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Prison Leave Across Europe: Some Reasons to Think About it*

In this article, we zoom in on prison leave, an institution that mostly remained under the scientific radar. Very little is known about prison leave in Europe (and elsewhere too). In this article, we focus on issues that emerged in the context of an analysis of prison leave in eight countries from all parts of Europe. Scholars from Belgium, Denmark, Finland, France, Italy, Romania, Spain and Ukraine provided us with detailed accounts of prison leave in their respective country¹. In this paper we draw on this concrete knowledge to raise general issues on the purposes and functions of prison leave, the criteria for obtaining prison leave, the authority to grant prison leave, the link between prison leave and prison life, and the link between prison leave and recidivism. We conclude this article by raising attention to an underlying tension: is prison leave a privilege or a right? Furthermore, we suggest additional questions in the hope of convincing other scholars to turn towards the study of prison leave in their jurisdiction.

Keywords: prison leave, europe, purposes, criteria, authority, prison life, recidivism

Hafturlaub in Europa: Einige Gründe, darüber nachzudenken

In diesem Artikel gehen wir näher auf den Hafturlaub ein, eine Lockerungsmaßnahme, die die Wissenschaft größtenteils vernachlässigt. Über den Hafturlaub in Europa (und anderswo) ist sehr wenig bekannt. In diesem Artikel konzentrieren wir uns auf Fragen, die sich im Zusammenhang mit einer Analyse des Hafturlaubs in acht Ländern Europas ergeben haben. Wissenschaftler*innen aus Belgien, Dänemark, Finnland, Frankreich, Italien, Rumänien, Spanien und der Ukraine legten uns detaillierte Berichte über den Hafturlaub in ihrem jeweiligen Land vor. In diesem Beitrag greifen wir auf dieses Wissen zurück, um allgemeine Fragen zu den Zwecken und Funktionen des Hafturlaubs, den Kriterien für dessen Gewährung, der Befugnis für seine Gewährung, dem Zusammenhang zwischen Hafturlaub und Gefängnisleben und dem Zusammenhang zwischen Hafturlaub und Rückfällen aufzuwerfen. Wir schließen diesen Artikel, indem wir die Aufmerksamkeit auf eine zugrunde liegende Spannung lenken: Ist Hafturlaub ein Privileg oder ein Recht? Darüber hinaus schlagen wir zusätzliche Fragen vor und hoffen, andere Wissenschaftler zur Analyse des Hafturlaubs in ihren jeweiligen Ländern zu motivieren.

Schlüsselwörter: Hafturlaub; Europa; Zwecke; Kriterien; Autorität; Gefängnisleben; Rückfall

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1. Introduction

Since the late 1990s, we are witnessing a revival of interest by scholars (e. g. Petersilia, 2003; Travis, 2005; Travis & Visher, 2005) and policy makers alike in what is called re-entry in the U.S.A., resettlement in the U.K. and reintegration in Europe (about these concepts, e. g. Maruna, 2006). This revival came at a time when mass incarceration shook many prison systems across the globe, with several jurisdictions – also in Europe - reaching unseen records in their prison populations since the second World War. As Armstrong and Durnescu state in their edited collection *Parole and Beyond* (2016, p. 1): ‘Ever since we have had prisons, most people held in them have been released back into society’. They call attention to the inescapable fact that almost all prisoners will one day return to society and thus that it is important to look at how prisoners return. This helped revive interest in old questions (such as parole) and introduced new issues, such as release policies (e. g. Padfield et al., 2010; Dünkel et al., 2018). In this article, we want to zoom in on an institution that mostly remained under the scientific radar, i. e. prison leave. This lack of specific attention is to a certain extent paradoxical since prison leave is usually in most jurisdictions the first step that enables the release policies to begin.

