Factors of criminalisation - A European comparative approach

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Transformations of the criminal justice systems in western societies have recently been linked with broader social and political changes. However, while some analyses focus on social and political changes which are assumed to be common to all western societies and to eventually influence their criminal justice systems in similar directions, others emphasize differences between developments in individual jurisdictions. In the first group, the globalisation processes of the economy are seen as limiting the traditional competences of national states. A worldwide shift of the welfare model towards the model of global capitalist competition is developing, although at different paces and with different depths in different national states. As economic and social matters increasingly escape national control mechanisms, national states are forced to find a new legitimacy. Crime and insecurity as political topics hence become
more a solution than a problem, leading to the emergence of « penal states » or « security states ». The US is described as the extreme model of the « penal state », imprisoning up to 20 times as many of their citizens as other western countries. The ongoing dismantling of the « social states » in Western Europe is however seen as a risky trend in the same direction towards « penal states » in Europe (Garland, 2001).

On the other hand, despite similar economic transformations, public opinion patterns, social developments and crime trends in most western countries, punishment trends vary widely. Several American innovations seem to have appeal only in Common Law jurisdictions such as England and Australia, and continental European traditions conversely do not take hold in the UK or US (Tonry, 2001).

One explanation could lie in the recognition that criminal justice systems have a relative autonomy from social trends and pursue their own aims: not only the general instrumental aim of crime control, but also intrinsic aims (due process, accountability, human rights) and organisational aims (staff and financial resources, bureaucratic aspects). Another explanation could lie in cultural differences between countries that affect penal policies, such as humane and moralistic ideas about crime and punishment, social welfare values, a greater receptiveness to rational and expert-based information, a European emphasis on human rights (Tonry, 2001, 530).

Indeed, the two distinct legal cultures of continental-European ("civil law") and common law systems are rooted in fundamentally different conceptions of the state and state power and its relation to the citizens. This might provide a further understanding of diverging penal policies in the face of increasing populist punitiveness through distinct political cultures. On the other hand, this may also explain the differences between liberal and democratic welfare states (Esping-Anderson, 1990), the emergence of different welfare models in the western world (Scandinavian, Anglo-Saxon and European) and their diverse relations with and influence on criminal and penal policies.

These two trends seem to indicate that our societies are facing common developments, which could lead to similar criminalisation tendencies in Europe as in the US, but also national differences which could allow for different political decisions. The fundamental question then becomes whether all European countries will witness the same populist and exclusionary criminal policies as described by Garland (2001) for the UK and the US?

To answer this question, a thorough comparative analysis of the indices of change should be pursued. In this introductory seminar on “Factors of criminalisation”, we have exchanged information on how different political and penal systems in Europe react to the more global social and political transformations. This analysis revolves around: (a) the interaction between (primary and secondary) criminalisation trends and welfare policies; (b) human rights; (c) victim movements; and (d) public versus expert opinion. The presence of 45 scholars from the different regions of Europe has allowed this seminar to aim at a really comparative European approach to these complex matters, which will be discussed below 1.

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1 After this introductory seminar, the discussion will be continued in subsequent seminars concerning three specific areas of (de)criminalisation: juvenile justice, drug policies and immigration policies.
1 - Welfare policies and criminalisation

1.1 - Interaction between welfare and penal policies

For the first seven decades of the past century, the principal hope of criminologists, penal reformers and most politicians was that the ‘welfare state’ would lead to a reduction in both crime and the need for punishment. However, the apparently remorseless rise in crime rates from the mid-1950s until, in most countries, the mid-1990s, eroded that confidence. The era of ‘penal-welfarism’, most prominent in Anglo-Saxon and Scandinavian countries, is seen as ceding ground to the era of a ‘culture of control’, especially in the US and UK (Garland 1985, 2001). For over two decades, the trend towards mass imprisonment has been accompanied by ever tighter restrictions on welfare rights for the poorest families. Several studies, discussed below, come to the conclusion that investments in welfare capital and penal capital are increasingly inversely related. These findings are of substantial importance from a policy perspective, as they indicate that a country that increases the amount of its GDP spent on welfare sees a relatively lower rate of increase or a greater decline in its imprisonment rate than in the past.

a) The United States: social marginality and penal exclusion

In the most systematic study of the welfare/punishment links to date, Beckett and Western (2001) view social and penal policies as inextricably linked, two ways of responding to social marginality. Welfare regimes in the US vary according to their commitment to including or excluding marginal groups. Inclusive regimes emphasise the social causes of marginality and aim to integrate the socially marginalized by generous welfare programmes. These regimes have less harsh views on crime and have lower imprisonment rates. By contrast, exclusionary regimes lay responsibility for social problems in the hands of the socially marginalized. Thus, the unemployed are seen as work-shy, deviancy is unjustifiable and deviants are non-reformable. Such regimes provide less generous welfare, take a harsher stance on crime and are more likely to favour imprisonment.

