

IMPRISONMENT AND ALTERNATIVES TO PRISONS: CHANGES AND PROSPECTS IN A COMPARATIVE PERSPECTIVE

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SUMMARY: I. *Introduction*. II. *Current developments in the use of criminal sanctions in Europe: a new concern for imprisonment*. III. *Alternative and intermediate sanctions: looking back*. IV. *What kind of changes occurred over the last decades*. V. *Changes in systems of penal sanctions in the 80's and 90's*. VI. *Alternatives to imprisonment in face of changes in criminal policy and sentencing*. VII. *Conclusions*.

I. INTRODUCTION

A comparative and cross-sectional view on post-adjudication dispositions may serve to promote understanding of what trends in sanctions systems are developing, how and why certain types of penalties spread, what forces are operational when new penal sanctions are adopted in a particular criminal justice system and finally, how criminal sanctions are implemented and to what end. It is especially the latter which should receive attention as common categories like imprisonment, fines, community service may turn out to be rather different in substance when turning from policy making and legislation on to sentencing and to the implementation process. With such questions it is essentially the topics of innovation in systems of criminal sanctions and the process of change that are raised.

There are two possible processes we might be able to observe in changing systems of sanctions. There might be actually transfer of sentencing and punishment policies across national boundaries, from one system or jurisdiction to another one or from a group of countries to others. There might be also a process that in different countries is driven by

the very same social, economic or political problems pushing towards the same solutions. It could be also that such processes include active selection of problems (and crime policy certainly is in an active way selective and not always responding passively to pressure from outside). Pressure and incentives may on the other hand play a role for joining particular types of policies. Certainly, there are also limits to transfers of criminal sanctions and punishment and methods of corrections, limits that can perhaps be explained historically, culturally or by mere sticking to the habits. Moreover, criminal sanctions and punishment are not merely factual consequences of norm-breaking but they represent themselves norms and are therefore not easily transplanted into another social system. It is this normative core of criminal sanctions where problems of legitimation are located and which explains why that many systems stick evenly to rehabilitation, deterrence, proportionality and justice as sentencing goals. M. Tonry recently has discussed further variables that might explain why systems differ in adopting innovations, among them professionalism in criminal justice staff and relationships between crime policies and general politics.

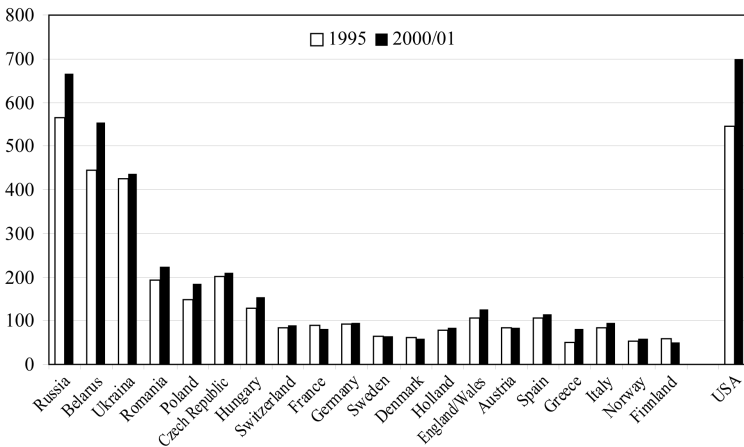
II. CURRENT DEVELOPMENTS IN THE USE OF CRIMINAL SANCTIONS IN EUROPE: A NEW CONCERN FOR IMPRISONMENT

European prison figures provide some evidence that there is a trend towards increasing rates of imprisonment since the end of the 80's. This is true for both the Western and the Eastern part of Europe. What is reported from virtually all European countries is a rather elevated rate of imprisonment in the mid-nineties as compared to the seventies and the early or mid 80's. Graph 1 demonstrates this trend with displaying the mid-ninety and the 2000/2001 prisoner rates. Germany, for example, reports at the beginning of the new millennium imprisonment rates which come close to rates observed some 40 years ago before a massive decline in prison figures set off. Obviously, England/Wales is expecting further increases in the prison population as current projections suggest for 2009 a prison population of between 90,000 and 110,000.¹ It is remarkable

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

then that there was definitely a process of convergence in rates of imprisonment in Western Europe. Large variations as *e.g.* observed in the seventies and still at the beginning of the eighties do not exist anymore. So, *e.g.* The Netherlands, once proud of their mild penal climate, have experienced a remarkable growth in prisoner rates² as did most of the Southern European countries like Greece, Italy and Spain. The reasons for these trends are easy at hand. First, it is a trend towards longer prison sentences, in particular for drug trafficking and violent offences which contribute to the increase in the prison populations in the West of Europe. Second, it is a trend towards increases in the size of precarious populations, populations most likely to be eligible for prison sentences.³

RATES OF IMPRISONMENT IN EUROPE
AND IN THE US 1995-2000/01



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*, 3rd edition, London, Home Office, 2002.

² Mooelnaar, D. E. G. *et al.*, *Prognose van de sanctiecapaciteit tot en met 2006. Onderzoek en beleid*, The Hague, 2002, p. 120; however, projections demonstrate that the pace of increase, although an increase of 13% between 200 and 2006 is predicted, will slow down.

³ Kuhn, A., *Comment Réduire le Nombre de Personnes Privées de Liberté? Rapport de Recherche FNRS*, Lausanne, 1997.

Precarious groups come especially from the immigrant and migrant populations as well as from the groups of long-term unemployed.⁴

Imprisonment rates are on the rise in Central and Eastern Europe, too. After a rather short but nonetheless drastic decline in the use of imprisonment shortly after the political changes at the end of the 80's—which was also driven by the use of amnesties—⁵ it can be assumed that since these days imprisonment is on the rise again.⁶ Virtually all criminal justice systems in the East of Europe experienced major drops in prison rates at the end of 80's or at the beginning of the 90's. But, obviously sentencing patterns either did not change or despite changing sentencing patterns and changing crime patterns contribute to fast rising prison populations in the 90's. The period of decarceration following immediately the process of entering economic and political transition surely was part of the general policy to reduce repression, but seemingly has been of a short transitional character only.⁷ For the East of Europe, we may hypothesize that a lack of alternatives to prison sentences,⁸ strong support for imprisonment in the public as well as fear of crime and demands for tough responses to messages on ever increasing crime rates has contributed to the growth in imprisonment rates.⁹

III. ALTERNATIVE AND INTERMEDIATE SANCTIONS: LOOKING BACK

It was in particular from the view of the abundant use of imprisonment that in Western Europe the question has been put forward as early as in the sixties whether the range of criminal penalties should be wid-

⁴ Palidda, S. *et al.*, *Les Conduites Déviantes et la Criminalisation des Immigrés*, Mailand, 1998.