We define prison leave here as types of release on temporary licence for prisoners in a closed regime, aimed at (preparing for) reintegration². With the exception of some notable pioneering texts (e. g. Toch, 1967; Van Zyl Smit, 1988; Liebling, 1989; Cheliotis, 2005), very little is known about prison leave in Europe and elsewhere too – at least in the *lingua franca* of criminology³. Our objective is to shed light on this relatively understudied institution and to touch upon several key issues that emerge across several countries in Europe. For this, we draw upon materials written for a thematic issue in the *European Journal on Criminal Policy and Research* which we have guest-edited (Robert & Larrauri, 2020). Scholars from eight countries in Europe were invited to describe prison leave and to provide readers with a reflection about prison leave in their country. The countries represented in the thematic issue are from all four quarters of Europe, including Spain (Larrauri, 2019b) and Italy (Talini, 2019) for Southern Europe, Romania (Durnescu & Poledna, 2020) and Ukraine (Symkovich, 2019) for Eastern Europe, Denmark (Storgaard, 2020) and Finland (Keinänen et al., 2019) for Northern Europe and Belgium (Robert et al., 2020) and France (Herzog-Evans, 2020) for Western Europe.

The structure of this article is as follows. First, we focus on the normative discourse regarding prison leave on the European level. Second, we identify a number of topics that emerge across the eight countries: 1) the functions and types of prison leave, 2) access to prison leave, 3) decision-making, 4) the relation of prison leave to prison life, and, finally, 5) its relationship with prisoner release and recidivism. We conclude the article by calling further attention to this institution by researchers and policy-makers.

² Prison leave is one of many denominators, alongside terms such as furloughs, temporary leave of absence, and release on temporary licence.

³ We are aware of several publications in other languages. In several jurisdictions, local publications exist about prison leave, but rarely they enter into the *lingua franca* of criminology. For example, about Spain (Rovira et al., 2018; Larrauri, 2019a), about Belgium (Kloeck, 1983; Mine & Robert, 2014); about the Netherlands (Nelissen et al., 2006); and so on.

One interesting example comes from Fink and Mine (2015), who guest-edited a thematic issue on prison leave in the *Swiss Journal of Criminology*, dealing with prison leave in several countries (Belgium, Canada, France, Germany, Luxembourg and Switzerland) published in French and German.

2. European Soft Law About Prison Leave

Already in 1982, prison leave received attention in European soft law. Recommendation Rec(82)16 of the Committee of Ministers to Member States on Prison Leave defended it for ‘making prisons more humane and improving the conditions of detention’ and ‘facilitating the social reintegration of the prisoner’. The Recommendation also mentions a *list of factors* to be taken into consideration, including the nature and seriousness of the offence, personality and behaviour of the prisoner, the prisoner’s family and social situation and the purpose of the leave. These factors involve a mix of ‘both internal and external aspects of the prison regime’ (see the discussion by Van Zyl Smit & Snacken, 2009, p. 321-324). The Recommendation also prescribes ‘to grant prison leave *as soon and as frequently as possible*’, taking requirements and factors into account, and grant it ‘not only to prisoners in open prisons but also *to prisoners in closed prisons*, provided that it is not incompatible with public safety’. This also includes granting prison leave ‘where possible, under well-defined conditions, *to foreigners* whose families do not live in the country’ and ‘to homeless persons and persons with difficult family backgrounds’. Van Zyl Smit and Snacken (2009, p. 323) go on to state that, when decision-makers are in doubt about how to reconcile the internal and external aspects of prison leave, ‘the emphasis placed on temporary release at the European level means that they should decide in favour of granting it wherever possible’.

Later on, Recommendation Rec(2003)23 of the Committee of Ministers to member States on the management by prison administrations *of life sentence and other long-term prisoners* states that ‘Particular efforts should be made to allow for the granting of various forms of prison leave, if necessary under escort, taking into account the principles set out [in the Recommendation on prison leave]’. This confirms again the importance given to prison leave as a means of gradually arranging their reintegration into society.

