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SENTENCE ADJUSTMENT MECHANISMS IN EUROPE:

Procedural Barriers and National Contexts

Comparative analysis of 7 European countries

EUROPEAN PRISON LITIGATION NETWORK

With the contributions of:

BELGIUM
Damien SCALIA
Université libre de Bruxelles
Morgane CANO DOMINGUEZ
Université libre de Bruxelles

FRANCE
Julien FISCHMEISTER
European Prison Litigation Network

GERMANY
Sven-Uwe BURKHARDT
Strafvollzugsarchiv

POLAND
Marcin WOLNY
Helsinki Foundation for Human Rights

PORTUGAL
Inês HORTA PINTO
Integrated researcher at Institute for Legal Research of the University of Coimbra
Diana SILVA PEREIRA
Attorney at law, Forum Penal

UKRAINE
Ihor KONIEV
Researcher

SPAIN
Ester PASCUAL RODRÍGUEZ
Francisco de Vitoria University
Xabier ETXEBARRIA ZARRABEITIA
Complutense University of Madrid
Clara REY SANCHEZ
Researcher

EDITORS:

Viktoria Kasongo AKERØ
European Prison Litigation Network

Julien FISCHMEISTER
European Prison Litigation Network

This research was carried out in the frame of the PrisonCivilAct project, in cooperation with:

Universidad Francisco de Vitoria UFV Madrid

Strafvollzugsarchiv

UNIVERSIDAD COMPLUTENSE MADRID

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INTRODUCTION

From a European perspective, the law on enforcement of sentences is characterised by a paradoxical situation. On the one hand, there is a dense and consistent European doctrine, whether resulting from recommendations of the Committee of Ministers of the Council of Europe or from reports of the Committee for the Prevention of Torture, reflecting a strong consensus on the primacy to be given to the objective of reintegration and the need to give sentence adjustments a central place. On the other hand, the case law of the Court, which has been the main vehicle for the reforms and even transformations of prison systems in Europe, remains reluctant to formulate obligations for States in this area (with the exception of the particular case of life prisoners).

In other words, investigating the European influence on national laws regarding the application of sentences amounts to examining the capacity of soft law to overcome disciplinary and managerial rationales, which are historically known to feed inertia in prison systems and to weigh down the transformative ambitions of reforms.

It is an undeniable fact that there has been a movement towards harmonisation of sentence adjustment mechanisms in Europe, with the spread of a judicialised model with varying degrees of procedural guarantees. Measures that were previously the sole responsibility of the executive authorities and left entirely to their discretion (in other words, on the basis of their assessment of the degree of rehabilitation of the prisoners) have been transferred, either entirely or by way of appeal, to the courts, with the establishment of specific procedures of varying complexity.

Despite the growing importance of penological work in the post-sentence field, this convergence of national laws has received little attention from a European perspective. The present study aims to both assess the degree of harmonisation of national laws in this area and to evaluate the impact of the judicialisation of sentence adjustment procedures on prisoners' access to these procedures.

It does so by providing a comparative analysis of sentence adjustment mechanisms in seven selected countries: Belgium, France, Germany, Poland, Portugal, Spain, and

Ukraine and highlighting areas where European harmonisation is needed to strengthen prisoners' rights.[1]

1. Definitions, Scope and Objectives of the Study

The scope of enforcement of sentences varies greatly from one country to another and could cover a very wide area of law that would have been impossible to cover in a comparative perspective, both in terms of time and consistency of approach.

Similarly, certain terms in national laws refer to different institutions, making comparative work difficult.

It was therefore necessary to limit the scope of the study and to define generic terms, detached from their national legal qualifications. This was done under the following conditions.

a. Scope and Definitions

The procedures considered are:

- **Sentence adjustment mechanisms**: procedures of ***early release****, i.e.* leading to the release of the convicts from prison for serving a ***sentence outside prison*** (home detention, conditional release, electronic monitoring, suspension of sentence, etc.), even in cases where the persons concerned retain legal prisoner status. Semi-freedom measures are included in the research when they provide the people concerned with large periods of freedom of movement in the community, outside the supervision of the prison administration, in a way that allows them to have a social life and maintain relations with the outside world
- **Sentence reduction mechanisms**: mechanisms that allow convicts to have the duration of their prison sentence reduced, ***where these measures involve an assessment of the merits of their behaviour (automatic measures are not taken into account)***.

[1] Two data collection methods are employed: desk research and semi-structured qualitative interviews. The desk research was conducted in 2024, while the semi-structured interviews will take place in 2025.

The conditions of access to the favourable detention regime are taken into account when they are a condition for the granting, de jure or de facto, of sentence adjustment measures. The same applies to temporary leave.

<u>Are excluded</u> from the scope of the study:

- Non-custodial punishment handed down by sentencing courts; as well as procedures for converting a prison sentence into a community sentence prior to incarceration (so-called *ab initio* sentence adjustments).
- Amnesty and pardon measures, unless according to the domestic law and practice, they fulfil a function similar to that of conditional release, particularly for long sentences (see above).
- The conditions and methods under which a prison sentence is served outside a prison facility, once the sentence has been adjusted, do not fall within the scope of this project.
- Sentence adjustment pending international transfer of prisoners is excluded, except when it takes place in the frame of the implementation of Council Framework Decision 2008/909/JHA on the transfer of prisoners,[2] as part of a broader question on the implementation of EU instruments in this area.

The research does not extend to **individuals detained in a specialised facility (separate from a prison) under a preventive detention regime**[3] (whether it is actually the case in practice or not, due to a lack of available places). Other kinds of detention in medico-judicial facilities for indeterminate periods are also not included. However, the impact of these systems on early release procedures needs to be studied. In other words, the research addresses the question, as whether **the risk-based approach of preventive detention impacts on sentence adjustment**

[2] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

[3] Secure preventive detention means detention imposed by the judicial authority on a person, to be served during or after the fixed term of imprisonment in accordance with its national law. It is not imposed merely because of an offence committed in the past, but also on the basis of an assessment concluding that he or she may commit other very serious offences in the future (Recommendation CM/Rec (2014) 3 of the Committee of Ministers to member States concerning dangerous offenders).

mechanisms (both in terms of the centrality of risk-based criteria or in procedures, with forensic expertise, etc.)?

