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Augusto Balloni•

Il primo anniversario che desidero ricordare riguarda i 25 anni dell'attività della Società Italiana di Vittimologia (S.I.V.): infatti, l'atto costitutivo reca la data del 15 gennaio 1991. E' quindi tempo per la S.I.V., dopo un quarto di secolo, di muovere verso nuovi traguardi. In effetti, il passato è ben documentato nel sito www.vittimologia.it, ove sono annotati e ricordati eventi, convegni, studi e ricerche organizzati dalla S.I.V. o ai quali la S.I.V. ha fornito contributi o patrocinio. Inoltre, una documentazione relativa all'attività svolta dalla S.I.V. è già stata presentata allorché vennero ricordati i primi venti anni (1991-2011) di attività della nostra associazione[1]. In questi anni sono state svolte rilevanti attività che meritano di essere segnalate.

A questo proposito, è da menzionare l'uscita del primo numero (aprile 2007) della *Rivista di Criminologia, Vittimologia e Sicurezza*, quadrimestrale, organo ufficiale della S.I.V., pubblicata sempre con regolarità che, con questo numero, completa il decimo anno di attività: è questo un altro anniversario.

Altro strumento operativo collegato alla S.I.V. è l'Università Popolare "Enrico Ferri" (U.P.E.F. www.upef.eu) che si propone di diffondere gli studi criminologici e vittimologici per una promozione culturale. L' U.P.E.F. sta per dare avvio al suo terzo anno di attività: ha, infatti, ufficialmente iniziato i suoi corsi il 24 ottobre 2014 con l'inaugurazione[2] del primo anno accademico presso la sala consiliare nel complesso Monastico Polironiano del Comune di San Benedetto Po (MN), città famosa per i suoi storici monumenti, ma soprattutto importante in questo contesto perché diede i natali a Enrico Ferri, valente avvocato penalista e illustre personaggio di sicuro interesse per tutti coloro che si occupano di criminologia e di sociologia giuridica[3].

Forti delle esperienze maturate nel corso degli anni, la Società Italiana di Vittimologia con la *Rivista di Criminologia, Vittimologia e Sicurezza*, in stretto collegamento con l'Università Popolare "Enrico Ferri", si organizza per una nuova sfida: fornire un concreto aiuto alle vittime tenendo presente che, con il 2016, si verifica un'importante svolta allorché l'Italia "si dota di nuovi strumenti a tutela della persona offesa dal reato, conformandosi alle sollecitazioni provenienti a livello europeo"[4]. Infatti, il Decreto legislativo 15/12/2015 n° 212, G.U. 05/01/2016 di attuazione della direttiva 2012/29/UE "integra e ristruttura in modo ampio e organico il quadro delle garanzie già predisposte dal legislatore, compiendo un passo in avanti verso il riconoscimento di uno status di vittima (e di vittima vulnerabile) e verso il perfezionamento delle forme di protezione ad esse assicurate, all'interno e all'esterno del processo penale. [...] Un primo

• Già professore ordinario di criminologia all'Università di Bologna, è presidente della Società Italiana di Vittimologia e dell'Università Popolare "Enrico Ferri".

[1] Balloni A., "1991-2011: la Società Italiana di Vittimologia. Un percorso di studio e di ricerca", *Rivista di Criminologia, Vittimologia e Sicurezza*, vol.VI, n. 2, maggio-agosto 2012.

[2] Balloni A., "L'Università Popolare 'Enrico Ferri' (U.P.E.F.): per aprire nuovi orizzonti formativi in criminologia", *Rivista di Criminologia, Vittimologia e Sicurezza*, vol. VIII, n. 3, settembre-dicembre 2014.

[3] Bisi R., *Enrico Ferri e gli studi sulla criminalità*, FrancoAngeli, Milano, 2004.

[4] http://www.altalex.com/documents/news/2016/01/11/vittime-di-reato

adeguamento dell'ordinamento interno è stato reso necessario dalla stessa definizione di 'vittima di reato' adottata in ambito europeo. Infatti, la nozione europea include sia la persona che abbia direttamente subito un danno dal compimento di un reato sia - in caso di decesso di questa a causa dell'illecito - i suoi familiari, fra i quali si annoverano anche le persone con essa conviventi in situazioni affettive stabili e continue. L'ampliamento del concetto di 'nucleo familiare' sostenuto in ambito sovranazionale, ha determinato una modifica in tal senso del codice di rito, legittimando - anche da questa prospettiva - la dignità delle unioni sentimentali non formalizzate"[5].

Nel citato decreto legislativo è anche puntualmente messa in evidenza l'importanza di definire l'età della persona offesa dal reato ed è altresì posta in rilievo la necessità che vengano trasmesse alla vittima le informazioni riguardanti la modalità di presentazione degli atti di denuncia o querela e la facoltà di ricevere comunicazioni relative allo stato del procedimento. Inoltre, nei procedimenti di delitti commessi contro la persona, sono immediatamente comunicati alla persona offesa, che ne faccia richiesta, con l'ausilio della polizia giudiziaria, i provvedimenti di scarcerazione e di cessazione della misura di sicurezza detentiva, dell'evasione dell'imputato e dell'internato. Vengono poi poste in rilievo, a livello di comunicazione, le condizioni di particolare vulnerabilità della persona offesa a cui deve essere fornita la possibilità di comprendere quanto le succede attraverso un interprete. Infine si precisa che, quando la persona offesa versa in condizioni di particolare vulnerabilità, l'esame della vittima deve essere effettuato con modalità protette. In particolare, alla vittima viene data la facoltà di avvalersi della consulenza legale, del patrocinio a spese dello Stato, del rimborso delle spese sostenute, della possibilità di richiedere il risarcimento e di tutta una serie di informazioni riguardanti il corso delle indagini e del processo.

L'entrata in vigore del decreto legislativo è senz'altro un'importante svolta a livello vittimologico e offre concrete possibilità perché le vittime della criminalità possano uscire dal silenzio ed acquisiscano quei diritti che le salvaguardino per quanto concerne i danni subiti.

Allora, con realismo creativo, è necessario promuovere condizioni per l'assistenza e per il sostegno alle vittime in parallelo a quei centri sociali istituiti per l'aiuto agli autori di reato: per le vittime occorre fornire tutti gli strumenti per il riadattamento al proprio ambiente di vita così come per gli autori di reato occorre offrire tutte quelle strutture idonee a favorire il loro reinserimento nella società[6].

Tali situazioni sollecitano gli aderenti alla S.I.V. affinché essa possa inserirsi tra le associazioni professionali utili per concorrere alla formazione del vittimologo facendo leva sia sui percorsi di studio e di ricerca, documentati nella *Rivista di Criminologia, Vittimologia e Sicurezza*, che sui programmi didattici, sviluppati dall'Università Popolare "Enrico Ferri". Più concretamente, auspico un'attività itinerante, attraverso gli associati alla S.I.V., che, nel loro territorio di residenza, potranno informare e promuovere iniziative nel settore di assistenza alle vittime.

[5] *Ibidem*.

[6] Balloni A., "Le vittime della criminalità: come uscire dalla spirale del silenzio", atti del convegno "*Fronte comune per le vittime di usura e di estorsione*", tenutosi il 12 aprile 2016 presso la Sala Auditorium della Regione Emilia-Romagna, Bologna, reperibile al sito: http://emiliaromagna.agenziaentrate.it/?id=10862

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Le alternative al carcere come strumento di reinserimento sociale: il caso italiano

Les mesures alternatives à l'incarcération comme instrument de réinsertion sociale : le cas italien

Alternatives to imprisonment as an instrument of social reinsertion: the Italian case

Giorgia Stefani[•]

Riassunto
L'articolo, partendo dall'attività di ricerca condotta nell'ambito del progetto "*Reducing Prison Population: advanced tools of justice in Europe*", propone alcuni esempi innovativi e promettenti di alternative alla detenzione sviluppate in Italia.

Résumé
À partir de l'activité de recherche effectuée dans le projet « Reducing Prison Population: advanced tools of justice in Europe», cet article propose quelques exemples prometteurs et innovants de mesures alternatives à l'incarcération développées en Italie.

Abstract
This article, starting from the research "Reducing prison population: advanced tools of justice in Europe", presents some examples of innovative and promising alternatives to detention developed in Italy.

Key words: prison; prison overcrowding; recidivism; alternatives to detention; Italy.

1. Il contesto attuale.

Nell'ultimo decennio, in Italia, l'aumento della popolazione carceraria italiana ha generato un forte sovraffollamento degli istituti di pena. Il carattere afflittivo del sistema ha portato ad una condanna della Corte Europea dei Diritti dell'Uomo (sentenza "Torreggiani" del 2013), che ha definito il trattamento detentivo in Italia "inumano e degradante", evidenziando come il ricorso alla carcerazione debba essere utilizzato come *extrema ratio* sia in funzione cautelare durante il processo, sia nell'ambito del ventaglio sanzionatorio, ricorrendo, al di fuori della stretta necessità, ad altre misure o sanzioni.

Negli ultimi anni, tuttavia, si è evidenziata un'inversione di tendenza (1). Dal 2013 ad oggi, infatti, si è registrata una riduzione della popolazione reclusa negli Istituti penitenziari e, di converso, un trend in crescita delle misure alternative.

L'Italia ha attuato una serie di norme e rimedi per ridurre il sovraffollamento e implementare misure alternative al carcere. La cosiddetta "sorveglianza dinamica" ha inciso sui ritmi di vita del carcere, riducendo il numero di ore da trascorrere confinati in cella e incrementando gli spazi dedicati a lavoro, sport, attività ricreative e culturali, diminuendo così

[•] Associazione Comunità Papa Giovanni XXIII, Rimini.

le tensioni e gli episodi di violenza all'interno delle sezioni detentive.

L'Amministrazione Penitenziaria Italiana ha, poi, avviato un importante percorso innovativo realizzando molteplici azioni quali: la realizzazione di circuiti omogenei regionali, la sensibilizzazione e il maggior coinvolgimento del volontariato, la sottoscrizione di protocolli mirati ad interventi volti a favorire l'accesso alle misure alternative.

Se è, quindi, doveroso ammettere che molto è stato fatto negli ultimi tempi sia a livello legislativo ed amministrativo, lo è altrettanto riconoscere che la realtà carceraria, salvo limitate eccezioni, è ancora distante dalle connotazioni e dal compito che alla pena assegna la Costituzione (2), la quale all'articolo 27 sancisce che "le pene (…) devono tendere alla rieducazione del condannato".

In Italia, le misure alternative alla detenzione o di comunità sono state introdotte dalla legge 26 luglio 1975, n. 354 meglio nota come "Ordinamento penitenziario". La competenza a decidere sulla concessione delle stesse è affidata al Tribunale di sorveglianza. Gli enti preposti alla gestione delle sanzioni di comunità sono gli Uffici per l'Esecuzione Penale Esterna (UEPE), organi periferici del Dipartimento dell'Amministrazione Penitenziaria del Ministero di Giustizia, istituiti nel 1975. A questi uffici competono diversi compiti, tra cui quello di favorire il reinserimento sociale dei condannati che scontano la pena in misura alternativa.

Le misure alternative previste dall'ordinamento penitenziario sono la semilibertà, le diverse forme di detenzione domiciliare e di affidamento in prova al servizio sociale. L'accesso alle misure alternative alla detenzione è determinato in funzione prevalente dell'entità della pena inflitta e dunque è consentito per i reati di minor allarme sociale.

L' affidamento in prova al servizio sociale, previsto dall'art. 47 dell'Ordinamento penitenziario, così come modificato dall'art. 2 della l. n. 165 del 27 maggio 1998 è considerato la misura alternativa alla detenzione per eccellenza, in quanto si svolge totalmente nel territorio, mirando ad evitare al massimo i danni derivanti dal contatto con l'ambiente penitenziario e dalla condizione di privazione della libertà (3). L'applicazione dell'affidamento, da un lato, fa venir meno ogni rapporto del condannato con l'istituzione carceraria; dall'altro comporta l'instaurarsi di una relazione di tipo collaborativo con l'ufficio di esecuzione penale esterna. Tale misura alternativa consiste sostanzialmente nell'espiazione della pena inflitta (o residua) in regime di libertà assistita e controllata. L'UEPE, in collaborazione con l'interessato, stende il programma di trattamento: qui sono indicate le attività che il reo dovrà svolgere, le prescrizioni cui attendersi e i controlli a cui sarà sottoposto, oltre alle modalità di riparazione del danno causato dal reato. L'esito positivo del periodo trascorso in affidamento estingue la pena, mentre l'andamento negativo (mancato rispetto delle prescrizioni, commissione di ulteriori reati, etc.) ne comporta la revoca e dunque il ripristino della sanzione detentiva.

L'introduzione dell'affidamento in prova al servizio sociale nell'ordinamento penitenziario italiano testimonia l'adesione a una linea di pensiero largamente applicata negli altri Stati occidentali, fondata sull'opportunità di articolare il sistema di difesa sociale con il ricorso a misure penali differenziate, in misura proporzionale alle esigenze di controllo delle manifestazioni delinquenziali e a quelle di trattamento dei loro autori.

L'affidamento in prova al servizio sociale è previsto anche per categorie di persone particolarmente

vulnerabili, quali ad esempio i tossicodipendenti e gli alcoldipendenti, così come previsto dall'art. 94 l. 309/1990, e i soggetti affetti da Aids o grave deficienza immunitaria, previsto dall'articolo 47-quater della stessa legge.

La misura alternativa della detenzione domiciliare è stata introdotta dalla legge n. 663 del 10/10/1986, di modifica dell'Ordinamento penitenziario. Rispetto all'affidamento in prova, questa misura è meno strutturata nelle modalità trattamentali, in quanto consiste nell'esecuzione della pena nella propria abitazione o in altro luogo di privata dimora, o in luogo pubblico di cura, assistenza e accoglienza.

La misura della semilibertà è applicata in misura notevolmente inferiore ed essa può essere considerata come una misura alternativa impropria, in quanto, rimanendo il soggetto in stato di detenzione, il suo reinserimento nell'ambiente libero è parziale (4). La misura consiste nella concessione al condannato e all'internato di trascorrere parte del giorno fuori dall'istituto penitenziario per svolgere attività lavorative e/o formative utili al reinserimento sociale attraverso un programma di trattamento supervisionato dal direttore del carcere.

2. Il progetto "Reducing prison population".

Il presente contributo prende in esame quanto emerso dall'attività di ricerca condotta in Italia nell'ambito del progetto "*Reducing prison population: advanced tools of justice in Europe*", il quale ha ottenuto il co-finanziamento dell'Unione Europea nell'ambito del Programma *Criminal Justice*.

Coordinato dalla "Comunità Papa Giovanni XXIII", il progetto si è sviluppato in 7 Stati Membri (Italia, Bulgaria, Francia, Germania, Lettonia, Romania, Scozia: Regno Unito) nel periodo compreso tra marzo 2014 e aprile 2016, con l'intento di migliorare la conoscenza e lo scambio delle buone pratiche alternative al carcere esistenti in Paesi europei caratterizzati da grande eterogeneità.

L'iniziativa si è strutturata attraverso diverse fasi, ognuna di esse realizzata in tutti i paesi coinvolti grazie al contributo del partenariato, composto da organizzazioni sia pubbliche che private, operanti, a vario titolo, nel settore penitenziario.

L'attività di ricerca ha permesso di compiere un'analisi del quadro europeo in tema di misure non carcerarie e una ricognizione delle caratteristiche e dell'avanzamento delle alternative alla detenzione, in tutte le fasi del procedimento penale, in ogni paese coinvolto nel progetto. Attraverso lo studio della letteratura nazionale in ogni paese coinvolto è stato inoltre possibile ottenere una fotografia della situazione carceraria nei diversi paesi, sia dal punto di vista socio-demografico che da quello delle politiche sociali.

In seguito, sono stati intervistati alcuni esperti del settore, in particolare: magistrati, politici, avvocati, assistenti sociali, volontari. I loro suggerimenti hanno permesso di identificare circa settanta diverse esperienze di alternativa al carcere presenti nei paesi coinvolti: negli ultimi anni, infatti, la Commissione europea ha incentivato le iniziative volte a promuovere l'individuazione di *buone pratiche*, da condividere e sostenere affinché tali esperienze possano alimentarne di nuove in altri contesti, o rappresentino un riferimento efficace per prendere spunti e informazioni utili ad avviare sviluppi innovativi alle proprie iniziative, o per essere adattate al proprio contesto locale e alle proprie esigenze.

La ricerca, l'identificazione e la selezione di esperienze significative nei contesti considerati ha richiesto un lavoro di elaborazione concettuale

volto alla definizione di criteri condivisi per poter garantire l'eventuale replicabilità delle esperienze. Le pratiche selezionate, ed approfondite attraverso dei casi studio, rappresentano alcuni esempi chiave sull'attuazione delle misure alternative alla detenzione attualmente adottate nei diversi ordinamenti (5). Di seguito si riportano le pratiche italiane che, in sede di confronto europeo, sono state considerate valide e promettenti.

3. Il progetto CEC "Comunità Educante con i Carcerati".

Il progetto CEC, promosso dall'Associazione Comunità Papa Giovanni XXIII, è stato considerato una buona pratica poiché permette all'autore di reato di intraprendere un percorso di rielaborazione alla luce delle esperienze passate e della sua personalità, garantendo in questo modo un'effettiva finalità riabilitativa.

Il progetto si rivolge a detenuti comuni, non tossicodipendenti, ed è stato perfezionato anche grazie all'incontro con la realtà Brasiliana dell'APAC (Associazione per la Protezione e Assistenza ai Condannati) (6) che ha condotto allo sviluppo di un progetto attuabile in Europa e in Italia.

Il percorso è aperto a tutti a prescindere dalla cultura, nazionalità o religione di appartenenza ed è sperimentato, ormai da alcuni anni, nelle regioni Emilia Romagna e Toscana, rispettivamente nei centri "Casa Madre del Perdono", "Casa Madre della Riconciliazione" (RN) "Pungiglione - Villaggio dell'accoglienza" (MS) in Puglia e in Piemonte, rispettivamente a Cupertino (LE) e Piasco (CN).

Possono prendervi parte sia imputati, in regime di arresti domiciliari, che condannati in regime di affidamento in prova al servizio sociale, detenzione domiciliare, semilibertà.

Il progetto si realizza in edifici senza strutture restrittive specifiche, e prevede un percorso progressivo di durata variabile, individualizzato e personalizzato per ciascun detenuto in base alle sue caratteristiche e alla tipologia di reato commesso.

La scelta delle persone da accogliere nelle strutture avviene dopo una serie di colloqui conoscitivi in carcere tra il detenuto che intende intraprendere il percorso e gli operatori del progetto, volti alla valutazione dell'effettiva volontà di cambiamento: è, in quest'ottica, particolarmente importante la collaborazione con gli avvocati e gli educatori del Carcere, che forniscono indicazioni più dettagliate sulla persona, sul suo carattere, la sua storia e sulla situazione giudiziaria. La richiesta scritta di accedere ad una delle strutture che sperimentano il progetto, formulata dal detenuto, deve essere accettata dal magistrato competente.

Nella prima fase, della durata di qualche mese, il detenuto è chiamato a concentrarsi sulla riflessione del proprio vissuto. Dopo i primi due mesi nella struttura verrà affiancato da un volontario, una figura di riferimento che collabora strettamente con gli operatori, che lo supporterà, attraverso un colloquio settimanale, fino al termine della pena. Durante il colloquio con il volontario il detenuto può parlare della propria storia personale, dei propri sentimenti e stati d'animo, di come vive le proprie giornate, dei progetti futuri, delle dinamiche interne alla Casa, in sintesi, cioè, di tutto ciò che concerne il percorso rieducativo.

Nella seconda fase, di durata variabile, le attività sono orientate alla formazione, al lavoro e alla professionalizzazione, elementi importanti per costruire il futuro e preparare la persona a un futuro rientro in società, mantenendo, comunque, sempre una logica educativa. L'impegno nelle attività lavorative, infatti, misura anche il grado di pentimento del soggetto, perché il lavoro non viene

remunerato. Sempre in questa fase il detenuto, assieme al volontario, inizia a scrivere la storia della sua vita: questo strumento relazionale non ha solamente lo scopo di ricostruire il passato, ma è volto a dare un senso a ciò che accade e a collegare i diversi eventi della vita lungo una dimensione sia temporale che spaziale, rielaborando la rabbia e valorizzando le proprie capacità.

Nella terza e ultima fase, infine, si sperimenta la libertà e l'autonomia diurna con rientro serale, avviando il graduale reinserimento nella società attraverso un lavoro esterno e una maggiore autonomia nelle relazioni con i famigliari. La Comunità Papa Giovanni XXIII, che conta circa 500 strutture sul territorio nazionale, con una rete costituita da vari servizi e centri, è un bacino d'accoglienza utilissimo. A discrezione del giudice, la parte finale della pena può essere svolta presso altre realtà di accoglienza della Comunità Papa Giovanni XXIII.

Il buon coinvolgimento del detenuto nel percorso garantisce, in base alle norme vigenti, la riduzione della pena e l'avanzamento delle fasi. In caso di comportamenti contrari al rispetto delle regole è prevista una retrocessione delle fasi fino ad arrivare, nei casi più gravi, ad un rientro coatto in carcere. La fine del percorso può non coincidere con la fine della pena, qualora il detenuto sia d'accordo. Non sempre, infatti, gli operatori ritengono che la persona sia già pronta ad affrontare un reinserimento sociale, soprattutto nei casi in cui la permanenza in Comunità sia durata solo qualche mese prima del termine della pena.

Il Progetto CEC è impostato su alcuni punti fondamentali, mutuati in parte dall'esperienza del metodo APAC. Affinché il progetto funzioni è, infatti, necessario (7):

- Un *forte coinvolgimento della società civile locale* attraverso volontari formati e motivati che instaurino relazioni individuali con i detenuti e operino insieme al personale qualificato della Comunità Papa Giovanni XXIII nelle attività educative. La gratuità del servizio prestato dai volontari è di importanza centrale perché, di fatto, scardina quella logica di calcolo costi/benefici spesso presente in molte persone con trascorsi delinquenziali. Fondamentale, infine, è la presenza costante nelle diverse Case di classi scolastiche, gruppi di scout, gruppi di giovani, gruppi di visitatori che vanno a visitare le strutture che accolgono detenuti, favorendo la conoscenza reciproca e un avvicinamento tra detenuti e Società esterna, in vista anche di un futuro reinserimento.
- *Auto e mutuo aiuto*: I detenuti sono direttamente coinvolti nell'aspetto educativo e in quello riguardante la sicurezza delle Strutture. Questo permette loro di responsabilizzarsi e di intraprendere il percorso educativo concretamente e con serietà, incentivando l'adozione un atteggiamento propositivo e una cultura di legalità all'interno della Casa. Così facendo si cerca, inoltre, di evitare l'insorgenza di atteggiamenti e di comportamenti omertosi tipici della vita in Carcere.
- *Coinvolgimento della famiglia d'origine*, quando possibile. La pacificazione con le famiglie è essenziale soprattutto nella fase di rientro in società. Se necessario, la Comunità Papa Giovanni XXIII può predisporre percorsi specifici per le famiglie stesse.
- Il *lavoro*, che, non essendo remunerato in denaro nelle prime fasi, assume un valore educativo e risarcitorio nei confronti delle vittime e della società.

- La *Formazione umana e valoriale-religiosa*, attraverso corsi di alfabetizzazione, di informatica, l'ascolto di testimonianze positive di vita e, soprattutto, incontri quotidiani individuali e di gruppo per mettere in crisi i principi che orientano alla vita delinquenziale per sostituirli con principi più sani. Per chi crede sono previsti momenti specifici di culto e di supporto spirituale.

Tutte le attività sono coordinate da operatori specializzati, affiancati da volontari del territorio appositamente formati e motivati attraverso corsi specifici e da personale medico qualificato secondo necessità. La realizzazione del progetto è, inoltre possibile grazie alla collaborazione degli UEPE, della magistratura, dei Provveditorati dell'Amministrazione Penitenziaria, delle Regioni, delle Forze dell'Ordine.

Sino ad oggi, i costi di sperimentazione del Progetto CEC sono stati quasi completamente a carico della Comunità Papa Giovanni XXIII, in quanto attualmente in Italia non sono previsti finanziamenti per opere educative, di recupero e di incremento della sicurezza pubblica alternative al carcere, come nel caso dell'attività qui presentata.

Ad oggi hanno preso parte al progetto CEC oltre mille persone, tuttavia, non tutte per intero: il numero elevato delle persone che svolgono il percorso educativo incompleto dipende dal fatto che le condizioni in cui si opera sono precarie; ad esempio ci sono diversi casi di recidivi costretti a rientrare in carcere a seguito dell'applicazione della legge 51/2005, cosiddetta "ex-Cirielli".

L'esperienza dei progetti già attivi dimostra che il cambiamento e il recupero del detenuto è possibile. La recidiva di chi ha partecipato al progetto, misurata secondo fonti interne della Comunità Papa Giovanni XXIII, si è abbassata al 10% circa rispetto al 75% circa di chi sconta la pena secondo la modalità tradizionale. A causa dell'impossibilità di accedere ai dati dell'Amministrazione Penitenziaria non si è potuto procedere ad un confronto con i dati Istituzionali.

4. Il progetto AC.E.RO.

Il progetto AC.E.RO (acronimo di "ACcoglienza E lavoRO), promosso dal Provveditorato Regionale dell'Amministrazione Penitenziaria dell'Emilia Romagna (PRAP-ER) e dall'Assessorato Promozione delle politiche sociali e di integrazione per l'immigrazione, volontariato, associazionismo e terzo settore (Regione Emilia Romagna), è stato considerato una buona pratica per il consistente lavoro di rete tra Istituzioni pubbliche e private. Attivato nelle annualità 2013 e 2014, ha permesso di rafforzare le competenze e l'autonomia di persone condannate ammesse a misure alternative alla detenzione garantendo loro un accompagnamento al reinserimento sociale, in modo da ridurre o contenere il rischio della recidiva (8).

Il progetto si è rivolto a soggetti in esecuzione di pena che, in assenza di risorse abitative e di inclusione socio-lavorativa, non avrebbero potuto fruire di misura alternativa. Il coinvolgimento di strutture del volontariato e degli Assessorati alla Formazione delle province emiliano romagnole ha permesso:

- l'accoglienza in strutture collettive, in grado di offrire risposte non soltanto al semplice bisogno di alloggio;
- l'attivazione di percorsi di formazione lavoro, distinti dall'offerta di attività lavorative puramente assistenziali.

Il progetto si è proposto di implementare dei percorsi per l'acquisizione e/o il consolidamento del livello di autonomia per detenuti dimessi dal carcere per l'ammissione ad una misura alternativa. L'azione

1 del progetto è stata finanziata grazie ai fondi di Cassa Ammende, un ente con personalità giuridica istituito presso il Dipartimento dell'Amministrazione Penitenziaria. Fra le entrate che concorrono a costituire il conto patrimoniale della Cassa vi sono i proventi delle manifatture carcerarie, le sanzioni pecuniarie, le sanzioni per il rigetto del ricorso per cassazione, d'inammissibilità della richiesta di revisione ed altre sanzioni connesse al processo.

Hanno preso parte al progetto AC.E.RO condannati definitivi, italiani e stranieri, non tossicodipendenti, residenti nel territorio emiliano romagnolo, con i requisiti necessari per fruire di una misura alternativa alla detenzione.

L'iniziativa si è potuta sviluppare grazie all'esistenza di un concreto e articolato partenariato tra le varie risorse del territorio emiliano romagnolo, che ha permesso di realizzare un lavoro integrato e sinergico tra le amministrazioni pubbliche e quelle del terzo settore.

L'articolazione del progetto, infatti, si è resa possibile per il contributo peculiare richiesto a: Istituti penitenziari, Uffici di Esecuzione Penale Esterna della regione, Comitati locali dell'esecuzione penale presenti presso i Comuni capoluogo, Assessorato regionale Formazione e Lavoro, Assessorati alla formazione e lavoro delle Province, associazioni datoriali, cooperative sociali e residenze riabilitative collettive.

AC.E.RO si è strutturato in due "azioni": accoglienza in strutture individuate sul territorio dell'Emilia- Romagna (azione 1) e percorsi di inclusione lavorativa (azione 2), da Piacenza a Rimini.

Il progetto ha individuato quale destinatari degli interventi dell'azione 1, quella fascia di popolazione detenuta non tossicodipendente, che presenta disagio sociale, per la quale sussistono difficoltà evidenti di trovare soluzioni alloggiative sul territorio.

A tal proposito, attraverso i fondi di Cassa Ammende (9) sono stati finanziati 124 interventi, che hanno coperto le rette giornaliere per l'Accoglienza di soggetti dimessi dal carcere per fruizione di misura alternativa presso Residenze riabilitative collettive, che hanno assicurato, oltre ad una idonea struttura abitativa, anche consolidate buone prassi educative, secondo le modalità proprie della Comunità della Papa Giovanni XXIII, dell'OVILE, cooperativa di Solidarietà Sociale di Reggio Emilia, e dell'Associazione Viale K di Ferrara . Il progetto, quindi, ha riconosciuto le strutture residenziali collettive come un valido strumento per intraprendere un importante percorso socio-riabilitativo.

Le Residenze riabilitative collettive, per essere ritenute idonee, dovevano presentare i seguenti requisiti:

- garantire una costante presenza di operatori;
- incontri settimanali di gruppo tra gli ospiti e gli operatori;
- colloqui progettuali individuali;
- costruzione di un progetto individuale;
- utilizzo, all'occorrenza, di specialisti esterni, (psicologi-pedagogisti-terapeuti, ed eventuali consulenti per i diritti dei migranti);
- eventuale presenza di operatori o volontari in possesso del tesserino rilasciato ai sensi dell'art 78 L. 354/75.

La seconda azione, "Lavoro e formazione", ha finanziato percorsi di inclusione lavorativa sostenuti da attività di tutoraggio che hanno favorito il graduale rientro nel tessuto lavorativo dei destinatari. Il progetto prevedeva l'attivazione di

almeno 45 tirocini all'anno nei due anni del progetto: ne sono stati attivati 221, 109 dei quali realizzati nel primo anno.

Il maggior numero di tirocini rispetto al previsto si spiega anche con un aumento di risorse messe a disposizione dai Comuni sede di Istituti penitenziari e dal Fondo Sociale Europeo; inoltre in alcuni contesti i Comuni hanno deciso di ridurre gli importi e la durata dei tirocini a favore di un più alto numero di beneficiari. Il coinvolgimento dell'amministrazione penitenziaria e dell'amministrazione regionale previsto nel progetto ha favorito la partecipazione e la collaborazione degli attori interessati: referenti degli Istituti penitenziari, referenti degli Uffici esecuzione penale esterna, referenti dei Comuni sede di carcere e referenti provinciali.

Il progetto si è articolato in tre anni prevedendo che ciascun soggetto potesse fruire per un periodo di sei mesi, anche contemporaneamente, degli interventi previsti dalle Azioni 1 e 2, rinnovabili per altri sei mesi per l'Azione 1 per motivate valutazioni espresse dai servizi competenti.

Il consolidamento e l'implementazione del progetto ha permesso di seguire ed affiancare quei soggetti più svantaggiati e privi di risorse e accompagnarli verso l'indipendenza. Il coinvolgimento della rete territoriale ha consentito alle persone coinvolte di costruire relazioni durature e favorevoli alla costruzione e al mantenimento dell'autonomia.

Per l'implementazione del progetto sono stati costituiti di due gruppi di lavoro: il primo, di livello regionale con il compito di approvare i progetti di accoglienza da finanziare e il secondo, di livello locale con il compito di valutare e approvare i percorsi di inserimento lavorativo e di invio al livello regionale di quelli di accoglienza.

Il Progetto AC.E.RO ha previsto una fase di valutazione affidata a Iress (Istituto Regionale per i Servizi Sociali e Sanitari). La valutazione è stata organizzata in due fasi: in una prima fase (inizio percorso) l'équipe Iress ha incontrato i tavoli locali e i rappresentanti del tavolo regionale con l'obiettivo di individuare opportunità e criticità del contesto nel quale si sarebbe dovuto sviluppare il progetto. La seconda fase, realizzata a conclusione del percorso, ha messo in luce, oltre ad una valutazione qualitativa (opportunità di miglioramento del progetto, aspetti positivi e criticità da superare) anche una valutazione quantitativa (numero di beneficiari, numero di successi/insuccessi, ecc).

Tra la prima e la seconda fase il tavolo regionale ha organizzato una serie di incontri con i rappresentanti dei tavoli locali con lo scopo di restituire ai diretti interessati i primi elementi di valutazione e di individuare criticità e opportunità per il miglioramento del progetto stesso.

I percorsi AC.E.RO hanno permesso di seguire ed affiancare quei soggetti più svantaggiati e privi di risorse, sostenendoli nell'accompagnamento verso l'autonomia. Il coinvolgimento nel progetto della rete territoriale ha consentito alle persone coinvolte di costruire relazioni durature utili al raggiungimento e mantenimento dell'autonomia.

5. Il progetto RiparAzioni.

La giustizia riparativa si propone di riparare il danno causato da un reato ponendo in relazione l'autore del reato, la vittima e altri membri della collettività. Partendo da questo presupposto il progetto "RiparAzioni", promosso dall'Associazione Libra Onlus di Mantova si pone l'obiettivo di diffondere la conoscenza degli strumenti di *restorative justice* e di realizzare percorsi di responsabilizzazione che possano sfociare in concrete azioni riparatorie. E',

pertanto, considerato una buona pratica poiché incoraggia il ricorso a modelli di intervento fondati sulla riparazione delle conseguenze dannose del reato, aiutando il reo a rielaborare il conflitto e i motivi che lo hanno causato, a riconoscere la propria responsabilità e ad avvertire la necessità della riparazione.

Il progetto è stato implementato a Mantova, coinvolgendo persone provenienti dal contesto mantovano e cremonese (vista anche la competenza dell'U.E.P.E di Mantova, che si estende alla provincia di Cremona) e si è rivolto, da un lato, agli operatori (personale UEPE, Casa Circondariale, dipendenti enti pubblici e terzo settore), dall'altro a persone sottoposte a provvedimenti dell'Autorità giudiziaria.

Partendo dall'assunto che gli operatori devono essere i primi in grado di favorire l'attecchimento del paradigma riparativo, a loro è stato rivolto un corso di formazione che gettasse le basi teoriche della giustizia riparativa.

Oltre all'offerta rivolta agli addetti ai lavori, è stato predisposto un percorso sperimentale rivolto a due gruppi di utenti in esecuzione penale esterna. Gli utenti coinvolti erano in regime di affidamento in prova al servizio sociale o di detenzione domiciliare.

Il percorso è stato rivolto a tutti gli autori di reato, senza esclusioni: l'individuazione dei partecipanti è stata effettuata dall'U.E.P.E. tenendo in considerazione in maniera particolare la volontarietà della persona, senza la quale non sarebbe stato possibile intraprendere un percorso senza benefici premiali nel caso di successo né svantaggi nel caso in cui non venisse portato a termine.

Il corso di educazione alla legalità ha avuto come suo scopo principale quello di provocare la riflessione su tematiche rilevanti al fine di una responsabilizzazione dell'autore di reato.

Si è strutturato attraverso tre incontri, complessivamente dieci ore totali, dove non sono state impartite lezioni frontali, quanto piuttosto problematizzati alcuni concetti e categorie che affondano le radici nelle norme giuridiche e sociali (10).

Gli argomenti trattati afferivano a tre filoni: il corso è iniziato con una riflessione sulle teorie della pena e sui diversi modelli di giustizia, lasciando quanto più possibile la parola agli utenti, qui invitati a riflettere su temi profondi quali le regole, le violazioni e le reazioni alle violazioni, ad esprimersi narrando le proprie esperienze come persone che hanno vissuto una pena, nonché a confrontarsi in merito alla posizione della vittima. E' seguito un incontro dedicato alla legalità nella sua accezione più ampia, promuovendo l'interazione e il dialogo e il confronto aperto sul perché delle regole e del loro rispetto. Infine, un terzo ed ultimo incontro si è concentrato sul concetto di responsabilità, intesa come capacità di rispondere: è stato quindi posto l'accento non solo sulle responsabilità giuridiche, ma anche e soprattutto su quelle sociali fondanti la solidarietà.

La fase successiva è consistita in un ciclo di otto incontri di gruppo, della durata di due ore ciascuno, che hanno coinvolto con cadenza settimanale utenti e operatori dell'U.E.P.E. Come per il corso di educazione alla legalità, ad essere in primo piano sono stati gli aspetti metodologici: attraverso l'utilizzo di materiali multimediali, nel corso degli incontri il dibattito si apriva intorno ad alcuni temi individuati nelle diverse occasioni dai partecipanti, con un professionista che svolgeva le funzioni di facilitatore, facendosi carico di stimolare la discussione e di fissare e riprendere i punti emersi. Nel tentativo di far comprendere la posizione dell'Altro, identificabile nella persona che ha subito

un reato, uno degli strumenti utilizzati è stato l'ascolto di interviste realizzate a vittime di reato che, consapevoli delle finalità per le quali la loro esperienza sarebbe stata utilizzata, venivano sentite su specifiche questioni: dal racconto del reato alle sue conseguenze, dall'idea sulle persone che hanno commesso crimini fino alla conoscenza del paradigma riparativo.

Nell'incontro conclusivo i partecipanti sono stati e invitati a esprimere le loro opinioni in merito al percorso seguito, evidenziandone punti di forza e criticità; sono state, poi, presentate agli utenti delle possibili azioni riparatorie da intraprendere, lasciando loro la scelta sul se, sul quando, sul quanto e sul come impegnarsi in questo tipo di iniziative.

Le possibilità presentate sono, di fatto, quelle consentite dall'ordinamento italiano, privilegiando lo svolgimento di attività volontaria e non retribuita di utilità collettiva. Si tratta, infatti, non solo di una valida misura restitutoria, ma anche di un'opportunità per la creazione di nuovi legami e relazioni, oltre che consistere, di fatto, nella riproposizione di uno di quegli elementi che hanno classicamente fondato il trattamento del reo (11).

6. Osservazioni conclusive.

La diffusione delle buone pratiche e di opportunità applicative concrete delle alternative al carcere sono strumenti fondamentali per fornire una prospettiva incoraggiante allo sviluppo di interventi alternativi tra i vari ordinamenti degli Stati europei.

Nella prospettiva della Costituzione (e della normativa europea) le misure penali di comunità dovrebbero essere la regola, e il carcere l'eccezione. Nonostante l'ampia gamma di alternative al carcere esistenti, tuttavia, permangono delle difficoltà nel promuovere la loro concreta applicazione. Il problema è soprattutto culturale, prima ancora che normativo (12).

Come è stato evidenziato anche di recente dagli Stati Generali dell'Esecuzione Penale, troppo spesso le misure alternative vengono considerate, e, quindi, disciplinate, come una risorsa per alleviare le situazioni di sovraffollamento carcerario. In realtà è necessario attribuire alle stesse il merito di porre in essere un'azione mirata "allo scopo di ridurre la perpetrazione di ulteriori reati".

Il ricorso alle pene alternative, infatti, permette il mantenimento o lo sviluppo di legami sociali importanti come la famiglia e il lavoro e la valorizzazione degli elementi positivi presenti nella persona, nella convinzione che da lì possa partire il riscatto e il pieno reinserimento nella società. Lo svolgimento di un'attività lavorativa a beneficio della collettività, inoltre, può costituire una forma di riparazione attuata verso la società, considerata parte offesa del reato.

E' necessario, pertanto, promuovere e valorizzare le alternative alla detenzione perché le stesse offrono alla persona la possibilità di reinserirsi socialmente e di diventare un membro attivo della società - a beneficio di tutta la collettività.

Dall'analisi condotta nell'ambito del progetto *Reducing Prison Population: advanced tools of Justice in Europe* è emerso come, per assicurare il successo delle misure alternative al carcere nel recupero della persona, sia necessario: un percorso riabilitativo volto a valorizzare gli elementi positivi presenti nella persona, nella convinzione che da lì possa partire il riscatto e il pieno reinserimento nella società; una rete in grado di garantire opportunità lavorative e di formazione; il coinvolgimento della famiglia, degli amici e della società civile nel percorso di recupero; il lavoro sinergico di Pubblica Amministrazione e organizzazioni del terzo settore.

Molto rimane ancora da fare per la costruzione di sistemi di attuazione efficaci ed un'effettiva collaborazione tra i vari professionisti, agenzie e gruppi di volontari coinvolti è fondamentale per offrire percorsi alternativi reali e concreti e per passare, come amava ricordare don Oreste Benzi "dalla certezza della pena alla certezza del recupero", considerando la pena come strumento di integrazione e non di ulteriore esclusione dell'uomo che sbaglia dal contesto sociale.

Note.

(1). Miravalle M., Sbraccia A., Scandurra A., Verdolini V. (a cura di), *Galere d'Italia: dodicesimo rapporto di Antigone sulle condizioni di detenzione*, Infinito, Modena, 2016.

(2). Stati generali sull'esecuzione penale, *Documento finale*, Aprile 2016. Disponibile alla pagina: https://www.giustizia.it/resources/cms/documents/documento_finale_SGEP.pdf

(3). Ministero della Giustizia, *Misure alternative o di comunità*, disponibile alla pagina: https://www.giustizia.it/giustizia/it/mg_2_3_1_4.wp

(4). *Ibidem*.

(5). Per maggiori informazioni si rimanda a: Stefani G., Freeman R., Lloyd G., (a cura di), *Reducing prison population: advanced tools of justice in Europe. Alternative alla detenzione in Europa: strumenti operativi e buone prassi. Kit formativo.* Disponibile alla pagina: http://www.reducingprison.eu/downloads/files/KIT_FORMATIVO.pdf

(6). L'APAC è un'associazione della società civile senza scopo di lucro che ha come obiettivo l'umanizzazione della pena privativa della libertà, che rappresenta una alternativa al carcere. In Brasile esistono 147 APAC. La metodologia utilizzata nelle APAC è nata nel 1972 ed è attualmente riconosciuta dalla legge Brasiliana e praticata dai Tribunali di 17 Stati. La metodologia utilizzata nelle APAC è focalizzata sulla risocializzazione reale dei condannati, per evitare che dopo aver espiato la pena, ritornino a commettere crimini. Le APAC sono un'alternativa reale all'espiazione della pena che è scontata in Centri di Reintegrazione Sociale, senza il coinvolgimento della polizia penitenziaria: sono gli stessi condannati che diventano responsabili della sicurezza e delle fughe. Per maggiori informazioni: Ottoboni M., *Vamos Matar o Criminoso? - Metodo Apac*, Paulinas, São Paulo, 2001.

(7). Comunità Papa Giovanni XXIII, *Comunità Educante con i Carcerati.* Disponibile alla pagina: http://www.apg23.org/it/carcere/comunita_educante/

(8). Regione Emilia Romagna Sociale, *Progetto Acero: Accoglienza e Lavoro.* Disponibile alla pagina: http://sociale.regione.emilia-romagna.it/carcere/temi/fuori-dal-carcere/progetto-acero-accoglienza-e-lavoro

(9). La Cassa delle Ammende è un ente con personalità giuridica istituito presso il Dipartimento dell'Amministrazione Penitenziaria. L'ente finanzia programmi di reinserimento in favore di detenuti e internati, programmi di assistenza ai medesimi e alle loro famiglie e progetti di edilizia penitenziaria finalizzati al miglioramento delle condizioni carcerarie. Fra le entrate che concorrono a costituire il conto patrimoniale della Cassa vi sono i proventi delle manifatture carcerarie, le sanzioni pecuniarie, le sanzioni per il rigetto del ricorso per cassazione, d'inammissibilità della richiesta di revisione ed altre sanzioni connesse al processo.

(10). Sandri G., Tosi M., "Proposte metodologiche per una 'Società riparativa'", in *Crimen et Delictum*, N. VII, Aprile 2014.

(11). *Ibidem*.

(12). Stati Generali dell'Esecuzione Penale, *op.cit.*

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A research approach to support the empowerment of alternatives to prison

Une approche de recherche pour soutenir le renforcement des mesures alternatives à l'incarcération

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Riassunto
Il Progetto Europeo "*Reducing prison population: advanced tools of justice in Europe*" è stato finanziato dalla Commissione Europea al fine di migliorare la conoscenza e lo scambio di misure innovative di pratiche alternative alla detenzione, sia nella fase pre-processuale, sia in quella dell'esecuzione della pena. La progettazione delle linee guida per l'attuazione di alternative alla detenzione in tutti i paesi europei e del pacchetto formativo, indirizzato al personale che lavora nei servizi che si occupano di alternative alla prigione, è stata preceduta da diverse attività di ricerca svolte in sette paesi europei (Italia, Lettonia, Scozia, Francia, Bulgaria, Romania e Germania). Questo articolo descrive la metodologia utilizzata nelle attività di ricerca e la gestione di queste ultime, condotte in diversi paesi e indirizzate ad una popolazione complessa.

Résumé
Le projet européen « Reducing Prison Population: advanced tools of justice in Europe » a été financé par la Commission Européenne afin d'améliorer la connaissance et d'échanger les approches innovantes de mesures alternatives à l'incarcération, avant comme après le procès. La définition de lignes directrices pour la mise en œuvre des alternatives à l'incarcération dans chaque pays européen et du dossier de formation conçu à l'intention du personnel des services offrant des alternatives à la prison, a été précédé par des recherches menées dans sept pays européens (Italie, Lettonie, Écosse, France, Bulgarie, Roumanie et Allemagne). Cet article décrit la méthodologie de recherche utilisée dans ce projet et la gestion des différentes activités menées dans plusieurs pays et ciblées sur une population complexe.

Abstract
The European Project "Reducing prison population: advanced tools of justice in Europe" was funded by the European Commission in order to improve the knowledge and to exchange innovative measures of practices alternative to imprisonment, both in pre and in post-trial phase. The design of the Guidelines for the implementation of alternatives to detention in every European country and of the Training Package targeted to staff working in services providing alternatives to prison setting was preceded by various research activities carried out in seven European countries (Italy, Latvia, Scotland, France, Bulgaria, Romania and Germany). The paper describes the methodology we used in research activities of this project and the management of different research activities, conducted in various countries and targeted to a complex population.

Key words: best practices collection; case study; snow ball interviews; marginal hidden population.

1. Introduction.

The activities of "*Reducing prison population: advanced tools of justice in Europe"* was aimed at improving the knowledge and at exchanging innovative measures of practices alternative to imprisonment, both in pre and in post-trial phase. The main objective was to design the Guidelines for the implementation of alternatives to detention in every European country and a smart Training Package with operative information and good practices targeted to staff

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working in services providing alternatives to prison setting.

In this paper we will briefly describe the methodology we used in research activities of this project, in order to obtain enough information for the design of the two final products and how we managed the implementation of different research activities, studying a complex target in seven European countries (Italy, Latvia, Scotland, France, Bulgaria, Romania and Germany)

According to the action research approach (1), we firstly collected secondary data and scientific literature on the topic, so that it was possible to identify:

- Main focus points to be deepened with the following research activity (interviews to experts;
- Type of actors/experts to be involved in the interviews.

