

Ideologies and Realities in Prison Law Some Trends¹

Vagn Greve & Annika Snare²

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1 The article further develops some issues that were discussed in Vagn Greve: *Straffuldbyrdelsens mål, Nogle retssammenligninger* [The purpose of sanction enforcement, Some comparisons of legal systems], in: Petter Asp et al. (eds.): *Flores juris et legem*, festskrift till Nils Jareborg, Uppsala 2002 p. 265 *et seq.*, and in Vagn Greve: *Trends in Prison Law*, in Kimmo Nuotio (Ed.): *Festschrift in honour of Raimo Lahti*, Helsinki 2007 p. 307 *et seq.* Old material is examined more thoroughly and with more references in the earlier articles.

2 The text is translated into English by Malene Frese Jensen, to whom we are thankful. Quotations from the Nordic languages have been translated into English unless otherwise noted; quotations from non-Nordic languages are not translated.

What is objectionable about a system
that inflicts disrespect, indignity or
degradation on its prisoners is ...
that it is intrinsically inappropriate
as a way for a state to treat its citizens

R.A. Duff³

Abstract

For a long period prisoners were in a kind of law-exempted space. It is only in more recent times they have received rights comparable to the human rights citizens enjoy outside prisons. This article reviews the characteristics and developments of legislations in the Nordic countries, England, Germany and U.S.A. It is noted that legislation in all these countries has moved toward principles of the 'Rechtsstaat'. However, it is also shown that today is marked by a reverse trend, which has led to – and will lead to – abandonment of achieved rights. 'Rechtsstaat'-principles have not been replaced by principles of 'welfare state' ideologies, but mainly by pure retribution or punitiveness.

1 Introduction

Sentencing and enforcement of the imposed punishment are, in reality, one and the same for the convicted individual; the judgment would be rather unimportant if it was not enforced. Within the legal sciences, however, sentencing was the only focus of attention for a long time. Very early on the philosophy behind punishment was discussed, and the legislative requirements for punishment were regulated and analysed in the literature. But the discussion of the philosophy behind sanction enforcement and the legislative regulation of same belong to a much later time. Convicts were considered to be in a kind of law-exempted space. They were simply objects for the enforcement of the rendered judgment. It is not a coincidence that prisoners constitute the last group of citizens to receive recognition of their human rights.⁴

In the middle of the 19th century the reigning ideology became a 'Rechtsstaat' ideology.⁵ The classical minimum requirements for a 'Rechtsstaat' are that the power of the state must be exercised according to a parliamentarian

3 R.A. Duff (1945) professor, University of Stirling, Scotland. The quote used as a motto for this article can be found in *Punishment, Dignity and Degradation*, Oxford Journal of Legal Studies 2005 p. 141 *et seq.*, p. 149.

4 Alexander Böhm: *Zum Einfluß von Vollzugstheorien auf internationale Vereinbarungen zur Behandlung Gefangener*, Alexander Böhm et al. (Eds.): *Idee und Realität des Rechts in der Entwicklung internationaler Beziehungen*, Festgabe für Wolfgang Preiser, Baden-Baden 1983 p. 183 *et seq.*

5 See also Vagn Greve: *Sheep or Wolves*, European Journal of Crime, Criminal Law and Criminal Justice 2005 p. 515 *et seq.*; Kimmo Nuotio: *The Ethics of Criminal Justice*, in Thomas Elholm et al. (Eds.): *Ikke kun straf ...*, Festschrift til Vagn Greve, Kbh. 2008 p. 491 *et seq.*

given law, and that the administration must be subject to review by the courts. Further it is required that the citizens have due process protection, i.e., a guarantee of procedural fairness on the part of the state. With such a view of society it naturally follows that enforcement of sanctions must be founded on parliamentary rules. Thus, discussions about the legal basis and fragmentary law regulations start appearing in the mid-1800s. One thing is to require or implement a legal basis; quite a different matter is what the legislation should provide for. Around the middle of the 19th century it was assumed, based on the prevailing view of man and society, that it was unwarranted for the state to impact on the personality development of an individual.⁶

By the end of the 19th century the ‘Rechtsstaat’ ideology was replaced by a ‘welfare state’ ideology, which rather than protection of the citizens prioritized protection of the society, and which rather than considering citizens as independent, knowledgeable individuals with the right to own values, sees them as individuals in need of proper guidance, willingly or not. Already with the Philadelphia prison system in the late 18th century, which achieved international recognition in the subsequent century, the prisons focused on the individual, as indicated, for example, by labels such as ‘reformatories’. In the area of criminal law these fundamental views dominate in the treatment philosophy that became accepted with Franz von Liszt and the criminalistic associations from around the turn of the century 1900. The main requirement then became that the punishment should affect the character and psyche of the prisoner.

In the 1970s the treatment philosophy was replaced in the Nordic countries and elsewhere by a so-called neo-classical view, according to which it was dismissed to incarcerate fellow human beings *because* the individual was in need of treatment. At the same time penitentiary case law was marked by a deep scepticism of treatment and the criminal justice policies of efforts to depenalize and reduce punishments. This trend expresses a return to the ‘Rechtsstaat’ ideals.

As will be apparent, the current trend is characterized by a retreat of both the ‘Rechtsstaat’ ideology and the welfare state ideology.

2 The ‘Rechtsstaat’ Principles

The ‘Rechtsstaat’ philosophy is epitomized by the requirement of *explicit legal authority for all measures*, the principle of legality. In so far, it is with good reason that the German ‘Rechtsstaat’ is translated into the English ‘rule of law’. Hence, the idea behind the new Danish Corrections Act of 2000 (hereafter sfbl.dk) was not primarily to change the existing rules for imprisonment, but to place the responsibility with the Parliament (‘Folketinget’). The reasoning was and is that conditions of significance must be regulated by clear rules adopted by Parliament, not by discretionary correctional orders issued by the administration according to an explicit or implicit broad authorization from the Parliament.

Yet a mere cursory reading of the Danish Act shows that it still delegates the issuance of a great deal of the rules to the administration. This holds true also for

6 Rolf-Peter Calliess: *Strafvollzugsrecht*, 3. Auflage, München 1992 p. 12.

quite significant matters. See, e.g., sfbl.dk § 50 about the conditions for furloughs. This practice of delegation is common in present-time legislation, where quite a lot is referred to administrative completion. As for sfbl.dk the rationale is also and with equal weight that the rules must cover all sorts of human activity, while at the same time be applicable to very different persons, from the poor person, who is serving a few days in lieu of a fine for bicycling at night with no lights on, to the mentally deviant and very dangerous person, who must be placed in safe custody for many years following repeated arsons. Consequently, the rules must be so nuanced and thus so comprehensive that they would exceed the natural limits for such a law.

Disciplinary punishments in particular presuppose specific legal authority. *Nulla poena sine lege parlamentaria* also applies as for disciplinary punishments. It is obvious when the disciplinary punishment extends the custodial period, but the requirement of legal authority is broader than that. Disciplinary punishment in the form of penalty cell presupposes that it is specifically authorized for the offence in question, see sfbl.dk, Chapter 11. The Norwegian rules are looser, see strgjfl.no § 40, according to which all that is required is a violation of “the rules ... or the prerequisites and conditions stipulated in or pursuant to this law”.