Specific categories of prisoners receive special attention in the study, such as, women, juveniles[4], prisoners with addictions, prisoners with health issues (in particular mental health issues) and foreign prisoners:[5] to analyse specific schemes designed for these categories of prisoners, and to assess whether their situation impacts on their accessibility to sentence adjustment mechanisms.

b. Time Scope

The research identifies evolutions in the legal framework and practice surrounding sentence adjustments over the last decade (2014-2024). However, when it is relevant for a given country, other periods of comparison were taken into account, especially if they help to anchor certain aspects of the research in a historical perspective. The statistical aspects were examined over a 20-year period (2004-2024).

c. Objectives

The general objectives of this study[6] are:

- To **critically analyse the general legal framework and functioning of sentence adjustment and reduction mechanisms**, and its implementation in the seven European countries researched;
- To **analyse recent trends in the granting of sentence adjustments or reductions**, in general and for specific categories of prisoners;
- To **identify the multiple factors impeding or contributing to prisoners' access to sentence adjustment or reduction**, paying specific attention to the judicialisation of the processes, the strengthening of associated

[4] The case of juveniles is limited to children (individuals below 18) detained in prisons, (children held in in specialised facilities not run by the prison service are excluded from the research).
[5] Are considered "foreign prisoners" persons who do not have the nationality of and are not considered to be a resident by the State on the territory of which they are held in prison (see Recommendation CM/Rec (2012) 12 of the Committee of Ministers to member States concerning foreign prisoners).
[6] Two data collection methods are to be used throughout the research: desk research and semi-structured qualitative interviews. To answer the research questions, national researchers have reviewed and analysed available legislation, statistics, case law and other relevant sources including grey literature.The desk research has been carried out in 2024, while the semi-structured qualitative interviews will take place in 2025. The findings of the desk research has been synthesised into the national factsheets included in this report.

procedural rights, and the growing influence of risk-based consideration in decision-making.

The national reports prioritise an analysis of the underlying national dynamics for each of the measures, rather than providing a precise and exhaustive description of their legal regimes. Technical details are instead addressed in the footnotes.

2. European Penological Doctrine and Requirements on Sentence Adjustment

In order to address the way in which states have developed their national laws on the enforcement of sentences, it is first necessary to take into account the mechanisms at the supranational level that encourage or even oblige them to make such changes. While bearing in mind that other forms of dissemination of normative models are possible (notably through the dissemination of academic knowledge, institutional exchanges between national prison administrations, or interventions by non-state actors capable of influencing public debate and/or decision-making processes), there is now a broad consensus on the influence of European law on the evolution of national prison systems. However, as mentioned above, European law in this area is paradoxical in that it is prolific but at the same time reluctant to recognise the full exercise of rights for convicts in terms of sentence adjustment, which are guaranteed under the European Convention on Human Rights and subject to review by the Strasbourg Court.

In understanding the European influences on the trajectories of national reforms, it is therefore necessary to clarify the contours of European standards, and thus of the Council of Europe's penological doctrine in this area, and the way in which they inform the jurisprudence of the Court.

a. Soft Law: The Council of Europe’s Penological Doctrine

i. General Orientation

The Council of Europe has developed soft-law standards regarding sentence adjustment mechanisms through its recommendations over years. Despite the absence of binding norms, these recommendations reflect an evolving consensus on

the necessity of structured and transparent processes governing early release, sentence reductions, and semi-freedom measures.

Indeed, the Council of Europe's penal doctrine is characterised by a reductionist philosophy, which tends to consider imprisonment as a measure of last resort. In the post-sentencing field, this approach is reflected from various angles.

The length of imprisonment has been a fundamental concern in the Council of Europe's approach to penal policy.[7] The Council of Europe has emphasised early release mechanisms as essential in curbing excessive use of imprisonment and promoting the successful reintegration of prisoners into society. It has emphasised that the prospect of being reintegrated into society is intimately linked to human dignity, and the European Prison Rules (EPR)[8] make it clear that all detention should be managed in a way that facilitates the reintegration of former prisoners into society.

Moreover, a crucial principle underpinning this area is that minimum use must be made of imprisonment and that it is a measure of last resort. In line with this, several recent recommendations by the Committee of Ministers, along with CPT standards, as illustrated below, emphasise reducing the use of imprisonment and promoting community sanctions and measures through early release from prison.

The adoption of the 1987 European Prison Rules was a significant development in the emergence of European prison policy, for it demonstrated a commitment at the official level to identifying general policies applicable to all aspects of European imprisonment. The formulation of the 1987 EPR also moved further away from the 1955 UN Standard Minimum Rules for the Treatment of Prisoners and towards a specifically European approach in that it contained a list of basic principles that underlined its fundamental commitment to ensuring the human dignity of all prisoners.[9]

The European Prison Rules (EPR), revised in 2020,[10] lay down, as a basic principle, that all detention should be managed in a way that facilitates the reintegration of former

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[7] Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (OUP 2009).
[8] Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (revised 2020), Rule 6.
[9] Rule 1 of the 1987 EPR.
[10] Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (revised 2020).

prisoners into society. They stress that prison regimes should be designed to facilitate early reintegration, including through mechanisms such as conditional release and open regimes. The rules advocate for structured sentence planning from the outset of imprisonment, ensuring that prisoners have access to vocational training, education, and psychological support to increase their chances of successful reintegration into society. They also emphasise the importance of ensuring that sentence adjustments do not disproportionately exclude certain groups of prisoners, such as those convicted of violent or serious crimes, without justification.

