

IMPLEMENTING ALTERNATIVE SENTENCING IN THE CRIMINAL JUSTICE SYSTEM: IMPLICATIONS FOR HUMAN RIGHTS

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ABSTRACT

Prisons operate with varying aims, including the infliction of punishment, individual deterrence and general deterrence, even retribution or revenge. One aim is to enable offenders to become aware of their mistakes and be accepted back into the community. A problem with implementing this aim is, however, that imprisonment may generate greater capacity for offending in the convict, who may emerge from prison ‘worse’ than when entering it. This article briefly reviews the philosophy that lies behind alternatives to imprisonment by reference to a small slice of the literature and concludes that more research is required to draw firm conclusions about their efficacy. Research is needed on the domestic level and internationally to determine how alternative punishments may result in upholding the human rights of offenders and improving outcomes for society as a whole.

Keywords: alternative sentencing, alternatives to imprisonment, human rights, recidivism, rehabilitation

INTRODUCTION

Maintaining order in the community, the control and prevention of crime are fundamental aims of the law persisting over time.¹ However, prisons face challenges, including high recidivism rates, ensuring offenders’ rights, and ensuring the stability of society.² Prisons can inadvertently function as institutions where

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¹ Cooper Jones, ‘The Failure of Incarceration’ (2014) 15 *Does Alternative Sentencing Reduce Recidivism? A Preliminary Analysis* 18.

² Bonarsius Saragih Emaliawati and Aji Mulyana, ‘Effectiveness of Social Work Sanction as a Substitute for Imprisonment in The Perspective of Sentencing Purposes’ (2022) 22 *Jurnal Penelitian Hukum De Jure* 325.

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non-violent offenders are exposed to criminal behaviour and learn criminal values, potentially escalating their involvement in more serious offences; this leads to an increase in the recidivism rate. Recidivism is commonly defined as the relapse of criminal behaviour by an individual following their punishment or participation in rehabilitation programs after a prior offence.³ The United States is an example of a heavily incarcerated country with a high recidivism rate. Studies indicate that 50% to 70% of offenders are rearrested within two to three years after release.⁴ Likewise, in 2021, the United Kingdom has witnessed re-offending rates reaching 59.5% in some prisons.⁵

Clearly, despite considerable efforts to prevent and reduce crime, traditional imprisonment has failed, resulting in high rates of recidivism⁶ and a massive cost to the state.⁷ This, in turn, has led reformers to look for better ways to protect the safety of the community while at the same time not producing more dangerous criminals.⁸ In various countries, previous studies have examined the effectiveness of implementing alternative sentences, the result showing some differences. This article adopts a literature-based analysis to better understand the philosophical concept of alternative sentencing in the existing literature. It succinctly analyses the practical realities, briefly exploring the impact of implementing alternative sentencing as a possible future direction of punishment in line with international human rights standards.

Prison overcrowding can lead to a compromised implementation of fundamental rights. Prisons have been unable to provide appropriate places and facilities for offenders due to the number of offenders who far exceed incarceration capacity. The result is, too often, decreased self-esteem and deterioration of human

³ Larasati, Munabari and Sumarwan, 'Prison Overcrowding: Alternative Sentencing in Indonesia's Draft Criminal Code and Its Consequences on Correctional System'.

⁴ Synove N Andersen and Kjetil Telle, 'Better Out Than In? The Effect on Recidivism of Replacing Incarceration With Electronic Monitoring in Norway' (2022) 19 *European Journal of Criminology* 55; Recidivism Rates by Country 2024 (worldpopulationreview.com) accessed 24 October 2024.

⁵ Ministry of Justice, Proven Reoffending Statistics: January to March 2022 (Accredited official statistics, 25 January 2024) <https://www.gov.uk/government/statistics/proven-reoffending-statistics-january-to-march-2019/proven-reoffending-statistics-january-to-march-2019> accessed 24 October 2024.

⁶ This means a re-offending rate.

⁷ Andrew Coyle, *Prisons of the World: A Better Way* (Policy Press 2021) 272.

