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Introduction

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I. BACKGROUND AND AIMS

The legal position of convicted offenders is complex,[1] as are the resulting social consequences (Van Zyl Smit and Snacken 2010). Convicted offenders, after they have served their sentences, custodial or not, often continue to be subject to numerous restrictions, in many cases indefinitely, due to their criminal conviction. In short, criminal convictions can have adverse legal consequences that may affect convicted offenders in several aspects of their lives. These legal consequences often are not formally part of the criminal law but are regulated by different areas of law, such as administrative law, constitutional law, labour law, civil law and immigration law. In turn, they have, and interact with, broader social consequences of conviction. For this reason, they can be obscured from judges, as well as from defendants and their legal representatives. The breadth, severity and longevity, and often hidden nature of these restrictions, raise the question of whether offenders' fundamental rights are sufficiently protected.

It is often assumed that the criminal law brings with it better procedural safeguards than, for example, civil law, but this view seems to be out-dated on the point that consequences regulated outside of criminal law can be even more far-reaching than criminal punishment itself. This is especially the case for the consequences a criminal conviction can have for immigration (Kirk and Wakefield 2018). Such consequences cause the lines between the criminal law and other areas of law to become blurred. Some scholars have expressed their concern that we might even be creating a form of second-class citizen, unable to come back from a period of punishment to lead a normal life (Thomas 2007: 189).

[1] Questions of the appropriate terminology to utilise when speaking of those who have encountered the criminal justice system are far from straightforward, especially for publications that span cultures and languages, such as this edited collection. Here, we tend to use the term 'convicted offenders', denoting individuals who have been convicted and who can either be serving their sentence or who have already served their sentence (hence terms such as 'prisoner' or 'individual under supervision' are often under-inclusive). Some chapters do focus on the consequences for people who have served their sentence, and thus in this technical sense use the term 'ex-offender'.

We can distinguish eight different domains in which offenders can experience legal consequences because of a criminal conviction: employment, education, freedom of movement, enterprise, housing, family, privacy, and immigration. Examples are the exclusion of offenders from certain jobs and/or positions (the right to work); disenfranchisement (the loss of the right to vote or the right to run for elections); the registration of fingerprints or cellular samples from ex-offenders, or registration as sex offenders (constraining the right to privacy); the refusal of a housing permit (excluding ex-offenders from living in certain areas; the right to housing); the refusal or withdrawal of professional licences, grants or contracts (the right to work and/or privacy); and measures of intensive supervision and preventive detention that restrict (ex-)offenders in their freedom of movement after they have served their (punitive) prison sentence. These consequences can be imposed automatically (by statute), by a court or by an administrative authority.

Given these adverse consequences, it is surprising that very little international comparative and empirical research has been undertaken in Europe on this subject. In the United States (US), a large body of research on the so-called 'collateral consequences of criminal convictions' exists (eg Damaska 1968a and 1968b; Demleitner 1999; Colgate Love 2001; Mauer and Chesney Lind 2003; Pinard 2006; Uggen, Manza and Thompson 2006; Uggen and Steward 2015).[2] In comparison, in Europe, only a few scholars have engaged in research on this topic (see Von Hirsch and Wasik 1997 on civil disqualifications attending conviction). Recently, European scholars have begun to point out the existence and importance of legal consequences of criminal convictions for different domains (Boone and Kurtovic 2015; Fitzgerald O'Reilly 2018).

Research in Europe has tended to focus on criminal records (Thomas 2007). Before the introduction of the European Criminal Records Information System (ECRIS) in 2012,[3] (comparative) research addressed the question of whether the European Union (EU) was in need of a European Criminal Record database (Stefanou and Xanthaki 2008; Vermeulen et al 2002). More recently, it has mainly focused on restrictions on one of the aforementioned domains, namely, convicted offenders' access to employment (see the Special Issue of the *European Journal of Probation* 2011 with contributions from France (Herzog-Evans 2011), Germany (Morgenstern 2011), England (Padfield 2011), Spain (Larrauri 2011; see also Larrauri and Jacobs 2013; Jacobs and Larrauri 2016) and the Netherlands (Boone 2011). There has also been research on Sweden (Backman 2012). Comparative research on the employment of people with criminal records in the EU has been published by Louks, Lyner and Sullivan (1998), and more recently by Buysse, Meijer and Szytniewski (2018). Less attention has

[2] We prefer to avoid the term 'collateral consequences', because, as Condry and Minson argue in the context of prisoner families, it can fail to capture the 'relational, mutual, non-linear, agentic and heterogenous properties' of the further effects of punishment on the individual and family members (quoted in Condry and Scharff Smith 2018: 12).

[3] A database that links the individual criminal records registries of EU-countries.

been given to disenfranchisement (with the exception of Tripkovic 2016), the consequences of a criminal conviction for immigration (with the exception of Blitsa, Gouldin, Jacobs and Larrauri 2016) and the right to housing (with the exception of Van Tongeren and Vols 2017). In short, this is a significant and under-researched area of law and criminology.

The aim of this book is to begin to explore the nature and extent of legal consequences of criminal convictions in Europe. What legal consequences can a criminal conviction have? How do these consequences affect convicted offenders? And how can and should these consequences be limited? 'Legal consequences' is intended here as a broad term. On the one hand, legal consequences may result directly from a criminal conviction. An example of this is that a criminal conviction may result in long periods of preventive detention, or long periods of supervision on the grounds of prevention. On the other hand, consequences may result from the exercise of legal powers. For example, the exercise of the power of national authorities to issue criminal record extracts or criminal record check certificates may result in individuals being denied employment on the grounds of a criminal conviction.