Along similar lines, the previous version of the European Prison Rules, dating back to 1987, mentions prison leave explicitly three times. Rule No.43.2° referred to prison leave ‘to encourage contact with the outside world’, Rule No.70.2° stated that ‘treatment programmes should include provision for prison leave which should also be granted to the greatest extent possible on medical, educational, occupational, family and other social grounds’, and Rule No.70.3° brought up the issue of not excluding foreign nationals ‘from arrangements for prison leave solely on account of their nationality’. The last version of the European Prison Rules (2006) distinguishes between prison leave for humanitarian reasons⁴ and prison leave as part of the regime for sentenced prisoners. Rule No.103.6 puts forward *prison leave ‘as an integral part of the overall regime for sentenced prisoners’*⁵, and this is the one that is our focus, prison leave as ‘part of the regime for sentenced prisoners’.

⁴ Rule No.24.7 states that “whenever circumstances allow, the prisoner should be authorised to leave prison either under escort or alone in order to visit a sick relative, attend a funeral or for other humanitarian reasons”.

⁵ The United Nations Standard Minimum Rules for the Treatment of Prisoners (also referred to as the Nelson Mandela Rules), adopted by Resolution on 17 December 2015, do not explicitly use the term prison leave, but in Rule 87, allusion is made to it. Rule 87 states that “Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same prison or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid” (our emphasis).

Of course, as the above is ‘soft law’, no direct implementation as such is guaranteed into local jurisdictions. This raises questions whether and how such normative statements also exist in separate jurisdictions and, if so, whether and how they relate with the European dimension (e. g. Daems & Robert, 2017). Throughout the remainder of the article, readers will get a flavour of the differences that exist across the eight countries we studied and we will see how different countries face common challenges.

3. Shared Questions, Divergent Answers

In what follows, we raise a set of topics that emerged in the eight different countries about prison leave in Europe. As stated, we focus on 1) the functions and types of prison leave as they exist in the eight countries, 2) criteria for prison leave, 3) the authority to decide over prison leave, 4) prison leave and its relationship to prison life and, finally, 5) the relationship between prisoner release and recidivism.

3.1. Prison Leave in Many Shades

Overall, it is possible to distinguish between humanitarian types of prison leave and ‘ordinary prison leave’. Humanitarian types of prison leave are present in all eight countries. Access to this type differs among the countries, both in terms of its objective (usually it refers to a negative life event, such as attending a funeral or visiting a sick or dying relative) as well as in terms of who can get it (in Ukraine, only prisoners in open prisons can have a short-term leave on compassionate grounds).

Ordinary types of prison leave, our focus in this article, also exist in each of the countries. It is very diverse in many aspects. The first main difference is *when* you can begin to apply, i. e. from the beginning of the sentence onwards or after having served a specified part of the prison sentence (linked to early release). This in turn reflects if we value it as a humanitarian institution that aims to avoid excessive time of institutionalization (providing a brief respite) or if we value prison leave mainly as a mechanism to prepare reintegration (in which case it will be linked to release from prison).

The *maximum overall duration* of prison leave is also widely divergent. For example, in Finland, ‘prison leave based on the length of the sentence’ is at most 18 days per year (but extra time may be added for travel time); in Italy and Spain, this can be up to 45-48 days per year and elsewhere, no maxima are provided (e. g. prisoners in Belgium can combine regular short leaves with a maximum of 12 days per year on extended leave).

Types of prison leave can also be focused on the *duration* of prison leave (e. g. Romania, Ukraine). Ordinary prison leave can involve short types of leave (where a prisoner leaves the institution for a maximum number of hours during one day, e. g. short-term leave in Belgium) up to periods of more than a week (e. g. 10-day leave in Romania).

The *purposes and functions* of ordinary types of prison leave that emerge are preparing for (early) release, social reintegration (including the re-establishing or maintaining of social contacts), but also fulfilling obligations that require the prisoner’s presence outside and that are not per se included in release planning due to their unpredictable nature. Some countries have diversified types of prison leave based on distinct purposes of prison leave. In some countries,

separate types of prison leave are focused on (preparing for) reintegration, including arrangements for housing, work, and so on (e. g. Finland, with a type of prison leave as part of the sentence plan). In other countries, types of prison leave can serve several purposes at once, involving release preparations and establishing or maintaining social contacts, especially with family (e. g. Belgium, France, Romania, Ukraine).