Beckett and Western test this approach using data from 32 US states for 1975, 1985 and 1995. After controlling for several factors such as crime rates, they find that as welfare spending increases, rates of imprisonment increase less sharply or are relatively lower. They also find a clearly positive relationship between imprisonment in a state and the proportion of black and other ethnic minority groups, the poverty rate and Republican representation in that state. Poor states with high poverty rates and large numbers of ethnic minority groups that have a Republican majority tend to imprison more people. Most of these relationships are stronger in 1995 than in earlier periods.

b) Cross-national analysis of the punishment and welfare thesis

Welfare policies in European countries have traditionally been more encompassing than in the USA, but are said to increasingly incorporate aspects of the American market driven approach to welfare. Despite these trends, huge national differences remain in the generosity of

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welfare provision. Despite recent changes, for example, the Nordic countries largely continue to provide a generous universal welfare state with, for the most part, high labour market security and a low incidence of poverty. By contrast, neo-liberal market approaches, typified by the United States, attach strict conditions to time-limited welfare; are less concerned with redistribution or equity across classes; and associate welfare spending with creating a culture of dependency. Unsurprisingly, as a result, inequality among citizens is great, as are its costs. A major comparative study found that economic inequality and low welfare provision are strongly related to high rates of lethal violence (Messner, Rosenfeld 1997). More generous welfare states therefore may not have lower rates of crime in general, but are less exposed to the most feared types of crime such as homicide. They also know a more restrained use of imprisonment. The underlying reasons arguably have much to do with the greater social cohesion and stability that flow from perceptions of fairness and investment in social capital. Despite having had for almost a decade a daily prison population of over two million, between 5 and 10 times the rate of Canada and most Western European countries, the US homicide rate remains three times their level.

Downes and Hansen (2006) have tested this hypothesis using comparative data from 18 OECD countries. Results matched the findings of Beckett and Western using US state-level data: that is, states that spent more on welfare had lower imprisonment rates (see Table 1), and the expenditure on welfare had a greater impact on imprisonment rates in 1998 than it did a decade before.

Table 1 - Descriptive Statistics on Imprisonment, GDP and Welfare across Countries, 1998

<table>
<thead>
<tr>
<th>Country</th>
<th>Imprisonment Ranking</th>
<th>Imprisonment Rate (Per 100,000 of the population aged 15+)*</th>
<th>Percentage of GDP spent on welfare</th>
<th>Welfare Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>USA</td>
<td>1</td>
<td>666</td>
<td>14.6</td>
<td>-8.2</td>
</tr>
<tr>
<td>Portugal</td>
<td>2</td>
<td>146</td>
<td>18.2</td>
<td>-4.6</td>
</tr>
<tr>
<td>New Zealand</td>
<td>3</td>
<td>144</td>
<td>21.0</td>
<td>-1.8</td>
</tr>
<tr>
<td>UK</td>
<td>4</td>
<td>124</td>
<td>20.8</td>
<td>-2.0</td>
</tr>
<tr>
<td>Canada</td>
<td>5</td>
<td>115</td>
<td>18.0</td>
<td>-4.8</td>
</tr>
<tr>
<td>Spain</td>
<td>6</td>
<td>112</td>
<td>19.7</td>
<td>-3.1</td>
</tr>
<tr>
<td>Australia</td>
<td>7</td>
<td>106</td>
<td>17.8</td>
<td>-5.0</td>
</tr>
<tr>
<td>Germany</td>
<td>8</td>
<td>95</td>
<td>26.0</td>
<td>3.2</td>
</tr>
<tr>
<td>France</td>
<td>9</td>
<td>92</td>
<td>28.8</td>
<td>6.0</td>
</tr>
<tr>
<td>Luxemburg</td>
<td>10</td>
<td>92</td>
<td>22.1</td>
<td>-0.7</td>
</tr>
<tr>
<td>Italy</td>
<td>11</td>
<td>86</td>
<td>25.1</td>
<td>2.3</td>
</tr>
<tr>
<td>Netherlands</td>
<td>12</td>
<td>85</td>
<td>24.5</td>
<td>1.7</td>
</tr>
<tr>
<td>Switzerland</td>
<td>13</td>
<td>79</td>
<td>28.1</td>
<td>5.3</td>
</tr>
<tr>
<td>Belgium</td>
<td>14</td>
<td>77</td>
<td>24.5</td>
<td>1.7</td>
</tr>
<tr>
<td>Denmark</td>
<td>15</td>
<td>63</td>
<td>29.8</td>
<td>7.0</td>
</tr>
<tr>
<td>Sweden</td>
<td>16</td>
<td>60</td>
<td>31.0</td>
<td>8.2</td>
</tr>
<tr>
<td>Finland</td>
<td>17</td>
<td>54</td>
<td>26.5</td>
<td>3.7</td>
</tr>
<tr>
<td>Japan</td>
<td>18</td>
<td>42</td>
<td>14.7</td>
<td>-8.1</td>
</tr>
</tbody>
</table>

Notes: Data are from 1998.
* These are the number of prisoners held either as remand prisoners or those convicted and sentenced per 100,000 of the population aged 15 and over. These numbers are slightly different from those published in the World Prison Population list, which gives the imprisonment rate per 100,000 of the entire population. We have excluded young children here as they are excluded from the imprisoned population.

c) Penal Systems and Political Economy

Welfare is but one component, albeit a major strand, of political economy. In the most wide-ranging survey to date of the relationship between types of political economy and the character of punishment, Cavadino and Dignan (2006) analyse the penal systems of twelve societies. Basing their typology on Esping-Anderson’s landmark study of welfare in late-modern capitalist societies (1990), they distinguish between four types of political economy and their penal tendencies as follows (op. cit., 15):

1. **Neo-liberalism**: free market, low welfare provision, extreme inequality, limited social rights, right-wing politically, highly exclusionary both socially and penalily, high imprisonment rate: archetype the USA (detention rate 701); South Africa (402); New Zealand (155); England and Wales (141); Australia (115)

2. **Conservative corporatism**: moderately mixed economy and welfare state, pronounced inequality, qualified social rights, centrist politically, penally rehabilitative, medium imprisonment rate: archetype Germany (98), but also France (93), Italy (100), the Netherlands (100)

3. **Social democratic corporatism**: universalistic, generous welfare state, limited inequality, relatively unconditional social rights, left-wing politically, rights-based penally, low imprisonment rate: archetype Sweden (73), but also Finland (and, logically, Norway and Denmark: 70).

