

# Trends and challenges in the Portuguese penitentiary system: from law to practice

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**Abstract:** *This article focuses on the trends and challenges faced by the Portuguese penitentiary system between 2000 and 2017, taking into account the Portuguese Penal Law, penal statistics, national and international reports, and studies regarding the Portuguese prison system. The description of the changes in the Penal Law helps us to understand, on one hand, the changes in penal statistics over time and, on the other hand, the inconsistencies between the law in books and law in practice.*

**Keywords:** *Portugal, Penitentiary system, Penal law, Penal practice, young adults, adults, social reintegration*

## 1. Introduction

The right to freedom and security is outlined in Article 27<sup>2</sup>, of the Constitution of the Portuguese Republic (CPR), under which no one shall be wholly or partially deprived of their freedom, except as a result of a judicial sentence convicting them to an offence punishable by law<sup>3</sup>. Every person who is deprived of liberty must immediately be informed of the reasons for the arrest, imprisonment or detention, and of their rights. Moreover, a sentence or security measure that deprives or restricts

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<sup>2</sup> The present CPR was adopted in 2 April 1976 and it was written by the Constituent Assembly elected on April 25, 1975, one year after the Carnation Revolution. The CPR became effective in 25 April, 1976 and its last revision occurred in 2005 (7th Constitutional Revision).

<sup>3</sup> Exceptions to this principle are detention in *flagrante delicto*, pre-trial detention (both civil and military), detention by judicial decision for disobeying a court decision or to ensure appearance before a competent judicial authority, committal of a person suffering from a mental illness to an appropriate therapeutic establishment, detention of suspects for identification purposes, for the time that is strictly necessary, and the subjection of a minor to educational measures within the framework of Juvenile Justice.

freedom cannot be perpetual in nature (i.e. no life sentences) nor have an unlimited or unspecified duration (Article 30(1) CPR).

The modern Portuguese Penal Code, established by the 1982 Reform<sup>4</sup> is regarded by many as deeply humanistic (P. Albuquerque, 2018; J. Dias, 2004; I. Pinto, 2016) because it focuses on the social reintegration of the offender and establishes that a custodial sentence is a last resort measure. Furthermore, the penal code sets the maximum length of a custodial sentence to 20 years, which could be extended to 25 years for certain crimes against humanity, serious terrorist crimes, or for the co-occurrence of crimes (J. Costa, 2017). Life sentences were abolished in 1884, and since 1911, sentences of undetermined duration cannot be applied, except in the cases of offenders with severe mental illness (I. Pinto and M. J. Antunes, 2018). Finally, the CPR prohibits the extradition to countries where the maximum punishment is higher than in Portugal.

Influenced by the legal science of the 1960s and the currents of criminology linked to the study of criminogenic social factors, the Portuguese law defines imprisonment as an exceptional sanction that needs to be replaced by non-custodial or non-institutional penalties - especially regarding minor crimes (J. Dias, 2004; R. Pinto, 2016). However, when applied to large-scale criminality, Portuguese legislation emphasizes the preventive and resocializing purposes of prison sentences (R. Pinto, 2016; B. Santos et al., 2003), while safeguarding the individuals' fundamental rights (P. Albuquerque, 2018; J. Dias, 2004; I. Pinto, 2016; R. Pinto, 2016). In this way, Portugal integrates in its legislation the international guidelines on the execution of sentences.

The 2008 financial and economic crisis strongly affected political options within the Ministry of Justice, leading to significant staffing cuts and closure of facilities in local justice services. Since then, services all over the country were reduced to a minimum, and many of the previous social, educational, employment, health, economic, and judicial responses collapsed (M. J. Carvalho, 2014). This means that essential services, provided to respond to the needs of communities and the justice system, have been seriously affected. The logic of budgetary cutbacks became central in the Portuguese State's administration of public policies, and

<sup>4</sup> In practice since 1983; by the end of December 2018 was on its 47th version: Law 44/2018, 9th August.

many political measures taken regarding Penal and Juvenile jurisdictions stem from the need to reduce expenses.

An example of these changes is the merger between the former General Directorate for Social Reintegration (DGRS) and General Directorate for Prison Services (DGSP) into the new General Directorate of Reintegration and Prisons Services (DGRSP) (Decree Law 123/2011, of December 29). Thus, the DGRSP is currently a single entity working with the judiciary administration concerning both criminal law and the juvenile justice jurisdiction. As a consequence, from October 2010 to September 2012, the Director of Prison Services accumulated the function of Director of Social Reintegration, simultaneously managing these two Ministry of Justice departments. Until 2012, the enforcement, control, supervision, and later reintegration of citizens sentenced to liberty-depriving and non-custodial measures were ensured by these two separate bodies. Since the changes that took place in 2012, all these functions are assumed by the same entity: the DGRSP.

The DGRSP's mission is to prevent offending and reoffending through the development of policies on crime prevention. Organized into three core components (Criminal Law – prison and probation services; Juvenile Justice; Family Law – acts as Central Authority in the field of international judiciary cooperation for the protection of children and youth)<sup>5</sup>, this department provides support to the courts, from the pre-sentence phase to the enforcement of sentences (institutional and served in the community) or measures applied to adults and youths.

More recently, a deep reform of the Portuguese Judiciary Organization (Law 62/2013 of August 26, Decree-Law 49/2014 of March 27, and subsequent Decrees - September 2014) established a new territorial map of the justice system. The aim was to promote the efficiency and specialization of a functional jurisdiction structure, based on the concentration of judicial offers to provide a better and more flexible judicial response throughout the Portuguese territory.

Three years later, this reform started to be evaluated by the Ministry of Justice, some adjustments have already been made, and new contro-

<sup>5</sup> As Central Authority, the DGRSP has the mission of overseeing the compliance with the established procedures in the framework of the legal international instruments signed and ratified by Portugal.

versial proposals were presented in 2018. This means, Portugal has been registering deep changes in the judiciary system over the last decade, thus more public debate and research are required to analyze the impacts of these changes.

Within this framework, this article discusses trends and challenges faced by the Portuguese penitentiary system in the last years, especially between 2000 and 2017. In order to identify these trends and challenges, we will explore three sources of data: (i) the Portuguese Penal Law, (ii) penal statistics, and (iii) national and international reports and studies regarding the Portuguese prison system. The description of the changes in the Penal Law helps us to understand, on one hand, the changes in penal statistics over time and, on the other hand, the inconsistencies between the law in books and the law in practice.

Another important element in this discussion is the inability to criminally charge individuals below the age of 16. A person between 12 and 16 years of age who commits a crime can only be subject to judicial educational intervention, as defined by the Educational Guardianship Law (Law 4/2015, of January 15, First amendment to the Law 166/99, September 14). A transfer of these juveniles (12-16) to adult courts is illegal, whatever the nature of the offence committed. Thus, a Young Adult's Special Penal Regime was created for individuals aged 16 to 21 at the time of the offense. Nonetheless, some measures defined by this special regime were never implemented, being possible to have minors (younger than 18) inside the adult prison system.

Therefore, when discussing penal trends and challenges in the Portuguese prison system, we further focused on the differences between these age cohorts - teenagers/young adults (16-21 years old) and adults (more than 21 years old). Finally, we will examine the prisoners' social reintegration process, since social and political perception is that Portuguese prison system does not operate as expected by the legislation. This idea is reinforced by Santos et al. (2003), in a report about prisoners' social reintegration: "the prison system does not correspond to what is legally expected of it in order to achieve, in practice, the objectives of the criminal policy embodied fundamentally in the current principles and constitutional norms and criminal law" (B. Santos et al., 2003, page 14).

## 2. Recent evolution of the Portuguese Penal Laws

### *The minimum age of criminal responsibility and the Young Adult's Special Penal Regime*

In 1911, Portugal was one of the first countries in the world to establish a specific legal framework separating the juvenile and adult justice system (Carvalho, 2017). Based on this framework, it is not possible to criminally sentence children below the age of 16 (Law 4/2015, of January 15, first amendment to the Law 166/99, September 14). There has never been a juvenile criminal law in Portugal, and the Portuguese Juvenile Justice does not possess retributive or punitive purposes. Essentially, it differs from most EU countries, giving less importance to the offence than the need for the offender to be educated on the fundamental community values that have been violated by the illicit act. Thus, the Portuguese Juvenile Justice can be regarded as falling in between a welfare model and a punitive or penal one.<sup>6</sup>

The Youth Court has the power to enforce compulsory educational measures to socialize and educate young offenders on the values protected by the penal law, in a process called “education in the law”, which “does not represent moral correction, but is rather – in respect for the freedom of conscience that pertains to all citizens – to educate the minor to pursue a social life that complies with essential legal norms” (A. Rodrigues and A. Fonseca, 2010, page 1035). The system could be described in what Bailleau and Fraene (2009, page 6) considered a “tendency towards bifurcation – a soft approach in most cases and tougher actions against a limited number of adolescent undergoing a custodianship order” that is carried out in Educational Centers managed by the DGRSP, which are separate from the penitentiary system.

