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Belgian release policies, rationales and practices

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Abstract
Belgium has a two-track policy towards prison release: a quasiautomatic administrative release system for those with a prison sentence of up to three years, and a discretionary system operated by multidisciplinary Sentence Implementation Courts for persons with a prison term of more than three years. This article describes, discusses and compares both release systems, with a particular focus on their rationales and consequences and provides updated figures on the use of the different forms of release in Belgium. The principle of relative autonomy will be described as an important legitimation strategy of conditional release. The article explains how the sentence implementation rationale of reintegration is put forward as an important aim of sentence implementation in the law and how it is pursued in practice. The consequences of the increasing use of the 'gradual system' of release on the detention trajectory of long-term prisoners will be illustrated.

Keywords
Belgium, maxing out, release, two-track system

Introduction

With the introduction of the so-called *Act Lejeune* in 1888, Belgium became one of the first countries in Europe to introduce conditional release (*voorwaardelijke invrijheidstelling or liberation conditionelle*), in order to allow some individualisation during the execution of punishment. An administrative discretionary system was installed and for 100 years parole was granted following an administrative but non-transparent procedure, where the Minister, or the members of the cabinet, could reject or accept requests for release, without having to provide a justification or judicial guarantees. This gave ministers a lot of power within the penal sphere and raised multiple criticisms, not least from prisoners. This decision-making power also came at a political cost, particularly in

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instances where a parolee committed further high-profile offences. The infamous Dutroux case in 1996, which involved the abduction, rape and murder of several young girls while Dutroux was on parole, and whose conditional release was decided by the then Minister of Justice Wathelet, was therefore a catalyst to hand over the decision-making responsibility for conditional release to multidisciplinary 'Parole Commissions' in 1998 and finally to independent multi-disciplinary Sentence Implementation Courts in 2006.

The *Act of 2006 on the External Legal Position of Convicted Prisoners and the Rights of the Victims in the Framework of Modalities of the Implementation of Sentences* (hereafter the *Act of 2006 on the External Legal Position*) transferred the decision-making authority from the executive to the judiciary in order to reinforce procedural and substantive statutory rights of prisoners (e.g. due process, fairness, legitimacy) and to address the criticism regarding the lack of judicial guarantees in the release procedure in Belgium. The multi-disciplinary composition of the Sentence Implementation Court was regarded as a necessary condition to improve the quality of the decision-making regarding release, which required a combination of legal reasoning and expertise in social reintegration and the effects of the deprivation of liberty (Scheirs et al., 2015; Snacken et al., 2010). Sentence Implementation Courts are presided over by a professional judge with a minimum of five years' judicial experience who has been trained for appointment to the Sentence Implementation Court. The two assessors are not professional judges, nor are they equivalent to lay-magistrates, as they are full-time professionals actively serving as a member of the court with a university degree (e.g. criminology, psychology, sociology, law) and a minimal professional expertise of five years in matters of social reintegration or prison. Current assessors have professional expertise as prison governors, as members of the psychosocial service in prison or as justice-assistants (probation officer) (Scheirs, 2016: 86).

As all the provisions on release were described in numerous and non-publicly available Ministerial Letters, an important goal of the *Act of 2006 on the External Legal Position* was to streamline the procedure for all convicted prisoners and to bring all the scattered provisions together in one Act. However, since 1 February 2007 and still at the time of writing (Autumn 2019), the Sentence Implementation Courts make decisions regarding the detention trajectory of persons sentenced to more than three years imprisonment. The transfer of the decision-making for persons with a shorter prison sentence has been postponed several times and thus still remains an administrative responsibility, leaving the authority of decision-making with the Prison Administration (in the majority of cases the prison governor). However, on 25 April 2019, a Bill has been accepted by the Chamber of Representatives that announces the entry into force of the part of the Act for this group of prisoners by 1 October 2020 the latest. This division reflects an important characteristic of the Belgian release system, namely, its two-track (or bifurcated) system, with different procedures for persons sentenced to a maximum prison term totalling three years (so-called 'short-term prisoners') than for those with prison sentences of more than three years (so-called 'long-term prisoners'). In practice, this means that the majority of convicted prisoners are released under a quasi-automatic and fast administrative procedure, while in contrast a smaller group of long-term prisoners are made subject to a very complex release procedure with several checks and balances.

The aim of this article is to briefly describe[1], discuss and compare both release systems[2], with a particular focus on their rationales and consequences. I will also provide updated

figures on the use of the different forms of release in Belgium. The article starts from the idea that Belgian release has to be understood within the wider context of sentencing and penitentiary policies and practices. The principle of relative autonomy between the aims of sentencing and sentence implementation will be explained as an important legitimation strategy of conditional release in Belgium. The article further explains how the sentence implementation rationale of reintegration has been mobilised in the law, how it is operationalised in practice and discusses its consequences in relation to the detention trajectory of long-term prisoners. This is linked to the rising number of prisoners maxing out their full sentence, in prison or under electronic monitoring.

