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**SPECIAL ISSUE**

# 'Judicial rehabilitation' in six countries: Australia, England and Wales, France, Germany, The Netherlands and Spain

## Editorial

Guest Editor: Martine Herzog-Evans*

I am pleased and honoured to present to the readers of the European Journal of Probation (EJP) a series of original papers pertaining to the concept of 'Judicial rehabilitation'.

To be exact, this issue goes beyond the French notion of 'judicial rehabilitation', which we chose to use as an overall title. In order to best explain it and why it was chosen as such, I need to explain how the idea of a special issue came to mind.

Whilst preparing a sentencing and probation class for my 5th year students in Reims law faculty, I read through some of the pages of Shadd Maruna's *Making Good* (2001). Reading the last pages again I realized I had not seen at first that what he recommended, in order to help finalize the desistance process, i.e. a ritual, preferably judicial, whereby the community would acknowledge solemnly that the offender had turned his life around, actually existed in French law under the label of 'judicial rehabilitation' ('*réhabilitation judiciaire'*). As a matter of fact, I had done several pieces of research on the historical and legal aspects of *réhabilitation judiciaire* and had thus studied numerous files and all known French cases. I thus planned to write a paper which would show that *réhabilitation judiciaire* did match most of Maruna's desistance ritual criteria. However when I had worked on *réhabilitation judiciaire*, I had also tried to uncover its penological grounds and had discovered that French law provided for a continuum of legal tools (criminal record expunging) which aimed first at helping with the desistance process, before finalizing its actual successful occurrence. I had also studied access to criminal records, which was strictly limited under French law in order to facilitate employment. Desistance being also a process, 'maintenance', to quote Maruna again, was crucial. The least a legal system could do – and this was undoubtedly in the community's best interest – was, in my opinion, not to make things worse. In that respect it should: limit the public's access to criminal records; sooner rather than later expunge mention

* Professor at the University of Reims, France.
Correspondence concerning this Editorial should be addressed to Martine Herzog-Evans, E-mail: martineevans@ymail.com

of at least non violent or serious crimes from criminal records in order to help with employment; and, ideally, provide for rehabilitation judicial rituals that would acknowledge achieved desistance.

I submitted my paper to Ioan Durnescu, the chief editor of the European Journal of Probation. He wrote back suggesting we issued a comparative special issue on this subject and asked me to chair it. I then contacted most of the authors who submitted to this issue: Miranda Boone (Holland), Elena Larrauri (Spain), Christine Morgenstern (Germany), and Nicola Padfield (England and Wales). I am very thankful to them for having accepted and for having written very original pieces. Bronwyn Naylor joined in later. She heard Miranda Boone, Elena Larrauri, Christina Morgenstern and myself presenting our first findings at the 2010 European Society of Criminology conference in Liege and offered to write about Australia, which we all welcomed with enthusiasm. Naturally this issue would not have been complete without a contribution from the very person who had inspired it: Shadd Maruna accepted to write a conclusive piece which would put in a theoretical and criminological perspective what we would have tried to describe with respect to our various jurisdictions. After some debate we decided to keep the title 'judicial rehabilitation' even though, strictly speaking, it only referred to the judicial ritual whereby achieved desistance was legally acknowledged.

Some of the authors who submitted to the review were at first dubious about whether they would discover anything of interest in their own legal system. Christine Morgenstern worried that our papers might come out as too legalistic and dry. I honestly do not think that this is what happened. It is my belief that our comparative approach has proved fruitful. In that respect, the collaboration of criminologists and lawyers has been an asset.

In our jurisdictions, little has been published about what I call the '*post sentenciam'* phase of the penal process, which made our endeavour all the more interesting. We discovered that *post sentenciam*, albeit less studied than other phases of the penal process be it by lawyers or by criminologists, is a very revealing vector of vast cultural differences when it comes to desistance and rehabilitation. In some countries (particularly England and Wales and Australia as shown by Nicky Padfield and Bronwyn Naylor), legal rules do not seem to focus on the need to help a person desist, in particular with regard to employment; on the contrary, a 'right to know' (to be compared to the French 'right to be forgotten') about a person's past seems to prevail, in numerous and increasing situations. This is certainly a sign of the penetration of tough on crime laws and culture of control trends, more apparent in common law countries than in continental Europe. However, the historical approach provided by Bronwyn Naylor also shows that the 'right to know' may also have deeper and older roots. An England and Wales (and Australia) and continental Europe divide was thus revealed. However, as is also apparent with other penological issues (see e.g. the recent edition of EJP on community service), Holland can be perceived as having one foot in common law countries and one foot in continental Europe jurisdictions. Unsurprisingly, Roman-Germanic jurisdictions (France, Germany and Spain) have a lot in common: they seem to still believe in rehabilitation and their legal rules – for the most part untouched by frantic legal reforming, at least as of *post sentenciam* – are very close. Elena Larrauri also pointed out that the importance of privacy in a given culture might have explained some of the differences that we came across.

Still, we also discovered that only France had rehabilitative rituals per se, although Germany had an equivalent for juveniles, which, was however never used; that all continental countries had one method or another of expunging criminal records; that they did not, unlike England

and Wales and Australia, let the public access these records; but that other administrations (police, public services when hiring people...) had such right. We also found that since employers could nonetheless ask employees to provide either certificates of good conduct or records' extracts, expunging or sealing techniques were definitely useful, whatever the technicalities in our various jurisdictions were.

However, all countries were stricter with sexual offenders, especially in order to prevent them from securing employment which involved contact with children. It is only with regard to this category of offender that there seemed to be an important reformative activity from governments; other than that *post sentenciam* did not seem to interest reformers.

In conclusion, as Miranda Boone emailed all of us: 'I can't wait to do empirical research'. Indeed, we have just uncovered part of the legal and theoretical background of judicial rehabilitation, expunging techniques, and more generally of access to criminal records and offenders' employment. Numerous questions are still raised: how often do employers actually ask for criminal records (it seems to be common practice in some countries, and rare in others... this would however need being confirmed), what is their reaction if they learn about the past of someone they are about to hire or have hired? Are there important cultural differences with regard to this? Are things changing in our respective jurisdictions – in particular are people less tolerant or 'reintegrative' than they might have been years back? What is the influence of the media in that respect? In other words, there is a sea ocean's worth of new research to conduct and it is our hope that this special issue will be a first step in that direction.