In the final decades of the twentieth century, the Committee of Ministers issued several Recommendations aimed at curbing the use of imprisonment. The 1992 Recommendation on the European Rules on Community Sanctions and Measures[11] reinforced the principle of reductionism by highlighting the benefits of non-custodial sanctions[12] and specifying that imprisonment should not be the automatic consequence of breaching the conditions of a community sanction or measure.[13] Likewise, the Recommendation on Consistency in Sentencing, adopted the same year, reaffirmed the principle that custodial sentences should only be used as a last resort.[14]

The Council of Europe has also viewed sentence adjustment mechanisms as a crucial means for alleviating prison overcrowding. As prison populations rose across multiple European countries in the 1990s, leading to severe overcrowding, the CPT condemned this phenomenon in its 7th Annual Report in 1997, identifying it as a primary cause of inhuman and degrading treatment.[15] In response, the Committee of Ministers sought to reinforce existing principles by adopting the Recommendation on Prison Overcrowding and Prison Population Inflation. In 1999, it established a fundamental guideline stating that “deprivation of liberty should be regarded as a sanction or

[11] Recommendation No. R (92) 16 of the Committee of Ministers to Member States on the European Rules on Community Sanctions and Measures.
[12] See also Recommendation Rec(2000)22 of the Committee of Ministers to Member States on Improving the Implementation of the European Rules on Community Sanctions and Measures.
[13] Rule 86 of Recommendation No. R (92) 16 on the European Rules on Community Sanctions and Measures.
[14] Recommendation No. R (92) 17 of the Committee of Ministers to Member States on Consistency in Sentencing.
[15] CPT *7th General Report* [CPT/Inf (92)12] §§ 12–15.

measure of last resort and should therefore be provided only when the seriousness of the offence would make any other sanction or measure clearly inadequate."[16]

A core instrument on sentence adjustment mechanisms is Recommendation Rec(2003)22 on conditional release (parole). Its Preamble strongly advocates for conditional release, describing it as "one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community."[17] This perspective has also been explicitly endorsed by the CPT.[18] The recommendation differentiates between discretionary and mandatory release systems, emphasising the necessity of clear eligibility criteria and procedural safeguards. The recommendation highlights the importance of post-release supervision and individualised conditions aimed at reducing reoffending, while also stressing the need to balance risk management with rehabilitation, preventing prisoners from being arbitrarily denied early release based on broad security concerns without individual assessment. It further underscores the role of post-release management, allowing for the imposition of individual conditions where necessary.

Recommendation Rec(2003)23 on the management of life and long-term prisoners provides additional guidance, affirming that those serving lengthy sentences should have a prospect of release, subject to periodic review. The recommendation highlights the necessity of individual sentence planning, risk and needs assessments, and progressive movement towards less restrictive conditions, particularly through open regimes or conditional release. It also calls for the use of therapeutic interventions and structured reintegration programmes to counteract the negative effects of long-term imprisonment, such as institutionalisation and social isolation.

Recommendation Rec(2010)1 on the Council of Europe Probation Rules promotes the role of probation services in supporting sentence adjustment, advocating for well-defined supervision frameworks and adequate resources. It highlights the necessity of multidisciplinary approaches in probation, ensuring that social workers, psychologists,

[16] Recommendation No. R (99) 22 of the Committee of Ministers to Member States on Prison Overcrowding and Prison Population Inflation.
[17] Preamble to Recommendation Rec(2003)22 of the Committee of Ministers to Member States on Conditional Release (Parole).
[18] CPT *Ukraine Visit 2006* [CPT/Inf (2007) 22] § 94.

and legal experts collaborate to provide effective rehabilitation support. The recommendation further encourages the use of modern risk and needs assessment tools to tailor supervision measures to individual cases.

Finally, Recommendation Rec(2014)3 on dangerous offenders acknowledges that risk-based assessments increasingly shape sentence enforcement decisions, urging states to ensure that such assessments remain transparent, proportionate, and subject to judicial oversight. It highlights the potential dangers of reliance on security-based classifications, warning against policies that indefinitely delay release due to speculative assessments of future risk rather than demonstrated behaviour. The recommendation advocates for periodic reassessments and access to rehabilitation programmes to allow prisoners classified as dangerous to demonstrate progress towards reintegration.

ii. Specific areas of European soft law

These instruments illustrate the Council of Europe's evolving approach to sentence adjustment mechanisms, rooted in principles of rehabilitation, proportionality, and human rights protection. Soft law not only provides a framework for the national systems of sentence enforcement, it also seeks to promote specific measures, which should be briefly reviewed in order to put into perspective the convergence movements achieved by national laws in this area.

Conditional Release

Conditional release has long been a cornerstone of European prison penology, with its origins tracing back to the 19th century.[19] Over time, its significance in prison policy has grown, driven by the increasing recognition of the need to facilitate a structured transition from incarceration to life in the community. Ensuring effective reintegration has become a central goal, as reflected in the 2003 Council of Europe Recommendation on Conditional Release (Parole).

The Council of Europe standards recognise that when prisoners' behaviour influences their release date, high procedural standards must be met. While prison adaptation

[19] Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (OUP 2009).

does not always correlate with post-release success, many European countries consider conduct when deciding on conditional release.[20] The CPT has criticised systems where vulnerable prisoners lose early release opportunities due to their refusal to report inter-prisoner violence.[21]

The Council of Europe's Recommendation on Conditional Release (Parole) distinguishes between mandatory and discretionary systems.[22] Some countries apply a hybrid approach, granting automatic release for shorter sentences while maintaining discretion for longer ones.[23] In mandatory systems, the focus shifts from whether release should be granted to determining appropriate supervision conditions, facilitating sentence planning and post-release support, particularly in employment and housing.