A revolving-door quasi-automatic release system for 'short-term' prisoners

According to the Act of 2006, a single Sentence Implementation Judge should decide upon the provisional release ('*voorlopige invrijheidstelling'* or *'libération provisoire'*) of persons with a prison term of to up to three years. However, the transfer of this decision-making competence from the Prison Administration to the Sentence Implementation Judge has not yet been realised. So, today, the biggest group of convicted prisoners is still released following an automatic administrative procedure, that is described and regularly adapted in several Ministerial Circular letters, that are not public and thus do not allow parliamentary scrutiny as ordinary legislation would entail. The regulation of sentence implementation through unpublished Letters and Circulars is, however, an often-applied policy in Belgium, allowing Ministers to promptly react to changing circumstances (prison overcrowding, for example), and thus to avoid lengthy legislative procedures.

Initially, provisional release started as an administrative measure by the Prison Administration, because parole had always been hampered for short-term prisoners due to the length and complexity of the procedure. Consequently, in 1972 an 'alternative' early release for prisoners serving sentences of up to one year was introduced and called 'provisional release in view of pardon'. It was originally an individual decision leading to an individual pardon for each prisoner. Pressured by the increasing prison overcrowding, from 1983 onwards the Prison Administration applied this tool more systematically and collectively, releasing all prisoners sentenced to up to one year after having served a part of their sentence. These releases were also renamed 'provisional release for reason of overcrowding' (Snacken et al., 2010). In 1994, this form of release without specific procedural safeguards became extended to sentences of up to three years imprisonment. With 77% of all the releases of convicted prisoners in 2017 (see Table 1 below), they have remained the major form of early release in Belgium. This means that, in the majority of the cases, local prison governors have the authority to decide about release. In certain 'sensitive' cases, however, such as sexual offences with minors and offences of human trafficking and terrorism, the decision-making authority is transferred to the Direction Detention Management at the Central Prison Administration. The conditions for eligibility with regard to sentence length have changed over time and are very complex, but the general rule was that all prisoners, irrespective of whether they are first offenders or recidivists, were automatically provisionally released after having served at most one-third of their sentence, in custody or under electronic monitoring (see later).

Table 1. Release of persons convicted to a prison sentence[1] according to the different modalities: 2017.

	End of sentence (maxing out)	Provisional release of persons with a prison sentence of up to three years (administrative decision)	Provisional release of foreigners with more than three years prison sentence (decision of Sentence Implementation Court)	Conditional release of persons with a prison sentence of more than three years (decision of Sentence Implementation Court)	Foreigners awaiting expulsion in administrative detention centres after their prison sentence	TOTAL
After EM	**123**	**4353**	**2**	**467**		**4945**
	2.5%	88.0%	0.0%	9.4%	0.0%	100.0%
After prison	**689**	**3070**	**414**	**272**	**260**	**4705**
	14.6%	65.2%	8.8%	5.8%	5.5%	100.0%
Total	**812**	**7423**	**416**	**739**	**260**	**9650**
Percentages	8.4%	76.9%	4.3%	7.7%	2.7%	100.0%

Source: Personal communication with the Prison Service, July 2019. The data are recalculated by the author.
[1]Mentally ill prisoners are not included in the table, as legally they are not convicted to a prison sentence, but to a security measure, so-called internment, which is dealt with by a separate chamber of the Sentence Implementation Courts. Internment is a measure that is undetermined in time.

Since 16 May 2017, Ministerial 'Temporary Instructions' have been issued, with new and even shorter eligibility periods of release : persons with a prison sentence of up to four months are immediately released; persons with a prison sentence between four and six months are immediately released or after one month if they are convicted after 31 January 2014; persons with a prison sentence between six and seven months are released after one month; with a prison sentence between seven months and one year after two months; with a prison sentence between one and two years after four months; and persons with a prison sentence between two and three years are released after having served eight months in prison or under electronic monitoring.

This release system through internal regulations is very flexible, but also unstable and can thus entail insecurity for the prisoners. The automatic nature of release for prisoners serving 'short' sentences means that there is no requirement for the views of the prisoners or any victims of an offence to be heard on the matter. Nor is there any possibility to appeal the decision to a higher decision-making authority. In this procedure, the prisoner is barely prepared for release and post-release supervisory conditions are only rarely imposed, so aftercare or supervision after detention are not generally implemented.

Since the Belgian prison system has suffered from overcrowding since the mid-1980s (Beyens et al., 1993), it is clear that this policy has been used by consecutive Ministers of Justice as a form of 'back-door' mechanism (Rutherford, 1984) to relieve the pressure on the prison population. It is perhaps not surprising that for prison governors, who have to deal with the consequences of prison overcrowding on a daily basis, this form of release is welcomed and has become fully integrated in their daily practices. While primarily a pragmatic policy, provisional release can therefore also be regarded as being part of an inadvertent reductionist policy to avoid an expensive and lengthy process of expansion of prison capacity. However, a genuine reductionist policy, would mobilise more front-door measures and promote alternatives to custody such as community sentences, to keep offenders out of prison as long as possible and to avoid the harms of detention. Providing for real alternatives to custody is a complex and lengthy process. It is known for instance that introducing non-custodial alternatives through legislation does not guarantee their implementation by the judiciary. It is also evident that there is a potential for unintended net-widening and mesh-thinning effects, whereby non-custodial 'alternatives' replace other non-custodial sentences (such as fines) rather than displacing the use of prison sentences (Cohen, 1985).