The legitimate use of *vague concepts as criteria for measures* has been discussed. In the German debate ‘escape risk’ and ‘abuse risk’ have been pointed out as examples.⁷ German law requires here “vollständig ermittelten Sachverhalt”; but the “completely established correlation” in these areas concerns personality traits and characteristics that are difficult to establish “completely”. Consequently, it is almost arbitrary what the courts have accepted, and their reasonings are characterized as apocryphal.⁸ In Danish law especially concepts such as ‘due regard to enforcement of the law’ and ‘the general sense of justice’ have been discussed and criticised.⁹

An example of *implications of the lack of concept clarity* can be found in the alcohol consumption prohibition. It is justified in the penal institutions as necessary to maintain order, which seems a reasonable argument. Yet, when home detention then is implemented, the rule is transferred to apply here and the justification given is that home detention replaces imprisonment and therefore should be served according to the same rules.¹⁰

According to another ‘Rechtsstaat’ requirement the citizens *are not to be subject to unnecessary encroachments upon their freedom*. Sweden implemented a new law in 1945. In the report¹¹ it was emphasized that the punishment rests only in the deprivation of liberty and not in the material factors during the

7 See, e.g., Michael Häuser: *Der Gefahrenbegriff im Strafvollzugsgesetz*, Münster 2004.

8 Hendrik Schneider: *Tempus fugit. Trendwende in der Rechtsprechung zu den unbestimmten Rechtsbegriffen?* Zeitschrift für Strafvollzug und Straffälligenhilfe 1999 p. 140 *et seq.*

9 Vagn Greve: *Straffuldbyrdelsesloven – og andre væsentlige ændringer i det danske sanktionssystem*, Nordisk Tidsskrift for Kriminalvidenskab 2001 p. 1 *et seq.*, p. 10 *et seq.*

10 Danish Policy No. 32 of 19. April 2006 Nos. 26 and 23.

11 SOU 1944:50 *Strafflagberedningens betänkande angående verkställigheten av frihetsstraff m.m.*

imprisonment. Since 1946 it has also been the foundation for enforcement of prison sentences in Denmark that the punishment solely consists in the deprivation of liberty, and that the prisoner otherwise retains the rights and duties as a citizen in society.¹² “People are sent to prison as a punishment and not for punishment”.¹³ The principle is a direct continuation of the Age of Enlightenment’s recognition that a person does not lose fundamental human rights simply for violating the rules of society. Compare the European Prison Rules (2006) Arts. 1 and 72 as well as Art. 102.2:

Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime shall not aggravate the suffering inherent in imprisonment.

(See also the Finish Prison Act (hereafter fängelselag.fi) 1:3 and the Norwegian Innstilling fra Komiteen til å utrede spørsmålet om reformer i fengselsvesenet, Oslo 1956, p. 61).

The ‘Rechtsstaat’ line of thought is also behind the important alteration of *the control system* that resulted from the new Danish sfbl.dk, under which the courts are given (opportunity for) a much more active role in the corrections area. The question is whether the control by the courts will be genuine. Can and will they perform a bona fide control of the administration, and will the administration conform to the courts? It has been argued that it even in Germany is difficult to make the administration comply with court decisions.¹⁴

The control by the courts is complemented by non-judicial controls. The Danish parliamentary ombudsman has left quite an impression on the prisons. It is characteristic that, when it was first suggested, the prisoners did not wish for control by the courts. The prisoners placed much more trust in the ombudsman than in the courts – a position we completely understand. The influence of the ombudsman is manifested both through critique in individual complaints cases and through reports on inspections of institutions. The Danish ombudsman has inspected 23 prisons over the past five years. A recent visit spanned over three days, and the report consists of 66 closely written pages. It criticizes that the ring wall is worn down, that broken windows have not been replaced, that there was no plan for window cleaning, and that there was only solid but no liquid hand-soap. The report continues with criticism of the prison as not being sufficiently active in convening meetings with the spokespersons. Further, it examines the use of solitary confinement, use of handcuffs and other force, psychologists’ confidentiality, use of medical castration etc.

The national control systems are complemented by the international, including especially the European Court of Human Rights (ECHR)¹⁵ and the

12 Hans Jørgen Engbo: *Straffuldbyrdelsesret*, 2. udg., Kbh. 2005 p. 19 *et seq.*, p. 29.

13 Alexander Paterson, quoted in S.K. Ruck (Ed.): *Paterson on Prison*, London 1951 p. 13.

14 Heinz Müller-Dietz: *Sinn und Unsinn von Kommentaren, insbesondere zum Strafvollzugsgesetz*, Bremer Institut für Kriminalpolitik: *Alternativsymposium zum Strafvollzug*, Bremen 2001 p. 63 *et seq.*, p. 71.

15 Günther Kaiser: *Menschenrechte im europäischen Strafvollzug*, Hans-Jörg Derra (Ed.): *Freiheit, Sicherheit und Recht*, Festschrift für Jürgen Meyer ... , Baden-Baden 2006 p. 133 *et seq.*

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT).

3 Recent Corrections Acts in Various Countries

Sweden's present Corrections Act (KvaL.se) is from 1974.¹⁶ The fundamental idea behind the 1974 reform was “as long as it is possible with consideration to the requirement of protecting society and differentiation to promote the prisoners’ adaptation to society and prevent the detrimental effects of deprivation of liberty”.¹⁷ The philosophy of normalization, as it is applied in this law, is a clear manifestation of the welfare state ideology that was behind the reform as such.

In *Germany* discussions began around 1870, and various administrative rules were implemented over time. There is reason to mention the rules of the ‘Third Reich’, which were characterized by rigid requirements of atonement, deterrence and revenge; see, for instance, the 1934 regulation § 48: “Die Freiheitsentziehung ist so zu gestalten, daß sie für den Gefangenen ein empfindliches Übel ist ... “ The mentioned requirements are the closest recent European parallel to the trends of the present rules in the U.S.A. It was not until 1975 that an actual ‘Strafvollzugsgesetz’ was implemented in Germany. Here – as opposed to the Nordic countries – the law came into existence pursuant to a call from the courts (rulings from ‘Bundesverfassungsgericht’). As a result the law bears the impression of the German Grundgesetz ideology, the social ‘Rechtsstaat’.¹⁸

Denmark got its first Corrections Act in 2000. It is based on a ‘Rechtsstaat’ ideology.

Norway had previously a Prison Law of 1958. It was clearly treatment oriented. In accordance with the welfare state ideology it was, in general, based upon very vague criteria for measures, see, e.g., § 24: “If the warden [of the prison in question] finds that a letter ... should not be sent, he shall keep the letter ... “

A committee established in 1980 submitted a report in 1988 entitled “New Prison Law”.¹⁹ The committee remarked that “since the treatment ideology gradually has lost ground, the question concerning use of imprisonment and the particulars of imprisonment has changed in character from more theoretical to political questions”.²⁰ The committee wrote that its starting point had been the principle of normalization; but immediately prior hereto noted as a crucial issue “how far one can go in allowing the prisoners to live their normal lives without

16 SOU 1971:74 *Kriminalvård i anstalt*.

17 Karnov, *Svensk lagsamling med kommentarer*, 10. ed., 2005 p. 2628 note 5.

18 See, e.g., Art. 28.

19 NOU 1988:37.

20 P. 13.

the theories of punishment ... being threatened”, and that the custodial enforcement “must ... satisfy the public’s call for punishment”.²¹

Not until the fall of 2000 was a bill introduced based on the 1988 recommendation from the Prison Law Committee²² and strgjfl.no was passed in 2001. The Justice Department remarked in the notes to the bill: “Overall, the proposed law represents a significant tightening up.”²³ This seems to be perceived as positive in it self. The tightening materializes in several new control measures, for example, authority to use narcotics dogs against individuals, penalizing prison escapes and stricter parole regulations.²⁴

The character of the law is neither one of a ‘welfare state’ nor of a ‘Rechtsstaat’.

Finland’s corrections act is the Prison Law of 2005. In the proposition hereto it is stated that: “The basis for this total reformation is that the rights and responsibilities of the prisoners as well as the limitations in prisoners’ fundamental rights shall be declared meticulously at the level of law according to the Constitutional requirements and the obligations in the conventions on human rights. An important goal is to increase the clarity of the law.” Hence, the law is a manifestation of a clear ‘Rechtsstaat’ philosophy.

England does not (yet) have any legislation comparable to the continental countries; the courts are further quite disinclined to get involved in the particulars of confinement. However, some development has taken place since the beginning of the 70s, when the courts directly conveyed that the prison staff should not have a threat of judicial control dangling overhead. “[T]he regime in most English prisons seems to have been closer to the authoritarian than the bureaucratic law model. ... [L]ike an army the authoritarian model needs rules but not law. Breaches of rules are a matter of censure from the next level above, not of rights for the level below.”²⁵ There is now some judicial and administrative control with the prison authority, but the control does not generate rights for prisoners. The portrayed viewpoint may, however, be somewhat weakened lately pursuant to the Parliament’s recognition of the human rights being part of English law.²⁶ The state of the law is neither one of a ‘Rechtsstaat’ nor of a ‘welfare state’.