Discretionary systems, however, require a structured decision-making process to ensure compliance with the rule of law. The minimum period before eligibility should be legally defined,[24] and authorities should initiate the process promptly.[25] The primary criterion is whether release would pose an "unbearable risk" to public safety,[26] yet this does not provide prisoners with clear expectations for eligibility. The Recommendation therefore insists on explicit, realistic criteria that account for individual circumstances and available resettlement programmes.[27]

Moreover, European policy recognises that barriers to release should not stem from factors beyond a prisoner's control. The Recommendation on Conditional Release explicitly states that lack of employment or housing should not justify refusal or postponement, and temporary accommodation should be provided if necessary.[28] However, systemic obstacles exist within prison administration. Some prisoners are denied access to rehabilitation programmes required for release, potentially rendering their continued detention unlawful. Long-term prisoners may only be released from

[20] H Tubex (with P Tournier) *Study of Conditional Release in the Member States: Analysis of Replies to the General Questionnaire* (PC-CP (2000) 24 REV 4) Strasbourg 17 February 2003.
[21] *CPT Visit Lithuania 2004* [CPT/Inf (2006) 9] § 61.
[22] Recommendation Rec(2003) 22 on Conditional Release (Parole) § 5.
[23] H Tubex (with P Tournier) *Study of Conditional Release in the Member States: Analysis of Replies to the General Questionnaire* (PC-CP (2000) 24 REV 4) Strasbourg 17 February 2003.
[24] Recommendation Rec(2003) 22 on Conditional Release (Parole) §§ 5 and 16.
[25] Recommendation Rec(2003) 22 on Conditional Release (Parole) § 17.
[26] Official Commentary on § 18 of the Recommendation Rec(2003) 22 on Conditional Release (Parole).
[27] Recommendation Rec(2003) 22 on Conditional Release (Parole) § 18.
[28] Recommendation Rec(2003) 22 on Conditional Release (Parole) § 19.

minimum-security prisons or after multiple periods of leave, and refusal to grant these transfers or leave can effectively prolong their incarceration.[29] To prevent such administrative obstructions, some countries, such as France and Germany, entrust one judicial authority with both sentence implementation and conditional release decisions.[30] In Belgium, the same authority also oversees other forms of prison regime relaxation, further integrating sentence management.[31]

Prison Leave

Temporary release is a key element in easing the effects of 'prisonisation' and facilitating reintegration. The European Prison Rules (EPR) recognise prison leave as an integral part of sentence management, particularly in preparing prisoners for their eventual release.[32] Since 1982, the Council of Europe has promoted a common policy on prison leave, highlighting its role in making prisons more humane and aiding social reintegration.[33] The Recommendation on Prison Leave urges states to grant leave for medical, family, social, educational, and occupational reasons, encompassing both day release schemes and structured leave programmes common in many European prison systems.[34] The CPT has endorsed such measures, commending Estonia's system of 21 days' annual home leave for working prisoners as beneficial for social rehabilitation.[35] The ECtHR has also acknowledged the value of temporary release, emphasising its role in reducing recidivism and improving public safety upon release.[36]

Many European states set fixed periods after which prisoners are entitled to leave if they pose no risk, ensuring that considerations of sentence length and offence severity do not unduly influence decisions.[37] Where no fixed period is prescribed, decision-makers must balance security concerns with the European-level emphasis on temporary release. The Recommendation on the Management of Life and Long-term

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[29] N Padfield, *Beyond the Tariff: Human Rights and the Release of Life Sentenced Prisoners* (Collumpton: Willan, 2002).
[30] D van Zyl Smit "Degrees of Freedom" (1994) 13 (1) *Prison Journal* 36–51 at 35.
[31] Act of 17 May 2006 on the External Legal Position of Prisoners and the Rights of Victims.
[32] EPR 103.6.
[33] Recommendation No. R (82) 16 of the Committee of Ministers to Member States on Prison Leave.
[34] Preamble to the Recommendation No. R (82) 16 on Prison Leave.
[35] CPT Estonia Visit 2003 [CPT/Inf (2004) 6] § 76.
[36] *Mastromatteo v Italy* [GC] 2002-VII (ECHR 2002).
[37] D van Zyl Smit and F Dünkel (eds) *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions* 2nd ed (The Hague/London: Kluwer Law International, 2001) 838-839.

Prisoners stresses the importance of leave in maintaining family ties and preventing social isolation.[38] Regardless of the approach, fair and transparent procedures are essential, including clear reasoning for refusals and a mechanism for review.[39]

Lifers

The early release of life-sentenced prisoners presents a paradox: while empirical evidence suggests they have low reoffending rates,[40] life imprisonment remains the most severe penalty in most European states.[41] Overall, European penal policy insists that all life-sentenced prisoners must have a realistic prospect of release.[42] This principle is embedded in key European instruments. The 1976 Committee of Ministers Resolution on Long-term Prisoners recommended reviewing lifers for conditional release after 8 to 14 years, with regular reassessments thereafter.[43] The CPT has reaffirmed that all life-sentenced prisoners must have a realistic prospect of release, supported by rehabilitative opportunities in prison.[44] Similarly, the 2003 Recommendation on Conditional Release (Parole) mandates that conditional release be available to *all* prisoners, including lifers.[45] The CPT has also opposed 'actual life' sentences, urging that all lifers be considered for release.[46]

European policy increasingly supports conditional release for life-sentenced prisoners, yet the legal framework remains unsettled. A clearer recognition of this right under human rights law is emerging, although the European framework has a limited capacity to prevent the development at national level of systems of indefinite detention that largely escape the cardinal principles of criminal law.[47]. Meanwhile, concerns persist over the detention of prisoners with severe mental illnesses, whose confinement often

[38] D van Zyl Smit "Leave of Absence for West German Prisoners: Legal Principle and Administrative Practice" (1988) 28 *British Journal of Criminology* 1-18.
[39] See, for example, *CPT the Former Yugoslav Republic of Macedonia Visit 2006* [CPT/Inf (2008) 5] § 95; *Hungary Visit 2005* [CPT/Inf (2006) 20] § 115; Recommendation No. R (82) 16 on Prison Leave, § 9.
[40] H Tubex *Dualisering en selectiviteit in de vrijheidsberoving—Toepassing op (levens)lange straffen* (Ph D dissertation, Vrije Universiteit Brussels, 1999).
[41] S Snacken "Recommendation Rec (2003) 23 on the management by prison administrations of life-sentence and other long-term prisoners" (2006) 25 & 26 *Penological Information Bulletin* 8–17.
[42] C Appleton and B Grover "The pros and cons of life without parole" (2007) 47 *British Journal of Criminology* 597–615.
[43] Resolution (76) 2 on the Treatment of Long-term Prisoners.
[44] CPT 11th General Report (CPT/Inf (2001) 16) § 33.
[45] Recommendation Rec(2003) 22 on Conditional Release (Parole) § 4.4.
[46] CPT Hungary Visit 2007 (CPT/Inf (2007) 24) § 33.
[47] This aspect will be developed in the second part of the study.

