Criminal Code).

longer valid. Second, due to the serious or repeated violation of the prohibitions and duties imposed by the Prison Supervision Court, or for evading the Administration's monitoring. Finally, if the convict provides inaccurate or incomplete information on the location of his/her goods and objects subject to seizure, in the event of failure to comply with civil liability obligations unless for lack of economic capacity, or if the convict provides inaccurate or incomplete information on his/her assets.

On the other hand, if breach of the imposed conditions is not serious or repeated, Prison Supervision Courts have two alternatives to sending the convict back to prison: modifying the rules of conduct or imposing new ones, or extending the suspension period up to one half of the period initially set (Article 83(2) of the Criminal Code).

Upon completion of the suspension period without any of these circumstances, the judge or court shall order the remission of the sentence (Article 87 of the Criminal Code).

f) Conditional release as an alternative to reviewable life sentences. The alleged constitutionality of an indefinite sentence, such as the reviewable life sentence introduced in 2015, can only be held if there are mechanisms allowing social reinsertion for those convicts with a favorable prognosis. That is the rationale for the review procedure, which can give access to conditional release and a suspension period[188].

Review of life sentences is an alternative mechanism to continuous execution of the prison sentence. It provides for a test regime for convicts that have served a long execution time. Like the open regime, this leaves the door open for reinsertion and the right to hope of those sentenced to life imprisonment. Any other conception would be contrary to the Spanish Constitution and the social rehabilitation purpose enshrined therein (Article 25(2)).

Requirements for accessing the review procedure and, through it, conditional release are those generally provided for prison sentences (see above). Long security periods are established, requiring completion in prison of a significant part of the sentence. Their duration depends on the number and seriousness of the sentences and the nature of the offence(s) (whether terrorism or organized crime, or not)[189].

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[188] Provided in Articles 78bis and 92 of the Criminal Code.

[189] Convicts sentenced for a single offence shall effectively serve at least 25 years of imprisonment (Article 92 of the Criminal Code); those convicted of several offences, one of which carries reviewable life sentence and the others adding to a prison sentence of more than 5 years, shall serve at least 25 years of imprisonment; convicts sentenced for several offences, two or more of which carry reviewable life sentences, or one of which carries revie-

The granting procedure may also vary. Upon completion of the sentence in accordance with the specified periods, the court must verify at least every two years whether the rest of requirements for conditional release are met. The court must also decide on the convicts' request for conditional release, and in the event of rejection it can set a 1-year period before new applications may be submitted (Article 92(4) of the Criminal Code). The court shall decide on the suspension by means of adversarial oral proceedings, with the intervention of the Public Prosecutor and the convict, with counsel assistance.

If the review is positive and the subject is placed on conditional release, the court shall suspend the execution of the reviewable life sentence for a period between 5 and 10 years[190]. If, according to the Prison Supervision Court, the conditions giving rise to suspension have changed and the lack of risk can no longer be upheld, suspension of execution may be revoked (Article 92(3) of the Criminal Code).

However, conditional release for humanitarian reasons under Article 91 of the Criminal Code remains open[191].

4.2. *General assessment of existing measures*

4.2.1. *Critical assessment with regard to European standards*

As a manifestation of the principle of imprisonment as last resort, recognized at a European level, a reductionist criminal policy should restrict incarceration through different strategies such as decriminalization, limited use and duration of preventive detention and prison sentences. Instead, non-custodial measures and sanctions should be promoted[192].

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wable life sentence and the rest adding to more than 15, shall serve at least 25 years of imprisonment; convicts sentenced for several offences, two or more of which carry reviewable life sentences and the others adding to 25 years or more, shall serve at least 30 years of imprisonment; convicts sentenced for several offences including terrorist crimes, one of which carries reviewable life sentence and the rest adding to more than 5 years, shall serve at least 28 years of imprisonment; convicts sentenced for several offences including terrorist crimes, one of which carries reviewable life sentence and the rest adding to more than 15 years, shall serve at least 28 years of imprisonment; convicts sentenced for several offences including terrorist crimes, two or more of which carry reviewable life sentences or if one carries reviewable life sentence and the others add to 25 years or more, shall serve at least 35 years of imprisonment (Article 78bis (2) of the Criminal Code).

[190] The convict may be subject to rules of conduct or prohibitions under Article 83, and these may be modified or suppressed if the underlying grounds for their adoption changed (Article 92(3) of the Criminal Code) (see above 4).

[191] On expulsion at the execution phase, see above 4.

[192] D. Van Zyl Smit, S. Snacken, *Principios de Derecho y Política Penitenciaria Europea. Penología y Derechos Humanos*, Valencia: Tirant lo Blanch, 2013, 149 ff. and 470.

Also, further mechanisms allowing for gradual reintegration into society before completion of the sentence should be incorporated, both in order to address a structural problem such as prison overcrowding and to guide the system towards social rehabilitation purposes[193].

The Council of Europe has highlighted the importance of reducing detention terms through conditional release in its Recommendations on probation[194] and long-term sentences[195].

Two of the three alternatives to imprisonment contained in the Spanish regulation are among that type of measures: the open regime (or pre-release) and conditional release. They are thus consistent with the international instruments promoting regimes for gradual reintegration, as established by Rule 107 of the 2006 European Prison Rules (EPR)[196]: "Sentenced prisoners shall be assisted in good time prior to release by procedures and special programmes enabling them to make the transition from life in prison to a law-abiding life in the community"[197].

An automatic application of conditional release upon completion of part of the sentence facilitates execution planning and, therefore, a more effective release of prisoners[198]. Experience shows that our legislation's discretionary systems for both pre-release and conditional release deprive many prisoners of such possibilities[199]. This is usually the case with most serious crimes and those with the highest risk of recidivism. Hence, regulatory barriers regarding access of certain offenders to these alterna-

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[193] According to Recommendation R (99)22 concerning prison overcrowding and prison population inflation, conditional release (parole) should be regarded as one of the most effective and constructive measures, which not only reduces the length of imprisonment but also contributes substantially to a planned return of the offender to the community (paragraph 24).

[194] Recommendation (2003)22 of the Committee of Ministers to member States on conditional release (parole), paragraph 3.

[195] Recommendation (2003)23 of the Committee of Ministers to member States on the management by prison administrations of life sentence and other long-term prisoners.

[196] The preamble stresses that the enforcement of custodial sentences must prepare prisoners for their reintegration into society.

[197] Also provided in United Nations Standard Minimum Rules for the Treatment of Prisoners of 1955 (number 60(1)). Also, in case *Léger v. France*, of 11 April 2006, Application n. 19324/02, the ECHR regarded conditional release as a lawful policy within the process of social reintegration for persons sentenced to imprisonment (paragraph 70).

[198] D. Van Zyl Smit, S. Snacken, *Principios de Derecho y Política Penitenciaria Europea,* op. cit., 481 ff.

[199] For a critical analysis of these deficiencies and the fact that conditional release is granted only after completion of one of the longest periods in relation to the countries of the Council of Europe, see J. Cid Moliné, *La política criminal europea en materia de sanciones alternativas a la prisión y la realidad española: una brecha que debe superarse*, op. cit., 77.

tives (full serving[200], exceptional requirements, and exclusion of penitentiary benefits) and the practice of rejecting applications are contrary to the EPR's provision that also in the case of prisoners with longer sentences "steps shall be taken to ensure a gradual return to life in free society" (107.2), echoed in Recommendation (2003) on conditional release (parole)[201].

Among other guidelines regarding conditional release systems, Recommendation (2003)22 establishes that the criteria should be realistic in the sense that they should take into account the prisoners' personalities and social and economic circumstances as well as the availability of resettlement programmes (paragraph 18). While the Spanish regulation takes into consideration these factors for the Prison Supervision Court's assessment of good behavior, it also introduces other elements beyond the convict's control[202]. Furthermore, it is worth recalling that such elements were already taken into account for the imposition of the prison sentence and that they may hinder access to conditional release.

Attention should also be drawn to the fact that conditional release is subject to prior placement on pre-release (third grade) and that the latter, in turn, is in practice subject to a job offer outside the prison. This is contrary to the recommendation contained in paragraph 19, according to which the lack of work possibilities should not constitute grounds for refusing or postponing conditional release (efforts being required to find other forms of occupation), nor should the absence of regular accommodation[203].

As for minimum serving periods determined by law, Recommendation (2003)22 establishes that the relevant authorities should initiate the

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[200] Which can actually entail a term for conditional release longer than that for final release, in breach of paragraph 6 of Recommendation (2003)22 on conditional release (parole), which provides that the minimum or fixed period should not be so long that the purpose of conditional release cannot be achieved.

[201] Which explicitly states that in order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners (paragraph 4.a). Also established in Recommendation (2003)23 of the Committee of Ministers to member States on the management by prison administrations of life and other long-term prisoners (paragraph 33).

[202] The offender's criminal record, the circumstances of the case, the relevance of legal assets that could be affected in case of recidivism.

[203] In other cases, barriers to conditional release come from the own Administration, for instance when the convict has no access to treatment programs required for conditional release, or when leave permits are required and the penitentiary Administration rejects them. See D. VAN ZYL SMIT, S. SNACKEN, *Principios de Derecho y Política Penitenciaria Europea*, op. cit., 483 ff.

procedure to adopt a decision on conditional release as soon as the prisoner has served the minimum period (paragraph 17). However, in the Spanish case such initiation lies with the Treatment Board, and it will depend on a positive assessment of compliance with all requirements, including not only the minimum period but also prior placement on prerelease (Articles 194 et seq. of the Criminal Code). The provision by the 2015 reform of a decision procedure at the convict's request may remedy the cases of the penitentiary Administration inaction or those in which the Board is *a priori* opposed to conditional release. In any event, the Spanish regulation does not comply with the Recommendation in this regard. On the contrary, the provision under Article 90(7) of a six-month period – with a possible extension to 1 year – for the submission of new applications after prior rejections is in accordance with paragraph 21 of Recommendation (2003)22.

One of the greatest deficiencies of the system is its lack of an efficient and appropriate monitoring system. In this regard, Spain must still define an autonomous service for the implementation of sanctions in the community, in the direction pointed by Recommendation (2010)1 on the Council of Europe Probation Rules[204].

On the other hand, and regarding the specific modalities of pre-release (open regime), the possibility of pre-release to enable the convict's transfer to detoxification centers or for humanitarian reasons is in line with Recommendation Number R (98) 7 of the Committee of Ministers concerning the ethical and organizational aspects of health care in prison (paragraphs 43 and 51).

The regulation on electronic monitoring of convicts placed on prerelease deserves criticism. As explicitly acknowledged by Recommendation (2104)4 of the Committee of Ministers on electronic monitoring, this modality may be used as an alternative to execution of prison sentences, in which case its duration shall be regulated by law, and it also may be used as in cases of conditional release with a duration proportionate to the remainder of the sentence (paragraphs 23 and 24). Although this modality is used, it is only governed by an internal instruction of the penitentiary Administration[205], without an adequate regulation in the LOGP or the Prison Regulations. Spain lacks a specific regulation on the grounds, procedure, and guarantees regarding electronic monitoring. That would require enactment of legal rules providing

[204] J. Cid Moliné, "La política criminal europea en materia de sanciones alternativas a la prisión y la realidad española", op. cit., p. 78 ff.

[205] Instruction 13/2006, on the application of Article 86(4) of the Penitentiary Regulations.

that such measure be approved by a judicial authority – or at least authorized by judicial review –, and establishing the conditions for its application, supervision and modalities in the least intrusive manner for the subject's privacy, his/her family, and third parties.

