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Renting cells abroad: Understanding contemporary policy responses to prison overcrowding

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Abstract
Since 2019, Denmark has faced problems of prison overcrowding exacerbated by shortages of prison staff. To overcome this, Denmark reached an agreement to rent 300 prison cells from Kosovo in order to house convicted prisoners from non-EU countries scheduled for deportation from Denmark after their sentences have expired. Based on the Belgian (2010–2016) and Norwegian (2015–2018) experiences of renting prison cells abroad, this article will explore the Danish policy of easing prison overcrowding by renting prison places abroad. The findings show that the principle of renting prison cells abroad can solve immediate problems of overcrowding for the sending state and fill empty prison places in the receiving state, but not without serious concerns. In particular, the commodification of foreign national prisoners can undermine the protection of prisoners' rights such as legal certainty and protection against torture or cruel and unusual treatment. Moreover, renting prison cells is a short-term solution for prison overcrowding underlying the fundamental issue of expansionist prison policies in European countries.

Keywords
prison overcrowding, renting prison cells abroad, forced transfers, legislation, crimmigration

1. Introduction

The 'rent a cell principle' is a common way of dealing with prison overcrowding in the USA, where agreements between states facilitate the transportation of prisoners from one state to another (Christie, 2000). In Europe, these collaborations between nation states were unheard of until 2010, when Belgium and the Netherlands started the so-called "Nova Belgica" co-operation. The agreement permitted the Netherlands to relocate prison capacity (staff included) to Belgian prisons in return for a yearly fee. The partnership was a solution to two problems. First, Belgium has struggled with prison overcrowding for decades (Beyens et al., 1993). The agreement with the Netherlands offered an additional prison capacity of 500 (and later 681) places in Tilburg prison from 2010–2016 (Beyens & Boone, 2013). Secondly, the prison population in the Netherlands was decreasing, so the deal filled the Dutch prison, providing work for their prison officers (Liebling et al., 2021). Norway

followed Belgium's example in renting prison places from the Netherlands, but for reasons other than overcrowding. In Norway, the backlog of sentences had grown to over one thousand in 2013 and 2014, leaving many convicted prisoners ostensibly free in "prison queues". To reduce the prison queue, Norway made an agreement with the Netherlands to rent vacant prison cells (Todd-Kvam, 2019). Between 2015 and 2018 a total of 650 prisoners convicted in Norway were sent to the Dutch prison of Norgerhaven to serve their sentences (Liebling et al., 2021:43).

Like Belgium, Denmark faces problems with both overcrowding and staff shortages (Danish Prison and Probation Service, 2021). In an internal negotiation note about the economy of the Danish prison system, it was estimated that Denmark would have a deficit of over 1000 prison cells in 2025 (Jensen & Jørgensen, 2021). By 2020, 368 prisoners due to be deported when their sentences expired occupied places in the Danish prison system (Danish Government et al., 2021, p. 6). This group of foreign national prisoners without residence permits and deportable under migration law have for years acted as a red rag for Danish politicians who favour a restrictive immigration policy. Different strategies have been implemented to force so-called "criminal foreigners" to leave Denmark as soon as possible with measures such as early release and repatriation after serving half of their sentence (Law no. 628, 2013) and limited access to education, employment, and services (Law no. 429, 2017). However, very few deportable foreign national prisoners have accepted deportation either during or after their sentences. To overcome prison overcrowding, and at the same time remove imprisoned non-Danish nationals for whom deportation was a condition of their sentence, in December 2021 the Danish government agreed to rent 300 prison cells from Kosovo. The Social Democratic Minister of Justice claimed the agreement would ease prison overcrowding and, in addition, send a clear signal that deportable prisoners should leave Denmark (Danish Government et al., 2021, p. 2). The law was implemented on 21 June 2022 (Law no. 893, 2022), and the deportation of Danish prisoners to Kosovo is planned to begin in 2023 (Danish Government et al., 2021, p. 7). However, on 19 September 2022, the Danish Trade Union for Prison Officers announced that the agreement was dormant due to a lack of finances (Danish Trade Union of Prison Officers, 2022). On the same day, the Danish Minister of Justice claimed that the rebuilding of the Gjilan prison in Kosovo was experiencing delays, and that consequently the agreement with Kosovo had not been legally ratified and would be slightly delayed. Nevertheless, intervention from the Danish Minister of Justice eventually made sure that the Danish prison in Kosovo would become a reality, albeit later than expected (Hagemann-Nielsen, 2022).