3.2. Discretionary Decision-Making about Prison Leave: Criteria

An important, perhaps the most important overarching topic across all eight countries concerns *discretionary decision-making* about prison leave. Discretion ‘is a critical element at almost every point in our criminal justice system’, Atkins and Pogrebin (1978, p. 1) wrote four decades ago in their introduction to an edited collection about discretion in all parts of the criminal justice system. Gelsthorpe and Padfield (2003, p. 3) define discretion as ‘the freedom, power, authority, decision or leeway of an official, organisation or individual to decide, discern or determine to make a judgment, choice or decision, about alternative courses of action or inaction’.

In none of the countries discussed here (see also Robert and Larrauri, 2020), prison leave comes automatically, which means prison leave in these countries implies a type of discretion that depends on the authority who takes the decisions, but also on the *criteria* that are used in the decision making process.

The criteria that are considered by decision-makers are central to a sliding scale of access to prison leave between countries. In this regard, it is interesting to observe the large width of criteria. These criteria reflect a jurisdiction’s functions or objectives related to prison leave, in that the criteria may focus on what goes on inside prison (e. g. good behaviour, disciplinary problems, taking programmes, ...) or on preparing for what comes after prison (release planning, such as focusing on finding housing, work, re-establishing social contact with family,...), or a mix of these.

In all jurisdictions prison leave may be granted unless there is risk of evasion, committing another crime or bad use (which usually refers to drug or alcohol use). In some jurisdictions this is done through risk assessment tools, in others still through ‘clinical judgment’ (i. e. interviews and individual case-based evaluation).

In addition, we find a plethora of requirements that prisoners have to fulfil before they can submit their application for a prison leave. We provide here some examples. Prison leave may be used to *promote good behaviour in prison*, and this might be explicitly recognised (e. g. Romania, with its credit point system, or Ukraine, with a type of prison leave for juvenile prisoners who show good behaviour), or it might be a latent function of prison leave, where it can be used as a disciplinary element (e. g. Italy’s ‘bonus leave’, which includes the condition of ‘good behaviour’, in Spain where ‘good conduct’ is a necessary requirement, or France, where a coming change will transfer the power to decide in part to prison governors, which will make it more dependent upon how prisoners behave in prison).

A second group of criteria focuses on the *psychological and moral criteria*, like taking part in therapeutic (cognitive behavioural) programmes, acknowledging the offence, or taking responsibility for the crime. Criteria of this nature can be found in Spain, Romania and Ukraine and, to some extent, in Italy too (with ‘bonus leave’ as part of ‘the rehabilitative treatment’, Talini,

2019). This set of criteria reflects how in some prison systems, the objective of ‘correcting’ (‘rehabilitating’) prisoners is well-anchored and conditions access to prison leave. Over time, in several jurisdictions, criteria related to the victim have also been introduced as part of the implementation of the sentence. Although they might not per se reflect psychological criteria, victim-related conditions bring in another type of moral dimension. These criteria may come under the guise of paying compensation to the victim for the damages incurred by the offence (e. g. Belgium, Spain), or may also be formulated into much more ambiguous criteria (e. g. the risk that the offender might harass the victim in Belgium, see Robert et al., 2020; indications related to ‘due respect for the victims of crime and for their relatives and loved ones’ in Italy, see Talini, 2019, n. p.).

