

**Summary of PhD Thesis**

**David Vig, J.D.**

**Unlimited pain?**

**Exclusionary effects of imprisonment in  
incapacitation and beyond**

Supervisor

Prof. Dr. Klára Kerezsi

Doctor of the Hungarian Academy of Sciences

**Budapest**

**2014**

## **I) Summary of the research project**

From a conventional point of view it might seem unusual that as a criminologist I am more interested in the crimes committed against detained offenders by the state or fellow inmates than the causation of the crime committed by the offenders themselves. However, since Sutherland's definition which has widened the focus of or one could even say revolutionized criminological research a number of criminological paradigms have emerged around the study of the "institutional reactions to crime".<sup>1</sup>

Criminal law is the "last resort" in the legal system<sup>2</sup>, imprisonment being one of the gravest sanction, if not the gravest one in states that have abolished capital punishment such as Hungary and countries of the European Union region in general. Throughout the centuries since the formulation of Beccaria's principles criminal justice policy has focused more and more effort on conducting criminal prosecutions in a manner that allows the defendants to exercise their right to a fair trial and related powers such as "equality of arms" and right to a public hearing. However, the prison reform movements which began with the work of John Howard and also have centuries-long history behind them still to this day haven't been able to achieve that similar guarantees be enforced throughout the implementation of imprisonment. This partial failure can be explained by innumerable reasons three of which, I would like to argue, are outstanding. While the procedural guarantees have been manifested as fundamental rights from the outset, the injuries of the detainees have emerged as a humanitarian issue and this fundamentally determined the outcome of the attempts at asserting claims that have surfaced. On the other hand the prison due to, among other things, its character as a total institution is the stage of nearly unrestricted enforcement of state power making the citizen almost completely vulnerable to state power. In this isolated environment the public's or even an attorney's options for ensuring the enforcement of prisoners' rights without delay are limited in the extreme.

The prison environment provides a diverse medium for the examination of power as not only the enforcement of state power can be studied but also the prison personnel's authority over imprisoned persons and the power relations between inmates themselves. In some ways, the latter seem to be in correspondence with the power relations of the "society on the outside" as well. At the same time, since the power relations of the "outside" society and the discrimination that can be experienced there both have considerable effect on the makeup of the inmates' group, in some cases certain social groups that are a minority in the outside society become overrepresented or find themselves in a majority position in prison. These power relations rooted in the social structure continuously exert their effects on crime policy and on the everyday functioning of the criminal justice system as well. They bring about the effects, in some cases intentionally, in others unintentionally, that result in situations where certain persons or groups are affected more by the same imprisonment-penalty than others.

---

<sup>1</sup> Edwin H. SUTHERLAND: Principles of Criminology (Chicago: J.B. Lippincott Company 1934)

<sup>2</sup> Opinion of András Szabó 23/1990. (X. 31.) AB decision ABH 1990, 88.

During the implementation of the detention radical changes occur in the imprisoned person's fundamental rights. The convicted person's right to personal freedom is suspended along with those civic rights and obligations that cannot be exercised having regard to the implementation of the punishment or, if the court has made a provision to that effect, those rights that are included in the scope of being barred from public affairs. Furthermore, the assertion of rights and civic obligations that are provided by the law or the ones that cannot be exercised or the convicted person is prevented from performing them is limited. Thus, for example, on the basis of the Decree on the Enforcement of Sanctions the right to move and reside freely, the right to assembly, and the right to strike are suspended. Certain rights of the detained person take on a modified form. For instance, they cannot exercise their right to freedom of expression if it compromises the orderly state and safety of the institution; also, their correspondence and telephone conversations can be monitored and this may entail breaches of privacy. Beyond the right restrictions, due to their legal relationship with the correctional service the convicted person enjoys certain rights and has certain obligations. The legislation in force, that is the Decree on the Enforcement of Sanctions, need to be subjected to considerable revisions, nevertheless these are the regulations that presently outline the framework of the detainee's legal status. Also, the newly adopted Law on the Enforcement of Sanctions has not solved all related problems. However, regarding the practice that fills in the legal framework, it is an essential question if all detained persons are affected by the imprisonment to the same degree or do other factors also have an effect. Another question is what other kind of legal institutions are built upon the so-called immanent pains or restrictions of detention as defined by the on the Enforcement of Sanctions, that can further exacerbate the abridgement either in terms of timescale or the extent of rights.

For years I have been dealing with this topic trying to understand social changes, processes, and factors that shape crime policy and consequently the status of the so-called prison question. Beyond understanding the tendencies of crime policy, throughout the process of researching and writing this dissertation the focus of my attention was mapping and analyzing the elements that are - historically or culturally or even presently, amidst the „climatic conditions” of late-modern crime policy<sup>3</sup> - added to the contents of punishment by imprisonment whether they are related to the aim of the penalty or the practical aspects of its implementation. The situations where crime policy is “pushing” the constitutional limits of criminal law are at the center of my attention.

## **II) Research design and research methodology**

During the research activities I conducted at the National Institute of Criminology and the work I did for Open Society Foundations Human Rights Initiative in the field I observed that punishments „overstretch”, they are extended beyond their constitutional limits. This means that not only are the sentences prolonged in a way that is hard to justify using penological arguments but there are also innumerable restrictions on rights, disadvantages, and

---

<sup>3</sup> Katalin GÖNCZÖL: „Pessimista jelentés a posztmodern büntetőpolitika klimatikus viszonyairól” *Mozgó Világ* 2010/4 <http://mozgovilag.com/?p=1190>

consequences that are not necessary parts of incarceration; moreover, these are questionable using constitutional and penological arguments.