4. **Oriental corporatism**: private sector welfare system, very limited inequality, quasi-feudal inclusiveness, politically centre-right, inclusionary penalties, low imprisonment rate: archetype Japan (53).

All three studies show a significant and growing relationship between the nature of political economy and the commitment to welfare, on the one hand, and the scale and punitiveness of penal systems, on the other, independent of crime rates. Moreover, comprehensive welfare systems offer a better protection against lethal violence. These findings indicate that the principal criterion of liberal Social Democracy, the willingness to intervene in the market for social and welfare ends, remains as, if not more important, than in the past. Above all, these studies imply that a substantial welfare state is increasingly a principal, if not the main protection against the resort to mass imprisonment in the era of globalization.

**1 - 2 - The Scandinavian path to welfare**

The comprehensive Scandinavian welfare states have from time to time been the objects of criticism and incredulity, but have in recent years won renewed praise and admiration from a variety of sources. The

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3 Stein Kuhnle (Univ. Bergen; Hertie School Governance, Berlin), *The Scandinavian path to welfare: lessons from Europe and lessons to the world*.
outcomes of the various welfare state institutions seem to be successful in terms of values and objectives highly regarded by many: limited poverty; relatively high degree of income equality; social stability – and relatively less crime of (violent) kinds, which again is conducive to less expenditure in other chapters of government budgets.

What follows highlights some of their major characteristics which relate to the underlying values of Scandinavian welfare state construction.

- The scope of social planning, including establishing and developing social security, health and educational systems during the first half of the 20th century, was clearly a result of democratic political processes aimed at balancing demands for and goals of economic growth and social justice. Scandinavian history has shown that ‘welfare’ can be ‘productive’: while the Scandinavian countries were considered poorer than the US and UK at the beginning of the 20th century, they are now amongst the richest countries. One possible effect of an unemployment insurance system is that it facilitates the process of restructuring in industry and business, as economic security enhances workers’ and employees’ flexibility.

- Social security policies are also about political and social preferences and anticipated effects of policies. The Nordic welfare model is based on the principles of public responsibility for the collective well being (the state as friend, almost no distinction between state and society) and the universalism of welfare through the institutionalisation of social rights (welfare as a basic right for each citizen).

- Recent Scandinavian (and European) experience indicates that there is no obvious clear link between scope of the welfare state, taxation levels, employment rates, labour productivity and economic growth. The examples of Sweden and, especially, Finland during the 1990s, show that comprehensive, democratic welfare states are fully capable of making policy adjustments to stimulate new economic growth when ‘hit’ by a serious economic recession or backlash. Social security represents a shock absorber and prevents the economic crisis to hurt primarily the most vulnerable social groups, which are also the most vulnerable to penal interventions.

- The Scandinavian welfare states, with their emphasis on (public) social services for children, the old and sick, can be considered ‘work-friendly’, ‘family-friendly’, and ‘business-friendly’. When families are relieved of some of their ‘burden’ as care-givers (for their young, old and sick family members), then labour market activity and labour mobility can increase, and thus also economic productivity and growth.

While it is often stated that the European welfare states are under serious pressure due to the open market globalization, the Scandinavian welfare model seems to have secured a lasting legitimacy, both with the public and with politicians from all parties. The economic crisis of the 1990s has not weakened its support. On the contrary, it has shown to be an important guarantee for all citizens, including the most vulnerable social groups, which are also the most vulnerable to penal interventions.

1 - 3 - Welfare states, penal states or « security welfare states » in Europe?

(Western) European societies still believe and largely invest in their welfare systems, and their incarceration rates are still vastly below the

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4 Philippe Mary (Université Libre de Bruxelles), Pénalisation du social ?
European societies can therefore not be described (yet) as “penal states”. However, changes have occurred in the European welfare and political systems, resulting in more security measures, an overall increase in prison rates and a questioning of the principle or the cost of solidarity. “Security welfare states” seems a better term to describe these current developments (“État social sécuritaire”). It is also important to look more closely at the different categories of welfare investments and their respective target groups. In Belgium e.g., welfare investments have increased by 70% between 1992 and 2005, and unemployment benefits by 65%. However, the latter represent only 10% of the total welfare investments, compared to 36% for pensions and 24% for health. This trend is expected to continue, which means that social security investments increasingly benefit the elderly population and less and less the young unemployed. And it is precisely this latter population who is most vulnerable to penal interventions and imprisonment.

2 - Human rights and criminalization

2.1 - Human rights against penalization in Europe?

Human rights are traditionally seen as a bulwark against criminalization, as the punitive system of criminal law cuts very deep into the freedom of the citizens. Criminal law should therefore be minimal and marginal and must meet a number of severe constitutional and human rights related conditions and standards. National constitutional courts and international human rights courts, such as the European Court of Human Rights, play an essential role in setting these conditions and standards. There is however a more recent tendency in which criminalization is seen as a necessary instrument for the protection of the human rights of victims of crime by their fellow citizens or by the state. And in the wake of the 9/11 attacks, anti-terrorist measures seem to foster a disproportionate penalization and to weaken the traditional bulwark of human rights.