Finally, mention should be made to the reviewable life sentence introduced by the 2015 reform of the Criminal Code and its conflict with the European standards, even if it has not been applied yet due to its recent adoption. In addition to the relativity and subjectivity of the criteria considered for the review, criticism should be leveled at the excessive duration of the minimum serving terms (from 25 to 35 years in the most serious cases)[206]. The combination of these two factors will turn this measure in lifetime imprisonment without real possibilities of review, which seems contrary to Article 3 of the European Convention on Human Rights as it has been construed by the recent case law of the ECHR. Indeed, the ECHR has referred to a right to hope regarding a realistic (rather than merely theoretical) expectation of release (case of Vinter and others v. the United Kingdom, of 9 July 2013)[207].

4.2.2. *Effects, challenges and problems arising from the measures*

(A) *Pre-release (open regime)*

Pre-release is conceived in our legal system as the main alternative to execution of prison sentences. This is because pre-release is in itself an alternative to execution of the sentence within prison, and also a condition for another alternative under the Spanish legislation, i.e. conditional release.

Therefore, the definition of its legal requirements and the political will regarding its use as a prison policy tool are very relevant for prison population.

With regard to the requirements, as already noted, pre-release is originally conceived in LOGP as a method of serving for convicts that, for their personal and prison circumstances, are able to live under semiliberty regimes (Article 102(3) of the Prison Regulations). Additional

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[206] Placing us above the average as one of the countries with highest minimum serving terms in the Council of Europe. F.J. De León Villalba, "Prisión permanente revisable y derechos humanos", in L. Arroyo Zapatero, J.A. Lacuraín Sánchez, M. Pérez Manzano (dir.), *Contra la cadena perpetua*, op. cit.

[207] On the importance of this decision, D. Van Zyl Smit et al., "Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?", in *Hum. Rights Law rev.*, n. 14/2014, p. 65 ff. On the Spanish case, see an analysis of these matters in L. Arroyo Zapatero, J.A. Lascuraín, M. Pérez Manzano (dir.), *Contra la cadena perpetua,* op. cit.

pre-release requirements were not introduced until 2003. Based on the seriousness and nature of the offence, they deviate from the flexibility of the scientific individualization system towards a progressive one.

Security periods are thus introduced. Originally, they were generally applied to prison sentences of more than 5 years, requiring completion of one half before having access to pre-release[208]. Depending on the favorable assessment regarding reinsertion, Prison Supervision Courts could decide not to apply such periods, but they were mandatory in cases of terrorism and organized crime. That same reform required compliance with civil liability obligations as a condition for pre-release, "in particular" for convicts sentenced for crimes against property and the socio-economic order, offences against workers' rights, against the Public treasury and the Social Security, and against the public Administration. Hence, by subjecting pre-release to a compensation criterion instead of the convict's evolution, the scientific individualization system is devoid of its essence[209].

But the greater or lesser use of this alternative does not only depend on its legal configuration. Political will is also relevant; in fact the actual prison policy regarding application of alternatives may be crucial. This becomes evident as regards pre-release, since the penitentiary Administration is responsible for its granting (Prison Supervision Courts only have a say in appeal). Therefore, a more restrictive interpretation on the application of security periods[210] during the years immediately after the reform, or on the requirement of compliance with civil liability obligations[211], resulted in stagnation in the access to this open regime. This was addressed only years later by less restrictive internal rules[212] and a new prison policy clearly based on the promotion of pre-release which materialized, for instance, in the priority given to the construction of penitentiary facilities for these purposes[213]. The legislator, sometimes guided by public opinion

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[208] Organic Act of June 30, n. 7/2003, op. cit.

[209] C. Rodríguez Yagüe, *El sistema penitenciario español ante el siglo XXI,* op. cit., p. 86 ff.

[210] Considering that not only prison sentences of more than 5 years were included, but also shorter ones that, combined, exceeded that duration. Penitentiary Institutions, Instruction 9/2003 and 2/2004.

[211] For certain specific offences, compliance with civil liability obligations or a sufficient guarantee regarding future compliance was required. Prison Supervision Courts, rather than the Treatment Board, were responsible for assessing the rest of factors. Penitentiary Institutions, Instruction 9/2003.

[212] Instruction 2/2005, limiting security periods for individual sentences of more than 5 years. It also confers upon Treatment Boards the weighed assessment of criteria, taking into account both compliance of civil liability obligations and also the willingness and capacity to pay.

[213] E. García España, J.L. Díez Ripollés, *Realidad y políticas penitenciarias*, op. cit., 239.

and media pressure regarding high-profile cases, has often confused serving prison sentences with remaining in prison. Such misunderstanding forgets that sentences can also be enforced under an open regime, underestimating the value of alternatives and their impact on prison population[214]. The penitentiary Administration may opt to reflect such perception or rather seek to reverse the negative consequences arising from excessively punitive reforms. It is true that under the same regulatory framework, a conservative prison policy may enhance the impact of new limitations, giving greater prominence to control rather than to social rehabilitation purposes, or even providing interpretations beyond the legal wording[215]. That was the same penitentiary Administration that, under a more progressive direction, sought strategies to mitigate the consequences of such tightening of the system during the 2000s[216]. Spain has oscillated between both penitentiary policies. Their different views on the specific problem of prison overcrowding, as well as on the more general issue of social rehabilitation vs. toughening of the Criminal Code and the execution of sentences also have an effect on prison population figures.

It was precisely the effect of these reforms on the Spanish penitentiary system (i.e. an alarming growth of prison population after 2003 and stagnation, or even an initial setback, regarding access to pre-release) which prompted the legislator to modify this figure in 2010[217]. In particular, this reform amended the regulation of security periods, introducing some flexibility and conferring its application upon courts or judges. Previous malfunctions which had stiffened the execution system leading to an increase of prison population were thus addressed[218]. Such security periods remained mandatory (without any possibility of discontinuation) only with regard to terrorism, organized crime and sexual offences against children under the age of 13.

Along with the legal definition of this alternative and greater sensitivity and willingness on the part of the penitentiary Administration towards its granting, further factors may hinder access to pre-release.

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214 Organic Act of June 30, n. 7/2003, on reform measures for full and effective serving of sentences, op. cit., provides an example in its title. It is based on the assumption that only sentences served in prison are fully and effectively enforced.

215 V. VALERO GARCÍA, *Repercusiones de la política criminal en el sistema de ejecución de penas*, Barcelona: Congrés Penitenciaria Internacional, Ministerio del Interior, Generalitat de Catalunya, 2006, 36, available at: *http://justicia.gencat.cat/web/.content/documents/arxius/doc_28044478_1.pdf*.

216 C. RODRÍGUEZ YAGÜE, *El sistema penitenciario español ante el siglo XXI*, op. cit., 16 ff.

217 Organic Act of June 22, 5/2010, op. cit.

218 C. RODRÍGUEZ YAGÜE, *El sistema penitenciario español ante el siglo XXI*, op. cit., 106.

On the one hand, access to the full open regime is subject in practice – although not under the regulation in force – to a job offer outside the prison. Even if it is sometimes granted to undertake courses or to seek employment (usually under the semi-open regime), the outside job tends to be an essential requirement. The lack of opportunities, aggravated by the economic crisis and even worse for long-term prisoners (whose environment might be more unstructured), may result in never accessing pre-release, which in turn prevents access to conditional release, thereby serving the full sentence in prison.

The location of the penitentiary facility may also affect access to this alternative. Although there are some centers near towns, in recent decades they have been built in rural areas remote from population. It is true that convicts placed on pre-release are transferred to Social Reintegration Centers in towns or subject to electronic monitoring, but seeking work or maintaining personal ties – required for reaching that grade –, is considerably impaired by the remoteness of these facilities. That explains the essential role of social workers in prisons and NGOs that help convicts rebuild their ties with their environment, including employment.

In the short term, the Spanish penitentiary system faces the challenge of promoting this alternative not only to deal with prison overcrowding but also to avoid imprisonment or continuous detention of persons able to live in semi-liberty. For that purpose, the job requirement should be put in perspective, fostering other possibilities (taking courses, workshops, domestic work…) and electronic monitoring, so that inmates do not have to return to prison for overnight. Along these lines, the LOGP provides a wide array of options including – in addition to the full open regime – a restricted modality and the possibility of establishing individualized methods of serving or detoxification programs in specific centers for drug-dependent persons. Electronic monitoring also includes new options, and it is an effective measure against overcrowding. The problem is far less about legislation than about prison policy. For its consolidation as a reintegration alternative available for the majority of prisoners, it needs strong support from the prison Administration and a clear commitment to pre-release as a form of execution of prison sentences.

(B) *Conditional release*

Conditional release is certainly the most appropriate instrument to reduce the use of detention and to address social rehabilitation needs[219]. However, its impact cannot be assessed without reference to access to

[219] J. Cid Moliné, "La política criminal europea en materia de sanciones alternativas a la prisión y la realidad española", op. cit., 75.

pre-release, since the latter is a condition for the former. In this sense, access to conditional release suffers the same problems already noted with regard to pre-release. A reduced use of conditional release in Spain has contributed to the increase of prison population during the 2000s[220]. Against this background, greater use of early conditional release upon completion of two thirds of the sentence[221] (coinciding with the growth of prison population)[222] tried to ensure an adequate functioning within prisons and to reduce tensions. It was a response to longer sentences resulting from the entry into force of the 1995 Criminal Code and the suppression of remission of sentences for work as a penitentiary benefit.

The main difficulties faced by this figure as an actual alternative come from the adoption of a discretionary model. Although the requirements have apparently remained constant, the access model has gradually toughened. Initially, it was subject to good conduct and guarantees of a future crime-free life (Article 98 of the 1973 Criminal Code). Following enactment of the 1995 Criminal Code, the requirement of a favorable prognosis regarding the convict's rehabilitation or probability of recidivism[223] excluded a large number of prisoners, as a consequence of both the regulation and its application[224]. Under this discretionary model, conditional release is mainly applied to convicts at low risk of recidivism, just like it happens with access to pre-release. Only a minority of prisoners serve the last part of their sentence under conditional-release regimes[225]. The rest usually serve the whole sentence in prison, without access to measures for their gradual reintegration into the community. For the latter cases, conditional release with a high level of rehabilitation intervention could be effective, fostering programs of gradual reintegration into community focused on the subject's criminogenic needs and social ties[226].

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[220] J.L. Díez Ripollés, *La evolución del sistema de penas en España*, op. cit., 26 ff.; V. Valero García, "Repercusiones de la política criminal en el sistema de ejecución de penas", op. cit., p. 39 ff.

[221] M. Vega Alocén, *La libertad condicional en el Derecho español.* Madrid: Civitas, 2001, 117 ff.

[222] V. Valero García highlights the changing trend: early conditional release upon completion of two thirds of the sentence represented 35% of the cases in 2005, against only 6% six years before. "Repercusiones de la política criminal en el sistema de ejecución de penas", op. cit., 39.

[223] Article 90 of the Criminal Code and 67 LOG.

[224] J. Cid, B. Tébar, "Libertad condicional y delincuentes de alto riesgo", in *Rev. Española de Investigación Criminológica*, n. 8/2010, 2.

[225] J. Cid, B. Tébar, "Spain. Early release", in N. Padfield, D. Van Zyl Smit, F. Dünkel (eds.), *Release from Prison: European Policy and Practice,* New York: Willan Publishing, 2011, 338.

[226] J. Cid, B. Tébar, "Libertad condicional y delincuentes de alto riesgo", op. cit., 9 ff.

Such discretionary model may become even more exceptional after the 2015 reform required Prison Supervision Courts to weigh certain factors in the assessment of good conduct. The use of this alternative may be reduced by taking into consideration elements completely unrelated to the convict's future good behavior. A greater use of conditional release is also hampered by maintaining the requirement of compliance with civil liability obligations, even if in recent years it has been softened by a broader interpretation comprising willingness to pay.