The latter consequences are also referred to in the literature as 'collateral consequences' (eg Demleitner 1999; Love, Roberts, and Klingele 2013), 'adverse (legal) consequences' (eg Damaska 1968a and 1968b) or 'civil disqualifications' (Von Hirsch and Wasik 1997). These terms are often not clearly defined, but from the description given by Von Hirsch and Wasik it follows that these disqualifications may (i) take effect automatically on conviction, (ii) be imposed by the sentencing judge, or (iii) be imposed by a regulatory agency. Although the starting point of this collection is the criminal conviction, an important finding is that some of the consequences described flow not only from a criminal conviction, but also, in some countries, from criminal record information that falls short of a conviction, such as data on charges or cautions held by the police.

It should be noted that not all of the rights as described in this book are equally protected in European countries. The European Convention on Human Rights (ECHR) protects basic (civil and political) human rights (Cliquennois and Suremain 2017). The principle of human dignity underpinning Article 3 ECHR may be drawn upon to restrict grossly disproportionate punishment (see *Vinter and others v the United Kingdom* and discussion in Annison and O'Loughlin, chapter 9 of this volume). Restrictions on liberty may be challenged under Article 5 ECHR, and preventive measures imposed after conviction may be construed as penalties in violation of Article 7 ECHR (see Annison and O'Loughlin, Dessecker, chapters 9 and 10 of this volume). Restrictions on the right to vote have been successfully challenged under Article 3 of Additional Protocol No 1 to the ECHR (see *Hirst v United Kingdom* 2005; *Scoppola v Italy* 2011). However, as Herzog-Evans shows, the protection offered by the interpretation of the European Court of Human Rights (ECtHR) is still rather minimal.

The European Social Charter (ESC) protects economic, social and cultural rights, such as the right to work (Article 15(1) ESC). The problem with this instrument, however, is that states do not have to sign up to all the provisions

of this treaty. Furthermore, individuals cannot invoke the rights protected by the ESC, and the conclusions of the European Committee of Social Rights – the body monitoring the implementation of the ESC – are legally non-binding. For these reasons, the focus of the book is on human rights protected by the ECHR. While the ECHR does not contain, for instance, a right to work, some protection may be found in the Article 8 right to respect for private and family life, where the disclosure of private information such as criminal convictions is involved (see Padfield 2011). However, in some countries, such as the Netherlands, pre-employment screening does not involve direct disclosure of criminal record information to employers (see Meijer and van 't Zand-Kurtovic, chapters 5 and 14 of this volume).

Furthermore, the Charter of Fundamental Rights of the European Union contains some socio-economic rights, such as the right to engage in work (Article 15(1)) and entitlements to social security and assistance (Article 34). However, these rights apply only where Member States are implementing EU law.

This book is the result of a workshop held at the Oñati International Institute for the Sociology of Law, which brought together for the first time a number of leading legal, socio-legal and criminological scholars from different parts of the world to discuss the topic of the legal consequences of a criminal conviction. The papers that were presented at the workshop have been extensively revised and form the substantive chapters of this book. In addition, Nicola Carr and Christine Morgenstern have contributed chapters to the book, for which we are very grateful. Because of our broad approach to the term 'legal consequences', not all chapters take the same approach: some chapters deal with the wide range of legal consequences a criminal conviction can have in a certain country, while other chapters deal with a specific consequence in more detail. The normative aspects of the legal consequences of criminal conviction are dealt with by various chapters. The advantage of this approach is that authors were able to focus on the most current and relevant developments in their respective countries. The corollary of the approach, however, is that close comparisons between the different countries are difficult to make. Nevertheless, the chapters allow for the identification of broad trends, highlight a variety of significant cultural, legal and empirical similarities and differences between countries, and point the way towards principles and methods for limiting the often extensive breadth of restrictions imposed as a consequence of criminal conviction.

We have organised the papers into four parts: I. Criminological Perspectives on Legal Consequences of Criminal Conviction; II. Legal Limits on the Legal Consequences of Criminal Conviction; III. Dangerous Offenders and Legal Consequences of Criminal Conviction; and IV. Juvenile Offenders and Legal Consequences of Criminal Conviction.

In this introduction, we set out some normative debates with regard to the consequences a criminal conviction might have (section II). Furthermore, we highlight the discussions presented in the various contributions, and point out how these chapters build on previous research (section III).

II. NORMATIVE DEBATES

While there is copious scholarly work on the rationales of and justifications for state punishment, surprisingly, the principles governing legal consequences of criminal conviction have attracted little doctrinal or conceptual analysis. As the contributions to this volume demonstrate, the (more or less clearly elucidated) justifications for legal consequences of conviction often echo the purposes of sentencing, which include retributive punishment or crime prevention (whether through deterrence, incapacitation, reform or rehabilitation).

However, due to their 'hidden' nature, judges may not be aware of these consequences when passing sentence. Thus, they are often not taken into account in calculations of proportionality. Furthermore, legal consequences are often determined by administrative authorities and governed by different areas of law. Therefore, they often escape the traditional safeguards of the criminal law. In addition to these considerations, criminal convictions are often also taken as an indication of a person's status or character. Consequently, those with a criminal conviction may find their rights and opportunities restricted because they are regarded as untrustworthy or undesirable, particularly in the employment context (see Morgenstern, chapter 4 of this volume). Similarly, those who have criminal convictions may be deprived of civil and political rights, such as the right to vote, not necessarily because of what they may do in the future, but because their past offending is taken as an indication that they are not deserving of the full rights and duties of citizenship. Given their potential to negatively impact upon offenders' rights, the question of what limits should be placed on legal consequences is an important one. For this reason, the proportionality or appropriateness of legal consequences to their purpose is a theme that runs throughout this volume.

A. Prevention

Restrictions on convicted offenders' rights are often justified by national authorities as a means of preventing reoffending through incapacitation or deterrence. Malsch's chapter in this volume (chapter 3) highlights the tendency of measures of incapacitation towards net-widening and self-perpetuation, as measures of prevention or incapacitation often seem to lead to further measures.