The first steps of activities regarded the collection of information both from scientific literature (in order to enlarge the knowledge on pre and post trial non custodial measures with an update of relevant legislation) and from research activities, in order to collect the existing practices on alternatives to detention in the seven countries involved in the project.

The general approach of the project assumed the mutual learning and the strict cooperation between partners at European and national level as a critical success factor for the implementation of the activities. One of the main key factor of the partnership was the mixed composition of competences and the long-term experience in working on the specific field of alternatives to imprisonment. The methodology used in the development of different work streams focused, first of all, on a careful analysis of scientific literature and legislation both at National and at European level and, secondly, on a recognition of existing practices related to alternatives to imprisonment in the project partners' national contexts and will focus some main dimensions to be further deepened in the case studies on practices selected as the good ones. In this phase, we foresaw the involvement of practitioners, referees of judicial systems, volunteers, social operators and other types of relevant actors working in the field of alternative to prison practices, in order to collect and analyse evaluative opinions on effectiveness, strengths and weaknesses of these practices and all the information needed for the realization of the products. This analysis represented a starting point for the definition of a first draft of the Guidelines and of the Training Package. For the definition of these tools, the partnership took into account the evidence based results of the research phase and then there has been implemented a feasibility study of the Training Package, as well as a transferability study of the Guidelines, in order to finalize the two products.

2. The structure of the project and of the workstreams.

For an appropriate development of the outlined methodology, we foresaw a first work stream in which there have been implemented both the literature analysis and the field research activities, as a preliminary phase in which the partnership collected all the relevant information which represented the basis for the development of the following activities. The second work stream, instead, represented a deepening of practices already detected in work stream 1, in order to highlight tools, professionals and methodologies which was useful to design the Training Package. The third

work stream was strictly related to the activities carried out so far, and it regarded the realization of the two final products, that is to say the Guidelines for the implementation of alternatives to imprisonment (mainly thanks to the indications coming from literature analysis) and the Training Package targeted to professionals and operators working on the field (mainly thanks to the indications coming from the field research phase and the good practices analysis).

Here following we provide a summary of the operative workstreams of the Reducing Prison Population project regarding the research phase.

1) Workstream 1 – Preliminary research.

The aim of this workstream was to collect data and information both through a literature analysis and through the field research activities in order to:

- enlarge the knowledge on pre and post-trial non custodial measures, with an update of relevant legislation, as well as an analysis of their costs and effectiveness and a specific attention to the effects of these practices on psychological conditions of the victims of the crimes;
- map the existing practices related to pre and post-trial alternatives to detention, mainly through in-depth interviews to highlight strengths and weaknesses and to select some indications for the identification of the good practices.

Activities of this workstream were:

a. Literature analysis on non custodial measures (National and European Level)
b. In depth interviews
c. Mapping of practiced on alternatives to detention.

2) Workstream 2 – Good practices analysis.

This workstream was aimed to collect and get a deep understanding of existing good practices (2) on pre and post trial alternatives to detention in countries involved in the project, in order to share different experiences between project partners as well as to promote a transnational reflection and a debate on methods used in these practices and on results on offenders and victims.

Activities of this workstream were:

a. Selection and case studies of good practices
b. Staff exchange to present the good practices collected.

3. The research activities of the project.

3.1 The literature analysis (3).

The first research activity, which concerned the analysis of scientific literature on the theme, can be viewed as a preliminary phase, in which the partner International Society of Criminology (FR) carried out a systematic review, as complete as possible, of the theoretical and empirical literature on legislation and regulations about pre and post trial alternative to detention at European Level.

The literature analysis deepened the state of art regarding the alternatives to the prison models and the new methodologies indicated at European level to foster the empowerment and the social inclusion of prisoners, as well as the costs and the effectiveness of these measures.

This first part of desk research foresaw also a recognition of existing practices related to alternatives to detention in the European context and focused some main dimensions to be further deepen in the second part of the research (field research with experienced witnesses). This analysis contributed to the design of the tools for the field research.

During the first online meeting the partnership with International Society of Criminology as leader established a common methodological framework to be used in the national literature analysis. Then,

the literature analysis at national level has been implemented by the partnership in all the countries involved in the project and the objectives of this activity was mainly two:

- a review of national legislative framework relating of alternative to detention, in order to point out the specific situations in which there is the possibility to apply such kind of sanctions according to national legislation of every country;
- a national recognition about the state of art on studies already carried out in this field and of practices related to pre and post trial alternatives to detention (with a specific attention to the profile of the victim of crime).

The partners made use of all existing sources of information, including:

a. primary sources, like legislation, case-law, statistics, media clippings, etc., and
b. secondary sources, e.g. legal and social science academic research and other studies related to the topics discussed.

Partners realized seven national reports and International Society of Criminology produced a comparative analysis, regarding the state of art in every country. These comparative conclusions of the literature analysis were presented to the whole partnership during the first Transnational Meeting in Leuven, 4 months after the beginning of the activities.

3.2 Field research activities.

The first transnational meeting was a crucial moment for the development of the whole project: in fact, the results of the literature analysis established a very important basis for the design of the tools to be used during the field research activities. Moreover, the Italian partner Synergia shared with all partnership the methodological framework to follow in the field research and presented its proposal for the draft of interviews, to be discussed and validated during the meeting.

The activity related to the interviews saw the involvement of k-actors working in the field of alternatives to detention, which was in-depth interviewed (4) by partners of Reducing prison population project, in order to deepen the main issues emerged in literature analysis phase.

In particular, the in-depth interviews was aimed to:

- Integrate and further expand the knowledge on different non custodial measures;
- Identify and assess different practices of alternative sanctions;
- Gain useful information and criteria to assess and select the best practices.

Interviews in every country was carried out to five different professionals and experts playing different roles in the criminal justice system. The interviewees have been chosen because of their specific knowledge or expertise on non custodial measures, and belonged to the following categories:

a. Legislators, legal drafters, law reform commissions and policy makers;
b. Judges, judicial officers, members of the judiciary;
c. Lawyers (especially defence lawyers);
d. Police, law enforcement authorities, prosecuting authorities, prison authorities and probation officers;
e. Volunteers and members of non-governmental organizations.

Interviews were composed by the following sections:

- Types of alternatives to imprisonment: aimed at exploring what are the alternatives to imprisonment

and which types are implemented by the judicial system;

- Strenghts and weaknesses of alternatives to imprisonment: aimed at understanding the main strengths and potential limitations of different alternatives to imprisonment and their implementation;
- Identification of the key actors involved: aimed at identifying the main actors involved both in pre and post trial phase and the role they play in implementing alternative sanctions;
- Identification of the feasibility and main conditions to implement alternatives to detention: aimed at identifying which conditions are necessary to implement alternative sanctions and their feasibility;
- Suggestions to identify and evaluate good practices: aimed at collecting information on the criteria to identify good practices related to alternatives to imprisonment.

People interviewed gave to partnership also useful indications on existing practices on alternatives to detention to be included in the mapping activities, as well as some possible criteria to identify good practices among the mapped ones. The "snow ball" technique (5) was recommended, in order to identify both other key informants to be interviewed and good practices to be mapped.

Results of interviews in this way carried out will be collected into 7 national reports (one report per country) and on the basis of these reports Synergia elaborated some comparative conclusions, which was presented during the second Online Meeting (8th month of the project course).

In occasion of first Transnational Meeting in Leuven, Synergia also presented the mapping forms that have been used for the mapping of practices related to alternatives to detention.

The mapping of different practices on alternatives to detention was aimed to:

- Identify services and practices which have already been adopted in different European countries as alternatives to imprisonment;
- Identify the key elements of each practice (target, tools, professionals and services involved, repeatability, etc.);
- Create a wide dataset among which identify the best practices on the subject.

For these reasons, partners of "Reducing Prison Population" project searched and analysed about 10 practices each of alternative measures to detention using a common form. This form included the following dimensions, useful to permit a comparison between practices of different countries and to include them in a common database:

- Type of practice (e.g. status penalties, house arrest, probation and so on);
- Aims and objective;
- Target population;
- Tools and methodologies;
- Services involved;
- Professionals involved;
- Strengths, weaknesses, opportunities and potential threats;
- Innovation;
- Monitoring and assessment;
- Sustainability and transferability.

Synergia collected all the mapping forms and presented some overall considerations in the occasion of the second Online Meeting. That online meeting also represented the occasion for partners to define and share some common criteria for the identification of good practices, also thanks to the indications coming from both literature analysis and k-witnesses interviews.

3.3 The good practices on alternatives to detention.

The workstream 2 of the Reducing Prison Population project, starting with the second Online meeting after the field research phase, foresaw three main activities, that is to say:

- The identification of good practices among the mapped ones, thanks to some shared criteria;
- The analysis of the selected practices, that is to say a careful study of materials, the conduction of interviews to referees of these practices and all the activities necessary to deepen the practices, according to some shared dimensions;
- The staff exchange in Rimini, after 5 months, useful to present the good practices collected and analysed in the different countries. During the staff exchange there has been a debate useful to provide some useful indications for the development of the two main products of the project.

After the online meeting, each national working group made a recognition of all the practices collected in the previous workstream and a selection of the good ones, according to some criteria, as a result of the research. The selection of good practices (three practices per country) contributed to inform the Workstream 3 aimed at developing the Guidelines for implementation of alternatives to detention in European countries and the Training Package targeted to operators and professionals working on services providing alternatives to detention.

Thanks to the analysis of interviews to experts, partnership established the following criteria for the selection of good practices among the mapped ones:

a. It is necessary that each penalty suits the characteristics of the accused and/or the condemned. The choice of the ATD according to its potential positive effects on the person accused/condemned indeed depends on every single case. It is necessary to know: the person, his/her personality (for instance, his/her risks and needs, values and the understanding of what is acceptable within the society), the path that he/she is willing to follow.
b. Alternatives to detention should be customizable in accordance with the risks and the needs of the offender and must have an impact on the way offender thinks, on one's values and understanding of what is acceptable within the society. In fact, they should have a rehabilitative effect.
c. Flexible approach that meets the needs of the individual and allows for monitoring, reviewing and, if necessary, changing the order over time according to the progress of the offender.
d. Trustworthy relationship between the offender and the supervisor: the relationship between the supervisor and the offender should be credible in the eyes of the offender. This relationship should be based on active listening, empathy and understanding of the offender's needs.

Then, partners of reducing Prison Population project implemented the case study analysis through a careful study of interviews to k-referees and of all materials collected. The case study analysis on good practices helped to:

- Get a deep understanding of the good practices' methodologies and strength points;
- Bring enough elements for the discussion in the Staff Exchange in Rimini, in order to promote a mutual learning;
- Underline some focus points for the development of the final products (Guidelines for implementation of alternatives to detention in European countries and the Training Package

targeted to operators and professionals working on services providing alternatives to detention).

For every single practice, partners deepened the following dimensions:

- Why it has been chosen as a good practice (main strength points)?;
- Which are the expected results of the application of the practices (description of the predicted improvement for the offender and for the society)?;
- A brief description of the practice itself (what happens to the offender from the decision of the court to the end of the period, step by step);
- Are the needs and the risks of the offender considered when the alternative is granted and/or when the path that the offender will follow is decided?;
- Detailed description of the actors involved and their role (description of the professionals, of the type of offenders involved, of the public and private organizations involved, of the ways of cooperation);
- Description of the source(s) of financing and clarification on how high are the costs per person (how many persons are reached within a given timeframe);
- Description of the relationship with society and with media (how the communication with civil society and citizenship is managed and if the main outcomes and results are communicated to the outside);
- Description of the follow-up mechanism (monitoring of the offender after the end of the penalty) and of the evaluation of the measure;
- Brief description of each included activity: a. flexibility of the path; b. presence of peer learning activities, c. involvement of the families of origin; d. work activities; e. training activities; f. other core activities;
- A successful story (brief real story of an offender who experienced this practice from the beginning to the end).

The Staff Exchange (Second Transnational Meeting), held in Rimini during the 13th month of the project course, was the occasion for partners to present the good practices collected in their own country. For this reason and also to promote the mutual learning, also some referees of selected practices were invited to the meeting, in order to bring their own experience and a direct witness.

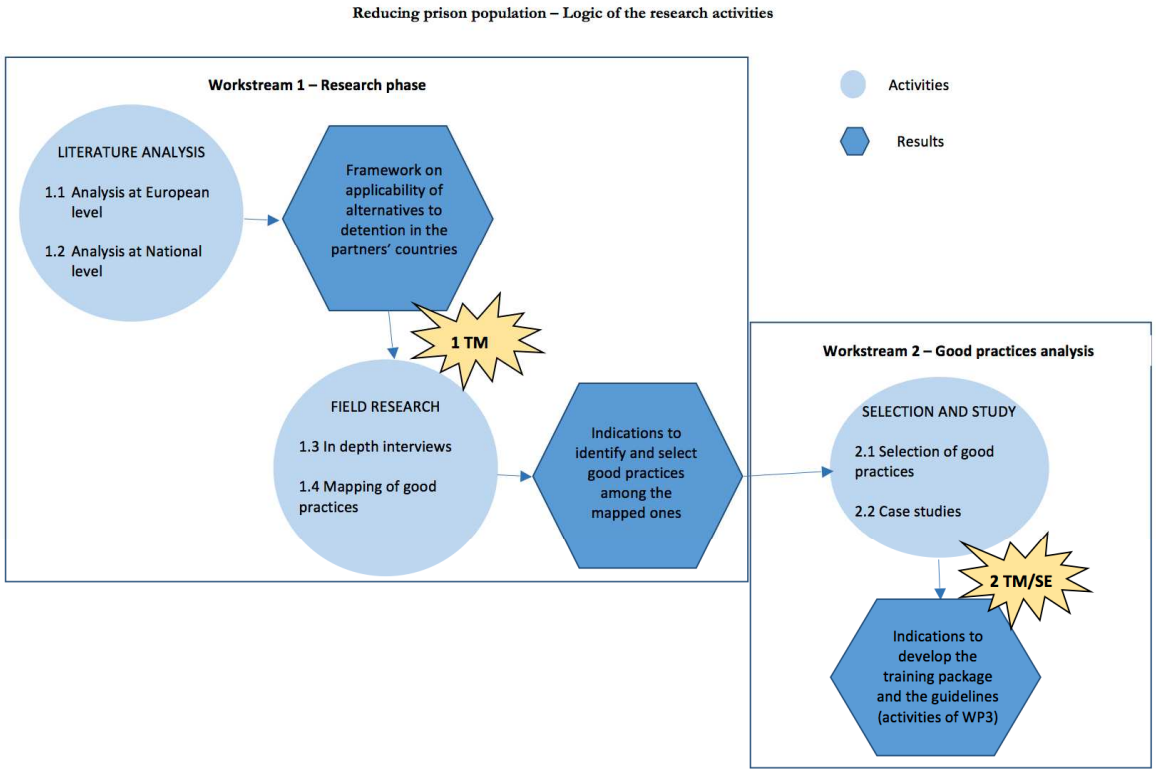
4. Concluding remarks.

At the end of the meeting, thanks to the results of the analysis of good practices, partners gained some useful indications to be used for the definition of the two main products.

In fact, thanks to the inputs coming from:

- Literature analysis (both at National and European level);
- Interviews to k-witnesses;
- Mapping of practices;
- Analysis of good practices.

It was possible to define contents of both the Training Package, with tools and operative indications for staff working on alternatives to detention and Guidelines on alternatives to imprisonment in Europe. In order to better understand the logic and the methodology used in this project of these working phases, maybe it can be useful to use a diagram to picture them.



Notes.

(1). See for example: Burns D., *Systemic Action Research: A strategy for whole system change,* Policy Press, Bristol, 2007; Greenwood D. J., Levin M., *Introduction to action research: social research for social change*, SAGE Publications, Calif, 1998.

(2). A best practice is a method or technique that has been generally accepted as superior to any alternatives because it produces results that are superior to those achieved by other means or because it has become a standard way of doing things, e.g., a standard way of complying with legal or ethical requirements. Best practices are used to maintain quality as an alternative to mandatory legislated standards and can be based on self-assessment or benchmarking.

(3). A literature review is a text of a scholarly paper, which includes the current knowledge including substantive findings, as well as theoretical and methodological contributions to a particular topic. Literature reviews are secondary sources, and do not report new or original experimental work. Most often associated with academic-oriented literature, such reviews are found in academic journals, and are not to be confused with book reviews that may also appear in the same publication. Literature reviews are a basis for research in nearly every academic field (see for example Lamb D., "The Uses of Analysis: Rhetorical Analysis, Article Analysis, and the Literature Review", in *Academic Writing Tutor*, 2014).

(4). In-depth interviewing is a qualitative research technique that involves conducting intensive individual interviews with a small number of respondents to explore their perspectives on a particular idea, program, or situation. For example, we might ask participants, staff, and others associated with a program about their experiences and expectations related to the program, the thoughts they have concerning program operations, processes, and outcomes, and about any changes they perceive in themselves as a result of their involvement in the program (Boyce C., Neale P., "Conducting in-depth interviews: A Guide for Designing and Conducting In-Depth Interviews for Evaluation Input", *Monitoring and Evaluation*, May 2006).

(5). In sociology and statistics research, snowball sampling is a non-probability sampling technique where existing study subjects recruit future subjects from among their acquaintances. As the sample builds up, enough data are gathered to be useful for research. This sampling technique is often used in hidden populations which are difficult for researchers to access; example populations would be drug users or sex workers (See for example Goodman L. A., "Snowball sampling", *Annals of Mathematical Statistics,* vol. 32, n. 1, 1961, pp. 148–170).

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Alternatives to imprisonment: opportunities and problems in Germany

Mesures alternatives à l'incarcération : opportunités et problèmes en Allemagne

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Riassunto
L'articolo fornisce una breve panoramica sulla normativa tedesco in materia di misure alternative alla detenzione. Vengono successivamente presentati i dati statistici relativi agli istituti penitenziari tedeschi e gli autori riflettono sulle problematiche principali della situazione attuale delle carceri tedesche. Inoltre, sulla base di dati statistici e di esempi pratici, l'articolo presenta una panoramica complessiva sulle misure alternative in Germania e sullo stato dell'arte della ricerca. Infine, gli autori sottolineano il ruolo e la prospettiva delle vittime, arrivando alla conclusione che una serie di iniziative e di progetti sono già stati avviati, ma che è ancora troppo presto per poter giungere a delle conclusioni.

Résumé
Cet article donne un aperçu du cadre juridique allemand des mesures alternatives à l'incarcération. Des données statistiques sur les prison allemandes et sur les détenus sont ensuite présentées. Les auteurs s'interrogent sur certains des principaux problèmes liés à la situation actuelle des prisons allemandes. De plus, cet article donne un aperçu global des mesures alternatives en Allemagne par le biais de données statistiques et d'exemples concrets. S'ensuit l'état des évaluations scientifiques et de la recherche. Enfin, les auteurs valorisent le rôle et la perspective des victimes, toutefois dans leurs conclusions ils soulignent que nombreux sont les programmes et les initiatives déjà commencés, mais qu'il est cependant encore trop tôt pour dresser un bilan.

Abstract
The article provides a short overview on the German legal framework regarding alternatives to imprisonment. Then statistical data about German prisons and their inmates are presented and the authors reflect on some major problems of the contemporary situation in German prisons. Furthermore, the article gives a comprehensive overview on alternative measures in Germany by statistical data and examples from the practice. Then the state of evaluations and research is examined. Finally, the authors emphasize the role and perspective of victims but conclude that a number of initiatives and projects have started already, but it is still too early for a resume.

Keywords: alternatives to imprisonment; Germany; legal framework; statistical data; victims of crime.

1. Introduction.

From a historical perspective, imprisonment as a sentence for offenders is a liberal and human achievement compared to death penalties, torture or feuds. Opposite to this, imprisonment is in the contemporary academic discussion also regarded as relict of a revenge-oriented criminal law and policy, which modern legislation and legal practice should overcome and replace by better alternatives. In particular, we know historical and contemporary examples of living conditions for prisoners, which are so dreadful and terrible that imprisonment is nothing but a modern kind of torture as the European Court of Human Rights (ECHR) ruled (1). In order to resolve these conflicting views we

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need to have a closer look on imprisonment and its alternatives.

There is not much doubt that imprisonment is still needed as a last resort, or at least a stopgap solution in order to deter future crimes, stabilize law-obeying behavior and safeguard the society from very dangerous criminals. This perspective gives space to consider and evaluate in detail the advantages and pitfalls of imprisonment as well as its alternatives. We can also deduce a two-fold strategy from this position, which includes both the improvement of living conditions in prisons and the development of proper alternatives to imprisonment. The most important factor in the evaluation of imprisonment and its alternatives may be the ability of imprisonment and its alternatives to re-integrate offenders into society and give them the motivation and the necessary abilities to keep themselves away from crime.

This strategy is at the same time utilitarian and humanitarian and seems therefore to be non-negotiable. However, in the course of developing human and effective treatment for offenders, and more or less eager efforts to improve their living conditions and re-integrate them into society it were the victims, who have been forgotten. Only in the last few decades, the suffering of the victims from the crime itself and sometimes even more from the further consequences of crime received attention again. This results not necessarily in a restriction of efforts towards the offenders or a relapse to revenge. On the contrary including the victims and their perspectives can rather become a fruitful element of rehabilitation and re-integration of both victims and offenders.

In order to find and collect best practices in this field the European Community funded the project "Reducing Prison Population: advanced tools of justice in Europe", which enabled the authors of this article to carry out the research that is outlined in the following article.

2. Legal framework for alternatives to imprisonment.

First of all we want to give a very short overview about the relevant German general legal framework for alternatives to imprisonment. It can be distinguished between alternatives to imprisonment in the phase of pre-trial detention and alternatives to imprisonment, which are available in the phase of post-trial detention.

In a pretrial detention, a not yet convicted person is arrested. Therefore the pretrial detention collides with the supposition of innocence (2). The enforcement of the detection of a crime and the punishment of the offender as soon as possible is the objective of the pretrial detention. In addition to that, the pretrial detention should guarantee the enforcement of the sentence of imprisonment (3). Due to this conflict with the supposition of innocence, the pretrial detention is only lawful in strictly restricted cases. Further a consideration between the interest in effective criminal proceedings and the supposition of innocence is necessary (4). As a result of this conflict the pretrial detention can only be arranged or maintained, when the interest of the public welfare in the enforcement of the pretrial detention is prevailing. In the academic discussion the electronic foot chain is partially considered as a substitution of the pretrial detention (5).

a) Regulations of the German Code of Criminal Procedure.

The provisions of the arrangement of the pretrial detention are part of the StPO (German Code of Criminal Procedure). However, the *Grundgesetz*

(German Constitution) and the European Convention on Human Rights (ECHR) have an effect to the interpretation of the provisions of the pretrial detention. Due to the legal character of the ECHR as an international agreement these provisions are not part of the German constitutional law (6). The ECHR is considered in the interpretation of the German fundamental rights by the Federal Constitutional Court (BVerfG).

According to article 104 paragraph 2 s. 1 German Constitution an arrest warrant generally requires a judge decree. Before the indictment regularly, a co-operation between the judge and the public prosecutor's office is necessary for the decree of an arrest warrant. The prosecutor is in accordance to sec. 120 paragraph 3 German Code of Criminal Procedure responsible for the preliminary proceedings. Therefore the public prosecutor has the competence to apply for the abolition of the arrest warrant before a person is charged (7). The court can decree an arrest warrant ex officio when the suspect is accused. In this case, the prosecutor has the right to be heard by the court (8).

The decree of the pretrial detention requires a sufficient suspicion and a reason for arrest in the sense of sec. 112, 112a German Code of Criminal Procedure. The reasons for arrest are: escape (9), a risk that the accused person will evade the criminal proceedings (10), strong suspicion that the accused person may manipulate evidence (11), severity of the offence (12), repeatedly or continually committing of specific offences (13). Due to the constitutional law sec. 112 paragraph 3 German Code of Criminal Procedure requires further a second reason for arrest. This second reason requires fewer indications. Finally the pretrial detention is referring to sec. 112 paragraph 1 s. 2 German Code of Criminal Procedure not lawful when it is disproportionate (14). Reasons for a disproportionate pretrial detention are when the accused person submits voluntary restrictions, e.g. the delivery of the passport or a therapy in a medical institution (15). Another reason is when the consequences for the life of the accused person and the significance of the case as well as the penalty are not be balanced. This proportionality always depends on a case-by-case review. In addition to that, the execution of a warrant of arrest can be suspended (sec. 116 German Code of Criminal Procedure). This provision must be applied, if the purpose of the pretrial detention can be achieved by other less affecting measures (16).

b) What alternatives to imprisonment are legally available in the phase of post-trial detention?

The sanction system for an offence are part of the provisions of the StGB (Criminal Code). This system distinguish between sentences and disciplinary measures. The public should be protected by disciplinary measures against dangerousness of offenders, which has manifested itself through previous crimes.

The sentence is according to sec. 46 paragraph 1 s. 1 of the Criminal Code based on the guilt of the offender for the committed crime (17). The duration of a prison sentence expresses the degree of illegality and the severity of the guilt (18). The only aspect for the sentence is how much the offence disturbed the legal system (19). Aspects like moral considerations are not relevant in this regard (20). The consideration of the guilt of the offender is the basis and the limitation of the penal frame at the same time (21). The sentence should allow the compensation of the offender's guilt and further give the offender the opportunity to reflect on his crime (22). Therefore a sentence should have the

effect that the offender "improve" his behavior and serve the goal of crime prevention (23). The court has to consider all circumstances, which speak for and against the offender as well the effect of the sentence to the life of the offender. Sec. 46 paragraph 2 s. 2 Criminal Code contains possible circumstances of consideration. The court has also the opportunity referring to sec. 46a and sec. 46b Criminal Code to reduce the sentence.

According to Sec. 12 Criminal Code, the various criminal offences are divided into felonies and misdemeanors. Felonies are unlawful acts punishable by a minimum sentence of one year imprisonment, while misdemeanors are unlawful acts punishable by a lesser minimum amount of imprisonment or by a fine. Only special circumstances can justify short termed imprisonments (24). About one fifth of the criminal sentences are custodial sentences, exceptional intentional homicides, violent sexual offenses, violent robberies as well as extortion. In 95 % of such cases, the sentence is imprisonment (25). A custodial sentence up to 2 years may be suspended on probation in accordance to sec. 56 Criminal Code. The objective of this provision is to reduce short and medium terms custodial sentences and to support the rehabilitation of the offender. Instead of imprisonment, the convicted person has to fulfill conditions and directions (26). The possible conditions in this sense are exhaustively listed in sec. 56b Criminal Code while the directions according to sec. 56c Criminal Code aren't exhaustively listed (27). Directions should help convicted persons to avoid further crimes (28). Not allowed are directions that can't achieve this goal, for example measures to facilitate the monitoring of offenders. Therefore, there is a controversial discussion about the use of electronic ankle bracelets or the electronically monitored house arrest (29). In cases of less severely crimes, the court has the competence to declare an admonishment with reservation of punishment (30). This is the mildest and rehabilitation supportive measure (31). If the offender was affected himself so seriously by the consequences of the crime, that an imposition of penalties would be clearly inappropriate the court can order a discharge (32).

c) The termination of proceedings according to sec. 153 German Code of Criminal Procedure and sec. 153a German Code of Criminal Procedure.

In a case of less severe crimes a proceeding can be terminated according to sec. 153 German Code of Criminal Procedure or sec. 153a German Code of Criminal Procedure.

A termination of proceedings by the prosecution according to sec. 153 German Code of Criminal Procedure is necessary when the offence is a misdemeanors as defined in sec. 12 paragraph 2 Criminal Code, the guilty of the offenders is minor and no reasons for public prosecution may exist (33). Contrary to the wording in sec. 153 paragraph 1 German Code of Criminal Procedure the prosecutor has no discretion in this case (34).

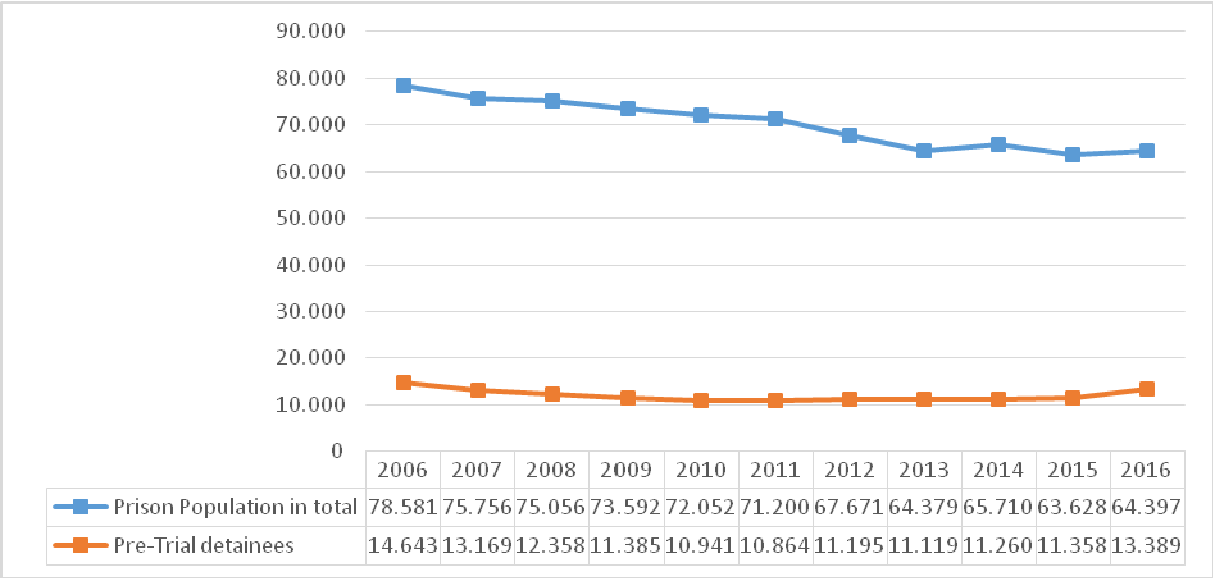
In addition to the termination in accordance with sec. 153 German Code of Criminal Procedure in cases of misdemeanors, the prosecutor can terminate the proceedings with approval of the court. The court can concurrently impose conditions and instructions upon the accused if these are suitable to eliminate the public interest in criminal prosecution and the degree of guilt is not withholding diversion. The justification of sec. 153a German Code of Criminal Procedure is that in some cases the objective of the punishment can also be reached by less drastic measures. Examples of such conditions and instructions are: the offender

compensates the damage, pays a sum of money to a non-profit institution or to the Treasury or the offenders' serves community work (35). It is necessary that the offender accepts these measures voluntarily. Therefore, they are not a punishment (36). Further, these measures are a "sanction" beside the sentence system of the criminal code. The conditions and instructions in sec. 153a paragraph 1 of the German Code of Criminal Procedure are not exhaustively listed. Due to this the court can determinate other conditions and instructions.

3. Statistical data about imprisonment in Germany.

After this short overview about the relevant German general legal framework for alternatives to imprisonment, we want to take a more detailed look into the situation of imprisonment in Germany. Firstly, it has to be mentioned that Germany is a state with a pronounced federal structure. Germany consists of 16 federal states. This remark is important when you look at the statistics, because there might be some differences between the federal states.

On March 31st 2016, the number of prisoners in Germany was 64.397 (37). As shown in the following figure, the number of prisoners in Germany has been declining nearly continuously since 2006. In 2006, the number of prisoners in Germany was 78.581. Accordingly, calculated back to 2006 there was a decrease of 14.184 prisoners. In 2006, there were 14.634 prisoners in pre-trial-detention. In addition, the number of pre-trial detainees is decreasing. On March 31st 2016, the number of pre-trial detainees was 13.389. Therefore, the number of pre-trial detainees decreased in the considered period by 1.245. However, it has to be mentioned, that the number of pre-trial detainees increased since the last years. This increase might be the result of imprisoned refugees. It can be assumed that refugees are more likely be imprisoned due to the before mentioned assumed higher risk of absconding. The ascending rate of pre-trial detainees might result in overcrowded prisons and a higher level of other problematic situations inside prisons. Before we take a closer look at this development and give more details about the prisoners we deal with the before mentioned federal states (38).



	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Prison Population in total	78.581	75.756	75.056	73.592	72.052	71.200	67.671	64.379	65.710	63.628	64.397
Pre-Trial detainees	14.643	13.169	12.358	11.385	10.941	10.864	11.195	11.119	11.260	11.358	13.389

Figure 1: *Development of the number of prisoners and detained in German prisons since 2006*

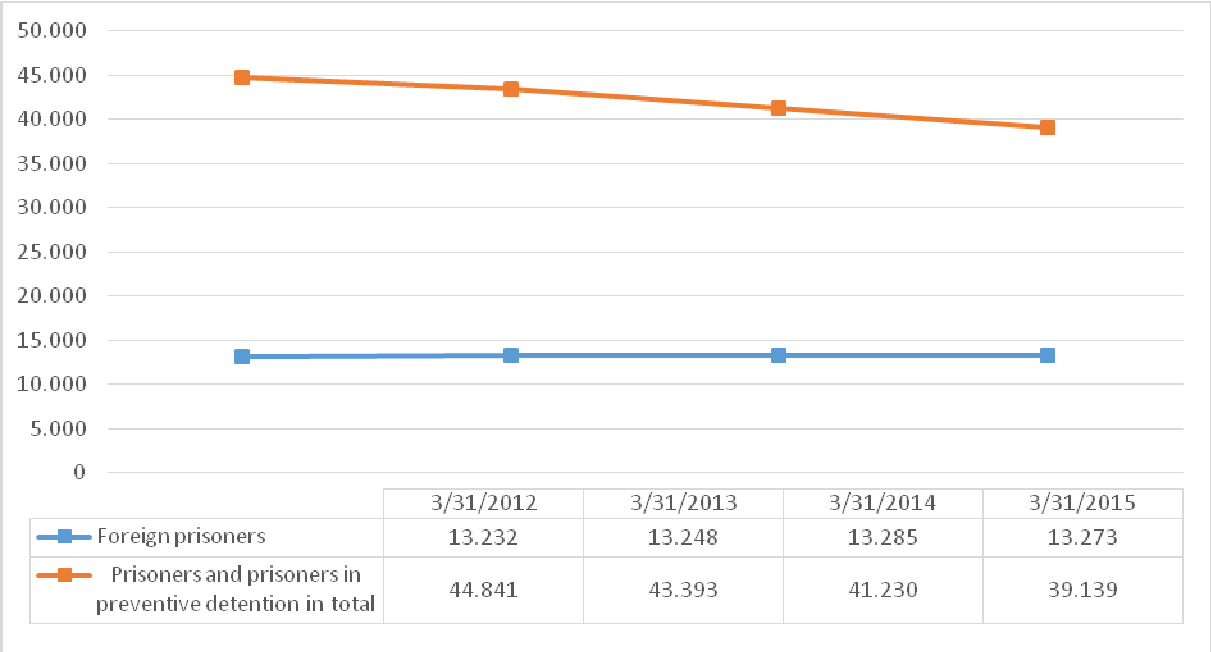
The prison population differs from federal state to federal state. For example on 30th November 2015, the prison population rate (prisoners per 100.000 citizens) in the federal state Schleswig-Holstein was 40 (39), in Bavaria 87 (40), in Brandenburg 53 (41) and in Bremen 77 (42). According to Dünkel those differences may be the result of different criminal policies and differences in the judicial decision-making practice (43). Furthermore, it has to be mentioned that the social structure of the federal states differs and that especially in large cities the crime rates are higher than in rural areas. Therefore, when you think about alternatives to imprisonment, you have to consider the fact that not only the general legal framework is of importance. Other aspects like the present government, their view on alternatives to imprisonment, the availability and quality of alternatives to imprisonment, the social structure/the social problems especially on local basis and the level of crime must be taken into consideration.

Now we want to take a closer look at the prison population in Germany. On March 31st 2015 the number of prisoners, including prisoners in preventive detention, but excluding pre-trial detainees, was 52.412. Most of the prisoners are male. At the mentioned date 49.307 prisoners were male and only 3.105 were female. 4.397 persons were inmates of youth imprisonment, and again most of them were male. Their number were 4.258 and only the remaining 139 inmates of youth imprisonment were female (44).

On March 31st 2015 80 % of the prisoners were sentenced to imprisonment up to and including five years. 3.980 prisoners (8 %) were sentenced to a prison sentence with a length from 5 years up to and including 15 years. 1.883 (2 %) prisoners were sentenced to life long imprisonment. In most of the cases, the prisoners were convicted due to theft and misappropriation (23 %), violations of the narcotics law (13 %), robbery and extortion (13 %) and violent crimes (12 %) (45).

In the year 2015, the proportion of foreign prisoners was about 34 %. The following figure shows that their absolute number is not increasing in the last years but their relative number is increasing. Newer data for the year 2016 is not available yet. Due to the before mentioned situation with criminal refugees it can be presumed that the share of foreign prisoners will continue to increase.

Until now, there are no scientific studies available that focus on this aspect.



	3/31/2012	3/31/2013	3/31/2014	3/31/2015
Foreign prisoners	13.232	13.248	13.285	13.273
Prisoners and prisoners in preventive detention in total	44.841	43.393	41.230	39.139

Figure 2: *Development of the number of foreign prisoners in German prisons since 2012*

Furthermore, we want to get into detail with the socio-demographic background of prisoners. Unfortunately, there are no standardized and regular surveys available that deal with the living situations and background of prisoners. Therefore, only older studies can be used to approach this topic. Some information can be found in the study "*Lebenslagen straffällig gewordener Menschen*" (life situation of delinquent people) of the "*Bundesarbeitsgemeinschaft für Straffälligenhilfe e. V.*".

A survey on 1.773 imprisoned persons compared to a control group of 1.081 interviewees has proved that 14.2% of the imprisoned have no graduation, while this finding applies to 7.4 % of the total population of Germany. Concerning the achieved highest graduations the differences between the groups are not so clear, but according to the special analysis it is a fact "[…] that the group of the delinquent on the one hand has less often an educational attainment and on the other hand fewer higher educational qualifications" (author's translation) (46). Also regarding vocational training it can be stated, that prisoners have less often finished successfully their vocational training or got a university degree then the total population of Germany. The high number of dropouts from vocational training is remarkable also 30 % of the prisoners have cut off their started vocational training. The cut off rate in the total population of Germany however amounts to 1.6 % (47).

The lower educational standard affects apparently negatively the income situation of the imprisoned persons. The special analysis of the BAG-S shows, that "[…] the majority of the offenders has a lower income then the comparative group: For 75 percent of the delinquents the income amounts to at least 400 Euros less than for 75 percent of the non-delinquents" (author's translation) (48). Moreover prisoners are more often indebted then the group of not imprisoned people. Further, they have more frequent health problems, e.g., alcoholism or drug addiction. A study from the year 2003 has proven

that approximately 10.000 from 62.000 prisoners are dependent on alcohol. Besides, about one third of them were dependent on other anaesthetics at the same time (49). Also Laubenthal points to the addiction problems of prisoners: "The proportion of drug addicted prisoners is high: Estimates with regard to the consumption of hard drugs like heroin, cocaine, ace etc. vary between 10 and 40%, whereby most information lies with 30%. The portion of those, which have already consumed cannabis, might be even higher" and he concludes: "The life in prison is stamped highly by the addiction problems" (author's translation)(50).

There are also differences between imprisoned persons and the all-German population concerning their residential situation. Thus 81.9% of the interviewees lived before the arrest in a lasting housing condition, while these were almost everybody with the interviewees of the control group. Furthermore the imprisoned persons have grown up exceptionally often in a difficult family situation or had a "problematic" circle of friends. For example, "[…] 35,7 % of narrow family members from the delinquent persons had alcohol or drug problems within the first 15 years of the delinquent's lives. The relatives of the not delinquent interviewees have such problems significantly less often. 13,6 % of their narrow relatives had problems with alcohol or drugs" (51) (author's translation) and more than 20 % of the relatives of the interviewed inmates were condemned during their youth, while these were 3,3 % within in the control group (52).

A confirmation for the partly problematic living conditions of convicted persons can be found within the 2. *Periodischen Sicherheitsbericht*. In a section about the topic "Probation services" those problematic living conditions are described as follows: "Many of the offenders which are under care of probation services are marked through social problems (like lacking vocational training and chronic unemployment, high debts) and personal difficulties and results of critical life events"(53) (author's translation).

These problematic backgrounds of prisoners were described and confirmed in many interviews we did in the framework of the "Reducing Prison Population" project. In this regard, some interviewees had the perspective that imprisonment is never a "really good idea". Alternatives to imprisonment would enable to work in a better way with convicted people. The problems that lead to their criminal offence/s could be dealt with in a more appropriate way then in prisons. For example, addiction problems could be treated, a new job could be searched for, and the convicted could get the possibility to learn self-control and impulse control when they attend an anti-violence-training. Therefore, alternatives to imprisonment would possibly result in a better social rehabilitation and stabilization of convicted persons.

Some of the before mentioned arguments against the penal system are taken from Kaiser and Schöch. In the year 2003 they observed an increase of violence, drug trafficking and acquisitive crime in prisons due to overcrowding. Therefore, a "Crisis of the imprisonment and penal system" (54) (author's translation) is stated. By the overcrowding, the human dignity of the prisoners is negatively affected and the chances for a successful penal system are endangered (55).

This finding of an increased aggressiveness from and among prisoners in the penal execution is empirically made clear by the study "Violence among prisoners" from the criminological service of the federal state of North-Rhein – Westfalia (NRW)

in the year 2006. The study focused on the amount of violence among the prisoners in NRW with the finding, "[…] that most registered acts of violence among the prisoners were assaults and offences causing bodily harm, which are similarly reported on schools. Violence in prisons shouldn't be seen basically as an isolated and special problem within the penal system" (56) (author's translation). Furthermore Wirth finds out that especially young prisoners, because of their socialization use the "*Faustrecht*" (Law of the strongest) to solve their problems (57). However, the results of such offences of violence are in about half of the cases rather marginal and "only" in less than 10 % of the cases more serious according to Wirth. Violence in prisons is still an everyday phenomenon (58). In his conclusion, Wirth expresses to draw different conclusions from the results of the study. Especially in prisons for juveniles "[…] vocational trainings and jobs close to the labor market should be offered for appropriate prisoners, especially for those with a high need of vocational training, these offers should be extended to create perspectives for the prisoners […]" (59) (author's translation).

Within this context the increased number of juvenile foreign prisoners and the negative outcomes of this development has to be mentioned: "With prisoners immigrated from thirty or more nations, in pre-trial-detention-institutions even up to sixty nations, there can already observed a lot of occasions for national or ethnic tensions and even open "frictions". Additionally there is the problem of the lacking or even totally missing possibility of communication caused by the variety of languages and dialects. Furthermore, the different religions have a high relevance, partly because of the various ritual needs of religious prisoners, because of the food orders or bans, because of the conflicts between the religions, not to mention from sects. The prisoners themselves suffer according to their origin and nationality from additional stress, for example because of restrictions regarding loosening of prison rules, lesser options to other offers of treatment or, finally, after partial or entire completion of the punishment, deportation or expulsion" (60) (author's translation). With the before mentioned current presumed increase of imprisoned refuges in German prisons those conflicts may rise and therefore may impede the rehabilitation and resocialization of prisoners.

Therefore, it is not surprising that in Germany there is a huge discussion about the treatment of foreign prisoners not only regarding juvenile foreign prisoners but as well as adult foreign prisoners. Different aspects are important here. It is determined that foreigners are overrepresented in German prisons. Considering their share of the population, they are overrepresented by two and a half time (61). Due to the development of migration it can be presumed, that this share will increase in the following years because foreigners are more likely imprisoned then Germans (62). Due to the before mentioned problems and needs of foreign prisoners, law enforcement has to deal with different challenges. There are for example only few "[...] specific concepts for the treatment of foreign prisoners" (author's translation) and the heterogeneous composition of foreign prisoners "[...] with various individual and independent cultural believes, lifestyle habits, different attitudes towards physical integrity, leads to conflicts and disputes between different groups of prisoners, which are sometimes pursued with violence" (63) (author's translation). The already mentioned language barriers, which influence communication between prisoners and correctional staff, have

possibly the effect that foreign prisoners can't use their rights or are not being able to make use of possibilities for long-term education because of an impending deportation (64). In his conclusion, Laubenthal establishes that foreigners in prison are being disadvantaged in comparison to German prisoners (65). According to Laubenthal an internationalization of imprisonment can help to solve problems resulting from imprisonment of foreigners. Among other things this means "[...] serving the sentences in the respective home states of convicts, who are not German" (66) (author's translation). This has to be questioned for example with regard to whether the convicted foreigners are in favor of serving their sentences in their home states, because the conditions of imprisonment might be worse than in Germany (67).

In this context, the current jurisdiction regarding custody-pending deportation by the ECJs has to be mentioned. It is a specific form of imprisonment used to prepare for or secure the deportation, which the court criticizes in its current form (68). According to a ECJ judgment of 17.07.2014 (69) the custody pending deportation has to be organized in such a way, that "[...] imprisonment of illegal immigrants with the goal of deportation has to take place in special prisons" (70) (author's translation). However, in federal structured Germany not every federal state has such special prisons. That is why the federal states without those prisons have to place the prisoners, who are supposed to be deported, in prisons of other federal states (71).

4. Alternatives to imprisonment.

Alternatives to imprisonment are available in every German federal state. Important are alternatives for imprisonment in default of paying a fine. This alternative imprisonment is used if a convicted can't pay his or her fine. This practice is criticised very often because the sentence for the convicted was not imprisonment but to pay a fine and may lead to a vicious circle. Social connections of the convicted may get lost or a loss of job may occur and therefore the situation of the convicted might not be improved by imprisonment. To solve this problem many federal states have projects like the "*Schwitzen statt Sitzen*" project in Lower Saxony. Convicted have the opportunity to work off their fines. The following figure shows the number of cases in which this alternative to imprisonment was used:

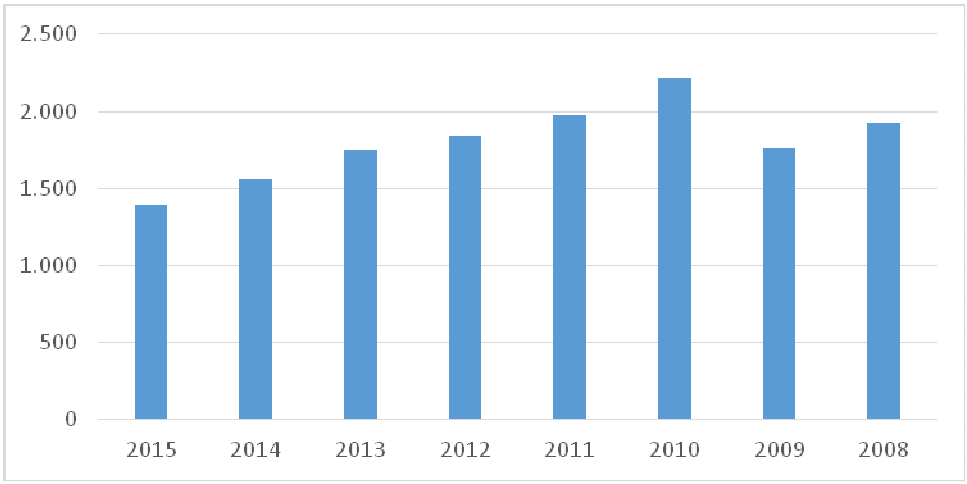


Figure 3: *Number of cases in which imprisonment in default of payment was avoided by working off the debts* (72)

Maybe more important is the following figure. It shows the number of days of imprisonment that were saved due to the project "*Schwitzen statt Sitzen*" in Lower Saxony.

