

SANCTION POLICIES AND ALTERNATIVE MEASURES TO INCARCERATION: EUROPEAN EXPERIENCES WITH INTERMEDIATE AND ALTERNATIVE CRIMINAL PENALTIES

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I. INTRODUCTION

It was in particular in view of the abundant use of imprisonment that in Western Europe the question was put forward as early as the 1960s whether the range of criminal penalties should be widened to what today is commonly called intermediate, community or alternative criminal penalties and what conditions must be established to make these types of criminal penalties work. In the face of rising crime rates¹ and – as a consequence - increasing numbers of offenders adjudicated and sentenced, virtually all criminal justice systems since the 1970s have been preoccupied with the search for cost-benefit efficient, non-custodial responses to crime other than the summary fine and non-prosecution policies based on conditional or unconditional discharges. Prison sentences and imprisonment place a heavy financial burden on the state and do not seem to meet promises such as being an effective deterrent to crime or reducing recidivism. Crime and punishment policies relying on imprisonment come with enormous costs for state budgets and for civil society, which has to deal with problems resulting from the impact of imprisonment on families and those communities and neighbourhoods which have to reintegrate large numbers of (young and male) ex-convicts. Imprisonment is of course the least elastic penal sanction because - in particular European - human rights instruments have placed prisons under strict rules which prevent its easy adjustment to changes in the number of offenders convicted and sentenced.

The search for intermediate penalties back in the Europe of the 1960s was also fueled by arguments stressing counterproductive effects of imprisonment in the form of stigmatization, labelling and proliferation of crime through prisons considered to be “schools of crime”. The search for alternatives was then still motivated in part by a strong interest in developing rehabilitative measures more effective in reducing recidivism. A two-track penal policy emerged which aimed at concentrating “rehabilitative” prison sentences on heavy recidivists (in particular career or chronic offenders or high-risk offenders) while low-risk offenders should be eligible for non-custodial criminal sanctions and diverted from the prison system. Furthermore, sentencing theory as elaborated in the 1960s and 1970s strongly advocated the need for a wide range of penalty options thought to facilitate matching particular sentences to particular offenders. Putting the focus on individualization in sentencing partially reflected rehabilitation theory but was in particular called for by the pursuit of justice and the assumption that personal and individual guilt as expressed in criminal offending could be best accounted for by various sentencing options tailored to the individual case.

The 1970s and 1980s also saw new concern for the role of the community in the system of criminal sanctions and their implementation. Community participation has been welcomed not only for its potential in contributing to cost-effective reintegration and rehabilitation of offenders, but also because it expresses recognition of the community’s responsibility for effective (informal) crime control

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¹ See Haen Marshall, I.: Trends in Crime Rates, Certainty of Punishment and Severity of Punishment in the Netherlands. Criminal Justice Policy Review 2(1987), pp. 21-52.

II. PENAL POLICIES AND ALTERNATIVES TO IMPRISONMENT IN EUROPE

A. The Proliferation of Alternative Penal Sanctions

From the 1970s on, a wide range of intermediate penalties have been introduced and put into practice in Europe. This policy of proliferating alternatives to incarceration has been endorsed and backed up, particularly by the Council of Europe² Several recommendations and resolutions issued by the Council of Europe over the last 50 years encourage the use of alternatives to imprisonment and provide for a supra-national normative framework. As early as 1965 the Council of Europe published a resolution on suspended sentences, probation and other alternatives to imprisonment (65, 1), followed by a resolution in 1976 on certain alternative penal measures to imprisonment (76, 10). In 1992, the Council issued recommendations (Rec. R (92) 16) on the European rules on community sanctions and measures, which for the first time provided for a complete set of rules on the application and implementation of community sanctions. Special recommendations deal then with conditional release (Rec. R (2003) 22 concerning conditional release). In 2000 a follow-up to the 1992 community sanctions recommendations focused on improving the implementation of the European rules on community sanctions and measures (Rec. R (2000) 22). In 1999 the Council of Europe in a Recommendation concerning prison overcrowding and prison population inflation (Rec. R (99) 22) reiterates its view that prison sentences should be a last resort and that community sanctions should be the punishment of choice, except in the case that the seriousness of the crime prohibits any penalty other than a prison sentence.

The position of the Council of Europe as regards alternatives to imprisonment can be summarized in the following points:

- Imprisonment should be the last resort in penal policies;
- Community sanctions must comply with human rights (and not infringe on human dignity);
- Community sanctions should aim at rehabilitation and integration of the offender and cater also to the needs of the victim of a crime;
- A well-functioning infrastructure is needed for proper implementation of alternatives to imprisonment.

Concern for alternatives to imprisonment and intermediate penalties back in the 1960s and 1970s in Europe was fuelled by an unprecedented rise in crime which certainly was a consequence of a process of modernization affecting social structure, mechanisms of social integration and social control. In particular, the rise in property crimes placed a heavy burden on criminal justice systems. New forms of crime emerging with technological, economic and social advances, for example motor vehicle traffic offences, added to the sharp increase in cases which had to be processed through the criminal justice system. The rise in bulk property crime and motor vehicle offences brought also a sharp increase in the share of the population which came to the attention of the criminal justice systems and ultimately was convicted and sentenced. A debate on over-criminalization and over-penalization ensued which pointed especially at the risk to the basic (preventive) function of criminal law resulting from imposing too much punishment.³ The observation that most offenders will not relapse into crime and that in fact most first-time offenders remained one-time offenders encouraged the pursuit of a two-track penal policy, as did the knowledge on chronic offenders building up since the 1970s as a result of cohort and life course research.⁴

Data from the Freiburg Birth Cohort Study confirm that chronic offending and criminal careers are confined to a small group of offenders (see Table 1) and that most offenders coming to the attention of police are one-time or occasional offenders.

² For a review see Dindo, S.: *Les Alternatives à la Détention*. Commission Nationale Consultative des Droits de l'homme, Paris 2006, pp. 7.

³ Popitz, H.: *Die Präventivwirkung des Nichtwissens*. Tübingen 1968.

⁴ Wolfgang, M., Figlio, R.M., Sellin, T.: *Delinquency in a Birth Cohort*. Chicago, London 1972.

Table 1: Criminal Suspects in the 1970 Birth Cohort of German males at the age of 30 (Baden-Wuerttemberg, N = 104.000)

N Arrests	All criminal offences (traffic offences excluded)	N Suspects
1	31	31.834
2	15	15.702
2	10	10.428
3	7	7.730
4	6	6.157
5	5	5.062
6	4	4.310
7	4	3.700
8	3	3.238
9	3	2.859
10-19	1	1.096
20-49	0,1	147
> 49	0,01	

Source: Freiburg Birth Cohort Study

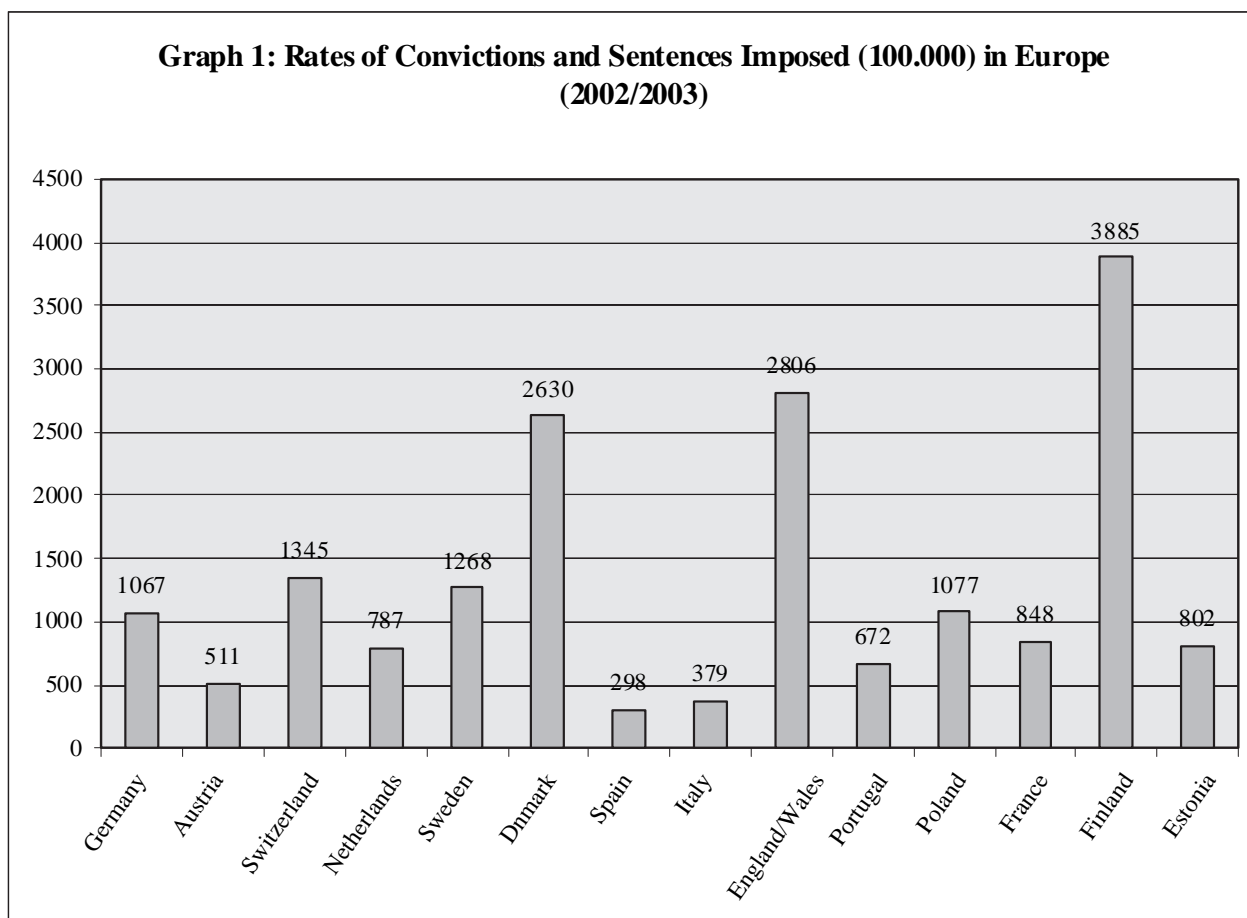
Imprisonment was therefore considered an option for offenders at risk of relapse into serious crime and in need of (long-term) therapeutic intervention; for low-risk (first-time) offenders, community sanctions or non-prosecution policies should apply. In Austria and Germany the debate on alternatives to imprisonment was particularly focused on short-term imprisonment. This followed from a discourse on negative effects of short term prison sentences which commenced with Franz v. Liszt (representing the modern school of criminal law) at the end of 19th century. Franz v. Liszt voiced mistrust against prisons and short term imprisonment. At the occasion of short term prison sentences, he argued, treatment programmes cannot be implemented, so the negative impact of prisons would prevail. In 1969, when the “Comprehensive Criminal Law Reform” in Germany was implemented, the legislature introduced also a quasi-prohibition of short-term prison sentences (up to six months). Instead of short-term prison sentences, (day) fines have to be imposed.⁵ While Germany and – to a certain extent also Austria – pursued a policy of “day fines instead of short prison sentences”, other European countries, while implementing alternatives to imprisonment too, continued to use short-term imprisonment. The issue of short-term prison sentences demonstrates that a uniform penal policy did not develop in Europe nor developed a consent as to what type of alternatives should be favoured. Penal policies are characterized rather by national particulars as well as specific (historical) trends in systems of criminal sanctions and sentencing practices.