This article contributes to the field of comparative penology in Europe (e.g. Sparks, 2001; Cavadino & Dignan, 2006; Brodeur, 2007; Laursen et al., 2020; Ievins & Mjåland, 2021; Crewe, 2021) by drawing on experiences from Belgium and Norway, as well as Danish political debate and legislation. We explore the problems that arise when nation states rent prison cells abroad for deportable foreign national prisoners.

The policy of renting prison cells abroad can be criticised in different ways. First, when national governments engage in rental of prison capacity in foreign countries it raises concerns about the "commodification of prisoners", where prisoners are both incapacitated in prison and mobile as a commodity between national states where they are warehoused as cheaply as possible (Pakes & Holt, 2017, p. 90). Second, the target group to be transferred are *treated unequally* if they experience a different prison regime (Todd-Kvam, 2019, p. 296). Thirdly, legislation and jurisdiction for both the sending and receiving states are complex matters, which heighten concerns about the *violation of prisoners' human rights* (Sivilombudsmannen, 2016). In addition, not all prisoners volunteer to be transferred to another country to serve their sentence (Liebling et al., 2021; Sivilombudsmannen, 2016).

This raises concerns about the selection criteria for being transferred and how transfers are carried out.

The methodological approach consists of document analysis, which is particularly applicable to qualitative case studies producing rich descriptions of a single phenomenon (Yin, 2014). The documents include background papers, law text, political program proposals, organisational reports, survey data reports, scientific articles, reports from control and monitoring bodies, newspapers, and press-releases. All documents have been reviewed in order to elicit meaning and gain understanding of national reasoning and principles of renting cells abroad (Bowen, 2009). The languages spoken by the authors allowed them to analyse these documents in the original languages (i.e., Danish, Norwegian, Dutch, French or English).

The article is structured in the following way. We initially explore the extant research about overcrowding problems in (Danish) prisons considering the various perspectives that emerge in the literature. Following this, we outline and place in comparative perspective the three agreements we are attentive to: "Nova Belgica" (Belgium/The Netherlands), "Norgerhaven" (Norway/The Netherlands), and "Gjilan" (Denmark/Kosovo). Thereafter, we explore the experiences of renting prison cells relative to legislative expectations. Finally, the implications of easing overcrowding problems in prisons by renting prison cells are critically explored within the crimmigration debate.

2. Strategies in easing overcrowding in the prison system

Like many other European countries (Penal Reform International 2021, p. 9) the prison population in Denmark has increased during recent years, bringing heightened occupancy rates and problems of overcrowding (Danish Committee on Legal Affairs, 2021). In an internal negotiation note about the economy of the Danish prison system, Demark is estimated to have 5,250 prisoners in 2025, which will leave the system short of more than 1000 prison cells (Jensen & Jørgensen, 2021). Figure 1 illustrates the development of the occupancy rate in the period between 2010 and 2021, contrasted with estimated figures (in black) between 2022 and 2025.

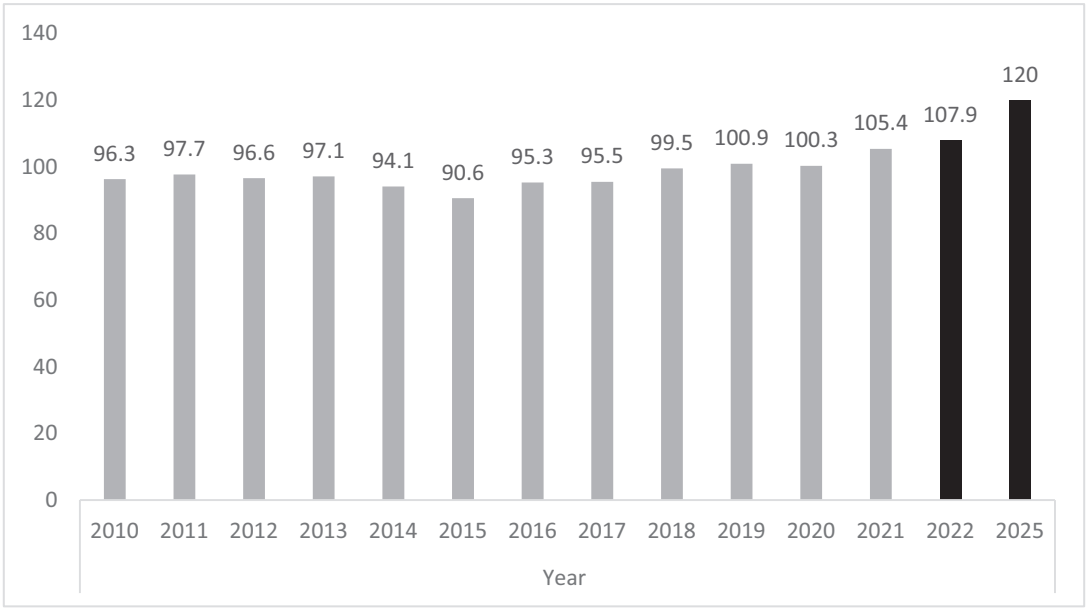

Figure 1. Development in occupancy rate (percent) in Danish prisons and custodies from 2010 to 2025