serves as *de facto* preventive detention rather than penal punishment.[48] Their risk must be proportionately assessed to prevent indefinite incarceration based solely on speculative threats.

b. The European Court of Human Rights' Jurisprudence

The European Court of Human Right has consistently restrained itself from intervening in post-sentencing matters, and this reticence stems primarily from its restrictive interpretation of the requirements of Articles 5 § 1 and 5 § 4. The crux of this is that the Court has held that no further review is required beyond conviction, as the supervision mandated by Article 5 § 4 is deemed to be incorporated into the court's decision at the conclusion of judicial proceedings.[49] The Court only departs from this and holds that intervention under Article 5 § 4 is required in cases where the causal link between the initial conviction and the detention has been broken. As the case law stands, this is the case in two areas: (1) decisions revoking a prisoner's release on licence[50] and (2) indeterminate detentions for public protection in the UK context, where the competent authority seeks to "rely solely on the risk posed by offenders to the public in order to justify their continued detention".[51]

In *Kafkaris v. Cyprus*,[52] the Court held that when the sentencing court explicitly stated that the applicant was sentenced to life imprisonment for the remainder of their life, the justification for the sentence did not rely on any factors subject to change over time. Consequently, no further review was required under Article 5 § 4.[53]

Article 6 § 1 of the Convention does not compensate for the lack of applicability of the guarantees under Article 5 § 4. Despite the increasing use by the Court of fair trial guarantees in prison cases, it has not applied them to sentence adjustment procedures.[54] The Court considers that the examination of requests for temporary release or of issues relating to the manner of execution of a custodial sentence do not fall within the scope of Article 6 § 1 of the Convention. According to the case law, they

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[48] I Kinzig *Die Sicherungsverwahrung auf dem Prüfstand* (Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht, 1996).
[49] *De Wilde, Ooms and Versyp v. Belgium*, no. 2832/66, 1971, § 76.
[50] see *Etute v. Luxembourg*, no. 18233/16, 2018, §§ 25 and 33.
[51] see *James, Wells and Lee v. the United Kingdom*, no. 25119/09, 2012, § 218.
[52] *Kafkaris v. Cyprus* (dec.) (no. 9644/09, 2011).
[53] see also *Murray v. the Netherlands* [GC], no. 10511/10, 2016.
[54] *De Tommaso v. Italy* [GC], no. 43395/09, 2017.

concern neither the determination of “a criminal charge” nor the determination of “civil rights and obligations” within the meaning of this provision. The Court has made it clear that the Convention “does not guarantee, as such, a right to conditional release or to serve a prison sentence in accordance with a particular sentencing regime”.[55]

This rigid approach has been criticised for overlooking the significant impact parole decisions have on prisoners’ liberty and rights. Judge Costa, dissenting in *Léger v France*, argued that once a state establishes a parole system, its decisions should be subject to judicial scrutiny.[56] He maintained that it was illogical for the ECtHR to deny review, particularly as procedural fairness in parole decisions is increasingly emphasised in European and national law.[57]

An exception to this restrictive approach in the area of sentence adjustments is the case of prisoners serving life sentences, for which the Court has defined under Article 3 of the Convention a series of precise obligations of both a substantive and procedural nature, ensuring that they are offered a realistic prospect of release. The Court requires States to establish a regular review mechanism that enables the competent domestic authorities to assess whether, over the course of the sentence, any changes in the life prisoner and their progress toward rehabilitation are significant enough to render continued detention unjustified on legitimate penological grounds.[58]

As summarised by Judge Pinto de Albuquerque in his partly concurring opinion in the case *Murray v. the Netherlands*,[59] the obligation incumbent on States is structured around five binding relevant principles:

> “(a) the principle of legality (“rules having a sufficient degree of clarity and certainty”, “conditions laid down in domestic legislation”); (b) the principle of the assessment of penological grounds for continued incarceration, on the basis of “objective, pre-established criteria”, which include resocialisation (special prevention), deterrence (general prevention) and retribution; (c) the principle of assessment within a pre- established time frame and, in the case of life prisoners, “not later than twenty-five years after the imposition of the sentence

[55] *Ballıktaş Bingöllü v. Türkiye*, no. 76730/12, 2021, § 48.
[56] *Léger v France*, 11 April 2006.
[57] *Léger v France*, partly dissenting opinion of Judge Costa § 9.
[58] *Vinter and Others v. the United Kingdom* [GC], no. 66069/09, 2013.
[59] *Murray v. the Netherlands* [GC] (no. 10511/10, 2016).

and thereafter a periodic review"; (d) the principle of fair procedural guarantees, which include at least the obligation to give reasons for decisions not to release or to recall a prisoner; (e) the principle of judicial review".[60]

The State's positive obligation is one of means[61] and can be achieved, for example, "by setting up and periodically reviewing an individualised programme that will encourage the sentenced prisoner to develop himself or herself to be able to lead a responsible and crime-free life".[62] This necessitates detention conditions that enable the objective of rehabilitation to be achieved,[63] and where necessary provide to lifers with mental health issues adequate care with a view to facilitating their rehabilitation and reducing the risk of their reoffending and to enable them to receive suitable treatment–to the extent possible within the constraints of the prison context–especially where it constitutes a precondition for the life prisoner's possible, future eligibility for release.[64]

As the obligations were set out by the Court in relation to Article 3 of the Convention, implying a very high threshold, they have so far been confined to life sentences. To date, this case law has not resulted in the extension of its underlying principles to other provisions. If the ECtHR has placed a positive obligation on States to reintegrate offenders into society,[65] its useful effect in the context of sentence adjustment procedures seems limited in the case of determinate sentences and confined to the question of life sentences.[66]