An important contribution of this volume to the literature on the consequences of criminal conviction is that several chapters emphasise the severity of the legal consequences that can flow from criminal conviction for a serious offence. Justifications for that severity blur the line between retribution and prevention by conceiving of serious offenders as 'dangerous' individuals. In this sense, there is often an assumption that a person with a history of serious offending is more likely to reoffend seriously in the future than someone without a criminal record. As Morgenstern argues (in chapter 4 of this volume),

empirical studies of reconviction rates amongst convicted offenders demonstrate that the assumption that past convictions are a reliable predictor of reoffending is often misplaced. This is particularly the case for sex offenders, who are often regarded by the public as particularly liable to reoffend but who actually have a very low rate of reconviction. Thus, in relation to dangerous offenders, the line between punishment and prevention is often blurred, and retributive justifications for lengthy periods of detention and supervision are intertwined with preventive justifications (see Annison and O'Loughlin, chapter 9 of this volume). Conversely, even minor offences can have far-reaching consequences that seem out of step with the preventive function they ostensibly seek to fulfil. In particular, chapter 8 by Blitsa and Kivrakidou on Greece highlights the sometimes arbitrary nature of restrictions that result from a criminal conviction.

Furthermore, as chapter 4 by Christine Morgenstern and chapter 5 by Sonja Meijer highlight, a previous conviction has legal consequences *within* the criminal justice system, as it is viewed as an aggravating factor in sentencing. In the German context, this is often justified by reference to the fact that the individual has reoffended despite the 'warning' effect of the previous conviction, or that reoffending is in itself evidence of a higher risk of recidivism (see Morgenstern, chapter 4).

B. Punishment

While the primary purpose of many restrictions on offenders' rights is the prevention of crime, punitive sentiments and the notion that offenders are less deserving of the rights and privileges accorded to (supposedly) law-abiding citizens are often not far below the surface. Indeed, restrictions on the right to vote are frequently conceived of as a punishment, and are defended on the grounds that offenders have broken the social contract and therefore no longer deserve to participate in civil life (see *Hirst v United Kingdom*; Herzog-Evans (chapter 11 of this volume); Lukács and Vig (chapter 6 of this volume)).

As several of the contributions to this volume demonstrate, restrictions that are primarily intended to prevent reoffending may also be experienced as punitive or stigmatising in their effects, or are applied so widely and indiscriminately that they impose hardships out of all proportion to their preventive aims (see Blitsa and Kivrakidou (chapter 8); Herzog-Evans (chapter 11); Lukács and Vig (chapter 6); Meijer (chapter 5); Annison and O'Loughlin (chapter 9); Keyzer and O'Donovan (chapter 12)). Kirkwood and McNeill (2015: 514) note that 'even under a retributivist approach to punishment, the polity has a duty to make sure that the punishment ends and that there is no punishment beyond the law ("*nulla poena sine lege*")'. Yet criminological and sociological evidence about the enduring unintended effects of punishment both for individuals and for their families, exposed by studies of desistance, suggests that this duty is

commonly neglected *de facto* if not *de jure*. Some US authors have referred to collateral consequences as (invisible) punishments (Travis 2002: 16; Karlan 2004 (focusing specifically on disenfranchisement); Pinard 2010: 1215; Colgate Love 2011; Chin 2012; Thomas and Hebenton 2012: 238). Yet in Europe, the *communis opinion* of criminal law scholars seems to be that these consequences are not to be seen as punishment (Von Hirsch and Wasik 1997; Morgenstern, chapter 4 of this volume).

Some authors argue that the principle that the severity of the sentence ought to be proportionate to the seriousness of the crime requires a close connection between the conviction and the collateral consequence (Von Hirsch and Wasik 1997; and Meijer, chapter 5 of this volume). For instance, Demleitner has argued that employment restrictions should be tied to the character of the occupation, function or activity involved, and calibrated specifically to the offence (Demleitner 1999: 160). The principle of proportionality in sentencing is proposed by several contributors to this volume as a potential limit on the severity of the legal consequences of criminal conviction (Blitsa and Kivrakidou (chapter 8); Coninx (chapter 7); Meijer (chapter 5); Annison and O'Loughlin (chapter 9)).

C. Character

In the US, the absence of a criminal conviction is considered proof of good character for the purposes of naturalisation, while those with an aggravated felony conviction are automatically disqualified (Colgate Love, Roberts and Klingele 2013; Jacobs 2015; Blitsa et al 2016; Larrauri and Rovira, chapter 2 of this volume). Criminal record checks in Europe tend to be for roles in public administration, or those for which a higher standard of 'integrity' is demanded, for example private security officers, high-ranking officials in the public sector or managers in gambling companies, and people working with children[4] and vulnerable adults (Jacobs and Larrauri 2016; see Larrauri and Rovira, chapter 2 of this volume). It may also be argued that practical and legal restrictions on social and welfare rights noted by some contributors to this volume, including the right to adopt, retain custody of children, receive social security benefits or live in certain areas (see Larrauri and Rovira (chapter 2); Meijer (chapter 5)), may be linked to judgments of character or deservingness rather than the risk of recidivism. Similarly, the notion that some offenders are no longer deserving or worthy of the exercise of the rights and duties of citizenship, such as the right to vote or to serve on a jury, may say something more about how (ex-)offenders are regarded by society than about the risks they may pose.

[4] EU Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L335/1.

D. Rehabilitation

Restrictions on offenders' rights are sometimes defended on the grounds that they not only protect the public, but also aid rehabilitation and eventual social reintegration. As noted by several contributors to this volume, however, the legal consequences of criminal conviction may impede the process of desistance from crime, conceived of as a personal journey towards 'long term committed compliance with the law' (McNeill 2012: 8). Such measures may therefore have the counter-productive effect of increasing the risk of reoffending in the long term. For this reason, it is important to distinguish between different forms of 'rehabilitation', and to examine their relationship with desistance and the legal consequences of a criminal conviction.

