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Day Fines in Switzerland

Martin Killias and Lorenz Biberstein

16.1 INTRODUCTION

In this chapter, we shall present the results of an evaluation of monetary penalties under the Swiss Criminal Code (SCC). In 2007, a new SCC became legally effective in which short prison sentences were to a large extent replaced by income-based day fines. In addition, flat fines (as fixed sums ranging from 1 to 10,000 Swiss francs) became more widely available as additional sanctions. Both fines and day fines are to be converted into custody if they remain unpaid. Several thousand defendants are affected by such a conversion every year, but virtually no data and no information has been collected on this phenomenon up to now. In order to fill this gap, the Department of Justice of the Canton of Zurich commissioned an evaluation on how often, under what circumstances and against whom (i.e. what type of defendants) monetary penalties are converted into custody. To this end, 447 case files settled between March 2017 and February 2018 were analysed and a sample of 106 defendants serving a monetary sanction in prison from April 2017 to February 2018 were interviewed. Staff members and officials of the services in charge of collecting debts resulting from monetary penalties were also interviewed. The results show that the majority of defendants serving monetary penalties in prison are confronted with multiple problems of integration. A second group are defendants who were sentenced to substantial amounts of flat fines or day fines that they or people from their networks are unable to pay.

16.2 MONETARY PENALTIES AS AN ALTERNATIVE TO CUSTODIAL SANCTIONS

16.2.1 *Criticism of Short Prison Sentences*

In the early twentieth century, monetary sanctions started to become a theoretical alternative to short prison sentences. From 1970 on, the idea of day fines received increasing attention and was implemented in many

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Western European countries. The idea behind day fines is that sentencing judges fix a certain amount of days to be ‘served’ by the defendant.

The basic idea of this innovation had been widespread criticism of short prison sentences as they were widely used throughout Europe during the nineteenth century. Generally attributed to the German-Austrian penologist Franz von Liszt,¹ the idea that short-term imprisonment is damaging was first expressed by Arnould de Bonneville de Marsangy,² a French pioneer who reached these conclusions from doctors who, at a time when Europe was still and regularly harassed by epidemics, saw short-term hospitalisation increasingly critical. In their view, bringing a patient to a hospital for a short period may be unnecessary if outpatient treatment could be equally promising, or too short to treat more serious diseases, but potentially damaging due to the risk of contamination. Bonneville de Marsangy who, as many of his contemporaries, saw crime as a kind of a contagious disease, concluded through analogy that short-term imprisonment might be too short to cure a prisoner from serious criminal propensities, but long enough to bring him into contact with hard-core criminals and to make him worse than before. These debates and their influence on Swiss criminal law are described in detail in Killias, Markwalder, Kuhn and Dongois.³

The idea that prison is damaging became extremely popular among penologists after World War II. Although empirical studies never were able to confirm the damaging effect of custody in comparison to non-custodial sanctions once all relevant variables were taken into account,⁴ the basic assumption that short-term imprisonment should be replaced remained widely unchallenged. The only reason why the system still relied, in Switzerland (until 2006) and elsewhere in Europe, on the widespread use of short-term imprisonment (either suspended or immediate) was the unavailability of a feasible alternative. Since the 1970s, however, more and more countries adopted day fine systems, as shown in the other chapters of this volume.

16.2.2 *The Implementation of Day Fines in Switzerland*

In Switzerland, the proposal to replace short-term imprisonment by day fines was initially submitted in a draft of a new penal code by Professor Hans

¹ Von Liszt, ‘Der Zweckgedanke im Strafrecht’, 1–47.

² Bonneville de Marsangy, *De l’amélioration de la loi criminelle en vue d’une justice plus prompte, plus efficace, plus généreuse et plus moralisante*, p. 260.

³ Killias, Markwalder, Kuhn and Dongois, *Grundriss des Allgemeinen Teils des Schweizerischen Strafgesetzbuchs*, pp. 223–50.

⁴ As shown by a Campbell systematic review of the literature, Villettaz, Gilliéron and Killias, *The Effects on Re-offending of Custodial versus Non-custodial Sanctions*.

Schultz,⁵ prepared at the request of the Swiss Federal Government. Over almost two decades, governmental expert and parliamentary committees studied the issue. Finally, the Penal Law Reform Act, voted on by Parliament on 13 December 2002, became legally effective on 1 January 2007.

The day fine system, as advocated by Professor Schultz and the vast majority of professors of criminal law, made day fines ('peine pécuniaire', 'Geldstrafe') available as a new sanction for those who were found guilty of a crime ('crime', 'Verbrechen') or an offence ('délit', 'Vergehen'), no matter of what kind or seriousness. Flat fines ('amendes', 'Busse'), however, remained the only option for offenders found guilty of a misdemeanor ('contravention', 'Übertretung'). Unlike day fines, flat fines are fixed according to the judge's discretion and range from 1 to 10,000 Swiss francs (or approximately 9,000 euros, Section 106 (1) SCC). Although the judge is expected to consider the defendant's economic situation (Section 106 (3) SCC), there is no strict correlation between his or her income and the amount of the flat fine.