The European Court of Human Rights (ECtHR) seems caught in this ambivalence. On the one hand, analysis of its case law shows a recent strengthening by the Court of the protection against elements of over-penalization such as the death penalty (Öcalan v. Turkey, 12 March 2003), torture (Selmouni v. France, 28 July 1999), inhuman and degrading punishment or treatment (Van der Ven v. the Netherlands, 4 February 2003), prison overcrowding (Dougoz v. Greece, 6 March 2001), disproportionate sentences (Weeks v. UK, 2 March 1987; Stafford v. UK, 28 May 2002), and life imprisonment without the possibility of parole for adults (Stafford v. UK, 28 May 2002; Einhorn v. France, 16 October 2001) or juveniles (T. v. UK, 16 December 1999).

On the other hand, the bulwark against (excessive) primary and secondary criminalization is not watertight. The Court, faced with large discrepancies between the member states on issues of criminalization and punishment levels, often relies on the margin of appreciation left to the national governments and courts in determining penal policies. E.g. a sentence to imprisonment must be legitimate according to Article 5.1, but the Court does not interfere with the “appropriateness” of the sentence imposed by a judge, unless it is considered grossly

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5 Paul De Hert, Serge Gutwirth, Sonja Snacken, Els Dumortier (Vrije Universiteit Brussel, Belgium), La montée de l’État pénal : que peuvent les droits de l’homme ?
disproportionate. The scrutiny of the Court into the principles of necessity and proportionality of the penal intervention is stricter with regard to Article 10 on the freedom of expression than for Article 5 which protects the right to liberty itself (Snacken, 2006). Even stronger, the Court has recently argued that the protection of human rights against severe violations by the state (Khachiev & Akaïeva v. Russia, 24 February 2005, Isataeva v. Russia, 24 February 2005 on extra-judicial killings; Öneyildiz v. Turkey, 30 November 2004 on deaths near a rubbish dump) or fellow citizens (M.C. v. Bulgaria, 4 December 2004 on rape) must necessarily be of a penal nature, thus fostering primary and secondary criminalization in these cases (De Hert, Gutwirth, Snacken & Dumortier, 2007).

A better codification of the basic principles for a subsidiary, modest and humane penal system is therefore proposed, e.g. through a Protocol to the ECHR (cf. Article II-109 of the European Constitution which prohibits disproportionate sentences).

2 - 2 - Human rights and criminalization in Hungary

As a result of the change of political regime in Hungary between 1988 and 1990, the attitude towards human rights and the related foundations of criminalisation has transformed. Before the transition period of 1988-1990, the “rights of the citizen” were featured in the Hungarian Constitution of 1949, modified in 1972. However, the Constitution was a so-called „paper or facade constitution” that possessed little normative power and did not restrict the possessors of power. The basis of criminalization had been, similarly to other socialist countries, social dangerousness, a „Guiding principle” of the soviet criminal law of 1919. The principles of *nullum crimen sine lege* and *nulla poena sine lege* were applied, but the principles of necessity, proportionality and ultima ratio as the obstacles to criminalisation were not. The Constitution was fundamentally amended in 1989, and its role and normative content strengthened by the acceptance of the rule of law (Art. 2.1). The institutional basis of the guarantee and protection of human rights was established (Article 8 “The Republic of Hungary recognizes inviolable fundamental rights. The respect and protection of these rights is a primary obligation of the State”). A detailed enumeration of human rights is listed in Chapter XII (“Fundamental Rights and Duties of the Hungarian Constitution”), which also includes the most important impediments of criminal law and criminal justice, such as the prohibition of torture or cruel, inhuman or humiliating treatment or punishment and the guarantees of due process.

Other significant institutions for the protection of human rights are the Constitutional Court established in 1989, the parliamentary ombudsman for civil rights and the parliamentary ombudsman for the rights of national and ethnic minorities. The European Convention for Human Rights and Fundamental Freedoms entered into force in Hungary on 15th April, 1993. As a result, human rights have become the focus of criminal law legislation. Criminalisation can no longer be justified merely through the social dangerousness of an act. The intervention of criminal law has to correspond to the requirements of constitutional criminal law, which will be evaluated by the Constitutional Court.

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6 Miklos Levay (Miskolc University, Hungary), *Human rights and criminalisation in Hungary*.
An analysis of decisions by the Hungarian Constitutional Court shows that, similarly to the European Court for Human Rights, human rights are featured on the one hand as a shield against criminalisation, on the other hand as a sword in favour of criminalisation.

a) The first significant decision of the Constitutional Court in criminal law was Decision of 23/1990 (X. 31.) on the abolition of the death penalty. The Court declared the death penalty unconstitutional because it represents the complete and irrecoverable nullification of the fundamental right to life and human dignity, protected by Article 8 of the Constitution. The right to human life and human dignity is the source and precondition of several other fundamental rights and thus represents a limitation against the punishing power of the state.

b) The decisions concerning freedom of speech demonstrate that the Constitutional Court applies a strict requirement of proportionality when the freedom of speech has to be limited and balanced against the protection of others’ rights: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned, and in enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. The Constitutional Court has laid down in several decisions that the freedom of expression is the „mother right” of several freedoms, the so-called fundamental rights of communication. The right to free expression protects opinion irrespective of the value or veracity of its content, even in cases of opinions expressing extreme or racist ideas [e. g. Decision 30/1992. (V. 26.), Decision 18/2000. (VI. 6.)]. As criminal law is the ultima ratio in the system of legal responsibility, it may only be used if such use is unavoidable, proportionate and there is no other way to protect the objectives and values of the State, society and the economy. In the case e. g. of strong incitement to hatred, such a constitutional limit to the freedom of expression is only accepted if there is a “clear and present danger” of lawless action disturbing social order and peace. The standpoint of the Constitutional Court concerning the obstruction of racist speech is a significant impediment to Hungary’s support of Proposal for a Council Framework Decision of the EU on combating racism and xenophobia.

c) On the other hand, the decision of the Constitutional Court on drug abuse argued that the criminalisation of the possession of drugs for personal use is validated by the State’s duty to protect human rights [Decision 54/2004. (XII. 13.)] According to the Decision, nobody has the right to be under the influence of drugs, therefore criminal prosecution against drug users is not unconstitutional. The Decision claims that drug use leads to the “loss of freedom”, therefore even the abridgement of personal freedom is allowed in the fight against drugs.