Source: Danish Prison and Probation Service, 2020, p. 19; Danish Committee of Legal Affairs, 2021; Jensen & Jørgensen, 2021.

The data show that between 2010 and 2014 the occupancy rate in the Danish prison system was relatively stable, with the drop in 2015 explained by a reduction of unsuspended sentences and fewer remand prisoners (Danish Prison and Probation Service, 2016, p. 5). Since 2016 the occupancy rate has increased. Notwithstanding an overall reduction in recorded crime during this period, Danish prisons have witnessed a widespread and growing problem of overcrowding. Some of the overcrowding can be explained by the combined effects of longer sentences, a reduction in the number of prisoners being paroled, and fewer alternative sanctions such as community service (Minke, 2021). It is also worth mentioning that Denmark was among a small group of European countries (including Andorra, Denmark, Greece and Sweden) that experienced a four percent growth in the prison population during the Covid-19 pandemic in 2020 (Aebi & Tiago, 2020, p. 2). This occurred despite a short period of ceasing to summon prisoners to avoid Covid-19 from spreading in Danish prisons (Storgaard & Minke, 2022).

Prison overcrowding constitutes a serious problem. Research has revealed that it undermines the well-being of inmates and is a strong predictor of heightened suicide risk (Huey & McNulty, 2005, p. 508). Overcrowded cells are found to positively correlate with increased instances of rioting and unlawful protest (Useem & Reisig, 1999) and crowding in general is a significant predictor of misconduct among prisoners (Wooldredge et al., 2001) – especially among young inmates (Franklin et al., 2006). Meško et al. (2011) found that prison overcrowding in Slovenian prisons led to a lack of privacy, fewer hygiene standards, lower employment, and fewer free-time activities. In addition, it let to a higher number of conflicts between prisoners and attacks on prison staff (p. 407). In 2013, the United Nations published a handbook on strategies to reduce overcrowding in prisons, highlighting several problems:

> The lack of adequate space is only one of the numerous problems that are experienced as a consequence of overcrowding in prisons. Overcrowding impacts also the quality of nutrition, sanitation, prisoner activities, health services, and the care for vulnerable groups. It affects the physical and mental well-being of all prisoners, generates prisoner tension and violence, exacerbates existing mental and physical health problems, increases the risk of transmission of communicable diseases and poses immense management challenges. (UNODC, 2013, p. 11)

In 2016, the European Committee on Crime Problems published a white paper on prison overcrowding stating that prison overcrowding could lead to "violating Article 3 of the ECHR [European Convention on Human Rights] because of overcrowded and insanitary conditions which facilitate or lead to inhuman or degrading treatment" (European Committee on Crime Problems, 2016, p. 26). As Hans Toch puts it, "the most serious consequence of crowding is warehousing, which creates a prison climate that prevents inmates from serving time in customary ways" (Toch, 1985, p. 58). In sum, a significant body of research stresses that overcrowding constitutes major problems for both prisoners and prison staff – explaining why nation states use different strategies to ease it.

The variety of political responses to prison overcrowding in Europe usually ranges from reductionist to expansionist government approaches towards imprisonment. Reductionist approaches exclude the construction of additional capacity, and instead seek to reduce overcrowding by using front-door and back-door strategies such as reducing criminal penalties, using community sanctions (instead of imprisonment), increasing suspended sentences, cutting the length of sentences, and increasing early release (Beyens & Maes, 2020). A reductionistic approach is also used to place sentenced people in a prison queue

until there is vacant capacity in the prison system for them to serve their sentence. This, however, is arguably problematic. Some suggest that the gap reduces the preventive effects of punishment, notably the idea that offences should be met with a quick response. In addition, if a punishment is not executed immediately, the public might lose faith in the criminal justice system whilst convicted persons can feel as if their life is "on hold" (Laursen et al., 2020).

In contrast, the expansionist approach seeks to open additional prison capacity. Renting prison cells abroad fits within an expansionist view but is a very particular form of expansionism that entails challenges to prisoners' legal certainty. How agreements on renting prison cells abroad are framed, and which encounters they face, is the focus of the following section.