McNeill (2012: 14; see also Burke, Collett and McNeill 2018; Kirkwood and McNeill 2015) distinguishes between four, interconnected forms of rehabilitation: psychological rehabilitation, which is principally concerned with promoting positive individual-level change in the offender; legal or judicial rehabilitation ('when, how, to what extent a criminal record and the stigma it represents can ever be set aside, sealed, or surpassed'); moral rehabilitation, meaning that an offender has to pay back before he or she can trade up to a restored social position as a citizen of good character; and social rehabilitation, encompassing the informal social recognition and acceptance of the reformed offender.

Legal rehabilitation has also been referred to as a process of 'requalification': restoring to offenders their rights and duties as full citizens (McNeill 2012, citing Beccaria 1764). As such, the law views the legally rehabilitated person as deserving of membership of the community of law-abiding citizens and of the status and entitlements that accompany it (Raynor and Robertson 2009: 10). Thus, in principle, legally rehabilitated offenders should no longer be excluded from public life. However, legal or judicial rehabilitation does not necessarily track psychological, moral or social rehabilitation, and the legal consequences of a criminal conviction can continue despite the progress made by the offender towards rehabilitation in the other areas. Similarly, where the expungement of criminal records occurs automatically after a prescribed number of years (see, eg, Herzog-Evans (chapter 11) and Lukács and Vig (chapter 6)), a committed offender may be legally rehabilitated despite lacking psychological rehabilitation.

Research has shown that stable employment, particularly after the age of 26, is associated with desistance from crime (Farrall and Calverley 2006, ch 1). The same applies to having access to housing (Bahr, Davis and Ward 2013). However, a criminal record can be grounds for the denial of a social housing permit (see Meijer, chapter 5 of this volume), and there appears to be an increase in the frequency of criminal record checking for the purposes of employment in several European countries (see Larrauri and Rovira, chapter 2 of this volume). Thus, it is clear that the legal consequences of criminal conviction can pose a significant barrier to desistance and reintegration. In this sense, legal rehabilitation can be conducive to social and moral rehabilitation, as the removal of a

criminal record removes many of these barriers (Maruna 2011). Furthermore, the restoration of the status of full citizen can go some way towards removing the often state-sanctioned stigmatisation and social exclusion that can result from the legal consequences of a criminal conviction. The more serious the offence, however, the longer the periods for expungement tend to be, with the result that serious offences not only carry a greater social stigma but also have legal effects for a longer period of time.

The importance of social rehabilitation has been recognised by the Council of Europe – which was founded on human rights principles – in Recommendation No R (84) 10 of the Committee of Ministers on the criminal record and rehabilitation of convicted persons (21 June 1984). After considering 'that criminal records are principally intended to provide the authorities responsible for the criminal justice system with information on the antecedents of the person on trial, in order to assist them in making a decision appropriate to that individual', the Recommendation considers 'that any other use of criminal records may jeopardise the convicted person's chances of social reintegration, and should therefore be restricted to the utmost'. The ECtHR, for its part, has recognised a form of a 'right to rehabilitation' on behalf of long-term prisoners (see Annison and O'Loughlin, chapter 9 of this volume; Meijer 2017), underpinned by human dignity and the capacity of individuals to change for the better (see *Vinter and others v the United Kingdom*). This right is limited, however, and does not extend to a right to work or other conditions conducive to social reintegration.

Social rehabilitation or social reintegration is often emphasised in relation to juvenile offenders, and children's rights standards encourage the promotion of social participation and the avoidance of stigmatisation. However, as Nicola Carr's and Elina van 't Zand-Kurtovic's contributions to this volume demonstrate (chapters 13 and 14 respectively), the consequences associated with a criminal conviction continue to impede social reintegration and desistance from crime for this group of offenders. This is the case even where young offenders have been diverted away from the criminal justice system in an attempt to reduce the negative repercussions of punishment for juveniles. Thus, the legal barriers imposed by a criminal conviction can undermine the rehabilitative aims of measures that seek to support or promote the reintegration and social rehabilitation of offenders.

III. LEGAL CONSEQUENCES OF CRIMINAL CONVICTION

A. Criminological Perspectives on Legal Consequences of Criminal Conviction

The two chapters in Part I of this book take a criminological perspective on the legal consequences of criminal conviction, drawing on examples and empirical research from Europe and the US. These contributions highlight an upward

trend in the frequency and severity of collateral consequences for convicted offenders in Europe that can have negative effects not only for ex-offenders but for society as a whole.

In chapter 2, Elena Larrauri and Martí Rovira use empirical research to explore the collateral consequences of a conviction in Spain and how their scope compares to those in the US. As other contributions to this volume highlight, a European constitutional culture or culture of rights appears to offer some protection to ex-offenders. Larrauri and Rovira's study should alert readers that the 'piling on' of collateral consequences, which Uggen and Steward (2015) detect in the US, is also present in Europe, especially regarding immigrants and sexual offenders. The extent of collateral consequences in Spain is particularly striking from a comparative perspective, considering that Spain is often depicted as a relatively 'lenient' European nation (Stefanou and Xanthaki 2008; Tripkovic 2016). Consequently, the contributors call for more research on this topic from different European countries.