A development partly similar to the one in our part of the world can be seen in the *U.S.A.* There used to be a “slave of the state” doctrine, according to which prisoners were completely without rights – to the extent that they could be used in medical and military experiments. Ninety percent of all pharmaceutical products were allegedly tested on prison inmates in the early 1970s.²⁷ The courts

21 P. 14 relating to p. 48.

22 Ot.prp. No. 5 (2000-2001).

23 P. 7, and Ståle Eskeland: *Rettsikkerhet og fengselsmessige hensyn i den nye straffegjennomføringsloven*, Juss-Buss (Ed.): Tvers igjennom lov til seier, Oslo 2001 p. 98 *et seq.*

24 P. 7 *et seq.*

25 Stephen Livingstone, Tim Owen & Alison Macdonald: *Prison Law*, 3rd Edition, Oxford 2003 p. 549.

26 Livingstone et al. 2003 (fn. 25) p. 543 *et seq.*, p. 551, 549.

27 The Sacramento Bee August 13, 2006.

on their own accord implemented a rights-enforcement era in the beginning of the 1970s. In numerous cases the courts dictated very precise changes both in the actual custodial circumstances, for example relating to the size of the staff and the prison capacity, as well as in the legal standing of prisoners; and they even declared a state's entire correctional system unconstitutional. In keeping with the general view of the legal system's role, the new interpretation opened up for a massive amount of court cases.²⁸ In this period there was a movement in the direction of a 'Rechtsstaat'. See below about the later abandonment of this ideology.

EU has authority to regulate correctional issues but has, as of yet, not utilized this possibility.

The corrections acts reflect, of course, their time. A hundred years ago the underlying ideology was treatment oriented, and the laws allowed for differentiation between the prisoners and for the creation of treatment-oriented institutions. This took place in such a way that in some countries (Finland, Norway and Sweden) implementation to a certain degree complied with the 'Rechtsstaat' idea of parliamentary regulation. In modern time this 'Rechtsstaat' requirement has – at least for a while – steadily gained more importance, and it is a very essential consideration behind the reforms in some countries (Denmark, Finland and Germany).

At the same time, recent laws can be conceived as rejecting the notion that citizens can lose their rights by committing a criminal act. The laws aim for equal status for prisoners and non-prisoners. The penal institutions are attempted integrated in the ordinary society and thus in the common legal system. “[L]a justice ne saurait s’arrêter à la porte des prisons ...”²⁹ The prisoner “ist nicht nur ‘der Staatsbürger von morgen’ ... sondern bereits von heute, d.h. er ist es geblieben”.³⁰ In that way the fundamental human rights are respected. In addition, several human rights instruments directly prohibit degrading treatment of prisoners; see, e.g., the European Human Rights Convention Article 3; compare also European Prison Rules (2006) Article 1 (regarding “respect for their human rights”). While the European Court of Human Rights in some areas has demonstrated a mind-boggling dynamism, it has, in the area of corrections, been just as mind-boggling restrained. Contrarily, CPT has required more from the systems. Human rights viewpoints have also been expressed in some of the corrections acts; see, for example, KvaL.se 9 §: “The prisoner shall be treated with consideration for his human worth” and fängelselag.fi 1:5: “Prisoners must be treated fairly and with consideration for the human worth.”

28 Compare, e.g., Geoffrey P. Alpert: *Legal Rights of Prisoners*, Lexington, Massachusetts 1978; John W. Palmer: *Constitutional Rights of Prisoners*, 3rd Edition, Cincinnati 1985; John W. Palmer & Stephen E. Palmer: *Constitutional Rights of Prisoners*, Cincinnati 2004; John A. Fliter: *Prisoners' Rights, The Supreme Court and Evolving Standards of Decency*, Westport 2001; and Kimberly E. Gilmore: *States of Incarceration, Prisoners' Rights and US Prison Expansion After World War II*, New York 2005.

29 *Campbell & Fell* ECHR 28/6 1984 # 69.

30 Heinz Müller-Dietz: *Mit welchem Hauptinhalt empfiehlt es sich, ein Strafvollzugsgesetz zu erlassen?* München 1970 p. 43.

4 The Objective of the Corrections Acts

While the objective of the criminal codes is quite evident, and the objective of the criminal procedural legislation equally evident is to carry through the objective of the criminal codes in a fair way, it is not immediately clear what the objective of the corrections acts is.

It is, of course, true that “*der Kern der Aufgabe des Vollzuges als Teil der Rechtspflege in der Verwirklichung des staatlichen Strafanspruchs liegt*”.³¹ Yet, this primary purpose only creates an outer shell or – if you choose – a limitation; and not much else can be deducted from this except that the enforcement shall include a deprivation of liberty in some sense of the words for a period of time, which has a certain relation to the period of time stipulated in the sentence by the court. The aim of the corrections act can thus very well be something different than assuring the enforcement of delivered sentences.

Terminologically there should be a distinction between that, which is the *execution* of the punishment (the imprisonment), and that, which is the *enforcement*, i.e., everything else that is done against and for the prisoner during the imprisonment. When it is assumed that the enforcement is an objective, which encompasses more than the pure execution of the sentence, it influences how both the execution and the other circumstances during the incarceration are implemented.

The execution of punishment shall take place in a manner that offers a reasonable guarantee that – for an adequate length of time – incarceration of a given kind takes place. In the area of correctional law two very central concepts are ‘safety and security’ and ‘order’. They are used incessantly both in legislation and by the debaters. The safety-and-security concept is divided into the ‘inner safety and security’ and the ‘outer safety and security’. Here it is the ‘outer safety and security’, which is referred to, i.e., that the incarceration must be upheld through prevention of escapes.³² According to a sensible German opinion it is important to maintain that the primary objective is not safety and security. “Sonst entstünde die Gefahr, daß die im gegenwärtigen Vollzug ohnehin überdimensionierten Faktoren der Sicherheit und Ordnung ihr Übergewicht behalten und eine wirksame Sozialisationsarbeit verhindern”.³³ It is further important that the prisoner assessments are not inflated. SfbI.dk § 22 contains, in this regard, without problem, an assumption that a convict may serve his or her sentence in an open prison, while the new strgjfl.no § 11 puts the opposite principle into law. The different assumptions are shown clearly in the criteria that determine the placement in either gaol, closed prison or open prison, where the escape risk is of essence. The law says one thing, practice often

31 Rolf Herrfahrdt: *Politische Verantwortung des Strafvollzuges angesichts des “allgemeinen Rechtsempfindens”*, Wolfgang Feuerhelm et al. (Eds.): *Festschrift für Alexander Böhm ...*, Berlin 1999 p. 81 *et seq.*, p. 90; *see also* Müller-Dietz 1970 (fn. 30) p. 15 and Calliess 1992 (fn. 6) p. 8.

32 FT 1999-2000 p. 3665; Rolf-Peter Calliess & Heinz Müller-Dietz: *Strafvollzugsgesetz*, 10. Auflage, München 2005 p. 94 *et seq.*

33 Müller-Dietz 1970 (fn. 30) p. 18 *et seq.*

something else. But in Denmark the assumption of placement in an open institution is not just a rule in theory; in practice 90 percent of convicted persons are placed in open prisons.³⁴ It is noteworthy that Denmark, without problems, uses five years of imprisonment as a guiding criterion,³⁵ Sweden uses four years,³⁶ Norway draws the line as low as 2 years,³⁷ and Finland at one year³⁸.

Experience shows that any measure can be given a more or – generally – less well-founded justification based on a consideration to safety and security. Daunting clear examples of this can be found in the latest Swedish report in the area.³⁹ Still, it follows from legal doctrine that consideration shall be made to the proportionality of the measure. This principle applies both to the composition of rules and to their enforcement. In this connection it should not be forgotten that the average prisoner in any case soon is released into society; in Denmark after approximately 2½ months (as the average time served is around 5 months).