All in all, the European normative power remained in midstream. While sentence adjustment is increasingly recognised in the Council of Europe's recommendations as central to a rehabilitative approach to imprisonment, this issue remains largely sidelined in Strasbourg case law, which remains scarce on the matter. Sentence

[60] § 13.
[61] *Viola v. Italy* (no.2), no. 77633/16, 2019, § 113.
[62] *Murray*, § 103.
[63] *Petukhov v. Ukraine* (no. 2), no. 41216/13, 2019.
[64] *Murray*, § 108.
[65] *Khoroshenko v. Russia* [GC], no. 41418/04, 2015.
[66] In particular, it makes it possible to reinforce the effectiveness of the substantive obligation on Contracting States to ensure that a life sentence does not over time become a penalty incompatible with Article 3, by apprehending the concrete conditions under which the sentence is carried out in detention.

adjustment mechanisms are still often viewed as mere “privileges”[67] or matters of discretion[68] rather than enforceable rights.

Moreover, this shift toward incentive-based law—offering minimal resources to those it targets—aligns with the widespread adoption of a neutralisation rationale in sentence enforcement. This is particularly evident in the resurgence and proliferation of security measures aimed at preventing future crimes rather than punishing past offences. This will serve as a central focus of the field research to be conducted in 2025.

3. Main areas of the comparative study and preliminary findings

The present study raises the question of the consequences, from the point of view of national law, of the weakness of the intervention of European law: In the absence of international requirements, **to what extent have the laws of the States concerned made sentence adjustments subject to the common law of fair trial**? What is the density in national law of the penological objective of **social reintegration** and to what extent is it justiciable before the courts? In other words, do national laws regarding execution of sentences display the same incomplete features as European law in this area? Is the predominance of soft law in international law reflected in domestic law by a predominance of standards issued by the administration as opposed to legally binding instruments?

This first set of questions gives rise to a second, concerning the practical effects of this indeterminacy from the point of view of the effectiveness of access to sentence adjustments. Do the processes of judicialisation of sentence enforcement law, the granting of procedural guarantees and, where applicable, the encouragement of the law, **result in easier access to sentence adjustment**? If not, what are the reasons? Are they due to a **persistent imbalance between the parties in the procedure**, combined with **reluctance on the part of the courts** to change? Are they due to the increasing number of formal obstacles or **procedural constraints** imposed by the legislature in certain areas? Or are they explained by an institutional and individual resistance based on risk?

[67] *Boulois v. Luxembourg* [GC], no. 37575/04, 2012.
[68] UN Tokyo Principles, Rule 3.3.

To summarise, this study seeks to answer the following question: “In the absence of a tight framework of binding international standards, has the strengthening of the penological objective of social rehabilitation resulted in a strengthening of the **position of prisoners in sentence adjustment procedures at national level**?”

A central hypothesis that emerges at this stage of the study is that the judicialisation of sentence adjustment mechanisms has not in itself led to improved access to sentence adjustment for prisoners. Across the countries studied, there has been no consistent upward trend in sentence adjustments; instead, a sharp but temporary increase occurred during the COVID-19 pandemic, driven by crisis management efforts, followed by a general decline outside this period.

Four preliminary findings are drawn from this study which are presented as follows.

a. A Judicialisation Without a Reintegration Policy

The judicialisation of sentence adjustment mechanisms has occurred without corresponding improvements in the capacity or resources of judicial bodies. In other words, despite the repeated announcement of sentence adjustment as the normal method of sentence execution, this process has not been integrated into a coherent public policy aimed at changing the paradigm of sentence execution. In this respect, the development of judicialised sentence adjustment mechanisms marks a change in the institutional packaging of a stable paradigm, rather than its reorientation towards the execution of sentences in an open environment.

Judges tasked with deciding whether to grant or refuse sentence adjustments face significant resource constraints across the countries studied. This results in a bureaucratisation of the processing of sentence adjustment measures and corresponding litigation. This manifests itself in the form of practices such as 'copy-paste' or 'rubber-stamping' decisions, particularly in Spain and Poland, where the opportunity for an individualised review of each case is often compromised. Additionally, the proliferation of exception regimes for certain categories of offenders has further constrained judges' discretion in granting sentence adjustments. In France, the system of sentence adjustments is characterised by great instability and the proliferation of exceptions. The proliferation of mechanisms leads to a significant increase in the complexity of this field of law.

b. Procedural Barriers

The judicialisation process has not been always accompanied by improvements in prisoners' procedural rights, which remain an important barrier to prisoners' access to sentence adjustments. Procedural rights are frequently recognised in law but are not effective. In some states, the judicialisation process has been accompanied by limited guarantees, pale reflections of the principles of a fair trial. Common procedural hurdles have included:

i. Access to Legal Assistance and Representation

Across the countries studied, access to legal assistance and representation with respect to the sentence adjustment process has been identified as a significant procedural barrier. For example, in both Portugal and Poland there is a lack of lawyers with specialised knowledge in prison law - most defence counsels in these cases are criminal attorneys who extend their practice into the enforcement phase. This has meant that many prisoners receive representation from general criminal lawyers who may not have the expertise necessary to navigate the complexities of sentence execution procedures. Moreover, logistical barriers further complicate access to legal assistance in these countries. Defence attorneys report inconsistencies in visitation policies, including long wait times, sudden cancellations, and inadequate private spaces for meetings.

ii. Access to Case Files

Across most countries, administrative opacity significantly impedes prisoners' procedural rights. Access to case files varies significantly. In Spain, prisoners face substantial restrictions at the administrative stage, accessing only limited documents such as their Individual Treatment Plan and assessment grids, and even then, only when the Judge for Penitentiary Supervision (JPS) deems it necessary. Portugal provides comparatively broader access but restricts prisoners from obtaining prison administration files containing vital criminological assessments, which limits their ability to challenge or verify information used in decision-making. Similarly, in Poland, prisoners can review court files but are barred from accessing penitentiary administration files, further narrowing their ability to contest evaluations. In France, only the lawyer can have access to the person's individual file, which raises issues

insofar as many sentence adjustment procedures are carried out without the assistance of a lawyer.