Third, criteria can be linked to (*planning for*) *reintegration*. They can be related to finding housing, an occupation, to therapy or to social contacts and social reintegration. In these cases, if an application for prison leave does not fulfil the criterion of finding work, therapy or other reintegration-oriented activities, it may be refused. In this regard, it is somewhat interesting to observe that a slightly different kind of ‘Scandinavian exceptionalism’ emerges. In Denmark and Finland, many prisoners obtain prison leave in order to prepare for early release. Prison leave in these countries is arguably the most widely applied of the eight countries. However, the issue of trust in prisoners on prison leave has made these governments resort to the use of an electronic tag during prison leave. The other countries do not use an electronic monitoring device during prison leave, even though they might also count prison leave as time served in prison or operate leave along very similar lines (only Romania refers to electronic monitoring in the context of prison leave, but so far, this is only the law in books, it is not put to practice). As Toch (1967) already stated, prison leave may operate as a kind of ‘pilot test’ regarding a prisoners capacity to deal with freedom during a short time span. Prison leave may then be a stepping stone towards early release, proving that the prisoner is worth a further step in an (implicit) progressive system of sentence implementation.

As researchers we remain in the dark about the scientific value of this plethora of requirements. Many of these criteria are formulated on the basis of principles, on what *ought* to be, without prior empirical assessment of their validity and reliability. Are they ‘evidence-led’, and linked to less recidivism? Are they manifestations of the entrance and power of the treatment industry inside prisons (Forde, 2017)? Are they a sign of the ‘soft power’ (Crewe, 2011) which is used to run the prison system?

3.3. Decision Making: Who Decides over Prison Leave?

Next to the criteria, the authority that decides over prison leave is central to discretionary decision-making. Differences about the *authority to decide over prison leave* can be found on the basis of countries’ particular legal traditions, alongside considerations related to prison leave itself.

In France, Italy and Spain, a member of the judiciary has the authority to decide over prison leave. In Italy, a penitentiary judge rules over prison leave. In Spain, a penitentiary judge also decides over prison leave (after a positive opinion from a prison board). In France, the sentence implementation judge (the JAP or *Juge de l’Application des Peines*) rules over the first permission. The prison governor has the authority to decide over subsequent applications for prison leave, which makes it a somewhat mixed system in terms of the authority to decide,

prioritising the judiciary for the first decision and then subjugating the authority to rule to the executive branch, in this case the prison governor.

In the other five countries, prison leave decisions are taken by the prison administration. Some countries confer to prison governors the authority to decide over (some types of) prison leave. This is the case in Ukraine, but also for Finland. In Denmark, the authority to rule can be with the prison governor, the regional office or with the Department of the Prison and Probation Service, depending on the sentence length and a set of other characteristics (e. g. certain offences, such as terrorism, or in case of a sentence to deportation). In Romania, either a local rewards commission or the general director of the National Administration Penitentiaries (NAP) concludes over prison leave, depending on the length of the prison leave. The rewards commission decides over one day prison leave, while the director general decides over prison leave of five days and ten days. In Belgium, prison leave is decided by a central unit within the national prison administration. If the prison administration has the decision-making authority, prison leave might potentially be used as a carrot for good behaviour in prison.

In addition, the more local and proximate the decision-maker, and the more 'individualized judgement', the more this might be a cause of concern with regard to uniformity in deciding over prison leave, with important differences in prison leave that may be granted in similar prisons. On the other hand, the further away (in terms of physical and social/interpersonal proximity) the authority to decide over prison leave, the less the decision-making authority will know the prisoner who is being considered for prison leave, and tend to rely on criteria like the severity of the offence, or the duration of the sentence, criminal record, or other criteria that have already been considered when sentencing. These tensions between proximity versus distance and detailed up to date information versus static factors can exist within the administration (if a central unit decides, it can be opposed to the local governor) or between local prisons and judges.

A further topic concerns the participation of prison staff in the prison leave decision-making. In case prison staff is totally left out of the decision, the prison staff workforce can be affected (e. g. they may recede into more security-oriented tasks); and in countries where prison staff participates it could eventually lead to some sort of 'corruption' (Cheliotis, 2006).

A final important dimension is the accountability for the decision about prison leave. Who will bear the responsibility if things go very wrong? This issue is very complicated and may have a series of effects on decision-makers. It pushes decision-makers towards risk-averse decisions, particularly in the context of highly unstructured and discretionary decision-making. It will also lead to imposing disproportionate conditions and requirements on prisoners during prison leave in order to avoid failures upon prison leave.