5 The Relation to the General Theories of Punishment

The objective of the corrections acts cannot be found by transferring the general theories of punishment to that area. It would obviously be peculiar if the sentence should be determined on considerations to (re)socialisation, without the correctional system seeking to accomplish (re)socialisation. Yet, there is nothing illogical about a sentence based on ‘just desert’ principles, whereas the enforcement, within the given time-frame, is devised in accordance with treatment objectives. The actual disparity in custodial circumstances, which may result thereof, would not invalidate the sentencing and the principles behind it. It is therefore hard to understand the Norwegian Prison Law Committee when it found it to be a significant restraint for the reforms that the theories of punishment must not be threatened.⁴⁰

6 Law-stipulated Objectives

European Prison Rules (2006) Art. 6 states:

All detention shall be managed so as to facilitate the reintegration into free society
...

34 William Rentzmann, Annette Esdorf & Jens Kruse: *Straffuldbyrdelsesloven*, Kbh. 2003 p. 65.

35 Rentzmann et al. 2003 (fn. 34) p. 65, Engbo 2005 (fn. 12) p. 106 *et seq.*

36 KvaL.se 7 § and 7 a §.

37 Ot.prp. No. 5 (2000-2001) p. 55 and 181.

38 Fängelselag.fi 4:9.

39 SOU 2005:54 *Framtidens kriminalvård*; see further below.

40 NOU 1988:37 p. 14, cf. p. 48.

The most obvious emphasis on (re)socialisation as the purpose of corrections can be found in the *German* law; see StVollzG.de § 2. The East-Nordic laws also point to (re)socialisation, but with some humility that stems from the awareness of research data from the fields of prison sociology and criminology. See the *Swedish* KvaL.se 4 §:

Enforcement of imprisonment shall be carried out so that the prisoner's adaptation to society is furthered and the detrimental effects of the deprivation of liberty are counteracted.

Similarly in *Finnish* law where the treatment optimism seems even less prominent; see fängelselag.fi 1:2 and 3:

The goal for the enforcement of imprisonment is to increase the prisoners' preparedness for a life without crime by furthering their handling of life and adjustment into society ...

... The harm that is caused by the deprivation of freedom shall, if possible, be prevented.

The provision describing the objective of the *Norwegian* corrections act, strgjfl.no § 2, Subs. 1, states, on the other hand:

The punishment shall be served in a manner which takes the purpose of the punishment into consideration, which prevents new criminal acts, which is reassuring for society, and which within this framework ensures the prisoners satisfactory conditions.

This provision is lacking clarity in every sense. To begin with it doesn't even explain what "the purpose of the punishment" is. In addition, strgjfl.no does not mention the adjustment into society, but only the prevention of crime.

7 The (Re)socialisation Principle

(1) (Re)socialisation can be the *purpose of the deprivation of liberty* and thus be part of or the basis for the justification of deprivation of liberty, as for example, was the case in Franz von Liszt's criminal justice policies. According to the present way of thinking such a configuration of sanctions is not acceptable – at least not if (re)socialisation is the only factor. It would be a rejection of the kind of proportionality considerations that are prominent in today's concept of sentencing.

(2) (Re)socialisation can be a *purpose within a deprivation of liberty sanction*, which has a different purpose. "Wir bestrafen nicht (mehr), um zu resozialisieren, sondern, wenn wir schon bestrafen müssen, versuchen wir zu resozialisieren."⁴¹

41 Heribert Ostendorf: *Jugendgerichtsgesetz*, 6. Auflage, Köln 2003, p. 224.

A custodial sentence that is motivated by (re)socialisation presupposes coerced (re)socialisation, while (re)socialisation efforts that take place in relation to a custodial sentence with a different motivation can, in principle, appear as coercive as well as voluntary options. What is discussed here is the legal structure.

Another quite different question is the criminological, whether coerced measures are effective and suitable means to achieve (re)socialisation, or whether it, to the contrary, is necessary or beneficial to let the measures be voluntary options.

A third question is the ethical one, whether one can applaud a 'Rechtsstaat' view of the human being as being autonomous and rational, while at the same time subject it to a duty to change.⁴²

Even if it is recognized that the punishment solely consists in the deprivation of liberty, and that the prisoner otherwise is an ordinary citizen, this does not mean that the state (the prisons and probation services) can limit themselves to incarcerating etc. the prisoners. The state has, as a welfare institution, an obligation to alleviate the detrimental effects of the incarceration etc. and to reduce the risk of recidivism, cf. sfbl.dk Sections 3 and 84. Comparisons between prisons and hospitals often lead down the wrong path; still it can be said that there is a similarity in that hospitals not only shall treat the broken bone etc., but that they also shall take care that the patient avoids hospital infections, and shall offer possibilities for rehabilitation after surgery. It is absurd that an individual incarcerated in an institution shall be capable of learning how to live in freedom; but that is the difficult task of the prisons and probation services. This is true even if "it lies in the logic of incarceration as such that it is impossible to carry out an effective isolation without, at the same time, contributing to the creation of humiliating situations between the guardian and the inmate".⁴³

The laws' stated correctional principles are not unambiguous. Further, they can be implemented in different ways, both in form and in substance. Still, the mentioned German rules stipulate that re-socialisation is the central objective. This means that the whole course of incarceration and its regulation has a different key-note in Germany than in the Nordic countries.

It is significant that the German objective is a welfare-state based principle, not just a humanitarian based restriction.⁴⁴ "[D]ie sozialstaatliche Verpflichtung zur Hilfeleistung besteht ... unabhängig davon, wie jene Situation entstanden ist, wer für sie die Verantwortung trägt ..."⁴⁵ "Nicht zuletzt dient die

42 For example, Günter Bemmann: *Zur Reform des Strafvollzugsgesetzes*, Zeitschrift für Strafvollzug und Straffälligenhilfe 1999 p. 204 *et seq.*

43 Vilhelm Aubert: *Epilog. Mot en anstendig kriminalpolitikk*, Rita Østesen (Ed.): I stedet for fengsel, Idéer og forsøk, Oslo 1970 p. 156.

44 Günter Kaiser & Heinz Schöch: *Strafvollzug*, 5. Auflage, Heidelberg 2002 p. 176.

45 Heinz Müller-Dietz: *Strafzwecke und Vollzugsziel, Ein Beitrag zum Verhältnis von Strafrecht und Strafvollzugsrecht*, Tübingen 1973 p. 16; Günter Bemmann: *Im Vollzug der Freiheitsstrafe soll der Gefangene fähig werden, künftig in sozialer Verantwortung ein Leben ohne Straftaten zu führen*, Strafverteidiger 1988 p. 549 *et seq.*, p. 551.

Resozialisierung dem Schutz der Gemeinschaft selbst; diese hat ein unmittelbares eigenes Interesse daran, daß der Täter nicht wieder rückfällig wird und erneut seine Mitbürger oder die Gemeinschaft schädigt”.⁴⁶

The (re)socialisation objective applies to all categories of inmates. It is not acceptable to write off some group as being without a need for (re)socialisation (for example prisoners serving life sentences), as being without the ability for it (for example drug addicts), or as being without interest in it (for example prisoners awaiting deportation). This applies even if it is unrealistic to have as a goal that life shall be lived entirely “ohne Straftaten”. Harm constraints are also desirable.⁴⁷

8 Limitations in the (Re)socialisation

In *Swedish* law there is, as mentioned above, some modification in the (re)socialisation attempts, as seen in the quoted KvaL.se 4 §. As opposed to the most obvious reading the provision is perceived so “that it is the protection of society that first and foremost shall be provided for”.⁴⁸ The Prison Committee Report stated that the objective of 4 § “in a way” has nothing to do with the purpose of punishment, but that there still is a conflict. Furthermore, it suggested deferring the treatment consideration by not having the offender be “granted ... mitigation ... so that the courts’ determination of punishment ... appears to be disregarded. This is important in order to maintain the public confidence in the legal system”. In other words, the public’s confidence in the legal system would dwindle if the prisons and probation services follow a clear rule of law! The Prison Committee Report therefore suggested an addendum to the provision, according to which the purpose of the punishment also should be taken into account. It is argued that this is already in effect pursuant to the Prisons and Probation Service’s internal rules.⁴⁹ And thus it calls for the same critique as falls upon the Norwegian law text.

