

Promoting non-discriminatory alternatives to imprisonment across Europe

WP 4.3

Guidelines for a criminal justice system that ensures that imprisonment is a measure of last resort, guarantees a humanistic and rehabilitative approach to non-custodial sanctions and addresses the rights and specific needs of persons in situations of particular vulnerability or belonging to minority groups

The issue of prison reductionism and alternatives to imprisonment has long been on the criminal policy agenda. The jurisprudence of the European Court of Human Rights, especially concerning the prohibition of torture, and inhuman or degrading treatment, highlights the consequences of overcrowding to the human rights of individuals deprived of their liberty. The recent COVID-19 pandemic also showed how overcrowded facilities, with poor living conditions and a lack of proper hygiene and ventilation, pose a risk to public health. The risk of similar events in the future makes the need to put into practice the limitation of imprisonment (both in its use and its length) even more pressing.

The fact that the release of a relevant number of inmates under the exceptional measures adopted during the pandemic did not raise significant social outcry nor created problems of rising criminality supports the claim that imprisonment is unnecessary - or unnecessarily long - in many cases.

On the other hand, international¹ and European² instruments encourage States to enhance the use of non-custodial sanctions and measures, as well as different forms of

¹ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) and United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules).

² Council Conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice (2019/C 422/06) .

early release or conditional release, to reduce imprisonment and rationalize criminal justice policies.

A significant reduction in imprisonment would allow for individual accommodation, sufficient personal space per inmate, and more decent detention conditions in general. At the same time, while reducing the number of individuals in prison and thus improving the ratio between available resources and inmates, it would create the conditions for more effective and humane implementation of prison sentences.

The main reasons behind the relatively high incarceration rate and the high occupancy rates in some prisons in Portugal seem to be: the relatively high length of the prison sentences (and the time actually served in prison); the short-term and medium-term sentences that, for some reason, are not replaced by a non-custodial alternative; and the long-term sentences where the court does not grant conditional release or only grants it at a later stage than the law would allow for.

In order to effectively promote the reduction of imprisonment and fulfill the preventive purposes of the penalty, non-custodial alternatives should be designed and implemented to be meaningful, supportive, and truly rehabilitating, tackling the individual criminogenic needs of the offenders – they should not consist of mere control.

It was found that, sometimes, sanctions or measures handed down by the courts are ill-suited to the criminogenic factors and the resocialization needs of the offenders, which may occur when the sentence has not been based on a social report aimed at determining the sanction or when the available sanctions or measures are inadequate or insufficient to meet the specific needs of persons in a situation of particular vulnerability or belonging to minority groups.

Technology has the potential to play a relevant role in the future of alternative sentences. It may enhance opportunities for rehabilitation, such as distance learning when courses are not available nearby or participation in programs or activities that are not available in the area or that, for any reason, cannot be attended in person. In addition, communication technologies could be used to provide closer and more regular support by the probation officers, as was experienced during the covid-19 pandemic. They could also contribute to modernising the way the justice system communicates

with its clients. It seems essential, however, that technology is used as a form of supplementing, not reducing or replacing, human contact, which is a fundamental dimension of the social reintegration process.

RECOMMENDATIONS

The research undertaken throughout the many components of the project revealed that most of the obstacles to a more effective, broader, and equitable application of alternative sentences to imprisonment do not result from gaps in the legal provisions but rather from practical inefficiencies or insufficiencies. Thus, rather than legislative reforms - although without prejudice to specific legislative adjustments - improvements in procedures and articulation between various competent bodies are needed.

Below are proposed guidelines, both for the development of non-custodial sentences in general and for the intervention with persons in particularly vulnerable situations or belonging to minority groups who are serving community sentences.

I

Guidelines for the development of non-custodial sentences

De-judicialization and diversion

- Focus on crime prevention and **diversion** mechanisms (alternatives to criminal justice), with greater involvement of the **community** (public entities from different areas, civil society organisations);
- Revitalization of the **mediation** system in criminal proceedings, provided for in Law No. 21/2007, of 12 June, namely through measures such as: training and awareness raising of judges, prosecutors, attorneys and mediators; information campaigns for the general public; directives issued by the Attorney General's Office guiding the action of the Public Prosecutors in the referral of cases to mediation;

- Development of **restorative justice mechanisms** applicable in the implementation of non-custodial sentences, similar to what is foreseen for the implementation of prison sentences (article 47 § 4 of the Code governing the Implementation of Prison Sentences);