Throughout my research I have interpreted imprisonment as a form of exclusion (using the term in its broad sense). Since the emergence of modern prison custodial sentence have always meant physical isolation using walls and barbed wire although the intensity of that isolation has changed over time. However, the aims of various punishments that have laid the penological foundation of imprisonment lasting for longer time periods have undergone even greater changes. While in the era of correctionalism corrective intent which was a part of the modernist idea contributed to the lengthening of the sentences, later the function of social protection which has arisen at the same time as the idea of correction became the defining element. It seems that thanks to the aggregated effect of multiple factors in the era of late modernity the function of social protection becomes more and more dominant for according to the assumption held by some prison with the use of physical isolation has the ability to make those people harmless who pose a particularly serious threat, be it a perceived or a real one, to society. The question of who exactly belongs to this „dangerous group of people” that needs to be made harmless is not answered by a positive system of categories existing independently rather it is affected by certain normative expectations. The latter, in turn, are formed by those social groups that are in the position and have the chance and the opportunity to influence this system of criteria. If these privileged groups use their power then legislation and consequently the criminal justice system gets trapped in a situation where - in addition to fulfilling its legitimate goals - another of its functions appears where it simply becomes an instrument for sustaining oppression and the exclusion of discriminated social groups. Imprisonment has a potential to become an extreme form of exclusion as well. This way, the exclusion of the persons subjected to incarceration can also intensify. Furthermore, various legal institutions - the scope of sanctions that are related to having a criminal record is one example - can contribute to an outcome in which the exclusion continues to exert its influence even after the end of the custodial sentence. The fact that the imprisonment of the convicted person also affects the lives of their family members and those within their immediate environment should also not be ignored and it is questionable what kind of influence will the incarceration of the breadwinner have on the social integration of these people.

The dissertation examines the questions of imprisonment and social exclusion, specifically it explores the extension of the period of isolation that is inherent to incarceration, the effects it has on certain social groups that are excluded, and the pains that extend beyond the timeframe of the sentence itself. In doing so, I tried to answer the following questions:

a) The objective of the research was to explore the causes and consequences of widespread use of imprisonment for the purpose of incapacitation. For this end I studied the changes occurring in social life, political discourse as well as public and professional thought dealing with questions of crime that could have had in the past and continue to have a determining effect on the processes of contemporary crime policy. An objective I have formulated was to explore and analyze the instruments of neutralizing crime policy with an emphasis on incarceration. In the course of the examination of incapacitation-oriented imprisonment I concentrated primarily on presenting the instruments used in the Euro-Atlantic Region.

Additionally, in the course of the research I dealt with the questions of how did the changes of the domestic crime policy shape the image of the prison and how did the practice of incarceration with the purpose of social protection and neutralizing criminals and its particularly extreme manifestation, actual life imprisonment appeared, changed, and assumed its complete form in Hungary.

b) I have been dealing with the question for a long time whether or not incapacitation or, in a broader sense the exclusion that is inherent to imprisonment affects different social groups in the same way and if the consequences of imprisonment which is theoretically the type of „time punishment” that can be imposed on somebody in the most proportionate way possible, mean the same amount of „pain”<sup>4</sup> for members of said social groups or not. I wanted to understand what kind of effect does the prison, „invented” by, organized, created, and most of the time run by men who typically belong to the social majority and are not financially deprived, have on the unprivileged members of society. Of course, imprisonment is a „late” stage of the criminal justice process and its functioning is determined by, among other things, the whole system of crime control, the shaping of crime policy, and the previous stages of the criminal justice process, particularly the activities of the investigation authorities, the prosecutor’s office, and courts. I put the prison in the center of my research and have dealt with changes in crime policy and investigating as well as sentencing practice only in so far as they have provided important factors for examining the topic of prisons. Imprisonment and social exclusion along with the relationship between social and institutional oppression were the focus of the analysis. The objective of the research was to explore this multifactorial system of relationships within the functioning and practice of the criminal justice system, primarily in the part that constitutes the correctional services. The scope of the research included multiple non-privileged social groups; the position of, among others, Roma people, women, people living in poverty, and LGBTQ<sup>5</sup> people in the criminal justice system and throughout imprisonment have been studied.

c) Another one of my goals was to analyze those legal institutions of which it can be presumed that they are antagonistic to the process of reintegration. As a result of the research project I described the historical roots these legal institutions have and their role in the criminal punishment system as well as the penological considerations that can be used to justify their existence. The research evaluates the shaping of these legal institutions and the dissertation includes recommendations on alleviating the unjustified and harmful consequences.

The research questions raised the possibility of conducting one empirical research, but I didn’t find this option suitable for the objectives of the project since the links between the interconnected questions of the study and the issues of oppression and exclusion can be characterized by different focuses and depths. Though the hypotheses of the research that are clustered around the topic of social exclusion are interrelated, the exploration and analysis of causative relationships would necessitate the employment of vastly different research methods

---

<sup>4</sup> This terminology is defined in Nils CHRISTIE’s ‘Limits to pain’ (Budapest: Európa 1991).

<sup>5</sup> LGBTQ: This abbreviation stands for ‘lesbian, gay, bisexual, transgender and queer’.

which in turn would make carrying out an empirical research project where all of the aforementioned aspects are equally taken into consideration difficult. Therefore, I did not opt for one empirical research instead I chose to use an interdisciplinary research method that combines quantitative and qualitative elements.

- A. The research interprets the processes and institutions that are the focus of the examination in their historical context for the basis of my assumptions was that phenomena of politics, crime policy, and law can be better understood if I examine how they have come into being in the first place and how they have evolved. The historical method was primarily used for examining the institutions mentioned in points a) and c) above. The various historical forms of indefinite imprisonment employed for the purpose of incapacitation, the circumstances of their emergence as well as the process of their development in Hungary, Europe and in the United States of America had to be explored. Lastly, dealing with the third comprehensive group of hypotheses required the examination of the historical development of how certain groups were excluded from exercising their political rights (primarily, the right to vote), and practicing certain professions.
- B. The research was also defined by the use of the comparative method. I have chosen this method because the processes that take place in the domestic setting are not unrelated to the international and global changes, thus phenomena observed in Hungary can be better understood employing this method. The comparative method proved to be useful for the formulation of *de lege ferenda* recommendations as well. The use of this method included but was not limited to the comparison of certain legal institutions; instead it was employed to interpret phenomena in their social context and collate them with societal practices. These comparisons were carried out on different levels of generality in accordance with the objectives of the research. In respect of the first group of research questions, the comparison of the emerging social theory questions appeared to be necessary while in the case of the second and third group practices of the correctional services, as well as regulation of actual legal institutions and their functioning in practice were compared.  
In the use of the comparative method I did not endeavor to examine all of the phenomena and processes in the same depth. The character of the different hypotheses determined how and in what range I employed the comparative method. These decisions were also influenced by the fact that the Hungarian social science and jurisprudence studies of the last two decades primarily have “looked to the West” in so far as their choice of subjects for comparison were overwhelmingly determined by the process called Euro-Atlantic Integration which in the past have been designating the framework for the range of phenomena and standards for comparison and continues to do so to this day.
- C. I used various empirical research methods for examining the research questions, primarily document and content analysis, interviews, observations, and case studies. The use of document analysis seemed to be a promising method for answering three questions. Firstly, I explored the courts’ classification and sentencing practices in cases of intimate partner homicide where the perpetrators were women and there was a