In this light, automatic release of 'short-term' prisoners can be seen as a quick-fix solution to pressing penitentiary problems while at the same time presenting a lever for government ministers when faced with pressure to reduce prison overcrowding. In Belgium, this pressure manifests as part of the daily penitentiary landscape in the form of protests and strikes by prison officers who complain about the detrimental consequences of overcrowding on their working conditions (Beyens, 2019). Reducing the prison population by facilitating release remains an easy option for the government and the delay or resistance to full implementation of the *Act of 2006 on the External Legal Position* must therefore be seen in this light. A further relevant factor has been a concern to control the workload of the Sentence Implementation Courts. In 2017, for example, 77% or 7423 decisions were related to cases of up to three years of imprisonment (see Table 1 below).

A further complicating factor in this overall picture is that since 2000, another 'solution' for prison overcrowding was introduced in Belgium, namely, the replacement of prison sentences by electronic monitoring. Initially the introduction of electronic monitoring was justified as a tool for supporting re-integration and harm reduction, however, it is evident that it quickly became another systemic management tool in the fight against prison overcrowding. As with the differential frameworks for prison release based on sentence length described above, different decision-making mechanisms also apply for electronic monitoring based on the length of the prison sentence imposed. Depending on the offence, prison sentences of up to three years can be fully or partly converted into electronic monitoring by the prison governor or the Central Prison Administration (Direction Detention Management).[3] This means that the part of the prison sentence that has to be served up to provisional release, can be served in prison or at home under electronic monitoring. Here too we have seen the relaxing of eligibility conditions for electronic monitoring over time and for the same reasons as for provisional release – namely systemic pressure. The replacement of prison sentences with electronic monitoring also occurs quasi-automatically, and here too the prison governor and the Direction Detention Management have the decision-making authority. Those made subject to electronic monitoring in these circumstances serve their sentence in the community, where they are required to adhere to a time schedule (i.e. they have specific curfew hours), but they do so without supervision by a justice assistant.[4]

This has led to a situation where electronic monitoring has become a cheap way of executing prison sentences and its standardised application allows more convicted persons to be processed through the penal system at a lower cost thereby facilitating a revolving-door policy (Beyens and Roosen, 2017). However, such policies have raised questions regarding the credibility of the execution of sentences system in Belgium, particularly with the judiciary, but also with the wider public and thus also with politicians who are sensitive to criticisms that the system operates with impunity. Before discussing this issue of legitimacy in more detail, the following section of the article will explain the release system of those convicted to a prison sentence of more than three years.

A complex discretionary release procedure for 'long-term' prisoners

One of the most important innovations since the introduction of conditional release in 1888 was the transfer of the authority to release prisoners before the end of their sentence from the executive power to independent Multidisciplinary Commissions in 1998 and to multi-disciplinary Sentence Implementation Courts in 2006. Since February 2007, these multi-disciplinary courts decide on the detention trajectory of prisoners sentenced to more than three years of imprisonment, after a judicial procedure and an adversarial court hearing where the Public Prosecutor, the prison governor and the prisoner and/or eventually his or her lawyer are heard. All the decisions have to be carefully articulated in a written verdict. For the legislator, this multi-disciplinary composition was seen as a guarantee for expert and deliberate decision-making through which the parliament aimed to improve the quality of the decision-making and to enhance the courts' independence and professionalism (see also Scheirs et al., 2015).

To be eligible to apply for conditional release, a minimum period of detention must be served, namely one-third for first offenders and two-thirds for repeat offenders ('legal recidivists'). According to the *Act of 2006 on the External Legal Position*, prisoners sentenced to life imprisonment have to have served at least 10 years of detention, repeat offenders have to have served at least 16 years of their sentence before they are considered eligible to apply for release. So repeat offenders are subjected to a more severe release system, and are doubly punished, as repeat offending is also an aggravating element in the sentencing phase. In March 2013, the time conditions have been restricted for prisoners sentenced to 30 years imprisonment or life sentences[5], after the highly publicised release of Michèle Martin, Dutroux's wife, who had assisted in his crimes. Since then, persons sentenced to 30 years or life-imprisonment have to serve at least 15 years of their prison sentence, which increases their eligibility date from one-third to at least half of the sentence, legal recidivists have to have served at least 19 or 23 years of detention, depending on their earlier convictions. The time conditions for prisoners with a prison sentence of up to 30 years have remained the same. To prepare for reintegration, temporary prison leave (*uitgaansvergunning*, maximum 16 hours) and prison furlough (*penitentiar verlof*, maximum 36 hours) can be granted by the Minister of Justice (in practice the Direction Detention Management at the Central Prison Administration) two years before the eligibility date for conditional release. 'Sentence implementation modalities', such as semi-detention[6] and electronic monitoring are more controlling measures, allowing a 'safer' transition from prison to society, than conditional release. Therefore, they can only be granted six months before the eligibility date of conditional release. All these intermediate measures are thus also delayed for the prisoners with a prison sentence of 30 years up to life imprisonment. The time conditions are strictly formulated by law and leave no discretionary room to the Sentence Implementation Courts to deviate; in other words, if the time conditions are not fulfilled, the prisoner cannot be released.

