PRISON OVERCROWDING AND ALTERNATIVES TO DETENTION

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Monitoring and updating of the Research Project

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The Project

The overall goal of the project is to promote the development and the implementation of alternatives to detention at a EU level, in order to reduce the disproportionate resort to incarceration by legislators and judicial authorities.

The abuse of custodial measures first of all determines prison overcrowding across Europe, which violates fundamental rights of individuals and jeopardises the mutual trust necessary to underpin judicial cooperation in Europe. What is more, incarceration proves to be dysfunctional both to the rehabilitation of the offenders and to the prevention of recidivism.

Therefore, the project activities are directed to criminal justice operators and policy-makers with the objective of improving their ability to appropriately implement the alternative strategies to detention.

To this end, the project aims to provide criminal justice operators and policy-makers with a strong comparative knowledge of alternatives to detention existing in other Member States.

A series of training meetings addressed to legal practitioners and other professionals is organised by both the coordinator organisation and the partners. In order to organise the meetings, a preliminary study of legal provisions in force in the selected Member States will be carried out. Drawing on this legal analysis, the researchers will then assess the efficiency of a selected number of alternative measures, identifying the best practices and the problems to solve.

Additionally, the project will propose a set of guidelines on the alternatives to detention. The purpose of these guidelines is twofold. On the one hand, they aim to promote the adoption and the implementation of alternatives to incarceration in accordance with Council of Europe standards and rules. On the other hand, they intend to encourage the circulation of best practices on a European level with the aim of fostering mutual recognition and mutual trust in cross-border judicial cooperation.

The focus will not only be limited to analysing the alternatives to detention in the sentencing phase, but will also envisage strategies to avoid incarceration before the trial, as required by the EU Council Roadmap on procedural rights of suspected or accused persons.

The research action will be focused upon Belgium, France, Italy, Romania and Spain, and it is intended to obtain scientific results which may also be useful and effective in other Member States. For this reason, a combined methodology is employed in order to maximise the validity of the results.

The activities include:

- a comparative study of legal provisions on alternative to detentions in the selected Member States;

- the elaboration of a questionnaire to collect practical data on the implementation of alternatives to detention according to scientific standards;

- three meetings among researchers and law practitioners in order to verify existing good practices and to raise awareness on the advantages of alternatives to detention;

- an integral analysis of legal and empirical findings;

- the practical guidelines and legislative proposal on the alternatives to detention in the EU;

- a two days international congress, to discuss and disseminate the results of the project;

This is the first of a series of booklet that will be published during the two years of research, in order to regularly update the operators about the development and activities of the project.

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SUMMARY OF THE ACTIVITIES CARRIED OUT DURING THE FIRST YEAR OF THE PROJECT

During the first year the research has achieved some major goals. In the first semester (May-November) an in-depth analysis of the factors contributing to prison overcrowding and prison population inflation was carried out. Data concerning prison rates and prison capacity have been gathered, showing significant discrepancies between the selected Member States.

At first sight, the outcomes of such examination might even appear paradoxical: according to the national data and CoE-Space I 2013 survey, for instance, prison population in Italy in 2012 exceeded by the 48% prison capacity, being the worst among the penitentiary systems scrutinized.

In striking contrast to its prison density, however, Italy revealed the lowest incarceration rate per capita among the selected Member States. Poland on the other hand had the highest incarceration rate among the selected systems but was the only one in which prison overcrowding was not detected. During the second semester of the research (December-May) national units have indeed focused on information and statistics concerning alternative sanctions and measures. Encompassing the instruments applicable, respectively, to the pre-sentencing, sentencing and post-sentencing phase, the analysis drew attention to the existence of a wide array of sanctions and measures available to prosecutors and judges in the selected Member States.