The day fine system, as advocated by experts and the Government,⁶ underwent a few significant changes during the parliamentary debates. First, day fines can be imposed for up to 360 days,⁷ that is, for relatively long sentences in international perspective. Second and perhaps most importantly, day fines – unlike flat fines – can be suspended, according to the same rules that had existed for decades in relation to prison sentences (Section 42 (1) SCC). As for other sanctions, the judge fixes a period of probation between two and five years (Section 44 SCC). Since basically all offenders without (or rather, without too many) previous convictions qualify for a suspended sentence, day fines become executable in case of reoffending only when the perspectives of rehabilitation seem seriously compromised from the onset (Section 42 (1)–(2) SCC), or in case of a new offence during the period of probation (Section 46 (1) SCC). Judges have very little discretion in this respect and consistently suspend sentences if the defendant has none or relatively few previous convictions.⁸

During the transitional period between 2002 and 2006, practitioners noticed that this system had a few critical shortcomings. For example, it was said that defendants of minor offences ('contraventions', 'Übertretungen') for whom

⁵ Schultz, *Bericht und Vorentwurf zur Revision des Allgemeinen Teils des Schweizerischen Strafgesetzbuches*.

⁶ Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches, 1979.

⁷ From 1 January 2018, the maximum has been lowered to 180 days (Section 34 (1) SCC). This had no tangible effects on the number of defendants convicted to day fines.

⁸ Killias, Markwalder, Kuhn and Dongois, *Grundriss des Allgemeinen Teils des Schweizerischen Strafgesetzbuchs*, p. 243.

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the only sanction available is an immediate flat fine, might fare worse than those found guilty of a felony ('crime'/'Verbrechen' or 'délit'/'Vergehen') who usually qualify for a suspended sentence. As an example, it was said that drivers with an intoxication beyond 0.8 (i.e. a 'délit') will be eligible for a suspended day fine, whereas those driving with a blood intoxication below this threshold (but beyond 0.5) will be subject to an unsuspended flat fine of, possibly, several thousand Swiss francs.

In order to correct for this inconsistency, the Parliament amended the Penal Law Reform Act even before its enactment by adding Section 42 (4) SCC according to which judges can add a flat fine to a suspended day fine (or any other suspended sentence). Since 2007, judges widely use this option. As a result, most offenders are, in practice, sentenced to a suspended day fine plus a flat fine of often substantial amounts. The obvious reason is that suspended day fines are not being taken seriously by many offenders – nor by the general public who sees suspended day fines as a threat of little credibility. By adding a substantial flat fine to a suspended day fine, judges can to some extent avoid this impression.

Further, the new criminal code provided, in Section 41 (1) SCC, for the possibility of an immediate custodial sanction of up to six months if the defendant seems unable to pay a day fine from the onset. In practice, this rule is widely used in case of defendants without an official address in Switzerland.

Regarding the estimate of the daily income (as a base for day fines), Section 34 (2) SCC remains rather vague. It is said that one day fine equals 30 to 3,000 Swiss francs.⁹ In assessing the amount, the judge has to take into account the defendant's income (of whatever source) as well as his/her financial obligations and constraints, including the needs of dependent family members. The code specifies that the judge will have access to information provided by the internal revenue service and social welfare data (Section 34 (3) SCC). On the way the amount is to be fixed, however, the code remains silent and the existing guidelines do not standardise even common living cost factors. After all, judges are expected to set out an amount that it is hoped will correspond to the defendant's daily income, but they are widely left alone in this task.

In theory, such a system can be considered fair, since – as in a fiscal system with taxes that are proportionate to every taxpayer's income – monetary

⁹ Before 1 January 2018, no minimum was set by the law and many defendants without (or rather without officially known incomes) got away with ridiculous amounts. In reaction to these criticisms, the Parliament introduced the minimal amount of thirty Swiss francs that can be lowered to ten Swiss francs in case of especially needy defendants.

sanctions are meted out according to the defendant's means. In practice, however, several shortcomings can be observed.¹⁰ First of all, judicial guidelines for the determination of daily incomes are by far not as developed as those that are in use among taxation offices, even with respect to living costs of a family. Second, the guidelines for day fines do not consider an individual's assets, but only his or her income. In practice, however, the difficulty to pay a day fine may depend more on how much cash a defendant has at his/her disposal, either personally or through support from his/her network, than on the monthly income. Those who are, theoretically at least, most at risk of being unable to pay a day fine are probably those who have a substantial income (and, thus, risk to be sentenced to higher day fines) but limited cash at hands. On the other hand, defendants with substantial assets and low (known) incomes tend to be privileged under such a system.