2 - 3  - Human rights as the good and the bad conscience of penal law

The case law of the ECtHR should not be seen as blindly promoting the use of criminalization and punishment. Criminal law should always be used as a last resort. However, the Court has stated since X & Y v. the Netherlands, 26 March 1985, that states have positive obligations to protect the human rights of the citizens, and that criminal law may sometimes be necessary when civil law is insufficient in protecting fundamental values.

7 Françoise Tulkens (Judge, European Court of Human Rights; Université Catholique de Louvain, Belgium), Jurisprudence de la CEDH et criminalisation.
A closer look at the recent case law of the ECtHR shows that criminal law has been mainly advocated by the Court when faced with the most serious breaches of the rights of the most vulnerable citizens, who are most in need of protection: unlawful killings and disappearances by state agencies (Khachiev & Akaïeva v. Russia, 24 February 2005), torture and abuse of power in police detention (Krastanov v. Bulgaria, 30 September 2004), state failure to act against life threatening environmental hardships (Öneryıldız v. Turkey, 30 November 2004), slavery or rape left in impunity (Siliadin v. France, 26 July 2005; M.C. v. Bulgaria, 4 December 2003). It is true, however, that the preventive and deterrent effects of criminal law and punishment are overestimated, and that the criminological and penological evidence to the contrary are not sufficiently known and taken into account by the ECtHR.

On the other hand, the Court still acts as a protection against overpenalisation. The principle of proportionality is strictly applied in cases of protection of the freedom of expression, and should be similarly applied to other fundamental freedoms protected by the Convention. Prisoners’ rights are increasingly protected and the Court’s view that all punishment is inherently humiliating should be closely scrutinized and questioned by legal and criminological jurisprudence.

The question of a codification of basic principles for a “humane and modest penal system” is interesting. The danger could be that it could result in a more restrictive document that would hamper further evolutions. The strength of the Convention and the ECtHR may precisely be that it deals with individual cases, which allows more flexibility and a more dynamic development of the protection of fundamental rights and freedoms.

3 - Victims and criminalisation

3 - 1 - Victims: role, expectations and disappointments

Victims of many sorts are increasingly at the centre of public demands and conflicts, resulting in what some authors have called “the society of victims” (Erner, 2006). This is also true for victims of crime, who have come to the fore in many social and juridical debates over the last 20 years. This attention to victims is usually coupled to strong emotional empathy for their needs and rights. This raises the question whether this increased emotionalism does and should lead to a fundamental transformation of the criminal justice system. What are the emotional expectations of the victims of crime, can/should the criminal justice system answer these expectations or should other alternatives be pursued?

A qualitative study of 30 victims of (domestic or other) violent and sexual crimes analyses the victims’ expectations concerning the punishment of the offender, the expression of their personal needs and their perceptions of the penal procedure.

a) Apart from moral and practical support by the penal system, all victims expressed expectations concerning the judgement and punishment of the offender. Several of the cases studied led to a waiver of prosecution, an acquittal or a suspended sentence, resulting for the victims in shocked disbelief, disenchantment, and feelings of injustice.

Victims who file suit expect to be automatically believed and supported by the criminal justice system, and a different reaction is experienced as
an additional trauma.
b) The personal needs expressed by the victims towards the justice system relate in the first place to a claim for attention and “listening”, literally and figuratively. Victims expect the penal system to recognize the wrong they have suffered and to declare it unjust and unacceptable. Such recognition must help the victim to regain the self-confidence, self-respect and public valorisation affected by the offence. The granting of a financial compensation is seen by many as an important form of symbolic and psychological reparation.
c) Several victims experienced a “reversal of roles” during the criminal procedure, claiming their offender received all the attention of the system while they were only treated as a source of information, or worse as if they were themselves guilty of the offence.

The emotional expectations of victims of (violent) crime towards the traditional criminal procedure seem doomed to be either disillusioned or to lead to an ever increasing punitiveness towards offenders, both quantitatively and qualitatively. A different approach is needed.

3 - 2 - Victims’ needs and punishment: balancing through restorative justice?  

A victimization experience can be described in terms of both its effects and impact. Possible effects refer to consequences at the financial, psychological and social level, whereas the impact is more related to the perceived seriousness and the overall assessment of the crime experience by the victim. In recovering from an offence, receiving an unambiguous form of social recognition is often considered as the most general, overarching need of a crime victim.

A variety of research findings show the following main expectations from victims towards the criminal justice system and its procedures: victims want a less formal process where their views count; they want more information about both the processing and outcome of their cases; they want to participate in their cases; they want to be treated respectfully and fairly; they want material restoration; and they want emotional restoration and an apology. International crime victim surveys teach us that – although important differences between countries exist - punitive attitudes with respect to sentencing options are not increasing in European countries since 2000 (Van Dijk et al., 2007) and that alternative responses to crime are supported widely.