Statistical data again showed that an increase in the use of alternatives to detention does not correspond to a decrease of the prison population rate. Surveys indeed demonstrated that in some Member States an augmentation of prison population can be noticed despite the increasing recourse to sanctions and measures executed in the community , raising questions on the risk that a process of "net-widening" may take place. This shows how the mere correlation of data may not be sufficient to assess the real impact of non custodial sanctions and measures on prison conditions. This is why, in the last working group held in Cluj-Napoca, consensus has emerged around the idea that the time has come to depart from a simple analysis of data and address a principle-based evaluation of alternative sanctions and measures as they operate in practice. It is essential to take into account the limits which might reduce or hinder the recourse to or the impact of non custodial sanctions, by analysing in depth both their legal basis and enforcement in practice.

This methodology will enable the researchers to point out, among other things, the shortcomings hampering the effective implementation of alternative measures, the counter-productive effects of their malfunctioning and the risks triggered by a lack of assistance, supervision and control in the execution of the latter.

A valuable benchmark to carry out such evaluation are the standards set out in the Recommendations enacted by the Parliamentary Assembly of the Council of Europe, drafted by the European Committee on Crime Problems (CDPC), the Council for the Penological Cooperation (CP-PC) and other ad hoc working groups of experts. Such a methodology will also help disseminating appropriate information to the public on the functioning of alternative sanctions and measures and lay down the basis for the elaboration of a set of guidelines at a EU level. European Committee on Crime Problems. An in-depth evaluation of European soft law in the field of alternative sanctions is essential to build common standards that will ease the functioning of instruments of judicial cooperation in this field, such as the Framework Decision on

probation and alternative sanctions whose effectiveness may be threatened by the differences between the various national systems of probation and by a lack of mutual trust among practitioners.
What follows is a first partial summary of the Conference held in Cluj-Napoca, where some of the above mentioned issues were discusses in-depth. Please note that other important contributions on the topics discussed during the Conference will be uploaded on our website. The research project has now entered its third phase. Ideally, the guidelines resulting from this part of the research will consist in a series of research-based recommendations aimed at enhancing a wider and safer recourse to non-custodial sanctions and measures in the EU.

SUMMARY OF THE CONFERENCE HELD IN CLUJ-NAPOCA, MAY 27TH 2015

A. THE MORNING SESSION: NATIONAL EXPERIENCES IN THE FIGHT AGAINST PRISON POPULATION:

Les alternatives à l'emprisonnement. L'expérience belge.

Abstract of the speech delivered by Prof. CHRISTINE GUILLAIN and Dr. THIBAUT SLINGENEYER – Facultés Universitaires Saint Louis de Bruxelles

La Belgique se caractérise par une augmentation de la population carcérale. On est ainsi passé de 8671 détenus en 2000 à 13576 en 2014, soit une augmentation de 56% entre 2000 et 2014. L'augmentation concerne toutes les catégories (prévenus, condamnés et internés) et porte tant sur le nombre d'entrées en prison (écrous) que sur la durée moyenne de détention. Malgré l'accroissement du parc pénitentiaire (30% entre 2000 et 2014), on assiste à une aggravation du taux de surpopulation (17% en 2000 contre 41% en 2014). Cette situation confirme la crainte du Conseil de l'Europe, exprimée dans sa recommandation R (99) 22 concernant le surpeuplement des prisons et l'inflation carcérale: « L'extension du parc pénitentiaire devrait être plutôt une mesure exceptionnelle, puisqu'elle n'est pas, en règle générale, propre à offrir une solution durable au problème du surpeuplement (…) ». Le système pénal belge est guidé par le principe de l'opportunité des poursuites, au stade préliminaire du procès pénal. La majorité des infractions traitées au stade du parquet se clôturent par un classement sans suite (+70%), la médiation et la transaction pénale n'occupant qu'une place tout à fait marginale (respectivement 0,4% et 1%) malgré l'étendue de leur champ d'application et les Recommandations européennes (R (87) 18, R (99) 19 et Rec (2000) 22). La Belgique a récemment judiciarisé la plupart des modalités d'exécution de la peine, comme la surveillance électronique et la libération conditionnelle, pour les condamnés à des peines d'emprisonnement de plus de trois ans. La surveillance électronique a certainement le vent en poupe puisque 15% des condamnés subissent leur peine sous cette modalité. Cette augmentation a un impact sur les chiffres de la libération conditionnelle. Les condamnés l'obtiennent moins facilement et doivent plus régulièrement réussir le test d'une surveillance électronique pour espérer l'obtenir. Une alternative à l'incarcération (la surveillance électronique) devient ainsi partiellement une alternative à la libération conditionnelle, pourtant moins restrictive de