In sum, the authority to decide over prison leave might also have relevance for better understanding the requirements that are being applied before granting the prison leave. But we cannot yet answer if there is a more desirable system in terms of consistency, nor in terms of a higher proportion of prison leave being granted.

3.4. The Relations of Prison Leave to Prison Life

Prison leave is important for life in prisons for several reasons. Prison leave is important because it provides prisoners with hope, and expectations. It is important for enduring a prison sentence because it gives prisoners short-term goals, it allows them to divide the sentence, and

wait for the next prison leave to go out (this argument is derived from the idea of ‘marking time’, in which prisoners differentiate and divide time, e. g. Cohen & Taylor, 1972, p. 93-111). However, prison leave also comes with challenges to prison managers. Sometimes prisoners that go out on leave are threatened to bring back forbidden goods (‘contraband’). This calls attention to the classification of prisoners to different prisons or regimes within a prison, with the policy choice of concentration versus dispersion applied to prisoners who have access to prison leave versus those that do not. Prison managers may arrange specific wings for prisoners that go out (and they can be referred to in negative ways, e. g. so-called ‘chicken wings’). Another option is that managers prefer to have prisoners with access to prison leave in all wings so that hope spreads, and prisoners can see that a prison leave is achievable.

Moreover, prison leave poses challenges for prison staff. As we have already mentioned, in prison systems where psychologists exercise a big amount of influence, psychologists enforce ‘the power of the pen’ (Crewe, 2011). On the other hand, criteria like ‘good conduct’ are prevalent, and then it is prison officers who may be the main ‘gatekeepers’ to obtain a prison leave. A good example in this regard comes from Cheliotis’ (2006, p. 181) study of prison leave in a Greek prison, where ‘the incentive function’ was put forward by the chief warden in such a way that (part of) the purpose of prison leave was good order in prison “more than greater need of contact with the outside world”.

In so far as order is achieved through the ‘instrumental mode’ (Bottoms, 1999) - benefits and sanctions -, the actual prison leave system might paradoxically do little to increase ‘legitimacy’⁶. This is because in most jurisdictions prisoners have no voice (Herzog-Evans, 2020), the criteria are vague, and finally because as we have seen sometimes the authority to decide over prison leave is not clear to prisoners.

In sum, while prison leave might have positive effects on life in prison and while it may increase order inside prison, paradoxically it might decrease legitimacy (which is also important to achieve order), both among prisoners and potentially also among staff. More research about the influence of prison leave on prison life would help shed more light on this.

3.5. Recidivism

Although there are a few studies in the literature that link prison leave to less recidivism (see the review by Cheliotis, 2008; Cheliotis, 2009), their concept of prison leave is much broader than the one used here, including work release schemes that in our view, qualify as more far-reaching types of sentence implementation.

Furthermore, we are not aware of any study that addressed in a sufficient manner the issue of (self-)selection bias in prison leave, so that results about the effect of prison leave on recidivism are doubtful and tentative, at least given the current state of research (see also Symkovich, 2019). For example, descriptive statistics in Catalonia show that prisoners with prison leave have a recidivism rate that is much lower than those without prison leave (20.5 % versus 38.6 %) (e. g. Larrauri, 2019b). Both groups are likely different in several respects (that also impact upon applying for and obtaining prison leave), so that the recidivism rates confound the impact of prison leave on recidivism with the (self-)selection of these prisoners and their

⁶ We refer to the three modes of achieving order explained by Bottoms (1999): coercion, instrumental and legitimacy.

pre-existing differences. For none of the other seven countries, studies exist about the link between prison leave and recidivism.

Additionally, prison leave concerns moments of leaving the prison institution; it remains to be seen if the (one short or repeated) short period(s) out of prison during prison leave can be isolated in terms of their effects on recidivism *after* prison, what their contribution to success or failure after prison is and whether an 'ideal' timing and amount ('dosage') of prison leave can be identified.