Despite still being considered children – as defined by the United Nations' Convention on the Rights of the Child (CRC) (Article. 1) – youth who commit offences at the age of 16 fall under the general penal law, and are regarded and judged as adults (Article 19, Penal Code). The minimum age of criminal responsibility (MACR) is 16 years old, which is

<sup>6</sup> According to the Council of Europe Recommendation Rec(2003)20, in this text, the term ‘juvenile justice’ is used in a broad sense referring to “all legal provisions and practices (including social and other measures) relevant for treating children in conflict with the law” (Doak, 2009, page 19).

also the minimum age for criminal majority<sup>7</sup>, despite the fact that the age of civil majority is at 18 years old (Article. 122, Civil Code).<sup>8</sup>

As a result of the Penal Code Reform of 1982, a Young Adult's Special Penal Regime (YASPP) was defined (Decree-Law 401/82, of September 23) to be applied to those aged from 16 to 21 years, even if individuals aged 16 and 17 are minors from a civil standpoint. This criminal regime is based on the need to establish formal control actions that are better suited to deal with crimes at these ages. In this way, the "juvenile criminal Law thus appears as a category of its own, involving a cycle of life, corresponding to a phase of social latency that makes crime an ephemeral and transient phenomenon" (except from DL 401/82). This special regime is not mandatory, so the judges are required to decide whether or not to apply this regime and justify the decision they make, even when it not applied (Pereira, 2005). This assessment is not dependent on a request from the Public Prosecutor's Office or from the accused, constituting an inherent part of the proceedings, including cases where there is insufficient evidence.

It is important to highlight that two age levels are included in the YASPP: one involving those 16 and 17 years old, minors, but criminally imputable; and the second concerning adults, from the civil point of view, between the ages of 18 and 21. The legislator specified a series of rules for the joint application of educational and penal orders for the same youth. More specifically, there is the possibility for a youth court to intervene and enforce an educational measure for a minor who has committed a criminal offense before reaching the age of 16 and who is under 18. But for those over age 16 who committed a crime for the first time, these rules cannot be enforced. Thus, there is a legal gap regarding individuals between 16-21 years old, as they by trialed as adults, facing the

<sup>7</sup> The establishment of MACR in Portugal follows Article 40(3) of the CRC (States' parties have the obligation to set a minimum age of criminal responsibility below which children shall be presumed not have the capacity to infringe the penal law), Rule 4 of the Beijing Rules (the beginning of MACR shall not be fixed at too low an age level, bearing in mind the child bio-psychological development and the level of maturity), and the General Comment 10, paragraph 30-35, Committee on the Rights of the Child (the MACR below the age of 12 years is considered by the as not internationally acceptable).

<sup>8</sup> Introduced by Decree-Law 496/77 of November 25, 1977, which brought the Civil Code into line with the principles of the 1976 CPR, approved following the democratization process after the Revolution on April 25, 1974. Until then, the majority age was 21 years old.

penal jurisdiction rather than juvenile jurisdiction. The major problem is that these young adults (age 16-21) serve their prison sentences in adult prisons and the system hardly can separate them from adults, without any true distinction between their sentences and those applied to adults.

Based on the recognition of the potentially high criminogenic effect of prison sentences and on the social and personal vulnerabilities affecting the transition stage from youth to adulthood, the YASPP provides for the special mitigation of the prison sentence (Article 4), depending on the judge's assessment. This assessment is based on two conditions: less censorship, due to the young person's lower level of maturity (both psychosocial and biological); and the overall need for criminal prevention in the Portuguese society. Some specific mitigating regulations and alternatives may be employed if the judge considers that there are more advantages to the young adult's social rehabilitation. In these cases 'corrective measures' can be employed to youths between ages 18-21, as an alternative to a prison sentence lower than 2 years (Article 6). These corrective measures include: admonition, imposition of obligations, fines, and detention in a detention center. However, there is a major issue in the implementation of this Regime: the detention centers were never built. As an alternative, the law allows for and promotes reduced sentences and house arrest with electronic monitoring (I. Pruin and F. Dünkel, 2012).

Despite these alternatives, young adults have been neglected in the last decades, as it is not possible to fully implement the special regime due to the lack of articulation with several changes in the Portuguese Penal jurisdiction. Not only is it based on a law dating back from 1980s, which has not been reformulated since then, but the evolution in youth lives forces us to consider the need for new and updated responses, to secure an adequate reaction to youth criminality, as is already happening in other EU countries.

#### *From the Penal Code Reform of 2007 to the current Penal Law*

The most recent major Penal reform occurred in 2007<sup>9</sup>. This reform took into account the amendments proposed by the Penal Reform Mission Unit created by Council of Ministers Resolution 113/2005 (29 July),

<sup>9</sup> Previous reforms, especially since the Prison Reform of 1936 to the Penal Code Reform of 1995, can be found on Santos et al. (2003) report.



as well as the recommendations contained in the Report produced by the Commission for the Study and Debate on the Prison System (12 February 2004). This Commission has generally advocated for limiting the application of prison sentences to more serious crimes, alongside with the diversification of non-custodial sentences and the strengthening of parole. Moreover, Recommendation 3-B/2004 by the Ombudsman<sup>10</sup> on the reduction of deprivation of freedom in imprisonment was considered. Finally, multiple proposals presented by representatives of the Superior Councils of the Judiciary and the Public Prosecutor's Office, the Bar Association, the criminal police, the General Directorate for Prison Services, the Institute for Social Reintegration, the Cabinets for Legislative Policy and Planning, and for the International/European and Cooperation Relations of the Ministry of Justice, and the university professors, who collaborated with the Penal Reform Mission Unit were considered.

Among the main changes proposed, we are especially interested in the following: (i) the diversification of non-custodial sanctions, thus adjusting penalties, promoting the social reintegration of sentenced individuals, and preventing recidivism; (ii) harsher responses to serious criminal phenomena, such as human trafficking, forest fires, environmental crimes, and counterfeiting; and (iii) the criminalization of new crimes against personal and sexual freedom, and the inclusion of new aggravating circumstances for crimes against life and physical integrity<sup>11</sup>.

Therefore, there are two measures that may differently impact the prison population. On the one hand, the introduction of alternative sentences to imprisonment avoid the desocialization process and the contact with the prison system, and may lead to a decrease in the prison population. These alternative sentences include, for instance, electronic surveillance, community service and suspended sentences. Individuals under electronic surveillance may serve time in their homes, for a maximum of

<sup>10</sup> The Ombudsman is a State body (Law No. 9/91, April 9) responsible for receiving complaints of all persons who feel harmed by unfair or illegal public administration's acts or when their fundamental rights are violated, including prisoners. More information on the Portuguese Ombudsman can be found here: <http://ennhri.org/Portuguese-Ombudsman>.

<sup>11</sup> Law 59/2007, approved by Decree-Law 400/82, of September 23, was published in *Diário da República* (September 4). More information on main changes in the Penal Reform of 2007, as well as the original documents may be found on the General Direction of the Politics of Justice.: <http://www.dgpj.mj.pt/sections/politica-legislativa/anexos/legislacao-avulsa/revisao-do-codigo-penal/>.



one year and, and in exceptional cases (pregnancy, age, sickness, disability, dependent minor or family member) up to two years. Community service alternatives also underwent some changes, being it can replace prison sentences for up to two years rather than just one year. Furthermore, it is possible to suspend prison sentences up to five years rather than three years. On the other hand, harsher sentences for certain crimes and the criminalization of new crimes took place, which may lead to an increase in the prison population, either by having more people sentenced to prison as well as having longer sentences. Either way, these changes send a clear message on the differentiation between minor crimes - with lower sentences, and the option of non-custodial sanctions - and major crimes that must have a stronger penal response.

The Portuguese Penal Code focuses on custodial sentences as a step towards the reintegration of individuals into society, being the success of this reintegration determined by the existence or not of recidivism after release. Thus, the ex-prisoner is considered to be reintegrated if there is no future criminal involvement. As can be read on article 42, paragraph 1 (Decree-Law 48/95): "The execution of the prison sentence, serving society's defense and preventing the practice of crimes, should be guided towards the social reintegration of the prisoner, preparing him/her to conduct his/her life in a socially responsible manner, without committing crimes". The social reintegration of the prisoner, as a means of preventing recidivism, is therefore one of the objectives of the application of a prison sentence. This element is reinforced by the Criminal Policy Law for 2015-2017, which defines as a priority "the promotion of reintegration of perpetrators of crimes in society (...) from policing to the execution of sentences" and is also transposed on the Law 115/2009, of October 12 - Code of Execution of Sentences and Measures Privative of Freedom (CEPMPL).

#### *The execution of custodial sentences - Law 115/2009, October 12*

Regarding prison sentences, the European legislation highlights a number of concerns about the dignity of detained persons, and a set of recommendations to answer those concerns. Some documents that convey these recommendations are the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Nelson Mandela Rules, and the Resolutions and Recommendations of the Council of Europe. There are

three principles that cross the spectrum of these documents: (i) by recognizing the manifest and latent dehumanization of prisons, there is an attempt to humanize them through various measures (*prison will never be human, but we can humanize it*); (ii) the execution of a prison sentence is in itself a punishment, in this way the person already in prison (i.e. being punished) cannot be further punished, and is entitled to basic rights (*prison as punishment, not for punishment*); and (iii) social reintegration is a key objective of the prison sentence, and should guide the activity of the professionals and prisoners, since the latter will necessarily leave the prison at the end of the sentence, and must be able to reintegrate society rather than return to criminal practices and/or prison (*they may go to prison but they all come back*).