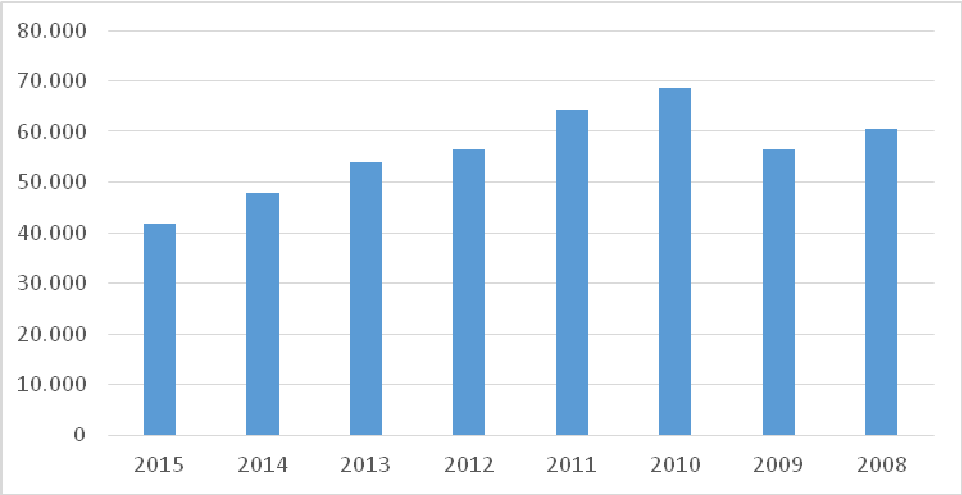


Figure 4: *Number of days in imprisonment were saved by working off the debts* (73)

At a rough estimate one day in prison costs about 120 €. Therefore the Ministry of Justice of Lower Saxony stated that due to the project "*Schwitzen statt Sitzen*" the amount of over 52. Million Euro were saved since 2008. This alternative to imprisonment could prevent negative side effects of imprisonment and save tax money (74).

In this context, another project in the federal state Bremen has to be mentioned (75). It aims at fare evaders. Some fare evaders are imprisoned because they could not pay their fine. In special hardship cases fare evaders can buy with very little money special tickets for the public transportation network. The Ministry of Justice Bremen and the Office of Social Services fund it. During a question time in the Parliament of Bremen the representative of the Ministry of Justice argued that this project is important because in Bremen 15 up to 20 people were imprisoned because they couldn't pay the fine for their fare evasion. These people would often have multiple problems like drug addiction, homelessness, indebtedness etc. The use of imprisonment in default of payment would not lead to a stabilisation or an improvement of their life situation. Therefore, this project would be better in special hardship cases then imprisonment. Furthermore the use of this project would save, like the before mentioned "*Schwitzen statt Sitzen*" project, personnel expenses at court, prosecution, prison and days of imprisonment and therefore tax money (76).

Of course, there are many more alternatives to imprisonment available in Germany. For example, many counselling institutions or support facilities for different problems can be used, like homelessness, drug addiction and addiction to gambling, indebtedness, joblessness and other situations. Assistance is available outside and inside - very important is the transition management, which is dealing with prisoners, who will be released of prisons in near future.

From our perspective, especially measures that are taken into action before imprisonment are useful. This is the so-called front-door-approach. This approach aims to limit the number of people sent to prison. Therefore, it seems to be reasonable to

invest especially in the primary and secondary crime prevention. In this regard, Franz von Liszt has to be cited. He said: "The best law and order policy is a good social policy". Possible causes for crime have to be identified and dealt with in a proper way so the crime rates are reduced. For example, the gap between poor and rich persons should not get any larger. Otherwise, social tensions may increase and crime rates will raise.

In the context of alternatives to imprisonment, it seems to be important to have a good public relation strategy because there are many different stakeholders. For example, the need for punishment of the society has to be taken into account; the alternatives to imprisonment have to be funded etc. A good practice is in this regard is the "*Haftvermeidung durch soziale Integration*"- network, which is located in the federal state Brandenburg. The network has its own info-portal in the internet. With this info-portal one can inform his or herself about the network itself, it's structure and partners. On the main page relevant news for and about the network are posted. Furthermore, one can download a newsletter, which is also sent to the social services of justice. The newsletter contains information about the network and about other relevant aspects, which may influence the network. Since 2009, annual reports are published. In addition, documents about conferences are available as well as information about the guiding principles of the network or about the evaluation of the network. Additionally a so-called "communication-plan" is published on the homepage. In this document, the different partners co-operating in the network are enlisted and specific contact persons are named. In summary, the network offers many ways of communication, which can be used by private persons, organisations or the media. The transparency of the work of the network seems to be very high. The communication with the media seems to be a very important factor. In the guidebook of the network the trans-regional public relation is described. The target groups of the PR are the professional public, policy and ministries. One goal is to inform the target groups about the goals, work and the results of the network/projects. Other goals of the PR are the promotion of and lobbying for the HIS-network/project and the promotion of the image and contacts. Therefore, the main outcomes and results of the network/project seem to be communicated with the civil society and the media in different ways to increase their support, which seems to be very relevant in the framework of alternatives to imprisonment.

5. Further need for research.

At the moment, especially research regarding the situation of refugees is needed in the context of crime prevention and alternatives to imprisonment. As mentioned before the number of foreign inmates in German prisons is increasing. This may lead to social problems inside the prisons and more negative side effects due to imprisonment. Some urgent questions are: What are the special needs of imprisoned refugees? Are the counselling institutions or support facilities inside and outside prisons sufficient and adequate in this regard? Is there a need for new alternatives to imprisonment?

Furthermore, external impact evaluations of alternatives to imprisonment in terms of longitudinal studies are still needed. In these studies possible selection-processes must be taken into account – e.g. which (groups) of people with what risks receive alternative measures and which are sent to prison. The opportunities, but of course also the

limitations of alternatives to imprisonment should be evaluated carefully considering differences in risk and problems.

6. Conclusion.

In conclusion, this short overview on the legal situation and the practise shows that alternatives to imprisonment are well established in Germany. Due to the federal structure of the country, a comprehensive picture is hardly possible. On the other hand, the federalism gives the opportunity to try different ways and pilot projects; some of them we have mentioned in this article. We support the idea of piloting new ways in the field of alternatives inside and especially outside prison walls. The raise of migration requires new answers for new problems. By the rising migration people and their problems and needs become more and more diverse and therefore we have to find individual answers to individual needs of different persons and groups. However, this includes also the danger to lose track of abundant projects and measures. Therefore, we mentioned the "*Haftvermeidung durch soziale Integration*"- network in Brandenburg as a possible solution. This research project also showed that only a few projects have been evaluated and only very little external (impact) evaluations and longitudinal studies are available. There is a lot of activity in the field but we do know only little about the effects. Finally, the situation of the victims and their perspectives came on the agenda of professionals in this field only very recently. A number of initiatives and projects have started already, but it is still too early for a resume.

Notes.

(1). See e.g. the case "Torreggiani et al. vs. Italy", ECHR application number 57875/09 et al.
(2). Cf. BVerfGE 19, 342 (347); BVerfGE 20, 45 (49); BVerfGE 53, 152 (158); Meyer-Goßner / Schmitt-Schmitt, StPO, Vor § 112, Rn. 2; HK-GS-Laue, StPO, § 112, Rn. 1.
(3). Cf. BVerfGE 19, 342 (348); BVerfGE 20, 45 (49); BVerfG NJW 1991, 1043 (1043); Meyer-Goßner / Schmitt-Schmitt, StPO, Vor § 112, Rn. 4.
(4). Cf. Meyer-Goßner/Schmitt-Schmitt, StPO, Vor § 112, Rn. 2; HK-GS-Laue, StPO, § 112, Rn. 1.
(5). Cf. Schünemann, Prolegomena zu einer jeden künftigen Verteidigung, die in einem geheimdienstähnlichen Strafverfahren wird auftreten können", GA 2008, 314 (332); Meyer-Goßner/Schmitt-Schmitt, StPO, Vor § 112, Rn. 2.
(6). Cf. Grabenwarter / Pabel, *EMRK*, § 3 Rn. 2.
(7). Cf. Meyer-Goßner / Schmitt-Schmitt, StPO, § 125, Rn. 8.
(8). Cf. *Ibidem*, Rn. 10.
(9). Sec. 112 paragraph 2 No. 1 German Code of Criminal Procedure.
(10). Sec. 112 Paragraph 2 No. 2 German Code of Criminal Procedure.
(11). Sec. 112 paragraph 2 No. 3 German Code of Criminal Procedure.
(12). Sec. 112 paragraph 3 German Code of Criminal Procedure.
(13). Sec. 112a German Code of Criminal Procedure.
(14). Cf. Meyer-Goßner/Schmitt-Schmitt, StPO, § 112, Rn. 10; KK-Graf, § 112, Rn. 52.
(15). Cf. Meyer-Goßner/Schmitt-Schmitt, StPO, § 112, Rn. 10; KK-Graf, § 112, Rn. 52.
(16). Cf. BVerfGE 19, 342 (351); BVerfG NJW 1991, 1043 (1043); Meyer-Goßner / Schmitt-Schmitt, StPO, § 116, Rn. 1; HK-GS-Laue, StPO, § 116, Rn. 1.
(17). Cf. BGHSt 20, 264 (266); BGH NJW 1987, 2685 (2686); HK-GS-v. Danwitz, StGB, Vor § 38, Rn. 3.
(18). Cf. *Ibidem*.
(19). Cf. BGHSt 20, 264 (266); BGH NJW 1987, 2685 (2686); HK-GS-Rössner / Kempfer, StGB, § 46, Rn. 12.
(20). Cf. HK-GS-Rössner / Kempfer, StGB, § 46, Rn. 12.
(21). Cf. Fischer, StGB, § 46, Rn. 19; HK-GS-Rössner / Kempfer, StGB, § 46, Rn. 12; with the same result BVerfGE 45, 187 (260).
(22). Cf. Fischer, StGB, § 46, Rn 3.
(23). *Ibidem*.
(24). Sec. 47 Criminal Code.
(25). Cf. HK-GS-v. Danwitz, StGB, Vor § 38, Rn. 6.
(26). *Ibidem*, Rn. 7.
(27). *Ibidem*.
(28). Cf. LK-Gribbom, § 56c, Rn. 1; HK-GS-Braasch, StGB, § 56c, Rn. 1; NK-Ostendorf, § 56c, Rn. 1.
(29). For example cf. Schlömer, „Die Anwendbarkeit des elektronisch überwachten Hausarrests als Bewährungsbeweisung nach geltendem Recht", In: *Bewährungshilfe*, BewHi 1999, 31; Bammann, „Anwendbarkeit des elektronisch überwachten Hausarrests in Deutschland?", JA 2001, 471; HK-GS-Braasch, StGB, § 56c, Rn. 1; Fischer, StGB, § 56c Rn. 6; NK-Ostendorf, § 56c, Rn. 1.
(30). Sec. 59 Criminal Code.
(31). Cf. HK-GS-v. Danwitz, StGB, Vor § 38, Rn. 17.
(32). Sec. 60 Criminal Code.
(33). Cf. HK-GS-v. Danwitz, StGB, Vor § 38, Rn. 22.
(34). Cf. *Ibidem*, Rn. 23.

(35). Cf. *Ibidem*, Rn. 25.
(36). Cf. *Ibidem*.
(37). Statistische Bundesamt, „Bestand der Gefangenen und Verwahrten in den deutschen Justizvollzugsanstalten – 31.03.2016“, 09.08.016, Available at: https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/BestandGefangeneVerwahrte.html
(38). *Ibidem*.
(39). Institute for Criminal Policy Research, „World Prison Brief“, Available at: http://www.prisonstudies.org/country/schleswig-holstein
(40). *Ibidem*, Available at: http://www.prisonstudies.org/country/bayern
(41). *Ibidem*, Available at: http://www.prisonstudies.org/country/brandenburg
(42). *Ibidem*, Available at: http://www.prisonstudies.org/country/bremen
(43). Dünkel F., "Strafvollzug in Deutschland – rechtstatsächliche Befunde“, 08.02.2010, Available at: http://www.bpb.de/apuz/32967/strafvollzug-in-deutschland-rechtstatsaechliche-befunde?p=all
(44). Statistische Bundesamt, „Strafvollzug – Demographische und kriminologische Merkmale der Strafgefangenen zum Stichtag 31.03.“, 29.06.2016, Available at: https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafvollzug2100410157004.pdf?__blob=publicationFile
(45). *Ibidem*.
(46). Meyer S., "BAG-S-Sonderauswertung: Lebenslagen straffällig gewordener Menschen“, Available at: http://www.bag-s.de/fileadmin/user_upload/PDF/sonderauswert.pdf.
Other studies have the same results. Within this context Laubenthal points: „Though prisoners have educational and vocational deficits in disproportionate frequency, this should not lead to the mono-causal interpretation that a lack of education is the cause of delinquency.“ (Laubenthal K., *Strafvollzug*, Springer-Verlag, Berlin, Heidelberg, 2011, p. 253).
(47). Cf. *Ibidem*.
(48). Cf. *Ibidem*.
(49). Heimerdinger A., „Alkoholabhängige Täter: justizielle Praxis und Strafvollzug“, 2006, Available at: http://www.krimz.de/fileadmin/dateiablage/E-Publikationen/kup52.pdf, p. 91.
(50). Laubenthal, *Strafvollzug*, Springer-Verlag, Berlin, Heidelberg, 2011, p. 351.
(51). *Ibidem*.
(52). Cf. *Ibidem*.
(53). Bundesministerium des Innern; Bundesministerium der Justiz, "Zweiter Periodischer Sicherheitsbericht“, 2006, Available at: https://www.bmi.bund.de/SharedDocs/Downloads/DE/Veroeffentlichungen/2_periodischer_sicherheitsbericht_langfassung_de.pdf?__blob=publicationFile, p. 603.
(54). Heinz Schöch K., „Strafvollzug – Eine Einführung in die Grundlagen“, UTB, Heidelberg, 2003, p. 71.
(55). Cf. *Ibidem*.
(56). Wirth, "Gewalt unter Gefangenen. Kernbefunde einer empirischen Studie im Strafvollzug des Landes Nordrhein-Westfalen.“, *Bewährungshilfe*, 54, 2/2007, pp. 185-206.
(57). Cf. *Iibidem*, p. 189.
(58). Cf. *Ibidem*, p. 191.
(59). *Ibidem*, p. 205.
(60). Bundesministerium des Innern; Bundesministerium der Justiz, "Zweiter Periodischer Sicherheitsbericht“, 2006, Available at: https://www.bmi.bund.de/SharedDocs/Downloads/DE/Veroeffentlichungen/2_periodischer_sicherheitsbericht_langfassung_de.pdf?__blob=publicationFile, p. 617.
(61). Walter J., "Minoritäten im Strafvollzug", Available at: http://www.bpb.de/apuz/32979/minoritaeten-im-strafvollzug?p=all
(62). Cf. *Ibidem*.
(63). Laubenthal, *Strafvollzug*, Springer-Verlag, Berlin und Heidelberg, 2011, p. 194.
(64). Cf. *Ibidem*.
(65). Cf. *Ibidem*.
(66). *Ibidem*, p. 195.
(67). Cf. *Ibidem*, p. 199.
(68). Cf. *Ibidem*, p. 579.
(69). ECJ judgement of 17.07.2014 in the case C-474/13.
(70). ECJ, Press release No. 105/14, http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-07/cp140105en.pdf
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Misure alternative alla detenzione e promozione dei diritti tra prossimità e sollecitudine

Mesures alternatives à l'incarcération et promotion des droits entre proximité et sollicitude

Alternative measures to detention and promotion of the rights between proximity and concern

Roberta Bisi[•]

Riassunto
I percorsi che portano ad usufruire di misure alternative alla detenzione sollecitano riflessioni circa l'importanza delle relazioni, dei processi ed anche delle modalità di costruzione degli interventi. Pertanto, è oltremodo necessario che, grazie a comparazioni verificate in altri Paesi e il progetto europeo di ricerca al quale è dedicato questo numero della Rivista ne è un esempio, vengano formulate e trasferite sul piano operativo contenuti e proposte che dovranno scaturire ed essere rilevate con iniziative di studio, di ricerche, di verifiche e di sperimentazioni poiché l'esigenza di libertà, che è alla base della detenzione, pone problemi di fondo e ne sollecita soluzioni, trattandosi di beni raramente e adeguatamente recuperabili o ricostruibili in pieno.

Résumé
Les parcours qui conduisent à bénéficier de mesures alternatives à l'incarcération sollicitent des réflexions sur l'importance des relations, des processus, mais aussi sur les modalités d'élaboration des interventions. Par conséquent, grâce aux comparaisons avec d'autres pays, et au projet de recherche européen auquel ce numéro de la « Revue de Criminologie, Victimologie et Sécurité » est consacré, il est plus que nécessaire que les propositions et les suggestions formulées soient mises en œuvre. Ces dernières devront être élaborées à partir d'études, de recherches, de vérifications et d'essais puisque l'exigence de la liberté, qui est à la base de l'incarcération, pose des problèmes majeurs et demande des solutions, s'agissant de biens rarement et adéquatement récupérables ou pouvant être pleinement reconquis.

Abstract
The routes leading to benefit from alternative measures to detention encourage to reflect on the importance of those relationships and procedures involved in the development of the relevant required interventions. Thanks to the comparisons made in other countries (and the European research project examined in this journal issue is an example) it is absolutely necessary to adopt and implement appropriate proposals and valid initiatives analysed through a specific research in order to highlight the possible solutions regarding the need for freedom which is a basic element in a detention situation, as this right is rarely recoverable.

Key words: alternative measures to detention; Italy; relationships; freedom; rights.

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1. Un idoneo percorso entro un adeguato contesto.

I percorsi che portano ad usufruire di misure alternative alla detenzione sollecitano riflessioni circa l'importanza delle relazioni, dei processi ed anche delle modalità di costruzione degli interventi, rivolti ad una circolarità comunicativa che può divenire occasione per nuove combinazioni creative e produttive di senso in cui la valenza interattiva e quindi dinamica lascia aperti ampi spazi alla relazione fra il soggetto e il suo contesto.

Si tratta di percorsi dove acquisisce importanza l'intreccio di relazioni sociali poiché è ovvio che una matura ed efficiente integrazione della personalità non si raggiunge solo alimentando potenzialità innate, bensì richiede un'idonea direzione entro un adeguato ambiente interpersonale.

Il problema di accertare quale sarà il comportamento futuro di un autore di reato, cioè se il provvedimento adottato nei suoi confronti contribuisca alla sua rieducazione e assicuri la prevenzione del pericolo che egli commetta altri reati, è un'annosa questione e riguarda le ricerche scientifiche sulla personalità. Se queste ricerche avessero un esito positivo, il risultato finale consisterebbe nella capacità di predire con esattezza le irregolarità della condotta umana, esercitando un controllo sul comportamento stesso. In realtà decisioni simili non possono essere prese facilmente dato che esse richiedono l'analisi delle alternative realisticamente possibili nella situazione in cui il soggetto agisce, individuando le variabili esterne che possono influire sui risultati dell'azione e le conseguenze delle diverse alternative in differenti campi, sia nel breve che nel lungo periodo. Occorre inoltre precisare che esse divengono particolarmente difficili allorché si avvalgono di un'informazione scarna, di criteri e modelli ambigui e quando implicano conseguenze molto serie (1).

La compresenza di questi fattori riduce notevolmente la possibilità di pervenire ad una decisione ragionevole, intendendo con tale termine una decisione maturata in seguito ad un accurato processo di ricerca finalizzato alla raccolta di dati e di informazioni utili per stabilire principi e procedure operative consoni al contesto in cui si agisce, in vista dell'organizzazione di tutti gli elementi disponibili al fine di attuare quanto si è in precedenza deliberato.

Tuttavia, è questa la precaria situazione che spesso si verifica allorquando i componenti del Tribunale di sorveglianza devono pronunciarsi sulla idoneità o meno del soggetto a godere della misura alternativa alla detenzione. L'informazione, infatti, in queste occasioni è spesso insufficiente oppure inadeguata; il concetto di "rieducazione" è estremamente ambiguo e non fornisce certo un valido criterio-guida di condotta riproponendo, al contrario, il dibattito tra dottrine preventive e dottrine retributive della pena a seconda che per rieducazione si intenda il ravvedimento del soggetto, l'acquisizione di una "nuova moralità" o, invece, una buona condotta esteriore, il mero rispetto della legge penale (2).

Infine, le conseguenze della decisione sono indiscutibilmente molto serie poiché l'accoglimento o meno dell'istanza significa, spesso, per il soggetto che la presenta, intraprendere un cammino verso la libertà oppure prolungare il periodo di reclusione, mentre per coloro che hanno il compito di giudicare, l'adozione di un provvedimento può permettere di reinserire nella comunità un responsabile cittadino oppure una persona che arrecherà nuovamente offesa alla società, commettendo reati.

Richiamando la necessità di sempre maggiore sicurezza, l'ordinamento penitenziario italiano è stato integrato da norme che hanno limitato l'applicabilità delle misure alternative alla pena. Il carcere ha visto un aumento di presenze al suo interno e un parallelo peggioramento della situazione detentiva al punto che la Corte Europea dei Diritti dell'Uomo ha condannato l'Italia e ha imposto al nostro Paese l'adozione di misure strutturali finalizzate a ripristinare condizioni di legalità nell'esecuzione penale detentiva (3).

Le modifiche legislative adottate successivamente alle sentenze europee hanno contribuito a rimuovere alcuni degli ostacoli che impedivano l'accesso alle misure alternative al carcere: il numero dei detenuti è così passato dai 68.258 del giugno 2010 ai 54.072 del giugno 2016 (4). E' vero, tuttavia, che coloro che restano in carcere vi rimangono nonostante le nuove modalità di ammissione previste per usufruire delle misure alternative alla detenzione e le opportunità create dal processo di riforma normativa, successiva al richiamo della Corte Europea dei Diritti dell'Uomo.

Pertanto, chi poteva disporre di risorse personali e sociali per accedere alle misure alternative è riuscito ad uscire, mentre tutti gli altri restano in carcere in attesa del fine pena, nell'impossibilità di usufruire di percorsi alternativi per mancanza di risorse personali, sociali, economiche. Si ripropone, in tali situazioni, la medesima difficoltà che si incontra nell'ambito della devianza minorile al cui interno coesistono spesso due gruppi di utenti: un primo più fortunato, costituito da soggetti che, avendo commesso reati episodici di non particolare gravità, gode di trattamenti indulgenziali, quali la "irrilevanza del fatto" e la "messa alla prova", ed un secondo, espressione di ceti marginali e culturalmente deprivati, nei cui confronti l'unica risposta rimane il carcere.

Per quanto riguarda le misure cautelari accade poi che i minori appartenenti a quest'ultima fascia quasi mai sono ritenuti meritevoli di esperienze diverse dalla custodia in carcere ed anzi non è infrequente che siano sottoposti a carcerazioni preventive talora superiori a quelle cui sono assoggettati i maggiorenni colpevoli di analoghi reati. Questa prassi troverebbe supporto nell'art.19, secondo comma, del D.P.R. 448/1988 ove si dice che nel disporre le misure cautelari il giudice, oltre che dei criteri indicati nell'art.275 del c.p.p. per gli adulti, deve tener conto "dell'esigenza di non interrompere i processi educativi in atto". In altri termini, qualora il nucleo familiare e sociale si rilevasse inidoneo, non si potrebbero adottare misure favorevoli al minore, non essendovi in atto alcun processo educativo (5). Pertanto, risulta difficile e forse anche paradossale formulare proposte circa la responsabilizzazione dei minori, ma anche degli adulti autori di reato, sprovvisti di adeguate risorse personali e sociali, se non si tiene conto delle diverse situazioni ambientali in cui queste persone sono costrette a vivere, condizioni che a volte recano grave pregiudizio alla libertà di scelta di questi soggetti.

Le istituzioni del lavoro sociale dentro e fuori il contesto penitenziario devono affrontare la necessità di avvicinarsi maggiormente agli utenti. In questa prospettiva, il lavoro sociale non può limitarsi a collocare il proprio destinatario in una classe di beneficiari, ma deve ambire ad intraprendere con lui un'azione condivisa e personalizzata. In altri termini, è quindi nel campo privilegiato delle relazioni interpersonali, più che nell'applicazione universale di una legge che si determina l'intervento sociale anche a favore di

coloro che potranno usufruire di misure alternative alla detenzione.

A questo proposito, anche per quanto concerne altre realtà penitenziarie quali, ad esempio, quella statunitense, si ribadisce da più parti la necessità di interventi che prevedano una formazione professionale qualitativamente significativa poiché quest'ultima, unitamente al lavoro, che dovrebbe essere disponibile per tutti i detenuti, rappresenterebbe senz'altro un sistema costoso, ma esso potrebbe rivelarsi vantaggioso poiché avrebbe elevate probabilità di far diminuire la recidiva. Si sottolinea inoltre come gli Stati Uniti non abbiano tanto un problema di carcerazione quanto piuttosto un problema di criminalità la cui unica risposta viene trovata nella possibilità di far leva sulla famiglia, offrendo validi supporti a quelle che versano in situazioni difficili, in particolare tra la popolazione di colore (6).

E' evidente che la possibilità di riuscire a creare un sistema integrato di lavoro e formazione, caratterizzato da adeguati servizi alla persona, tali da renderla attivabile, adattabile e occupabile (7), deve riguardare anche la popolazione detenuta, al fine di ridurne la recidiva, mediante un inserimento nella società esterna e nel mercato del lavoro. La Corte costituzionale ha ritenuto assolutamente prevalenti le finalità da raggiungere mediante il lavoro e cioè 'la redenzione ed il riadattamento del detenuto alla vita sociale; l'acquisto o lo sviluppo dell'abitudine al lavoro e della qualificazione professionale che valgono ad agevolare il reinserimento nella vita sociale'. Pertanto, vi è l'assoluta necessità di una consistente riforma dell'impianto normativo di riferimento, in materia di lavoro dei detenuti e degli internati che dovrebbe tendere al superamento delle seguenti criticità: " a) ambiguità della qualificazione giuridica e funzionale della fattispecie, specie con riferimento al lavoro alle dipendenze dell'Amministrazione penitenziaria; b) razionalizzazione della disciplina del lavoro penitenziario, anche alle dipendenze del datore di lavoro esterno, dopo le modifiche legislative successive all'O.P., ivi comprese quelle rivenienti dal diritto internazionale; c) sottostimata centralità del lavoro quale elemento essenziale del trattamento rieducativo […], tanto da indurre la Corte costituzionale ad affermare che il lavoro 'si pone come uno dei mezzi di recupero della persona, valore centrale per il nostro sistema penitenziario non solo sotto il profilo della dignità individuale ma anche sotto quello della valorizzazione delle attitudini e delle specifiche capacità lavorative del singolo'" (8).

2. Registri di competenze.

In tal senso la relazione d'aiuto dovrà fare emergere registri di competenze in cui troveranno spazio la capacità di saper sospendere il giudizio, l'adozione di un atteggiamento comprensivo e il saper stare nel particolare senza trascurare la regola (9).

Per quanto concerne la capacità di saper sospendere il giudizio, quest'ultimo spesso può rappresentare una minaccia che scalfisce la residua stima di sé della persona sottoposta a misura alternativa. La sospensione del giudizio esprime, infatti, un senso di attenzione verso la persona che potrà favorire l'emergere progressivo di fiducia da parte dell'utente nei confronti dell'ambiente.

L'adozione di un atteggiamento comprensivo dovrebbe concretizzarsi nell'assunzione di una costante attenzione da parte dell'operatore nei confronti delle biografie personali e questo lavoro di scambio e di ricostruzione è un mezzo fondamentale per ripristinare un senso di fiducia, non considerando soltanto la biografia come una specie di aneddoto, ma come elemento che ridona

valore alla persona, favorendo quello scambio che è strettamente correlato alle posizioni occupate dai partecipanti medesimi nel contesto all'interno del quale agiscono (10). Secondo Bourdieu, infatti, il principio di efficacia della parola non risiede nella sua sostanza linguistica e soltanto il carattere artificioso di esempi tratti dalla loro situazione concreta può far credere che gli scambi simbolici possano ridursi a rapporti di mera comunicazione. In realtà, il potere delle parole deriva dall' adeguatezza tra il ruolo sociale di chi enuncia e l'enunciato: un discorso non può avere alcuna autorevolezza se non è pronunciato dalla persona legittimata a farlo in una situazione legittima, dinnanzi ad interlocutori legittimi. In tal senso, l'azione esercitata dall'oratore sul suo uditorio non è di ordine linguistico, bensì sociale (11).

I punti fondamentali che devono essere affrontati nell'esplorazione biografica saranno, pertanto, quelli ritenuti utili "per descrivere e comprendere, in senso propriamente ermeneutico, il complesso, intricatissimo insieme di rapporti intercorrenti tra la biografia di un individuo, le caratteristiche di base della sua personalità – ammesso che sia possibile distinguere tra caso e necessità – e il gruppo familiare di origine, gli altri gruppi primari cui ci si può, più o meno stabilmente, legare e infine il quadro globale della più ampia società, con il suo mondo normativo e le sue strutture istituzionali" (12). Infine, stare nel particolare senza trascurare la regola: si tratta di un livello di competenza che richiede di sapere armonizzare la capacità di sospendere il giudizio e l'adozione di un atteggiamento comprensivo con le esigenze generali del servizio e la dimensione impersonale dell'istituzione. In altri termini, un'attenzione ravvicinata alla persona con il suo trattamento generale, un registro di coinvolgimento della persona ed un altro che se ne distanzia mediante un processo di generalizzazione del suo caso.

Evidentemente, questo processo non può avvenire in modo separato dalla società civile: infatti, come si apprende dagli stati generali dell'esecuzione penale, in particolare dal tavolo 12, dedicato a Misure e sanzioni di comunità (13), vi è la necessità di incrementare, nell'opinione pubblica, la consapevolezza che il sistema delle pene non detentive tutela la sicurezza delle comunità, facendo diminuire il rischio di recidiva. Si raccomanda altresì una riforma dell'art.17 o.p. e del 120 del Regolamento del 2000 (D.P.R. 30 giugno 2000, n.2 30) prevedendo il coinvolgimento del volontariato nell'esecuzione penale esterna in modo da superare l'ostacolo che oggi impedisce appunto l'accesso della società civile alla diffusa collaborazione con l'Ufficio per l'Esecuzione Penale Esterna. Si raccomanda inoltre la predisposizione di Programmi di trattamento educativi individualizzati con il coinvolgimento della società civile locale anche attraverso volontari formati e motivati, la previsione di sistemi di reciproco aiuto, il coinvolgimento della famiglia di origine, il lavoro. Si ribadisce di favorire il consenso dei soggetti ammessi a sanzioni di comunità, in funzione di percorsi responsabilizzanti e idonei a ricostruire il patto di cittadinanza rotto con la commissione del reato, favorendo anche percorsi di giustizia riparativa.

Diviene quindi di fondamentale importanza sottolineare come la risocializzazione del cittadino-detenuto passi anche attraverso un lavoro comune delle professionalità nate con la riforma penitenziaria ed ancora divise da competenze, trattamento giuridico, responsabilità diverse o addirittura contrastanti. Il loro ruolo, elemento che collega l'individuo, in quanto soggetto agente, alla società fa parte di una situazione di interazione, cioè

di un sistema di comunicazione che, per qualificarsi come tale, deve essere provvisto di meccanismi di regolazione. Ancora oggi, questa chiarezza circa le varie categorie di ruoli, pur avendo una rilevante importanza, non è adeguatamente perseguita, creando non poche difficoltà alla professionalità.

Quest'ultima, intesa come capacità-competenza nel ruolo è un processo continuo che richiede il padroneggiamento sempre più raffinato della reciprocità, il mantenimento del compito di autoidentificazione, la conservazione dell'identità dell'io, pur nell'ambito di una differenziazione costante e continua (14).

Tali riflessioni concernenti le professionalità in ambito penitenziario si correlano anche alla possibilità di saper immaginare nuovi modelli di detenzione per i quali risulta imprescindibile affrontare il tema della maggiore responsabilizzazione del detenuto attraverso processi di graduale autonomizzazione, di composizione dei conflitti, nuove forme di rappresentanza, interventi sul procedimento disciplinare e forti investimenti culturali anche sul versante del linguaggio.

L'obiettivo principale è quello di adottare un modello di detenzione, rispetto all'attuale ancora sostanzialmente caratterizzato da passività e segregazione, che sia in linea, oltreché con i parametri costituzionali (finalità rieducativa della pena e sua umanizzazione), con le migliori prassi in ambito europeo ed al fine di orientare l'azione congiunta degli operatori verso un nuovo modello caratterizzato da attività ed integrazione, socialità e condivisione, responsabilità ed autonomia (15).

Bisognerebbe tener presente ed interrogarsi sulle conseguenze di politiche securitarie troppo spesso demagogiche volte a colpire più che i reati precise tipologie di autori degli stessi (recidivi, immigrati, tossicodipendenti), sintomatiche del fallimento di politiche sociali inclusive.

Per poter giungere ad un'efficace azione di promozione e di tutela delle persone sottoposte a trattamento risocializzante sono allora indispensabili risposte strettamente giuridiche, ma anche, e forse soprattutto, è necessario disporre di una coscienza della responsabilità e dei doveri che chiama in causa la testa e il cuore degli uomini. L'idea qui, con riferimento a Margalit (16), è quella di una società decente, una società che non ha perduto il suo senso della vergogna e i cui membri si vergognano di atti di umiliazione e di abuso. In tale prospettiva assume una particolare importanza la necessità di comunicazione e di maturazione delle conoscenze in modo tale che dalla mobilitazione di queste ultime possano scaturire modalità operative che, fondandosi sull'analisi della situazione specifica concreta, siano appropriate e consone al particolare contesto entro cui operano.

Un simile modo di operare richiede la capacità di saper analizzare tutte le risorse di tipo personale e collettivo senza peraltro trascurare quelle legate al sistema organizzato dei servizi e alle reti informali di aiuto, costituite queste ultime da quell'insieme di competenze personali e iniziative che un individuo o un gruppo mettono in gioco allorché, incontrando una persona che manifesta un bisogno, si preoccupano di aiutarla ad affrontarlo e a risolverlo attraverso gradi diversi di organizzazione informale.

A tal fine diviene rilevante l'analisi del contesto in cui un determinato evento deve essere realizzato, partendo dal presupposto che qualsiasi tentativo di modificare l'esistente può essere avviato soltanto se ci si può avvalere di una corretta analisi della realtà che si intende trasformare, non dimenticando, tuttavia, che i fatti divengono "dati" in quanto percepiti, organizzati, elaborati secondo una teoria.

Il percorso che può essere seguito è riconducibile ai quattro processi ben evidenziati da Miller e Rollnick (17): stabilire una relazione, focalizzare, evocare e pianificare

Utilizzando le abilità di base del colloquio quali l'ascolto riflessivo, le domande aperte, i riassunti, il sostegno e lo scambio di informazioni, si fanno emergere le motivazioni al cambiamento e si riuniscono le idee e i sentimenti circa le modalità per realizzarlo.

Il processo evocativo si sviluppa, pertanto, attraverso modalità che contribuiscono a far emergere dalla persona il proprio punto di vista sul comportamento e sui fatti che sono stati focalizzati. Pianificare comporta poi l'impegno al cambiamento e alle strategie di azione e la persona deve sentirsi affiancata mentre sceglie le azioni da compiere per mettere in atto il suo processo di cambiamento, di inizio di una nuova fase della vita (18).

3. Il rapporto libertà-sicurezza.

Si tratta di partire dal presupposto che è necessario riconoscere all'individuo una sua identità come singola persona e ciò significa attualizzare concretamente il principio ed il valore di cui è portatore.

In tale accezione il concetto di identità trova la sua piena realizzazione sul piano delle pratiche di vita attraverso le quali l'uomo si mette in relazione con il mondo mediante il suo conoscere e il suo agire. Il senso della nostra individualità e unicità personale può essere allora considerato il prodotto dell'equilibrio dinamico tra la "tendenza verso l'esterno", volta a cogliere il nostro essere parte di un tutto, e la "tendenza verso l'interno", volta a percepire la totalità del nostro essere una parte. Pertanto, l'interazione diretta e simbolica con l'esperienza degli altri diviene il processo basilare capace di trasformare il divenire soggettivo in un'operazione incessante di assimilazione di esperienza personale (19).

La percezione della identità personale, corrispondente poi al senso stesso della realtà, trova quindi negli altri la possibilità di esistere e, al contempo, scopre nel processo di differenziazione dagli altri il presupposto, parimenti necessario, per poter giungere ad avere un'esperienza di sé.

Il rapporto dell'Io con se stesso è sempre anche un rapporto con le cose e con gli altri. Di questo rapporto tutti noi, ma alcune persone, in misura maggiore rispetto ad altre, portiamo i segni, le difficoltà e le ferite poiché l'unità dell'Io non è mai assoluta e il rapporto con gli altri è spesso problematico.

La prospettiva dalla quale osservare rappresenta un ulteriore fattore critico nel senso che ciò significa presumere che la competenza, l'efficacia e la correttezza di un intervento risultano valutabili da testimoni che non sono imparziali, ma che hanno interessi ed aspettative precisi. In altri termini, nella valutazione delle azioni di coloro che occupano una particolare posizione specialistica o professionale che li legittima ad intervenire sulla realtà sociale, e nel caso specifico, su una popolazione come quella penitenziaria, è importante accordare la massima attenzione alla possibilità di soddisfare i bisogni e le aspettative presenti negli ambiti in cui agiscono. E' questa possibilità, infatti, che viene sottoposta ad analisi critica da parte di soggetti dotati di un'autonoma capacità d'interpretazione.

Ci si trova di fronte pertanto ad una modificazione di rapporti sociali in cui la presenza di rischi che non possono essere eliminati è destinata a mettere in discussione il rapporto "libertà-sicurezza" e a rendere sempre più difficile l'arduo compito di arrestare la crescita di rischi senza limitare le nostre libertà più preziose. E' evidente che queste

considerazioni non possono fornire soluzioni immediate, ma credo debbano essere tenute presenti allorquando ci si occupa del posto che può essere riservato alla persona, anche quella condannata per delitti efferati, nella società attuale: l'impegno dovrà essere quello, infatti, di valorizzare ed affermare la dignità dei sentimenti e delle relazioni affettive, utili per ridare senso alla propria appartenenza sociale, nel tentativo di conciliare le ragioni del cuore e le passioni della ragione.

Attività, azioni concrete, quindi un fare che, per risultare soddisfacente, non può mai essere disgiunto dallo stare. Lo stare col pensiero per poi fare è una possibilità che abbiamo per trasformare le relazioni e che ci riporta ai fondamenti della nostra socialità e del vivere in comunità nella consapevolezza che sarebbe senz'altro più facile procedere sul vecchio percorso anziché riattivare e prestare ascolto all'autenticità sollecitata dalle esperienze traumatizzanti e dolorose che sconvolgono le aspettative personali (20).

I percorsi psicologici di risalita e di recupero possono essere alternativamente lenti o rapidi e ciò è strettamente correlato alle persone, ai momenti, alle fasi della vita. E' per questa ragione che anche la più grande delle catastrofi che può capitare all'uomo, essa, per non spingere all'autoeliminazione, deve fornire l'occasione per riflettere sulla propria vulnerabilità confidando sull'aiuto dell'ambiente esterno che dovrà fornire gli elementi necessari alla realizzazione di un nuovo inizio. Del resto il rapporto che unisce la tutela della dignità personale e l'attenzione alle forme della privazione della libertà è un rapporto inscindibile tanto che "anche gli autori critici di un concetto di dignità come 'dote' di ciascuno e che tendono invece a individuare la dignità come meta da riconquistare attraverso azioni positive che risarciscano così per quella dignità che si presume perduta con il reato, convengono che il sistema detentivo debba offrire possibilità effettive per tale riconquista, attraverso un percorso di autodeterminazione, di diritti e di doveri, attraverso cioè un sistema effettivo di 'trattamento'" (21).

E' noto, infatti, che nei confronti di alcune fasce di popolazione opera sovente un meccanismo di attribuzione sociale e di inquadramento che tende a porre in evidenza le caratteristiche negative a scapito di quelle positive in soggetti che appartengono a determinati gruppi sociali, delineandoli come intrinsecamente devianti e, pertanto, capaci di minacciare la vita della comunità. L'amplificazione mediatica del gesto delittuoso contribuisce poi a rendere più solido il pregiudizio e all'adozione di strategie volte a neutralizzare il soggetto ritenuto sospetto. Per essere sospetti, poi, come ricorda Castel, non è più necessario manifestare sintomi di pericolosità o di anomalia, è sufficiente possedere qualche particolarità che i responsabili della definizione di una politica preventiva hanno costruito in fattori di rischio. Le moderne ideologie della prevenzione "sono sovrastate da una grande 'rêverie' tecnocratica, razionalizzatrice, del controllo assoluto dell'accidente concepito come irruzione dell'imprevisto" (22). Pertanto, è oltremodo necessario che, grazie a comparazioni verificate in altri Paesi e il progetto europeo di ricerca al quale è dedicato questo numero della Rivista ne è un esempio, vengano formulate e trasferite sul piano operativo contenuti e proposte che dovranno scaturire ed essere rilevate con iniziative di studio, di ricerche, di verifiche e di sperimentazioni poiché l'esigenza di libertà, che è alla base della detenzione, pone problemi di fondo e ne sollecita soluzioni,

trattandosi di beni raramente e adeguatamente recuperabili o ricostruibili in pieno.

E' comunque necessario aver presente che i mutamenti di conoscenze e di opinioni, di valori e di modelli non avvengono in modo frammentario e indipendente l'uno dall'altro, bensì interessano la struttura dell'intera vita del soggetto nel gruppo. Da questo punto di vista, come ben evidenziato da Lewin, "anche la rieducazione di un falegname affinché diventi orologiaio, non consiste semplicemente nell'insegnare al falegname una serie di nuove esperienze in relazione alla fabbricazione degli orologi, ché, prima di diventare un orologiaio, egli dovrà acquisire un nuovo sistema di abitudini, di modelli e di valori, quelli appunto che sono propri del modo di pensare e del comportamento di un orologiaio" (23). E', infatti, soltanto legando il proprio comportamento a qualcosa di ampio e di sostanziale, come è la cultura di un gruppo, che l'individuo può ancorare stabilmente le nuove credenze e renderle impermeabili a tutte le oscillazioni dovute agli stati d'animo e alle influenze cui, come individuo, è sottoposto.

Dalle lacerazioni, dalle fatiche e ferite profonde si può allora sperare che nascano nuovi racconti di vite che, opportunamente ed adeguatamente sostenute, riescano a resistere, a reagire, a tessere nuovi legami e a recuperarne altri. E' allora evidente che qualsiasi intervento settoriale ha scarse probabilità di successo se non è affiancato da progetti di più ampio respiro, che mirino all'instaurarsi di una cultura che ponga in primo piano quegli universali di convivenza civile sulla cui assenza si sviluppano gli incentivi alla sopraffazione.

Ciò significa forse prendere le distanze anche da quei modelli fondati esclusivamente sulla logica preventiva e predittiva in cui non importa tanto la motivazione, la dinamica del gesto o il contesto entro cui esso si realizza, quanto piuttosto il singolo gesto, singolarmente considerato. In altri termini, la logica predittiva è quella che focalizza l'attenzione sulla capacità di intervenire in anticipo, impedendo il verificarsi di un evento, cercando di allontanare dalla vista, credendo soprattutto di poter in tal modo evitare la dimensione riparativa che implica invece attenzione costante alle dinamiche che accompagnano i fenomeni.

E' stato, infatti, sottolineato che la progressiva convergenza del tema della prevenzione con quello della sicurezza ha contribuito alla scomparsa di quelle interazioni significative che si realizzano nel sociale (24).

Questo non significa che non ci siano problemi e situazioni che richiedono interventi che si collocano a metà strada tra sociale e sanitario, significa piuttosto che non è tanto importante incontrare qualcuno che ci dica in modo preciso come possiamo risolvere il nostro problema, a volte anche prospettandoci promesse vuote e illusorie, quanto piuttosto qualcuno che ci riconosca e che sia disposto ad intraprendere con noi un cammino che si snoda oltre le rassicuranti certezze (25).

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Is it or is it not necessary to apply alternative detention methods in Romania? (1)

Est-il ou pas nécessaire de promouvoir le recours aux mesures alternatives à l'incarcération en Roumanie ?

Francisc Csimarik •

Riassunto
L'articolo, partendo da una breve analisi della situazione degli istituti penitenziari in Romania, giunge alla conclusione che, per un utilizzo efficace e proficuo delle misure alternative alla detenzione, è necessario poter seguire nel tempo l'evoluzione dei modelli di buone pratiche ed avere il pieno coinvolgimento delle istituzioni statuali.

Résumé
À partir d'une brève analyse sur la situation des prisons en Roumanie, cet article conclut qu'afin d'assurer une utilisation efficace et fructueuse des mesures alternatives à l'incarcération, il est nécessaire de suivre dans le temps l'évolution des modèles de bonnes pratiques et d'avoir l'engagement intégral des institutions étatiques.

Abstract
Starting from a brief analysis of the prisons situation in Romania, this article concludes that, in order to ensure effective and successful use of the alternative detention methods, it is necessary to follow the evolution of best practices models and to have the commitment of government institutions.

Key words: alternative detention methods; Romania; best practices.

1. The situation of people held in detention in Romania.

In July 2016 there were a series of protests manifested in Romanian prisons, as the demands started in the North of the country, in Iasi, after which they extended in Botosani, Tulcea, Bistrita, Constanta, Miercurea Ciuc, Arad, Oradea, Vaslui, Giurgiu, Rahova… The protesters burned matrasses and clothes they throw out the windows of their cells, they climbed on the buildings and some of them refused food… The movement was stopped by the public intervention of the Minister of Justice, Raluca Pruna who declared: "The protests are the results of an expectation that was fed by the imminence of legislative stipulations. I believe that as soon as I came out and explained that I, as a minister, will not suggest any measures under pressure, things settled down with the help of the National Administration of Prisons (ANP). When I say this I don't only refer to ANP, but to those from each and every prison who took the necessary measures in order to calm the protests supported in certain prisons".

The truth is that due to the poor conditions, there are prisoners who came to protest in forms that include self-mutilation, some of them even sowed their mouths with string after they were beaten by the authorities because they had the courage to speak up, others cut themselves up with glass or they beat nails in their heads. Crowdedness, the very

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small and rusty beds, only one toilet that had to be shared every day by tens of prisoners, are only part of the issues that prisons in our country face.