possibility that previous intimate partner violence played a role in the criminal activity. Secondly, surveys of the policies of Hungarian correctional facilities have provided a lot of information on the internal order and daily practices of these institutions. Thirdly, I analyzed the prison visitation reports published by organizations that carry out systematic monitoring of detention facilities, principally the Council of Europe anti-torture Committee, national institutions protecting fundamental rights and non-governmental organizations.

I used the method of content analysis in cases where I was interested in the political and social environment of the emergence of particular legal institutions. Since minutes of sessions of the National Assembly primarily aided the exploration of political discourse, they have proved to be useful for examining the creation and amendment of regulations concerning both the three forms of incapacitation for social protection in Hungary as well as the and voting rights of incarcerated persons or criminal discharge. For the dissertation I also used the data of an empirical study that was previously conducted in the National Institute of Criminology in a project I took part in as a co-researcher. In the course of the study we interviewed 168 juvenile detainees in Tököl and Szirmabesenyő. For the present research I performed a secondary analysis of the data previously recorded during the interviews and the conclusions drawn from that work are included in the section on juvenile detainees. As a part of an expert survey I conducted interviews with two dozen people working for non-governmental organizations active in Eastern Europe who, due to their regular prison monitoring work and their extensive legal assistance services have in-depth knowledge of the prison system of Hungary and of other countries that are not discussed in the English or German literature but are relevant to my topic.

- D. In certain phases of the research project, primarily for the analysis of legal problems I, to the extent that it was necessary, resorted to the use of legal dogmatics methodology which was helpful primarily for analyzing of legal institutions from a perspective defined by criminal law and the law dogmatics of imprisonment.
- E. Both the „divergent” research questions and the interdisciplinary research method necessitated the use of quantitative secondary data and the secondary analysis of previous studies for the examination of certain hypotheses. The reason behind this is that while countless studies have touched upon particular themes included in my dissertation there has not yet been done any comprehensive studies that explore the relationship between exclusion in a broader sense and the power relations of crime control throughout the whole process of the criminal justice system from making something a criminal offense up to the process of reintegration.

### **III) The theoretical framework of the research**

The approach, structure, logic and in some respects the framework and the research methods employed in this dissertation were fundamentally determined by three approaches:

- 1.) My research has been influenced by the criminological, or symbolic interactionism of Howard Becker<sup>6</sup> although not primarily because of the labeling theory approach which had a significant impact on the criminological research on causation. According to Becker, deviance has been constructed by social groups through the creation of rules and by stating that violation of these rules counts as deviance; the rules are applied against certain people who are stigmatized as outsiders. Through the concurring opinion and the consistent labeling voiced by the interactional partners during social interactions the individual internalizes the deviant label and sooner or later will start to act as a deviant.<sup>7</sup> Getting caught and being branded as deviant has serious consequences for the individual's self image and social participation. The most important change will affect the individual's community identity, that is to say, by the end of the process a new identity will be constructed.<sup>8</sup> According to Becker, political and economic power will determine which groups are going to be able to force their own rules on other groups. His research centered on juveniles who are forced to follow the adults' rules, but according to Becker's interpretation, disparities in the ability to create rules and apply them prevail in relation to men and women, Whites and Blacks, Anglo-Saxon Protestants and immigrants, middle-class people and people belonging to the "lower classes" as well.<sup>9</sup> Therefore, in the dissertation I placed great emphasis on the interactionist analysis of social institutions, norms, and the practices of the criminal justice system.
- 2.) The analysis in the dissertation is also strongly influenced by the tradition of critical criminology. The critical questioning is influenced by Georg Rusche's and Otto Kirschheimer's approach originally published in 1939<sup>10</sup>, in which they argue that the economic conditions, the mode of production, or the situation of the labor market have a decisive impact on the use of the dominant form of punishment. The focus of their research was the interactions between the incarceration rate and the level of unemployment. This approach, still dominant to this day<sup>11</sup>, has led to the formulation of fundamental penological axioms which state that cultural values and economic circumstances or needs have a bigger impact on the punishments employed or the treatment of detainees than the objectives of crime prevention.<sup>12</sup>  
This thought is reflected in the approach of critical criminology as well. According to critical criminology, criminal law and its practices are the instruments of control and exercising power over others: the conditions of criminalizing certain behaviors or prosecuting them are all determined by power relations. Feminist and later queer

---

<sup>6</sup> Howard S. BECKER: *Outsiders Studies in the Sociology of Deviance* (New York: Free Press 1963)

<sup>7</sup> László KORINEK: „A XX: század kriminológiai elméletei” in Katalin GÖNCZÖL–Klára KEREZSI–László KORINEK–Miklós LÉVAY (ed.): *Kriminológia – Szakkriminológia* (Budapest: Complex Budapest 2006) 112.

<sup>8</sup> See BECKER (footnote 6.)

<sup>9</sup> See BECKER (footnote 6.)

<sup>10</sup> Georg RUSCHE – Otto KIRSCHHEIMER: *Punishment and Social Structure* (London: Transaction Publishers 2008)

<sup>11</sup> Katherine BECKETT – Bruce WESTERN: „Governing Social Marginality - Welfare, Incarceration, and the Transformation of State Policy” *Punishment & Society* 2001/1. 43-59.

