

## Editorial

Nicola Padfield<sup>1</sup>

This special issue of the European Journal of Probation seeks to cast some light on a subject which until recently appears to have been somewhat hidden. There has been widespread discussion of growing prison populations, but so far, it would appear that both European academic criminology and public debate have largely ignored one important cause: the decisions of administrative or judicial bodies to recall released prisoners back to prison. This provides something of a paradox: the increasing size of prison populations, and the increasing use of recall, is happening at the same time as there appears to be an increase in the number and variety of early release schemes. Paradoxically, an ‘improvement’ in the supervision of released offenders may actually lead to a rise in the prison population: closer supervision may mean more recalls to prison?

This series of articles has not been ‘scientifically’ selected. The authors have simply been identified, or identified themselves, as interested in the subject. The coverage could usefully have been much wider, but what we have here is an important starting point for further debate. There are dramatic differences between otherwise similar systems (for example, in Scotland questions of recall are normally referred to the Parole Board for decision before the offender is returned to prison; in England, the Parole Board is only involved after the event of recall). On the other hand, even where processes appear very different, the authors of these articles often raise similar questions. The Editorial raises some common concerns.

First, once a prisoner has been released from prison, who should be responsible for the decision to revoke any ‘early release’ or licence? In some countries and for some prisoners, release may be unconditional. But many of the schemes of early release discussed here allow a prisoner to leave prison on conditions or on licence. Who decides if a licence condition has been broken and if the breach is serious enough to justify re-imprisonment? We see many different patterns developing: and different trends in different jurisdictions. In Germany and in Austria, the recall procedure is seen as providing the court with the opportunity to review the suspension of the sentence and the underlying prognosis, and it is not simply seen as a means of sanctioning or punishing offenders for violating their conditions of release. There are various alternative sanctions to recall. But in all the jurisdictions, the processes seem

---

<sup>1</sup> Nicola Padfield is a senior lecturer at the University of Cambridge. Contact: Fitzwilliam College, Cambridge CB3 0DG; email: nmp21@cam.ac.uk

somewhat ‘blunt’: there is little discussion of lessening or ‘tightening’ punishment under certain conditions (see Crewe, 2011).

Language is always interesting: this English academic writes more easily of recall or revocation of licences, but the Spanish authors speak of ‘regression’ (see Cid and Tébar, this issue: 115). This term usefully reflects the idea that the prisoner is going backwards: the offender is like a counter (or token) on a snakes and ladders board (is this game common throughout Europe?). The offender progresses slowly though their sentence helped by certain ‘ladders’ upwards – but the recalled prisoner falls to the bottom of a long snake, ‘regressed’ to an earlier stage in the sentence, starting the slow journey up the board, looking, often as if blind-folded, for ladders to speed the climb.

The rules appear complex everywhere. Different schemes of conditional release may co-exist, with different sanctions for ‘failures’. In some countries the length of the original sentence will decide the appropriate scheme. Thus, for example, in Belgium the appropriate release scheme depends on whether the prisoner was sentenced to more than three years imprisonment (why not two or four? The answers to such questions often lie in history). Whereas in Spain, more important than the length of sentence is the category of prison regime. The offender on home detention curfew or parole is still a ‘prisoner’ within the Spanish system. In most countries it would appear that the most common reason for revocation or regression is re-offending. But does this mean conviction (as the rule of law requires in Spain) or the very different English practice, where arrest is sufficient to justify recall? The British system can appear deeply unfair: the charges may be dropped, but he or she remains recalled to prison.

Another apparent injustice is the practice in some countries that, when parole is revoked, the part of the sentence suspended by parole comes back into force in full (the period spent outside the prison is not deducted from the prison sentence). This is the case in Slovenia. And the Belgium system appears for similar reasons to discourage offenders from applying for conditional release, since this extends the length of the period under the control of the criminal justice system. Instead prisoners often choose to ‘max out’. It seems very unfair that time spent at liberty before revocation should not count toward the sentence, as it does in many other jurisdictions (Spain, England).