According to prisoners' complaints, some prisons are full of roaches, mosquitoes and bugs, the healthy prisoners are held together with the sick ones, some of them suffering from AIDS or other sexually transmitted diseases, prisoners who suffer from hepatitis work in the canteen. The risk of becoming severely sick is very high even when being consulted by a dentist, as prisoners claim that all the instruments are only washed in cold water. Regarding crowdedness, the data published in the report issued by the People's Attorney regarding the situation in the Romanian Penitentiary System are relevant: in the prison from Iasi, at the end of 2015, there were 1534 prisoners under a legal capacity of detention of 763 prisoners. In the building where there were prisoners of maximum security, each room had 33 square meters and there were 24-26 prisoners in each.

At the prison in Craiova there were 1174 prisoners at a legal capacity of 674 places (occupancy factor of 174%); there were 500 prisoners above the legal capacity of detention. After randomly visiting some rooms we noticed that the prisoners who were accommodated in bunk-beds on two and three rows. Regarding the used surface of the prison cells (without including bathrooms and the room for keeping food), in relation to the number of prisoners, after measurements, we came to the following conclusions:

- Women's section in open system – in the detention room no. E1.5, with a surface of 23 square meters, there were 23 prisoners, so that each prisoner had about 1 square meter.
- Section 3 preventive arrest – the detention room E3.23 – closed system, with a useful surface of 38.5 square meters, there were 27 prisoners, so that each prisoner had about 1.42 square meters.
- Section 4 – closed system, youth and transit – detention room no. E 4.25, with a useful surface of 20.6 square meters there were 10 prisoners, so that each prisoner had about 2.06 square meters.
- Section 5 – closed system – detention room 5.36, with a surface of 32.2 there were 20 prisoners, so that each prisoner had about 1.61 square meters.
- Section 6 B – maximum security system – detention room E6B.74, with a useful surface of 6.30 square meters, there were 3 prisoners, so that each prisoner had about 2.1 square meters.
- Section E7 – maximum security system, vulnerable non-smokers – detention room no. E7.101, with a useful surface of 11.75 square meters, there were 6 prisoners, so that each prisoner had about 1.95 square meters.
- Section 8A – closed system – detention room no. E8A.108, with a useful surface of 46.40 square meters, there were 38 prisoners, so that each prisoner had about 1.22 square meters.
- Section 8B – closed system – detention room E8B.113, with a useful surface of 32.00 square meters, there were 25 prisoners, so that each one had about 1.28 square meters.

At the Galati prison there were 979 prisoners on a legal capacity of 496 places (occupancy factor of 197.38%). The prison had 1081 beds. According to the information provided by ANP (form registered with the People's Attorney under no. 6362 in May 13th 2015), the number of places calculated according to European norms is 18 986, and the number of beds was 37 137 (4374 on one row, 15 494 on two rows, 17 269 on three rows).

The discontentment of prisoners according to the information communicated by ANP on May 13th

2015, during 2014-2015, there were 8508 requests, complaints, intimations. Among these, there were 1549 complaints focusing on the following:

- there is an over crowdedness on certain systems of the space, minimum air volume allocated to each prisoner, according to the system in which they have been sentenced and in some situations, some prisoners don't have their own beds;
- inhuman/degrading prison conditions, dangers (roaches, bugs, mice, rats);
- not observing the Deontology Code and Law no. 293/2004 regarding the Statutes of public clerks in the National Administration of Prisons, republished;
- having higher prices compared to the reference commercial ones. This aspect was noticed in a few prisons (for example: Aiud, Margineni, Slobozia), as it is shown in the specific chapter;
- not respecting certain rights (access to information of public interest, petitions, correspondence, walks, visits, shopping, food, medical assistance, hygienic products, etc.);
- aggressions/threats of prisoners upon others and aggressions/threats of personnel upon prisoners;
- non-inclusion in educational programs and psycho-social assistance;
- not observing the stipulations regarding selecting and allocating prisoners to productive activities, as in norming and respective assurance for benefits from these activities.

The impossibility of ensuring accommodation norms according to the Order of the Ministry of Justice no. 433/C/2010, cumulated especially with high temperatures, lead to tensions among prisoners, which lead to negative events, sickness and also many complaints based on detention conditions and implicitly over crowdedness and obtaining sentences towards Romania for the cases in CEDO (European Court of Human Rights), based on not observing these minimal conditions.

The Ministry admits the acute lack of qualified medical personnel and intents to employ very soon 81 physicians. Besides this, for the about 2600 prisoners with psychiatric diseases, there will be psychiatric wards.

The revolts were barely over and after about a month, employees' revolts started within the prisons in Romania. The main demand of ANP (the Prison Administration) employees were focused on the fact that they don't have the same wages rights as the employees in the system of defense and public order. According to the letter written to the Ministry, the representatives of the Union from ANP mentioned that the personnel from the prisons work in the same conditions that the Minister of Justice disapproves regarding the prisoners. However, there is no plan to improve work conditions for the personnel, although ANP took the responsibility through successive agreements to do that.

Currently, within the prison system in Romania, there are 1.5 million hours in overtime for the personnel, most of which are impossible to make up for due to the lack of personnel of 8000 employees, estimated by ANP through reports according to official personnel standards. As a consequence, the employees notified the Employer regarding their lack of agreement to exceed the 180 hours of annual overtime, and regarding the initiative under coordination and Union protection to refuse working overtime, expressed by all employees, actions that will get prisons stuck in the month of October of the current year.

2. Romania and the European Court for Human Rights.

In addition to the above presented , there are also the sanctions that Romania risks to receive from the European Court of Human Rights for the conditions that prisoners are kept in detention centers across the country. The current Minister of Justice has sent a letter to Strasbourg underlining these conditions, in order to postpone the decision regarding this situation in prisons.

Italy has been in the same situation, and the European Court for Human Rights made it pay 8 euros/day for each prisoner held in detention. This means that Italy is paying 78 million euros/year. For Romania, according the declaration made by Minister Raluca Pruna, even if the amount would be halved, and Romania would pay 4 euros, for the approximately 28 000 people who are held in prisons, Romania would have to pay approximately 80 million euros.

The Romanian Government wrote a letter through which took the responsibility to come up with an improvement plan for all prisons, but it is very clear that it cannot be done. The 8 month-period established by the Romanian authorities seems unachievable for the employees in the detention system.

The president of the national Syndicate for Works within Prisons declared: "improving the situation in Romania is almost impossible, it can at the most be postponed. No matter how much the Minister of Justice and the Government manages to postpone these fines, sooner or later we will find ourselves in this situation, because managing to come up with 10 000 places for detention in such a short time is absolutely impossible. This means 10 new prisons, which considering the value already set for the European standards, would amount to very high figures. Such a prison would cost approximately 500 million euros. European standards, even viewed in their basic form, focus on the surface allocated to each prisoner, of 4 square meters".

At the moment, the European Court for Human Rights has lots of cases in which the Romanian state is accused regarding bad detention conditions. The Court has over 1000 cases to review. Romania has already paid high amounts for these cases.

The European court for Human Rights might make Romania pay upon releasing the prisoners a compensatory amount of money for the bad conditions under which they have been imprisoned. We are talking about approximately 10 000 euros/prisoner for 3 years of imprisonment.

3. Probation system in Romania.

In the conditions mentioned, alternative measures to detention are more than welcome. The Department of Parliamentary Politics and Studies EU – section of legislative documentation within the Chamber of Deputies made an inventory of penal sanctions for not un-imprisoned criminals used in some of the European countries, members in the EU. We are talking about a synthetic presentation of punishments to be executed outside of prison and the way these could be applied in countries like France, Great Britain, Germany, Belgium, Finland, Sweden, Italy, the Czech Republic, Croatia, Ireland and Portugal.

The authors of the study identified two main categories of alternative non-custodial measures – some that imply a control of the defendants and some that do not involve this control. These measures are applied within certain conditions established by a judge and unlike the detention punishments, they lead to re-educating the criminal without isolating him from his family, allowing him

to improve his antisocial behavior and the mentality that motivated him to commit the crime he was sentenced for.

The conclusion of the study is that due to social and economic advantages it implies, non-comital penal punishments are a preferable alternative to imprisonment when we talk about less severe crimes and criminals who represent a low social risk. Administered mainly by probation services, alternative measures to imprisonment are a remedy for eliminating negative consequences of imprisonment and a consequence of evolution and humanizing of punishments.

More than two years ago, when we first started working on this European project ("Reducing Prison Population: advanced tools of justice in Europe"), alternative measures represented a brand new concept for the whole of the Romanian society. Enclosed in the New Penal Code, they represent an addition of good practices or the non-comital alternative measures, applied in more developed European countries. But, good intentions and all the documentation of the clerks in the Justice Ministry, mainly those who wrote the New Penal Code, are not applicable in sentences, but only with great hold-backs.

There are well-known cases in which there were sentences to prison for fathers who stole food of a few euros in value because they had no food for their children, mothers who stole bread or a hen for the same reasons or old people sentenced when they were over 65 years of age for violent crimes determined by conflicts regarding property rights. In none of the examples above, alternative punishments were not even tried, but people were condemned to long years of imprisonment.

Perhaps because in Romania, the concept of "the one who made a mistake must pay", comes from way back in the past, the Romanian society is not yet fully prepared to embrace alternative measures. Moreover, there is a lack of financial resources for the functioning of probation services, of non-involvement of NGOs in these cases, but also because of the lack of trust generated by corruption, favoritism in certain severe cases of corruption of well-known people, and we would like to give a few examples.

As it is already known, Romania is trying to align itself to everything that means a legislative system as dictated by the existing norms of the European Union. If we only look at the written documents, Romania has very good alternative measures. But, because of the lack of financial resources, probation services are in a critical situation. This is a un-natural situation due to the large amount of work reported by insufficient human resources, although dramatic consequences that result from this are many: illegal delays in applying court orders, low quality, lack of motivation, professional dissatisfaction, stress and chronic exhaustion. For example, at the beginning of 2016, in the records of the 42 probation services there were 53 009 cases instrumented by 324 employees (282 probation councilors and 42 bosses). In all services, bosses work alongside the employees, because the their workload exceeds the objective capacity of assimilation, and so the average number of cases within the country that a probation councilor is responsible for is very high, about 188 and it very slowly decreases due to the involvement of the managers, to 164.

Out of the 42 probation services, in 22 services, the average for councilor was 200 cases and in this critical overlook, there were even more critical elements: in 13 services, the average was 200-250 cases, in 7 services, the average was over 250 cases,

as for example in the counties of Alba, Braila, Gorj, Ilfov, Maramures, Mures and Suceava, and for Arad the average was over 300 cases and in Teleorman over 400.

A simple search on the site of the National Administration of Prisons for protocols, networking highlight the fact that for the tens of documents signed, only two were signed with religious organizations and make references to developing certain programs regarding the re-insertion in society of sentenced people or offering alternative solutions.

Precept Ministries (2) is the first organization we can find on the list of the National Administration of Prisons and it is actually a center for Bible studies, set up as a resting place, a spiritual establishment for camps, conferences and rest, where they teach computer courses, English, they hold conferences and seminaries. There is no reference to having programs of alternative programs for detention.

The second organization is also religions, Pentecostal, the Betesda Humanitarian Christian Association. We could not find any information on this organization either, to confirm the fact that they really develop alternative programs for detention. If we search the Internet for this organization reveals no results.

The only NGO that really has a collaboration with the probation service on a national level and that offers programs to people who are under the incidence of the service, is the Association for Promoting Communitarian Sanctions. The Association has workshops in which they work on old objects for home use and consequently the resulted objects are separately valued. Up to last year, APPSC had centers in a few cities in the country, but due to difficult financial situations, there are only two such locations left, in Brasov and Bucharest.

Regarding the lack of trust of the population or better said its reserve regarding alternative measures to detention, it is due to the media attention given to those called "luxury detainees". Especially people who were lately sentenced in Romania, who have been given all sorts of favorable circumstances both regarding home arrest and work for the community, measures for a lowered sentence, based on intellectual activities, the semi-open regime, etc. In all the cases that got the media attention, it has been discovered not only that these measures did not have a re-educational purpose for re-integration in society, but they have been deficiently applied, or even worse, based on suspicious cases of corruption. These aspects increased the lack of trust the society has towards any non-governmental organization, which would like to develop alternative programs. From the very beginning, such an organization would be suspected of favoritism.

There is no doubt, as one of the most important factors for putting alternative measures into practice is up to the personnel called to apply them, which means the clerks from the Ministry of Justice. This summer, the Ministry announced that it is analyzing the opportunity of the proposal of some legislative changes regarding alternatives to going to prison or conditional release as part of the plan of sustainable reduction of over-crowdedness and to improve detention conditions. There is an information and public consulting process that has been launched, and as a consequence the Minister of Justice awaits suggestions from the civil society in order to set up a package of integrated short-term, medium and long-term measures, which could lead to the reduction of over-crowdedness and to improve detention conditions. There is a focus on measures

for consolidating the infrastructure, improving life quality for those in detention, facilitating social re-integration, probation consolidation etc.

Reality shows that in Romania, for the alternative measures to detention to be effectively applied and to be successful, there needs to be an evolution in time and examples of good practices. If we talk about the non-governmental sector, for the beginning, we need information on the work methods that gave the real results (see the recovery programs of Comunità Papa Giovanni (3)).

There need to be experience exchanges and a better dissemination of information regarding these alternative programs. Of course, beyond determination, there must be a collaboration with the state and understanding the fact that a mad is recovered most of all as a gain for the society.

Notes.

(1). The article is based on information collected over the two-year duration of the project, from discussions with officials of the Ministry of Justice, and based on discussions with detainees.

(2). www.precept.ro

(3). http://www.apg23.org/it/carcere/comunita_educante/

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Alternatives to imprisonment in Scotland: policy, strategy and practice

Mesures alternatives à l'incarcération en Écosse : politique, stratégie et pratique

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Riassunto
La gamma delle iniziative introdotta dal governo scozzese e dalle agenzie partner, nazionali e locali, ha lo scopo di ridurre il ricorso alla detenzione di breve durata, di promuovere una risposta più efficace nei confronti delle cause del crimine e di ridurre la recidiva. Queste iniziative indicano che il governo ed i suoi partner riconoscono che, anche se di cruciale importanza, le misure in comunità da sole saranno inefficaci. Sono state previste anche altre risposte che focalizzano chiaramente l'attenzione sulla prevenzione, sulla riduzione delle disuguaglianze e sulle problematiche connesse all'infanzia e associate alla recidiva in età adulta. Viene prestata particolare attenzione all'importanza della tipologie di condanne disponibili e alle agenzie che lavorano in modo collaborativo e responsabile nella comunità, al fine di concentrarsi su obiettivi condivisi. Resta da verificare se, dopo anni di continuo aumento della popolazione carceraria, queste diverse misure possono dimostrare di avere un impatto sia sul ricorso alla custodia in carcere sia sui tassi di recidiva. Tuttavia, in conformità con la ricerca, in merito a ciò che funziona per ridurre il crimine e a quello che potrebbe ridurre il ricorso alla carcerazione, sembra che l'approccio si mostri complessivamente promettente.

Résumé
Les différentes initiatives mises en œuvre par le gouvernement écossais et par les agences partenaires nationales et locales ont pour but de réduire le recours à l'emprisonnement de courte durée, de promouvoir une réponse plus efficace aux causes de la criminalité et de réduire la récidive. Elles indiquent que le gouvernement et les partenaires reconnaissent que, bien qu'elles soient extrêmement importantes, les solutions communautaires alternatives à l'incarcération seules s'avéreront inefficaces. D'autres réponses, clairement axées sur la prévention, sur la réduction des inégalités et sur des questions liées à l'enfance et associées à la récidive à l'âge adulte, sont mises en place. Il reste à voir si, après des années d'augmentation constante de la population carcérale, ces différentes mesures pourront produire un effet clairement positif aussi bien sur la mise en détention que sur les taux de récidive. Toutefois, conformément à la recherche sur les moyens efficaces de prévenir le crime et sur les mesures pour réduire le recours à la prison, il semblerait que cette approche s'annonce généralement prometteuse.

Abstract
The range of initiatives being introduced by the Scottish Government and national and local partner agencies are intended to reduce the use of short-term imprisonment, promote a more effective response to the causes of crime and reduce re-offending. They indicate that the Government and partners recognize that, although crucially important, alternative community based options alone will be ineffective. Other responses, involving a clear focus on prevention and reducing the inequalities and related issues in childhood associated with re-offending into adulthood, are also being introduced. There is a clear emphasis on the importance of available sentencing powers and of agencies working collaboratively and accountably in the community to focus on shared aims. Whether, after years of steadily increasing prison populations, these various measures can demonstrably impact on both the use of custody and re-offending rates remains to be seen. However, in accordance with the research on what works to reduce crime and what might reduce the use of custody, it would appear that the approach collectively shows promise.

Key Words: alternatives to imprisonment; Scotland; crime prevention; community sentences; diversion.

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1. Introduction.

In Scotland there are currently 7,671 people in custody, the majority of whom are adult male prisoners (5553) (1). In 2014-15, only 7% of all sentences were of two years or more with 26% of sentences between 3 and 6 months and 29% less than 3 months (2). More recent statistics suggest that about two-thirds of all sentences are of 6 months or less (3) in Scotland.

Increases in the prison population in Scotland and in other jurisdictions have occurred despite a range of alternatives to custody being introduced over the last 20 years, a recent presumption against very short-term prison sentences and reduced crime levels (4), which are not shown to be associated with the growing use of imprisonment. Commentators have therefore noted that reducing the prison population is dependent on a range of factors, including the prevention of crime and certain types of more serious crime; a culture of political, community and media support for the use of alternatives; available sentencing powers; and the consequences of non-compliance with community based penalties.

Since the available evidence from Scotland has shown that short sentences of less or equal to 6 months are associated with reoffending and reconviction, and that community sentences result in reduced recidivism, the Scottish Government called for a change in thinking. They suggested that longer periods of imprisonment would be necessary for those who committed serious offences while alternatives to imprisonment, such as community payback orders, should be considered for specific and less severe crimes. The reasoning behind this call was:

[i] to address the causes of the causes of offending behaviour in conjunction with community justice services; [ii] the recognition that short sentences do not provide an opportunity or environment to address offending behaviours; [iii] that short sentences disturbed social, family and community relations; [iv] that short prison sentences are costly and (v) to reduce re-offending rates. Therefore, when a set of key principles (Table 1) were carefully implemented, evidence showed that community sentences were more likely to be successful.

In the Criminal Justice and Licensing Act (Scotland) 2010 (5), the Scottish Government introduced Community Payback Orders as a single community sentence to which up to 9 conditions can be attached, alongside a presumption against short-term prison sentences of 3 months or less. In Section 12 (1) of the Act, the Government also made provision for a Scottish Sentencing Council, an independent advisory body, to be set up to prepare sentencing guidelines for the Scottish Courts, publish guidelines judgements issued by the Courts and publish information about sentences imposed by the Courts. The Council was established in October 2015 and in its first Business Plan for 2015-18 (6), outlines how it will set out the 'fundamental principles and purposes of sentencing', including sentencing young people. The first suite of guidelines are due to be published by the autumn of 2018. There is a clear emphasis on achieving greater consistency and transparency in sentencing, whilst preserving judicial discretion.

Alongside this, as part of a wider programme of reform, in its Strategy for Justice in Scotland of 2012 (7) the Scottish Government also called for a 'whole system approach to criminal justice reform [*to include*] an increased emphasis on the use of alternatives to custody; the introduction of new community disposals including Community Payback Orders; increased emphasis on providing services

and support to help individuals address offending behaviour (both in custody and in the community); further development of electronic monitoring; the establishment of an improvement project focused on further reducing the use of remand and short sentences; and a continuing shift in the role of the Scottish Prison Service (SPS)' (8).

Key Principles	Explanation
Risk	Interventions should be informed by the nature and extent of the risk of re-offending. Where risks are higher and/or involve potential harm to self or others, supervision and/or monitoring should be increased accordingly.
Need	Interventions should target relevant criminogenic needs. In particular, attitudes towards crime, problem solving skills, self-efficacy, pro-social networks and substance misuse, alongside assistance to overcome practical barriers.
Responsivity	Interventions should be suitably individualised to reflect different levels of intelligence, communication styles and emotionality. They therefore require staff with advanced levels of interpersonal sensitivity and awareness.
Relationship	Interventions must involve a respectful, participatory and flexible working relationship between the supervisor and supervisee. The supervisor must be empathic in that they are seen to understand the needs of the supervisee.
Community	Interventions are more likely to be effective when delivered in accordance with each of the principles in the community, where supervisees can retain and/or promote important social ties and apply, reflect on and develop skills in the real world.
Integrity	Interventions must be delivered within these parameters and must involve a clear, transparent and bespoke supervision plan. The plan must include small, measurable, achievable, realistic and time-limited (SMART) goals.

Table 1: *Key principles involved in successful community sentences* (9)

In March 2016, Lord Carloway, Lord Justice General for Scotland, in his paper entitled, 'Imprisonment in Scotland: towards a penological post-modernism', revisited and questioned the role of 'conventional notions of punishment' and the need to identify and acknowledge the fundamental determinants of criminal behaviour[2]. Relating the high prevalence of criminality to social and economic causes, he again emphasised the necessity to keep communities safe from serious criminal acts, while at the same time acknowledging that current imprisonment regimes had done little to reduce recidivism or promote rehabilitation. Of particular importance, in Carloway's thesis, was the tendency for short prison sentences where other forms of punishment, such as community sentences would be more appropriate. Carloway called once more for, 'Scotland..[*to*] move beyond its reliance on imprisonment as a means of punishment in favour of a default system of paying back to the community when dealing with less serious offenders'. Carloway's sentiments reflected the 2008 Scottish Prisons Commission (10) and the later Scottish Government's Strategy for Justice of 2012(7). These policy documents stated that there was a need to: 'change the structure of the criminal

justice system; work to address the underlying causes of criminal behaviour; reforms to the laws around disclosure of criminal history; a presumption against short term sentences; and increased use of criminal sentences'[2].

By 2015, the Scottish Government, in their report entitled, 'What Works to Reduce Reoffending: A Summary of the Evidence' (11), revisited the role of social and economic factors in criminal behaviour, re-emphasised the outcomes of short sentences and stated the need for different and tailored interventions for men and women to reduce recidivism. Figure 1 taken from the 'What Works to Reduce Reoffending: A Summary of the Evidence'[11] document illustrates the importance of social and economic factors and the requirement to address these factors using alternatives to imprisonment. However, given the complexity, unpredictability and changeability of behaviour change, caution must be voiced since there is always uncertainty concerning the effectiveness of an intervention and its ability to reduce re-offending. Nevertheless, the evidence suggests that some interventions are more effective more of the time and can increase the chances for behaviour change in people. Table 2 details the evidence used within Scotland with regard to the choice and type of intervention[11] [12].

The Scottish Government and the Scottish Prison Service in their policy documents address the social and economic factors associated with criminal behaviour to reduce reoffending. These social and economic factors have been described by Marmot (13) as the social determinants or the 'causes of the causes' of inequality and health disparities. Therefore, to address these fundamental causes (14) of inequality by providing education and employment opportunities will affect the prevalence of substance misuse, mental health issues and impact indirectly upon reoffending. Using such evidence-based approaches to provide alternatives to imprisonment that address the underlying causes of offending (i.e. promoting secure attachments between child and parent; providing children, adolescents and adults with education and employment opportunities and creating supportive and sustainable environments[2] [8] [11] [13]) will not only tackle crime but will also promote the welfare of the child, family and their communities as well as ensuring safer and sustainable social spaces, civic and active participation and the improvement of public health.

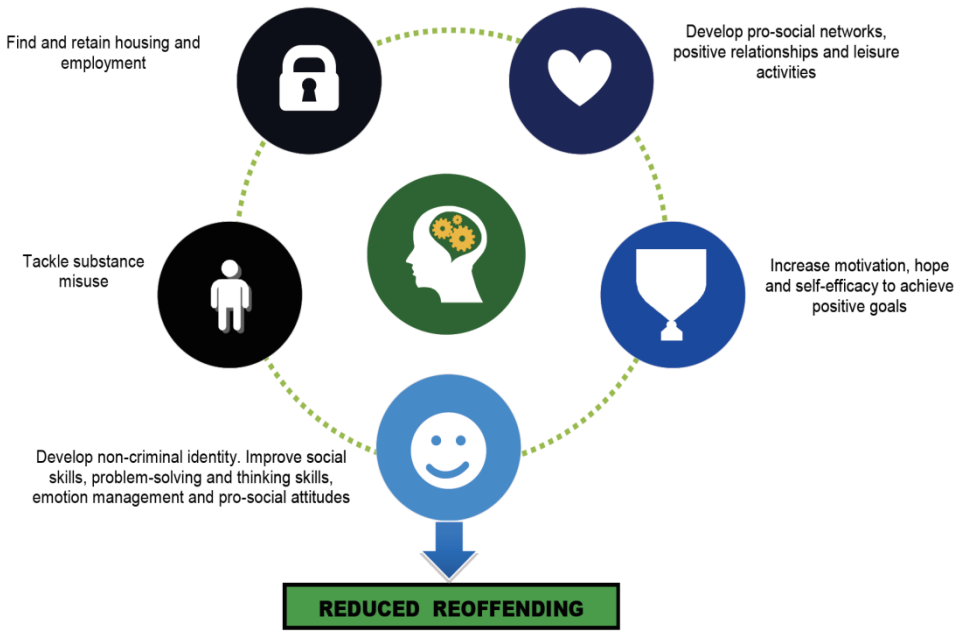

Figure 1: *Addressing the social and economic causes of criminal behaviours*[11]

Reproduced from Scottish Government, What Works to Reduce Reoffending: A Summary of the Evidence: 2015. Available at: http://www.gov.scot/Publications/2015/05/2480.

Intervention	Effective	Less effective
Education, training and employment	Remaining in education is especially important for young people, with a high correlation between school exclusions, offending and re-offending. Employment can generate income and social ties, which can promote the development of a pro-social identity and encourage desistence	Education can help people obtain qualifications to become more employable and is therefore helpful but it is unlikely to reduce re-offending on its own. Some people are already in employment but offend regardless. Other risk factors, such as alcohol use or the perceived benefits of crime, may be more relevant
Cognitive behavioural work	Can help to change negative thinking patterns and associated behaviours, especially when delivered with practical support	Some people, such as people who are currently resistant to change or have a learning disability, may require a more directive or instructional approach
Motivational or strengths based work	Interventions which match levels of motivation are more likely to reduce re-offending. Building strengths and goals might help promote motivation	More research is required into the effects of a strengths based approach, including the extent to which it helps address underlying risk factors and barriers to change
Substance misuse treatment	Drug treatment programmes have a generally positive impact on reducing re-offending and offer good value for money	It should also be noted that alcohol related crime often involves violence, with other underlying features
Pro-social friends/peer group/family	Strong social bonds can help trigger or maintain desistence, whilst failed or anti-social relationships can trigger re-offending or make people feel trapped	Some people may have only experienced anti-social peers, unsupportive families and/or dysfunctional personal relationships. Alternative opportunities may be limited
Mental health treatment/support	Offenders frequently have mental health problems, which may act as barriers to the development of social skills or triggers for	Depression, phobias and anxiety have not been found to be directly related to re-offending. Typically, this is more associated with personality disorders

	substance misuse	
Controls, such as Electronic Monitoring	Can assist with alternatives to custody as the front-door stage by providing monitoring and/or restricting access to specified places and/or people. Can assist with the early release of prisoners, who are not more likely to re-offend than others not released early but who meet the same criteria.	Controls and sanctions in general can help but are likely to be more effective when they are combined with individualised support and enforced consistently. Controls and sanctions in general can help but are likely to be more effective when they are combined with individualised support and enforced consistently
Unpaid work in the community	Tasks which contribute towards others wellbeing and involve contact with the beneficiaries of the work are more likely to be effective	Basic menial work, or work which does not reflect the person's strengths and interests, will involve community reparation but is likely to promote behavioural change

Table 2: *Summary of research evidence on interventions*[11] [12]

In recognition of the holistic, multi-faceted and often complex causes of re-offending, the Scottish Government has also outlined a new approach under the Community Justice (Scotland) Act 2016 (15). The Act places a legal duty on a set of statutory community justice partners to work together in producing a local Community Justice Outcomes Improvement Plan. These plans will correspond to a national performance framework, which focuses on the impact of changes on the system, offenders, victims and communities. Within this, they will also be required to take account of local needs and priorities. Partners will be required to produce an annual report on the progress they have collectively made towards achieving outcomes. Significantly, there is an emphasis on the inter-dependency of different organisations to achieve shared aims, including in respect of the key issues of education, training and employment; health and wellbeing; substance misuse; housing; financial inclusion; and social skills.

Similarly, a range of other strategic developments introduced by the Scottish Government, including Getting it Right for Every Child (GIRFEC) (16), the National Improvement Framework and specific approaches towards particular groups such as Looked After Children, are also promoting a more preventative approach towards the problems associated with crime as 'causes of the cause'. The Government has expressly indicated its determination to reduce inequality and ensure that the needs of more vulnerable groups are met before they escalate and become more problematic both for individuals, families and society as a whole. As such, there are clear commonalities between the approach towards community justice and inter-related issues elsewhere. It suggests a genuine commitment to a whole systems approach which goes beyond the confines of the formal criminal justice system and encompasses approaches within the entirety of health and social care.

The aim of this paper is to provide the reader with the current status of alternatives to imprisonment in Scotland, in both the pre-trial and post-trial phases. The presentation of the current and promising practices described are based upon Scottish Government policy grounded in the implementation of the key principles (Table 1) and the evidence-based as detailed in Table 2.

2. The pre-trial phase.

2.1. Early intervention - Persistent Offender Project (17), UK: Scotland.

The Police Service of Scotland together with Addiction Services developed. The aim being to 'establish joint partnership working to improve health and social well-being for offenders with drug and alcohol problems and their communities.' The content of the service ensures support for drug and alcohol rehabilitation, assistance with housing and tenancy difficulties as well as training and education as required. The content of the early intervention includes:

1. The participants were identified by police from lists of potential candidates. These included: those over 16 year of age; persistent offenders; crime used to fund addiction and that they resided in areas of high social deprivation.
2. The participant was contacted at home and informed of the aims of the programme. Assessments of motivation and engagement were made. A further follow-up appointment was made to engage proactively with the potential participant, 7 days after the initial contact.
3. The programme consisted of an agreed care plan with specific roles for the trained addiction and homeless teams. It provided a multi-agency focus approach involving all necessary practitioners.
4. The care plan was flexible and tailored to the needs of the participant. The care plan was monitored and reviewed on a 6 weekly basis to include assessments of risk and engagement.
5. The continuing evaluation of the programme shows an overall fall in convictions, reported crime and the time spent in prison.

2.2. Diversion - Community Triage, NHS Greater Glasgow and Clyde Crisis Out of Hours CPN Service (18), UK: Scotland.

The Police Service of Scotland together with National Health Services (NHS) Greater Glasgow and Clyde developed a Community Triage (CT) as an early intervention (diversion) to prioritize people presenting with mental health. The CT aimed to show that 'more timely intervention by Mental Health professionals [community psychiatric nurses: CPNs] when required', would reduce the necessity for confinement either in a police station or hospital.

The Police and NHS Service provide accessible and appropriate interventions to: 'reducing the number of detentions to custody; improve outcomes for those who are detained and also those who are dealt with in the community; improve partnership working between Police and Health Services, improve pathways to effective Mental Health Services including follow up for those difficult to engage with, following initial contact with the police and reduce costs to police, health and criminal justice system'[13].

The CT is targeted to people 'where there was no immediate danger or threat to life'. The out of hours service operated between 2000-0900 hours on week-end and public holidays. Police officers who feet that the person is distressed and/or showing signs of mental ill-health are required to complete a series of 6 questions about the event:

1. Where was the person found?
2. Was a telephone consultation conducted?
3. Was there a face-to-face mental health assessment conducted?
4. What was the outcome?

[i] fit and well, no further action:

[ii] detained and taken to a place of safety:

[iii] a mental health officer called to organise to take the person to a place of safety.

5.Was the person arrested for an offence?

6. How long did it take?

The evaluation of the Community Triage showed that of the 234 episodes attended all individuals had been assessed. Two hundred and thirty people were fit and well and needed no further intervention. CPNs assessed seven other cases. Of the remaining six people, four were taken into police custody with the remaining 2 'were dealt with at the locus of their offence and reported to the Procurator Fiscal'. This represented only 2.6% of the total.

3. Post-trial phase.

3.1. Community Payback Orders (CPO)[19-20] [24]

Following the Criminal Justice and Licencing (Scotland) Act 2010 (19), the Scottish Parliament introduced a number of alternatives to short prison sentences of 3 months or less, for those convicted with minor offences. These alternatives were called, 'community pay-back orders'. By 2011 CPOs were introduced and implemented across Scotland and replaced previous legislation on community orders (20). The CPO kept many of the aspects of existing orders such as the community service order (e.g. unpaid work), probation order (e.g supervision, substance misuse treatment programmes etc.) while including new features such as 'other activities'[16]. The aim of the CPO is to:

- 'Achieve a positive impact on individuals;
- Require individuals to make payback to the community;
- Replace an unnecessarily complex range of community sentences and increase public understanding;
- Ensure the level of intervention matches the level of assessed risk;
- Create a robust and consistently delivered community sentence, which enjoys public confidence and credibility'(21).

The decision to provide a CPO rather than a custodial sentence is based upon reports on the offender and his circumstances made to the Court from criminal justice social work. The CPO is tailored and devised to guarantee that people convicted with an offence will 'pay-back' to their society and communities. The individual during this time was required to:

[i] do unpaid work for the community;

[ii] participate in programme(s) to enable the modification of offending behaviours, to allow reintegration into society and ensure that the social environment will be safe and sustainable.

The requirements for each of the CPO activities are shown in Table 3. During the period of the CPO, 'periodic review hearings' to assess progress are conducted by the Court. During these 'progress reviews' the responsible officer provides written reports and the individual must attend.

Evaluation reports from local authorities (22), (23) suggest that CPOs fulfill the aims of the original programme with increased unpaid work and improved confidence in those on CPOs noted since its inception. In addition earlier reports[21-23s] suggested that CPOs may have had an effect on reducing reoffending.

Requirements for community pay-back order	
Unpaid work or other activity requirement	Level 1: common elements The offender must provide up to 100 hours of unpaid work which must be completed within 3 months. The person cannot be under 16 years of age and in the case where the individual is 17 or 18 years old a local authority report is required.

	Level 1: fine defaulter. Consent is not required and the offender has the opportunity to pay the fine or untake unpaid community work of up to and including 50 hours. Level 2: common elements Consent is required by the individual. The offender must undertake up to 300 hours of unpaid community work or other activity (e.g. education) of not more than 30% hours in total. The work must be completed within 6 months.
Offender supervision requirement	The responsible officer will provide supervision if the person is under 18 years of age; when the Court requires other activities in addition to unpaid work. The responsible officer will work together with the individual to ensure adherence with the CPO and encourage behaviour change.
Compensation requirement	The offender is required to pay compensation for 'any personal injury, loss, damage or other matter incurred as a result of the individual's offending behaviour'. It is paid either by a lump sum or by instalments and to the court'[24].
Programme requirement	The recommendation for a programme is made from a Criminal Justice Social Work Report, as appropriate. The programme will run concurrently with a supervision requirement.
Mental health treatment requirement	This requirement is imposed when an individual has been diagnosed with a mental health condition and/or learning disability, which has been provided by an approved doctor. This requirement ensures that people are provided with appropriate care, treatment and support.
Drug treatment requirement	Drug treatment programmes are put in place when the individual is diagnosed with a dependency or addiction. In this requirement the 'drug issues are not the sole or main issue driving the offending behaviour.'[24] Supervision is always required during the period of the treatment and CPO. Treatment may be residential or otherwise and will be multidisciplinary in nature to ensure treatment success and reintegration with family and their community.
Alcohol treatment requirement	As with drug measures the individual must be dependent or addicted to alcohol. 'Non compliance should be addressed immediately, rigorously and effectively. An offender supervision requirement will always be imposed in addition to an alcohol treatment requirement.'[24]
Residence requirement	In the majority of cases individuals will reside in public or private accommodation with no intervention from the responsible officer. In other cases the individuals will be provided with assistance from the responsible officer to enable them to reintegrate and reduce the risk of reoffending. For those offenders who could cause harm will reside in specific accommodation and will be supported by their responsible officer to assist them to overcome offending behaviours and to reintegrate into society.

Conduct requirement	This is to ensure that the offender's behaviour is non-contentious. The individual may not be allowed to go to specific communities, streets or visit relatives. During this time they are supported by Criminal Justice Social Work.

Table 3: *Community payback order requirements* (24)

3.2. Specific programme for specific crimes - the Caledonian System for Domestic Violence[25]

'The Caledonian System was developed for the Scottish Accreditation Panel for Offender Programmes & the Equality Unit of the Scottish Government' (25). It is for adult males over 16 years old who are in a heterosexual relationship and who have been convicted of domestic abuse. The Scottish Government funds criminal justice services, which implements CS in various local authority areas.

The CS is an integrated systemic approach that addresses domestic abuse behaviour in men and which also safeguards women and children through parallel services. The expected results are a reduction in domestic abuse and improvement of lives of the men, their partners, children and families. Family or partner involvement is dependent and tailored to individual cases.

The aims of the programme are to:

1. increase safety of women and children via addressing abusive behaviour in men.
2. reduce offending.
3. manage risk.
4. promote change in men by providing safe and respectful learning context.
5. assist men in changing their attitudes responsible for violence.
6. increase men's accountability for their abuse.
7. develop a 'good life' plan which does not rely on abusing partners and children.
8. increase men's knowledge, skills and understanding necessary not abuse partners.
9. promote better lives for women and children who are affected by domestic abuse.

Stage 1: Pre-group activities: 14 sessions. The offender starts with the pre-group activities, which are carried out with their case manager, who is responsible for the implementation and enforcement of the order. In this stage, preliminary work necessary for moving onto Stage 2 is carried out. During this stage an analysis of his abusive behaviour is completed, his criminogenic needs are identified and a personal plan is formulated.

Stage 2: Group work programme: 26 sessions: Group work consists of 6 modules. Each module has 4-5 sessions (each 3 hours long) delivered over a 3-5 week period in a group format. Offenders can join in for the first available module and do not need to wait until the next start of the programme. The exception to that is 'sexual respect' module, which is run on 2-to-1 basis and men normally do not start with this module as it can make offenders anxious and resistant to change.

Stage 3: Maintenance sessions: Once the offender has completed the Caledonian System modules he enters into the maintenance phase. The maintenance phase continues until the end of the court order and involves work with the offender's case manager. It is during this time that any outstanding issues identified during the group work can be further addressed. In addition, offenders are monitoring and reviewing their progress according

to the risks and needs identified in the early stages of the Caledonian System programme and in accordance with their personal plan. During maintenance offenders are encouraged to translate the learning and skills obtained in the group to their relationships and to life in general.

4. Conclusions.

The Scottish Government has embraced an optimistic policy and strategic vision from lessons learnt from the past. Their policy shows their clear determination [i] to stop short-term sentencing and [ii] to reduce reoffending rates. This will be achieved not only by a range of alternative sentencing options but also by tackling the root causes ('the causes of the causes') of crime; introducing new sentencing guidelines; and addressing the issues associated with the consequences of non-compliance and non-adherence. Equally of importance is promoting a culture whereby community-based alternatives are viewed as a more acceptable sanction than short-term custody.

A note of caution, however, must be sounded, since difficulties have historically existed in the trajectory from policy through to practice, with strategic aims apparently lost in the day-to-day working of all those involved in criminal justice and therefore custody rates continuing to increase. It is necessary to support proposed and current changes in sentencing practice through multi-disciplinary joint training and continuing professional development. Doing so will ensure that all professionals working both within criminal justice and within health and social care are involved and empowered to address the root causes of crime and to promote community-based alternatives rather than endorsing short-term custody.

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Community service as the first alternative to imprisonment in Latvia: expectations and reality

Les services à la communauté comme la première mesure alternative à l'incarcération en Lettonie : attentes et réalité

Ilona Kronberga•

Riassunto
Nel corso degli ultimi decenni, in Lettonia, le sanzioni penali sono aumentate rapidamente a causa dei cambiamenti significativi, ma non è possibile spiegare dettagliatamente questa situazione in una sola pubblicazione. Pertanto, l'obiettivo di questo articolo è quello di aiutare il lettore a capire come le sanzioni penali si sono sviluppate in Lettonia da 25 anni a questa parte, esaminando quella sanzione penale che, tra le altre, non è legata all'isolamento della persona dalla società.

Résumé
Au cours des dernières décennies en Lettonie, les sanctions pénales ont rapidement évolué en raison de changements significatifs sans qu'il soit possible d'expliquer en détail cette situation dans une seule publication. Le but de cet article est donc d'aider le lecteur à comprendre la manière dont les sanctions pénales se sont développées en Lettonie depuis 25 ans, en examinant la sanction pénale qui, entre autres, n'est pas liée à l'isolement de la personne de la société, c'est-à-dire le service à la communauté. Cet article se base sur l'expérience de longue date de l'auteur dans le domaine de l'application des peines comme sur les résultats du projet « Reducing prison population : advanced tools of justice in Europe ».

Abstract
During the last decades, criminal penalty policy in Latvia has developed rapidly going through particularly significant changes and it is not possible to explain it fully in one publication. The aim of this article is to demonstrate the reader how the criminal penalty policy has developed in Latvia over the last 25 years, analysing one criminal penalty which is not connected to the person's isolation from the society – community service. For the publication, the author's personal experience of many years in the field of criminal penalty implementation and application is used, as well as the results of the project "Reducing prison population: advanced tools of justice in Europe.

Key words: community service; Latvia; criminal penalty policy; prison overcrowding.

1. Introduction.

Criminal penalty or criminal sanctions policy as the set of measures and tools for protecting the society is different in every country despite common international standards (1). Criminal penalty policy in each particular country is determined by a range of factors including historical and geographical factors, system of social values, as well as the system and doctrine of justice. Regarding the development of criminal penalty policy in Latvia and its results all these aspects have to be taken into account. During the last decades, criminal penalty policy in Latvia has developed rapidly going through particularly significant changes and it is not possible to explain it fully in one publication (2). The aim of this publication is to demonstrate the reader how the criminal penalty policy has developed in Latvia over the last 25 years, analysing one criminal penalty which is not connected to the person's isolation from the society – community service. For the publication, the author's (3) personal experience of many years in the field of criminal penalty

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implementation and application is used, as well as the results of the project (4) "Reducing prison population: advanced tools of justice in Europe".

2. The beginning and tendencies of criminal penalty policy development in Latvia.

The Republic of Latvia (5) regained its independence *de facto* in 1991 (6). After the restoration of the independence, legal enactments issued by Soviet institutions were into force for some time until the newly elected Parliament and Government of Latvia made alterations in them or issued new laws and Regulations of the Cabinet of Ministers. The reform of legal system was comprehensive, long and complicated and, actually, it finished only at the end of 1990s. From 1991 till 1995, the main objective of the state was to secure the independence and withdraw the Russian army that occurred only in 1994. At this time, long-term criminal sanction policy was not stipulated in a separate enactment, the process of development for a new Criminal Law and Criminal Procedure Law was carried out instead. It was conceded that after these laws also a new law on the Enforcement of Criminal Sanctions would be developed.

Unlike the quick development of the legal thought, the practice of the application of legal provisions developed much slower. In the Soviet Union, the number of sanctions without social isolation was very low and they were applied only for petty offences. Social judgement on what effective criminal sanctions look like were restricted to a wish for very long imprisonments and preferably at conditions as rough as possible. However, the modest financial situation in the country and the progression of Latvia towards the European Union and NATO all-in-all stimulated the society to consider such penalties that are not connected to isolation from the society. Inherited from the Soviet times, Latvia obtained 15 huge places of imprisonment, all built as patterned penal colonies – in fact, they are as labour barracks because the only means of prisoners for re-socialisation was hard work. The prison premises were in very poor technical condition and it was not possible even to ensure the safety of prisoners and specialists, not to mention any content improvements of criminal penalties implementation. Overall, there were more than 10 thousand prisoners in Latvia in 1991; besides a part of Latvian citizens were imprisoned in Russia where they had been sent to serve their prison sanctions according to the legal enactments of that time. This was the starting point of the Latvian criminal penalties policy.

Now, in 2016, there are 4409 prisoners in Latvia and 11 different places of imprisonment, the majority of them being renovated. Deprivation of liberty is one of the two criminal sanctions which are connected to the convicted person's isolation from the society (deprivation of liberty and arrest), whereas the other penalties are not connected to personal isolation (7). The term "sanctions alternative to deprivation of liberty" is not being used in Latvia at the moment because by doing that it is, in fact, emphasised that deprivation of liberty is the dominant type of criminal penalties however it may have alternative solutions in some cases. Therefore, the system of criminal sanctions in Latvia includes two types of penalties, namely, connected to isolation from the society (a) and to be served in the society (community measures) (b). Thus, for instance, it is possible to consider conditional sentence with deprivation of liberty as an alternative sanction to isolation from the society; however, this publication analyses the criminal sanction – community service which is a penalty

without isolating the person from the society. Applying the penalty, the judge evaluates the type, severity and conditions of the committed offence, as well as the offender's personality and only then decides on the appropriate sanction choosing from the ones stipulated in the law. The only case when the judge may decide to apply conditional deprivation of liberty (without enforcement) is the case when the responsibility about the committed offence includes the possibility to apply real deprivation of liberty but the judge is of conviction, based on facts, that the person (if staying in the society) will not re-offend. If the person who is conditionally sentenced commits a new offence during the probation time or breaks probation supervision rules, the judge may decide on enforcing the penalty containing deprivation of liberty in the place of imprisonment. In such cases, it is considered that the judge has initially applied an alternative sanction to deprivation of liberty which is (or is not) later commuted with real implementation of penalty at prison.

The statistics of deprivation of liberty differs in various countries. The values mentioned in statistical summaries have to be analysed also with the help of content analysis not only quantitative analysis in order to gain an overall notion about the current tendencies in European countries (8). Let us address several aspects in particular. First, prison occupancy level (9) (to draw conclusions whether the prisons of the particular country are or are not overcrowded) is calculated from the number of places in prisons that are envisaged by the country and the number of occupied prison places. If we look at the Baltic States, Estonia is in the closest position to prison overcrowding with 96,3% occupied prison places of all the available; Lithuania has 79,1% occupied prison places, whereas Latvian prisons are half-empty – 59,5% (10). Looking at the reasons, not only at the numbers, it is possible to conclude that this number is the result of prison reforms in Estonia over the last 10 years when the number of prisons was reduced by half. When building new prisons, Estonia has made precise estimations how many places are necessary in order to ensure deprivation of liberty for a particular number of people in the country. In Latvia, however, the new prisons are not built yet which would comply with the real needs of the country (regarding the number of prisoners) but the majority of places in the old prisons are not usable without breaking the regulations of Latvian criminal penalty policy and international principles of penalty enforcement. Thus, looking only at the numbers the viewpoint may be formed that Estonian prisons could soon be overcrowded although it does not correspond to the real-life situation.