The legal document that defines the guiding principles for the execution of custodial sentences is the Code of Execution of Sentences and of Freedom Privative Measures (CEPMPL - Law 115/2009, October 12). This code follows closely the European recommendations, in the pursuit of respect for detained individuals' dignity, especially taking into account the person's age (young or elderly), gender (need to consider specific female health, hygiene, maternity protection and parental education), and nationality and ethnicity (allowing the expression of individuals' cultural values and alleviating any difficulties with social integration). Furthermore, there is a need to maintain the prisoners' civil and legal rights, individualize the prisoner's in-prison treatment, mitigate the harmful consequences of deprivation of liberty, and promote the responsibility of the detainees in the planning and concretization of their social reintegration plan through programs available in prisons and, finally, a need for better articulation between prisons and communities.

With regard to the individualization of the prison sentence (Article 5), prison treatment is defined as a set of social reintegration activities and programs, aimed at preparing the prisoners for freedom by developing their responsibilities, acquiring skills that enable prisoners to engage in a prosocial lifestyle, and provide for prisoners' needs after release. This individual treatment is necessarily programmed and phased to progressively allow the prisoners to prepare for life outside the prison.

The instrument used for planning the prisoners' treatment is the Individual Readaptation Plan (PIR), exposed in Article 21. The PIR is aimed at preparing prisoners for freedom by establishing adequate mea-

asures and activities during imprisonment, as well as their duration and phasing, in particular regarding education, vocational training, work, health, socio-cultural activities and contacts with the outside. This plan is designed based on the assessment of the prisoner's needs; it is discussed and decided alongside the prisoner, and then approved by the prison administration and the Court of Execution of Sentences (TEP). In addition to those activities, the execution of the custodial sentence presupposes the prisoners' participation in a set of specific programs<sup>12</sup>, which allow them to acquire or strengthen personal and social competences, to promote orderly coexistence in the prison establishment, and encourage the adoption of socially responsible behaviors (Article 47, paragraph 1).

Participation in these activities and programs is also important for a more flexible execution of the sentence. This means that the prisoners' participation in any of the activities or programs available in the prison is one of the necessary elements to evaluate if they are eligible for specific measures, such as temporary release programs<sup>13</sup> and parole. These measures aim at promoting and maintaining family and social ties, helping prisoners prepare for life after they are released. In this way, based on the law, prisoners' social reintegration is seen possible when they go through a process of individual transformation, i.e., rehabilitation or treatment. According to the Penal Code (2010 -, Article 61, paragraph 2/a), for parole to be granted the circumstances of the criminal case must be considered. Specifically, the prisoners' previous life, their personality, and their evolution during the incarceration period are evaluated, as well as the likelihood that, once released, the prisoners will conduct their lives in a prosocial, law abiding manner. The way to evaluate the execution of the sentence is based on several elements, including the prisoners' completion of the treatment or programs as contemplated on the PIR.

<sup>12</sup> To access a list with all the existing programs, access the DGRSP website: <https://dgrsp.justica.gov.pt/Justi%C3%A7a-de-adultos/Penas-e-medidas-privativas-de-liberdade/Programas-e-projetos/Programas-espec%C3%ADficos-de-reabilita%C3%A7%C3%A3o>.

<sup>13</sup> There are two types of temporary release programs: 1) a jurisdictional temporary release that can last between 5-7 day every 4 months, and aims at promoting a reconnection with family and community before release (article 76/2, CEPMPL); and 2) an administrative temporary release that can last 3 days every 3 months, aimed at promoting relationships with family and community, but can only be granted to prisoners who successfully completed a jurisdictional temporary release and are closer to their release date.

The General Regulation of Prisons (approved by Decree-Law 51/2011) operationalizes the CEPMPL, to a certain extent. This General Regulation standardized the procedures for the entire Portuguese penitentiary system. In its Articles 67 to 69, the criteria for assessing the prisoners in preparation for their prison treatment, the programming of the prison treatment, and the execution, modification and planning of the PIR are set out in detail. Based on this Regulation the prison staff responsible for these procedures are those responsible for monitoring the execution of the sentence, the surveillance and security services, and (when necessary) clinical services. That is, prison directors, case managers (correctional treatment specialists), prison guards, and clinical staff should work together in the evaluation, programming and implementation of the prison treatment. The PIR is reviewed annually and has to be approved by the prison director and the TEP.

Indeed, one of the most significant changes in the Code and in the General Regulation was the jurisdictionalisation of penal execution. The TEP began assuming some tasks that were previously performed by the prisons' directions. In addition to determining the sentence, and monitoring and supervising the execution of the sentence, the TEP became responsible for approving all the PIR as well as approving the decision of the Director of the Prison Services to place the prisoner in an open regime abroad<sup>14</sup> (Article 91, paragraph 3, CEPMPL).

Finally, there is one more aspect regarding the Portuguese legislation that warrants discussion. Expressions such as "as much as possible" appear constantly in the law, especially with regard to sentence execution. Therefore, laws are created and revised following the international guidelines, but the law is written in a way that allows for the possibility of not being able to comply with the legislated requirements. In practical terms, the prisoners who do not have access to activities or programs in the prison cannot be favorably evaluated for a temporary release program or parole as they do not have the necessary evaluation elements to present to the TEP. Thus, they might spend more time incarcerated when compared to counterparts that had access to programming and

<sup>14</sup> An open regime abroad is characterized by the development of activities such as education, vocational training, work or other programs in a free environment, without direct supervision of the prison staff (see Article 12 and Article 14 of the Law 115/2009).

obtained positive evaluations of progress. Moreover, these individuals have no ability to defend themselves from the legal point of view, as the possibility of not having programming falls under the purview of the law. Nevertheless, having “lack of resources” for programming (and thus for prisoner’s evaluation) goes against international guidelines, namely the European Penitentiary Rules, which states that the lack of resources should not be invoked for any violation of prisoners’ rights (Rule 4).

### **3. Exploring penal trends: characterization of the Portuguese prison system and its population**

#### *Methodological note*

At the present time, the Directorate General for Justice Policy (DGPJ) is the division of the National Institute of Statistics responsible for Portuguese statistics regarding the Justice sector. For this paper we analyzed data on the penitentiary system as provided by the DGPJ to the authors.

The current Information System for Justice Statistics (ISJS) is a product of the Hermes Project - Reformulation Project of the Justice Statistics Information System, promoted by the Ministry of Justice in 2003. The objectives of this project were (i) to change the way statistical data was collected, (ii) to improve the data collection process, and (iii) to promote data availability online. Thus, until December 31, 2006, data collection was conducted in paper format, and after January 1, 2007, it started being collected electronically using specific platforms. For participating entities that did not have these platforms, such as the DGRSP, data was collected using specific online forms. Therefore, data between 2005 and 2017 from the penitentiary system are based on the Prison Information System (SIP), and were electronically sent to the DGPJ via Excel forms filled by the DGRSP.

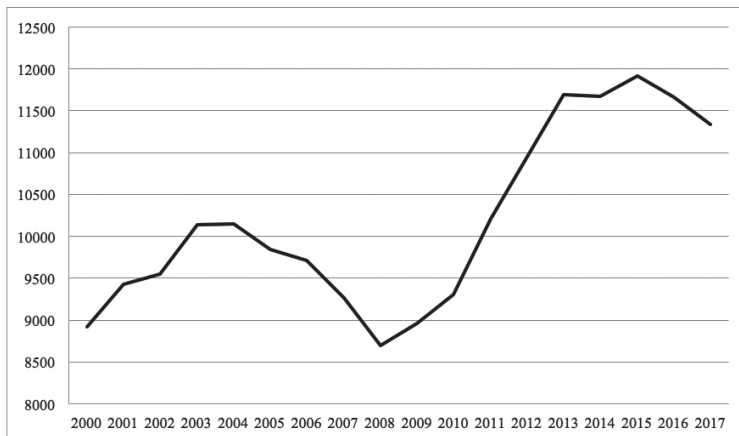
The ISJS data are obtained by aggregation of raw data and subjected to a descriptive analysis. The information is gathered as established by Law 22/2008 of May 13 (Law of the National Statistical System), and the data is all de-identified, assuring that the prisoners cannot be identified.

All data under analysis is based on the statistics available on the December 31 of each year between 2000 and 2017.

### *Prison population and the prison system*

Studies on the evolution of the Portuguese prison system clearly indicate the progressive increase in the number of prisoners since the 1980's. The incarceration rate has grown more than 2.5 times since the beginning of the 1980's until 2013 (from 5,352 prisoners in 1980 to 14,284 in 2013) (see R. Pinto, 2016, page 139). When exploring the evolution of the prison population from 2000 to 2017 (see figure 1), we can see that the amount of prisoners decreased between 2003 and 2008 (from 13,866 prisoners to 10,813), rapidly increasing after that from 2008 to 2015 (14,241 prisoners), and then showing a very slight decrease until 2017 (13,463 prisoners). Thus, despite the decrease in the total number of prisoners observed between 2000 and 2008, in 2017 the number of prisoners was again above 13,000, as in 2000. According to the Council of Europe Penal Statistics - SPACE I, in 2015 Portugal had a total prison population rate of 137.5 per 100,000 inhabitants, which established the country as very punitive compared to its European counterparts (M. Aebi, M. Tiago and C. Burkhardt, 2016), and this rate remained comparatively high in 2017 with 130.8 prisoners per 100,000 inhabitants.