Further, the *Act of 2006 on the External legal Position of the Prisoners* states that a conditional release order is awarded if the time-conditions are fulfilled *and* if there are no counter-indications for release. The Sentence Implementation Courts are therefore required to assess five additional counter-indications, that might endanger a smooth re-entry into society, namely: (1) the absence of the prospects of the social reintegration of the offender; (2) the risk of committing new serious offences; (3) the risk that the offender would harass the victims; (4) the attitude of the offender towards the victim(s) of the offence that has led to the conviction and (5) the absence of efforts of the prisoner to financially compensate the victims. It has to be pointed out that three of the counter-indications are victim-related and that the attention for the victims in the parole procedure is also reflected in the name of the *Act of 2006*, which explicitly mentions the interests of the victims.[7] To counter any such risks prisoners have to prepare a reintegration plan that describes the efforts they have already made to prevent these risks upon their release and how they will be dealt with after their prison stay. Three main anchor points guide the Sentence Implementation Court's evaluation of the reintegration plan: (1) where the prisoner will reside on release; (2) how they will be occupied (work or any other day activity) and (3) whether they will be required to undergo treatment, e.g. drug treatment (Scheirs 2014, 2016).

As the Act stipulates that conditional release 'is granted' if the time and other conditions are fulfilled, some scholars interpret this as a legally constructed 'subjective right' for the prisoner (Pieters, 2009; Snacken, 2004). However, as the counter-indications are potentially very wide-ranging, the Sentence Implementation Courts have a broad scope for discretion, meaning that this system still can be described as a discretionary release system (Scheirs, 2014; Snacken et al., 2010). Indeed, the evidence supports this characterisation. As a result of this assessment procedure and the difficulties in meeting the prescribed conditions, the majority of prisoners do not leave prison after one-third, half or even two-thirds of their sentence, but mainly stay in prison for considerably longer periods (Maes and Tange, 2014). Furthermore, when a person is released, they are required to adhere to general and individual conditions. The general conditions are stipulated by law and entail that the released person should not commit new offences[8] during his licence period, is required to have a home address, and has to respond to any questions and appointments with the justice assistant or Public Prosecutor. Typical individual conditions include an obligation to maintain meaningful daily activity and/or to follow a treatment plan, and prohibitions on drinking alcohol, on using drugs or possessing guns and/or on contacting the victim(s) of the offences that have led to the conviction (Scheirs, 2014, 2016).

Data on prison release

As mentioned previously, the majority of the convicted prisoners are released via a quasi-automated system. Table 1 provides an overview of the number of releases of convicted prisoners, distributed over the different modalities in 2017.

Table 1 shows that more than three-quarters (76.9%) of all the releases of convicted prisoners occur through the quasi-automatic administrative system, while the Sentence Implementation Courts only decide on approximately 12% of all the releases (total of 4.3% and 7.7%, i.e. all sentences of more than three years). However, in practice, the Sentence Implementation Courts are also responsible for the 'end of sentence' group, as these are all prisoners who have either applied unsuccessfully for a release modality (electronic monitoring, semi-detention or conditional release), did not undertake any release action at all or who maxed out their sentence under electronic monitoring (15.1% of all those who served until the end of their sentence, see Table 2). This phenomenon of the rising number of prisoners who max out their full sentence will be further discussed in the following section.

Table 2 illustrates the (growing) importance of electronic monitoring as a form of sentence implementation: 63.2% of all the prisoners with a prison sentence of more than three years are conditionally released after electronic monitoring, which illustrates the increasing importance of electronic monitoring as a transitionary phase between prison and conditional release (cf. 'progressive' system). Although, following the Ministerial Circulars, sentences of up to three years are quasi-automatically converted into electronic monitoring, the data show that still a considerable part of this group (41.4%) is released from prison. This high number of people still serving their sentence of up to three years in prison can have several reasons, such as: people serving the part of their sentence up to provisional release in prison under remand and when finally convicted

Table 2. Release of persons convicted to a prison sentence according to whether it is from prison or from electronic monitoring: 2017.

	End of sentence	Provisional release of persons with a prison sentence of up to three years (administrative decision)	Provisional release of foreigners with more than three years prison sentence (decision of Sentence Implementation Court)	Conditional release of persons with a prison sentence of more than three years (decision of Sentence Implementation Court)	Foreigners awaiting expulsion in administrative detention centres after their prison sentence	TOTAL
After EM	15.1%	58.6%	0.5%	63.2%	0.0%	51.2%
After prison	84.9%	41.4%	99.5%	36.8%	100.0%	48.8%
TOTAL	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Personal communication with the Prison Service, July 2019. The data are recalculated by the author.

being immediately released from prison; prisoners who are convicted for terrorist related offences, human trafficking and sexual offences with minors are excluded from electronic monitoring, persons under electronic monitoring who are recalled to prison, prisoners who do not have a fixed address or residence or who are illegal in the country are not granted electronic monitoring; people who refuse electronic monitoring and 'prefer' to serve their sentence in prison.