Based on *Eurostat* data (11), the ratio of imprisoned people per 100 thousand population is calculated, however the number of population altogether is also taken into account. Thus, the prison population rate based on an estimated national population is similar in all three Baltic States, respectively, in Latvia there are 4409 prisoners per 1,97 million population in total which makes the ratio 217; in Lithuania – 7355 prisoners per 2,9 million population and the ratio of 254; in Estonia there are 2868 prisoners per 1,32 million population and the ratio is 217. Of course, evaluating the prison population rate in the Baltic States in comparison to other European countries, the ratio is rather high, thus, for instance, in Bulgaria there are 9028 prisoners per 7,2 million population and the penitentiary ratio correspondingly is 125, in France – 69375 prisoners per 67,4 million population and the penitentiary ratio 103, in Germany –

64397 prisoners per 82,5 million population and the ratio of 78, in Italy – 54195 prisoners per 60,82 million and the rate of imprisoned people makes 89, in Romania – 27774 prisoners per 19,69 million residents and the rate 141, whereas in Scotland – 7672 prisoners per 5,4 million population and the penitentiary rate is 142.

Several factors have to be taken into consideration when making analysis of this information and drawing conclusions. For instance, although the number of prisoners in Latvia in 2016 makes half as much as in 2000 (respectively, 8815 prisoners in 2000 and 4409 in 2016), the penitentiary ratio remains rather high in comparison to other countries because the number of prisoners in Latvia is high in relation to the number of population, the latter being decreased in the last seven years by approximately 300 thousand. Similarly rapid decrease of population related both to emigration caused by the economic crisis and the decline of demographic situation rate is observed also in Lithuania and Estonia. Therefore, paying attention only to the statistics an impression may appear that criminal policy in the Baltic States is oriented on the application of penalties connected with deprivation of liberty instead of alternative solutions or measures without isolation from the society which is not true. Quite the contrary, all three Baltic States have faced significant reforms in criminal penalty systems in the last seven years which have had good results – significantly reduced numbers of prison population, developed modern and sustainable system of re-socialisation in the institutions of imprisonment, as well as developed national probation institutions which are responsible for the implementation of penalties to be served in the community. Thus, for instance, community service is one of the most applied sanctions in criminal cases in Latvia.

3. First searches for alternatives to deprivation of liberty.

Community service as a criminal sanction was first introduced in the legal provisions of Criminal Law in 1998 (12). Simultaneously with the new Criminal Law coming into force also the Sentence Execution Code of Latvia (13) was supplemented stipulating that a new Division 7 (14) "Execution of Criminal Punishments Unrelated to Deprivation of Liberty" has to be added to the Code. Thus, in fact, the division of penalties was introduced in the Sentence Execution Code of Latvia by the method of their execution – sanctions related to isolation from the society (deprivation of liberty, arrest and also death penalty) and sanctions without isolation from the society (a fine, property confiscation, deportation from the Republic of Latvia, and limitation of rights).

In the Sentence Execution Code of Latvia the execution procedure of community service was envisaged and it was stipulated that the executive institution of the new criminal sanction, community service, would be the Community Service Supervision Service (15) established by the city council, parish council or several parish councils together, also the conditions and procedure of community service execution were provided for. Recalling the development process of the Criminal Law, U.Krastiņš (16) wrote (17) that initially there was an idea that the new law would envisage a wide range of alternatives for the penalty related to deprivation of liberty. U.Krastiņš admits that it failed to succeed in full amount. He indicates that there was no success in finding types of sanctions other than related to deprivation of liberty; a fine

and community service were the only options for basic sentence, and the limitation of rights and later also police control (also together with a fine) were envisaged as additional punishment.

Around 2000, community service already existed as a sanction in criminal justice in European countries. The differences could be found in the status of this sanction and the procedures of its application. For instance, the German Criminal Code (18) stipulates that community service has to be applied to the convicted person as a condition in order to compensate the harm to the victim, whereas the Swedish Penal Code (19), where a great role has been devoted particularly to various combinations of sanctions, community service is possible as a condition in addition to conditional sentence or probation supervision or other construction of sanctions if the convicted person agrees with such conditions.

The development of the procedure for community service execution was a complicated task also because of the lack of such a sanction in previous historical legal provisions in Latvia, namely, Penal Code of 1833, Penal Code of Tsarist Russia of 1903, Criminal Code of former Russian Federation of 1926 which was in force also in the territory of Latvia, Penal Code of 1933, Criminal Code of the Latvian Soviet Socialistic Republic of 1961, and the Criminal Code of the Republic of Latvia. The Penal Code of 1933 envisaged forced labour sentenced for lifetime or for the period of time from four till fifteen years, however this forced labour was, in fact, deprivation of liberty sentenced for severe crimes. Therefore the authors of the Criminal Law not only had to elaborate the regulation for the new punishment (without isolation from the society) in material legal provisions but also develop and implement the execution procedure of this sanction in the legal provisions for the execution of criminal sanctions, so that it would be operational and eligible in practice. It was no easy task.

The concept of penalty or punishment was not explained in the Criminal Code of Latvia therefore it got defined in the new Criminal Law stipulating that the aim of penalty is to punish the guilty person for the offence committed and to achieve that the convicted person as well as other people obeyed the law and refrained from committing offences. Thus, general (universal) and special prevention got included in the objective of the punishment. Explaining the need for such alterations, U.Krastiņš indicates that the previous law strongly emphasised the correctional nature of the sanction aiming to re-educate the convict during the execution, however it mostly appeared to be an impossible task to perform (20). Therefore, the objective of the sanction was changed and it obtained the inclusive nature. It was indeed this alteration that served as the basis for the further development of sanctions unrelated to isolation from the society in Latvia. Moreover, such alterations provided the possibility to further develop various forms for the execution of sanctions related to deprivation of liberty (for instance, its content and form), setting re-socialisation (including also the correction of social behaviour and rehabilitation) of the person as the main objective. These alterations served as the starting point for modern and efficient approaches in the system of criminal penalties including conditional sentencing with deprivation of liberty, conditional release or parole from the execution of the sanction at the place of deprivation of liberty, as well as electronic monitoring of the offenders.

4. Problems for specialists in Latvia implementing community service.

When the Criminal Law entered into force in 1999 and also later the calculations were not made to envisage the amount of financial resources necessary for local municipalities to execute the new function and establish the services for supervising community service. Simultaneously, there appeared also the problem of missing targeted methodology and management to implement the basis of community service execution, no resources were allocated from the national budget to organise the system in local municipalities. Being aware of the real situation, courts were reserved as to the application of the new criminal sanction.

Despite that, the first statistical data appeared in 1999 showing that community service was applied to 183 offenders. This revealed another previously not detected problem. At that time, the Sentence Execution Code of Latvia envisaged that in cases when the convicted person did not follow the regulations and procedure of the penalty without plausible reasons he got warned but in the case of failing to obey the warning community service was replaced with arrest. However, such sanction as arrest was not implemented yet therefore it was not possible to apply the measure stipulated by law in practice. The situation managed to be changed only after the amendments in the Sentence Execution Code of Latvia on November 27, 2002 stipulating that until March 31, 2003 the conditions in which the person whose non-executed sanction (community service or fine) is replaced with arrest is kept have to be equal to those conditions in which the convicts are kept who serve their sentence in semi-open prisons, lowest prison regime level. Later the deadline of this condition was extended until March 1, 2007 and then more, until on April 1, 2013 amendments were made in the Criminal Law with which arrest was excluded from the list of sanctions and replaced with short-term detention, changing the legal provisions of the Sentence Execution Code of Latvia to comply with the amendments.

The practice of community service execution was developing slowly, all in all, the tendencies were positive, respectively: in 2003 community service was applied to already 1359 individuals, in 2004 – 1545, in 2005 – 1750, in 2006 – 1952. Nevertheless, the practice implemented in various municipalities thanks to particular projects was still different. The situation could not be considered and evaluated as a stable system. The lack of clear and planned system and financial resources led to the human factor become the dominant, it means that in those municipalities where there were individual enthusiasts the work went on, whereas in the municipalities where there were no such people the implementation did not get organised at all. Local municipalities organised community service supervision services according to their possibilities delegating this function to various institutions, for instance, social services or municipal police. This resulted in different practices, opinions, interpretation and implementation of legal provisions. Such situation failed to guarantee equal execution of criminal sanctions in the form of community service to all convicts.

Due to the aforementioned reasons, on April 28, 2005 amendments to the Sentence Execution Code of Latvia were issued as the result of which the conditions for community service execution were specified stipulating at the same time that the State Probation Service is the institution in charge of the execution of community service. The amendments provided transit period in which the State Probation Service would take over the supervision of

community service execution from the services established by individual municipalities. On June 14, 2005 the first "Procedure on the coordination of community service execution" was published. As the mechanisms for community service execution developed over time, the State Probation Service correspondingly improved its legal order.

5. The process of development for community service execution.

It has been 10 years now since the State Probation Service took over the implementation and execution of community service. At the moment, community service is the most often applied criminal sanction in Latvia: in 2010 it was applied to 2738 individuals, in 2013 – 3536, in 2014 – 4266, whereas in 2015 – to 4750 individuals (21). The Criminal Sentencing Policy Concept adapted in 2009 has had an important role in a wider application of community service. As the result of the Conception, the amendments to the Criminal Law were elaborated, submitted and approved in the parliament of Latvia, the Saeima, envisaging a wider possibility to apply community service. In the annotation of the draft legislation it was emphasised that it is necessary to develop a combined system of sanctions in the criminal law, at the same time envisaging that community service is applicable also independently of other basic sanctions. It is essential, though, to take into consideration that neither from the historic, nor legal perspective has community service become an alternative to deprivation of liberty, it is possible that it has reduced the number of conditional sentencing. This fact is indicated to by the correlation between the increased number of community service application cases and the reduced number of people punished conditionally. Thus, for instance, analysing the number of criminal penalties applied by the judgement of court in 2012 against the data in 2015, it is possible to conclude that the number of conditional sentencing cases has a 44% reduction, whereas the number of cases of applied community service shows a 46% increase. This tendency was observed already in 2004 when it was first introduced; this fact is confirmed also by the analysis included in the Criminal Sentencing Policy Concept where the data show that community service rate among all criminal sanctions eligible in Latvia is 25,7% (in 2007). At the moment, the rate of community service among all other criminal sanctions is 54% (in 2015, including judgements of court and prosecutors' applied punishment orders; 47% without prosecutors' orders). It means that every other person in Latvia is sentenced to community service. The possible balance among the applicable penalties was planned in the Criminal Sentencing Policy Concept taking into account the crime dynamics and the system of the planned penalties and sanctions foreseeing that the rate of community service would not exceed 45% of all the applicable criminal penalties and sanctions (respectively, deprivation of liberty 21%, fine 13%, conditional sentencing 21%, and other penalties and sanctions 21%).

The evaluation of the situation is ambiguous as it is not possible to distinguish whether such development of community service is simply positive or rather negative. First, it has to be admitted that this situation allows considering that there is still a great demand for various types of penalties and sanctions which are not related to isolation from the society but appear to be sufficiently efficient at the same time. Probably, it is not enough with what we have. Secondly, an evaluated is needed on how to further improve the institute of conditional sentencing or replace it fully

with probation supervision in the near future developing various sub-forms of supervision and their content. It is possible that probation supervision may become a basic punishment over time or combined with other penalties. The research conducted in 2013 (22) shows that the level of recidivism among people who have been sentenced conditionally is lower (10%) than among people who have been sentenced with community service (15%) (23). Therefore it may be considered that conditional sentencing can be efficient if it is organised and developed purposefully. K.Ķipēna (24) indicates that community service does not envisage correctional measures for social behaviour therefore it does not change the mistakes in cognition or behaviour that have caused the commitment of the offence. As the result, the possibility to re-offend does not decrease after the execution of the penal sanction. Conditional sentencing, in its turn, ensures the possibility to provide long-term and efficient correction of social behaviour thus decreasing the risk of recidivism (25). Taking that into consideration, the content of community service has to be improved.

6. Evaluation of community service as a criminal sanction from today's perspective in 2016.

It has to be taken into account that community service in its nature is not "the cure for all diseases". At the moment, Article 35, part 2 of the Criminal Law stipulates that the objective of any punishment is not only to punish the person who has committed an offence for which a punishment is provided for by law, but also *to protect the public safety, to restore justice,* including to achieve that the convicted *person wishes and is able to join the society* and live in compliance with the rules for behaviour acceptable in the society. Every punishment provided for in the Criminal Law has to be formulated (included in the law), appropriate (in compliance with procedural legal norms), comprehended (applied in practice according to its objective) and executed (legal process of sanction execution) aimed at this objective provided for by law. Article 35, part 1 of the Criminal Law stipulates that punishment is a compulsory measure. In this case, the compulsory nature of punishment envisages that the sanction applied by court or prosecutor to the person who has failed to obey the law is mandatory. This is exactly the way how law enforcement institutions use legal measures to protect the society from illegal actions committed by particular people. Justice is restored not by punishing the person for the committed offence but when the offender has compensated the harm caused by the offence to the victim and the society. Compensation of harm and damage has to be regarded not only as financial remuneration of material nature (for the material or moral harm) but also as work or mediation between the victim and the offender. Therefore, special measures and tools (mediation (26), reconciliation with a mediator in criminal proceedings, conference) need to be envisaged for the restoration of justice damaged by the offence. In order to have the person wish and be able to reintegrate in the society, in their turn, each type of punishment (according to the form of the sanction) includes a particular amount of re-socialisation measures that eliminate those traits in the person which caused the commitment of the offence (correction of social behaviour) and provides motivation, knowledge and skills to the convict to live a legitimate life in the society (social rehabilitation). Taking that into consideration, each type of punishment will differ not only by its form (e.g. including isolation from

the society or sentence to be served in the society) but also by its content (possible set of re-socialisation measures during the execution of penal sanction).

Thus, also community service as a criminal sanction is efficient to a particular target group and in particular cases, respectively, to such convicts and for such offences where it is possible to compensate the harm made to the society working without remuneration. It means that community service will be efficient in the cases when the objectives of the punishment are reached, the convict stays in the society and does not endanger public safety (a), participates in restorative justice activities (b), joins re-socialisation activities (c) to prevent re-offending. If the answer is "no" to one of these statements in the particular case, there is a risk that community service will not be the most appropriate type of punishment for the particular person in the particular situation. A. Reigase (27) emphasises that the Recommendation No. R(92)16 of the Committee of Ministers of the Council of Europe to member states on the European rules on community sanctions and measures stipulate that the objective of community sanctions and measures is to do everything to make the offender assume his responsibilities regarding the society and the particular victim and enable him to cooperate and see the sanction as a just and reasonable reaction to the offence committed. Also the Recommendation No. R(2000)22 of the Committee of Ministers of the Council of Europe to member states on improving the implementation of the European rules on community sanctions and measures emphasise that a significant objective of the punishments without isolation from the society is social reintegration which is related to active cooperation of sentence execution services with local community.

Analysing the practice of applying community service, K. Ķipēna concludes that community service is frequently applied to people addicted to drugs who are not able to serve it due to their addiction, often community service is applied to them repeatedly, even in cases when community service has been replaced by other punishment more than once. Thus, in 2015, 22% of people serving community service applied by court or prosecutor were sentenced with community service for the second time, 54% had it applied for the first time, 12% – the third time, but 11% of convicts had community service for more than four times. It can be concluded thereof that the system of criminal sanctions has a strong necessity for other penal sanctions, combinations of penalties or compulsory measures unrelated to isolation from the society (a), that a repeated application of community measures proves not to be the most efficient measure in particular cases (b), and that there is a possibility that community service is not appropriate for this particular target group (c).

7. Final considerations.

In Latvia, community service is one of the most efficient and most often applied penal sanctions unrelated to personal isolation from the society. Considering the information mentioned in this publication, the content of community service has to be improved adding correctional measures for social behaviour to it. Possibly, the application of community measures should be limited defining particular target groups or types of offences which allow repeated application of this penal sanction. It is necessary to deliberate how it is possible to develop community service and/or probation

supervision together by creating mutual combinations of these sanctions. For instance, community service could be as one of the conditions together with conditional sentencing or in a combination with probation supervision.

Notes.

(1). Author's remark: International standards that are included in the UNO documents about the implementation of criminal penalties and the treatment of prisoners, as well as the Recommendations of the Committee of Ministers of the European Council in this field.
(2). Author's remark: Detailed information on the criminal penalty system in Latvia is available in the publication: Kronberga I., National Report on Latvia, from the project "Reducing prison population: advanced tools of justice in Europe" (JUST/2013/JPEN/AG/4489). Available: http://providus.lv/upload_file/Projekti/Kriminalitesibas/National%20Report%20on%20Latvia_final_07_31_2014.pdf (last visited 10.10.2016).
(3). About the author: Ilona Kronberga is a leading Latvian expert on Criminal sanctions, Penal systems and Crime prevention, Juvenile Justice and Children's Rights Protection; has long-standing experience in policy planning and legal drafting related to the enforcement of criminal sanctions, including policies on probation, community service and other alternative sanctions in Latvia. More information is available here: http://providus.lv/en/ilona-kronberga (last visited 10.10.2016).
(4). More information about the project "Reducing prison population: advanced tools of justice in Europe" is available here: http://providus.lv/en/article/reducing-prison-population-advanced-tools-of-justice-in-europe (last visited 10.10.2016).
(5). See more information on the history of Latvia here: https://en.wikipedia.org/wiki/History_of_Latvia#Restoration_of_independence (last visited 10.10.2016).
(6). Author's remark: After a brief period of independence between the two World Wars, Latvia was annexed by the USSR in 1940. It re-established its independence in 1991 following the breakup of the Soviet Union.
(7). More on criminal sanctions ir Latvia see here: Kronberga I., National Report on Latvia, from the project "Reducing prison population: advanced tools of justice in Europe" (JUST/2013/JPEN/AG/4489). Available: http://providus.lv/upload_file/Projekti/Kriminalitesibas/National%20Report%20on%20Latvia_final_07_31_2014.pdf (last visited 10.10.2016).
(8). See also: Alternatives to detention in Europe: Promising practices and tools. A training package. Available: http://www.reducingprison.eu/downloads/files/TRAINING_PACKAGE.pdf (last visited 10.10.2016).
(9). Occupancy level, based on official capacity.
(10). See more: World Prison Brief. Home page of Institute of Criminal Policy Research: http://www.prisonstudies.org/map/europe (last visited 10.10.2016).
(11). *Ibidem*.
(12). Criminal Law. Accepted by the Parliament 17.06.1998. Available: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Criminal_Law.doc (last visited 10.10.2016).
(13). Amendments in the Sentence Execution Code of Latvia. Issued: 14.10.1998. Available: http://likumi.lv/ta/id/51519-grozijumi-latvijas-sodu-izpildes-kodeksa (last visited 10.10.2016).
(14). Author's remark: A special new chapter was introduced to the Sentence Execution Code of Latvia. It stipulated separately those criminal sanctions which were not related to personal isolation from the society, respectively, the fine, property confiscation, deportation from the Republic of Latvia, and the limitation of rights. Thus, the system was, in fact, secured that apart from deprivation of liberty and arrest there were also criminal sanctions unrelated to isolation from the society.
(15). Amendments in the Sentence Execution Code of Latvia. Issued: 14.10.1998. Article 134. Available: http://likumi.lv/ta/id/51519-grozijumi-latvijas-sodu-izpildes-kodeksa (last visited 10.10.2016).
(16). Author's remark: Dr.habil.iur. U.Krastiņš is the professor at the Chair of Criminal Law of the Faculty of Law of the University of Latvia.
(17). Krastiņš U., „Krimināllikumam 10 gadi: tapšana, attīstība un perspektīva" *(10 Years of the Criminal Law: Creation, Development and Perspective)*, Magazine of the University of Latvia "Juridiskā zinātne" *("Legal Science")*, No.1, 2010, p. 12. Available: http://www.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/LU_Juridiska-Zin_Nr-1.pdf (last visited 10.10.2016).
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(19). The Swedish Penal Code was adopted in 1962 and entered into force on 1 January 1965. Chapter 27, Section 2 a. Available: http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf (last visited 10.10.2016).
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in Latvia at the turn of 20th and 21st centuries). 2016. Presentation at the seminars "Valsts probācijas dienesta īstenojamā funkcija kriminālsoda – piespiedu darbs – 10 gadu šķērsgriezumā – izaicinājumi un iespējas" *(The role and function of the State Probation Service in the 10 year execution of community service as a criminal sanction: challenges and possibilities).* Unpublished material.

(22). Ķipēna K., Zavackis A., Ņikišins J. Sodu izcietušo personu noziedzīgo nodarījumu recidīvs *(Crime Recidivism in Former Convicts).* Law magazine "Jurista Vārds", 27.08.2013., No. 35 (786), pp.12.-17. Available also: http://www.juristavards.lv/doc/259267-sodu-izcietuso-personu-noziedzigo-nodarijumu-recidivs/ (last visited 10.10.2016).

(23). Author's remark: The level of recidivism among people sentenced with deprivation of liberty and served all the sentence is 40-50%, whereas among people conditionally released from prison on parole – 15-25%.

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(25). Ķipēna K., „Krimināsodu politikas tendences Latvijā 20 - 21 gadsimtu mijā"*(Tendencies of Criminal Sanction Policy in Latvia at the turn of 20th and 21st centuries)*, 2016. Presentation at the seminars "Valsts probācijas dienesta īstenojamā funkcija kriminālsoda – piespiedu darbs – 10 gadu šķērsgriezumā – izaicinājumi un iespējas" *(The role and function of the State Probation Service in the 10 year execution of community service as a criminal sanction: challenges and possibilities).* Unpublished material.

(26). See more: Mediation Law. In force from: 18.06.2014. Available: http://vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Mediation_Law.doc (last visited 10.10.2016).

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Alternatives to imprisonment in Bulgaria – Development, State and Challenges

Mesures alternatives à l'incarcération en Bulgarie : développement, état de l'art et défis

Andrey Momchilov•

Riassunto
L'obiettivo del presente articolo è quello di presentare sinteticamente alcuni punti chiave legati all'implementazione delle misure alternative in Bulgaria. Vengono presi in considerazione esclusivamente gli aspetti importanti e viene presentato un approccio equilibrato basato sull'analisi di punti di vista differenti. Nel caso in cui vengano tratte conclusioni particolari o espresse valutazioni, è importante precisare che si tratta soltanto dell'opinione personale dell'autore dell'articolo.

Résumé
Cet article vise à présenter de façon très succincte certains points-clés liés à la mise en œuvre de mesures alternatives à l'incarcération en Bulgarie. Seuls les détails importants sont pris en considération, tandis qu'une approche équilibrée basée sur l'analyse de points de vue différents est présentée. Dans les cas où des conclusions particulières ou des évaluations sont exposées, elles n'expriment que l'opinion de l'auteur.

Abstract
This article aims to present in a very concise manner some key points related to the implementation of alternatives to detention in Bulgaria. Only the most important details have been included, while a balanced approach in terms of different points of view has been pursued. Where particular conclusions or judgements have been expressed, they remain opinion of the author.

Key words: Bulgaria; alternatives to detention; probation service; corrective labour without imprisonment; community service.

1. Historical notes.

The emergence of a unified Bulgarian ethnicity and state dates back to the 7th century AD. All Bulgarian political entities that subsequently emerged preserved the traditions (in ethnic name, language and alphabet) of the First Bulgarian Empire (681–1018), which at times covered most of the Balkans and became a cultural hub for the Slavs in the Middle Ages. With the decline of the Second Bulgarian Empire (1185–1396), Bulgarian territories came under Ottoman rule for nearly five centuries. The Russo-Turkish War of 1877–1878 led to the establishment of a Third Bulgarian state as a principality in 1878, which gained its full sovereignty in 1908. In 1945, after World War II, it became a communist state and was a part of the Eastern Bloc until the political changes in Eastern Europe in 1989/1990, when the Communist Party allowed multi-party elections. Bulgarian politics undertook a transition to democracy and free-market capitalism was introduced.

The Bulgarian government functions as a parliamentary democracy within a unitary constitutional republic. Sofia, a global city, is the country's capital and the 12th largest settlement in the European Union. Bulgaria is a member of the European Union (since 2007), NATO (since 2004),

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the United Nations, the Council of Europe, and the World Trade Organization and is a founding member state of the OSCE and the Black Sea Economic Cooperation Organization.

The Bulgarian legislative system has been greatly influenced by continental law. Court decisions are based on the Constitution, codes and different general and special laws. The main criminal law is the Penal Code. The first Penal Code has been adopted soon after the country gained its independence from the Ottoman Empire – February 21st 1896 (Punishment Law).

Assuming that some elements of alternative sanctions in Bulgaria can be traced back to shortly after the Liberation in 1878, it is important to track the development of particular alternative sanctions. The "deprivation of liberty" penalty was introduced in the system of penalties by the first Penal Law (21st of February 1896). Working on the regulation of all different kinds of penalties, the lawmakers used the extensive experience of England, France, Germany, Russia and other countries and adapted the progressive European ideas to the traditions of the Bulgarian nation. In the organization of the system of sanctions in the Penal Code, the dualistic system of sanction consequences was adopted. The institute of conditional release was established in 1896 and the Conditional Sentencing Law was adopted in 1903 and entered into force in the beginning of 1904. Thus Bulgaria became one of the first European countries to look for alternatives to the deprivation of liberty and seek different forms of intervention on the prisoners while they are in and when they are out of prison.

The current system of penalties was adopted with the Penal Code of 1968 when the country was under Soviet influence (1944-1989). Despite the strong ideologization of the government system, some positive developments of the different alternative sanctions should be recognized. Most important was the utilization of the conditional sentence where the court may rule that a community organization, group of colleagues or a particular person should provide supervision to the sentenced offender within the "trial period". However, it should be mentioned that all community organizations are controlled by the government during this period. The conditional release was still in use during that period. Special Supervising Commissions attached to the local authorities were obliged to support prisoners and ex-prisoners.

The start of democratic changes in Bulgaria since the early 1990s and above all the country's accession, first, to the Council of Europe in 1992 and, later on, to the European Union in 2007, have laid the foundations for the development of legislation towards adoption of modern European approaches in the execution of penalties. The period 1990–1992 saw the beginning of a process of deideologization, demilitarization and humanization of penitentiary treatment, as well as of reforming correctional education work and the training of penitentiary staff. At the same time series of reforms began in the field of criminal policy aimed at synchronization with the European models, and important step towards this aim was the implementation of probation as a specific community measure to impact offenders.

Probation as a main alternative to imprisonment finally became reality in the Bulgarian legislation through the Law for Amendments of the Penal Code passed on the 27th of September 2002. The general regulation of the nature of probation, the mechanisms for its execution and the structural implementation of the probation system in Bulgaria

have been made with the adoption of further amendments of the Penal Code and the Law for Execution of Penalties on the 23rd of November 2004. The first probation sentences were issued by courts in the summer of 2005.

2. Current state of the alternatives to imprisonment.

It should be noted that the development of modern alternatives to imprisonment was not so much the result of internal debates or evidence based initiatives, but rather because of the need to synchronize the existing legislation with the *acquis communautaire* in the process of EU accession. If we track the history of the establishment of probation system in Bulgaria, we should mention that first came the amendments of the legislation, which were then followed by the process of elaboration of strategy for development of the service. Within the twinning project "Establishment of Probation Service in Bulgaria" (BG/2004/IB/JH/2007) implemented in the period 2005-2007 with the support of English experts, the first Strategic Plan and Priorities 2007-2009 of Bulgarian Probation Service has been developed. So it is safe to say that the ideas and philosophy behind the application of non-custodial measures, and especially probation, came from the outside, and not as a result of internal processes.

As a result, Bulgaria has a system of alternatives that is not really innovative and follows the structures and content seen across most EU Member States (1).

With regard to the pre-trial phase, according to Bulgarian law the measures, alternative to pre-trial detention are the rest of the remand measures, laid down in art. 58 of the Penal Procedure Code (PPC)

- signed promise for appearance, granting bail and home arrest. The home arrest is the most repressive of all those measures. The accused is banned from leaving their home without a permission of a relevant competent authority.

In the post-trial phase, the most important measures, alternative to effective custodial sentence are the application of "stay of enforcement" and "stay of execution" with a probation supervision obligation under the art. 66 PPC (suspended or conditional sentence with or without supervision).

This legal regime has traditionally a large application, when the proprietor has not been sentenced to imprisonment towards the moment of committing the offence. This "stay of enforcement" burdens the statute of the person, but does not lead directly to their isolation from the society or to making any other commitments and it comes down to a warning to abstain themselves from committing other criminal acts in the probation period. In case where such acts have been committed the offender would serve separately the postponed punishment as well. Because of that special feature the effectiveness of the sanction is disputable. After 2005 that effectiveness may have been increased by the additional application of a measure of probation surveillance in the probation period, by which an actual influence on the convicted person is exercised.

- the enforcement of probation as a combination of measures for influence and control.

Probation can be imposed as a single penalty (Article 55, Paragraph 1, Sub-paragraph 2, case "b" from the Penal Code). It is designed as the appropriate sentence for offenders who have committed low impact crimes. The Bulgarian legislation allows in some cases deprivation of liberty to be substituted with probation.

Probation can also be imposed as a complementary penalty in cases of conditional sentencing, as mentioned above (Article 67, Paragraph 3 from the Penal Code). In such cases probation does not lead to suspension of the conditional sentence but adds to it by measures for supervision during the "trial period".

Speaking of post-trial alternatives, probation can also be imposed in cases of conditional release from prison. A peculiar legal regulation in such cases is that the judge deciding on whether to grant conditional release, can select only one of the available probation measure options, and in the vast majority of cases this measure is either the regular registration at the probation service office, or regular meetings with a probation officer. Therefore we conclude, that in cases of conditional release, the system focuses on the supervision of the released individual.

Given the regulations and characteristics of probation outlined above, we can conclude that probation will always be an alternative to imprisonment. The experience so far, indicates that the punishment fulfills its purpose effectively to some extent. As an alternative to the imprisonment, the probation in its two forms (as an independent sanction and as a form of surveillance in the probation period of the "stay of enforcement" or a pre-term release) should be encouraged by the European Union.

In the transposition of the Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, every Member State has the heavy task of offering a set of probation measures, which should cover the large scope under Art. 4 of the Framework Decision. Bulgaria has enough opportunities through individualizing and combining the 6 probation measures, laid down in our law to satisfy the requirements of the Framework Decision, without an amendment to the material law.

Apart from probation there are two other non-custodial sanctions, which are not standalone, but are used in conjunction with either suspended prison sentence or probation – "community service" and "corrective labor without imprisonment":

- "Corrective labor without imprisonment". This is a measure for reparation of harm caused by the crime. It is imposed by appraisal of the court and is legally defined by Article 43 of the Penal Code and Article 141f of the LEP. This measure is actually gathering of deductions of 10 to 25 percent of the salary in state's benefit and excluding the period of the sentence from the social security record (providing the right to receive a pension) of the sentenced person. This measure is applicable only to persons that have permanent jobs. If the sentenced becomes unemployed the measure is substituted with community service.
- "Community service" is a measure for reparation of the harm caused by the offence. It is imposed by appraisal of the court and is legally defined by Article 42b, Paragraph 5 of the Penal Code and Article 141g of LEP. This measure is one of the most frequently applied so far and by its nature it is similar to the probation practices throughout Europe. It consists of work in benefit of the society for a period between 100 and 320 hours per year, for no more than 3 consecutive years. The workplaces where this can happen are selected by the correspondent Probation Council; they should not be privately owned, state or municipal

ownership of more than 50 % of the capital is required. The sentenced person does not get paid for this work and it is not included in the social security record. In regard to restorative justice, from community service can benefit victims of the crime that have expressed agreement for this.

Of course, all meaningful alternatives to imprisonment should contain elements of support, building the human capital (2) and social capacity of offenders, in order to reduce the risk of re-offending. In Bulgaria the legal framework for corrective and supportive interventions is defined only with regards to probation.

The Law on Execution of Penalties describes a specific measure, which can be included in a probation sentence by discretion of the court: "Participating in vocational qualification courses and programs for corrective influence".

This is a measure for support and assistance to the sentenced person that can imposed by appraisal of the court. It is legally defined by Article 42b, Paragraph 4 of the Penal Code and Articles 141c, 141d and 141e of the LEP. The content of this measure comprises an obligation on the sentenced person to attend for professional qualification courses and/or programs for corrective influence with the aim of labor integration and development of social skills and law-abiding behavior of the sentenced person.

This measure, as said above, includes participation in professional qualification courses and/or programs for corrective influence. Programs for corrective influence are two types:

- personal development programs include literacy courses, developing job search skills, positive communication with the social services and the police.
- corrective programs are aimed at changing the personal values and behavior of the sentenced person or to help him/ her to overcome an addiction.

From administrative point of view all alternatives, as well as detention measures, are structured within the Ministry of Justice jurisdiction, in particular General Directorate "Execution of Sanctions". The General Directorate incorporates three key sectors:

- Prisons, responsible for the implementation of imprisonment;
- Probation service, responsible for the implementation of probation. It consists of administrative staff, probation officers (called inspectors), junior probation inspectors (serving police like support functions) and technical support staff. An important part of this service are specialized probation officers based in prisons, who are responsible for supporting the inmate's release from prison back into the society;
- Arrests – responsible for the implementation of pre-trial detention.

It is important to note that this three-directional structure is replicated on the local (district level), where there is a District Service "Execution of Sanctions", incorporating the local arrests, probation service units and where applicable – a local prison (there are 11 prisons for adult males, one for adult females and one for male juveniles).

3. Some problems of the application of alternatives in Bulgaria.

The system is rather hierarchical and rigid and in this aspect follows the similar approach taken by the legislator. All pre- and post-trial alternatives to detention in Bulgaria are described in the penal legislation, the conditions for selection are also

described, and the responsible decision maker is always the judge. This means that there is simply no space to allow for discretion or maneuvers by the judge, no difference in the approach that we can pick up and say that this is a good practice. Alternatives are the same for everyone and are implemented in the same way as required by the legislation.

This tight framework does not always produce the best effect for those sentenced to an alternative sanction or measure. During the initial development of the legislation on probation in Bulgaria in the period 2002-2005 we insisted that it should be introduced as an alternative not to imprisonment, but to criminal sentencing as a whole (3). The arguments in this regard were that if the offender had the opportunity to avoid the sentence, and thus to preserve their clean criminal record, the motivational effect of this will be much larger. The balance of the severity of the sanction would have been maintained by limiting the possibility for a person to be sentenced more than once to probation for the same thing. Neither approach was adopted by the legislative body, which decided that probation will have be imposed with a sentence and will be a punishment, which, however, can be imposed unlimited number of times with respect to the same person.

A recent research that included in-depth interviews with offenders and probation officers illustrates the practical implications resulting from this legislative approach (4):

Interviewer: *"What do you think on this – if probation is not a punishment but a sanction and a measure only? Will there be any effect on your work?"*

Inspector: *"For our clients it would be better that way. Because people start to resent the system and instead of the work being aimed at him solving the problem, it focuses on explaining that the system is not so nasty, it's not about screwing him, etc., but if it's not a penalty, the way it is in other countries, then the work could focus entirely on the person and their ability to solve problems."*

Loss of motivation and negative reaction to the conviction is typical for people who have not committed any offenses to this point, and carry low risk of committing a new offense. An important principle of working with offenders is that the intensity of intervention should be based on their needs and the risk they pose (5). Therefore in terms of low-risk cases, government intervention can turn out to be excessive:

Inspector: *"Unfortunately, I see more and more such people who have a first conviction, and just turn bitter towards the system and the state in general. And I mostly understand them, because at some point the punishment really becomes disproportionately severe. If they hadn't done anything wrong by that point, you can't say this person had any manifested criminal attitudes. And it gets "Am I really the greatest criminal in this country?" He really suffers much more sanctions, and since he's, so to speak, a decent person, the very fact that he was on trial makes him feel bad. He's ashamed and then he also gets a much more severe punishment, which I believe has the opposite effect.*

On the other end of the problem are situations bordering with absurdity, when on the same person multiple consecutive sentences "probation" are imposed without any legal method to compel the court to finally impose a more severe punishment. For this reason, the practice shows cases of people who have been sentenced to probation more than twenty times and never went to prison.

Offender: *"Pretty much since probation exists I've been on it. Five or six times I've been convicted, I'm not sure. And to tell you... it's been always the same – misuse of alcohol."*

For such individuals the probation inspectors cannot achieve any additional effects:

Inspector: *"Through probation and the programmes they are supposed to receive some support, but this is for people with a first conviction. Otherwise, there are people who from the beginning of probation have already changed 5 inspectors because they are constantly on trial and have an active probation. Their case is a little different. Since I've been working here for five years, their number has increased. On the other hand, it is natural for their number to rise because they received probation, say, 5 years ago, etc. From this perspective, the classical case are people who drive without a licence because they work as illegal taxis. These people come with 5 or 6 sentences, a few cumulations are done, etc., but every time you try to speak with them, they say: "There's nothing else I can do, I can only be a taxi driver." At some point they have their licence taken away because they run out of points. However, they can't pay the fines or they have to take a refresher course, while they earn money working as taxi drivers and that's how they're sentenced to probation. Judges apparently consider it ridiculous to put in jail someone for driving without a licence but with no accidents on their record; it's a crazy story!"*

Inspector: *"He's here with me for the third time for the same thing. There's nothing new I can tell him."*

Another problem is the lack of a global procedure for judges to receive and review all necessary information on the offender prior to deciding about their sanction. Although the possibility for the court to request from the probation service a pre-trial report on the defendant has been introduced in the Law on Execution of Sentences and Detention (ESGDA), in practice this opportunity is used by very few judges in the country. We leave aside the arguments of the magistrates not to require pre-trial reports (independence of the court, the fact that pre-trial report does not appear in the Criminal Procedure Code, but only in special in nature ESGDA etc.) and focus on the results of non-use of pre-trial report. They are expressed in a more or less constant percentage of "poor" sentences that are not commensurate either with the needs of the convicted person nor valid for their criminogenic factors and problem areas or even their ability (physical and mental) to participate in relevant probation activities. Therefore, the court keeps sending pensioners to vocational training courses, illiterate persons to cognitive-behavioural programs and people with prestigious and useful professions to clean arrests - and examples of this kind are abundant. The problem is further deepened given that the type of the sanction imposed, including the individual probation measures, is determined by the court, and the legislation does not provide that the will of the offender is taken into any consideration whatsoever.

This lack of feedback from the offender in the pre-sentence phase of their trial can be overcome only at a later stage, and only to some extent. Taking feedback from offenders enables probation inspectors to adjust their approach to the individual person (6) to overcome the barriers between them and to eliminate formal and declarative participation of the offender in the probation activities. Therefore feedback should be encouraged despite any resistance on behalf of the offenders. It would be advisable to develop and implement more innovative and interactive methods for obtaining such feedback, while bearing in mind that with the current level of rigidity of the judicial system, such efforts will have limited impact.

Still it is important to conclude that with all the developmental and ethical issues, alternatives to imprisonment, and probation in particular, constitute one of the biggest achievements in the field of justice reform in Bulgaria. Its impact on the

lives of more than 45 000 clients since 2005, on their families and communities, and the Bulgarian society as a whole is beyond questioning, and there are many testimonials to this.

Further broadening of the understanding of the complex philosophy and theory behind modern alternative sanctions and measures will only benefit further the Bulgarian system, and this can be achieved directly with the involvement of the country in projects such as "Reducing Prison Population: advanced tools of justice in Europe".

Notes.

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Alternatives to Detention in France: much ado about law, little about criminology

Mesures alternatives à l'incarcération en France: beaucoup de bruit sur la loi, pour rien ou presque sur la criminologie

Martine Herzog-Evans, Delphine Boesel, Stephan Parmentier, Pietro Sullo•

Riassunto
Il presente articolo descrive sinteticamente il contesto politico e sociale nel quale sono maturate le discussioni relative alle alternative alla detenzione in Francia. Successivamente, analizza le alternative previste attualmente evidenziandone la ratio giuridica e criminologica ed esprimendone una succinta valutazione. Infine, vengono riportate ulteriori informazioni circa le alternative alla detenzione previste per specifiche categorie di persone.

Résumé
Cet article décrit tout d'abord le contexte politique et social dans lequel il conviendrait d'échanger sur les alternatives à la détention en France. Il analyse ensuite les alternatives existantes en expliquant leur nature et leurs sources juridiques et criminologiques avant de donner une courte évaluation des solutions alternatives à la détention. L'article se termine par un supplément d'informations sur les alternatives à l'incarcération pour certaines catégories de personnes.

Abstract
This article first sketches the political and social context in which the discussions about alternatives to detention in France are to be situated. It then analyses the existing alternatives by explaining their legal and criminological rationale and sources, and goes on providing a short evaluation of the alternatives to detention. It concludes with more information about alternatives to detention for specific categories of persons.

Keywords: alternatives to detention; France; law; criminology; victims.

1. Introduction.

In recent years France has increasingly developed a number of methods to reduce prison incarceration. The system has adopted a threefold articulation, relying on measures (a) adopted before the trial ('doorstep approach'), (b) at the end of the trial ('front door approach'), or (c) after the sentencing phase ('back door approach'). In the first case, pre-sentencing procedures which are alternative to prosecution or to judgement are installed. In the second case, alternative sentences are available for the felony courts when they are seized in the absence of a pre-trial procedure. In the third case, back door options allow opportunities for the reduction of prison sentences which have already been imposed, either before or after their execution. This article first sketches the political and social context in which the discussions about alternatives to detention in France are to be situated. It then analyses the existing alternatives by explaining their legal and criminological rationale and sources, and goes on providing a short evaluation of the alternatives to detention. It concludes with more information about alternatives to detention for specific categories of persons.

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2. Political and Social Context of Alternatives to Detention in France.

In order to situate the legal provisions relating to alternatives to detention in their proper context, we first deal with four aspects of a politico-social nature.

2.1 Political arguments to implement and design alternatives to imprisonment.

In France, criminal justice issues are systematically politically polarised. However, in recent years the traditional punitive versus lenient opposition between both sides of the political spectrum has become more blurry. For instance, whilst former president Nicolas Sarkozy has built much of his political career on 'tough on crime' discourses and policies, he nonetheless had a 'Prison Act' passed in 2009 that attempted to fast release as many prisoners as possible – a law that failed as it did not address the root causes of overcrowding, nor dealt with France's lack of re-entry programmes and practices. Likewise, a 2014 Act by the current 'left' government is an odd mix of punitive and lenient discourses which both tries and create yet another fast release system that is equally failing (ongoing research by this report' leading author) for identical reasons and attempts to sound punitive. In the latter vein, the 2014 act has created a new – and additional – probation sentence presented as tougher than previous ones ('penal constraint', a telling terminology). In other words, the narrative of recent reforms has become rather similar for both sides of the political spectrum. This narrative goes as follows: the government wants to appear sufficiently punitive whilst developing alternative sentences and speedy unconditional release measures with two identical goals: first, in financially dire times, to cut expenses; second, to at least present the appearance of protecting human rights by addressing overcrowding (1).

2.2. A cost-benefit analysis of prison detention and its alternatives

To date no cost-benefit analysis has ever been produced in France which is to be correlated with a general reluctance to evaluate practices and legislations. However, the Accountancy Court (*Cour des Comptes*) has controlled prison finances three times (2006, 2010, 2014); in relation to overcrowding it has advocated the development of alternative sentences and measures. The *Cour des Comptes* has fustigated the terrible mismanagement of finances and the inability to correctly execute the prisons' core missions i.e. 'guarding inmates and preparing their reinsertion' (2006). Each time, it has also commented on the lack of methodologically convincing evaluations of prison management, prison outcomes, along with the lack of comparison between the private and the public sector. It has also focused on overcrowding in particular (2010). In 2014, it has focused on prisoners' health, and even though it has praised the fact that since 1994, health agencies had been put in charge, it has concluded that health needs were far from being met. The *Cour des Comptes* has recently investigated how sentences are implemented and, in the course of an Emergency Report, has regretted the lack of evidence-based practices in probation (2).

2.3 The socio-demographic profile of prisoners.

It is worth noting that France does not produce detailed statistics pertaining to the socio-demographics of its inmates or probationers. Each year, its prison services issue a ten-page general report that only provides one socio-demographic element pertaining to prisoners' age. Thus on January 1st, 2013: 0,1% inmates were under the age

of 16 (N 95); 0,8% 16-18 (N634); 7% 18-21; 17,9% 21-25; 20,4% 30-40; 16,3% 40-50; 7,7% 50-60; 3,5% over 60 (3). For more information one can only rely on *ad hoc* reports and occasional studies. Such was the case of a 2008 small report published by two prison services' researchers who focused on socio-demographic characteristics of offenders serving their prison sentence under electronic monitoring (EM). This five-page report showed that women accounted for only 5% of offenders under EM; 7,5% were foreigners; 42,6% were married or lived with a partner; 46,4% had at least one child (4). It showed that their mean age was 34 and that nearly two thirds were employed. Another, albeit older, study by the National Agency for Statistics showed that more than half of male inmates were less than 30 and that in many jurisdictions, the peak of the incarceration rate was between 21 and 25 years of age (5). However, it also reported that over the previous twenty years, prisoners had become older.
Unsurprisingly, it revealed that the vast majority belonged to the lower classes of society with the lowest educational levels. One out of seven had never been employed and one out of two was or had been a labourer. More than half of them had at least four brothers or sisters and one out of twenty belonged to a family with more than ten children. The study showed that there were twice as many foreign prisoners than foreigners in the general population.

2.4 A focus on victims.

There is an extreme paucity of French research on victims and sentences and on their implementation. However, as in many Western jurisdictions, victims' associations and networks have campaigned and obtained a few rights at the sentencing and sentences' implementation phase. At the sentencing phase, France mainly allows victims to present their claim for damages and to swiftly describe how the offence has been committed (6). The law does not organise a victim impact statement. In many cases the trial is too speedy, or a bifurcation procedure has been used, for the victim to actually be present (7). Regarding the sentences' implementation phase, a law passed in 2000 (June 15) has ensured that whenever damages are to be paid, early release measures and remission are *inter alia* subjected to the offender actually paying them (8). Moreover, victims *can* now be asked to provide a written (in certain cases by phone) statement whereby they express their opinion on the early release of the offender (Penal Peocedure Code, art. 716-16-1); this rule is in practice only applied for serious crimes. Victims are in any case not considered as being a party to release trials (Court of Cassation, Criminal Chamber, March 15, 2006, n 05-83.684) and cannot appraise the judge applying the sentence (*juge de l'application des peines*) of any claim; nor can they appear in court. Only with parole cases pertaining to sentences exceeding five years, can their attorney represent them in court (PPC, art. 730, sec. 4).

3. Alternatives to prison detention: an overview.

In the last decades, several alternatives to prison detention have been developed in France which take place during three phases of the penal process: pre-sentence (plea-bargaining; alternatives to prosecution; and alternatives to trial); sentencing (with community sentences), and release (with release measures or other sentence reduction systems).