**Figure 1. Number of prisoners in Portuguese prisons (2000-2007)**



*Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice*

Despite the slight decrease in the number of prisoners between 2015 and 2017, the total number of prisoners still remains especially high, not only considering the ratio of prisoners to general population, but also taking into account that Portuguese prisons are overcrowded - in 2017 were at 107% capacity (12,591 available beds for 13,463 prisoners) (M. Aebi, M. Tiago and C. Burkhardt, 2016) -, and that following the international trends, crime rates for general and violent criminality continue to decrease<sup>15</sup> (RASI, 2018).

Regarding the characteristics of the incarcerated population, the great majority is male, above 20 years old, and Portuguese<sup>16</sup> (figures 2, 3 and 6). Therefore, when evaluating different age groups (16-20 vs. 21+), genders (male vs. female) and nationalities (Portuguese vs. foreign), it is not surprising that between 2000 and 2017 the trends for male prisoners, for those over 20, and for Portuguese prisoners follow an identical pattern to that of the overall prison population, as seen in figure 1. However, when we take a closer look to the trends regarding female prisoners' population, those under 21 years old and foreign follow a different pattern.

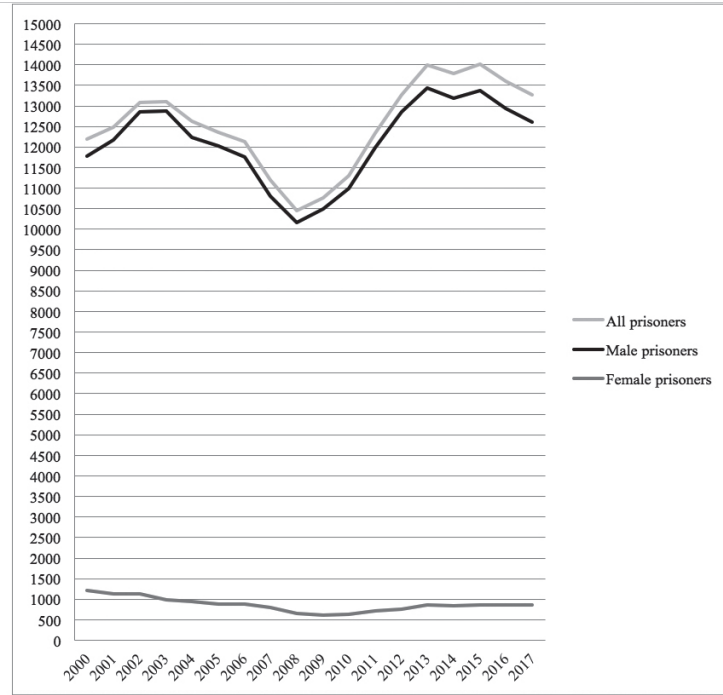
While male prisoners follow an identical trend described above for the general prison population (figure 2), females follow a different pattern. More specifically, the number of female prisoners in Portuguese prisons (figure 3) decreased between 2000 (1216 prisoners) and 2009 (613 prisoners), following the pattern observed in the overall prison population and the male group. As expected there was also an increase in the number of female prisoners between 2010 and 2017; nevertheless this increase was not as substantive as the one observed in the overall prison population, with considerably fewer women in prison in 2017 (856 prisoners) than in 2000 (1216 prisoners) (figure 3).

<sup>15</sup> Between 2008 and 2017 the general criminality decreased 18.8% and violent criminality decreased 37.1% (RASI, 2018).

<sup>16</sup> Direct or indirect collection of data on ethnicity by the Portuguese State is prevented by law, to avoid reinforcing stereotypes or racialization of the Portuguese society – see Decree-Law 28/94 (S. Gomes, 2014). Therefore, in official statistics the category used is foreign vs. national, being a foreigner anyone who does not prove to be a Portuguese national, as defined in the Decree-Law 244/98, of August 8, and amended by the Decree-Law 4/2001, of January 10 and the Decree-Law 34/2003, of February 25 (and now revoked by the Law 23/07, of July 4).



**Figure 2. Comparison between number of male and female prisoners in the Portuguese prisons (2000-2007)**



Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice

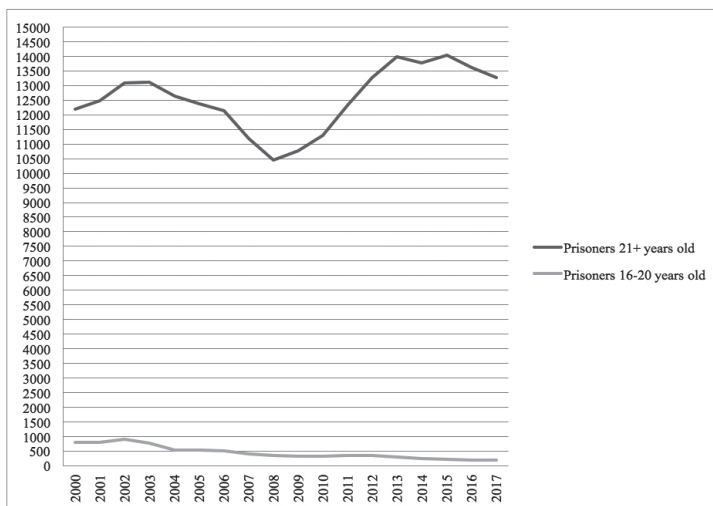
**Figure 3. Number of female prisoners in Portuguese prisons (2000-2017)**



Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice

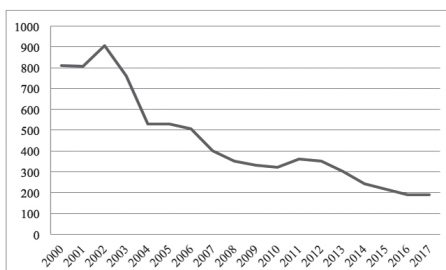
Additionally prisoners aged 16 to 20 also present a different trend than the one observed for the overall prison population (figure 4). For this group there is a steady decrease in the number of prisoners between 2000 and 2017, going from 813 prisoners to 189 prisoners. As for those ages 21 and above, as they comprise the majority of the Portuguese population, as expected, they follow an identical pattern to that of the general prison population (figure 5).

**Figure 4. Comparison between number of prisoners aged 16-20 and 21+ in Portuguese prisons (2000-2017)**



Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice

**Figure 5. Number of prisoners ages 16-20 in Portuguese prisons (2000-2017)**



Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice

The total number of foreign prisoners also increased between 2000 and 2017, going from 1,547 prisoners to 2,144 prisoners in 2017. Thus, for this specific group the number of prisoners in 2017 was considerably higher, matching more closely the trend observed in the overall prison population. When analyzing the data in more detail, the largest increase in the number of foreign prisoners took place between 2001 and 2002, increasing very slightly after that, and showing a minor decrease in 2008, followed by a slight increase after that. Nonetheless, the curve seems to be more or less constant when compared with the variations observed in the overall prison population (figure 6).

**Figure 6. Comparison between number of Portuguese and foreign prisoners in Portuguese prisons (2000-2017)**

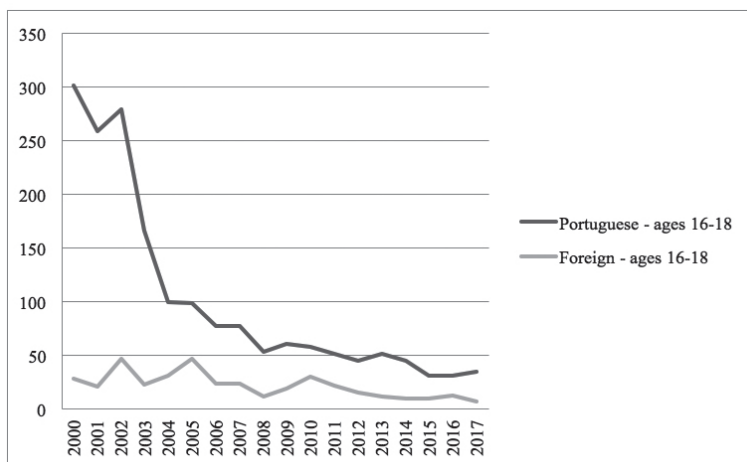


*Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice*

Based on the available data, we can further expand the comparisons between Portuguese and foreign prisoners, taking into account age and gender. It is important to highlight that the data for age/nationality was coded differently than the remaining data, with age groups ranging from 16-18, 19-24 and 25 years, which limits the comparisons that can be established. When comparing the number of Portuguese and foreign prisoners by age group, we note the trends are quite different (figure 7).

Regarding the number of Portuguese prisoners aged 16-18, there was a sharp decline in the number of prisoners between 2002 and 2004, going from 301 prisoners to 100, numbers that continued to go down at a steady rate reaching a total of 35 prisoners in 2017. On the other hand, the number of foreign prisoners from the same age group was more constant with smaller variations throughout the years. Specifically, there was an increase in the number of foreign offenders between 16-18 years old from 2001 to 2002, where the total number approximately doubled (2001 - 21, 2002 - 47), and a similar pattern can be found between 2003 (23 prisoners) and 2005 (47 prisoners), and again between 2008 (12 prisoners) and 2010 (30 prisoners) (figure 7). Between 2011 and 2017 there was a constant decrease in the number of foreign prisoners aged 16-18, going from 22 prisoners in 2011 to 7 in 2017.