The new *Norwegian* rule, strgf.no § 2, is both more comprehensive and more vague than the other countries’ equivalent rules. At the outset it mentions that “the purpose of the sanction” shall be taken into account. The bill states that the treatment of the prisoner must not “violate the common conception of justice”, and that consideration in all cases shall be taken to “the general sense of justice”.⁵⁰ *Norsk Lovkommentar*⁵¹ construes the meaning in this way: “In a few cases this results in the deferment of individual considerations, for example, if it will contravene with the public’s sense of justice to transfer the convict to a

46 BVerfGE 45, 187 [239].

47 Johannes Feest (Ed.): *Kommentar zum Strafvollzugsgesetz* (AK-StVollzG), 4. Auflage, Neuwied 2000 p. 17.

48 Karnov (fn. 17) p. 2628 note 5.

49 SOU 1993:76 *Verkställighet av fängelsestraff*, p. 18 *et seq.*

50 Ot.prp. No. 5 (2000-2001) p. 149.

51 P. 3369.

special alternative program.” “The sense of justice” or “the general conception of justice” has undoubtedly a justifiable role in the creation of rules. This is true even though part of the ideology behind the representative democracy upholds that the right decision not necessarily is the one the majority of the citizens spontaneously believes in. Such concepts are, on the other hand, quite unsuitable when it comes to concrete decisions. This is firstly because it is extremely difficult to find out what the “the sense of justice” requires or dictates. Scientific studies have with great certainty shown that the population has one opinion, when asked in general terms, and a quite different one, when asked specifically. Also, there is rarely *one* sense of justice. One individual can have a clear and well-founded perception of what is right and just, but there will almost always be other citizens, who have a quite divergent opinion. Secondly, it is very rare to have scientifically sound research results that are directly applicable, when a concrete case is being decided. References to the “common” “sense of justice” are therefore in reality shrouding that the speaker’s own beliefs are assumed. The resemblance between ‘sense of justice’ and ‘repression’ is also exposed by the Norwegian Prison Law Committee when it emphasizes, that imprisonment “must ... have a content that satisfies the public’s call for punishment”.⁵² The most courteous characteristic of the new Norwegian rule is that it is devoid of content.

9 Interim Summary

”Die Völker unterscheiden sich mehr durch die Eigenschaften Derer, die Gesetze machen, als durch den Character Solcher, die sie übertreten.”⁵³ The corrections acts in our cultural sphere agree that a judgment’s conclusion must be complied with, but there is no agreement as to the significance of much else.

The punishment is executed no matter what the particulars of the deprivation of liberty are, and it is therefore important to find an enforcement purpose that can fill the shell, which the incarceration constitutes. The present-day opinion is that prisoners must be treated like other citizens unless there is legal basis for the opposite. The reviewed corrections acts seem to agree this far and to be in reasonable harmony with the ‘Rechtsstaat’ principles. However this does not amount to a purpose of the enforcement, but solely to general human rights.

The question then is whether an actual enforcement purpose exists. It can presumably only be to make the prisoner better suited for leading a life free of crime. The German law is most clearly based on social welfare state principles; it goes as far as instructing the prisoner to be (re)socialised. The Nordic ones are more reticent and oriented toward voluntary options. (Except the new Norwegian code that stands out with confusing and unclear mission statements).

52 NOU 1988:37 (at fn. 19) p. 14.

53 Franz v. Holtzendorff & Eugen v. Jagemann: *Handbuch des Gefängniswesens*, Hamburg 1888 p. 25.

Implicitly stated herein is a rejection of the notion that sanction goals, which might be in conflict either with the possibility to execute the sanction or with the (re)socialisation goal, can be given significant weight or even weight at all.

10 The Recent Development

The following concerns the current development. The question is whether recent legislative changes bring the laws further in the direction of the 'Rechtsstaat' principles. In general, as will appear below, one will find that it is no longer the implementation of prisoners' rights, but rather the abolishment of same that has political prominence.

10.1 The Social Sciences

The social scientists have changed direction and pointed out that it actually is possible to change people, including prisoners, and consequently influencing recidivism. In criminology, as in other professions, the new catchword became evidence-based policies.⁵⁴ Except by certain not very convincing law-and-economics theoreticians there are, however, not many who refer to prisons in a positive way.

10.2 The Prison Administrations

Around 1990 a shift also took place in the prison administrations' positions to the treatment of prisoners. The "nothing works" pessimism was abandoned. With epicentre in Canada a treatment optimism spread throughout many correctional systems.⁵⁵

10.3 U.S.A.

Compared to the former 'Rechtsstaat' ideology the Supreme Court went into reverse already in 1991; the lower courts reacted immediately in the same direction, and the prisoners no longer had success to the same degree when they filed suits against the system.⁵⁶ The Congress and the state systems also joined in; particularly restrictive was the Prison Litigation Reform Act of 1996.⁵⁷ Restrictions showed in limitations in the right to bring cases before the courts; increased court fees; preclusion from parole following unsuccessful court cases against the prison administration etc. The prison facilities were deliberately made ugly; prisoners were given pink underwear to humiliate them; chain-linked work crews were reintroduced in public areas etc. "If prison reform through litigation has been directed at the overuse or misuse of prison as an institution

54 As for recent time *see*, for example, the review in Britta Kyvsgaard (Ed.): *Hvad virker – hvad virker ikke?* Kbh. 2006, with several references.

55 Compare Jim Vantour (Ed.): *Our Story*, Ottawa 1991.

56 Richard Bruce Cole: *Prison-conditions cases since Wilson v. Seiter: A study in lower court compliance with supreme court decision making*, University of Connecticut, 1999.

57 Margo Schlanger: *Civil rights injunctions over time: A case study of jail and prison court orders*, New York University Law Review 2006 p. 427 *et seq.*

then it has failed. If such reform is aimed at race-class inequalities in the prison population, or at otherwise dysfunctional sentencing laws and practices, then it has also failed. On the other hand, if reform efforts through litigation are aimed at brutal, uncivilized conditions of penal confinement, the total absence of medical or mental health systems, naked physical brutality, and the absence of any procedural regularity in the disciplinary system, then there has been some success.”⁵⁸ After *Johnson v. California* (2005) the editors of the Harvard Law Review observed: “[T]he key question ... is why prisoners lose full constitutional protection at all.”⁵⁹ An influential federal panel of medical advisers has now recommended that the government loosens regulations limiting testing of pharmaceuticals on inmates.⁶⁰

Still, the pendulum has not swung all the way back to the “slave of the state” doctrine.⁶¹ Following the publication of the Abu Ghraib photographs voices are heard anew inquiring about the conditions in the U.S.A. prisons. High-ranking jurists are again demanding a reformation of sentencing and correctional principles. Commissions have been formed to investigate abuse and maltreatment in the prison systems.⁶² In December 2005, 308 members of the House of Representatives supported a bill that prohibits cruel, inhumane and humiliating treatment of prisoners, while 122 members voted against it.⁶³

10.4 The Criminal Law Theories

The U.S.-American repressive shift happened for the courts and the politicians. At the same time a similar change of opinion occurred among criminal law theorists in U.S.A. and other countries. The very lengthy bad conscience over the sufferance of imprisonments was superseded by a greater appreciation of this form for punishment. The acceptance of or even the satisfaction with imprisonment is reflected in some of the expressions of the present, such as ‘just desert’ and ‘positive general deterrence’. (This does not necessarily mean that these theorists advocate long and harsh punishments). Retribution has been known far back in time; but it gained new importance through several works of Andrew von Hirsch and others in the 1970s⁶⁴ and onwards; and the term - ‘just desert’ - is in itself positively loaded in a quite different way than the past’s ‘retribution’. Similarly, ‘positive general deterrence’ has been a wellknown criminal law theory for a long time; the Danish jurist Anders Sandøe Ørsted was

58 Fred Cohen: *The Limits of the Judicial Reform of Prisons: What works, What does not*, Criminal Law Bulletin 2004 p. 421 *et seq.*

59 James E. Robertson: *Correctional Case Law: 2004-2005*, Criminal Justice Review 2006 p. 185 *et seq.*, p. 201.

60 The Sacramento Bee August 13, 2006.

61 Fliter 2001 (fn. 28) p. 196 *et seq.*

62 Margaret Colgate Love: *The American Way of Punishment*, ABA Justice Kennedy Commission Recommends Sweeping Change, Criminal Justice 2005, 19:4 p. 32 *et seq.*; Jennifer Trone & Robin Dull: *Commission Focuses on Safety, Abuse in Prisons*, Criminal Justice 2005, 20:3 p. 36 *et seq.*

63 Weekendavisen December 16, 2005.

64 Andrew von Hirsch: *Doing Justice: The Choice of Punishment*, New York 1976.

thus a proponent for this view in the beginning of the 1800s. Yet it is probably not a complete coincidence that the first two references in Jescheck's & Weigend's thorough textbook to 'positive general prevention' are from 1989.⁶⁵

10.5 Europe

The European legislation evolved, in general, up until recent time in the direction of stronger acceptance of the 'Rechtsstaat' principles. There has also been a strong development in the area of *human rights*, which also has been of significance for sanction enforcement. The human rights development has not, in particular, come straight from conventions etc. in the Nordic European countries, but instead to some extent through influences from the European Court of Human Rights (ECHR) and the European Committee for the Prevention of Torture (CPT).