But how to understand victims’ needs, including the so-called need for revenge or retribution?

While traditional victimology reduced the need for punishment to psychological motives, victims’ needs are now seen as the result of a configuration of both (evolving) sociological mechanisms and individual factors. The crime victimization experience destroys personal basic assumptions, such as the assumption not to be vulnerable, and requires a process of cognitive restructuring to cope with it. This can be presented as a permanent interactive process, in which the social environment plays an important role. The contrast between the new experiences and existing mental schemes results in different strategies by the victim: the denial of the new input, the interpretation of the new input in order to make it consistent with existing mental schemes, or the reform of mental

9 Ivo Aertsen (Katholieke Universiteit Leuven, Belgium), Victims’ needs and punishment: balancing through restorative justice?
schemes. The social environment and its reactions to the victimization influence these strategies.

‘Procedural justice’, a theoretical framework from social psychology, is congruent with this cognitive approach and links it to the functioning of the criminal justice system. This theory states that one’s perception of fairness and justice depends more on the procedure that led to them than on the outcome of the procedure. If this is true, then the elaboration of participatory processes in the course of criminal justice procedures, including at the stages of sentencing and administration of the sentence, could reduce the punitive expectations of victims. However, victim involvement and participation in the criminal justice process can be conceived in many ways. In the US, politicians have passed legislation illustrating the view that the rights of victims can only be defended through more punitive and exclusionary practices towards offenders ("zero-sum policy"). In Europe, victims’ needs in the criminal justice process are more and more translated in terms of rights (cf. EU Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings): the rights of victims to receive and to provide information, to respectful treatment, to protection, to compensation and to assistance are generally recognized. However, more delicate is the right to (active) participation, which in most jurisdictions is not really foreseen (exception might be different types of Victim Impact Statements and Victim Statements of Opinion in mainly Anglo-Saxon countries and more recently also in the Netherlands). The strengthening of the legal position of the victim in the criminal justice process does not necessarily result in an effective use of these rights or in a better treatment of the victim, e.g. due to resistances within the system, limited budget and personnel or because they are applied in a very restrictive, selective or polarizing way.

Indeed, taking into account the complex nature of victims’ needs and the psychological processes of victims in coping with their experience, criminal justice procedures will almost by definition never be able to fully answer these needs. But criminal justice could benefit a lot from restorative justice practices such as victim-offender mediation and conferencing in order to make it more responsive.

The direct meeting and dialogue between conflict parties in restorative justice practices offers a framework for victims to work at least partly through their (punitive) emotions, to give meaning and to develop (alternative) mental schemes, and to see the outcome of the process realized in concrete behaviour from the side of the offender. This framework must be open enough to allow interaction with both the victim’s informal environment and the criminal justice system. Until today, restorative justice practices remain too much isolated from interactions with both community and justice system. In particular, more attention should go to the punitive needs of victims and how they evolve during mediation processes. A hypothesis is that the interplay between victim, offender, community and justice system results in a less polarizing and more balanced way of thinking and acting on punishment. Promising case studies are available, but so far – amongst others because of a possible selective bias and the still limited scope of application of restorative justice in most countries - findings cannot be generalized and estimations on its final potential are not possible.
3 - 3 - Victims and the criminal justice system: threat or promise?  

The increased attention for victims of crime must be analyzed at different levels. At the macro (political) level, the attention for real or symbolic victims seems to lead to more primary criminalization, often independent of the individual expectations of the victims themselves. As for the secondary criminalization, victims increasingly influence decisions on prosecution, sentencing and implementation of sentences. However, the analysis of the needs and expectations of victims on the one hand, and the characteristics of the criminal justice system on the other hand, leads to the conclusion that the traditional criminal procedure has little to offer to victims. To enhance the victims’ satisfaction, the system seems faced with only one of two choices: either it keeps its traditional way of functioning, and then increasing the level of punishment for offenders may seem the only answer to the emotional needs of recognition for the victims, or it finds other ways of recognition through more emphasis on procedural and participative justice, and then punishment levels become less important. However, it seems important to make a clear distinction between “needs” and “expectations”: needs are absolute and must be answered, while expectations can be fulfilled or disappointed. Punitiveness must be considered as an expectation, which is doomed to be disappointed in a traditionally polarizing criminal procedure. That is precisely the reason why victims have historically been barred from participating in the criminal procedure, with the exception of their interests in civil compensation. A better recognition of the needs and expectations of victims can and maybe should be attained through more participatory or restorative procedures outside the criminal justice system.

4 - Public versus expert opinion and criminalisation

4 - 1 - Social and political characteristics and different prisoner rates in Europe

The last decades have witnessed unprecedented expansion of penal control in different parts of the world. In the US, prisoner rates have increased by 320 % from around 170 in the mid-70s to around 740/100 000 pop now. Similar, albeit smaller, changes have taken place in the other Anglo-Saxon countries (Australia, New-Zealand, the UK), with the exception of Canada, where prisoner rates have been more or less stable during the last 15-20 years. Trends in continental Europe are diverse. Some Western European countries have fairly stable prisoner rates on the level of 80-90/100 000 (France, Belgium, Germany and Switzerland). However, there are notable exceptions. During the last two decades Netherlands has more than six-folded their prisoner rate from the low of 20 to 130/100 000. Spain has more than tripled their rates from 40 to 140/100 000.