Discussion

This section deals with the main issues of the debate on prison release in Belgium, namely the principle of the relative autonomy of the aims of sentencing and the execution of sentences, the aim of reintegration and how this is pursued in practice and the rising phenomenon of maxing out.

Relative autonomy of the aims of sentencing and the execution of sentences as an important leading principle of parole

Why is parole needed and where can its legitimations be found? The Belgian Prison Act of 2005 that enacts prisoner's rights and the Act of 2006 on the External Legal Position, that enacts the release modalities, are both rooted in the principle of the relative autonomy of the aims of the implementation of sentences and of the aims of sentencing. This principle reflects and justifies the different priorities in decision-making at the different stages of punishment and states that whatever the aims may have been at the time of sentencing (retribution, general prevention, incapacitation etc.), these cannot be considered automatically to determine the content of the execution of the imprisonment (Dupont, 1998: 135; Snacken, 2004; Snacken et al., 2010; van Zyl Smit and Snacken, 2009). Both laws that regulate the implementation of prison sentences state that imprisonment should aim at limiting the detrimental effects of the deprivation of liberty, at reparation of the harm caused to victims and at the reintegration of prisoners into society. The theory of relative autonomy recognises the complexity of the various aims of punishment at the different stages of the criminal justice process and it emphasises that their importance may vary between the point of sentence imposition and implementation. Sentencing is an important symbolic moment in which a judge publicly expresses the censure of a particular offence with due regard to the responsibility and guilt of the offender. Although the court may take the future of the offender into consideration when choosing between different penalties, the sentencing decision is primarily directed towards the past, namely the offence that has taken place (and usually the criminal record of the offender).

The implementation of the prison sentence takes place during a more or less long period of time in prison or under electronic monitoring and the majority of prisoners will eventually be released into society. The implementation of the prison sentence must therefore necessarily also be oriented towards the future, and the prison regime must be organised accordingly. As a result, where the sentencing judge decides to take the offender out of society by imposing a term of imprisonment, the actors responsible for the implementation of this sanction must have due regard to the conditions for his

reintegration into society. Although the principle of relative autonomy is not explicitly mentioned in the laws, it allows for an emphasis on reintegration as a specific aim of the implementation of sentences and legitimises adaptations and relaxations of prison regimes, and systems of temporary or early release from the restrictions that these sentences impose (Beyens et al., 2013; van Zyl Smit and Snacken, 2009: 80–84).[9] A notable example of the difficult acceptance of early release is the introduction of the possibility to impose a 'security period' for 'extremely serious offences', such as, for example, terrorism, rape, murder of police officers in the sentencing phase in 2017, allowing the sentencing judge or the Court of Assizes to fix a certain period, where no conditional release is possible. This can be a security period of two-thirds of the sentence instead of one-third before being eligible for conditional release eligibility date, or a security period of between more than 15 and 25 years.[10] The introduction of such a security period was clearly a reaction to criticisms on what is regarded as a too flexible or liberal release policy for long term prisoners.

It should immediately be recognised that the theory of relative autonomy may not be persuasive to all. Both penal decision-makers and the general public may regard 'relative autonomy' as a weakening of the retributive, deterrent or incapacitatory effects that sentencers may have intended, and therefore call for a 'truth in sentencing policy', where all sentences are served in prison until the last day. Additionally in Belgium, as has been demonstrated, the non-execution of short prison sentences and the widespread application of provisional release were not introduced following a principled approach to the relative autonomy of the aims of punishment fostering reintegration at the level of implementation of sentences, but as purely pragmatic 'solutions' to the continued crisis of prison overcrowding. Perhaps unsurprisingly those criticising 'early' release from prison do not always make a distinction between the two, complicated and regularly changing systems. Even judges admit that they have a poor knowledge of the implementation of their sentences.

The research of Beyens et al. (2010) shows that judges are not in favour of the principle of relative autonomy and feel frustrated about the erosion of their sentences, leading to a loss of proportionality and punitiveness of their decisions. The non-execution of prison sentences of up to six months in particular has generated a sense of impunity. This release policy has had several consequences for sentencing, where many judges in the research (although not all), admit that they take release policies into account and are inclined to impose longer sentences to be sure that offenders have to go to prison (and that their sentence will not be converted into electronic monitoring) or impose a prison sentence of three years and one day, to be sure that offenders will not be automatically released without an intervention of the Sentence Implementation Court (Beyens et al., 2010).

It can therefore be concluded that release policies, particularly when they are not well communicated or accepted by the judiciary, can be counterproductive and lead to a backlash. Notably, within the last 10 years presumably in an attempt to address this issue, all of the declarations of the Ministers of Justice contain references to the importance of the credibility of the execution of prison sentences. The use of electronic monitoring to execute prison sentences between four and six months has also been explicitly linked to this objective (Beyens and Roosen, 2017).

