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Supervision in Alternative Penalties: Origin, Cross-Fertilization and Resistances*

Supervisión en la ejecución de las penas alternativas: origen, fertilización y resistencias

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Abstract: Nowadays, both common law and civil law legal systems include noncustodial criminal sanctions that involve an intervention in the life of the offender through supervision. In this paper, it is argued that these elements of intervention were embedded in alternative penalties from their inception in the common law system, which later fertilized civil law jurisdictions, that had alternative penalties without supervision. To do so, this study examines the origin and evolution of alternative penalties in both groups of jurisdictions. It also considers the introduction of supervision into civil law systems in the 1960s and a second moment of cross-fertilization or transfer in the 1990s. To explain these developments, it considers the broader legal and cultural processes to explain these developments, as well as the main sources of resistance to these changes. Finally, a special reference is made to the role of European institutions in the homogenization of European criminal systems.

Keywords: Alternative measures, community sanctions, probation, rehabilitation, mandatory treatment

Resumen: En la actualidad podemos encontrar en los sistemas jurídicos del common law y del derecho civil castigos penales que se cumplen en libertad e implican una intervención en la vida del penado que adopta la forma de supervisión. Este trabajo sostiene que estos elementos de intervención estaban presentes en las penas alternativas desde su inicio dentro del sistema del common law, el cual posteriormente fertilizó a las jurisdicciones del derecho civil, que contaban con penas alternativas sin supervisión. Para hacerlo, se estudia el origen y la evolución de las penas alternativas en ambos grupos de jurisdicciones. También se tiene en cuenta la introducción de la supervisión en el sistema del derecho civil en la década de 1960 y un segundo momento de fertilización o transferencia en la década de 1990, recurriendo a los procesos jurídicos y culturales más amplios para explicar estas evoluciones y las principales resistencias ante estos cambios. Finalmente, se hace especial

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Palabras clave: Penas alternativas, penas comunitarias, libertad vigilada, rehabilitación, resocialización

I. INTRODUCTION

All penalties involve personal restrictions, which is clearly a deprivation of freedom. However, penalties served in freedom entail different restrictions on the offender's life, which will vary depending on the specific form these will take. They may range from temporary restrictions to the freedom of movement—which could involve the obligation to report periodically to a station and sign in—to more intrusive penalties, such as participating in a drug rehabilitation program.

Supervision is one of the most intensive forms of restrictions imposed through alternative penalties. It is established in probation[1] and community service penalties. Supervision was incorporated into some non-custodial penalties long ago, and it originated with the development of probation in common law jurisdictions during the second half of the 19th century.

It started being very slowly incorporated into civil law jurisdictions during the 1960s, giving origin to a genuine legal transplantation from the common law system, though this process was initially met with resistance and was constrained by the prevailing criminal law

1 In the original Spanish version, the term probation was not translated, because it is a well-known Anglicism often used by Ibero American criminal law practitioners, but also because the use of the Spanish term "libertad vigilada" may be confusing in Spain, where that term refers to a post-relase measure. In the Spanish version of the European rules on community sanctions and measures, the term probation was translated as "libertad vigilada", and in Latin America the term is used to refer to probation. However, in the Spanish legal system it could lead to misunderstandings. In fact, *libertad vigilada* is effectively the equivalent of probation in the juvenile criminal law (LO 5/2000, art. 7.1 h). The problem arises because the same concept was used in the Law N° 5/2010, dated June 22, 2010, to refer to a new post-release security measure, clearly referring to something completely different to probation. In that line, see the critics to the legislative option, in Ortiz de Urbina (2010, p. 2). In contrast, Martínez (2012) supports a wide definition of *libertad vigilada,* which comprises the security measures, alternatives to the sentence, penalties, precautionary measures and alternatives to imprisonment, as a way to serve the sentence. I don´t want to use "probación", considering that its use has not been widely accepted by legal scholars researching this subject, even though some translators have encouraged its use. Cid (2009, p. 25), for instance, who chose not to translate the term into Spanish, suggested "sometimiento a prueba" as an option for those who want to translate the term. The Spanish Ministry of Interior also leaves the term probation untranslated for the Spanish version of the European rules on Probation.

culture in such civil law systems. During the 1990s, obligations imposed on offenders through alternative penalties and supervision by law enforcement agencies gained a shared popularity. This trend gave place to a second wave of cross-fertilization, which concurred with the emergence of the "community penalty" concept. This concept refers to "a penalty imposing *personal* restrictions on the offender, which consist of fulfilling *obligations* in the community -rather than incarcerated- under the *supervision* of an agent, with whom the offender shall maintain active contact"[2] (Murillo, 2017, p. 127).

According to Bottoms *et al.* (2001, p. 1), community sentences are located—within the penalty structure—between imprisonment, on the one hand, and pecuniary and nominal penalties[3] on the other hand. What distinguishes community penalties, according to these authors is that they are personally restrictive sanctions. However, in contrast with imprisonment, such contact is maintained while in freedom.

The personal restriction factor is fundamental. It refers to a personal burden imposed on the offender, rather than a merely pecuniary or symbolic one. This last aspect is relevant, since those sanctions that represent only a superficial interference in the offenders' life (rather than a direct personal one) are excluded from this category of penalties. This is the feature that places community penalties just below imprisonment and above pecuniary and non-intervention penalties.

Personal restriction may adopt different forms, but it always involves the burden of maintaining active contact with a supervising agent. This agent is the main responsible for supervision, which gives the sanction its community-based character. The concept of a community penalty is not merely used to describe forms of punishment imposed within the community or outside the prison, otherwise it would also include fines[4], which are the most frequent non-custodial penalties. Rather, the concept specifically requires an element of supervision (Raynor, 2012, p. 928). In fact, "community penalties and community measures have in common some sort of surveillance or supervision of individual activities while they are kept in the community" (Robinson *et al.*, 2014, p. 152). Indeed, the penalty is the supervision, understood as an activity carried out by an agent, which involves monitoring the penalty enforcement, and is characterized by elements of control, support and rehabilitation (Marti, 2019, p. 7; Murillo, 2017, p. 126)[5].

2 Emphasis made by the author.

3 Such as the conditional remission of sentence or a suspended sentence with no additional obligations.

4 Fine penalties, have their own enforcement mechanisms, which sometimes may involve a stronger restriction on the offender, e.g. a payment in installments for a long period of time. However, provided that it is served naturally, and that no special enforcement mechanism is applied due to non-compliance, fines do not involve a personal restriction or a supervision in the sense established in the current study.