⁵ 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.

⁶ Walmsley, R., *World Prison Population List*, 3rd ed., Londres, Home Office, 2002.

⁷ Walmsley, R., *Prison Systems in Central and Eastern Europe...*, *cit.*, note 5, p. 9.

⁸ Stern, V., *Alternatives to Imprisonment in Developing Countries*, London, 1999.

⁹ Lammich, S., “Politische Demokratisierung und strafrechtliche Entwicklung in den Ländern des ehemaligen Ostblocks”, *op. cit.*, note 5, pp. 6-14, p. 11.

ened by what today is commonly called intermediate, community or alternative criminal penalties and what conditions must be established to make this type of criminal penalties work. Faced with rising crime rates on the one hand and herewith increasing numbers of offenders adjudicated and sentenced, virtually all criminal justice systems since the sixties have been preoccupied with the search for cost-benefit efficient but non-custodial responses to crime other than the summary fine and non-prosecution policies based on conditional or unconditional discharges. It goes without saying that these efforts were devoted to a considerable part to the search for alternatives to imprisonment which on the one hand lays a heavy financial burden on the state and on the other hand does not seem to meet promises such as being an effective deterrent to crime or reducing recidivism.

However, the search for intermediate penalties back in the sixties was fueled also by theoretical arguments stressing the counterproductive effects of detention practices in terms of stigmatization and labeling as well as the then still strong political and public support of rehabilitative approaches to the individual offender. A bifurcated approach developed with an attempt to concentrate “rehabilitative” imprisonment on heavy recidivists (in particular career offenders) while the non-dangerous offenders or one time offenders should be eligible for non-custodial criminal sanctions and diverted from the prison system. Mistrust voiced against prisons and imprisonment already by Franz v. Liszt at the end of 19th century prevailed and was backed up by the rise of labeling theory on the one hand and general (social-democratic) political programmes headed towards more freedom and less repression on the other hand. Furthermore, sentencing theory as elaborated in the sixties and seventies 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 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. Although, community sanctions had been justified with avoiding negative impacts of imprisonment and the European Rules on Community Sanctions and Measures demand for proper research on and evaluation

of community sanctions¹⁰ such research has rarely been carried out in Europe. In particular, controlled experiments have been neglected.¹¹ Indeed, in an attempt to identify cost benefit research on various sentencing options for a review of the state of research McDougall et al were able to find 9 studies satisfying criteria for inclusion.¹² Out of these, only two of these studies dealt with a comparison between secure institutions and community sanctions.¹³

However, despite deficits in the area of evaluation and implementation research remarkable success stories can be reported from creating and successfully implementing alternatives to imprisonment in Europe. There is *e. g.* clear evidence that day fines succeeded in Austria, Germany and some Scandinavian countries as well as in Switzerland, partially also in France and Spain in replacing to a quite considerable though differing extent in particular short-term imprisonment in the 60's and 70's. 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 1921.¹⁴ 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 or recession. Nevertheless, with the exception of some South American countries, Finland, Sweden and Denmark were the only

¹⁰ Bishop, N. and Schneider, U., "Improving the Implementation of the European Rules on Community Sanctions and Mesures: Introduction to a New Council of Europe Recommendation", *European Journal of Crime, Criminal Law and Criminal Justice* 9, 2001, pp. 180-192.

¹¹ Bremer Institut für Kriminalpolitik (Hrsg.), *Experimente im Strafrecht. Wie genau können Erfolgskontrollen von kriminalpräventiven Maßnahmen sein?*, Bremen, 2000.

¹² McDougall, C. *et al.*, "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.

¹³ *Ibidem*, p. 167.

¹⁴ See the comprehensive historical analysis in Jescheck, H. H. and Grebing, G. (eds.), *Die Geldstrafe im deutschen und ausländischen Recht*, Baden-Baden, Nomos, 1978.

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 the 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 being unanimously accepted.¹⁵ The Federal Republic of Germany and Austria introduced day fine systems in 1975,¹⁶ followed by Hungary in 1978,¹⁷ then by France and Portugal in 1983.¹⁸ Some ten years ago a system of unit fines was introduced after a series of experiments¹⁹ in England/Wales through the Criminal Justice Act 1991 which went into force end of 1992.²⁰ On the other hand introduction of day fines didn't seem to be successful in England/Wales after all. Some 6 months after the new day fine provisions went into force the Home Office announced suspension of those provisions as the judiciary obviously opposed extremely the idea of fining offenders according to day fine standards. The new French Criminal Code in force since 1st March 1994 has expanded the scope of day fines which has been rather narrow since the criminal law amendment of 1983.²¹ Poland and Spain have recently introduced systems of day fines while Bel-

¹⁵ 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*, London, Vera Institute of Justice, 1981; a general overview of sanction-systems is provided by van Kalmthout, A. and Tak, P., *Sanctions-Systems in the Member-States of the Council of Europe*, Deventer/Boston, Kluwer, Part I 1988, Part II 1992.

¹⁶ See Grebing, G., "The Fine in Comparative Law: A Survey of 21 countries", *Institute of Criminology Occasional Papers*, Cambridge, num. 9, 1982.

¹⁷ Nagy, F., "Arten und Reform punitiver und nicht-punitiver Sanktionen in Ungarn", in Eser, A. *et al.* (eds.), *Von totalitärem zu rechtsstaatlichem Strafrecht*, Freiburg, Max-Planck-Institut, 1993, pp. 313-339, p. 324 (with a number of day fine units ranging from 10 and 180; the new draft criminal code will increase the maximum number of day fines to 360).