16.2.3 *Conversion of Monetary Penalties into Custody*

Whatever the pros and cons may be, those who turn out to be unable to pay monetary penalties end up in prison where they serve the number of days that corresponds to the number of day fines fixed by the sentencing judge. This conversion of monetary sanctions into prison terms has been in practice all along the history of criminal law, since unpaid fines had always been converted into some other form of punishment (prison, forced labour or, possibly, corporal punishment). To this end, unpaid fines used to be divided by a flat amount that corresponded to one day imprisonment.

The conversion of day fines and flat fines follows the same principles. Flat fines, however, can be converted more easily. Indeed, the sentencing judge sets, in meting out the fine, also the number of days (of up to three months) that are to be served if, except in cases of duress, the defendant fails to pay the due amount (Section 106 (2) SCC). Day fines, however, are meted out as a fixed number of days, ranging from 1 day to a maximum of 180 days (and even 360 days before 2018), the amount per day ranging from 10 to 3,000 Swiss francs (Section 36 (1) SCC). A further difference is that roughly nine in ten sentences involving day fines are suspended and become payable only once a judge, usually in connection with a new conviction, changes a formerly suspended into an immediate day fine sentence. This happens in roughly 9 per cent of all day fine sentences (Federal Statistical Office 2019, Table T 19.03.03.02.01.10.01). Flat fines, however, cannot be suspended (Section 105 (1) SCC). Since, in cases of

¹⁰ For details and examples, see *supra* note 8, pp. 230–5.

a suspended day fine, judges regularly impose, in addition, a flat fine (Section 42 (4) SCC) in order to make the defendant feel at least partially an immediate consequence, defendants with financial constraints will far more often be subject to a decision of conversion related to their flat fine. In contrast, day fines, left aside that they are suspended in about nine out of ten cases, will only be converted as a last resort. Indeed, authorities in charge of collecting debts will have to bring the case to court who alone can decide over the conversion. This will be done only after lengthy procedures of instalment¹¹ (for details, see Section 35 (1) and (3) and Section 36 SCC). Flat fines, in contrast, are payable at short notice and, in case of default, immediately convertible into custody for three months at most (Section 106 (2) SCC).

16.3 EFFECTS OF DAY FINES ON SENTENCING

16.3.1 *Short Custodial Sentences Disappeared – at First Sight*

Before the SCC reform introduced in 2007, some 10,000 to 12,000 defendants used to be sentenced to an immediate (unsuspended) custodial sentence of up to six months per year (Figure 16.1; see also Simmler 2016, 78). In addition, between 35,000 and 40,000 suspended prison sentences of up to six months had been handed down by judges in Switzerland. In 2007, the number of entries into prison for a term not exceeding six months had dropped to 3,741, down from 11,910 in 2006, that is, the last year before the new system became effective. At the same time, short suspended prison sentences had disappeared completely. Figure 16.1 illustrates this dramatic change in the sentencing landscape.

In 2013, the number of entries into prison reached almost pre-reform levels, with 9,253 recorded entries of defendants serving ordinary custodial sentences not exceeding six months. Over the years, the number of entries has stabilised at that level, that is, the intentions behind the Penal Law Reform Act of 2002 seem to have largely vanished within a few years.

This is illustrated by Figure 16.2 that gives the details by main sanction at the level of convictions over an extended period. Before 2007, suspended custodial sentences played a very significant role, but disappeared completely after the Penal Law Reform Act became effective. They were almost completely replaced by suspended monetary penalties (day fines). Unsuspended monetary penalties (day fines) played an increasing role once this system was introduced in 2007. Flat fines played a very significant role before and after 2007, but the

¹¹ *Supra* note 8, p. 253.

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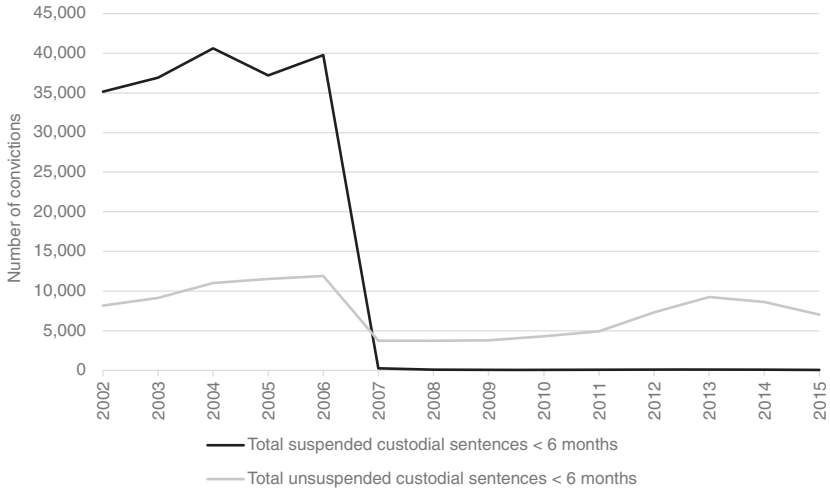