Training and dialogue between justice professionals

- Enhanced **specialization** of all professionals involved in sentencing and close **dialogue** between them, and with academia, with the aim of harmonising concepts and procedures and of better understanding each other's roles and needs;
- Organisation of regular **meetings** (at least annually) between magistrates of criminal courts and courts of implementation of sentences, prison and probation officers, and lawyers, with the aim of discussing difficulties, problems, and solutions. The dialogue would notably allow for better articulation between courts and probation services, in particular concerning the preparation of pre-sentence reports that correspond to the needs of the courts and ensure that the most appropriate penalty is chosen to meet the prevention needs of specific cases;
- Development of **guidelines**, by the judiciary and probation services jointly, for the request and preparation of **pre-sentence reports** (e.g., cases in which they should be requested, most appropriate moment in the procedure, issues to cover in the reports), in order to ensure that the reports correspond to the court's needs and enhance the application of the most suitable sanction to the case, while promoting efficiency, avoiding waste of resources;
- **Training on international human rights instruments** targeted at both magistrates and probation officers, as a means to ensure that intervention with persons serving penal sentences is adequate to their individual needs;

Human resources

- Improvement of the ratio between probation officers and persons under their supervision, so as to guarantee effective individualised support aiming at rehabilitation;

Availability of programmes in the community

- Development of **effective individualized support** by the probation service to ensure that community sentences - particularly suspended prison sentence and home detention - are implemented with a positive and rehabilitative approach, rather than mere control³. To that end, it is essential to have adequate territorial coverage of the social reintegration teams, and a reasonable ratio between officers and probationers.
- Availability of **programmes** aimed at specific problems or certain forms of criminality to those serving community sentences. The design of the programmes must facilitate their attendance and may combine components provided at home with others attended in other premises, and also with remote sessions when it can ensure effective and adequate intervention.
- Development of a **catalogue** of the programmes available in the community (containing: the description of the programmes; conditions for their application; the sentences to which they are applicable), made available to the courts so that they can take this information into account when determining the sentence;
- In a future amendment to the Penal Code, the provision of **attendance of programmes as an ancillary penalty** should be reconsidered: the penalties of "obligation to attend specific programmes for the prevention of domestic violence" (Article 152, Penal Code) and "obligation to attend specific programmes for the prevention of stalking" (Article 154-A, § 3, Penal Code) are provided as ancillary penalties, applicable together with the main penalty, for crimes of domestic violence and stalking, respectively. The attendance of programmes should not be imposed by the courts as an ancillary penalty, for the following reasons: firstly, attending rehabilitation programmes should not be a form of punishment; secondly, criminal sanctions should have a determinate length, which is hardly possible with the attendance of a programme;⁴ thirdly, as this is a penalty imposed by a judicial sentence that has become *res judicata*, any impossibility of implementation or inadequacy of the programme to

³Anabela Miranda Rodrigues, «Da 'afirmação de direitos' à 'proteção de direitos' dos reclusos: a jurisdicionalização da execução da pena de prisão», *Direito e Justiça*, 2004, p. 185 e ss., highlights this positive and rehabilitative approach.

the individual needs or profile of the sentenced person poses legal difficulties in complying with/terminating the sentence;

- Thus, the obligation to attend **programmes** in the implementation of community sentences should be included in the social reintegration plans prepared by the probation service (in case of suspended sentence or home detention) and may also be part of the rules of conduct applied by the court (in the same type of penalties), in this case, after consulting the probation services on the suitability of the programmes for the case;

Involvement of civil society organizations in the implementation of community sentences

- Encourage the involvement of **civil society organisations** in the implementation of community sentences (such as suspended sentence/probation, community service, home detention), complementing and strengthening the support provided by the probation service;

Use of new technologies

- Learning from the experience of the pandemic period, the possibility of using **communication technologies** (between probation officers and courts, probation officers and individuals subjected to probation, between probation officers from different teams) should be used whenever appropriate. Experience has shown that this allows, in many cases, time and travel savings. It can also allow participation in activities or programs that are not available in the individual's area of residence or that, for whatever reason, he or she cannot attend in person. Distance communication can also complement and reinforce the support of probation officers to probationers. It has also been shown to provide new ways of exchanging experiences and knowledge between colleagues working in different regions. Always bearing in mind that distance communication should complement, not replace, face-to-face human contact, which is a fundamental dimension of the social reintegration process;

⁴ Maria João Antunes, *Penas e Medidas de Segurança*, Coimbra: Almedina, 2. ed., p. 45, highlights this example of penalties which, contrary to the constitutional prohibition of penalties of indefinite duration (article 30 § 1 of the Constitution), do not provide for the necessary time frame.