The *EU Commission* takes the view that EU can regulate and harmonize the area of corrections. Considering the experiences thus far in terms of EU's harmonizations in the criminal law area,⁶⁶ there is reason to believe that this will result in deteriorations rather than improvements. It permeates the Green Paper concerning these issues from 2004 that the decisive factor is uniformity, not the prisoners' conditions. Attention is especially called to harmonisation of the time-related conditions for release on parole and the possible abolishment or adjustment of the life sentence. At the same time the objective of re-socialisation is emphasized.⁶⁷

In *England* a radical policy change took place when Home Secretary Michael Howard in 1993 proclaimed that "prison works" and that correctional systems should be "austere". Labour immediately followed suit with "Tough on Crime".⁶⁸ The prison populations increased and the prisons decayed. The British initiatives have been followed up by many political parties – conservative and social democratic – in *other European countries*.

Out in the world *the Nordic countries and the Netherlands* have been renowned for their humane and progressive correctional systems. It is therefore particularly illustrating to consider the development in these countries. Below is a schematic overview of the development in Denmark in recent years and a brief review of the latest Swedish proposals. As will appear the trends are the same.

Denmark

2001: Reintroduction of "youth prison" results in considerably longer incarceration periods for young criminals – further, the sanction is applied more than twice as often as the minister had projected before the Parliament. It is significant that the former 'youth prisons'

65 Hans-Heinrich Jescheck & Thomas Weigend: *Lehrbuch des Strafrechts*, 5. Auflage, Berlin 1993 p. 68.

66 Thomas Elholm: *EU's strafferetlige samarbejde – er lig med øget repression i Norden?* Juristen 2006 p. 134 *et seq.*

67 Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, KOM(2004)334.

68 Liora Lazarus: *Contrasting Prisoner's Rights, A Comparative Examination of Germany and England*, Oxford 2004, for example p. 251 *et seq.*

- (‘borstals’) until 1973 were ‘prisons’ according to the Criminal Code. The new ones, which are very similar, are classified as ‘other sanctions’ in order to(!) avoid basic principles for sentencing.
- 2002: CPT sharply criticizes the special prison for aliens awaiting deportation.
- 2002: CPT criticizes that “prison officers’ approach to their work appeared to be focussed almost exclusively on custodial duties and it was rare ... for staff to venture outside their office located within the units”.
- 2002: Doubling of specially secured institutional accommodations for youths.
- 2002: Fewer criminals are released on parole after two thirds of time served. This trend has continued ever since.
- 2002: The custodial conditions are characterized by increased conflicts between inmates and staff.
- 2002: Limitations in the possibility for leave of absence.
- 2002: Criminalizing escape from prison.
- 2002: Limitations in disclosure of documents, pursuant to which the prisons no longer have to explain several restrictions in an inmate’s rights. – Since this example is so illustrative of the development a few more comments are in place: The rules mean, for example, that an inmate can be excluded from social interaction or be transferred from an open to a closed prison, without it being necessary to inform the individual what the decision is based on and who has put forward the information that prompted the decision.⁶⁹ A minority in the Criminal Law Commission characterised this as a Kafkaesque state of law. The rules are not in harmony with the European Prison Rules (2006) # 59. The CPT has also stated that “prisoners facing disciplinary charges should always be heard in person by the adjudicating authority (in addition to ... being able to call witnesses ...)”.⁷⁰
- 2003: 100 additional cell accommodations are granted.
- 2003: Construction begins on a new big closed prison; opened in October 2006.
- 2003: The State Budget grants an additional prison, and a tougher approach toward young offenders is called for.
- 2004: A study shows that five-year-old rules concerning assistance to newly released inmates are not followed.⁷¹
- 2004: Overcrowding creates internal problems in the prisons; classrooms are, for example, being utilized as cells.
- 2004: New rules about release on parole after serving half the time – according to the explanatory notes to the bill it shall among other factors depend upon the ‘general sense of justice’; vague criteria are also used in other respects.
- 2004: The government insists on zero tolerance toward young offenders.

69 Public Administration Act Section 9, Subsection 9, as modified by law No. 382 June 6 2002; see further Engbo 2005 (fn. 9) p. 168 *et seq.*

70 2003, Sweden, # 68.

71 NK 30(1) p. 23 *et seq.*

- 2004: Law about so-called zero tolerance toward drugs in the prisons,⁷² with 40,000 random drug tests a year and increased number of narcotic dogs. See further below.
- 2004: Members of motorcycle gangs are prohibited from keeping their vests in the prison for use during leave of absence.
- 2004: Weights of more than 30 kilos are removed from the prisons' exercise facilities.
- 2005: Limited social interaction for so-called negative strong prisoners.
- 2005: The Minister of Justice stated during the inauguration of the prison at police headquarters: "It is not the intention that it should be very fun for inmates to stay here."⁷³
- 2006: It is found that, compared to year 2000, there are twice as many young people who receive an unconditional prison sentence (including the special youth sanction).
- 2006: Increased authority to deny leaves of absence from the prisons.
- 2007: Criminalization of possession of telephones in prisons.
- 2008: The new minister of justice tells reporters that he wants to be known as "Tough Brian" and intends to disregard knowledge provided by criminologists and professors.

Sweden

The present Swedish 1974-law, KvaL.se, has been criticized for being based on an abandoned view of punishment, determined from a treatment point-of-view. Such a view conflicts with the sentencing rules that later have been implemented.⁷⁴ Since then the development has gone further, so that the 1974-law now is criticized for not being extensive enough in the treatment area.

The Corrections Committee presented in 2005 a report⁷⁵ with a proposal to a new law, the Corrections Act. The title of the report is "Corrections of the Future", although the main line is a return to abandoned correctional principles. The Committee pointed to the desirability of "a more developed system for both positive and negative reinforcement to increase the possibilities for influencing the convicts' behaviour".⁷⁶ The proposal is based on increased individualisation with progress plans for every prisoner. The plans shall be prepared taking into consideration the victim.⁷⁷ A classical system of privileges attainable through good behaviour is implemented (a 'förmånssystem').⁷⁸ Prisoners, who follow the plan, end up in a halfway house. "It is presupposed that the prisoner overcomes any substance abuse and criminal way of thinking, any inclinations to violence and anger, and also increasingly takes part in self-management in various