Alternatives to imprisonment in Europe can be roughly collapsed into the following groups:

- Alternatives to pre-trial detention:
 - Bail
 - Electronic tagging and tracking
- Intermediate (or alternative) sanctions (in their own right) which are aimed at replacing prison sentences fully:
 - (Day) fines
 - Fully or partially suspended prison sentences (with conditions attached)
 - Community service
 - Compensation/restitution
 - House arrest and electronic monitoring
 - Treatment orders (drugs, alcohol)
 - Interdiction/exclusion orders (driving ban, exclusion zone)
 - Combinations of alternative sanctions
- Alternatives which aim at:
 - reducing the duration of a prison sentence (parole)
 - reducing the intensity of imprisonment (work furloughs, open prisons etc.).

⁵ See Albrecht, H.-J.: Strafzumessung und Vollstreckung bei Geldstrafen. Berlin 1980.

A comparative approach to the analysis of criminal sanctions in Europe has to take into account that conviction rates differ significantly among European countries. This is due to differences in the definition of a criminal offence as well as differences in the scope of non-prosecution policies.



Source: Aebi, M.F. et al: European Sourcebook of Crime and Criminal Justice Statistics 2006. 3rd Ed., Strasbourg 2007, p. 99.

In some systems a qualitative distinction is made between a criminal offence and administrative wrongs (or misdemeanors) while others (for example Denmark or Finland) classify a wide range of non-serious offences as criminal (reducing, however, the penalties to be applied to low ranked criminal offences to fines).

B. Alternatives and Criminal Procedure

The concept of intermediate, community or alternative sanctions must be understood also from the perspective of changes in criminal procedure and a trend towards a simplified, summary and partially also consensual way of determining and imposing criminal penalties.

All systems obviously try to develop procedural mechanisms which enable criminal justice systems to cope with growing caseloads and more complex criminal cases (in particular economic crimes) and to improve performance of the system as regards goal attainments. However, while in the 1960s and 1970s goals pursued by way of settlement out-of-court procedures certainly were focused on reducing stigma and relapse in crime, the last decade has seen the dominance of cost arguments and the economic rationale. But, the last two decades have seen the victim of the crime become again a central figure in the criminal process. Mediation and compensation have attracted considerable attention also with a view to justifying conditional dismissals, making mediation and compensation an important argument in policy debates on settlements out-of-court. However, empirical evidence so far suggests that mediation and compensation in most systems do not play a major role compared to transaction fines which evidently are better suited for routine application and efficient administration.

- A common trend - although not affecting all systems - obviously concerns the leading role of public prosecution services in settlements out-of-court. It seems obvious that European legislators - France and Austria are the most recent examples to demonstrate this trend - are increasingly entrusting more powers to public prosecution services in dismissing cases conditionally. Public prosecution services have slipped into the role of decision-makers and of policy makers; they have become “judges before the courts”. They decide on individual cases; however, by applying new powers, such as transaction fines, public prosecutors create and implement criminal policies as regards the general approaches adopted towards certain types of crimes. There is evidence also that this trend is continuing: on the one hand extending such powers on the side of prosecutors and on the other hand entrusting the power of case dismissal increasingly to police. At least in the Danish and Dutch criminal justice systems, such trends become visible while cautioning powers have always been part of police powers in England/Wales.
- A second common trend seems to be the emergence of sentence bargaining elements, be it on a statutory basis like in common law systems; in systems such as Spain, Italy or Poland; or as informal mechanisms, as for example developed by German courts. With that it becomes also evident that common law systems and continental systems, expediency based prosecution systems and legality driven systems converge substantially.
- A third common trend is visible with simplified procedures - penal orders - which consist of an administrative type of arrangement with a focus on petty crimes and mass crimes. Here, too, the public prosecutor in most systems has a significant position as it is the public prosecutors’ office which initiates such proceedings, although, formally, it is the judge who is responsible for issuing the penal order. With simplified proceedings, the case in most instances is settled out-of-court as a trial is not requested and - according to empirical evidence - penal orders are rarely refused by defendants. As penal orders in most systems are restricted to non-custodial sanctions, simplified procedures may be considered to include some sort of implicit understanding that in exchange for accepting such economic processing a sentencing discount on a large scale is granted.

Out-of-court settlements, be it through unconditional and conditional dismissals by the public prosecutor, or through court-based bargaining and settlement procedures cutting off a full trial are first of all aimed at petty offences and moderately serious crime. However, it seems clear that there is a certain trend to move with conditional dismissals deeper into serious crime while court-based settlement arrangements from the very beginning have been developed and implemented to respond also to cases of serious crime, in particular complex cases of economic crimes.

Most important elements in out-of-court settlements certainly concern consent and/or confession. There are numerous variations as regards this element; however, there seems to be convergence towards consent as the major requirement for launching “out-of-court proceedings”.

As regards evidence, available respective sufficient evidence or requirements in terms of factual circumstances making a case suitable and eligible for out-of-court procedures there exists a certain “double bind”, as out-of-court settlements certainly have been introduced in various systems with a view to disposing complex cases of economic crimes. In general, if economic reasons in terms of saving resources and time are actually the most important push factors then it seems evident that certain groups of criminal cases eligible for transaction fines and the like should exhibit serious problems of evidence as only such cases may be considered to produce savings on the side of the criminal justice system (which then justifies sentencing discounts). However, it is evident that at least as regards mass and petty offences the bulk of cases will actually have properties such as clear and simple factual circumstances which do not call for a full trial.

Finally, there remain many open questions as regards a most important issue: the sentencing discount and the size of discounts that can be offered in exchange for consenting with out-of-court proceedings. There are certainly important links to sentencing theory in this field. Statutory guidelines most often either reduce possible penalties to non-custodial penalties (as is the case in penal order procedures as well as in conditional dismissals) or cut down the range of penalties by one third or two thirds (an option which quite often is used in statutory guidelines on mitigation in sentencing).

Summarizing concerns and conflicts around the emergence of out of court settlements, we may note the following:

Concerns for equal treatment have been raised with entrusting public prosecutors the power to create and to implement non-prosecution policies. In the Dutch system, general prosecution and sentencing guidelines for public prosecutors have recently come into force. These guidelines very precisely define those cases which must be prosecuted or dismissed and provide for a detailed tariff as regards the size of transaction fines. It seems plausible that such guidelines should be implemented wherever prosecution services adopt the functions of a sentencing judge.

The problem of division of powers has been addressed throughout Europe in the face of growing powers of public prosecutors in dismissing criminal cases conditionally and unconditionally. On the one hand, the trends towards non-prosecution policies certainly undermine the role of the parliament and the function of the rule of law; on the other hand, the judicial system is in danger of becoming marginalized. The proper response to these problems seems to be located in serious efforts to link the kind of crime policy problems addressed by way of non-prosecution policies with statutory decriminalization on the one hand as well as serious efforts to parcel out petty crimes by way of substantive criminal law. The latter would also re-instate the courts into a position of efficient control. The Austrian Criminal Code (§42) could serve as a promising model.

With extending police and prosecutors powers in settling cases a sort of executive law is spreading rapidly, characterized by informality and discretion. This is opposed to conventional principles of law as the legislator provides only a shell which is filled with substance by the executive branch.

Control of discretion and the risk of abuse of power have been prominent arguments on the agenda, too. Control of discretion and proper responses to the risk of abuse are linked to the victims' position in the procedure on the one hand, and to the question of transparency of out-of-court settlements on the other hand. In particular, the victims' position is of paramount importance, not only for the purpose of control, but also for pursuing victim policies independent of whether the case is settled out-of-court or within the framework of trial procedures. The French model in this respect offers a feasible solution as crime victims have to be informed on how the case is processed and may be heard by the public prosecutor or the court. As regards possibilities for appeal on the side of the crime victim, there are certainly arguments arising out of the goal of simplifying and cost-saving which speak against formal appeal powers for the victim.

Finally, the principle of presumption of innocence certainly suffers from out-of-court arrangements. The main argument which is used in favour of accepting out-of-court settlements and in view of presumption of innocence concerns "consent". However, out of court settlements then should be safeguarded by rules which can be delineated from the concept of "informed consent" and monitored either through a defence counsel or through the possibility of appeal mechanisms which allow for re-instating procedures in case "informed consent" principles have not been complied with.

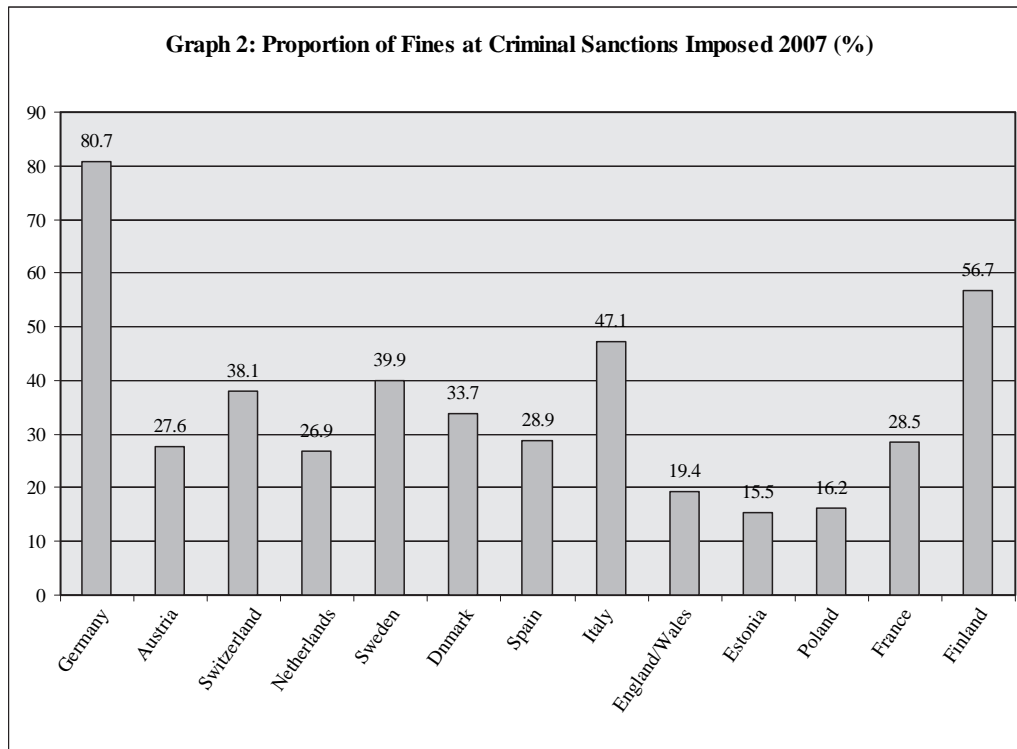
III. ALTERNATIVE AND INTERMEDIATE SANCTIONS: LOOKING BACK

A. Day Fines and Summary Fines

There is clear evidence that day fines succeeded in Austria, Germany and some Scandinavian countries as well as in Switzerland, and partially also in France and Spain, in particular in replacing to a quite considerable, though sharply differing, extent short-term imprisonment in the 1960s and 1970s (see graph 2).