What is very clear, however, is the low rate of failures *during* prison leave, with failures also including late return, absconding, not respecting conditions and new offending. Low rates of failures during prison leave have been documented in several countries. For example, in Denmark, failure rates range between 2 and 6 %, with only between 0.1 % and 0.2 % of all failures related to new offences (Storgaard, 2020, n. p.). These findings are not exceptional, but rather are found in other European countries too (e. g. in Germany, Dünkel & Fritsche, 2005).

The current state of research does not allow conclusive statements about the effects of prison leave on recidivism. Much more research is needed about whether and how prison leave can affect and impact upon recidivism. The low failure rates, on the other hand, do indicate that prison leave may be used without many risks for recidivism; there are no indications against the (wide-spread) use of prison leave at this point.

Another important topic pertains to whether and how prison leave 'works'. In light of the variety of objectives prison leave is imbued with across different jurisdictions, this matter stretches beyond recidivism after prison. In terms of properly evaluating prison leave, it is first and foremost important to identify one or several outcome measures. Outcomes could be related to successfully taking up prison leave, but they could also relate to post-release recidivism, re-integration, desistance and other outcomes such as ex-prisoner wellbeing, social ties (during and/or after prison).

Methodologically, an assessment of prison leave could be reached ideally by combining qualitative and quantitative strategies. This could include research on (ex-)prisoners' experiences with prison leave and what role it played in their preparations for release and in 'making it' after prison (qualitatively). In terms of a more large-scaled (quantitative) evaluation, absent the possibility of randomized controlled trials⁷, a second best option could consist of advanced statistical analyses of prison leave and its role in obtaining early release. This could be done by comparing predefined outcomes of ex-prisoners that used prison leave in their release preparations (and within this group, subgroups could further be identified, based on a range of characteristics, including problems during prison leave or not, type of problems, types of prison leave and the number of times prison leave was used) with those of prisoners that did not use prison leave prior to release (and within this group, groups could also be distinguished on a range of aspects, including whether prisoners were granted early release or not,...), with statistical matching of these groups.

These strategies could push forward the current empirical knowledge base that exists about prison leave. Much remains to be done in this regard, qualitatively and quantitative. Further research on the link between prison leave on the one hand and recidivism, alongside other outcome measures, on the other hand, would help to shed further light on this institution.

⁷ A randomized controlled trial – to many but not all, the 'golden standard' of causal research designs (e. g. Sampson, 2010) - involving randomly granting or refusing prison leave is ethically not defensible.

4. Conclusion: Is Prison Leave a Privilege or a Right?

One of the recurrent issues that emerge is the rather large degree of discretion that exists when deciding over prison leave. Decision-makers often have much leeway when deciding to approve or grant prison leave, which raises the question of the status of prison leave: is prison leave a right or does it boil down to a privilege? As Larrauri (2019b, n. p.) mentions, this issue goes at the heart of the debate about the 'legal nature' of prison: 'to defend that prison leave is a 'right' seems to foster the possibility of granting prison leave 'automatically' [...]. On the contrary, to insist that it is a privilege, seems to open the door for vague criteria, and discretionary concessions (based on performance inside prison and/or on an 'individual assessment' based on re-integration efforts).'

It seems obvious that even if it is claimed as a right it will always need to be balanced (see Scott, 2013, on 'qualified rights'). On the level of individual states, some countries have included the goal of rehabilitation in their Constitution (e. g. Italy, Spain). In those countries, it would make sense that laws and practices promote prison leave and that it would even be considered as a right. Yet, a legally recognised goal of rehabilitation does not imply that prisoners have a right to prison leave (and it is not the case in Italy and Spain).