liberté. Ceci n'est pas spécifiquement souhaitable au regard de la Rec (2003) 22.

Alternative measures to detention in the trial phase. The Italian experience.

Abstract of the speech delivered by MARIA LOMBARDI STOCCHETTI – University of Milan

The paper aims at offering an overview of the state in the practice of the sanctions system in Italy by means of the study of the statistical data. The first part of the paper deals with the analyses of data related to the prison population, in particular her trend, her rate and the overcrowding rate. These statistical data allow us to observe a strong drop in the number of prisoner in the last years, as effect of the reforms introduced in Italy after the decision of the ECtHR in the case Torregiani v. Italy. The second part of the paper focuses on the other hand on the non-custodial measures provided by the Italian legal system. In particular, are analysed measures provided before and during the trial, pointing out, in addition to their legal regulation, their concrete application and the expected results in terms of general and special prevention as well as reduction of the incarceration rate.

Alternative measures to detention in the post-trial phase. The Italian experience.

Abstract of the speech delivered by Dr. CIRO GRANDI – University of Ferrara

The purpose of the report is to describe how alternative measures to detention to be implemented after the trial have influenced prison population in Italy. Prison overcrowding has become a matter of special concern for the Italian legislator after the European Court of Human Rights found the Italian prison system structurally and systematically inconsistent with the respect of the fundamental rights of detainees. In order to comply with the general obligations set out under the "pilot judgement" *Torreggiani* (2013), several acts have amended the system of alternative measures to detention as disciplined first and foremost by law no. 354/1975. The original aim of the latter was to implement the constitutional principle according to which penalties should be directed at resocializing the offenders (art. 27 Const.). To this end, law no. 354/1975 provided for a manifold list of alternative ways to serve the prison sentence imposed by the trial judge, all of them aimed at facilitating the offender's return to society: early release, probation under the social services' supervision, day release with curfew, automatic remission and others. Such measures shall form part of an individualized rehabilitation program, customized upon a period of observation of the offender's behaviour and personality into custody, and implemented under the control of special judicial authorities (*Supervision Judge or Tribunal*). Notwithstanding some periodical fluctuations, Law no. 354/1975 displayed a considerable impact on prison population, especially after a reform passed in 1998 allowed, under certain circumstances, the application of alternative measures immediately after the conviction and before the offender entrance into prison. However, following subsequent law reforms – especially on drug-related offences and on repeated offenders – prison population started increasing again, the amnesty of 2006 being only a temporary palliative. Compelled by the aforementioned ECHR judgment, the Italian legislator straightforwardly addressed the issue of prison overcrowding, namely extending the

scope of application of the numerous alternative measures to detention already in force.

Alternative measures to detention. The Romanian experience.