3. Agreements on renting prison cells abroad

The "Nova Belgica" agreement between Belgium and the Netherlands, in force between 2010 and 2016, was the first of its kind in Europe, while the "Norgerhaven" agreement between Norway and the Netherlands existed from 2015 until 2018. The "Gjilan" agreement between Denmark and Kosovo was signed in December 2021 and was slated to begin in 2023.

3.1. The "Nova Belgica" agreement

The Nova Belgica agreement between Belgium and the Netherlands was signed on 31 October 2009 (Chambre Des Représentants De Belgique, 2009). The agreement permitted Belgium to rent 500 places in Tilburg prison, at a cost of €30 million per annum with additional fees, for example, for medical care or transport. Tilburg prison was established as a part of the prison of Wortel located on Belgian territory approximately 40 km from Tilburg. All inmates coming from or going to Tilburg prison had to pass through the prison of Wortel. Consequently, all prisoners were released or went on leave from the prison of Wortel in Belgium.

The agreement stated that an additional collaboration act had to be introduced to specify rules in relation to the regime and other legal rules that were applicable. This was carried out under the authority of a Belgian-Dutch leadership team. Consequently, the responsibilities and legalities were divided. The Belgian Internal Prison Act and the Belgian External Prison Act were both applied, and a Belgian prison governor was principally responsible for ensuring that legislation was adhered to in Tilburg prison. At the same time, the prison governors were also responsible for the proper execution of the sentence, the treatment of prisoners, and order and security in the institution. The Belgian authorities were also responsible for prisoners' personal finance, the canteen shop, and ensuring that all relevant information was given to prisoners and staff. The Dutch authorities had to guarantee that the situation and context allowed the Belgian governor to meet the (legal) standards of the material conditions and the presence of uniformed prison staff. Dutch law was applied in relation to health care, procedures relating to the use of force, and processes in the case of a prisoner's death and instances of criminal offences being committed. Some responsibilities were shared, for example, those relating to prisoners' clothes and personal hygiene (Beyens & Boone, 2013, pp. 23–27). Consequently, the governor(s), the psychosocial service, some of the administrative staff, and a security staff member were employed by the Belgian prison system. All other staff members, such as the custodial prison staff, the medical service, food service, and recreational services in Tilburg prison were Dutch. The national and international control and monitoring bodies retained the power to undertake visits as they would in Belgian prisons.

Outside of legislation, other complications needed to be agreed. It was important, for example, to specify the procedures in case of an escape. If a prisoner escaped from Tilburg prison, Belgium had to issue a European arrest warrant, since the Belgian authorities were not permitted to arrest prisoners on Dutch territory.

3.2. The Norgerhaven agreement

Between 2013 and 2014 Norway experienced a growing prison queue. To overcome the problem Norway struck an agreement to rent 242 prison cells from Norgerhaven prison in the Netherlands. Norgerhaven prison is located approximately 20 kilometres from Groningen Airport Eelde, with a flight time from Oslo airport of approximately 1 hour and 45 minutes. Norgerhaven prison functioned as an annexe of Ullersmo prison in Norway (Stortinget, Justis- og beredskapsdepartementet, 2015, article 1). Regardless of the actual number of detention places used, the fee would be a fixed annual amount of €25.5 million, provided the number of detention places did not exceed 242. For the years 2015 and 2018 respectively the fee would be a fixed amount of €2,125,000 for each month the prison places were at the disposal of the Norwegians (Stortinget, Justis- og beredskapsdepartementet, 2015, article 27).

Like the Nova Belgica agreement, the prison governor was from the sending state – in this case, Norway. The prison governor closely collaborated with the Dutch leadership team. The prison governor was responsible for the execution of Norwegian sentences, maintaining order and security, and the treatment of prisoners in accordance with the Norwegian Execution of Sentences Act. The governor was also responsible for the rules covering the use of force (including restraint) against prisoners to maintain order and security or for reasons of wider safety and preventing escape (op. cit., article 6). Like the Nova Belgica agreement, the Netherlands had to provide the staff necessary to implement the cooperation agreement (op. cit., article 8). In addition, in the Norgerhaven agreement prisoners on completion of their sentences, could not be released on the territory of the receiving state, so had to be transferred back to the sending state at least two months before their release (op. cit., article 9). Finally, this agreement also provided for procedures in the event of criminal offences committed in prison; they were to be governed by the criminal law of the receiving state (op. cit., article 17). The national and international control and monitoring bodies retained the potential to undertake visits as they would in Norwegian prisons (see for example Sivilombudsmannen, 2016).