As is the case with some other innovations in criminal law and criminal justice, the conceptualization and implementation of day fines initiated in Scandinavia. Finland is noted as the first country to introduce a day fine system, beginning in 1921.⁶ Although there had been a long-standing scholarly debate prior to 1921 on the advantages of day fines and the potential in terms of proportional and equal punishment, the primary reason for the introduction in Finland early in the century lay in the rapidly declining value of money. Day fines, compared to summary fines, are easily adjusted to changes in the economy brought about by inflation

⁶ See the comprehensive historical analysis in Jescheck, H.-H., Grebing, G. (Eds.): *Die Geldstrafe im deutschen und ausländischen Recht*. Nomos, Baden-Baden 1978.



or recession. Nevertheless, with the exception of some South American countries, Finland, Sweden and Denmark were the only countries to introduce a day fine system in the first half of this century. This was the case despite the fact that Italy, Germany, the Netherlands, Austria, and Switzerland made substantial revisions in their penal codes during the 1920s and 1930s. At the same time, it should be noted that the concept of the day fine generated substantial controversial discussion in all three Scandinavian countries and was far from unanimously accepted.⁷ The Federal Republic of Germany and Austria introduced day fine systems in 1975,⁸ followed by Hungary in 1978,⁹ then by France and Portugal in 1983.¹⁰ Some 20 years ago a system of unit fines was introduced after a series of experiments¹¹ in England/Wales through the Criminal Justice Act 1991 which went into force at the end of 1992.¹² But, introduction of day fines was ultimately not successful in England/Wales. Some six months after the new day fine provisions went into force the Home Office announced suspension of those provisions as the judiciary were obviously extremely opposed to the idea of fining offenders according to day fine standards. The French Criminal Code in force since 1 March 1994 has expanded the scope of day fines, which had been rather narrow since the criminal law amendment of 1983.¹³ Poland and Spain have recently introduced systems of day fines, as did Switzerland. Belgium has retained the concept of summary fines. The trend toward an extended use of day fines is not unequivocal. Other European countries, including the Netherlands, Norway, Italy, and Iceland have not incorporated day

⁷ For a review of the use of fines in Europe see also Casale, S.S.C.: *Fines in Europe: A Study of the Use of Fines in Selected European Countries with Empirical Research on the Problems of Fine Enforcement*. Vera Institute of Justice, London 1981; a general overview of sanction-systems is provided by van Kalmthout, A., Tak, P.: *Sanctions-Systems in the Member-States of the Council of Europe*. Kluwer, Deventer/Boston, Part I 1988; Part II 1992.

⁸ See Grebing, G.: *The Fine in Comparative Law: A Survey of 21 countries*. Institute of Criminology Occasional Papers No. 9, Cambridge 1982.

⁹ Nagy, F.: *Arten und Reform punitiver und nicht-punitiver Sanktionen in Ungarn*. In: Eser, A., Kaiser, G., Weigend, E.(Eds.): *Von totalitärem zu rechtsstaatlichem Strafrecht*. Max-Planck-Institut, Freiburg 1993, pp.313-339, p.324 (with a number of day fine units ranging from 10 and 180; the new criminal code has increased the maximum number of day fines to 360).

¹⁰ Spaniol, M.: *Landesbericht Frankreich*. In: Eser, A., Huber, B. (Eds.): *Strafrechtsentwicklung in Europa. Landesberichte 1982/1984 über Gesetzgebung, Rechtsprechung und Literatur*. Max-Planck-Institut, Freiburg 1985, pp. 251-318, p.262; Hünerfeld, P.: *Neues Strafrecht in Portugal*. *Juristenzeitung* 1983, pp. 673-675.

¹¹ See Gibson, B.: *Unit Fines*. Waterside Press, Winchester 1990.

¹² Wasik, M., Taylor, R.D.: *Criminal Justice Act 1991*. Cambridge 1991.

¹³ *Ministere de la Justice: Circulaire Generale Presentant les Dispositions du Nouveau Code Penal*. *Journal Officiel de la Republique Francaise*, Paris 1993, p.44.

finer into the criminal justice system and do not consider abolishing the system of summary fines. But at the same time, fines *per se* continue to play a major role in the sentencing practices of these countries.

However, an explicit penal policy aiming at the replacement of short-term prison sentences through day fines has only been implemented in Germany and Austria. In other European countries, short-term prison sentences continue to play a salient role in penal practice. But, fine default imprisonment results in Germany in a significant number of prisoners serving short-term prison sentences (see table 2).

Table 2: Prisoners broken down by sentence length 2006

Country	< 6 months	6-12 months	1 – 3 years	3 – 5 years	> 5 years	Life
Denmark	25	16	17	21	20	1
Sweden	11	12	34	17	24	3
France	17	16	21	11	34	1
England/Wales	8	6	22	22	31	11
Germany	22 *	20	19	26	10	3
Italy	1	2	8	14	66	8
Poland	6	17	44	14	15	1

* Includes fine default imprisonment

Source: Aebi, M.F., Delgrande, N.: Council of Europe Annual Penal Statistics. SPACE I, Survey 2006.

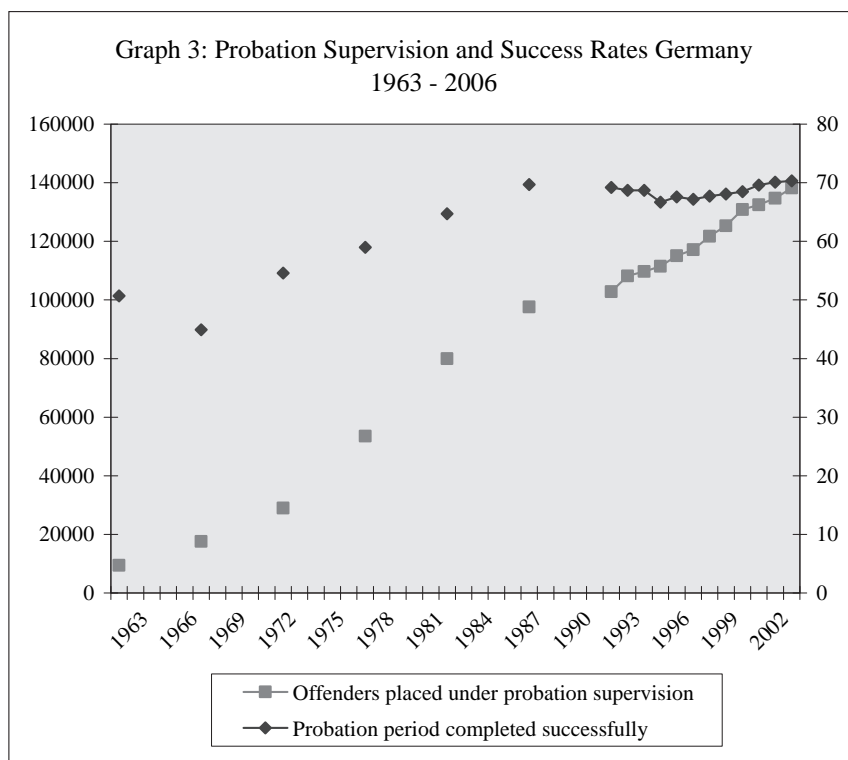
Strasbourg, 12 November 2007, p. 50.

B. Suspended Prison Sentences, Probation and Community Service

A second pillar in the system of intermediate sanctions developed and implemented in the 1970s, besides day fines and financial penalties, concerns suspended prison sentences and probation. Suspended prison sentences and probation turned out to be quite successful as alternatives to immediate imprisonment. As the concept of day fines is strongly dependent on settled offenders' probation, suspension of prison sentences has had an important share at replacing imprisonment for offenders not eligible for day fines on economic grounds. Probation and suspended prison sentences are rooted in the rehabilitative idea and emphasize placement of offenders under the supervision of probation workers. Both probation and suspended prison sentences come with conditions and orders attached which seek to tailor the sentence to the specific needs and risks displayed by the offender. Such conditions and orders, which may include a fine, community service, electronic tagging, exclusion orders, compensation, treatment orders or victim-offender-mediation, make probation and suspended sentences a flexible tool which may be used to implement various criminal policies. In fact, while during the 1970s suspended prison sentences had been primarily considered to further rehabilitation, the 1980s and 1990s then saw a certain emphasis on punitive and risk controlling conditions attached to probation orders and suspended prison sentences.

In Germany, in particular during the 1970s and 1980s, suspension of prison sentences and placement of offenders under probation supervision were expanded significantly (see graph 3: from some 20,000 cases end of the 1960s to ca. 140,000 cases in 2006). Despite the considerable increase in prison sentences suspended (due also to an increasing willingness of the courts to grant suspension in face of medium and high-risk offenders) the success rates (in terms of completion without revocation of probation) increased, too.

Furthermore, community service received considerable attention in the 1980s in most European countries. Some countries report a strong increase in the use of community service orders. What makes community service so attractive to be incorporated into systems of criminal sanctions is (comparable to day fines) the easy transformation into time spent in serving punishment, and with that, the easy comparability with imprisonment. Insofar, community service is built easily into sentencing schemes which take as a point of departure time which has to be served. Community service has been introduced in various European countries, among them the Netherlands, England and Wales, Norway and France. In others, like for example Germany, community service may not be imposed as a sole criminal penalty in adult criminal law but is available as a condition for a suspended prison sentence or as a substitute for fine default imprisonment.



The limits to community service are found in international conventions and national constitutions on forced labour outside the prison context (see for example the International Covenant on Civil and Political Rights 1966, Art. 8). Here the consent of the offender is seen as a way of avoiding the infringement of prohibition of forced labour. Whether this is an adequate solution to the problem has been doubted, but in principle community service is accepted virtually everywhere when consented to by the offender. Currently, the sanction systems in European countries providing for community service as sole sanction set minimum and maximum numbers of hours to be imposed by the court, with a maximum number of between 240 and 360 hours evidently the standard in European legislation.

C. Compensation, Restitution, Mediation, and Restorative Justice

Throughout the 1980s the topics of reparation, restitution, compensation, victim-offender-mediation or reconciliation have received considerable attention in most Western European countries and to a considerable extent also in countries of central and Eastern Europe. International standards have emerged with respect to the role and position of the crime victim in the criminal justice system.

The United Nations started to address the needs of crime victims in the first half of the 1980s. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by General Assembly resolution 40/34 of 29 November 1985. Here, for the first time, the particular relevance of crime victims and the need to create legislation that facilitates access to justice not only for crime victims but also for those who have been victimized by the abuse of power were recognized on the international level. In 1999 a “Guide for Policy Makers and the Handbook on Justice for Victims” was approved. The Statute of Rome in 1999, establishing the International Criminal Court (and the Rules of Procedure and Evidence), deals with victims of crime, as does the Palermo Convention on Transnational Organized Crime in 2000 and its optional protocol in 2002 on trafficking, which includes specific sections for victims. ECOSOC adopted in 2002 Guidelines on Restorative Justice, in 2002 crime prevention guidelines and in 2005 the Guidelines for Child Victims and Witnesses. The General Assembly issued in 2005 the Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The United Nations Draft Convention on Justice and Support for Victims of Crime and Abuse of Power (14 November 2006) summarizes victim-related criminal justice standards with demands for:

- (i) Procedural safeguards as regards confidentiality of proceedings and respect for the privacy of the victim;
- (ii) The right to information on the course of criminal or administrative proceedings as well as the rights of victims;
- (iii) Comprehensive rights to compensation;
- (iv) (Short, medium and long term) assistance in coping with the adverse effects of victimization; and
- (v) Effective protection of victims from the risk of retaliation.