In chapter 3, Marijke Malsch describes forms of incapacitation that imply the taking away of opportunities to commit certain wrongs or restricting freedoms in other ways (see Malsch and Duker 2012). She argues that incapacitation is not restricted to the most invasive types of elimination of certain people, but may also refer to less comprehensive forms, such as the exclusion of offenders from certain jobs, positions or activities (like driving a car or running a particular business), as long as disabling the individual involved is the goal of the intervention or of the person issuing it. Her chapter focuses not only on the effect of the criminal law, as incapacitating interventions can also be found in both civil law and administrative law, or outside the law in a strict sense. For Malsch, disproportionate use of measures of incapacitation can increase the risk of recidivism instead of diminishing it, and disproportionate use of incapacitation can be experienced as a form of punishment by the person subject to such measures. She argues that the type of incapacitation used should bear a strong relation to the type of behaviour that is to be prevented, that it should not exceed the limits of proportionality, that decisions should be made by a court and that measures should be accompanied by interventions that aim to rehabilitate the offender.

B. Legal Limits on the Legal Consequences of Criminal Conviction

The chapters in Part II of this volume take a legal perspective on the consequences of criminal conviction and discuss their legal and normative limits. Like the previous two chapters, these contributions discuss a range of possible consequences of criminal convictions, including restrictions on employment opportunities, on the right to privacy and on political rights. In addition, Morgenstern and Meijer highlight the consequences a criminal conviction can have within the criminal justice system itself. Together, the chapters in Part II reflect the extent to which

the legal consequences of criminal conviction circumvent traditional criminal law safeguards, and argue for a more robust approach to protecting fundamental rights drawing on the principle of proportionality.

Christine Morgenstern in chapter 4 explores the under-researched and under-theorised topic of 'the stain of conviction' in Germany. Taking both a criminal justice and a human rights perspective, Morgenstern argues that the state, as 'author of the conviction', must take responsibility for its consequences and counteract any that are unintended and illegitimate. In so doing, she uses penal theory and the right to privacy to point towards a more coherent theoretical approach to criminal records.

As Sonja Meijer shows in chapter 5, while criminal records in most European countries typically do not provide information on so-called 'administrative sanctions', this is currently up for debate in the Netherlands, because administrative fines can possibly become included in the Certificate of Conduct. In the Netherlands, draft legislation is in preparation that makes it possible to deny a Conduct Certificate on the basis of police intelligence. Furthermore, a permit for social housing can be refused on a screening based on police registers.

Morgenstern and Meijer not only point to the consequences that criminal convictions can subsequently have outside the criminal justice system, but also emphasise the significant consequences that can flow from a criminal conviction within the criminal justice system. For most judges, the fact an offender has a previous conviction, regardless of the nature of the offence, is enough to substantiate a risk of recidivism and to justify the imposition of pre-trial detention. Furthermore, a criminal record can be an aggravating factor in sentencing, and can even lead to sentences being automatically imposed by statute.

In chapter 6, Lukács and Vig chart the detrimental legal consequences of a conviction in Hungary, focusing particularly on restrictions on political rights. While the ECtHR has established that a blanket prohibition on the right to vote violates Article 3 of Protocol No 1 to the Convention (*Hirst v the United Kingdom* 2005), Lukács and Vig show that Hungarian courts almost always order the deprivation of political rights, as such an order is included in 95 per cent of all prison sentences. Nevertheless, under Hungarian law, as one of the aims of a prison sentence is to prevent reoffending, the law requires that the social reintegration of the convicted person should be supported not only when imposing and when executing the sentence, but also after the sentence has been served. This gives rise to a right to legal rehabilitation in Hungarian law, underpinned by human dignity. Lukács and Vig describe three methods of legal rehabilitation in Hungary, which include automatic legal rehabilitation after a certain time period, the possibility of applying to a court for rehabilitation on the grounds of 'worthiness', and the possibility of a pardon by the President of the Republic of Hungary or the Parliament as a form of clemency. Lukács and Vig argue, however, that, notwithstanding the legal rehabilitation regime, the scope and duration of detrimental consequences for convicted offenders undermine their human dignity.

In chapter 7, Anna Coninx focuses on criminal background checks in the employment context. Like many other European countries, Switzerland allows the expungement of criminal records from the 'ordinary' extract, used for employment screening purposes, once the sentence has been served or the monetary penalty has been paid and a certain waiting period has passed. This means that the record itself is deleted, by contrast to other jurisdictions, such as England and Wales, in which the conviction remains on record but the individual does not have to disclose it to employers. The idea is that after some time, an ex-offender is at no more risk of reoffending than a non-offender (see Larrauri Pijoan 2014: 58). However, serious offences are not deleted from the 'private' extract, which can be requested when the individual wishes to apply for a job involving close contact with vulnerable groups, such as children. In 2012, however, the Swiss Government took the view that 'employers, landlords, associations and other organisations of employers can ask employees, tenants or members of an association to provide a private extract' (Botschaft BBl 2012, 8857). The fact that criminal records are considered to be confidential was not even mentioned. Coninx challenges the assumption that employers have a legitimate interest in being fully informed about previous convictions. Using Rawls' general analytic method of fair decision-making, introduced in *A Theory of Justice*, she argues that although in Swiss law the access to criminal records for private employers is limited in content and time, it is still over-inclusive. According to Coninx, potential future employers should only be informed about convictions if the crime committed is related to employment and there is a considerable risk of reoffending. She also argues that it should be up to courts, and not to employers, to decide on whether an ex-offender should be disqualified from working in a specific field or from undertaking a certain activity.

In chapter 8, Dimitra Blitsa and Anna Kivrakidou seek to limit the role a person's criminal past, as depicted in his or her criminal record, plays in obtaining legitimate employment. Using Greece as a starting point, they summarise the current Greek legislation on criminal records and employment disqualifications and identify significant shortcomings. These include a lack of uniformity between the occupational barriers faced by similar professionals (eg any felony conviction is an obstacle to employment as a dentist, but not as a doctor), a lack of correspondence between the requirements of the particular job and the disqualifying crimes (eg a person who wants to work as a lifeguard must not have been convicted of defamation or tax evasion), and under-inclusive background checking (eg unlike financial crimes, crimes against life or sex offences do not constitute an obstacle to employment for doctors). They argue that employment bans must be governed by clear principles and be respectful of offenders' rights. Moving from theory to practice, they identify the key policy questions any European policymaker needs to answer when implementing employment disqualifications based on criminal records.