3.1 Alternative procedures at the pre-sentence phase.

According to the French penal procedure code (hereinafter PPC) Public Prosecutors are vested with a decisional power called 'the principle of

opportunity', whereby they can decide over the action to be taken to address a felony offense. Article 40-1 of the penal procedure code states that prosecutors decide: '*... if it is opportune 1° either to initiate prosecution; 2° or to enforce an alternative procedure applying the regulation of articles 41-1 and 41-2; 3° or to close the case with no further action...*" (*emphasis added*) (9). In other words, prosecutors are in charge of what has become known as 'penal orientation'.

As a result, alternative procedures to prosecution or alternative procedures to judgment are both admissible. 'Alternative to prosecution' procedures have been developed in the 1990s. Initially their goal was not to reduce prison populations, but, quite the contrary, to actually deal with felony offences in a faster and more systematic way and, in particular, to end the widespread but contentious practice that consisted in 'closing the case with no further action'. At the outset, alternatives to prosecution were more akin to 'zero tolerance' policies than to rehabilitative or restorative approaches. Another rationale for prosecutors' office being vested with such crucial powers within felony courts was the desire of central executive bodies, particularly the Ministry of Justice, to have a decisive influence over the judiciary: in France, prosecutors are under the direct authority of the Ministry of Justice.

Thus a distinction was made between two forms of out of trial treatment of felony offences, which were regulated by a law passed on 23 of June 1999. On the one hand, 'the alternative measures of article 41-1 of the criminal procedure code, often labelled as simple alternatives' and, on the other hand article 41-2 penal composition 'which is presented as a punitive alternative, insofar as punishing the person is truly an advantage...' (10).

Alternative to trial procedures were also inspired by the need to speed up the processing of felony offences. In fact, they were developed in order to provide a swift response without the need to assemble three judges to compose a felony court in collegial hearing or even when a hearing with one judge may have been an option (art. 398a, para. 3 PPC). However, prosecutors' decisions must be homologated by the President of the tribunal or a judge delegated by him/her. These procedures' main purpose is therefore to accelerate and systematise the handling of felony offences while simultaneously relieving felony courts. However, their implementation has as indirect impact on the reduction of incarceration.

3.1.1 Alternative procedures to prosecution.

The French PPC provides two alternative procedures to prosecution. The first alternative, regulated by article 41-1, is penal mediation. Article 41-1 contains a list of measures that public prosecutors can draw upon in the course of penal mediation. The overall goal is to fulfil three objectives, namely: a) ensure that the damages caused to the victim are compensated; b) put an end to the public disorder caused by the offence; c) allow perpetrators' reinsertion into society. Prosecutors must have these aims in mind when they choose between the following options: simply remind the offender of his legal obligations as a citizen; ask the offender to seek treatment, or improve his situation in terms of social insertion and employment, by referring him/her to a partner agency (often a third sector association); submit to a form of training or internship that pertains to citizenship, parental responsibility, or awareness on the use of drugs; or ask the offender to compensate for the damages, or to comply with the law.

The second alternative procedure to prosecution in embodied in article 41-2 PPC and relates to penal

composition. When a person admits to having committed a felony punishable by a fine or a prison sentence of up to five year, and in lieu of setting prosecution in motion, public prosecutors can draw upon a very long list of eighteen options, listed in article 41-2, and, inter alia: paying a fine; being deprived of the use of one's car or driving licence for six months and other confiscations; executing a maximum of sixty hours of community work; submitting to a form of training or internship; six months restraining order; submitting to various forms of mandatory treatment; and so forth. This procedure also applies to misdemeanours (art. 41-3 PPC).

The two procedures have a different impact on public prosecution. The full execution of the obligations imposed on the basis of article 41-2 extinguishes public prosecution; conversely, executing the constraints imposed on the basis of article 41-1 does not bar victims from lodging a complaint. However, the two procedures share one important thing in common, however: in both cases, no custodial sentence can be pronounced.

Going one step further, the aforementioned 2014 Act (Law of 15 August 2014, n° 2014-896 relative to the individualisation of sentences and strengthening the effectiveness of penal sentencing) allows higher rank police officers (those vested with important investigative powers) to propose a penal transaction to both natural and legal persons as long as no public action has been set in motion. Police Officer Penal Transaction as regulated by article 41-1-1 of the PPC only applies when the person has committed a felony which is punishable by up to one year imprisonment (with the exception of contempt offences). This transaction has to be authorised by the public prosecutor, must be accepted by the person in question, and then has to be homologated by the president of the tribunal or by a judge delegated by him/her. The proposed transaction is '*determined on the basis of the circumstances and the severity of the offense, the personality and the material, family and social circumstances of the perpetrator as well as his/her resources and loads*. Again, custodial sentences are excluded from Police Officer Penal Transactions.

3.1.2 Alternatives to trial procedures.

French law also establishes for two alternatives to trial procedures. The first alternative is Penal Ordinance for Felonies (*Ordonnance Pénale Délictuelle*), which was first created by the Law of 9 September 2002 (n° 2002-1138). This procedure allows the felony judge to impose a sentence to an adult offender who has committed a felony offence and has not also committed a misdemeanour. This procedure only applies to unintentional manslaughter or unintentional damage to a person. It can only be set in motion if the victim has not made his/her intentions clear at the investigation stage. As with the previous alternatives presented above, it does not allow imposing a custodial sentence (art. 495 PPC). In the case of Penal Ordinance for Felonies, the main explanation for this is that these are potentially relatively serious cases and the procedure does not provide for an adversarial hearing. Clearly, then, and regrettably, this procedure aims at bypassing due process.

The second alternative to trial is the procedure of Appearance on Prior Guilty Plea (*Comparution sur Reconnaissance Préalable de Culpabilité* (CRPC). Pursuant to CRPC, a sentence is proposed by the public prosecutor following the accused's appearance before him/her. In this case, legal assistance is mandatory. This sentence can only be executed if it is accepted by the accused and then approved by the president of the tribunal or a judge

delegated by him/her. In the absence of such an agreement or approval, the accused is summoned before a regular felony court in order to be tried. This procedure does not rule out the imposition of a custodial sentence. However, such a sentence should be reduced by comparison with the Penal Code tariff. Article 495-8 of the PPC thus states: '*when a prison sentence is proposed, its duration cannot exceed one year nor exceed half of the applicable prison sentence*'. In other words, this procedure is not truly an alternative to imprisonment; it is more precisely a procedure which allows reducing the length of custodial sentences.

According to the last statistics published by the Ministry of Justice (11) in relation to 'prosecutable cases' (1.379.076 representing 100%), the public prosecution decided to resort to alternative procedures in the following proportions: a) penal compositions 5,5% (75.493); b) alternative procedures 39,7% (547.678). The decisions to prosecute amounted to 43,8% of the sum total of all cases (603.582), while 11% were closed without further action (152.333). According to the same data and relating to the total number of decisions to prosecute (603.582, representing therefore 43,8% of the prosecutable cases) prosecutions before felony court amounted to 492.304 cases representing 81,56% of the trialled cases. Of these procedures CRPC represented 10,78% (65.106) and Penal Ordinance for Felonies represented 24,20% (146.102 cases).

3.2 Alternative sentences.

It can be argued that prison sentences remain the reference sentence in France, occupying the leading position in the convictions pronounced by French penal courts. In fact, all crimes and felonies are in punishable by a custodial sentence, at least according to the Penal Code. As for felonies, however, article 132-19 of the Penal Code (hereinafter PC) as amended by the Law of 15 August 2014 affirms that felony courts can only pronounce custodial sentences:

a) '*when the gravity of the offense and the personality of the offender make this sentence necessary and if any other sentence is clearly inadequate*' and in such cases, the courts must, if possible, try to convert it into an alternative sentence.
b) if they justified in their ruling the reasons why such a sentence was appropriate, why no other sentences was sufficient, and, furthermore, why they did not deem possible to convert a custodial sentence into a community sentence or measure; as a matter of fact the Court of Cassation stringently controls that felony courts submit to article 132-19 constraints (12).

The central role of imprisonment sentences is confirmed by the following data. In 2012, 617.221 convictions were pronounced, 47,37 % of which were prison sentences (292.399 in total). Of these prison sentences, 122.301 (41,8%) comprised one part custodial and one part non-custodial (probation) ('mixed sentences').

In reality, though, French felonycourts can choose form a vast array, and often rather sophisticated, list of alternative sentences. These first of all include fines, which consist in the payment to the Public Treasury, of a sum of money. Fines amounted to 36,54% of the pronounced sentences during the year 2012 (225.582 fines were pronounced). Fines can be pronounced either as a standalone sentence or additionally to another sentence, and in particular to custodial sentences.

A specific sentence not implying incarceration is day-fine. Article 131-5 of the PC stipulates that '*when an offense is punishable by a prison sentence, the felony*

court can pronounce a day-fine consisting for the convicted in paying a sum of money to the Treasure, the amount of which results from the determination by the judge of a daily contribution during a specific number of days'. When choosing a given number of day-fines, and the exact amount for each day, the judge has to take into account the person's financial situation. It is important to note that this sentence is not completely detached from the prison sentence because if the person does not pay, he/she will then have to serve the number of prison days attached to the day-fine. A day-fine can, and usually is, pronounced not by the felony court itself, but by the re-entry judge (*juge de l'application des peines* – hereafter JAP). During the year 2012, 24.271 sentences of day-fine were pronounced, that is 3,93% of all sentences.

Suspended prison sentences represent a second type of alternative. In this case a custodial sentence is imposed, but not executed. The suspended sentence is not executed if the person does not commit further offences during the probationary period attached to this sentence and, when this probationary period comprises a probation order, if the person does not violate his/her obligations. Suspended sentences are either 'simple' or 'with probation'. The custodial sentence which is pronounced is either entirely suspended or partially suspended, in which case it is called a 'mixed sentence'. Articles 132-29 to 132-57 of the PC specify the cases and the conditions under which these sentences can be pronounced or revoked.

In the case of a simple suspension, the conviction is 'annulled' (that is, it disappears retroactively and is erased from criminal records), if the beneficiary is not convicted again for a crime or an offense within a period of five years after sentencing. Conversely, a conviction for another offence during this five year period causes the withdrawing of the suspension. Any new sentence pronounced for the new offence is thus executed following the original suspended sentence; they cannot be served concurrently. However, the court can exempt the convicted of the withdrawal of the initial sentence (13). Relative to the suspended sentence with probation, the offender must serve a probation order as determined by the felony court, which cannot exceed three years (and is typically of eighteen months to two years); five years for recidivists and seven for people twice sentenced as recidivists. If, during this probation period, the person is neither sentenced for a new offence, nor held in breach of the conditions attached to the order, as with simple suspension, the sentence is retroactively annulled. If the person commits a new offence, the felony court, and if the person breaches the order, the JAP, can revoke entirely the suspended custodial sentence. They can alternatively prolong the order if the initial order did not exceed the aforementioned maxima; they can also partially revoke the custodial sentence (14).

The PC allows pronouncing other sentences, when imprisonment is applicable. One main category of such sentences is Community Work (*travail d'intérêt general* - TIG) is regulated by articles 131-8 and 131-22 of the PC. It can apply to felony offences punishable by custodial sentences. Depending on the court's decision, the person can be sentenced to 'carry out for a period of 20 to 280 hours of non-paid community work for either a public *law legal person, or a private law legal person that has received a public service delegation, or for a not for-profit association*'. This sentence can only be pronounced if it is formally accepted by the person immediately after his/her conviction (15). Not complying with TIG constitutes an offense which is punishable by up to

two year imprisonment, and/or a fine of up to 30.000 euros (art. 434-32 PC). TIG can also be mixed with suspended sentence with probation (see *supra*). It then constitutes a separate sentence called STIG (*sursis avec mise à l'épreuve et travail d'intérêt général*). Albeit autonomous from both suspended sentence with probation and TGI, STIG nonetheless comprises legal consequences attached to both sentences, such as: a custodial sentence; which is suspended; plus a probation order; plus community work. If STIG is a sentence, the JAP can also pronounce STIG to transform a custodial sentence of up to six months in the context of article 723-15 procedure (see below). If either the obligations or the community work attached to STIG are not complied with, the JAP can revoke all or part of the custodial sentence. In practice, it is most of the time preceded by one or even two 'reminding of the law' informal hearing(s) with the JAP.

In 2012, 25.732 TIG sentences were pronounced, that is slightly in excess of 4% of the total number of sentences. These numbers include STIG with the following distribution: 8.721 STIG and 17.011 TIG. For the year 2011, the Ministry of Justice estimated that almost 77% of all TIG were correctly executed, that is to say that offenders both complied with their work obligation and their obligations and did not commit a new offence. On January 1st 2013, the Ministry of Justice further indicated that the probation services (*services pénitentiaires d'insertion et de probation* - hereafter SPIP) supervised 34.096 persons either for a TIG or a STIG (unfortunately official statistics did not specify). These numbers increased up to 36.588 on January 1s, 2014 (16).

A third alternative sentence is a 'citizenship course' (*stage de citoyenneté*). It can be pronounced in lieu of a custodial sentence (art. 131-5-1 PC). *Stage de citoyenneté* is a form of educational refreshing class which should 'remind' the offender of '*republican values of tolerance and of respect for human dignity on which society is based*'. Fees for the class are to be paid by the offender and for this reason, can only be pronounced if he or she agrees. Therefore it cannot be pronounced against a person who is not present at his/her hearing.

A fourth series of alternatives to imprisonment is listed in article 131-6 of the PC. These so-called 'complementary sentences' can, in actual fact, either be pronounced as a stand-alone sentence or as a complementary sentence. These sentences can either deprive or restrict a person's liberty or rights. They consist in, inter alia: suspending a driving license; prohibiting the use of certain vehicles; cancelling a driving license; prohibiting the carrying of weapons, or the confiscation of weapons. In 2011, 198.505 'complementary sentences' were pronounced in repression of felony offences. These included: 3.053 exclusions from the French territory; 90.887 driving license suspension; 26.707 prohibitions to retake a driving license test after annulment; and 42.390 confiscations (17).

A fifth category of alternatives to custodial sentences is 'punishment and redress' (art. 131-8-1 PC). It can be pronounced 'instead of or at the same time as' a prison sentence. It consists in obliging the person to repair the damages caused to the victim within a time frame defined by the felony court. If the convicted individual does not respect this obligation, (s)he faces the execution of a prison sentence, which cannot exceed six months, which is pre-determined by the felony court should this happen.

A six category of alternatives, adjournment, is not in actual fact an alternative sentence. It represents the caesura of the penal process between the

conviction and the sentencing phase, when, in all other instances, these two phases traditionally take place in the course of one single hearing. In such a case, the felony court decides that the person is guilty and convicts the person, but temporarily exempts him or her of any sentence, by adjourning the sentencing to another hearing, at a further date up to one year. This is typically decided at the conviction, but can exceptionally occur a second time, when there has been a first adjournment. Adjournment can be 'simple' or conditional. If the adjournment is simple, the person simply has to avoid committing a new offence. If adjournment is conditional, the person is submitted to a probation period, during which he or she is submitted to various obligations, identical in nature to those which prevail with suspended sentences with probation (e.g. pay damages; submit to treatment; seek employment, and so forth). During the second trial, set on a date no later than a year after the first hearing, the felony court can either sentence the person, exempt the person of any sentence, or adjourn again if the maximum one year maximum was not exceeded the first time around. Unfortunately adjournments are quite rare. On January 1st 2014, there were only 184 people benefitting from conditional adjournment and supervised by the PSIP. Although penal caesura seems very positive on paper, in overburdened French felony courts' real life, it is simply impossible to devote two hearings to a given case.

In France, sentencing is typically hurriedly decided upon on the basis of a single hearing. It is made at the very same time as the conviction decision on the basis of very little, if any, psycho-social information pertaining to the person and his/her circumstances. Most decisions are made in the absence of a pre-sentencing report; French probation services no longer consider that this is part of their job. This is very important since studies show that the less information a court has on an offender, the highest his risks are of being sentenced to prison (18). This is one of the major obstacles in this jurisdiction, to the development of alternative sentences.

In 2011, 290.322 custodial sentences were pronounced for felony offences. Of these however, only 89.484 were not suspended or otherwise converted. Partial simple suspension amounted to 4.557 decisions; partial conditioned suspension to 27.505 cases; total simple suspensions, to 111.015 cases; total conditional suspension to 49.207 cases; and, lastly STIG accounted for 8.554 decisions. Data of 2011, as published by the Ministry of Justice, included all types of offences, ranging from the most serious to the less serious offences: crimes, felonies, and misdemeanours. On this basis, 593.143 sentences were pronounced comprising: 291.849 custodial sentences (90.317 unsuspended; 32.468 partially suspended; 169.064 totally suspended); 206.049 fines; and 6.639 sentence exemptions.

Penal constraint (*contrainte pénale* - hereafter CP) is an additional probation sentence created by the Law of August 15, 2014. CP consists in a probation period of six months to five years. It can include identical obligations attached to conditional sentence suspension or STIG; it can thus include community work. It can even include mandatory treatment for sex offenders, although in practice CP is not the sentence of choice for such offences. Its official goal was to compete with imprisonment. In actual fact, however, it was presented as a competitor for all the other alternative sentences, which it was supposed to abrogate and replace as of 2017. The resulting impact would have been a net widening effect, as PC was in fact supposedly more constraining than other alternative sentences with

probation, had it been successful. Instead, its implementation rather pathetically failed, as predicted (19). Indeed, although it was nearly identical to conditional sentence suspension, it was much more complicated technically and much less thorough in terms of its legal provisions (20). A second reason was that it was apparent from the very beginning that SPIP would not be in a capacity to develop the full range of evidence-based practices and more stringent probation supervision that penal constraint was supposed to entail. Thirdly, SPIP had strongly opposed any partial privatisation to the not-for-profit sector to help them implement a sentence they advocated but could not implement. Lastly, the so-called detachment from custodial sentence that CP was supposed to represent was patently false: in order to sanction a person serving CP who would not comply with his/her obligation or would commit another offence, the felony court had to pre-determine a custodial offence. Rather than allowing the JAP to implement this sentence as is the case with other alternative sentences, the law created an extremely impractical system, which has strongly contributed to courts' detestation of this sentence.

3.3 Release measures.

Article 707 of the PPC contains a list of principles which must guide the JAP and TAP (a three JAP court competent for the most serious cases) when they make decisions pertaining to the sentences' implementation phase: 1) sentencing decisions must be executed swiftly; 2) offenders' reinsertion and rehabilitation are, along with the prevention of reoffending. the ultimate goals of sentences' implementation; 3) most prisoners should be early released on license. '*Back door*' decisions – called 'sentence management' in French – is the most widely used path used to avoid or shorten imprisonment.

As mentioned supra, felony courts can pronounce a prison sentence and immediately convert them into an alternative sentence or measure. However, in practice, sentencing courts do not have the time, nor the information required to convert custodial sentences to fit the person's personality and circumstances. Sentence conversion or 'management' is therefore mostly done in the context of one of two procedures, that take place after the sentencing phase and are pronounced by the JAP, or for the long sentences, in certain cases, by the TAP. The first, and very original, of these procedures is that of 'ab initio sentence management' as regulated by articles 747 and 723-15 of the PPC – otherwise known as 'procedure 723-15' – whereby the JAP can convert a custodial sentence of up to two years into a community sentence or measure (one year if the person is a recidivist) (I). More traditional is the release procedure, yet France is also original in that its legal systems has a great number of releases; not limited to parole, unlike many other European (21) or other legal systems (II). These measures are equally applicable in the context of article 723-15.

3.3.1 Sentence reduction before execution.

Articles 474, and 723-15 is a particularly original procedure. 'Procedure 723-15' applies to any person sentenced to one or several custodial sanctions of up to two years (one if he/she is a recidivist), a person who is convicted to one or more sentences, the total of which does not exceed two years, who is not yet incarcerated for another reason. Should the felony court object to article 723-15 being applied, it must then issue a bench warrant. The offender is convoked before the JAP and the SPIP may be asked to issue a report on his/her personality and circumstances. In many cases the

attorney acts in lieu of the SPIP and provides documented proofs. The JAP can transform the sanctions normally available for prisoners, into: 1) a STIG sentence – in this case only if the person has up to six month to serve; 2) a day-fine – with the same six month limit; 3) parole (only in two cases: in the form of 'parental parole' if the person has at least one child under the age of ten, whom the person has physical and legal custody of; or, if the person does not have children, if (s)he has been previously provisionally detained and then released and has therefore executed part of his/her sentence); 4) semi-freedom (a measure whereby the person has reinsertion activities in the community and sleeps in the prison at night where he/she also stays on non-working days); 5) 'placement in the community' (a measure which applies to people with multiple social, psychological, and criminogenic needs (22); 6) electronic monitoring (23).

No official statistics exist pertaining to article 723-15, as this would be a rather contentious subject. However, the first author who was consulted by the leading author of a public report, at the beginning of 2016 heard the latter, M. Delbos, confiding that officially up to 30.000 custodial sentences are avoided each year thanks to this procedure. However, he refrained from writing it in his report (24). In other words, 'procedure 723-15' is an extremely efficient alternative procedure; but it is efficient precisely by remaining hidden from the general public. That being said, and as mentioned previously, the court can always prevent its implementation by issuing a bench warrant; moreover, the leading author of this article has been the direct witness during her own research (25) that an important proportion of offenders simply do not turn up at the tribunal when they are convoked, thereby wavering their right to an *ab initio* release measure.

3.3.2 Sentence reduction during the execution of an effective sentence.

When a custodial sentence is implemented, the person can still benefit from the reduction of his/her sentence. In this regard, France presents three particularities. Firstly, it is a court that pronounces the decisions, not an administrative commission or authority. This court, the JAP, constitutes in essence the ancestor of 'problem-solving court' (26). Secondly, as indicated above, there is a host of different release measures in the French legal system. Thirdly, this legal system has been amended multiple times in the recent period – with the latest episode of this legal saga being the aforementioned 2014 Act – which has rendered the field of sentence implementation extremely complex and confusing, one consequence being that several procedures can lead to different release measures. Some of these procedures abide by due process rules; others do not.

Regardless of the release measure solicited by the prisoner, the person must normally file a petition with the JAP or TAP and prepare a release plan ('the Project'), either with the help of the SPIP, or increasingly, with his attorney, the third sector, and relatives. The decision, subject to appeal, is then made in the context of adversarial hearing. Parallel to this mainstream due process procedure, the 2014 Act has created a supposedly fast-track procedure, precisely because it has been deprived of its due process attributes. However, this procedure has predictably failed, as previous similar procedures had, as they do not provide JAP with enough information and offenders prefer having a voice in the proceeding (27). Regardless of the sentence reduction, the JAP rules on the basis of the quality

of the release project and, in particular, on employment, education, and addiction or other forms of treatment. They also take into account the reinsertion efforts made in prison. They also pay attention to previous community sentences or measures, and whether they were complied with (28).

Needless to say that JAP and TAP pay particular attention to reoffending risk levels. However, in the absence of evidence-based assessment tools, this consideration is essentially present with serious offenses, long sentences or violent offenses. In France, the purely disciplinary behaviour while in detention has very little weight in the decision making. Unfortunately with the so-called fast track release created by the 2014 Act, JAP have such little information that they have to rely heavily on such behaviour and sometimes merely on flimsy information pertaining to whether the person does something, in fact *anything*, whilst in prison.

France oldest release measure is parole (conditional release). France was indeed the first European country which created this measure as early as 1885 and for decades, it was the only available release measure. Today it is little pronounced because of the competition with other existing measures. As a matter of fact, there is not one type, but several types of parole. The first is ordinary parole as regulated by article 729 of the PPC. It is accessible to prisoners who have a minimum of half of their sentence left to serve. It is important to note however that this this 'half' point condition does not represent exactly half of the sentence since two types of remission, one for good conduct, one for resocialisation efforts, apply and may reduce gradually, but significantly, what is left to serve. In practice, it is thus not rare that offenders can apply for parole when they have actually served only a third of their sentence. The 2014 Act moreover abrogated the more stringent rule that previously applied to recidivists who had to have served two thirds (minus remission) of their sentence. Adding to this, Mister Sarkozy's Prison Act (2009) allows offenders to apply for semi-freedom, placement in the community, or electronic monitoring as a probationary measure to parole, to which it is then attached, one year before they are eligible to parole. One can thus see that the lack of success of parole may be due to its extremely generous conditions – far more than any other European jurisdiction. Courts may have become a little weary of such generosity and opted for more constraining measures. Nonetheless, legislators' generosity is also patent with the second type of parole, namely Parental Parole (art. 729-3 PPC). Parental parole is available to any person convicted to a sentence of up to four years or who have up to four years to serve on a longer sentence, and who have both physical and legal custody of at least one child aged up to ten years old, with whom they effectively and habitually reside. A third type of release on parole applies to elderly prisoners who are at least seventy year old (art. 729, last but one paragraph, PPC), providing they have a bare minimum release plan (e.g. reside in a pensioners' home) and do not represent a serious risk of harm. Special rules, regulated by article 730-2 of the PPC created by the August 10th 2011 Act, C, apply to all these types of parole, to several categories of offenders serving long sentences who have committed serious crimes (notably sex offences or very violent homicides), and, since the antiterrorist Act of June 3, 2016 (n°2016-731), which has introduced in the PPC a new article 730-2-1, to terrorists. According to articles 730-2 and 730-2-1, these dangerous offenders cannot be released on parole unless they

have submitted to a long series of expert risk assessment, and unless they first serve a one to three year period under one of the aforementioned three stringent measures under prison registry, i.e. semi-freedom, placement in the community, or electronic monitoring.

As mentioned supra, these three measures are also release measures. They are increasingly favoured by JAP; this is particularly the case of electronic monitoring, which the prison services have chosen to fund much more extensively than semi-freedom and placement in the community.

According to official statistics provided on January 1st 2015 (29), only 20,9% of prisoners had benefitted from an early release measure. This can be explained by two factors. On the one hand, the vast majority of prisoners serve short sentences, which does not allow probation services to prepare them for release. On the other hand, a gradual shift in probation services' professional culture (30) has led them to behave more like paralegals than social workers (31) – this terminology having been voluntarily deleted from the PPC by the prison services with which probation services have been merged. The result of this shift is that probation services do not actively prepare offenders for release, this job being increasingly taken, but insufficiently so, by third sector charities and, in many cases, by prisoners' families and their attorneys (32). Naively, prison services imagined that by creating a new release procedure, devoid of any social or merit condition, it would force judges to release more prisoners.

3.3.3 The procedure of release under constraint.

The Law of August 15th 2014 created a parallel procedure of anticipated release (33), called release under constraint (*liberation sous contrainte* – LSC) whereby prisoners having served two thirds of their sentence (minus remission) would automatically see their fate examined by the JAP. Said JAP could pronounce, in theory, parole, and the three measures under prison registry, in reality only semi-freedom, where it existed, or electronic monitoring. Prison authorities, which drafted this law, hoped that by bypassing due process (prisoners would hardly ever appear), by pretending on the basis of a spurious legal reasoning, that the usual rules applying to release measures did not apply to LSC (34) and by surrounding JAP with prison and probation officials when they made their decision, they would both gain time and force Judges to release more offenders. Prison authorities had attempted similar techniques in 2004 (35) and in 2009. In both cases, rather than releasing more offenders, JAP released less. The leading author of this article has been conducting an evaluation of LSC (36) and has found that LC has failed for similar reasons. The first reason is that both judges and prisoners, as our research has found, favour hearings, and the legitimacy of justice that fair trial represents (37). The second reason is that France does not seem to understand that judges cannot be forced to make decisions on the basis of inferior substantive norms and procedures; they take the risk of releasing offenders when they have more information on them, rather than less (38). Indeed, our study shows that probation services write useless reports with merely narrative information ('Mr X has a wife and two children and says he wants to look for a job'), do not support offenders in the least to prepare a release plan, because their administration has told them that LSC did not require such a plan, which do little to help the JAP want to release totally unprepared offenders. Precisely, a third to half of all prisoners refuse to 'benefit' from LSC measure (39) because no re-

entry plan has been put in place for them or with them.

3.3.4 'Release measures' adaptation.

The three aforementioned measures under prison registry can be transformed into each other at any point in time during their execution. The JAP can for instance transform a semi-freedom into an electronic measure in order to alleviate the constraints imposed on an offender who is compliant; (s)he can conversely convert electronic monitoring into semi-freedom as a sanction for non-compliance, rather than recalling the offender to prison, and so on. The sheer number of release measures allows JAPs to better adapt supervision. The JAPs can also transform measures under prison registry into parole, again, when the probationer is compliant. This is frequent because practitioners consider that measures under prison registry are not bearable for more than six months (40).

4. Alternatives to detention for specific categories of persons.

We have presented general rules that apply to most prisoners. It is now necessary to briefly describe different rules that apply to specific categories of prisoners.

4.1 Psychiatric prisoners.

Psychiatric inmates have very rarely been the focus of public reports and official data. As an exception to this rule, a joint report by the Ministry of Health and the Ministry of Justice was published in 2003, which unsurprisingly pointed towards inmates' considerable higher psychiatric morbidity compared with the general population: 55% of those who entered prison suffered from anxiety and 33% of depression; 42% had behavioural problems; 24% had intelligence impairments; and 19% had a psychosis diagnosis (41). The report pointed to the difficult collaboration and the lack of communication between prison staff and medical staff and complained about what they perceived as being prison services' attempts to infringe on medical secrecy.

The reasons for the high prevalence of mental illness lie in the very limited use of article 122-1 section 1 of the penal code (the French equivalent of a 'not guilty for reason of insanity'), which is itself due to a dual phenomenon: on the one hand, the impact of the antipsychiatry movement particularly in the 1970s, which led to the *en masse* closing of asylums; on the other hand, the conviction amongst the majority of French psychiatrists that people with such diagnosis who also offend *need* to be punished by the criminal justice system. The result is that the vast majority of such offenders are now housed in prison. In order to tackle these difficulties, policies inaugurated during former president Nicolas Sarkozy's government have consisted in creating special prison units within psychiatric hospitals, and in doubling the number of 'Units for Difficult Patients' (*unités pour malades difficiles*), which are psychiatric units for very dangerous offenders with a mental health diagnosis and focus both on treatment and containment.

4.2 Drug addicts.

France produces slightly more studies on addicted offenders. The French Observatory for Drugs and Addictions (OFDT) has devoted a handful of its studies to prisons. In 2005, a report showed that detection was still not systematic. However, it declared that the treatment of addicts in prison had 'remarkably' improved (42). Conversely, a more recent report by the National Medicine Research Centre sadly concluded: 'Today there is no risk

reduction policy in France' (43). It added that the principle of the equivalence of treatment access between prisons and the outside world was simply not implemented. Any offender with an addiction diagnosis who serves a community sentence or (release) measure is generally subjected to mandatory treatment (art. 132-45, 3° of the penal code). However, there is no systematic screening of all these probationers and parolees and judges generally order mandatory treatment solely based on the nature of the offence. Moreover, France rarely tests whether they are still taking drugs or abusing alcohol during their probation order.

4.3 Foreign detainees.

Finally, it should be noted that French studies on foreign prisoners are also rare. A European study by Delgrande and Aebi compared 27 European countries and found that France (with 19,8% of foreign prisoners) was mid-way between the two extremes (Romania with less than 10% of foreign prisoners and Luxemburg with more than 75%) (44). An old study by Tournier, published at a time where the political debate focused on foreign delinquents, showed that prisoners systematically feared worse at each stage of the criminal justice process (45). Over a decade later, the National Council on Human Rights published a report on foreign prisoners and commented that they now were 'largely ignored in the public debate and by prison research' (46). As most agencies or institutions focusing on the CJS in France, they deplored the total lack of official data on this subject. From the legal viewpoint, foreign inmates are not treated differently than French citizens so long as they are not to be deported. However, this quasi-robotic and purely apparent equality very likely masks actual inequalities, for instance in terms of access to rights and treatment, education and early release. It is telling that France has completely ignored the Council of Europe's recommendation on foreign prisoners (2012) whilst it has long used the European Prison Rules (2006) and is currently using the European Probation Rules (2010).

5. To conclude.

This contribution on the existing alternatives to detention in the French legal system has highlighted a number of specific features pertaining to its criminal policy and criminal justice.

First of all, it is noteworthy that France has paid relatively limited attention to collecting adequate statistical information about its prison population(s), as well as the application of prison sentences and their alternatives. As a result, it has proven very difficult to conduct thorough policy and public debates about these issues, e.g. about the philosophy of prison sentences, or present serious analyses of the costs and benefits of either option.

When it comes to the legal provisions relating to alternatives to detention, one element is certainly striking, namely the large number of alternatives that exist in France in several phases of the criminal justice system. Pre-sentencing alternatives are numerous and they are applied in high numbers. The same is true for alternative sanctions to imprisonment like fines, community work, and citizenship courses. As to sentences themselves, they are executed quite rapidly, and may also give rise to substantial reductions of prison time.

Whether France occupies a specific place in the wider context of Europe remains to be studied in more detail. Obviously, each country has its own criminological considerations and legal arrangements, and it is therefore of crucial importance to conduct adequate comparative research to highlight similarities and differences,

and identify 'good practices' that may be eligible for transfer between countries and regions.

Notes.

(1). See Herzog-Evans M., 'France: legal architecture, political posturing, 'prisonbation' and adieu social work', in Robinson G. et McNeill F. (eds.), *Community Punishment: European Perspectives,* Routledge, Abingdon, 2015.
(2). Cour des comptes, *La prise en charge et le suivi, par l'administration pénitentiaires, des majeurs condamnés. Rapport en Référé,* 22 mars 2016.
(3). Administration Pénitentiaire, *Les chiffres clefs au 1er janv. 2013*, 2014.
(4). Kensey A,.Narcy M., « Les caractéristiques socio-démographiques des personnes sous PSE (2000-2006) », *Cahiers d'études pénitentiaires et criminologiques*, n°21, Feb 2008.
(5). Cassan F., Toulemon L., « L'histoire familiale des hommes détenus », *INSEE Première*, n°706, April 2000.
(6). For a short introduction on victim-friendly restorative justice approaches see Sullo P., "Restorative Justice", in Wolfrum R. (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2016.
(7). Cario R., *Victimologie. De l'infraction du lien subjectif à la restauration sociale,* l'Harmattan, Paris, 2012.
(8). Herzog-Evans M., « Les victimes et l'exécution des peines. En finir avec le déni et l'idéologie », *AJpénal*, 2008, p. 356.
(9). As Grunvald wrote: "*The orientation of a criminal case, is not so much an implementation of the principle of opportunity (the conditions for closing the case without further action having been widely examined to limit it) as a decision about 'the opportunity of the modalities of the penal response*" (Grunvald S., « Les choix et schémas d'orientation », in Danet J. (dir.), *La réponse pénale, 10 ans de traitement des délits*, Editions Presses Universitaires de Rennes, 2014, pp. 83-112). In other words, the orientation of criminal cases has become an essential decision within criminal courts and according to the decision taken in this regard, a prison sentence can or cannot be considered.
(10). Pouget Ph., (2014) « La mise en place de la diversification du traitement des délits à travers la législation », in Danet J. (dir.), *op. cit.,* pp. 54-81,54, and particularly his analysis of the two alternatives encompassed in articles 41-1 et 41-2 CPP.
(11). « Les chiffres clés de la Justice 2013 » - Sous-direction de la Statistique et des Etudes du Ministère de la Justice. See : www.justice.gouv.fr/art_pix/1_stat_Chiffres_cles_2013.pdf
(12). See e.g. Court of Cassation. Criminal Chamber June 29, 2016, n° 15-82, p. 114; *Ajpénal* 2016, p. 515, obs. M. Herzog-Evans.
(13). It must be specified that the Law of 15 August 2014 puts the individualization of sentencing in perspective and improving the effectiveness of criminal punishment foresees that every new conviction, within a period of five years, no longer automatically results in a dismissal of a previous common suspension. Article 8 of the mentioned law thereby suppresses the automatism of this dismissal, thus giving flexibility to the criminal courts. This measure took effect from January 1st 2015.
(14). On these alternatives and how they are applied by JAP: Herzog-Evans M., *French reentry courts and rehabilitation: Mister Jourdain of desistance,* L'Harmattan, Paris, 2014.
(15). If a CW can be pronounced instead of a prison sentence, it can never be in addition to an effective sentence (except, in application of the Law of 15 August 2014, when it is pronounced as an obligation of criminal coercion).
(16). Ministère de la Justice. Direction de l'Administration Pénitentiaire - Bureau des études et de la prospective (PMJ5), *Trimestrial statistics of the population subjected to the community sentences - January 2014 – Table 13. – Statistiques trimestrielles de la population prise en charge en milieu ouvert. Mouvements au cours du premier trimestre 2013. Situation au 1er janvier 2014,* n°18.
(17). Unfortunately it was not detailed in the statistics of the department if it concerns primary or additional sentences.
(18). E.g. Hough M., Jacobson J., Millie A., *The Decision to Imprison: Sentencing and the Prison Population*, Prison Reform Trust, London, 2003; Tombs J., *A Unique Punishment. Sentencing and the Prison Population in Scotland*, Edinburgh, the Scottish Consortium on Crime & Criminal Justice, 2004; Boone M., Herzog-Evans M., "Decision-Making and Offender Supervision", McNeill F., Beyens K. (dir.), *Offender Supervision in Europe*, Palgrave McMillan, London, 2013, pp. 51-96.
(19). Herzog-Evans M., **«** Récidive et surpopulation: pas de baguette magique juridique », AJpénal, mars 2013, pp.: 136-139.
(20). See Herzog-Evans M., *La contrainte pénale ne marche pas. C'est donc une bonne mesure !*, 2016. Available at http://herzog-evans.com/la-contrainte-penale-ne-marche-pas-cest-donc-une-bonne-mesure, retrieved on Dec. 12, 2016.
(21). Padfield N., van Zyl Smit D., Dünkel F., *Release from Prison. European policy and practice,* Willan Publishing, Cullompton, 2010.
(22). This measure is in a way the French version of the North-American half-way houses or the approved premises of the United Kingdom.
(23). On semi-freedom, placement in the community, and electronic monitoring, see Herzog-Evans M., **"**The six month limit to community measures 'under prison registry': a study of professional perception", *European Journal of Probation,* vol. 4, n. 2, 2012, pp. 23-45.
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(25). Herzog-Evans M., *French reentry courts, op. cit.*
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La recidiva in Italia: riflessioni per il monitoraggio del fenomeno

La récidive en Italie : réflexions pour l'observation du phénomène

Recidivism in Italy: reflections for the monitoring of the phenomenon

Raffaella Sette[•]

Riassunto
L'articolo si pone l'obiettivo di analizzare alcuni aspetti del fenomeno della recidiva in Italia, partendo da dati provenienti da fonti statistiche ufficiali e, successivamente, basandosi sulle risultanze di alcune ricerche empiriche.
Viene messo così in evidenza che condizioni dignitose di vita, responsabilizzazione e operosità sembrano fattori efficaci per attivare un adeguato reinserimento sociale, ma ulteriori studi di follow-up sarebbero necessari per verificare empiricamente questa ipotesi.
In tale direzione si è orientata la ricerca europea "*Reducing Prison Population: advanced tools of justice in Europe*" che ha il merito di aver sistematizzato i pregi e i difetti dell'utilizzo delle misure alternative alla detenzione con l'obiettivo di promuoverne maggiormente la diffusione.

Résumé
L'article a pour but d'analyser certains aspects du phénomène de la récidive en Italie, tout d'abord sur la base de données statistiques officielles et, par la suite, grâce aux résultats de quelques recherches empiriques.
Il est ainsi mis en évidence que des conditions de vie dignes, la responsabilisation et le dynamisme semblent des facteurs efficaces pour soutenir adéquatement la réinsertion sociale. Toutefois, il serait indispensable de mener d'autres études de suivi pour vérifier empiriquement cette hypothèse.
La recherche européenne "Reducing Prison Population: advanced tools of justice in Europe" a été conduite dans cette direction et a le mérite d'avoir permis de systématiser non seulement les points forts des mesures alternatives à l'incarcération, mais également leurs faiblesses, ayant l'objectif d'assurer leur diffusion.

Abstract
The aim of this article is to analyse some aspects of recidivism in Italy, starting by official statistical data and continue with examining the results of some empirical researches.
It is stressed that decent living conditions, even if restricted, responsabilisation and industriousness appear to be effective elements able to facilitate an adequate social reinsertion. Nevertheless, more follow-up studies would be needed to better verify this hypothesis.
Keeping in mind the above mentioned a European research "Reducing Prison Population: advanced tools of justice in Europe" has been conducted. Its merit is to have systematised the strengths and the weaknesses of alternatives to imprisonment with the aim of promoting their wider use.

Keywords: recidivism; official statistical data; Italy; alternatives to imprisonment; social reinsertion.

"E' il tempo che tu hai perduto per la tua rosa che ha fatto la tua rosa così importante".
"E' il tempo che ho perduto per la mia rosa..." sussurrò il piccolo principe per ricordarselo.
"Gli uomini hanno dimenticato questa verità. Ma tu non la devi dimenticare. Tu diventi responsabile per sempre di quello che hai addomesticato. Tu sei responsabile della tua rosa..."
"Io sono responsabile della mia rosa..." ripeté il piccolo principe per ricordarselo.
Il Piccolo Principe, Antoine de Saint-Éxupery

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1. Introduzione.

Al fine di proporre soluzioni per ridurre il sovraffollamento penitenziario, la ricerca biennale finanziata nell'ambito del programma europeo "Criminal Justice 2013" in tema di "Reducing Prison Population: advanced tools of justice in Europe" (1), alla quale la scrivente ha partecipato sia in qualità di componente dello *steering committee* che in qualità di ricercatore afferente al Centro di Ricerca Interdisciplinare sulla Vittimologia e sulla Sicurezza – Dipartimento di Sociologia e Diritto dell'Economia – dell'Università di Bologna, si è posta l'obiettivo di migliorare le conoscenze e lo scambio di misure innovative sulle pratiche alternative alla detenzione nelle fasi pre e post processuali (2).

In tal senso, i prodotti finali prodotti dal gruppo di ricerca europeo sono consistiti in un documento che riporta linee guida circa l'implementazione di alternative alla detenzione e in un *training package* per la formazione del personale coinvolto nella gestione delle misure alternative al carcere. Entrambi questi scritti mettono in evidenza i principi alla base delle alternative alla detenzione a livello europeo e si focalizzano, tra l'altro, sul seguente aspetto chiave che si desidera approfondire in questa sede: la riduzione della recidiva.

2. La recidiva: definizioni e possibile "misurazione".

Volendo analizzare il fenomeno della recidiva, il primo problema che si deve affrontare è quello definitorio, successivamente ci si imbatte in quello relativo alla quantificazione della sua estensione.

Dal punto di vista giuridico, si sottolinea che non vi è "alcun sistema normativo che non dia rilievo a livello sanzionatorio allo *status* di recidivo" (3) e, con riferimento all'Italia, l'articolo 99 del nostro codice penale, che apre il Capo II relativo alla recidiva, all'abitualità e professionalità nel reato e alla tendenza a delinquere, definisce tre tipologie di recidiva:

1) la recidiva semplice, che si verifica quando un individuo "dopo essere stato condannato per un delitto non colposo, ne commette un altro", sempre non colposo;

2) la recidiva aggravata, che si realizza quando il nuovo delitto non colposo: a) "è della stessa indole (4) di quello precedente" (la c.d. recidiva specifica) ; b): "è stato commesso nei cinque anni dalla condanna precedente" (la c.d. recidiva infraquinquennale), c): "è stato commesso durante o dopo l'esecuzione della pena, ovvero durante il tempo in cui il condannato si sottrae volontariamente all'esecuzione della pena";

3) la recidiva reiterata, nel caso in cui la persona, già definita recidiva, "commette un altro delitto non colposo".

Il motivo per cui la recidiva è posta dal codice penale in relazione soltanto con la commissione di delitti non colposi (quindi dolosi o preterintenzionali) è da ricercare nel fatto che essa viene ritenuta "un indice della maggiore capacità a delinquere del soggetto" (5), l'espressione dell'"insensibilità etica all'obbligo di non violare la legge, dimostrata dal reo dopo la condanna"(6), perciò comporta un aumento di pena ed ulteriori conseguenze, come ad esempio la restrizione nella concessione di benefici previsti dall'ordinamento penitenziario. In tal senso, la recidiva rappresenta un parametro per verificare il successo (o meglio, l'insuccesso) del processo rieducativo intrapreso in seguito al reato commesso in precedenza.

Lo studio dell'estensione del fenomeno della recidiva è utile al sistema di giustizia e a quello penitenziario al fine di mettere a punto strumenti

sempre più adeguati e fondati scientificamente per individuare i potenziali fattori di rischio che possono concorrere alla reiterazione del reato e, quindi, per riuscire ad impostare percorsi realmente individualizzati di reinserimento sociale, efficaci ai fini della riduzione del rischio stesso (7).

A fronte della scarsità e della frammentarietà sia delle ricerche effettuate in Italia che dei monitoraggi specifici e degli studi di follow-up da parte dell'amministrazione penitenziaria (8) con riferimento alla recidiva degli ex detenuti, è possibile comunque misurare alcuni aspetti dell'estensione di questo fenomeno facendo ricorso alle statistiche degli imputati condannati pubblicate dall'Istat sul sito http://dati.istat.it.

In particolare, con riferimento alle tabelle relative ai "condannati con sentenza irrevocabile e caratteristiche dei reati sentenziati", vengono effettuate classificazioni dei dati sulla base dell'esistenza di precedenti penali e della recidiva.

Più a valle, cioè nell'ambito dell'esecuzione penale, il Dipartimento dell'Amministrazione Penitenziaria pubblica regolarmente, con riferimento alle misure alternative assegnate annualmente, i dati sui motivi della loro revoca. Essi sono raggruppati tramite diverse classificazioni e, in questo caso, sono necessarie alcune puntualizzazioni di tipo metodologico.

Innanzi tutto, la tipologia "revoca per nuova posizione giuridica per assenza di requisiti giuridico-penali previsti" significa che al condannato, durante l'esecuzione della misura alternativa già concessa, è giunto un nuovo titolo definitivo di esecuzione pena che ne impedisce la prosecuzione per superamento dei limiti di pena richiesti: questo non denota automaticamente la sussistenza di una carriera criminale ma, come frequentemente accade, ciò può significare che la persona abbia commesso diversi reati in un unico periodo della sua vita e riceva le condanne in momenti diversi (9). Tale situazione è in grado di causare danni incalcolabili ai percorsi di reinserimento sociale perché la misura alternativa rischia di essere, "invece che la porta di reingresso nella società, la tappa di una vicenda in cui si costruisce di giorno la tela" del reinserimento "che poi i ritardi della giustizia disfano con condanne che nel migliore dei casi portano […] alla nuova tessitura del percorso di reinserimento" (10). Si precisa che, dal momento che non è possibile avere informazioni più dettagliate al riguardo, si rende quindi necessario prendere in considerazione tale tipo di revoca in questa sede.

Anche la colonna denominata "per andamento negativo" sarà oggetto di analisi in quanto, pur non indicando l'avvenuta commissione di reati da parte del condannato nel corso dell'esecuzione della misura alternativa, fornisce comunque l'idea che il comportamento da lui tenuto è incompatibile con il percorso di reinserimento sociale intrapreso in stato di libertà parziale o totale perché non ha rispettato le prescrizioni impostegli dalla magistratura di Sorveglianza.