The Scandinavian countries differ from many other European as well as non-European countries both in terms of stability and leniency of penal policy. For almost half of a century the prisoner rates in Denmark, Norway and Sweden have stayed between the narrow limits of 40–60

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10 Dan Kaminski (Université Catholique de Louvain, Belgique), Les victimes et le système de justice pénale : menace ou promesse ?
11 Tapio Lappi-Seppälä (National Research Institute of Legal Policy, Helsinki, Finland), Social and political characteristics and different prison rates in Europe.
prisoners. However, Finland has followed its own path. At the beginning of the 1950s, the prisoner rate in Finland was four times higher than in the other Nordic countries. Finland had some 200 prisoners per 100,000 inhabitants, while the figures in Sweden, Denmark and Norway were around 50. Even during the 1970s, Finland’s prisoner rate continued to be among the highest in Western Europe. However, the steady decrease that started soon after the Second World War continued, and during the 1970s and 1980s, when most European countries experienced rising prison populations, the Finnish rates kept on going down. By the beginning of the 1990s, Finland had reached the Nordic level of around 60 prisoners.

Figures in Eastern Europe are about double from those in Western Europe (200), and even more for the Baltic states (300) and Russia (550). In Lappi-Seppälä’s study (2007), the factors behind the overall differences in penal severity (prisoner rates) are traced with two samples, one including 25 industrialized countries covering years between 1960 and 2005 and another from 99 countries for the year 2005. The first sample of 25 industrialized countries includes 16 Western European countries, 3 Eastern European countries (Czech Republic, Hungary and Poland), two Baltic countries (Estonia, Lithuania) and four Anglo-Saxon countries outside Europe (US, Canada, New Zealand and Australia). The second cross sectional (global) sample covers the top 99 countries ranked according to the UN Human Poverty index.

Factors explaining prisoner rates fall into seven main categories:
1. Crime: recorded crime (Council of Europe Sourcebook and National statistics) and victimization surveys (ICVS and ECVS)
2. Fears and punitiveness (surveys ICVS, ECVS, ESS)
3. Trust (surveys ESS, WVS, EB)
4. Social indicators: income inequality and social welfare expenditures (LIS, Eurostat, UN, EUSI, OECD plus specific studies)
5. Demographic factors: multiculturalism, immigrants, foreign populations (LIS, Eurostat plus specific studies)
6. Economic factors: unemployment, GDP, poverty (LIS, Eurostat, UN)
7. Political factors: political culture, corporatism, vote turnout (LIS plus specific studies).

The results confirm that the differences in prisoner-rates can not be explained by differences in crime. Instead, penal severity seems to be closely associated with public sentiments (fears, level of trust and punitiveness), the extent of welfare provision, income inequality, political structures and legal cultures. The analysis supports the view that the more lenient Scandinavian penal model has its roots in a consensual and corporatist political culture, high levels of social trust and political legitimacy, as well as a strong welfare state. The welfare state has sustained less repressive policies and has made it possible to develop workable alternatives to imprisonment. Welfare and social equality have also promoted public trust and legitimacy, which enable normative compliance based on legitimacy and acceptance instead of sentence severity. These characteristics of the social system also reduce political pressures to resort to symbolic penal gestures. This has its structural-political side, as well. Low prisoner rates are the by-products of consensual, corporatist and negotiating political cultures. These political cultures are, first of all, more “welfare friendly”, as compared to many majoritarian democracies. Consensual politics also lessen controversies, produce less crisis talk, inhibit dramatic turnovers and sustain long-term consistent policies.
While the structures of the political economy and their impacts and interactions with the public sentiment are of fundamental importance in the shaping of penal policies, several other factors need to be taken into consideration. These include differences in the media culture as well as the responsiveness of the political system to the views expressed in the media. Demographic homogeneity may ease the pursuit of liberal penal policies (but is no guarantee for success; neither has multiculturalism lead to harsher regimes). Judicial structures and legal cultures evidently play an important part, especially in explaining the differences between continental and common-law countries. The power of professional elites (closely associated with certain political structures), small groups, and even individuals may be of great importance, depending on which countries are included in the analyses (e.g. the traditional expert-oriented political culture in the Scandinavian countries). This also raises questions concerning decision-making within the European Union, where “harmonization” in the penal sphere always seems to lead to a more repressive stance being imposed on the more lenient countries.

4 - 2 - The punitive turn in the Netherlands and the changing role of expert knowledge

The Dutch penal system was traditionally characterized by very low imprisonment rates, a focus on rehabilitation and rights of prisoners and relaxed inmate-staff relations, resulting in some of the “least bad” prisons in the world and very few prison riots. This has changed quite dramatically, as a “new punitiveness” has lead to a seven-fold increase in the prison population from 18/100.000 in 1975 to 134 in 2005), a more austere prison regime and more focus on the protection of society through incapacitation. This development can not be explained by changing crime-rates, as the prison rates dropped when the registered crime rates increased, and the enormous expansion of the prison system took place after the crime rates had stabilised and victimisation rates dropped. Some aspects of Dutch penal policy help to explain this change: the “war on drugs”, pressured on the Netherlands by neighbouring countries, is seen as a major booster for Dutch penal expansionism, as is the growing influence of victims’ interests on sentencing and the idea that a decline in informal control mechanisms must be compensated by an increase in formal penal control.

The role of the penal expert has also changed in that period. The Dutch penological and professional elites used to play an important role in defending a humane and reductionist penal policy. This reductionist ideal was discredited by highly mediatised prison incidents (spectacular escapes, waiting lists due to shortages of cells), the portrayal of the Netherlands as the most criminal country in the International Crime Survey 1989 (even if it referred mainly to bicycle theft) and its central role in the international drug trade and other organised crime. The reductionist discourse was increasingly neutralised by the managerial discourse on the efficacy of the penal chain, and penological experts were replaced by risk analysts, business managers, psychologists and psychiatrists.