Reintegration and the execution of prison sentences: Theory and unintended consequences

It has already been mentioned that Belgian legislation emphasises social reintegration as an official aim of sentence implementation. In order to prepare the prisoner's re-entry into society, the detrimental effects of imprisonment should be limited and adequate activities and services should be provided during and after detention.[11] As the absence of prospects of reintegration are a general counter-indication for conditional release, while in prison, prisoners have to prove their perspectives and efforts to reintegrate in a social reintegration plan. Without a social reintegration plan, conditional release and also electronic monitoring or semi-detention are no options for the Sentence Implementation Courts (Scheirs, 2014, 2016).[12] Although the Sentence Implementation Courts apply the key elements of the reintegration plan, namely residence, work or daily activity and treatment, in a rather routinised and standardised way, Scheirs' (2014) research illustrates that the assessment of the social reintegration plan gives them a large discretionary power and that there are significant differences and expectations in how reintegration plans are conceived and constructed.

Furthermore, the support prisoners receive to prepare this plan differs between prisons and depends inter alia on cooperation with prison governors, the cooperation and availability of the psychosocial services and of local services in the community, and the available infrastructure in prison (De Koster, 2017; Scheirs, 2014; Scheirs and Beyens, 2019). As the members of the psychosocial service in prison are predominantly responsible for the assessment of the counter-indications (e.g. risk of recidivism) and the provision of written advice to the prison governor concerning the release modality, the social reintegration of the prisoner is often subordinated to a more risk-based approach. At the same time the participation and availability of external welfare services and social workers in prison focussing on the social reintegration of prisoners also remains modest due to understaffing and long waiting lists. These problems are exacerbated by strikes by prison officers, which regularly take place in Belgian prisons, meaning that access to the prison of the social aid workers is further hindered. Moreover, in some overcrowded prisons (e.g. Antwerp and Brussels), due to a shortage of prison officers, prisoners are often cut off of access to social services (Beyens, 2019). Therefore, many prisoners are not fully supported in the preparation of their social reintegration plan (Scheirs, 2014).

Moreover, the (preparation of the) social reintegration of the prisoner should start at the beginning of the detention period and prisoners should be supported in this in order to be prepared to participate in society as full citizens after their release. However, in practice, members of the psychosocial service and external social workers only start preparing for the release of the prisoner when the possible release date is approaching, which is too late. Often this delay in preparation leads to a follow-on delay in the release date. With regard to the reintegration aim, it must also be pointed out that the preparation for the re-entry into society of prisoners serving less than three years is not a consideration at all for the government and that all the available supportive efforts are targeted to long-term prisoners. It can, however, not be doubted that the first group of prisoners may also need help to restart their lives after imprisonment or during or after electronic monitoring.

Maxing out as an unintended consequence of the progressive system of release?

If conditional release is granted, the Sentence Implementation Court also imposes a period of probation (*proefperiode*). This period lasts for *at least* the remaining time of the prison sentence, with a minimum probation period of two years, between five and 10 years if the prisoner is serving a prison sentence of more than five years, and 10 years for life-sentence prisoners. This probation period can thus exceed the remaining prison sentence if the conditional release is delayed. The longer it takes before a prisoner is released in the discretionary system and the nearer towards the date of the end of their sentence, the higher the risk that prisoners will calculate that it is less overall effort to remain in prison until the end of their sentence rather than having to make efforts to meet the (for them often high) expectations of the Sentence Implementation Courts and running the risk of being recalled to prison during the probation period for non-compliance with the conditions. Therefore, a critical tipping point is reached during the release decision-making process, when prisoners become discouraged and sometimes (voluntarily or involuntarily) 'choose' to max out their sentence in prison, and thus to be released without any supervisory conditions at the end of their sentence, which is counter-effective for their reintegration.[13]

Indeed, over the past 10 years we can observe an increasing number of prisoners who serve their full sentence in prison (see Table 1), and in 2017, the number of prisoners maxing out their sentence (N = 812; 8.2% of all releases) outnumbers those who are conditionally released (N = 739; 7.7% of all releases). This is a creeping evolution and can be interpreted as an indication of the difficulties of getting parole. It also contrasts with the situation at the beginning of the implementation of the *2006 Act*, when the number of parolees clearly outnumbered the number of prisoners staying until end of sentence (Beyens and Maes, 2017). Although there is an absence of systematic research in this area, (see however the interesting study of Robert, 2018), such a trend is often linked to the difficult process of the 'the gradual way' or the 'progressive system', where different doors have to be opened consecutively, first by the Direction Detention Management for the short prison leave or prison furlough, and secondly by the Sentence Implementation Courts; and where prisoners often get stuck and discouraged in the first phase of this process.