La revoca denominata "per altri motivi" è, invece, troppo generica e verrà esclusa dall'analisi dei dati, mentre quella "per irreperibilità" verrà presa in considerazione perché può trattarsi, in questo frangente, di persone straniere che ritornano nel paese di origine e si sottraggono, in tal modo, all'esecuzione penale.

E' necessaria, infine, un'ultima puntualizzazione relativamente sia alle statistiche dei condannati che a quelle sulle revoche delle misure alternative con riferimento al fatto che tali dati permettono soltanto un'analisi estremamente parziale del fenomeno della recidiva dato che non sono corredati di ulteriori elementi che, invece, potrebbero permettere di

effettuare delle riflessioni più approfondite, quali ad esempio i fattori socio-demografici e socio-economici degli individui in questione.

I dati sui condannati si riferiscono al periodo 2007-2011 (11) e danno luogo alla distribuzione di frequenza sintetizzata qui di seguito nella figura n. 1:

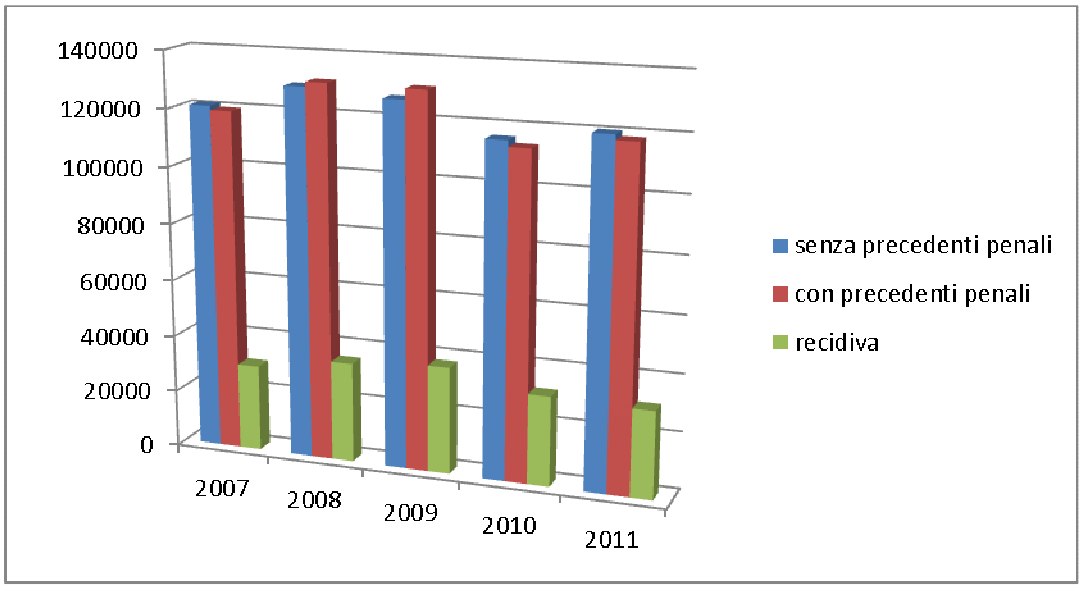

Figura n. 1: Condannati con sentenza irrevocabile (anni 2007-2011) (Fonte: dati.istat.it)

I condannati tra il 2007 e il 2011 che erano già stati in precedenza condannati in via definitiva sul territorio italiano (e anche all'estero se le condanne sono state riconosciute dal nostro Stato) rappresentano in media il 44% di tutti i condannati. Ad essi si aggiunge un 11,9% (valore medio dei cinque anni presi in considerazione) costituito da coloro che sono stati etichettati come recidivi. Ciò significa che più della metà dei condannati (il 55,9%) aveva già una vita giudiziaria (la consistenza della quale purtroppo non si evince da queste statistiche) registrata sul proprio certificato penale.

La distribuzione di frequenza sulla base del sesso dei condannati (vedasi figura n. 2) mette in evidenza una realtà che, anche se interpretata in modo non totalmente soddisfacente dalle teorie che si sono susseguite nel corso del tempo (12), è comunque di facile constatazione e cioè che l'emancipazione della figura femminile nell'ambito delle contemporanee società occidentali non ha fatto aumentare la criminalità (registrata) delle donne, anche se il "tasso di aumento percentuale della delinquenza femminile supera quello maschile" (13), e che queste ultime continuano a tutt'oggi ad assumere il ruolo di vittima piuttosto che quello di carnefice.

Infatti, negli anni presi in considerazione, in media soltanto il 14,8% di tutti condannati è rappresentato da donne. Tale percentuale diminuisce ancora se si prendono in considerazione esclusivamente i condannati con precedenti penali (il 10,9%) e cala ulteriormente con riferimento alla sola caratteristica della recidiva (l'8,3%).

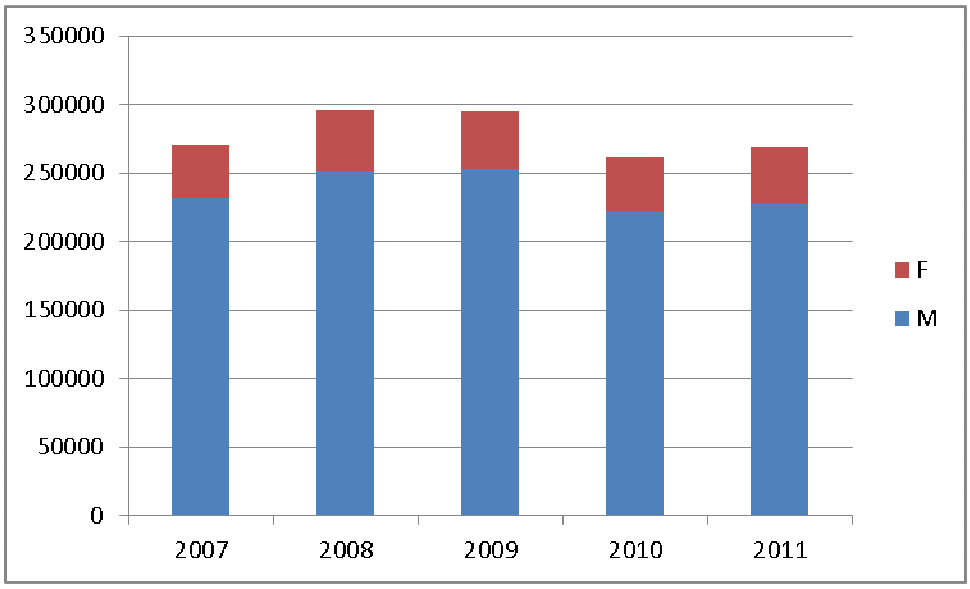

Figura n. 2: Condannati con sentenza irrevocabile (anni 2007-2011) – Dati per sesso (Fonte: dati.istat.it)

Lo scenario del "fenomeno recidiva" cambia radicalmente se si analizzano i dati relativi alle revoche delle misure alternative alla detenzione (14) da cui appare, in estrema sintesi, che esse sono assolutamente efficaci per prevenire la ricaduta del condannato nelle attività criminali durante l'esecuzione della misura stessa e, di conseguenza, adatte ad assicurare un'adeguata difesa sociale. Purtroppo, non sono disponibili ulteriori statistiche ufficiali circa la recidiva dopo la fine della misura e questo non permette di effettuare precise valutazioni sull'effettiva efficacia delle alternative alla detenzione a distanza di tempo anche se, come autorevolmente sostenuto, mettere in correlazione dati statistici su chi ha beneficiato delle alternative alla detenzione, sull'andamento della misura e sui reati commessi successivamente alla conclusione dell'esecuzione penale esterna presenta, dal punto di vista socio-criminologico, il grave inconveniente che queste correlazioni non sono in grado di fornire indicazioni utili "sugli effettivi percorsi che hanno portato o meno a compiere un nuovo reato", dato che "le ragioni per cui il nuovo reato è stato commesso possono non avere assolutamente nulla a che fare con le modalità di esecuzione della pena" (15).

Stante questa situazione, comunque, è interessante analizzare i dati ufficiali resi disponibili dall'amministrazione penitenziaria riguardanti l'andamento delle misure alternative alla detenzione in corso di esecuzione.

Con riferimento, innanzi tutto, all'affidamento in prova al servizio sociale, che è la misura alternativa alla detenzione più ampia tra quelle previste dalla nostra legge penitenziaria, le revoche, negli anni 2007-2011, rappresentano in media il 5,3% dei casi seguiti (16), valore che scende al 4,98% nel successivo periodo 2012-2015.

Si desidera precisare che, per omogeneità di trattazione rispetto ai precedenti dati sui condannati, si esamineranno nel dettaglio le motivazioni delle revoche delle misure alternative alla detenzione soltanto per gli anni 2007-2011.

Se pensiamo ad una scala di "gravità" dei motivi, certamente i casi revocati perché l'affidato ha commesso dei reati durante l'esecuzione della misura ne rappresentano il valore massimo, seguiti

da quelli revocati per andamento negativo e ancora dall'irreperibilità: nei cinque anni presi in considerazione (vedasi figura n. 3), l'ordine di grandezza della prima motivazione alla base della chiusura dell'incarico è pari allo 0 (0,45%), mentre tale percentuale sale, pur restando nell'ambito di cifre molto basse se paragonate a quelle rilevate dalla statistica dei condannati, al 4,1% nel secondo caso ed è vicina allo zero (0,2%) per le revoche causate dall' irreperibilità del condannato.

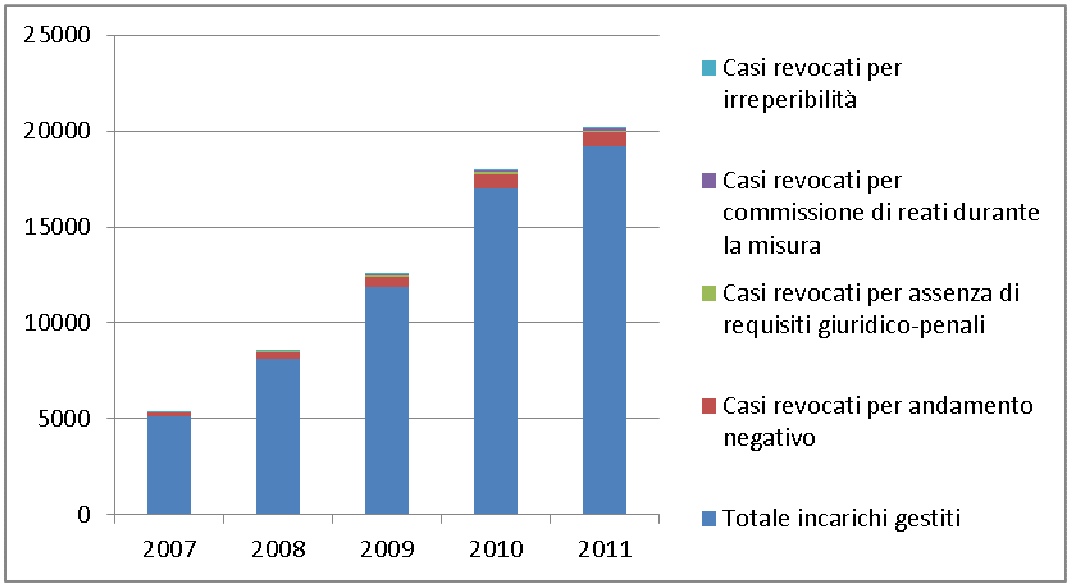

Figura n. 3: Motivi di chiusura incarico – affidamento in prova al servizio sociale (anni 2007-2011) (Fonte: Dipartimento dell'amministrazione penitenziaria – Direzione generale dell'esecuzione penale esterna – Osservatorio delle misure alternative, www.giustizia.it)

Le percentuali più elevate di revoche per la semilibertà (9,3% nel periodo 2007-2011, 9% nel 2012-2015) rispetto a quanto messo in evidenza per l'affidamento in prova al servizio sociale non devono stupire perché ciò può essere attinente alla natura stessa della misura che, contrariamente all'affidamento, si può concedere anche in presenza di un margine maggiore di "incertezza sull'affidabilità in considerazione del ritorno quotidiano del condannato nella struttura carceraria che consente di mantenere un controllo continuativo sullo stesso" (17).

Questo incide prevalentemente sulle revoche per andamento negativo della misura la cui percentuale è del 5,5% (vedasi figura n. 4), mentre la percentuale dei casi revocati per commissione di reati è dello 0,5%, paragonabile a quella relativa agli affidamenti.

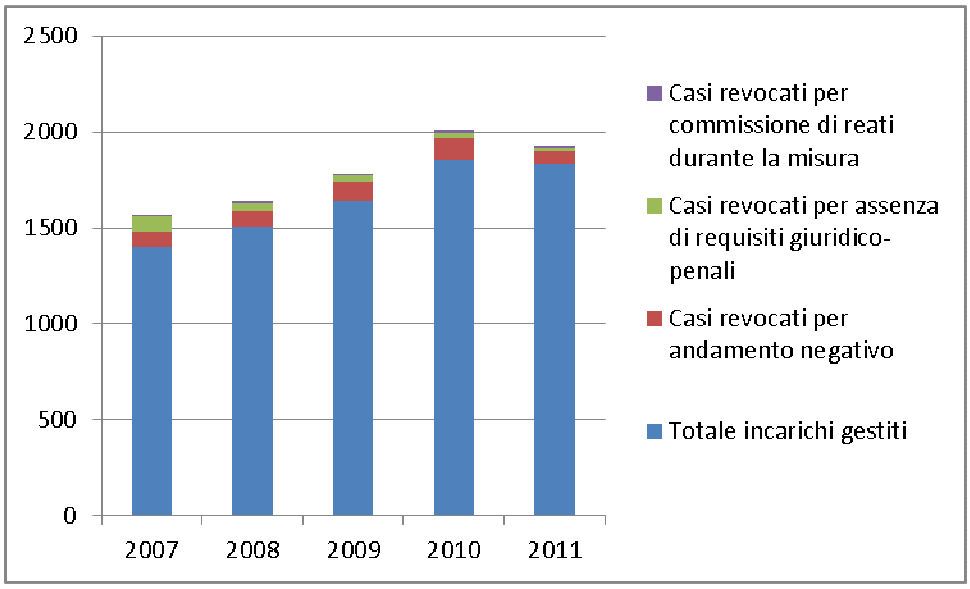

Figura n. 4: Motivi di chiusura incarico – semilibertà (anni 2007-2011) (Fonte: Dipartimento dell'amministrazione penitenziaria – Direzione generale dell'esecuzione penale esterna – Osservatorio delle misure alternative, www.giustizia.it)

Le revoche dei casi di detenzione domiciliare presentano un andamento simile a quello dell'affidamento in prova al servizio sociale e ciò assume, a parere di scrive, una connotazione maggiormente positiva in quanto la detenzione domiciliare, contrariamente all'affidamento, "si caratterizza per l'assenza di una qualsivoglia finalità rieducativa, configurandosi piuttosto come modalità alternativa di esecuzione della pena" (18) (sebbene le previsioni per le condannate-madri possano costituire un'eccezione (19)).

In generale, le revoche, negli anni 2007-2011, rappresentano in media il 7,4% dei casi seguiti, valore che resta stabile (7,3%) nel successivo periodo 2012-2015.

In particolare (vedasi figura n. 5), i casi di detenzione domiciliare revocati tra il 2007 e il 2011 per commissione di reati durante l'esecuzione della misura rappresentano in media lo 0,5% dei casi totali, quelli per andamento negativo il 4% e quelli per irreperibilità lo 0,5%.

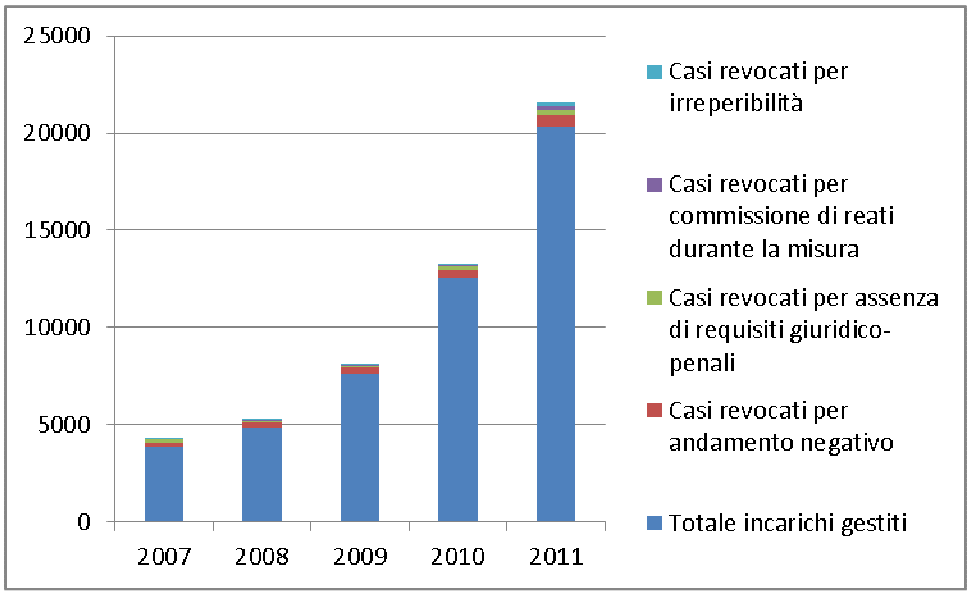

Figura n. 5: Motivi di chiusura incarico – detenzione domiciliare (anni 2007-2011) (Fonte: Dipartimento dell'amministrazione penitenziaria – Direzione generale dell'esecuzione penale esterna – Osservatorio delle misure alternative, www.giustizia.it)

3. La questione della recidiva in una prospettiva qualitativa e di follow-up.

Al fine di poter disporre di modelli interpretativi fondati su dati qualitativi da analizzare sia per la comprensione delle dinamiche e dei percorsi di reinserimento sociale attivati nonché per la definizione di buone pratiche da utilizzare da parte delle amministrazioni degli istituti penitenziari e degli Uffici per l'Esecuzione Penale Esterna, sorge la necessità di avere a disposizione ricerche condotte e pubblicate con regolarità su campioni significativi della popolazione penitenziaria, di quella in esecuzione penale esterna e di quella non più nelle mani della giustizia penale.

Con riferimento alla popolazione penitenziaria, si è orientata una ricerca, presentata nel mese di marzo 2015 (20), condotta in collaborazione con il DAP, con il PRAP di Milano e con la casa di reclusione di Milano Bollate. Partendo dal presupposto che, come già sottolineato in precedenza, è difficile misurare gli effetti di un "trattamento" dato che gli individui "trattati" differiscono da quelli "non trattati" anche per motivi diversi dal "trattamento", tale indagine ha inteso esaminare le storie di vita di tutti i detenuti italiani, di sesso maschile, non *sex-offenders*, che hanno composto la popolazione del carcere nel periodo 2001-2009 (pari a 2.318). E' da precisare che è possibile scontare la pena a Bollate o perché il condannato fa esplicita domanda ritenendosi adatto alla vita di un "carcere aperto" (21) (in tal modo, tali detenuti devono superare un percorso selettivo per essere ammessi) oppure perché l'amministrazione del carcere di provenienza lo richiede, ad esempio, per motivi dovuti al sovraffollamento di carceri limitrofe.

Con riferimento a tutto il campione preso in esame, i risultati mettono in evidenza che la riduzione della recidiva è di circa il 10% per ogni anno di pena effettivamente scontato a Bollate invece che in un altro carcere.

Per meglio orientare le politiche carcerarie, è ovviamente importante capire le motivazioni alla base di tale esito. In tal senso, la ricerca ha messo in evidenza che la recidiva si riduce maggiormente per

i detenuti condannati per reato di tipo economico, per i detenuti con pochi precedenti penali, per i detenuti che intrattengono relazioni significative con i familiari all'esterno e per coloro che hanno un minor livello di istruzione.

Quindi, condizioni dignitose di vita, pur se ristretta, responsabilizzazione e operosità sembrano fattori efficaci per attivare un efficace reinserimento sociale, anche se ulteriori studi di follow-up sarebbero necessari per verificare empiricamente questa ipotesi che, comunque, è ormai data per assodata dalla letteratura nazionale e internazionale in materia e che la nostra ricerca europea "*Reducing Prison Population: advanced tools of justice in Europe*" ha ulteriormente confermato.

A tal proposito, i mezzi di comunicazione di massa (22) descrivono l'istituto penitenziario di Bollate come "carcere modello". Certamente, si tratta di una struttura degna di servire d'esempio e di essere imitata, ma non perché costituisca un'eccezione, piuttosto perché dovrebbe rappresentare la regola cioè quella di un carcere "normale" che applica alla lettera i principi contenuti nella legge penitenziaria italiana, nelle convenzioni e raccomandazioni europee, invece di restare lettera morta.

Con riferimento, poi, allo studio della popolazione condannata in esecuzione pena nelle forme di una misura alternativa, si è indirizzata un'indagine empirica nazionale, finanziata dal Dipartimento Nazionale Antidroga e condotta da un gruppo di ricerca afferente alla cattedra di "Metodologia e tecniche della ricerca sociale" della Università "Sapienza" di Roma, insieme alla Direzione Generale del Ministero della Giustizia per l'Esecuzione Penale Esterna, basata su un universo di 106 utenti in esecuzione penale esterna inseriti in risorse di rete afferenti a 23 CSSA (Centri di Servizio Sociale per Adulti, rinominati nel 2005 in Uffici per l'Esecuzione Penale Esterna, UEPE) (23). Tale ricerca, pubblicata nel 2006, ha esaminato sia le caratteristiche delle risorse socio-territoriali di rete (sfera pubblico-istituzionale e settore del no profit) sia i soggetti-utenti dal punto di vista delle loro caratteristiche socio-anagrafiche, di quelle dei familiari, della loro storia penale e dello stato di tossicodipendenza e, infine, quelle relative al trattamento.

In particolare, il fenomeno della recidiva ha interessato il 36% del campione (23 persone su 106) e si riferisce a chi ha subito ulteriori condanne definitive dopo aver terminato la prima misura alternativa. La maggior parte di essi risiede al Sud, ha esperienze di tossicodipendenza, ha commesso reati contro il patrimonio (furti e rapine) e violazioni della normativa sugli stupefacenti (24).

Quest'indagine ha messo in evidenza che l'esecuzione penale esterna viene vissuta dai condannati come "un'esperienza a diversi livelli di sedimentazione interiore" (25).

La maggioranza di essi (l'88% dei casi) vive tale periodo come un'occasione per ricostruire un proprio progetto di vita attraverso un lavoro intenso, morale e materiale, supportati da operatori qualificati e da un clima organizzativo favorevole e aperto. Un quarto degli intervistati ha evidenziato il confronto con il carcere, sottolineando i benefici dell'esecuzione penale esterna e il 24% ritiene positivo l'aspetto del lavoro "come agente di maturità interiore e come strumento di risocializzazione". Altri, che contrariamente ai precedenti vivono con più difficoltà il periodo della misura alternativa, evidenziano alcuni elementi critici relativi alle eccessive rigidità che la misura impone, all'elevata burocratizzazione del processo e alla scarsa utilità per il singolo delle attività svolte presso la struttura di riferimento.

E' a questo punto importante ricordare, dunque, che la nostra ricerca europea "*Reducing Prison Population: advanced tools of justice in Europe*" ha il merito di aver sistematizzato i pregi e i difetti dell'utilizzo delle misure alternative alla detenzione (26) con l'obiettivo di promuoverne maggiormente la diffusione, identificando buone prassi utili a ridurre sempre più il rischio che tali diritti diventino dei "privilegi" solo per una popolazione selezionata e a prestare particolare attenzione alle persone con bisogni speciali, all'adozione di percorsi multidisciplinari per l'inclusione sociale, al lavoro di rete per garantire istruzione, formazione professionale e inserimento nel mondo del lavoro, al coinvolgimento della famiglia, degli amici e della società civile e, infine, ai programmi di prevenzione sociale (27).

Note.

(1). Grant n° JUST/2013/JPEN/AG/4489.

(2). Il design del progetto, la partnership, i documenti prodotti e gli eventi organizzati sono reperibili sul sito: www.reducingprison.eu

(3). Rocchi F., *La risposta sanzionatoria e il potere discrezionale del giudice. Con particolare riferimento al ruolo e al significato della recidiva nella teoria della pena*, Università degli Studi di Roma "Tor Vergata", Dottorato di ricerca in Diritto Pubblico (indirizzo Diritto e Procedura Penale), a.a. 2008-2009, tutor: Prof. R. Rampioni, pp. 151-152.

(4). Ai sensi dell'art. 101 c.p., "sono considerati reati della stessa indole non soltanto quelli che violano una stessa disposizione di legge, ma anche quelli che, pure essendo preveduti da disposizioni diverse di questo codice ovvero da leggi diverse, nondimeno, per la natura dei fatti che li costituiscono o dei motivi che li determinarono, presentano, nei casi concreti, caratteri fondamentali comuni".

(5). Mantovani F., *Diritto penale*, Cedam, Padova, 1992, pag. 661.

(6). Sentenze Corte di Cassazione citate in *Ibidem*, pag. 664.

(7). Cfr. Volpini L., Mannello T., De Leo G., "La valutazione del rischio di recidiva da parte degli autori di reato: una proposta", *Rassegna Penitenziaria e Criminologica*, n. 1, 2008, pp. 147-161.

(8). Cfr. Manconi L., Torrente G., *La pena e i diritti. Il carcere nella crisi italiana*, Carocci, Roma, 2015, pag. 193.

(9). Vedasi, ad esempio: Casarosa M., Erbi S., Lo Giudice M. (a cura di), Le misure alternative alla detenzione. Primi risultati di un'indagine conoscitiva sul sistema dell'esecuzione penale esterna a Pisa, Ministero della Giustizia – DAP- UEPE Pisa-Lucca, Provincia di Pisa, Novembre 2010, disponibile alla pagina: http://www.provincia.pisa.it/uploads/RAPPORTO%20DEFINITIVO%201-9.%20con%20copertina.pdf

(10). Santoro E., Tucci R., "L'incidenza dell'affidamento sulla recidiva: prime indicazioni e problemi per una ricerca sistematica", *Rassegna Penitenziaria e Criminologica*, n. 1, 2006, pp. 141-142.

(11). Si precisa che al momento della stesura definitiva di tale contributo (ottobre 2016) non erano ancora stati pubblicati dati più recenti.

(12). Vedasi, ad esempio: Fadda M. L., "Differenza di genere e criminalità. Alcuni cenni in ordine ad un approccio storico, sociologico e criminologico", *Diritto Penale Contemporaneo*, disponibile alla pagina: http://www.penalecontemporaneo.it/upload/1348089164fadda_def.pdf; Balloni A., Bisi R., Sette R., *Principi di criminologia. Le teorie*, Wolters Kluwer-Cedam, Padova, 2015, pp. 327-340.

(13). Gaddi D. (1999) citato in Leonardi F., "Le misure alternative alla detenzione tra reinserimento sociale e abbattimento della recidiva", *Rassegna Penitenziaria e Criminologica*, n. 2, 2007, pag. 17.

(14). Si precisa, tuttavia, che i dati sui condannati e i dati sulle revoche delle misure alternative alla detenzione non sono direttamente confrontabili anche se riferiti allo stesso periodo temporale.

(15). Santoro E., Tucci R., "L'incidenza dell'affidamento sulla recidiva: prime indicazioni e problemi per una ricerca sistematica", *Rassegna Penitenziaria e Criminologica*, n. 1, 2006, pag. 86.

(16). I casi seguiti rappresentano i casi pervenuti nell'anno di rilevazione unitamente a quelli già in carico nel medesimo anno.

(17). Pavarini M., Guazzaloca B., *Corso di diritto penitenziario*, Edizioni Martina, Bologna, 2004, pag. 133.

(18). *Ibidem*, pag. 136.

(19). Vedasi a tal proposito: Balloni A., "La perizia criminologica attraverso l'analisi di un caso", *Rivista di Criminologia, Vittimologia e Sicurezza*, vol. 8, n. 3, settembre-dicembre 2014, pp. 14-43, DOI: 10.14664/rcvs/142; Bisi R., "Un evento catastrofico: una sfida per l'attivazione di strutture di conoscenza e di azione", *Rivista di Criminologia, Vittimologia e Sicurezza*, vol. 8, n. 3, settembre-dicembre 2014, pp. 44-55, DOI: 10.14664/rcvs/141; Sette R., "Le cure materne e il reinserimento sociale della condannata: attualità di un vecchio problema, *Rivista di Criminologia, Vittimologia e Sicurezza*, vol. 8, n. 3, settembre-dicembre 2014, pp. 56-73, DOI: 10.14664/rcvs/143.

(20). Mastrobuoni G., Terlizzese D., "Delle pene e dei delitti: condizioni carcerarie e recidiva", presentazione disponibile sul sito: http://www.prisonovercrowding.eu/it/documenti/terlizzese_carecereaperto_recidiva

(21). Le celle sono aperte tutto il giorno, non vi sono problemi di sovraffollamento, le giornate sono operose perché trascorse a svolgere attività lavorative, di studio, di formazione professionale, sportive e ricreative, i detenuti sono chiamati alla responsabilità e all'autodeterminazione e il controllo è esercitato in maniera condivisa fra tutti gli operatori (cioè la sorveglianza non è solo appannaggio della sola polizia penitenziaria).

(22). Vedasi, tra gli altri, a titolo di esempio: Stucchi E., "Carcere di Bollate: dove il detenuto non perde la sua dignità", 19 novembre 2012, disponibile all'indirizzo web: https://www.fondazioneveronesi.it/articoli/altre-news/carcere-di-bollate-dove-il-detenuto-non-perde-la-sua-dignita/; "Nel carcere modello di Bollate ora c'è un ristorante aperto a tutti", *Bergamo post*, 3 luglio 2015, disponibile all'indirizzo web: http://www.bergamopost.it/pensare-positivo/nel-carcere-modello-di-bollate-ora-hanno-aperto-un-ristorante/; Demurtas A., "Bollate, il carcere dove le pene non si scontano a porte chiuse", *Lettera 43*, 31 marzo 2013, disponibile all'indirizzo web: http://www.lettera43.it/fatti/bollate-il-carcere-dove-le-pene-non-si-scontano-a-porte-chiuse_4367585217.htm; Cavazzuti N., "Bollate, nel carcere modello i detenuti offrono la cena a tutti", Oggi, 31 maggio 2013, disponibile all'indirizzo web: http://www.oggi.it/attualita/notizie/2013/05/31/bollate-nel-carcere-modello-i-detenuti-offrono-la-cena-a-tutti/; Brambilla M., "Il carcere modello senza suicidi", La Stampa, 21 giugno 2013, disponibile all'indirizzo web: http://www.lastampa.it/2013/06/21/italia/cronache/il-carcere-modello-senza-suicidi-salvati-dal-lavoro-mnNewIOHmdzquuWiE1kWEN/pagina.html

(23). Frudà L. (a cura di), *Alternative al carcere. Percorsi, attori e reti sociali nell'esecuzione penale esterna: un approfondimento dalla ricerca applicata*, FrancoAngeli, Milano, 2006.

(24). Vedasi l'analisi approfondita sui soggetti-utenti in Frudà L. (a cura di)., *op. cit.*, pp. 192-266.

(25). *Ibidem*, pag. 356.

(26). Vedasi: http://www.reducingprison.eu/downloads/files/KIT_FORMATIVO.pdf

(27). Per un'analisi sistematica delle molteplici sfaccettature della prevenzione del crimine quale attività pubblica strettamente connessa ad altri aspetti della vita politica e sociale di un territorio, vedasi: Sette R., *Controllo sociale e prevenzione. Un approccio criminologico*, Clueb, Bologna, 2008.

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La sécurité de proximité, un remède à la ségrégation territoriale ?

Community security, a remedy for territorial segregation ?

François Dieu[•], *Xavier Latour*[*]

Riassunto
Partendo da un'analisi socio-giuridica, il presente articolo propone alcune risposte alle seguenti domande che vengono poste con una particolare cogenza nella società francese di oggi: la segregazione territoriale si ripercuote sull'ambito della sicurezza? E' possibile trasformare la logica di prossimità in una risposta da implementare? Qual è l'impatto degli interventi di sicurezza di prossimità sulla lotta contro la segregazione territoriale, in particolare la partecipazione dei cittadini e la mediazione sociale? In altri termini, la sicurezza di prossimità rappresenta una risposta adatta ed efficace nei confronti della segregazione territoriale?

Résumé
A partir d'une analyse à la fois juridique et sociologique, cet article répond aux questions suivantes, qui se posent avec une acuité particulière dans la société française d'aujourd'hui : la ségrégation territoriale se manifeste-t-elle en matière de sécurité, et s'avère-t-il possible de développer en réponse une logique de proximité ? Quel est l'impact en matière de lutte contre la ségrégation territoriale des dispositifs de sécurité de proximité, en particulier de la participation citoyenne et de la médiation sociale ? En d'autres termes, la sécurité de proximité est-elle une réponse adaptée et efficace en matière de ségrégation territoriale ?

Abstract
From a legal and sociological perspective, this article aims to answer the following questions which are central to current French society: Does the territorial segregation reveal itself in regard to security and is it possible to develop in reply a response based on local security measures? What is the impact on the fight against territorial segregation of local security measures, in particular citizen participation and social mediation? In other words, are local security measures an appropriate and efficient answer to territorial segregation?

Keywords: community security; France; territorial segregation; social mediation; citizen participation.

1. Introduction.

En France comme ailleurs, la sécurité n'est pas uniquement l'affaire de l'Etat et de sa police, mais concerne aussi les citoyens. Elle est en permanence menacée par différents dysfonctionnements sociaux, en particulier la ségrégation urbaine (1), qui met gravement en cause les liens interpersonnels sur lesquels sont fondés la confiance, le respect et la solidarité entre les habitants d'un quartier ou d'une ville. En divisant et en cloisonnant, elle conduit à instaurer de la méfiance et de la tension entre les composantes de la population, sur des bases sociales, religieuses, ethniques ou géographiques. En plus de rendre beaucoup plus malaisée l'action des services de police exposés à des phénomènes de bandes et à des pratiques mafieuses, elle contribue au développement des comportements délinquants. La ségrégation territoriale accentue, en effet, la précarité, les ressentiments et la désocialisation. Les habitants des zones ségréguées sont les premières victimes d'une insécurité plus importante dans des

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espaces de plus en plus anomiques, de telle sorte que certains utilisent à leur propos, à tort ou à raison, les expressions de « ghettos » et de « zones de non droit » (2).

Les forces de police françaises, qu'elles soient étatiques (police et gendarmerie) ou municipales, tentent de s'adapter en faisant évoluer leurs modes opératoires (patrouilles pédestres, ilotage) et leur organisation (communautés de brigades pour la gendarmerie, zones de sécurité prioritaires dans les quartiers difficiles). Elles entendent occuper le terrain et résorber ce qui est une rupture d'égalité manifeste entre les usagers du service public. En dépit des efforts déployés, les services de police ne sont plus, depuis longtemps, en mesure d'agir seuls. En effet, les réponses à la délinquance, à l'insécurité réelle ou ressentie sont devenues multiples et de plus en plus partenariales (3). Ces réponses comprennent un éventail de méthodes allant de la prévention situationnelle (qui consiste à entourer de protections les victimes potentielles en agissant sur les situations propices à la survenance d'actes de délinquance), à plusieurs dispositifs constitutifs de la politique de la ville (4). La prévention de délinquance passe également par le recours à des technologies de sécurité comme la vidéosurveillance, rebaptisée « vidéoprotection » (5). Si la prévention peut avoir un côté fourre-tout dérangeant, tout en étant entourée d'un certain scepticisme quant à son efficacité, elle implique aussi des approches stimulantes. A cet égard, l'une des clés de la réussite consiste à s'attaquer aux origines du phénomène insécuritaire, parmi lesquelles la perte des repères sociaux par une partie des individus. Comme le soulignait dès 1983 le rapport Bonnemaison (6), la « prévention est l'affaire de tous », ce qui se concrétise par une pluralité de dispositifs consistant à impliquer l'individu dans la construction de sa propre sécurité. S'il veut protéger ses biens et sa personne contre les malveillances et les agressions, il doit commencer par s'investir dans son environnement immédiat. En d'autres termes, il revient à chacun de construire, avec la puissance publique – dans le cadre d'une sorte de « contrat sécuritaire » par analogie avec la sempiternelle idée rousseauiste de contrat social – une sécurité de proximité pouvant être définie comme s'exerçant d'une part, dans un environnement géographique proche (le quartier, la ville), et d'autre part, étant guidée par l'objectif de reconstruction de liens sociaux. La proximité est autant géographique que relationnelle et vise toutes les formes d'insécurité, de l'incivilité à la grande délinquance (7).

Deux formes de prévention sont mobilisées, en France, par la sécurité de proximité : la prévention communautaire et la prévention sociale, qui s'opposent donc aux logiques de ségrégation urbaine. La prévention communautaire, qui vise à mobiliser les habitants pour mieux contrôler l'espace social, se traduit par quatre types de mesures : l'intégration dans le projet urbain d'espaces d'interaction entre les habitants (commerces et services de proximité, jardins et espaces verts, maisons de quartier) ; l'encouragement à l'acquisition des logements et le développement du « sens communautaire » (« résidentialisation ») ; la mise en place de conseils de quartier et l'activation des solidarités de voisinage ; l'amélioration des relations entre la police et la population (*policing by consent*, c*ommunity policing*, police de proximité) (8). La prévention sociale renvoie, quant à elle, à des actions dirigées vers le délinquant potentiel. Il s'agit alors de briser la spirale infernale susceptible de conduire un individu à commettre des actes délinquants, en

intervenant sur son environnement social. Au-delà de sa responsabilité individuelle, le délinquant est considéré, sur un plan plus général, comme la victime d'une société qui n'a pas su/pu assurer son intégration, et sur laquelle pèsent des facteurs d'inadaptation, des déterminismes inhérents à son environnement social, à son vécu et à ses conditions de vie. L'objectif est de mener une ou plusieurs actions sur le sujet et son micromilieu (famille, groupe des pairs, milieu scolaire), afin de parvenir à un recul des prédispositions à commettre des actes délinquants. En pratique, les actions d'animation et d'occupation destinées à améliorer les conditions de vie des populations sont privilégiées, de manière à infléchir les progrès de la délinquance et de l'insécurité, indissolublement liées aux phénomènes de précarisation et d'exclusion.

En faisant converger les perspectives juridique et sociologique, cette contribution entend apporter des éléments de réponse aux questions suivantes, qui se posent avec une acuité particulière dans la société française d'aujourd'hui : La ségrégation territoriale se manifeste-t-elle en matière de sécurité, et s'avère-t-il possible de développer en réponse une logique de proximité ? Quel est l'impact en matière de lutte contre la ségrégation territoriale des dispositifs de sécurité de proximité, en particulier de la participation citoyenne et de la médiation sociale ? En d'autres termes, la sécurité de proximité est-elle une réponse adaptée (I), et efficace (II) en matière de ségrégation territoriale ?

2. La sécurité de proximité : une réponse adaptée ?

Le territoire est un paramètre important pour les politiques de sécurité, avec notamment une tendance à un certain enfermement dans les découpages administratifs. La réponse publique à la délinquance est prisonnière des frontières imposées par la multiplicité des circonscriptions administratives (communes, cantons, intercommunalités, arrondissements, départements, régions), et judiciaires (ressorts des tribunaux de grand instance et des cours d'appel), alors qu'il serait plus opérant de déployer l'action des forces de police et de gendarmerie en tenant compte des bassins de vie et des axes de communication, au lieu de les enfermer dans des territoires institutionnels pas forcément cohérents (9). L'échelon départemental, au centre des politiques locales de prévention et de sécurité, privilégié par un Etat soucieux de préserver, autour du préfet, la dimension régalienne de la sécurité ; ne constitue pas toujours un territoire fonctionnel homogène au plan de la géographie comme des activités humaines. Face à une criminalité souvent mobile et en perpétuelle mutation, la réponse publique paraît engoncée et morcelée, comme entravée dans des périmètres étroits, extrêmement difficiles à faire évoluer, avec le sentiment que la puissance publique oppose alors à des phénomènes dynamiques un certain immobilisme. C'est manifestement le cas lorsqu'il s'agit de mettre en œuvre des adaptations nécessaires, au regard des déséquilibres constatés, dans l'organisation territoriale des forces de police et de gendarmerie (A), mais aussi de permettre la diffusion dans les rangs de ces dernières des logiques de sécurité de proximité (B).

A) La nécessaire réforme de la carte policière.

Le trait principal des politiques publiques de sécurité est à rapprocher de l'une des caractéristiques premières du système policier français, sa dimension dualiste, en ce qu'il est le produit de l'évolution distincte, jusqu'au début du XX^e^ siècle, des composantes rurale et urbaine de la société française. La police et la gendarmerie se

sont, en effet, développées séparément, l'une dans les villes, l'autre dans les campagnes, avant que, sous la pression de la révolution industrielle et des progrès de la communication, les mondes rural et urbain n'entrent en relation, en interaction, en conflit, pour s'enchevêtrer et se confondre de nos jours dans les zones périurbaines. La concentration urbaine des populations et, par voie de conséquence, des problèmes d'insécurité a conduit les pouvoirs publics à privilégier une prise en considération essentiellement urbaine du fait insécuritaire. Aussi les politiques publiques de sécurité sont-elles principalement orientées vers les villes et leurs quartiers, sous réserve d'une certaine préoccupation, depuis ces dernières années, pour les zones périurbaines. La réponse publique à l'insécurité dans les zones rurales prend, quant à elle, la forme multiséculaire et pragmatique de l'action policière de proximité des brigades de gendarmerie, de sorte qu'il est possible de discerner, compte tenu des évolutions sociodémographiques du monde rural (désertification des campagnes, périurbanisation), une certaine inertie de cette action publique, qui est manifeste au niveau de l'implantation territoriale de la gendarmerie par trop figée.

En matière de sécurité, la question de la ségrégation territoriale ne se pose pas forcément avec la même intensité que dans d'autres domaines de l'action publique. En apparence, deux types de territoires, aux deux extrémités de l'hexagone, paraissent les plus concernés par une inégalité de traitement : d'un côté, les quartiers sensibles des principales agglomérations, de l'autre, les campagnes les plus reculées. En dépit d'un certain volontarisme de la puissance publique depuis les années 1980, les quartiers relevant aujourd'hui de la « géographie prioritaire » se singularisent par une présence insuffisante des services publics en général et de sécurité en particulier. Il s'agit là de l'un des axes principaux des politiques de développement social urbain fédérées dans le cadre de la politique de la ville. L'intégration effective, depuis le milieu des années 1990, de la prévention de la délinquance au titre des priorités de la politique de la ville en a fait une composante à part entière de la politique urbaine de sécurité. Pour ce qui est des organisations policières, la prise en considération des objectifs de la politique de la ville s'est traduite, outre la participation aux instances de prévention de la délinquance, par l'utilisation de forces mobiles (CRS et escadrons de gendarmerie mobile) dans des missions de sécurisation, par la réactivation de la pratique de l'îlotage et la mise en œuvre de la police de proximité, ou encore par l'amélioration de l'accueil (en particulier des victimes) dans les commissariats de police et brigades de gendarmerie (10). Les institutions policières contribuent également aux initiatives en matière de prévention de la délinquance, par la désignation d'anciens policiers comme délégués à la cohésion police-population (DCPP) dans certains quartiers difficiles, l'animation des dispositifs « ville, vie, vacances » (VVV), l'action des centres de loisirs jeunes (CLJ) de la police et des brigades de prévention de la délinquance juvénile (BPDJ) de la gendarmerie, par l'intervention en milieu scolaire des policiers formateurs antidrogue (PFAD) et des gendarmes formateurs relais antidrogue (FRAD), ainsi que par la désignation de correspondants et référents en matière de sécurité à l'école ou encore de lutte contre les violences intrafamiliales. Bien que ne constituant pas un élément décisif pour guider l'action des organisations policières, la politique de la ville n'en a pas moins contribué à la diffusion des

logiques de proximité et de partenariat dans la réponse à l'insécurité.

Si la présence policière s'avère manifestement insuffisante dans les quartiers les plus précarisés des villes, au regard de l'ampleur des problèmes de délinquance, de l'omniprésence de l'économie clandestine et du phénomène des bandes, ainsi que des besoins considérables de protection et de sécurité des populations, la situation est plus complexe dans les zones hyper-rurales, avec certes une présence clairsemée de la gendarmerie, mais aussi, en dépit d'une activité singulièrement réduite, le maintien dispendieux du dispositif de « maillage » territorial, alors même que l'institution ne dispose pas forcément dans les zones périurbaines de l'ensemble des moyens humains nécessaires à l'exécution de ses missions notamment de sécurité de proximité.

La question a notamment été posée, il y a une vingtaine d'années, par le rapport Carraz-Hyest (1998) (11), qui se voulait le préalable à une grande réforme de la carte policière, souvent évoquée, parfois tentée, mais toujours sacrifiée sur l'autel des égoïsmes locaux et des corporatismes. Et pourtant, la formule utilisée était sans ambages : « La répartition géographique des effectifs de fonctionnaires assurant la sécurité des Français est inversement proportionnelle aux besoins ». Cette tentative de réforme de la carte policière a démontré, par les réactions qu'elle a provoquées, la difficulté, pour ne pas dire l'impossibilité, d'opérer une redistribution des territoires entre police et gendarmerie. Le constat de l'inadéquation entre, d'un côté, la répartition territoriale des effectifs de policiers et de gendarmes, de l'autre, les évolutions de la société et l'état de la délinquance a conduit ses auteurs à définir alors les grandes lignes d'un redéploiement obtenu au moyen de la conjonction de deux évolutions d'ensemble : d'une part, une modification de la carte des implantations respectives de la police et de la gendarmerie, d'autre part, un mouvement de réorganisation territoriale interne à chacune des deux institutions, de manière à dégager des effectifs supplémentaires afin de renforcer leur présence dans les quartiers sensibles et les zones périurbaines. Pour ce qui est de la situation de la gendarmerie et de la police, le rapport Carraz-Hyest indiquait combien, au regard de leurs différences d'organisation et de fonctionnement, il semble pour le moins hasardeux de procéder à des comparaisons. Si, abstraction faite de l'étendue des espaces à surveiller, la situation paraît déséquilibrée au préjudice de la police (avec 60 % des effectifs des forces policières, elle a en charge 50 % de la population, 75 % des faits de délinquance et 80 % des zones urbaines sensibles), l'augmentation de la population relevant de la gendarmerie en matière de sécurité publique a réduit, ces dernières années, l'écart entre les deux institutions. Quelques redéploiements sont malgré tout intervenus depuis dans le cadre d'une politique plus pragmatique, ce qui a permis de procéder, entre 2003 et 2007, dans une soixantaine de départements, à des substitutions de brigades par des commissariats dans plus de deux cents communes périurbaines situées à la périphérie des principales agglomérations et d'une quarantaine de commissariats intervenant dans une centaine de communes par des brigades dans des villes moyennes – moins de 20 000 habitants – connaissant une criminalité inférieure à la moyenne nationale. Face à cette nécessité d'adapter la répartition des effectifs de policiers et de gendarmes aux évolutions sociodémographiques, les gouvernements successifs ont généralement opté pour la solution de facilité qui consiste à accroitre les effectifs, sous réserve de la période 2007-2012

marquée par la mise en œuvre en ce domaine des mesures de réduction appliquée à l'ensemble de la fonction publique d'Etat. A l'évidence, et même face à la menace terroriste, la cohérence et l'efficacité plaident avec insistance non seulement pour une réduction drastique des tâches indues et autres surcharges procédurales qui consomment une bonne partie du potentiel opérationnel, mais aussi pour une meilleure adéquation des effectifs aux besoins objectifs par une réforme progressive et ambitieuse de la carte policière.