<sup>12</sup> Georg RUSCHE – Otto KIRSCHHEIMER: *Punishment and Social Structure* (London: Transaction Publishers 2008)

theories examined the power relations of the status quo from a gender perspective and attempted to answer the question of why are men, first and foremost heterosexual men, able to impose their will on women and LGBTQ people, and how do they utilize the conceptualization of criminal law and the institutions of crime control in order to do this. As highlighted in the fields of sociology and criminology by Connell<sup>13</sup> and Messerschmidt, respectively, class positions, gender and race relations are all related to the social structures which are defined on a systemic level and these social constructions have an effect on the behavior of individuals as well as the functioning of the whole society.<sup>14</sup>

- 3.) Although the dissertation's approach is fundamentally a criminological one, the results of the research and the arguments are imbued with fundamental rights considerations. Incarcerated persons are under the total control of state power in a situation where public control and the possibilities of complaints or effective legal remedy are limited. In this context, the work of organizations and actors who represent the check against state power has great significance and, in addition to their ability to reveal violations that have already been committed and promote impeachment, they also exert an influence in order to prevent future serious infringements. The mechanisms that facilitate the enforcement of fundamental rights amidst the conditions of enclosed institutions also gain great significance. The institutional character of the prison isolated from the public, the pressure exerted by the market capital and the processes of globalization have created the need for and shaped those, primarily regional European and global mechanisms that aim to insure that the rights of incarcerated persons are enforced; examples of these include the CPT operating under the Council of Europe, or the mechanisms spreading on the basis of the OPCAT convention.

#### **IV) The structure of the dissertation**

The dissertation consists of three main parts which are built around the hypotheses of the research: the units deal with (1) the extension of the time period of incapacitation by means of imprisonment, (2) the process of making the exclusion a selective one in nature and the pains of imprisonment which mean different experiences for members of different social groups, and (3) the connection between resocialization and institutional exclusion.

The first part has a crime policy approach: it examines the process that has led to the inflation of the custodial sentence and the use of this punishment in a way that its timeframe has been extended. I carried out the analysis focusing on incarceration for the purpose of incapacitation, and specifically on actual life imprisonment (hereinafter LWOP). In connection with the legal institution I examined whether theories on the purposes of the punishment are verifiable; I also subjected it to penological analysis. In this chapter, I collated actual life imprisonment with the system of constitutional criteria for the integrity of rights in the case of retributive punishment, chiefly with the criterion of "moderation." In connection with the topic of the right to resocialization, the first part of the dissertation also contains the

---

<sup>13</sup> Raewyn CONNELL (született: Robert CONNELL): *Gender and Power: Society, the Person and Sexual Politics* (Stanford: Stanford University Press 1987)

<sup>14</sup> James. W. MESSERSCHMIDT: *Crime as Structured Action* (Thousand Oaks: Sage 1997)

results of my international comparative research projects that have dealt with actual life imprisonment.

In this chapter, in addition to actual life imprisonment, I analyzed other forms of incapacitation-oriented imprisonment; from the set of current practices, I primarily focused on the rule of three strikes, the changes in medium term sentencing and the changes of the regulations concerning cumulative punishment. The shaping of the purposes of punishment and the “chameleon-like quality” of indefinite imprisonment also made the examination of the institutions of high security workhouse and restricted custody necessary. However, the analysis remained prison-focused for the thorough analysis of the complete terrain of crime policy is beyond the scope of this paper.

The second part of the dissertation is centered on the question whether imprisonment means the same disadvantages, the same “pains” for every person or do social structures influence prison experiences and the degree of pain. Because of the novel point of view of the analysis I broadened the scope of the research in order to take in groups that are often included both in criminological studies and in prison research, like the groups of juvenile persons and Roma people, as well as groups that have only become the focus of studies in the past few years, like the groups of women and the elderly. The research also necessitated the examination of groups like people living with disabilities and LGBTQ detainees to which, up to now, neither criminological nor prison research have paid attention. Naturally, the reason for extending the scope of the research this way was not the great number of detainees belonging to the analyzed groups; rather, it was the number and relevance of the emerging questions related to penology, fundamental rights and implementation of punishments that made this necessary. At first, the question of transgender identity may seem peculiar in the context of the enclosed institution, however, the relationship of the deprivations that are inherent to total institutions, the harms of prison, the re-interpretation of masculinity and femininity, and the distinctive internal power structures have resulted in an extremely interesting analysis.

The third chapter of the dissertation deals with the process of reintegration. I have chosen two legal institutions as the indicators of exclusion which have been a part of the Hungarian legal system for a long time; these legal institutions have almost never been questioned despite the fact that the effects they have are antagonistic to reintegration. Both depriving a person from their voting rights, and the system of disadvantages outside the criminal law that are related to having a criminal record prior to criminal discharge are features of the punishment that symbolize the exclusion from the community. Analysis of the disadvantages that are related to having a criminal record focuses on the certificate of good moral character along with the related penological problems and issues of reintegration that are connected to it, however, the examination of the emergence of the present regulations of criminal registration was also inevitable. According to the conclusion of the research, in view of their purpose, the regulations of both the deprivation of voting rights, and the certificate of good moral character contribute to the exclusion of the persons concerned from the decision-making process of the community and a significant part of the labor market, in an excessively expansive way; in consideration of the changes in the standards of equal treatment, this could raise the question of institutional discrimination.

## V) Summary of the results and their use

1.) The most general conclusion of the research was the demonstration of the fact that instruments can be detected both in crime policy and the criminal justice system that put certain social groups at a disadvantage on a systemic level. Injuries caused by the organization or actors of the criminal justice system effect institutional exclusion.

In the analysis of the relationship between imprisonment, social exclusion and social and institutional oppression, I applied the examination of various privileges, i.e. invisible advantages of which people who have them are unaware, as a separate aspect.<sup>15</sup> Constitutional lawyers would identify this phenomenon as positive discrimination, but there is more to it than that. During the process of the analysis I noticed that the advantages possessed by privileged people have major significance when people are faced with police, sentencing, and even penal practices. Concepts of infringement, discrimination, oppression and exclusion raise the question whether the agent - on an individual level this means the person, on a collective level, the social group - who is in the position of power, is responsible for their active behavior or by omission, and what kind of responsibility are we talking about.