3.3. The Gjilan agreement

The "Gjilan" agreement between Denmark and Kosovo, permitting Denmark to rent 300 prison cells in Kosovo (Danish Ministry of Justice, 2021), was signed on the 20 December 2021. The estimated price for Denmark is set to be €15 million per annum over an initial five-year period, with the possibility for an extension for an additional five-year period (Government of Kosovo & Government of Denmark, 2021). The Gjilan prison is approximately 50 kilometres southeast of the capital, Pristina. The nearest airport is Pristina (PRN), which is 38.7 km away. The flight from Copenhagen takes approximately 2 hours and 45 minutes, and the trip to Gjilan prison will take place under an escort of about five people from Kosovo's prison system.

The agreement confirms that sentences served at Gjilan prison will conform to the Danish Prison Act, and that physical conditions will correspond to those that apply in Danish prisons and operate within the framework of Denmark's international obligations (Government of Kosovo & Government of Denmark, 2021). The prison in Kosovo will be

managed by a Danish prison governor (Law 893, 2022, article 1, f) who will ensure these obligations are met. The administrative manager will be from Kosovo and will ensure the fulfilment of Kosovan obligations under the Treaty and the Cooperation Agreement, to ensure compliance with the law under the objectives of the Treaty (op. cit., article 14, 1). In relation to security, violence and escape attempts, the responsibility lies with the local authorities. The Danish Ombudsman, as well other national and international regulatory bodies, retain the potential to undertake control visits as they would in Danish prisons (op. cit., article 30).

All three agreements share important similarities. In each case, the prison governors are employed by the sending state and the prison acts put in place are the ones in force in the sending state, although prison officers are commonly drawn from the receiving state. Similarly, in all three cases, national and international regulatory bodies have access to the prison. Equally, the transportation of prisoners on the sovereign ground of the receiving states means that new rules have been and will be implemented. In both the Nova Belgica (Belgium/Netherlands) and Norgerhaven (Norway/Netherlands) agreements, leave and parole must take place from the sending state. However, in the Gjilan agreement (Denmark/Kosovo), which has been implemented only for those who are going to be deported, prison leave will not be granted as their particular status is seen as a high-risk factor for absconding (Consolidation Act Regarding Prison Leave, 2022, nr. 176, § 2, 4.). This brings us to an important and controversial element of these collaborations: foreign nationals being transferred to *transnational* prisons.

4. Target group for transfers

In the Nova Belgica agreement, the selection criteria for being transferred were restricted: male inmates who would serve a minimum prison sentence of one year. However, in reality, the majority of prisoners served a sentence of five years or more. In October 2011 this was 60 percent of the population (CPT/Inf (2012)19). Moreover, prisoners could not possess Dutch nationality, nor have an existing judgment of expulsion against them from the Netherlands. Prisoners could not be the subject of an arrest warrant, be under suspicion of criminal activity in the Netherlands, or pose a flight or security risk that could not be routinely met by Tilburg prison.

The Norgerhaven agreement stated that only male adult prisoners serving a longer sentence could be transferred. All prisoners subject to transfer should have started serving their sentence in a Norwegian prison and had to be transferred back two months before they were due to be released (Sivilombudsmannen, 2016, p. 43). Dutch nationals or prisoners expelled from the Dutch territory could not be transferred. Moreover, no transferred prisoners could be the subject of criminal investigation in the Netherlands, nor could they be sought for prosecution or the execution of a sentence. The prisoner should not pose a risk of escape, or a risk to society that exceeds the security level of the prison as determined by the Netherlands. In addition, the prisoner should not be in need of medical or other care which could not be provided in prison (Stortinget, Justis- og beredskapsdepartementet 2015, article 8). Finally, the Dutch government did not wish Norgerhaven to be overrepresented by foreign nationals and requested a representation of Norwegian prisoners (Liebling et al., 2021).

In contrast with the Nova Belgica and Norgerhaven agreements, the Danish Government and the contracting parties agreed that the target group to be transferred to Gjilan (Kosovo) would be deportable foreign national prisoners who will be deported from Denmark when their sentence is spent. As underlined in the multi-year agreement for the Danish Prison system, the purpose of a deportation sentence is that the convicted person must leave Denmark.