In this regard, the doctrine has stressed the different use of this measure depending on the seriousness of the offence[227]. Although in principle there are no exclusions by crime categories, the establishment of further requirements for specific offences (sexual offences, organized crime or terrorism), the length of the sentences and tougher prison practices *de facto* hinder – if not prevent – access to early release.

On the other hand, conditional release may also suffer the effect of its own absence: due to prison overcrowding, Treatment Boards cannot deal personally with inmates for whose rehabilitation prognosis it is responsible[228]. Given the distance of Prison Supervision Courts, it has been suggested that they could collect alternative reports from supervision officers or personnel outside the prison (for instance, volunteer workers and associations) engaged in reintegration activities[229].

Another obstacle to the use of conditional release as a real alternative for the large majority of prisoners is the requirement of prior placement on pre-release (third grade), which has the abovementioned problems of seeking employment as a previous condition. Therefore, some have rightly argued for suppressing this requirement *de lege ferenda*, since its purpose could be fulfilled by the assessment of the favorable prognosis regarding social rehabilitation[230].

At the same time, the change in the processing of conditional release introduced by the 2015 reform may have a positive effect on convicts. Hence, unlike the previous model based on the Administration's exclusive powers regarding initiation and processing of the file[231], Prison Supervision Courts are now responsible for deciding *ex officio* on the sus-

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[227] B. Tébar Vilches, *El modelo de libertad condicional español*, Navarra: Aranzadi, 2006, 244 ff.

[228] H. Roldán Barbero, "El uso de la libertad condicional y su influencia en el tamaño de la población reclusa en España", op. cit., 14.

[229] M. Vega Alocén, *La libertad condicional en el Derecho español,* op. cit.

[230] B. Tébar Vilches, *El modelo de libertad condicional español*, op. cit., 140 ff.

[231] In this regard, see B. Tébar Vilches, *El modelo de libertad condicional español*, op. cit., 188 ff.

pension of the execution of the sentence, as well as on the granting of conditional release at the convict's request. This may increase the number of proceedings initiated and, therefore, of positive decisions.

Finally, the lack of an appropriate control system embodied in a specific agency in charge of monitoring the evolution of this measure[232] – turned into a suspension of the sentence – may result in the absence of a correct and consistent supervision (see above). It is thus necessary to create a specific monitoring body with supervision powers for conditionally released convicts.

4.2.3. *The effect of each measure on prison population*

(A) *Pre-release (open regime)*

Unfortunately, available official data on this alternative are not sufficiently disaggregated: we know the number of convicts placed each year on pre-release; however, we do not have the total figure but only the information of how many were in that situation at 31 December each year. Data do not distinguish between full open regime and semi-open regime or between sentences of more and less of 5 years. Therefore, we do not have information on whether security periods were applied or not. There is also no information as to the failure of the open regime and the number of regressions to the second grade, which imply serving the sentence in prison.

The biggest impact of criminal reforms concerning access to pre-release is suffered in the first months of 2003, along with the entry into force of Organic Act 7/2003. Legal practitioners were "confused" as regards the interpretation of the requirement of compliance with civil liability obligations[233]. Such access has subsequently increased, stabilizing at around 13% of imprisoned convicts (Table 16).

Data of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*, CGPJ) shed some light on the appeals for the non-application of security periods for sentences of more than 5 years under Article 36 of the Criminal Code after the 2003 reform. However

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[232] Criticism has been leveled at the insufficiency of human and material resources, as well as at the assignment of these functions to the social services of the penitentiary facility (Article 202 of the Penitentiary Regulations), which confuses care with control and surveillance tasks. See in this regard F. RENART GARCÍA, *La libertad condicional: nuevo régimen jurídico*, op. cit., 274 ff.

[233] In fact, during the first month following entry into force, placements on pre-release decreased 40%, and 38.8% the second month, i.e. 1,289 less than in the first half of the year. V. VALERO GARCÍA, "Repercusiones de la política criminal en el sistema de ejecución de penas", op. cit., 33.

TABLE 16. *Number of convicts placed on pre-release (third grade) and percentage of total prison population*[234]

Year	Total prison population	Pre-release (third grade)	Percentage
2000	45,104	4,645	10.2
2001	47,571	4,863	10.2
2002	51,882	5,361	10.3
2003	56,096	5,104	9
2004	59,375	5,585	9.4
2005	61,054	6,195	10.1
2006	64,021	6,944	10.8
2007	67,100	7,740	11.5
2008	73,558	8,372	11.3
2009	76,079	9,618	12.6
2010	73,929	9,731	13.1
2011	70,472	9,701	13.7
2012	68,597	9,083	13.2
2013	66,765	8,715	13
2014	65,017	8,487	13

there is only information on the decided cases, but not on whether the decision was favorable or unfavorable. In any event, these data show that the increasing resort to Prison Supervision Courts requesting non-appli-

TABLE 17. *Number of decisions of Prison Supervision Courts regarding the non-application of security periods (Article 36 of the Criminal Code)*[235]

Year	General application (Article 36 of the Criminal Code)
2008	175
2009	276
2010	361
2011	80
2012	102
2013	29
2014	17

[234] Own compilation based on information of the statistical yearbooks of the Ministry of Interior.

[235] Information from the database of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*).

cation of security periods (and the application of the general regime instead) has found a solution upon the enactment of the 2010 reform, since sentencing courts and tribunals are no longer required to apply such periods. That could explain the subsequent decrease in the number of appeals filed before Prison Supervision Courts (Table 17).

The CGPJ also offers data on the number of cases decided with regard to pre-release applications for admission to detoxification facilities. Although the use of this option increased significantly to a peak in 2008, it has consistently decreased in recent years. New treatments in prison, such as drug-free modules (therapeutic modules and respect modules) can hardly account for the dramatic reduction in the last period (Table 18).

TABLE 18. *Number of decisions on pre-release applications for admission to detoxification facilities (Article 182 of the Prison Regulations)*[236]

Year	Outpatient treatment
1999	139
2000	196
2001	159
2002	270
2003	261
2004	315
2005	391
2006	703
2007	596
2008	765
2009	614
2010	511
2011	351
2012	174
2013	68
2014	97

Finally, data of the CGPJ also show the trend towards the increased use of the option under Article 100 of the Prison Regulations, i.e. the preparation of an *ad hoc* regime for the convict mixing characteristics of

[236] Information from the database of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*).

TABLE 19. *Decisions on the application of the flexibility principle (Article 100 of the Prison Regulations)*[237]

Year	Article 100 of the Prison Regulations
2008	1,321
2009	1,321
2010	1,445
2011	1,452
2012	1,397
2013	1,452
2014	1,609

several regimes with the approval of the Prison Supervision Court. Given the toughening of pre-release requirements, this instrument has allowed for some flexibility in the enforcement of sentences, as shown by the data regarding its use (Table 19).

(B) *Conditional release*

Again, it is not easy to gather information on the application of this alternative. The data of the Ministry of Interior are very recent and only show a very small increase in the number of convicts placed on conditional release in the last three years.

Paradoxically, the greatest use of conditional release took place under the 1973 Criminal Code, rooted in Franco's regime. After 1997, when the effects of the 1995 Criminal Code became apparent, access to conditional release started to decline. The longer average duration of prison sentences, the new requirement of a favorable prognosis regarding social rehabilitation, and other policy reasons (giving preference to security over reintegration purposes) explain such gradual decrease[238]. Such trend was most aggravated by the entry into force of Organic Act 7/2003, which regards conditional release as an exceptional measure. Among others, the requirement of compliance with civil liability obligations and, in particular, its originally restrictive interpretation (which disregarded the willingness to pay) had a very negative effect[239]. Such remarkable decline is even

[237] Information from the database of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*).

[238] H. ROLDÁN BARBERO, "El uso de la libertad condicional y su influencia en el tamaño de la población reclusa en España", op. cit., 6.

[239] V. VALERO GARCÍA, "Repercusiones de la política criminal en el sistema de ejecución de penas", op. cit., 39.

more acute than that of pre-release, also affected by the reformulation of the requirement regarding payment of civil liability. The increase in the average duration of sentences – which in turn affects the required completion of three quarters or two thirds –[240], as well as the practical difficulties for foreign convicts, may explain such slowdown[241] in spite of the slight increase in recent years (Tables 20).

TABLE 20. *Evolution in the granting of conditional release (1996-2008)*[242]

Year	Conditionally released	Percentage of prisoners
1996	8,684	25.6
1997	6,669	20
1998	6,215	18.6
1999	6,050	17.4
2000	5,628	15.8
2001	5,453	14.9
2002	5,442	14
2003	5,062	12
2004	5,499	12
2005	5,078	10.8
2006	5,703	11.7
2007	6,293	12.4
2008	6,303	11.9

Its exceptional nature is also confirmed by different studies according to which sentences are normally completed without prior access to conditional release. Only 23% in Catalonia and approximately 31% in the rest of Spain have benefitted from this alternative mechanism be-

[240] In the view of J. CID y B. TÉBAR, longer serving times due to the suppression in the 1995 Criminal Code of remission of sentences for work account for the 53.5% decline in the total number of conditional release applications granted between 1996 and 2008. "Libertad condicional y delincuentes de alto riesgo", op. cit., 3.

[241] In addition, prison overcrowding has a negative impact, given that Treatment Boards find difficulties to engage in personal interaction with the inmates for whose social rehabilitation prognosis they are responsible. H. ROLDÁN BARBERO, "El uso de la libertad condicional y su influencia en el tamaño de la población reclusa en España", op. cit., 13.

[242] Information from J. CID, B. TÉBAR, "Libertad condicional y delincuentes de alto riesgo", op. cit., 4.

tween 1996 and 2008[243]. These data can be complemented by the information of the CGPJ on proceedings handled and decisions adopted by Prison Supervision Courts. This gives an idea on the evolution of decisions regarding conditional release applications, although we ignore whether such decisions are favorable or unfavorable (Table 21).

TABLE 21. *Number of decisions of Prison Supervision Courts regarding conditional release applications (general regime, Article 90 and 91 of the Criminal Code)*[244]

Year	Number of proceedings handled: Conditonal release (general regime)
2000	5,696
2001	5,023
2002	5,374
2003	5,351
2004	5,593
2005	5,852
2006	6,340
2007	6,519
2008	6,879
2009	7,683
2010	9,432
2011	10,932
2012	10,999
2013	11,332
2014	11,383

Also available is the number of cases decided regarding early conditional release, conceived as a penitentiary benefit, allowing release upon completion of two thirds of the sentence. Since we do not know whether such decisions were favorable or unfavorable, we can only point at the existence of a declining trend (from 870 in 1995 or 996 in 1996, to 491 in 1999) coinciding with the entry into force of the 1995 Criminal

[243] Given the lack of official available data in the Spanish territory, the study carried out by J. CID y B. TÉBAR, project the information provided by the Government of Catalonia. "Libertad condicional y delincuentes de alto riesgo", op. cit., 6.

[244] Information from the database of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*).

Code. There is an increase at the turn of the century with a new decline after the enactment of the 2003 reform. It is worth noting that, in spite of the new possibilities implemented by the reform, the number of cases decided was higher in the 90s (Table 22).