Elsewhere, legislation suggests that prison leave should be granted, although none of the eight countries explicitly recognize it as a fully-fledged right in its legislation. For example, in Finland prison leave is 'semi-automatic' when linked to the prison sentence. In Belgium, prison leave is considered a part of the standard regime of sentenced prisoners, even though in practice this does not imply an automatic system of providing prison leave. Belgium's Court of Cassation (which checks applications of the law in ongoing cases) ruled that prisoners have a *subjective* right to prison leave, which means that, if all requirements are met, prisoners should be granted prison leave. Other countries do not go so far as to almost provide prison leave as a 'right'. In Romania, prison leave legislation has shifted from 'may benefit from the following rewards' to 'shall benefit from the following rewards', including prison leave, which suggests that prison leave should become more accessible to prisoners. The legislator did not mention official reasons behind the change; drawing on qualitative data, Durnescu and Poledna (2020) point out that this shift was intended to encourage the prison administration to make greater use of prison leave. In Denmark, France, Italy and Spain, too, it is granted in case of meeting criteria and conditions, but just like Romania, its status oscillates somewhere between a right and a privilege. In Ukraine, finally, prison leave seems to operate mostly as a 'legal privilege available to a tiny fraction of prisoners' (Symkovich, 2019, n. p.).

The more prison leave leans towards the status of a right, the more we see that a higher rate of prison leave is granted when applied for. In Finland, for example, Keinänen and colleagues (2019) mention that in 2018, out of ca 17 000 prison leave applications, over 13 000 were granted, which amounts to 79 %. This is one end of the spectrum, with a wide access to prison leave, whereas Ukraine seems to be on the other side of the spectrum. In 2014, only 36 prisoners had obtained temporary prison leave, which was ca 0.04 % of the prison population (Symkovich 2019).

This debate has already found its way to the level of the European Court of Human Rights (ECtHR). In *Boulois v. Luxembourg* (2012), the Grand Chamber of the ECtHR denied the existence of a right to prison leave (which would then merit the protection of art.6 § 1 of the European Convention on Human Rights, the right to a fair trial). Boulois disputed the authorities' decision to turn down his requests for prison leave and argued that his right to a fair trial was

violated. The Grand Chamber argued that no (civil) right to prison leave can be derived from international law. Furthermore, the ECtHR also referred to a lack of consensus among member states about ‘the status of prison leave and the arrangements for granting it. In some countries, the decision-making authority is obliged to grant leave once the statutory conditions are met, while in others it enjoys complete discretion in the matter.’ The ECtHR also added that ‘not all States provide avenues of appeal against decisions refusing prison leave’ (§ 102 *Boulois v. Luxembourg*, 2012). Against this background, the ECtHR decided that no (civil) right to prison leave exists in Luxembourg.

However, this discussion might be in need of further reflection. Prison leave should be considered a right, because the prisoner has a claim to be considered for leave (van Zyl, 1998), and it is (usually) actionable in front of judges. Furthermore, considering it a right gives it more symbolic force to back up the claim (Scheingold, 2004).

In addition, we should try to structure the discretion of the administration⁸ and not resign ourselves to an eventually arbitrary use under the justification of its definition as a ‘treatment tool’. We need to be aware of the used criteria, and make them more open for discussion, in order to assure that prison leave is not mainly a mechanism for achieving order. Prison leave should be granted to facilitate reintegration and in our view the main criteria should be ‘future-oriented’ and, ideally, empirically tested and adapted. Therefore, we also need to keep discussing the criteria under which a prison leave is granted, who should grant it and, more broadly, how to structure discretion in the prison leave decision-making process.

Finally, in spite of the great tradition of the Council of Europe Penal Statistics (better known as the SPACE-statistics), it is unfortunate to see that data about prison leave as linked to prison rates are missing. This is unfortunate because such data could help us begin to understand the different applications of prison leave and their links with early release across countries. And they could also help to keep developing European soft law about prison leave by European institutions (and by the European Court for Human Rights (ECtHR) and the Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT)).

We hope that the emerging interest in this topic will lead to further research findings, data and knowledge about prison leave in the international scientific forum.

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⁸ The fact there is discretion in the decision making is no definitive argument against the existence of a right. As the Dissenting Opinion of Judges Tulkens and Yudkivska stated “(...) the Court has already accepted ‘that the mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a civil right’” (§10 *Boulois v. Luxembourg*, 2012).

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