Consequently, resources such as those aimed at reintegrating prisoners into Danish society should not apply to prisoners who are going to be deported (Danish Government et al., 2021, p. 22). This approach echoes a new rule in the Danish Prison Act, which states that "an inmate who is expelled from Denmark by judgement, cannot be employed in education, teaching or program activities unless certain circumstances speak for it" (Danish Prison Act no. 1333, 2019, § 38, 2.). In this case the Danish Prison Act explicitly advocates for, and requests, inferior treatment for prisoners who will be expelled. In addition, prisoners without children in Denmark will be prioritised over those with children for speedy deportation (Danish Government et al., 2021, p. 7). Finally, those convicted of terrorism, known war criminals, the terminally ill, and those who need treatment for mental disorders, will not be transferred to the Gjilan prison (Law no. 893, 2022, article 17, 4).

The previous collaborations contained no formal agreement for the transfer of foreign national prisoners. However, based on information retrieved from Tilburg prison in August 2015, more than half (52 percent) of the transferred prisoners transferred from Belgium had an unknown residence status (Vanhouche, 2022). While there was no formal aim to transfer non-Belgian nationals to Tilburg prison, the data show that this group was disproportionally selected for a transfer. Despite the Dutch government's express preference for Norway not to solely house foreign nationals in Norgerhaven prison, a large proportion of the transferred prisoners were not naturalised Norwegians. It is worth acknowledging that some foreign national prisoners in the Norwegian system opted for the transfer, because they would have access to Skype calls with friends and family and longer telephone time (Liebling et al., 2021, p. 49). Similarly, some prisoners transferred to Tilburg preferred it there to the Belgian prison they had come from.

While the official discourse in the previous collaborations did not focus on the transfer of (deportable) foreign national prisoners to transnational prisons, the reality showed that this group was specifically selected for transfer. In the Belgian case, this was legitimised with reference to the limited ties this group had to Belgium, and the lack of reintegration measures they would need relative to those returning to Belgium. The Danish proposal takes this a step further with clear and very explicit rhetoric that justifies the transfer only of those due to be deported. This group of prisoners has become increasingly vulnerable to exclusion in what is best described as a "continuing transformation from human prisoner to commodity" (Pakes & Holt, 2017, p. 91). In addition, it is a far-reaching example of the Janus-faced penal policies in the Nordic countries (Barker, 2012). In this respect, certain groups of people are denied individual rights because an *ethno-cultural conception* of citizenship is used to justify how one group deserves an inferior prison regime (Todd-Kvam, 2019). Additionally, Barker & Smith (2021) use the term *penal nationalism* to highlight how criminal justice tools are used in Denmark to protect national interests. While their research mainly focuses on the way in which migration is punished as an offence, our research focuses on how foreign nationals convicted of a criminal offence are being transferred and exposed to an inferior prison regime. It is no surprise that some prisoners justifiably refuse to be transferred to an organisationally uncertain transnational prison.

4.1. Forced transfers

To our knowledge there are no figures on involuntary prison transfers from Belgium to Tilburg. Belgium initially agreed only to transfer prisoners from prisons in Flanders, where the official language is Dutch, on the basis that this would facilitate effective communication between prisoners and (Dutch) officers. However, few Dutch speaking prisoners volunteered for a transfer. Considering the high cost of the rent, the Belgian prison administration

decided to force transfers. At that time, the articles of the Belgium Prison Act which regulate the low-threshold complaint mechanisms were not in place, meaning that prisoners could not make such a complaint about a forced transfer. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Belgian Human Rights League (2011) presented strong critiques of this practice. The CPT argued that even if upon arrival prisoners expressed a preference for the regime in Tilburg, their consent was still required prior to being moved. They argued that prisoners who have been sentenced to imprisonment in one state should not:

> [o]n the basis of an administrative decision, be forced to serve the sentence in another state. The Committee recommends that all prisoners whose transfer to Tilburg Prison is envisaged should have the opportunity to discuss the matter with the Director of the sending Prison, or a Deputy, so as to put forward any legitimate concerns they might have about such a transfer. (CPT/Inf (2012)19, p. 8)

The Belgian government disagreed and continued the forced transfers, using selection criteria that shifted to prisoners who were not following an education or training offer, or in receipt of therapeutic care (CPT/Inf (2013)10).

In the case of Norgerhaven, about 38 percent of the prisoners were involuntarily transferred to the Netherlands (Liebling et al., 2021; Sivilombudsmannen, 2016). The Norwegian Civil Ombudsman (Sivilombudsman) expressed a strong critique of this practice. They argued that the transfer to another state for the execution of Norwegian sentences entails a major intervention in the inmate's life, and that inmates who are sentenced to a prison sentence in Norway "*should not be forced to serve their sentence in another state*" [our italics] (p. 42). Despite the criticism from regulatory bodies, prisoners were nevertheless transferred to the Netherlands in cases of forced transfer.