The data in Table 1 also show the growing importance of electronic monitoring in the progressive system, with it almost becoming a standard phase in the journey out of prison. This, however, was not the initial idea of the so-called 'Commission Holsters'[14], who prepared the 2006 legislation (Snacken, 2004, 2014). Scheirs's (2016) research and also research on recall (Beyens et al., forthcoming) shows that the members of the Sentence Implementation Courts see electronic monitoring as a safe form of transition to release (cf. monitoring of risks), and use it more and more often. And although prisoners are eligible earlier for electronic monitoring in their way out (six months before the conditional release eligibility date), which can be seen as a positive aspect, it is also evident that due to the long and complex process and (institutional) delays, prisoners are released under electronic monitoring only at the time that they are eligible for parole, therefore being subject to a stricter regime, which can be considered as both widening and thinning

the mesh of punishment (Cohen, 1985; see also Snacken, 2014). At the same time, we also see that the failure rates and thus recall rates for those who are put under electronic monitoring are higher than for those who are conditionally released without electronic monitoring (Beyens et al., forthcoming).

Another complicating factor in getting parole is that one year before being eligible for conditional release, prisoners can be granted prison furloughs of 36 hours three times each semester, or short prison leaves of maximum 16 hours, two years before the eligibility date for parole. These leaves can be used to prepare for conditional release, by looking for a job, housing or education and should be regarded as part of the 'standard regime', as the law stipulates that they '*are'* granted to each convicted prisoner who meets the conditions, in order to limit detention harm and to allow prisoners to prepare for their social reintegration. According to Snacken (2014), this expression in the law should be interpreted as that they 'should be granted' the release modality, as they are part of a standard regime. However, these leaves are only granted after a discretionary decision of the Direction Detention Management, taking the same counter-indications into account as for conditional release. Sentence Implementation Courts do not mainly grant conditional release, electronic monitoring or semi-detention if the prisoner has not been granted a penitentiary furlough or a short prison leave beforehand; so it is an essential first step in the 'gradual process' towards conditional release, This means that the Prison Administration still retains a lot of power in opening up, delaying or cutting off the possibility for release. For many prisoners, this is a first hurdle to overcome and if these doors stay closed, this puts them on a trajectory towards maxing out.

Robert and Mine's (2014) research shows that access to prison leave in practice is much lower than what could be expected from being part of a standard regime, due to negative decisions of the Direction Detention Management and a restrictive and overly risk-oriented attitude of the administration. Therefore, Art. 59 of the Act on the External Legal Position is sometimes used to provide prisoners a way out of a blocked trajectory, as it provides the Sentence Implementation Courts with the possibility, in some cases, to grant prison leaves on their own initiative. The Sentence Implementation Courts may take such an initiative when there has been a systematic refusal of prison leaves. It is worth noting, however, that as a reaction to the research of Robert and Mine (2014), the Direction Detention Management has changed its policy and has become less strict in its decision-making. While in 2013, 74.5% (N = 2843) of all the decisions with regard to a request for penitentiary furlough were negative, this percentage decreased to 54.6% (N= 1824) in 2017. With regard to short prison leave the percentage of negative decisions decreased from 48.7% (N= 2487) in 2013 to 37.5% (N= 1967) in 2017 (Prison Service, 2014, 2019).

If blocked during their trajectory, and the possibility to get conditionally release is delayed, the road towards gradual release becomes less attractive for the prisoner, as the risk that the supervisory period is longer than the sentence imposed becomes more real. Such prisoners are therefore placed in a situation where they may consider it preferable to max out their sentence in prison or to do 'end of sentence' under electronic monitoring, to avoid a probation period exceeding the imposed sentence length. During the preparatory discussions in the Commission Holsters, that prepared the *Act of 2006*, the proposal to equal the probation period to the imposed sentence length was not

followed (Snacken, 2014). Research with the members of the Sentence Implementation Courts on recall decision-making also found resistance to the idea of ensuring equivalency between post-custody supervisory periods and the original sentence length (Beyens et al., forthcoming). That this is not an impossible option, however, is illustrated by Scotland, where a law reform of 2015 guarantees that all long-term prisoners will be released at least six months prior to the expiry of their full sentence, thus ensuring supervision and support during the first months after release (McIvor et al., 2019). Scheirs' (2014) research also shows that the Sentence Implementation Courts try to avoid the end of sentence, but apparently too late. She observed that prisoners who were in the very last phase of their sentence, were encouraged by the Sentence Implementation Court to at least try to apply for an electronic monitoring, so that there was some follow up possible in their first period out of prison, which ends at the end of sentence. This might also explain the rising application of electronic monitoring with long-term prisoners, and that, meanwhile, 15% of all prisoners max out their sentence under electronic monitoring. The Sentence Implementation Courts realise that they lose judicial control over prisoners who max out, and from this point of view parole and all other execution modalities are not only regarded as vehicles of reintegration, but also of control. That is also the reason why prisoners prefer to fully serve their sentence in prison or under electronic monitoring, to be fully released and to get rid of the burden of judicial control and supervision during a long probation period after the end of their sentence and not run the risk that they can be recalled to prison after their sentence has expired.

This all shows that a system that is introduced with the best intentions, can have a lot of unintended and even counterproductive effects in practice.