Although the problem of intention and effect or influence runs through my dissertation, and “responsibility” cannot be defined unambiguously in every case, the stance of the research on this issue is that from the viewpoint of the excluded group the actual intention of the agent who is in the position of power, or the conscious, emotional-volitional aspect of said intention, is less important than the consequences of their actions, behaviors, omissions or their perceived nature.

For the interpretation of the phenomenon, I developed a model consisting of four elements: (a.) There are messages, goals, actions in crime control and the criminal justice system that purpose exclusion and effect it as well, but these still remain fair and can be legitimized. (b.) Actions, that are intentionally oppressive and effectively cause oppression, but are unjust or cannot be legitimized in an integrated society, need to be distinguished from actions belonging to the previous category. (c.) The third category of actions is made up of cases in which the intentions do not include exclusion; nevertheless, they effect it. Not recognizing a group’s privileges over another group, can be one example of the actions that belong to this category. (d.) The fourth category consists of cases where the intent is to cause oppression, but it fails to cause this effect. Naturally, from the viewpoint of social integration, this in and of itself raises questions about the action’s legitimacy and *raison d’être*.

2.) In my dissertation, I examine the process that has led to the inflation of the custodial sentence and the use of this punishment in a way that its timeframe has been extended, in its historical context. I carried out the analysis focusing on incarceration for the purposes of incapacitation; primarily, I have examined actual life imprisonment, for, based on my hypothesis, this is where the incapacitation function of imprisonment appears in its purest, and at the same time, most extreme form, which means permanent exclusion from the community.

---

<sup>15</sup> Peggy MCINTOSH: *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies* (Wellesley: Wellesley College 1988)

In connection with actual life imprisonment, I have studied the purposes of this punishment, and through researching the theories on the purposes of the punishment and penological examination, I have come to the conclusion that actual life imprisonment cannot be legitimized on the basis of thoughts on the purposes of the punishment. This in itself would not mean that employing this punishment is unjust under any circumstances; however, following a collation with the system of constitutional criteria for the integrity of rights in the case of retributive punishment, the conclusion formulated in my analysis is that actual life imprisonment is unacceptable for it violates the criterion of “moderation.” This is the main conclusion of both the international comparative research included in the analysis, and the collation with the “right to resocialization”, which is viewed as a precondition of human dignity and has become increasingly accepted as such internationally.

3.) Numerous signs suggest that penal or punitive populism has a major impact in Hungary. Its influence can be detected in the 2009 amendment to the Penal Code, which introduces a more forceful action against violent recidivists, as well as in the 2010 Amendment to the Penal Code actualizing the three strikes regulation. According to the results of my studies, Hungarian crime policy, fearing their further crimes, have employed similar methods against recidivist offenders in the 1928-1950 period and throughout the years between 1974 and the regime change in 1989-1990; furthermore, it has re-introduced and continues to use these methods since 2009. Although they are products of different time periods and different principals of jurisprudence and penology, in practice, high security workhouse, restricted custody, and the so-called three strikes along with the regulations concerning the treatment of violent multiple recidivists have attempted to achieve incapacitation for the purpose of protecting society in very similar manner. All of these instruments have targeted nearly the same number of perpetrators, approximately 800-1000 of them, and although theoretically they have been justified using different arguments by the crime policy of their time, in practice, they have not accomplished other goals outside of incapacitation of repeat offenders, despite the intention of conditioning people into the habit of working or pedagogic ideology. The resistance of the judicial profession can be observed in the case of all three of these legal institutions; in practice, neither the high security workhouse, nor restricted custody has been employed in accordance with the intent of the lawmakers. Although the lawmakers have considerably reduced, in certain cases revoked the deliberative powers of the courts, critical comments, coming from the courts, are often voiced concerning the applicability of the mandatory imposition of three strikes or actual life imprisonment.

4.) Almost simultaneously with the discontinuation of preventive detention in the period of the regime change, the hierarchy of the penalty system has gone through significant changes. Since the abolition of capital punishment, our criminal law has been allowing the use of imprisonment for the purpose of incapacitation more and more widely, and it has left greater and greater scope for excluding the possibility of conditional release in the case of actual life imprisonment. In my dissertation, I share the view of previously voiced opinions found in the legal literature, that actual life imprisonment violates the right to human dignity, for, in the absence of realistic chance of release, the detainee’s “right to hope” is violated. The conclusion of my research projects is that the practice of the Hungarian Constitutional Court

gets closer and closer to recognize resocialization as a precondition of human dignity. In my view, actual life imprisonment can be interpreted as a so-called “passive capital punishment”, characterized by an extended timeframe, in so far as the punitive power, instead of treating the detainee as a subject, degrades them into a status of being the object of imprisonment. Employment of actual life imprisonment signifies the decision that the state gives up on one of its citizens and their capability of personality development, and interprets incarceration as simply a means of conservation, in other words, as some kind of “storage facility”, where the convicts incapable of progression are being held.

In my dissertation, I also demonstrate that actual life imprisonment is an unnecessary and disproportionate punishment, for the necessity and proportionality of the restriction of the convict’s fundamental rights cannot be justified by looking at the purposes of the punishment or referring to penological arguments. I question the general deterrent effects of LWOP. The lawmakers treat the motivations of felonies that are punishable by LWOP as cases belonging to a homogenous category, while - based on my categorization - from a criminological viewpoint, they allow the exclusion of the possibility of conditional release in the cases of committing conducts that belong to three basic groups. These groups are the following: war crimes and crimes against humanity; crimes against the state or crimes that gravely disrupt the functioning of the state; cases of homicide, kidnapping, or human trafficking that qualify as more severe. These conducts presuppose differing perpetrator motivations and motives, and, according to the data gained from empirical studies, the existence of deterrent effects cannot be proved in neither of their cases.