The Council of Europe's recommendations on the position of the victim within the framework of criminal law and criminal procedure and on the assistance to victims and the prevention of victimization refer also to the new concern for the crime victim and frame victim policies designed also to recognize the crime victim in the system of criminal sanctions. Among the policies derived from the victim's perspective it is restitution (or compensation) and victim-offender-conciliation which in one way or another have been incorporated into penalty systems. However, restitution or compensation orders are mostly attached to probation or suspended prison sentences or serve as conditions to be fulfilled in exchange for non-prosecution.

It is interesting to see why restitution suddenly received so much attention in the 1980s and how these grounds may fit into penal policies developed since then. Different answers can be found here. It's first of all the perspective of the victim which has to be taken into consideration. It has been claimed that victims of crime are marginalized in the criminal process, which emphasizes solely the offender. Indeed, concentrating the criminal procedure and criminal penalties on the offender matched with legal theory as prevention, either pursued through individual or general deterrence or through rehabilitation or incapacitation represented the main goal of criminal law and its implementation. When rehabilitative efforts as well as deterrence failed to demonstrate at least significant effects, the vacuum left behind could be easily filled with a new rationale for responding to the offender: restitution and compensation for the victim. An answer is provided also by cost-benefit-considerations arguing that the burden for the criminal justice system, especially for the correctional system, can be reduced by introducing pre-trial restitution as an alternative to regular criminal proceedings and criminal penalties. In particular, from the victims' policy perspective, compensation and restitution are open to various crime policies. These devices can be used to make the system more punitive and to demonstrate the offenders' accountability. It seems that recently the punitive aspects of compensation and restitution are receiving more recognition. From a practical point of view however, it must be noted that compensation and restitution as a main response or a sole penalty range far behind imprisonment, probation and day-fines.

D. Electronic Tagging and Tracking

The developments so far visible in Europe point to acceptance and integration of electronic monitoring (and house arrest) into the systems of criminal sanctions.¹⁴ When at the beginning of the 1990s electronic monitoring entered the European crime policy arena, England/Wales,¹⁵ Sweden¹⁶ and the Netherlands¹⁷ were the first countries to introduce electronic monitoring as a main penalty, as a post-sentencing and early release from prison device and/or as an alternative to pretrial detention. Portugal, Italy, France, Belgium, and Scotland introduced electronic monitoring around 2000.¹⁸ Austria, Denmark and some of the Eastern European countries recently passed legislation on electronic monitoring.¹⁹ Switzerland is still operating

¹⁴ Bishop, N.: Le controle intensif par surveillance electronique: un substitut suedois a l' emprisonnement. Bulletin d' information penologique 19/20(1995), pp. 8-9 1996, arguing that eg. the Swedish system of electronic tagging complies fully with rules 31 and 55 of the European Rules on Community Sanctions and Measures; see also Bishop, N., Schneider, U.: Improving the Implementation of the European Rules on Community Sanctions and Measures: Introduction to a New Council of Europe Recommendation. European Journal of Crime, Criminal Law and Criminal Justice 9(2001), pp. 180-192, p. 184.

¹⁵ Mortimer, E., May, Ch.: Electronic monitoring in practice: the second year of the trials of curfew orders. London: Home Office 1997.

¹⁶ Bishop, N.: Le controle intensif par surveillance electronique: un substitut suedois a l' emprisonnement. Bulletin d' information penologique 19/20(1995), pp. 8-9.

¹⁷ Ministry of Justice: Electronic Monitoring. The Hague 1996.

¹⁸ For a summary see Haferkamp, R.: Elektronisch überwachter Hausarrest - Europa und die Schweiz. Neue Kriminalpolitik 1999, pp. 4-6; Mayer, M., Haferkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003.

¹⁹ Mayer, M., Haferkamp, R., Levy, R. (Eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003.

local experiments with electronic tagging, as is Spain.²⁰ In Germany the state of Hesse introduced electronic monitoring in 2000 on an experimental basis²¹ and has expanded its outreach to the whole state.²² Other German states currently draft laws on electronic monitoring. The German Federal Government had established a Reform Commission on Criminal Sanctions whose proposals for reforming the system of sanctions did not include electronic monitoring but were restricted to modest developments within the current system, based on the day fine, as well as immediate and suspended prison sentences.²³ In the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union of April 2004,²⁴ electronic tagging was covered and evidently has been understood as a criminal sanction that is part of European standards. Also, in a Report submitted to the Committee on Legal Affairs and Human Rights of the Council of Europe on the Situation of European Prisons and Pre-Trial Detention Centres published in 2004,²⁵ electronic monitoring is presented together with community service, suspended sentences and the like, as a promising alternative to imprisonment and as a strategy to reduce costs linked to deteriorating prison conditions and the heavy burden of overcrowded prisons in Europe.

Electronic monitoring can be found in Europe in pretrial criminal proceedings,²⁶ either as an alternative to regular bail or as an instrument which is launched with the aim of reducing the risk of absconding and thus allowing for suspending an arrest warrant that would have placed a suspect in pretrial detention.²⁷

Then, electronic monitoring was introduced as a main or sole sanction in some systems, normally labelled "front door electronic monitoring". This has been the case for example in England and Wales and in the Netherlands.

Some systems add electronically monitored house arrest to conditions attached to suspended prison sentences or as an element in the imposition of community sanctions tailored to the needs of an offender.

Post-sentencing replacement of prison sentences by electronic monitoring has been chosen by Sweden, while in other systems, electronic monitoring has found its place as a modification of imprisonment (and thus has contributed to further diversifying prison regimes).

Finally, electronic monitoring may be inserted into correctional programmes by adding it as a condition of earlier than regular release, in terms of a condition attached to parole. In this perspective, electronic monitoring is introduced also to ease the transition from prison to liberty.

Therefore, electronic monitoring may be used as a sole sanction which is then related to house arrest and the concept of confinement and/or supervision and monitoring of physical freedom within a concept of restrictions put on liberty.

²⁰ Ceron I Riera, M.: The Pilot Project on Electronic Monitoring in Catalonia, Spain. In: Mayer, M., Haverkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003, pp. 149-154.

²¹ Albrecht, H.-J., Arnold, H., Schädler, W.: Der hessische Modellversuch zur Anwendung der „elektronischen Fussfessel“. Zeitschrift für Rechtspolitik 33(2000), pp. 466-469.

²² Schädler, W.: The Pilot Project on Electronic Monitoring in Frankfurt, Germany. In: Mayer, M., Haverkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003, pp. 163-168; Mayer, M.: Modellprojekt Elektronische Fußfessel. Wissenschaftliche Befunde zur Modellphase des hessischen Projekts. Freiburg 2004, p. 17.

²³ See Abschlußbericht der Kommission zur Reform des strafrechtlichen Sanktionensystems. Bonn 2000, pp. 165-181 displaying a rather poor assessment of electronic monitoring and evidently completely misled view on electronic monitoring in Europe and elsewhere; Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Reform des Sanktionenrechts. Deutscher Bundestag Drucksache 15/2725, 17. 03. 2004.

²⁴ Commission of the European Communities: Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union. Brussels, 30.04.2004, COM(2004)334 final, p. 74.

²⁵ Report, Committee on Legal Affairs and Human Rights of the Council of Europe on the Situation of European prisons and pre-trial detention centres. Doc. 10097, 19 February 2004.

²⁶ In Portugal electronic monitoring is restricted to the function to serve as an alternative to pretrial detention, see Nunes, J.R.: The Portuguese Pilot Project on Electronic Monitoring. In: Mayer, M., Haferkamp, R., Levy, R. (Eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003, pp. 155-158.

²⁷ See Albrecht, H.-J.: The Place of Electronic Monitoring in the Development of Criminal Punishment and Systems of sanction. In: Mayer, M., Haferkamp, R., Levy, R. (Eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003, pp. 249-264.

Electronic monitoring may be used as an element of community sanctions in terms of an add-on, if community sanctions are constructed along the goal of individualization of punishment. In England and Wales, for example, various community sanctions are put at the disposition of criminal courts and can be combined and adjusted to the needs of the offender, the victim and society. Electronic monitoring then is part of a programme of sentencing which enhances the capacity of community sanctions to deliver credible and efficient punishment.

Some countries, for example the Netherlands, have opted for introducing both “front and back door” models of electronic monitoring.²⁸ Electronically monitored house arrest in the Netherlands may be imposed as a sole sanction instead of a prison sentence of not more than six months. Electronic monitoring may be combined also with a suspended prison sentence as well as with community service.²⁹ Then, a modification of serving a prison sentence was introduced, entitling a prisoner, after having served half of the prison sentence (but at least a minimum of one year), to apply to serve the remainder in the form of electronically monitored house arrest. Here, electronic monitoring is part of a correctional programme which lies at the discretion of prison administration and can range between six weeks and one year. Electronic monitoring thus adopts the function of low security detention facilities and of a precursor to full parole. The programme provides for participation of the prisoner in measures of rehabilitation for a minimum of 26 hours a week.³⁰ Voluntary participation is required, as is consent of adult members of the household where house arrest is to be served. Sweden has opted for a back-end model of electronic monitoring, which covers prison sentences of up to three months.³¹ Here too, consent of the convicted person as well as of the adult members of the household is a condition for electronically monitored house arrest. The experiment currently implemented in parts of Switzerland is based on the Swedish model.³² The prison administration is the competent body to decide on whether and how electronically monitored house arrest is to be served instead of a prison sentence. However, different models have been implemented during the experiments in the participating Cantons. While in some Cantons electronic monitoring can be combined with community service, in others community service is strictly separated from electronic monitoring.³³ The French model is also focused on replacing sentences of immediate imprisonment; however, it is extended to serve as an alternative to remand prison.³⁴ It is aimed at convicted persons whose sentence does not exceed one year of imprisonment as well as at prisoners who have to serve not more than one year of their original prison sentence. As in the Dutch and Swedish models, consent is required, which furthermore in France has to be declared in the presence of a defence counsel. Either the convicted person or the public prosecutor can apply for substituting imprisonment through electronic monitoring while the correctional judge (*juge d'application des peines*) makes the final decision. Electronic monitoring should not exceed four months and should be embedded in a programme of rehabilitative measures. In England and Wales electronic monitoring was introduced through the Criminal Justice Act 1991 after a series of experiments.³⁵ The courts may impose electronically monitored house arrest in all cases where the law does not prescribe the penalty as imprisonment. However, a back-end model of electronic monitoring has been added which allows for prison sentences of not more than four years to be reduced by two months.³⁶ Scotland has introduced “Restriction of Liberty Orders” by Section 5 of the Crime and Punishment (Scotland) Act 1997. This legislation also provides for the use of electronic tagging to monitor offenders' compliance with conditions of the order. A Restriction of Liberty Order requires an offender to be restricted to a specific place for a maximum period of 12 hours per day up to a maximum of 12 months, and/or from a specified place or places for up to 12

²⁸ Boelens, R.: Electronic Monitoring in The Netherlands. In: Mayer, M., Haverkamp, R., Levy, R.: (eds): Will Electronic Monitoring Have a Future in Europe? Freiburg 2002, pp. 81-88.

²⁹ See Spaans, E.: Electronic Monitoring: The Dutch Experiment. CEP-Bulletin June 1998, pp. 6-8.