FIGURE 16.1 Total suspended and unsuspended custodial sentences not exceeding six months 2002–18, for all offences
 Source: Federal Statistical Office, Table T 19.3.3.2.2.1.2

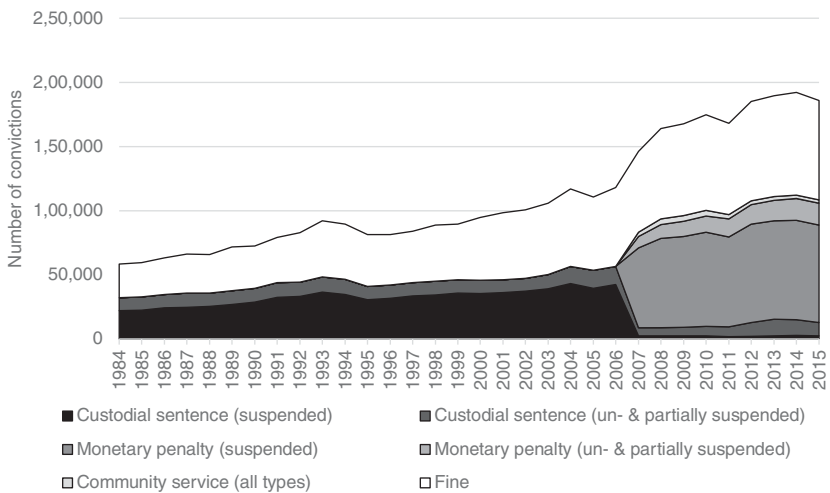


FIGURE 16.2 Convictions for misdemeanours and felonies¹² by type of principal sanction 1984–2014
 Source: Federal Statistical Office, Table T 19.3.3.2.2.1.2

¹² Not all misdemeanours (‘contraventions’, ‘Übertretungen’) are recorded in the Register of Criminal Convictions, but only those with a fine exceeding 500 Swiss francs.

amounts have certainly increased in comparison to the pre-reform era, due to the newly introduced combination of suspended day fines with flat fines.

16.3.2 *Day Fines and the Incarceration Rate*

On a different level, the number of prison inmates ironically increased following the Penal Law Reform Act, as shown in Figure 16.3. This may be related to the fact that prisoners are, on average, serving longer sentences, often in connection with measures of treatment. In fact, the replacement of short prison sentences of up to six months, combined with the extension of the threshold for the suspension of custodial sanctions from eighteen to twenty-four and – in special cases¹³ – even thirty-six months, may have pushed judges to opt for longer sentences, given the lack of judicial discretion whenever the defendant has too few previous convictions to justify an immediate custodial sentence. This observation is in line with the net-widening effect of many alternative sanctions.¹⁴ It was equally made after previous legal reforms whereby the scope of alternative sanctions was widened.

The trend over time shows that, first of all, the number of inmates in confinement for the purpose of treatment (stationary measures)¹⁵ has increased substantially over the years, in line with the increasing popularity of therapeutic approaches brought about with the Penal Law Reform Act. Whereas the number of inmates serving ordinary custodial sentences remained fairly stable over time, there was a clear drop in conversions of suspended custodial sentences into immediate custody, due to the massive decrease of suspended prison sentences and a reciprocal shift to day fines converted into custody. Flat fines converted into custody make up for a small minority among prisoners, but play an important role in other respects, as will be shown in the following sections.

16.3.3 *Warning Voices Were Ignored*

When the penal reform was debated, there were a few voices warning that, without appropriate precautions, the system could easily lead to a social redistribution of short custodial sentences rather than to their abolition.¹⁶

¹³ According to Section 43 (1) SCC, judges can impose partially suspended custodial sentences for more than two years but not exceeding three years. For sentences up to twenty-four months, full suspension is the rule.

¹⁴ Killias, Aebi and Kuhn, *Précis de criminologie*, pp. 453–5.

¹⁵ In practice, this equals to indeterminate sentences to be served, in most cases, in an ordinary prison.

¹⁶ See sources in *supra* note 8, p. 235.

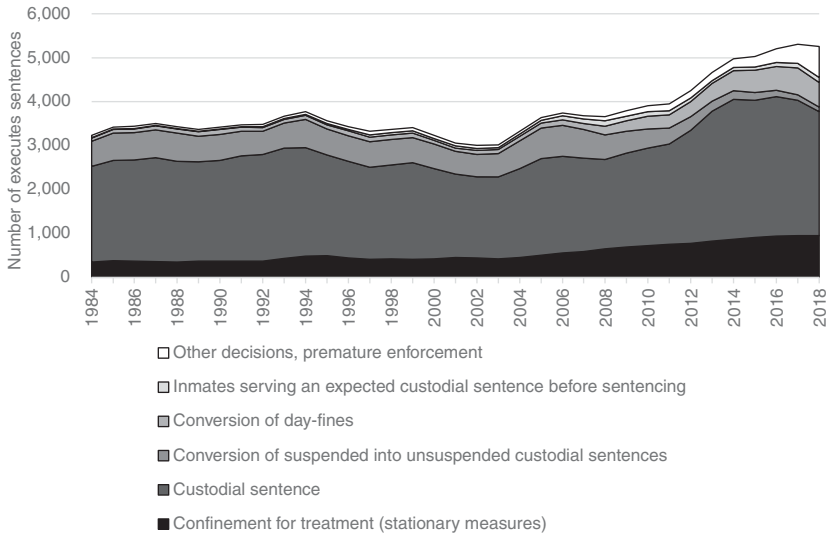


FIGURE 16.3 Execution of sentences and measures: average number of inmates by principal sanction 1984–2018