iii. Right to Present Evidence

Procedural rights to present evidence differ in scope and practical implementation. In Spain, prisoners may submit expert reports during appeals, but these must be privately arranged and funded, creating financial barriers. Witnesses are generally only permitted in disciplinary proceedings, with social workers verifying claims through direct family contact. Portugal and France allow prisoners to present evidence and request expert evaluations, but in practice, institutional reports dominate decision-making, with independent evaluations rarely ordered. Poland offers similar rights, but courts seldom request expert opinions, prioritising institutional reports and probation officer evaluations. Across these systems, institutional assessments—particularly those concerning reintegration prospects or risk—are given significant weight, often without meaningful scrutiny. The limited role of independent evaluations in practice reduces prisoners' ability to engage with or challenge the assessments shaping their sentence adjustment outcomes.

iv. Appeals

Across these systems, procedural constraints and low success rates largely undermines appeals as an effective avenue for prisoners. Spain offers a tiered appeal structure, starting with a complaint to the JPS, followed by appeals for reconsideration and to the Provincial Court. While cost-free unless a private lawyer is used, appeals are often unsuccessful, with JPS decisions upheld in most cases. Portugal allows appeals for parole decisions but limits this right for other adjustments like prison leave, reducing its scope as an oversight mechanism. Poland, France, Belgium and Ukraine permit appeals for conditional release and other adjustments, but success rates are low, and the appellate process focuses narrowly on procedural defects or manifest injustice.

v. Delays in Processing Applications

Delays represent a systemic issue across countries studied. Spain lacks legal deadlines for the JPS or prosecutors to resolve cases, exacerbated by judicial

understaffing. Portugal similarly suffers from delays, worsened by premature applications that courts dismiss if eligibility criteria are not fully met. Poland faces comparable issues, with procedural delays in conditional release applications compounded by the exclusion of executive criminal matters from mechanisms addressing prolonged proceedings. France and Belgium have legal time limits, but these either do not cover all procedures or carry no meaningful legal consequences when breached. The same applies to Ukraine, where, as in other jurisdictions, failing to meet these deadlines does not result in any repercussions for the competent authority. In all systems, delays leave prisoners in prolonged uncertainty, undermining timely access to sentence adjustments.

c. Sentence Adjustment Mechanisms Instrumental to Respond to Managerial or Political Concerns over Rehabilitative Objectives for the Prisoners

The desk-based research conducted largely shows that the formalisation of sentence adjustment procedures has not automatically led to a significant increase in the granting of early release measures, as noted above. Across the countries studied, sentence adjustments have not demonstrated a consistent upward trend. Instead, a sharp but temporary increase was observed during the COVID-19 pandemic, driven by crisis management efforts. Outside this period, the overall trend has generally declined. These patterns are shaped by contextual factors such as penal policies, judicial practices, overcrowding, and public sentiment influenced by penal populism. The examples below illustrate these dynamics.

The study of Portugal, Spain, Poland, and France illustrates how sentence adjustment mechanisms are instrumental for crisis management and operational purposes over long-term rehabilitative goals. In Portugal, sentence adjustments, such as conditional release and prison leave, were expanded during the COVID-19 pandemic to alleviate overcrowding, but this increase was temporary and lacked sustained follow-through. Similarly, in Spain, mechanisms like the “flexible regime” under Article 100.2 RP were occasionally utilised during systemic strain, particularly in Catalonia, but these adjustments had limited impact on reducing overall prison populations. In Poland, electronic monitoring was expanded during the pandemic as a short-term measure, reflecting a similar crisis-driven approach. In France, there has been no comparable decline in sentence adjustments, but rates have historically been low, with

approximately two-thirds of individuals released each year without adjustment. The pandemic demonstrated how sentence adjustments could serve as a tool for regulating prison populations, yet the reforms introduced in its aftermath have achieved only short-term results.

The analysis of national contexts reveals that sentence adjustment mechanisms have been driven more by political expediency than by a genuine commitment to reintegration or prisoners' rights. Instead of being strengthened through thoughtful reforms and adequate resources to enhance accessibility, they have been repurposed as policy tools to serve short-term state objectives. When faced with pressure from the public or external bodies, such as the European Court of Human Rights, to address issues like prison overcrowding, these mechanisms are temporarily expanded, resulting in short-lived increases in the granting of adjustments or reductions. Conversely, under the influence of penal populist rhetoric, they are restricted to reinforce a "tough on crime" stance. Rather than being embedded within a sustained and coherent policy framework aimed at strengthening prisoners' rights and facilitating reintegration, sentence adjustment mechanisms function primarily as instruments of crisis management or political signalling. This approach allows the state to appear responsive to immediate concerns while avoiding the substantive investment of material and human resources needed to ensure genuine access to sentence adjustments. This dual function is further reinforced by the structural design of these mechanisms, which position the Penitentiary Administration as the primary gatekeeper of successful applications.

The growing influence of penal populism across Europe has shaped the instrumentalisation of sentence adjustment mechanisms. These mechanisms have increasingly become a tool for states to both respond to and reinforce penal populist rhetoric. Understanding this broader context is essential for gaining a clear and comprehensive insight into how sentence adjustment mechanisms operate and the ways they are influenced by political and public pressures.