³⁰ Van Kalmthout, A., Tak, P.: New Sanctions Proliferating in the Netherlands. *Overcrowded Times* 11(1999), pp. 1, 20-23.

³¹ Haferkamp, R.: Intensivüberwachung mit elektronischer Kontrolle - das schwedische Modell, seine Bedingungen und Ergebnisse. *Bewährungshilfe* 1999, pp. 51-67.

³² Haferkamp, R.: opus cited, 1999, pp. 4-6.

³³ Entwicklung & evaluation: interkantonaler Modellversuch Elektronisch überwachter Strafvollzug (Electronic Monitoring / EM) für Kurz- und Langstrafen 1. September 1999 - 31. August 2002. *Evaluations-Schlussbericht e&e*, Zürich, 30. Juni 2003, p. 8.

³⁴ See www.justice.gouv.fr/chancell/cc49inia.htm for an overview on aims and the scope of application; for a full description of the French scheme of electronic monitoring see Kensey, A., Pitoun, A., Lévy, R., Tournier, P.V.: *Sous surveillance électronique. La mise en place du “bracelet électronique” en France*. Paris 2003.

³⁵ Whitfield, R.G.: *Electronic Monitoring - Erfahrungen aus den USA und Europa*. *Bewährungshilfe* 1999, pp. 44-50.

³⁶ See for a summary Whitfield, D.: *Tackling the Tag. The Electronic Monitoring of Offenders*. Winchester 1997.

months. Offenders will be aged 16 or over. The offender must consent to the Order. Electronic tagging is imposed concurrently with a probation order. Therefore, a breach of the probation order is not a breach of the restriction of liberty order and vice versa.

The technology implemented is restricted in most European systems to tagging that allows the authorities to ascertain whether the convicted offender complies with the conditions as regards house arrest and the daily schedule that has been made part of the sanction. The radio frequency technology that is used in electronic monitoring is, however, unable to determine an offender's whereabouts during their absence from their residence. In contrast, Global Positioning Satellite system electronic monitoring continuously tracks movements at home and in the community on the basis of uniquely defined inclusion and exclusion zones. Violations of this (active) monitoring system are immediately sent to an on-call officer in the circuit for resolution. Another GPS technology used with less frequency is "passive" GPS. Here, the offender is tracked 24 hours a day, but this information is reported only once a day instead of being continuously transferred to an officer. This tool for offender supervision is of course less expensive than the active GPS system, but is unable to immediately notify authorities of non-compliance.

GPS tracking has become in England and Wales part of an exclusion order that prevents an offender from accessing an area as specified in a judicial order. The Criminal Justice and Court Services Act 2000 allows the tracking of offenders released on license to monitor their whereabouts, or their compliance with other license conditions. This act introduces the community sentence of an exclusion order. After a trial period (that started on 2 September 2004 and was completed in the second half of 2005) the government has decided to postpone the introduction of tracking devices.³⁷ Electronic tracking is already used in Florida (as well as other parts of the United States). In Florida, electronic tracking will in the near future in particular be used for monitoring sex offenders. The Florida Senate in April 2005 passed a bill that requires sex offenders who have been sentenced for sexual abuse of children under the age of 12 after expiration of a mandatory prison term of at least 25 years to wear GPS tracking devices for life.

IV. EVALUATING ALTERNATIVES TO CUSTODY

A. Introduction: The Need for Evaluation Research

Although, the European Rules on Community Sanctions and Measures demand proper research on and evaluation of community sanctions,³⁸ and community sanctions are justified with avoiding negative impacts of imprisonment, reducing overcrowding in prisons, saving resources and improving prevention of recidivism, such research has rarely been carried out in Europe. Those criminal sanctions which are the pillars of alternatives to custody, fines and probation/suspended sentences, are completely under-researched.

When looking at empirical research on alternatives to custody, it can be noted that the most powerful method of identifying effects of criminal sanctions and sentencing options, the controlled experiment, until now has not been used,³⁹ with the exception of a Swiss evaluation study that adopted randomized assignment to electronic monitoring and to community service (as alternatives to imprisonment).⁴⁰ Indeed, in an attempt to identify cost-benefit research on various sentencing options for a meta-analysis, McDougall et al were able to find nine studies satisfying (methodological) criteria for inclusion.⁴¹ Out of these, only two dealt with a comparison between secure institutions and community sanctions.⁴² More interest in empirical evaluation research can recently be noted for electronic monitoring where at least some basic research is now available

³⁷ Shute, S.: *Satellite Tracking of Offenders: A Study of the Pilots in England and Wales*. Ministry of Justice, London 2007.

³⁸ Bishop, N., Schneider, U.: *Improving the Implementation of the European Rules on Community Sanctions and Measures: Introduction to a New Council of Europe Recommendation*. *European Journal of Crime, Criminal Law and Criminal Justice* 9(2001), pp. 180-192, pp. 190.

³⁹ Bremer Institut für Kriminalpolitik (Hrsg.): *Experimente im Strafrecht – Wie genau können Erfolgskontrollen von kriminalpräventiven Maßnahmen sein?* Bremen 2000.

⁴⁰ Villettaz, P., Killias, M.: *Les arrêts domiciliaires sous surveillance électronique dans les cantons de Genève, du Tessin et de Vaud*. Rapport final à L'Office fédéral de la justice. Lausanne 2003, pp. 16-18.

⁴¹ McDougall, C., Cohen, M.A., Swaray, R., Perry, A.: *The Costs and Benefits of Sentencing: A Systematic Review*. *The Annals of the American Academy of Political and Social Sciences* 587(2003), pp. 160-177.

⁴² McDougall, C. et al: opus cited 2003, p. 167.

from all systems that have introduced electronic monitoring.⁴³ Evaluation research addressing electronic monitoring, however, is not different from evaluation research carried out in the field of community sanctions in general. Some studies make use of control groups that have been either matched with experimental cases subject to electronic monitoring or have been taken from cases where imprisonment had been imposed prior to introducing electronic monitoring but which would have been eligible for electronic monitoring.⁴⁴ The limitations of evaluation research in Europe reflect legal restrictions as regards implementation of controlled experiments and random assignment of cases.

The goals of evaluation studies concern first of all:

1. Identification of problems in implementing alternatives.
2. Possible net-widening effects:
 - (i) This goal can be subdivided into the goal of finding out whether alternative sanctions in fact reduce the burden of the prison system and how on the micro-level cases of alternative sanctions compare with imprisonment as regards costs and benefits.
 - (ii) Net-widening related research then deals with questions of whether punishment is intensified⁴⁵ and whether the net of criminal justice is expanded through creating new enforcement organizations.⁴⁶
3. Success (and failure) of alternatives to custody is measured through completion or revocation of community sanctions as well as recidivism.

⁴³ Brottsförebyggande radet: Intensivövervakning med elektronisk kontroll. Et utvärdering av 1997 och 1998 års riksomfattande försöksverksamhet. Stockholm 1999; Swedish National Council on Crime Prevention: Electronic Tagging in Sweden. Report 2005: 8; Spaans, E.: Electronic Monitoring: The Dutch Experiment. CEP-Bulletin June 1998, pp. 6-8; Mortimer, E., May, Ch.: Electronic Monitoring in Practice: The Second Year of the Trials of Curfew Orders. London 1998; Villettaz, P., Killias, M.: Les arrêts domiciliaires sous surveillance électronique dans les cantons de Genève, du Tessin et de Vaud. Rapport final à L'Office fédéral de la justice. Lausanne 2003; entwicklung & evaluation: interkantonaler Modellversuch Elektronisch überwachter Strafvollzug (Electronic Monitoring / EM) für Kurz- und Langstrafen 1. September 1999 - 31 August 2002. Evaluations-Schlussbericht e&e, Zürich, 30. June 2003; National Council for Crime Prevention (BRÅ): Intensive supervision with electronic monitoring. BRÅ-report: Stockholm 1999; Loble, D., Smith, D.: An Evaluation of Electronically Monitored Restriction of Liberty Orders. Crime and Criminal Justice Research Findings No. 47 Lancaster University; Home Office Research Study 222, London 2000; Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme Home Office Research, Development and Statistics Directorate, London March 2001; Schaap, R.A.: Results of the Evaluation of the Netherland Project on Electronic Monitoring. In: Mayer, M., Haverkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe. Freiburg 2003, pp. 89-92; Elliott, R., Airs, J., Easton, C., Lewis, R.: Electronically monitored curfew for 10- to 15-year-olds – report of the pilot. Research, Development and Statistics Directorate Home Office London 2000; Kensey, A., Pitoun, A., Lévy, R., Tournier, P.V.: Sous surveillance électronique. La mise en place du "bracelet électronique" en France. Paris 2003; Penedo, C.: Evaluation of the Portuguese Electronic Monitoring Programme. In: Mayer, M., Haverkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe. Freiburg 2003, pp. 159-161; Mayer, M.: Modellprojekt elektronische Fussfessel. Studien zur Erprobung einer umstrittenen Maßnahme. Freiburg 2004; Mayer, M.: Modellprojekt Elektronische Fußfessel. Wissenschaftliche Befunde zur Modellphase des hessischen Projekts. Freiburg 2004.

⁴⁴ Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme. Home Office Research Study 222, Home Office Research, Development and Statistics Directorate, March 2001, p. 51.

⁴⁵ March, B. L. Prison crowding and alternatives to incarceration: A diffusion study of acceptance in the state of Missouri. Columbia 1993.

⁴⁶ Mainprize, St.: Electronic monitoring in corrections: Assessing cost effectiveness and the potential for widening the net of social control. Canadian Journal of Criminology 34(1992), pp. 161-180; Schumann, K.F.: Widening the Net of Formal Control by Inventing Electronic Monitored Home Confinement as an Additional Punishment: Some Issues of Conceptualization and Measurement. In: Mayer, M., Haverkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe. Freiburg 2003, pp. 187-198.

B. Implementing Alternatives

1. Resources

Research on the process of implementation of alternative sanctions first of all points to the need to have in place a solid infrastructure in terms of staff, organizations, technology and resources.⁴⁷ Research and practical experiences show that sufficient financial and human resources are to be placed at the disposal of those organizations responsible for the implementation of community sanctions, in order that they can fulfill their tasks and duties, as can prison authorities when executing prison sentences. Implementation of community service for example is dependent on access to work places and proper supervision of offenders serving community work hours. In Europe, probation services and social work units in the criminal justice system have been extended considerably since the 1960s. However, this trend came to an end in the 1990s when welfare related budgets started to shrink significantly.

2. Implementing the “ultima ratio” Standard

While the *ultima ratio* idea was not new as criminal law at large should be the *ultima ratio* in systems of social control, it is nevertheless difficult to present viable methods to implement this principle in everyday decision-making in the criminal justice system. So far, Germany has put into effect firm statutory guidelines as regards the choice between day fines and short-term imprisonment (laying a rather heavy burden of justification on trial judges resorting to imprisonment) which proved to be efficient in cutting down short term prison sentences. Sentencing guidelines now provide in some systems (the Netherlands, England and Wales) for clear rules on the choice between prison and non-custodial sanctions while others (for example France) leave the decision to the discretion of the courts.

3. Alternatives and Pretrial Detention

An obvious problem for implementing intermediate penalties is then the use of pretrial detention. In fact, the use of pretrial detention makes intermediate penalties or community sanctions illusionary. The use of pretrial detention partially reflects “short sharp shock” and security policies. Insofar, the concept of intermediate penalties points also to the need to develop strict criteria which help avoid the abuse of pre-trial detention as a form of pre-trial custodial penalty.