¹⁸ Spaniol, M., "Landesbericht Frankreich", in Eser, A. and Huber, B. (eds.), *Strafrechtsentwicklung in Europa. Landesberichte 1982/1984 über Gesetzgebung, Rechtsprechung und Literatur*, Freiburg, Max-Planck Institut, 1985, pp. 251-318, p. 262; Hünerfeld, P., *Neues Strafrecht in Portugal*, Juristenzeitung, 1983, pp. 673-675.

¹⁹ See Gibson, B., *Unit Fines*, Winchester, Waterside Press, 1990.

²⁰ Wasik, M. and Taylor, R. D., *Criminal Justice Act 1991*, Cambridge, 1991.

²¹ Ministère de la Justice: Circulaire Generale Presentant les Dispositions du Nouveau Code Penal, *Journal Officiel de la Republique Francaise*, Paris, 1993, p. 44.

gium has retained the concept of summary fines. The draft of proposed revisions in the penal code of Switzerland²² includes also recommendations for the introduction of a day fine system. 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 the idea of day fines into the criminal justice system and do not consider to abolish 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.

Then, suspended prison sentences and probation turned out to be quite successful as alternatives to immediate imprisonment. Furthermore, community service has received considerable attention in the 80's in several European countries with some countries like e.g. Holland and England/Wales reporting a rather strong increase in the use of community service orders. Compensation and restitution have been developed into well elaborated and fully accepted penalties. In general, community based criminal sanctions and the development of punishment philosophies trying to integrate punishment, non-custodial, community sanctions as well as the crime victim had received wide support in the eighties and were based upon the perception that still too many offenders were sent to prison although not presenting risks to the community.²³ Finally, various diversionary practices, as for example transaction fines as used extensively in Holland and in Germany, today are firmly rooted in the criminal justice system's responses to not only juvenile crime, but to adult criminal offences also. However, the latter is also a significant expression of a dislocation of powers from the judicial system to the prosecution authorities.

Actually, intermediate sanctions and diversion work in many European countries and for a wide range of offender groups. A lot of these success stories are documented in several volumes on sentencing and sentencing systems published in the nineties and providing full evidence

²² Schultz, H., *Bericht und Vorentwurf zur Revision des Allgemeinen Teils des Schweizerischen Strafgesetzbuchs*, Bern, 1985; Heine, G. and Spalinger, B., "Landesbericht Schweiz", in Eser, A. and Huber, B. (eds.), *Strafrechtsentwicklung in Europa*, Freiburg, Max-Planck Institut, 1988, vol. 2, pp. 1347-1462, p. 1365.

²³ See e.g. Home Office: *Punishment, Custody and The Community*, London, 1988, p. 2.

for the success of alternatives to imprisonment.²⁴ In 1992, the Council of Europe has adopted “European Rules on Community Sanctions and Measures” which are based on the belief that negative impacts can be avoided by strengthening community sanctions.²⁵ However, in 2000, the Council of Europe adopted “recommendations on improving the Implementation of the European Rules on Community Sanctions”²⁶ aiming at identifying the role community sanctions actually play in member states and attempting also to identify problems in implementing community sanctions properly.²⁷

Research on the implementation of intermediate penalties suggests that the judiciary and prosecution makes heavy use of intermediate penalties. However, it is obvious that there are still very clear priorities in the use of intermediate penalties. Dayfines 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 or at the end of the enforcement process. But, evidently a major obstacle concerns public demands for safety and severe punishment.²⁸

IV. WHAT KIND OF CHANGES OCCURRED OVER THE LAST DECADES

1. *Changes in Perceptions of Crime Problems and in Models of the Criminal Offender*

Changes in sanction systems during the 80’s and 90’s reflect changes in crime patterns and perceptions of crime problems. Penal policy mak-

²⁴ Tonry, M. and Hatlestad, K. (eds.), *Sentencing Reform in Overcrowded Times. A Comparative Perspective*, New York, Oxford, 1997; see also van Kalmthout, A. and Tak, P., *Sanctions-Systems in the Member States of the Council of Europe*, Part I and II, Deventer, Arnhem, 1988, 1992.

²⁵ Recommendation No. R (92), 16.

²⁶ Recommendation (2000), 22.

²⁷ Bishop, N. and Schneider, U., *op. cit.*, note 10, pp. 180-192.

²⁸ *Ibidem*, p. 181.

ers in the 60's and in the 70's have been preoccupied with developing penal sanctions along the two main groups of offenders into which the criminal population had been split up. First, mass crimes and herewith essentially the first-time offender as well as the well integrated or settled offender on the one hand, and the heavy criminal as well as desintegrated recidivating individual on the other hand have been made those offender groups for which penal policies and penal sanctions had to be developed. For the well integrated offender techniques such as diversion and a wide range of community based or intermediate sanctions have been created and implemented with day fines, compensation, probation and suspended sentences serving to avoid incarceration. Imprisonment then was thought to be the adequate response to heavy recidivists, as an *ultima ratio* or a last resort with concentrating rehabilitative efforts on this group within a secure prison environment. The basic conception of these policies which have been implemented in the 60's and 70's referred to dichotomized criminal offender groups: one not requiring rehabilitation (but for which imprisonment would even be counterproductive), the other being in need of supervision, treatment and care. Although, evaluation of this policy never came up with convincing results confirming the basic assumptions as regards its impact on recidivism and crime rates in general the policy of alternatives and intermediate sanctions was successful insofar as it managed to create an administrative feasible and economically reasonable response to increasing crime rates and exploding case loads.