- Study of feasibility and effectiveness of providing structured **programmes**, remotely or in a hybrid regime, to persons serving community sentences (namely in locations where there are obstacles to face-to-face attendance);
- Provision of **equipment and training** for probation officers to work with forms of remote communication in order to maintain the quality and effectiveness of intervention and ensure respect for the privacy of persons under probation;
- Development of **research** and pilot projects with the purpose of increasing the knowledge and the development of activities and intervention programmes carried out remotely, within the scope of the implementation of community sentences, namely when the location does not allow attendance in a face-to-face group or when for any reason face-to-face attendance is not viable;
- Provision of **training** in information and communication technologies to persons serving community sentences;

Research

- Promotion of empirical research on the **effectiveness** of non-custodial sentences in the rehabilitation and the prevention of recidivism, with a view to improving them and enhancing the knowledge and trust of the courts and the community in their ability to achieve the aims of punishment;
- Development of in-depth analysis of the **causes of the relatively high length of prison sentences** in Portugal (the second highest in Europe, in 2020); of the cases of non-replacement of short and medium-term prison sentences (these represented 40,2% of all prison sentences served on 31 January, 2020); and of the cases of non-granting of conditional release (more than 40% of the releases of sentenced individuals from prisons in 2003-2019 were due to end of the sentence);
- Implementation of **surveys** among persons who served community sentences to assess whether the monitoring and support provided by probation services, as well as the programmes and activities involved in the implementation of the sentence, were suited to their needs, the main difficulties experienced, and the effects of the sentence on their lives.

II

Guidelines for the intervention with persons in a particularly vulnerable situation or belonging to minority groups serving community sentences

Although there is no consensus on the adoption of specific measures or programmes for specific social groups or categories, it is essential to ensure that intervention with sentenced persons is suitable to their characteristics and needs.

- The adequacy of the intervention should be ensured, namely, through the **articulation** with other **public bodies or civil society organisations** with experience in supporting persons or groups with specific characteristics. Such entities may support overcoming difficulties (like cultural or linguistic barriers), meeting special needs (namely in case of persons with disabilities or mental health conditions) or in training and awareness-raising of professionals.
- Despite the widespread belief that circumstances such as unemployment, poverty, homelessness, or foreign status may constitute barriers to the imposition of non-custodial sentences, there is limited information available on the experience of persons from minority groups or in particularly vulnerable situations when serving non-custodial sentences. It would therefore be relevant to develop **empirical studies** on the subject, analysing the difficulties felt by both the professionals and sentenced individuals.
- It is also important to **train** judges, prosecutors, attorneys and probation officers on **international human rights instruments**, namely those related to the rights of persons in a situation of particular vulnerability, to ensure that intervention with sentenced persons is appropriate to their characteristics and needs.
- Development of “**guides of good practices**” for the adaptation of the implementation of sentences to the particular needs of certain minority or vulnerable groups. Each "guide", referring to a "category" or a situation of particular vulnerability (e.g., women, juveniles, foreign nationals, persons unemployed and/or in situation of poverty or

homelessness; older persons; ethnic minorities; persons with disabilities, including persons with mental health conditions), should be developed by probation services in partnership with public entities and non-governmental organisations specialised in policies or assistance of the referred "categories";

- Specific measures are also proposed for some situations of particular vulnerability:

Persons with mental health conditions

- **Articulation between the probation services and the local mental health services**, as the community mental health teams provided for in Decree-Law No. 113/2021, of 14 December are created throughout the country, thus disseminating the application of the **Good Practices Guide** drawn up as part of the pilot project developed by the Dão-Lafões social reintegration team and the Dão-Lafões community mental health team, with the coordination of the research team of the University of Coimbra Legal Research Institute.⁵ According to the pilot project's external evaluation report, it would be important to formalise the articulation through a protocol between the Ministry of Justice and the Ministry of Health, as well as to disseminate the protocol and its results among the community, thus reinforcing the confidence of the courts and the society in the effectiveness of non-custodial sentences for persons in need of mental healthcare.