C. 'Dangerous' Offenders and Legal Consequences of Criminal Conviction

The contributions in Part III of this book on offenders who are categorised by the law as 'dangerous',[5] point to similarities but also to significant differences between the jurisdictions surveyed. In conjunction with the chapters relating to juveniles (in Part IV), they provide points of alignment with, but also differentiation from, measures and processes relating to more 'run of the mill' offenders (see chapter 11 by Herzog-Evans).

Harry Annison and Ailbhe O'Loughlin's (chapter 9) discussion of a prison sentence created for dangerous offenders in England and Wales points to the significant extent to which legal consequences can impact on individuals *within* the traditional confines of the criminal justice system. Their contribution focuses on the indeterminate sentence of Imprisonment for Public Protection (IPP), a measure of preventive detention that sits within a broader system of preventive justice that seeks to target individuals on the basis of the likelihood of their committing future harm (Ashworth and Zedner 2016). Those released from indeterminate prison sentences such as the IPP face onerous and highly restrictive licence conditions and the prospect of immediate recall to prison. In this sense, the legal consequences of convictions for serious offences continue to have a significant impact on the lives of offenders who have already served the punitive part of their sentences. On the strength of a detailed analysis of case law from domestic courts and the ECtHR, Annison and O'Loughlin argue that while the ECHR and English common law provide important protections to convicted offenders, the current interpretation of Article 5 ECHR fails to adequately safeguard the rights of 'dangerous' individuals serving indeterminate sentences. While Article 7 acts as an important safeguard against 'penal subversions' (Zedner 2016), Article 5 allows significant incursions into individual liberties by failing to scrutinise sentences, such as the IPP, that allow for very long periods of detention, and which hand over release decisions to administrative bodies. In light of these limitations, Annison and O'Loughlin argue that prisoners who have exceeded the punitive tariff of these sentences and are held in prison on preventive grounds should be conceived in principle as being 'beyond' their sentences. This has significant implications for how the predicament of these particular prisoners should be addressed, but also more broadly for the conceptualisation of the imprisonment of 'dangerous offenders' and such convicted offenders' journeys towards rehabilitation.

In chapter 10, Axel Dessecker describes various forms of intensive supervision in Germany: a set of individualised interventions directed at probationers

[5] The term 'dangerous offender' is here used to refer to what has been termed the modern 'monstrous' (Simon 1998), most usually serious sexual offenders, serious violent offenders and other offenders thought to pose a risk of serious physical or sexual harm.

or parolees living in the community. Empirical research shows an increasing number of offenders are subject to a form of intensive supervision in Germany, whether as an alternative to prison or upon leaving prison. Although intensive supervision can be part of the sentence imposed by the court, most cases occur in specific situations when the law orders intensive supervision as a binding legal consequence based on the assumption that the offender is dangerous. Where measures of intensive supervision are imposed post-sentence, they are classified by the German penal code as 'measures of reform and prevention' rather than punishments. Commonalities with the system in England and Wales described by Annison and O'Loughlin are readily apparent: intensive supervision is conceived of as a measure for both rehabilitation and incapacitation (with the implicit view that these goals are readily reconcilable). As in England and Wales, the system takes a hybrid approach: it is primarily crime-based (prompted by the crime committed, rather than a risk assessment), but measures are also triggered for some individuals by their categorisation (which in effects operates as a form of dangerousness trigger). The level of intervention also varies significantly, from minimal oversight to very severe intrusion into, and restrictions on, an offender's life. While intensive supervision measures are intended to be non-custodial, they often blur the distinction between custodial and non-custodial sanctions, such as in cases of compulsory residence. Dessecker concludes that, despite the potential for serious interference with offenders' rights, including their right to liberty under Article 5 ECHR, non-custodial sanctions and measures are less open to challenge on human rights grounds, as they will always appear as a less serious alternative to the imprisonment of high-risk offenders.

In chapter 11, Martine Herzog-Evans uses Anthony Bottom's (1977) concept of 'bifurcation' to compare the legal consequences of criminal conviction in France for 'run of the mill' offenders with those for 'dangerous' offenders. Her discussion of 'run of the mill' offenders surveys the right to vote, criminal records and offender supervision. She shows that, in France, two main principles explain why criminal records are not easily accessible and are easily expunged: the right to be forgotten, and the necessity of supporting the desistance process and of acknowledging achieved desistance. She shows that while very light-touch supervision for 'run of the mill' offenders means that they are subject to few restrictions, they also receive very little support. The result is that such offenders are expected to prepare their own release plan, obtain employment and housing, and engage with community agencies and the health system with little formal support.

In contrast, at the opposite end of the spectrum, dangerous offenders appear to be treated somewhat more harshly but yet tend to receive greater support. Notwithstanding superficial similarities with both the United Kingdom (UK) and Germany, Herzog-Evans shows that the French system for governing dangerous offenders differs significantly in practice from that in other jurisdictions. While common systems exist – longer periods of supervision for the dangerous, preventive detention for dangerous offenders, and a sex offender register – their

use in practice is dramatically limited. 'Safety Measures', ostensibly a form of intensive supervision for dangerous offenders (coupled with the longstanding 'socio-judicial supervision') are cast by Herzog-Evans to amount, in practice, to little more than the supervision provided for 'run of the mill' offenders.