5 Definition made in collaboration with Marta Martí Barrachina in seminars of the Research Group on Criminology and the Criminal Justice System at Pompeu Fabra University, in 2015.

This concept encompasses three key purposes of law enforcement activity. In line with this understanding, mere control over the offender's life would not be enough, unless it is accompanied by measures that aim at his/her rehabilitation.[6] Furthermore, if we consider—for instance—the obligation to appear before the judge or sign in within the context of a non-custodial sentence, does not—by itself—constitute a community penalty, as it only involves a control component, but it lacks an element of assistance or intervention, and it also fails to connect the offender with a law enforcement agency responsible for his/her supervision. It is worth noting that in the case of probation, all three elements are integrated into the single obligation of having periodical meetings with the probation officer.

Both the specific content of supervision over the offender, and the goals it seeks to achieve may vary across time periods and jurisdictions. Thus, "the supervision implications, its goals or purposes, and who is responsible for it, are all aspects that vary both globally and historically" (Robinson *et al.*, 2014, p. 152). This paper will prove the validity of this statement, showing how changes in penological practices are shaped—among others—by the purpose of the penalty in each context under study.

To understand the purposes of punishment in relation to community penalties, two fundamental aspects must be considered: they allow the offender to serve their sentence outside of prison, and they require supervision. Following our definition, community penalties are characterized by a personal restriction imposed by supervision by a public agent, and this supervision aims at rehabilitating the offender. From this perspective, out of all the purposes of punishment, community penalties are most closely aligned with the special positive prevention. This form of prevention has taken different approaches, ranging from efforts to provide employment or social assistance, to more intensive psychotherapeutic intervention. According to Cid (2009), when the purpose of a sanction is rehabilitation, flexibility is required so that retributive sanctions without interventions are be imposed, in those cases where such intervention is not necessary, and intervention-based penalties are applied, where it is required due to "psychological, family-related or social deficits that need to be addressed" (p. 37).

When punishment is understood as having mainly a retributive purpose, community penalties have to address two obstacles: first of all, the central role of imprisonment in the retributive criminal model; and, secondly, mistrust in rehabilitative interventions (treatment). Due to

6 Referred only to the scope of domestic violence. The development of an activity that involves "both control and surveillance over the offender, and actions that aim at his/her rehabilitation" is required (Dobash & Dobash, 2005, p. 149).

the latter, criminal models are increasingly resorting to alternatives with no intervention, such as fines. In principle, it seems that imprisonment fits very well, because it allows measuring the inflicted pain almost mathematically, which is very convenient when applying proportionality, a central principle in these theories (Cid, 2007, p. 153). Even though it is more difficult to assess (both the absolute and comparative) severity of community penalties, it is possible to fit them into a proportional model. Already from an intuitively perspective, community sanctions offer a wider range of penalties, which may help better ensure a proportionate response to the criminal conduct. And, more specifically, community penalties do require personal restrictions, which is a necessary punitive element for the retributivist theories.

In 1989, Von Hirsch *et al*. created the Hirsch-Wasik–Greene model for punishments in the community, using a desert-based approach. The authors propose a system of penalties organized using a severity scale, which also contemplates the possibility of substitution of penalties. They argue that if A and B are different type of penalties, but they are similarly severe, then B may be substitute by A without violating the limits imposed by desert-based proportionality. Consequently, the authors suggest that it is possible to choose between two sanctions that are equally hard, A and B, based on prevention reasons, because doing so would not alter the penalty's severity. Regarding the extent of penalty substitution within the model, they propose a partial or limited substitution model, rather than one allowing full substitution or no substitution at all (pp. 600-606).

Currently, both theoretical and actual penological models present a set of principles that allow establishing a penalty proportional to the offense, and a rehabilitation-oriented enforcement of such sentence (*e.g.*, Roxin's well-known dialectical unified theory). Of course, the potential impact on the offenders' fundamental rights, such as the free development of their personality, respect for their identity and dignity in such rehabilitation interventions are still being discussed, and they are not limited to social assistance (Murillo, 2017, pp. 141-143). In this regard, the comprehensive model presented by Cid (2009, pp. 43-46) stands out. While it supports that the purpose of the penalty is both the offender's rehabilitation and the victim's compensation, it considers it must be limited by retributive principles, such as proportionality—which sets a top limit when determining the sentence—and principles arising from human dignity, such as the offender's will in relation to the intervention.

The debate on the purposes of punishment is far from being over and it should never end. It shall not be disregarded that rehabilitation (special positive prevention) is a component of criminal penalties, in general;

and has a significant role in community penalties, in particular. In 1981, Allen (2009) developed assumptions upon which the rehabilitation ideal was built[7]. Based on Allen efforts, I can state that if we know there are risk factors associated to the criminal behavior; if we know that these factors are dynamic and, therefore, can vary; if behavioral sciences contribute with evidence on programs and interventions that may contribute to reduce an offender's risk factors within the sentence enforcement stage; if it is not only possible, but also appropriate, to implement such interventions avoiding imprisonment; then we shall implement them, provided that we are capable to do so respecting fundamental rights of the offenders, abiding by the principles of blameworthiness and proportionality, as well as the offender's will.

Supervision serves as a tool for reintegrating and controlling offenders within the community. It has been defined in this study as an activity carried out by supervising agents, in charge of monitoring enforcement of sentences, which involves features of control, support and rehabilitation (Marti, 2019, p. 7; Murillo, 2017, p. 126). Analysis of supervision in non-custodial penalties has been a recent subject of study among criminologists and penologists (Blay, 2019; Boone & Maguire, 2017; Marti, 2019; McNeill & Beyens, 2013; Phelps, 2013; Robinson & McNeill, 2016). They have examined supervision forms, purposes, and perceived differences based on the profiles of supervising agents, and its effectiveness, among others.

The term "community penalty" emerged as an attempt to define and conceptualize this group of sanctions, independently and without referring to imprisonment (Worrall & Hoy, 2005, pp. 3-6). In contrast to former names used to call these or similar types of punishment (non-custodial penalties, alternative penalties, alternative criminal measures), these sanctions are no longer define in their relation with imprisonment, and the current term highlights their community setting, the supervision component, their ability to provide satisfaction or compensation, and their autonomous punitive value (Murillo, 2017, pp. 124-129).