**Figure 7. Comparison between number of Portuguese and foreign prisoners aged 16-18 years old in Portuguese prisons (2000-2017)**



*Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice*

The 2002 increase in both Portuguese and foreign prisoners between 16-18 years old can be (at least partially) explained as an outcome from the Child Law Reform approved in 1999, which was effectively implemented in 2001, associated to the highest peak in violent juvenile oc-

currences registered by the police from 1997 to 2001. Deep changes in the juvenile justice Law led to the early return to the community of many youth aged 15 or more that usually would return later to the system as juveniles to be placed in juveniles institutions. With the legal changes, that possibility was no longer available so a potential explanation focus on the continuity of their violent criminal trajectories in the transition to adulthood ended up in prison.

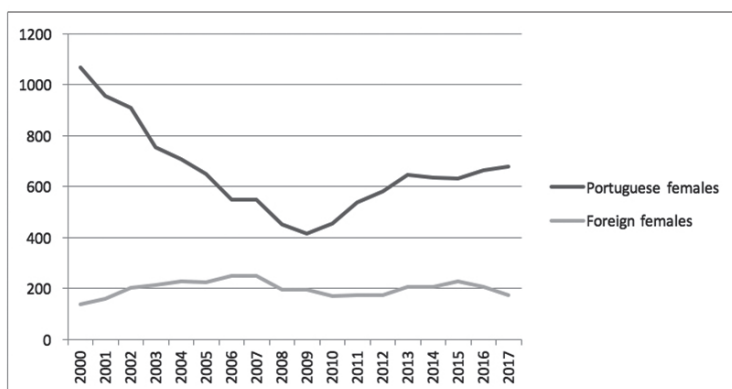
As for the 2005 increase in the number of foreign prisoners ages 16-18, it might be somewhat associated with the intense and controversial mediatization of a purported large scale robbery that took place in the summer of 2005 in the Lisbon area. In short, in June a large group comprised of approximately 500 youths robbed everyone who was on Carcavelos beach (close to Lisbon). These youths were mostly from the Lisbon suburban neighborhoods, characterized by concentrated disadvantage, and were mainly of African origin or descent. In the following months, the public and political debate continued and one core question was the need for more severe prison sentences in such cases. This exceptional event is still regarded as a case study, as it showed the tensions lived among youth in the Lisbon Metropolitan Area.

Regarding the comparison between Portuguese and foreign prisoners by gender, some differences can also be observed. Provided that a large majority of prisoners were male, the general trends observed for the overall Portuguese vs. foreign prison population (figure 6) were identical to those observed for the Portuguese vs. foreign male prison population. It is further relevant to note that the ratio of foreign to Portuguese male prisoners was of 1 to 8 in 2000, and this ratio went down to approximately 1 to 5 in 2017. Portuguese and foreign female prisoners follow different trends (figure 8).

While Portuguese female prisoners follow similar trends to those observed in for the overall female prisoners in the Portuguese prisons (figure 4), foreign female prisoners follow a different pattern. In this way, following the overall trend, the total number of Portuguese female prisoners decreases between 2000 and 2008, increasing after that until 2012 when the number plateaued. As for foreign females, we observe a consistent increase between 2000 and 2007 (from 138 to 249). These numbers slowly decreased until 2012, reaching 175 prisoners, but started increas-

ing after that until 2015. Between 2015 and 2017 there was quite a sharp decrease in the total number of female foreign prisoners, going from 229 to 176. Finally, similarly to what we found in males, the ratio of foreign to Portuguese female prisoners was approximately 1 to 8 in 2000, and in 2017 the ratio had gone down to 1 to 4, i.e. the differential between foreign and Portuguese prisoners decreased between 2000 and 2017.

**Figure 8: Comparison between number of Portuguese and foreign female prisoners in Portuguese prisons (2000-2017)**

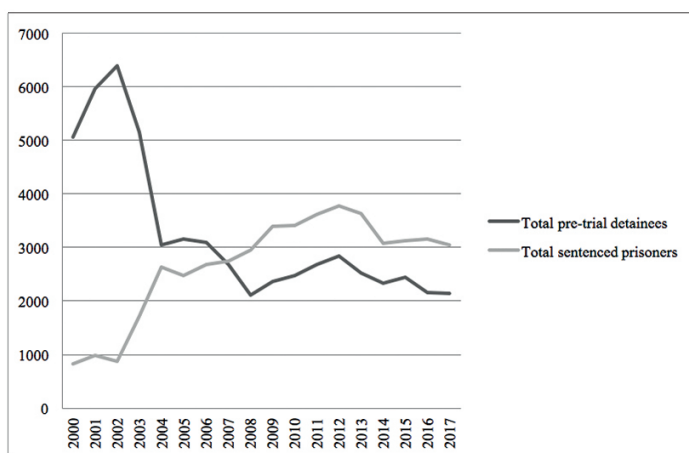


*Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice*

In terms of the prisoners legal status at the time of imprisonment, two groups need to be considered, those entering the prison as pre-trial detainees and those who enter the prison as sentenced prisoners. It is important to highlight that, while in other locations pre-trial detainees are held in separate institutions (e.g. jails), in Portugal they are held in prisons while waiting for trial. When comparing pre-trial detainees vs. sentenced prisoners, these follow opposite trends between 2000 and 2017 (figure 9). Although there was an increase in pre-trial detainees between 2000 and 2002, between 2002 and 2008 the number of pretrial detainees entering prison system sharply decreased, going from 6393 detainees to 2116 detainees. After that, the number of pre-trial prisoners presented some small variations remaining within the 2000 range, being at 2135

pretrial detainees in 2017. As for the number of sentenced prisoners, we observed the opposite trend. Between 2000 and 2003 there was a large increase in the number of sentenced prisoners entering the prison system (from 829 to 1714), this number continued to consistently grow until 2012, reaching a maximum of 3770 prisoners, more than 4.5 times the total of sentenced prisoners entering prisons in 2000. Between 2013 and 2017 there was a slight decrease in the number of sentenced prisoners entering the prison system, remaining within the 3000 range (3051 in 2017). In this way, the number of sentenced prisoners surpassed that of pre-trial detainees in 2007 and has remained higher ever since, even though the difference is not as marked as in early 2000's.

**Figure 9: Comparison between number of pre-trial detainees and sentenced prisoners that entered Portuguese prisons (2000-2017)**



*Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice*

As with previous data, when separating the different legal status groups by gender, we observe similar trends between the male groups and overall trends, and more substantial differences with the female groups. In this way, for males the trend of pretrial detainees and sentenced prisoners remain identical to the overall trends. In other words, there was a



sharp decrease in the number of pre-trial detainees between 2002 and 2008, with a slight increase after that, and a sharp increase in sentenced prisoners between 2000 and 2008, surpassing the number of pre-trial detainees in 2007. For females although the same pattern of decreasing numbers of pretrial detainees and increasing numbers of sentenced prisoners was observed, there are some differences worth notice (figure 10). One of the biggest differences is that the number of sentenced prisoners came close to that of pretrial detainees in 2008, but only effectively surpassed it in 2016 (192 pretrial vs. 210 sentenced). Despite this, we still observe the sharp decrease in pre-trial detainees between 2000 and 2008, and a slower, but still marked, increase in sentenced female prisoners during the same period. Between 2008 and 2017 the number of pre-trial and sentenced female prisoners remained relatively close, around the 200 range.

**Figure 10. Comparison between number of female pre-trial detainees and female sentenced prisoners that entered Portuguese prisons (2000-2017)**

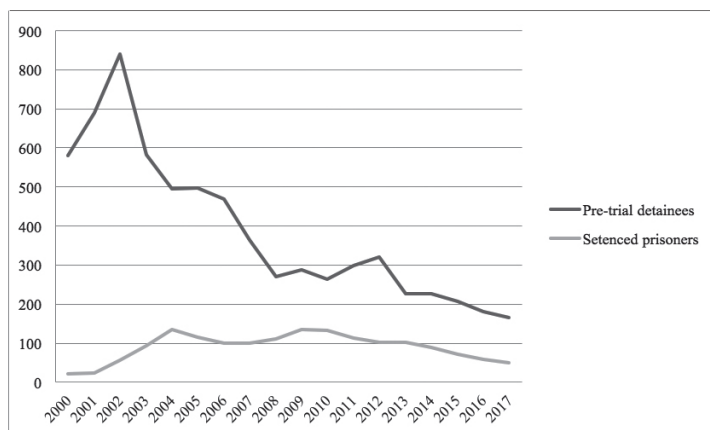


*Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice*

Finally, we looked at trends in regarding legal status by age group. For the pretrial detainees and sentenced prisoners aged 21 or older, the

pattern was very similar to the overall trends for these groups. Specifically, as the number of pre-trial detainees went down the number of sentenced prisoners went up, being that the number of sentenced prisoners surpassed that of pre-trial detainees in 2007, remaining higher until 2017. Given that over 80% of both pre-trial and sentenced prisoners were over 20 years old, it is not surprising to see this group follow the same pattern as the overall trend. However, when looking at the trajectories for individuals aged 16-20 a very different pattern emerges. In fact, for this age group the number of pretrial detainees always remained higher than the number of sentenced prisoners (figure 11). Between 2003 and 2017 there was a decrease in the overall number of pre-trial prisoners aged 16-20 entering prison (from 839 detainees to 165 detainees). For the same period, the number of sentenced prisoners between 16-20 years old initially increased between 2000 and 2009 (from 21 prisoners to 135 prisoners), but steadily decreased after that reaching a total of 50 sentenced prisoners belonging to this age group in 2017 (figure 11).