It is essentially with respect to this conception of the criminal offender that significant changes came up during the 80's and 90's. In the 80's and 90's organized crime, transnational and cross-border crimes, furthermore new crimes like for example economic and environmental crimes, have been put on the policy agenda. Sensitive crimes such as hate crimes and sexual violence, terrorism and drug crimes also have contributed to change the policy debates on criminal sanctions. In particular, dangerous offenders (and among them sexual offenders) attract attention during the nineties in virtually all European countries after the Dutroux case in Belgium unleashed a hitherto unknown wave of political concern for human predators. In the wake of this interest in dangerous offenders new interest in extended prison sentences and incapacitative sentencing gave way to criminal law amendments which strengthened a response based on

longterm confinement.²⁹ However, already in the concept of mass crimes and the first-time offender/well integrated offender another policy concept was embedded which was based on a different line of policy-making than that one based upon rehabilitation. Mass crimes have lead to capacity and overload problems and have contributed to a significant trend towards simplification and streamlining basic criminal law, and in particular criminal procedure.³⁰ Then, organized, economic and other types of rational (and mostly victimless) crime have lead to an ongoing search for measures and policies likely to improve clearing rates and to overcome problems of evidence and problems of collecting evidence which has become a notorious field of concern in virtually all criminal justice systems. This is specially true for those so-called victimless crimes where the function of the crime victim, that is bringing an offence to the attention of police and prosecuting authority, is not fulfilled any more and must be taken over by criminal justice agencies themselves. These changes have contributed to the emergence of a system of proactive policing with undercover police, new investigative technologies and an understanding of crime as network relationships which in turn has lead to an erosion of the line between investigations triggered by reasonable suspicion that a crime has been committed and criminal investigations being extended to a pre-suspicion field. With the new type of crimes mentioned above the complexity of criminal cases has increased automatically, too, with certain types of economic, environmental and transnational crimes placing new and hitherto unknown demands on the procedural, legal and technological expertise of prosecution authorities and criminal courts. Finally, with all that costs of criminal justice have increased dramatically.

New types of offenders then have to be considered which are partially linked to the new crime phenomenon like *e.g.* the rational offender, the minority offender and criminal organizations or corporate criminals.

²⁹ See *e.g.* Henham, R., “The Policy and Practice of Protective Sentencing. Criminal Justice”, *The International Journal of Policy and Practice* 3, 2003, pp. 57-82; Kinzig, J., “Neues von der Sicherungsverwahrung – ein Überblick über den Stand der Gesetzgebung”, *Strafverteidiger* 22, 2002, pp. 500-504.

³⁰ Council of Europe, *The Simplification of Criminal Justice*, Strasbourg, 1988; Weigend, Th., “The Bare Bones of Criminal Justice: The Simplification of the Criminal Process”, in Heuni (ed.), *Effective, Rational and Humane Criminal Justice*, Helsinki, 1984, pp. 233-239.

With these types of offenders the basic approach adopted in criminal justice systems during the 60's and 70's, *i.e.* rehabilitation and reintegration focusing on the individual offender has come under considerable pressure. Socio-economic changes in modern societies point also towards new demands. Black markets and the shadow economy represent new social and economic frameworks and produce new precarious groups to which crime policies and criminal sanctions are adjusted. The victims then came back into the picture, and with the crime victims their needs and expectations towards the criminal justice systems in terms of compensation and restitution had to be considered. Besides the victim, the public's role, more specifically the community's role in crime control as well as the private sectors' potential in crime control, justice administration and criminal corrections have become issues in crime policy debates.

Finally, we observe a process of globalization of social problems and hence also demands for globalization and harmonization of criminal justice reform. In the last decades, international crime control conventions more and more demand for uniform legislation in basic criminal law and procedural law in order to assure swift and problemless cooperation between different criminal justice systems. 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. Forfeiture and money-laundering as well as police cooperation as framed also in the European Schengen Treaties (1985 and 1990) and the Maastricht Treaty have become European concerns. International treaties and standards (*e.g.* the European Convention on Human Rights, the European Convention Against Torture and other Degrading and Inhuman Punishment, the United Nations Prison Minimum Standards, the European Prison Rules, the Hague Child Convention, the Beijing Minimum Rules on Juvenile Justice, the Riyadh Rules and the like standards) demand for uniform and principled ways of implementing criminal sanctions. It is especially the European Convention on Human Rights and herewith article 3 forbidding degrading and inhumane treatment which influence systems of sanctions and the implementation of criminal sanctions.³¹

³¹ Jung, H., "Some Reflections on the German System of Sanctions", *Israel Law Review* 30, 1996, pp. 223-233, p. 224.

2. *Changes in Sanctions and Sentencing*

Modern criminal law then has become part of risk management in societies. Modern criminal law relies essentially on the concept of “endangering offences”, a technique today widely used in European criminal legislation to ensure for example traffic safety, proper natural environment, the well-being of economy, public health, internal security and ultimately, feelings of safety in the public. Here, the focus switches on the one hand from the results of human behaviour to risks attributed to human behaviour while on the other hand easily portrayable interests or values traditionally protected by criminal law (e.g. human life, health, property, etc.) in certain fields have been exchanged for abstract interests which risk to lack any meaningful profile (at least in the context of criminal law). With risk management and the concept of endangering offences a mechanism is initiated which among others influences the type of sanctions used. Endangering offences and herewith punishment of creating unacceptable risks for society at large have several consequences. The first consequence shows up with a convergence between sanctions or sanction severity for intentional behaviour on the one hand and negligent behaviour on the other hand. A second consequence concerns that endangering offences are frequently linked to behaviour emerging from organizations and corporations and thus demands for concepts which acknowledge corporate liability instead of focusing on individual liability.³² With that, new demands for criminal penalties adapted to the particular conditions of law-breaking emerging out of the context of organizations come up. Furthermore, as regards a third consequence which affects sanctions and sentencing modern criminal law becomes intertwined with administrative laws and thus becomes dependent on goals and needs not conceived and developed within the criminal justice system autonomously but set by other agencies. So, for example, environmental, economic, and drug offences do not contain complete descriptions or definitions of what a criminal damage done to the environment, a drug or a dangerous substance should be. Drug offences and environmental offences as well as some economic offences are not completely

³² Tiedemann, K., “Die Europäisierung des Strafrechts”, in Kreuzer, K. F. *et al.* (Hrsg.), *Die Europäisierung der mitgliedstaatlichen Rechtsordnungen in der Europäischen Union*, Baden-Baden, 1997, pp. 133-160.

defined by legislative bodies but are open to discretionary decision-making within the ministry of health, the ministry of the interior or some other administrative authority competent to add to the lists of drugs annexed usually to drug laws or prescribe those conditions under which criminal offences can be established. Intertwining administrative systems and criminal law brings upon numerous problems as has been shown for example in the case of environmental offences, tax offences, economic offences and criminal drug laws. The primary problem here concerns the conflict of goals which seems to be unavoidable and may be easily demonstrated when confronting a legalist perspective on environmental or drug problems (aiming at detection, conviction and sentencing of offenders) with an administrative or public health perspective (aiming at improving health or minimizing health risks). However, with extending criminal law in these fields a specific set of sanctions has emerged as *e.g.* the treatment-punishment/enforced treatment approach to drug users³³ and corporate penalties.