Source: Federal Statistical Office, Table je-d-19.04.01.32

They were not taken seriously enough to redesign the system in a way to mitigate undesirable side effects. In the meantime, conversions of fines and day fines into custodial sentences have reached disturbing proportions.

Indeed, an increasing number of people are entering the custodial system in order to ‘pay’ for unpaid fines and day fines. Ironically and not untypical for a problem that is generally considered not to exist, no precise statistical data is collected to measure the extent of conversions of day fines into prison. According to data published by the Swiss Federal Statistical Office, some 1,500 persons are entering prison following the revocation of a suspended custodial or the conversion of a day fine sentence. Since, over many years, roughly 10 per cent of suspended prison sentences used to be revoked during the probation period and given the drop particularly of short custodial sanctions following the SCC reform, it is very unlikely that revocations make up for more than 500 cases per year after 2007. In sum, the number of day fines converted into custody can be estimated at about 1,000. To this number one should add 3,000–3,500 persons who are entering prison following the conversion of a flat fine (Figure 16.4).

More precisely, during the last year before the penal reform, in 2006, the number of persons entering prison following a decision of conversion of a fine

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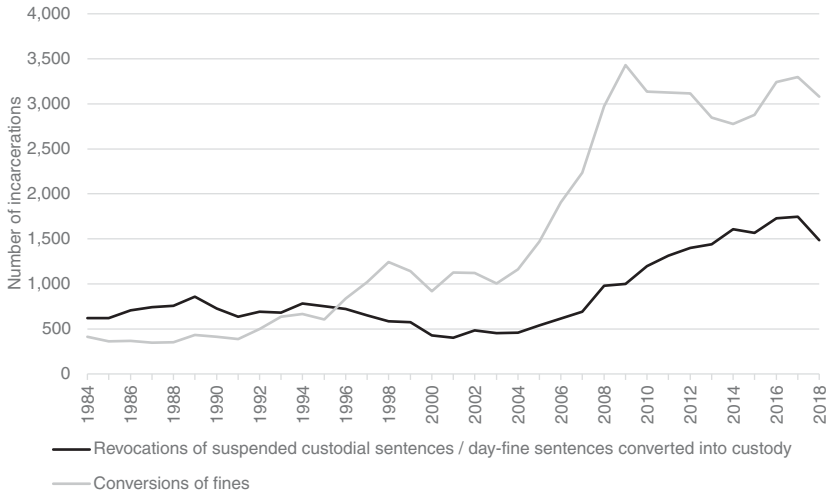


FIGURE 16.4 Prison admissions following the conversion of monetary sanctions into custody, 1984–2018

Source: Federal Statistical Office, Table je-d-19.04.02.32

was 1,907. By 2012, this number had increased to 3,115. In addition to the presumably 1,000 converted day fines, some 4,500 entries into the custodial system are due to unpaid fines and day fines. In view of the continued ignorance of the problem by federal policy-makers, the Department of Justice and Home Affairs of the Canton of Zurich mandated an evaluation of reconversions of flat fines and day fines¹⁷ whose key results are presented in this contribution.

The main purpose of the evaluation was to assess the factual nature of such decisions and of the persons this concerned. How many day fines and flat fines are converted and how many persons are concerned? How many decisions of conversion are actually executed, or how many defendants successfully mobilised the necessary cash through friends or family networks to pay before the reconversion, or even after their admission to custody? What is the profile of those who end up in prison compared to those who avoided the ultimate consequence? What efforts were made preceding the conversion by the specialised agencies within the criminal justice system? How many fines remained unpaid because their execution through prison became time-barred?

¹⁷ Killias and Biberstein, *Ersatzfreiheitsstrafen im Kanton Zürich*.

16.4 A MAJOR PROBLEM DENIED: MONETARY PENALTIES CONVERTED INTO CUSTODY

16.4.1 *The Present Study*

The present study is based on a sample of 447 cases that the authorities in charge of collecting fines and day fines in the county and city level had referred to the Department of Justice, because all reasonable efforts seemed exhausted to collect the due amount and which were settled between March 2017 and February 2018. In these cases, a conversion of a day fine or a fine into community service (possible at the defendant's request, under Section 79(a) (1) (c) SCC) was not feasible. The officials in charge of executing monetary sanctions on the county and city level were also interviewed in order to complete the picture. Beyond the analysis of official data, a survey among prisoners serving short custodial sentences following a decision of conversion was conducted to include the perspective of those concerned in the first place. Besides, we were able to obtain data from the Internal Revenue Service of the Canton of Zurich on prisoners serving time for unpaid monetary sanctions and their economic situation. Finally, the specialists of the correctional system assessed the costs associated with the execution of fines and day fines, on one hand and of executing such sanctions in prison, on the other hand.