Nevertheless, despite their descriptive and political advantages, this concept has not been able to consolidate outside common law jurisdictions, which is initial evidence of resistance from civil law systems (and scholars). These continue referring to this group of sanctions as alternative penalties, calling probation and community services by their

7 According to Allen (2009 [1981], pp. 11-14), the rehabilitation ideal relies on the following assumptions: if we know human behavior has pre-existing causes, these may be identified, and scientists must find them and describe them thoroughly. Knowing the causes of human behavior enables a scientific approach to controlling human conduct. Then, within the criminality scope, it is assumed that measures used to treat the offender should respond to therapeutical purposes, and such measures shall be designed to produce changes in the offender's behavior in its own interest and that of society.

specific name, without regarding the fact that they share a common feature, *i.e.*, supervision within the community, which justifies placing them into a new and independent category, apart from alternative penalties with no intervention.

II. ORIGIN OF ALTERNATIVE PENALTIES

To study the origin of obligations and supervision within alternative penalties, it is necessary to distinguish between two major legal jurisdictions: the common law, and the European continental or civil law tradition. While in the common law tradition community penalties can be traced back to the establishment of probation; in continental Europe it is necessary to study the gradual incorporation of supervisory mechanisms into pre-existing alternative penalties without supervision (mainly, the suspended sentence), since the community penalties were incorporated much later. Furthermore, in both cases it is relevant to mention the origin, evolution and crisis of imprisonment penalty, which preceded the development of alternative sanctions.

The consolidation of the modern criminal system, with imprisonment as its cornerstone, has been considered the most relevant step in the process of humanization of penalties. In the 19th century, this process meant great progress, since physical punishments were replaced by confinement, which emerged as the main form of punishment, between death penalty and more lenient sanctions[8]. Before that, confinement was not used as punishment itself; rather defendants were detained while waiting for trial or the enforcement of a sentence, such as exile or forced labor (Foucault, 2009 [1975], p. 133)[9]. Such transition was primarily considered as a success of the Enlightenment, specifically of the liberal thinking. From this perspective, "the driving force causing such changes came from the thinking field: ideals, visions, theories, intentions, scientific progress" (Cohen, 1988, p. 39). Consequently, any failures in the system are interpreted as implementation issues that may be solved through the system itself.

However, this liberal thinking was soon questioned. It was imperative to recognize that the imprisonment system had problems since it wasn't able to rehabilitate the offender. This was not due to implementation issues, but rather due to the absence of an individual intervention to achieve this goal or due to structural defects in the institution responsible for it. As a consequence, programs for individualized

8 See the history of the prison in Morris y Rothman (1998), and the history of the prison on Spain in Roldán (1988).

9 In private law matters it was generally applied, not as a punishment, but as a guarantee, where the person and his/her body was given as a collateral (Foucault, 2009 [1975], p. 138).

treatment, work and supervisions for resocialization were created (Rothman, 2002 [1980], pp. 43-81; Cohen, 1988, pp. 42-43).

Furthermore, revisionist theories account for an alternative way to explain the emergence of imprisonment and challenge the official narrative through economic and political explanations. This new approach (in Cohen's words, "pessimistic and radical") reinterprets the reform processes by arguing that imprisonment has never failed. It did not fail at the beginning when offenders were isolated to achieve their natural reform, nor in its later stage, when individualized interventions were introduced to promote their rehabilitation, since imprisonment and its reform have served other purposes, different than the officially ones. The humanizing discourse concealed that imprisonment and the entire criminal system, including alternative penalties, adjusted to changes in the productive and disciplinary process it served (Baratta, 1977, p. 347; Cohen, 1988, p. 44; Foucault, 1977, pp. 157 and 266). Moreover, following the same sceptic spirit, when the real reasons of the so-called humanist reform process were discovered and imprisonment started being criticized, the new impulse of alternative penalties was similarly critically examined (Larrauri, 1991, pp. 45-46).

As outlined above, the rise of imprisonment has several explanations (an official account, and several revisionist interpretations), which may be called either disjunctive or complementary, but they had a global scope (remained consistent across different cultural contexts). In contrast the emergence of the community and alternative penalties has not a global explanation, it varies depending on its place of origin. Between the end of the 19th and the beginning of the 20th century probation arose in common law countries and suspension of sentence in continental Europe, and these are the cornerstones of the history of alternative penalties in each system.

While probation originated in the United Kingdom and the United States, the *sursis* model or suspended sentence emerged in continental Europe. In common law systems, probation developed from early practices in various jurisdictions. In contrast, civil law systems trace its origin to the first laws introducing alternative penalties. This makes sense, considering the difference between the common law systems —which give greater significance to case law—and civil law systems, which are more legalistic. The earliest records of probation in common law date back to 1841, while in continental Europe the first records appear in 1888 (Belgium) and 1891 (France). In Spain, the Probation Law of March 17, 1908, introduced the suspension of sentences for the first time, under the *sursis* model. It allowed suspending the main sentence after it was imposed, although accessory penalties remained enforceable (Maqueda, 1985, p. 25).

Cid and Larrauri (2005, pp. 21-27) have organized the theories on the origin and historical evolution of alternative penalties to imprisonment, concluding that in both legal traditions their emergence is primarily rooted in different ideals. One is a rehabilitation ideal, which believes that alternative sanctions have greater potential for rehabilitation; and the other aims to prevent the desocialization of occasional offenders that may result from imprisonment. This helps explaining the absence of supervision and treatment components in alternative penalties within civil law systems.

Next, we will briefly describe the emergence of community penalties within the scope of each legal tradition, so that we can afterwards make some reflections around symbiotic evolution between both systems and the European trend towards unification, including their consequences.