72 SfbL.dk Section 60 a.

73 Politiken December 27, 2005.

74 SOU 1993:76 *Verkställighet av fängelsestraff* p. 16.

75 SOU 2005:54.

76 P. 127.

77 Proposal's 1:5.

78 Proposal's 3:6-8, p. 34 *et seq.*

forms.”⁷⁹ In relation hereto the Committee applies a somewhat narrow concept of duty. This can be illustrated by the following quote: “In the new law [i.e., the Committee’s proposal] there is no specific rule about occupational duties. A prisoner must, however, participate in the occupational activities, which are stipulated in the progress plan, in order to be considered for certain benefits. A prisoner who does not participate in occupational activities as directed has no right to participate in the social interaction with other prisoners ... A prisoner, who does not participate in occupational activities as directed, usually doesn’t qualify either for means of payment for different expenses in the institution.”⁸⁰ Some other changes similarly show a radically different position to correctional issues than the present one. The upcoming law will make it “easier to separate a prisoner from social interaction.”⁸¹ It will be permitted under the law to design visitation rooms with glass panes.⁸² It will be possible to conceal from the prisoner that the institution has suppressed correspondence.⁸³ The Committee “suggests that severe restrictions are implemented as for prisoners’ opportunities to possess means of payment and personal effects in institutions and as for carrying out financial transactions with each other within the institutions.”⁸⁴ The reason given for this is “that every object represents a potential security risk”,⁸⁵ and that “[e]very personal object inside an institution makes visitation more difficult and the belongings represent a potential possibility to hide prohibited property or to carry out prohibited transactions. As a rule prisoners should therefore not be allowed to possess personal belongings ... “.⁸⁶ “The Committee has... found that own belongings inside institutions in principle always are a security risk”.⁸⁷ This argumentation is a typical example of how any limitation can be justified in security risks. Based on order considerations pornographic pictures are prohibited, even if they are legal outside the institution; the Committee is of “the opinion that such should not exist at all in the assortment of the institutions’ stores”.⁸⁸ It is permissible though, to wear a wedding band. “Out of consideration to order it should, however, not be possible for prisoners to wear other jewellery in the institutions, even if they are of simple kinds.”⁸⁹ After this nothing seems to be left, which cannot be prohibited based on order considerations. “According to the opinion of the Committee one-sided muscle-enhancing exercising is incompatible with the correctional task to ... reduce the

79 P. 334.

80 P. 30 and p. 392 *et seq.*

81 P. 32.

82 P. 32 *et seq.*

83 P. 33.

84 P. 31.

85 P. 417.

86 P. 422.

87 P. 423.

88 P. 429.

89 P. 425 *et seq.*

risk of the prisoner committing new crimes following release. ... Even for those who not previously have committed violent crime it is found, according to the Committee's opinion, to be a risk that pure muscle-building can lead to violence being used in continued criminal activities."⁹⁰ The parole rules "will have an increased facultative element",⁹¹ even though the rules already had a facultative character.⁹² The Committee wants to abandon the distinction between closed and open institutions. This can be seen as a consequence of the gradual increase of security measures in the open prisons, whereby the classical open prison has disappeared.

The Committee's starting point was somewhat surprisingly that it "[has] not had ... reason to take a stand on imprisonment's ... purpose". Its starting point was rather that "such a punishment must be carried out in the best possible way".⁹³ How one can imagine what the best possible way is, when one does not know what is to be achieved, evades comprehension. The proposal as such is marked by a belief in forced socialisation, and one easily gets the impression that the Committee dismisses the notion that restrictions in people's lives should require a concrete and well thought-out reason – even if it itself says the opposite.⁹⁴ The existing KvaL.se 4 §, 1st period, according to which "[e]nforcement of imprisonment shall be carried out so that the prisoner's adaptation to society is furthered and detrimental effects of the deprivation of liberty are counteracted", is not replicated. It has been replaced by the rule of the progress plan, which is to "reduce the risk of him or her committing new crime" (the proposal's 1:5). The Committee's reasoning is that it is a "big problem with today's legislation ... that it does not include sufficient incentives for prisoners to look after themselves".⁹⁵ The lowest level in the progressive correctional system must obviously not be so low that it violates human rights etc.⁹⁶ Surprisingly, however, the Committee is of the opinion that the right to communicate with the outside world is not such a right. Such communication is instead validated as having importance for the prisoner's re-socialisation.⁹⁷ In the proposed progressive system several conditions are listed for moving up to higher levels. The Committee emphasizes, on the one hand, that it is important out of consideration to equal protection under the law that these conditions are clear and precise. On the other hand, one of the conditions, which the individual must fulfil, is to follow the directions of the staff.⁹⁸ And not just have followed them, but "[i]t will be crucial whether there ... is reason to believe that the

90 P. 440.

91 P. 38.

92 BrB.se 26:7, cf. Ulf Berg et al.: *Brottsbalken, En kommentar*, Stockholm, p. 26:28.

93 P. 211 *et seq.*

94 P. 211 *et seq.*

95 P. 338.

96 P. 345 *et seq.*

97 P. 345 *et seq.*

98 P. 360.

prisoner in the future shall respect the rules, which apply to prisoners who are at a higher level in the benefits system”.⁹⁹ It is completely incomprehensible that the Committee can find that these requirements fulfil the conditions, which it has laid down for the equal protection under the law. “It is ... a more humane solution to have a restrictive assessment when deciding on upgrading to a higher level, so that the number of downgraded prisoners can be minimized ...”¹⁰⁰ Downgrading is always done to the lowest level, no matter what level the prisoner was at.¹⁰¹

11 How are the Frameworks Actually Filled in?

The prison administration’s respect for the aim of the enforcement ought to show in the contents of the administrative rules and in the actual conditions in the prisons. These years, international comparisons are showing depressing results. Correctional conditions that violate human rights are found in too many places. A great number of countries have drastically increasing prison populations that show no correlation to the crime development.¹⁰² In Europe this is especially the case of the Netherlands, and Spain, but the trend is far from limited to these.¹⁰³ The most obvious exception was for a long time Finland, which deliberately went in the opposite direction.

The extreme increases have resulted in prison populations over capacity, sleeping accommodations in big dormitories, conversion of common living rooms into sleeping accommodations etc. Newer prison architecture originating in U.S.A., e.g., “maximum security units”, is designed in such a way that the prisoner has absolutely no private life, and so that contact with fellow human beings is impossible.¹⁰⁴

Prisoners are not receiving the opportunities for vocational training and education that they should have; only half of the prisoners in France, Germany and England have such opportunities.¹⁰⁵

99 P. 361.

100 P. 361.

101 P. 362.

102 Tapio Lappi-Seppä: *Penal Policy in Scandinavia*, Michael Tonry (Ed.): *Crime, Punishment, and Politics in Comparative Perspective*, Chicago 2007 p. 217 *et seq.*

103 *See*, for example, Irene Sagel-Grande: *Modernisierung des Sanktionssystem und der Sanktionsanwendung in den Niederlanden*, *Monatschrift für Kriminologie und Strafrechtsreform* 2005 p. 427 *et seq.*

104 For example P. Artières & P. Lascoumes (Eds): *Gouverner, enfermer: La prison, un modèle indépassable*, Paris 2004; Philip H. Schneider: *Besprechung*, *Zeitschrift für Strafvollzug und Straffälligenhilfe* 2005 p. 138 *et seq.*; Sylvia Casale: *Der Strafvollzug in internationalen Vergleich*, *Zeitschrift für Strafvollzug und Straffälligenhilfe* 2005 p. 19 *et seq.*; and Nils Christie: *Kriminalitetskontroll som industri, På vej mod Gulag, vestlig stil*, 2nd ed., Kbh. 2001, English edition: *Crime Control as Industry*, 3rd ed., London 2000.

105 Evelyn Shea: *A Comparative Study of Prison Labour in France, Germany and England*, *Penal Issues*, March 2006 p. 11 *et seq.*

A fresh example is the allocation of prisoners in Denmark. Humane and crime-preventive considerations lead to the adoption of a *principle of proximity*, which allows the prisoners to maintain contact with their families.¹⁰⁶ This is required directly in the European Prison Rules (2006) Art. 17.1. Now new prisons are located based on the unemployment statistics to create employment in remote provinces, even if such practice contravenes the mentioned fundamental considerations. Criminal law policies have become inferior to the general financial policies.

Another typical, Danish example: Politically it has been imposed that a certain number of daily *urine samples* shall be collected, i.e., no matter whether there is a concrete reason to suspect an individual. The prisoners in the prison 'Anstalten ved Herstedvester' complained to the Ombudsman, who replied that considering the Parliament deliberately had laid down the rule, he could not criticize it. The prisoners also objected to the samples being collected by the uniformed staff; this complaint was dismissed for the same reason (inspection in 2005). The Danish Prisons and Probation Services' Chief of Security has emphasized, "that the personnel must ensure that the urine comes straight out of the prisoner's urinary system".¹⁰⁷ CPT¹⁰⁸ has expressed "serious misgivings" over the fact, that "[i]nmates ... were obliged to urinate in the presence of two prison officers, and additionally in front of two mirrors, apparently to avoid substitution of samples. Not surprisingly, many prisoners felt that these conditions were humiliating." On the other hand, the European Court of Human Rights has found that it does not conflict with Art. 3, that a prisoner must urinate in the presence of an attendant.¹⁰⁹

This overall development is meeting less resistance as the criminal justice policies meanwhile, *de facto*, have abandoned the principle, which has been fundamental for the course of law since the American and the great French revolutions, namely the principle that all people have human rights. Perhaps it can be said that with the present rejection of the welfare state follows a rejection of the responsibility for others. Flemming Balvig has similarly considered the development as a manifestation of a late-modern revolution.¹¹⁰

12 Closing Remarks

The fundamental position to punishment has changed radically. It shows everywhere. In short – and too short – the changes are:

106 Engbo 2005 (fn. 12) p. 134 *et seq.*

107 Nyt fra Kriminalforsorgen, December 2005 p. 16.

108 Iceland, 2004, # 31.

109 21132/93, *Peters v. Netherlands*, April 6, 1994.