This must be seen within the broader political and cultural changes in the 1990s. Crime and safety became highly mediatised with the emergence of commercial TV. Safety became a key electoral theme, and the populist

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12 René Van Swaaningen (Erasmus University Rotterdam, the Netherlands), The new punitiveness in the Netherlands and the changing role of expert knowledge.
rationale replaced the representative democracy and the influence of intellectual elites ("populism" refers to a “not mediated, direct link between politicians and the public” and is characterized by hostility to representative politics, authoritarianism, anti-elitism, and above all a mistrust of expert opinion). At the same time, welfare expenditures decreased, a more neo-liberal policy was developed and the ideal of a multicultural society was replaced by fear for the “allochtonous” criminal. Trust in the government decreased, rightwing populism with a “get tough on crime” discourse came to stay and more emphasis was put on zero-tolerance policing (Downes & van Swaaningen, 2006).

The high rates of imprisonment in the Netherlands correlate mainly with the increasing populism in media and politics, a greater ethnical, political and socio-economical polarization and a decrease of trust in the government. The traditional penal expertise has been replaced by a different, more managerial expertise, which does not question the more punitive turn. This calls for a reassessment of the role of criminologists in penal policies.

4 - 3 - Primary and secondary criminalisation processes, political and penal cultures and the influence of criminological knowledge

The interaction between public versus expert opinion and criminalisation is different when we look at primary or secondary criminalisation processes. Primary criminalisation refers mainly to the level of the legislation and therefore to political cultures, while secondary criminalisation refers more to the penal actors and their penal culture.

At the level of political cultures, the distinction described above between consensual and majoritarian democracies seems highly relevant. Political parties in consensual systems are forced to bargain and compromise, therefore resort less to crisis talk and dismissive discourses, and manage to keep a higher level of trust from the people. This reduces their need for “populist punitiveness” and allows them to have more lenient penal policies.

Another feature could be the balance of power between the Parliament and the Government on the one hand, and the availability of independent criminological research on the other hand. In Belgium, the shift of political power from Parliament to the Government means that penal policies are primarily developed by the competent ministers and their cabinet advisors. The latter often are academically trained criminologists with clear ties to a university. This could be explained by the development of criminology as a full academic degree in Belgium and the absence of large research units in the ministries themselves (cf. Home Office in England) or private research bureaus (cf. the Netherlands).

The structural characteristics of the criminological training in a particular country seem also important with regard to its possible influence on penal actors at the level of secondary criminalisation. The reductionist penal policy in Finland was developed by criminological experts and implemented in interaction with the judges and prosecutors. The fact that criminology courses are compulsory in law schools in Scandinavia may have facilitated this transfer of ideas. Similarly, the fact that criminology has developed into a full academic degree in Belgium may

13 Sonja Snacken (Vrije Universiteit Brussel, Belgium), Primary and secondary criminalisation processes, political and penal cultures and the influence of criminological knowledge.
have increased its influence on political decision making and its visibility for the media, but has hampered its influence on the judiciary (Snacken, 2007).

This also raises questions concerning political decision-making at the European level. In the Council of Europe, recommendations and standards on penal issues are developed through a long preparation aiming at finding a consensus between the member states, and with the help of criminological and penological experts, who have a long standing legitimacy. This recalls the consensual decision-making process described for the Scandinavian countries. This consensual process at national level is felt to be curtailed by decision making at the European Union level, which shows more similarity with the majoritarian political cultures.

**Conclusion**

The four factors described have complex interactions with criminalisation tendencies and with each other. Strong welfare states have lower income inequality, less violent crimes, a higher trust and legitimacy with the public, have to resort less to populist punitiveness and have lower prisoner rates. They develop more easily in consensual corporatist political cultures, where there is more emphasis on compromise than on attacking policies. Such a political culture may also be more open to the influence of criminological expert opinion and more able to keep the right balance between the human rights of offenders and victims.

Human rights as applied by the ECtHR or the Constitutional Court in Hungary offer a bulwark against boundless penalization. In the case law of the ECtHR, an obligation for states to resort to criminal law is advocated in cases of severe breaches of human rights of the most vulnerable persons. The preventive and deterrent effects of the criminal law and of punishment are however overestimated, as ascertained by criminological research.

The increased emphasis on victims’ rights at the national and international levels may also lead to an increase in both primary and secondary criminalisation. In the traditional criminal procedure, the participation of victims is limited to their civil compensation. In the absence of other forms of recognition, increasing the level of punishment for the offender may seem the only possible symbolic answer to the emotional expectations of the victim. It is argued that this increased punitiveness can be avoided by putting more emphasis on procedural justice through more restorative or participative initiatives. But the questions remain whether it is a function of the criminal law to answer the emotional needs or expectations of the victims or whether these should be taken care of outside the criminal justice system?

Finally, differences in levels of criminalisation and punishment between European countries are not the result of different crime rates, but of complex interactions with a variety of social, economical, cultural and political factors. These are not causal relations, but influences, and could better be described as protective and risk factors for over-penalisation. Countries can learn from each others’ experiences and policies, as can the European decision-makers.

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14 Michael Tonry (University of Minnesota, USA); Sonja Snacken (Vrije Universiteit Brussel, Belgium), Concluding remarks.


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