III. ORIGIN AND EVOLUTION OF COMMUNITY PENALTIES IN COMMON LAW

The two institutions that have played the main role in shaping both the discourse and practice of community penalties are *probation* and community services (Raynor, 2012, pp. 929-930). However, the first penalty to be carried out outside of prison and under supervision is *probation* (Nellis, 2001, pp. 19-20). Thus, the history of community penalties concurs with the history of probation. The contextual elements that better explain the successful emergence of probation (and its underlying rehabilitation purpose) are: the historical concurrence with Victorian society in the UK (Rowbotham, 2009, pp. 109 and 116-117; Van Zyl Smit *et al.*, 2015, p. 6), the American Enlightenment in the US (Rothman, 2002 [1980], pp. 5-6 and 46), the creative flexibility of the common law tradition, and the theoretical support provided by sociological criminology schools. Garland (2005 [2001], pp. 71-106) referred to penal welfarism as an ideal that emerged to support the criminal justice system, or—more precisely—its reform: using punishment to include, rather than exclude, the working class, by instilling the discipline required for integration into the dominant social structure (Bottoms *et al.*, 2004, pp. 2-3). It considers that an offender can be rehabilitated through supervision and the assistance of an appointed agent (Rothman, 2002, pp. 82-116), who plays a key role in the rehabilitation process that was originally defined by the principle: "advise, assist and befriend" (Durnescu, 2014, p. 410). In the early implementation of probation, this agent was a voluntary citizen, but afterwards it became the responsibility of public official (government or judicial official, depending on the case).

In the United States, John Augustus was considered the father of probation. He was a Boston shoemaker, who in 1841 persuaded a judge

to release an alcoholic offender on bail, under his personal supervision, rather than sentencing him to imprisonment. He then repeated this request to release other 1800 defendants (Petersilia, 1997, p. 155; 1998, p. 32; Rumgay, 2009, § 1). This practice served as a model and was progressively adopted in several jurisdictions; for instance, it was implemented for adults in New York in 1901. However, Rothman (2002 [1980], pp. 82-116) points out that, even though its origins date back to that period, it truly expanded between 1900 and 1920. During this time, influenced by Enlightenment ideals, the prevailing view in the US was that offenders required individualized treatment based on their specific needs. This mindset gave rise to a range of innovations, such as probation, parole, indeterminate sentence, juvenile courts, redesign of prisons to facilitate personalized rehabilitation, etc. These developments were supported by the prevailing criminological thinking of that time, according to which certain individuals or social groups had been excluded from the not fully participated from the benefits of society, therefore, the sanction should address this situation.

In the United Kingdom, the probation model emerged around the same time as in the US.[10] Some authors trace its origins to 1841, when judge Birmingham began placing young offenders under the supervision of their parents, guardians or other volunteers. This practice was then successfully institutionalized in 1907 (Probation of Offenders Act) thanks, in part, to the context provided by the Victorian society, characterized by strong moralism, where charity played a key role, which gave rise to several institutions aiming at saving offenders (Rowbotham, 2009, pp. 116-119). The 1907 Act created both the probation order and the role of the probation agents in charge of supervising the offenders.

From this historical study it is possible to conclude that the model emerged almost simultaneously in the United States and the United Kingdom[11], at the beginning as a way to prevent formal punishment entirely, replacing it with some sort of supervision by the community. It was an alternative to punishment, rather than an alternative penalty. Thus, the decision on blameworthiness and the hypothetical and consequent punishment was paralyzed, and defendants were released under the condition of coming back in a future date to evaluate and revise their behavior[12]. During this period of time, the individual had to remain in contact with a probation agent, have a good behavior

10 Even though they emerged simultaneously, its development was highly influenced by the US evolution of this mechanism (Van Zyl Smit *et al.*, 2015, p. 6).

11 It is worth highlighting the expansive effect it had across the colonies (Durnescu, 2014, p. 409-410).

12 This intervention without determining blameworthiness may seem strange, unjustified and against basic principles for the civil law reader, and indeed it was. It must be considered that these principles of modern criminal law were being born at that time. Therefore, supervising an individual who was did not have a good life—according to the parameters of that time—in exchange of not conducting the trial seemed to be a good solution. Furthermore, the mechanism is similar to the current trial suspension or conditional trial suspension, which is used in several countries of the civil law tradition.

and a fruitful life. Once the period of supervision had been successfully completed, no further measures should be taken in relation to the original crime.

It is worth emphasizing that this happened "initially", since over time probation stopped evolved from being a mechanism to suspend the sentence to becoming a consequence of the sentence. Nowadays, instead of a probation that suspends the sentence, an offender is sentenced to probation. Even currently, probation is many times understood as a suspended imprisonment sentence, as it occurs for instance in certain jurisdictions in the United States (Petersilia, 1997, p. 163). In the United Kingdom, the probation order was redefined as a sentence in 1991, and as of today probation is no longer a standalone penalty but is always part of a community order (Crime and Courts Act, 2013; Criminal Justice Act, 1991). What is relevant is that, despite the formal changes probation has experienced (which have an impact on the consequences of non-compliance and on issues related to criminal records, for instance), it maintains its original components and, thus, even the changes in its name have been ignored by legal practitioners and scholars, who continue calling it probation.

The evolution of community penalties in the common law tradition can be divided into three main periods, which are clearly outlined in the chapter "How did we get here?" (Bottoms *et al.*, 2004, pp. 1-27), which is summarized below. The first period, already explained above, refers to their emergence in the early 20th century and the rise of rehabilitative ideals that aimed to rehabilitate offenders under the supervision of an appointed agent. This supervision evolved from accompaniment by a volunteer from a church to the most sophisticated and individualized psychiatric treatments. However, the core ideal remained the same. This stage came to an end with the decline of the rehabilitative ideal, prompted mainly by an effectiveness crisis and growing pessimism, due to the poor results—in terms of reducing recidivism—it seemed to have (nothing works)[13]. Additional contributing factors included a crisis of resources driven by a growing prison population, and an ideological crisis[14] caused by the abuse and arbitrariness exerted in the name of the "rehabilitation treatment".

The second period started in the 1970s and is marked by the crisis explained above, that caused widespread mistrust around probation and the system that had been developed so far. This stage meant a return to the traditional justice model, as well as the emergence of a non-interventionist

13 See the recurrent quote of Martinson (1974, p. 49).

14 According to Allen (2009 [1981]), the critic to the rehabilitative ideal was based on three reasons: it threatens the political values of free societies, it is susceptible to being demoted to the pursuit of other social purposes, and there is a lack of a rehabilitation technique, since "we do not know how to prevent recidivism changing the offenders' character and behavior" (pp. 11-14).

approach that included alternatives to imprisonment to avoid its costs, but without the rehabilitative intervention that characterized the earlier period (or, sometimes, with reduced interventions).