Criminal sanctions in modern societies have been characterized by separating the process of sanctioning from the public sphere. As Foucault has explained, experts and professionals have been left alone with offenders and a curtain was drawn between this process and the public.³⁴ Punishment thus had lost at least some of its expressive and moral implications as well as some of its potential to serve as regulatory in the moral economy of modern societies. Instrumental properties of criminal sanctions, their preventive potential, their impact on recidivism as well as the process by which personality change can be promoted in order to reduce the risk of relapse in crime, all these goals and procedures dominated criminal law and punishment for some of the 19th and most of the 20th century. However, over the last twenty years a process has gained momentum which seems to indicate that the modern penalty has lost at least some of their attractiveness which had been established for at least one century. With such characteristics of the modern criminal penalty some of the pre-modern elements of criminal sanctions had been out-ruled: degradation, stigmatization, incapacitation, shaming in the public,

³³ See Cesoni, M. L. (ed.), *Usage de Stupéfiants. Politiques Européennes*, Geneva, 1996.

³⁴ Pratt, J., "The Return of the Wheelbarrow Men; or, the Arrival of Postmodern Penalty?", *BritJCrim* 40, 2000, pp. 127-145.

exclusion from public and political life, all of that has been either abolished or downgraded to mere residuals (although exclusion from political participation still has remained a powerful instrument in the US as the 2000 Federal elections have shown). However, all that had no place in the moral economy of modern societies which relies on expert knowledge in a process of rehabilitating and re-including offenders and in particular on the growing body of social services blending into criminal justice systems and corrections. Punishment and criminal sanctions had progressed into discrete and untransparent phenomenon hidden from the public and entrusted to the work of experts. However, recently Pratt pointed to some phenomenon in criminal punishment which at the surface at least can be linked back to pre-modern criminal sanctions. He put forward the question of whether such phenomenon like *e.g.* chaingangs meant that the Wheelbarrow Men (who worked North American streets in the late 18th century heads shaved and wearing clothing of stigma) had returned or whether such phenomena pointed to a transformation of criminal sanctions into post-modern or late modern penalties. Indeed, introduction of chaingangs in some US states, punitive work orders in other countries, incapacitating sentencing, boot camps, supermaximum security prisons, electronic monitoring, curfews, forfeiture arrangements which tend to affect third parties (and not the culprit him or herself), organizational and conspiracy offence statutes that extend criminalization far beyond conventional participation in crime but also well known mechanisms like routine application of fines in administrative and simplified procedures as well as negotiated punishment in complex cases of economic crime are clear signs that the basic characteristics of modern penalties and criminal sanctions are changing and are giving way to new trends in systems of criminal sanctions. Changes include *e.g.* greater involvement of the public (and/or the community) in particular with arrangements that provide for confrontation of the offender with the victim and the community or exposure of certain categories of (sex) offenders to the public. The latter approaches have led certainly 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 rely more and more on expressive and mobilizing functions of criminal law when confirming that criminal justice must pursue the goal

of safety and increase the probability of punishment. “Closing the gap” between the number of offences known to police and 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). Then, 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 and control language indeed has changed into a language that is attentive to costs and customers. But, the customers evidently today are not offenders anymore, it is victims and the public who consume services provided by criminal justice systems.

3. *No Uniform Trend*

However, when looking at these changes there are no clear or dominating trends but it is evidently patchwork which reflects various and sometimes diverging interests and interest groups. Other than in the 60’s and 70’s problematisation of crime cannot be attributed clearly anymore to particular groups or parties within the political and criminal justice systems. This is also true as regards demands for more criminal law and criminal law enforcement. Crime and safety are made problems by victim and other support groups, the whole range of political parties, religious groups, unions as well as professional organisations. What makes a difference concerns only the particular type of violence and crime phenomena that are put on the respective agenda. The alleged causes of these phenomena of violence and crime are adjusted to the respective political and professional programs which are developed to guide social and political changes.

Hate violence and hate speech directed against ethnic and other minorities, sexual violence against women and children, youth violence, organised and instrumental violence, trafficking in cocaine, heroine, women and children, production and distribution of child pornography in conventional and new media (internet), crime committed by foreign nationals and drug abuse, the juvenile chronic offender, child killers and killer children, corruption, organised fraud and economic crime at large

—all these phenomena are put on the agenda, but rarely evaluated and reflected critically—. These phenomena are then used to justify demands for extending, strengthening and intensifying criminal law based crime control. Demands for criminal law and tougher punishment obviously are well-suited to demonstrate the significance of particular political positions, they strengthen the position of victims and of those who stand up to defend victims of crime. 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). For selected groups of offenders the impact is extended to security issues and dangerousness. In particular for sex offenders a punishment regime is established which is based on risk assessment, indeterminate detention and incapacitation. In general, these changes are consistent with a move in criminology away from empirical theories and towards normative theories of crime and criminal justice. However, the prospects for a “republican theory” of criminal justice (that amount essentially to recycling the thinking of a standard liberal and social democratic party of some forty years ago)³⁵ do not seem to be that good. It is evidently an enemy type criminal law that is emerging during the last decade putting the emphasis on exclusion and security rather than fundamental individual rights and re-integration.

V. CHANGES IN SYSTEMS OF PENAL SANCTIONS IN THE 80’S AND 90’S

Summarizing statutory changes and reform processes in European countries conveys the message that change is rather slow and, then, that

³⁵ Braithwaite, J. and Pettit, Ph., *Not Just Deserts: A Republican Theory of Criminal Justice*, Oxford, Oxford University Press, 1990.

change obviously is not predictable that well. There are some incidents where new penalties have been introduced although for years preceding introduction there were firm commitments not to introduce that very penalty. Moreover, seen from statutes changes are not very spectacular in Europe. As has been stated recently with respect to the new Swedish sentencing law: it is both revolutionary and leaves everything as it was.³⁶ Finally, although common issues and trends are visible there are also signs indicating diverging policy positions, in particular as regards the questions of life term imprisonment and short term imprisonment.