In my view, the incapacitation that LWOP means, in a legal-technical sense, “can be solved” without the exclusion of the possibility of conditional release, for if the sentencing judge who makes the decision about the conditional release, states that the detainee poses a threat to society, he or she has the option of not ordering conditional release from the actual life imprisonment, thus, de facto, the convict will never be released. My standpoint is that LWOP ignores the results of both criminal careers studies and research focusing on desistance; furthermore, it does not take into account the fact that frequency of criminal behavior decreases steadily with age, and in a relatively dynamic fashion, thus, the crime prevention benefits of incapacitation, which is based on expectations about the future, are very limited.

[16] <sup>16</sup>

5.) I also examined whether or not LWOP meets the requirements of proportionate, retributive punishment for the protection of the integrity of rights in constitutional criminal law. In my view, the principle of “moderation” in punishment, in other words, self-restraint of the state’s punitive power has been violated, when the lawmakers revoked the sentencing court’s right and potential to impose a retributive punishment for the protection of the integrity of rights, that is truly proportionate to the crime, and to make a decision about the exclusion of the possibility of conditional release, or omit this. According to my standpoint, the question of proportionality is also problematic when LWOP is imposed on account of taking of human

---

<sup>16</sup> My arguments are supported by the judgement of the European Courts of Human Rights in the case of Laszlo Magyar v. Hungary (73593/10) which was made on 20.05.2014.

life, which is considered to be of absolute value, and at the same time, on account of robbery, committed using violence against the person, but directed against the prevailing property relations. The absolutization of the state's punitive power, which manifests itself in the form of actual life imprisonment, is especially problematic in the case of felonies where the object of legal protection is the constitutional order of the state (examples of this category include destruction, or the alteration of the constitutional order by the use of violence), since in this case, the state orders the same punishment for crimes, that violate its own existence (but do not cause its termination), as for the taking of human life, which is considered to be of absolute value. In my view, imposing the same punishment for the violation of the state's then-prevailing constitutional system and for taking of human life is disproportionate in and of itself.

6.) I have analyzed the effects of punitive populism on crime policy, by examining the criminal justice system as a process. I have showed that in the "upper range" of the penalty system, penal populism has resulted in the extension of periods of imprisonment. The lawmakers have attempted to make the judicial jurisdiction, which they saw as being too soft, stricter, by introducing medium-term sentencing. The basis of the argument was that penal law has lost its character as the "keystone of sanctioning" and is in the state of being a fortress under siege, and this problem can be resolved by making it stricter. The control is increasingly expanding, and by overstretching the traditional limits of criminal law, it occupies bigger and bigger areas, and attempts to bring the social groups, that it sees as the ones that are the bearers of the problem, under its supervision. This, for a large part of the cases, affects the small criminal conducts, or the lifestyles and situations that qualify as pre-criminal. The result of this process is that crime policy attempts to bring behaviors or life situations that previously haven't even qualified as contraventions under its own influence. It is palpable that, similarly to the expansion of the notion of American "underclass", politics is bringing a series of behaviors into the field of vision of crime control by stigmatizing homeless and Roma persons as undeserving, and portraying them as dangerous, thus contributes to the social exclusion of these groups with the instruments of crime policy. Expansion of punitive power, like the mechanisms of punitive populism seen in other fields, is happening in parallel with social scapegoating, and through the demonization of unlawful acts of minor significance.

Part of this process was declaring poverty, as a state, to be dangerous, and criminalizing it. The criminalization of homelessness, as a lifestyle, or more accurately, as a social status, and the order to punish the acts of collecting discarded objects from city streets and scavenging, have also followed a logic very similar to this. In my view, in these cases, criminal law has transgressed the limits that are set up for criminal law under the rule of Law, and have attempted to solve social problems with the use of crime policy instruments, and the further exclusion of the affected social groups is inherent to this process. Based on the results of my research, I propose that criminal law, and contraventional law should "move back" within the frameworks of constitutionality, and criminalization that cannot be justified, and is not proportionate to the violation committed against the object of legal protection should be eliminated.

7.) The dissertation shows that criminal law is not devoid of “discounts” that have advantageous effects for the wealthy. For the “filters” operating in criminal prosecution do not allow those with privileges to reach the terminus of the process, which is the prison; this way, the diversional mechanisms or the decisions of authorities who make the decisions in the course of the proceedings, can easily turn into some kind of selective mechanism, which pre-selects the privileged, virtually diverting them from the progression of the proceedings. Due to their privileges, they are in a more favorable situation, for the phenomenon that is referred to as the criminal law “turning a blind eye” to certain behaviors, is in action when it comes to the acts typically committed by them; the results of this is that the behavior in question is failing to be criminalized. In my dissertation, I demonstrate the more favorable situation of the privileged, by examining the design of the limits on usury-crimes and tax-optimization, along with the regulations on damaging environmental behaviors. Implementation of these aspects and the re-evaluation of criminalization could be an important task for crime policy in the future.

8.) Deprivation of voting rights, and exclusion from the labor market by the use of disadvantages related to having a criminal record, are outdated instruments of community moral judgment; by employing these, criminal law transgresses the framework defined by constitutional criminal law. Both of these legal institutions have their roots in Hungarian law, furthermore, international examples can be found, and legitimate objectives can be formulated for both of them, yet the thing they have in common is that both serve the exclusion of detainees and result in their oppressed status. This way, through their negative special preventive objective, they are fundamentally in conflict with the resocializational objectives of incarceration. The rehabilitation draft of 1914 is pervaded by correctionalism, the thought of improvement. Nevertheless, according to my standpoint, this was the point where the lawmakers started to go in the wrong direction. The “curtailment” of existing public law restrictions, confining them to limits, instead of the option, of creating a rule that considers each case on an individual basis, and decides whether or not the person released from prison is employable. Instead, the lawmakers headed for the road that made spending the probationary period the general condition of “social re-admittance” and equal participation on the labor market for every released person. This way, the law has created the presumption against the detainee that he or she is a “bad person”; though this is a defeasible presumption, it still creates a disadvantageous situation for the person released. While before their imprisonment - having the same socio-economic status - he or she has experienced the benignity of the community and criminal law, after enduring imprisonment, the law presupposes that he or she is a “bad person” (here, we can find examples in the field of public law, civil law and criminal law as well), despite the fact that having endured the imposed punishment that was proportionate to their act, the requirement of reprisal has been satisfied. Furthermore, under the guise of seemingly well-meaning rehabilitation, the demand for correction, moral improvement is hiding, along with the overstretching of jurisdiction to a period that comes after the person has already endured the punishment. By imposing the burden of proof on the released person, the state is placing the consequences of its potentially failed pedagogy on the detainee, and establishes the presumption of dishonesty against them.