Penal populism refers to practices and discourses that explicitly (re)locate, through mass media, "penalty at the centre of political space" and stimulates a shift from a

rehabilitative towards a punitive rationale.[69] The 'penal turn' that has swept "across the entirety of liberal democracies"[70] over the past few decades.[71] A crucial tenet of penal populism is the politicisation of penal policy.[72] The focus is placed on 'zero tolerance' and 'tough on crime' rhetoric, fostering a consciousness of crime anxiety and ensuring it is permeated across social action,[73] with a manifest disregard for actual criminological expertise[74] and for prisoners' rights. The penal turn has therefore involved a widespread decline in prison conditions.[75]

Moreover, penal populism has led to the enactment and use of laws designed to project an image of the state as actively addressing public concerns by adopting a tough-on-crime stance. This approach prioritises shaping criminal policy for the political benefit of decision-makers over ensuring robust legal safeguards for prisoners. It marks a departure from evidence-based policymaking, sidelining social dialogue and disregarding opportunities for constructive engagement. Critics of these changes are often attacked, further stifling dissent, while there is a marked reluctance to implement international standards. As a result, prisoners' rights are compromised in favour of showcasing a response to public fears about crime—fears that the state itself continues to foster for political gain. By severing the link between imprisonment and rehabilitation, governments sidestep criticism for failing to prevent repeat offences, framing recidivism as proof that harsher punishment is needed.[76]

This dynamic is a prevalent theme across the countries studied, but it is particularly evident in Poland, where the populist regime that took power in 2015 has heavily influenced criminal policy and sentence adjustment mechanisms.[77] The government has used penal populism as a tool to consolidate political support, prioritising a tough-

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[69] On France, see Salas, D. (2010*), La volonté de punir : essai sur le populisme pénal*, Paris, Pluriel.
[70] Hallsworth, S. (2002), The Case for a Postmodern Penality, Theoretical Criminology, 6, 145-163, p. 473; Hogeveen, B.R. (2005), 'If We Are Tough on Crime, If We Punish Crime, Then People Get the Message'. Constructing and Governing the Punishable Young Offender in Canada During the Late 1990s, Punishment & Society, 7, 73-89, p. 87.
[71] John Pratt, *Penal Populism* (Routledge 2007); see also, for France, Bonelli L. (2008), *La France a peur. Une histoire sociale de l'insécurité*, Paris, La Découverte.
[72] John Pratt, *Penal Populism* (Routledge 2007).
[73] Chevigny, P. (2003), The Populism of Fear, Punishment & Society, 5, 77-96, p. 91.
[74] Loader, I. (2006), Fall of the 'platonic guardians'. Liberalism, criminology and political responses to crime in England and Wales, British Journal of Criminology, 46, 561-586.
[75] Garland, D. (2001), *The Culture of Control. Crime and Social Order in Contemporary Society*, Chicago, University of Chicago Press.
[76] John Pratt, *Penal Populism* (Routledge 2007).
[77] See, for example, K Wigura and J Kuisz (eds), *The End of the Liberal Mind: Poland's New Politics* (Kultura Liberalna, Warszawa).

on-crime narrative over evidence-based policymaking. There has been a sharp decline in applications for conditional release initiated by penitentiary institutions, reflecting the state's reluctance to implement sentence adjustments that could be perceived as lenient. Moreover, critics of these changes, including civil society and academic institutions, have faced hostile measures such as intimidation tactics, discrediting campaigns, and lawsuits. Judges who grant sentence adjustments or reductions have faced public backlash, often being branded as "defenders of criminals." Likewise, the government has routinely dismissed feedback from public consultations and disregarded international standards, using the same rhetoric to discredit critics. This environment has fostered a punitive approach where sentence adjustment mechanisms are instrumentalised to reinforce the state's populist rhetoric, further weakening procedural safeguards.

d. Convicts in Precarity: Punished Twice Over

Convicted offenders are not treated equally when it comes to the execution of their sentence. A constant in the jurisdictions observed is that prisoners in a precarious socio-economic situation face multiple difficulties in terms of access to sentence adjustments and ultimately remain in prison longer than others. They struggle in particular to fulfil the substantive conditions of sentence adjustments, given the impossibility in which they find themselves of forming a life plan on the outside (in the absence of accommodation, employment, etc.). These difficulties are also manifested by increased difficulties in finding their way through the mechanisms of sentence adjustment and in mobilising procedural resources.

With the rise of austerity policies and of penal populism, the disproportionate impact of sentence adjustment mechanisms on specific categories of prisoners has become increasingly apparent. Foreign nationals face distinct barriers, as highlighted in Spain, where the lack of interpreters during the sentence enforcement stage leaves non-Spanish speakers reliant on fellow inmates or personal translators, often limiting their ability to navigate adjustment processes. In Portugal, foreigners are disadvantaged by limited access to resources that facilitate reintegration, such as family support or suitable accommodation required for parole or open regimes. In France, the reluctance of judges to adjust the sentences of foreign nationals without a residence permit – *i.e.* most of them, as a result of the impact of imprisonment on their administrative situation

– is also sticking, even more so in a context where migration policies are moving towards the deportation of foreign offenders.

Moreover, it is also clear from the countries studied that prisoners from a low socio-economic background face additional barriers in accessing sentence adjustments. In Spain, financial constraints impact prisoners' ability to navigate procedural requirements. For instance, inmates must independently fund expert reports for appeals, a cost many cannot afford, leaving them unable to present necessary evidence to challenge decisions effectively.

Similarly, in Portugal, socio-economic disadvantages manifest in the limited access to resources needed for reintegration. Prisoners from low socio-economic backgrounds often struggle to meet requirements such as securing stable housing or family support for parole or open regimes, placing them at a distinct disadvantage compared to wealthier inmates. The reliance on institutional reports in decision-making can further disadvantage these prisoners, as they lack the financial resources to commission independent evaluations to counter these assessments.

In France, where the vast majority of the prison population suffers from profound social and economic marginalisation, inmates often struggle to comply with the legal criteria for obtaining an adjustment – as shown by the generally low figures for the granting of these measures.

In Poland, the issue is exacerbated by the structure of the sentence adjustment system, which prioritises institutional evaluations over individual advocacy. Prisoners from disadvantaged backgrounds are less likely to have legal representation or access to resources that could improve their criminological prognosis. The reliance on cognitive evaluations, often conducted by probation officers, tends to disadvantage inmates without a stable social or economic background, as they cannot present evidence of employment or community ties.