Sanction systems in Europe have been also affected through changes in sentencing philosophies. In case of personal crimes and property crimes the victim's perspective has been integrated with compensation and restitution serving today either as sole sanctions or, at least, as conditions in case of discharge/dismissal or suspension of a prison sentence. In sentencing theory, then, proportionality as a principal goal of sentencing has received considerable attention and wide support. While the debate on criminal sanctions in the 60's and 70's has been characterized rather through demands for adding more and more alternative sanctions to the already existing list (in order to provide for more individualization in sentencing) the 80's and 90's partially are marked through a certain trend towards simplification of the systems of sanctions. However, the nineties haven seen also a growing demand for tougher penalties³⁷ for selected groups of offenders (including *e.g.* sexual and violent offenders, organized criminals). Finally the concept of incapacitation has received re-newed attention, with life-term imprisonment without the possibility of parole (like *i.e.* provided in the French Criminal Code) or automatic life sentences (or two strike laws) as now available in England/Wales and various other options of incapacitative sentences (including *e.g.* criminal or civil commitment to psychiatric hospitals).

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.

³⁶ Arnholm, M. (ed.), *The System of Administrative and Penal Sanctions in Sweden*, Uppsala, 1997, p. 32.

³⁷ Jung, H., *op. cit.*, note 38, p. 232.

The development of sanction systems goes hand in hand with simplification of procedures. Simplification of procedures is sought in order to escape in particular those problems coming up with the phenomenon of crime becoming an everyday event. There are two lines in this simplification trend, one fueled by mass crimes where essentially fines imposed in summary procedures (or transaction fines imposed by the public prosecutor) are used to speed up procedures. The other line is marked by particular reactions towards complex and time consuming cases (*e.g.* economic, environmental and transnational crimes). Here plea-and sentence bargaining between prosecution and defense (as well as criminal courts) serves to establish consent between the parties and to minimize the burden coming along with a full-blown trial.³⁸ Although, *e.g.* the German criminal justice system in principle cannot allow for such bargaining in practice plea-bargaining has become an important means to deal with complex economic or transnational cases. Essentially, this trend has economic reasons and points towards a growing concern for economic correctness instead of political correctness.

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 —and Austria is the most recent example 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, with applying new powers such as transaction fines and the like public prosecutors create and implement also criminal policies as regards the general approaches adopted towards certain types of crimes. There is evidence also that this trend is continuing with on the one hand extending such powers on the side of prosecutors and on the other hand with entrusting the power of case dismissal increasingly to police. At least in the Dane and in the Dutch criminal justice system, such trends become visible while cautioning powers have always been part of police powers in England/Wales.

What should be considered then is the great potential of punishment and control which lies in investigative techniques that have been devel-

³⁸ Weigend, Th., *Absprachen in ausländischen Strafverfahren*, Freiburg, 1990.

oped and implemented essentially as a response to new or organized types of crimes. This goes hand in hand with the trend away from the debate on criminal law and penal sanctions towards procedural issues. The concepts of rational crime, organized crime and criminal networks are linked to the introduction of new investigative techniques which essentially aim at the collection of information, not on the usual suspects, but on a larger group of people who are thought to belong or to be close to criminal networks or criminal organizations, or could possibly in the future get involved in criminal activities. Embedded in these new investigative techniques is a large potential of supervision and control, probably far more efficient than that what is done with ordinary probation supervision, intensive probation, or even electronic monitoring. These techniques of supervising and controlling extend not only to suspects but they are implemented to monitor groups (not defined by criminal suspicion) or to survey a certain space where it is assumed that crimes are committed. This trend again is linked to the current debate on whether social groups in total may be legitimately treated as if they are likely to engage in criminal acts. Such generalized suspicion has been implemented with money-laundering controls or systems of information collection which are not based anymore on the concrete suspicion of a criminal offence but on the perception that certain (in principle legitimate) activities pose in one way or the other particular risks.

What seems to develop in the 90's is basically a four-tier approach to criminal offenders.

- A soft approach is adopted towards the juvenile offender and petty criminals (in particular such criminals engaging in traditional individual crimes such as property crimes, fraud, assault, etc.) as well as settled offenders.
- A tough approach aims at the rational and organized offender with new sanctions opening a third line in responding essentially towards illegal profits considered to be the driving force behind organized crime and black markets.
- An incapacitating approach aims also at the individual, dangerous offender though here traditional sanctions like long-term imprisonment and herewith physical control lies at the core of the penal response. This approach extends more and more to serious and se-

riously persistent offenders and those who consistently breach community sentences and thus seem to be unfit for such sentences (as was set out recently in the UK White Paper “Justice for All”).

- In case of foreign and immigrant minority offenders a mix of responses flowing from merging criminal law and immigration law based reactions is developing in the nineties.

The changes described so far point to the following concepts: danger and risk, settled and unsettled offenders, compliance and consent, justice and control.

VI. ALTERNATIVES TO IMPRISONMENT IN FACE OF CHANGES IN CRIMINAL POLICY AND SENTENCING

As far as old crime phenomena are concerned criminal sanctions most probably will develop along two dimensions which on the one hand relate to the differentiation between resident and migrant (immigrant) offender populations, while on the other hand penal responses will be organized along the difference between criminal offenders belonging to criminal networks or criminal organizations and the individual offender.

The developments in the demographic structure of suspects, sentenced offender groups and prisoners have shown in the last decade that immigrant and migrant offenders (or foreign respectively ethnic minority offenders) are the fastest growing groups in the respective populations.³⁹ With the resident and the individual offender in principle nothing changed in the last decades. Most probably the latter will continue to be subject to the trends in the sanction systems which have been developed since the 60s and 70's. It is for these resident offenders that intermediate or community based sanctions will play a major role as is diversionary practices and non-prosecution policies. In turn, this means that the role of imprisonment for these groups will continue to decline.