Measures of preventive detention for dangerous offenders (akin to the German system, or the Australian system discussed below) have been little used, to the point that specially-designed institutions that anticipated heavy reliance on group-work therapeutic interventions have never held more than two people at a time. A register of sex offenders exists, but the requirements it imposes on individuals are limited, and there are significant constraints on access when compared to the systems in place in the US, the UK, Switzerland and elsewhere. In short, Herzog-Evans concludes that notwithstanding such measures, dangerous offenders in France retain most of their rights, and certainly to an extent that compares positively to many other jurisdictions. Equally, however, Herzog-Evans shows that the reasons for this situation are not necessarily so positive, and offenders often lack the support needed to help them reintegrate into the community.

Contrasted with these accounts of European policy and practice (with the variations therein), Patrick Keyzer and Darren O'Donovan provide, in chapter 12, a dystopian account of current Australian practice that serves as a cautionary tale for Europe. Australia has increasingly developed a system of civil preventive detention at both State and federal level. Keyzer and O'Donovan describe how this has been coupled with the growth of data-driven policing, whereby risk increasingly underpins everyday practice. Thus on the one hand, for the dangerous offenders *du jour* (sexual and violent offenders), significant interventions exist both within and beyond imprisonment/preventive detention. On the other hand, individuals or groups who may have had few or no criminal convictions, but who nonetheless are regarded as dangerous, find themselves subject to significant criminal justice intervention. Furthermore, issues of migration are increasingly bound up in such risk-based practices: in short, the 'riskiness' (including even 'low risk' categorisation) of individuals serves as a standalone justification for deportation.

Empirical research cited by Keyzer and O'Donovan shows practitioners to have serious reservations about the risk-reduction interventions targeted at dangerous offenders. Not unlike the situation Herzog-Evans describes in France, 'high risk' individuals find themselves essentially having to develop their own 'exit strategies' from civil detention, including identifying appropriate accommodation, developing appropriate social networks and so on. The disproportionate impact on juveniles (in particular) of risk-oriented (ie data-driven) policing is becoming increasingly clear, with juveniles assailed by frequent home visits, stop and searches, and other activities with no therapeutic component. In sum, Keyzer and O'Donovan point to a 'normative drift towards rights deprivation'. This is attributed, in part, to Australia's weak constitutional law framework, which limits accountability and thus facilitates the emergence of such a trajectory.

While casting European frameworks – not least the ECHR – as particularly valuable instruments (see also Brown 2011), Keyzer and O'Donovan's chapter also presents an important cautionary tale.

D. Juvenile Offenders and Legal Consequences of Criminal Conviction

Contributors to Part IV of this book stress the importance of a criminal record regime that adequately differentiates between criminal records acquired as a juvenile and those acquired as an adult. The rationale for this is grounded in the view that the labelling and stigmatisation inherent in the mark of a criminal record impacts negatively on the rehabilitation and reintegration of juveniles.

In chapter 13, Nicola Carr likens juvenile criminal records in England and Wales to an albatross around one's neck: some childhood transgressions can never be shaken off and continue to have consequences later in life. She examines a series of legal challenges in domestic and European courts, highlighting the difficulties with the current regime and the negative impact it has had on fundamental areas of life such as education, employment, travel and family life. She describes cases in which criminal records acquired as a juvenile for minor offending have been subject to disclosure many years after the event, even where the penalty issued at the time was intended to 'divert' the child from the criminal justice system, and thus on the understanding that fewer consequences would result. These disposals may even remain on a person's criminal record *ad infinitum*, regardless of the age at which he or she acquired the record. Therefore, Carr argues that one of the main justifications for the use of diversionary disposals in England and Wales – to avoid the negative effects of contact with the criminal justice system, including the labelling of young people as offenders – is fundamentally undermined by the criminal record regime.

In legislation in England and Wales, a distinction is drawn between records of juvenile and adult offending, in that shorter time periods apply for a juvenile record to become 'spent' than for offences committed as an adult. However, as Carr argues, legal rehabilitation for juvenile offenders is still very limited, because the list of specific professions to which the legislation does not apply and the range of exceptions have expanded significantly over time. Carr considers the implications of this regime in relation to children's rights standards and highlights a paradox: greater access to the criminal records of juveniles has in many instances been justified by reference to the need to protect children.

In chapter 14, Elina van 't Zand-Kurtovic presents a critique of Dutch criminal record screening in the light of childrens' rights standards. She shows that in the Netherlands, like in England and Wales, information can be stored in the Dutch criminal record database for both adult and juvenile offenders for lengthy periods (20 years for minor offences, 30 years for more serious offences and 80 years for sexual offences). Such information is registered as soon as the police submit a case to the public prosecutor's office, so individuals who are merely suspected

of an offence will acquire a criminal record without the need for a conviction. Unlike other European countries, the Netherlands does not provide for the possibility for criminal records to become spent or expunged once a juvenile reaches the age of majority. In the Netherlands, however, criminal record disclosure is highly restricted due to the weight given to the protection of privacy, and the only way for most employers to acquire information on a potential employee's criminal background is by means of an official request for a Certificate of Conduct (see also Meijer, chapter 5 of this volume). According to Dutch policy, criminal record information on juveniles can only be used for pre-employment screening purposes for two years. In cases of violent offending, this period increases to four years. While the Dutch system appears relatively lenient when compared to other systems detailed in this book, van 't Zand-Kurtovic shows, using findings from qualitative empirical research, that having acquired a criminal record as a juvenile can negatively impact young adults' entry into the Dutch labour market.

IV. REFLECTIONS

It is hoped that the analyses of different legal systems presented in this book raise a number of important issues that will stimulate further in-depth legal and criminological research on, and analysis of, the consequences of criminal convictions. Overall, it seems that during the last few decades, preventive measures have been imposed with ever greater frequency on the grounds of criminal convictions. The result of this is that the potential legal consequences of a criminal conviction are expanding in scope.