Persons in a situation of illiteracy or dyslexia

- Analysis of the cases in which a prison sentence has been handed down for driving without a license to find out whether there are a significant number of persons deprived of their liberty for driving without a license who, being illiterate or suffering from dyslexia, are not able to pass the theory test, despite knowing the rules and being able to drive.⁶ A study with such a scope would allow an assessment of the need to adopt

⁵ More information on the pilot project, including the Good Practices Guide and the Project Evaluation Report, available at: <http://www.prialteur.pt/index.php/home/activities/pilot-project>.

⁶ According to the Prison Statistics, available at: <https://dgrsp.justica.gov.pt/Estatisticas-e-indicadores/Prisionais/2021>, on 31 December, 2021, 447 individuals were serving prison sentences for driving without a license. On the same date, there were 400 inmates who could neither read nor write, 458 who could read and write but without a formal school habilitation, and 2,548 with only the 4th grade.

measures, outside the criminal justice system, to prevent this offence and, ultimately, imprisonment.

Foreign nationals

In a future amendment to the Penal Code, the elimination of the deportation of foreign nationals as an ancillary penalty should be considered.⁷ Deportation "is more a matter of the State's political relationship with foreign nationals than criminal policy" – it does not really constitute an ancillary penalty.⁸ The consequences of committing crimes and being sentenced for them for the person's stay in the national territory should be regulated outside the scope of criminal law, within the framework of the legal regime governing the entry, stay, exit and removal of foreign nationals.

⁷ The ancillary penalty of deportation is provided for in article 151 of Law no. 23/2007, 4 July, which governs the entry, stay, exit, and removal of foreign nationals from the national territory. The ancillary penalty of deportation can be applied to non-resident foreign nationals, convicted of an intentional crime and sentenced to more than 6 months imprisonment or to a fine in alternative to imprisonment for more than 6 months. The same penalty can be applied to a foreign national resident in the country, convicted of an intentional crime and sentenced to more than 1-year imprisonment. In applying the penalty, the seriousness of the facts, the personality, recidivism, the degree of social integration, special prevention, and the time of residence in Portugal, must be considered. The ancillary penalty of deportation may only be given to foreign nationals with permanent residence if their offence constitutes a serious danger or threat to public order, security, or national defence.

⁸ Maria João Antunes, *Penas e Medidas de Segurança*, Coimbra, Almedina, 2nd. ed., 2022, p. 43, and *Idem*, «Penas acessórias e aplicação a título principal», *Estudos em homenagem ao Professor Doutor Américo Taipa de Carvalho*, 1st. ed., Porto, Universidade Católica Editora, 2022, pp. 71-83. Teresa Pizarro Belez, «Hostilidades (Sobre a pena acessória de expulsão de estrangeiros do território nacional)», in *Estudos em Homenagem a Cunha Rodrigues*, Vol. I, Coimbra: Coimbra Editora, 2001, p. 147, pointed out that the provision of this penalty (although the wording of the article was different at the time) did not comply with the constitutionally established requirements for penal provisions, namely those of legality and proportionality.

ORGANISATIONS CONSULTED THROUGHOUT THE PROJECT

The proposed guidelines have been developed throughout the PRI Alt Eur project in dialogue with the following organisations:

Public bodies

Direção-Geral de Reinserção e Serviços Prisionais (Prison and Probation Service)

Provedoria de Justiça (Ombudsperson's office)

Inspecção-Geral dos Serviços de Justiça (Inspectorate-General of Justice Services)

Judges and other justice professionals who participated in the workshop and training organised during the project

Civil society organisations

Dar a Mão - Associação para Ajuda à População Reclusa (NGO providing support to individuals currently or formerly in prison)

O Companheiro (NGO providing support to individuals currently or formerly in prison)

APAR – Associação Portuguesa de Apoio ao Recluso (NGO providing support to individuals currently or formerly in prison)

Reshape (NGO providing support to individuals currently or formerly in prison)

SOS Racismo (NGO tackling racism)

CASA – Centro de Apoio ao Sem-Abrigo, Coimbra (NGO providing support to persons in situation of homelessness)



**Funded by
the European Union**

This document is part of the project ***Promoting non-discriminatory alternatives to imprisonment across Europe*** (PRI Alt Eur), funded by the European Commission under the programme JUST-JCOO-AG-2020 — action grants to promote judicial cooperation in civil and criminal justice.

The project is implemented together by Penal Reform International, the Institute for Legal Research of the University of Coimbra (Portugal) and the Hungarian Helsinki Committee.

The European Commission support for the production of this publication does not constitute endorsement of the contents which reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.