⁸ Isobel Renzulli, 'Prison Abolition: International Human Rights Law Perspectives' (2021) 26 *The International Journal of Human Rights* 113, 114.

dignity.⁹ In addition, incarceration carries social costs that can impact families and society. Considering these concerns, there is an expanding focus on developing alternatives to imprisonment.¹⁰ Alternative sentencing aims to keep the offender at liberty while implementing a sentence as a deterrent against re-committing crime.¹¹ The aspiration is to mitigate the negative aspects associated with imprisonment and to provide more effective and humane approaches to address criminal behaviour.¹²

A systematic review of the literature was conducted to gain a comprehensive understanding of current realities within the criminal justice system. This methodology examines the practical implications of alternative sentencing; it also evaluates its potential as a future direction for punishment in alignment with international human rights standards. The article aims to offer valuable insights for legal scholars, legislators, the judiciary, and other key stakeholders, including law enforcement. A better understanding of the philosophical concept and implication of the application of alternative sentencing in the currently existing literature may lead to better planning and implementation of programs directed toward deterrence.

ALTERNATIVE SENTENCING

Punishment has developed over the years to achieve actual or conceptual reconciliation between the offender and the victim.¹³ In the 19th century, harsher treatments were imposed upon prisoners to protect society; conversely, the notion of reform and rehabilitation also witnessed a steady rise.¹⁴ Throughout history, remarkable initiatives have been taken to devise and inflict punishment and induce

⁹ Nuraeny Henny and Utami Tanti, *The Impact Of Over Capacity On Fulfilling The Basic Rights Of The Assisted Citizen In Prison In The Perspective Of Human Right* (Atlantis Press 2019) 149-151.

¹⁰ Maiza Putri, 'The Effort to Reduce Over Capacity in Correctional Facilities Through Social Work Alternative Punishment' (2021) 2 *Ius Poenale* 114.

¹¹ Putri (n10) 114.

¹² Sebastian Schildbach and Carola Schildbach, 'Prevalence of Psychiatric Disorders in Detainees Serving Imprisonment as an Alternative Punishment for Failure to Pay Penalty Fees: a Longitudinal Study' (2018) 58 *International Journal of Law and Psychiatry* 105.

¹³ For example, through 'restorative justice': Restorative Justice and Criminal Justice - Hirsch, Andreas von. - Roach, Kent - Bottoms, Anthony E. - Roberts, Julian V. - Hart Publishing - Torrossa accessed 21 October 2024; Restorative-Justice2.pdf accessed 21 October 2024.

¹⁴ WJ Forsythe, *The Reform of Prisoners: 1830-1900* (Routledge 2020) <https://doi.org/10.4324/9781003074816> accessed 20 October 2024.

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the offender to conform through educational and therapeutic means. However, there has been a lack of innovation in developing effective reformatory measures.¹⁵ In the 1960s, ideas about the reform of offenders generally derived from a prevailing influence of secular psycho-social explanations of human behavior and a notion of 'cure' or 'growth'.¹⁶ Therefore, prisons shifted from punitive to corrective, goals being rehabilitation, and reform. Hence, according to Zivanai and Mahlangu,¹⁷ rehabilitation should be centered on promoting the goodness of humans by helping offenders gain knowledge and skills to enjoy a better life post-prison. Community service originated in the UK in the 1970s as the first application of alternative sentences, aiming to reduce prison overcrowding.¹⁸

The philosophy of criminal sentencing is moving towards rehabilitation and reform, aiming to reintegrate the offender back into the community as a better person.¹⁹ Alternative sentencing can keep the offender at liberty while implementing a sentence as a deterrent against re-committing crime and avoiding the need for social reintegration.²⁰ Furthermore, alternative sentencing refers to a set of non-custodial measures, implemented by the judge following sentencing guidelines, instead of incarceration, where the accused participates in charity in society (such as community work) or engages in educational programs to rehabilitate the individual and foster their involvement through social engagement through remaining in outside society.²¹ Alternative sentences encompass various forms, such as fines, electronic monitoring (EM), community service, house arrest, weekend detention, and suspended release (suspended imprisonment).

Moreover, to protect the offender's right not to be subject to coercive measures and to avoid measures that involve force, such as forced labour, as well as

¹⁵ DL Howard, *The English Prisons: Their Past and Their Future* (Taylor & Francis 2023) <https://doi.org/10.4324/9781003436829-1> accessed 18 October 2024.

¹⁶ Forsythe (n12) 5.