**Figure 11. Comparison between number of pre-trial detainees and sentenced prisoners aged 16-20 years old that entered Portuguese prisons (2000-2017)**



*Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice*

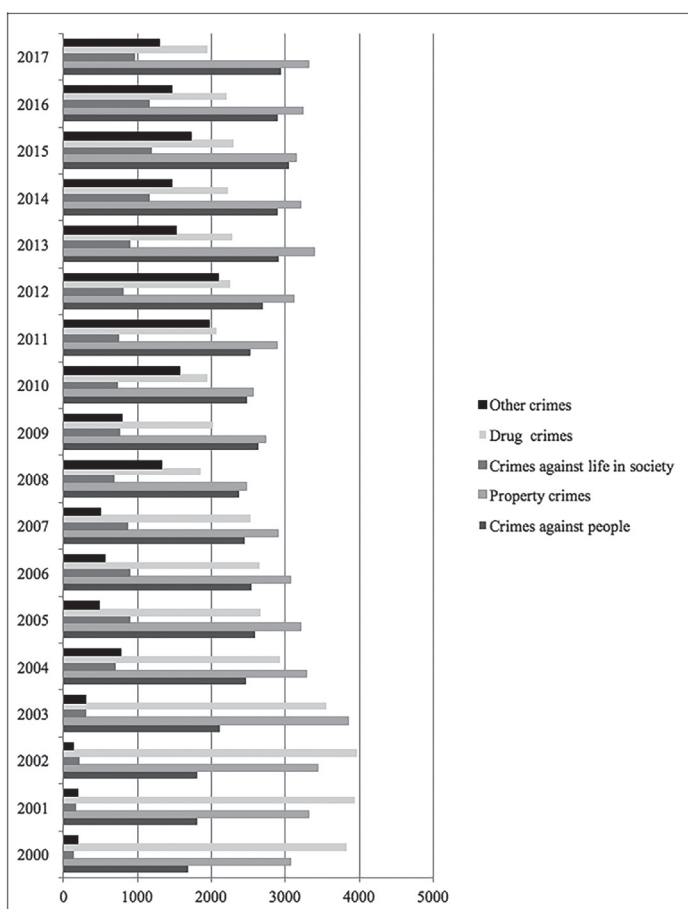
Despite the differences in terms of prisoners entries by legal status, it is important to mention that the rate of prison entries in Portugal is relatively low (51.9%) when compared to the European rate (195.7%). Moreover, Portugal also has a very low rate of prisoner releases, 54.6% when compared to the European rate (154.3%) (M. Aebi, M. Tiago and C. Burkhardt, 2016). This means that, although fewer people are entering in prisons in Portugal, they tend to be imprisoned for longer periods of time when compared to other European countries. While prison sentences in Portugal tend to be above 3 years and up to 20 years, if we look at their distribution we see that 19.3% represent 3-5 year sentences, 36.4% 5-10 year sentences, and 15.3% 10-20 year sentences. This higher incidence of 3-5 year sentences contrasts with what is seen in other European countries, where individuals are more frequently sentenced to less than 3 years in prison (24.6% 1-3 years sentences, 19.3% 3-5 year sentences, 21.6% 5-10 years sentences). As a result, the time spent in prison in Portugal is 3 times higher than the European average (31.3 months, compared to 10.9 months in Europe) (M. Aebi, M. Tiago and C. Burkhardt, 2016).

This results in what Cunha (2008, page 15) called a 'stock effect' or 'cumulative effect' on the prison population: the prison population rotates less because individuals remain in prison longer. This is due, to a certain extent, to legislative changes, such as the revision of the 1995 Penal Code and to the reform of the Penal Code of 2007. The revision of the 1995 Penal Code substantially impacted the criminal framework for certain crimes, in particular for crimes against people, and stipulated new requirements for granting parole, favoring an increase in the average length of prison sentences. Moreover, the reform of the Penal Code of 2007 increased certain criminal penalties of imprisonment and fixed new charges for more serious criminal phenomena (R. Pinto, 2016, page 140). In fact, we can observe the impact of this 2007 reform in many of the trends discussed here.

However, we need to take a closer look at crime types to better explore this association between the Penal Code Reform of 2007 and the changes in the penitentiary system. By looking at figure 12, we can see that between 2000 and 2017 there is an increase of prisoners sentenced for property crimes (from 3072 prisoners in 2000 to 3321 prisoners in 2017), crimes against people (from 1686 prisoners in 2000 to 2947 in 2017), crimes against life in society (from 139 prisoners in 2000 to 964 prisoners in 2017) and other crimes

(from 188 prisoners in 2000 to 1303 prisoners in 2017). On the other hand, drug crimes decreased between 2000 and 2017 (3829 prisoners in 2000 to 1950 prisoners in 2017), which means this type of crime stopped being the most prevalent crime in the Portuguese prison system. This decrease appears to be related with the change in drug policy in Portugal, as Law 30/2000 adopted in November 2000 (in effect since July 2001) decriminalized drug consumption, acquisition, and possession for personal consumption.

**Figure 12. Number of prisoners per crime type in Portuguese prisons (2000-2017)**



Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice

Immediately after the Penal Reform of 2007 we can observe an increase in all crimes (even those on a descending trajectory such as drug crimes), with the exception of crimes against life in society. Regarding property crimes, we actually observe that the number of prisons convicted for these crimes were consistently decreasing until 2007, and after that the trend reversed and started consistently increasing until 2017.

If we categorize these crimes in terms of violent and non-violent crimes<sup>17</sup> (RASI, 2017), we see an increase on the number of violent convictions in Portuguese prisons from 2000 to 2017 (from 2599 prisoners to 4008 prisoners), and of non-violent convictions (from 6318 to 7327) (figure 13).

**Figure 13. Comparison between the number of violent and non-violent convictions in Portuguese prisons (2000-2017)**



Source: Data provided by the Portuguese Directorate-General for Justice Policy (DGJP) - Ministry of Justice

<sup>17</sup> The distinction between violent and non-violent crimes was made based on the Annual Internal Security Report (RASI, 2017). Based on the report the crimes considered violent were: homicide; kidnapping, abduction or taking hostages; human trafficking; rape, sexual abuse of children or dependent children; criminal association; and resistance or coercion of a state official. Added to these, we considered arson (property and forest) a violent crime, based on what has been done in international research (E.g. Uniform Crime Reports), and given that arson was not classified in the RASI as violent or non-violent. An exception to the classification proposed by the RASI was assault. As we did not have access to the distinction between aggravated and simple assault we chose to include it in the non-violent crimes to avoid over-estimation. In this way, non-violent crimes included: assault; simple and qualified burglary; other property crimes; dangerous driving; driving under the influence; other crimes against life in society; disobedience; corruption; embezzlement; other crimes against the state; drug/substance trafficking; other drug crimes; checks without provision; tax crimes; driving without a license; other crimes.

Violent conviction decreased between 2003 and 2008, reaching a total of 2574 that year, and consistently increasing thereafter reaching 4008 by 2017. As for non-violent conviction, the pattern is similar, although the number of convictions remained relatively stable, only slightly decreasing in 2008 and 2009, after which they increased consistently until 2017 (7327).

Therefore, despite having a reduction of the crime rates in Portugal for both violent and non-violent crimes (RASI, 2017) we notice a general increase in prison population associated with most of the crimes. Provided the timing of these changes we expect that some derived, at least partially, from the changes that took place with the Penal Reform of 2007, even though these were not in the direction that law and policy makers expected. We see the consequences of the increased severity of certain penalties and the criminalization of new practices on the increasing numbers of prisoners. However, we do not see the alternative sentences playing an important role on the penal trends, as would be expected based on the Penal Reform. Thus, we may question whether alternative sentences are actually being considered by legal practitioners.

#### **4. Identifying challenges in the prison system: national and international reports**

When we take a closer look at reports about the Portuguese prison system, we notice a gap between what is written in the Law and the actual practice. Based on both national and international official reports and studies (discussed below) on the conditions of Portuguese prisons, we can see a clear disjuncture between the law in books and the law in practice. In fact, the reality in Portuguese prisons is so different from the legal objectives (e.g. due to lack of resources) that it greatly interferes with (i) the ability of prisoners to access law and justice, and (ii) the effective exercise of social reintegration.

Based on the data presented in the previous section and on these reports, the Portuguese case deserves a special analysis. Specifically, it is important to look into the distinction between the civil and the penal majority (18 years old vs. 16 years old), and the current issues in implementing the special legal regime for young adults. Although Portuguese

law does not allow for the criminal prosecution of juveniles below age 16, it does not follow the guidelines provided by the Committee of the Rights of the Child (UN). These guidelines defend that every child under the age of 18, at the time of the offence, falls under the purview of juvenile justice and not adult penal justice. This provision is also defended by Rule 17 of the European Rules for juvenile offenders. Moreover, according to this Rule 17, while it is possible to have young adults be judged/treated as juveniles, under special conditions, the opposite should never occur. While the Portuguese Law takes these guidelines into account (hence the creation of the Young Adult's Special Penal Regime approved in 1982), in practice we still have juveniles and young adults (16+ years) in prisons and being treated as adults, due to lack of resources (such as juvenile institutions).