TABLE 22. *Number of decisions of Prison Supervision Courts regarding early conditional release applications (general regime, Article 90 and 91 of the Criminal Code)*[245]

Year	Early conditional release
2000	758
2001	782
2002	967
2003	679
2004	631
2005	604
2006	693
2007	726
2008	638
2009	650
2010	831
2011	695
2012	668
2013	685
2014	596

The available information on the number of cases decided – not on the favorable or unfavorable decisions thereof – regarding conditional release applications for aliens or Spanish residents abroad show a somewhat stable trend in the use of this modality. However, it varies significantly depending on the years, with peaks in 2005 and 2011 (almost doubling the number of proceedings in other years) (Table 23).

It is not until 2008 that the CGPJ data started to include the number of cases decided by Prison Supervision Courts regarding revocation of conditional release (Table 24). Since we do not know the total number of decisions granting conditional release in a specific year, it is not possi-

[245] Information from the database of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*).

TABLE 23. *Number of decisions of Prison Supervision Courts regarding applications for conditional release to be enjoyed by aliens in their country of residence (Article 97 of the Prison Regulations)*[246, 247]

Year	Conditional release for aliens
2000	547
2001	317
2002	455
2003	428
2004	506
2005	1,015
2006	415
2007	453
2008	445
2009	568
2010	697
2011	1,044
2012	713
2013	669
2014	516

ble to determine the ratio of violations. There is also no information on the grounds for revocation.

TABLE 24. *Number of decisions on conditional release revocation proceedings*[248]

Year	Conditional release revocation proceedings
2008	566
2009	509
2010	619
2011	644
2012	801
2013	853
2014	788

[246] Information from the database of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*).

[247] According to the State Public Prosecutor's Office, it was applied to 500 inmates in 2009 and to 640 in 2010.

[248] Information from the database of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*).

The data provided by Penitentiary Institutions do not allow assessing the number of violations, since the information on conditional release cancellations comprise both revocations and completion of sentences (Table 25).

TABLE 25. *Number of conditional release cancellations*[249]

Year	Conditional release (CANCELLATIONSÍ)
2012	8,617
2013	8,389
2014	8,156

5. *Final conclusions*

The following conclusions can be drawn from the analysis of alternative measures in the Spanish legal system:

First of all, it should be stressed that without appropriate criminal statistics, it is impossible to implement an evidence-based criminal policy oriented towards results. So far, the Council of Europe has provided regulatory criteria and it has made great efforts through SPACE, but it is extraordinarily advisable to harmonize criminal statistics. Only thus could we develop a measurable criminal policy at the European level, regardless of whether it comes from Brussels or Strasbourg. The legislator on criminal matters must assume that the lack of empirical evidence is as aberrant in the field of criminal policy as it is in economics.

But whatever the improvements required with regard to effectiveness and evaluation, the Spanish system is urgently needed to develop and refine its system of alternatives in accordance with the basic regulatory principle of European criminal law: the *last ratio* principle of criminal law and the deprivation of liberty as the absolute last resort. A good system of alternatives is not only a matter of effectiveness, figures and percentages; it is also a matter of principles and values. The lesson the Spanish system seems to have drawn is that there is not a problem of prison overcrowding in spite of the existence of a punitive criminal law and the lack of effective alternatives. Massive construction of penitentiary facilities has been the answer. Our problem is not one of numbers but of values.

In this sense, these are the major discrepancies with the recommendations of the Council of Europe:

[249] Data regarding the number of convicts placed on conditional release at 31 December of the relevant year. Statistical yearbook of the Ministry of Interior, 2012, 2013 and 2014.

First, the underdevelopment of criminal mediation. The reference introduced in 2015 to mediation in the suspension of sentences introduced is not sufficient. It is necessary to regulate mediation as an autonomous figure. Mediation remains hidden in legal spaces left by complaint-based offences or sentences subject to suspension. But it is in some way still an "unofficial," almost clandestine alternative. Also relevant are the inconsistencies with international standards regarding pretrial or preventive detention. Simpler measures are needed, such as enforcement in the offender's residence.

Other divergences with international standards which should be addressed come from the excessive rigidity in the regulation of alternatives. For instance, suspension should be considered completed if it fulfills its purpose (e.g., detoxification), even if its term has not expired. The 2015 reform has introduced some flexibility; for example, the commission of an offence by someone subject to probation only entails revocation when there is proof that the expectation underlying the suspension decision can no longer by maintained.

Strangely enough, while rigidity seems to soften regarding alternative measures prior to execution, it has significantly increased in the execution phase. Expression of this is the chain or succession of alternatives, like in the case of conditional release and pre-release, or electronic monitoring with regard to both, since the latter cannot be imposed as a separate modality unconnected to the former two alternatives; also, the establishment of requirements impossible to fulfill such as compliance with civil liability obligations or finding a job in a country with more than three million unemployed as a condition for pre-release. The lack of an employment contract closes the door to pre-release, and this in turn prevents access to conditional release.

Alternatives concerning foreign citizens are an example of how the purpose of such measures can be distorted. Curiously, alternatives seem most generous in this field, but it is only because they aim at expulsion, i.e. a type of punishment, rather than at social rehabilitation. Only exceptional alternatives can be considered as such, at least if we consider that this term must be linked to concepts like reintegration or compensation.

Finally, a system of alternatives can only function with an appropriate infrastructure. This is another serious deficiency. On the one hand, the legal culture must change, which may contribute to create a specialized body to assist the judge in choosing alternatives. A true probation agency would also be needed, with an actual and efficient monitoring system, provided with specific resources and personnel.

Section III

CONCLUSIONS AND GUIDELINES

ADRIANO MARTUFI - MARCO VENTUROLI[1]

TRANSFORMATION AND CROSS-FERTILIZATION OF NON-CUSTODIAL SANCTIONING MODELS: A EUROPEAN AND COMPARATIVE LAW PERSPECTIVE

SUMMARY: 1. Preamble: prison sentences and reductionism in European sources. – 2. The rise of community sanctions and the growing role of European Union law. – 3. Genetic mutation of alternatives to prison: comparative analysis and European law. – 4. Multiplication of non-custodial sanctioning models.

1. *Preamble: prison sentences and reductionism in European sources*

In the numerous Council of Europe sources now available on the topic of sanctions as alternatives to imprisonment there is a strong emphasis from the very outset on the harmful effects of imprisonment on the individual[2]. Indeed, on the basis of now widely established approaches to criminology, the sources of this supranational organization highlight, on the one hand, the risk that the deprivation of personal liberty might adversely affect certain fundamental rights of the individual, and on the other, the need to implement appropriate treatment programs designed to avoid contamination with further criminal behaviour inside penal institutions[3].

Such undesirable results, moreover, are exacerbated by the state of overcrowding that has long been an issue, to a greater or lesser extent, in the penal institutions of many European countries[4]. On the one hand, overcrowding inevitably causes a reduction in the overall quality of life within penal institutions, which can even lead to inhuman and degrading treatment of prisoners; so much so that the European Court of Human

[1] Parr. from 1 to 2 written by A. MARTUFI; parr. from 3 to 4 written by M. VENTUROLI.

[2] As an example, see the recommendation by the Committee of Ministers of the Council of Europe Rec. R (2003) 22, which emphasizes the harmful effects of prison sentences (rule 4).

[3] S. SNACKEN, "A reductionist penal policy and European Human Rights Standards", in *Eur. J. Crim. Pol. Res.*, 2006, 14.

[4] M. AEBI, M. TIAGO, C. BURCKHARDT, *SPACE I - Council of Europe Annual Penal Statistics: Prison populations. Survey 2014*, Strasbourg: Council of Europe, 2014.

Rights (ECtHR) has judged that the situation of serious overcrowding constitutes in itself a sufficient condition for the violation of Article 3 of the European Convention on Human Rights[5]. On the other hand, insofar as the presence of a disproportionate number of inmates inside a prison facility constitutes a barrier to the implementation of individualized programs, which are themselves prescribed by the European Prison Rules (Rec. (2006) 2), prison overcrowding could hinder the social resettlement of the sentenced persons to whom such programs are targeted, and thereby increase the risk of recidivism by prisoners once they have regained their liberty.

Thus, the main axis of the Council of Europe's policy concerning penal sanctions is clearly the promotion of alternatives to custodial sentences[6]. However, while at the early stages the call for using alternatives to prison was a reflection of the principle of subsidiarity if not of an overall reduction in penal action, at a subsequent stage the impulse to introduce non-custodial sanctions and measures was mainly driven by renewed confidence in the effectiveness of these alternatives from the perspective of resocialization and the reduction of recidivism[7].

Accordingly, European sources – in line with the prevailing criminal justice theory – consider that legislators should use imprisonment as a last resort, or *ultima ratio* (deprivation of personal liberty "should be regarded as a sanction or measure of last resort" Rec. R (92) 17, rule B5). Moreover, the Council of Europe does not merely denounce the dysfunctional nature of imprisonment, but also identifies a number of actionable strategies in order to apply the principle of subsidiarity to these types of sanctions.

In the first place, European sources call for de-criminalization and de-penalization measures with a view to actualizing the liberal idea which considers that penal law as a punitive tool should only be used as a last resort, or *extrema ratio*. In practice, it actually seems unlikely that the choice of imprisonment as a last resort can be attained without the prior

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[5] ECtHR, *Ananyev and Others v. Russia*, 10.1.2012. § 148; *Neshkov v. Bulgaria*, 27.1.2015 § 232; *Varga v. Hungary*, 110.3.2015, § 74. A comprehensive summary of the legal aspects of imprisonment conditions is provided by the very recent judgment by the ECtHR, 20.10.2016, (Grand Chamber) *Muršić v. Croatia*.

[6] P. Poncela, R. Roth, "Introduction", in *La fabrique des sanctions pénales au Conseil d'Europe*, Paris: La documentation française, 2006, 6.

[7] Such confidence is amply supported by the evidence provided by empirical studies looking at offenders assigned to treatment programs applied as part of community-based sanctions and measures; see, for example, D.L. MacKenzie, *What Works in Corrections. Reducing the Criminal Activities of Offenders and Delinquents*, New York: Cambridge studies in *Criminology*, 2006, 55.

adoption of strategies underscoring the *subsidiary* nature of criminal law as a whole.

In the second place, they express support for measures and sanctions which do not deprive individuals of their personal liberty during the pre-trial, trial and enforcement stages. Council of Europe texts notably call for: the use of custodial remand exclusively in cases for which it is not possible to resort to alternative measures; the substitution of short-term custodial sentences with non-custodial sanctions and measures; the possibility to grant conditional release to all prisoners, including those serving life-sentences; and the adoption of provisions to prevent the automatic conversion to imprisonment of the alternative measures in case of violation of the prescriptions attached to such measures.

Furthermore, all these recommendations have the overall aim of promoting the sanction that is most appropriate to the social reintegration of the convicted person (Rec. R (92) 16, rule 55; R (2000) 22, rule 17; CM/Rec. (2010)1, Glossary, R (99) 22, rule 9). The Council of Europe, moreover, calls on member states to use non-custodial sanctions as primary sanctions right from the sentencing stage (Rec. (2000) 22, rule 2), so as not to leave their application entirely up to the discretionary powers of the court. At the same time, the recommendations set out a series of criteria for grading sentences (inspired by the American *sentencing guidelines* models)[8], whereby courts should choose the type of sanction according to the degree of seriousness of the offence (Rec. R (92) 17, rule B6) in order to discourage the use of custodial sentences for minor crimes[9].

2. *The rise of community sanctions and the growing role of European Union law*

The review of European legal has shown the increasing tendency of Council of Europe texts to promote primarily community sanctions or measures[10], and while these instruments include a diversity of contents,

[8] A. Ashworth, "Towards European Sentencing Standards", in *Eur. Journ. Crim. Pol. Res.*, 2, 1994, 7.