L'absence de remodelage de la carte des brigades a conduit la gendarmerie à ne pas être en mesure d'accompagner pleinement les mouvements de population inhérents aux phénomènes de désertification des campagnes et de périurbanisation. Depuis 2009, elle n'est ainsi parvenue qu'à la fermeture d'une centaine de brigades de proximité et d'une quarantaine de brigades autonomes, les effectifs correspondants ayant été redéployés au niveau local. Tout porte à considérer que les mentalités n'ont pas su faire évoluer l'idée même de maillage, qui a constitué et constitue encore l'un des piliers du développement et de l'action de la gendarmerie. En effet, à la conception territoriale et statique du maillage, qui correspondait à l'époque du cheval et de la bicyclette, aurait dû succéder, dans la seconde moitié du XX^{e} siècle, une conception dynamique et plus humaine, le référent en matière d'implantation des brigades n'étant plus (seulement) le territoire, mais la population. Plus concrètement, et sans renoncer à une présence de la gendarmerie sur l'ensemble du territoire, la carte des brigades aurait dû être modifiée en profondeur, de manière à permettre une plus grande concentration des moyens dans les communes à forte densité de population, ce qui aurait nécessité la fermeture et le déplacement d'un grand nombre d'unités implantées dans les zones rurales les plus touchées par l'exode rural. Deux principaux arguments plaident pour un remodelage de la carte d'implantation des brigades : d'une part, préserver le principe de proximité de toute évolution attentatoire à l'idée de gendarmerie, d'autre part, optimiser l'emploi des moyens dans un contexte de malthusianisme budgétaire. L'émiettement de la gendarmerie en pas moins de 3 300 brigades (soit autant qu'au milieu du XIX^{e} siècle), même réunies désormais dans cet embryon de mutualisation que constitue le système des communautés de brigades, participe de cette approche surannée et dysfonctionnelle de la proximité, en maintenant une organisation territoriale d'une autre époque.

B) <u>Les entraves à la sécurité de proximité</u>.

Au-delà du constat de la nécessaire réforme de la carte policière, à l'aune des déséquilibres perceptibles au préjudice des populations des quartiers difficiles et des zones périurbaines, l'autre question qui est posée est la possibilité de mettre en œuvre en matière de sécurité une authentique action de proximité. Dans une démocratie pluraliste, le souci de rapprocher la police de la population ne souffre d'aucune contestation, ne serait ce que par référence aux principes mêmes du service public. Pour autant, il paraît bien difficile, en France, d'installer durablement ces logiques dans la production de sécurité, en dépit des progrès, ces dernières années, des logiques partenariales et des politiques de prévention. En réalité, au moins trois phénomènes tendanciels semblent se liguer pour entraver cette sécurité de proximité qui demeure à l'état d'ébauche et de concept : le primat de l'individualisme, l'étatisme de la sécurité, et l'ambivalence du rapport à l'ordre.

Processus par lequel l'individu s'affranchit des règles et des valeurs issues de la conscience collective, l'individualisme postule l'autonomie de l'individu par rapport aux règles collectives, son affranchissement des normes imposées par autrui, en d'autres termes, des tutelles traditionnelles qui pèsent sur son existence. A l'origine, il est indissociable des idées de modernité et de démocratie façonnées par la philosophie des Lumières, avant d'être ensuite associé, avec sa généralisation dans la seconde moitié du XX^e siècle, à une crise de la citoyenneté et de la sociabilité, voire au recul des logiques de solidarités et à la permissivité de la société post-moderne. C'est devenu un lieu commun que de souligner le progrès constant de cet individualisme dans les relations sociales, qui tend à distendre davantage les relations entre les individus, *a fortiori* lorsqu'il s'agit des rapports que chacun entretient avec les représentants de l'ordre. Cette érosion a ainsi pu être identifiée dans l'exercice de la mission de surveillance générale de la gendarmerie (12).

La sécurité relève, en France, d'une logique étatique tant il est vrai que la puissance publique, même si elle autorise le renfort précieux des communes et de leurs regroupements ainsi que du secteur privé, n'en conserve pas moins un authentique monopole, exercé par le pouvoir exécutif. Cet étatisme a pour corollaire la prépondérance des réponses policières produites par les deux institutions régaliennes que sont la police et la gendarmerie, toutes les deux nationales, et placées sous la responsabilité du ministre de l'Intérieur. Aussi la police hexagonale est-elle une police d'État, c'est-à-dire relevant de l'autorité exclusive du pouvoir central (exécutif), mais aussi une police d'ordre avec comme priorité le maintien de l'ordre public. Cette dimension fondamentalement régalienne et policière de la sécurité fait indéniablement obstacle à l'émergence des logiques de police proximité.

Ce modèle recouvre les expériences destinées à renforcer la visibilité de l'action policière et la communication entre police et population. Mode de gestion de la sécurité publique, elle n'est pas la négation du caractère ultimement coercitif de la fonction policière. Elle est un positionnement particulier de l'organisation policière caractérisé par le souci d'instaurer un partenariat avec les différents acteurs sociaux, afin d'assurer des tâches de sécurité dont la légitimité ne peut d'ailleurs que se trouver renforcée par ce rapprochement entre policiers et citoyens. Fondée sur une approche communautaire des rapports sociaux, cette forme de police « douce » et « proactive » présente trois caractéristiques : d'abord, elle est décentralisée, elle reconnaît une large autonomie pratique aux services et agents ; ensuite, elle est acceptée par la population, elle privilégie la persuasion et la prévention, la communication et la collaboration avec le public, grâce à la multiplication de la présence policière sur le terrain et la mise en place de mécanismes de prévention situationnelle ; enfin, elle est fondée sur une conception étendue du mandat de la police, elle suppose, d'une part, l'implication des services de police dans une fonction de résolution des problèmes, par la recherche collective des facteurs communs à une série de troubles de manière à permettre une réponse non séquentielle, d'autre part, l'ajustement des priorités policières aux attentes des citoyens, avec la mise en place d'enquêtes permettant d'appréhender les attentes de la population et d'évaluer l'action de la police. Si l'idée de police de proximité n'est pas ainsi sans présenter un pouvoir d'attraction, tant elle s'inscrit dans une vision intégratrice du travail policier conforme à l'idéologie

pluraliste, elle semble difficile à mettre en œuvre pour des institutions policières construites, comme en France, à partir de logiques autoritaires et centralistes qui ont subsisté par-delà l'avènement du régime républicain. Si, pour la gendarmerie, il est possible de parler, empiriquement, d'une police de proximité séculaire mais qui connaît actuellement une certaine érosion, pour la police nationale, il s'agit de pratiques policières traditionnelles (îlotage) qui ont fait l'objet, entre 1997 et 2002, d'une tentative d'institutionnalisation qui s'est heurtée tout à la fois à des résistances culturelles, à des contraintes organisationnelles, mais aussi à des clivages idéologiques.

Evoluant dans un contexte social dominé par l'individualisme en tant que producteur d'une sécurité orientée principalement vers la protection de l'Etat, de sa souveraineté et de son ordre public, le policier français donne lieu, de la part de la population, à une méfiance chronique, voire à une aversion structurelle qui s'explique, en grande partie, par le poids de l'histoire et des représentations populaires. Le policier est d'abord la victime toute désignée, le catalyseur, le bouc émissaire du rapport ambigu des Français à l'ordre et à la puissance publique. Ce procès d'intention fait à l'appareil étatique est une constante dans les pays occidentaux nourris par l'idéologie libérale, mais il est rendu encore plus prégnant dans des pays, comme la France, caractérisés par une histoire politique nationale marquée par de nombreux épisodes de violences politiques. L'avènement de la démocratie demeure, en France, un phénomène récent, après plusieurs siècles de pouvoir oppresseur et cette réplique traumatisante au cours du XX^{e} siècle que constitue le régime de Vichy. Aussi les Français, même s'ils vivent aujourd'hui dans une démocratie stable, ont-ils conservé, plus ou moins consciemment, une certaine méfiance à l'égard du pouvoir d'État, immanquablement suspect, dans l'imaginaire collectif, de comploter contre leurs libertés individuelles.

Le rapport à l'ordre est parasité par ce trait de la culture politique française. Pour résumer, du fait de son incapacité à laisser derrière elle cette psychose collective, la France a un rapport ambigu avec sa police, qui ne se limite pas, loin s'en faut, aux relations conflictuelles avec les jeunes des quartiers difficiles. Le problème est bien plus large même s'il ne se traduit que marginalement pas des confrontations directes. Les Français se méfient de l'ordre, et donc de leur police, même si cette dernière bénéficie d'un capital confiance plus que convenable dans la population ; les gendarmes et les policiers recueillent, respectivement, 81 % et 65 % de bonne opinion dans un sondage de l'IFOP de novembre 2014 pour *L'Essor de la gendarmerie nationale*) et, dans une moindre mesure, chez les jeunes (52 % des lycéens expriment cette confiance dans la police, contre 85 % pour l'armée, dans l'*Enquête sur les jeunes et les armées* réalisée en 2011 par l'IRSEM, l'Institut de recherche stratégique de l'École militaire). Un autre sondage, réalisé pour *L'Express* (11-17 février 2015), il est vrai, quelques semaines après les attentats de janvier 2015, et après les témoignages de sympathie à l'égard des policiers et gendarmes notamment lors de la manifestation du 11 janvier (qui ont même conduit le chanteur Renaud à « embrasser un flic » dans une de ses récentes compositions), indique que 84 % des Français auraient une bonne opinion des policiers (17 % une très bonne opinion et 67 % une assez bonne opinion). Ces opinions quantifiées sont surtout révélatrices des attentes très importantes en matière de sécurisation, ce qui justifie des mesures de contrôle qui, quant à elles, sont loin d'être

populaires. Cette ambivalence du rapport à l'ordre est un des principaux déterminants de la production de sécurité. Elle parasite les relations du citoyen à la police, en plaçant cette dernière et ses agents dans une sorte de schizophrénie, et empêche donc l'avènement éventuel des logiques de sécurité de proximité.

3. La sécurité de proximité : une réponse efficace ?

En s'inscrivant dans une logique de prévention non exclusivement policière, la sécurité de proximité peut emprunter différents dispositifs, comme la participation citoyenne (A) et la médiation sociale (B). Ces dispositifs sont révélateurs des ambiguïtés de cette sécurité de proximité : valorisée en ce sens qu'elle entend provoquer une mobilisation sociale et une réponse préventive à la délinquance, elle n'en remet pas moins en cause le monopole matériel et symbolique de la puissance publique et de sa police. Assortie de limites et de préventions, elle peine à s'imposer et à faire la preuve de son efficacité en dépit de premiers résultats souvent encourageants.

A) Sécurité de proximité et participation citoyenne.

Bien connue à travers les dispositifs anglo-saxons de « *neighbourhood watch* » (13), elle a été popularisée en France par les « voisins vigilants », expérimentés il y a une dizaine d'années dans les Alpes-Maritimes. Le principe, qui repose sur un partenariat entre les forces de sécurité et les habitants, présente un double avantage. D'une part, il s'agit de rapprocher les policiers et les habitants d'un quartier. Les actions sont structurées autour de réseaux alimentant la police en informations, tout en diffusant vers la population des règles et des conseils de prévention. D'autre part, du lien social est recréé entre des personnes animées par la volonté de se mettre au service de la collectivité. Face à la ségrégation urbaine, la participation citoyenne contribue à revitaliser le tissu social, les habitants se rapprochant autour d'un objectif commun : leur sécurité. Ils se constituent en réseau d'interlocuteurs des forces de police. Les administrés sont sollicités pour être associés à une mission de surveillance de leur cadre habituel de vie. Mieux que quiconque, ils sont les yeux et les oreilles de ce qui les entoure : ils peuvent remarquer les comportements et les événements suspects, puis faire remonter les informations aux forces de police. Après quelques années d'expérimentation d'une formule promue initialement pour améliorer la lutte contre les cambriolages, quelques villes ont créé, dans le prolongement des attaques terroristes de novembre 2015, des dispositifs faisant appel au civisme des habitants, en étendant alors la mobilisation à la prévention des attentats. Si chaque initiative communale est particulière, la participation des citoyens à leur sécurité n'est ni nouvelle, ni problématique par principe. Concrètement, les habitants sont sensibilisés aux questions de sécurité et participent directement à une forme de contrôle social fondé sur le civisme et la proximité. Les quartiers s'animent, et de nouveaux liens font reculer l'individualisme. Cette surveillance doit permettre autant de suppléer la police que d'améliorer la prévention des incivilités, et de faire baisser l'insécurité objective ou ressentie. Pour parvenir à cela, les forces de sécurité et les maires s'appuient sur un tissu associatif plus ou moins développés (associations de quartier par exemple), dans une logique de partenariat.

L'intérêt que portent certaines communes à la participation citoyenne a conduit la gendarmerie et la police à mettre en place, au niveau central, la première un « bureau des partenariats et de la prévention » (DGGN), tandis que la seconde a opté

pour un « conseiller prévention et coopération de sécurité » (DGPN). Localement et depuis 2007, les « référents sûreté » de la police et de la gendarmerie jouent un rôle actif en ce domaine, par-delà leur implication dans des missions de conseils en matière de vidéosurveillance et de protection des bâtiments publics. De nombreux aspects de la vie en société sont concernés. Parallèlement à la prévention des cambriolages, des réseaux plus ciblés concernent directement des professions avec le concours des chambres concernées (industrie, métiers, agriculture, voire des ordres professionnels), tandis que la sécurité routière recourt, par exemple, à des retraités à la sortie des écoles (« gilets jaunes »). Plus récemment, les technologies de la communication ont été intégrées dans le fonctionnement des réseaux citoyens, dès lors qu'il convient d'alerter telle ou telle partie de la population d'un danger. Dans cet appel à la population, on peut ainsi mentionner le développement du dispositif si efficace d' « alerte enlèvement ».

La participation citoyenne renvoie à une diversité de procédés qui ne se limitent pas aux expériences de « voisins vigilants », cette dernière appellation ayant d'ailleurs fait l'objet d'une accaparation commerciale (voisinsvigilants.org) et pâtissant d'une image négative. Le maire est le pivot de la participation citoyenne, qui suppose son adhésion et son implication, avant la signature d'une convention avec la préfecture. Un grand nombre de maires éprouve encore des réticences à entrer dans ce type de dispositif, souvent par méconnaissance ou par frilosité. Dans sa zone de compétence, la gendarmerie s'est particulièrement impliquée dans le développement de la participation citoyenne, notamment en effectuant cette nécessaire information de proximité des maires. En cas de volonté de l'édile de mettre en place ce dispositif, la gendarmerie intervient d'abord, en tant que force de conseils et de propositions, en matière d'identification des problèmes, de détermination de l'aire géographie (un quartier, un lotissement, etc.), et de désignation des référents (des personnes volontaires et reconnues dans leur voisinage, disponibles et présentes, entretenant de bonnes relations avec la mairie, plutôt à l'aise dans la relation avec les autres). Les référents désignés par le maire bénéficient généralement, de la part de la gendarmerie, d'une réunion initiale de formation, complétée par une visite du centre opérationnel de la gendarmerie (CORG), avec la possibilité également d'être réunis une fois par an pour bénéficier de quelques rappels. Sous réserve de panneaux indiquant le dispositif, la participation citoyenne ne produit pas de changements notables dans la vie des quartiers concernés : elle ne donne pas lieu à l'organisation de patrouilles d'auto-défense, pas plus qu'à la mise en place de services de sécurité privée, mais vise simplement à accentuer les réflexes de vigilance et à développer des comportements plus efficaces en termes d'alerte et de communication avec la gendarmerie et les polices municipales, avec une responsabilisation accrue s'agissant des référents. Il ne s'agit donc pas de sortir de la normalité de la vie des quartiers, mais simplement de faire un peu plus attention et de communiquer plus systématiquement et plus rapidement avec la brigade de gendarmerie. En aucune manière, les référents ne doivent intervenir pour se livrer à des vérifications et autres contrôles, et leur priorité demeure la prévention des cambriolages.

Même si on ne dispose pas d'évaluation dans la durée pour une politique encore récente et d'application différente selon les communes, les dispositifs ont plutôt tendance à restaurer un climat

de sécurité et à avoir un effet dissuasif sur certains cambrioleurs. Ils peuvent ainsi renforcer le lien entre les voisins, favoriser l'intégration des nouveaux arrivants, encourager les initiatives de vie de quartier. Malgré un engouement certain, la portée réelle sur le niveau de délinquance est loin d'être évidente. La difficulté d'inscrire le dispositif dans la durée est aussi à prendre en considération. L'implication des membres du réseau peut, en effet, s'émousser, alors que la mobilisation de nouveaux habitants n'est pas toujours aisée. La collaboration dépend aussi de l'implication des forces de police et de gendarmerie, en particulier de la qualité de l'animation des réunions du réseau. De manière plus pragmatique, et pour répondre aux plus sceptiques, aucun dysfonctionnement majeur n'a été constaté, ce qui aurait donné lieu, on peut s'en douter, à une forte mobilisation médiatique. En dépit de ces apports, il ne s'agit donc pas d'un dispositif miracle, capable à lui seul de faire disparaître les cambriolages, mais d'un instrument supplémentaire dans la prévention de la délinquance, au même titre que les patrouilles, les caméras de vidéosurveillance, les mesures de protection des domiciles. Il convient donc d'inscrire la participation citoyenne dans la palette des instruments de prévention dont peut disposer le maire, avec l'avantage d'associer la population, de la responsabiliser, et de la valoriser.

La participation citoyenne peut prendre aussi d'autres formes relevant plus largement de la prévention communautaire : les dispositifs de veille sociale, qui permettent de collecter des informations sur des problématiques de précarisation et d'exclusion, mais aussi de maltraitance et de délinquance, notamment sur des personnes vulnérables (enfants, conjoints, personnes âgées) ; les visites de bénévoles auprès des personnes âgées, en particulier pour prévenir les abus de faiblesse de la part de l'entourage et de personnes indélicates ; les réunions de quartiers avec la population, soit périodiquement, soit après la survenance d'événements marquants ; ces réunions permettent un échange direct et des remontées rapides d'informations et peuvent servir de point de départ à la mise en place d'un dispositif de participation citoyenne ; les chaines d'alerte pour les commerçants et les maires (« Vigicommerces» et « Vigimaires ») qui permettent à la gendarmerie ou à la police de délivrer instantanément des messages opérationnels ou de prévention au niveau départemental en tirant profit des outils actuels de communication (SMS, mails) ; les dispositifs de veille et d'échange en matière de citoyenneté et de tranquillité publique, instances d'échanges entre les acteurs de terrain dans le dessein de promouvoir des diagnostics partagés des problématiques délinquantes et de favoriser la coordination des réponses apportées.

Ces différentes actions ne se développent pas sans cadre juridique. Ainsi, une circulaire du 22 juin 2011 consacrée à la participation citoyenne précise les conditions dans lesquelles sont menées les « actions partenariales ». Les espaces urbains sont logiquement visés, ainsi que les zones rurales. Les participants sont des bénévoles qui ne disposent d'aucune prérogative juridique. Le réseau est créé sur la base d'une convention tripartite associant la commune, le préfet et les forces de police ou de gendarmerie. En tout état de cause, l'Etat entend garder la maîtrise de la participation citoyenne, et la faire fonctionner dans le strict respect des dispositions du Code de la sécurité intérieure (CSI) et du Code général des collectivités territoriales (CGCT). C'est, en effet, à l'Etat qu'il revient d'assurer la sécurité sur le fondement de l'article L 111-1 CSI, ce qui conduit le préfet à animer et à

coordonner le dispositif de sécurité intérieure (article L 122-1 CSI). Il agit en étroite relation avec le maire, pivot de la prévention de la délinquance dans la commune (article L 132-2 CSI). Par voie de conséquence, en associant des habitants au travail des forces de sécurité, la participation citoyenne doit s'inscrire dans cette relation tripartite.

Délation ou solidarité ? Cette question en forme de dilemme est fréquemment posée lorsqu'il s'agit d'organiser la participation des citoyens à la sécurité en général, et à celle des communes en particulier. En France, le bilan de la formule est d'ailleurs assez mitigé : 1260 communes l'ont adoptée en zone gendarmerie pour seulement 60 en zone police (14). L'évocation des premiers résultats obtenus dans certaines communes du Nord et des Alpes-Maritimes s'est accompagnée d'un florilège de critiques, certains établissant un parallèle avec les « rondes citoyennes » initiées en Italie par la Ligue du Nord, d'autres soulignant l'impossibilité de transposition d'un système par trop anglo-saxon, la palme, si on peut dire, revenant à un site d'information (http://probe.20minutes-blogs.fr/archive/2010/03/15/operation-voisins-vigilants.html), qui a illustré quelques articles sur ce sujet avec des photos extraites du film d'Yves Boisset *Dupont Lajoie* (1975) montrant la scène de viol d'une adolescente et celle du lynchage d'un ouvrier maghrébin suspecté d'avoir commis ce crime. Pourtant il ne s'agit pas, comme en Corée du Sud, de rémunérer la dénonciation à la police de faits de délinquance, mais d'apporter une aide précieuse aux policiers et aux gendarmes. Si la participation citoyenne à la prévention de la délinquance relève du civisme autant que de la coproduction de sécurité, encore convient-il qu'elle se fasse dans le respect du droit.

Le tribunal administratif de Montpellier l'a rappelé sans ambiguïté dans une ordonnance de référé du 19 janvier 2016, puis à l'occasion du jugement au fond, le 5 juillet 2016 (15), intéressant le projet de « garde biterroise » initiée par un maire aussi médiatique que controversé. La ville de Béziers a décidé, par délibération de son conseil municipal du 15 décembre 2015, la création d'une « garde biterroise » chargée de renforcer les forces de l'ordre. En s'adressant à des retraités de la police et de la gendarmerie, la ville souhaitait bénéficier de renforts bénévoles destinés à opérer des « gardes statiques devant les bâtiments publics et des déambulations sur la voie public ». En aucun cas, ces citoyens ne devaient agir ; au contraire, ils devaient se contenter d'alerter les forces de police en cas de problème. Prise manifestement sans concertation avec la préfecture de l'Hérault, cette décision très médiatisée a suscité l'hostilité du représentant de l'Etat. Dépassionnant le débat entre les tenants du civisme et ceux qui craignaient la création d'une milice, il a saisi le juge administratif d'un référé-suspension (article L 544-1 du Code de justice administrative), et d'un recours en annulation. Dans une ordonnance du 19 janvier 2016, le juge a décidé de suspendre la délibération du conseil municipal en raison d'un « doute sérieux » quant à sa légalité, doute confirmé au fond. La ville de Béziers a, dans un premier temps, cherché à justifier la création de sa « garde » en se référant à la notion de collaborateur occasionnel du service public. Si, médiatiquement, un rapprochement pouvait être fait avec le dispositif des « voisins vigilants », la commune n'a pas repris cet argument devant le juge. Il est vrai que cette participation citoyenne relève d'un partenariat entre les communes et les acteurs étatiques de la sécurité, le préfet et les forces de police. Intéressant pour sensibiliser la population à la prévention de la

délinquance, il n'est en rien comparable avec la formule biterroise, beaucoup plus poussée. Elle concerne, en effet, de missions accomplies habituellement par la sécurité privée (gardes de bâtiments), et les services de police (surveillance de la voie publique). La référence au collaborateur occasionnel du service public n'était, de toute façon, pas très convaincante. Appliquée en matière de responsabilité administrative, cette notion suppose qu'un individu étranger au service public puisse être amené à y participer, soit à la demande du service, soit de manière spontanée. S'il le fait à la demande du service, cela doit être justifié par un besoin particulier. S'il le fait spontanément, cela doit répondre à une urgence. En l'espèce, la référence aux collaborateurs ne suffit pas à fonder la décision. Le juge des référés a relevé, réservant l'hypothèse de circonstances exceptionnelles ni établies ni même invoquées, que le conseil municipal *« ne tient d'aucune disposition législative ou réglementaire actuellement en vigueur la compétence pour créer, de sa propre initiative et pour une durée non déterminée, un service opérationnel en vue de confier à des particuliers, nommés ou désignés par le maire en qualité de collaborateurs occasionnels du service public, des missions de surveillance de la voie publique ou des bâtiments publics qui, dans les communes, relèvent de la police municipale et sont exercées [...] par le maire ou par des agents placés sous son autorité et sous le contrôle du représentant de l'Etat »*.

On cherche en vain dans les arguments de la ville devant le juge un élément plus solide. C'est sans doute le signe qu'il n'est pas évident à trouver, sauf à considérer que tout ce qui n'est pas explicitement interdit est permis. Une jurisprudence constitutionnelle (DC 2011-625 du 10 mars 2011), et administrative (CE, Ass., 17 juin 1932, *Ville de Castelnaudary)* constante montre à quel point le monopole de la puissance publique en matière de sécurité est préservé (16). A titre de comparaison, si la sécurité privée intervient aux côtés des forces de police, elle le fait dans un cadre contraint, ce qui l'empêche, en principe, de surveiller la voie publique. Comme le précise le tribunal administratif dans un considérant bien argumenté, ni le Code de la sécurité intérieure (CSI), ni le Code général des collectivités territoriales (CGCT) n'offrent un fondement juridique à la décision de la ville. Mais *quid* d'une initiative venant des citoyens eux-mêmes ? Conformément à l'article L 111-1 CSI, il revient à l'Etat « *le devoir d'assurer la sécurité en veillant, sur l'ensemble du territoire de la République, à la défense des institutions et des intérêts nationaux, au respect des lois, au maintien de la paix et de l'ordre publics, à la protection des personnes et des biens* ». Cela explique la participation systématique du préfet aux dispositifs de participation citoyenne, ce que confirme l'article L 122-1 selon lequel il « *anime et coordonne l'ensemble du dispositif de sécurité intérieure* ». Certes, le maire « *concourt à la politique de prévention de la délinquance* » (article L 2211-1 CGCT), mais uniquement dans le respect du droit de l'Etat et de la hiérarchie des normes. Le devoir de l'un et la participation de l'autre suffisent-ils à empêcher le bénévolat dans le respect des règles d'intervention ?

Au-delà de la polémique, la création de la « garde biterroise » ne doit pas masquer un débat de fond. L'insécurité réelle ou supposée combinée avec un discours étatique axé sur la participation favorisent des initiatives variées. A ce titre, ne serait-il pas judicieux de commencer par dissocier les bâtiments publics de la voie publique ? Dans les bâtiments placés sous la seule responsabilité de la commune, l'illégalité de la décision est-elle aussi évidente ? Comme une commune peut en confier la garde à une société privée de sécurité, pourquoi ne pourrait-elle pas y associer des citoyens bénévoles, liés à elle par convention ? En quoi une telle démarche

porterait-elle atteinte au rôle de l'Etat en matière de sécurité ? Sur ce terrain, c'est plus avec les syndicats locaux qu'il conviendrait de dialoguer qu'avec le préfet. La situation est différente sur la voie publique tant celle-ci est le terrain de prédilection des forces de police. Pourtant, des citoyens sont déjà sur la voie publique, souvent en coordination avec la police municipale dans le cadre la sécurité routière à la sortie des écoles. A la suite des attentats de 2015, des communes mobilisent des « citoyens vigilants » et bénévoles pour surveiller les abords des écoles. Rien que dans les Alpes-Maritimes, Saint-Laurent du Var, Cannes, Nice et Villeneuve-Loubet y recourent, sans susciter l'ire préfectorale. En s'inspirant éventuellement d'expériences étrangères et en se coordonnant aux représentants de l'Etat, des évolutions ne seraient-elles pas envisageables ? Il n'est pas inutile de rappeler que tout citoyen peut s'appuyer sur l'article 73 du code de procédure pénale pour intervenir en cas de flagrance de délit ou de crime et qu'il doit, en outre, porter assistance à une personne en danger. Tout un chacun est donc, à sa façon, un surveillant de la voie publique. Même les technologies de communication pourraient faire bouger les lignes. Les applications d'alerte en réseau de citoyens et/ou des forces de l'ordre se multiplient, tout en étant de plus en plus performantes. Elles incitent les citoyens à s'organiser et à se réapproprier la surveillance de la voie publique, sans volonté de concurrencer l'Etat, juste avec la préoccupation de retisser des liens de solidarité dans un contexte de « guerre » déclarée au terrorisme.

Il reste alors à déterminer comment structurer ces initiatives pour les rendre réellement utiles et juridiquement acceptables. L'appréciation des réussites et des échecs de la participation citoyenne ne peut pas uniquement passer par une approche chiffrée de la délinquance. Elle peut impacter les perceptions de la population par les forces de police et inversement. Le civisme aussi est une valeur républicaine qu'il convient d'encourager. La participation citoyenne n'est donc pas condamnable *a priori*. Tout dépend du cadre dans lequel elle s'exerce, et de la marge de manœuvre accordée aux participants. Cette marge de manœuvre contrainte pour la participation citoyenne est, à l'inverse, plus grande dans le cas de la médiation sociale, ce qui n'en est pas moins problématique.

B) Sécurité de proximité et médiation sociale.

Dans de nombreuses situations, les collectivités territoriales, les établissements publics de coopération intercommunale, les bailleurs sociaux et les transporteurs ont recours en France à des associations pour développer des dispositifs afin de désamorcer les conflits, apaiser les tensions et faire progresser le sentiment de sécurité (17). Tous sont rassurés par une méthode axée sur « l'idéalisation des rapports sociaux » (18). Cette médiation sociale, qui relève de la prévention sociale, est suffisamment consensuelle pour transcender les clivages politiques. Des médiateurs sont présents, par exemple, devant les établissements scolaires, dans les transports publics (19) et dans certains quartiers. Ces agents locaux de médiation sociale travaillent sous diverses appellations (correspondants de nuit, agents de médiation...), mais ils sont tous des acteurs de la régulation sociale (20). Mobilisés dans la lutte contre les incivilités, ces médiateurs agissent aussi sur la petite délinquance, en impliquant les intéressés dans le processus de résolution et de prévention. Ils bénéficient, en règle générale, d'une bonne connaissance du terrain sur lequel ils évoluent, et des populations rencontrées.

La médiation sociale est progressivement devenue un métier à part entière, avec ses règles et ses

structures. La volonté de rompre avec des pratiques peu rigoureuses, voire contreproductives est clairement affirmée. Le recrutement de personnes peu recommandables et mal formées avait dégradé l'image de cette forme de prévention. Après des années d'errements faute d'un cadre réglementaire (contrairement à la médiation pénale ou familiale), la tendance s'inverse. Au début des années 2000, le droit appréhende de manière plus précise la médiation sociale, d'un côté, sous l'angle de la sécurité, de l'autre, sous celui de la politique de la ville et de la politique sociale. La médiation sociale fait, dans un premier temps, l'objet de circulaires à la fin des années 1990 (28 octobre et 15 décembre 1997). Les mécanismes de médiation sociale sont abordés dans l'environnement des contrats locaux de sécurité (CLS), et des diagnostics qui les accompagnent. Alors que la loi du 18 mars 2001 pour la sécurité intérieure fait de la médiation sociale un axe de la politique de sécurité, celle du 1er août 2003 d'orientation et de programmation pour la ville et le renouvellement urbain l'appréhende sous un angle différent, mais complémentaire. Deux objectifs pour une même méthode. Au mieux, cela peut être perçu sous l'angle de la complémentarité ; au pire, sous celui d'une concurrence ou d'une indétermination. Le projet de loi « Egalité et citoyenneté » (déposé le 13 avril 2016) ne tranche pas réellement. Certes, la médiation sociale est indissociable, selon les promoteurs du texte, de l'égalité réelle. Toutefois, il est prévu de passer par la nouvelle réserve citoyenne de la police nationale (nouveaux articles L 411-18 à 22 CSI) pour la promouvoir.

Concomitamment ou presque, le droit de la fonction publique territoriale intègre la logique de la médiation sociale. Celle-ci a rejoint la filière « animation » avec le décret du 30 avril 2002. Pour favoriser l'accès à des emplois de catégorie C ou B, un troisième concours a été ouvert. Il est accessible aux personnes justifiant de l'exercice, pendant au moins quatre ans, d'une expérience professionnelle, en relation avec les missions du cadre d'emplois (décret du 3 mai 2002). L'intégration immédiate dans la fonction publique territoriale n'est pas la seule voie d'accès à la médiation sociale. En application d'une politique de discrimination positive, les médiateurs recrutés peuvent être des jeunes bénéficiant de contrats conclus dans le cadre des parcours d'accès aux fonctions publiques (PACTE, ordonnance du 2 août 2005). De la sorte, l'Etat emploie le relais des collectivités pour faciliter l'accès à des emplois stables, tout en renouvelant l'environnement social de la fonction publique territoriale. En 2011, la médiation sociale a fait l'objet d'une valorisation par le Comité Interministériel des Villes (CIV du 18 février 2011). Le décret du 11 octobre 2012 complète « le descriptif des missions des adjoints territoriaux d'animation et des animateurs territoriaux lorsqu'ils interviennent dans le domaine de la médiation sociale ». Entre aide au retour (ou à l'accès à l'emploi dans le travail social notamment) au bénéfice de jeunes en difficulté (71% ont un niveau inférieur au bac dans les transports publics terrestres) (21) et prévention des incivilités, la médiation sociale mobilise des moyens variés. Si le bénévolat n'est pas absent, les promoteurs recourent aux emplois aidés par l'Etat (à 47% dans les transports publics terrestres). Ces emplois, quel que soit leur nom, viennent relayer les subventions locales souvent attribuées à des associations relais. Il se crée ainsi un lien de dépendance financière entre la politique locale de sécurité et la politique publique nationale de l'emploi, une dépendance à l'Etat renforcée par l'octroi de sommes attribuées par le

fonds interministériel de prévention de la délinquance (FIPD).

Si le droit a pénétré la sphère de la médiation sociale, il reste, par principe, à l'écart de leurs actions. La médiation a justement pour particularité de ne pas mobiliser de prérogatives juridiques, car elle est déconnectée d'une logique répressive et, plus largement, policière. Elle repose, à l'inverse, sur la responsabilisation des intéressés. Cependant, les médiateurs sont normalement intégrés dans les dispositifs de partenariat de sécurité. Leur action est prévue par les stratégies territoriales de sécurité, tandis qu'ils participent aux conseils locaux et intercommunaux de sécurité et de prévention de la délinquance (CLSPD, CISPD).

Des questions sont parfois posées sur le profil des personnes recrutées et leur efficacité. Il est délicat de séparer les effets de la médiation de ceux produits par d'autres méthodes. Le cadre d'intervention des associations est alors comparé à celui des entreprises privées de sécurité. Les personnes recrutées ne font pas l'objet des contrôles administratifs de moralité et de compétence auxquels sont assujettis les agents privés. En outre, le recours à des associations ne conduit-il pas à une forme de concurrence déloyale ? A cet égard, la jurisprudence du Conseil d'Etat n'aide pas vraiment à clarifier la situation (22). Pourtant, des associations ont pris l'habitude d'intervenir en parallèle ou à la place d'entreprises privées de sécurité. Elles le font, généralement, sans se soumettre aux dispositions de ce code, au prétexte qu'elles feraient de la médiation et non de la sécurité. La question des activités exercées sans but lucratif est pourtant sujette à débats. Si l'article L. 611-1 fait uniquement référence à des « services », sans plus de précision, la suite du Livre VI concerne exclusivement des entreprises. Il existe donc un vide juridique qui exige d'être comblé. Il serait paradoxal, d'une part, que des bénévoles ne soient pas contrôlés, alors qu'ils accomplissent des missions identiques à des prestations marchandes ; d'autre part, de laisser perdurer une concurrence déloyale malgré l'avantage que cela peut représenter en particulier dans la vie de petites communes (vide-grenier, kermesse, etc.). Une clarification est encore plus justifiée par l'attribution de certains marchés à des associations de médiation assurant des missions souvent peu éloignées d'activités privées de sécurité.

En la matière, la jurisprudence aboutit à des résultats contestables. Ainsi, les prestations de médiation de nuit faisant l'objet d'un référé contractuel n'ont pas été, en l'espèce, assimilées à des activités privées de sécurité. Le juge relève que l'activité des médiateurs, consiste à assurer, sur l'ensemble du territoire de la commune, une présence destinée, globalement, à entretenir et à renforcer les relations avec et entre les habitants, à prévenir et apaiser les conflits pouvant s'élever entre eux et à signaler le cas échéant aux autorités compétentes, en particulier aux forces de police, seules chargées d'assurer l'ordre et la tranquillité publics, la survenue de troubles à l'ordre public. Bien que cela englobe l'identification de dysfonctionnements pouvant affecter les immeubles de certains bailleurs, le juge considère que les prestations de médiation de nuit ne visaient ni à assurer la surveillance ou le gardiennage de biens meubles ou immeubles précisément identifiés, ni à assurer la sécurité des personnes se trouvant dans de tels immeubles. Dès lors, en estimant que ces prestations relevaient des activités de surveillance ou gardiennage énoncées au 1° de l'article L. 611-1 CSI, le juge des référés a inexactement qualifié les faits. Par suite, il n'est pas fondé de soutenir que l'exécution des prestations objet du marché ne

pourrait être prise en charge, en application des articles L. 612-1 et L. 612-6 CSI, que par une personne physique ou morale immatriculée au registre du commerce et des sociétés et détentrice d'un agrément.

Cette appréciation est particulièrement surprenante, car si les médiateurs ne sont pas attachés à la surveillance d'immeubles, cela signifie *a contrario* qu'ils sont affectés à la surveillance de la voie publique, ce que le juge admet d'ailleurs en soulignant qu'ils peuvent alerter les forces de l'ordre. Or, la surveillance de la voie publique fait justement partie des opérations de police administrative qui ne peuvent pas être déléguées. Cette décision ne traduit-elle pas l'embarras du juge administratif ? En tenant la médiation à l'écart de contrôles, il ne prend pas le risque de déstabiliser les équilibres d'un système reposant sur la souplesse de recrutement. Qui aurait à gagner à introduire des contraintes et donc des coûts ? Il est plus facile de tirer la médiation du côté social que du côté de la sécurité. Les employeurs disposent alors de la marge de manœuvre souhaitée pour utiliser ce levier de paix sociale.

En conclusion, en dépit de réticences à l'égard des appareils policiers et de leur inefficacité ressentie dans la lutte contre la petite délinquance du quotidien, les Français préfèrent s'en remettre à ces derniers, au lieu d'entrevoir de possibles interventions des citoyens volontaires et bénévoles tendant à promouvoir, sous réserve d'un encadrement rigoureux exercé par les services de police, des réflexes de vigilance et de solidarité à l'image de ceux qu'il est possible de rencontrer, pour les plus démunis, dans les associations et mouvements humanitaires. Ces réserves concernent aussi la médiation sociale, en dépit, là aussi, d'un volontarisme social salutaire.

La sécurité de proximité n'en constitue pas moins en France un segment de la réponse à la délinquance prometteur, au même titre que le renforcement des mesures de protection, de nature à produire des résultats significatifs en matière de sécurisation, mais aussi et surtout de renforcement du lien social et des solidarités de proximité. Cette place accessoire, voire marginale reconnue, en somme, au citoyen dans les politiques de sécurité se manifeste également par la faible attention portée à la population dans l'analyse du phénomène délinquant, en particulier dans les diagnostics locaux de sécurité, avec la quasi absence de réunions publiques et le peu de succès rencontré par les enquêtes de victimation, dans un domaine largement dominé par les statistiques policières, en dépit de leurs limites et instrumentalisations. Avec la promotion de la proximité, il s'agit donc bien d'introduire plus de citoyenneté, et donc peut-être plus de démocratie, dans la sécurité.

Notes.

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Recensione

Recensione

di Pasquale Peluso[•]

Balloni A. Bisi R., Sette R., *Principi di Criminologia – Le Teorie*, Wolters Kluwer-Cedam, Padova, 2015, 360 pp., 27 €.

Balloni A. Bisi R., Sette R., *Principi di Criminologia Applicata – Criminalità, Controllo, Sicurezza*, Wolters Kluwer-Cedam, Padova, 2015, 475 pp., 33 €.

Edito per i tipi della Wolters Kluwer – Cedam, il manuale Principi di Criminologia di Balloni, Bisi e Sette si segnala per la vastità degli argomenti trattati e per l'originalità dell'approccio metodologico scelto. L'opera si compone di due tomi e si avvale anche di contributi di altri studiosi per la trattazione di alcune specifiche tematiche.

Nel primo volume del manuale "Principi di criminologia. Le teorie" vengono illustrate le principali teorie sulla genesi della devianza e della criminalità dei diversi approcci di cui si avvale la criminologia. L'analisi delle diverse teorie permette agli autori di evidenziare, di volta in volta, le peculiarità di ciascuna costruzione teorica e la diversa interpretazione che ognuna da del comportamento deviante, ma consente, anche, al lettore di cogliere le diverse disarmonie derivanti dai diversi approcci e dai differenti metodi di ricerca evidenziate dagli autori. Ben chiara appare la trattazione in relazione all'evoluzione fatta registrare dagli studi partendo dallo sviluppo delle teorie bio-antropologiche finendo all'esame dell'approccio comportamentale attraverso le teorie psicologiche e sociologiche.

Tuttavia, come messo in evidenza nel manuale, l'osservazione del criminale deve essere operata tenendo in considerazione che l'agire umano è influenzato da diversi aspetti. Diversamente, analisi condotte da angoli di visuale univoci possono fornire letture ed interpretazioni dei comportamenti degli individui parziali, insufficienti, unilaterali e, talvolta, perfino deterministiche. L'analisi e lo studio delle teorie, però, continuano a rappresentare un aspetto importante perché la criminologia, in quanto scienza applicata, deve basarsi sulle teorie per individuare, comprendere e risolvere i problemi che si verificano in un determinato contesto sociale. Ovviamente, le teorie saranno maggiormente valide ed efficaci quanto esse saranno in grado di formulare ipotesi a medio-lungo raggio e saranno in grado di tenere in considerazione sia i fattori disposizionali o di personalità sia quelli ambientali o culturali.

Per questo motivo gli autori ritengono necessario che la criminologia utilizzi un approccio più generale per lo studio e l'analisi del comportamento deviante e criminale che consideri quest'ultimo in stretta correlazione con l'ambiente ed con la persona. La criminologia non deve studiare il comportamento del criminale come se questi fosse un automa, ma come quello di un soggetto razionale, inserito all'interno di un determinato contesto sociale in un preciso momento storico ed

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influenzato dai diversi rapporti esistenti tra i vari elementi dell'ambiente individuale.

L'apporto innovativo dell'approccio scelto dagli autori sta proprio nell'attenzione posta, nell'analisi e nella comprensione del comportamento criminale, sul rapporto intercorrente tra le modalità con cui viene in essere un evento o quelle in cui evolve e la presenza di alcune condizioni nel contesto ambientale in cui esso si verifica. Per gli autori, invero, non possono essere ignorate le connessioni esistenti tra storia personale dell'autore di reato e condizioni sociali e personali in cui possono generarsi quelle tensioni criminali come effetto di particolari situzioni vissute. Pertanto, la criminologia deve considerare il comportamento umano non solo in relazione alla persona ed all'ambiente ma anche come elemento attivo nella loro determinazione. Per tale ragione, gli autori hanno fatto proprio l'approccio della psicologia topologica di K. Lewin per l'interpretazione della criminalità e della devianza poiché, come sosteneva lo psicologo tedesco, lo spazio di vita contiene tutti gli elementi ed i fattori idonei a determinare il comportamento di un soggetto; racchiude tutti quei fatti che devono essere conosciuti per valutare il comportamento di un individuo in un determinato contesto psicologico ed in uno specifico momento storico. Gli autori si riportano alla nota formula C = f (S) e cioè il comportamento (C) è una funzione (f) dello spazio di vita (S). Pertanto, la criminologia per poter verificare ed analizzare un comportamento deve conoscere a fondo lo spazio di vita nel quale si è verificato il comportamento poiché lo spazio di vita contiene tutti quei fattori ed eventi di particolare rilevanza per l'interpretazione del crimine. Il comportamento umano (C), e pertanto, anche quello criminale, deve essere posto in relazione (f) alle caratteristiche dell'individuo (P) ed a quelle dell'ambiente (A). Deriva da ciò la nota formula C = f (P, A) che gli autori propongono di utilizzare per l'interpretazione della criminalità.

Invero, il modello teorico lewiniano prendendo in cosiderazione fattori personali, sociologici e psicologici riesce a fornire possibilità di maggiore prevenzione e maggior controllo sociale soprattutto in relazione alle nuove forme di criminalità di cui si tratta nel secondo volume "Principi di criminologia applicata – Criminalità, Controllo e sicurezza".

In tale tomo sono esaminate diverse forme delittuose, convenzionali e meno convenzionali, alcune davvero recenti, come nel caso dell'adescamento dei minori normato in Italia sono nel 2012, attraverso la teoria del campo di Lewin. Sono proprio questi gli ambiti in cui si evidenzia l'innovativo approccio scelto dagli autori che permette di analizzare ed interpretare il comportamento criminoso in relazione a ciò che è presente ed è vissuto all'interno del campo in cui si verifica il crimine. Infatti, la teoria di K. Lewin mette in risalto la connessione indissolubile esistente tra un comportamento umano ed il contesto ambientale in cui avviene. Per questo motivo, le c.d. nuove delinquenze si prestano meglio a tale tipo di analisi, soprattutto nell'ottica di fornire maggiori possibilità di prevenzione, rispetto alle teorie tradizionali che nell'interpretazione di fenomeni come la criminalità organizzata, la criminalità informatica, il terrorismo e le altre nuove forme di violenza, non forniscono modelli utilizzabili per attuare strategie di controllo sociale.

Occorre sottolineare non solo l'innovatività di tale tipo di approccio scelto dagli autori, ma anche la validità dello stesso nel fornire chiare analisi per porre in essere progetti di riduzione dei processi di vittimizzazione, programmi di prevenzione di

specifiche forme di criminalità o strategie di controllo sociale.

In conclusione, appare particolarmente condivisibile l'approccio del manuale tenuto conto che un criminologo moderno non può, nello studio del crimine e della criminalità, non tenere presente che il comportamento criminale condivide con il comportamento normale le stesse basi ed origini e, pertanto, egli deve portarsi ad uno stadio costruttivo che gli consenta la formulazione di costruzioni teoriche valide sia per l'analisi che per l'interpretazione dei dati derivanti dall'osservazione.