¹⁷ E Zivanai and G Mahlangu, 'Digital Prison Rehabilitation and Successful Re-entry into a Digital Society: A Systematic Literature Review on the New Reality on Prison Rehabilitation' (2022) 8 *Cogent Social Sciences* 14 <https://doi.org/10.1080/23311886.2022.2116809> accessed 18 October 2024.

¹⁸ RD Morgan and ME Olver, 'Envisioning the Future of Correctional Psychology: Administration, Training, Practice, and Research' in *The History and Future of Correctional Psychology* (Springer 2023) 289-301.

¹⁹ Marcus Ayodeji Araromi, 'Prisoners' Rights Under the Nigerian Law: Legal Pathways to Progressive Realization and Protection' (2015) 6 *Journal of Sustainable Development Law and Policy* 169.

²⁰ Putri (n10) 114.

²¹ Coyle (n7) 272.

to gain a commitment by the offender, an offender ‘consent statement’ must be included before the implementation of the alternative sanctions.²² Alternative sentencing is inappropriate in every case since it is designed for offenders who do not threaten society or public safety. Accordingly, probation officers or other professionals who provide reports on eligibility for alternative sentencing will need to evaluate the risk the offender poses to society, and to determine sentencing lengths and conditions.²³ Therefore, alternative sentencing is applied to the offender if they are charged with a less severe crime.²⁴ Since relatively few people in the corrections system are on death row (in those countries retaining capital punishment) or have a life sentence (generally replacing capital punishment), arguably this means that, eventually, the vast majority of incarcerated offenders will be re-entering society.²⁵ In allowing minor offenders or persons with no prior conviction to avoid adverse encounters with the justice system through imprisonment, potential stigma and a permanent mark on their lives can be avoided, with the additional benefit that a program to assist prisoners to return to open society is not required.

As to success or the potential for success, different studies measure the impact of the application of alternative sentencing by measuring the recidivism rate. For example, a study in Chile revealed stability in the recidivism rate after implementing alternative sentences.²⁶ In Norway, there was a reduction in recidivism rates for two years after release.²⁷ These results go against the results achieved in the Czech Republic where findings reported that connecting effective sanctions and crime control is both unfeasible and impossible.²⁸ Most studies focus on recidivism as a measure to evaluate the effectiveness of alternative sentences. However, the impact extends beyond this measure. An important consideration is the offender’s human rights.

²² Darko Radulovic, ‘Community Service as an Alternative Criminal Sanction’ (2019) 70 *Revija za kriminalistiko* 36.

²³ Jones (n1).

²⁴ Jones (n1).

²⁵ Jones (n1) 20.

²⁶ Gabriel Moraga and others, ‘Impact of the Reform to Non-custodial Sanctions in Chile’ (2022) *Journal of Quantitative Criminology* 1.

²⁷ Synove N Andersen and Kjetil Telle, ‘Better Out Than In? The Effect on Recidivism of Replacing Incarceration with Electronic Monitoring in Norway’ (2022) 19 *European Journal of Criminology* 69, 70.

²⁸ Jan Tomasek and Jan Rozum, ‘Recidivism as a Measure of the Effectiveness of Sanctions: Experience from the Czech Republic’ (2018) *Auc Philosophica Et Historica* 9.

IMPACT OF THE APPLICATION OF ALTERNATIVE SENTENCING ON HUMAN RIGHTS

One of a prison's fundamental aims is to invoke deterrent measures as a means to retribution, the most apparent of which is loss of liberty.²⁹ Obviously, being deprived of liberty is distressing and depressing for an inmate.³⁰ Such punishment is one way of making individuals pay a debt to society.³¹ This analysis assumes that crime is a conflict between offenders and society.³² However, the right to liberty is a fundamental human right protected by various legal instruments, emphasising the individual's inherent right to life and, arguably, enjoyment of life. The European Standard Minimum Rules for the Treatment of Prisoners, amended in 1973, states in Article 5-3: 'Every individual deprived of liberty must be treated with humanity and uphold the inherent dignity of the human being.'³³ This right is initiated in Article 3 of the Universal Declaration of Human Rights (UDHR), ratified by the United Nations in 1948: 'Every person has the right to life, freedom, and personal security.'³⁴ This powerful concept asserts that freedom should not be curtailed without a valid reason.