This discrimination, according to the results of the research, can be regarded as institutional exclusion.

9.) Based on the empirical data that I have used in my research I have come to the conclusion, that the legislation in force on the certificate of good moral character presents institutional discrimination, for they exclude the released detainees from a significant part of the labor market on a systemic level, and in a significant portion of the cases this exclusion cannot be justified. As a result of this legislation, the released detainees are excluded from almost the entire public sector, which, according to current data, means more than 800 000 positions. Furthermore, according to my data, in the case of 600 000 additional jobs, a released person cannot be employed if he or she has not been acquitted in accordance with legal provisions. All in all, people released from imprisonment are excluded *ex lege* from more than 35 percent of the potential job positions. In practice, due to prejudices of employers and reasons inherent to the workings of the labor market, in many cases, the certificate of good moral character is also required for applying for the positions that, in principle, are available.

In this respect, thinking about rehabilitation as a discount, and viewing at something that is similar to conditional release, and is a part of a progressive system which has motivational effects for the incarcerated serving time, is an approach that is mistaken. Rehabilitation had a protective function for the released, against the disqualifications constructed by sectoral legislation, after serving a certain amount of time, and in the case if their worthiness and righteousness had been proved. The situation compared to which this discount appears, is not “caused” by criminal law; instead, it is a product of other branches of law, and social mechanisms. Exclusionary sectoral legislation is “proliferating” outside criminal law, and for vastly different reasons; in my view, its treatment with criminal law instruments cannot be justified, for this peculiarly merges criminal law’s framework of objectives with those of other branches of law. It is a question of warranting, then, whether or not it is acceptable for other fields of law, to “sail in the wake of” criminal law’s sanctioning, and employ a sanction used in criminal law, which has a completely different basis of legitimacy and set of objectives, as a measuring stick for the objectives of their own branch of law. For this could result in a situation where certain elements of content, that are not employed by the criminal court but which logically have consequences for the convict’s punishment, are “built upon” the criminal law sanction.

10.) In the past few years, lawmakers have taken steps to achieve a situation where the exclusion of detainees from the decision-making process of the community is not automatic, thus the regulations meet the requirements of the standards of the European Court of Human Rights. However, having examined the Hungarian sentencing practice, it can be stated that deprivation of voting rights has remained an automatic mechanism in the case of those sentenced to imprisonment for committing intentional offences. Courts increasingly employ a parallel disqualification from public affairs beside imprisonment, which presently means 95% of the cases; this way, real deliberation and proportioning to the seriousness of the offences committed do not take place. There is no doubt about the fact that historically punishment has meant exclusion, and it continues to carry this symbolism through deprivation of voting rights. In my dissertation, I demonstrate that the present regulation and practice of deprivation

of voting rights violate the European Convention on Human Rights; furthermore, they cannot be justified using penological arguments. In addition, it can be stated that deprivation of voting rights does not have either special or general deterrent effects, the role it has in incapacitation is negligible. What's more, its effects are antagonistic to the desirable process of reintegration. The reasons behind this have two basic parts. Firstly, the stigma inherent to exclusion is hampering the process of reintegration, and secondly, exclusion from the decision-making process of the community has effects that are antagonistic to the increase of one's sense of responsibility. Deprivation of voting rights is also contrasts the principles of normalization and responsibility, which are two of the most important principles of punishment in the 21<sup>st</sup> century.

11.) The effects of the oppression resulting from exclusionary legal institutions do not cause the same "pain" to all detainees, since the pain is also affected by the social group membership of the persons concerned. The institutional exclusion on a systemic level, that takes place in the criminal justice system, affects some detainees that belong to certain social groups in a more disadvantageous way. That's why, in the model used in the research, I have dealt with the questions of gender, sexual orientation, and gender identity, along with age, and ethnicity.

In the course of the research related to gender, my starting point was the feminist premise that states that women are oppressed in society. Though the norms that serve to maintain the oppression become more and more neglected, I have detected multiple rules in our criminal law, that are the remnants of male domination. The main conclusions of the second part of the dissertation concern the prevailing power relations of the prison, which is an exceptionally specific space of power and oppression. The research has come to its most important findings related to gender roles and gender identity, by building upon the observations of gender studies. Analysis of the prison, as an institution created by men, for men, and, typically run by men, is relevant not only because of the special needs of women and transgender persons, but also because of the male detainees' gender roles. Masculinity, or the experiencing and expressing of masculinity that is expected from them, become important factors in the prison in relation to the creation of authority and dominance, which poses specific expectations of both the male supervisors and the male detainees. In my view, hegemonic masculinity can provide an explanation for the dynamics of the interactions of men amidst the conditions of the prison. Prison, as a total institution, is a hyper-masculine world in which masculinity can be enforced in an uncontrolled way, partly because the effects inherent to the total institution. In the dissertation, I show that forcing fellow inmates to clean, do the dishes, or take part in violent sexual contact stems from demonstrating male roles that are expected of them, and these actions are present in the total institution is due to its institutional character. Consequently, eliminating these phenomena cannot be achieved by intensifying the repression or demonstrating the power of supervision.

12.) Two important characteristic of the treatment of female detainees described in foreign literature are medicalization and feminization. Data examined in my research have proved the presence of both of these "methods" in Hungarian prisons. Employment programs and trainings available in women's prisons typically prepare the detainees for low-prestige,

traditionally “female” jobs, and they do not facilitate the process of making a living independently by stepping outside of conventional female roles. Study groups available to detainees are also enforcing a set of roles that are connected to the female gender. In women’s prisons, both being a mother and a Roma person can play an important role in terms of the prison experience. It seems as though experiencing motherhood is a central question of female identity, and keeping in touch with others, as well as coping with the tasks of motherhood have a prominent place in the internal dynamics of the prison, both in the relationships between fellow detainees, and the interpersonal relations that the detainees have with the supervision. Beside the injuries to coping with the tasks of motherhood, prison personnel should have regard to the fact that stigma associated with imprisonment can be significantly stronger in the case of women, and this can have a determining effect on the female detainees’ prison experience and their correspondence with the outside world.