The migrant and immigrant offender has furthermore provoked the emergence of a new mix of administrative and criminal sanctions, a pro-

³⁹ See the reports in Tonry, M. (ed.), *Ethnicity, Crime, and Immigration. Comparative and Cross-National Perspectives*, Chicago, London, 1997; Palidda, S. (ed.), *Délit d'immigration. Immigrant Delinquency*, Bruxelles, 1996.

cess which can be explained partially by economic reasons. This mix of administrative and criminal sanctions consists of administrative measures rooted in immigration laws as well as criminal sanctions which take into account the administrative (immigration) response. So, for example, the new Spanish criminal law accepts that prison sentences of up to 6 years are not enforced if the offender is deported to his/her home country. Similar mechanisms affect the enforcement of prison sentences in virtually all European countries. Administrative detention of illegal immigrants (as well as immigrant offenders to be deported) must be mentioned here, too. Increasingly, detention centres for illegal immigrants are established and increasing numbers of illegal immigrants serve substantial periods of time prior to deportation.

The second dimension is introduced with offenders belonging to criminal organizations or networks on the one hand, and the individual offender on the other hand. With the organized or “networking” offender the phenomena of organized crime, black markets and the money trail come in. Here, confiscation and forfeiture as the “third pillar” in the system of criminal sanctions will play major roles in developing alternative sanctions adjusted to the specific needs seen in this field. While monetary penalties, administrative penalties and interdiction orders as penal responses towards corporate crime (or crimes committed in the context of corporations) will play a major role as fast as ordinary companies or corporations and the first market are concerned, it is especially penalties like confiscation and forfeiture which are considered to have the greatest potential in controlling crime organizations. The interest in strengthening control over the flow of money and the interest in confiscation of crime proceeds arose primarily within a drug trafficking context at the beginning of the 80’s and has then been extended to the profits generated by criminal enterprises and criminal organizations at large.⁴⁰ Legislative bodies have been very active in adjusting the legal framework to the needs as expressed by advocates of confiscation and forfeiture. Confiscation and forfeiture of criminal proceeds now seem to represent the most powerful weapons available in the fight against drug trafficking and

⁴⁰ See Albrecht, H. J., “Money Laundering and the Confiscation of the Proceeds of Crime. A Comparative View on Different Models of the Control of Money Laundering and Confiscation”, in Watkin, Th. G. (ed.), *The Europeanisation of Law*, London, 1998, pp. 166-207.

other types of organized crime. It is even argued that the traditional response to crime such as imprisonment and fines alone are ineffective, the better alternative being to follow the money trail with the ultimate goal to dry up the resources of criminal networks and criminal organizations. Within just one decade most of the European countries have amended both, basic criminal codes and procedural laws with the intent to facilitate seizure and forfeiture of ill-gotten gains. Both, confiscation and anti-money-laundering policies have contributed to change criminal law, criminal procedure and the systems of sanctions significantly. Policies designed to prevent organized crime from profiting from various types of crime, especially drug trafficking, are backed up by commitments to uniform legislation and joint efforts in law enforcement as expressed in international treaties and supra-national directives. Among the models of confiscation which have received considerable attention in policy debates are the U.S. statutes on forfeiture on the one hand and the English Drug Trafficking Act of 1986 (moreover the Criminal Justice Act 1993 and the new forfeiture legislation of 2002) on the other hand. These systems are strongly advocated in Europe as these jurisdictions were among the first to introduce forfeiture legislation which put the emphasis on those issues which were perceived to create severe obstacles in the attempt to combat drug trafficking through tough confiscation policies. These issues concern the problem of whether the net profits or the gross proceeds of crime should be the object of confiscation as well as the problem of full evidence which according to standard forfeiture statutes must be provided in order to prove causal links between particular assets and a criminal offence. Both, the U.S. model and the British model of confiscation were assessed to provide efficient responses to those problems. It is especially the reversal of the burden of proof which was focused upon during the debates. A general trend seems to emerge heading towards the introduction of forfeiture, not dependent on full proof beyond a reasonable doubt but requiring under-standard requirements of evidence only. These new types of non-custodial sanctions point towards important changes. While intermediate sanctions in the seventies have been developed within the framework of rehabilitation or diversion (trying to avoid the negative side-effects of imprisonment and other criminal sanctions), sanctions such as forfeiture and confiscation are solely based on the idea of incapacitating rational criminals and criminal organizations and to strip them from all means necessary to keep criminal organi-

zations going. The sanction itself is not that much pointed to an individual offender, but the rationale behind this new type of sanctions lies in drying up resources necessary to run criminal networks. It follows then that this type of sanction tends to become independent from traditional elements of criminal sanctions, *i.e.* a concept of guilt and presumption of innocence. Of particular relevance here are approaches that aim basically at de-solidarization with offenders. Civil forfeiture arrangements apparently do not focus on suspects or offenders anymore but on third parties that for what reason ever have relationships with offenders or criminal groups and networks and should be deterred away from such groups. The new English forfeiture law then is explicitly targeting what is behind all forfeiture laws: that is the “criminal lifestyle”.

Community based penalties or alternatives to imprisonment are in need of settled offenders and compliance. So, *e.g.* community service certainly is dependent fully on voluntary co-operation of the offender. However, compensation, probation as well as other non-custodial penalties rely also on a certain measure of compliance. This falls in line with developments described above for the criminal process and with developments in community sanctions that ultimately lead to contract sanctions and acceptance of behavior changing treatment approaches. 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.

Changes in sentencing goals and customers of criminal sanctions then demand for 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. There is 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 of restrictions which are placed

upon the offender. Convertability more and more is sought in combination schemes which allow for combining various community sanctions⁴¹ as well as through sentencing guidelines which provide for normative guidance in imposing alternatives to imprisonment.