The outstanding question is, will non-Danish nationals, especially those who have a decision of deportation in connection to their sentence, be involuntarily transferred to Kosovo? Many prisoners worry about getting few or no visits and are concerned that Kosovo prison officers may be violent (Dahlin, 2022). The evidence strongly suggests that the practice of forced transfer that characterised the previous cases will most likely be repeated in the Danish case.

Besides the problem of forced transfers, other important issues may well arise in transnational prisons. Below we revisit some of the important risks that have been identified in the extant research about previous collaborations, those which also informed discussions between Danish experts when the agreement with Kosovo was published.

5. Legal uncertainty

The very fact that Belgian law was declared applicable in a penitentiary on Dutch soil made the agreement between Belgium and the Netherlands in 2009 somewhat peculiar. While the federal government considered its applicability unproblematic by acknowledging Tilburg prison as an appendage of the Belgian prison of Wortel, the Flemish community who organised social and welfare services for Flemish prisons in Belgium (including Wortel prison) did not provide an equivalent offer in Tilburg prison because it was not located within an area of its jurisdiction. While the Dutch staff consequently decided to develop a similar offer, it became clear that some important services remained absent.

A further concern related to the problem of jurisdiction in cases where a crime was committed in prison. The Belgian Council of State stated this concern as follows:

> According to the agreement the public prosecutor at Breda may order the arrest of a detainee suspected of having committed an offence in the penitentiary institution of Tilburg and may then transfer him to another place of detention in the Netherlands. This provision has the effect that Belgian law on the execution of sentences will no longer apply to the convicted person and that the Dutch authorities will be able to take any measures they deem necessary regarding him. (Belgische Senaat, 2009–2010)

This means that, in addition to being transferred to another country against their will, new infractions could lead to a new conviction and consequent punishment in the receiving country. These measures would be applied and executed according to all laws of the receiving country. In the case of forced transfers, where the person in question never consented to reside in the receiving country, these cases were considered especially problematic.

These and other cases relating to equal treatment and the logical feasibility of applying Belgian rules in the Dutch penitentiary raised concerns. For example, according to the Belgian Prison Act, prisoners have the right to legal assistance during the hearings for disciplinary sanctions. However, prisoners testified that they found it embarrassing to ask their lawyers to travel all the way to the Netherlands to attend. Their right to legal aid was thus not officially refused, but the distance and related costs constituted a *de facto* denial of representation.

In the Norwegian agreement, Dutch criminal law and procedural legislation was applied exclusively if an inmate died or a criminal act was committed in Norgerhaven Prison. This elicited a strong critique from the Norwegian Civil Ombudsman because Norwegian authorities were unable to investigate or prosecute matters if inmates were to be subjected to torture or to inhuman or degrading treatment or punishment in the prison (Sivilombudsmannen, 2016, p. 22).

The uncertain legal structures surrounding the policy of transnational prisons ensured not only that equal treatment could not be guaranteed, but also gave rise to an environment that posed a tangible risk to prisoners' human rights. Along with issues questioning the external legitimacy of these prisons, the examples highlight additional issues with regard to their internal legitimacy.

6. Discussion

Our focus on the legal and penological issues raised by the trend toward transnational prisons in Europe makes a valuable contribution to the field of comparative penology. In our comparison, we have stressed three major findings. First, we explored the relationship between the growth of transnational prisons in the context of expansionist and reductionist approaches to prison overcrowding. We have shown that variants of expansionist policies were pursued. Secondly, the explicit policy of selecting deportable foreign national prisoners for transfer in the Danish case is less anomalous than both the rhetoric and aims of previous cases suggested. Thirdly, the above reflects the growing synergy not only between the goals and narratives of immigration policies, but also the way that immigration becomes a case of 'policy creep' in the organisation of criminal justice. The intertwining of criminal law and immigration law is what Stumpf (2006) has dubbed *crimmigration*. Prison legislation and the legislation on sentence implementation can be considered as a third field of law that interacts with criminal law and immigration law. Consequently, and in line with the work of Barker & Smith (2021), we have shown that the claims made in comparative penology regarding the exceptional nature of penal policies in Denmark should be questioned. The Gjilan case shows how penal policies aim to 'protect' the Danish welfare state

and highlight the exclusionary practices of the welfare states that are often overlooked in comparative penology.