13.) Numerous lessons can be learned from researching sexuality in the prison environment, which are relevant for the situation of transgender, as well as gay, lesbian, or bisexual detainees. In my research, I have focused on these detainees not because they make up a particularly large group, but because of their vulnerability and the gravity of the violations they face. In relation to gay, bisexual or queer male detainees, my most important conclusion is that their prison experiences are defined by heteronormativity, hegemonic masculinity, and homophobia, which is connected to the former two. Contrary to popular belief, in the prison, male-on-male non-consensual sexual relations are determined by the demonstration of male gender roles expected of men, as well as violence, not the sexual orientation of the detainees. Anyone can become a victim of this kind of sexual violence; however, those, who have disclosed their sexual orientation, or belong to the GBQ group according to the perception of the majority, are exposed to greater danger due to the effects of homophobia. The treatment of consensual relationships of emotional or sexual nature in the prison is a special issue. The conclusion of my research is that deprivation of heterosexual relationships, as one of the “pains” of imprisonment, is transformed into an instrument of maintaining heteronormativity in the case of LGBQ detainees.

14.) A number of dysfunctional phenomena can be observed in the practice of imprisonment that are caused by structural oppression or privileges. In practice, these can result in a situation in which the detainee experiences the pain that is inherent to imprisonment in a way that is affected by inequalities; the detainee’s placement in the institution, education, employment, correspondence or reintegration can all be influenced by this. In a research that deals with the prison as the terrain of oppression, treating the topic of prison experiences of Roma persons was also inevitable. However, having regard to the fact that among the affected groups, the group of Roma people is the most elaborately discussed in Hungarian literature, in my research I have only included aspects that I have found to be of great significance in relation to privileges and oppression. The situation of roma persons is a special one compared to those of other marginalized groups, in that their numerical minority in the prison is not self-evident at all. Primarily because of the structural oppression that can be experienced in the society outside the prison, the fact that the criminal justice system contributes to their structural exclusion through incarceration is the most evident in the case of the group of Roma

persons. But the fact that Roma people are overrepresented in Hungarian institutions, does not mean that because of this, they are not subjected to oppression throughout the imprisonment.

One of these structural problems is related to placement, as the institutional network - naturally - does not follow the geographical distribution of Hungarian Roma communities; thus, if the institutions are not aware of this fact, placement in the institution that is nearest to the location of residence cannot be ensured in the case of Roma persons, who make up more than one third of the inmate population. This adversely affects them when it comes to keeping in touch with the outside world. According to the studies, in the case of Roma families, the average number of children is bigger than the number of underage children who, according to the rules, are allowed to visit a detainee at the same time; this means that, in the case of Roma people, this rule creates a situation of systematic disadvantage. Based on interviews with Roma relatives it seems that in practice, they also have to wait for a long time before they get to go into the visiting room at the occasions of visitation. Thus, if a relative has to travel to the other part of the country to visit their family member, the visitation requires a great sacrifice from them. The other reason why the geographical distribution of Roma people and institutions in the country can cause problems is that since the mobility of the labor force is low, the distance between the institutions and the location of the residence can function as a pre-selection mechanism, which excludes the Roma persons from applying for supervision jobs at a prison organization.

The quality of training and employment that is available in the institutions is of paramount importance for the reintegration of Roma persons, and basically, the whole of the inmate population. The courses that are run by the institutions beside vocational trainings on constructing insulation or painting walls, are about selling fast food, building adobe walls or operating forklifts. In my view, these activities are not among those professions that would make it possible to do marketable jobs after release; rather, they reflect the majority's prejudices about Roma people and contribute to the sustainment of a situation, in which Roma persons have reduced chances of making a living.

15.) Age was an important aspect for the analysis in my research both because ageing and youth: youth, beyond its vulnerability, is relevant because of the different treatment needs and the role of education; while ageing, beyond its vulnerability, is relevant because of the medical, and consequently financial pressure that will increasingly weigh on the institutions in the future. An important conclusion of my research, to which I have come through comparing education in the reformatory and incarceration of juveniles, that the latter's "inefficiency", its relative unsuccessfulness in terms of education, as well as the abuses committed by detainees against each other are not unrelated to the characteristics of prison, as a total institution, and the fact that due to its nature, it is incapable of satisfying the educational needs of this special group. The totality of the institutions at Tököl and Szirmabesenyő, and the underage boys' hyper-masculinity are two factors that need to be reduced in order to achieve efficient education and reintegration.

In Hungarian literature, the dynamically growing group of ageing people has received less attention. Given the fact that the number of actual life imprisonment sentences is rising, it is

expected that in the future, the need to provide medical and mental health service to the ageing detainees will mean an increasingly big pressure on the prison organization, which has not yet been prepared for this. The costs of providing services to an ageing detainee are multiple times bigger than the costs in the case of a middle-aged detainee, and that is one reason why the makers of the crime policy should remember to create opportunities periodically for the conditional release of those people, whose incarceration is no longer justifiable by their dangerousness. But even in absence of this, correctional services should be prepared to answer questions such as the problems of euthanasia, or the service that needs to be provided to the detainees who are incurable and inert patient. In old age, numerous emotions and fears can develop in the detainee, which need to be addressed by finding the appropriate professional answers for them: the narrowing of the social and societal spheres or the fear of having wasted their life can pose serious challenges for the educators and the psychologists as well. According to research data, the number of detainees sentenced to actual life imprisonment shows dynamic growth, and parallel to that tendency, is the reduction of the age at the time of conviction. This means that at an old age, the institutional dependency of the inmate population can become extremely intense, since their outside relationships have completely atrophied and they have spent virtually all of their adulthood in prison.