The study concerned 447 case files involving 1,668 monetary penalties (of which 1,510 were fines and 158 were day fines).¹⁸ The official data provided information on personal background, offence(s) the person had been found guilty of, sentences meted out against them and the way the case was settled (through payment, time-barred, execution of the custodial sentence instead of the monetary sanction and a residual category including deaths, early release etc.).

The survey among the inmates was based on a written, anonymous and standardised questionnaire that every inmate received at admission. 188 questionnaires were distributed to 185 persons (three persons having entered prison twice between October 2017 and February 2018). The response rate was 60 per cent (ninety-eight men and eight women). Data from the Internal Revenue Service were received in a form that allowed linking the data to the other information in our files while respecting data protection regulations. Beyond information on financial circumstances (including income, debts and assets), data on marital status, children and other dependent persons were

¹⁸ Readers should be aware that flat fines are very frequently imposed next to suspended day fines. Being always unsuspended, they are far more likely to be converted into custody than day fines.

obtained. The interviews with employees of the several offices in charge of collecting fines and debts from day fines included information on number of cases dealt with, sentences at stake, nature of offences and details on the management of the case. The data on the gross and net costs of converting monetary sanctions into custodial sentences were obtained through the accounting offices of the Justice Department. These costs include direct and indirect costs of staff as well as of consumables and infrastructures, of which the sums actually collected were deducted.

16.4.2 *How Many Monetary Sanctions Are Converted into Custody?*

A first finding concerns the number of penalties per person. The distribution is highly skewed, with 45 per cent of all persons in our sample having just one sanction to face. The other half have often experienced, however, multiple sentences, in two cases even twenty-five. A few persons are systematically sentenced to additional sanctions, such that the number of unpaid fines or day fines to be executed is constantly growing. Time-barred cases usually involve fines or day fines of persons without a known address in Switzerland (31 per cent with a known address versus 69 per cent without). The execution of monetary sanctions is time-barred after five years in the case of day fines (Section 99 (1)(e) SCC) and after three years in the case of flat fines (Section 109 SCC). In other words, the offices in charge of collecting debts are doing their job correctly in most cases. In the case of debtors without residence in Switzerland or without known address at all, the odds of collecting debts are fairly low in any case, even beyond monetary sanctions. If the amounts are relatively low, it can be suspected that the debt collectors often view the effort needed as disproportionate.

Day fines and flat fines can be paid (and prison avoided) even once all deadlines have expired (Section 36 (1) and Section 106 (4) SCC). Many persons concerned by a decision of conversion make use of this possibility. This was the case also among a substantial number of respondents in our sample. Of the total of 447 cases, 195 were settled last-minute, namely by complete payment in 155 cases and partial payment in 40 cases (these defendants had to 'pay' the unpaid sum in prison).

Successful payment clearly depends on the number of days to serve. Among those facing difficulties of payment (and, therefore, included in our sample), the average number of days was eight (and the median three) days among those who, in the end, successfully paid the amount due (and avoided prison), whereas those who were not successful faced on average 52 days (the median being 25), with an outlier serving 755 days. Even if the daily income has not

TABLE 16.1 *Kind of final settlement by type of monetary penalty*

	Flat fines		Day fines		Total	
	N	%	N	%	N	%
Amount paid	354	(97.0)	11	(3.0)	365	(100)
Execution time-barred	86	(94.5)	5	(5.5)	91	(100)
Other settlements	185	(84.5)	34	(15.5)	219	(100)
Conversion to custodial sentence	885	(89.1)	108	(10.9)	993	(100)
Total	1,510	(90.5)	158	(9.5)	1,668	(100)

Source: own table.

been overestimated by sentencing judges, the amounts to pay can rapidly reach staggering proportions as the number of days increases, the maximum being set at 180 days (Section 34 (1) SCC).

This is well reflected in our data: Among those who successfully paid their fine, the amount due was on average 120 Swiss francs, compared to 235 Swiss francs among those who went to prison. In the case of day fines, the gap is less clear, with both groups having a median due amount of 1,800 Swiss francs. On average, however, those who succeeded paying the amount due have outstanding fines of 1,700 Swiss francs, compared to 2,660 Swiss francs among those who went to prison. In sum, those who actually went to prison had, on average, higher amounts to pay that even their network could not easily afford coping with. In our sample, around 90 per cent of those who actually ended incarcerated faced an unpaid flat fine (Table 16.1), often of a substantial amount. By contrast, payment is more frequent among those who had to cope with flat fines (97 per cent) rather than a day fine (3 per cent).