The third and current period, which began in the 1990s, is referred to the "community penalty" stage and brought back community-based penalties. It is characterized for offering courts credible sanction options through community penalties within a just deserts model, using the supervision and rehabilitative intervention tools for adjusting such penalties. At this stage it is possible to note a new momentum in the legal transfer from the common law to the civil law system, where European institutions have played a significant role in promoting this legal convergence.

IV. INCORPORATION OF SUPERVISION INTO ALTERNATIVE PENALTIES BY CIVIL LAW JURISDICTIONS: CROSS-FERTILIZATION AND SOURCES OF RESISTANCE

Community penalties were incorporated into continental European systems more recently than in common law jurisdictions. As a result, studying their origins requires examining earlier forms of alternative sanctions, even though they lacked the elements of community penalties (namely, supervision and personal restriction). It was not until the 1960s that supervision started cautiously being introduced in alternative penalties in some European countries, gradually transforming them into community penalties. Even today, community penalties seem to play a secondary role within the penal system of continental Europe (although their use is steadily increasing) and their adoption is usually justified due to their potential to reduce imprisonment rates, rather than by evidence of their capacity to impact on the offenders' rehabilitation, as it is done in common law countries (McNeill & Robinson, 2016, p. 234)[15].

Alternative penalties in continental Europe are characterized by their non-interventionist nature and by their application mainly at the post-conviction stage. When they first emerged (at the end of 19th century and the beginning of the 20th century), a classic criminal law model based on proportionality prevailed in continental Europe. This model was strongly influenced by the idealistic legality of the French Penal Code of the 1791 Revolution, whose principles gradually spread throughout Western Europe (Durnescu, 2014, p. 410; Van Zyl Smit *et al.*, 2015, p. 5). This classical model was grounded in the fundamental idea that crime

15 In the cited text, the authors conduct a comparative study of eleven European countries, emphasizing the difficulties of analyzing community penalties using common law interpretation elements. In this regard, they stress out that the relevance of rehabilitation in legitimizing community penalties corresponds to common law countries, while rehabilitation is commonly framed as a right of the offender in the continental European countries.

was the result of the offender's free will. This notion was later challenged by the positivist school of criminology that developed a legal description of crimes differentiating between regular offenders and occasional offenders, arguing that the latter committed crimes due to external circumstances, rather than inherent failings. This notion of occasional offender was the reason that supported the introduction of alternative penalties within a model that started admitting them as exceptions to the general rule, rather than as tools aimed at the rehabilitation of the offender.

The main promoters of alternative penalties came from the Italian Positive School of Criminology and the International Union of Penal Law, founded by the renowned scholars Van Hamel, Von Liszt y Prins (Cid & Larrauri, 2005, pp. 22-23; Maqueda, 1985, pp. 36-37). The main rationale to establish these penalties was the perceived benefit of avoiding imprisonment for authors of minor offenses which—from a criminological point of view—were regarded as mere occasional offenses.

The International Union of Penal Law incorporated into its Bylaws nine political-criminal and ideological theses[16], which clearly explain the emergence of non-interventionist alternatives to imprisonment. These theses established key principles, for instance: the need to distinguish between habitual and occasional offenders as a foundation for criminal laws (thesis 4); that imprisonment remains at the top of the penal system (thesis 6); and that, despite the abovementioned, "it is possible and desirable to replace short-term imprisonment with alternative sanctions of equivalent effectiveness" (International Union of Penal Law, 1889, thesis 7).

Thus, the first alternatives to imprisonment in European civil law jurisdictions initially lacked any rehabilitative purpose. They were merely punitive/retributive—such as fines—or had a deterrent purpose—such as the conditional suspension of a prison sentence, and they were only applicable to minor offenses. In two relevant studies, Muñoz Conde (1979, 1985) reflects on rehabilitation as a purpose of punishment, its influence on European criminal systems, and its belated incorporation into Spanish law through the General Penitentiary Law of 1979, at a moment when such rehabilitation ideal was facing strong criticism in comparative law debates. Among Muñoz Conde's arguments, it is worth emphasizing those explaining why alternative penalties lacked a rehabilitative component. He asserts that while imprisonment should pursue the resocialization of offenders, in all other cases it will aim at intimidating or securing them. He further

16 This led to its decline, which was later addressed through a Bylaws amendment for a less controversial version in 1895-1896 (Berdugo, 1982, pp. 15-18).

argues that, even after committing a crime, an individual remains a member of society and abides by its criminal laws. He presents an example referring to occasional offenders, those committing minor or traffic-related offenses, who don't need to be resocialized (1979, pp. 74 y 79). From this perspective, prison is the penalty designed for rehabilitation, and should therefore be avoided in cases where the offender doesn't need to be rehabilitated. In other words, it is believed that imprisonment is unnecessary in certain cases, and—when it is imposed for a short time—, it may produce criminogenic effects, due to exposure to criminal environment ("spread of crime"), since there is not enough time to conduct a rehabilitative intervention (Cid & Larrauri, 2005, p. 23)[17].

According to some authors, the prevailing criminal culture in continental Europe is another element that helps explaining non-interventionist penalties: the classical ideal that inspired the Napoleonic Code mentioned above, which—although at odds with the principles of the Positivist School of Criminology—nonetheless led to similar outcomes. This "classical" ideal mistrusted judicial discretion and removed it from the process. Similarly, the possibility of courts having the power to impose individualized or "customized" interventions in the lives of offenders was unwanted (Van Zyl Smit *et al.*, 2015, p. 5). Therefore, even though the positivist thinking influenced the incorporation of suspended prison sentences, these were typically implemented with a certain degree of automatism in the requirements in order to limit the judges' discretional powers. Likewise, the suspension of a sentence served as a warning to the offender, who continued to be regarded as a rational and autonomous individual.

The model adopted (*sursis*) implied a two-stage decision: first, a prison sentence; then, the decision to suspend the enforcement of that sentence, on the condition that the offender refrained from committing any new offenses during a defined probationary period. Thus, if the offender committed a new crime during this time, the suspension would be revoked and the original prison sentence enforced (Durnescu, 2014, p. 410; Maqueda, 1985, pp. 25-48)[18]. In Belgium and France, laws enacted in 1888 and 1891, respectively, allowed for the suspension of short-term prison sentences on the condition that the offender did not commit

17 Muñoz Conde (1979, pp. 75-84) highlights—among the critics made to the rehabilitation ideal—the doubts about its practical implementation, its actual necessity, the difficulties to oversee state interventions. He also refers to the skepticism expressed by critical criminology, which questions all instruments of social control. Furthermore, he explains resocialization concerns from a moral standpoint, arguing that it involves the imposition of a particular moral system and specific beliefs, limiting individual autonomy and personal freedom.