An important question that requires further research is when and how the legal consequences of criminal conviction should come to an end. A Special Issue of the *European Journal of Probation* explored in some detail the possibility for legal or judicial rehabilitation in Europe. Almost all European countries have some form of 'expunging technique', including: (i) automatic expungement; (ii) expungement by judicial decision, or (iii) expungement by an administrative decision (Thomas 2007: 94). Herzog-Evans (2011) divides automatic expunging techniques into automatic measures, granted without any requirement of the offender (ie reaching a certain age), and measures based on the absence of reconviction.

With regard to automatic expungement, the period after which a criminal record becomes expunged or spent differs between the countries described in this volume. Most countries have adopted a two-step approach to the expiry of recording periods: in the first step, criminal convictions are no longer included in the extract of the criminal record (see Blitsa and Kivrakidou (chapter 8), Morgenstern (chapter 4), Lukács and Vig (chapter 6)), nor are they relevant to the decision whether or not to provide a Conduct Certificate (Meijer (chapter 5) and Kurtovic (chapter 14)). In the second step, criminal convictions are removed from the criminal register altogether. In the latter case, much longer periods apply.

The general justification for expunging criminal records is that after some time, an ex-offender is at no more risk of reoffending than a non-offender. As noted, the expungement periods between the different countries as described in this volume differ from each other. Periods also differ between different groups of offenders, most notably with regard to convictions for sexual offences: in some countries a criminal conviction can have life-long consequences, whereas in other countries the legal consequences of sexual offences are limited in time (although the consequences tend to last longer than for other crimes). Furthermore, the systems as described in this volume distinguish between offences only according to their seriousness (as reflected in the length of the sentence imposed) and do not take into account the findings of reconviction research, including the declining risk of recidivism over time (Blumstein and Nakamura 2009; Kurlychek, Brame, and Bushway 2006, 2007; Soothill and Francis 2009). At what point is a person with a criminal record, who has remained free of further contact with the criminal justice system, at no greater risk than a counterpart of the same age? So far, very limited (criminological) research has been undertaken in Europe on this question (with the exception of Bushway, Nieuwbeerta and Blokhuis 2011 for the Netherlands) and on the implications of such research for policy. This raises the question of what criminological reconviction research can contribute to improving current systems for expunging criminal records, and thereby protect more effectively the dignity and rights of individuals.

Another question on legal rehabilitation is whether an offender should be seen as a passive recipient of legal rehabilitation (ie through the passage of time), or as an active participant in his or her own rehabilitation. Should the offender be able to influence his or her legal rehabilitation and, if so, how? Recommendation No R (84) 10 on the criminal record and rehabilitation of convicted persons is clear on this point: Member States should provide for 'an automatic rehabilitation *after a reasonably short period of time*' and should – in addition – provide 'a possibility of rehabilitation at an earlier moment *at the request of the person concerned*' (emphasis added). However, it is unclear whether all Member States provide the possibility of legal rehabilitation at the request of the ex-offender.

With regard to the question of the extent to which offenders should be able to influence the consequences of their criminal conviction, the contributions in this volume build upon previous research by describing procedures that enable ex-offenders to request legal rehabilitation from the court (see Herzog-Evans for France and Morgenstern (chapters 4 and 11 of this volume), who describes the procedure of 'elimination of the stain of conviction' in Germany). Also, this volume includes procedures in countries not described previously (see Lukács and Vig for Hungary, chapter 6 of this volume). A distinction can be made between mechanisms that allow the offender to request the sentencing judge to exempt the offender from the negative consequences of a criminal conviction at the same time as imposing a sentence (see, for instance, the 'preliminary exemption' in Hungary), and exemption methods that may be employed after

the sentence has become final (see, for instance, the 'subsequent exemption' in Hungary). Usually, these exemption methods are based on merit and/or require some degree of 'worthiness'. In deciding on worthiness, various factors can be of significance: the gravity of the criminal offence; the level of culpability; whether or not the harm caused by the act in question has been repaired (damages paid); whether the offender has paid all of his or her fines; whether he or she had a record of good behaviour whilst incarcerated; and whether he or she has been of good behaviour since release (meaning that he or she has not only not been reconvicted, but also has not been on the police radar).

Another important question that follows from this is whether all ex-offenders should be eligible for legal rehabilitation: should there be a point in time for all offenders where they no longer are affected or restricted by law due to their former criminal conviction? Or is it legitimate to exclude certain offenders from being legally rehabilitated? And if so, which offenders and under what conditions?

The various contributions to this collection demonstrate that there is an urgent need for greater normative debate on the limits on legal consequences of criminal conviction. And if greater limits are desired, how this is to be achieved. As different contributions show, the ECHR offers very little protection to convicted offenders. Within the current framework of the ECHR it seems rather unlikely that the ECtHR can itself set out firmer normative limits on the legal consequences of criminal conviction. The scope of these consequences, and the differences between countries, raises the question of whether harmonisation at the EU level is perhaps needed. Another approach would be to introduce an EU directive on (legal limits on the) rights of former offenders, similar to the guidelines that are in place for victims[6] or suspects.[7]

Adding further complexity, the future relationship between the UK and the EU, and the ECHR/ECtHR, remains at time of writing (and likely for many years) an open question. This raises questions, prompted by insights provided by Keyzer and O'Donovan (in chapter 10 of this volume), about other national or supra-national mechanisms by which the concerns raised throughout this collection can satisfactorily be addressed. The far-reaching ramifications of the ratcheting-up of 'tough on crime' policy and rhetoric over recent decades in many Western nations (UK, US, Australia), and the more recent populist uprisings in parts of Europe and elsewhere (Hungary, Poland, Brazil, Philippines), make it clear that the protection of fundamental rights of convicted offenders will remain a crucial concern.

[6] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

[7] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1.

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