Among those whose fine was converted, the prevailing offences for which they were convicted were either a traffic offence or repeated fare-dodging (riding in public transportation without a valid ticket).¹⁹ Interestingly, among those who faced unpaid fines, those who actually paid in order to avoid custody had been convicted for a (serious) traffic offence in 59 per cent of the cases, compared to 44 per cent who had been convicted for fare-dodging. This difference probably reflects also the fact that traffic offenders may be better off than fare-dodgers who are indeed a more marginal population. They make up for 41 per cent of those who actually go to prison.

¹⁹ Fare-dodging is usually not prosecuted, except in cases of persistent offenders, Section 57 (3) Law on Public Transportation.

Those who serve monetary sanctions in prison are, therefore, often convicted to high fines or a considerable number of day fines, often with substantial per day amounts. Next to this group, decisions to convert fines and day fines into custody often concern defendants with fairly trivial amounts. No less than 75 per cent of fines converted concern amounts of 350 Swiss francs or less and 25 per cent of no more than 100 Swiss francs. Thus, a substantial number of people serving fines in prison do so because of trivial amounts usually imposed for rather trivial offences. They must be faced with multiple problems of social integration (including previous incarceration) and often lack a social network that otherwise might support them in such situations. Those who ultimately succeed in avoiding prison by last-minute payments are typically better off in these respects.

16.4.3 *The Survey among Persons Entering Prison*

Shortly after their admission, persons actually entering custody were interviewed through a written, standardised questionnaire that included questions on the circumstances leading to their incarceration and previous experiences of this kind. Just over 80 per cent said having been unable to cope with the monetary penalty, 9 per cent said they were absolutely unwilling to pay and 12 per cent responded that they considered it easier to serve the time in prison rather than to pay (multiple responses were possible). This last result, that may come as a surprise, has to be seen in the context of often high debts resulting from day fines. Sums of around 30,000 Swiss francs (that are not unusual for day fines), may be hard to gain on the labour market, especially if, as a result of a former offence or of the conviction, a person with substantial revenues had lost his/her position.

Among those entering prison, 57 per cent had been arrested by the police, whereas 43 per cent entered on their own initiative. Compared to ordinary prison sentences, the proportion of unwilling entries seems relatively high, pointing, once more, to the probably problematic social integration of this population. Despite the fact that they are in prison to serve their monetary sentence, 39 per cent still hope being able to mobilise funds to pay the remaining amount and to get out of prison. Among these, 65 per cent hope that somebody belonging to their network might volunteer to pay the remaining amount. Among those who have a job, 48 per cent had informed their employers or colleagues about the reason of their immediate absence in advance. Finally, for 30 per cent the actual experience is the first incarceration in their lifetime – or, conversely, for 70 per cent prison has already been part of their history.

16.4.4 Fiscal Data

For obvious reasons, the internal revenue service was able to provide information only about persons with a known address in the Canton of Zurich. This included 57 per cent of the sample. The fiscal data provided covered the period 2013 to 2016.

According to the results, monetary sanctions that the authorities did not collect in time before they were time-barred concern mostly persons without a known address in Switzerland and on whom the tax offices do not have actual data. Defendants who paid the amount due before they were arrested typically had higher incomes than those who did not. As it seems, defendants who failed to pay rarely had children or other dependent persons to support. As it seems they disproportionately live in social isolation. They lack a network on whose support they can count in critical situations.

16.4.5 Costs of Executing Monetary Penalties

Collecting debts through various procedures and eventually converting them into prison terms brings substantial bureaucratic costs. The accounting office of the Justice Department was able to provide approximate estimates of the costs involved. Since the question is how much is to be paid and how much can be gained through the (often much delayed) collection of debts, two ways of handling this issue will be presented.

In both approaches, the 'cost estimate' will be a balance of payments received, minus costs of debt collection including the costs of converting monetary penalties into prison terms. If only direct costs are considered, that is, investments in collecting debts and having served days in prison, the net balance is positive, with a net profit per case of 113 and 143 Swiss francs, respectively, gained in 2017 and 2018. If indirect costs are included, such as the maintenance of the necessary infrastructure (offices, staff, prison facilities, etc.), the balance becomes negative, meaning that the net costs were seventeen and twenty-one Swiss francs, respectively, in 2017 and 2018. Per day served in prison, the balance of gains and costs is positive again, with 188 and 189 Swiss francs in both years 2017 and 2018. If indirect costs are included, the balance turns into a loss of twenty-eight and twenty-seven Swiss francs per day served in both years considered.

What does this mean? Of course, serving time in prison brings costs and only minimal profit. On balance, prisons operate, therefore, worldwide at considerable costs to the taxpayer. In the particular case of monetary penalties and their conversion into time to be served in custody, one should not ignore possible benefits through enforcing the payment of these particular kinds of

debts. In sum, all cases included in our sample concern convicted defendants who had failed to pay the due amount within reasonable deadlines. It can, therefore, be presumed that without the pressure of having to serve the unpaid sanction in prison, the amounts ultimately collected would probably be more modest. From a bureaucratic point of view, the system of converting monetary sanctions into custody can hardly be seen as a failure. Even when all indirect costs are included (which is not obvious), it should be noted that the loss to the taxpayer is far more modest than with practically all other kinds of punishments.