18 While Maqueda, like many others, clearly addresses and distinguishes *sursis* and probation; Durnescu (2014)—in my view, mistakenly or at least in a confusing manner—seems to consider *sursis* as a form of probation, asserting that continental European countries understood probation primarily as a suspended sentence, rather than as a measure involving supervision (p. 410).

any new offenses during the suspension period. A similar provision was introduced in 1895 in the territories that would later become Germany, where offenders were conditionally pardoned, provided they refrained from reoffending. Likewise, the Spanish Law on Probation was enacted in 1908. These continental-European institutions, besides initially differing from the common law model, had in common the fact that they offered an alternative to imprisonment for individuals who already had been convicted, and they imposed no additional rules of conduct, beyond the no-reoffending requirement.

In the majority of continental European countries, supervision was introduced into sentencing practices through reforms to the suspended sentence model. The suspension of sentence itself allowed for additional requirements–other than the prohibition to reoffend—during the probation period, including supervision by an appointed agent was among them. These changes took place in the 1960s in countries such as Belgium, which introduced probation as a measure within a suspended sentence in 1964. Beyens (2016, p. 14) explains that such measure was rarely applied during its first three decades. Austria implemented a similar reform in 1966, while France enacted suspended sentences with probation[19] and created formal probation services in1958. Herzog Evans (2016, p. 54) highlights this incorporation as a clear example of cross-fertilization or legal transfer from the British criminal justice system. Between 1951 and 1953, Germany established its probation services (*Bewährungshilfe*) and amended its Criminal Code to include probation within the framework of suspended sentences. This development is also acknowledged as a noteworthy example of legal transfer from the UK (Durnescu, 2014, p. 411; Morgenstern, 2016, p. 78). In contrast, Sweden and the Scandinavian countries, incorporated probation explicitly considering the United States' experience which had a strong influence in their criminal justice system (Svensson, 2016, pp. 212-214). Furthermore, Turkey, Bulgaria, Czech Republic, Romania, Croatia, Estonia, Bosnia, Ukraine and Azerbaijan have resorted to the UK (specifically to is National Probation Service) for the development of their own probation systems (Canton, 2009, p. 67).

Finally, it is worth mentioning that Canton (2009) argues that the leadership role of the common law system in the legal transfer of community penalties is largely due to the dominance of US-based research on effective penal practices (the "what works" approach).

19 SME: *sursis avec mise à l'épreuve*.

V. EXCURSUS: INTRODUCTION OF COMMUNITY PENALTIES IN SPAIN

Penalties involving rehabilitative and supervisory elements were introduced relatively late in Spain. Priorly, the rehabilitation ideal and its paradigmatic mechanisms of individualized treatment had already been incorporated, though belatedly, into the penitentiary system, in line with the principles of offender rehabilitation and social reintegration (Muñoz Conde, 1979, pp. 74-75; 1985, pp. 85-86). According to this author, rehabilitation (under the terms "resocialization" and "reeducation") was formally established in Spain through the General Penitentiary Law of 1979 and the Spanish Constitution of 1978, at a moment when such ideas were being strongly criticized from several fronts. Muñoz Conde (1979) indicates that this decision adopted is healthy and dignified:

> The decision adopted by the legislator in this regard,—although belated —reflected the aspirations of many criminal law scholars, who had been advocating for over a century for a more humane and resocializing system of imprisonment and penalties in general (p. 75).

However, he adds that "this decision arrived at a moment when complaints started being heard everywhere, and serious doubts were being raised about the possibilities of their practical implementation and even the necessity of resocializing offenders" (Muñoz Conde, 1979, p. 75).

Thus, before 1995, rehabilitative intervention in Spain existed only in the juvenile justice system; and in the adult system, it was limited to the probation stage and the third degree of imprisonment. This leads to an important question: why was probation introduced so late in Spain? To answer this question, we shall initially refer to the reasons discussed above for the rest of Europe, considering once again that developing a suspended sentence model for occasional offenders who do not need to be rehabilitated, eliminates the need for supervision. Despite that, other countries of the civil law system incorporated supervision into their *sursis* models in the 1960s. Spain didn't do it, most likely due to two additional reasons: the adoption of a dual-track system and Franco's dictatorship.

A dual-track system exists when the objectives of punishment, prevention and control of crime are pursued through the combined use of penalties and security measures (Muñoz Conde, 1985, p. 39)[20]. The Spanish legislator adopted the dual-track system, which was the prevailing model in the 19th century. According to it, the rehabilitative intervention was reserved for security measures, while penalties should not include any other element beyond the proportional punitive

20 In a single-track system, all these purposes are pursued through a single instrument: the penalty.

component (Silva Sánchez, 1995, pp. 79-80). Any deviation from this notion of penalty tends to generate mistrust, as it appears to conflict with the principles of liberal criminal law[21]. It is worth pointing out, that the model is not pure, and it allowed for exceptions during the enforcement stage and within the juvenile justice system, for instance (Silva Sánchez, 1995, pp. 80-83); nevertheless, it serves to explain, at least in part, the difficulties of incorporating community penalties in Spain.

Likewise, the ideas that led to a reemergence of the rehabilitation ideal in the 1960s were unable to take root in Spain because it was under the Franco dictatorship. After dictatorship ended other priorities emerged in the process of consolidating the rule of law, and—at the same time—the rehabilitation ideal was already in decline and was often viewed with pessimism (Cid & Larrauri, 2005, p. 26; Muñoz Conde, 1979, p. 75).