These changes certainly have also contributed to develop alternative and community or intermediate sanctions into more restrictive and punitive sentences. Although, such sanctions are to be served in the community such as house arrest and electronic monitoring are determined also to provide tight supervision instead of the community bound sanctions of the 60's and the 70's headed towards rehabilitation and reintegration of criminal offenders under the guidance of social or probation workers. Electronic tagging provides evidently for a potential of sending out credible messages of supervision and control. European countries for quite some time have been rather reluctant to add electronic controls to their systems of sanctions. But, recent developments point to a growing acceptance to electronic supervision.⁴² Since the beginning of the nineties electronic monitoring entered the European crime policy arena. England/Wales, Sweden⁴³ and The Netherlands⁴⁴ were among the first to discuss introduction of electronic monitoring as a main penalty as well as an alternative for pretrial detention. After some experimentation in the said countries electronic monitoring (essentially as a form of house arrest or home detention) became all of sudden an issue of concern in 1996 and 1997 in virtually all other European countries, too. In Germany the state of Hesse introduced electronic monitoring in 2000,⁴⁵ Switzerland is ex-

⁴¹ Roberts, J. V., "Public Opinion and the Nature of Community Penalties: International Findings", in Roberts, J. V. and Hough, M. (eds.), *Changing Attitudes to Punishment. Public Opinion, Crime and Justice*, Portland, Willan, 2002, pp. 33-62.

⁴² Bishop, N., *op. cit.*, 1996, pp. 2 and 3, arguing that *e.g.* 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. and Schneider, U., *op. cit.*, note 10, 2001, p. 184.

⁴³ Bishop, N., "Le controle intensif par surveillance electronique: un substitut suedois a l'emprisonnement", *Bulletin d'information penologique*, 19/20, 1995, pp. 8 and 9.

⁴⁴ Ministry of Justice, *Electronic Monitoring*, The Hague, 1996.

⁴⁵ Entwurf eines Gesetzes zur Änderung des Strafvollzugsgesetzes. Gesetzesantrag des Landes Berlin, BR-Drucksache 689/97 of 16.9, 1997; Lindenberg, M., *Ware Strafe, elektronische Überwachung und die Kommerzialisierung strafrechtlicher Kontrolle*, München, 1997.

perimenting with electronically monitored house arrest⁴⁶ as is France since 2001.⁴⁷ Other European countries are considering seriously introduction of electronic monitoring. In most of these proposals and monitoring schemes the focus is on the replacement of short term imprisonment through electronic monitoring, most of the arguments in favor of electronic monitoring refer to problems of prison overcrowding and costs.⁴⁸ In Holland the scope of prison sentences to be replaced concerns those of less than 6 months. Electronic monitoring here is used also as an additional device in the control of sentenced prisoners paroled after lengthy periods of imprisonment (combined with other elements like participation in training programmes) and as an alternative for shorter prison sentences with combining electronic monitoring and community service. In Sweden prison sentences of up to 3 months are targeted. There, electronic monitoring is part of intensive probation supervision. Although, the mere number of countries having introduced electronic monitoring is impressive it is doubtful whether electronic monitoring will ever play a significant quantitative role in penal dispositions replacing imprisonment. Doubts arise obviously from the problem to identify suitable groups of offenders who could be eligible for electronic monitoring. Attention has been paid to the role of technology and commerce in pushing criminal sanctions such as electronic monitoring. But, the current attraction of electronic monitoring obviously is due to the heavy concern for costs in the criminal justice systems as well as to its potential to symbolize cost-benefit consciousness and modernity on the one hand as well as its potential to symbolize crime politicians concern for tough control and supervision.

Despite these moves towards discipline, punitiveness and control alternatives to imprisonment will continue to be a part of a civil type of criminal law as opposed to what is emerging since quite some time as enemy type criminal law. The enemy criminal law is different from civil criminal law insofar as criminal offenders are imagined who cannot or do not want to give a cognitive guarantee that they will behave as ordi-

⁴⁶ Circulaire du Ministre de la Justice MO 1680/IX du 27 novembre 1997, Het elektronisch Toesicht-Regelgeving.

⁴⁷ Rapport de la Commission des Lois du Senat, No. 3, 1996.

⁴⁸ Mayer, M. *et al.* (eds.), *Will Electronic Monitoring Have a Future in Europe?*, Freiburg, 2003.

nary participants in social communication and who thus do not guarantee a cognitive minimum of safety in individual behavior. These criminal offenders produce in a certain way the picture that they diverted from order and law permanently or that they have never thought about giving voluntarily a cognitive minimum of trust that they will behave as individuals bound by law, norms and social institutions in the future. As regards the answer to the question what the type of offender will be who does not provide these cognitive minimums, we find those who are characterized as being determined by (untreatable) rational choice and not by (treatable) social stress as well as personal and individual deficits as well as displaying signs of unsettledness. This approach becomes visible in particular in the context of debates on transaction crime or organized crime. There, the suspect is described as a general threat and not as a threat for individual interests. The offender is described as a threat for society at large and the social fabric and internal or external safety of the states.

VII. CONCLUSIONS

Intermediate and community based penalties, moreover alternatives to imprisonment have been successful in replacing detention as penal mechanism in case of resident and individual offenders.

However, the back bones of alternatives today as 40 years ago are fines and suspended sentences or probation.

The content of alternatives has changed —from rehabilitation towards more punitive and restricting contents—.

The latter is in particular expressed through old and new sentencing powers allowing alternatives to be combined.

These changes have been due to basic changes in criminal policies that today are more expressive than instrumental, focused on new customers, in particular the victim and the public and more interested in providing for visibility in responses to crime and to feelings of unsafety.

Alternatives that have been successful some thirty/forty years ago have not been able to stop significant increases in prison populations throughout Europe during the nineties.

The grounds for this failure lies in alternatives to imprisonment requiring settled and trusted criminal offender.

Offenders attracting prison sentences in the nineties belong to either unsettled groups (like *e.g.* immigrants, in particular irregular immigrants) or to criminal networks and imagined underworlds that do not provide for the cognitive minimum of trust that evidently is required for being eligible for alternatives to imprisonment.

Parallel to the traditional alternatives to imprisonment as emerging some 40 years ago we find new lines of alternatives though not community sanctions. These lines consist of:

- Civil and criminal forms of forfeiture.
- Administrative measures (like deportation) with punitive content.
- Procedural and investigative powers that provide for surveillance and control based on suspicion alone.