[9] It is specifically suggested that non-custodial sanctions and measures should be graded, taking into account not only the different types of punishments by also the varying degrees of harshness of such punishments. States are thus called upon to set minimum and maximum statutory limits for non-custodial sentences (such as fines or community service, for example) to enable the court to impose the punishment that is most appropriate to the seriousness of the act carried out and to the personality of the individual who carried it out.

[10] For similar considerations, see D. Van Zyl Smit, S, Snacken, D. Hayes, "One cannot legislate kindness: ambiguities in European legal instruments on non-custodial sanctions", in *Pun. & Soc.*, 2015, 3-26.

they are all characterized by the fact that they impose certain restrictions on personal liberty to be accompanied by treatment programs delivered by probation services.

We are thus beginning to see a gradual reduction in the rhetoric of subsidiarity and reductionism in penal law, and its replacement with a growing emphasis on the benefits of alternative approaches based on special prevention measures. The use of certain traditional and non-interventionist substitutes for jail – such as fines or unconditional suspended sentences – is fast disappearing. Conversely, there has been a dramatic increase in the adoption of methods of intervention inspired by the approaches based on cognitive behavioural therapy successfully applied in the British system and in other countries following the Anglo-Saxon model.

The use of suspending measures "devoid of content" thus seems to be strongly discouraged, while references to alternative measures and sanctions whose re-socializing contents are wholly entrusted to community service activities abound, as illustrated by the various forms of probation and of services benefiting the community (CM/Rec. (2010)1, rule 47). European sources, taking their cue from the experience of the Anglo-Saxon model once again, also call for re-education activities to be modulated according to the risk coefficient of the individual offender (CM/Rec. (2010)3) and to his needs, with a view to containing the risk of recidivism (CM/Rec. (2010)1, rule 66). All this is aimed at encouraging the offender to take responsibility towards society and the victims of the crime.

The growing role played by the European Union on the subject of non-custodial sanctions, among other things, is clearly emerging among European sources[11]. Notably, in this regard, the European Parliament's resolution of 15 December 2011 (2011/2897 on detention conditions within the EU) points out "the need for Member States to honour the commitments made in international and European fora to making greater use of probation measures and sanctions which offer an alternative to imprisonment, including decisions taken within the Council of Europe such as Recommendation CM/Rec(2010)1 of the Committee of Ministers of member states on the Council of Europe Probation Rules (point 11)", and calls on "the Commission to examine the impact of differences in criminal law and procedural law on detention conditions in the EU Member States and to make recommendations on these issues, notably in relation to recourse to alternative measures" (point 16)[12].

[11] E. Baker, "The Emerging Role of the EU as a Penal Actor", in T. Daems, S. Snacken, D. Van Zyl Smit (eds.), European penology, London: Hart, 2013, 77-111.

[12] L. Mancano, "The Place for Prisoners in EU Law?", in *Eur. publ. law*, 2016, 591 ff.

The impact of detention conditions on judicial cooperation in criminal law, moreover, is the focus of the most recent European Court of Justice (ECJ) case-law. The latter has clearly stated that limitations apply to the principle of mutual recognition between member states whenever the enforcement of another country's provisions or the transfer from another country of a person for whom an arrest warrant has been issued can expose that person to custodial conditions in breach of fundamental rights, and has indicated non-custodial measures and sanctions as the main pathway to bringing the prison population down to within the limits of regulation capacity[13].

It should be added to this that, during the negotiations for joining the European Union, there has been an increasing tendency to impose on candidate countries not only respect for standards concerning the rights of individuals subjected to measures involving the deprivation of liberty, but also the adoption and regulation of institutions, such as the *probation* system[14], for which, as seen earlier, Council of Europe recommendations provide shared regulatory standards.

However, the number of *soft* and *hard* law texts adopted by the European Union on the subject of alternatives to prison sentences is immeasurably smaller than the number of texts adopted by the Council of Europe. This – along with the fact that, at least with regard to particularly serious offences, the European Union's criminal law sources are prone to prescribing the use of custodial sentences, which in such cases is clearly regarded as the only "proportionate, effective and deterrent" sentence – might suggest, upon reflection, that imprisonment is the European Union's preferred punitive response.

It should not be forgotten, however, that in the majority of cases the restrictions imposed on European Union member states with regard to the use of custodial sentences concern particularly serious offences for which the use of sanctions not involving imprisonment would be difficult to envisage. Moreover, EU sources on criminal law sometimes allow the use of non-custodial sanctions for cases in which offences against European Union "property" are only moderately serious. As an example, we might cite Art. 5 paragraph 5 of European Union directive 2014/62/EU *on the protection of the euro and other currencies against counterfeiting by*

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[13] Judgment of the ECJ (Grand Chamber) of 5 April 2016, in Joint Cases C-404/15 and C-659/15 PPU.

[14] On this subject, see D. VAN ZYL SMITH, "Community Sanctions and European Human Rights Law", in L. ZEDNER and J.V. ROBERTS (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, Oxford: Oxford University Press, 2012, 197.

criminal law, and replacing Council Framework Decision 2000/383/JHA, according to which the less serious offences of "fraudulent uttering of counterfeit currency" – unlike other and more serious offences – are punishable by non-custodial sentences, particularly fines.

3. *Genetic mutation of alternatives to prison: comparative analysis and European law*

As will be seen more clearly in the next section of these conclusions, the rationale behind alternatives to imprisonment has changed over time. Their predominant aim has progressively become to reduce prison overcrowding and contain the risk of recidivism, so that their original purpose of providing social solidarity and resocialization opportunities has been gradually obscured. Thus, in the lifetime of alternatives to imprisonment, "practical" drivers have gradually come to prevail over "ideological" drivers.

This transformation has manifested itself primarily through the contents of these measures, particularly "probative" measures. Indeed, the security-related aspect of control has come to prevail over the factor of solidarity which, at the time of their introduction, represented the "soul" of these tools, and which today, by contrast, has been significantly weakened, even to the point of being wholly disregarded. Consider, for example, the process of weakening and standardization to which the preceptive component of alternative measures has undergone – a component which instead should have been deemed of the utmost importance and duly individualized in the light of the convicted person's personal characteristics. It should not be forgotten that historically alternative sentences not involving imprisonment were introduced in order to make the punitive treatment more suited to the specific nature of the case in hand and, most notably, to the personality of the culprit to help rebuild the latter's human and social dimension.

The weakening of the re-socialization component of alternative measures also runs counter to the need stated in several Council of Europe recommendations to adapt the nature and duration of the sanction to the offender's personal circumstances (R (92) 16, rule 6; Rec. (2003) 22, Preamble and rule 9; CM/Rec. (2014) 4, rule 4). European law, as mentioned earlier, states with increasing persistency that the alternatives should aim towards the social inclusion of the convicted person through positive interventions involving the active engagement of the relevant social services (on this point, see the indications of the recommendations R (92) 16, rule 67 and CM/Rec. (2010) 1, rules 47 and 76).

The above-mentioned change of priority, moreover, has impacted the way in which alternatives to prison take effect during the *post-sentencing* stage, that is, when the sentence is being served. The prevailing function originally ascribed to such alternatives (in Italy, for instance) was to provide flexibility in the enforcement of the sentence by including different ways in which prisoners could serve the sentence "in the community". In recent decades, however, precisely because such measures are designed to reduce the prison population, their main objective has become to diminish inflows into penitentiary institutions, and they can be applied even without a period of observation of the convicted person inside prison (Italy and France).

However, the transformation which non-custodial sanctions have recently undergone does not seem to be a purely domestic phenomenon or to result from the relevant national laws and practices moving closer together spontaneously. To a certain extent, this evolution is the effect of the influence exercised "from above" of Council of Europe sources on the subject of non-custodial sanctions and measures. On close inspection, if compared to older texts, those adopted during the last fifteen years show that the primary objectives assigned to non-custodial sanctions are to "combat prison overcrowding" and "counteract recidivism".

Furthermore, the European Union itself, in the preamble to Council Framework Decision 2008/947/JHA of 27 November 2008, on the application of the principle of mutual recognition to judgments, probation decisions and alternative sanctions, seems to emphasize clearly that when it comes to the free circulation – within the common EU space of liberty, security and justice – of convicted persons subjected to non-custodial measures, due regard should be paid to the protection of victims and the general public (Article 8)[15]. In addition, as pointed out earlier, even within the perspective of the most recent European law, recourse to non-custodial sanctions is essentially viewed as necessary for the reduction of the prison population. Added to this is the fact that Framework Decision 2008/909/JHA, on the application of the principle of mutual recognition to judgments imposing custodial sentences, aims quite explicitly to speed up the process of transferring sentenced persons to their home state, thereby contributing to lowering the imprisonment rate through the "redistribution" of persons sentenced to imprisonment among the various member states[16].

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[15] For comments on this Framework Decision, see H. KUCZYNSKA, "Mutual recognition of judicial decisions in criminal matters with regard to probation measures and alternative sanctions", in *EuCrim.*, 2009, 45 ff.

[16] M. KNAPEN, "Implementation of framework decision on the enforcement of foreign

What has been said so far points to a kind of short-circuiting within the system of European sources since assigning these essentially "practical" objectives to alternative measures could at the same time – as we have seen – foster solutions that might prevent the implementation of the principle of individualization which, on closer inspection, continues to be regarded by those same texts as the cornerstone of a system of sanctions that is sensitive to socially inclusive and humanitarian aspirations.

The approach to non-custodial sanctions as a way of "counteracting" prison overcrowding and criminal recidivism may be a general consequence of the widespread 'tightening up' which took place in the national criminal law systems from the Nineties onwards – driven, sometimes and in some areas, by the European sources themselves, and, other times and in other respects, by certain criminal policy lines imported from overseas.

Moreover, while such neo-retributionist influences may on the one hand have contributed to transforming the nature of alternatives to imprisonment, on the other, they have narrowed the scope of application of these alternatives and widened that of imprisonment. Thus, some of the countries examined in the research have introduced (and subsequently eliminated or diluted) exclusions from the possibility of benefiting from alternatives to imprisonment for certain types of offenders (such as recidivist offenders or persons convicted of particularly serious crimes, for example), for whom prison sentences are regarded as the most natural outcome (as in France, Italy and Spain, for example).

In addition, we cannot overlook the weakness found in all the countries examined of the legal provisions concerning many types of sanctions. Thus, in what are frequently very broad-based regulatory frameworks, the definition of the prescriptions attached to suspending mechanisms and alternative sanctions of a prescriptive character is effectively delegated to the court and, in certain cases, even to the administrative bodies responsible for enforcing the sentence.

In actual fact, legal theory has long been warning about this deficiency in the law and its attendant tendency to formulate prescriptions that are not linked to any legal provisions based on special prevention requirements. This aspect, too, in the life of the alternatives to custodial sentences is in stark contrast with the framework of European instruments adopted on this subject, which underscore that any penal substi-

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criminal judgement: (how) can the aim of resocialisation be achieved?", in M.S. Groenhuijsen, T. De Roos, T. Kooijmans (eds.), *Fervet Opus: Liber Amicorum-Anton Van Kalmthout*, Maklu: Antwerpen, 2010, 113.

tutes and alternatives to imprisonment should be laid down by the law (see Rec. R (92) 16, rules 3, 4 and 5).

Ultimately, the set of changes which alternative sanctions are subject to gives rise to syncretistic processes that end up affecting not only the system of sanctions itself but also, and more generally, the underlying characteristics of the entire legal and judicial system, to the point of mixing together the peculiar features of civil and common law.