In the face of the Child Rights Convention principles and guidelines, the Portuguese State has been regularly notified by national and international entities about the dangers of accommodating 16- and 17-year-old youths in the same facilities and cells as adults. As these international standards have not been met (A. Rodrigues and A. Fonseca 2010; U. Kilkelly, 2011; R. Alfaiate, 2014; M. J. Carvalho, 2018), the last report issued by the Permanent Observatory on Portuguese Justice (OPJ)<sup>18</sup> in 2010, recommended changing the age of the criminal majority from 16 to 18 years, as previously defended by others (J. Dias, 2005, A. Rodrigues and A. Fonseca, 2010). This change in the criminal majority age would allow complying with international legislation and avoiding having youth aged 16-17 years in the adult prison system (B. Santos et al., 2010).

Nevertheless, and despite the international consensus on this matter, not everyone agrees with the suggestion of changing criminal majority to 18 years old. In fact, Taipa de Carvalho (2008) suggests that criminal majority could be decreased to 14 years old, arguing that many youngsters at that age already have a degree of understanding about the illegality. According to the author this justifies a need for different approach through a special criminal regime that would keep young people separate from adults, while still considering their acts criminal. Furthermore, Alfaiate

<sup>18</sup> At the Center for Social Studies, of the University of Coimbra, the Observatory aims at accompanying and analyzing the performance of Portuguese courts and related institutions such as police forces, prisons, alternative dispute resolution mechanisms, forensic services, and social reintegration services.



(2014) proposes an intermediate model. She advocates for (i) an absolute age-related penal minority for all children under age 16 allowing them to be not imputable, and (ii) a conditional imputability for youth between ages 16 and 21. For the latter, the conditional imputability would depend on the evaluation of the individual's understanding about their behavior, being that this assessment would only be mandatory for all 16 and 18 year olds accused of a crime, and not for those between 18 and 21.

A new Directive (EU) 2016/800 issued by the European Parliament and of the Council of 11 May 2016 on Procedural Safeguards for Children who are Suspects or Accused Persons in Criminal Proceedings, aims at establishing common minimum standards for the rights of children who are suspects or accused of a crime, and must be implemented by June 2019. This implies more political action and public debate in the short-term to overcome the persistent violation of international standards regarding the treatment of young adults, and the (non-)enforcement of the YASPP.

Beyond the issues related with the treatment of young adults, Portugal is showing an increasingly punitive stance, with growing incarceration rates leading to prison overcrowding, as shown above. These incarceration rates continue increasing despite (i) the changes in the law promoting more non-custodial sentences, and (ii) the systematic lack of resources to accommodate the growing prison population. This lack of resources can be clearly seen not only in the absence of programming opportunities (which are required for the prisoners positive evaluation), but also in the low investment made in prisons. According to the most recent data, the Portuguese State spends 41.22 euros per prisoner per day, which is less than half of what is spent on average in Europe (102.61 euros) (M. Aebi, M. Tiago and C. Burkhardt, 2016).

In addition to this punitive tendency and the lack of investment in the penitentiary system, there are international reports denouncing some violent and degrading practices in Portuguese prisons. For instance, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT, 2013), focusing on the Lisbon Prison (EPL), shows little progress (in response to previous recommendations) regarding the physical conditions of the prison and the treatment of prisoners by prison guards. Among other things, the 2013 report mentions: (i) that despite the 1% increase in the DGRSP budget in 2013, the prison population had increased by more than 1000 individuals since 2012, so

there is no real increase in available funds; (ii) claims of prisoners' mistreatment, such as slapping, punching, kicking and blows with a baton to the body and/or head of the prisoners, with some medical evidence consistent with these claims; (iii) the existence of inter-prisoner violence, especially in some wings, which is known to prison guards who lack the means and human resources to prevent it; (iv) poor physical conditions, in terms of the buildings and infrastructure; (v) activities such as work and education were carried out by only a small part of the prisoners (187 worked and 232 were in school or vocational training, even for only a few hours per week), leaving the vast majority without any occupation (almost 900 inmates).

In their latest report (CPT, 2018), the same scenario is present not only in Lisbon Prison but in multiple others: Caxias, Lisbon Central, Montijo, Setubal Prisons and Leiria Juvenile Prison. In these prisons: (i) a number of reports of ill-treatment of prisoners by prison guards were received (e.g. slaps, punches, kicks and blows with truncheons to the body and/or head), (ii) a high level of overcrowding was observed, affecting not only the material conditions, but also the regime, staff-prisoner relations and order in prison, (iii) the living conditions were unsuitable to hold prisoners and may amount to inhuman and degrading treatment (e.g., in the basement areas of Lisbon Central Prison, the cells were cold, dark and damp with crumbling plaster and rats were entering the cells via the floor-level toilets). Prison overcrowding, which is amplified in its effects by obsolete and inadequate physical structures, is regularly identified as causing tensions in Portuguese prisons, enhancing the occurrence of violence, weakening the conditions of punishment, and affecting the development of intervention and rehabilitation programs (R. Pinto, 2016).

Moreover, in face of the growing numbers of prisoners and prison overcrowding, prison guards are also facing added stresses due to the scarcity of their numbers and absence of means to deal with the constant demands of the growing penitentiary system. This leads to additional tensions between prison guards and prisoners, and has led to constant strikes held by prison guards in order to improve their working conditions, careers and professional status<sup>19</sup>. As a result, the prisoners are the most

<sup>19</sup> See, for example, a recent national news article on this matter: <https://www.publico.pt/2018/12/10/sociedade/noticia/guardas-prisionais-greve-assegurar-almocos-natal-reclusos-familias-1854225>.

affected, as they have been constantly deprived of services in recent years, except for minimum services or those of an urgent nature. Part of the prison guards' claims in recent years is a reaction to practical issues, such as the State's attempt to reduce guards' working hours, namely to establish the rules defined for public administration jobs and eliminating extended hour shifts (12 and 24-hour shifts). This reduction is perceived as negative given that night shifts are paid better, and guards may use days off to rest, or to work elsewhere for complementary income. However, the strikes are also a way of claiming for status recognition, since prison guards feel their work is socially devalued, playing an undervalued, difficult and unprotected role (A. Roseira, 2018).

Finally, regarding the physical conditions of prisons, although the national penitentiary system has distinct types of establishments (e.g. central, regional and special), most of these are old and with poor conditions, as noted in the CPT reports. Thus, despite some changes in recent decades, prison conditions remain heterogeneous, with some having more recent infrastructure and better conditions, while others continue to be housed in centennial buildings that are not suitable for holding prisoners.

Beyond the issues related with prison overcrowding, living conditions, and staff that were just illustrated, we further need to discuss the fact that Portuguese prisons are not complying with one of their main missions: the rehabilitation of prisoners so they can reintegrate society as productive and prosocial members. The last report from the Permanent Observatory on Portuguese Justice (OPJ) (B. Santos et al., 2003) about the prisoners' social reintegration focuses on the ways professionals in the judicial and prison system see the social reintegration process and voice their concerns. Recognizing again the gap between Law and practice, this report points out some of the issues concerning the social reintegration process. These issues take place both during the incarceration period and during the immediate post-release time. Specifically, during incarceration, as we discussed, there has been a failure in adequately elaborating and implementing the PIRs due to a lack of resources. Moreover, even in prisons that have programming, the activities developed seem to serve merely to combat the inactivity rather than to create and promote skills that the prisoners can use once release, which is in part due to the shortage of work opportunities and vocational training actions. Finally, there are no formal plans to accompany, supervise and provide support to ex-prisoner in the post-seclusion period.

The OPJ report further highlights issues not directly related with the prisoners, but that extensively affect their rehabilitation and reintegration. Specifically the report points out the lack of communication and articulation between the judicial and prison systems, which causes inefficiency in procedural terms, and increased costs on an already constrained budget. There is also a strong awareness of the need for adequate initial and ongoing training of professionals working in prisons and reintegration, in order to respond to the constant challenges of the profession. This need for training would help these professionals not only provide a better response and more effectively complete their objectives, but would also provide them with the tools to adequately cope with the hardships of working in a high-stress environment. Finally, it is pointed out the need to recruit and train magistrates, so that they actually follow the transformations in the system and can make contextualized decisions.

Beyond the OPJ report, several academic studies have shown the limitations of the social reintegration practices. Dores (2016), one of the most critical national academics on the penal and prison system, points out that no public investment in prison institutions was made between 1974 and 1996, and that subsequent investments were essentially related to security concerns (e.g., the creation of high security wings in bigger prisons) (A. Dores, 2016), with social reintegration services as “mere bureaucratic exercises for the court to see” (A. Dores, 2016).

Although education and vocational training in prison are constitutionally foreseen rights<sup>20</sup>, it is clear that they have been viewed both by prison administrations and by the prisoners themselves, only as a form of passing time. The task of persuading prisoners to attend classes is difficult, since the school is an institution for which they have never been motivated and where they were already been labeled as failures (C. Gomes, M. Duarte and J. Almeida, 2004). For these reasons, and despite reasonable school adherence, success rates remain low. Regarding vocational training, there are also some difficulties related to the prisoners' motivation. Again, many attend these courses as a way to stay busy, in hope of obtaining parole, temporary releases, or the money from the training grants (C. Gomes, M. Duarte and J. Almeida, 2004). In this way,

<sup>20</sup> See Article 43 of the CPR.

programming is failing, as prisoners are adhering for the wrong reasons, and not always acquiring the skills they should be acquiring.