Abstract of the speech delivered by IOANA CURT – University of Cluj-Napoca

The current presentation tackles an important, but still underdabated issue, namely the prison overcrowding phenomena in Romania. In the first part, the author examines the statistical data provided mostly by the National Administration of the Penitentiaries, data which shows the constant decrease of Romania's population as being directly proportional with the prison population evolution in the last fifteen years. Moving on, the prison population by the end of the year 2014 is divided by it's structure in regard with different criteria like: definitive/pre-trial detainees and security regime. Next in line, the writer presents Romania's incarceration rate decrease since the year 2000. An important part of the presentatioin envisages the two legal standards regarding the minimum number of square meters per detainee, namely, the CPT standard (4 square meters per detainee) and the standards provided by the domestic law (4 square meters per detainee and/or 6 cubic meters per detainee). Furthermore, the most important component of this first part regards the prison capacity and the prison overcrowding rate, using the aforementioned standards, an analisys which concludes by using the Gherla Penitentiary as a work example. During the second part of the presentation, the alternative measures to detention enter the spotlight. At this point, the author proposes a detailed chronological approach, which helps the audience realise each of the measures' place within the topographic scheme of criminal and procedural law. After presenting both the preventive measures (judicial control, judicial control on bail, house arrest) and the definitive measures (dropping charges, criminal fine, waiver of sentence enforcement, postponement of penalty enforcement, suspension of service of a sentence under supervision, conditional release), the author focuses on a statistical approach regarding the fail ratio of the above mentioned measures, during 2011-2013.

Surpopulation carcérale et alternatives à la détention: L'expérience espagnole.

Abstract of the speech delivered by Dr. MARTA MUNOZ DE MORALES ROMERO – University of Castilla-La Mancha.

Ce rapport est divisé en deux parties. Dans la première, on analyse les rasions de la baisse de la population pénitentiaire et de la surpopulation carcérales à partir 2009 en Espagne. À ce propos, le progressif durcissement du système pénal est expliqué en faisant référence à l'introduction des peines de plus en plus élevées pour les délits les plus communs (vols, larcins, trafique de drogues, homicides, agression ou abuses sexuels) ; l'introduction des nouvelles infractions pénales qui étaient des infractions administratives avant 1995 (délits contre la sécurité routière) ou aux nouvelles limites de peine d'emprisonnement minimales et maximales. La deuxième partie montre les mesures alternatives du système pénal en Espagne en distinguant les trois phases de la procédure : phase pre-sententielle (assignation à résidence dans le cas de malades ; internement pour suivre un traitement de désaccoutumance et liberté

moyennant le respect de certaines conditions) ; phase sententielle (amendes, sursis, remplacement, expulsion, etc.) et phase post sententielle (semi-liberté et libération conditionnelle).

B. THE AFTERNOON SESSION: THE EUROPEAN LAW FRAMEWORK BETWEEN EU AND COUNCIL OF EUROPE

The case-law of the European Court of Human Rights on article 3 ECHR and its impact on prison overcrowding

Abstract of the speech delivered by Dr. ANGELA DELLA BELLA – University of Milan

The presentation addressed the European case law on prison overcrowding. The rule of reference - when the subject of the dispute is detention conditions - is Article 3 ECHR, that prohibits in absolute terms torture or inhuman or degrading treatment. In European case-law, when assessing if prison conditions are inhuman or degrading, a number of factors should be considered, such as: lack of personal space, access to outdoor exercise, natural light or air, ventilation, heating, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements. Normally, inhuman detention stems from the cumulative effects of these conditions and also form the length of the detentions: so, usually, prison overcrowding is just one of the elements that, together with the others, can determine breach of Art. 3. However, dating back to early 2000, as a result of increasing overcrowding, the Court has considered that a serious lack of space could alone constitute degrading and inhuman treatment: as it is well known, 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. In many cases, the Court, on the subject of overcrowding, used the 'pilot' and 'quasi-pilot' procedure, because the violation arose from a structural problem. In analyzing this decisions, we'll focus on the measures suggested by the Court to the States and we'll try to understand what lesson we should learn from the European jurisprudence to deal with prison overcrowding.

A "Peculiar" Way of Taking into Account Convictions in Member States: The Spanish Case

Abstract of the speech delivered by Dr. MARTA MUNOZ DE MORALES ROMERO – University of Castilla-La Mancha

This presentation focused on the Picabea case where the interpretation of the 2008 framework decision taking account of criminal convictions in Member States and the Spanish implementation of this EU legal instrument were at stake. Mr. Picabea had been convicted in France for the commission of a crime of *association de malfaiteurs* and had totally served the penalty. Then he was extradited to Spain where he was convicted for the commission of terrorism-related crimes. Once he is serving the penalty in Spain, he asks for cumulation of the French conviction and the Spanish one. The fact of

taking into account the French conviction meant that he would be released, because time already served in France would be credited towards the sentence to be served in Spain. On the contrary, not taking into account the French conviction meant that he would remain in prison.