16.5 POLICY IMPLICATIONS

Even if reasonable efforts are made to execute short prison terms resulting from the conversion of monetary penalties in a form that supports inmates' resources of coping with life in society, it must realistically be accepted that imprisonment, though not generally damaging as often claimed,²⁰ rarely produces positive effects. This does not mean that the continued use of prison is 'irrational', as often has been claimed. The present example of conversion of monetary penalties into custody offers a helpful illustration on this behalf. Indeed, if monetary penalties could remain unpaid without any serious consequences for defendants, it could be expected that many more defendants would simply ignore orders to pay. This would definitively undermine the legitimacy of monetary sanctions and, ultimately, of the criminal law itself since it relies upon such sanctions so widely. It should not be ignored that defendants who face difficulties paying the due amount are eligible for community service if they file such a request (Section 79(a) (1)(c) SCC). Only once authorities order the conversion into custody, community service no longer is an available option (Section 79(a) (2) SCC).

Even if the system of conversions operates with rationality and moderation, the fact remains that monetary penalties instead of formerly common short (and often suspended) custodial sentences leave a growing fraction of convicted defendants in custody. In other words, short prison sentences have not really been abolished. Rather, they were socially redistributed, hitting, in the first place, defendants with multiple problems of social integration including financial strain, as well as foreign defendants without (legal) residence in the country. These two groups continue to be targets of (short) immediate custody. This side effect was by no means unforeseeable. It was a deliberate decision of the legislator to save the middle class from custody, even under the form of

²⁰ *Supra* note 4.

suspended sentences, in connection with traffic and minor economic offences. The question, of course, remains whether this kind of sentencing system can be seen as fair, but we have to admit that this is, ultimately, a political decision.

As the data have shown, defendants who serve their monetary penalties in prison are not in all cases marginal persons without any resources. In some cases, day fines were meted out at a time when the defendant had a well-paid job that he/she may have lost after the hearing. Perhaps even more often, day fines were suspended in the first place and became payable after a new offence when the judge revoked the former suspension. Under such circumstances, it may well be that the amounts to pay are out of proportion with the defendant's current or foreseeable financial situation. In such cases, it may well be rational to spend a few weeks or months in prison, given that the income during the corresponding period might never reach the amount of the penalty.

In this connection, there remains also the question whether day fines and flat fines are being fixed with the necessary attention to the defendant's financial circumstances. For example, the real costs of having dependent children are often not handled with great attention. This, however, is just a simple and frequent situation, but neither the Parliament nor the Judiciary have ever cared about preparing more developed guidelines on how simple and frequent situations like these can be taken into account. Left alone with a few summary indications, judges are not really able to pay the necessary attention to these details during a short hearing centred on issues of guilt and fault. More precise guidelines, modelled along taxation offices' ways of handling frequent and typical life-circumstances, might be helpful in streamlining day fines and flat fines efficiently and more equitably.

All these problems are accentuated in Switzerland with its extremely high rate of suspended sentences. In a European comparison, based on data published regularly by the European Sourcebook of Crime and Criminal Justice Statistics,²¹ Switzerland is among the countries where even serious offenders face fairly low risks of being sentenced to immediate custody, at least for a first or even a second conviction. This is not only true for traffic and minor offences, but includes serious crimes such as robbery, drug trafficking, serious bodily injury (i.e. aggravated assault) and even a majority of rapists. In light of this preference for suspended sentences, it should not come as a surprise that day fines are almost systematically suspended. This may lead judges to pay only superficial attention to the financial circumstances of the defendant, given that in nine out of ten cases, the amount will never be payable. However,

²¹ Aebi, *et al.* *European Sourcebook of Crime and Criminal Justice Statistics* 2014.

the problem will be serious if the defendant relapses and if, following a subsequent conviction, the formerly suspended sentence is to be executed.

Furthermore, as explained above, flat fines can never be suspended. Since judges almost systematically add a flat fine to whatever sentence (monetary or custodial) they impose, these fines are more likely to be converted into prison. Although, in theory, even for meting out flat fines the defendant's financial circumstances should be taken into account, judges usually fix 'round' amounts that can be substantial. In addition, the conversion of flat fines is made easier because the judge indicates how many days the defendant has to serve in case he/she does not pay within the deadlines.

Finally, it is possible that the problems reported in this chapter are more serious in Switzerland than in other countries. To the authors' knowledge, in no other European country have short custodial sentences been so systematically replaced by monetary penalties, suspended or not. This means that monetary penalties are more than presumably anywhere else hitting defendants found guilty of even serious offences and often marginal profiles, combined with very limited financial resources.

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