4. Alternatives and Compliance

Intermediate penalties then need compliance. So, for example, community service certainly is dependent fully on voluntary co-operation of the offender. However, compensation, probation, and other non-custodial penalties, rely also on a certain measure of compliance. A core problem in implementing intermediate penalties therefore concerns the question of what to do with non-compliance or violations of conditions, etc. attached to intermediate penalties. With respect to intensive supervision of probation clients, research could demonstrate that the rate of technical violations increases sharply compared to ordinary probation programmes. Therefore, reactions towards non-compliance with community sanctions should be re-considered. At least technical violations should not automatically lead to the imposition of a prison sentence and should not constitute a criminal offence.

5. Alternatives, Conversion Rates and Credibility

What seems of paramount importance (in particular as regards acceptance of intermediate penalties by the judiciary and the public) is the requirement of clear and rational conversion rates between the various penalties incorporated into the system of criminal sanctions. Intermediate penalties as well as community-based sanctions on the one hand and financial and custodial sanctions on the other hand must be related to each other and made comparable on one or several dimensions. This is one of the weakest points in much legislation. So, for example, it does not seem to be very convincing that a prison sentence of, say, one year can be substituted by a community sanction of 240 hours, while at the same time when the community sanction is a failure, each two hours not worked off can be substituted by a subsidiary imprisonment of not more than one day. This means in fact that one year, originally substituted by 240 hours community service, because of the refusal to comply, will be again substituted in a prison sentence which can be no more than 120 days. A legal provision which opens a way for calculating offenders to gamble is certainly doomed to be a failure. There are two dimensions on which various penalties can be compared. The first dimension refers to the time an offender is subject to a criminal penalty, the second dimension concerns the intensity

⁴⁷ Report of an Independent Inquiry into Alternatives to Prison: Crime, Courts & Confidence. London 2004.

of restrictions which are placed upon the offender. These should be elaborated in a set of sentencing guidelines.

6. Combining Alternative Sanctions

Research on the implementation of intermediate penalties suggests that the judiciary and prosecution make heavy use of intermediate penalties. However, it is obvious that there are still very clear priorities in the use of intermediate penalties. Day fines and summary fines are those sanctions used most widely. Then, probation and suspended sentences follow. Compensation/restitution as well as community service rank rather low on the list, although we may observe some community service and compensation “bubbles” on the European landscape drawn by official accounts of main penalties meted out. These “bubbles” are explained by the fact that most systems use compensation and community service either as attachments to suspended sentences or at the back end of the enforcement process. In particular, alternative “combination” penalties mixing various alternatives in an attempt to adjust alternative sentences to the seriousness of the offence as well as to the specific needs of the individual offender seem to be on the rise.

7. Implementation of Technology

Technology plays a crucial role in the implementation of electronic monitoring. Here, it is evident from evaluation reports that no major problems are encountered.⁴⁸ Violations of obligations accompanying electronic monitoring are rare.⁴⁹ This reflects the selection of good risks. An exception so far is the Scottish experiment where case recruitment led to more young offenders and offenders with a prior record being placed under electronic monitoring and completion rates of electronic monitoring amounted to 72% (while completion rates in other jurisdictions range well above 90%).⁵⁰ Completion rates are correlated with age, prior record and length of electronic monitoring.⁵¹ Research on the English home curfew programme shows that the most common reason for not completing the curfew period successfully is breach of curfew conditions.⁵²

⁴⁸ Loble, D., Smith, D.: opus cited, 2000, pp. 42.

⁴⁹ Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme. Home Office Research Study 222, Home Office Research, Development and Statistics Directorate, March 2001, p. 13; Mayer, M.: Modellprojekt Elektronische Fußfessel. Wissenschaftliche Befunde zur Modellphase. des hessischen Projekts. Freiburg 2004, p. 15; Haverkamp, R., Mayer, M.: Die Zukunft der elektronischen Überwachung in Europa. In: Monatsschrift für Kriminologie und Strafrechtsreform 86 (2003), pp. 217; Villettaz, P., Killias, M.: Les arrêts domiciliaires sous surveillance électronique dans les cantons de Genève, du Tessin et de Vaud. Rapport final à L'Office fédéral de la justice. Lausanne 2003, p. 3.

⁵⁰ Loble, D., Smith, D.: Evaluation of Electronically Monitored Restriction of Liberty Orders. The Scottish Executive Central Research Unit 2000

⁵¹ Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: opus cited, 2001, p. 20.

⁵² *Ibid.* p. 14.

Table 3: Implementation of electronic monitoring in Europe ⁵³

	Sweden	England/Wales	The Netherlands	Hesse/Germany	France
Average period (months)	1,3	3,1	3,5	4,6	85% less than 4 months
Recidivism	11%	18%			
% successfully completed	95	82	90	90	95
Age (medium)	37	27	34		Most < 35 years old
Violations %	5	11	16		
Drugs %	5	3	20	40	16
Burglary %	2	17	19		
DUI %	51	3	-	10	18
Property crime %	3	30	-	20	35
Violence %	21	12	22	15	15
% male offenders	93	92	90	89	Almost exclusively male
Min-Max months	0,5-2	- 6	1-6	- 6	- 3

Sources: CEP: Electronic Monitoring in Europe. www.cepprobation.org/reports/electronic_monitoring_in_europe.shtml; Brottsförebyggande radet: Intensivövervakning med elektronisk kontroll. Et utvärdering av 1997 och 1998 års riksomfattande försöksverksamhet. Stockholm 1999; Spaans, E.: Electronic Monitoring: The Dutch Experiment. CEP-Bulletin June 1998, pp. 6-8; Mortimer, E., May, Ch.: Electronic Monitoring in Practice: The Second Year of the Trials of Curfew Orders. London 1998; Max-Planck-Institut für Ausländisches und Internationales Strafrecht: Laboratoire Europeen Associee. Bilanz (1998-2001) und Perspektiven (2002-2006). Freiburg 2002, pp. 28-29; Swedish National Council on Crime Prevention: Electronic Tagging in Sweden. Report 2005: 8, p. 19.

C. Net-widening, Replacement of Imprisonment and Alternatives

The assessment of the extent of replacement of prison sentences through non-custodial penalties and net-widening effects is difficult. From the perspective of longitudinal aggregate data on sentencing and imprisonment, it can be concluded that suspended sentences, probation, parole and the fine play a significant role. However, the question remains whether the role of alternatives includes replacement of imprisonment or whether alternatives serve as a penalty for new offender groups (or offenders who would have been discharged without or with conditions).

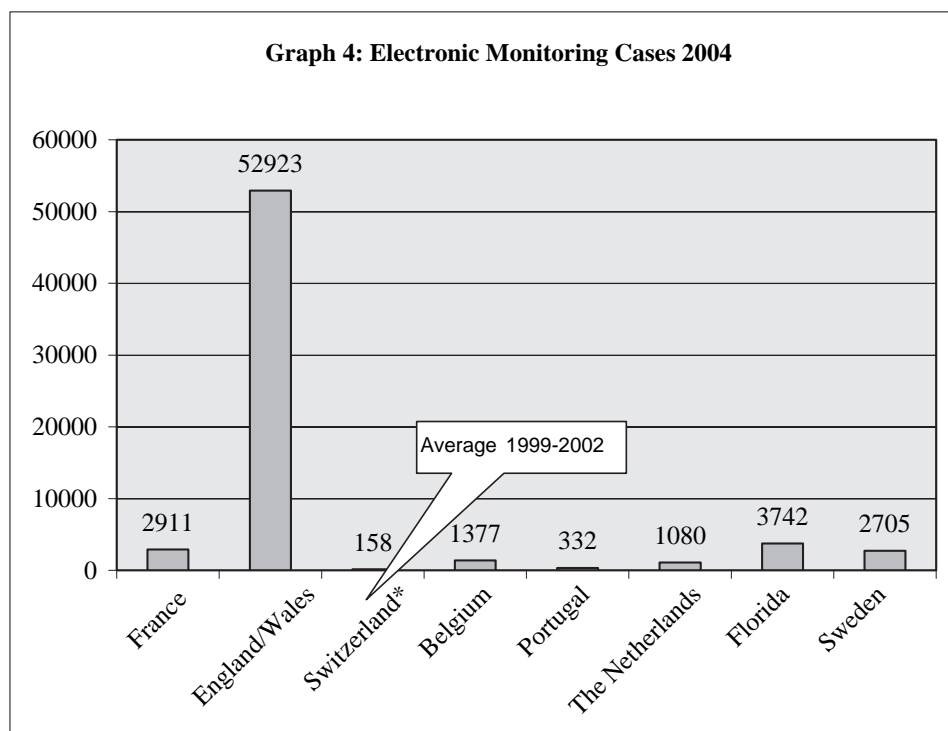
The problems can be demonstrated in particular in the case of electronic monitoring. As none of the evaluation studies conducted so far in Europe have been based on randomized assignment of cases, hard data on replacement of prison sentences by electronic monitoring are not available. Conclusions therefore are made on the basis of qualitative data and perceptions of decision makers as well as perceptions of offenders on how their cases would have been decided without the option of electronic monitoring. In most studies it is cautiously concluded that electronic monitoring replaces prison sentences to a certain extent.⁵⁴ In Switzerland, it was concluded that the replacement effect is close to zero and that competition between electronic monitoring on the one hand, and community service (which serves also as an alternative to detention in a prison facility) on the other hand, results in one alternative replacing the other.⁵⁵ But anyway, the number of electronic monitoring cases is rather small in all European countries, except for England and Wales. This prevents of course electronic monitoring from having impacts similar to penalties like e.g. day fines, suspended sentences, etc. Graph 4 shows the absolute numbers of electronic monitoring cases in

⁵³ CEP: Electronic Monitoring in Europe. www.cepprobation.org/

⁵⁴ Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme. Home Office Research Study 222, Home Office Research, Development and Statistics Directorate, March 2001, p. 42; Mayer, M.: Modellprojekt Elektronische Fußfessel. Wissenschaftliche Befunde zur Modellphase des hessischen Projekts. Freiburg 2004, p. 23.

⁵⁵ entwicklung & evaluation: interkantonaler Modellversuch Elektronisch überwachter Strafvollzug (Electronic Monitoring / EM) für Kurz- und Langstrafen 1. September 1999 - 31. August 2002. Evaluations-Schlussbericht e&e, Zürich, 30. Juni 2003, p. 30.

various jurisdictions for 2004 and reveals that this disposition has become a major instrument in supervising parolees in England and Wales.



D. Cost-Effectiveness

The cost-effectiveness of penal sanctions is rarely made an issue of in-depth research. Cost-effectiveness, however, has been debated in the new millennium, particularly with respect to electronic monitoring. Differences in per case costs (graph 5) certainly reflect the type of programme which is implemented through electronic monitoring as well as the average length of electronic monitoring.

When looking at costs per day, the average seems to oscillate around some €50,⁵⁶ well below the average costs of imprisonment (approximately €100 per day) and above the costs of regular probation supervision. Another perspective can be adopted with trying to estimate the share of funds that go to electronic monitoring. Based on estimates on the budgets for criminal justice at large (including criminal corrections),⁵⁷ the proportion of such budgets vested in electronic monitoring can be calculated for England and Wales, and France and Sweden. According to that, out of each €100 spent in England and Wales on criminal justice, some 80 cents go to electronic monitoring. In Sweden it is approximately 50 cents and in France 10 cents. The small share of funds invested in electronic monitoring may be also interpreted as indicating that net-widening effects are limited also as regards creation of new and powerful enforcement agencies.