Notably, many retributivists believe punishment should deprive offenders of liberty proportional to their blameworthiness.³⁵ Thus, there is a fine line between

²⁹ Hamida Hamed Said Al Harthi, 'Exploring the Relationship Between Life Experiences and Early Relapse Among Imprisoned Users of Illegal Drugs in Oman: A Focused Ethnography' (Queen Margaret University, Edinburgh 2020) 34.

³⁰ Eliel Jim P Gales and others, 'The Life in Jail: Lived Experiences of Persons Deprived of Liberty' (2023) 3 *Cognizance Journal of Multidisciplinary Studies* 42, 44.

³¹ Gales (n30).

³² Henny Nuraeny and Tanti Utami, 'The Impact of Over Capacity on Fulfilling the Basic Rights of the Assisted Citizen in Prison in the Perspective of Human Right' (Proceedings of the First International Conference on Progressive Civil Society (ICONPROCS 2019), (Atlantic Press 2019) 149.

³³ United Nations General Assembly (UNGA), The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (United Nations Human Rights 2015), art 3–5 <Nelson_Mandela_Rules-E-book.pdf (unodc.org) > accessed 15 May 2024. See also Koichi Kikuta, 'The Situation of the Prisoners in Japan Judging by The United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)' (2023) 30 *Meiji Law Journal* 1.

³⁴ UNGA, 'Universal Declaration of Human Rights' (adopted 10 December 1948) (UDHR) art 3 < Universal Declaration of Human Rights | United Nations > accessed 15 May 2024.

³⁵ Adam J Kolber, 'The End of Liberty' (2021) 15 *Criminal Law and Philosophy* 407, Page 411.

limiting the offender's liberty and human rights upon the imposition of custodial sentences.³⁶ It is essential to balance the harm caused by the offender and the necessary restriction of liberty to protect the public. While protecting human rights is a fundamental pillar of civilised society, it is not the only consideration. Human rights, as fundamental as they are, are not absolute in relation to each individual and must be subject to certain limitations. One such limitation is the necessity of protecting the rights and freedoms of other individuals. This often leads to the argument that a fair balance must be struck between the right of liberty and the constraints necessary to safeguard society's general interests.³⁷

Retributivists argue that offenders who commit serious crimes deserve significant deprivation of their liberty, while those who commit less serious crimes deserve correspondingly fewer deprivations of their liberty. Hence, when the state imposes criminal sanctions, a criminal may justly be deprived of liberty proportionate to the offence comprising their breaking of the law.³⁸ The principle of human rights, therefore, harmonises with the notion of alternative sentences, which curtail the freedom of convicted individuals without completely depriving them of liberty. Alternative sentences offer a middle ground, allowing individuals to maintain certain aspects of their lives while serving their sentences, upholding their dignity, and respecting their fundamental rights. Along with this comes the notion that the rest of society can benefit from alternatives to imprisonment, because offenders remain in the community where, it is hoped, they will be benefited by not becoming brutalised or expanding their capacity for criminal offending by learning from more experienced inmates.

CONCLUSION

Traditional imprisonment has proven ineffective in reducing recidivism and has imposed substantial financial burdens on states. Furthermore, the often degrading and inhumane conditions within prisons highlight the urgency for re-evaluating our approach to criminal justice. Alternative sentencing presents a viable strategy for reform, offering an effective means to alleviate the issue of overcapacity in prison, which will retain prisoners' human rights. The right to liberty is upheld by implementing alternative sentences, as these measures minimise the restrictive

³⁶ Liora Lazarus, 'Conceptions of Liberty Deprivation' (2006) 69 *The Modern Law Review* 748.

³⁷ Kjetil Mujezinovic Larsen, 'Detention for Protection: Searching for a Fair Balance Between the Restrictions on Preventive Detention and the Obligation to Protect Individuals' (2017) 2 *Oslo Law Review* 1,18.

³⁸ Kolber (n35) 413.

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nature of conventional imprisonment and align with international human rights standards.

However, the scope of this research is limited by the availability of comprehensive data across different legal systems and the varied implementation of alternative sentencing measures globally. More empirical studies are needed to assess the long-term effects of these measures across diverse jurisdictions.

The journey towards a reformed criminal justice system requires ongoing dialogue, collaboration between policymakers and practitioners, and a commitment to evidence-based practices. Further research will help determine the future direction of the criminal justice process in reforming the legal framework to enshrine alternative sanctions in the criminal justice system.

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