It was during the second wave of cross-fertilization that the Spanish Criminal Code of 1995 incorporated the possibility of imposing additional obligations within the framework of a suspended prison sentence (for instance, the obligation to complete educational or treatment programs) as well as the community service penalty. The suspended sentence with obligations is considered a form of probation by Cid (2009, pp. 26-27), who calls it "suspension with probation"[22]. For the author, the suspended sentence with obligations closely resembles probation for two reasons. First, he provides a historical argument, noting that while the ordinary suspension considers unnecessary to conduct a rehabilitative intervention to prevent recidivism, the suspension with probation "introduces supervision of the non-imprisoned individual as a new element intended to address the factors contributing to recidivism" (p. 27). Second, it contributes with a penological argument, supporting the distinctive relevance of suspension with probation within a penal system that, as shown by research on special-preventive effectiveness of penalties, "requires differentiated responses adapted to risk levels s and criminal issues of each individual offender" (p. 27).

VI. STANDARDIZATION OF SUSPENSION AND PROBATION IN EUROPE FROM THE 1990S

Both probation and suspended sentence did not evolve in an isolated manner. For instance, the International Union of Penal Law, mentioned above, was comprised by criminal law scholars from both the continental Europe tradition as well as from the United States and the United

21 See the critics to the security measure system in Muñoz Conde (1985, pp. 47-52).

22 Other authors, *e.g.*, Mapelli, also seem to consider that this sanction us similar to the probation used in the common law system.
Mapelli (2011) argues that "new regulations have brought our suspension model closer to the British probation, with a stronger special-preventive approach, moving closer towards the disappearance of more objective elements" (p. 122)

Kingdom. When the Union's Bylaws established the need to replace short-term prison with other types of punishment (Berdugo, 1982, p. 16), the common law scholars understood this within the framework of the already existing probation system in their jurisdictions (Van Zyl Smit *et al.*, 2015, p. 7).

There are many other events throughout history that have brought the two jurisdictions closer together, both academically and professionally, while also starting a path toward regulatory standardization. The most noteworthy development took place in 1990s, when community regained popularity. More recently, Robinson et al. (2014) offered four narratives that help explaining why community penalties are so strong in the current context, despite the decline of both the rehabilitation ideal and welfarism. According to these authors, community penalties have adapted to changes to remain a consistent and reliable response, even in late modern times. These adaptations meant both discursive and substantive changes. They also meant redefining their foundational principles and creating new types of community penalties. Thus, a) community penalties and institutions enforcing them have adapted to a "managerial" model, focusing on management and administration of penalties, offenders and associated risks; b) sanctions have been adjusted, incorporating and acknowledging their punitive dimension; c) rehabilitation has been promoted within a new context, not in terms of its humanistic value and its capacity to improve the offenders' lives, but rather for its instrumental role in protecting the public; and, d) the community penalty discourse[23] and content[24] have been adapted to include a remedial component to provide them with renewed legitimacy. The narrative described in point b) allows consistency with both punitive and retributive tendencies, as community penalties operate within a wider penological framework that adheres to the principle of proportionality, given the personal nature of the restrictions they impose. As previously indicated, from the desert-based school, Von Hirsch et al. (1989, pp. 599-600) created the Hirsch-Wasik-Greene model for "community punishments". They proposed the application of community penalties within a retributivist framework. Furthermore, the narrative discussed in point c) raises concerns, because it regards the central role of public security in the debate as problematic, considering that not all risks are foreseeable and not all harms can be prevented (McNeill & Weaver, 2010, pp. 13-14). Thus, we must be careful when justifying community penalties only based on their effectiveness in reducing recidivism. Instead, these sanctions should be supported for

23 According to this discursive line, the best way to retribute society from the harm made is to straighten his/her life.

24 With the incorporation of community services and mediation.

offering an alternative to imprisonment and enabling resocializing interventions.

These four characteristics and developments of community penalties nourish the arguments that support their legitimacy and credibility, even within the framework of what has been described as the "European punitive shift», allowing them to gradually increase since the 1990s (Aebi *et al.*, 2015, pp. 581-597). According to Yang (2019, p. 6), this period saw a shift in the public perception of impunity in relation to community penalties, which was facilitated by two factors: a wider range of "eligible" offenders and an increasing emphasis on public safety. These changes are reflected in the several and strong conditions attached to community penalties, and the intensified surveillance of these sanctions through electronic monitoring.

The abovementioned reflects an international convergence, which manifested in a variety of regulations (the UN and the Council of Europe) since the 1990s. These regulatory efforts have been used both to promote the use of community penalties as a means to reduce incarceration rates, and to establish minimum standards to ensure the offenders' human rights (Morgenstern & Larrauri, 2013 pp. 126-130). Therefore, when analyzing these tools, we find constant references to the necessary promotion of community penalties and the somehow detailed development of minimum standards for their implementation, thus acknowledging their punitive nature. This last point is critical, as it underscores the fundamental purpose of international instruments and recommendations, providing a standard that aims at expanding or operationalizing human rights instruments on a particular matter.

These international instruments aim to standardize regulations and practices across member countries—among others—so that many of them perceive their domestic practices as consistent with European standards, while others use these regulations to make decisions on which practices should be implemented and how to structure their community penalty service (Canton, 2010, p. 65). Likewise, Morgenstern and Larrauri (2013, p. 151), observe with certain skepticism how some states claim compliance with the standards included in European Recommendations (even though they hold limited value or relevance within their jurisdictions). One question that arises with the transfer of policies produced by these international standards (as well as any other) is that while the transfer has to consider and respect the local ways to do things, the States often seek for inspiration and guidance from other countries (Canton, 2010, p. 65). Therefore, these international standards may increase the influence of common law countries in the development or shift of penal policies in civil law jurisdictions. All this influence, however, may be curtailed by the recent Brexit.

Regarding the impact of European standards on community penalties, Morgenstern (2009, pp. 135-139) has observed that such standards may have a punitive effect on domestic law, because the regulation of measures—such as indeterminate sentence and electronic monitoring[25]—without prior assessment of their effectiveness and consequences, can lead to their adoption in civil law jurisdictions where they were previously absent and possibly contribute to an expansion of the criminal justice enforcement network. However, scholars have tempered these concerns reminding us that international standards in this area are the result from the joint efforts of experienced criminal law practitioners and academics. Thus, the involvement of experts and scholars in shaping criminal policy has been considered as a safeguard against punitive tendencies.

In 1990, the General Assembly of the United Nations adopted the Standard Minimum Rules for Non-Custodial Measures through Resolution 45/110, of December 14, also known as the Tokio Rules. This Resolution encouraged Member States to implement non-custodial measures, and established safeguards to protect the rights of offenders. These measures aimed to address prison overcrowding and enhance the credibility of non-custodial penalties (Morgenstern, 2009, p. 129). International bodies and NGOs contributed to the development of these standards, and the final text was drafted by experts from the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (Unafei), based on a proposal of the International Penal and Penitentiary Foundation: the Groningen Rules of 1988 (p. 130).