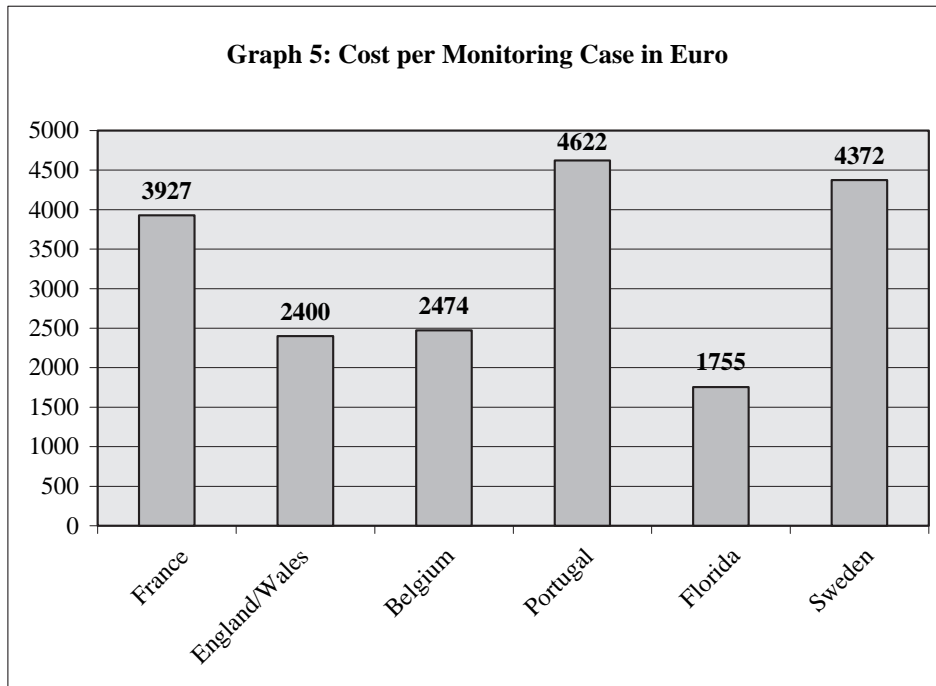
The costs of electronic monitoring are certainly lower than those occurring when implementing prison sentences.⁵⁸ However, the costs of regular probation may be below the costs resulting from electronic monitoring, due to more investments in supervision and programmes including electronic monitoring.⁵⁹

⁵⁶ See Mayer, M.: opus cited 2004, p. 211.

⁵⁷ van Dijk, F., de Waard, J.: Legal infrastructure of the Netherlands in international perspective. Crime control. The Hague, June 2000.

⁵⁸ Lobley, D., Smith, D.: opus cited, 2000, pp. 39.

⁵⁹ *Ibid.*



E. Effectiveness of Alternative Penalties

The effectiveness of alternative penalties is regularly measured by rates of recidivism. However, as was mentioned earlier, controlled experiments which could provide for a conclusive answer have – with one exception – not been carried out in Europe. Accounts of recidivism rates after various sentences have been imposed demonstrate that the highest recidivism rates come with imprisonment. Fines, suspended sentences, and community service are followed by significantly lesser rates of re-offending. This of course is due to selection: low-risk offenders are more likely to receive non-custodial penalties than are high-risk offenders.

So, for example, rates of recidivism are rather low after electronic monitoring. Low rates of recidivism reflect here – as do high completion rates – selection of good risk cases. However, Swedish evaluation research concludes that recidivism rates after electronic monitoring are not different from those of a group of offenders matched to the electronic monitoring group.⁶⁰ This confirms research on recidivism which says that any criminal penalty has only a very small potential to change those conditions which nurture crime. However, high-risk cases seem to do better than predicted when subject to electronic monitoring.⁶¹ This is true also for drug offenders.⁶²

V. A NEW CONCERN FOR IMPRISONMENT, PRISON OVERCROWDING AND ALTERNATIVE SANCTIONS IN THE NEW MILLENNIUM

A. A New Generation of Alternatives to Custody

While intermediate sanctions in the 1970s developed within the framework of rehabilitation or diversion (trying to avoid the negative side-effects of imprisonment and other criminal sanctions), security and risk management have become leading motives in penal policies implemented since the 1990s.

The focus of penal policies has switched to organized crime, transnational and cross-border crimes as well as sensitive and highly polarizing crimes such as hate and sexual violence, terrorism and drug crimes.

⁶⁰ Swedish National Council on Crime Prevention: Electronic Tagging in Sweden. Report 2005: 8, p. 19; similar results are reported in Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme. Home Office Research Study 222, Home Office Research, Development and Statistics Directorate, March 2001, p. 55.

⁶¹ Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: opus cited, 2001, p. 56.

⁶² *Ibid.* p. 21.

New types of offenders have entered the arena of policy-making which are partially linked to new crime phenomena like, for example, the rational offender, the immigrant offender and criminal organizations or corporate criminals and criminal corporations. With these types of offenders, the basic approach adopted in criminal justice systems during the 1960s, rehabilitation and re-integration focused on the individual sentenced offenders, has come under considerable pressure.

Penal policies in Europe then have become more expressive and turn away from knowledge-based, rational approaches to crime control. This can be seen in the greater involvement of the public (and/or the community), in particular with arrangements that provide for confrontation between the offender and the victim and the community, or exposure of certain categories of (sex) offenders to the public. The latter approaches have led to a rediscovery of public shaming and stigmatization. Besides demands for safety, this expresses also a move towards more emotionality and moralizing in punishment. In fact, criminal policy and crime politicians during the last decades relied more and more on expressive and mobilizing functions of criminal law when confirming that criminal justice must pursue the goal of improving safety and increasing the probability of punishment. "Closing the gap" between the number of offences known to police and the number of offenders convicted and sentenced has become a rallying point for such sentiments, which upgrade criminal law and criminal sanctions again to instruments which serve as censure on the one hand and reassurance of the public on the other hand (and express also low (or zero) tolerance towards criminals).⁶³

Punishment underwent a process of economization; it has become a high quality product whereby quality is evidently linked to cost-efficiency, in particular as regards implementation and enforcement. The punishment, rehabilitation and control language indeed has changed into a language that is attentive to costs and customers. Most remarkable, however, is the momentum victim policies have gained during the last decades. With placing more emphasis on victims and the community, on compensation and restorative justice, a process of re-privatization of punishment is initiated which fits well into the general trend of the declining importance of the monopoly of power.

With criminal policies turning away from the offender and towards the victim and the public another change becomes visible. Sentencing theory, once strongly expressing the goal of fitting punishment to the individual offender, moves towards fitting punishment to the crime and the impact the crime had (on victims and society).⁶⁴ For selected groups of offenders, security and incapacitation become focal concerns. In particular for sex offenders, a punishment regime is established which is based on risk assessment, indeterminate detention and incapacitation.⁶⁵ In general, these changes are consistent with a move in criminology away from empirical theories and towards normative theories of crime and criminal justice. It is evidently punishment theories and practices emerging during the last decades which emphasize exclusion and security rather than fundamental individual rights, inclusion and re-integration.

These changes have resulted in switching the goals of community sanctions to tight supervision, credibility and cost-effectiveness. In fact, this concerns a departure from the concept of community bound sanctions of the 1960's and the 1970's headed towards rehabilitation and reintegration of criminal offenders.

B. A New Concern for Imprisonment

Despite the general recognition of the last resort standard and the implementation of alternatives to imprisonment, the 1990s saw in some European countries a massive surge of imprisonment rates and in virtually all European countries imprisonment rates well above those reported in the 1970s and 1980s.

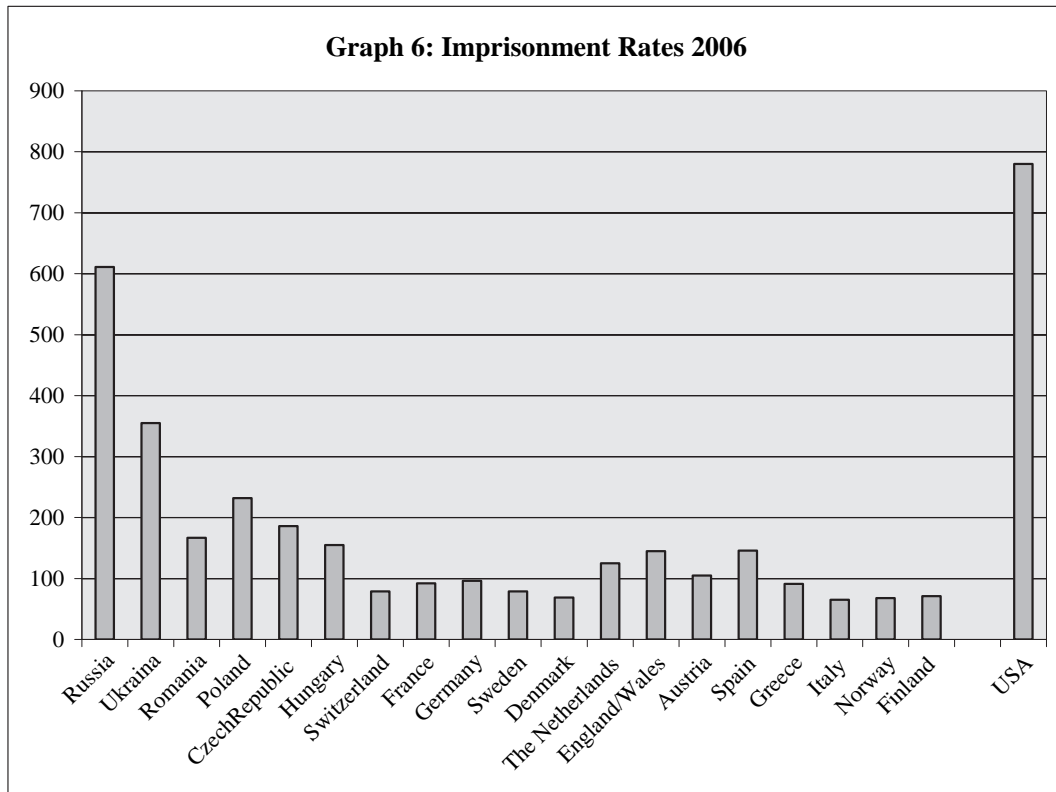
Based on the latest prison figures in Europe (Graph 6) four groups of countries can be differentiated:

- the new democracies in the east of Europe which display the highest rates of imprisonment (around 200/100,000), still in line with the heavy use of prison sentences in the past;