4. *Multiplication of non-custodial sanctioning models*

The research has clearly shown that during the last thirty years there has been an emerging and widespread proliferation of sanctioning instruments other than imprisonment (Italy, France, Belgium, Poland and Romania). Among the countries examined, the only exception is Spain, where non-custodial alternatives, which were in any case already very few to start with, have actually decreased in recent years. With specific regard to the pretrial stage, the 2015 reform of the Spanish criminal code has merged the two previous systems of *suspensión* and *sustitución de las penas* into the single system of *suspensión de la ejecución de las penas privativas de libertad* (articles 80-87 of the Spanish criminal code).

It should be pointed out, however, that the multiplication of different types of alternative sanctions does not necessarily entail – as one might intuitively believe – a weakening of imprisonment. Indeed, even in France – which among the countries examined is the one with the widest range of alternative sanctions at each of the stages considered – the number of prisoners is anything but modest, and the rate of application of certain alternative sentences is close to zero (such as, for example, many of the sentences involving the deprivation or limitation of liberty, the *sanction réparation* and the *stage de citoyenneté*).

It is also emblematic that the most significant increase in imprisonment rates (in Italy and France, for instance) has occurred in parallel with the introduction and proliferation of non-custodial sanctions and measures[17]. This seems to substantiate the argument that alternatives to prison essentially contribute to increasing the target population of the criminal justice system rather than to actually reducing the prison population[18].

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[17] On this point, see the data collected in M. Aebi, F. Chopin, "Council of Europe. Annual penal statistics: persons serving non-custodial sanction and measures in 2013", Strasbourg: Council of Europe, 2014. For useful comments on this data, see M. Aebi, N. Delgrande, Y. Marguet, "Have community sanctions and measures widened the net of the European criminal justice systems?", in *Pun. & Soc.*, 2015, 575-597.

[18] S. Cohen, *Visions of Social Control. Crime, Punishment and Classification,* Cambridge: Polity, 1985, 31 ff.

The comparative study of the national legal systems of the countries examined in the research has also highlighted the main processes whereby this proliferation of alternatives has taken place. They are essentially two: *a*) *hybridization* between different models; *b*) the *breaking up* of existing models into their component parts.

a) A typical example of the first is the way in which the methods of imposing suspended sentences in continental Europe have drawn progressively closer to the Anglo-Saxon model of *probation* by bolstering the prescriptive characteristics of such methods (the imposition of prohibitions and obligations); this process has developed to the point of transforming some of these suspending measures into full-blown autonomous sentences of a prescriptive charcater (such as the *contrainte pénale* in France, the *peine de probation autonome* in Belgium, and the prescriptive sentences contained in several draft legislation proposals in Italy).

b) The second occurs when a system of sanctions is broken up into its component parts and one of these is then raised to the status of a single type of punitive sanction in its own right, as distinct from the prototype from which it derives: an emblematic example of this is reparation for injury, loss or damage, which, from being merely a criterion for the determination of the sentence or its dismissal, or simply an element of the prescriptive sentence, has come to be regarded as the main alternative sanction to imprisonment in France. Somewhat similarly, in the mid-2000s community service in Belgium was raised from a prescription typically imposed as part of a probation decision (*sursis probatoire*) to a sanction in its own right, which has even been granted recognition as primary sanction.

Sometimes, the processes described above can eventually erode traditional conceptual models, as in the case of reparation for injury, loss or damage, for instance, which has risen to the status of a non-custodial sanction, given that, as is well known, the *summa divisio* between various types of punitive sanctions is precisely the one which creates the distinction between punitive sanctions on the one hand, and reparative, restorative, reintegrating and reinstating sanctions on the other.

In this respect, national legislators are showing a growing interest for certain elements of restorative justice, which are regarded as valuable alternatives to imprisonment[19]. Different technical solutions, however,

[19] For our purposes, we can use the definition of restorative justice provided by EU Directive 29/2012/EU on the rights, support and protection of victims of crime, which states that justice should be taken to mean "any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party".

are adopted in different countries. While in some countries the components of restorative justice are beginning to emerge, albeit in the context of variegated forms of procedural laws (Italy and Belgium), elsewhere the restorative and reparative content of what the convicted person is required to perform constitutes the very core of autonomously imposed sanctions (France). What is striking, however, is the extremely low rate of application of such "experiments" in practice[20]. This is a symptom of the difficulty encountered in integrating such methods of intervention within a system of sanctions which, in spite of being differentiated, still appears to remain anchored – at least in its assumptions – to the need for harshness or mere retribution[21].

That being said, it is clear that the process of designing alternative sanctions is aided by the circulation of different models, which in turn is facilitated by the comparative study of different systems. Nevertheless it should always be kept in mind that any actions to "import legislation" should proceed with extreme caution, given that such systems always inhabit their own specific setting and are the result of complex and diverse factors.

[20] This is suggested by the fact that, as the research has shown, systems such as the *sanction réparation* in France or *médiation pénale* in Belgium are infrequently applied. The Italian practice of *sospensione del procedimento con messa alla prova* (pretrial probation) appears to have met with greater success, although it only provides for the use of restorative justice programs and mediation in criminal cases as a possibility.

[21] It should also be noted that the restorative justice paradigm is also something which European norms envisage and strive towards. It is referred to in Council of Europe Recommendation Rec. R (99) 19, on mediation in penal matters, in the previously mentioned CM/Rec. R (2010)1, as well as in EU Directive 29/2012/EU on the rights, support and protection of victims of crime.

YVES CARTUYVELS - ADRIANO MARTUFI[1]

CONCLUDING REMARKS ON PRISON OVERCROWDING AND THE STATUS OF OFFENDER SUPERVISION: A SOCIO-LEGAL APPROACH

SUMMARY: 1. Offender supervision: inadequacy of means and the evolution of management techniques, – 2. Alternative sanctions and measures and prison overcrowding: an optical illusion? – 3. Legal differentiation and social exclusion: migrants and drug addicts.

1. *Offender supervision: inadequacy of means and the evolution of management techniques*

The role played by social services (or the probation service) provides an essential contribution to the development of a true system of sanctions and measures as an alternative to imprisonment. The evidence in the different countries examined in the research does indeed show that wherever support and assistance services are underdeveloped or inadequate, the courts hesitate to resort to non-custodial measures such as suspended sentences or probation. The problem is clearly discernible in Poland, Romania and Spain, and might partly explain the reluctance shown by judges to use alternatives to prison during the three stages examined in this study. Elsewhere, as in the case of Italy, chronic shortages of financial and human resources which make it impossible for the services to establish a relationship with the offender are at the root of the widespread perception that some of these measures are ineffective.

In other countries (Belgium and France), by contrast, the methods of assistance and control have undergone a striking evolution, which reflects certain patterns of development already extensively described in the recent international literature[2]. In this regard we can identify at least four elements.

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[1] Parr. from 1 to 2 written by Y. CARTUYVELS; par. 3 written by A. MARTUFI.

[2] G. ROBINSON, F. MC. NEILL, *Community Punishment. European Perspectives*, London, NewYork: Routledge, 2016.

The first element concerns institutional changes in the bodies responsible for delivering social services within the penitentiary system. In France, the introduction of alternatives to imprisonment during the pre-sentencing phase has gone hand in hand with a far-reaching *institutional reconfiguration of the (office of) the Public Prosecutor*. The introduction of alternatives to criminal investigation and criminal proceedings has significantly contributed to changing the character of professional relations between judiciary police officers, who are answerable to the Public Prosecutor's office, and their "partners" in the social services, who are responsible for supporting and assisting suspects, as well as the nature of relations among judiciary police officers themselves. In this regard, while the development of a "network" approach encourages greater management sharing in the work of assistance involved, it also entails a process of rationalization of the actions which leads to more streamlining and standardization of the criteria for choosing the procedures to be followed.

The second element concerns a *possible "shift" in the rationale that guides the actions* of social services (or probation services). Probation – meant as putting the offender to the test [where the test takes place outside prison] – has its historical origins in a welfare-oriented criminal law. It is effectively the transposition of a broad-based rationale founded on social assistance and integration into the domain of criminal law. Thus, this measure's stated priorities, regardless of their practical implementation, were once the treatment and resocialization of the person who had committed the crime through a system for putting that person to the test, designed according to the individual, his needs and his personal life-path which had to be rebuilt.

In recent times, however, the objectives officially assigned to alternatives to imprisonment seem to be evolving. On the one hand, it is becoming increasingly clear that their development – frequently taking distinct forms in the three different stages of the criminal proceedings – is a response to the drive to reduce prison sentences and combat prison overcrowding. Thus, non-custodial sanctions and measures end up being absorbed by a quantitative flow-management based rationale which gains legitimacy through its own internal properties, with the emphasis being on quantitative data. On the other hand, particularly during the enforcement stage, the criminological objective of alternatives to prison is increasingly characterized by a concern to prevent the risk of recidivism, a requirement that seems to prevail over the original purpose of securing the resocialization of the offender.

This kind of change seem to be particularly conspicuous in Spain and Italy where, due to the absence of any preparatory enquiries (on social and family background) conducted by social services, the courts show a propensity to base their decisions on criminal records and on the risk of recidivism rather than on the offender's social background and needs with a view to social reintegration. In France and Belgium, the change of priorities mentioned above seems instead to be reflected in the professional role of the social workers as well as the contents of their support and assistance activities (articles 47, 72 prison system laws and executive rule 118). Probation services, for their part, focus less on help and treatment and more on straightforward control, although we cannot go as far as to talk about the introduction of an "actuarial model of risk management"[3]. In this regard, in both France and Belgium we can see a cultural and generational gap between "older" social workers, who are more committed to the values underpinning social services, and their "young" counterparts (in France they are generally recent law graduates), who are more receptive to the requirements of control and supervision. This observation highlights a crucial issue, namely the educational background and training of the professionals employed to oversee the enforcement of these measures.

The third element that deserves to be underscored concerns the impact of the so-called *New Public Management* on the organization of social services. While it was found that some countries (Spain, Poland, Romania and Italy) lack an organic, centralized system of assistance and control within their probation services, in other countries (France and Belgium) there is a noticeable growth in the application of management techniques to the criminal justice system. The development of mostly computerized tools and grids, along with the standardization of the rules of professional conduct, are contributing to the standardization of practices, the design of standard programs for offenders as well as the introduction of social workers' performance assessment and comparative appraisal tools. There has thus been a shift from a more informal approach, based on case-by-case management, to a more formalized assumption of responsibility, which in terms of its final outcomes appears to be more attentive to the needs of the penal system than to those of the offender. Administrative streamlining, flow management techniques and the primacy of quantitative objectives therefore prevail over "clinical approaches" based on the relationship between the offender and his/her supervisor.

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[3] M. FEELEY, J. SIMON, *The New Penology : Notes on the Emerging Strategy of Corrections and its Implications*, in *Criminology,* 1992, 449- 474.

The fourth element involves the increasingly technical and technological character of offender supervision. Several factors appear to highlight this phenomenon, including the decreasing extent to which inquiries into the offender's social and family background are taken into account by judicial decisions (Belgium, France, Italy and Spain), the increasing use of computer programs for the management of social support activities (Belgium and France), as well as the widespread use of electronic surveillance during the stages examined by the research (Belgium and France). This trend has clear consequences, including the fact that the use of technology and computers can lead to the gradual reduction in the relational aspects of activities in support of offenders, which involve greater costs in terms of time and human resources. In addition to going against Council of Europe recommendations, this development undermines the prospects of success of alternative sanctions and measures, given that social support activities targeted at the individual feature less and less.