Whilst Belgium has been increasing the role of the judiciary, in England the power of the administration is being increased. In some countries (Belgium, France, for example) we see Sentence Implementation Courts, which may be administrative or multidisciplinary (which may in itself blur the distinction between a judicial and an administrative body). In Spain a person is called back to closed conditions on the decision of the general director of the prison system following a proposal from the Treatment Board and only then is the case considered by a prison judge, and from there a case may be appealed to a sentencing court. In England, too, recall is initially a purely administrative process. Re-release may be authorised by the administration or by the semi-independent Parole Board. To this reviewer, it seems clear that there should be judicial oversight of this process. Executive recall followed by lengthy periods of further imprisonment, cannot be just or appropriate. Those who are recalled to prisons, or who regress to closed conditions, should be entitled to be re-

released as soon as possible: an independent court or tribunal must find valid legal reasons for further detention.

But judicial oversight alone will not resolve many of the problems which may arise. The tests for recall and for re-release seem to vary hugely. Slovenian law seems more certain than many: the court *must* revoke parole if the parolee commits during the parole period one or more criminal offences incurring a prison sentence of more than one year (Art. 89(1) CC). In other systems, revocation does not follow automatically. English and Scottish authors have found the distinction between the concepts of ‘front door’ and ‘back door’ sentencing to be useful. A sentencing court may send someone to prison ‘visibly’, through the front door. Recall is a less visible, ‘back door’, way into prison. Thus, Weaver et al usefully consider the policy relationship between ‘front door’ and ‘back door’ sentencing in Scotland and how its consequences are undermining the effectiveness of support and the ability of offenders to comply with conditions (see in particular, this issue: 91-93). But the concept of this ‘backdoor’ to prison does not necessarily apply to more judicialised processes.

Even in a judicialised process, the judge or judges are heavily dependent on the decisions taken earlier in the process and are reliant on others to provide them with the information on which their decision must be based (two very different ‘problems’). In Italy the recall process is initiated by the Surveillance Judge who provides the Surveillance Tribunal with the evidence upon which the final decision of returning the offender to jail is based. Gualazzi and colleagues, in this issue, conclude that the ‘real’ problem with the recall system in Italy, the so called ‘penitentiary sentencing’, is that, whilst the recall procedure itself is a judicial procedure, regulated by the law and subject to the control of the Supreme Court, the surveillance judges have ‘excessive’ discretion’ (79).

Many of the articles underline the role of social workers or probation officers. Recent years have seen the development of a variety of probation services, with responsibilities for supervising offenders. They function under fascinatingly different names. For example, Belgium probation officers have now become ‘justice assistants’. This may be a useful change, underlining their role as supporting the justice system, not as part of the penitentiary system? In Scotland, they are Criminal Justice Social Workers (CJSWs), employed by local authorities to work within wider social work departments, rather than as part of a centralized ‘offender management’ authority (as in France or England). In both France and England, the probation service often appear as the ‘poor relation’ of the prison system. In England many probation ‘services’ appear to be facing privatization. Is this an appropriate role to be undertaken by private sector organizations? In reality, the parole or probation officer, the justice assistant, the CJSW, whatever he or she is called, is in a compromised and often “an (uncomfortable?) intermediary position” between friend and licence enforcer (see Bauwens, Robert and Snacken, this issue: 25). Should they be specialist ‘parole officers’, with a more open recognition that they are part police officer, part social worker? Another question is whether such workers are adequately skilled and trained (or are they becoming de-skilled)? It may well be that the focus of their work in many countries is increasingly on routinised enforcement practices. Here, we see another facet of the paradox: the more ‘efficient’ probation officers appear, the more likely they may be to recall offenders. The Parole Board for Scotland says, without apparent irony, that the increasing number of recalled prisoners is explained by the

“improved quality of service in the post-release phase”. And let us not forget that the reality in several of the countries reviewed here is that in most cases “parolees are left to themselves upon release” (Šugman Stubbs and Ambrož, this issue: 109).

Supervising staff often have both heavy caseloads and enormous powers. There needs to be much more research into the decision-making of these criminal justice workers: is there a danger that they may become preoccupied with enforcing what may be technical breaches, or so committed to public protection, and so risk averse, that they forget the offender’s perceptions of legitimate or fair treatment or their right to rehabilitation? Several of the articles note poor communication between different criminal justice agencies (Slovenia, for example). But there are also examples of what might be called ‘good practice’: particularly, in the relationship between courts and supervisors. In Austria, probation officers report regularly to the court (after six months, initially): see Bruckmüller, this issue, at page 14. These court reviews of successful as well as unsuccessful cases seem to me to provide an interesting example of what Maruna calls re-integration rituals (see Maruna, 2011). Herzog Evans makes very clear that the *juge d’application des peines* provides a human face to release and recall decisions. I have suggested elsewhere the need for English legislators to consider the practice in France: a process which is both judicialised and individualised (Padfield, 2011). Another piece of good practice comes from Austria: an offender cannot be recalled for breaching a condition of his licence without having been given first a formal warning.