The presentation dealt with the Spanish Supreme Court's decision by which the French conviction is not taken into account.

Community sanctions and measures in the Council of Europe framework: soft law or hard law?

Abstract of the speech delivered by Dr. ADRIANO MARTUFI – University Ferrara

The aim of the contribution was to provide a general overview on the content and the limits of alternative intermediate and community sanctions in the framework of the Council of Europe. The growing use of community-based sanctions and measures in several European states starting from the seventies and throughout the years, raised concerns on the risk that the spread of these instruments might lead to a widening of the "penal net" and a would result in an increase of the state-sponsored social control. The contribution therefore firstly presented the various attempts carried out on an international level (the so-called Groningen Rules and the UN Tokyo Rules) to underpin a number of guarantees and limits to which community sanctions should be subject. It subsequently more specifically addressed the wide array of recommendations enacted by the Council of Europe in the field of non custodial sanctions. After sketching out the broader penological framework in which these soft law instruments operate, the contribution tackled the more relevant issues raised by the implementation of CoE rules, focusing specifically on the principles of legality and proportionality of non custodial measures. The opportunity to obtain a prior agreement by the convicted person has also been thoroughly evaluated my making specific reference to provisions in force in certain Member States. Conclusively, the non-binding character of the European Recommendations was also critically scrutinised stressing the importance of some recent ECtHR judgments which, by referring to these instruments, may have the effect to improve their legal status.

Council Framework Decision 2008/909/JHA. Custodial sentences. Sentencing equivalence. Execution

Abstract of the speech delivered by Dr. DANIEL NITU – University of Cluj-Napoca

In the present study, the author draws attention on the Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union and its late transposition in the Romanian law, in December 2013. The analysis begins by focusing on the provisions of Article 8 on adapting the custodial sentences, in cases of incompatibility due to the duration of the penalty or the nature of the penalty. In the follow up, Article 17 on enforcement of sentences is closely looked upon. The premises are that the executing State alone shall decide on the procedures for enforcement and to determine all the measures relating thereto, including the

grounds for early or conditional release. In cases of early release, the Framework Decision provides that Member States may provide that any decision on early or conditional release may take account of those provisions of national law, indicated by the issuing State, under which the person is entitled to early or conditional release at a specified point in time. The so called "Romanian experience" is presented, where Article 144 of Law no. 302 of 2004 on international cooperation in criminal matters represent a simple translation of Article 17 paragraphs 1 and 2 of the FD. No reference to the national legislation of the issuing State on early or conditional release is made, so discussion appeared in the Romanian case-law on the subject if the courts can rely on foreign provision (especially, the *liberazione anticipata* from the Italian law).

The Romanian High Court of Cassation and Justice, through the voice of its Special Panel for preliminary rulings to settle legal issues decided in 22 May 2015 that "after the transfer of the person in Romania, the part of the sentence term that may be deemed, according to law of the issuing state, as served due to the work performed and the good behaviour of the person shall not be deducted from the sentence executed in Romania". Starting from the decision of the Romanian Supreme Court, the author briefly examines the perspectives on this subject from the ECHR point of view (the case *Szabo vs. Sweden*, 2006), which created a praetorian standard of flagrantly longer de facto term of imprisonment in the executing state. The European Union's Court of Justice perspective is yet to be seen, as a request for a preliminary ruling from the Sofiyski gradski sad (Bulgaria) was lodged on 3 December 2014 (case C-554/14), seeking, *inter alia*, answers to the question if the executing state can take into account provision regarding early or conditional release provisions from the issuing State.