110 Flemming Balvig: *When law and order returned to Denmark*, Journal of Scandinavian Studies in Criminology and Crime Prevention 2004 p. 167 *et seq.*, and: *Brun kriminalitet – sort politik*, Politiken October 16, 2005.

Politicians who previously implemented decriminalizations and more lenient punishments now implement uninhibited new criminalizations and stiffer punishments. The repeated substantial increases in sanctions result – in spite of the decline in crime – in escalating prison populations. Criminals are no longer regarded as victims.

Practitioners have regained the belief in enforced rehabilitation and therefore consider the incarceration as a possibility to influence the offender in a positive direction.

Criminologists find scientific data that support the practitioners in so far as they point to treatment options.¹¹¹ Still, there is probably not any recent criminologist who has coupled treatment options to the purpose of incarceration as such. Meanwhile, it is remarkable that studies by and large no longer focus on prison culture, prisonization etc, i.e., on the negative side of imprisonment.

Criminal law theorists profess to ‘positive’ general deterrence or to ‘just desert’. The abolitionism is history.

And many *jurists* express concern over the dynamic expansion of the human rights by the European Court of Human Rights.

In the preceding we have seen a century-long development directed toward a still better and more humane fulfilment of the ‘Rechtsstaat’ ideals in the countries’ prison systems. But this development breaks off, and what is seen now in almost all countries and in almost all areas is a ‘new punitiveness’ characterized by drastically increasing prison populations and considerable tougher prison conditions.¹¹² Historically, this increase has parallels only with the events during wars and civil wars. It is possible that the penal tradition and modes of thought in the Western European countries stand firmly in the way of a descent into such penal harshness and inhumanity as in U.S.A.;¹¹³ still, we find it hard to make out anything other than that the dikes also here have buckled. The aggravation cannot be attributed to the crime development; in both U.S.A. and England, who have taken the lead, crime was declining beginning several years before the change,¹¹⁴ and crime is declining in general in most countries. The classical Durkheimian balance in society seems gone. And it raises the question of what the matter is. A U.S.-American study has focused on the big differences in the prison populations in the different states – from Louisiana’s 803 to Minnesota’s 150 prisoners (serving more than one year!) per 100,000 inhabitants; it is concluded that a significant part of the differences can be

111 See, e.g., the literature reviews in Mark W. Lipsey: *What Do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents?*; James McGuire (Ed.): *What Works: Reducing Reoffending, Guidelines from Research and Practice*, Chicester 1995 p 63 *et seq.*; Francis T. Cullen: *The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference*, Criminology 2005 p. 1 *et seq.*; Kyvsgaard 2006 (fn. 51); and Thomas W. Strand: *Mot en senmoderne kriminalomsorg?* Materialisten 2006:1 p. 55 *et seq.*

112 J. Pratt, D. Brown, S. Hallsworth & W. Morrison: *The New Punitiveness: Trends, Theories, Perspectives*, Devon 2005.

113 Duff 2005 (fn. 3) p. 141.

114 Jeffery T. Ulmer: Review of Michael Tonry: *Punishment and Politics*, Contemporary Sociology 2005 p. 668 *et seq.*

explained based on differences in the citizens' involvement in government.¹¹⁵ Others have seen the development as a result of a still greater polarisation between the haves and the have-nots; which is the conclusion of a comparative study of the prison systems in North- and South-America.¹¹⁶ Still, it can be difficult to understand that the similar and simultaneous international developments, which can be seen within the past decade, can be explained by changes of the mentioned kind.

But why are such policies so free of charge? Why don't the voters react negatively? Is the reason that 'criminal' and 'foreigner' successfully have been made into synonyms in the same way as 'criminal' and 'black' successfully have been made into synonyms in the U.S. public conscience?¹¹⁷ Where we used to see crime as normality, i.e., as acts committed by our own, we now see crime as acts committed by foreigners. In that case the discussion about the actual effects is quite irrelevant in our xenophobic time. Criminal law has indeed become a 'Feindstrafrecht'.

Earlier, i.e., until the 1970s, imprisonment was considered a tool to prevent crime. With the treatment-scepticism the politicians gave up that thought. The correctional system became a political tool for showing strength. From U.S.A. via England to the European continent "Tough on Crime" became the war cry. Today's politicians have sufficient knowledge about the criminological results, so they no longer proclaim that crime can be reduced through sanctions – they only refer to a diffuse "signal effect".

Yet, is there a new wave underway? The English government has suggested that the courts shall adjust the sentencing to the number of prison accommodations.¹¹⁸ The English conservative shadow minister for home affairs, Edward Garnier, has discovered that prisons are "wasting lives and wasting money". He is shocked that only 2 percent of the prison budgets are applied to education and that not all, who so wishes, can receive treatment for drug abuse; he wants to strengthen the psychiatric health system and get the treatment-needing prisoners transferred there; he will support the post-release services; he is for "rebranding the Tories as a party with a social conscience". But as written in *The Times*:¹¹⁹ "[I]t is going to take a huge amount of explaining to persuade people that the tories are not simply going soft on crime."

And even the most optimistic person must confess that there is a long way to an articulation of a conception of criminal punishment that could underpin a non-degrading, respectful penal system – a system fit for citizens.¹²⁰

115 Vanessa Barker: *The politics of punishing, Building a state governance theory of American imprisonment*, Punishment & Society 2006 p. 33 *et seq.*

116 Angelina Snodgrass Godoy: *Converging on the Poles: Contemporary Punishment and Democracy in Hemispheric Perspective*, Law & Social Inquiry 2005 p. 515 *et seq.*

117 Steven E. Barkan & Steven F. Cohn: *Why Whites Favor Spending More Money to Fight Crime: The Role of Racial Prejudice*, Social Problems 2005 p. 300 *et seq.*

118 *The Times* January 14, 2005.

119 April 7, 2006.

120 Duff 2005 (fn. 3) p. 155.

PS:

The Copenhagen Criteria for admission to the European Union require that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'

Abbreviations

A	Part A
BrB.se	The Swedish Criminal Code
BVerfG	Bundesverfassungsgericht [the German Constitutional Court]
BVerfGE	Bundesverfassungsgericht judgment
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Court of Human Rights
fgsl.no	The previous Norwegian Prison Law No. 7 of December 12, 1958
fn.	footnote
FOB	Folketingets Ombudsmands beretning [the yearly report of the Danish Parliamentary Ombudsman]
FT	Folketingstidende [the Danish Parliament's official publication]
fullnustulög.is	The Icelandic Prison Law, No. 49/2005
fängelselag.fi	The Finnish Prison Law, No. 767 of September 23, 2005
Kbh.	København [Copenhagen]
KvaL.se	The Swedish Corrections Act, SFS 1974: 203
NK	Nordisk Kriminologi [Newsletter for the Scandinavian Research Council for Criminology]
NOU	Norges Offentlige Utredninger [Norwegian reports]
Ot.prp	Norwegian bill
sfbl.dk	The Danish Corrections Act, Order No. 1337 of December 3, 2007
SFS	Svensk författningssamling [The official Swedish collection of codes]
SOU	Statens offentliga utredningar [Swedish reports]
StGB.de	The German Criminal Code
strgjfl.no	The Norwegian Corrections Act, No. 21 of May 18, 2001
StVollzG.de	The German Prison Law, Strafvollzugsgesetz