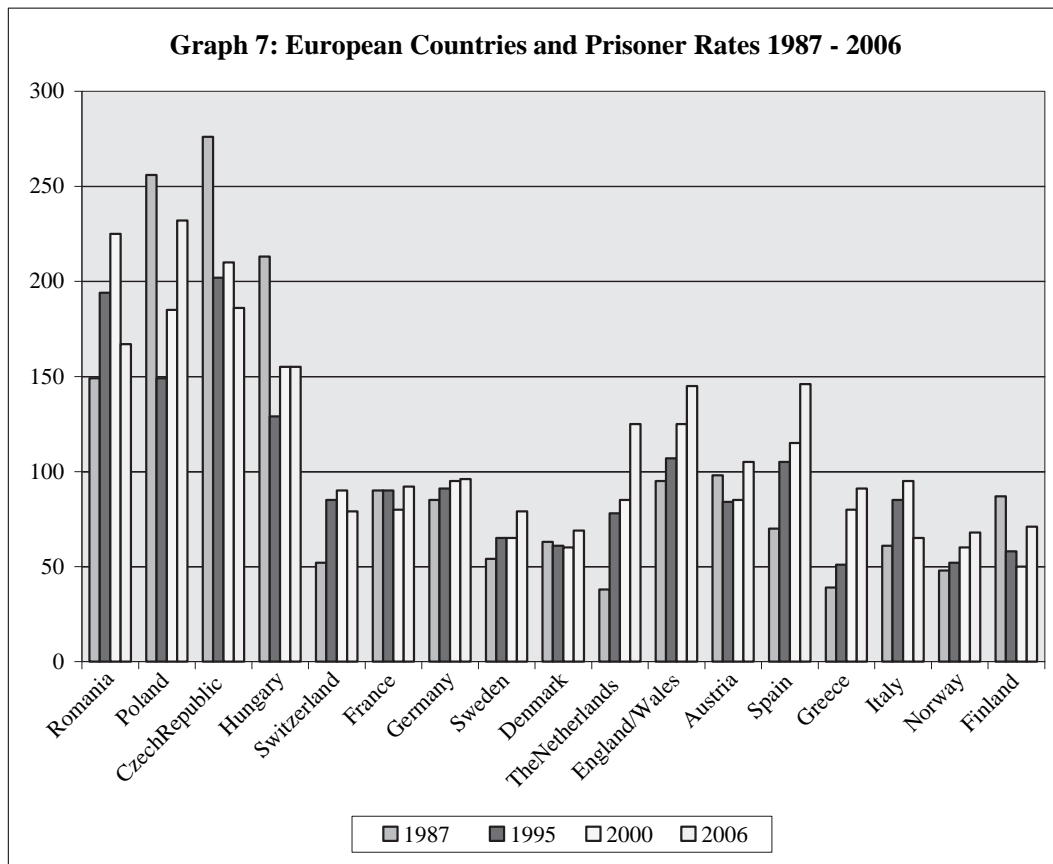
⁶³ Home Office Communication Directorate: Criminal Justice: The Way Ahead. Home Office, London 2002, p. 3; White Paper on Criminal Justice: Justice for All. Home Office, London 2002.

⁶⁴ See eg. Home Office: Making Punishment Work. Report of a Review of the Sentencing Framework for England and Wales. London, July 2001; White Paper on Criminal Justice: Justice for All. Home Office, London 2002, pp. 86.

⁶⁵ Walther, S.: Umgang mit Sexualstraftätern: Amerika, Quo Vadis? Vergewisserungen über aktuelle Grundfragen an das (deutsche) Strafrecht. MschrKrim 80(1997), S. 199-221.



Source: Walmsley, R.: Prison Systems in Central and Eastern European Countries. Progress, Problems and the International Standards. Helsinki 1996; Walmsley, R.: World Prison Population List (third edition). Home Office: London 2002, 2009.



- countries which experienced a steep increase in the number of prisoners in the last decade and display a prison rate of well above 100/100,000 (the Netherlands, England and Wales, Spain);
- countries which display prisoner rates that fall short of 100/100,000 (France, Germany, Greece);
- countries with prisoner rates still well below 100/100,000 (Scandinavian countries, Switzerland, Italy).

A closer look at the period 1987–2006 and the course imprisonment rates take in various European countries leads to a different grouping.

In some countries, between 1987 and 2006, prisoner rates have increased at a rapid and significant pace (England and Wales, the Netherlands, Greece, Spain).

Another group of countries is characterized by small increases (France, Germany, Denmark, Austria, Switzerland).

In most of the new democracies in the east of Europe imprisonment is on the rise again⁶⁶ after a rather short but nonetheless drastic decline in the use of imprisonment shortly after the political changes at the end of the 1980s - which was also driven by the use of amnesties.⁶⁷ Virtually all criminal justice systems in the east of Europe experienced major drops in prison rates at the end of 1980s or at the beginning of the 1990s. But, obviously sentencing patterns either did not change, or, despite changing sentencing patterns and changing crime patterns, contributed to fast-rising prison populations in the 1990s. The period of a policy of decarceration which followed immediately the process of entering economic and political transition certainly was part of a general policy to reduce the level of repression maintained by the former authoritarian regimes, but seemingly has been of a short transitional character only.⁶⁸ For Eastern Europe, we may hypothesize that a lack of alternatives to prison sentences,⁶⁹ strong public support for imprisonment, as well as fear of crime and demands for tough responses to messages of ever increasing crime rates, has contributed to the growth in imprisonment rates.⁷⁰

Most countries of the “Old Europe” have experienced significant increases in the number of prisoners over the last decades. Germany, for example, reports in 2006 an imprisonment rate which comes close to rates observed some forty years ago (before a massive decline in prison figures set off). England and Wales are leading imprisonment rates in Western Europe. Prison projections for England and Wales at the beginning of the new millennium had suggested for 2009 a prison population of between 90,000 and 110,000.⁷¹ The head count in March 2009 in English prisons comes close to that estimate with some 83,000 sentenced and remand prisoners.⁷² The Netherlands, once proud of its mild penal climate, has experienced a remarkable growth in prisoner rates⁷³ (which was accommodated by enlarging drastically the prison capacity) as did some of the Southern European countries like Greece and Spain. There is but one exception from this rule: Finland. Finland was, back in the 1960s, top ranked in Europe in the list of imprisonment rates. Finland today falls in the category of countries with the lowest rates of imprisonment in Europe and displays, when contrasted with prison figures of 1987 and 2006, a decline. This due to a political decision to reduce the difference in the use of prison sentences between Finland and the other Scandinavian countries.

⁶⁶ Walmsley, R.: World Prison Population List (third edition). Home Office: London 2002.

⁶⁷ Lammich, S.: Politische Demokratisierung und strafrechtliche Entwicklung in den Ländern des ehemaligen Ostblocks. *Kriminalpädagogische Praxis* 19(1991), pp.6-14, p. 11; see also for a description Walmsley, R.: Prison Systems in Central and Eastern Europe. Progress, Problems and the International Standards. Helsinki 1996, pp. 6-8.

⁶⁸ Walmsley, R.: Prison Systems in Central and Eastern Europe. Helsinki 1996, p. 9.

⁶⁹ Stern, V.: Alternatives to Imprisonment in Developing Countries. London 1999.

⁷⁰ Lammich, S.: Politische Demokratisierung und strafrechtliche Entwicklung in den Ländern des ehemaligen Ostblocks. *Kriminalpädagogische Praxis* 19(1991), pp.6-14, p. 11.

⁷¹ Morgan, R.: English Penal Policies and Prisons: Going for Broke. *Overcrowded Times* 7(1996), p. 1, 20-21; Councill, R., Simes, J.: Projections of Long Term Trends in the Prison Population to 2009. Home Office, London 2002.

⁷² Ministry of Justice: Population in custody, monthly tables, March 2009. England and Wales Statistics Bulletin. London 2009.

⁷³ Mooelnaar, D.E.G. et al: Prognose van de sanctiecapaciteit tot en met 2006. *Onderzoek en beleid*, The Hague 2002, pp. 120; however, projections demonstrate that the pace of increase, although an increase of 13% between 200 and 2006 is predicted, will slow down.

The increase in the use of imprisonment has been also interpreted as a “punitive turn” in European penal policies.⁷⁴ In fact, there are plausible explanations for the increase in the size of European prison populations which seem to support a punitive turn. Prison sentences have become longer, in particular for drug trafficking and violent offences. Concern for violent offences (including domestic violence) as well as sexual offences, from the viewpoint of both retribution and incapacitation of the dangerous offender, contributed also to the increase in the prison populations in Europe. Then, increases in the size of precarious populations, populations most likely to be eligible for prison sentences, provide a fertile ground for the use of prison sentences.⁷⁵ Precarious groups are those which are unsettled and not integrated into the labour market and therefore do not lend themselves easily to the application of alternatives to pretrial detention and custodial sentences. The immigrant and migrant populations especially are among the fastest growing prisoner groups in Europe.⁷⁶

The new interest in prison sentences is then carried by a process of globalization and harmonization of criminal justice reform.⁷⁷ In the last decades, international crime control conventions more and more demand uniform legislation in basic criminal law and procedural law in order to assure swift and uncomplicated co-operation between different criminal justice systems. The international instruments (and their European counterparts stemming from the Council of Europe and the European Union) demand punishment that fits the seriousness of the criminal offences dealt with and the need to discourage individuals or groups effectively from committing such crime. Here, for example, conventions like the 1988 Vienna U.N. Convention on Measures against Drug Trafficking and the 2000 Transnational Organized Crime Convention have to be mentioned.

The international and national penal policies evidently come today with contradicting and sometimes confusing messages;⁷⁸ while the last resort standard shall still apply to imprisonment, a demand for credible penalties and discouraging punishment is voiced at the same time.

VI. SUMMARY

1. Imprisonment has again gained considerable ground in Europe.
2. Intermediate penalties which originally have been developed as alternatives to imprisonment do not seem to counteract this trend in an effective way.
3. However, intermediate penalties have been successful in replacing imprisonment and still are successful in doing so. This success certainly can be attributed to theoretical and practical efforts vested in the implementation stage of intermediate penalties.
4. The success of intermediate and alternative sanctions in Europe certainly can be explained also by combining various alternative sanctions, in particular the fine, with simplified and summary procedures that allow for both a swift response to crime as well as a cost-effective way to process a wide range of petty and moderately serious criminal offences.
5. Despite this success, certain problem areas of intermediate penalties become apparent, most importantly, the lack of clear conversion philosophies which make various penalties comparable, and, as an overlay to such conversion rates, the lack of clear policy decisions and sentencing statutes which define priority areas for specific penalties.
6. The concepts and philosophies of intermediate penalties then have been subject to important changes which, roughly, can be summarized in a move towards cost-effectiveness, risk control and punishment and away from rehabilitation.

⁷⁴ Garland, D.: *The culture of control*. Oxford 2003.

⁷⁵ Kuhn, A.: *Comment Réduire le Nombre de Personnes Privées de Liberté? Rapport de Recherche FNRS*, Lausanne 1997.

⁷⁶ Palidda, S., Frangouli, M., Papantoniou, A.: *Les Conduites Déviantes et La Criminalisation des Immigrés*. Mailand 1998.

⁷⁷ Weigend, Th.: *Strafrecht durch internationale Vereinbarungen – Verlust an nationaler Strafrechtskultur? ZStW 105 (1993)*, pp. 774-802.

⁷⁸ Dindo, S.: *Les Alternatives à la Détention*. Commission Nationale Consultative des Droits de l’ homme, Paris 2006.

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7. The 1990s then saw the emergence of new offender groups and new criminal offences which attracted policy concern, groups which obviously are outside the reach of intermediate penalties. The organized and rational offender, as well as transnational and migrant offenders, point towards social and legal responses which aim at physical control and exclusion.
8. The changing composition of prison populations in Europe underline the need to adjust the concepts of intermediate penalties to immigrant offenders, drug offenders and other offenders active in the informal economies, if intermediate penalties shall serve a role they played successfully for the group of settled offenders.