The effectiveness of these education and vocational training in prisons is supposed to be measured by the effects they produce after the prisoners' release. However, due to the lack of coordination between the programs available and the opportunities of the labor market, these individuals find it difficult to find a stable job that can have a positive impact on their integration in a community, their self-esteem and personal motivation. One of the elements that allow us to understand the lack of success in school in prisons is related to the curricula, which matches the curricula from civil schools. It should be noted that the academic diplomas obtained by attending any of these courses do not indicate that their holder obtained them as a prisoner and have the same value as those obtained in regular schools (J. Moreira 1994, page 64). However, these curricula fail to provide these individuals with the necessary skills to integrate the labor market, as they are still focused on basic educational competences and knowledge.

Despite the benefits described in the scientific literature of occupational labor during prison sentences (M. Gomes, M. Duarte and J. Almeida, 2004; B. Santos et al., 2003; E. Latessa, 2012; R. Pinto, 2016), in Portuguese prisons there is a shortage of occupational placements, failing to reach a substantial part of the prison population. This is often a result of a lack of facilities, overcrowding, and a mismatch between prison work available and the work prisoners had before or want to pursue after imprisonment (A. Dores, N. Pontes and R. Loureiro, 2013; M. Gomes, M. Duarte and J. Almeida, 2004). The work developed inside prisons is still dominated by small workshops, where competences that are usually sought in the labor market are not developed (e.g. communication skills, group work and professional responsibility). Many of these workshops are outdated and there is a need to renew equipment and training. As a consequence, there is an excessive amount of 'jobs' related to the maintenance of prisons (A. Dores, N. Pontes and R. Loureiro, 2013), such as cleaning, which are not compatible with the need to provide the prisoner with professional skills that the labor market demands (M. Gomes, M. Duarte and J. Almeida, 2004). In addition, since the prisons' capacity to absorb labor is limited, prison guards or other prison staff are the ones responsible for defining who will or will not have the right to work, and this choice is often very subjective (J. Moreira, 1994).

Finally, while studying the prisoners' preparation for release and the follow-up period towards their social reintegration into society, Gomes (2008) came across some of the same problems presented previously. Moreover, she argues that the support allegedly provided to ex-prisoners upon their release from prison is perceived by them more as a form of social control than as an actual support on key aspects such as housing or employment. The regular visits that these individuals have to make to the Delegation of the Social Reintegration Directorate were seen more as an inspection and a form of domination, rather than an element of support to help them succeed in their social reintegration.

Therefore, a large group of people in detention do not seem to benefit from the right to prepare for social reintegration through educational, training, labor and cultural/recreational strategies, being their stay in prison limited to the imposition of institutional control mechanisms (R. Pinto, 2016, page 149). This has also been openly reported by Portuguese organizations, such as the Human Rights Observatory (ODH)<sup>21</sup>, Amnesty International<sup>22</sup> or the *Obra Vicentina de Auxílio aos Reclusos* (OVAR)<sup>23</sup>. And, as pointed out by Cunha (2002), imprisonment seems less focused today on the transformation of individuals than on their containment. Additionally, there is a lack of research focused on the cost-benefits analysis of the programs implemented inside the penitentiary system, which lead us to not having a comprehensive knowledge of the real impact that these programs, when implemented, have in the individuals that participate on them.

The last report developed by the DGRSP (2017) acknowledges many of the criticisms presented above and proposes guidelines for future policies in terms of redistribution and allocation of prison buildings and pris-

<sup>21</sup> The ODH produces legal reports based on complaints from prisoners themselves, as well as their friends and relatives. More information about this organization and the reports they produce is available online at <http://www.observatoriodireitoshumanos.net/>.

<sup>22</sup> See, for example, the latest report from this organization denouncing the assaults on detainees by prison guards, and the degrading conditions of imprisonment, which result from lack of hygiene, food quality, medical support and access to medication (Amnesty International Report, 2017, p. 300).

<sup>23</sup> This civil organization is very active, particularly in the northern part of the country, giving some support to relatives of people in prison, but also holding debates with the community about the problems identified in the penal system - <http://ovarpriso.es.wixsite.com/ovar>.

on population. This report recognized the “clearly excessive” number of people in detention, and the need to respect national and international recommendations, namely in what concerns (i) the reduction in the number of prisons and the re-qualification of others, (ii) the distribution of prisons in the national territory according to the locality from which people who are currently in detention come from, (iii) the privileging of smaller prisons (not exceeding 600 people), and (iv) favoring individual detention cells (instead of collective). This report further defended the need for prison staff training, namely at the management level, the promotion of certain professional careers more directed to the resocialization and reintegration of prison population, and the investment in security through the application of more technological equipment to support surveillance. In addition to these proposals, the report highlights the need to eliminate the gap between the Law and practice:

“It is necessary to reduce the gap that still separates the legislation from its execution and the Portuguese daily prison life, creating the necessary conditions for the effectiveness of the rights of the imprisoned citizens, which should be held in dignified and human levels, guaranteeing them the maintenance of ties such as the outside world, access to health care and a labor occupation, education or training, and to promote the progressive and flexible nature of the prison sentence” (DGRSP, 2017, page 17).

After this report, some legal changes took place which transformed, at least apparently and in an immediate way, the prison overcrowding scenario. In late 2017 amendments to articles 43 to 46 of the Penal Code were made. These changes focused on minor criminality, and mostly substituted small prison sentences for electronic monitoring. Electronic surveillance is presented as an alternative to incarceration, not only to reduce the number of individuals in prisons but mainly to promote the resocializing and social reintegration purposes of criminal sentences and prevent recidivism (similar to the ideal presented in the Penal Code Reform of 2007). As an immediate consequence of this legal change, the Ministry of Justice announced that only 6 months after its implementation, national prison overcrowding ceased to be a problem, with prisons now at 98% capacity<sup>24</sup> rather than 107%. Therefore, in technical terms,

<sup>24</sup> See the news released by the Ministry of Justice here: <https://www.portugal.gov.pt/pt/>



it seems the Portuguese prison system is no longer with an excess population, by favoring alternative freedom deprivation measures, which is in line with international recommendations. Nonetheless, it is wise to be cautious with this sudden change, since we still do not have data to clearly relate this legal change to the actual change in the prison statistics, and we still do not know if it will endure, or if it is a transversal reality to all the prisons or only to some of them.

### **Final considerations**

In sum, we observe that the original premise of this paper holds true in multiple aspects of the Portuguese penal system: the law in books is quite different from the law in practice. From our discussion of this issue we can derive three main conclusions. First, despite the European regulations, international recommendations and a change in the Portuguese legislation to establish different treatment for those under 18 (YASPP), we still have a number of youths ages 16 to 18 in the adult prison system. This number has been progressively decreasing, however more work needs to be done to assure these youths are housed separately and integrated in age-appropriate programming to promote socialization, social reintegration, and reduce recidivism.

Second, we noted that the effects of the 2007 Penal reform were not in the expected direction. This reform aimed at reducing the number of prison sentences, limiting these sentences to more serious crimes, and promoting the use of alternative non-custodial sentences. However, these changes seem to have had the opposite effect, since we observed an increase in incarceration rates for almost every group analyzed, whether we broke the analysis down by gender, nationality, age or type of crime. There is a clear need to improve the application of these changes made to the law. One recommendation would be to provide better training to justice professionals on not only the changes in the law, but also on the benefits of alternative sentences, and the negative impact prison sentences can have on individuals.

Third, regarding the Portuguese penitentiary system, we clearly see a

pattern of excesses detained people, taking into account the crime rates and the types of crime that lead to imprisonment, added to very long sentences, and prison overcrowding (until 2018). These characteristics create additional obstacles to the implementation of activities and programs for prisoners' resocialization and later social reintegration. These issues are added to poor physical conditions in prisons, which undermine the physical conditions of prisoners' habitation and the working conditions of prison staff. Moreover, there is a lack of human and financial resources, despite a (marginal) increase in the budget available. All of these issues lead to added stresses and constraints increasing the risk of violence to which both young adult and adult prisoners are subject during their sentence.

There is a clear mismatch between what is an ideal of social reintegration that is conveyed by Portuguese Penal Code and the actual practice. The penitentiary system is no more than a model of containment and internal management, and neutralization of certain incarcerated individuals. In a more critical tone:

"... The system of penalties and prisons have no way of complying with their stated purposes, in particular with the aim of social reintegration. The truth, following Young (1999), is that the authorities themselves failed to pursue such desideratum, keeping it in the form of a law only by tradition (and political difficulty in suppressing it). The utopia of the re-educational treatment founder of the modern penalty is immediately and easily informed by the uncompromising observation of the prison life. It is maintained, at best, as a hopeful goal, and at worst, as a catalyst for institutional hypocrisy and for the prisoners and professionals themselves." (Dores, 2012, page 37)

At the date of this article submission (31 January 2019) a new director general of the DGRSP took office. Therefore, we may be looking at new changes in terms of the penitentiary system management.

## Funding

**Maria João Leote de Carvalho** and **Silvia Gomes** acknowledge this work was supported by the FCT - Fundação para a Ciência e Tecnologia through individual Postdoctoral research grants (References SFRH/BPD/116119/2016 and SFRH/BPD/102758/2014, respectively), under POCH funds, co-financed by the European Social Fund and Portuguese National Funds from MCTES.

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