2. *Alternative sanctions and measures and prison overcrowding: an optical illusion?*

The lack of integrated statistics in the different countries examined by the research makes any comparison of the figures somewhat arbitrary and thus requires due caution. That being said, one aspect seems to emerge quite clearly. With the exception of Spain, where the problem of prison overcrowding does not exist thanks to a massive investment program in the prison sector (as well as in other public sectors) launched during the 2000s, all the other countries are experiencing a growth in imprisonment rates and consequent prison overcrowding. Some of them (Belgium, France, Italy and Poland) have been repeatedly condemned by the European Court of Human Rights (ECtHR) due precisely to that situation which, as is well known, is in violation of Article 3 of the ECHR[4]. One is therefore necessarily led to conclude that where alternative sanctions have been introduced, whatever their number or variety, they do not seems to meet the goal of reducing custodial sentences and the associated overcrowding of prisons.

In order to explain this result we can focus on a number of significant factors.

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[4] ECtHR, *Torreggiani and Others v Italy*, 8.1.2013 § 93-94. See also ECtHR, *Orchowski v Poland*, 22.10.2009; *Ananyev and Others v Russia*, 10.1.2012. § 148; *Canali v. France*, 25.4.2013; *Vasilescu v. Belgium*, 25.11.2014, § 119; *Neshkov v. Bulgaria*, 27.1.2015 § 232, *Varga v. Hungary*, 11.3.2015, § 74.

With regards to the pre-sentencing phase, there appear to be two main problems. The first concerns pre-trial detention, which in the different systems examined has proved to be an almost irreplaceable measure and the incidence of which does not seem to have been significantly affected, in practice, by the abstract possibility of resorting to non-custodial measures. It should be noted, however, that where there is a decrease in the number of pre-trial detentions there is also a significant fall in prison population (Italy and Spain). Elsewhere, by contrast, increases in the prison population almost coincide with increases in the number of cases of "preventive imprisonment" (Poland). Moreover, the fact that during this phase the rejection of alternative measures almost automatically translates into the application of measures which deprive the individual of personal liberty could paradoxically result in increasing the prison population (Romania). Finally, wherever the decrease in pre-trial detention is counterbalanced by an increase in its average duration (France), the potentially positive effect of this measure on imprisonment rates appears to be almost neutralized. Thus, pre-trial detention is without any doubt one of the most significant factors affecting prison overcrowding. In this respect it is significant that in France overcrowding essentially concerns "maisons d'arret", i.e. facilities designed exclusively for offenders who are remanded in custody or serving short-term detention sentences.

The second problem has to do with the classic issue of the status of alternative measures during the pre-sentencing phase. One might in fact ask whether in practice such measures act as real alternatives to the trial or whether they are an alternative to its possible dismissal. It could perhaps be supposed that they can be applied in both cases. However, the fact that in certain countries the application of prescriptions imposed through provisions for abandoning disciplinary procedures has been deemed unconstitutional (Romania), and that in other countries the growing use of such prescriptions does not result in the reduction of the number of indicted persons, both add strength to the thesis that we are witnessing a phenomenon of *net widening*.

As to the sentencing or judgment phase, we can see a proliferation of alternative sanctions in all the countries considered, to a greater or lesser extent. It is true that in some countries alternative sanctions are not yet established as primary sanctions. This is because the two are in a mutually exclusive relationship (France), and especially because alternative sanctions suffer from competition with imprisonment. As a rule, prison is perceived as a "true sanction" and represents a measure of first rather than last resort, being, moreover, almost systematically imposed as

a subsidiary sanction in case of alternative sanctions being revoked. The absence of priority criteria for promoting the use of alternative sanctions, along with the absence or inadequacy of facilities for offender observation or supervision can contribute to explaining the weak quantitative impact of these sanctions. Moreover, in those cases where these sanctions enjoy a degree of success (community service in Belgium), it is due to the fact that they are used as a substitute for the non enforcement of short-term custodial sanctions. Suspended sentences (or *sursis*) are a further contributing factor to the erosion of the scope of application of non-custodial sentences. The latter's poor coordination with substitute penalties and tendency to overlap with their scope of application (Italy) can discourage the use of sentences which require a greater effort of individualization from the court. Finally, for cases in which the non-custodial sentence is revoked and the offender is consequently returned to a state of detention, if the overall sentence served is longer than the one initially imposed by the court (Poland), the resulting effect is the opposite of that which was originally intended.

Lastly, with reference to the post-sentencing phase, it was found that all the countries examined have systems in place to allow convicted offenders to be returned to freedom (subject to supervision) before the full sentence has been served. These measures, which are the legacy of the movement for social defence of the late 19th century, aim to achieve three distinct objectives: to foster the gradual resocialization of the convicted person; to avoid an abrupt, unsupervised transition to freedom after the sentence has been served; and to combat prison overcrowding.

Based on the experience of the different countries examined in this study, it is possible to highlight five factors that hinder the effectiveness of alternatives to prison at this stage. They are: *a*) the existence of set timeframes or periods of security which act as conditions for granting early release; *b*) the presence of rigid systems whereby the convicted person is required to go through progressive and distinct stages of the penitentiary system in order to benefit from certain measures; *c*) prohibition of access to alternative measures based on the specific nature of the convicted person (recidivist); *d*) in case of early release, provisions for a probation period that extends beyond the sentence to be served and thereby discourages prisoners from requesting it; *e*) systematic recourse to imprisonment if the measures are revoked. Moreover, these measures are sometimes only granted subject to conditions which are difficult to fulfil (such as the need to find a job during periods of low employment), making it harder for prisoners with a low level of "social capital" to have access to them.

Finally, the transformation of the role of social services, with a weaker provision of treatment programs, the decline in personalized social assistance and the temptation to rely purely on technology for control increase the likelihood of the measures being revoked and substituted with imprisonment. Nevertheless, we cannot exclude the possibility that, as shown by the recent developments in Belgium, intra-mural detention (prison) will gradually leave more scope to extra-mural detention (electronic surveillance).

In conclusion, one key aspect remains to be underscored. This involves the cultural influences to which judges and politicians are exposed.

In the public domain, the promotion of alternatives clashes with an "impunity narrative" which fosters recourse to imprisonment and thwarts the use of alternatives to it. While decriminalization and depenalization for certain types of offences are among the most significant tools against imprisonment, in some countries they are still rarely used. This is despite the fact that the Spanish example (in which a number of drug trafficking offences have been decriminalized)[5] shows that small interventions can have a significant effect on imprisonment rates. However, in a predominantly security-minded environment, the propensity among law-makers seems to be to widen the scope of criminal liability (through the redefinition of certain acts as felony in France, or the downgrading of certain acts from felony to a less serious criminal offence in Belgium, but with paradoxical effects).

With regards to the courts, the culture of risk, combined with the drive to "really punish", influences the discretionary decision-making process. These factors sometimes result in a lack of confidence in the alternatives to imprisonment, which are not regarded as being very credible in view of the absence of any tangible control (Italy and Poland). In other cases these instruments are still perceived as "new" and thus approached with prudence by the courts, which have scarce confidence in them and still prefer the option of imprisonment over them (Romania).

This culture also accounts for the reticence of the judicial authorities to introduce measures for the early release of prisoners, even if they are personalized according to the offender's profile, unless they are pre-

[5] In Italy, somewhat similarly, a Constitutional Court decision taken in February 2014 restored the distinction between hard and soft drugs, reintroducing lighter sanctions for the sale of soft drugs. It is estimated that through this change, alongside a legislative reform adopted at the same time providing for a separate offence of "small-scale drug trafficking", has contributed to reducing the number of offenders entering prison by over 50% in just a few years.

ceded by more restrictive measures (Belgium). The same culture also explains why the courts are only prepared to grant such measures to convicted persons considered to be "low-risk" (Spain and Italy). Side by side with a form of "penal populism" found in the public domain, the "culture of control" which seems to be a distinguishing feature of the interventions of judicial authorities (namely the decisions taken within the scope of "secondary criminalization") constitutes a powerful obstacle for the development of alternatives to imprisonment – alternatives which, if the court were to apply them, would still inevitably involve taking a risk.

It should be pointed out however, that the rapid fall in imprisonment rates in countries such as Italy seems to be attributable precisely to a change in the cultural attitude of those working in the criminal justice system. The public prosecutors and judges responsible for putting into effect the response to the warning of the ECtHR – which, as mentioned earlier, condemned Italy for its detention conditions and overcrowded prisons – therefore decided to opt for a softer policy, probably because they felt themselves to be under observation. The pressure exercised by the supranational judicial institution thus resulted in a decreased use of restrictive measures and a consequent reduction in the number of offenders entering prison.

This kind of approach, however, should not be interpreted as being representative of a significant and lasting change in the culture of public prosecutors and judges, but only as a temporary trend reversal. It is accounted for by the strong political pressure that was brought to bear (for a short period of time) on the judiciary and the police so that they would reduce their law enforcement activities, thereby easing the pressure on the prison system. It was thus an ephemeral rather than a structural change, exclusively dictated by the "emergency" situation brought about as a result of the condemnation by the Court of Strasbourg.

3. *Legal differentiation and social exclusion: migrants and drug addicts*

The situation of overcrowding found in almost all the countries considered in the analysis can be attributed to the increase in the incarceration rates which, from the Nineties on, was seen – with varying emphases – across all Western countries[6]. While it is true that, as we saw in the preceding section, there is not always a direct correlation between prison and

[6] The Eastern European countries (Poland and Romania), by contrast, like other countries belonging to that geographical area, are characterized by the high imprisonment rates they have inherited from the era dominated by socialist regimes.

alternatives to it, an analysis of the composition of the prison population, by extension, nevertheless offers important insights into the way alternative sanctions and measures work and into the nature of their recipients.

In the prison population there is a clear over-representation of social groups characterized by conditions of social marginalization or exclusion, such as migrants (particularly from countries outside the EU), ethnic minorities and drug addicts. We would therefore suggest that the "genetic mutation" of non-custodial sanctions described earlier takes place within the context of a broader evolution involving the contraposition of *hard* penalties (represented by prison) and *soft* penalties (represented by alternatives to prison).

In many of the systems examined, whether offenders fall into the first or the second group of penalties depends on their particular social, family, ethnic and religious background and situation. Some of the countries investigated are undergoing a tightening up of the system whereby the offender's social condition is the exclusive basis for judging whether alternatives to prison are worthwhile. In other words, offenders who are able to provide guarantees as to their living, employment and family conditions can benefit from the *soft* penalty represented by alternative measures. For those who fail to meet these requirements, the only option offered by the system is the *hard* penalty of being sent to prison.

This kind of assessment penalizes especially those offenders, such as irregular migrants, who find themselves in conditions of particular legal vulnerability, and who in addition almost always suffer from economic and social exclusion. This can explain the high rate of detained immigrants, which has long been highlighted by the criminological literature as one of the main features of European penal systems[7]. This phenomenon seems to be a distinguishing feature of Southern European countries (Italy and Spain) and cannot be explained in terms of the growing number of immigrants living in these countries.

There has thus been a shift from an assessment of the degree of dangerousness based on the offender's personality to an assessment focussing increasingly on factors associated with the individual's social and family situation. In those countries where the actuarial system of risk management is underdeveloped, we can therefore talk about a situational assessment of the degree of dangerousness[8], which translates into the exclusion of those who are regarded as socially untrustworthy.

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[7] D. MELOSSI, "In a peaceful life: Migration and the Crime of Modernity in Europe/Italy", in *Pun. & Soc.*, 2003, 371-397.

[8] M. PAVARINI, *Governare la penalità. Struttura sociale, processi decisionali and discorsi pubblici sulla pena*, Bologna: Bologna University Press,, 2014, 11 ff.

Extensive empirical research has shown that, in some countries (Italy), the courts responsible for assessing the offender's level of trustworthiness prefer to rely on the information provided by the police or the criminal records rather than base their decisions on the observations of the social services[9]. In these countries, social services reports have been found to have a very limited influence on the courts' decisions as to whether or not to grant non-custodial sanctions or measures.