With regard to the former, we considered the use of transnational prisons in each case as reflective of an expansionist approach to prison overcrowding. Prison overcrowding is an increasingly widespread problem in several European countries, generating substandard, and in many cases inhumane conditions of incarceration, which affects both staff members and incarcerated individuals. Whilst the Council of Europe, as the continent's leading human rights organisation, recommends reductionist prison policies (Snacken, 2006), we have shown that in these three cases expansionist approaches were dominant when the policy of renting capacity abroad was framed and implemented. Nevertheless, the experiences of Belgium and Norway strongly suggest that renting prison cells can only serve as a short-term solution within an expansionist framework. In the Belgian case, the use of Tilburg prison only served as a temporary measure to relieve immediate overcrowding. The strategy, however, has failed to remedy the underlying sources of the overcrowding problem and has proved an expensive option. Moreover, 2020 European prison statistics showed that Belgium still has the third highest prison density in Europe (Aebi & Tiago, 2021), with 117.2 inmates per 100 places. The rent of prison cells abroad looks likely to follow a similar pattern and raise equally critical questions about the Danish case.

Our second important finding concerns the selection criteria that are used to transfer people to a transnational prison. In each case, either indirectly (Tilburg and Norgerhaven prison) or directly (Gjilan), transnational prisons target (deportable) foreign national prisoners. In 2013, when Belgium was renting Tilburg prison, research found that:

> [t]he situation of irregular migrants in the prison of Tilburg reveals the importance of prisoners' residence status within a penal context. With their limited access to reintegration activities, for convicted irregular migrants life in Tilburg resembles that in an administrative detention centre, suggesting their stay in prison serves more as an instrument of migration control than of crime control. (De Ridder, 2013)

While the transfer policy in Tilburg prison was not initially designed to send deportable foreign nationals abroad, in practice, the criteria for transfers disproportionately impacted (deportable) foreign nationals, which De Ridder convincingly linked to the *crimmigration* debate, and has documented as an example of the percolation of migration law enforcement into penal decision-making and sentence implementation in Belgium. Almost a decade later, the Danish policy, with its explicit intention to transfer irregular migrants to a transnational prison located in Kosovo, puts these transfers more than ever at the centre of the *crimmigration* debate. Moreover, the Danish proposal makes the Janus-faced nature of prison policies – previously claimed to characterise Nordic countries – more visible than in the Norgerhaven case. The Danish selection criteria can be seen as an explicit example of how Nordic countries are characterised by what Barker calls a Janus-faced society:

> An ethno-cultural conception of citizenship makes certain categories of people such as criminal offenders, criminal aliens, drug offenders and perceived 'others', particularly foreign nationals, vulnerable to deprivation and exclusion. (Barker, 2012, p. 5)

This dovetails neatly with our third finding, which strongly suggests a bifurcation in policy direction whereby humane punishments are reserved for nationals, and less desirable

systems meet the response to the perceived challenge of foreign nationals (Ugelvik & Damsa, 2018). In the case of the latter, they are conspicuously treated as second-class prisoners who are undeserving of proper conditions of imprisonment. Consequently, the treatment of deportable foreign national prisoners shows the extent to which immigration policies and penal policies increasingly intertwine in Europe, resulting in their differential treatment. Border penologists who have highlighted the existence of a parallel penal system for foreign nationals that aims to achieve migration control instead of penal goals such as reintegration (Aas, 2014), such as Brouwer (2020), have called these specific prisons 'crimmigration prisons'. While the term 'crimmigration' prison is mainly used to cover 'prison-like environments' that lock up deportable foreign nationals, a criminal offence – which is not linked to a violation of migration law committed by the people that will be transferred to Gjilan prison – appears to serve as a legitimation to create a particular questionable 'crimmigration prison'. This specific prison is not only located in a remote area (which is often the case), but even outside the Danish borders and without the foreign national officers that are typically present in these places. This instigates questions and concerns relating to the conditions, legal protection and quality of life that will be present in this institution.

In the Tilburg and Norgerhaven cases, this move towards 'crimmigration prisons' was an indirect outcome, but in the case of Gjilan it is direct and explicit. Consequently, we believe that the current narrative by Danish politicians to reduce prison overcrowding echoes the policy trajectories in the antecedent cases above: they are just as much a reflection of wider European trends in immigration policy as they are a penological one. The agreement between Denmark and Kosovo thus exists at the intersection of processes of commodification of prisoners, crimmigration and the Scandinavian Janus-faced society. It results in a highly complex development that deserves critical attention from Danish and European scholars and control bodies such as the Ombudsman and CPT once the transfers begin. Moreover, empirical research on the imprisoned person's experiences in this place will provide us with insights on how these macro-level policies impact daily life in prison.

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