Conclusion

This analysis shows that prison overcrowding has had an enormous impact on the Belgian release system and that it has led to an instrumentalisation of provisional release as a tool to govern prison overcrowding and solve systemic problems. Fear of systemic overflow also explains why the transfer of the authority from the executive to the judiciary has been delayed for so long, as this means losing a means of controlling the size of the prison population and thus of prison overcrowding. Regarding the high number of cases of up to three years to be dealt with, a lot of sentence implementation judges will be needed. One can also wonder to what extent these judges will be able to make individualised decisions or whether they will also become part of a quasi-automated system. Minsters of Justice have also become more sensitive to the critique of impunity and questioning of the credibility of the execution of prison sentences, due to the non- or partial execution of short prison sentences as a means of alleviating prison overcrowding on a short-term basis. So, rehabilitative and systemic objectives compete with the aim to improve the credibility of the sentence implementation system.

Over the years, the existing two-track system has become even more divided, with a stricter legal release policy for those with very long sentences, through the introduction of security periods for certain very serious crimes and the phenomenon of maxing out of those prisoners who get stuck in the gradual way of prison. Reintegration efforts

seem to be nullified by controlling and risk-oriented practices. At the same time, it seems that the confidence in the decision-making of the Sentence Implementation courts is sneakingly corroded by giving more power to the sentencing judge with regard to release eligibility dates (cf. introduction of security periods) and also by the decision in 2013 to add two judges to the composition of the Sentence Implementation Courts in certain serious cases.[15]

Following Herzog-Evans (2014), one could wonder, which system is the best: an automatic one where prisoners are released at a given point in time and where the release date is clear from the beginning (but ignoring offenders' immediate needs after release), or a discretionary system, where a court or a judge decides, based on a series of elements. It is choosing between a system, where all are treated equal and a discretionary release system with some ambiguity and potentially unequal treatment of comparable persons, but where prisoners have some agency, some voice and some opportunity to show their good intentions and to be rewarded for being a 'good' prisoner that meets the expectations of society and the system. In such a system, prisoners are expected to file an application and to elaborate a social reintegration plan, alone or with the help of other services. My analysis of the Belgian situation shows that this discretionary system, although interesting in theory, also has systemic shortcomings and the (unintended) consequence of an increasing number of prisoners who do not leave prison under supervision, but at the end of their sentence, without judicial follow up, supervision or control.

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Notes

1. For a detailed account on the Belgian early release system and its modalities, see Snackenet al. (2010). This article also builds on other previous co-authored publications on this subject, such as Beyens et al. (2013), Snacken (2014), Scheirs et al. (2015), Scheirs (2016) and Scheirs and Beyens (2019). I thank all these authors for our enduring cooperation and co-authorship on release in Belgium. This article provides, however, updated figures about release and also discusses the most recent policies and practices in Belgium.
2. I will not discuss the release systems of mentally ill prisoners (internees) nor of foreign prisoners (see De Ridder et al., 2012), as these release systems involve other actors and follow different procedures and would make this article too complicated.
3. Also, for electronic monitoring, sexual offences against minors, human trafficking and terrorism related offences are dealt with by the Direction Detention Management. See the Ministerial Circular Letter ET/SE-2 of 17 July 2013, 'concerning the regulation of electronic monitoring as a modality for prison sentences of which the executable part does not exceed 3 years'.
4. For a more detailed account on the regime for this group and electronic monitoring in Belgium in general, see Beyens and Roosen (2017).

5. Act of 19 March 2013, which amends the Act of 17 May 2006 on the External legal position of sentenced prisoners and the right of the victims in the framework of modalities of implementation of sentences.
6. Semi-detention gives the offender the opportunity to leave the prison during the day for maximum 16 hours to work or to take part in education. The nights are spent in prison.
7. See, The Act of 17 May 2006 on the External Legal Position of sentenced prisoners and *the right of the victims* in the framework of modalities of implementation of sentences.
8. Research on recall to prison (Beyens et al., forthcoming) finds, however, that a legal conviction for a new offence is required to be able to recall a sentence modality.
9. The paragraph on the relative autonomy and its consequences is fully based on Beyens et al. (2013).
10. Act of 21 December 2017 changing several provisions to introduce the implementation of a security period and to change the Act of 20 July 1990 with regard to remand imprisonment and immediate arrest.
11. See Scheirs and Beyens (2019) for Belgium and the European comparative study of Dünkel et al. (2019) on this regard.
12. Prisoners without a legal residence permit who can be the subject of a provisional release in view of expulsion or extradition do not have to provide a reintegration plan. For more information, see De Ridder et al. (2012).
13. See further the PhD study of Robert (2018) on the phenomenon on maxing out in Belgium.
14. The 'Commission Holsters' is the name of the Commission of experts, who prepared the Act of 2006 on the External Legal Position and is named to its President, judge Denis Holsters.
15. Act of 19 March 2013, which amends the Act of 17 May 2006 on the External legal position of sentenced prisoners and the right of the victims in the framework of modalities of implementation of sentences.

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