A key role for the purposes of granting these measures is played by the appraisal of what might be defined as the offender's "social or family capital", over and above the fact that being employed and having a home are legal requirements for being granted these measures. This trend is developing in parallel with (France and Belgium), or instead of (Italy, Romania and Spain), the technocratic approach described in the first section.

This does not mean that non-custodial sanctions and measures do not form part of the increasingly punitive approach to penal control which characterizes European penal systems[10]. However, all the observations put forward in this conclusion contribute to highlighting a tendency for alternatives to prison to be employed as a tool with which to neutralize the dangerousness of those who are regarded as still being redeemable through their inclusion in society. For those who are untrustworthy and socially unredeemable, on the other hand, there continue to be no alternatives to imprisonment, which is the most radical form of social exclusion that can be implemented through the penal system[11]. Hence, even from a sociological perspective it is legitimate to feel sceptical about the possibility that alternatives to prison can constitute a panacea for reducing imprisonment rates.

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[9] G. Rusconi, M. Pavarini, "Discrezionalità e sentencing penitenziario. La flessibilità della pena in fase esecutiva nell'attività dei tribunali", in *Del. pen.*, 1993, 149-189.

[10] M. Aebi, N. Delgrande, Y. Marguet, "Have Community Sanctions and Measures Widened the Net of the European Criminal Justice Systems?", in *Pun. & Soc.*, 2015, 575-597.

[11] J. Joung, *The exclusive society: Social Exclusion, Crime and Difference in Late Modernity*, London: Sage, 1999.

GIAN LUIGI GATTA - EMILIO DOLCINI

FINAL PROPOSALS ON POSSIBLE GUIDELINES OF THE EU-POLICY IN ORDER TO IMPLEMENT THE BEST PRACTICES IN THE FIELDS OF DETENTION CONDITIONS AND ALTERNATIVES TO DETENTION

SUMMARY: 1. The humanization of punishments as an objective of EU policy. – 2. Possible courses of action at the European level in the light of the *best practices*. – 2.1. A European monitoring body on prisons and alternatives to detention. – 2.2. A European support program for the modernization of prisons. – 2.3. A European support program for the implementation of alternatives to prison.

1. *The humanization of punishments as an objective of EU policy*

The research presented in this volume, relating to six EU Member states (Belgium, France, Italy, Spain, Poland and Romania), confirms a fundamental fact that emerges from the Space I-2014 Report by the Council of Europe[1]: *prison overcrowding* in the EU is still a present problem; even though, since 2011, it has been in a phase marked by a slow reduction. Significant differences exist between the States, which may also be a consequence of convictions for violations of Article 3 of the ECHR handed down by the European Court of Human Rights against several EU Member States. This is a problem that is traditionally addressed by the individual Member States with a predominantly national perspective and that, as the positive effects of the Court of Strasbourg case law show, may instead find a more rapid solution if it is approached from an international perspective. Policy guidelines to reduce the use of prison or to improve prison conditions with costly burdens on the public deficit can hardly find space at the top of a government's agenda in this or any other country. In fact, these policies that are likely to lose more electoral con-

[1] See E. DOLCINI, *L'Europa in cammino verso carceri meno affollate e meno lontane da accettabili standard di umanità*, in *Dir. pen. cont.*, 16 March 2016.

sensus than gain such. Precisely for this reason, as shown recently in several European countries (i.e. Italy), a push from international settings can lead policy makers to implement actions to reduce the prison population – and to improve prison conditions – and present these actions to voters as necessary steps to be taken in order to avoid international censure. Although policy on criminal law issues undoubtedly falls under the competence of the Member States, the impression one gets from the overall research presented in this volume is that the European Union – like the Council of Europe – can do a lot more to identify common guidelines for the Member States in the fight against prison overcrowding and in the identification of effective alternatives to detention.

A prison with a human face and a punishment in prison or in the "community" oriented towards the re-socialization of convicted offender represent, in fact, fundamental objectives for the European Union, which is "founded on the values of respect for human dignity […] the rule of law and […] human rights" (Article 2 TEU) to "combat social exclusion" (Article 3 TEU). The prohibition against inhuman and degrading punishments, then again, is specifically raised as a fundamental principle of the European Union (Article 4 of the Charter of Fundamental Rights) as it is commonly known within the Council of Europe (Article 3 ECHR).

The research results published in this volume, however, reflect that in Europe even in countries with a longer tradition of the process of the humanization of punishment and recognition of fundamental human rights, much still needs to be done in the view towards the fulfillment of the objectives mentioned above. The problem – we reaffirm – is demonstrated in dramatic fashion by a number of judgments in which the European Court of Human Rights, even in recent years, has censured some of the EU Member States for prison overcrowding and inhumane detention conditions.

These condemnations formally relate only to the individual Member States. However, as a matter of fact, they also involve the European Union: they demonstrate how much still needs to be accomplished along the way of the process of humanization of punishments, which, as we have said, is a fundamental objective of the Union itself. The problem, from the European perspective, is that of *raising and harmonizing the standards of protection of fundamental rights* of the individuals subject to punishments that deprive or limit their personal freedom. Furthermore, it is a problem that, in our opinion, this could be considered in the context of an extensive program of policy guidelines with a broader vision than the traditional view of judicial cooperation in criminal law issues. Overcrowded prisons in Europe as well as the insufficient implementa-

tion of alternatives to detention are problematic not only because they impede judicial cooperation (for example, issues of expulsion, extradition, European arrest warrants, and the recognition of judicial decisions), but, even before such, because they pose *a problem of violating fundamental human rights and they reflect a failure to achieve the fundamental objectives* of the European Union itself, recited in the first articles of its founding treaty.

We find it necessary to reiterate that it is true that policy on criminal law issues is traditionally reserved to the competence of the Member States; but it is equally true that membership in the European Union requires compliance with high standards of protection of fundamental rights and the pursuit of common objectives in terms of policies of social inclusion for inmates once they have served their sentences. Criminal law and penitentiary practices, insofar as they undoubtedly have a national character, must thus necessarily deal with those goals at the European level. This means that the prison conditions and the reality of punishment in general must not be considered as domestic problems: in reality, these issues are often uncomfortable and hidden in terms of international relations. Instead the opposite is true. The reality of punishment – starting from the custodial punishment – is *a reflection of the degree of civility of a country* and it is a matter that the European Union must inevitably take into account to achieve its objectives and, to that end, direct its policies. A Europe that is inspired by the values of respect for human rights may not tolerate repeated condemnations, which verify the violation of fundamental human rights related to detention conditions, by the European Court of Human Rights against Member States. It is, in political terms, more of a significant problem from the point of view of instruments of judicial cooperation in criminal law matters, in whose view most of the measures in the EU area have been, to date, adopted. The research presented in this volume suggests, at a political level, that actions by the EU demonstrate awareness of the greater magnitude of the problem of prison overcrowding, which is essentially *a human rights issue* in accordance with the EU Charter of Fundamental Rights. It is surprising, in this perspective, to read the Report on the application of the EU Charter of Fundamental Rights (2015)[2], commenting on Article 4 (Prohibition of torture and inhuman or degrading treatment or punishment), considerations that relate *only* to the diverse problem of illegal migration and human rights guarantees in repatriation proceedings.

[2] See *http://ec.europa.eu/justice/fundamental-rights/files/2015_charter_report_full_version_en.pdf*.

2. *Possible courses of action at the European level in light of best practices*

2.1. *A European monitoring body on prisons and alternatives to detention*

A proposal that could be evaluated at the EU level is for the creation of a permanent monitoring body on prisons and alternative detention measures in cases under the purview of the European Agency for Fundamental Rights. A measure of this kind would have major cultural and political significance and would allow for the collection of large-scale amounts of data and information and the identification and monitoring over time of the *best practices*, which may be a model for the different Member States and also through the appropriate exchange of expertise and knowledge.

The practices of the countries involved in the research set forth herein – and even States outside the EU such as the United States of America[3] – show, there again, how in order to improve living conditions in prisons and to implement alternative measures it is *essential to invest public funds*. Without the appropriate resources, reaching these goals is unthinkable. Therefore, it would be beneficial to have, from the EU, a policy of economically supporting initiatives for improving living conditions in prisons and alternatives to prison.

2.2. *A European support program for the modernization of prisons*

As specifically relating to prisons and as pointed out by the former director of the Milan-Bollate prison Lucia Castellano during a meeting organized at the University of Milan as part of this research project[4], it is good to see a prison as a *public service* like a hospital or a great means of communication. European funding for construction projects in prisons could, thus, be considered in the appropriate places. In our view, the priority should not be represented by an increased number of prison beds – which, as is shown in the research presented here (i.e., France), does not solve, in a structural way, the problem of overcrowding – but rather the priorities should be represented by an *improvement of structures*, many of which, in different Member States, are obsolete, deteriorating and do not function properly in terms of *rehabilitation* activities, and by meeting the standards of protection of prisoners' rights as to the prison spaces and *facilities* in general.

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[3] See *https://www.justice.gov/archive/fbci/progmenu_reentry.html*.

[4] "Open" prison and recidivism: results of an empirical study on the experience of the Milan-Bollate prison, University of Milan, 23 March 2015.

2.3. *A European support program for the implementation of alternatives to prison*

Above all, a European support program could allow the Member States, each according to its own political choices, to introduce new alternative measures to detention or to improve the existing measures extending the application of such to a larger number of individuals. The comparison of the knowledge and expertise of the countries involved in the research presented here confirms that without appropriate investment, alternatives to detention (consider for example even electronic monitoring) not only just remain on paper, but (consider for example *probation* or *community service*) may lead to prison overcrowding. In some countries (i.e. Poland), in fact, the number of inmates is in significant part made up of people whose alternative detention measures were revoked because they were not properly followed by social services during the process of reintegration.

Upon closer look, the profile of social reintegration itself, which represents the goal of alternative measures to detention, may justify *the use of European funds* according to a point of view not far from that of the European Social Fund.

A EU-wide program of guidelines- funded in theory, at least in part, with the proceeds of pecuniary fines (which remain substantially unexecuted somewhere, as is the case in Italy) from the Member States – might aspire to support the dissemination and implementation of the *best practices* some of which are identified and highlighted in the research published in this volume.

It is the case of *community service* in Spain and in Belgium, and also in Italy even if it is limited to certain crimes[5], which in order to find extensive and efficient application requires agreements with public or non-profit entities and involves costs related to, for example, the stipulation of insurance contracts. It is also the case that the different forms of *probation* – with the suspension of the offender's trial or suspension of the execution of the offender's sentence, possibly accompanied by forms of *criminal mediation* – show how the comparative experience needs, in order to be successful, a complex organization with equipment and personnel and, referring to the model of the UK *probation office*, also needs costly monitoring tools such as *electronic monitoring*. As for the number of staff members working in the *probation* agencies, the data of the Space-II 2014 Report by the Council of Europe reflects significant dif-

[5] This relates to the crimes of driving under the influence of drugs or alcohol.

ferences from State to State. In Italy, for example, the number of staff members is 2048. If we look at the relationship with the population, the Italian figure is lower than the European average: 3.4 versus 4.7 (per 100,000 inhabitants). The highest number is found in England and Wales, with 29.9. This is, obviously, a decisive aspect in relation to non-custodial measures that aim at fulfilling the actual oversight functions and/or aiding the recipient. Furthermore, it is for this reason that a common program of guidelines at the European level could enable the Member States to make significant progress towards the construction of an efficient system of credible prison alternatives: a goal that the Europe "envisioned" by Cesare Beccaria must carry out with conviction

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