European standards on community penalties have been primarily developed through recommendations that, despite not being binding, derive their authority from having been adopted unanimously by government representatives (Committee of Ministers) and from the involvement of several NGOs and academics in their preparation (Morgenstern, 2009, p. 131; Morgenstern *et al.*, 2017, pp. 19-20). These recommendations are generally governed by article 15 of the Statute of the Council of Europe[26], which in its final section establishes a sort of monitoring mechanism. This mechanism allows the Committee to request information from member governments regarding measures they have taken in response to such recommendation.

25 In this last case, he refers to the pressures of service providing companies.

26 "a) On the recommendation of the Consultative Assembly or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters. Its conclusions shall be communicated to members by the Secretary General.
b) In appropriate cases, the conclusions of the Committee may take the form of recommendations to the governments of members, and the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations."

The European Rules on Penalties and Community Measures were published in 1992, which were updated in 2000 to include indeterminate penalties. In their Preamble, it is provided that community penalties had to balance the need to protect society and the offenders' needs, considering their social adaptation

In 2017, these European rules were updated following the Recommendation CM/Rec(2017)3. This update considered the progress made by member States on community penalty matters; their potential to prevent crime, reduce harm and enhance justice while avoiding the negative consequences of imprisonment; the new possibilities for a more effective use of community penalties; and the new developments and practices identified by the member States, among others. While the core principles and main rules remained essentially unchanged, some of them were developed or updated to align with new penological trends (for instance, withdrawal is included as a purpose of community penalties).

In 2008, the Framework Decision 2008/947/JAI was adopted to supervise probation measures and alternative sanctions, and in 2010 the European Rules on Probation were approved. Regarding the latter, Canton (2010, p. 69), one of the two academics who supported the Council of Europe in drafting these rules, stated that they reflect a commitment to guide the development of probation in line with the spirit and the text of the Convention. Ideally, these rules could serve as inspiration and the foundation for the evolution of probation across Europe or at least provide an ethical safeguard against the potential excess of punitivism, preventive justice and the instrumentalization of probation.

This academic and European momentum in the 1990s was reflected in the domestic reforms across several countries that introduced or strengthened community penalties. In Belgium, community services and mediation were incorporated in 1994, as a way to reinforce alternative penalties and address concerns about their legitimacy. This was followed by several legal changes introducing new autonomous community penalties that were no longer tied to a suspended prison sentence (Beyens, 2016, p. 15). As mentioned above, Spain introduced the first community penalties in 1995, as part of the new criminal code, which included the suspended sentences with probation and community services, both as stand-alone penalties and as substitutes for imprisonment (Blay & Larrauri, 2016, p. 193). In France, community services—both as a condition of a suspended sentence and as an autonomous penalty—were introduced in 1983, followed by electronic monitoring in 1997. These developments were the result of a new legal transfer from United Kingdom (Herzog-Evans, 2016, p. 54). The Netherlands expanded the legal framework of community penalties in 2001, complementing existing alternatives to prison with other autonomous penalties. Thus,

the *taakstraffen* (literally, "task penalties") or community services, were introduced. These could be imposed as autonomous penalties by the courts or be included by prosecutors as conditions in extrajudicial agreements (Boone, 2016, pp. 96-97). In the 1990s, Germany was part of the discussion around community penalties. However, it refused to make amendments to extend alternative penalties, except in one federal state (Morgenstern, 2016, pp. 82-83). Nevertheless, the German country made similar reforms in the early 21st century.

VII. CONCLUSIONS

Supervision in community penalties originated in common law systems as a necessary tool for the rehabilitation of offenders. This helps explain its initial absence in early forms of alternative penalties within the civil law tradition, which were designed for offenders deemed not to require rehabilitation (or resocialization).

Over time, common law mechanisms started influencing civil law systems, leading to the gradual incorporation of the supervision component into their own alternative penalties (*sursis*). Such transfer occurred in in two waves. The first wave took place in the 1960s, when the rehabilitation ideal was at its peak. During this period, civil law countries began integrating supervision into their penal systems. However, such transfer met with two sources of resistance: rather than incorporating supervision as an autonomous penalty through probation, countries opted to adapt the existing *sursis* model. The resulting legal mechanisms were slowly and cautiously implemented by civil law countries. It is worth considering that the so-called decline of the rehabilitation ideal was probably the cause of this phenomenon.

The second wave of legal transfer—or cross-fertilization—occurred in the 1990s, driven by two key factors. First, at that historical moment, supervision—as an element of non-custodial penalties—had evolved according to the new times, thus gaining renewed popularity. Some of these changes were substantial, *e.g.*, introduction of electronic monitoring and the tendency to increase the obligations of those serving community sanctions. Nevertheless, other changes meant mainly discursive changes, such as the defense of this type of penalties due to their punitive nature, which could have been a response to the demands for stronger sanctions amid a broader European shift toward retributivism or due to their contribution to public safety through offenders' rehabilitation.

The second key factor was the increase of international standards on community penalties. These standards aimed at promoting the use of these non-custodial sanctions to reduce prison sentences, while also

establishing minimum human rights safeguards for their implementation. This nomogenetic trend served as an inspiration for some civil law jurisdictions to deepen the role of supervision within their penal systems.

Last but not least, it is necessary to reflect on the impacts of transferring community penalties across different legal systems. Since community penalties are structurally positioned between imprisonment on one end, and nominal sanctions and fines on the other, they can help reducing prison sentences (as promoted by international standards), or they can contribute to the expansion of the penal network, widening the scope of criminal law enforcement and government surveillance. The latter can result in the supervision of individuals who were previously outside the reach of the penal system, the criminalization of new conducts, and a stronger state intervention in the lives of offenders, who—in the absence of community penalties—might have been sentenced to sanctions without supervision. Therefore, community penalties should be used with moderation, with a clear definition of its scope that delimitates *a priori* the extent to which they may replace imprisonment. Nevertheless, there is a paradox in the legal transfer of community penalties: although its purpose is reducing imprisonment rates, they originate from common law countries, which have stronger problems with prison overpopulation than civil law jurisdictions.

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