It is easy for Governments to promote early release schemes. Sometimes this is openly acknowledged to be in order to reduce the prison population (in Scotland or in Italy, for example) or to encourage the resettlement of offenders in the community (in Spain). Elsewhere there may be more mixed messages and motives. But the decisions of the individual players within the process are also constrained by what seem to be ever-growing levels of public and/or media anxieties about crime. This so-called popular punitiveness has encouraged both legal and practical restrictions on the way early release is implemented, thereby contributing to the continuing growth of imprisonment rates (see Cheliotis, 2010 for a striking description of this phenomenon in Greece). The media highlight rare catastrophes such as dreadful murders or riots (in Belgium in the 1970s or in England in 2011). But nothing is straightforward. Some ‘players’ within the process remain more rehabilitation-focused than other. Herzog Evans paints a fascinating picture of French *juges d’application des peines*, with their generally rehabilitative approach to sanctioning non-compliance, for example, taking offenders’ personal circumstances and individual ‘merit’ seriously, resisting public punitiveness.

Many of the articles focus on the use and abuse of discretion, or as Herzog Evans nicely puts it, ‘the problem with discretion’ (this issue: 59). I am often reminded when reading these articles of Dworkin’s warning that ‘discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept’ (Dworkin, 1977: 39). The size of the hole in the ring doughnut, the breadth of discretionary powers, is constrained not only by detailed laws and administrative guidelines. The powers of both judges and judicial assistants/probation officers are constrained in complex ways. It is to be hoped that these articles may lead to further comparative analysis of discretionary decision-making. The article from Slovenia provides a practical case study which may

well prove to be an effective way to progress comparative research in this area. We know so little: questions of age (for example, see the question raised by Pruin (this issue: 69) on why, in the German context, younger probationers are recalled sooner than those released from an adult prison sentence), race and gender are staring us in the face: discrimination is the sister of discretion.

This is not just a topic of academic interest. We should identify significant issues of justice. Prisoners should not want to forego early release on the basis of potential injustice; offenders who are recalled simply because they are suspected of further offences (often on arrest) should be entitled to re-release when the subsequent charges are dropped, or when they are acquitted. These articles throw up many such examples of potential injustice. Perhaps a subsequent review will explore the relationship between all sentencing decisions and previous conviction history (including recall).

This brief introduction should not end without pointing out that the available statistical data are frequently problematic: it is of course easier to note the numbers of those who are recalled for re-offending, than those who are not recalled. We do not know how many offenders who have re-offended or been reconvicted are not recalled. But even with revocation/recall data, the figures are unreliable. Even in Germany, data do not distinguish between those supervised who were conditionally released after serving much of their sentence, or whether the sentence was suspended from the start. In England, probation statistics often ‘merge’ those offenders who are serving minor community penalties with those, more serious offenders, released conditionally from prison. Thus the frequency of recall remains unclear: whilst it is a “daily occurrence in Austrian court rooms”, and perhaps 30% of suspended sentences are activated in Germany, it is difficult to draw clear conclusions. We have a lot still to learn!

### **References (apart from those which are to the individual papers in this Special Issue)**

- Cheliotis, L. (2010) ‘Greece’ in *Release from prison – European policy and practice* (Padfield, N, Dünkel, F and van Zyl Smit, D (eds). Cullompton: Willan.
- Crewe, B. (2011) ‘Depth, weight, tightness: Revisiting the pains of imprisonment’ 13 *Punishment & Society* 509-529
- Dworkin, R. (1977) *Taking Rights Seriously*. London: Duckworth.
- Maruna, S. (2011) ‘Reentry as a rite of passage’ *Punishment & Society* 3 – 28
- Padfield, N. (2011) ‘An Entente Cordiale in Sentencing?’ (2011) 175 *Criminal Law and Justice Weekly* 239-42, 256-9, 271-4 and 290-293